

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

(DS577)

**U.S. RESPONSES TO QUESTIONS FROM THE PANEL FOLLOWING THE VIRTUAL
SESSION WITH THE PARTIES**

November 12, 2020

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<i>China – HP-SSST (Japan) (AB)</i>	Appellate Body Report, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from Japan</i> , WT/SD454/AB/R and Add.1, adopted 28 October 2015
<i>EC – Tube Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>Japan – DRAMs (Korea) (AB)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007
<i>US – Anti-Dumping and Countervailing Duties (China) (AB)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , W/DS379/AB/R, adopted 25 March 2011
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USA-15	U.S. Department of Commerce Countervailing Duty Investigation Respondent Selection Memorandum (July 28, 2017)

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I. SPECIFICITY CLAIMS

Question 1 (To the United States) In paragraph 31 of its 10 June 2020 responses, the United States argues that the critical question for an inquiry under Articles 2.1(a) and (b) of the SCM Agreement is whether the conduct or instruments of the granting authority discriminate or not. The United States submits that such discrimination may happen even if other enterprises receive payments under the same programme based on other calculation criteria.

- a. Please explain how the United States understands "discrimination" in this context and what was the nature of the discrimination in the underlying investigation. In that regard, how could discrimination based on the calculation criteria affect "access" to a subsidy programme?

Response:

1. To understand whether legislation “limits access” to certain enterprises, it is relevant to consider whether the legislation discriminates in favor of certain enterprises. The evaluation is simply whether, as a matter of law, certain enterprises have access to subsidies that those outside the group do not. That understanding is reflected in the observation in a prior report that Article 2.1(a) and Article 2.1(b) “set out indicators as to whether the conduct or instruments of the granting authority discriminate or not.”¹

2. The USDOC identified specificity based upon legislation that limited access, as a matter of law, through olive production under the Oils and Fats Program.² The BPS Programs were specific to certain enterprises because those programs retained the limitation on access of the Oils and Fats Program. To recall, the Parties agree that the Oils and Fats Program limited access in this way and that the BPS Programs continued to limit access based on the Oils and Fats Program.³

3. Thus, the USDOC identified discrimination in that certain enterprises could access entitlement values based on past olive production under the Oils and Fats Program while other enterprises could not. The USDOC summarized that access-based distinction in describing how two otherwise identical farms “can have different total entitlement values” based upon historic olive production.⁴

- b. Was the discrimination found by the USDOC in the form of most of the payments and/or the greater overall amounts of payments being made to olive growers as compared to other farmers? If so, did it occur under the SPS, BPS, or Greening

¹ See *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 367.

² Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

³ See U.S. Opening Statement at the Panel’s Videoconference with the Parties, paras. 5-6.

⁴ Final Issues and Decision Memorandum (Exhibit EU-2), pp. 35-36.

programme, was that fact verified, and where is this finding referred to in the record of the investigation? If the discrimination was not in the form of the differences of relative amount of the payments to olive growers, what form did it take?

Response:

4. As described above, the USDOC identified discrimination as a matter of law under the BPS Programs in that certain enterprises qualified for historic olive production-based subsidies that others did not. The USDOC did not make a finding as to the amount of subsidy payments in fact received by olive farmers compared to other farmers. Nor was such a finding necessary under Article 2.1(a).

5. The amount of payments received is not relevant to the analysis under Article 2.1(a), because this provision concerns a limitation on access to a subsidy as a matter of law. For that reason, Article 2.1(a) does not require an analysis of the amounts of subsidies received by the group of certain enterprises compared to those outside that group. Such a comparison would only be relevant to an analysis of specificity as a matter of fact under Article 2.1(c). Such a comparison could permit the investigating authority to determine whether, despite apparent legal neutrality, actual payments revealed the subsidy to be specific as a matter of fact.

6. Because the USDOC identified specificity as a matter of law under Article 2.1(a), it appropriately did not evaluate the amount of subsidy actually received by olive growers or by other enterprises. Instead, the USDOC considered the eligibility criteria of the implementing legislation – i.e., the Oils and Fats Program, which conferred subsidies based on historic olive production, and the BPS Programs, which limited to certain enterprises a discrete component of entitlement payments.⁵

7. In any event, the record contained no evidence of payments received by non-olive farmers. In response to the USDOC's request, 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."⁶ However, the EU's inability to provide this information did not impede the USDOC's specificity determination regarding the BPS Programs, which concerned a matter of law rather than fact.

Question 2 (To both parties) In paragraphs 1-3 of its 10 June 2020 responses, Canada argues the phrase "explicitly limits access to" in Article 2.1(a) of the SCM Agreement refers to criteria that determine eligibility for the subsidy. Canada also submits that, unlike in other provisions of the SCM Agreement, Article 2.1(a) does not refer to the "amount of subsidy", meaning that Article 2.1(a) concerns access in general, and not the particular amount of a subsidy received. In paragraph 6 of its 10 June 2020 responses, the United States, in turn,

⁵ See U.S. FWS, paras. 62-64; Final Issues and Decision Memorandum (Exhibit EU-2), p. 33

⁶ See Exhibit EU-33, p. 7.

argues that the choice of the term "access" by the drafters in Article 2.1(a) means that they did not intend to confine the inquiry under Article 2.1(a) only to either "eligibility for" or the "amount of" a subsidy. Please comment.

Response:

8. Canada errs in both arguments, which would modify the phrase “limits access” with conditions that are conspicuously absent from the text of Article 2.1(a).

9. First, as the United States has explained in several previous submissions, Article 2.1(a) 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 type of access, such as “amount” or “eligibility” or “threshold eligibility”.⁷ It would be inappropriate to read into “limits access” a more restrictive meaning that is unsupported by the actual language of Article 2.1(a). Such an interpretation would allow WTO Members to avoid a finding of *de jure* specificity merely by structuring their program to provide for a limitation on access in one form but not another, as the United States has explained.⁸

10. Second, that “amount of subsidy” appears in Article 2.1(b) but not Article 2.1(a) in no way supports Canada’s position. As an initial matter, “eligibility for”, which Canada believes should replace or restrict the meaning of “access to” under Article 2.1(a), also appears in Article 2.1(b) but not Article 2.1(a). Canada cannot have it both ways, arguing that the presence of “amount of subsidy” under Article 2.1(b) supports its interpretation while ignoring that “eligibility for” appears under the same provision but not Article 2.1(a). Instead, the terms of Article 2.1(a) must be read in their context. The term “access” is not modified by either the term “eligibility” or “amount”, and thus should not be read as coterminous with, or limited by, either term. Again, doing so only risks creating a loophole in the SCM Agreement whereby a party can avoid a finding of *de jure* specificity merely by placing the threshold eligibility criteria and the access limitation in separate pieces of legislation.

11. Thus, Canada’s arguments are legally erroneous and do not support the EU’s narrow reading of Article 2.1(a).

Question 3 (To both parties) In paragraph 11 of its 10 June 2020 responses, Canada argues that if an analysis of the amount of subsidy actually granted to certain enterprises was provided for within Article 2.1(a), it would render the consideration of "the granting of disproportionately large amounts of subsidy to certain enterprises" under Article 2.1(c) redundant and inutile. Please comment.

⁷ See, e.g., U.S. June 10 responses to Panel questions, paras. 3-15 (elaborating on the proper understanding of “limits access”); U.S. September 8 responses to Panel question, paras. 1-4; U.S. Opening Statement at the Panel’s Videoconference with the Parties, paras. 11-19.

⁸ See U.S. June 10 responses to Panel questions, paras. 5-7; U.S. September 8 responses to Panel questions, paras. 2-3; U.S. Opening Statement at the Panel’s Videoconference with the Parties, para. 17.

Response:

12. This argument of Canada’s is erroneous for the same reason its first argument errs – because Canada conflates Article 2.1(a) and 2.1(c) in a manner not supported by the text.

13. First, Article 2.1(a) concerns, and the USDOC evaluated in its specificity analysis, express legal conditions governing access to certain subsidy amounts, not “the amount of subsidy actually granted”. Specifically, the USDOC evaluated the express legal limitation on access to an entitlement component based on olive production during a historic reference period.⁹ No Party is arguing that Article 2.1(a) covers the amount of subsidies actually granted, so Canada’s argument is beside the point.

14. Second, it is not the case that limited access to certain amounts of subsidy under Article 2.1(a), which must be provided for as a matter of law, risks crossing over into the distinct issue of whether a granting authority has, as a matter of fact, “grant[ed] [] disproportionately large amounts of subsidy to certain enterprises” under Article 2.1(c).¹⁰ If certain enterprises receive, as a matter of fact, disproportionately large amounts of subsidy, there is no reason why that must also entail an explicit access-based limit. Indeed, the purpose of Article 2.1(c) is to prevent a Member from evading a finding of specificity by failing to provide for that specificity in its laws and instead simply granting the subsidy in larger amounts only to certain enterprises.

15. Therefore, Canada’s interpretation fails for the same reason the EU’s does: it would allow a granting authority to avoid a finding of *de jure* specificity merely by placing the threshold eligibility criteria and the access limitation in separate legal instruments.

Question 4 (To the United States) In paragraph 2 of its 10 June 2020 responses, the United States argues that the USDOC found that certain enterprises eligible under the Common Organisation of Markets in Oils and Fats (COMOF) programme were eligible under the SPS, BPS and Greening programmes to access assistance based on the assistance received under the COMOF programme. How does this characterization correlate with the fact that recipients of subsidies under the SPS, BPS and Greening programmes (e.g. olive growers) could have inherited payment entitlements, or received them by transfer or from the national reserve?

Response:

16. As an initial matter, the investigation record does not contain evidence of any assistance received under the BPS Programs based on inherited or transferred payment entitlements or entitlements from the national reserve. Nor does the record contain evidence that any olive growers received payments that were not based on the assistance received under the Oils and Fats Program. Accordingly, the USDOC did not separately address the specificity of such

⁹ See Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36.

¹⁰ Emphasis added.

hypothetical payment entitlements, and consequently did not exclude such benefits from its benefit calculation.

17. However, even where certain entitlements might have been inherited or transferred, this would not sever the link to the access limitation identified by USDOC in its determination. The fact remains that, under the law, only the legacy entitlement holders could apply for and receive the subsidy amounts reserved for that class of certain enterprises. That entitlement holders might themselves transfer these rights does not alter the scope of access, and the resulting specificity, under the law.

