

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

**(DS577)**

**U.S. COMMENTS ON THE EU'S RESPONSES TO THE ADDITIONAL QUESTIONS  
FROM THE PANEL FOLLOWING THE SECOND VIRTUAL SESSION**

**April 13, 2021**

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## I. INJURY

### Overall U.S. Comment on EU’s Responses

1. Before commenting on the EU’s responses to the Panel’s additional injury questions, the United States would like to address certain matters arising from the EU’s conduct in these proceedings, as well as the EU’s February 25, 2021 letter concerning business confidential information (“BCI”). The United States is disappointed that the EU has chosen to pursue its injury claims by asserting pejorative and baseless accusations.<sup>1</sup> Such tactics do not assist with the Panel’s disposal of these proceedings in a fair, prompt, or effective manner, and the United States trusts that the Panel will not be distracted or misled by the EU’s efforts.<sup>2</sup> This is because, quite simply, the text of the Agreements does not support the EU’s arguments.

2. To the extent the EU focuses on the USITC determination, its arguments consist mainly of asking the Panel to reweigh the facts to come to its own conclusion. However, this is not the role of the Panel. And the EU has failed to show in any instance that an objective and unbiased investigating authority could not have come to the same conclusion as the USITC based on the same facts.<sup>3</sup>

3. From a procedural perspective, the EU advances several erroneous procedural allegations that do not support the EU’s arguments that the USITC’s determinations were in any way

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<sup>1</sup> To list just a few examples, the EU: (1) disparaged the U.S. summary of its challenges to the USITC’s analysis of volume as “made in the USA” at para. 57 of its opening statement at the second virtual session, (2) likened its examination of the USITC determination as akin to a “first-year student of WTO law... smell[ing] a rat” at para. 18 of its closing statement at the second virtual session, (3) in one of the dozens of instances where it espoused inapposite magic analogies, characterized the USITC’s injury analyses as “bogus” and “analytical hocus-pocus” at para. 20 of its closing statement at the second virtual session, and (4) gratuitously remarked, in para. 11 of its letter of 25 February 2021, that “[o]ne can vividly imagine what the United States’ reaction would be if one of its own industries would be slapped with duties on the basis of the USITC’s reasoning.” In addition, the EU representative’s extemporaneous remarks to the Panel and the United States in its closing statement at the second virtual session were so incendiary that the EU itself apparently did not consider it appropriate to include them in the “as delivered” version of that document.

<sup>2</sup> The United States also notes that Article 3.10 of the DSU emphasizes that the use of dispute settlement proceedings “should not be intended or considered as contentious acts” and that all Members are presumed to engage in such procedures in good faith.

<sup>3</sup> Similarly unavailing is the EU’s effort to suggest that the USITC’s opinion is any less sustainable because one Commissioner dissented based on her weighing of the facts. The fact that one Commissioner weighed the facts differently is in no way a “smoking gun” as the EU alleges, based on its misunderstanding of the U.S. legal system. EU closing statement at the second virtual session, para. 18. Indeed, dissents are not atypical in the U.S. administrative and judicial legal system. See U.S. FWS, para. 152 n.222. As the United States previously explained, the dissent does not form part of the USITC’s affirmative determination, which is the basis for the measures in dispute. U.S. FWS, para. 252 n.347. Contrary to the EU’s understanding, the Panel’s task is not to decide whether the dissent’s analysis was “correct,” but rather to assess whether the USITC’s determination was reasoned and adequate. See *US – Tyres (China)(AB)*, para. 280.



inconsistent with the Agreements. First, the EU incorrectly asserts that it has raised claims to which the United States has failed to respond. These include that the “USITC improperly extended its analysis concerning “volume effects” in the retail “segment” to the domestic ripe olive industry as a whole;”<sup>4</sup> the “USITC improperly extended its analysis concerning price (volume) effects in the retail channel to the domestic industry as a whole;”<sup>5</sup> and the “USITC’s causation determination is flawed because it does not assess causation with respect to the domestic industry as a whole.”<sup>6</sup> In fact, the United States refuted each of these claims in its first written submission,<sup>7</sup> and repeatedly again in subsequent submissions.<sup>8</sup>

