

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

(DS577)

**U.S. RESPONSES TO ADDITIONAL QUESTIONS FROM THE PANEL FOLLOWING
THE SECOND VIRTUAL SESSION**

March 26, 2021

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I. INJURY

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.

Response:

1. The EU's arguments on this point attempt to impose requirements nowhere specified in Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. These provisions do not specify from what entities authorities must collect pricing data, how authorities must choose products for their pricing analysis, or the breakouts of time periods for which authorities must collect data. Nor do they specify how authorities are to measure underselling, much less require authorities to calculate margins of underselling. Thus, the EU's complaint about lack of a specific undercutting margin for any segment or product is unavailing as nothing in the Agreements requires authorities to calculate or consider underselling margins in any aspect of their injury analysis.

2. While the Agreements do require authorities to collect their pricing data in such a way that ensures an objective examination, the EU has not raised a claim in this regard with respect to the USITC's selection of pricing products or collection of pricing data.

3. To analyze underselling, the USITC collected quarterly pricing data on four representative ripe olive pricing products covering a significant portion of subject import and domestic industry shipments.¹ The USITC collected these data based on the first sales that U.S. producers and importers, respectively, made in the U.S. market. Thus, the data reflect the equivalent level of trade and reflect the prices in same manner that producers and importers kept records of the transactions.²

4. The USITC characterized the underselling for the retail products as "pervasive," an indication that such underselling was prevalent, but with an acknowledgement that it did not

¹ USITC Pub. 4805 (Exhibit EU-5) at 19-20.

² USITC Pub. 4805 (Exhibit EU-5) at 19-20.

occur in every instance.³ The USITC further indicated that there was more concentrated underselling by volume in the two institutional products, which also represented the largest volumes of importers' shipments.⁴ However, these considerations – which the USITC certainly did not overlook – provide no basis for a claim of a violation of Articles 3.2 and 15.2.

5. The USITC found that the unfairly traded imports from Spain undersold the domestic like product in 37 of 48 quarterly comparisons. This was based on the pricing data collected from U.S. producers and importers on the four pricing products – two of which were smaller sizes typically sold at retail, and two of which were larger sizes typically distributed for institutional purposes.⁵ In addition, the USITC found predominant underselling for both of the retail products for which it collected pricing data across both channels in which these products were sold by importers and producers.⁶

6. As the United States has previously explained, a finding of significant underselling does not require that subject imports undersell the domestic product in all instances.⁷ Moreover, the instances of underselling that the USITC found for sales of the retail products all transpired towards the end of the POI, coinciding with increases in shipments of the Spanish product to retailers.⁸ Prior panels have recognized that the most recent available record data may be “inherently more relevant and thus especially important to the investigation.”⁹ The USITC’s particular reliance on the pricing data for the most recent years of the POI, as well as its overall characterization of underselling for the products sold at retail as “pervasive” throughout the POI was based on positive evidence and reflected an objective examination of record data.¹⁰ Moreover, while the USITC premised its finding of significant underselling on data collected for all products, which indicated underselling by the unfairly traded imports on 37 of 48 quarterly comparisons,¹¹ it provided a particularized discussion linking the underselling in the two retail pricing products to lost sales and reduced market share in shipments to retailers, as explained further in response to the next set of questions. The EU has not shown that these findings could not have been made by an objective and unbiased investigating authority and its claims under

³ USITC Pub. 4805 (Exhibit EU-5) at 20 7 n.117.

⁴ USITC Pub. 4805 (Exhibit EU-5) at 20 7 n.117.

⁵ USITC Pub. 4805 (Exhibit EU-5) at 19-20 & n.112.

⁶ USITC Pub. 4805 (Exhibit EU-5) at 20-21.

⁷ U.S. SWS, para. 77.

⁸ U.S. FWS, para. 202.

⁹ See, e.g., *Mexico – Steel Pipes and Tubes (Panel)*, para. 7.228.

¹⁰ The term “pervasive” is defined in Merriam-Webster’s Dictionary as “existing in or spreading through every part of something.” See <https://www.merriam-webster.com/dictionary/pervasive> (last accessed: November 28, 2020).

¹¹ USITC Pub. 4805 (Exhibit EU-5) at 20.

Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement should therefore be rejected.