Question 5 (To the United States) In paragraphs 43-45 of its 8 September 2020 comments, the European Union argues that the United States comes up with an "alternative explanation" concerning the scope of certain enterprises, and that explanation appears for the first time in the United States' first written submission (i.e. the explanation is not evident from the record). Please comment and point to where this explanation is on the record.

Response:

18. The USDOC clearly identified the group of certain enterprises as the holders of entitlements whose value derived from olive production under Oils and Fats Program.¹¹ The EU's contention to the contrary is false. To support it, the EU fixates on the phrase "specific to olive growers" to the exclusion of the surrounding four single-spaced pages of the USDOC's final determination that explain its de jure specificity determination.¹² Those surrounding pages set out the foundation for two key findings (i) the Oils and Fats Program conferred subsidies based on historic olive production and (ii) the BPS Programs retained the conditions that limited access to those subsidies as a discrete component of entitlement payments, whether the holders of those entitlements continued to produce olives or not.

19. It is true that olive production – namely, historic olive production – is one facet of the USDOC's finding. But it is not the full extent of the limit on access the USDOC described in its final determination. Rather, the USDOC set forth how the limit on access to olive production subsidies under the Oils and Fats Program took the form of a discrete component of the entitlements established under the BPS Programs.

20. This analysis in the USDOC's determination is what the United States summarized in paragraphs 20 to 26 of its opening statement and other submissions before the Panel.¹³ In particular, the USDOC recognized that 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

¹¹ See, e.g., U.S. September 8 responses to Panel questions, paras. 11-15 (citing Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32 and 35-36)).

¹² Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36.

¹³ U.S. September 8 responses to Panel questions, paras. 11-15; U.S. June 10 responses to Panel questions, paras. 22-28.

whether or if the land was later converted to a different use: “[T]he 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.”¹⁴ As the USDOC explained, only certain enterprises enjoyed access to those discrete entitlement components.

21. The USDOC’s remand redetermination identified in a similarly straightforward manner the group of certain enterprises under the BPS Programs.¹⁵ For example, the USDOC found that:

[T]he value of entitlements under the BPS [Programs] 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].¹⁶

22. In sum, in its determinations the USDOC clearly explained that access to a discrete component of the BPS Programs – entitlement values derived from historic olive production-based subsidies – was limited to farmers on lands that qualified them for these entitlements.

23. The EU’s attempts to reduce the USDOC’s comprehensive analysis to one phrase, which captures only one aspect of the USDOC’s analysis and ignores the rest, is inappropriate and should be rejected.

Question 6 (To the United States) In paragraph 38 of its first written submission, the United States notes, with respect to the meaning of the term "certain enterprises", that "[p]ast reports have observed that this term involves 'a certain amount of indeterminacy at the edges', and a determination of whether a group of enterprises or industries constitute 'certain enterprises' can only be made on a case-by-case basis". If this indeterminacy is relied upon by the United States as supporting the USDOC's *de jure* specificity determination, could the United States point to the relevant references in the investigation record referring to the degree of indeterminacy that is acceptable, or to the degree that was present in this particular case?

Response:

24. In its submissions, the United States has referred to this finding, and has emphasized the case-by-case nature of the specificity inquiry, because it reflects a proper understanding of Article 2.1(a). Specifically, the finding reflects the reality that, except in the event that specific entities are named in a piece of legislation, the identities of each member of a group of “certain

¹⁴ Final Issues and Decision Memorandum (Exhibit EU-2) p. 33.

¹⁵ U.S. Opening Statement at the Panel’s Videoconference with the Parties, para. 24.

¹⁶ Exhibit EU-80, pp. 58-59 (identifying this as the reason the program was specific to olive growers).

enterprises” may not be precisely determinable. Therefore, it was not necessary for the USDOC to identify the degree of indeterminacy that might exist in this case. Rather, these concepts support an understanding of Article 2.1(a) that, in making its determination, the USDOC was not precluded from finding *de jure* specificity merely because some indeterminacy as to the precise contours of the group of “certain enterprises” might have existed. That indeterminacy is consistent with the fact that, although the enterprises that constitute the certain enterprises must be “known and particularized,” they need not be “explicitly identified” for the subsidy to be considered *de jure* specific.¹⁷

25. In reviewing this determination, the Panel must assess whether, based on the record before the USDOC, an objective and unbiased investigating authority could have come to the same conclusion.

Question 7 (To the United States) In footnote 31 of its 10 June 2020 responses, the United States explains that the USDOC's final determination does not contain the shorthand "certain enterprises" because the US statute does not use the same language to capture that concept. How does the US statute refer to that concept?

Response:

26. 19 U.S. Code § 1677(5A)(D)(i) reads:

Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry, the subsidy is specific as a matter of law.

Question 8 In connection with the USDOC's specificity findings, the Panel asked the parties to comment on a hypothetical example involving Farmer A and Farmer B (see the Panel's 21 July 2020 request for comments, Question 1(d)).

- a. (To the United States) In paragraph 18 of its 8 September 2020 comments, with respect to Farmer A, the United States indicates that if Farmer A received olive-specific subsidies under the COMOF programme, Farmer A could access "the discrete component of the SPS, BPS, and Greening programmes that was derived from the COMOF programme". The United States comments that, as a matter of law, this would "place Farmer A (*and any transferee*) among the certain enterprises under Article 2.1(a) identified by the USDOC" (emphasis added). Does this explanation suggest that the United States agrees that Farmer B (who would qualify as a transferee in the Panel's hypothetical) would be among "certain enterprises" identified by the USDOC? What does the United States understand by "any transferee"?

Response:

¹⁷ US – Carbon Steel (India) (AB), para. 4.365. See also US – Anti-Dumping and Countervailing Duties (China) (AB), para. 373.

27. As explained in the U.S. September 8 responses, the record contained no information concerning transferees. The USDOC did not – nor did it need to – make a finding concerning such a fact pattern. However, if the farmer in question was a transferee such that she could access the discrete component of the BPS Programs that was derived from the Oils and Fats Program, that would as a matter of law place her among the certain enterprises identified by the USDOC, for purposes of the specificity analysis.

28. As noted in response to question 4, whether entitlement holders might choose to maintain or transfer these rights does not alter the scope of access under the law. That fact reflects the manner in which the EU and Government of Spain chose to embed the conditions that limited access to olive-specific subsidies under the Oils and Fats Program in entitlement payments under the SPS Program and BPS Programs, rather than to confer the payments under a standalone Oils and Fats Program.

b. (To both parties) Please comment on whether the following situation could have occurred in the investigation at issue:

Farmer C started growing olives in 2016 and received payment entitlements from Farmer D (who was growing tangerines since the 1990s and never received assistance under the COMOF programme). Farmer C is currently receiving assistance under the BPS and Greening programmes.

Would Farmer C be considered as a "certain enterprise"/"group of enterprises" that was identified by the USDOC?

Is it reasonable to assume that Farmer C would be factored into the benefit calculations for the purpose of imposing countervailing duties on ripe olives from Spain upon importation into the United States?

Did the USDOC exclude Spanish olive growers whose payment entitlements may be not based on the assistance received under the COMOF programme from the benefit calculations?

Response:

29. This question refers to a circumstance where the certain enterprises identified by the USDOC for purposes of the specificity analysis might not be coextensive with the olive growers who under the BPS Programs received countervailable subsidies for purposes of measuring the benefit. As described below and in response to question 8.c, this fact does not affect the USDOC's evaluation under Article 2.1(a).

30. To begin with, because Farmer C did not hold an entitlement value based on olive production under the Oils and Fats Program, she would not be one of the certain enterprises identified by the USDOC. As the United States has explained, the *de jure* specificity identified by the USDOC derived from entitlements based on historic olive production, not current

production.¹⁸ In addition, it is possible that Farmer C received subsidies under the BPS Programs that would factor into the calculation of benefit. Specifically, the USDOC stated in its preliminary and final determinations that it was attributing the benefits provided to olive growers to the processors of ripe olives.¹⁹

31. The record before the USDOC did not indicate that the above fact pattern occurred, or that under the relevant legislation, it would have occurred. Accordingly, the USDOC made no finding regarding this fact pattern and did not distinguish subsidy payments based on olive production under the Oils and Fats Program. In addition, Article 2.1(a) concerns limitations based on access, not the amounts of subsidies actually received, and therefore does not provide for such an analysis. An examination of the amounts of subsidies in fact received could be relevant to *de facto* specificity under Article 2.1(c) or the calculation of benefit, but not Article 2.1(a).

- c. (To both parties) The United States notes that having transferred the entitlement component to another farmer, Farmer A would not have actually received subsidies under the programmes in question and would not have been factored into the benefit analysis. In light of this explanation and the potential situation described in item (b) above, are there any relevant requirements under the SCM Agreement requiring some degree of a match (e.g., full or partial) between the "certain enterprises" identified by an investigating authority for the purposes of specificity analysis and those factored into the benefit analysis? If so, does any potential mismatch (e.g., assuming Farmer C would not be considered part of "certain enterprises", but would have been factored into the benefit analysis) affect whether an investigating authority's specificity determination is consistent with Article 2 of the SCM Agreement?**

Response:

32. It is important to keep separate the inquiry under Article 2.1(a), which pertains to access-based limits and not the amount of subsidy in fact received, and the calculation of benefit. Whether Farmer A in fact received subsidy payments, and the amount Farmer A received (in absolute terms or relative to other farmers), is not relevant to the analysis under Article 2.1(a).

33. As the United States has explained, Article 2.1(a) qualifies 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. Although the text does not prescribe a particular form that the limit on “access” must take, it plainly does not take the form of the amounts in fact received. Similarly, nothing in the text of Article 2.1(a) indicates that limits based on access are in some way conditioned on the amounts in fact received. For purposes of Article 2.1, the evaluation of subsidy amounts in fact received is confined to Article 2.1(c),

¹⁸ See, e.g., U.S. FWS, paras. 63-67.

¹⁹ Final Issues and Decision Memorandum (Exhibit EU-2) p. 6.

which contemplates specificity based on “the granting of disproportionately large amounts of subsidy to certain enterprises”.