4. Second, the EU persists in characterizing the U.S. responses to its arguments on the relevance of the channels of distribution in the framework of its “actual competition” arguments as *ex post*.<sup>9</sup> As the United States previously explained, the EU challenges the USITC determination on the basis of the pertinence of the market channels – which was not discussed at greater length in the determination because it was not a matter in dispute.<sup>10</sup> Therefore, the EU seeks to relitigate the factual record. In rebutting these arguments, the United States has every right to draw the Panel’s attention to portions of the record that contradict the EU’s misrepresentations and omissions of record facts.<sup>11</sup> Moreover, there is nothing *ex post* about relying on these record facts to clarify the USITC’s determination.<sup>12</sup>

5. Last, as the United States explained in its communication to the Panel following its request for BCI, the requested BCI are subject to the disclosure requirements of an administrative protective order.<sup>13</sup> To assist the Panel in making its “objective assessment” of the USITC’s determination, including its understanding of the record data underlying that determination, the United States has submitted tables showing directional trends in key

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<sup>4</sup> EU SWS, para. 145. The United States refuted this claim in its FWS, paras. 177-180.

<sup>5</sup> EU SWS, para. 171. The United States refuted this claim in its FWS, paras. 209-214.

<sup>6</sup> EU SWS, para. 187. The United States refuted this claim in its FWS, paras. 233-239.

<sup>7</sup> See notes 4 through 6 above.

<sup>8</sup> U.S. June 10, 2020 responses to Panel questions, paras. 66-70; U.S. opening statement at the first virtual session, paras. 48, 54-56, 62-63; U.S. November 12, 2020 responses to Panel questions, paras. 61, 68-69; and U.S. SWS, paras. 47, 89-90.

<sup>9</sup> EU February 25, 2021 letter to the Panel, para. 10.

<sup>10</sup> U.S. SWS, para. 57.

<sup>11</sup> U.S. SWS, para. 56.

<sup>12</sup> See *US – Countervailing Measures (China) (Article 21.5 – China) (AB)*, paras. 5.164-165.

<sup>13</sup> U.S. February 4, 2021 letter to the Panel, p. 2.

datapoints considered by the USITC in its determination, including domestic producers' and importers' commercial shipments by market channel during the period of investigation ("POI"). As the United States explained, the directional versions of the tables show the actual trends for the data contained in each of the tables that the Panel requested, including certain data which was compiled into one table in Appendix C-1. The United States agrees with the EU that these tables do not contain "new" information; rather they corroborate the explanatory discussions and explanation in the Commission's Views. Contrary to the EU's accusation, in submitting the directional versions of these table, the United States did not "cherry-pick" items that it "selectively [chose] to provide to the Panel."<sup>14</sup> To the contrary, the United States provided the complete directional versions of the tables containing the data requested by the Panel.

6. The EU has requested in a number of instances that the Panel draw "appropriate inferences" should the United States not provide BCI.<sup>15</sup> While the EU does not explain what "inferences" it considers "appropriate," and the basis for so concluding, it is notable that the EU does *not* contest the accuracy of the directional versions of the tables the United States has submitted. From this, the Panel may draw the appropriate conclusion that those tables are accurate and complete. Accordingly, there would be no basis in logic for drawing any negative inferences as it pertains to BCI.

7. The United States notes that, as the complainant in this dispute, it is for the EU to set out its *prima facie* case. The EU has stated clearly in its second written submission that it decided *not* to seek BCI and that *none* of its arguments rely on BCI.<sup>16</sup> Neither does the United States require these data to establish its defense of the EU claims. Therefore, the absence of any BCI from the record of this WTO proceeding is not relevant to an evaluation of the EU's claims.

8. Notably, the EU itself has in the past declined to provide during dispute settlement proceedings confidential business information pertaining to the injury determination of its investigating authorities. During the panel proceedings in *EC – Tube or Pipe Fittings*, the EC refused to provide confidential worksheets on the basis that "these contain[ed] highly confidential business information relating to the performance of individual EC producers and the EC would prefer not to release them."<sup>17</sup> The panel accepted the EU's preference in this respect and made its findings based on the facts available to it on the record. Here, the Panel also has sufficient information on which to base its findings, as the EU itself has indicated that its claims do not rely on BCI.

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<sup>14</sup> EU February 25, 2021 letter to the Panel, para. 8.

<sup>15</sup> See, e.g., EU opening statement at the second virtual session, para. 40.

<sup>16</sup> EU SWS, paras. 84-85.

