

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

(DS577)

**FIRST WRITTEN SUBMISSION
OF THE UNITED STATES OF AMERICA**

March 17, 2020

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<i>Australia – Apples (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010
<i>China – Broiler Products (Article 21.5 – US) (Panel)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS427/RE, adopted on 28 February 2018
<i>China – GOES (AB)</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012
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<i>China – HP-SSST (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/DS454/AB/R, WT/DS460/AB/R, adopted 28 October 2015
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<i>EC – Large Civil Aircraft (AB)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>EC – Tube or Pipe 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
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<i>Mexico – Anti-Dumping Measures on Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>Mexico – Olive Oil (Panel)</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 21 October 2008
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<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> , WT/DS379/AB/R, adopted 25 March 2011

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<i>US – Anti-Dumping and Countervailing Duties (China) (Panel)</i>	Panel Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/R, adopted 25 March 2011
<i>US – Canadian Pork (GATT Panel)</i>	GATT Panel Report, <i>United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada</i> , DS7/R, adopted 11 July 1991
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<i>US – Coated Paper (Indonesia)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia</i> , WT/DS491/R, adopted 22 January 2018
<i>US – Cotton Yarn (AB)</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001
<i>US – Countervailing and Anti-Dumping Measures (China) (AB)</i>	Appellate Body Reports, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014
<i>US – Countervailing Duty Investigation on DRAMS (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Countervailing Duty Investigation on DRAMS (Panel)</i>	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/R, adopted 20 July 2005
<i>US – Countervailing Measures (China) (Panel)</i>	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/R and Add.1 and Corr.1, adopted 16 January 2015
<i>US – Countervailing Measures on Certain EC Products (Panel)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report WT/DS212/AB/R
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005

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<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Hot Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
<i>US – Large Civil Aircraft (Second Complaint) (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint</i> , WT/DS353/AB/R, adopted 23 March 2012
<i>US – Lead and Bismuth II (AB)</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000
<i>US – Pipe and Tube Products (Turkey) (Panel)</i>	Panel Report, <i>United States – Countervailing Measures on Certain Pipe and Tube Products from Turkey</i> , WT/DS523/R, circulated 18 December 2018
<i>US – Softwood Lumber III (Panel)</i>	Panel Report, <i>United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada</i> , WT/DS236/R, adopted 1 November 2002
<i>US – Softwood Lumber IV (AB)</i>	Appellate Body Report, <i>United States Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004
<i>US – Softwood Lumber VI (21.5) (AB)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/AB/RW and Corr.1, adopted 9 May 2006
<i>US – Supercalendered Paper (Panel)</i>	Panel Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/R and Add.1, adopted 5 March 2020
<i>US – Tyres (China) (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011
<i>US – Upland Cotton (Panel)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, and Add.1-4, adopted 21 March 2005
<i>US – Washing Machines (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R and Add.1, adopted 26 September 2016

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<i>US – Wool Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

TABLE OF ABBREVIATIONS

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

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USA-1	Section 771B of the Tariff Act of 1930
USA-2	ASEMESA’s Comments on the Commission's Draft Questionnaires, Ripe Olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (December 1, 2017)
USA-3	U.S. Department of Commerce Briefing Schedule (April 16, 2018)
USA-4	The Government of Spain’s Pre-Hearing Brief for the Final Phase in the Investigation on Ripe Olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (May 17, 2018)
USA-5	The Government of Spain’s Report Carried Out by AGRIBUSINESS INTELLIGENCE-INFORMA for the Final Phase of the Investigation on Ripe Olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (May 17, 2018)
USA-6	U.S. Department of Commerce Letter to Agro Sevilla Aceitunas S.Coop.And. Regarding Questionnaire on Sources of Raw and Ripe Olives (August 4, 2017)
USA-7	U.S. Department of Commerce Letter to Angel Camacho Alimentacion, S.L. Regarding Questionnaire on Sources of Raw and Ripe Olives (August 4, 2017)
USA-8	Petition for the Imposition of Antidumping and Countervailing Duties, Volume III (June 21, 2017)
USA-9	133 Congressional Record S8787-01 (June 26, 1987)
USA-10	Ripe Olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (Final): Petitioner’s Posthearing Brief (June 1, 2018)
USA-11	Ripe Olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (Final): Petitioner’s Prehearing Brief (May 17, 2018)
USA-12	U.S. Department of Commerce Letter to Agro Sevilla Aceitunas S.Coop.And. Regarding Questionnaire to Affiliated Suppliers (September 7, 2017)
USA-13	U.S. Department of Commerce Letter to Angel Camacho Alimentacion, S.L. Regarding Questionnaire to Unaffiliated Suppliers (September 7, 2017)
USA-14	U.S. Department of Commerce Letter to Aceitunas Guadalquivir, S.L.U. Regarding Questionnaire to Unaffiliated Suppliers (September 7, 2017)
USA-15	U.S. Department of Commerce Countervailing Duty Investigation Respondent Selection Memorandum (July 28, 2017)

Exhibit No.	Description
USA-16	U.S. International Trade Commission, Blank U.S. Processors' Questionnaire in Ripe Olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (Final)
USA-17	U.S. International Trade Commission, Transcript of Hearing in Ripe Olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (Final) (May 24, 2018)
USA-18	U.S. Department of Commerce Letter to Agro Sevilla Aceitunas S.Coop.And Regarding Verification of Questionnaire Responses (February 2, 2018)
USA-19	U.S. Department of Commerce Letter to Angel Camacho Alimentacion S.L. Regarding Verification of Questionnaire Responses (February 2, 2018)
USA-20	Case Brief of Petitioner in Countervailing Duty Investigation of Ripe Olives from Spain (April 23, 2018)
USA-21	U.S. Department of Commerce Letter to Aceitunas Guadalquivir, S.L.U. Regarding Verification of Questionnaire Responses (February 9, 2018)
USA-22	U.S. Department of Commerce Memorandum Regarding Verification of the Questionnaire Responses of Aceitunas Guadalquivir, S.L.U. (March 22, 2018)
USA-23	U.S. Department of Commerce Public Hearing Regarding Countervailing Duty Investigation on Ripe Olives from Spain (May 16, 2018)
USA-24	Rebuttal Brief of ASEMESA, Agro Sevilla Aceitunas S.Coop.And., Angel Camacho Alimentacion, S.L., and Aceitunas Guadalquivir S.L.U. (May 8, 2018)
USA-25	Definition of “appropriate” from The New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 103
USA-26	Definition of “case” from The New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 345
USA-27	Definition of “consideration” from The New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, pp. 485-86
USA-28	Definition of “amount” from The New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, pp. 68-69

I. INTRODUCTION

1. Applying U.S. laws and regulations consistent with the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement” or “ASCM”) and the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), the U.S. Department of Commerce (“USDOC”) determined that (i) imports of ripe olives from Spain were sold at less-than-fair-value; and (ii) the European Union (“EU”) and Government of Spain provided subsidies that benefited imports of ripe olives from Spain. In connection with the USDOC’s antidumping and countervailing duty determinations, the U.S. International Trade Commission (“USITC” or “Commission”) determined that imports of subsidized ripe olives and ripe olives sold at less-than-fair-value caused material injury to the domestic U.S. industry.

2. In this dispute, the EU challenges certain USDOC and USITC determinations in the antidumping and countervailing duty investigations of ripe olives from Spain. The EU’s claims lack any merit. The EU’s claims rest on flawed interpretations of the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994. The EU calls on the Panel to interpret the ADA, ASCM, and the GATT 1994 in a manner that does not accord with customary rules of interpretation of public international law, contrary to the requirements of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).¹ When subjected to scrutiny, none of the EU’s proposed interpretations of these agreements are supported by the ordinary meaning of the text of the agreements, in context, and in light of the object and purpose of the agreements.

3. In the context of a WTO challenge to a trade remedies determination, a WTO panel must not conduct a *de novo* evidentiary review, but instead should “bear in mind its role as *reviewer* of agency action” and not as “*initial trier of fact*.”² The role of a panel in a dispute involving a Member’s application of an antidumping or countervailing duty measure is to assess “whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner.”³ Put differently, the Panel’s task in this dispute is to determine whether a reasonable, unbiased investigating authority, looking at the same evidentiary record as the USDOC, could have – not would have – reached the same conclusions that the USDOC reached.

4. Reviewed in this light, the USDOC and USITC determinations in the antidumping and countervailing duty investigations of ripe olives from Spain accord with the requirements of the Anti-Dumping Agreement, SCM Agreement, and the GATT 1994, properly interpreted pursuant to customary rules of interpretation. The USDOC and USITC provided a reasoned and adequate explanation for their determinations, those determinations were based on ample evidence, and

¹ See DSU, Art. 3.2.

² *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis original).

³ *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.82. See also *ibid.*, paras. 7.78-7.83; *US – Supercalendered Paper (Panel)*, paras. 7.40, 7.150, 7.202; *US – Coated Paper (Indonesia) (Panel)*, paras. 7.61, 7.83; *US – Countervailing Measures (China) (Panel)*, para. 7.382; *China – GOES (Panel)*, paras. 7.51-7.52; *EC – Countervailing Measures on DRAM Chips (Panel)*, paras. 7.335, 7.373.

the USDOC and USITC’s conclusions in the investigations were ones that any unbiased and objective investigating authority could have reached.

A. Structure of the U.S. Submission

5. The United States has structured this submission as follows.
6. **Section I.B** describes the rules of interpretation, standard of review, and burden of proof applicable in WTO dispute settlement proceedings.
7. **Section II** addresses claims in the EU’s first written submission that were not identified in the EU’s consultations request or panel request and thus are outside the Panel’s terms of reference.
8. **Section III** addresses the EU’s claims that the USDOC’s *de jure* specificity determination with respect to subsidies conferred to olive growers was inconsistent with Articles 1.2, 2.1, 2.1(a), 2.1(b), and 2.4 of the SCM Agreement.
9. **Section IV** addresses the EU’s claims that the SCM Agreement and the GATT 1994 contain the obligation to conduct a pass-through analysis, as well as a particular methodology for how to conduct such an analysis. This section also addresses the EU’s claims challenging Section 771B of the Tariff Act of 1930.⁴
10. **Section V** addresses the EU’s claims that the USITC’s injury analysis was inconsistent with Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.
11. **Section VI** addresses the EU’s claims that, in obtaining raw olive supply information from one of the mandatory respondents and in using that information in calculating the final subsidy rate, the USDOC breached Article VI:3 of the GATT 1994 and Articles 10, 12.1, 12.8, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement.

B. Rules of Interpretation, Standard of Review, and Burden of Proof

12. Article 11 of the DSU describes the “function of panels” and the standard of review to be applied by panels. Article 11 of the DSU provides that:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the

⁴ Section 771B of the Tariff Act of 1930 (Exhibit USA-1).

recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

13. In making that objective assessment of the applicability of and conformity with the relevant covered agreements, a WTO adjudicator is to apply the “customary rules of interpretation of public international law” pursuant to Article 3.2 of the DSU. Articles 31 to 33 of the *Vienna Convention on the Law of Treaties* (“Vienna Convention”) have been recognized as reflecting such customary rules.⁵ Article 31 of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

14. The *US – Tyres (China) (AB)* report summarized as follows the role of a panel under Article 11 of the DSU in a dispute involving a determination made by a domestic authority based on an administrative record:

[I]n examining an investigating authority’s determination, a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the investigating authority. Rather, a panel should examine whether the conclusions reached by the investigating authority are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations. A panel’s examination of an investigating authority’s conclusions must be critical, and be based on the information contained in the record and the explanations given by the authority in its published report. As the Appellate Body has explained, what is “adequate” will depend on the facts and circumstances of the particular case and the claims made.⁶

15. Similarly, the *US – Cotton Yarn (AB)* report reasoned that:

[P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assess whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority’s explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de*

⁵ See *US – Gasoline (AB)*, p. 17 (providing the general rule of interpretation for treaties).

⁶ *US – Tyres (China) (AB)*, para. 123 (footnotes omitted).

novo review of the evidence nor substitute their judgement for that of the competent authority.⁷

16. The Article 21.5 panel report in *US – Countervailing Measures on Certain EC Products* referred to the Appellate Body report in *US – Cotton Yarn*, as well as other reports concerning the Anti-Dumping Agreement, and observed that its role was to assess “whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner.”⁸

17. Under Article 11 of the DSU, therefore, the Panel’s task in this dispute is not to determine whether ripe olives from Spain were subsidized, or the amount of the benefit conferred, or whether the subsidies were specific, or whether the domestic industry was injured. Rather, the Panel’s role is to assess whether the USDOC and USITC properly established the facts and evaluated them in an unbiased and objective way. Put differently, the Panel’s task is to determine whether a reasonable, unbiased investigating authority, looking at the same evidentiary record as the USDOC and USITC, could have – not would have – reached the same conclusions that the USDOC and USITC reached. It is well established that the Panel may not conduct a *de novo* evidentiary review, but instead should “bear in mind its role as *reviewer* of agency action” and not as “*initial trier of fact*.”⁹ Indeed, it would be inconsistent with a panel’s function under Article 11 of the DSU to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.¹⁰

18. Finally, it is a “generally-accepted canon of evidence” that “the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.”¹¹ Accordingly, the EU, as the complaining party, bears the burden of demonstrating that the U.S. measures within the Panel’s terms of reference are inconsistent with a provision or provisions of the SCM Agreement, Anti-Dumping Agreement, or the GATT 1994. The EU must establish a *prima facie* case of inconsistency with a provision of a WTO covered agreement before the United States, as the defending party, has the burden of showing consistency with that provision.¹²

II. PRELIMINARY RULING REQUEST

19. Pursuant to paragraph 4 of the Panel’s Working Procedures, the United States requests a preliminary ruling with respect to claims in the EU’s first written submission that were not

⁷ *US – Cotton Yarn (AB)*, para. 74.

⁸ *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.82. See also *ibid.*, paras. 7.78-7.83.

⁹ *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis original).

¹⁰ *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-190.

¹¹ *US – Wool Shirts and Blouses (AB)*, p. 14. See also *China – Broiler Products (Panel)*, para. 7.6.

¹² *EC – Hormones (AB)*, para. 109 (citing *US – Wool Shirts and Blouses (AB)*, pp. 14-16). See also *China – Broiler Products (Panel)*, para. 7.6.

identified in the EU’s consultations request or panel request and thus are outside the Panel’s terms of reference.

A. Article 6.2 of the DSU

20. Article 6.2 of the DSU provides in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly....

Article 6.2 thus requires two elements to be included in a panel request, namely: (a) identification of the specific measures at issue; and (b) a brief summary of the legal basis of the complaint.¹³ These elements comprise the “matter referred to the DSB,” which is the basis for a panel’s terms of reference under Article 7.1 of the DSU.¹⁴

21. Under the terms of Article 7.1, then, “if either of [the measures or the claims] is not properly identified, the matter would not be within the panel’s terms of reference.”¹⁵ Thus, a claim that is not set out in the request for establishment of a panel would not form part of the “matter” referred to the DSB, that the DSB has established the panel to examine. Because of the requirement to set out in writing the request for establishment of a panel, and its constituent features of the specific measures at issue and the legal basis of the complaint, the Appellate Body reasoned in *EC – Bananas III* that “[i]f a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently ‘cured’ by a complaining party’s argumentation in its first written submission.”¹⁶

22. Thus, whether a measure or a claim is set out in the panel request “must be objectively determined on the basis of the panel request as it existed at the time of filing” and be “demonstrated on the face” of the panel request.¹⁷

B. The EU’s Claims Under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement Fall Outside the Panel’s Terms of Reference

23. In its first written submission, the EU raises claims with respect to Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement. These claims were not included in its panel request and thus are outside the Panel’s terms of reference.

¹³ *Australia – Apples (AB)*, para. 416. See also *China – Raw Materials (AB)*, para. 219; *EC – Large Civil Aircraft (AB)*, para. 786; *US – Carbon Steel (AB)*, para. 125.

¹⁴ *Australia – Apples (AB)*, para. 416 (emphasis omitted).

¹⁵ *Australia – Apples (AB)*, para. 416.

¹⁶ *EC – Bananas III (AB)*, para. 143 (emphasis omitted).

¹⁷ *US – Carbon Steel (AB)*, para. 127.

24. In its request for the establishment of a panel, the EU challenged the United States' imposition of countervailing and anti-dumping duties on ripe olives from Spain as a result of, in part, the USITC's final determinations. With respect to the USITC's determinations, the EU challenged the USITC's determination of injury. The EU identifies the portions of the USITC's analysis that it alleges were lacking, specifically that "the ITC did not properly factor into the determination of injury the evolution in the volume of subsidized imports, or the effect of the subsidised [sic] imports on prices, and did not demonstrate the required causal relationship between subsidized imports and injury to the domestic industry, also taking into account non-attribution factors."¹⁸ The EU also claims that "[f]or the same reasons, the dumping measures appear to be inconsistent with Articles VI:1 and VI:2 of the GATT 1994, and Articles 3.1, 3.2 and 3.5, and Article 12.2.2 of the Anti-Dumping Agreement."¹⁹ As a result of these alleged deficiencies, the EU claims that the USITC's analysis breached the U.S. obligations under Articles VI:1, VI:2, and VI:3 of the GATT 1994, Articles 3.1, 3.2, and 3.5, and Article 12.2.2 of the Anti-Dumping Agreement, and Articles 15.1, 15.2, and 15.5 of the SCM Agreement.²⁰

25. The panel request does *not* identify a claim under Article 3.4 of the Anti-Dumping Agreement or Article 15.4 of the SCM Agreement, nor does it raise any arguments with respect to the economic factors to be considered during an examination of the impact of dumped/subsidized imports on the domestic industry. The EU's legal claims are thus limited to its assertion set out in its request for the establishment of a panel, that the USITC's determination of injury "appear[s] to be inconsistent with... Article VI:3 of the GATT 1994, and Articles 15.1, 15.2 and 15.5 of the SCM Agreement...[and] Articles VI:1 and VI:2 of the GATT 1994, and Articles 3.1, 3.2 and 3.5, and Article 12.2.2 of the Anti-Dumping Agreement."²¹

26. Despite expressly limiting its panel request to claims under Articles VI:1, VI:2, and VI:3 of the GATT 1994, Articles 3.1, 3.2, and 3.5, and Article 12.2.2 of the Anti-Dumping Agreement, Articles 15.1, 15.2, 15.5, and 22.5 of the SCM Agreement, the EU has attempted to expand the scope of this dispute by improperly introducing in its first written submission new claims under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement with respect to the USITC's injury determination. The EU in large part relies on its challenge of the consistency of the USITC's determination with Articles 15.1 and 15.2 of the SCM Agreement and Articles 3.1 and 3.2 of the Anti-Dumping Agreement. It contends that for the same reasons it argues the USITC's volume and price effects analysis breaches those provisions, the USITC's analysis consequently results in a breach of Articles 15.4 and 3.4.²² Such arguments are not relevant to whether the EU's Article 15.4 and 3.4 claims fall outside the Panel's terms of reference. Regardless of whether the EU's 15.4 and 3.4 claims rely on the same legal reasoning with respect to USITC's volume and price effect findings cannot cure

¹⁸ EU's request for the establishment of a panel, p. 2.

¹⁹ EU's request for the establishment of a panel, pp. 2-3.

²⁰ EU's request for the establishment of a panel, pp. 2-3.

²¹ EU's request for the establishment of a panel, pp. 2-3.

²² EU FWS, paras. 561-564.

deficiencies in a panel request.²³ These claims were not included in the EU’s panel request and are therefore not within the Panel’s terms of reference.

27. For the foregoing reasons, the United States respectfully requests that the Panel find that the EU’s alleged claims under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement with respect to the ITC’s injury determination are outside of the Panel’s terms of reference.