34. Thus, a specificity finding under Article 2.1(a) would not be undermined by a finding that subsidy amounts are received by different enterprises. The operative question for specificity is whether access is explicitly limited as a matter of law to the certain enterprises, which does not involve an analysis of the amounts actually received by the certain enterprises, or by other enterprises. In other words, whether any “mismatch” exists as a matter of fact is irrelevant under Article 2.1(a). The analysis of the amounts actually received by the beneficiaries of the subsidy programs is only relevant when evaluating (i) whether specificity as a matter of fact exists under Article 2.1(c) or (ii) the benefit conferred under Article 1.1(b) and Article 14.

35. Furthermore, reading into Article 2.1(a) such an analysis (one with no basis in the text) would permit the granting authority or legislation to evade *de jure* specificity simply by providing for the transfer of the right to access the subsidy in question. For example, if the legislation restricts access to a subsidy to one enterprise (i.e., the certain enterprises under Article 2.1(a)), that enterprise could transfer the access right to ten other enterprises who all grow olives. That transfer does not then prevent the investigating authority from taking into account, in calculating benefit, the subsidy payments received by the ten olive grower-transferees. Otherwise, a granting authority could, through intermediaries, launder subsidies that are benefiting the recipients in the same way as if the subsidy were received (or entitled to be received) directly.

Question 9 (To the European Union) In paragraph 46 of its opening statement, the European Union submits that “[i]n the Remand Determination the USDOC tries to fix its failure to explore compliance with the eligibility and calculation criteria”.

- a. Does this statement suggest that the European Union accepts that the USDOC examined criteria under Article 2.1(b) of the SCM Agreement in its remand redetermination?
- b. How should the Panel now understand the European Union's claim in paragraphs 278-279 of its first written submission that the USDOC did not examine criteria under Article 2.1(b) of the SCM Agreement to “exclude” *de jure* specificity, in light of the Panel's decision of 18 September 2020 that the remand redetermination with respect to the *de jure* specificity matter is a measure or is part of the measure that is before the Panel in this dispute?
- c. Does the European Union suggest that the Panel should assess the European Union’s claims first with respect to the USDOC's original determination and secondly with respect to the remand redetermination?

II. “PASS-THROUGH” OF BENEFIT CLAIMS

Question 10 (To the United States) Why do the circumstances surrounding agricultural commodities justify a different methodology than is followed in assessing manufacturing input products under Section 1677-1 of US law? Are circumstances affecting agricultural

inputs necessarily different from circumstances affecting manufacturing inputs? If so, how?

Response:

36. The EU has challenged the methodology set out in Section 771B as not permissible under the terms of the SCM Agreement for purposes of determining the existence of pass-through. Therefore, the question of whether the circumstances surrounding agricultural commodities “justify a different methodology” than might otherwise be used to assess pass-through in the context of manufacturing inputs is not before the Panel. As the United States has explained in section IV.A of its first written submission, the SCM Agreement does not prescribe a particular methodology for the determination of pass-through in any circumstance, including with respect to manufacturing inputs. Furthermore, the United States has provided historical context demonstrating that this lack of a prescribed methodology reflects the drafters’ inability to reach consensus regarding a calculation methodology that would be appropriate in all circumstances.²⁰ Instead, investigating authorities retain flexibility with respect to the methodology they apply based on the facts and circumstances before them.

37. In this dispute, the EU has challenged the U.S. statute “as such”. Therefore, the burden rests with the EU to demonstrate that application of the statute would necessarily lead to a WTO-inconsistent result. The EU has not done so, and given the flexibilities reflected in the SCM Agreement, the EU could not do so.

Question 11 (To the United States) What is the economic logic behind the criteria in Section 771B, and how does meeting these criteria of substantial dependence and limited value added through processing on its own establish that pass-through of an upstream subsidy has occurred?

Response:

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

39. These characteristics are not *necessarily* restricted to agricultural commodities. However, they are systematic features of markets in the agricultural sector, and therefore affect the relationship between producers and processors of raw agricultural products. Given these underlying market conditions, where an agricultural commodity market also exhibits certain additional characteristics – i.e., where in addition to perfect competition there is *also* substantial

²⁰ U.S. FWS, paras. 124-127.

dependence and limited value added – the benefit of a subsidy provided to an agricultural producer will be determined to have passed through to a processed agricultural product.

Question 12 (To the United States) Paragraph 4.8 of the US – Canadian Pork GATT Panel Report, as referenced in paragraph 4 of Japan's oral statement at the third-party session, states that "the words in Article VI:3 of the GATT 1994 'to determine' and 'estimated' as well as the practices of the contracting parties under that provision, as reflected in Part I of the Subsidies Code, indicate that the decision as to the existence of a subsidy must result from an examination of all relevant facts". How may this statement be reconciled with the approach taken in section 771B where only two factors are mentioned and there is no apparent requirement to consider any other factors? Were factors other than the two factors taken into account in the case under consideration?

Response:

40. There is no conflict between the obligation to examine “all relevant facts” and the approach taken in Section 771B. The GATT panel report referenced by the Panel does not suggest that there are a certain number of factors that must be taken into account, nor does it prescribe particular factors that an investigating authority must consider in its analysis. Moreover, application of the statute does not reflect the consideration of the two factors identified only. As described in response to Question 11, above, the statute reflects the specific factual and economic circumstances that exist in agricultural commodity markets, and identifies two additional conditions, which – if met – will lead to a finding that the benefit received by a producer has been passed through to a downstream processor.

41. The EU is therefore incorrect when it claims that the U.S. statute does not require a finding of pass through, or that pass through is automatically presumed without a factual basis. Nor has the EU explained why consideration of the factual circumstances reflected in the U.S. statute necessarily lead to a breach of Articles VI:3 of the GATT 1994 or Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement.

Question 13 (To both parties) In paragraphs 15-17 of its 10 June 2020 responses, Japan submits that the degree of reliance of the downstream producers on the input from the upstream producers is highly relevant to a pass-through analysis and that, the higher the degree of reliance, the more likely that the benefit is transferred to the downstream producer. Is this observation correct and if so, does it have implications for the need to quantify the extent to which a downstream producer receives a benefit?

Response:

42. The United States generally agrees with the factual statement by Japan that “the higher the degree of reliance, the more likely that the benefit is transferred to the downstream producer.”

43. As the United States has explained in section IV.B of its first written submission, its June 10 response to Panel question 15, and in paragraph 33 of its opening statement, Section 771B identifies specific circumstances in which, because of the nature of the relationship between raw

agricultural products and downstream processed products, the benefit of a subsidy received by the producer of the raw agricultural commodity will be deemed to be provided with respect to the manufacture, production, or exportation of the processed product. These circumstances exist in the specific context of agricultural commodities markets, and include whether the demand for the raw agricultural product is substantially dependent on the demand for the downstream processed product, and whether the processing operation adds only limited value to the raw commodity.

44. Based on the specific factual and economic circumstances facing certain agricultural commodities, the level of dependence is relevant to the analysis of whether the USDOC will deem subsidies provided with respect to the production of the raw agricultural product to have been provided to the production of the processed product. Whether that relationship may justify the same determination in a different circumstance is not before this Panel. As the United States has explained in its submissions, including, inter alia, in section IV.A of its first written submission, the SCM Agreement does not prescribe a methodology for the determination of pass-through; therefore, the consistency of an investigating authority's methodology must be determined on a case-by-case basis.

Question 14 (To both parties) In paragraph 7 of its oral statement at the third-party session, Japan submits that if downstream producers have access to low-priced imports that are substitutable for the domestic input produced by subsidized upstream producers, then an upstream subsidy may not change the input price to be paid by the subject downstream producers. In that case, Japan submits that the benefit of the upstream subsidy would not pass through to the downstream producers. Could this be the case, and if so, would it have been relevant in the context of the ripe olives investigation?

Response:

45. Japan's hypothetical is not relevant to the resolution of this dispute, as the market circumstances described do not reflect those facing trade in agricultural commodities, and in particular, raw and ripe olives. In such circumstances, it is inappropriate to rely on a comparison of input prices to determine whether and to what extent a benefit has passed through to downstream producers.

Question 15 (To both parties) In paragraph 82 of its 8 September 2020 comments, the European Union argues that it "made clear that a pass-through analysis requires some sort of price comparison". In paragraph 24 of its 8 September 2020 comments, the United States disagrees "that the USDOC was required to conduct a price comparison" and states that the "EU has failed to demonstrate the existence of any such requirement, because none exists in the GATT 1994 or SCM Agreements." Article 19.1 of the SCM Agreement states that, where a Member makes a final determination that "through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty". Articles 19.3 and 19.4 of the SCM Agreement refer to the countervailing duty that shall be levied "in the appropriate amounts" in each case and that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy".

Is it possible to read Article 19.1 of the SCM Agreement as being satisfied if a Member makes only a qualitative finding that, through the effects of the subsidy, the subsidized imports are causing injury? Do Articles 19.3 and 19.4 of the SCM Agreement require quantitative assessments only with respect to the calculation of the countervailing duty? To what extent does the word "appropriate" apply in the application of those Articles?

Response:

46. Article 19 is concerned with the primarily ministerial function of imposing and collecting CVDs *once those duties are already calculated and determined* in accordance with the obligations imposed by the preceding articles of the SCM Agreement. Article 19 does not impose substantive requirements with respect to an investigating authority's calculation and determination of a CVD rate.

47. Rather, Article 19.3 provides guidelines on the amount of the countervailing duty that an investigating authority may levy once an investigating authority has identified and calculated the amount of subsidies. The text sets out that countervailing duties levied on a non-discriminatory basis on imports from all sources found to be subsidized and causing injury shall be "levied in the appropriate amounts in each case." In the context of the main clause of Article 19.3 of the SCM Agreement, the term "the appropriate amounts in each case" suggests a requirement that countervailing duties be levied in the "proper" or "fitting" amounts, in each "instance" or "occurrence" of levying countervailing duties.

48. In addition to the obligation to levy the duties in "the appropriate amounts", importing Members cannot discriminate among sources when imposing countervailing duties; and more specifically, when imposing countervailing duties on sources found to be subsidized and causing injury, the amount of countervailing duties must correspond to the amount of subsidies identified.

49. Article 19.4 subsequently limits the maximum amount that may be imposed to countervail a subsidy already found to exist. It establishes an upper limit on the amount of the countervailing duty that may be levied, i.e., the amount of the subsidy found to exist. The issue expressly addressed by Article 19.4 is the *levying* of duties *after* a subsidy has been "found to exist."²¹ The sole calculation requirement in Article 19.4 is the requirement to calculate the subsidy on a per-unit basis. However, like the rest of Article 19, Article 19.4 does not establish any other requirements concerning how the subsidy is to be calculated.