<sup>17</sup> *EC – Tube or Pipe Fittings (AB)*, paras. 122-133; *EC – Tube or Pipe Fittings (Panel)*, paras. 7.45-7.46 and n.73. The panel declined to draw any adverse inference regarding either the fact that these data were not disclosed to the parties in the underlying investigations, or the fact that consideration of certain contested elements of Article 3.4 of the AD Agreement was not discernible from the published documents.

**Question 1 (To the United States)** In its 25 February 2021 response to Question 12, the United States asserts that the USITC's pricing data was based on product type (not purchaser), and that "[t]he USITC did not calculate underselling margins specific to any channel of distribution". The European Union argues that the USITC's finding that underselling resulted in the domestic industry losing market share in the retail sector was not based on positive evidence and was contradictory. In particular, at paragraph 157 of its second written submission, the European Union argues this was because: (i) "the responding purchasers were mainly distributors (not retail)"; (ii) "the underselling was concentrated in the institutional channel (not retail)"; (iii) "there were even instances of overselling in the retail channel in two out of three years" (emphasis omitted); and, (iv) "the USITC provided no undercutting margin for the retail channel". Please respond to the European Union's argument in light of the United States' response to Question 12. Please provide specific references to evidence on the USITC record that supports its answer.

**U.S. Comment on the EU's Response:**

9. The material the EU submitted concerning a question directed to the United States is, for the most part, unresponsive to the Panel's inquiry. In fact, the only portions of the EU's response that address the topic of the question – contained in paragraphs 2 and 29 of its submission – appear to admonish the Panel for seeking further information about the factual underpinnings of the USITC's underselling analysis in order to evaluate a claim that the EU itself introduced late in these proceedings.<sup>18</sup> Indeed, the EU goes so far as to suggest, in paragraph 2 of its submission, that the facts underpinning the USITC's price effects analysis in the underlying *Ripe Olives* investigations do not matter.<sup>19</sup>

10. For the most part, the EU largely rehashes its prior fallacious arguments concerning so-called "volume effects."<sup>20</sup> The United States will not reiterate its point by point refutation of these arguments, but will address some obvious inconsistencies and misreadings of the AD and SCM Agreements in the EU's arguments concerning price effects.<sup>21</sup>

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<sup>18</sup> See U.S. February 25, 2021 responses to Panel questions, paras. 50-51. The United States recalls that the EU's claim in its opening statement at the first virtual session that the USITC's price effects analysis lacked positive evidence is a wholly separate claim, as the EU acknowledged in its oral responses to the Panel's question at the second virtual session. This claim was not identified in the EU's request for establishment of a panel, and therefore falls outside the Panel's terms of reference in this dispute. The U.S. comment on the EU's response to this question from the Panel is provided without prejudice to that view.

<sup>19</sup> Specifically, the EU contends that the Panel should find in its favor "irrespective of specific factual issues such as, e.g. the sub-division of the retail channel into retail private label or retail branded sub-channels, the exact composition of the USITC's pricing products, or the reason why certain purchasers shifted from domestic products to subject imports which are the subject of question 2 in particular."

<sup>20</sup> EU March 26, 2021 responses to Panel questions, paras. 3-10.

<sup>21</sup> To wit, the EU's response largely rehashes prior arguments concerning its interpretation of the requirements of the first sentences of Articles 3.2 and 15.2 of the Agreements. The United States has already explained why the EU's

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***The EU’s Repeated Allegations that the USITC Conducted a Segmented Analysis***

11. The EU has argued that the USITC *only* found underselling in the retail sector,<sup>22</sup> and continues to object that the USITC failed to report an individual underselling margin for that sector.<sup>23</sup> The United States has previously demonstrated that the USITC’s price effects analysis was based on data concerning the entire market.<sup>24</sup> Further, as the United States explained in its own response to the Panel’s question, the EU’s complaint about the lack of a specific undercutting margin for the retail products is unavailing as nothing in the Agreements requires authorities to calculate or consider underselling margins in any aspect of their injury analysis.<sup>25</sup>