Question 2 (To the United States) Additionally, to facilitate the Panel's assessment of the European Union's argument 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, could the United States answer the following questions:

- a. **In its price effects analysis on page 20 of USITC Publication 4805 (Exhibit EU-5), the USITC states: "subject imports undersold the domestic like product and captured market share in the retail sector of the market". The USITC makes equivalent statements at other points in the price effects analysis (see pages 21 and 22 of USITC Publication 4805 (Exhibit EU-5)). Please explain the definition of the term "retail sector" as referred to by the USITC in its price effects analysis with reference to supporting evidence on the USITC record. Please ensure that your explanation clarifies whether "retail sector" as employed by the USITC in its price effects analysis refers to: (a) a sector defined by sales made to the channel of distribution composed of retailers; or (b) a sector defined by sales of retail branded and retail private label products (regardless of whether the customers are retailers or distributors).**

Response:

7. The USITC used the term “retail sector” to refer to commercial shipments of ripe olives directly from producers/importers to retailers. This is true for the quoted language in the question. Examining the sentence in context, the phrase “retail sector of the market” refers to the record data concerning commercial U.S. shipments to retailers. This term modifies the directly preceding phrase “captured market share,” as demonstrated in the two sentences following that one in which the USITC specifically addresses the coinciding underselling of Products 1 and 2 at the same time that the unfairly traded imports increased their presence or penetration in the {private label or branded} retail sectors of the market.¹²

8. To assist in its assessment of the significance of this pervasive underselling, the USITC looked at shipment data in the record, which were comprehensive for the span of shipments throughout the POI. In these investigations, the USITC collected shipment data from U.S. producers and importers categorized by channel of distribution, olive variety, and manner of processing.¹³ In particular, the USITC directed both U.S. producers and importers to furnish information about the quantity of commercial U.S. shipments in the following six categories:

- Branded product to distributors;

¹² USITC Pub. 4805 (Exhibit EU-5) at 20-21 & n.119.

¹³ Blank U.S. Producers Questionnaire (Exhibit USA-16), Questions II-8 and II-9; Blank Importers Questionnaire (Exhibit USA-44), Questions II-6b and II-6d.

- Private label product to distributors;
- Institutional product to distributors;
- Branded products to retailers;
- Private label products to retailers; and
- Products to institutional and food processors.¹⁴

9. The USITC found that the record data indicated that during the 2015-17 POI, the share of shipments to retailers that domestic producers supplied fell while the share of shipments that importers of unfairly traded merchandise from Spain supplied increased.¹⁵ The USITC also cited other record evidence about the Spanish industry's aggressive attempts to increase sales directly to U.S. retailers.¹⁶

10. Furthermore, the record indicated numerous instances of domestic producers losing sales to the unfairly traded imports due to lower prices.¹⁷ As described in our response to question 2.g. below, a substantial proportion of those purchasers confirming lost sales were retailers.

11. Moreover, besides asking responding importers and domestic producers to provide the price data for their sales of ripe olives, the questionnaires also asked these firms to identify their major (i.e. ten largest) customers.¹⁸ The purchasers, in turn, were asked in their questionnaires, to identify what type of purchaser they were (*e.g.*, distributor, retail, institutional).¹⁹ The identification of certain purchasers as retailers enabled the USITC to confirm that the demonstrated underselling of retail products and confirmed lost sales to retail purchasers coincided with increases in import volumes and market share in the retail sector.

12. The USITC thus logically found a nexus between the lower prices for unfairly traded retail pricing products and the gains in subject market penetration in shipments to retailers, even

¹⁴ Blank U.S. Producers Questionnaire (Exhibit USA-16), Question II-8; Blank Importers Questionnaire (Exhibit USA-44), Question II-6b. *See* USITC Pub. 4895 (Exhibit EU-5) at 11-1-2 and Table II-2.

¹⁵ USITC Pub. 4805 (Exhibit EU-5) at 18-19, 20-21. As seen in table II-1 of the USITC report, the percentage of shipments by importers that were sold to branded and private label product more than doubled from 7.3 percent in 2015 to 17 percent in 2017. USITC Pub. 4805 (Exhibit EU-5) at II-2, table II-1.

¹⁶ USITC Pub. 4805 (Exhibit EU-5) at 20 n.119. For example, as the USITC explained, the Spanish industry spent €7.5 million on an advertising campaign in an aggressive bid for U.S. retail sales.

¹⁷ USITC Pub. 4805 (Exhibit EU-5) at 21.

¹⁸ Blank Importers Questionnaire, Question III-24 (Exhibit US-44); Blank Producers Questionnaire, Question IV-24 (Exhibit USA-16).