Question 16 (To the European Union) Is the Panel bound to understand that the word "indirectly" in the phrase "directly or indirectly" in Article VI:3 of the GATT 1994 can only refer to the need for an investigating authority to consider the degree to which an

²¹ Article 20.3 of the SCM Agreement provides that, "[i]f the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed . . ." The possibility that the duty actually levied may be lower than the definitive duty "found to exist" in the investigation unavoidably includes the possibility that the duty actually levied may be zero because, on examination in a review, the particular producer in question may be found not to have received a subsidy. Therefore, the SCM Agreement does not require that each exporter be found to have received a subsidy in order to be subject to countervailing duties.

upstream subsidy is "passed through" to downstream producers by way of enabling lower prices to be charged for the upstream input, or could "indirectly" refer to something else?

Question 17 (To both parties) The GATT panel in paragraph 4.9 of *US – Canadian Pork* stated that it "fully recognized that subsidies need not in all cases, particularly in cases involving only one industry, have a price effect to be countervailable; its finding was merely that Canadian pork producers, as an industry separate from the swine producers and operating at arm's length, could not have been considered to be subsidized unless the subsidy bestowed on swine production has had a price effect." Please comment on whether this indicates that the *US – Canadian Pork* GATT panel report stands for the proposition that a price comparison is only necessary in certain circumstances, and, if so, what are those circumstances?

Response:

50. The United States has explained that confining an investigating authority to a test requiring the comparison of input prices in every circumstance would not address certain distinct circumstances facing certain industries, thus eliminating the possibility of a remedy in those cases. The abstract question of what factual circumstances, outside of those before the USDOC in this investigation, might require a price comparison methodology is not one this Panel need address in order to resolve this dispute. The United States notes that the GATT panel in *US – Canadian Pork* agreed that a “decision as to the existence of a subsidy must result from an examination of all relevant facts;”²² and that it is not for a panel to determine in the abstract what factors an investigating authority must take into account. The EU’s assertion during the virtual session with the Parties on October 22 that that report supports the proposition that a price comparison is required in every circumstance is factually incorrect and is in any event unsupported by the text of the WTO Agreements.

Question 18 (To both parties) The Panel notes that Article 14 of the SCM Agreement states that any method used by an investigating authority for the purpose of working out the amount of a subsidy in terms of the benefit to the recipient shall be provided for in the national legislation of the Member concerned. However, none of the subparagraphs of Article 14 relate to a subsidy in the form of a direct transfer of funds. Moreover, the chapeau states that its subparagraphs are "further" to the chapeau. In light of the lacuna with respect to the prescription of a method for an "indirect" subsidy, could it not be said that Section 771B is relevantly a "method" for that purpose?

Response:

51. The United States explained in Section IV.A of its first written submission that none of the provisions cited by the EU in its complaint provide substantive rules addressing the calculation of an indirect subsidy within the meaning of that term in Article VI:3 of the GATT 1994. Article 14 of the SCM Agreement speaks to the notion of calculating the amount of benefit in terms of the benefit to the recipient; but the EU has not raised a claim under Article 14.

²² *US – Canadian Pork* (GATT Panel), para. 4.8.

To the general question of whether Section 771B is a “method used by an investigating authority for the purpose of working out the amount of a subsidy in terms of the benefit to the recipient,” however, the answer is: yes. The EU agreed that Article 14 is the correct provision governing the calculation of benefit, but suggested during the virtual session of the Panel with the Parties that Section 771B is not a calculation methodology. In making this suggestion, the EU implies that Article 14 could not apply to the U.S. CVD investigation, and that therefore the Panel must find the EU’s alternative provisions to apply instead. The EU is incorrect. None of the provisions identified by the European Union prohibits the calculation methodology applied by the USDOC in the underlying investigation.

52. Article 14 of the SCM Agreement only supports the United States’ position that the SCM Agreement does not prescribe a particular methodology for determining whether a benefit has passed through to a downstream producer. Specifically, the chapeau of Article 14 establishes that the four subparagraphs in Article 14 establish “guidelines” regarding the basic framework for the calculation of benefit.²³ Far from prescribing a specific methodology, however, these guidelines provide significant flexibility to investigating authorities regarding how to conduct that calculation.²⁴ Prior reports support this interpretation of Article 14.²⁵ The EU cannot avoid this conclusion merely by declining to bring a challenge under Article 14 directly.

Question 19 (To both parties) With respect to the phrase in Article 15.5 of the SCM Agreement "through the effects of the subsidies" for injury causation purposes, do prior WTO disputes provide any relevant guidance concerning the question of whether a subsidy should be taken to have "passed through" to a downstream producer to its full extent?

Response:

53. The text of Article 15.5 does not speak to the question of benefit, and in particular whether a benefit “passes through” to a downstream processor.

54. The United States has addressed the EU’s arguments with respect to Article 19.1 in its written submissions.²⁶ Article 19.1 contains some similar language to that in Article 15.5, that is, the phrase “through the effects of the subsidy”. However, the United States has explained that

²³ See *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.55.

²⁴ See *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.55.

²⁵ *US – Softwood Lumber IV (AB)*, paras. 91-92 (Referring to Article 14 of the SCM Agreement, the Appellate Body noted that “The reference to ‘any’ method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.”); *Japan – DRAMs (Korea) (AB)*, para. 191 (“The chapeau of Article 14 provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit. Paragraphs (a)-(d) of Article 14 contain general guidelines for the calculation of benefit that allow for the method provided for in the national legislation or regulations to be adapted to different factual situations.”).

²⁶ See U.S. FWS, paras. 115-116; U.S. June 10 response to Panel question 14(b).

the text of Article 19.1, like the other provisions to which the EU has cited, does not prescribe a specific methodology for the assessment of “pass-through”.²⁷

55. Furthermore, there are significant differences between the text of Article 19.1 and the text of Article 15.5. Article 15.5 provides that an investigating authority’s analysis of the causal relationship between subsidized imports and the injury shall be based on “all relevant evidence.” It then provides an illustrative list of factors which may be relevant. As the United States has repeatedly explained, the covered Agreements do not prescribe any factors, even illustratively, which must be considered to make a finding that the benefit to an upstream product has passed through to the downstream product.

III. Injury

Question 20 (To both parties) In paragraph 25 of its 10 June 2020 responses, Japan argues that once an investigating authority determines to undertake a segmented analysis of one of the injury components, it must carry out that segmented analysis throughout its injury inquiry.

Do you agree with Japan's argument as a question of law?

Did the USITC undertake a segmented analysis of one of the injury components, but fail to carry out that segmented analysis throughout its injury analysis as a question of fact?

Response:

56. The United States has previously explained that the USITC examined the overall ripe olives market, including each channel of distribution. The USITC’s volume, price, and impact analyses were based on data pertaining to the market as a whole.²⁸ Accordingly, the USITC did not, in fact, conduct a “segmented analysis” of injury in the ripe olive market. To the contrary, the USITC considered all segments of the market, and it based its volume, price, and impact analysis on data pertaining to the entire olives market. The EU’s repeated attempts to recast the USITC’s determination in this respect are factually wrong.

57. In conducting its analysis of import volume and price effects on the industry and market as a whole, the USITC provided information concerning trends in the retail channel of distribution, as this was the channel in which competition between domestically processed and unfairly traded ripe olives from Spain was concentrated during the POI.²⁹ This examination, which was based on positive evidence illustrating how different parts of the market fared with competition from unfairly traded subject imports during the POI, accorded with the USITC’s

²⁷ U.S. FWS, Section IV.A; U.S. June 10 response to Panel question 14(b); U.S. opening statement, para. 27.

²⁸ See, e.g., U.S. FWS, paras. 175-178, U.S. June 10 responses to Panel questions, para. 72, U.S. September 8 responses to Panel questions, para. 37.

²⁹ See, e.g., U.S. FWS, para. 175, U.S. June 10 responses to Panel questions, para. 59.

obligation, under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement, to consider “all relevant economic factors and indices having a bearing on the state of the industry.”

58. Thus the question of whether or to what extent an investigating authority undertaking a segmented analysis of one component of injury must carry forth that analysis throughout its injury determination is not one that the Panel needs to address. The United States nonetheless observes that Japan acknowledges that nothing in the text of Articles 3 and 15 of the AD and SCM Agreements “precludes a segmented analysis of any kind.”³⁰

Question 21 (To the European Union) In paragraph 7.160 of its report, the panel in *Mexico – Corn Syrup* referred to the two market segments into which the investigating authority divided the domestic industry for the injury analysis. The panel noted that “the sugar sold in one market is indistinguishable from that sold in the other (except by the identity of the purchaser) and all sugar producers apparently sold sugar in both markets”. The panel further found in the same paragraph that “an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the AD Agreement”.

In light of the above, does the European Union agree that the panel in *Mexico – Corn Syrup* found segmentation of the domestic industry for the purpose of injury analysis to be permissible in principle under the Anti-Dumping Agreement even if the product under consideration can be sold indistinguishably in all market segments?

Question 22 (To the European Union) In paragraph 29 of its closing statement at the first substantive meeting of the Panel, the European Union asserted:

[T]he injury analysis must be carried out on the basis of the definition of the domestic industry in Article 16.1. As the EU demonstrated, the US defined the industry as “all ripe olives” with no segmentation by distribution channels. The US cannot segment for injury purposes in the context of Article 15.2.

Please explain whether this assertion is linked to any specific claim presented in the European Union's first written submission.

Question 23 (To the European Union) In paragraph 99 of its 10 June 2020 responses, the European Union states:

The USITC's segmentation approach would not be “justified” even if the majority of the US's ripe olives were primarily destined to the retail “segment” (i.e. the retail customer distribution channel). It does not matter whether 40%, 51% or 70% of domestic sales are in the retail “segment”. The US was under an obligation to assess injury and causation for the domestic industry as a whole, not only for the so-called retail “segment”.

³⁰ Japan's Oral Statement, para. 9.

Will the USITC's particular focus on the retail segment for certain elements of the injury analysis be improper even if, in addition to assessing the retail segment, the USITC also properly assessed "injury and causation for the domestic industry as a whole, not only for the so-called retail 'segment'"?