III. THE USDOC’S DETERMINATION THAT SUBSIDIES PROVIDED TO OLIVE GROWERS UNDER THE BASIC PAYMENT SCHEME ARE *DE JURE* SPECIFIC WAS CONSISTENT WITH THE SCM AGREEMENT

28. The EU argues that the USDOC’s determination that the programs under the EU’s Basic Payment Scheme, the Direct Payment and Greening programs (collectively, the “BPS Programs”) under the EU’s Common Agricultural Policy (“CAP”) Pillar I, are *de jure* specific was inconsistent with Articles 1.2, 2.1, 2.1(a), 2.1(b), and 2.4 of the SCM Agreement. In particular, the EU claims that its transition from the Common Market Program in Oils and Fats,²⁴ which conferred subsidies based upon olive production, to successor programs, in which subsidies were “decoupled” from production, achieved a “Copernican revolution”.²⁵ However, the USDOC’s examination revealed that, for purposes of countervailable subsidies, the eligibility criteria for subsidies conferred to olive growers under the BPS Programs remained linked to production of olives. Thus, the successor BPS Programs were specific to “an enterprise or industry or group of enterprises or industries” within the meaning of Article 2.1.

29. As demonstrated below, positive record evidence supported the USDOC’s determination that eligibility for subsidies conferred under the BPS Programs was explicitly limited to certain enterprises or industries. In particular, the USDOC’s finding reflects that access to benefits under the BPS Programs, and the predecessor Single Payment Scheme (“SPS Program”), was based on the benefits received under prior programs that were specific to olive producers. The EU’s claims to the contrary discount the explicit link to olive production under the Oils and Fats Program and mischaracterize the USDOC’s examination of that link.

30. The United States addresses the EU’s arguments as follows. Section II.A sets forth the proper legal framework under Article 2.1 of the SCM Agreement for an investigating authority to evaluate *de jure* specificity.

²³ *US – Pipe and Tube Products (Turkey) (Panel)*, para. 7.241.

²⁴ The EU uses “Common Market Program” as shorthand for this program, even though its provision of subsidies did not encompass the “Common Market” but, instead, limited access based on production in oils and fats. The United States refers to this program as the “Oils and Fats Program”, a more precise label.

²⁵ EU FWS, paras. 59, 65.

31. Section II.B demonstrates that the USDOC properly applied that framework to examine the eligibility conditions for access to subsidies under the BPS Programs and its predecessor programs (i.e., the SPS Program and Oils and Fats Programs).
32. Section II.C demonstrates that, in evaluating the BPS Programs, the USDOC properly took into account the programs' relationship with subsidies conferred under the Oils and Fats Program, which were limited to producers of oilseed crops (e.g., olives).
33. Section II.D demonstrates that although the USDOC's *de jure* specificity determination properly considered the BPS Programs' link to the Oils and Fats Program, the USDOC's determination was based upon the eligibility conditions of the BPS Programs themselves.
34. Section II.E demonstrates that the BPS Programs are not governed by the "objective criteria or conditions" set forth under Article 2.1(b) of the SCM Agreement, and therefore are not excluded from a finding of *de jure* specificity.
35. Section II.F demonstrates that, consistent with Articles 2.1, 2.1(a), 2.1(b), and 2.4 of the SCM Agreement, the USDOC based its findings on positive evidence and supported those findings with a reasoned and adequate explanation.
36. Section II.G explains why the Panel should reject the consequential claim that the USDOC breached Article 1.2 of the SCM Agreement.

A. The Proper Legal Framework to Understand the Obligations Under Article 2.1 of the SCM Agreement

37. Article 1.2 of the SCM Agreement provides that a subsidy may be subject to countervailing measures only if it "is specific in accordance with the provisions of Article 2."
38. Article 2.1 of the SCM Agreement sets out guiding principles to determine whether a subsidy is "specific" to "an enterprise, industry, or group of enterprises or industries," referred to in the SCM Agreement as "certain enterprises."²⁶ This text establishes that a subsidy may be specific where the recipient "enterprise" or "industry" is known or can be discerned, or a "group of enterprises or industries" is known or can be discerned. Although the industries and enterprises must be "known and particularized," they need not be "explicitly identified" for the subsidy to be considered *de jure* specific.²⁷ Past 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.²⁸

²⁶ SCM Agreement, Art. 2.1. See also *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 364.

²⁷ *US – Carbon Steel (India) (AB)*, para. 4.365. See also *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

²⁸ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

39. The inquiry whether a subsidy is specific to certain enterprises is guided by “principles” articulated in subparagraphs (a) through (c) of Article 2.1. Article 2.1(a) identifies circumstances in which a subsidy is *de jure* specific (i.e., where limitations on eligibility explicitly favor certain enterprises).²⁹ Article 2.1(b) identifies circumstances in which a subsidy shall be regarded as non-specific (i.e., where “objective criteria or conditions” exist that “guard against selective eligibility”).³⁰ Objective criteria or conditions are described in footnote 2 to Article 2.1(b) as “criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.”³¹ Subparagraphs (a) and (b) both “direct scrutiny to the eligibility requirements imposed by the granting authority or the legislation pursuant to which the granting authority operates.”³²

40. Article 2.1(c) provides that, “notwithstanding any appearance of non-specificity” resulting from application of Articles 2.1(a) and 2.1(b), a subsidy may nevertheless be “in fact” specific.³³ Application of Article 2.1(c) is a fact-driven, context-dependent exercise. By providing for a *de facto* specificity analysis, Article 2.1(c) “reflects the diversity of facts and circumstances that investigating authorities may be confronted with when analysing subsidies covered by the SCM Agreement.”³⁴

²⁹ SCM Agreement, Article 2.1(a) provides as follows: “Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.” See also *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 367, 369.

³⁰ SCM Agreement, Article 2.1(b) provides as follows:

Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

Footnote omitted. See also *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 367, 369.

³¹ SCM Agreement, Art. 2.1(b), footnote 2.

³² *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368.

³³ SCM Agreement, Article 2.1(c) provides as follows:

If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

³⁴ *US – Countervailing Measures (China) (Panel)*, para. 7.240.

41. The principles set out in subparagraphs (a) through (c) of Article 2.1 are not rules.³⁵ Although Article 2.1 suggests that the specificity analysis ordinarily will proceed sequentially, it is not necessary that it do so.³⁶ Nothing in the SCM Agreement indicates that an investigating authority must examine whether a subsidy is specific under each subparagraph of Article 2.1 in every case. When the evidence under consideration unequivocally indicates specificity or non-specificity under one subparagraph of Article 2.1, further consideration under other subparagraphs of Article 2.1 may be unnecessary.³⁷

42. Article 2.4 of the SCM Agreement requires that a specificity determination under Article 2 be “clearly substantiated on the basis of positive evidence.” “Positive” evidence is evidence that is “characterized by the presence or possession of features or qualities” or “affirmative” and “objective” evidence.³⁸

43. Thus, where an investigating authority clearly substantiates on the basis of positive evidence that access to a subsidy is limited to certain enterprises by a granting authority, or the legislation pursuant to which the granting authority operates, then the determination of specificity made by that authority is consistent with the requirements of Article 2 of the SCM Agreement.

B. The USDOC Examined the BPS Programs Conditions of Eligibility, Consistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement

44. The EU argues that the USDOC’s specificity determination did not in the first instance “look[] at the eligibility conditions for access to the subsidy” and instead “focused on the rules for the determination of the amount of subsidy”³⁹ That supposed failure was inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement because “an assessment of *de jure* specificity focuses on whether certain enterprises are eligible for the subsidy, not on whether they in fact receive it.”⁴⁰ However, the USDOC’s finding that the BPS Programs (and

³⁵ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366.

³⁶ *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 796 (explaining that “the language of Article 2.1(c) . . . indicates that the application of this provision will normally follow the application of the two subparagraphs of Article 2.1” (emphasis added)).

³⁷ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371. The Appellate Body also “caution[ed] against examining specificity on the basis of the application of a particular subparagraph of Article 2.1, when the potential for application of other subparagraphs is warranted in the light of the nature and content of measures challenged in a particular case,” implying that when the potential for application of other subparagraphs is not warranted, Article 2.1 does not require such an examination. *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371 (emphasis added). See also *EC – Large Civil Aircraft (AB)*, para. 945; *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 754.

³⁸ *US – Hot-Rolled Steel (AB)*, para. 192 (describing “positive evidence” as evidence “of an affirmative, objective and verifiable character,” which is “credible”). This interpretation of the term “positive evidence” in the AD Agreement was found to be applicable to the SCM Agreement by the panel in *EC – Countervailing Measures on DRAM Chips*. *EC – Countervailing Measures on DRAM Chips*, para. 7.226, n. 191.

³⁹ EU FWS, paras. 205-206.

⁴⁰ EU FWS, para. 207 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368 and *US – Carbon Steel (India)(AB)*, para. 4.368).

antecedent SPS Program) were *de jure* specific was based upon the eligibility conditions under the Oils and Fats Program, which were limited to olive growers, and incorporated into the BPS Programs as a matter of law. That the EU developed successive subsidy programs with different names and modified methodologies did not alter the fact that the subsidies conferred under the Oils and Fats Program – and the criteria necessary to access those subsidies – remained at the heart of the eligibility criteria for the successive programs (i.e., the SPS Program and BPS Programs).

45. This section will (i) outline the USDOC’s examination of the BPS Programs, showing the role that the Oils and Fats Program played in determining eligibility for subsidies conferred under those programs, and (ii) explain why the EU has failed to show that that examination of the eligibility conditions did not accord with Article 2.1(a) of the SCM Agreement.

1. The USDOC’s examination of the link between eligibility for subsidies under the Oils and Fats Program and the successor BPS Programs

46. In response to allegations from petitioner regarding annual grants to olive growers, the USDOC examined the establishment and operation of a group of programs under the EU’s CAP – namely, the BPS Programs. As identified in the preliminary determination, “[a]ll respondents, and many of the growers surveyed, reported receiving assistance” under these subsidy programs during the period of investigation (i.e., calendar year 2016).⁴¹

47. At the outset of its analysis, the USDOC identified that the availability of subsidies under the BPS Programs depended, at least in part, upon availability under its two predecessor programs (i.e., the Oils and Fats Program and SPS Program).⁴² That is because, rather than replace the Oils and Fats Program, the EU carried forward subsidies conferred under the program into later iterations of the EU’s CAP subsidies regime. Accordingly, to evaluate the BPS Programs, including the conditions governing eligibility for subsidies, the USDOC analyzed how these predecessor programs remained linked operationally to the BPS Programs. Ultimately, as described in greater detail below, the USDOC based its *de jure* specificity finding on the manner in which Spain implemented the BPS Programs with reference to the operations of the two predecessor programs, the SPS Program and the Oils and Fats Program, and the manner in which assistance was determined under those predecessor programs. The USDOC explained that:

the Common Organisation of Markets in Oils and Fats[] was in place from 1999 through 2003, and provided production aid in the form of annual grants to farmers on the basis of type of crop and the volume of production. Both olive oil and table olives were specifically identified as products eligible to receive production aid under this program, and the payments provided during this period

⁴¹ Preliminary Decision Memorandum (Exhibit EU-1), p. 18.

⁴² Preliminary Decision Memorandum (Exhibit EU-1), p. 18.

were based on whether the olives were used to produce olive oil or table olives.⁴³

48. Although the Oils and Fats Program ceased benefiting olive growers after 2003, because it provided annual grant payments only to producers of oilseed crops (e.g., olives), the eligibility criteria to access the payments would render the program *de jure* specific.⁴⁴

49. The Oils and Fats Program was succeeded by the SPS Program which, as described below, conferred subsidies in a manner that retained the Oils and Fats Program eligibility criteria. To implement the SPS Program, each EU Member State was required to collect data under a geographical indicator system, including land area in hectares, the types of crops on the hectares, crop production from the hectares during the periods from 1999 to 2002 or 2000 to 2002, and the grant amount provided under the annual grant-to-farmer program for the same periods.⁴⁵ The USDOC noted that, when Spain implemented the SPS Program, aid provided to farmers was converted into “entitlements”, which are rights to receive payments that were linked to land area and decoupled from production.⁴⁶ However, the SPS Program conferred grants to recipients based upon a “reference period” for olives and olive oil – from 1999 through 2002 – the period during which the Oils and Fats Program operated and made subsidies available to olive growers based upon olive production (i.e., on a *de jure*-specific basis).⁴⁷ Because the SPS Program continued to make grant payments based upon access under the Oils and Fats Program, the USDOC determined that the SPS Program retained the *de jure* specificity inherent in the Oils and Fats Program.⁴⁸

50. In 2015, Spain implemented a new scheme under CAP Pillar I: the BPS. The BPS encompassed two sub-programs: (i) a Direct Payment program that provides annual grants to farmers and (ii) a Greening program that provides annual grants to farmers who are entitled to a grant under the Direct Payment program and undertake agricultural practices beneficial to the climate and the environment.⁴⁹ Because the USDOC based its specificity determinations under each program on the same analysis, for the sake of clarity, we discuss them together as the BPS Programs.

51. Under Spain’s implementation of the BPS, the BPS Programs established an initial value of payment entitlements explicitly based, among other things, on “[t]he amounts correspond[ing]

⁴³ Final Issues and Decision Memorandum (Exhibit EU-2), p. 32.

⁴⁴ Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

⁴⁵ Preliminary Decision Memorandum (Exhibit EU-1), p. 19; Final Issues and Decision Memorandum (Exhibit EU-2), p. 33 (citing Council Regulation (EC) No 1782/2003 (Exhibit EU-24)).

⁴⁶ Final Issues and Decision Memorandum (Exhibit EU-2), p. 33 (citing, e.g., Council Regulation (EC) No. 73/2009 (Exhibit EU-23); Council Regulation (EC) No 1782/2003 (Exhibit EU-24)).

⁴⁷ Final Issues and Decision Memorandum (Exhibit EU-2), p. 33 (citing EU IQR (Exhibit EU-12) at Exhibit 10).

⁴⁸ Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

⁴⁹ See Council Regulation (EC) No 1307/2013 (Exhibit EU-25).

to the single payment scheme”⁵⁰ The BPS entitlements’ initial value for each farmer is then calculated by applying a fixed percentage to the amounts the farmer received in 2014, i.e., under the SPS Program.⁵¹ The fixed percentage is determined by dividing the national ceiling for the BPS by the total amount of the payments in 2014 (so as not to exceed that national ceiling).⁵² The initial unitary value of each basic payment entitlement is then determined by dividing the total initial value by the total number of payment entitlements allocated to the region in which the land is located.⁵³ Spain created 50 agricultural regions using the historical farmland data gathered when implementing the SPS Program.⁵⁴ If a farmer has eligible land in more than one region, the grant payments received by the farmer are allocated to each region in proportion to the area declared by the farmer in each region, applying a weighting coefficient based on the “productive orientation”⁵⁵ of the land.⁵⁶

52. The USDOC also examined how the EU’s convergence process applied to the entitlements of each region, bringing payment entitlement amounts closer to the regional average.⁵⁷ Specifically, over five stages from 2015 to 2019, the convergence process was intended to increase the value of payment entitlements below the regional average and decreases the value of those above the regional average.⁵⁸ In other words, the convergence process affected the amount of subsidy payments during the 2016 period of investigation but was not completed and indeed continued after 2016. For this reason, the USDOC recognized that “while any adjustments resulting from convergence may ultimately affect the amount of assistance”, during the period of investigation, the subsidies provided under the BPS Programs remained linked to the *de jure* specific subsidies conferred under Oils and Fats Program.⁵⁹

53. The USDOC analyzed Spain’s implementation of the BPS Programs and determined that, because the benefits provided under the BPS Programs depend on the earlier subsidy programs that were *de jure* specific (i.e., the Oils and Fats Program and SPS Program), the BPS Programs were also *de jure* specific.⁶⁰ To arrive at the determination, the USDOC analyzed the EU and Spain’s questionnaire responses, the relevant EU regulations, and the Royal Decrees

⁵⁰ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 33; Royal Decree 1076/2014 (Exhibit EU-30), p. 4.

⁵¹ Final Issues and Decision Memorandum (Exhibit EU-2), p. 34; Royal Decree 1076/2014 (Exhibit EU-30), § 14.

⁵² Royal Decree 1076/2014 (Exhibit EU-30), § 14.

⁵³ Royal Decree 1076/2014 (Exhibit EU-30), § 14.

⁵⁴ Preliminary Decision Memorandum (Exhibit EU-1), p. 19; Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

⁵⁵ The possible productive orientations are “permanent crops” (e.g., olives) with a coefficient of 1, “irrigated land” with a coefficient of 1.717, rain-fed land with a coefficient of 0.568, and “permanent pasture” with a coefficient of 0.376. See Official Spanish Gazette: Order AAA/544/2015 (Exhibit EU-21).

⁵⁶ Royal Decree 1076/2014 (Exhibit EU-30), § 14.

⁵⁷ Royal Decree 1076/2014 (Exhibit EU-30), § 16.

⁵⁸ Royal Decree 1076/2014 (Exhibit EU-30), § 16.

⁵⁹ Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

⁶⁰ Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

implementing the assistance programs in Spain.⁶¹ The USDOC identified the express limitation to olive producers in the Oils and Fats Program and explained how that limitation carried through to the SPS Program and BPS Programs. The USDOC summarized its findings as follows:

[T]he annual grant amounts provided to olive farmers under BPS Direct Payment and Greening derive from the amount of SPS grants that were provided to each farmer in 2013. As explained above, the calculation of the grant amount under SPS retains the *de jure* specificity inherent in the Oils and Fats Program. Therefore, the annual grant amounts provided under BPS Direct Payment and Greening in 2016 are directly related to, and continue to retain the *de jure* specificity of, the grants provided to olive growers under the Oils and Fats Program.⁶²

54. In this way, the USDOC traced the operational link between eligibility for subsidies under the Oils and Fats Program and the subsidies available under the successor SPS Program and BPS Programs. During the period of investigation, olive growers received grants payments under the BPS Programs, which the USDOC reflected in the subsidy rates attributable to the BPS Programs.⁶³

2. *The EU fails to demonstrate that the USDOC's examination of the eligibility conditions of the BPS Programs was inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement*

55. The EU argues that the USDOC examined *de jure* specificity with respect to the SPS Program and BPS Programs “without looking at the eligibility conditions for access to the subsidy.”⁶⁴ In particular, the EU argues that the USDOC focused its analysis on the rules for determining the amount of subsidy rather than on the eligibility conditions governing access to the subsidy.⁶⁵ The EU’s arguments are meritless. As explained below, the USDOC’s analysis of the BPS Programs – which encompassed the inherent link to eligibility for assistance under the Oils and Fats Program – was based on its eligibility conditions.

56. The EU’s argument that the USDOC did not consider eligibility criteria and instead focused on the determination of the amount of subsidy fails to consider that, because of the design of these programs, the determination of subsidies available to would-be recipients under the BPS Programs depended on earlier eligibility criteria.⁶⁶ The EU does not dispute that olive

⁶¹ Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36.

⁶² Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

⁶³ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 12.

⁶⁴ See EU FWS, para. 205.

⁶⁵ See EU FWS, paras. 207-208.

⁶⁶ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

production was among the eligibility criteria under the Oils and Fats Program.⁶⁷ Because the subsidies conferred under the BPS Programs (and predecessor SPS Program) depend on the subsidies conferred under the Oils and Fats Program as a matter of law, the BPS Program subsidies continue to be specific to olive producers.

57. The EU observes that Article 2.1(a) of the SCM Agreement “describes limitations on eligibility that favour certain enterprises,” but argues that the USDOC’s determination was made “without looking at the eligibility conditions for access to” the SPS Program and BPS Programs.⁶⁸ That is incorrect. In its final determination, the USDOC identified the limitations on eligibility under the Oils and Fats Program that favored olive production, stating that “both olive oil and table olives were specifically identified as products eligible to receive production aid under this program, and the payments provided during this period were based on whether the olives were used to produce olive oil or table olives.”⁶⁹ The USDOC further explained how the SPS Program and BPS Programs’ incorporation of this element of the Oils and Fats Program constituted positive evidence that those programs were also *de jure* specific. Specifically, under the SPS Program, “the amount of each farmer’s payment was calculated as a percentage of the average annual grant payments previously provided over a reference period.”⁷⁰ As the USDOC observed, “[i]n the case of olives and olive oil, this reference period was from 1999 through 2002, when the Oils and Fats Program was in operation.”⁷¹ Put simply, the eligibility limitations under the Oils and Fats Program continued to determine the subsidies available under the SPS Program and BPS programs. The SPS Program and BPS Programs explicitly reference the subsidies conferred under the Oils and Fats Program and, in this way, limit eligibility to access those subsidies.