¹⁹ Blank Purchasers Questionnaire, Question III-1 (Exhibit US-45).

if the two data sets were not entirely aligned.²⁰ Consequently, there was positive evidence supporting the USITC’s finding that the subject imports “captured market share in the retail sector of the market.”²¹

- b. Based on the United States' response to question 1(a) above, please explain whether the USITC's references to the "retail sector" in the discussion of price effects are the same or different to references to the "retail sector" in the sections of USITC Publication 4805 (Exhibit EU-5) entitled "Volume of Subject Imports" (pages 18-19) and "Impact of the Subject Imports" (pages 22-26).**

Response:

13. As noted above, the reference to the “retail sector” in the section of the USITC report on volume of subject imports reflects the record data concerning U.S. shipments to retailers.²² The same is true of the reference in the impact section, which incorporates earlier findings.²³ Thus, the references uniformly concern the data the USITC collected concerning U.S. commercial shipments to retailers.

- c. At pages 20-21 of USITC Publication 4805 (Exhibit EU-5), the USITC refers to the "retail private label sector" and the "retail branded sector". Please explain the definition of these sectors as referred to by the USITC, with reference to supporting evidence on the USITC record. Please ensure that your answer clarifies whether sales to these sectors included sales to both retailers and distributors included in these sectors, and whether the "retail label sector" and the "retail branded sector" are coextensive with the "retail sector" (as that term is used by the USITC in its price effects analysis).**

Response:

14. As explained in the response to question 2.a., the questionnaires the USITC issued to U.S. producers and importers requested information on the quantity of U.S. shipments made to retailers of both branded products and private label products. The questionnaires directed producers and importers to report shipments to distributors separately. Table II-1 of the USITC

²⁰ Even the dissenting Commissioner recognized that retailers increased their reliance on subject imports over the POI while domestic producers experienced increasing import competition at low prices. USITC Report (Exhibit EU-5) at 30, nn. 18 and 19. The dissenting Commissioner, however, exercised her factfinding discretion to give more weight to the absence of significant price depressing effects than to the significant underselling that the majority found more probative.

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

²² USITC Pub. 4805 (Exhibit EU-5) at 18, n.105 (expressly referencing “total reported shipments to retailers.”).

²³ USITC Pub. 4805 (Exhibit EU-5) at 24.

Ripe Olives report reflects the data collected in response to these requests, as well as to the other distribution categories referenced in the questionnaires.²⁴

15. The terminology in the USITC report, in turn, reflects the data categories reported in Table II-1. References to the “retail branded sector” reflect U.S. shipments of branded product to retailers; references to the “retail private label sector” reflect U.S. shipments of private label product to retailers, and references to the “retail sector,” reflect the sum of the prior two categories.

16. We note that the terms “branded” and “private label” were not further defined in the questionnaires, nor were the terms “distributor” or “retailer.”²⁵ No party requested elaboration of these terms in their questionnaire comments, suggesting their meaning was understood by marketplace participants.²⁶

- d. The Panel understands that the "23 importers" identified on pages 19 and V-6 of USITC Publication 4805 (Exhibit EU-5) are firms that purchased subject and non-subject imports, and then sold these imports to purchasers categorised in USITC Publication 4805 (Exhibit EU-5) as retailers, distributors, and institutional/food processors. Please confirm whether this understanding is correct and, if this is not the case, please explain. Please support your answer with references to evidence on the USITC record.**

Response:

17. Pertinent data about importers who responded to the USITC questionnaire are provided throughout the USITC report. These data are summarized below to aid the Panel’s understanding.

18. The USITC issued importers questionnaires to 55 firms believed to be importers of ripe olives from both Spain and other sources.²⁷ The USITC received usable responses from 32 importers.²⁸ The 32 firms are identified in Table IV-1 of the USITC *Ripe Olives* report.²⁹ As indicated in Table II-1 of the report, responding importers variously made commercial shipments

²⁴ USITC Pub. 4805 (Exhibit EU-5) at II-2.

²⁵ See generally Blank U.S. Producers Questionnaire (Exhibit USA-16); Blank Importers Questionnaire (Exhibit USA-44).

²⁶ See generally AFI Group Comments on Draft Questionnaires (Exhibit USA-46), ASEMESA Comments on Draft Questionnaires (Exhibit USA-47); Petitioners Comments on Draft Questionnaires (Exhibit USA-48).

²⁷ USITC Pub. 4805 (Exhibit EU-5) at IV-1.

²⁸ USITC Pub. 4805 (Exhibit EU-5) at IV-1.