Question 24 (To the United States) In paragraph 469 of its first written submission, the European Union submits that the "potential relevance of the different customer group 'segments' is not explained in the determinations [...]. [T]he USITC's 'segmentation' of the domestic ripe olive industry was arbitrary because it was neither explained nor grounded in facts and evidence". Please comment on these assertions of the European Union. Please point to specific parts of the injury determination where the USITC explained the relevance of the different customer group segments for the purpose of its injury analysis.

Response:

59. As the United States explained in its first written submission, the USITC solicited data from market participants, including U.S. processors and importers of ripe olives, in order to enable it to conduct its injury analysis.³¹ After analyzing these data, the USITC found, in its analysis of pertinent demand conditions of competition, that ripe olives were generally sold to three channels of distribution, namely distributors, retailers, and institutional/food processors, and that each channel involved unique purchasers who purchased specific types of ripe olive products.³²

60. The USITC found that domestically processed ripe olives were largely sold to retailers, whereas unfairly traded ripe olive imports from Spain, which were largely sold to institutional/food purchasers during the POI, were increasingly penetrating the retail channel, such that competition between the domestic industry and unfairly traded subject imports intensified in this channel.³³ The USITC thus fully explained the significance of the different distribution channels for the purpose of its injury analyses, and its focus on the retail channel in its volume and price effects analyses was guided by positive evidence on the record. The EU's arguments to the contrary cannot be reconciled with the USITC opinion.

Question 25 (To the United States) Rebutting the United States' argument that the fact that a majority of domestically produced ripe olives were sold to retailers justified the USITC's

³¹ U.S. FWS, para. 175 and n.244.

³² USITC Pub. 4805 (Exhibit EU-5) at 14-15, 19-20 n.112. As the United States has previously emphasized, all respondent entities, including the Government of Spain, recognized that the ripe olives market was segmented across channels of distribution. See US September 8 Response to Panel Questions, para. 32. This particular market condition, accordingly, was not in dispute by the parties to the underlying proceedings. In light of this, there was no need for the USITC to provide the more extended discussion of the "potential relevance" of the different channels of distribution for purposes of its injury analysis that the EU has in this dispute characterized as necessary.

³³ USITC Pub. 4805 (Exhibit EU-5) at 14-15.

segmentation approach, the European Union argues in paragraph 483 of its first written submission:

In itself and without further explanation, the existence of different sales shares of domestic and foreign producers for a homogeneous product for different customer group segments is [] *entirely irrelevant* for a volume effects analysis since it is in any event the *industry as a whole* that needs to be assessed under such circumstances. (emphasis original)

Please respond to the quoted argument of the European Union.

Response:

61. The EU’s characterization of the USITC analyses of volume and price effects contains several basic factual and legal mischaracterizations. First, while the USITC reasonably focused its injury analysis on the parts of the market where the domestic industry was concentrated, it did not reach its determination based on a “segmentation analysis.” Rather, as the United States previously explained, the USITC considered all channels of distribution and it based its volume, price, and impact analysis on data pertaining to the entire ripe olives market.³⁴

62. Second, the EU is wrong that the USITC’s close examination of the retail channel was “entirely irrelevant.” As the United States explained, positive evidence guided the Commission’s findings that the domestic industry sold most of its ripe olives in the retail channel and that retail sales were where competition between domestically processed and unfairly traded ripe olives from Spain was concentrated and intensified during the POI.³⁵ Thus, the USITC reasonably and objectively paid particular attention to trends in this channel in to support its findings pertaining to the ripe olives market as a whole.

63. Third, the EU seeks to have this Panel impose requirements nowhere specified by Articles 3.1 and 3.2 of the AD Agreement or Articles 15.1 and 15.2 of the SCM Agreement. As the United States has repeatedly emphasized in these proceedings, these provisions do *not* direct investigating authorities to assess “volume *effects*.” Rather, the plain text of these provisions requires only that an authority “consider” whether there has been a significant increase in unfairly traded imports. By contrast, the same provisions explicitly obligate investigating authorities to consider the “*effect*” of dumped or subsidized imports on prices. Notably, the EU has yet to address this point.

Question 26 (To the European Union) In response to the European Union's use of the term "volume effects" in context of the claim under Article 15.2 of the SCM Agreement/Article

³⁴ See, e.g., U.S. FWS, paras. 175-178, U.S. June 10 responses to Panel questions, para. 72, U.S. September 8 responses to Panel questions, para. 37.

³⁵ See U.S. FWS, para. 175, U.S. June 10 responses to Panel questions, paras. 59-60, and U.S. Opening Statement, para. 41.

3.2 of the Anti-Dumping Agreement, the United States argues the following in paragraph 179 of its first written submission:

Neither Article 15.2 of the ASCM nor Article 3.2 of the ADA require an investigating authority to assess the "effects" of subject import volume on the domestic industry. Rather, the plain text of these provisions require only that investigating authorities consider whether there has been a significant increase in subsidized or dumped imports, respectively.

Instead of using the term "volume effects", the United States uses the term "volume analysis" in its submissions (see, for example, United States' first written submission, paragraph 180). Please comment.

Question 27 (To the United States) In paragraph 118 of its 10 June responses, the European Union argues that an investigating authority cannot consider whether there has been a significant increase in subsidized imports and a significant price undercutting without *analysing* the market data and other relevant information, as failure to do so would result in failure to carry out an "examination" within the meaning of Article 15.1 of the SCM Agreement. The European Union submits that "[s]imply gathering market information and putting such information into a table or text without inquiring into and evaluating the relevant effects in view of the information gathered" does not constitute an "objective examination" within the meaning of Article 15.1 of the SCM Agreement. Please comment. With respect to the USITC's volume analysis, please also explain how the USITC "examined" and "analysed" the relevant data, apart from observing that the volume of subject imports and their share increased from 2015 to 2016, and decreased in 2017.

Response:

64. There are a number of flaws with the EU's argument. For one, the premise of the argument ignores the overall structure of Article 3 of the AD Agreement and Article 15 of the SCM Agreement. The EU's efforts to impose a full blown causation examination into each paragraph of those Articles cannot be reconciled with either the organization or text of these provisions and upends the "logical progression of inquiry" contemplated by Articles 3 and 15, whereby an authority's inquiries set forth in Articles 3.2, 3.4, 15.2, and 15.4 lead to its "ultimate injury and causation determination."³⁶

65. Articles 3.2 and 15.2 require an investigating authority to "consider" volume and price effects. As an initial step in the injury inquiry, the requirement to "consider" the significance of the volume of unfairly traded imports and the effects of unfairly traded imports on prices in the domestic market for like products in Articles 3.2 and 15.2 is distinct from other subsequent requirements in Articles 3 and 15. This includes those to "examine the impact of unfairly traded

³⁶ See *China – GOES (AB)*, paras. 128, 143, and 149.

imports on the domestic industry in Articles 3.4 and 15.4 and “demonstrate a causal connection between unfairly traded imports and injury to the domestic industry” in Articles 3.5 and 15.5.³⁷

66. The concept of an “objective examination” under Articles 3.1 and 15.1 concerns the investigative process itself. The EU’s assertion to the contrary, that it concerns the facts justifying the ultimate injury determination, amounts to an effort to impose legal requirements unsupported by the texts of the Agreements, and relies on an isolated portion of a prior dispute settlement report that the EU takes out of context. Specifically, the EU’s reference to the Appellate Body’s view of the meaning of the term “examination” in its *US – Hot Rolled Steel* report conspicuously omits any reference to the Appellate Body’s consideration of how this treaty term is modified by the qualifier “objective,” and that this requirement concerns how an authority undertakes the investigative process.

67. Read in its entirety and in context, the Appellate Body in *US – Hot Rolled Steel* stated that an “objective examination” must be conducted in good faith, must be based on data that provides an accurate and unbiased account of what is being examined, and must be conducted without favoring the interests of any particular party.³⁸ This statement fails to provide support for the EU’s view of what an “objective examination” entails; instead, it confirms that the USITC’s injury analysis clearly constituted an “objective examination” within the meaning of Articles 3.1 and 15.1.

68. The United States has previously explained that the USITC did in fact evaluate all of the relevant factors and effects. The USITC did not, as the EU contends, “[s]imply gather [. . .] market information and put [. . .] such information into a table or text without inquiring into and evaluating the relevant effects.”³⁹ Rather, as the United States has shown, the USITC based its analysis of subject import volume on all relevant record data concerning the entire ripe olives market. These included official U.S. import statistics and apparent U.S. consumption data based on the official U.S. import statistics and the domestic industry’s reported U.S. shipments and production for all ripe olive products. Based on these data, the USITC determined that subject import volume was significant in absolute terms and relative to consumption and production in

³⁷ U.S. FWS, para. 189.

³⁸ *US – Hot Rolled Steel (AB)*, para. 193.

³⁹ In the quoted language, the EU submits that showing that an investigating authority considered data presented in a table is insufficient to demonstrate compliance with the objective examination obligations set out in Articles 3.1 and 15.1. Yet, this position is at odds with the Appellate Body’s report in *EC – Tube Fittings* and with the position the EU took in that dispute. In those proceedings, the EU asserted, and the Appellate Body agreed, that the EU’s compliance with its obligations to evaluate the injury factors and indices listed in Article 3.4 of the ADA were demonstrated by the existence of a checklist, tables and graphs for the Article 3.4 factors. See *EC – Tube Fittings (AB)*, para. 119 n.125.

the United States.⁴⁰ The USITC made these findings after considering all the relevant record evidence concerning subject import volume and U.S. consumption and production.

69. Similarly, the USITC based its analysis of price effects on the overall record data on pricing, including price comparisons and confirmed lost sales across all channels of distribution. Based on its review of these data, the USITC properly determined that subject imports significantly undersold the domestic industry.⁴¹ In so doing, the USITC conducted the inquiries required by Article 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement, and the EU has failed to make a *prima facie* showing that the USITC's analyses of volume and of price effects were inconsistent with these provisions.

Question 28 (To the European Union) In paragraph 107 of its 8 September 2020 comments, the European Union argues that the USITC failed to consider a "significant increase" in imports, and, at most, considered "decrease" and "significant presence". Is it not possible for an investigating authority to consider whether there has been a "significant increase", find that there was no such an increase, and thereby discharge its obligation to undertake that consideration? Does the European Union suggest that, in circumstances where there is no significant increase, an investigating authority is precluded from finding injury and would necessarily be in violation of its obligations under Article 15 of the SCM Agreement/Article 3 of the Anti-Dumping Agreement? Please explain.