58. The EU further argues that because *de jure* specificity under Article 2.1(a) of the SCM Agreement depends on whether certain enterprises are eligible for a subsidy, not on whether they in fact receive it, the same must hold true for the amount of subsidy actually granted to such enterprises.⁷² However, the USDOC’s *de jure* specificity determination is based neither on whether certain enterprises actually received a subsidy nor on the amount of subsidy actually granted to certain enterprises. Instead, as described above, the USDOC based its specificity determination on the eligibility conditions imposed by Spain.⁷³ The USDOC based its determination not on differences in the amount of subsidies that farmers in fact received but on the amount of subsidies they were eligible to receive under the BPS Programs pursuant to the

⁶⁷ See EU FWS, para. 58.

⁶⁸ EU FWS, paras. 203, 205.

⁶⁹ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 32 (citing Council Regulation (EC) No 1638/98 (Exhibit EU-26)).

⁷⁰ Final Issues and Decision Memorandum (Exhibit EU-2), p. 33 (citing Preliminary Decision Memorandum (Exhibit EU-1), p. 21-23; EU IQR (Exhibit EU-12) at Exhibit 10).

⁷¹ Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

⁷² EU FWS, para. 207.

⁷³ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

production-based eligibility of the Oils and Fats Program.⁷⁴ Accordingly, the EU does not show that, in examining the *de jure* specificity of the BPS Programs, the USDOC applied factors that would instead be relevant to a *de facto* specificity analysis.

59. The EU similarly argues that, in failing to identify any explicit BPS eligibility limitations, the USDOC ignored record evidence concerning eligibility conditions.⁷⁵ The USDOC’s final determination refutes this characterization. Specifically, the USDOC identified the explicit, production-based limitation governing the Oils and Fats Program,⁷⁶ and explained that the SPS Program and BPS Programs incorporated that limitation to determine the grant payments for which an olive grower was eligible. Clearly, the SPS Program and BPS Programs do not restate the entirety of the laws and regulations pursuant to which the Oils and Fats Program was implemented. Instead, the SPS Program and BPS Programs incorporate the production-based reference under that predecessor program, which they used to determine subsidy payment eligibility.⁷⁷ For the SPS Program, the amount of each farmer’s payment was based on the assistance received during the reference period when the Oils and Fats Program was in effect. For the BPS Programs, the value of each farmer’s entitlement is related to the assistance received under the SPS Program.⁷⁸ Therefore, the USDOC identified the explicit limitations inherent in Spain’s implementation of the SPS Program and BPS Programs.

60. Furthermore, the EU is incorrect to the extent that it is arguing that under Article 2.1(a) an explicit limitation cannot include a reference to another legal instrument. The EU’s understanding runs counter to the text, which contains no such restriction on investigating authorities, and would invent a loophole for subsidy programs that favor certain enterprises based on explicit eligibility limitations in earlier or separate programs. Here, the USDOC identified that the reference to the earlier, production-based Oils and Fats Program to determine eligibility for assistance under the SPS Program and BPS Programs constituted positive evidence that the SPS Program and BPS Programs were also *de jure* specific.⁷⁹

⁷⁴ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

⁷⁵ See EU FWS, para. 208.

⁷⁶ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 32. For avoidance of doubt, the United States also addresses the EU statement that the USDOC’s errors “are so obvious that even” the United States Court of International Trade “found that the USDOC did not provide a proper explanation of why the BPS program would be *de jure* specific under US law.” EU FWS, para. 54. As an initial matter, the court’s decision is not final and conclusive. The USDOC’s determination may be affirmed based upon its remand redetermination or affirmed on appeal. Moreover and in any event, the remand concerns a domestic U.S. statutory provision and standard of review that are not before the Panel. The United States gathers that the EU shares this understanding because the EU does not mention findings in the same court decision regarding other issues in this dispute (e.g., the court affirming the USDOC’s benefit calculation with respect to mandatory respondent Aceitunas Guadalquivir S.L.U.).

⁷⁷ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 32.

⁷⁸ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 34; Royal Decree 1076/2014 (Exhibit EU-30), § 14.

⁷⁹ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

61. Accordingly, the EU has failed to demonstrate that USDOC’s specificity finding was inconsistent with Articles 2.1 and 2.4 of the SCM Agreement, because the USDOC’s determination was based on the eligibility conditions of the BPS Programs and these payments were made to an identifiable group of enterprises.

C. The EU’s Argument That the USDOC’s *De Jure* Specificity Determination Was Inconsistent with Articles 2.1, 2.1(a), and 2.4, of the SCM Agreement Because the BPS Program Is “Decoupled” Is Meritless

62. The EU argues that the SPS Program and BPS Programs cannot retain the *de jure* specificity of the Oils and Fats Program because olive production does not determine eligibility for grant payments under the SPS Program and BPS Programs.⁸⁰ In particular, the EU argues that because under the SPS Program and BPS Programs there is no legal obligation to continue growing the same crops, subsidy assistance to farmers is not tied to the production of any particular agricultural product.⁸¹ As demonstrated below, the EU’s arguments (i) are not responsive to the USDOC’s analysis and determination of *de jure* specificity and (ii) are at odds with the plain language of Article 2 of the SCM Agreement.

63. First, although eligibility for subsidies under the SPS Program and BPS Programs was not based upon continued olive production, the explicit reliance on past programs that themselves conferred subsidies to olive growers on a *de jure* specific basis resulted in treatment that favored certain enterprises over others, i.e., favorable treatment to those enterprises that engaged in olive production. A component of the subsidy payments under the SPS Program and BPS Programs, even for the new and purportedly decoupled BPS Programs, is explicitly based upon historical olive production. In addition, olives are classified as a “permanent crop” under the BPS Programs.⁸² Therefore, a limitation based on the favorable treatment of agricultural producers with historical olive production directs benefits to an identifiable group of enterprises for purposes of a *de jure* specificity finding under Article 2.1.

64. Moreover, Article 2.1(a) of the SCM Agreement directs that to find *de jure* specificity, the investigating authority must find that the relevant legislation or granting authority explicitly limits access to a subsidy to certain enterprises. The SPS Program and BPS Programs limit access based on historical olive production and therefore that limitation explicitly restricts access to certain enterprises based on past olive production. Such a limitation remains an explicit limitation on access inherent in the SPS Program and BPS Programs. Similarly, because the USDOC identified the basis for its *de jure* specificity determination and the positive record evidence supporting that determination (i.e., the link between the BPS Programs and the Oils and Fats Program), the EU’s claim under Article 2.4 of the SCM Agreement fails.

⁸⁰ EU FWS, para. 224.

⁸¹ EU FWS, para. 225.

⁸² Final Issues and Decision Memorandum (Exhibit EU-2), p. 34 (citing GOS IQR (Exhibit EU-16) at 44).

65. Finally, the EU argues that “the USDOC approach is at odds with the notion of decoupled income support under WTO law” because the SPS Program and BPS Programs qualify as “decoupled income support” under Annex 2 of the Agreement on Agriculture (“AoA”).⁸³ According to the EU, the USDOC’s finding of *de jure* specificity must be wrong because “eligibility to and the amount of such payments” are based on a method “explicitly admitted under the AA”.⁸⁴ The EU’s argument fails because it conflicts with the texts of the AoA and SCM Agreements in at least the following two ways.

66. First, as the USDOC explained in its final determination, Annex 2 to the AoA no longer pertains to countervailing duty investigations under the SCM Agreement.⁸⁵ Specifically, the “Peace Clause” under Article 13 of the AoA, which designated domestic support measures under Annex 2 of the AoA as non-actionable subsidies for purposes of countervailing duties, expired after nine years. Indeed, as the USDOC explained: “the requirement to treat agricultural subsidies as not countervailable no longer applies to imports from WTO Member countries—in this case, Spain—after January 1, 2004.”⁸⁶ Accordingly, whether a subsidy program qualifies as “decoupled” income support under Annex 2 of the AA has no bearing on whether under the SCM Agreement a subsidy is deemed to exist.

67. Second, the EU cites nothing in the text of either the AoA or the SCM Agreement to support the proposition that, after expiry of the Peace Clause, Annex 2 remained relevant to the SCM Agreement. Instead, the EU simply asserts that “decoupled” programs achieve policy objectives such as “stability to farmers income, and preserv[ing] social structures” while avoiding production-based incentives.⁸⁷ Whatever the policy benefits of a decoupled subsidy program, these considerations are not among the considerations required of investigating authorities when evaluating whether programs are specific under Article 2 of the SCM Agreement. Therefore, the EU’s claims under Articles 2.1, 2.1(a) and 2.4 regarding the “decoupled” nature of the BPS Program must fail.

D. The EU’s Claim That the USDOC Breached Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement Because the USDOC Grounded Its Analysis on Eligibility Conditions of a Previous Subsidy Program Has No Merit

68. The EU argues that the USDOC breached Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement by supposedly analyzing the Oils and Fats Program to the exclusion of the subsidy programs actually in force during the period of investigation – the BPS Programs.⁸⁸ In particular, the EU faults the USDOC for “grounding its analysis on a subsidy program that had

⁸³ See EU FWS, paras. 228-231.

⁸⁴ See EU FWS, para. 232. Indeed, the EU summarizes that “the US logic is absurd.” EU FWS, para. 234.

⁸⁵ Final Issues and Decision Memorandum (Exhibit EU-2), pp. 5-6.

⁸⁶ Final Issues and Decision Memorandum (Exhibit EU-2), p. 6.

⁸⁷ EU FWS, para. 232.

⁸⁸ See EU FWS, para. 237.

ceased to apply 13 years before the POI[.]”⁸⁹ However, the USDOC appropriately factored into its analysis the clear operational link between the BPS Programs and subsidies under the predecessor Oils and Fats Program. As explained below, the USDOC thoroughly explained how the eligibility conditions for the Oils and Fats Program, and its *de jure* specificity based upon olive production, carried forward into the SPS Program and the BPS Programs.

69. As an initial matter, the EU relies upon the premise that the “USDOC found that the BPS and Greening programs are not specific in themselves, but because the amounts they grant are somehow calculated on those granted under the previous program[.]”⁹⁰ This is incorrect. Rather, the USDOC stated that “the reliance on earlier assistance programs that were specific to determine the amounts of assistance under the current program, renders specific the benefits under the BPS programs.”⁹¹ The USDOC did not examine the BPS Programs in isolation given the programs’ “reference to the operations of its two predecessor programs” (i.e., Oils and Fats and SPS Program).⁹² In doing so, USDOC found that the specificity inherent in the earlier programs (namely, the Oils and Fats Program), forms a part of the BPS Programs and makes the BPS Programs specific, as a matter of law, in themselves.

70. The EU argues that the USDOC breached Articles 2.1 and 2.1(a) of the SCM Agreement by “building a link” between the BPS Programs and the Oils and Fats Program which, the EU emphasizes, “was terminated 13 years before the POI!”⁹³ In fact, the USDOC based its *de jure* specificity finding for the BPS Programs on the programs’ eligibility criteria after evaluating how Spain elected to administer those programs. As explained, the support under the SPS Program was determined using the reference period (1999 through 2002) when the Oils and Fats Program was in effect.⁹⁴ Therefore, access to grant payments was limited in accordance with the payments made available, on a *de jure* specific basis based upon olive production, under the Oils and Fats Program.⁹⁵ The assistance a farmer was eligible to receive under the BPS Programs, in turn, is explicitly based on payments conferred under the terms of the predecessor SPS Program.⁹⁶ Accordingly, although it is true that the USDOC considered the express link between access to subsidies under the BPS Programs and access under its predecessor programs, that analysis supported (rather than supplanted) the USDOC’s *de jure* specificity determination regarding the BPS Programs.

71. The EU also argues that the USDOC’s reasoning is simplistic because it ignores that the amounts received under the SPS Program and BPS Programs were determined partially, not

⁸⁹ See EU FWS, para. 240.

⁹⁰ See EU FWS, para. 237.

⁹¹ Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

⁹² Final Issues and Decision Memorandum (Exhibit EU-2), p. 32.

⁹³ See EU FWS, paras. 202, 240.

⁹⁴ Final Issues and Decision Memorandum (Exhibit EU-2), p. 32.

⁹⁵ See Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36.

⁹⁶ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

exclusively, on the subsidies conferred under the Oils and Fats Program.⁹⁷ The EU further asserts that, because entitlements could have been bought, rented, or inherited, a simple correlation between what a farmer received under the Oils and Fats Program and the SPS Program cannot be taken for granted.⁹⁸ These arguments, however, do not undermine the USDOC’s conclusion that the SPS Program was *de jure* specific in light of the reference to the predecessor Oils and Fats Program. Even though other factors contributed to the calculation of the amount of support under the SPS Program, it is nevertheless the case that the amount of support was related to the support received under the *de jure* specific Oils and Fats Program.⁹⁹

72. As to the argument that a simple correlation between the Oils and Fats Program and the SPS Program cannot be taken for granted, the USDOC’s determination does not rely on a simple correlation. Rather, the USDOC relied on the structure of the SPS Program itself, which explicitly relies on a reference period during which the Oils and Fats Program was in place.¹⁰⁰ The fact that entitlements could have been bought, rented, or inherited does not sever the reliance on the Oils and Fats Program that Spain elected to incorporate into the SPS Program (and by extension, the successor BPS Programs).¹⁰¹

73. The EU similarly argues that the USDOC’s reasoning is simplistic because it assumes a direct link between the grant amount under the SPS Program and the BPS programs, and thus ignores that fact that the value of the BPS entitlements in Spain for each farmer may be adjusted.¹⁰² In other words, considering all the adjustments taken together, “the payment each farmer enjoy[s] under the BPS is loosely connected to the amount that the same farmer received under the SPS.”¹⁰³ The European Union argues that the USDOC ignores this evidence that the connection from the BPS programs to the Oils and Fats Program becomes “remote and indirect[.]”¹⁰⁴ The record facts contradict these arguments. In particular, the USDOC observed the relationship between subsidies conferred under the Oils and Fats Programs and the manner in which the SPS Program and the BPS Programs calculated subsidies.¹⁰⁵ Thus, the USDOC considered that the correlation is not perfect, but that the eligible amount of assistance under the BPS Programs is directly affected by the amount received under the Oils and Fats Program.

74. The EU claims that the USDOC’s logic is extreme because the USDOC found the BPS Programs retained the *de jure* specificity of the Oils and Fats Program despite the convergence

⁹⁷ See EU FWS, para. 244.

⁹⁸ See EU FWS, para. 244.

⁹⁹ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

¹⁰⁰ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

¹⁰¹ See *US – Upland Cotton (Panel)*, para. 7.1148 (observing the “fact that some of the subsidies go to farmers who may produce different commodities, or, in theory, may not produce a given commodity does not mean, by some process of reverse reasoning, that the specificity that is apparent from the face of the grant instrument no longer exists.”).

¹⁰² See EU FWS, para. 245.

¹⁰³ See EU FWS, para. 245.

¹⁰⁴ See EU FWS, para. 245.

¹⁰⁵ See Final Issues and Decision Memorandum (Exhibit EU-2), pp. 34-35.

factor, which adjusts the assistance provided to each farmer to bring it closer to a regional average.¹⁰⁶ The EU argues that, following the USDOC logic, *de jure* specificity could not be removed as long as the resulting amount is in some way calculated based on an earlier *de jure* program, regardless of the actual amount that results. The European Union mischaracterizes the USDOC's findings. The USDOC did not find that *de jure* specificity could never be removed by the convergence factor. The convergence factor brings the eligible assistance under the BPS programs closer to the regional averages over five stages from 2015 to 2019.¹⁰⁷ The period of investigation is January 1, 2016, to December 31, 2016. Accordingly, even if the convergence factor did ultimately bring the eligible assistance completely in line with regional averages such that it eliminated the differences in assistance carried over from the Oils and Fats Program (i.e., the favorable treatment to olive production), it would still be premature to make such a finding for the period of investigation.

75. Furthermore, the convergence factor will not in fact result in the complete elimination of the differences in the amounts of assistance. The convergence factor increases only basic payment entitlements with an initial unitary value lower than 90 percent of the regional average, and the corresponding decreases to the initial unit value of the basic payment entitlements that exceed the regional average are capped at 30 percent.¹⁰⁸ Therefore, although the convergence factor will bring the value of assistance closer to the regional averages, it will not completely eliminate the differences in assistance. Moreover, although the BPS Programs as developed by the EU gave implementing Members options for how to effect convergence, Spain elected to implement a convergence factor that would not fully align the assistance under the BPS Programs.¹⁰⁹ Combined with the fact that the BPS Programs in Spain rely on a prior *de jure* specific program to determine the amount of assistance granted, Spain's choice of convergence system underscores that the BPS Program in Spain has not eliminated the *de jure* specificity of the Oils and Fats Program.

76. Finally, the EU fails to recognize that the assistance provided to olive farmers under the Oils and Fats Program could result in higher regional averages for the regions where olive growers are located. If, for example, a region was comprised entirely of olive growers, the assistance provided under the Oils and Fats Program could have ultimately resulted in a higher average for that region. In this example, even bringing the assistance under the BPS Programs completely in line with regional averages would not necessarily eliminate the *de jure* specificity carried from the Oils and Fats Program because of the impact on the regional averages themselves. Accordingly, the convergence factor does not negate the USDOC's finding that the eligible assistance under the BPS Programs is related to the assistance received under the *de jure* specific Oils and Fats Program.

¹⁰⁶ See EU FWS, para. 247-251.

¹⁰⁷ See Royal Decree 1076/2014 (Exhibit EU-30), § 16.

¹⁰⁸ See Royal Decree 1076/2014 (Exhibit EU-30), § 16.

¹⁰⁹ See Final Issues and Decision Memorandum (Exhibit EU-2), pp. 33-36.

77. Because the USDOC based its *de jure* specificity findings on the particular conditions of the BPS Programs, including the continued role of production-based subsidies under the Oils and Fats Program, the EU’s claim fails.

E. The EU’s Claim that the Eligibility Conditions of the BPS Program Satisfy Article 2.1(b) of the SCM Agreement and Therefore Prevent a Finding of *De Jure* Specificity Must Fail

78. The EU argues that the USDOC breached Articles 2.1, 2.1(b), and 2.4 of the SCM Agreement because, under Article 2.1(b), both “eligibility for” and “the amount of” subsidies under the SPS Program and BPS Programs exclude *de jure* specificity.¹¹⁰ In particular, the EU argues that the subsidies are “unbiased and not inclined to favour an enterprise or industry” because they cover “the whole of the agriculture sector in the EU.”¹¹¹ As explained below and elaborated upon in the USDOC’s analysis, the SPS Program and BPS Programs continued to incorporate the Oils and Fats Program and, for that reason, to favor olive growers. The operational link to the Oils and Fats Program meant that (i) “eligibility for” subsidies under the programs was limited based upon production by past olive producers and (ii) “the amount of” subsidies conferred to olive growers continued to be calculated based on the olive growers’ prior production-based subsidies.

79. Under Article 2.1(b) of the SCM Agreement, “specificity shall not exist” if

the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions* governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

* Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

80. Accordingly, Article 2.1(b) establishes a specificity exception for a program in which “objective criteria or conditions” determine both the “eligibility for” and “amount of” subsidies. “Objective criteria or conditions” are “neutral” and do not favor certain enterprises or industries. The footnote to Article 2.1(b) elaborates that the “objective criteria or conditions” must be both “economic in nature” and “horizontal in application” – meaning based upon a neutral factor such

¹¹⁰ See EU FWS, paras. 252-280.