12. As the United States has explained throughout these proceedings, the EU has failed to show that an objective and unbiased investigating authority could not have come to the same conclusion as the USITC based on the same facts, specifically in paying particular attention to the role of the subject imports in competing with domestic producers in the part of the U.S. market where those producers predominantly sold their product. In attempting to characterize the U.S. rebuttal to the EU’s arguments as “*ex post*,” the EU asserts that footnote 153 of the USITC’s determination undermines the U.S. observation concerning the USITC’s focus on “actual competition in the retail channel.” Contrary to the EU’s statement, this footnote supports the U.S. points and defeats the EU’s claim that this explanation is *post hoc*. In fact, footnote 153 addresses the fact that competition between domestically processed and subject imported ripe olives intensified in the retail sector during the POI.<sup>26</sup> Specifically, the USITC, in the footnote, dismissed respondents’ argument that subject imports did not have an adverse impact on the domestic industry, as they sold mostly to institutional/food customers, on the basis that the volume of subject imports sold in the retail sector undersold and captured market share from domestic processors in that sector.<sup>27</sup>

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interpretations of these requirements are unavailing. *See, e.g.*, U.S. FWS, paras. 181-189; U.S. opening statement at the first virtual session, paras. 44-49; U.S. SWS, paras. 63-68; and U.S. opening statement at the second virtual session, paras. 28-36.

<sup>22</sup> EU FWS, paras. 540-547.

<sup>23</sup> EU March 26, 2021 responses to Panel questions, para. 6.

<sup>24</sup> EU FWS, paras. 540-547.

<sup>25</sup> U.S. March 26, 2021 responses to Panel questions, para. 1.

<sup>26</sup> EU March 26, 2021 responses to Panel questions, para. 4 n.5.

<sup>27</sup> USITC Pub. 4805 (Exhibit EU-5) at 26 n.153. The argument that the USITC dismissed in this footnote parallels the EU’s argument concerning the USITC’s purported failure to account for the “explanatory force” of subject imports for the injury experienced by the domestic industry in its examination of the impact of subject imports on the domestic industry’s condition. The United States has previously explained that the Agreements do not contain

13. The EU has argued in earlier submissions that this footnote does not provide an adequate basis for a market segmentation injury analysis.<sup>28</sup> However, this argument is simply irrelevant. As the United States has explained at length in these proceedings, including in response to two direct questions from the Panel on this issue,<sup>29</sup> the USITC did *not* undertake a “segmented” analysis of the U.S. ripe olives market.<sup>30</sup> Accordingly, the EU’s reliance on footnote 153 does nothing more than undermine the EU’s own straw man argument concerning a methodology that the USITC never applied in its underlying investigations.

### ***The EU’s Continued Efforts to Diminish the USITC’s Underselling Finding***

14. In its continued efforts to undermine the USITC’s finding of significant price effects, the EU persists in trying to read price undercutting out of the text of the second sentences of Articles 3.2 and 15.2 of the AD and SCM Agreements. In its response to the Panel’s question, the EU emphasizes its theory that price undercutting is not “a ‘true’ stand-alone price effect” and that only price depression and/or price suppression are ‘true’ price effects.”<sup>31</sup> The EU’s interpretation is in disaccord with the text and plain meaning of the Agreements, which draw no distinction between “true” and “false” price effects. Rather, as the United States has previously explained, the Agreements expressly state that “[w]ith regard to the effect of the [dumped] [subsidized] imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting . . .”<sup>32</sup> Accordingly, a plain reading of the Agreements compels the conclusion that significant underselling is, itself, a price effect.<sup>33</sup>

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any requirement to provide such an account in the framework of an authority’s impact analysis. *See, e.g.*, U.S. SWS, paras. 80-88; and U.S. opening statement at the second virtual session, paras. 44-48.

<sup>28</sup> EU March 26, 2021 responses to Panel questions, para. 4 n.5. *See also* EU’s March 11, 2021 comments on U.S. responses to Panel questions, para. 72 (“not only is the US’s “competition argument” factually incorrect, not only is the “competition argument” inapt to explain a segmental [*sic.*] focus, not only did the USITC fail to make any reference to “actual competition” in the determinations, even worse, the USITC had explicitly rejected the US’s *ex post* “competition argument” in footnote 153 of the determinations!”) (Emphases in original.)

<sup>29</sup> U.S. June 10, 2020 responses to Panel questions, paras. 71-72; U.S. November 12, 2020 responses to Panel questions, paras. 56-58. *See also* U.S. September 8, 2020 responses to Panel questions, para. 37.