²⁹ USITC Pub. 4805 (Exhibit EU-5) at IV-2.

of ripe olives to distributors, retailers, and institutional/food processors.³⁰ Of the 32 responding importers, 23 provided usable data for first sales to unrelated customers of the four pricing products.³¹ These 23 importers are referenced on pages 19 and V-6 of the USITC report.³²

- e. **The Panel understands from the United States' response to Question 12, and page V-6 and Table II-1 of the USITC Publication 4805 (Exhibit EU-5), that the underselling and overselling margins for sales data regarding Product 1 (Retail Branded) and Product 2 (Retail Private Label) (see Table V-10) are based on, and do not distinguish between, sales to both retailers (as identified in Table IV-7) and distributors (as identified in Table IV-6). Please confirm whether the Panel's understanding is correct and, if this is not the case, please explain. Ensure your explanation also addresses whether USITC Publication 4805 (Exhibit EU-5) indicates that prices for private label and branded products when sold to distributors tend to be the same or different to prices for these products when sold to retailers. Please support your answer with references to evidence on the USITC record.**

Response:

19. As explained in response to question 1 above, the USITC did not collect the quarterly pricing data by distribution channel, and no party in the investigations requested it to do so. Since the pricing data was uniformly collected at the same level of trade (*i.e.*, the first arms' length sale from the importer/producer to the purchaser), there is nothing to indicate that prices for the same product would be differentiated.

- f. **At footnote 7 on page II-2 of USITC Publication 4805 (Exhibit EU-5) the USITC states: "Petitioner contends that shipments to distributors of branded and private label product generally reflect sales to the institutional segment" (referring to pages 20-22 of Exhibit USA-10). Please clarify whether the USITC adopted this statement by the Petitioner and, if so, explain whether "branded" and "private label" products as identified in Table II-1 are sold to institutional/food processors, as well as retailers and distributors. Please ensure that your answer clarifies whether footnote 7 on page II-2 of USITC Publication 4805 (Exhibit EU-5) implies that pricing Product 1 (Retail Branded) and**

³⁰ USITC Pub. 4805 (Exhibit EU-5) at II-2-3

³¹ USITC Pub. 4805 (Exhibit EU-5) at V-6. Not all pricing data submitted by importers were usable. USITC Pub. 4805 (Exhibit EU-5) at V-6 n.7. For example, the USITC declined to include price data for sales of Product 2 by an importer of product from Spain that showed lower than average unit values, because the firm did not provide an explanation why the product was priced so low. USITC Pub. 4805 (Exhibit EU-5) at V-6 n.7. *Id.* Five importers reported pricing data for nonsubject imports from Morocco, with one importer accounting for more than 75 percent of the data for Morocco in the last year of the POT. The importers of Moroccan product reported shipments only to distributors and institutional users, and price data only for the two institutional products (Products 3 and 4). USITC Pub. 4805 (Exhibit EU-5) at 15, n.68 and E-3.

³² USITC Pub. 4805 (Exhibit EU-5) at 19, V-6.

Product 2 (Retail Private Label) (as referred to in footnote 112 on pages 19-20 of USITC Publication 4805 (Exhibit EU-5) were sold to institutional/food processors.

Response:

20. While the USITC did not specifically address petitioner’s contention, the rest of the footnote is factual in nature, as is the text on that page. These facts do not indicate that Products 1 and 2 were sold by importers or U.S. producers to institutional users; and the record suggests that these two pricing products are more likely to be sold to retailers because it would normally make little sense for institutional users to purchase the small can sizes in which the branded and private label olives are packaged. Instead, these facts reflect that (1) the largest volumes of import shipments were shipments of institutional product to distributors; and (2) most of the customers of the largest importer reporting U.S. commercial shipments to distributors of branded and private label product were either food service distributors or otherwise in the food service sector.

21. In any event, the record contains no reported shipments to institutional customers of branded or private label product.³³

- g. At page 21 of USITC Publication 4805 (Exhibit EU-5), the USITC identifies that of 25 responding purchasers: (i) 13 reported that they had purchased subject imports instead of domestically produced product since 2015; (ii) 12 of these 13 purchasers reported that subject import prices were lower than those for the domestically produced product; and, (iii) six of these 13 purchasers reported that price was a primary reason for its decision to shift its purchases from the domestic like product to subject imports. Please identify how many of each of these were categorized by the USITC as retailers, distributors and institutional/food processors.**

Response:

22. To answer this question, USITC staff tabulated the individual purchaser questionnaire responses. The data in the responses, including the identity of the individual purchasers that submitted responses, were submitted pursuant to the USITC’s *Ripe Olives* Administrative Protective Order (“APO”), under which the questionnaire respondents agreed only to allow limited disclosure of business confidential information to approved counsel.³⁴ Nevertheless, the United States can provide the following public summary of the information requested by the Panel:

³³ See USITC Pub. 4805 (Exhibit EU-5) at II-2, Table II-1.