¹¹¹ EU FWS, para. 274.

as number of employees or size of enterprise. The SPS Program and BPS Programs did not satisfy these criteria for at least the following two reasons.

81. First, as explained in greater detail above, “eligibility for” subsidies under the SPS Program and BPS Programs is based on assistance under the Oils and Fats Program, which on its face favored olive growers. The EU asserts that the eligibility criteria and conditions of the SPS Program and BPS Programs are “unbiased and not inclined in favour of an enterprise or industry or group of enterprises or industries as they apply horizontally to the whole of the agriculture sector in the EU.”¹¹² However, contrary to the EU’s argument, it demonstrably is not the case that the criteria and conditions “are the same regardless of the type of agricultural activity performed by each farmer.” Similar to its argument regarding the conditions of eligibility, the EU fails to account for the continued role of the Oils and Fats Program in determining the subsidies conferred under the BPS Program. It cannot be the case that the SPS Program and BPS Programs do not favor certain enterprises over others when the assistance under these programs is based on assistance under the Oils and Fats Program, which explicitly favored olive growers. As the USDOC explained, the assistance for which a farmer is eligible depends on a program which favored a type of agricultural activity – the Oils and Fats Program.¹¹³

82. Second, even if “eligibility for” SPS Program and BPS Program subsidies were based on objective criteria and conditions (which is not the case), Article 2.1(b) still would not be satisfied because the “amount of” subsidies nevertheless inherently favors olive growers. The EU argues that the “calculation criteria [i.e., amount of subsidies] . . . comply with the requirements of Article 2.1(b) of the SCM Agreement.”¹¹⁴ However, other than to refer to unspecified “above mentioned sections” and explain that the criteria and conditions “are clearly spelled out in the legal framework” and “automatic”, the EU overlooks the relevant USDOC analysis.¹¹⁵ Specifically, the EU does not address the USDOC’s findings that “the annual grant amounts provided under BPS [Programs] in 2016 are directly related to, and continue to retain the *de jure* specificity of, the grants provided to olive growers under the Oils and Fats Program.”¹¹⁶ As the USDOC detailed in its preliminary¹¹⁷ and final determinations, “the amount of assistance provided to olive farmers and the methodology for determining it under [the Oils and Fats Program] forms the foundation for determining the amount assistance provided to olive farmers under the successor programs”¹¹⁸ The Oils and Fats Program correspondingly favored olive producers because it conferred subsidies in an amount based upon the production of olives – a fact the EU does not dispute.¹¹⁹ That the SPS Program and BPS Programs rely at least in part on

¹¹² See EU FWS, para. 274.

¹¹³ See Final Issues and Decision Memorandum (Exhibit EU-2), pp. 33-34.

¹¹⁴ EU FWS, para. 272.

¹¹⁵ See EU FWS, paras. 272-273, 276.

¹¹⁶ Final Issues and Decision Memorandum (Exhibit EU-2), pp. 35-36.

¹¹⁷ See Preliminary Decision Memorandum (Exhibit EU-1), pp. 18-27.

¹¹⁸ Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

¹¹⁹ See, e.g., EU FWS, para. 44.

the subsidies provided under the Oils and Fats Program to determine the amount of subsidies to olive growers precludes application of Article 2.1(b) of the SCM Agreement.

83. Indeed, elsewhere in its first written submission, the EU appears to concede this point. In arguing that the USDOC inappropriately considered the amount rather than eligibility for subsidy payments, the EU observes: “It is true that the amount of such assistance depends to a certain extent[] on what farmers received in a past period for the different crops they grew, including olives.”¹²⁰ In other words, because the SPS Program and BPS Programs continue to calculate the subsidies conferred to olive growers at least in part based on what olive growers produced, the “amount of” subsidies conferred necessarily is not based on objective criteria or conditions.

84. In sum, as evident in the USDOC’s analysis, the SPS Program and BPS Programs did not confer subsidies pursuant to “objective criteria or conditions” as defined by Article 2.1(b) of the SCM Agreement. Specifically, because the programs favored olive growers, they satisfied neither the “eligibility for” nor “amount of” conditions of the “objective criteria or conditions” provision.

F. The USDOC’s *De Jure* Specificity Finding Is Based on Positive Evidence and Supported by Reasoned and Adequate Explanations, Consistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement

85. The EU argues that the USDOC’s preliminary and final determinations contained several explanations that were “incoherent and inconsistent and sometimes plainly contradictory”.¹²¹ Thus, according to the EU, the determination and supported explanations were “not based on positive evidence, or to the extent that they pretend to be based on such evidence” misrepresented that evidence.¹²²

86. These claims are meritless. Rather than presenting any further legal basis for the panel’s review of USDOC’s findings, through this claim, the EU seeks *de novo* review of USDOC’s factual findings by the Panel, inconsistent with the Panel’s standard of review. As discussed in section I. above, a Panel must not conduct a *de novo* evidentiary review, but instead should “bear in mind its role as *reviewer* of agency action.”¹²³ Indeed, similar arguments and interpretation of the evidence were presented to the USDOC in the countervailing duty investigation.¹²⁴

87. In addition, as shown below, the EU’s claims variously mischaracterize or take out of the context the USDOC’s analysis of the *de jure* specificity of the SPS Program and BPS Programs.

¹²⁰ See EU FWS, para. 225. The accompanying footnote noted the following, which does not diminish the EU concession: “After the various adjustments discussed in Sections IV.B.3 and IV.C.3 such as modulation, reduction for the reserve, internal and external convergence, transfer of entitlement, etc.”

¹²¹ EU FWS, para. 281.

¹²² EU FWS, para. 281.

¹²³ *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis original).

¹²⁴ See Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36.

Most of these arguments stem from the EU’s erroneous position that, despite the record evidence, the USDOC should have discounted the role of the Oils and Fats Program in the BPS Programs. As we already have explained in response to each of the EU’s claims above, this is incorrect.

88. To begin with, Article 2.4 of the SCM Agreement requires that a determination of specificity under Article 2 must be “clearly substantiated on the basis of positive evidence.” “Positive” evidence is evidence that is “characterized by the presence or possession of features or qualities” or “affirmative” and “objective” evidence.¹²⁵ Because the USDOC clearly substantiated its findings on the basis of positive evidence, as demonstrated above, its specificity determination was consistent with Article 2.4 of the SCM Agreement.

89. The EU argues that the USDOC’s determination is internally inconsistent because of the USDOC’s statement that it was not rendering a decision on the *de jure* specificity of the Oils and Fats Program despite relying on the *de jure* specificity of that program in determining that the SPS Program and BPS Programs are *de jure* specific.¹²⁶ According to the EU, the USDOC thereby illogically “renders the decision it said it would not render but it labels it as a would-be-decision.”¹²⁷

90. The EU’s argument ignores the context of the USDOC’s statement within its analysis of the Oils and Fats Program and its successor programs (i.e., the SPS Program and BPS Programs). Specifically, the USDOC’s statement reflected that even though the Oils and Fats Program ended in 2003, it remained an inherent part of the SPS Program and BPS Programs. Given the BPS Programs’ reference to the Oils and Fats Programs, it was sensible for the USDOC to explain that it *would* find the Oils and Fats Program to be *de jure* specific, not that it was rendering a decision as to the specificity of the program itself.¹²⁸ It would be senseless to countervail a program that, albeit integral to the operation of programs that conferred subsidies during the period of investigation, had itself ceased operation.

¹²⁵ *US – Hot-Rolled Steel (AB)*, para. 192 (describing “positive evidence” as evidence “of an affirmative, objective and verifiable character,” which is “credible”). This interpretation of the term “positive evidence” in the AD Agreement was found to be applicable to the SCM Agreement by the panel in *EC – Countervailing Measures on DRAM Chips*. *EC – Countervailing Measures on DRAM Chips*, para. 7.226, n. 191.

¹²⁶ See EU FWS, paras. 282-289. The relevant passage from page 33 of the Issues and Decision Memorandum (Exhibit EU-2) reads:

We recognize that the Common Market Program is no longer in operation and ceased providing benefits to olive growers in 2003, and we are not rendering a decision regarding whether the assistance provided under this program was specific under section 771(5A) of the Act. However, because the amount of assistance provided to olive farmers and the methodology for determining it under this program forms the foundation for determining the amount of assistance provided to olive farmers under the successor programs SPS and CAP Pillar I BPS and Greening, it is necessary to evaluate the specificity of this program separately. In doing so, we consider that, because the Common Market Program provided annual payments only to producers of oilseed crops, including olives, we would find this program to be *de jure* specific, as explained in further detail below.

¹²⁷ See EU FWS, para. 283.

¹²⁸ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

91. Next, the EU asserts that the USDOC’s description of the SPS Program as providing entitlements linked to land area and decoupled from production contradicts the USDOC’s findings that the SPS Program and BPS Programs retain the *de jure* specificity of the Oils and Fats Program.¹²⁹ This argument similarly misconstrues the USDOC’s analysis of the SPS Program and BPS Programs, and their incorporation of the eligibility conditions of the Oils and Fats Program. As an initial matter, the EU does not establish the assumption underlying its assertion – that “decoupling” from production precludes an affirmative finding of *de jure* specificity. As the USDOC explained, although the entitlements under the SPS Program were ostensibly decoupled from production, they were based on the assistance received in a reference period during which assistance was based on production.¹³⁰

92. Decoupling eligibility for benefits, in this case in the form of entitlements, from production does not in itself remove *de jure* specificity, as the EU argues. Nor does it remove *de jure* specificity if the entitlements are based upon another proxy for production and, thus, are limited to an identifiable group enterprises. Indeed, the EU cites no language in the text of Articles 2.1, 2.1(a), or 2.1(b) of the SCM Agreement to suggest that decoupling in this manner excepts subsidy programs that otherwise satisfy the definition of specificity.¹³¹ Compare that omission to Annex 2 of the Agreement on Agriculture, discussed further below, in which the drafters specifically contemplated decoupled income support.

93. The EU also claims to identify certain “logical errors” in USDOC’s analysis of the convergence factors applied to subsidies conferred under the BPS Programs.¹³² In particular, the EU argues that the USDOC failed to adequately recognize that “the convergence factor results in adjustment to individual payments to bring them closer over time,” and that it failed to “examine [the convergence factor] in detail and explain why in its view they do not remove” *de jure* specificity.”¹³³ According to the EU, those supposed errors mean that the USDOC found that “*de jure* specificity cannot be removed whatever that calculation or its results might be.”¹³⁴

94. However, the USDOC explained why it found unavailing the argument that the convergence factor eliminating disparities in payments over time eliminated the possibility of finding the assistance specific to olive growers.¹³⁵ Importantly, the USDOC explained its understanding that the “convergence factor results in adjustments to individual payments to bring them closer to an average over time”¹³⁶ The USDOC thus understood that the convergence factor did not completely eliminate deviations from the national, or even regional, average for

¹²⁹ EU FWS, paras. 290-293.

¹³⁰ Final Issues and Decision Memorandum (Exhibit EU-2), p. 33 (citing Council Regulation (EC) No 864/2004 (Exhibit EU-27)).

¹³¹ See EU FWS, paras. 290-293.

¹³² EU FWS, para. 294.

¹³³ See EU FWS, paras. 294-296.

¹³⁴ EU FWS, paras. 294-296.

¹³⁵ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

¹³⁶ Final Issues and Decision Memorandum (Exhibit EU-2), p. 36 (emphasis added).

the period of investigation. This understanding is underscored by the USDOC’s explanation of the convergence calculation in its European Commission verification report.¹³⁷ Moreover, Member States had a choice when implementing the BPS Programs between using a flat rate multiplied by the number of eligible hectares or using the convergence step that gradually reduced the disparity in income grant amounts.¹³⁸ Spain chose to implement a convergence factor that would not fully align the assistance under the BPS Programs.¹³⁹ That choice further supported the USDOC’s conclusion that, “while any adjustments resulting from convergence may ultimately affect the final amount of assistance, the grant amounts awarded to farmers under the BPS program are still based on, and thus retain, the *de jure* specificity of prior programs as explained above.”¹⁴⁰

95. The EU details other supposed errors in the USDOC’s evaluation of the BPS Programs and the predecessor subsidy programs – namely, the USDOC’s statement in its preliminary determination that “Spain created 50 regions which were determined using farmland data that was collected in 2003” despite also observing that that “[e]ach region’s territorial definition is based on their productive potential and the productive orientation determined in the 2013 campaign.”¹⁴¹ The USDOC’s explanations reflect the record evidence, and even accepting the EU’s claims does not undermine the USDOC’s finding that the BPS Programs are *de jure* specific. Additionally, the EU’s own explanations of the programs support the USDOC’s explanations. First, the EU claims that the USDOC “reveals a serious misunderstanding of the whole functioning of the BPS,”¹⁴² but in explaining this purported misunderstanding the EU states that, “[u]nder the BPS, any hectare of farmland is not associated with any value of the payment entitlement. The value of the payment entitlements of each farmer will depend on the amount of support the farmer received in a previous period.”¹⁴³ Far from being contradictory, this explanation supports the USDOC’s findings regarding the functioning of the programs, and in particular, supports the USDOC’s understanding that the value of payment entitlements depends on the amount of past support. Specifically, the explanation supports the USDOC’s statement that “the annual grant amounts provided to olive farmers under BPS [Programs] derive from the amount of SPS [Program] grants that were provided to each farmer in 2013.”¹⁴⁴

¹³⁷ See Verification Report: European Commission (Exhibit EU-22), p. 3.

¹³⁸ See Verification Report: European Commission (Exhibit EU-22), p. 3 (“The choice was between using a flat rate chosen by the Member State as the value to be multiplied by the number of eligible hectares a farmer activates, or using an additional step in the calculation, a convergence step, that used entitlement values assigned to specific hectares that, over time, gradually reduce the disparity in income grant amounts provided to beneficiaries across the Member State.”).

¹³⁹ See Final Issues and Decision Memorandum (Exhibit EU-2), pp. 33-36.

¹⁴⁰ Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

¹⁴¹ EU FWS, paras. 298-303.

¹⁴² EU FWS, para. 301.

¹⁴³ EU FWS, para. 301.

¹⁴⁴ Final Issues and Decision Memorandum (Exhibit EU-2), p. 36 (citing Council Regulation (EC) No 1307/2013 (Exhibit EU-25); Council Regulation (EC) No. 73/2009 (Exhibit EU-23)).

96. The EU’s argument regarding the USDOC’s findings related to the regional coefficient also do not undermine the USDOC’s determination. In particular, the EU explains that the regional coefficient is applied only when a farmer’s land falls in more than one region.¹⁴⁵ The USDOC did not in its final determination elaborate upon the application of the regional coefficient in this circumstance, but this distinction does not change the fact that the amount of assistance under the BPS Programs is related to the *de jure* specific assistance previously provided under the Oils and Fats Program. Accordingly, that the regional coefficient is applied only to allocate the global value of the entitlements attributed to one farmer therefore does not detract from the USDOC’s determination. Moreover, even if the regional coefficient is not applied for every farmer, it is nevertheless the case that the coefficient is higher for irrigated crops and permanent crops (e.g., olives) than it is for rainfed land and permanent pastures.¹⁴⁶ Specifically, the coefficient for permanent crops such as olives is 1. Therefore, where the regional coefficient is applied, it would effect no reduction, and guarantees, in the assistance allocated to olive growers. Regarding the EU’s assertion that “the regional reference value is simply the average regional value used for the convergence process,”¹⁴⁷ this also fails to undermine the USDOC’s finding. The USDOC explained that the convergence process did not eliminate the *de jure* specificity of the Oils and Fats Program.¹⁴⁸

97. Additionally, the EU states that the evidence on which the USDOC relied in explaining regional value is “mysterious,” despite the USDOC explicitly stating in its final determination that its finding was based on Council Regulation (EC) 1307/2013, Article 26(3) and Royal Decree 1076/2014.¹⁴⁹ The EU fails to explain how the USDOC’s explanation is inconsistent with the regulations, and a plain reading of the regulations demonstrates that they are consistent with the USDOC’s interpretation.¹⁵⁰ The EU’s assertion that “farmers received payments under the SPS, not regions,” similarly does not contradict the USDOC’s findings.¹⁵¹ The USDOC stated that “two farms of the same size can have two different total entitlement values if there is a historical difference in the amount of assistance provided in the different regions previously

¹⁴⁵ EU FWS, paras. 304-308.

¹⁴⁶ See Final Issues and Decision Memorandum (Exhibit EU-2), p. 34 n.101 (“The weights assigned to each characteristic are: rainfed land (0.568), irrigated land (1,717), permanent crop (1), and permanent pastures (0.376).”) (citing Official Spanish Gazette: Order AAA/544/2015 (Exhibit EU-21)).

¹⁴⁷ EU FWS, para. 139.

¹⁴⁸ Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

¹⁴⁹ See Final Issues and Decision Memorandum (Exhibit EU-2), pp. 34-35 (quoting Council Regulation (EC) No 1307/2013 (Exhibit EU-25); Royal Decree 1076/2014 (Exhibit EU-30)).

¹⁵⁰ Council Regulation (EC) No 1307/2013 (Exhibit EU-25) provides:

[a] fixed percentage of the value of the entitlements, including special entitlements, which the farmer held on the date of submission of his application for 2014 under the single payment scheme, in accordance with Regulation (EC) No 73/2009, shall be divided by the number of payment entitlements he is allocated in 2015, excluding those allocated from the national reserve or regional reserves in 2015.

¹⁵¹ See EU FWS, para. 309.

received under SPS.”¹⁵² The EU’s argument fails to recognize that the differing payments received by farmers under the SPS Program resulted from the payments available under the predecessor programs – for olive growers, the Oils and Fats Program, for producers of other crops, the program providing coupled assistance that were then in place – and that the differing payments under the SPS Program could lead to different entitlement values for farms in different regions, even if the regions themselves were not designated as separate regions until the BPS Programs. Additionally, as the EU recognizes, when a farmer owns land in more than one region, the regional coefficient is used to allocate among the different regions the global value of the entitlements attributed to that farmer.¹⁵³ Therefore, it is also the case that two farms of the same size can be allocated different entitlement values if they are owned by the same farmer but have different regional coefficients, consistent with the USDOC’s finding.¹⁵⁴

98. The EU attempts to downplay the significance of the regional weighting coefficients used to determine grant payment amounts by arguing that the coefficient represents the contribution of each productive orientation to the national agricultural income.¹⁵⁵ Similar to its argument regarding convergence, the EU does not explain how this fact would undermine the USDOC’s findings. Indeed, how much certain enterprises contribute to the national income is not relevant to whether a subsidy that is limited to those enterprises by law is *de jure* specific. Article 2 of the SCM Agreement provides for no such consideration, and it is particularly irrelevant given that the programs in question concern grant payments rather than tax revenue foregone.

99. The EU argues that the Aid to Olive Groves program, a program created alongside the SPS Program in 2003, granted subsidies for “maintenance of olive trees regardless of actual production of olives”.¹⁵⁶ Therefore, the Aid for Olive Groves program did not support the USDOC’s finding that the SPS Program and BPS Programs are *de jure* specific.¹⁵⁷ As an initial matter, the USDOC’s final determination does not rely on a connection between the Aid to Olive Groves program and the SPS Program or BPS Programs. Rather, the USDOC supports its finding based on the retained *de jure* specificity of the Oils and Fats Program.¹⁵⁸ Even if the USDOC did rely on the connection, however, the EU’s argument is faulty. Specifically, it relies on a superficial distinction between “growing olives” and “the maintenance of olive trees.”¹⁵⁹ Logically, a program that supports the maintenance of olive trees also confer a benefit for the cultivation of olives, consistent with the relevant passage in the USDOC’s preliminary determination.¹⁶⁰ Additionally, the EU’s claim that most of the production aid payments granted to the olive sector in Spain during the reference period entered the SPS Program demonstrates

¹⁵² Final Issues and Decision Memorandum (Exhibit EU-2), pp. 35-36.

¹⁵³ EU FWS, para. 303.