<sup>30</sup> As the United States discussed in its second written submission, it cited the *US – Hot-Rolled Steel* report for the limited purpose of rebutting the EU’s initial argument that the Agreements did not permit any such analyses – an argument that the EU subsequently retracted. U.S. SWS, paras. 46-48.

<sup>31</sup> EU March 26, 2021 responses to Panel questions, paras. 6-8.

<sup>32</sup> AD Agreement, Article 3.2; SCM Agreement, Article 15.2.

<sup>33</sup> *See, e.g.*, U.S. FWS, paras. 199-206; U.S. opening statement at the first virtual session, paras. 50-52; U.S. SWS, paras. 63-68; and U.S. opening statement at the second virtual session, paras. 37-39.

15. Moreover, the EU's theory is internally inconsistent. The EU acknowledges that under its theory, price suppression is a "'true' stand-alone price" effect.<sup>34</sup> Yet, in arguing that an authority cannot find significant price effects if domestic prices increase at all, the EU also would have to read price suppression (prevention "of price increases, which otherwise would have occurred") out of the Agreements.<sup>35</sup> The very notion of price suppression recognizes that there can be price effects without declines or downward trends in domestic prices, or with some price increases albeit not to the level attainable absent the imports.

16. At bottom, the EU's lengthy arguments on price effects amount to an effort to impose its preferred price effects methodology upon other Members. As other panels and the Appellate Body have recognized, the Agreements do not impose any particular methodology on how an authority is to perform its injury analysis.<sup>36</sup> Yet, that is exactly what the EU is imploring the Panel to do, in order to arrive at the factual result that the EU would have preferred the USITC to have reached in its determinations.

17. In a final effort to find textual support for its preferred interpretation, the EU also raises a new argument. Cross-referencing Articles 3.7 and 15.7 of the AD and SCM Agreements, which address threat of material injury determinations, the EU argues that the absence of references to underselling in those provisions somehow provides support for its interpretation of price undercutting as a "non-true" price effect.<sup>37</sup>

18. The EU's logic is untenable. The *absence* of any reference to underselling in the threat of material injury provision does not support the idea that the *inclusion* of underselling as a price effect in the present injury articles means that for present injury purposes it is not as important as other price effects.<sup>38</sup> Indeed, the EU's effort to use the absence of a specific reference in the threat provisions in order to override the explicit provisions in Articles 3.2 and 15.2 is in disaccord with the customary rules of interpretation.<sup>39</sup>

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<sup>34</sup> EU March 26, 2021 responses to Panel questions, para. 7.

<sup>35</sup> EU March 26, 2021 responses to Panel questions, para. 4.

<sup>36</sup> See *Mexico – Rice (AB)*, para. 204; *EU – Footwear (Panel)*, para. 7.929.

<sup>37</sup> EU March 26, 2021 responses to Panel questions, para. 20.

<sup>38</sup> Moreover, Articles 3.7 and 15.7 explicitly state that "{n}one of these factors [listed in Articles 3.7(i)-(iv)/15.7(i)-(iv)] can necessarily give decisive guidance." Accordingly, the EU's contention that "Article 15.7(iv)... exhaustively lists the negative price effects that exist" is incorrect. EU March 26, 2021 responses to Panel questions, para. 20.

<sup>39</sup> The United States recalls that Article 3.2 of the DSU requires a WTO adjudicator to apply the "customary rules of interpretation of public international law." Articles 31 to 33 of the Vienna Convention on the Law of Treaties ("Vienna Convention") have been recognized as reflecting such customary rules. Article 31 of the Vienna

**Question 2 (To the United States) [omitted – the EU did not reply to this question]**

**Question 3 (To the United States) In "Table 2: Import sources during the POI (short tons dry weight)" at paragraph 633 of its first written submission, the European Union estimates that Moroccan imports increased from 5,633 short tonnes to 9,254 short tonnes between 2015 and 2016. In contrast, Table C-1 provided by the United States to the Panel on 4 February 2021 indicates that the quantity of imports from Morocco declined during this period. Please provide the quantity of imports from Morocco identified in USITC Publication 4805 (Exhibit EU-5) for each of 2015, 2016 and 2017. If the United States is unable to provide this information, please describe the change in quantity of imports from Morocco for each of 2015, 2016 and 2017.**