Question 29 (To both parties) In paragraph 122 of its 8 September 2020 comments, the European Union contends:

The EU's claim is that where an authority explicitly finds that there is no price suppression and no price depression, the authority will have to consider a volume effect in the context of price undercutting since the domestic industry cannot be injured with respect to price.

Please discuss whether the text of Article 15.2 of the SCM Agreement/Article 3.2 of the Anti-Dumping Agreement supports this view.

Response:

70. As the United States previously explained, the EU's premise suffers at the start from the same flawed effort to read into Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement an obligation to consider volume "effects."⁴² There is no such requirement.

⁴⁰ See U.S. June 10 responses to Panel questions 20 and 22, paras. 63 and 67.

⁴¹ See U.S. June 10 responses to Panel question 22, para. 68.

⁴² See U.S. FWS, para. 179, U.S. June 10 responses to Panel questions, para. 60 n.55; U.S. Opening Statement, paras. 45-46.

71. Moreover, the text of these provisions separates the consideration of volume from the inquiries into price effects. With respect to price effects, the use of the word “or” unequivocally sets out three distinct ways in which unfairly traded imports can have an “effect” on prices: through undercutting, “or” through depression, “or” through suppression.⁴³

72. The Agreements do not, as the EU appears to contend, set out a hierarchy where one type of significant price effect (in the EU’s view, significant undercutting) is less important than the other two types of possible price effects. The EU’s contention referenced in this question thus cannot be reconciled with what the Agreements expressly indicate: that significant price undercutting in and of itself may constitute a price effect.

73. Thus, the EU’s argument is not consistent with the text of the Agreements, and its citation to the Appellate body Report in *China – HP-SSST* does not further its position. The situation at issue in the cited passage concerned the significance of the word “significant” as it appears in the term “significant price undercutting” in Article 3.2 of the AD agreement.⁴⁴ This does not support the EU’s claim that significant price undercutting is less important than the other two types of possible price effects.

Question 30 (To both parties) In paragraphs 561-565 of its first written submission, the European Union claims that the USITC's impact analysis is flawed because the volume and price effect assessments underlying the impact analysis are flawed. Please discuss whether the text of Article 15 of the SCM Agreement/Article 3 of the Anti-Dumping Agreement supports the view that a violation of Article 15.2 of the SCM Agreement/Article 3.2 of the Anti-Dumping Agreement automatically leads to a violation of Article 15.4 of the SCM Agreement/Article 3.4 of the Anti-Dumping Agreement.

Response:

74. As the United States explained in its first written submission, the EU’s claim fundamentally misinterprets the relationship among the provisions of Article 3 of the AD Agreement and Article 15 of the SCM Agreement.⁴⁵ Articles 3.2 and 15.2 create independent obligations from those of Articles 3.4 and 15.4.⁴⁶ Articles 3.2 and 15.2 direct investigating authorities to consider changes in the volume of subject imports, as well as the relationship between subject imports and prices of the like domestic product. Articles 3.4 and 15.4 require an authority to examine “all relevant economic factors...having a bearing on the state of the industry”. The final clauses of Articles 3.4 and 15.4, as well as of Articles 3.2 and 15.2, make

⁴³ U.S. FWS, para. 199.

⁴⁴ *China – HP-SSST (Japan) (AB)*, para. 5.163.

⁴⁵ U.S. FWS, para. 216.

⁴⁶ See U.S. FWS, para. 216.

clear that no single factor necessarily determines whether subject imports have an adverse impact on the domestic industry.

75. Furthermore, Articles 3.2 and 15.2 focus on the authorities' consideration of the subject imports, whereas Articles 3.4 and 15.4 focus on factors reflecting the state of the industry during the period of investigation. Compliance with the obligations of Articles 3.2 and 15.2 is therefore distinct from compliance with the obligations of Articles 3.4 and 15.4.

76. Moreover, the EU's claim lacks predicate as the EU has in any event failed to show that the USITC's analyses of price effects and volume were inconsistent with the Agreements.

Question 31 (To the European Union) In paragraph 69 of its 10 June 2020 responses, the United States argues:

[T]he USITC's analysis of the impact of subject imports on the domestic industry was based on aggregated data compiled on various production, employment, and financial performance factors.⁶⁷

⁶⁷ USITC Pub. 4805 (Exhibit EU-5) at 22-26 and Tables III-4, III-8, III-10, III-13, VI-1, and VI-4. These included data on production capacity, production, capacity utilization, commercial shipments, export shipments, and inventories; the number of production-related workers (PRWs), hours worked, hours worked per PRW, wages paid, hourly wages, unit labor costs, and worker productivity; net sales, the cost of goods sold (COGS), gross profit, sales, general, and administrative (SG&A) expenses, operating income, net income, research and development expenses, capital expenditures, unit COGS, unit SG&A expenses, unit operating income, unit net income, the COGS/sales ratio, the operating income/sales ratio, and the net income/sales ratio.

In light of the above argument of the United States, does the European Union agree with the United States that the USITC conducted its impact analysis under Article 15.4 of the SCM Agreement/Article 3.4 of the Anti-Dumping Agreement based on data from the domestic industry as a whole?

Question 32 (To the United States) Referring to the requirement under Article 3.1 of the Anti-Dumping Agreement that an investigating authority conduct an "objective examination", the Appellate Body in *US – Hot Rolled Steel* found the following in paragraph 204 of its report:

In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole.

Does the United States agree that in the case under consideration the USITC should have examined, in principle, all the parts of the industry other than the retail segment in the same manner as it had examined the retail segment? Please point to the specific portions of the injury determination that indicate the examination of the institutional and distribution

segments, and the industry as a whole, in that same manner for each step of the injury analysis.

Response:

77. As the United States previously explained, including above in its response to Question 20, the USITC did not carry out a segmented analysis of the U.S. ripe olives market in its injury analyses.⁴⁷ Accordingly, the question of how the USITC should have examined the various segments of the ripe olive industry does not arise in this dispute.⁴⁸ Rather, the USITC examined data from the competitive retail channel as one aspect of its analysis concerning the volume and price effects of the dumped and subsidized imports pertaining to the overall market.

78. Moreover, the Appellate Body, in paragraph 204 of its *US – Hot-Rolled Steel* report, evaluated the relationship between Articles 3.1 and 3.4 of the AD Agreement. The Appellate Body’s finding that an “examination” was required for other parts of the industry flowed from the explicit requirement, in Article 3.4 (and Article 15.4) to “examin[e] the impact” of unfairly traded imports, and not from the more general obligation to conduct an “objective examination” in Article 3.1 (and Article 15.1).⁴⁹ As the United States previously explained in its response to Question 27, the USITC’s consideration of subject import volume and price effects under Articles 3.2 and 15.2 of the AD Agreement and SCM Agreement, like its evaluation of the relevant injury factors under Articles 3.4 and 15.4, meets the criteria of an “examination” within the meaning of these more detailed provisions of the Agreements, and there is no basis in the text of the Agreements to support the EU’s contention that Articles 3.1 and 15.1 impose a substantive requirement to conduct an “examination... in the same manner for each step of the injury analysis.”

Question 33 (To the European Union) On page 141 of its first written submission, the European Union claims that "The USITC's analysis of volume effects is flawed because the USITC arbitrarily divided the domestic industry into meaningless 'segments' in order to artificially create a volume effect". On page 165 of its first written submission, the European Union claims that "The USITC's analysis of price effects is flawed because the USITC arbitrarily divided the domestic industry into meaningless 'segments' in order to artificially create a price effect".

Please confirm whether the substantive basis for the European Union's view that the USITC's segmentation was "meaningless" is identical under both claims quoted above.

⁴⁷ See also U.S. FWS, paras. 175-178, U.S. June 10 responses to Panel questions, para. 72; U.S. September 8 responses to Panel questions, para. 37.

⁴⁸ We have made the same representation in our responses to the Panel’s prior questions concerning whether paragraph 204 of the Appellate Body report in *US – Hot – Rolled Steel* allows an authority to waive its obligations to objectively examine the industry as a whole when undertaking an examination of one part of the industry. See U.S. June 10 responses to Panel questions, para. 71; U.S. September 8 responses to Panel questions, para. 37.

⁴⁹ *US – Hot-Rolled Steel (AB)*, para. 194.

Question 34 *(To the European Union)* Could the European Union's claims under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement (as presented in paragraphs 493, 512, 518, 526, 539, 551, and 557 of its first written submission) be subsumed under the European Union's claim presented on page 174 of its first written submission that "The USITC's impact analysis is flawed because the volume and price effect assessments underlying the impact analysis are flawed"?

Question 35 *(To the European Union)* Could the European Union's claims under Article 15.5 of the SCM Agreement and Article 3.5 of the Anti-Dumping Agreement (as presented in paragraphs 493, 512, 518, 526, 539, 551, 557, 565, 573, 582, 589, 593, and 597 of its first written submission) be subsumed under the claim presented in paragraph 610 of the European Union's first written submission?

Question 36 *(To the European Union)* Are the claims presented in paragraph 581 of the European Union's first written submission consequential to the claims presented in paragraph 511 of the European Union's first written submission?

Question 37 *(To the European Union)* Are the claims presented in paragraph 588 of the European Union's first written submission consequential to the claims presented in paragraph 550 of the European Union's first written submission?

Question 38 *(To the United States)* In paragraph 60 of its 10 June 2020 responses, referring to imports of ripe olives from Spain, the United States asserts that "[t]he USITC found that the increase of nearly 250 percent in the volume of low-priced ripe olives supplied to the retail channel of the market by one of the largest sources of supply served to reduce prices and capture market share from U.S. producers." Please provide record evidence that supports the assertion that the Spanish imports into the retail channel increased by 250 percent.