¹⁵⁴ Final Issues and Decision Memorandum (Exhibit EU-2), pp. 35-36.

¹⁵⁵ See EU FWS, para. 310.

¹⁵⁶ See EU FWS, para. 317.

¹⁵⁷ See EU FWS, paras. 316-317 (citing Preliminary Decision Memorandum (Exhibit EU-1), p. 23).

¹⁵⁸ Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36.

¹⁵⁹ EU FWS, para. 317.

¹⁶⁰ See Preliminary Decision Memorandum (Exhibit EU-1), p. 23.

that some percentage of support remained dedicated to the olive sector in Spain (beyond the aid payments converted to entitlements under the SPS Program).¹⁶¹

100. Finally, the EU returns to its argument that “nothing in the SPS program required a farmer producing olives” during the period when the Oils and Fats Program applied “to continue growing olives during the application of the SPS” to remain eligible for SPS Program subsidies.¹⁶² Therefore, the SPS Program and BPS Programs provide grant payments not to olive growers but to individuals who may in the past have grown olives.¹⁶³ Absent a legal requirement to continue producing olives, the EU posits, the USDOC’s finding regarding the relationship between the BPS Programs and Oils and Fats program is incorrect. However, as explained above, even if the SPS Program and BPS Programs limit access based on historical olive production, it is nevertheless true that such a limitation explicitly limits access to certain enterprises based on the production of past olive producers. Such a limitation is an explicit limitation on access inherent in the SPS Program and BPS Programs. Because the USDOC has supported this explicit limitation based on positive evidence, it has supported its determination in accordance with Article 2.4 of the SCM Agreement.

G. The Panel Should Reject the EU’s Consequential Claim Under Article 1.2 of the SCM Agreement

101. The EU argues that by not properly demonstrating that the BPS Programs are *de jure* specific, the USDOC violated Article 1.2 of the SCM Agreement.¹⁶⁴ However, as demonstrated above, the USDOC substantiated, on the basis of positive evidence, its determination that access to subsidies under the BPS Programs is explicitly limited to certain enterprises or industries. The United States therefore respectfully requests the Panel to reject the EU’s consequential claim under Article 1.2 of the SCM Agreement.

IV. THE EU’S AS SUCH CHALLENGE TO SECTION 771B OF THE TARIFF ACT OF 1930 AND ITS APPLICATION IN THE UNDERLYING INVESTIGATION FAILS BECAUSE THE EU MISUNDERSTANDS THE RELEVANT WTO PROVISIONS AS WELL AS THE U.S. STATUTE

102. The EU raises several claims with respect to the issue of “pass-through” – that is, the determination by an investigating authority that the benefit of a subsidy has “passed through” to a downstream product. Each of these claims fails, however, because the EU misunderstands the relevant WTO provisions as well as the U.S. statute it challenges.

103. First, the EU claims that Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement contain an obligation to conduct a pass-through analysis for

¹⁶¹ See EU FWS, para. 317.

¹⁶² EU FWS, para. 323.

¹⁶³ See EU FWS, paras. 319-328.

¹⁶⁴ See EU FWS, para. 330.

downstream products¹⁶⁵, and specifically, an analysis of “whether and to what extent the price of the input product is lowered vis-à-vis the alleged indirect beneficiary as a result of the subsidy.”¹⁶⁶ The EU’s legal interpretation lacks any basis in the text or negotiating history of the GATT 1994 or the SCM Agreement, and relies instead on a strained reading of prior WTO reports.

104. Second, the EU claims that Section 771B of the Tariff Act of 1930 is inconsistent with these same WTO provisions because Section 771B “automatically” “presumes” that, where an upstream product receives a subsidy, that a benefit has been conferred indirectly to a downstream product.¹⁶⁷ Relatedly, the EU claims that the USDOC’s finding that ripe olives received a benefit is inconsistent with the same WTO provisions because the USDOC applied Section 771B and thus failed to perform the pass-through analysis it alleges to be required under those provisions. The EU errs in arguing that Section 771B does not contain a pass-through analysis.¹⁶⁸ The EU misunderstands and misrepresents the meaning of Section 771B of the Tariff Act of 1930, as well as its application in the underlying investigation.

105. In Section IV.A, the United States explains why the EU’s position concerning a pass-through analysis lacks any legal basis in the covered agreements. The provisions cited by the EU provide rules concerning the imposition of countervailing duties once the existence of a subsidy has been established. The GATT 1994 and the SCM Agreement do not require a particular methodology for conducting a pass-through analysis. The EU’s premise is erroneous that a pass-through analysis must always involve an analysis of price differentiation. The EU’s interpretation attempts to create specific methodological requirements from general obligations in the GATT 1994 and the SCM Agreement. Next, in Section IV.B, the United States explains why the EU’s claim that Section 771B does not set out a pass-through analysis is erroneous. The statute requires a particularized test for agricultural products in certain factual circumstances and does not “automatically” “presume” pass-through of a benefit to downstream producers. Finally, in Section IV.C the United States shows why, due to its misinterpretation of both the WTO provisions and the facts (i.e., the U.S. statute) before the Panel, the EU has failed to demonstrate that the USDOC acted inconsistently with its obligations in applying Section 771B in the underlying investigation.

**A. The EU Errs in Claiming that the GATT 1994 and the SCM Agreement
Require a Particular Methodology for Conducting a “Pass-Through”
Analysis**

106. The EU’s claims regarding the requirement that an investigating authority perform an analysis of “pass-through” must fail because they lack any legal basis in the covered agreements. The EU’s interpretation attempts to create specific methodological requirements from general obligations in the GATT 1994 and the SCM Agreement. But the relevant provisions do not

¹⁶⁵ EU FWS, paras. 336-357.

¹⁶⁶ EU FWS, paras. 372 and 407-408.

¹⁶⁷ See EU FWS, paras. 334, 335, 336, 346, 357, 361, 362, 363, 369, 377, 380, 400, 401, 414, 415, and 417.

¹⁶⁸ See EU FWS, paras. 406-412.

require a particular methodology for conducting an analysis of whether a subsidy to an upstream producer (or product) benefits a downstream product.

107. The EU argues that a conjoint reading of Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement imposes an obligation on an investigating authority to conduct a pass-through analysis based on “price differentiation” to determine the existence of a benefit to a downstream product. The EU purportedly derives this obligation from the general proposition, found in Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement in particular, that “[a] Member must establish that a subsidy exists before it may impose countervailing duties, and it may not impose such duties in an amount greater than the amount of the subsidy demonstrated to exist.”¹⁶⁹

108. The EU argues in its first written submission that Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement contain a “mandate” for investigating authorities to “determine the existence and extent of a subsidy, notably the element of benefit” that is “also found elsewhere in the SCM Agreement, including Articles 19.1, 19.3 and 19.4.”¹⁷⁰ Notably, though, the EU does not contend that the criteria for a “pass-through” analysis exists in Article 19, but rather argues that Articles 19.1, 19.3, and 19.4 “reinforce” its interpretation of how to identify an indirect subsidy.¹⁷¹ The EU argues that a countervailing duty may only be “appropriate” under Article 19 if it is imposed to the extent imports are actually subsidized.¹⁷² As such, the EU argues that as a result of the USDOC not conducting a pass-through analysis, the countervailing duty imposed is consequently inconsistent with Article 19. That is, the EU’s claims under Articles 10, 19, and 32 of the ASCM appear entirely dependent on its claim under Article VI:3 of the GATT 1994.¹⁷³

109. A plain reading of the provisions cited by the EU demonstrates that none contains any obligation to use a specific methodology to calculate the benefit conferred by the subsidy found to exist, much less a specific “pass-through” methodology. The EU has, therefore, failed to make out a breach of any of these provisions.

110. Article VI:3 of the GATT 1994 provides:

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any

¹⁶⁹ EU FWS, para. 337.

¹⁷⁰ EU FWS, para. 341.

¹⁷¹ EU FWS, paras. 351-352.

¹⁷² EU FWS, para. 353.

¹⁷³ EU FWS, paras. 351-352. *See also* EU FWS, para. 678 (“Article 10 of the SCM Agreement is a consequential violation, in the sense that it is sufficient to show that the imposition of the countervailing duties at issue contravened either Article VI:3 of the GATT 1994 and/or any provision of the SCM Agreement in order to show a violation of Article 10.”).

special subsidy to the transportation of a particular product. The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

111. This provision affirms Members’ authority to levy duties that “offset” subsidies, subject to the requirement that they not exceed the amount of subsidy found to exist. This provision also recognizes the variety of ways in which subsidies may be conferred. Members may impose countervailing duties to offset subsidies that are “bestowed” or “granted” either “directly or indirectly.” For instance, Members may counteract “indirect” subsidization by imposing duties on products that benefit from subsidies conferred on “upstream” companies and products.¹⁷⁴ Likewise, Article VI:3 of the GATT 1994 provides that Members may impose countervailing duties regardless of whether the subsidies are bestowed “upon the manufacture, production or export” of a particular product. And duties may be imposed to offset subsidies imposed on “any merchandise,” *i.e.*, without restriction as to the type of product. Therefore, while the obligation in Article VI:3 is *related* to the determination of a benefit, it presupposes that such a determination has already been made at that point of the analysis.

112. Article 10 of the SCM Agreement incorporates Article VI of the GATT 1994.¹⁷⁵ Specifically, Article 10 requires Members to take all necessary steps to ensure that the imposition of a countervailing duty is in accordance with Article VI of the GATT 1994 and the SCM Agreement. Similarly, Article 32.1 of the SCM Agreement provides that “no specific action against a subsidy ... be taken except in accordance with the provisions of GATT 1994”. Therefore, a breach of Articles 10 and 32.1 may be established based on a breach of Article VI of the GATT 1994.¹⁷⁶ Likewise, if the right to impose a countervailing duty has been established,

¹⁷⁴ *US – Softwood Lumber IV (AB)*, para. 140 (“The phrase ‘subsid[ies] bestowed...*indirectly*’, as used in Article VI:3, implies that financial contributions by the government to the production of *inputs* used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the *processed product*.”).

¹⁷⁵ Article 10 of the SCM Agreement, concerning the Application of Article VI of GATT 1994, reads as follows:
Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture. (footnotes omitted).

¹⁷⁶ *US – Softwood Lumber IV (AB)*, para. 138 (“...any inconsistency of the United States’ imposition of countervailing duties on Canadian imports of softwood lumber products with Article VI:3 of the GATT 1994, would necessarily render this measure inconsistent also with Articles 10 and 32.1 of the SCM Agreement.”).

the countervailing duties imposed are, as a consequence, consistent with Article 10 of the SCM Agreement.¹⁷⁷

113. The EU does not provide any textual support in Article VI:3 of the GATT 1994 or Articles 10 or 32.1 that illustrates particular legal conditions governing how an investigating authority should attribute a benefit received indirectly by downstream producers. The provisions of the GATT 1994 and the SCM Agreement are silent on this issue. The EU seeks to fill that silence with a specific, methodological obligation. However, this silence cannot be so filled. Rather, “[t]he most logical conclusion to be drawn from this silence is that the choice . . . is up to the investigating authority”¹⁷⁸ regarding how a pass-through analysis should be conducted in a particular factual circumstance.

114. Article 19 of the SCM Agreement also does not contain any requirements regarding a determination of whether a benefit has been conferred. Rather, Article 19 presumes that an investigating authority has already found the existence of a subsidy.

115. Article 19.1 of the SCM Agreement states:

If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

116. Article 19.1 therefore requires a final determination of the amount of the subsidy and a final determination of injury as pre-conditions to the imposition of a countervailing duty. Article 19.1 does not, however, establish any requirements concerning how a subsidy or injury is to be determined. Those obligations are found elsewhere in the SCM Agreement.

117. Article 19.3 provides guidelines on the amount of the countervailing duty that an investigating authority may levy. It provides, in relevant part:

When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing

¹⁷⁷ In prior disputes, panels and the Appellate Body also have treated claims under Articles 10 and 32.1 as consequential to claims concerning whether countervailing duties have been imposed in a manner inconsistent with Article VI of the GATT 1994 and/or any substantive provision of the SCM Agreement. *US – Countervailing and Anti-Dumping Measures (China) (AB)*, paras. 4.19-4.21; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 358; *US – Softwood Lumber IV (AB)*, para. 143; and *US – Supercalendered Paper (Panel)*, paras. 7.240, 7.274, and 7.276.

¹⁷⁸ *EC–Bed Linen (21.5 India) (Panel)*, para. 6.87.

injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

118. 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.” The ordinary meaning of the term “appropriate” means “specially suitable (for, to); proper, Fitting.”¹⁷⁹ The term “case” is defined as “an instance of a thing’s occurrence, a circumstance, a fact, etc.”¹⁸⁰ In this context, the “thing” that is occurring is the levying of a countervailing duty, which applies to a product for which the producer or exporter has received a subsidy. 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, as well as in a manner that otherwise satisfies the obligation in Article 19.3 not to discriminate between sources of a subsidized product.

119. Moreover, use of the definite article “the” before “appropriate amounts” suggests that “the appropriate amounts in each case” is not an open-ended or subjective concept. Instead, “the appropriate amounts” (rather than “in an appropriate amount” or “in appropriate amounts”) is an objective concept. To be objective, the metric for “the appropriate amounts” must be known and defined. In the context of the SCM Agreement, it is the rules set out in the SCM Agreement itself that provide the basis to ascertain if the amounts are “the” appropriate ones. That amount must be determined in each “instance” or “occurrence” of levying a duty on an imported product. In other words, the amount of countervailing duties imposed should correspond to the subsidies identified for imports from a particular source, and not from any other.

120. Accordingly, where a Member has decided to impose countervailing duties, Article 19.3 of the SCM Agreement requires the Member to levy duties on imports from all sources found to be subsidized and causing injury: (i) on a non-discriminatory basis on imports from those sources; and (ii) “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.

121. Article 19.4 subsequently limits the maximum amount that may be imposed to countervail a subsidy found to exist. Article 19.4 of the SCM Agreement states:

¹⁷⁹ Definition of “appropriate” from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 103 (Exhibit USA-25).

¹⁸⁰ Definition of “case” from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 345 (Exhibit USA-26).

No countervailing duty shall be levied on any imported product in excess of the amount of subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.¹⁸¹

122. Article 19.4 of the SCM Agreement therefore 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.”¹⁸² 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.¹⁸³

123. Where the amount of the duty imposed is appropriate, applied on a non-discriminatory basis, and equal to the subsidy found to exist, there can be no breach of Articles 19.1, 19.3, or 19.4 without first finding a breach of some other provision of the SCM Agreement addressing the calculation of the subsidy itself.

124. The negotiating history of Article VI:3 of the GATT 1994 and the SCM Agreement additionally support a finding that no specific methodology is required with respect to the issue of pass-through. GATT Contracting Parties envisioned that a simple A to B transaction of a financial contribution from a government to a producer of a good would fail to encompass the entire realm of potential subsidies. As such, the text provides that subsidies may also be bestowed “indirectly”. A Drafting Committee Report on subsidies, adopted by the Contracting Parties to the GATT 1947 on 24 May 1960 provides clear evidence that the drafters purposefully inserted the words “directly or indirectly” to make clear that Article XVI:1 “can thus not be

¹⁸¹ Footnote omitted.

¹⁸² 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.

¹⁸³ Similarly, Article VI:3 of GATT 1994 states:

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party *in excess of an amount equal to the estimated bounty or subsidy determined to have been granted*, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation . . .

(Emphasis added). Article VI:3 of GATT 1994, like Article 19.4 of the SCM Agreement, establishes that the amount of the subsidy found is the upper limit on the amount of the countervailing duty that may be levied. Article VI:3 of GATT 1994 does not, however, address how the subsidy is to be calculated.

interpreted as being confined to subsidies operating directly to affect trade in the product under consideration.”¹⁸⁴

125. This flexibility in the text is crucial. To exclude subsidies received indirectly would be to render useless the ability under Article VI of the GATT 1994 to levy a countervailing duty in a manner that restores trade to the position in which it would have been in the absence of a subsidy. The report in *US – Softwood Lumber IV (AB)* also noted the negotiated intent of the text, determining that “[t]he phrase ‘subsid[ies] bestowed ... *indirectly*’, as used in Article VI:3, implies that financial contributions by the government to the production of *inputs* used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the *processed product*.”¹⁸⁵

126. However, negotiators did not reach any consensus as to how an investigating authority must investigate such subsidies in the context of a countervailing duty investigation. During the Uruguay Round, Members were unable to agree on text they felt confident would account for every possible factual situation that might lead to indirect subsidization. One Member noted that “[s]ince the issue of indirect subsidies has rarely been broached outside the context of upstream subsidies exclusively as those given to an input producer and required by the government to be passed through to the downstream producer, even though we agree that such a subsidy is a countervailable input subsidy... [a] comprehensive definition of indirect subsidies, in our opinion, is difficult to achieve.”¹⁸⁶

127. In light of the difficulty Members recognized with respect to defining all indirect subsidies, it is no surprise that they did not set out a particular test for identifying whether and to what extent a subsidy on an input gives rise to a subsidy on an end-product; using a one-size-fits-all approach could create situations where it is effectively impossible to countervail certain indirect subsidies even where the benefit of the subsidy clearly is passed through. Members noted during the Uruguay Round negotiations that an investigating authority could not rely on a single factor to irrefutably determine that downstream producers received a benefit as a result of subsidies provided to upstream products, not even price. In fact, one proposal by a Member acknowledged that different factual scenarios may call for a different type of analysis, suggesting that:

In cases where the input purchase price is equivalent to the prevailing market price, the investigating authorities may need to investigate further to the extent that the market price is suspected of being unduly influenced by the subsidy on the input in question,

¹⁸⁴ Drafting Committee Report on Subsidies, BISD 3S/81, para. 15.

¹⁸⁵ *US – Softwood Lumber IV (AB)*, para. 140.

¹⁸⁶ GATT, Uruguay Round-Group of Negotiations on Goods-Negotiating Group on Subsidies and Countervailing Measures-Subsidies and Countervailing Measures-Note by the Secretariat, MTN.GNG/NG10/W/4 (28 April 1987), p. 15.

and thus, is not a valid test of non-pass-through. Validity may be suspected where, for example, the subsidized input producer(s) represent(s) all or a predominant proportion of total sales of that input or where the end-product producer(s) under investigation purchase all or a predominant share of the subsidized inputs such as to unduly influence the market price.¹⁸⁷

128. The EU’s reliance on prior WTO reports is also unavailing. The EU frequently cites to the Appellate Body Report in *US – Softwood Lumber IV*. In that dispute the Appellate Body examined whether the investigating authority was required to make individual findings of a benefit with respect to downstream producers that were not individually investigated, rather than in the aggregate, where the producers of the input and the processed product are not the same entity.¹⁸⁸ The Appellate Body found, in that context, that benefit “cannot simply be presumed”.¹⁸⁹ It explained that the obligation in Article VI of the GATT 1994 to make a determination of a benefit must be fulfilled before countervailing duties can be imposed consistent with Article 19.¹⁹⁰ It agreed¹⁹¹ with the panel’s finding that:

If it is not demonstrated that there has been such a pass-through of subsidies from the subsidy recipient to the producer or exporter of the product, then it cannot be said that subsidization in respect of that product, in the sense of Article 10, footnote 36, and Article VI:3 of GATT 1994, has been found.¹⁹²

129. The Appellate Body’s findings therefore confirmed that Article VI:3 of the GATT 1994 requires a finding of benefit.¹⁹³ It does not, however, identify Article VI:3 as containing a specific methodology to determine whether and to what extent a benefit is conferred to a downstream producer where the subsidy is granted to an upstream producer.

130. The EU also relies heavily on a GATT Panel Report from thirty years ago to bolster its claims that a pass-through analysis requires an analysis of “price differentiation”. However, the GATT Panel in *US – Canadian Pork* made a finding of the opposite, that “subsidies need not in all cases ... have a price effect to be countervailable”.¹⁹⁴ Rather, the Panel found, a “decision as

¹⁸⁷ GATT, Uruguay Round-Group of Negotiations on Goods-Negotiating Group on Subsidies and Countervailing Measures-Subsidies and Countervailing Measures-Note by the Secretariat, MTN.GNG/NG10/W/4 (28 April 1987), p. 17.