³⁴ See 19 U.S.C. § 1677f(b)-(c) (Exhibit USA-38).

- i. Of the 13 purchasers who reported that they purchased subject imports rather than the domestic product, six were retailers, four distributors, two restaurants, and one deemed itself “other.”
 - ii. Of the 12 purchasers who reported that the subject imports were lower priced than the domestic like product, six were retailers, four distributors, one a restaurant, and one deemed itself “other.”
 - iii. Of the six purchasers who reported that lower prices were the primary reason that they purchased subject imports rather than the domestic like product, four were retailers and two distributors.
- h. Please provide all redacted information contained in Table V-10 of USITC Publication 4805 (Exhibit EU-5) (quantity, average overselling and underselling margins, and margin range for each pricing product). If the United States is unable to provide this information directly, please explain the extent of underselling and overselling with regard to Product 1 and Product 2 referred to in this table, including an identification of the difference between the underselling and overselling margins for each product (sufficient to allow an understanding of the magnitude). Please support this explanation with a graphical representation.**

Response:

23. For the reasons explained in the United States’ communication to the Panel of February 4, 2021, the data redacted from the public USITC report are business confidential information. The United States can disclose that subject imports of Pricing Products 1 and 2 undersold the domestically produced product in 54 percent of quarterly comparisons, which reflected 62 percent of the total import shipments of those two pricing products. For each product, the average underselling margin exceeded the average overselling margin.

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.

Response:

24. For the reasons explained in the United States’ communication to the Panel of February 4, 2021, the data redacted from the public USITC report are business confidential information. The directional data that the United States previously provided to the Panel refer to U.S. shipments of imports from Morocco, the quantity of which declined from 2015 to 2016, and then

increased in 2016 to a level above 2017. The data submitted by the EU and the data in the USITC report reflect different measurements; the U.S. shipments data included in the USITC report do not include merchandise placed in inventories.

Question 4 (To the United States) At page 25 of USITC Publication 4805 (Exhibit EU-5), the USITC determined that the injury found to have been experienced by the domestic industry was not attributable to the decline in consumption of ripe olives because the "relatively modest decline in apparent U.S. consumption was smaller than the declines in shipments, net sales, and operating and net income experienced by the domestic industry". In paragraph 623 of its first written submission, the European Union posited that "it was the decline in consumption that caused injury, if any". The Panel would be assisted by data concerning the decline in apparent US consumption, as well as the domestic industry's shipments, net sales, and operating and net income and requests the United States to provide this information. To the extent that the United States is unable to provide this information, please describe, elaborate, or characterize the relative magnitude of the decline in these indicators. Please ensure that your answer identifies USITC's record evidence that would allow the Panel to confirm this characterization.

Response:

25. For the reasons explained in the United States' communication to the Panel of February 4, 2021, the data redacted from the public USITC report are business confidential information.

26. The United States notes that the EU's claim is not that the USITC mischaracterized the evidence in the record. Rather, the EU, in paragraph 623 of its First Written Submission, notes that one of the four Commissioners participating in these investigations weighed the facts differently from the majority.³⁵ Specifically, there is no dispute that the decline in apparent consumption was "relatively modest." Nor is there any doubt that the majority of Commissioners accurately observed that this decline was smaller than the decline in the industry's shipments, net sales, and operating and net income.³⁶ Under the proper standard of review of the USITC's determination, it is not relevant that one of the Commissioners may have weighed the facts differently – or that the Panel itself might have come to a similar conclusion. As the United States explained in its First Written Submission, the Panel must not conduct a *de novo* evidentiary review, and instead must "bear in mind its role as *reviewer* of agency action."³⁷ That is, unless the Panel considers that an objective and unbiased investigating authority could not have come to the same conclusion the USITC did, the EU's claims must be rejected.

³⁵ EU FWS, para. 623.

³⁶ The Spanish respondents in the USITC investigation, whose counsel had access to the proprietary data pursuant to administrative protective order, and received a disclosure of the USITC's final confidential report, did not contest the accuracy of the data in the USITC's business proprietary report.

³⁷ U.S. FWS, paras. 12-18, 86, citing *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis in original).

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.

Response:

27. This question is addressed to the European Union.

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?

Response:

28. This question is addressed to the European Union.