**U.S. Comment on the EU Response:**

19. As the United States explained in its response to this question, the data table contained in the EU's first written submission tabulates raw import volume data extracted from the USITC's import database whereas Table C-1 of the USITC report tabulates U.S. shipment data.<sup>40</sup> Of note, the USITC relied upon shipment data for computing volumes and market share for the entire market by totaling shipments of subject imports, domestic shipments, and shipments of nonsubject imports.<sup>41</sup>

20. Moreover, the import volume data compiled in the EU's table are not aligned with the verified import volume data compiled by the USITC, which relied upon proprietary import data reported by importers in their questionnaire responses.<sup>42</sup> For the reasons explained in its communication to the Panel of February 4, 2021, the United States cannot disclose these data to the Panel. However, these data do not show that the volume of nonsubject Moroccan imports entering the United States doubled between 2015 and 2017, but instead indicate an increase of less than 20 percent during this period.

21. In any event, we again note that the USITC did consider that the imports from Morocco captured market share from both subject imports and the domestic industry.<sup>43</sup> As the USITC explained, however, subject import had a substantially larger presence in the market than

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Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." U.S. FWS, para. 13.

<sup>40</sup> U.S. March 26, 2021 responses to Panel questions, para. 24.

<sup>41</sup> USITC Pub. 4805 (Exhibit EU-5) at Tables IV-5, C-1.

<sup>42</sup> Compare EU FWS para. 633 n.524 with USITC Pub. 4805 (Exhibit EU-5) at Table IV-2 Note. See also USITC Pub. 4805 (Exhibit EU-5) at IV-1 n.2 ("Import data in this report for countries *other than Morocco* are based on official import statistics reported under HTS statistical reporting numbers 2005.70.5030, 2005.70.5060, 2005.70.6020, 2005.70.6030, 2005.70.6050, 2005.70.6060, 2005.70.6070.") (Emphasis added).

<sup>43</sup> USITC Pub. 4805 (Exhibit EU-5) at 25.

nonsubject imports throughout the POI, and nonsubject imports were not present in, and did not capture market share in the retail sector.

22. The United States has two additional comments on the EU's response. First, the dataset cited by the EU at paragraph 31 of its submission, which concerns Moroccan table olive exports to the United States, includes olives specifically excluded from the scope.<sup>44</sup> Further, the timing of exportation is not coincident with the timing of importation; importers reported lead times of 60 days or more to ship ripe olive products produced to order or from foreign inventories.<sup>45</sup> These export data, accordingly, cannot be used as a one for one proxy for the import data on which the USITC relied.

23. Second, as the United States previously explained, nonsubject imports from Morocco were less substitutable with domestically processed ripe olives than subject imports and had a smaller and narrower market presence in the United States.<sup>46</sup> The smaller presence of Moroccan ripe olives is also apparent from the EU's data table, which indicates that the volume of Spanish olive imports exceeded that of Moroccan olive imports throughout the POI by multiples of 2.91 to 6.22.<sup>47</sup> The United States notes that the EU appears to accept that (small) baselines matter when assessing the significance of the magnitude of import volume increases.<sup>48</sup>

**Question 4 (To the United States) [omitted – the EU did not reply to this question]**

**Question 5 (To the European Union)** The Panel observes that revised public versions of Table C-1 and Tables IV-6-8 provided by the United States on 4 February 2021 show trends in the redacted data. Please explain if, and if so how, the trend lines observed in relation to any of these indicators support the European Union's arguments.

**U.S. Comment on the EU Response:**

24. The United States notes that the EU, at paragraph 35 of its submission, has finally acknowledged that the USITC's impact analysis was based on "economic indicators at the industry level." Moreover, the EU does not challenge the accuracy of any of the "individual positive or negative trends of given economic factors at industry level" in the directional data

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<sup>44</sup> USITC Pub. 4805 (Exhibit EU-5) at 6, I-7. These encompass a number of so-called "specialty olives," including "Spanish-style" and "Sicilian-style" green olives, "Kalamata" olives, and certain other olives, in a full range of colors, sizes, and origins, that are typically fermented in a salt brine for three months or more.

<sup>45</sup> USITC Pub. 4805 (Exhibit EU-5) at II-12.

<sup>46</sup> U.S. FWS, paras. 253-256.

<sup>47</sup> *Derived from* EU FWS, Table 2 at para. 633.