¹⁸⁸ *US – Softwood Lumber IV (AB)*, para. 147-149.

¹⁸⁹ *US – Softwood Lumber IV (AB)*, para. 143.

¹⁹⁰ *US – Softwood Lumber IV (AB)*, para. 154 (citing *US – Countervailing Measures on Certain EC Products (Panel)*, para. 7.44).

¹⁹¹ *US – Softwood Lumber IV (AB)*, para. 146.

¹⁹² *US – Softwood Lumber IV (Panel)*, para. 7.91.

¹⁹³ *US – Softwood Lumber IV (AB)*, para. 154.

¹⁹⁴ *US – Canadian Pork (GATT Panel)*, para. 4.9.

to the existence of a subsidy must result from an examination of all relevant facts;”¹⁹⁵ it is not for a panel to determine what factors an investigating authority must take into account.¹⁹⁶

131. Therefore, the EU is wrong when it argues that:

[t]he essence of a pass-through test is to determine whether and to what extent the subsidies granted to the input (raw) product led to a *decrease in the level of prices* for the input product paid by the processors below the level they would have to pay for the input product from other commercially sources of supply.¹⁹⁷

132. Rather, consistent with the text of the GATT 1994 and SCM Agreement, as well as the negotiation history of Article VI, no such “test” is required. Therefore, the Panel should reject the EU’s claims under Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement, as they do not contain an obligation (much less a “decrease in the level of prices” test) regarding how to conduct a pass-through analysis.

B. Section 771B of the Tariff Act of 1930 Does Not “Automatically” “Presume” Pass-Through

133. The EU argues that Section 771B “mandates an approach by the investigating authority which excludes the carrying out of a pass-through analysis” and which irrebuttably presumes pass-through for processed agricultural products.¹⁹⁸ It further claims that Section 771B “provides for an attribution of benefit in the form of a non-rebuttable presumption of pass-through that is inconsistent with the GATT 1994 and the SCM Agreement”.¹⁹⁹ The EU’s claims are in error both because they rest on a faulty legal theory, and because they reflect a misunderstanding and misrepresentation of the U.S. law.

134. Section 771B of the Act addresses the calculation of countervailable subsidies on certain processed agricultural products, and states:

In the case of an agricultural product processed from a raw agricultural product in which—

(1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and

¹⁹⁵ *US – Canadian Pork (GATT Panel)*, para. 4.8.

¹⁹⁶ *US – Canadian Pork (GATT Panel)*, para. 4.10.

¹⁹⁷ EU FWS, para. 407 (footnote omitted) (emphasis added).

¹⁹⁸ EU FWS, para. 400.

¹⁹⁹ EU FWS, para. 391.

(2) the processing operation adds only limited value to the raw commodity,

countervailable subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.²⁰⁰

135. Section 771B directs the USDOC to employ a step-by-step analysis for agricultural products to determine whether and to what extent a benefit provided to the upstream raw agricultural product can be attributed to the downstream processed agricultural product. It contains a set of “cumulative conditions”²⁰¹ that must be fulfilled in order for the USDOC to attribute the benefit received by raw agricultural product producers to downstream processed products. In this regard, the statute provides a basis to make a finding attributing benefit to a downstream product, in the way that the “pass-through” concept has been understood. These cumulative conditions provide utility to the USDOC by making available a remedy in certain distinct circumstances that otherwise would not be addressed were it confined to the “price differentiation” test insisted upon by the EU.

136. The Congressional Record for Section 771B illustrates the particular factual circumstances associated with agricultural products identified by the U.S. Congress, and the importance of providing investigating authorities with an alternative method, specific to agricultural commodities, to evaluate the benefit conferred on the product under investigation. Specifically, members of Congress found that:

The upstream subsidies test, if applied to agricultural commodities, would understate the magnitude of the subsidy and permit wholesale circumvention of the countervailing duty statute. The trade statute would be rendered essentially useless in the case of subsidized agricultural commodities.²⁰²

137. In essence, by enacting Section 771B, the U.S. Congress sought to eliminate the possibility that “a foreign nation could avoid U.S. countervailing duty on an agricultural product merely by doing some minor processing of the agricultural product before it is exported to the United States”.²⁰³ Such economic circumstances are precisely the impetus for why the U.S. Congress enacted Section 771B. The U.S. Congress appropriately has created different mechanisms for the USDOC to use for an analysis of the benefit conferred in the context of indirect subsidies that is fact-specific and responsive to the economic realities of trade in different industries. The mechanism under Section 771B recognizes the economic realities of

²⁰⁰ Section 771B of the Tariff Act of 1930 (Exhibit USA-1).

²⁰¹ EU FWS, para. 371.

²⁰² 133 Congressional Record S8787-01 (June 26, 1987) (Exhibit USA-9) at S8815.

²⁰³ See 133 Congressional Record S8814 (Exhibit USA-9) at S8815). See also Issues and Decision Memo for Final Determination C-469-818 (Exhibit EU-2), p. 23.

trade in raw agricultural products and processed downstream products and provides for USDOC to conduct an analysis where certain market conditions exist – namely, (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product; and (2) the processing operation adds only limited value to the raw commodity.

138. Therefore, the EU is wrong that Section 771B does not “take into consideration the various factors that may be relevant to assess whether (and to what extent) a subsidy granted to a raw input product lowers its price and hence passes through to processors;”²⁰⁴ and that the very purpose of Section 771B is to avoid carrying out a pass-through analysis for agricultural products and to “replace such test with a simple presumption of full pass-through.”²⁰⁵ This contention is based on the EU’s earlier arguments that an analysis of pass-through requires an analysis of price differentiation. As the United States explained in Section IV.A, the EU’s claim that a pass-through analysis requires an analysis of price differentiation in the context of attributing a benefit to indirect subsidy recipients is simply incorrect.

139. As the U.S. Congress found, a subsidy that affects the trade of a raw agricultural commodity necessarily affects the trade of a product processed exclusively from the raw commodity. Section 771B was enacted to address the special commercial and economic circumstances presented by some agricultural industries in connection with the provision of subsidies and the effectiveness of countervailing remedies sanctioned by the GATT 1994. Indeed, a raw agricultural commodity is often devoted completely to the production of a processed product. Similarly, a product processed from a raw agricultural commodity often is produced substantially from the raw product.²⁰⁶ Whenever these circumstances exist, a subsidy that affects the production of the raw product necessarily affects trade in the product processed exclusively from the raw product because the production of the two products is inextricably linked. In this regard, a countervailing duty imposed on the raw commodity alone would fail to offset the full effects on trade caused by the subsidy to the raw commodity because production – and the effects of the subsidy – would simply shift to the product processed exclusively from the raw commodity.

140. The EU has failed to show that Section 771B does not contain a pass-through analysis because it does not require an analysis of price differentiation or that it mandates a “presumption” that the benefit to upstream producers passes through to downstream producers. In contrast, Section 771B provides for USDOC to conduct an analysis that is tailored to the specific factual and economic circumstances that are relevant to agricultural commodities. As such, Section 771B provides a reasoned and coherent methodology for determining whether and to what extent a benefit is conferred to ripe olives that is fully consistent with the United States’ WTO obligations. The EU’s claims that Section 771B is inconsistent with Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement must therefore be rejected.

²⁰⁴ EU FWS, para. 410.

²⁰⁵ EU FWS, para. 395.

²⁰⁶ 133 Congressional Record S8787-01 (June 26, 1987) (Exhibit USA-9) at S8815.

C. The USDOC Applied Section 771B to the Facts on the Record, and Therefore Did Not Impermissibly Presume a Benefit to Ripe Olive Producers

141. The EU argues that an investigating authority may not presume that a subsidy provided to producers of an upstream product automatically benefits unrelated producers of downstream products.²⁰⁷ Rather, an investigating authority must “demonstrat[e] that the benefit has passed through to the processed product and thus benefits it indirectly.”²⁰⁸

142. As explained in Section IV.B, Section 771B sets out factual and economic circumstances that the USDOC must determine are present in order to attribute subsidies initially provided to upstream agricultural goods to downstream products. Specifically, the USDOC must find that (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product; and (2) the processing operation adds only limited value to the raw commodity. The USDOC cannot presume that either of these two factors exists in the abstract, but rather, must make findings based on a reasoned analysis supported by the record evidence.

143. Therefore as a factual matter, the EU errs in asserting that the USDOC “automatically” “presumes” that a benefit received by an upstream producer can be attributed to a producer of a downstream product. Further, as explained in Section IV.A, as a legal matter, the EU provides no basis in the text supporting its supposition that the GATT 1994 and the SCM Agreement provide a particular test for whether an indirect subsidy exists and whether and to what extent a subsidy to an upstream producers confers a benefit to a downstream producer. And, as demonstrated in Section IV.B, Section 771B contains a valid methodology for determining pass-through.

144. The USDOC used the methodology in Section 771B to determine whether the benefit calculated with respect to the upstream product – raw olives – was provided to the production of the processed product – ripe olives. The finding by the USDOC was one that an unbiased and objective investigating authority could have reached.

145. First, it examined the demand for raw olives and found that it depended substantially on the demand for processed olives.

146. The USDOC initially noted in its preliminary determination in the countervailing duty investigation that the reference to “the latter stage product” under the first prong of Section 771B is undefined.²⁰⁹ The USDOC found guidance in the legislative history of Section 771B,²¹⁰

²⁰⁷ EU FWS, para. 350.

²⁰⁸ EU FWS, para. 351 (footnote omitted).

²⁰⁹ Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 15.

²¹⁰ See 133 Congressional Record S8787-01 (June 26, 1987) (Exhibit USA-9) at S8815 (Statement from Senator Baucus: “a foreign nation could avoid a U.S. countervailing duty on an agricultural product merely by doing some minor processing of the agricultural product before it is exported to the United States. For example, a duty on raspberries could be avoided by merely freezing the raspberries before they are shipped to the United States...and that is why Senator Grassley and myself, with the support of Senator Pryor, are today offering an amendment to the

highlighting that “section 771B was enacted by Congress in order to capture the subsidies that are provided to raw agricultural products that are processed into a next-stage product, such as live swine into pork and paddy rice into milled rice. In this investigation, similarly, a raw olive is simply processed into the next-stage olive product.”²¹¹ In the context of Section 771B, absent a clear definition, the latter stage product is not limited to only include the product subject to investigation, ripe olives. The USDOC therefore correctly found that the first prong of the statute called for an examination of whether the demand for raw, unprocessed olives is substantially dependent on the demand for all processed olives.²¹²

147. The USDOC also determined that there is no magic number that would necessarily satisfy the first prong of Section 771B to demonstrate substantial dependence,²¹³ meaning its analysis could not rely on a benchmark level of dependence based solely on the USDOC’s past practice. Rather than using a benchmark, the USDOC’s examination of substantial dependence focuses “on the nature of the raw product and the market” and places weight on what would happen to the market for the raw product if demand for the processed product ceases to exist.²¹⁴

148. Importantly, the USDOC considered petitioner’s argument (that respondents did not dispute) that raw olives have no use other than as a processed product, of which there are two downstream products: table olives and olive oil.²¹⁵ The USDOC considered, therefore, that the demand for the prior stage product is 100 percent dependent on the demand for the latter stage product. However, even separating the two downstream products, the USDOC found that demand for raw olives is also substantially dependent on demand for table olives.²¹⁶

149. Second, the USDOC examined the processing operation used to turn raw olives into ripe olives. The petitioner provided quantitative data demonstrating that processing the raw input added

trade bill that directs the Commerce Department to place duties on processed agricultural products if the raw agricultural product is being subsidized.”).

²¹¹ Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 15. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (Exhibit EU-2), p. 22.

²¹² Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 15. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (Exhibit EU-2), pp. 21-22.

²¹³ Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 16 (“To date the Department has not found, or otherwise established, a specific minimum threshold for what amount is considered ‘substantially dependent.’”). Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (Exhibit EU-2), p. 22.

²¹⁴ See Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 16.

²¹⁵ Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 13.

²¹⁶ Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 16. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (Exhibit EU-2), p. 22.

three percent to its value. In the absence of any quantitative data from respondents, the USDOC determined that the three percent value-added from processing activities represents a limited value-added to the raw commodity, in accordance with section 771B(2) of the Act.²¹⁷ The USDOC also determined that the processing failed to change the essential character of the raw olive.²¹⁸ The USDOC therefore concluded that the processing operation added only limited value.²¹⁹

150. As a result of the USDOC's investigation, it found that both prongs of section 771B were satisfied.²²⁰ Having satisfied both prongs of Section 771B, the USDOC determined that the subsidy provided to olive growers bestowed a benefit to ripe olive producers.²²¹ The Panel should therefore reject the EU's claims that the USDOC "presumed" a benefit to ripe olive producers in the underlying investigation.

D. Conclusion

151. The EU has failed to demonstrate that the USDOC's determination of benefit in the underlying investigation runs afoul of Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement. As explained in Section IV.A, the EU's claim that a pass through analysis requires an analysis of price differentiation is based on an errant interpretation of what is required by the GATT 1994 and the SCM Agreement. In Section IV.B, the United States showed that Section 771B does not mandate a presumption of a benefit. Rather, it provides for USDOC to conduct an analysis of the factual and economic circumstances associated with trade in agricultural commodities, to determine whether and to what extent a benefit is conferred to ripe olives. And as demonstrated in Section IV.C, the EU is simply wrong that the USDOC "presumed" a benefit to ripe olive producers in the underlying investigation inconsistent with U.S. obligations. The Panel should therefore reject the EU's claims under Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement.

²¹⁷ Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 16. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (Exhibit EU-2), pp. 22-23.

²¹⁸ Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 16. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (Exhibit EU-2), pp. 22-23.

²¹⁹ Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 16. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (Exhibit EU-2), pp. 22-23.

²²⁰ Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 15. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (Exhibit EU-2), p. 22.

²²¹ Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), pp. 15-17.

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

152. In the injury investigation, the Commission determined that dumped and subsidized ripe olives from Spain were causing material injury to the domestic industry producing ripe olives.²²² The EU’s first written submission challenges the Commission’s injury determination as inconsistent with various paragraphs of Article 15 of the ASCM and Article 3 of the ADA.

153. At the root of the EU’s challenge of the Commission’s injury analysis is its overarching claim that the Commission failed to assess the effects of unfairly traded imports of ripe olives from Spain on the domestic industry as a whole. The EU’s challenge is premised on a misinterpretation of Article 15 of the ASCM and Article 3 of the ADA. The EU further challenges that the Commission analyzed the effects solely on one segment of the market to the exclusion of other market segments. This contention is incorrect as a factual matter. According to the EU, this alleged examination of only one part of the industry to the alleged exclusion of considering the impact of unfairly traded imports of ripe olives on the domestic ripe olive industry as a whole undermined all aspects of the Commission’s injury determination, including its volume, price effects, causation, and non-attribution analyses.

154. With respect to the Commission’s volume analysis, the EU argues that the Commission did not find any absolute or relative increases in subject imports, and that as a result, its finding that subject import volume was “significant” conflicts with the requirement in Article 15.2 of the ASCM and Article 3.2 of the ADA,

155. The EU further challenges the Commission’s price effects findings as inconsistent with Article 15.2 of the ASCM and Article 3.2 of the ADA, based on the contention that the Commission did not find any price suppression or depression. The EU takes the position, based on an errant interpretation of what is required by the cited provisions, that absent a finding of price suppression or depression, an investigating authority may make a finding of adverse price effects.

156. Largely using the same factual basis of its challenge of the Commission’s volume and price analysis, the EU also argues that the Commission’s impact analysis is inconsistent with Articles 15.1 and 15.4 of the ASCM and Articles 3.1 and 3.4 of the ADA. The EU misinterprets the relationship between an authority’s obligations with respect to its analysis of volume and price effects and its obligation to conduct an impact analysis. This misinterpretation informs its position that an error in the Commission’s volume and price effects analysis necessarily results in a breach of Articles 15.4 and 3.4. For the same misguided reasons, the EU also argues that the

²²² *Ripe Olives from Spain, Inv. Nos. 701-TA-582 & 731-TA-1377 (Final)*, USITC Pub. 4805 (July 2018) (Exhibit EU-5) at 1. Three of the four participating Commissioners voted in the affirmative. As the EU repeatedly notes in its submission, one of the four participating Commissioners weighed the record evidence differently and reached a negative determination.

Commission did not establish the necessary causal link between subject imports and injury to the domestic industry, in alleged breach of Articles 15.5 and 3.5.

157. The EU also contends that the Commission did not adequately ensure that any material injury caused by factors other than subject imports, particularly decreasing apparent consumption and nonsubject imports, was not attributed to subject imports of ripe olives from Spain. The EU's claims are based on a selective and incomplete reading of the Commission's determinations and on a misinterpretation of Article 15 of the ASCM and Article 3 of the ADA.

158. In Section V.A, the United States will first demonstrate that the EU errs in arguing that the Commission's volume analysis was inconsistent with the ASCM and ADA. In particular, we will show the error in the EU's argument that an investigating authority may not pay particular attention to one segment of the domestic industry in its analysis. Further, the United States will explain that the Commission did not fail to consider whether there was a significant increase in the volume of subsidized and dumped imports, and that a finding of absolute or relative volume increase was not required.

159. Second, in Section V.B, the United States will rebut the EU's argument that the Commission's price effects analysis was inconsistent with the ASCM and ADA. In particular, we will show the error in the EU's argument that an investigating authority may not pay particular attention to one segment of the domestic industry in its analysis, for the same reasons explained in Section V.A. Further, we will demonstrate that the EU errs by arguing that the Commission's finding of significant price effects is inconsistent with the ASCM and ADA in the absence of price depression or suppression.

160. Third, in the event the Panel determines to address the EU's claims under Articles 3.4 and 15.4, in Section V.C, the United States will show that the EU failed to show that the Commission did not consider all of the relevant economic factors having a bearing on the state of the entire domestic industry producing ripe olives.

161. Fourth, in Section V.D, the United States will disprove the EU's argument that the Commission did not establish a causal link between subject imports and injury to the domestic industry.

162. Finally, in Section V.E, the United States will show the error in the EU's claim that the Commission did not account for any injury caused by factors other than subject imports as part of its non-attribution analysis.

163. As such, the EU has failed to establish a *prima facie* case that the USITC's injury determination is inconsistent with Articles 15.1, 15.2, 15.4, and 15.5 of the ASCM and Articles 3.1, 3.2, 3.4, and 3.5 of the ADA.

A. The EU Has Failed to Make a *Prima Facie* Case that the USITC’s Analysis of Volume Was Inconsistent with Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA

1. *The EU’s argument that Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA restrict an investigating authority from considering the volume of individual segments within the domestic industry has no textual basis. Its argument that the USITC considered individual market segments to the exclusion of the rest of the domestic industry is factually incorrect.*

164. The EU’s basic theory, reiterated throughout its first written submission, is that the Commission improperly engaged in an analysis of only one segment of the domestic industry rather than the domestic industry “as a whole”. In particular, the EU argues that the Commission was required, pursuant to Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA, to conduct a “volume effect” analysis at the level of the domestic industry as a whole.²²³ According to the EU, “the only relevant volume effect analysis under Article 15.2 may relate to the ripe olive industry *as a whole*, certainly absent any explanation to the contrary.”²²⁴ As the United States explains in this submission, the EU’s claim is fundamentally misdirected, as neither Article 15.2 of the SCM Agreement nor Article 3.2 of the Anti-Dumping Agreement require the consideration of volume “effects”, nor do Articles 15.1 and 3.1 provide any additional support for this contention.