Response:

79. In its analyses of pertinent demand conditions and subject import volume, the USITC found that, as a share of total reported shipments to retailers, U.S. importers' U.S. commercial shipments of ripe olives from Spain increased from 7.3 percent in 2015 to 17.0 percent in 2017, which amounts to an increase of 233 percent during the POI.⁵⁰

Question 39 *(To the United States)* In paragraph 61 of its 10 June 2020 responses, the United States asserts that "the USITC's examination of trends in the retail channel was guided by positive evidence that competition between domestically produced and subject imported ripe

⁵⁰ USITC Pub. 4805 (Exhibit EU-5) at 15 n.68, 18 n.105. The United States notes that, while the first sentence of Question 38 faithfully reproduces the United States' statement that the volume of subject imports supplied to the retail channel increased by "nearly 250 percent" during the POI, this statement is not accurately paraphrased in the last sentence of the question.

olives was concentrated in and intensified in this channel during the POI". Please provide record evidence that supports this assertion.

Response:

80. As the United States previously explained,⁵¹ the USITC solicited data from suppliers of domestically processed and imported ripe olives on their commercial shipments across the three channels of distribution in the U.S. market to enable it to conduct its injury analyses.⁵² These data indicated that the domestic industry sold predominantly to retailers and its participation in the institutional/food channel was extremely limited. And, while the USITC found that most of the unfairly traded imports during the POI were sold to distributors, an appreciable and increasing share were sold to retailers.⁵³ Nonsubject imports, by contrast, were increasingly sold to the institutional/food channel. Further, ripe olives from Morocco, the largest source of nonsubject imports, were not present at all in the retail channel.⁵⁴

81. Consequently, competition between the domestic industry and unfairly traded imports from Spain intensified in the retail channel during the POI.

Question 40 (To the United States) The Panel requests the United States to submit the unredacted version of the following data contained in USITC Publication 4805 (Exhibit EU-5):

- a. **Table II-1 "Ripe olives: U.S. producers' and importers' U.S. commercial shipments, by sources and channels of distribution, 2015-17" at p. II-2;**
- b. **Table III-4 "Ripe olives: U.S. producers' capacity, production, and capacity utilization, 2015-17" at p. III-2;**
- c. **Table III-8 "Ripe olives: U.S. producers' U.S. shipments, export shipments, and total shipments, 2015-17" at p. III-4;**
- d. **Table IV-2 "Ripe olives: U.S. imports, by source, 2015-17" at p. IV-4;**
- e. **Table IV-5 "Ripe olives: Apparent U.S. consumption, 2015-17" at p. IV-11;**
- f. **Table IV-6 "Ripe olives: U.S. producers' and U.S. importers' commercial U.S. shipments to distributors, 2015-17" at p. IV-13;**

⁵¹ U.S. FWS paras. 175-176. See also U.S. June 10 responses to Panel questions, para. 59.

⁵² These data were compiled in USITC Pub. 4805 (Exhibit EU-5) at Tables II-1, IV-5 – IV-8, and Figures IV-2 – IV-5.

⁵³ USITC Pub. 4805 (Exhibit EU-5) at 14-15.

⁵⁴ USITC Pub. 4805 (Exhibit EU-5) at 25-26.

- g. Table IV-7 "Ripe olives: U.S. producers' and U.S. importers commercial U.S. shipments to retailers, 2015-17" at p. IV-14;**
- h. Table IV-8 "Ripe olives: U.S. producers' and U.S. importers commercial U.S. shipments to institutional/food processors, 2015-17" at p. IV-15; and**
- i. Table C-1 "Ripe olives: Summary data concerning the U.S. market, 2015-17" at p. C-3.**

Response:

82. Certain data in the tables requested by the Panel include business proprietary information (“BPI”) submitted by questionnaire respondents in the underlying *Ripe Olives* investigations. Consistent with the U.S. statute and the USITC regulations, questionnaire respondents agreed only to allow limited disclosure to approved counsel under the USITC’s *Ripe Olives* Administrative Protective Order (“APO”) for purposes of the investigations.⁵⁵ The USITC’s APO guidelines state the following on the publication of aggregated BPI:

[t]he Commission has established criteria as to when it will treat as proprietary aggregate business information - that is, information that pertains collectively to more than one company. Aggregate business information pertaining to fewer than three companies normally is always treated as proprietary. Information pertaining to three or more companies normally is treated as publishable, unless two companies account for more than 90 percent of the data, or unless one company accounts for more than 75 percent of the data.⁵⁶

83. The domestic industry in the underlying investigations consisted of two ripe olives processors accounting for all known domestic production of the like product during 2017, the last full year of the POI.⁵⁷ Additionally, Moroccan import data were based on U.S. importers’ questionnaire data. The largest of these importers accounted for more than 75 percent of the volume of imports from Morocco in 2017.⁵⁸ Accordingly, the USITC redacted aggregated BPI provided by the domestic processors and U.S. importers of ripe olives from Morocco in its published views and report.

⁵⁵ See 19 U.S.C. § 1677f(b)-(c) (Exhibit USA-38).

⁵⁶ See *An Introduction to Administrative Protective Order Practice in Import Injury Investigations*, USITC Pub. 3755 (March 2005) (Exhibit USA-37) at 14. The United States emphasizes that registered private counsel for interested parties—including counsel who were present in this dispute at the Panel’s first meeting with the parties—had complete access during the investigations to all of the BPI in the record.

⁵⁷ USITC Pub. 4805 (Exhibit EU-5) at 3.

⁵⁸ USITC Pub. 4805 (Exhibit EU-5) at I-4 n.9.

84. The United States is attempting to seek authorization from the parties that submitted the information to disclose it to the Panel to the extent feasible. Specifically, the United States has requested authorization from the two U.S. processors (one of which was purchased by a Spanish respondent entity after the conclusion of the investigation) to provide the unredacted data. The United States may need to request authorization from additional parties as it continues to go through the data included in the requested tables. The United States will respond to the Panel's request as soon as this work is complete.

IV. Calculation of Guadalquivir's Subsidy Rate

Question 41 (To the European Union) Is it necessary to bring a claim under Article 14 of the SCM Agreement to properly challenge the calculation of the "amount" of the subsidy determination?

Question 42 (To both parties) In paragraph 44 of its 10 June 2020 responses, Canada submits that the verification of questionnaire responses in U.S. countervailing duty investigations occurs after the record is closed to new evidence. Canada considers that any disclosure of "essential facts" in a verification report produced after the record is closed would not provide the relevant respondents an opportunity to defend their interests. Do you agree?

Response:

85. Canada's comments on Article 12.8 do not relate to a claim at issue in this dispute, and in that respect raise issues that are not before the Panel in this dispute. Without prejudice to this, we note that in any event the text of Article 12.8 refutes Canada's position. Article 12.8 provides that disclosure "should take place in sufficient time for the parties to defend their interests." It does not prescribe a particular manner for disclosure by an authority or form of participation for a party.

86. Therefore, Canada's arguments under Article 12.8 are both irrelevant to the EU's claims, and legally incorrect.

Question 43 (To both parties) Is the fact that information was asked for in an initial questionnaire sufficient to establish the information is an essential fact under consideration for purposes of Article 12.8 of the SCM Agreement?

Response:

87. Yes, under Article 12.8, such a request may suffice. As the United States explained in its first written submission,⁵⁹ the facts "under consideration" include competing sources of information that may serve as the basis for the final determination, and not necessarily a single

⁵⁹ U.S. FWS, paras. 322-329.

set of facts on which the investigation authority will rely in the final determination.⁶⁰ And as explained in response to the Panel’s previous question, Article 12.8 does not prescribe a particular method of disclosure. What it requires is that the disclosure take place in sufficient time for the parties to defend their interests.

88. Here, the USDOC’s August 4, 2017, questionnaire directed the mandatory respondents to provide “information on your company’s sources of raw olives that were processed into ripe olives” Furthermore, it informed that such information would be under consideration in determining whether to apply definitive measures. In such a case, the investigating undoubtedly satisfies Article 12.8. As noted in the U.S. first written submission, the USDOC also disclosed the essential facts on at least two other occasions – namely, in the verification agenda provided to each mandatory respondent and the verification report concerning those verifications.⁶¹ Therefore, the Panel need not address the issue of whether disclosure in the initial questionnaire is itself sufficient.

Question 44 (To both parties) The Panel notes the parties' 8 September 2020 comments in response to its Question No. 4(a) in respect of the language "resubmit" and "correct" in the USDOC's letter of 27 September 2017. What are the parties' views on the extent to which the 27 September 2017 request could be viewed as ambiguous, particularly if a party had already provided information on all raw olives and there was no explanation of how the 27 September 2017 request was different to the 4 August 2017 request?

Response:

89. As an initial matter, the United States does not agree that the September 27 request was ambiguous. As we explained in our September 8 responses,⁶² the first written submission,⁶³ and the opening statement,⁶⁴ the USDOC’s August 4 letter sought information on purchases of raw olives that were used to produce ripe olives while the September 27 letter sought information on purchases of all raw olives regardless of use.

90. In addition, as we have also explained, it is not the case that Guadalquivir indicated, or that the USDOC otherwise should have detected, that Guadalquivir provided different information than what the USDOC had asked for and what the other two respondents in fact provided.

⁶⁰ See *China – GOES (AB)*, para. 240.

⁶¹ U.S. FWS, paras. 322-332.

⁶² U.S. September 8 responses to Panel questions, paras. 38-42.

⁶³ U.S. FWS, paras. 282-285.

⁶⁴ U.S. Opening Statement at the Panel’s Videoconference with the Parties, paras. 73-74.

91. If Guadalquivir found the request ambiguous, it could have and should have asked the USDOC for clarification. As indicated in the USDODC's questionnaires, including the first page of its August 4 letter, Guadalquivir was encouraged to do so: "If you have questions during the course of this investigation, we urge you to consult with the officials in charge named on the cover page."⁶⁵ Because Guadalquivir did not ask for clarification, the USDOC was not in a position to know that Guadalquivir was confused and understood the questionnaires to be asking for something different than what was intended.

Question 45 (To the United States) In paragraphs 135-136 of its 10 June 2020 responses, the European Union refers to Article 12.1 of the SCM Agreement and states that "the 'onus' is on the investigating authority to (i) define the information which it requires, to (ii) give notice to the interested members and all interested parties of this information and to (iii) provide them with ample opportunity to present in writing all evidence which they consider relevant." Was the onus on the USDOC or on Guadalquivir to ensure that USDOC had the "correct" information on the record? Please also include any comments on the European Union's response.

Response:

92. We agree that, consistent with Article 12.1, the investigating authority must give notice of the information it requires and provide ample opportunity to present in writing all evidence it considers relevant. However, nothing in the GATT 1994 or SCM Agreement indicates that the investigating authority must investigate further to ensure that the information it receives in response to a request is "correct", nor does it appear that the EU is advocating such a position.