<sup>48</sup> EU letter of February 25, 2021 to the Panel, para. 11 ("On that same basis, the United States could also have argued e.g. that an increase of Spanish imports from 200 to 1,000 short tons in the retail channel during the POI – it's the largest channel for the domestic industry, it's an increase of 500%, it's "actual competition"!").



tables provided by the United States in its February 4, 2021 communication to the Panel.<sup>49</sup> The EU nevertheless attempts to claw back these concessions by claiming that “the USITC’s assessment of the actual ‘impact’ was only focused on the retail channel and not on the industry as a whole.”<sup>50</sup> This claim is untenable, inasmuch as every single citation contained in the USITC’s impact analysis cites to Table C-1 or other industrywide compilations of data.<sup>51</sup>

25. The United States notes the EU’s inability to respond directly to the Panel’s question by pointing to any trends in the directional tables that support its preferred weighing of the record facts. The United States further notes the dramatic shifts in the EU’s arguments concerning the purported WTO-inconsistency of the USITC’s impact analysis. In sum, the EU itself has demonstrated that the claims it sought to pursue under Article 3.4 of the AD Agreement and 15.4 of the SCM Agreement (but are outside the Panel’s terms of reference)<sup>52</sup> are based on little more than speculation, conjecture, and legal interpretations unmoored from the actual text of the Agreements.<sup>53</sup>

**Question 6 (To the European Union) At paragraph 9 of the European Union's 25 February 2021 comments on the United States' 4 February 2021 letter, the European Union asserted that the row concerning the domestic producers' inventories in Table C-1 "had a positive trend at the industry level according to Attachment 1 but the USITC argued that undercutting in the retail channel led to increased inventories in the retail channel". The Panel understands that a positive trend would indicate increasing inventories. Please clarify whether this is a correct understanding. If it is a correct understanding, how is it said that the positive trend in inventories identified in the revised public version of Table C-1 is inconsistent with the USITC's finding that the domestic industry's inventories increased during the period of investigation?**

**U.S. Comment on EU Response:**

26. The United States notes that the EU, at paragraph 37 of its submission, acknowledges that inventories increased at the industry level. This accords with the U.S. observation that the USITC collected and compiled production-related data, including on ripe olive inventories, on an

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<sup>49</sup> EU March 26, 2021 responses to Panel questions, para. 35.

<sup>50</sup> EU March 26, 2021 responses to Panel questions, para. 35.

<sup>51</sup> USITC Pub. 4805 (Exhibit EU-5) at 22-24 nn.130-142, *citing* Tables III-4, III-8, III-10, III-13, VI-1, VI-4, VI-5, C-1.

<sup>52</sup> *See* U.S. FWS, paras. 23-27.

<sup>53</sup> In so doing, the EU has failed to “exercise its judgment as to whether” pursuing this claim under the WTO dispute settlement mechanism “would be fruitful,” as required by Article 3.7 of the DSU.

industry-wide basis.<sup>54</sup> The United States previously explained that this development was far from “positive” – the decreased sales volume and increased inventory experienced by domestic processors led to credit problems, cancelled or deferred projects, and other negative effects, including higher interest and borrowing costs from banks.<sup>55</sup> Moreover, the increase in ripe olive inventories led to an increase in total net assets, which the United States explained was a decidedly negative development for the industry.<sup>56</sup> In sum, the EU's characterization of increased inventories as “mixed” or “positive” in its February 25, 2021 letter ignores the factual context of the USITC's findings and displays a fundamental misunderstanding of industry financial metrics.

27. The United States also recalls that the USITC's impact analysis examined inventory data collected from processors (domestic producers), as opposed to purchasers. Processors were not directed to segregate these data on the same basis as U.S. shipments data.<sup>57</sup> Nor were inventory data collected from purchasers.<sup>58</sup> Accordingly, the procedural record belies the EU's contention that the USITC assessed inventory data “only for the retail channel without any explanation and without assessing all such indicators at the level of distribution channels,” and its similar statement that the USITC “simply transposed its findings concerning the retail channel to the industry as a whole without explanation.”<sup>59</sup>

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<sup>54</sup> U.S. FWS, para. 225.

<sup>55</sup> U.S. FWS, para. 237.

<sup>56</sup> U.S. FWS, para. 237.

<sup>57</sup> See Blank U.S. Producers Questionnaire (Exhibit USA-16).

<sup>58</sup> See Blank Purchasers Questionnaire (Exhibit USA-45).

<sup>59</sup> EU March 26, 2021 responses to Panel questions, para. 35.