165. The EU further contends that the Commission’s segmentation of the domestic industry represents a “partial” analysis, and is “entirely meaningless and unsuited for a volume effect analysis”.²²⁵ In the EU’s view, market segmentation is only appropriate where it “helps to identify the competitive interactions between the different product types within a domestic industry.”²²⁶ The EU argues that the Commission’s segmentation of the domestic market with respect to its volume analysis “was to artificially create a volume effect that could not be established at the level of the industry as a whole.”²²⁷ Moreover, the EU alleges that the Commission did not explain in its determination the relevance of the different customer group segments in its description of the domestic industry or the conditions of competition.²²⁸ This line of argumentation is based on a misinterpretation of the cited provisions as well as a selective and incomplete reading of the Commission’s determinations.

166. In addition to its contention that the Commission erred in focusing on the retail segment of the market in its analysis of volume,²²⁹ the EU variously asserts that the Commission ignored

²²³ EU FWS, paras. 458-465.

²²⁴ EU FWS, para. 487.

²²⁵ EU FWS, para. 461.

²²⁶ EU FWS, para. 471. *See ibid.* at para. 473. The EU contends that market segmentation may only occur along customer groups if those customer groups only purchase certain differentiated product types.

²²⁷ EU FWS, paras. 462 and 469.

²²⁸ EU FWS, para. 469.

²²⁹ EU FWS, paras. 466-492.

the other segments and the overall market, where subject import volumes declined, and extended its conclusions concerning subject import volume in the retail segment to these other segments and the overall market.²³⁰ The EU is wrong as a factual matter.

167. Therefore, the EU argues that the USITC’s volume analysis was inconsistent with Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA as it was not based on positive evidence and an objective examination, but rather was “arbitrary” and based on “meaningless” evidence.²³¹ However, the EU’s position has no basis in the text of the ASCM or the ADA. The United States also notes that the EU’s claim that the Commission’s analysis of volume failed to consider the industry “as a whole” contrary to Articles 15.2 and 3.2 is largely derivative of its claim that the Commission failed to conduct an objective examination based on positive evidence, consistent with Articles 15.1 and 3.1, of the effects of the subject imports on the entire domestic industry.²³²

168. Article 15.1 of the ASCM and Article 3.1 of the ADA provide the following:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the [dumped or subsidized] imports and the effect of the [dumped or subsidized] imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.

169. As observed by the Appellate Body, the term “positive evidence” relates to “the quality of the evidence that an investigating authority may rely upon in making a determination, and requires the evidence to be affirmative, objective, verifiable, and credible.”²³³ The term “objective examination” requires “that an investigating authority’s examination “conform to the dictates of the basic principles of good faith and fundamental fairness” and be conducted “in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation”.”²³⁴

170. Articles 15.1 and 3.1 are “overarching” provisions that set forth “a Member’s fundamental, substantive obligation” with respect to injury determinations and “informs the more detailed obligations in” the succeeding paragraphs.²³⁵ These include the obligations to consider whether there has been a significant increase in the volume of subsidized and/or dumped

²³⁰ EU FWS, paras. 494-511, 513-517.

²³¹ EU FWS, paras. 611-615.

²³² See EU FWS, paras. 466-492, 532-538, 566-572, and 611-615.

²³³ *China – GOES (AB)*, para. 126, citing *US – Hot-Rolled Steel (AB)*, para. 192.

²³⁴ *China – GOES (AB)*, para. 126, citing *US – Hot-Rolled Steel (AB)*, para. 193.

²³⁵ *China – GOES (AB)*, para. 126, citing *Thailand – H-Beams (AB)*, para. 106.

imports. However, neither Article 15.1 nor Article 3.1 articulates a requirement for an investigating authority to conduct a volume analysis for the domestic industry “as a whole.”

171. With respect to an investigating authority’s volume analysis as part of its overall injury analysis, Article 15.2 of the ASCM and Article 3.2 of the ADA require an investigating authority to, in relevant part, undertake the following:

With regard to the volume of the [dumped or subsidized] imports, the investigating authorities shall consider whether there has been a significant increase in [dumped or subsidized] imports, either in absolute terms or relative to production or consumption in the importing Member ... No one or several of these factors can necessarily give decisive guidance.

172. The EU’s argument that Article 15 of the ASCM and Article 3 of the ADA did not permit the Commission to focus on the retail segment of the ripe olive market is not supported by the text of the agreements and is therefore wrong as a matter of law. In fact, the contention that an investigating authority may not look at particular market segments was directly contradicted by the Appellate Body in *US – Hot Rolled Steel*.²³⁶ In that case, the Appellate Body stated that “a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole” provided an investigating authority, in undertaking such an analysis, also considers the other parts that make up the industry as well as the industry as a whole.²³⁷

173. The Appellate Body considered, in this respect, that Article 3.4 of the ADA, which elaborates an obligation to “examin[e] the impact of the dumped imports on the domestic industry” through an “evaluation of all relevant economic factors and indices having a bearing on the state of the industry,” supported the Commission’s decision to undertake an evaluation of “particular parts, sectors, or segments within a domestic industry” provided it did so in an even-handed manner.²³⁸ The Appellate Body stated the following on the need for an even-handed analysis:

We have already stated that it may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the *Anti-Dumping Agreement* requires that such a sectoral examination be conducted in an “objective” manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in

²³⁶ *US – Hot Rolled Steel (AB)*, para. 204.

²³⁷ *US – Hot Rolled Steel (AB)*, para. 195. See also *China – HP-SSST (AB)*, paras. 5.210-5.212.

²³⁸ *US – Hot Rolled Steel (AB)*, paras. 194-195.

principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole.²³⁹

174. We agree with the EU that this excerpt provides useful interpretative guidance.²⁴⁰ However, it does not support the EU’s proposition that an authority may not pay particular focus on a particular market segment. To the contrary, the Appellate Body’s reference to “part[s], sector[s] or segment[s]” explicitly contemplates that an authority may analyze data and trends in a specific segment of a market, provided there is an economic basis to do so, and that other segments of the market are not ignored without explanation.²⁴¹

175. In the *Olives* investigation, certain aspects of the Commission’s volume analysis gave particular focus to the retail segment of the U.S. ripe olives market. The Commission had an economic basis to focus on the retail segment, where the domestic industry was concentrated.²⁴² The Commission was not, as the EU says, pulling something “out of its magician’s hat” by identifying discrete market segments and providing particular emphasis on segments where competition between the domestic like product and the unfairly traded imports actually occurred.²⁴³ Rather, the Commission solicited data from domestic processors and suppliers of imported ripe olives on their commercial shipments across all three channels of distribution to enable it conduct such an analysis.²⁴⁴

176. The data that the Commission collected in the underlying investigations indicated that during the POI the domestic industry sold predominantly to retailers and its participation in the institutional market was extremely limited.²⁴⁵ And while most of the unfairly traded imports during the POI were sold to distributors, an appreciable and increasing share were sold to retailers.²⁴⁶ By contrast, nonsubject imports were increasingly sold to the institutional channel.²⁴⁷ Consequently, during the POI, competition between the domestic industry and the

²³⁹ *US – Hot Rolled Steel (AB)*, para. 204.

²⁴⁰ EU FWS, para. 499.

²⁴¹ See *US – Hot Rolled Steel (AB)*, paras. 195 and 204. Consequently, the EU’s citation of the *US – Hot Rolled Steel (AB)* report for the contrary proposition, at paras. 450-454 of the EU’s First Written Submission, is out of context.

²⁴² According to an economic study submitted by the Government of Spain with its own prehearing brief, the domestic industry’s sales to customers in the retail segment accounted for between 85.3 and 94.0 percent of total annual shipments from 2013 through 2017. See Government of Spain’s Prehearing Brief (Exhibit USA-4) at 10-11; Report Accompanying Government of Spain’s Prehearing Brief (Exhibit USA-5) at 28-29.

²⁴³ EU FWS, paras. 460 and 490.

²⁴⁴ 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.

²⁴⁵ To collect the information necessary for its investigation, the Commission issued detailed questionnaires, developed with input from Petitioner and Respondents, to known industry participants. The Commission received questionnaire responses from: two domestic producers (*i.e.*, Bell Carter and Musco), accounting for virtually all domestic production; 32 importers, accounting for the vast majority of subject imports from Spain; 26 purchasers; and ten Spanish producers of ripe olives. USITC Pub. 4805 (Exhibit EU-5) at 3.

²⁴⁶ USITC Pub. 4805 (Exhibit EU-5) at 14-15.

²⁴⁷ USITC Pub. 4805 (Exhibit EU-5) at 25-26.

unfairly traded imports in the retail channel of distribution intensified and the Commission accordingly undertook a detailed examination of trends in this segment when conducting its volume analysis.²⁴⁸

177. The EU also argues that the Commission ignored the domestic industry as a whole. The Commission reasonably focused its analysis on the retail segment and properly explained why it did so. However, the EU is wrong as a factual matter in alleging that the Commission, in focusing on the retail segment of the market, excluded from its analysis the other two segments of the market or how the subject imports were impacting the totality of the domestic producers' sales.²⁴⁹

178. The Commission's report makes clear that it did in fact analyze data concerning *total* subject import volumes.²⁵⁰ It neither ignored the overall market nor purported to extrapolate its findings concerning the retail segment to the market as a whole. The same material the Commission cited to support its findings on import volume and market penetration in the retail segment of the market also includes data on the distribution and institutional/food market segments.²⁵¹

179. Moreover, the EU's contention that the Commission improperly assessed "volume effects" for subject imports pertains to a purported obligation that simply does not exist under the Agreements.²⁵² Neither Article 15.2 of the ASCM nor Article 3.2 of the ADA require an

²⁴⁸ The Government of Spain recognized the importance of the retail market to domestic producers, arguing in its prehearing brief that domestic producers "continue to be predominant in the retail sector, with approximately an 85% of total sales to that sector in 2017." See Government of Spain's Prehearing Brief (Exhibit USA-4) at 10-11; Report Accompanying Government of Spain's Prehearing Brief (Exhibit USA-5) at 28-29.

²⁴⁹ The USITC's approach in these investigations – where it collected and considered data for the entire domestic industry, while paying particular attention to the sector where that entire industry felt the most intense competition from unfair imports – is readily distinguishable from the non-representative collection of data found to be inconsistent with Articles 15.4 of the ASCM and 3.4 of the ADA in *EC – Fasteners (AB)*. In *EC – Fasteners*, the Appellate Body cautioned against limiting an investigation of an industry containing multiple firms to data provided only by entities that support an antidumping petition and are thus more likely to be performing poorly. See *EC – Fasteners (AB)*, para. 427. In contrast, in these investigations, the Commission sought and relied on data from processors responsible for virtually all domestic ripe olives production.

²⁵⁰ The Commission's opinion made findings based on *total* subject import quantity, which declined from 35,037 short tons in 2015 to 32,782 short tons in 2017, nonsubject import volume data. USITC Pub. 4805 (Exhibit EU-5) at Tables IV-2 and IV-5. The record before the Commission further indicated that subject import value increased overall during the POI, from \$71.5 million in 2015 to \$76.3 million in 2017. USITC Pub. 4805 (Exhibit EU-5) at Table IV-5.

²⁵¹ USITC Pub. 4805 (Exhibit EU-5) at Tables II-1 ("Ripe olives: U.S. producers' and importers' U.S. commercial shipments, by sources and channels of distribution, 2015-17"), IV-5 ("Ripe olives: Apparent U.S. consumption, 2015-17"), IV-6 ("Ripe olives: U.S. producers' and U.S. importers' commercial U.S. shipments to distributors, 2015-17"), IV-7 ("Ripe olives: U.S. producers' and U.S. importers commercial U.S. shipments to retailers, 2015-17"), and IV-8 ("Ripe olives: U.S. producers' and U.S. importers commercial U.S. shipments to institutional/food processors, 2015-17"). The EU relies on the data in Table II-1 at Table 1 of page 157 of its submission to substantiate its arguments that the Commission erred in focusing on the retail segment of the market.

²⁵² EU FWS, para. 502.

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.

180. For the foregoing reasons, the EU’s legal argument that the Commission improperly focused its volume analysis on the retail segment is based on a flawed interpretation of the obligation for investigating authorities to “consider” subject import volume and a flawed understanding of the required volume analysis that is unsupported by the text of Articles 15.2 and 3.2. Further, the EU’s factual argument that the Commission ignored the rest of the market or the overall market is based on a flawed reading of the Commission’s opinion. The EU has failed to demonstrate that the Commission’s consideration of volume was inconsistent with Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA.

2. *The EU errs in arguing that the Commission’s volume analysis was inconsistent with Article 15.2 of the ASCM and 3.2 of the ADA as a result of its finding that subject import volume was significant in the absence of any absolute or relative increases in volume*

181. The EU argues that Article 15.2 of the ASCM requires an authority to find “some sort of increase in subsidized imports,” whether “in absolute terms, relative to domestic production or relative to domestic consumption.”²⁵³ The EU posits that the Commission’s consideration of whether subject imports had a significant presence in the U.S. market does not satisfy WTO obligations.²⁵⁴

182. The EU’s argument that Article 15.2 of the ASCM and Article 3.2 of the ADA require an authority to find an absolute or relative increase in subject import volume is unsupported by the texts of those provisions. Moreover, its reliance on the panel report in *US – Countervailing Duty Investigations on DRAMs* grossly misrepresents the panel’s conclusions with respect to this issue.

183. Article 15.2 of the ASCM and Article 3.2 ADA state:

With regard to the volume of the [subsidized/dumped] imports, the investigating authorities shall consider whether there has been a significant increase in [subsidized/dumped] imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the [subsidized/dumped] imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the [subsidized/dumped] imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to

²⁵³ EU FWS, para. 525 (emphasis in original).

²⁵⁴ EU FWS, para. 525.

a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

184. A rigid requirement to find an increase in subject import volume would render meaningless the last sentence of Article 15.2, which states that “[n]o one or several of these factors [concerning volume or price effects] can necessarily give decisive guidance.” By their terms, neither Article 15.2 nor Article 3.2 condition the imposition of countervailing or antidumping measures, respectively, on a finding of a significant increase in subject import volume. This accords with the finding of the panel in *US – Countervailing Duty Investigation on DRAMS*, that the language of Article 15.2 “would seem to suggest that an injury determination may be consistent with Article 15 of the *SCM Agreement* even in the absence of a determination that (as opposed to consideration whether) there has been a significant increase in the volume of subsidized imports.”²⁵⁵

185. In *US – Countervailing Duty Investigation on DRAMS*, the panel explained how an investigating authority may “consider whether there has been a significant increase in subsidized imports” under Article 15.2 of the ASCM. It explained that the obligation to “consider” the issue did not further require that an authority find that there has been a significant increase in unfairly traded imports:

There are three ways in which an investigating authority may comply with the Article 15.2 requirement to “consider whether there has been a significant increase in subsidized imports.”[FN224] First, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports in absolute terms. Second, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports relative to domestic production. Third, the investigating authority may consider whether there has been a significant increase in the volume of

²⁵⁵ *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.233 n.224. The panel in *US – Countervailing Duty Investigation on DRAMS* also stated the following on this issue:

We note, however, that a finding of increased imports is a necessary condition for the imposition of a safeguard measure. This appears not to be the case for countervailing measures, since Article 15.2 of the *SCM Agreement* provides that “[n]o one or several of these [volume and price effect] factors can necessarily give decisive guidance.” This provision suggests that a countervailing measure may be imposed even in the absence of a significant increase in the volume of subsidized imports, provided the requisite price effects exist. If there is no need to demonstrate increased imports in all cases, one might conclude that there is no generalized requirement to establish any temporal correlation between increased imports and injury in the context of a countervail investigation.

US – Countervailing Duty Investigation on DRAMS (Panel), para. 7.319 n.283.

subsidized imports relative to domestic consumption. Article 15.2 provides that “[n]o one or several of these factors can necessarily give decisive guidance.”

FN224: Article 15.2 does not require a determination that there has been a significant increase in subsidized imports. It simply requires investigating authorities to “consider” whether there has been such an increase. Although this issue is not disputed by the parties in this case, we note that the language of Article 15.2 would seem to suggest that an injury determination may be consistent with Article 15 of the SCM Agreement even in the absence of a determination that (as opposed to consideration whether) there has been a significant increase in the volume of subsidized imports.²⁵⁶

186. Notably, while the EU’s first written submission also cites to this same excerpt, it omits the footnote, which directly contradicts its argument that the “text of Article 15.2 unequivocally stipulates that a volume effect requires an increase of subject imports.”²⁵⁷

187. Furthermore, Articles 15.2 of the ASCM and 3.2 of the ADA require an investigating authority to “consider whether there has been a significant increase” in unfairly traded imports”. The text of those provisions do not include a requirement that there be increased imports as a prerequisite to an affirmative injury determination. Thus, notwithstanding the EU’s attempt to expand this obligation to require a *determination* that there was a significant increase of subsidized/dumped imports, the Agreements do not require an investigating authority to find an increase in subject import volume, let alone a significant increase.

188. The obligation to “consider” in Articles 15.2 and 3.2 is not tantamount to a requirement to make a definitive determination on the matter under consideration. In this respect, the Appellate Body has emphasized that:

The notion of the word “consider”, when cast as an obligation upon a decision maker, is to oblige it to take something into account in reaching its decision. By the use of the word “consider”, Articles 3.2 and 15.2 do not impose an obligation on an investigating authority to make a definitive determination on the volume of subject imports and the effect of such imports on domestic prices. Nonetheless, an authority's consideration of the volume of subject imports and their price effects pursuant to Articles 3.2 and 15.2 is also subject to the overarching principles,

²⁵⁶ *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.233.

²⁵⁷ EU FWS, para. 523 (citing to *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.233 (footnote omitted)).

under Articles 3.1 and 15.1, that it be based on positive evidence and involve an objective examination.²⁵⁸

189. The obligation for investigating authorities to “consider” whether there has been a significant increase in subsidized or dumped imports for purposes of Article 15.2 of the ASCM and Article 3.2 of the ADA is distinct from other obligations in Articles 15 and 3, such as that of “demonstrat[ing]” a causal connection between subject imports and injury to the domestic industry in Articles 15.5 and 3.5. It follows that an investigating authority’s obligation to “consider” whether there has been a significant increase in subsidized or dumped imports requires authorities to “take into account” whether subject import volume increased in absolute terms or relative to domestic production or consumption. This obligation does not, however, require an authority to make a definitive determination that subject import volume has increased pursuant to any of these three metrics. Consequently, an injury analysis may be consistent with Articles 15.2 and 3.2 even in the absence of such a finding.²⁵⁹

190. The term “significant” in Articles 15.2 and 3.2 does not have a specific meaning in the ASCM or ADA, but rather is subject to the “positive evidence” and “objective examination” requirements of Articles 15.1 and 3.1. The panel in *Thailand – H-Beams* previously opined that the obligation to “consider” whether the increase in dumped imports is “significant” within the meaning of Article 3.2 of the ADA is met when it is “apparent in the relevant documents in the record” that an investigating authority has “given attention to and taken into account” whether there has been a significant increase in dumped imports, in absolute or relative terms:

We examine the nature of the obligation in Article 3.2. We note that the text of Article 3.2 requires that the investigating authorities “consider whether there has been a significant increase in dumped imports”. The Concise Oxford Dictionary defines “consider” as, *inter alia*: “contemplate mentally, especially in order to reach a conclusion”; “give attention to”; and “reckon with; take into account”. We therefore do not read the textual term “consider” in Article 3.2 to require an explicit “finding” or “determination” by the investigating authorities as to whether the increase in dumped imports is “significant”. While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports as “significant”, and to give a reasoned explanation of that characterization, we believe that the word “significant” does not necessarily need to appear in the text of the relevant document in order for the requirements of this provision to be fulfilled. Nevertheless, we consider that it must be apparent in the relevant documents in the record that the investigating authorities have

²⁵⁸ *China – GOES (AB)*, para. 130 (footnotes omitted).

²⁵⁹ *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.233.

given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms.²⁶⁰

191. In the *Olives* investigations, the Commission considered the volume of subject imports in a manner consistent with this obligation. In conducting this objective analysis, the Commission reasonably concluded that subject imports had a significant presence in the U.S. market on an absolute and relative basis, and increased their presence in the retail segment, which enabled them to capture market share directly at the expense of the domestic industry in that segment.