93. In any event, were it the case that an investigating authority had such an affirmative obligation, a respondent could evade, or successfully challenge, the findings of an investigating authority merely by claiming misunderstanding. Instead, in reviewing the investigating authority's actions in this investigation, the Panel must determine, as with other findings, whether the USDOC's conducting of the investigation reflects that of an unbiased and objective investigating authority.

94. As explained at length in the U.S. first written submission, the USDOC conveyed such a request and satisfied the Article 12.1 notice obligation.⁶⁶ Specifically, the USDOC notified the three mandatory respondents, including Guadalquivir, that they were required to provide purchase information for raw olives processed into ripe olives in the original August 4, 2017, questionnaire. Once the parties were notified by the August 4, 2017, questionnaire that such information was required, it was incumbent on those in possession of the information (i.e., the three mandatory respondents, including Guadalquivir) to submit complete and accurate responses to the request. Not having received questions from Guadalquivir regarding its request, an unbiased and objective investigating authority could have concluded, as the USDOC did, that

⁶⁵ Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58), p. 1.

⁶⁶ U.S. FWS, paras. 270-285.

the information submitted by Guadalquivir in response to the August 4, 2017, questionnaire in fact represented the company's purchases of raw olives that were processed into ripe olives.

Question 46 (To both parties) In paragraph 137 of its 10 June 2020 responses, the European Union refers to Article 12.1 of the SCM Agreement and states that it was "incumbent upon the investigating authority to give notice to Guadalquivir of [the] requested information". In paragraph 42 of its 8 September 2020 comments, the United States submits that "to the extent a respondent company had any questions regarding the information it was being asked to submit, it could have consulted with USDOC officials to obtain clarification or additional guidance." In footnote 69 thereof, the United States also states that the USDOC's instructions encouraged respondent companies to contact the USDOC should any question arise during the investigation. How would the parties draw the line between these two issues: on one hand, whether an investigating authority has "given notice of the information which the authorities require"; and on the other hand, whether notice had been given but a lack of clarity requires a respondent company to seek clarification?

Response:

95. When an investigating authority seeks information from a respondent company, as the USDOC did in its August 4, 2017 questionnaire, the notice of the information required is given through the information request itself. There may be factual circumstances where the information request is so unclear that it could not have provided the parties with the notice required under Article 12.1. However, Article 12.1 does not provide a standard to determine whether notice is defective, so it is necessarily a case-specific inquiry.

96. To be clear, the mere act of seeking clarification from an investigating authority does not necessarily mean that its request for information failed to give notice to the parties under Article 12.1. When a respondent company seeks clarification regarding the information requested by an investigating authority, it would be necessary to evaluate the specific factual circumstances (e.g., the information request and the nature of the clarification sought) to determine whether the original information request satisfied Article 12.1.

97. No such evaluation is needed here. As the United States has explained, the August 4 questionnaire was clear. Specifically, through the August 4 questionnaire, the USDOC satisfied the notice requirement under Article 12.1 by notifying the three mandatory respondents, including Guadalquivir, that they must provide purchase information for raw olives processed into ripe olives.

98. In any event, Guadalquivir did not seek clarification or additional guidance from the USDOC even though (i) Guadalquivir and the other two mandatory respondents were represented by the same law firm and (ii) that law firm requested clarification on behalf of the other two mandatory respondents.⁶⁷ Given that other respondents took the USDOC up on its

⁶⁷ See Ripe Olives from Spain Countervailing Duty Investigation: Clarification of the Department's September 26, 2017 Letter (Exhibit EU-60), pp. 1-2 (responding to the law firm's questions regarding (i) the reporting obligations

invitation for any additional clarification, it is not credible for the EU to claim that the USDOC misled or failed to provide notice to Guadalquivir. Furthermore, it is notable that the other two respondents properly understood the USDOC's August 4, 2017, request regarding purchases of raw olives that were processed into ripe olives.

Question 47 (To the European Union) Assume *arguendo* that the questionnaire issued by the investigating authority made clear its requirement for respondent companies to report purchase information of raw olives that were used to produce ripe olives, and that this was misinterpreted by one respondent company such that it reported its purchase information of all raw olives no matter what they were used to produce. Can latter conduct of the investigating authority that appears to confirm that the respondent company did not misinterpret the requirement in the questionnaire excuse the original misinterpretation, in the sense that the investigating authority is then at fault for not giving "notice of the information which the authorities require"?

Question 48 (To both parties) Should the Panel read into the words "otherwise does not provide" under Article 12.7 of the SCM Agreement a requirement for an interested party to act "to the best of its ability" in like manner to the requirement under paragraph 5 of Annex II to the Anti-Dumping Agreement? Regardless of your answer to that question, do the parties believe that Guadalquivir acted to the best of its ability in not providing data solely with respect to raw olives for ripe olive production as appears, on one view, to have been requested in the USDOC's 4 August 2017 questionnaire? What level of understanding should a respondent company demonstrate with respect to its participation in a countervailing duty investigation, and does that level vary depending on factors and circumstances relating to the respondent company's participation in the investigation?

Response:

99. Annex II to the Anti-Dumping Agreement relates to the circumstances in which an investigating authority may apply facts available in the absence of receiving information necessary for the completion of its investigation. Here, however, the USDOC used the information submitted by Guadalquivir, not facts available, to calculate Guadalquivir's subsidy rate. For that reason, the Panel need not reach the issue of whether Guadalquivir acted to the best of its ability in responding to USDOC's questionnaire for purposes of applying facts available.

100. With respect to Guadalquivir's participation in the investigation, as described in response to Questions 45 and 46, above, the USDOC provided notice to Guadalquivir regarding the information requested, and Guadalquivir responded without seeking clarification or requesting additional information from the USDOC (in contrast to the other two respondents, represented by the same law firm as Guadalquivir). In the absence of such communications, nothing in Article

of the suppliers of Agro Sevilla and Angel Camacho and (ii) the raw olive purchase information supplied by Agro Sevilla).

12 requires an investigating authority to investigate on its own initiative a respondent's level of understanding of the information requested.

Question 49 (To the United States) In paragraph 151 of its 8 September 2020 comments, the European Union asserts that the "USDOC knew that... all raw olive purchases were included in the ERP (and it is that figure which was communicated to USDOC in reply to the August 4, 2017 questionnaire)". Did the USDOC know this? Does the United States agree with this interpretation of the statement in the 22 March 2018 verification report?

Response:

101. As the United States has explained in its submissions, the record reflects no such thing. The EU's attempt to ascribe a state of mind to the USDOC, one that is the opposite of what it in fact stated in its communications and determination, is baseless.

102. As to the March 22, 2018, verification report, the USDOC never indicated that it knew that Guadalquivir had provided all raw olive purchases. In fact, at verification, the USDOC discovered additional purchases of olives, and Guadalquivir explained that it did not report those purchases because the USDOC's August 4, 2017 letter requested purchases of raw olives that were processed into ripe olives and that the additional unreported purchases of olives were ultimately processed into green olives, which are not subject merchandise.

103. Thus, as the USDOC explained in its amended final determination, it "understood that the originally reported volume of olives purchased represented purchases of raw to ripe [(i.e., purchases of raw olives used to produce ripe olives)] and the additional volume of olive purchases not reported represented olives purchased for the production of non-subject merchandise".⁶⁸

Question 50 (To both parties) On page 8 of its verification agenda (Exhibit USA-21), the USDOC indicates that Guadalquivir should "be prepared to tie the reported sales total to the company's general ledger, for ... [t]otal quantities of raw olives used for specific types of finished products (i.e. ripe olives, other table olives, olive oil, other)". Did the USDOC pursue this information and is it on the record of the investigation? If so, please provide this information.

Response:

104. Yes, the verification agenda and verification report indicated that the USDOC pursued this information. In its verification agenda, the USDOC provided notice of the "agenda [that the USDOC verifiers] intend to follow at the verification of questionnaire responses" of

⁶⁸ Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), p. 5.

Guadalquivir.⁶⁹ The USDOC verifiers followed that agenda during the on-site verification of Guadalquivir. Subsequently, the USDOC issued its verification report, which “provid[ed] parties with a factual report of the methods, procedures, and results collected during the {USDOC}’s verification.”⁷⁰

105. Section IV of the verification report details USDOC’s verification of Guadalquivir’s sales and export information.⁷¹ Section IV.B explained that the USDOC verifiers “[r]eviewed for the POI as well as for the other years of the average-useful life period, the total sales and total export sales reported in the questionnaire response, and tied those sales values to the overall sales values in the company’s general ledger and financial statements.”⁷² Further, as stated in section IV.D of the report, USDOC verifiers “[r]eviewed the total purchases of olives by supplier, both cross-owned and unaffiliated, as well as the purchase terms of raw olives.” USDOC officials “observed no inconsistencies with the information reported in the questionnaire responses as corrected by [Guadalquivir] at the start of verification,”⁷³ though Guadalquivir reminded the USDOC officials that its responses contained only information on “purchases of raw olives not purchases of any ‘semi-processed’ or ‘processed’ olives that are to become or already are green olives.”⁷⁴ The report also explains that USDOC officials reviewed Guadalquivir’s reported sales of olive-derived products.⁷⁵

Question 51 (To both parties) In paragraph 658 of its first written submission, the European Union submits that the USDOC modified its calculation methodology in the final determination. Does the record indicate when the USDOC decided to modify its margin calculation methodology for the final determination?

Response:

106. Yes, the USDOC decided to modify its subsidy rate calculation methodology in the final determination. The final determination set forth that decision and why it was made.⁷⁶ As

⁶⁹ Exhibit USA-21, p. 2.

⁷⁰ See Exhibit USA-22, p. 1.

⁷¹ See Exhibit USA-22, pp. 5-8.

⁷² See Exhibit USA-22, p. 5.

⁷³ See Exhibit USA-22, p. 7.

⁷⁴ See Exhibit USA-22, p. 7.

⁷⁵ See Exhibit USA-22, p. 7.

⁷⁶ Final Issues and Decision Memorandum (Exhibit EU-2), pp. 5 and 43-44.

explained in the U.S. first written submission, the USDOC applied the same calculation methodology to Guadalquivir as it did the other two mandatory respondents.⁷⁷

⁷⁷ U.S. FWS, paras. 287-305.