192. The Commission found the volume of subject imports during the POI to be significant on several bases.²⁶¹ One basis was on an absolute level; the Commission acknowledged that subject import volume fluctuated on an annual basis over the course of the POI.²⁶² The Commission further found the volume of subject imports to be significant relative to apparent U.S. consumption since subject imports' market share remained at significant levels during the POI; again, it acknowledged that subject import market penetration fluctuated annually.²⁶³ The Commission also found that the ratio of subject imports to U.S. production was significant.²⁶⁴

193. In addition to reciting and evaluating these data from the overall market, the Commission further considered subject import volume in the three major channels of distribution.²⁶⁵ The Commission observed that subject imports increasingly entered the retail segment – which, as previously stated, was the predominant channel of distribution for the domestic industry. The percentage of subject imports shipped to the retail segment increased from 7.3 percent in 2015 to 11.5 percent in 2016 and 17.0 percent in 2017.²⁶⁶ The Commission observed that subject imports captured market share from the domestic industry in the retail segment, including in both the retail private label and retail branded subsegments of the retail segment.²⁶⁷

194. The Commission directly addressed the absolute and relative presence of subject import volumes during the POI and did not find that they increased from 2015 to 2017.²⁶⁸

²⁶⁰ *Thailand – H-Beams (Panel)*, para. 7.161.

²⁶¹ USITC Pub. 4805 (Exhibit EU-5) at 18.

²⁶² USITC Pub. 4805 (Exhibit EU-5) at 18.

²⁶³ USITC Pub. 4805 (Exhibit EU-5) at 18.

²⁶⁴ USITC Pub. 4805 (Exhibit EU-5) at 19 & n.109.

²⁶⁵ USITC Pub. 4805 (Exhibit EU-5) at IV-11 and Table IV-5. The domestic industry's market share declined during the POI by quantity (short tons dry weight) and by value (dollars). *Id.* Subject imports volume, by quantity, which declined overall by 6.4 percent during the POI, increased by 0.3 percent from 35,037 short tons in 2015 to 35,139 short tons in 2016 and declined by 6.7 percent to 32,782 short tons in 2017; by value, subject import volume increased overall by 6.6 percent during the POI, from \$71.5 million in 2015 to \$76.3 million in 2017. *Id.*

²⁶⁶ USITC Pub. 4805 (Exhibit EU-5) at 18 & n.105.

²⁶⁷ USITC Pub. 4805 (Exhibit EU-5) at 18-19.

²⁶⁸ USITC Pub. 4805 (Exhibit EU-5), p. 18. Although outside the POI for the final phase of the investigation, the Government of Spain itself noted the increase in the volume of subject imports starting in 2013. According to data provided by the Government of Spain in its prehearing submission, ripe imports from Spain increased from 24,085

Consequently, it considered the issue of whether subject import volume increased and concluded that, notwithstanding the lack of such an increase overall, subject imports maintained a significant presence in the U.S. market in absolute and relative terms, and increased their presence in the retail segment, which was the largest market segment for the domestic industry.²⁶⁹ The Commission consequently conducted the examination of subject imports volume as required by Articles 15.2 and 3.2 and provided an analysis that was a reasoned explanation supported by positive evidence.

195. The EU has therefore failed to demonstrate that the Commission’s consideration of whether there was a significant increase in the volume of dumped or subsidized imports in the underlying investigations was inconsistent with Articles 15.2 and 3.2.

B. The EU Has Failed to Make a *Prima Facie* Case that the USITC’s Analysis of Price Effects Was Inconsistent with Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA

1. *The Commission properly considered whether prices of unfairly traded imports significantly undercut those of the domestic like product, and the EU’s argument that the Commission erred in finding price effects in the absence of price depression or suppression has no basis in the SCM Agreement or the Anti-Dumping Agreement*

196. The EU argues that the Commission’s finding of no price depression or suppression in the underlying investigations necessarily means that the Commission could not have properly determined that subject imports had adverse price effects.²⁷⁰ The EU contends that in the absence of price depression or suppression an investigating authority may not make a finding of adverse price effects through undercutting/underselling. It further argues that it could only be the volume of the domestic industry that was potentially affected by price undercutting, not prices, in the absence of price depression or price suppression.²⁷¹ In the EU’s view, the Commission’s analysis of price effects was inconsistent with Article 15.2 of the ASCM and Article 3.2 of the ADA. However, the EU’s argument is based on a clear misreading of the cited provisions and a misinterpretation of the factors an authority is required to consider with respect to its price effects analysis.

197. Article 15.2 of the ASCM and Article 3.2 of the ADA state the following with respect to price effects:

metric tons (“MT”) in 2013 and 26,979 MT in 2014 to 29,739 MT in 2017. *See* Government of Spain’s Prehearing Brief (Exhibit USA-4) at 4.

²⁶⁹ The increased focus of imports on sales to retailers is highlighted by the almost 250 percent increase in the share of subject imports going to those customers between 2015 and 2017. USITC Pub. 4805 (Exhibit EU-5) at 18, fn.105, 21.

²⁷⁰ EU FWS, paras. 528-542.

²⁷¹ EU FWS, para. 528.

. . . With regard to the *effect* of the [subsidized/dumped] imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the [subsidized/dumped] imports as compared with the price of a like product of the importing Member, *or* whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.²⁷²

198. The Appellate Body has previously explained that “[t]he definition of the word “effect” is, *inter alia*, “something accomplished, caused, or produced; a result, a consequence.” The definition of this word thus implies that an “effect” is “a result” of something else.”²⁷³ An examination of price effects thus requires an investigating authority to examine whether subject imports significantly undercut the prices of like domestic products, or depressed or suppressed prices of these products to a significant degree. Read in conjunction with Article 15.1 of the ASCM and Article 3.1 of the ADA, investigating authorities must also ensure narrow comparability between the domestic and subject products for which prices are being examined, namely by comparing products that are sold at the same levels of trade (or in this case, through similar channels of distribution), and by making adjustments where required to reflect any material differences.²⁷⁴

199. Articles 15.2 and 3.2 explicitly recognize three alternative ways in which subject imports can have an “effect” on prices: through undercutting, “or” through price depression, “or” through price suppression. As the Appellate Body explained in *China - HP-SSST*, the inquiry into undercutting, on the one hand, and the inquiry into price depression or suppression, on the other, are separate inquiries, either of which can demonstrate price effects under Article 3.2 (and, similarly, under Article 15.2). While underselling can lead to price depression or suppression, the Agreements recognize that significant undercutting in and of itself may constitute a price effect:

. . .the two inquiries under the second sentence of Article 3.2 are separated by the words “or” and “otherwise”. The elements that are relevant to a consideration of whether there has been “significant price undercutting” may, therefore, “differ from those relevant to the consideration of significant price depression and suppression”. We do not read Article 3.2 as suggesting that the “effect” of price undercutting must either be price depression or price suppression. Instead, we agree with the Panel that, while

²⁷² Emphases added.

²⁷³ *China – GOES (AB)*, para. 135.

²⁷⁴ *China – GOES (AB)*, para. 200.

price undercutting by imports may lead to price depression or price suppression, “there is no requirement in Article 3.2 to demonstrate the existence of these other phenomena when considering the existence of price undercutting”.²⁷⁵

200. With respect to the relationship between the terms “price undercutting” and “significant” in Article 3.2 of the ADA, the Appellate Body previously stated, “term “price undercutting” in Article 3.2 is qualified by the word “significant”, which is relevantly defined as “important, notable, consequential”.²⁷⁶ The term “price undercutting” requires an investigating authority to undertake a “dynamic assessment of price developments and trends in the relationship between the prices of the dumped [or subsidized] imports and those of domestic like products over the duration of the POI,” whereas the qualifier “significant” requires an assessment of the “magnitude” of any price undercutting.²⁷⁷

201. The Commission used pricing data for four specific pricing products in its analysis of price undercutting (which is called the “underselling” analysis in the Commission opinion). In consultation with the parties, it chose four pricing products, two of which were produced for sale to customers in the retail segment, and two of which were produced for sale to customers in the institutional/food segment.²⁷⁸ These products ensured that the price comparisons reflected products of equivalent presentation (such as sliced versus whole pitted), weight, and packaging (such as how many cans or pouches per case), as well as at the same levels of trade.²⁷⁹ The Commission, accordingly, ensured that price comparability was not distorted by comparisons that might reflect presentation, packaging, or distribution differences.

202. Upon examination of the price comparison data, the Commission found that subject imports pervasively oversold the domestic like product in 37 of 48 quarterly price comparisons, at significant underselling margins.²⁸⁰ On a pricing product-specific basis, for Product 1 (retail branded cans), the Commission found that subject imports undersold the domestic product in four of 12 quarterly comparisons, all in 2017; for Product 2 (retail private label cans), subject imports undersold the domestic product in nine of 12 quarterly comparisons, mostly concentrated in the last two years of the POI; and for sales of Products 3 and 4 (institutional cans and pouches,

²⁷⁵ *China – HP-SSST (AB)*, para. 5.156 (footnotes and emphases omitted).

²⁷⁶ *China – HP-SSST (AB)*, para. 5.161 (footnotes omitted).

²⁷⁷ *China – HP-SSST (AB)*, para. 5.161.

²⁷⁸ USITC Pub. 4805 (Exhibit EU-5) at 19-20 & n.112. Respondents did not object to the Commission’s use of these pricing products in the underlying investigations. *See* Comments on the Commission’s Draft Questionnaires (Exhibit USA-2).

²⁷⁹ USITC Pub. 4805 (Exhibit EU-5), pp. 5-6.

²⁸⁰ USITC Pub. 4805 (Exhibit EU-5), pp. 20-21. The underselling margins ranged from 4.4 percent to 37.8 percent and averaging 30.3 percent, and on a significant volume basis.

respectively), subject imports undersold the domestic product in each available quarterly comparison.²⁸¹

203. Notwithstanding the absence of price depression or price suppression, the Commission found instances in which the domestic like product lost sales to the subject imports due to lower prices. Of 25 responding purchasers that responded to the Commission’s lost sales and lost revenue survey, 12 purchasers indicated that the subject imports that they purchased were priced lower than the domestic product, and six of these purchasers reported that price was a primary reason for their decision to switch purchases from the domestic like product to subject imports.²⁸²

204. The Commission concluded, in its price effects analysis, that:

- subject imports pervasively undersold the domestic like product across all four pricing products, with average underselling margins of 30.3 percent;
- the domestic industry’s sales were largely concentrated in the retail segment of the market during the POI;
- subject imports pervasively undersold the domestic product for sales of Product 2 (retail private label) in 2016 and 2017;
- subject imports also undersold the domestic product for sales of Product 1 (retail branded) in 2017; and
- the underselling and lost sales enabled the subject imports to maintain their significant presence in the overall market during the POI, and to take market share from the domestic industry in the important retail segment.²⁸³

205. In light of these facts, the Commission objectively determined, on the basis of positive evidence, that the underselling by subject imports was significant within the meaning of Articles 15.2 and 3.2.

206. As discussed above, there are three distinct ways in which subject imports can have an “effect” on prices for purposes of Articles 15.2 and 3.2: through undercutting “or” through price depression “or” through price suppression.²⁸⁴ The EU’s argument that the absence of price

²⁸¹ USITC Pub. 4805 (Exhibit EU-5), Tables V-5 – V-8, and V-10. *See also* USITC Pub. 4805 (Exhibit EU-5) at 20-21. The Commission observed that the pervasive underselling by subject imports in 2016 and 2017 for Product 2 coincided with increasing volumes of subject imports, which captured market share from the domestic industry for retail private label products in both of those years. The Commission also noted that subject imports undersold the domestic like product for Product 1 as they captured additional market share from the domestic industry for branded products.

²⁸² USITC Pub. 4805 (Exhibit EU-5), p. 21.

²⁸³ USITC Pub. 4805 (Exhibit EU-5), pp. 20-22.

²⁸⁴ *See China - HP-SSST (AB)*, para. 5.156.

depression or suppression in the underlying investigations negates the Commission’s finding of adverse price effects through undercutting/underselling fails and lacks any basis in the text of the ADA or the ASCM. Instead, the EU’s claim would have the effect of reading the references to “or” in the second sentences of Articles 15.2 and 3.2 out of these provisions. The EU thus relies on a flawed interpretation of the second sentences of Articles 15.2 and 3.2. It has therefore failed to demonstrate that the Commission’s finding that subject imports significantly undercut domestic prices was improper or inconsistent with Articles 15.2 and 3.2.

2. *The EU’s argument that the Commission’s analysis of price effects is flawed because the Commission arbitrarily divided the domestic industry into different segments is unsupported by the ASCM and the ADA*

207. The EU wrongly contends that the Commission erred in focusing on the retail segment of the market in its analysis of price effects.²⁸⁵ Specifically, the EU argues that the Commission’s price effects analysis, which it allegedly failed to carry out for the domestic industry as a whole, was “meaningless and superfluous,” and inconsistent with Articles 15.1 and 3.1 and Articles 15.2 and 3.2.²⁸⁶

208. For the same reasons the United States has set out above in Section V.A, neither the ASCM nor the ADA restricts an investigating authority from focusing its analysis on a particular segment of the domestic market. Here, the Commission determined that retail segment was the primary segment in which domestically produced and subject imported ripe olives competed directly for sales in the U.S. market.

3. *The EU’s arguments that the Commission ignored the rest of the market and the overall market are factually incorrect*

209. Similar to its arguments concerning the Commission’s volume analysis, the EU inaccurately contends that the Commission examined the retail segment of the market to the exclusion of the other two segments and the overall market in its analysis of price effects.²⁸⁷ Again, the EU variously argues that the Commission ignored the other segments and the overall market and extended its conclusions concerning subject import price underselling in the retail segment to these other segments and the overall market.²⁸⁸

210. The Commission’s findings on significant underselling were not limited to a particular market segment. Instead, it was based on the *overall* data on pricing in the record – including aggregated data concerning instances and quantities of underselling in all pricing products, which reflected ripe olives sold in multiple channels of distribution, as well as data concerning

²⁸⁵ EU FWS, paras. 532-538.

²⁸⁶ EU FWS, paras. 532-538.

²⁸⁷ EU FWS, para. 540.

²⁸⁸ EU FWS, paras. 540-550, 552-556.

confirmed lost sales from purchasers.²⁸⁹ In fact, responding purchasers — upon whose data the Commission largely relied in assessing price effects — were predominantly distributors.²⁹⁰

211. Moreover, even a casual reading of the Commission opinion makes clear that the Commission did not exclude the institutional/food segment of the market from its analysis. Rather, the Commission recognized that the largest volumes of subject import underselling occurred in that segment.²⁹¹

212. The Commission realized, however, that the domestic industry had relatively few sales in the institutional/food channel of distribution. Information in the record indicated that low-priced subject imports had driven the domestic industry out of the institutional/food segment.²⁹² The U.S. shipment data described in Section V.A.1 above, as well as other information in the record, demonstrated that competition between the domestic like product and the subject imports was increasingly focused on the retail channel of distribution. As such, the Commission took particular care to examine that channel as well in its price effects analysis.

213. This examination indicated that subject imports also significantly undersold the domestic product in the retail channel of distribution. In particular, subject imports pervasively undersold the domestic product for sales of Product 2 and for sales of Product 1, and subject imports gained market share in this channel at the expense of the domestic industry over the POI.²⁹³ These conclusions about lost market share – as opposed to its findings on underselling generally – were limited to the retail channel of distribution.

214. For the foregoing reasons, the EU has failed to demonstrate that the Commission’s analysis of price effects was inconsistent with Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA.

²⁸⁹ USITC Pub. 4805 (Exhibit EU-5), pp. 20-21.

²⁹⁰ USITC Pub. 4805 (Exhibit EU-5), Table II-1.

²⁹¹ Footnote 117 of the Commission opinion states:

We recognize that on an overall volume basis the underselling by subject imports was concentrated in Products 3 and 4 (i.e., institutional), the two pricing products involving the largest quantities of subject imports during the POI and in the sector of the market where subject imports had a large presence. CR/PR, Tables V-7, V-8, and V-10.

USITC Pub. 4805 (Exhibit EU-5), p. 20 n.117.

²⁹² See USITC Hearing Transcript. (Exhibit USA-17) at 41-42, 51-52, 66-67, 130-133 and 215-216. The Commission also heard from witnesses that the domestic industry faced direct competition for sales in the retail branded subsegment from the Mario brand during the POI, which was purchased by a Spanish entity and that, as prices in both retail subsegments were interconnected (branded products, *inter alia*, appear on retail shelves next to private-label products), the domestic industry’s branded products also faced price pressure from low-priced subject imports in the private label subsegment. See USITC Hearing Transcript (Exhibit USA-17) at 67.

²⁹³ USITC Pub. 4805 (Exhibit EU-5) at 20-22.

C. The EU’s Claims under Article 15.4 of the ASCM and Article 3.4 of the ADA Also Fail

215. As the United States noted in its preliminary ruling request, the EU failed to include its claims concerning Article 15.4 of the ASCM and Article 3.4 of the ADA in its panel request, and the Panel should rule that these claims are outside its terms of reference.²⁹⁴ In addition, the EU has in any event failed to show any breach of Articles 15.4 and 3.4 for the reasons set out below.

216. The EU’s argument that, as a consequence of the Commission’s allegedly flawed volume and price effects analyses, the Commission’s analysis of impact was inconsistent with Articles 15.1 and 15.4 of the ASCM and Articles 3.1 and 3.4 of the ADA, misinterprets the relationship between the provisions of Article 15 of the ASCM and Article 3 of the ADA, respectively.²⁹⁵ As explained above, Articles 15.2 and 3.2 provide that an investigating authority should consider changes in the volume of subject imports, as well as the relationship between subject imports and price of the like domestic product. In contrast, Articles 15.4 and 3.4 require an examination of “all relevant economic factors...having a bearing on the state of the industry”. The final clauses of those articles as well as of ASCM Article 15.2 and ADA Article 3.2, makes clear that no single factor necessarily determines whether subject imports have an adverse impact on the domestic industry. As such, the EU’s argument that an error in analyzing the volume and price effects necessarily results in a breach of Articles 15.4 and 3.4 is without merit. Nevertheless, as the United States will explain, the EU’s arguments with respect to Articles 15.4 and 3.4 largely rely on the same reasoning it applied in its challenge of the Commission’s volume and price analysis. For the reasons discussed in Sections V.A and V.B, the EU has failed to establish that the Commission’s analyses of volume and price effects were inconsistent with Articles 15.1 and 15.2 of the ASCM, and Articles 3.1 and 3.2 of the ADA. Accordingly, the EU’s consequential challenge to the Commission’s impact analysis lacks basis.

1. The EU’s arguments that the Commission’s analysis of impact is flawed because the Commission arbitrarily divided the domestic industry into different segments are unsupported by the ASCM and the ADA

217. As with its arguments concerning volume and price effects, the EU wrongly contends that the Commission erred in focusing on the retail segment of the market in its analysis of impact.²⁹⁶ Relatedly, the EU argues that the lack of “volume effects” and price effects for subject imports at the level of the industry as a whole precluded any finding that subject imports had an impact on the domestic industry.²⁹⁷

218. As the United States has set out above in Section V.A.1, the Commission reasonably focused aspects of its analysis on the retail segment and properly explained why it did so.

²⁹⁴ See *supra* at Section II.B.

²⁹⁵ EU FWS, paras. 561-564.

²⁹⁶ EU FWS, paras. 566-572.

²⁹⁷ EU FWS, paras. 574-581, 583-588. As we have explained in Section V.A, the EU’s references to “volume effects” are misplaced.

Specifically, the retail segment was the primary segment in which domestically produced and subject imported ripe olives competed directly for sales in the U.S. market. As the United States demonstrated in Section V.A.1, neither Articles 15.1 and 15.2 of the ASCM nor Articles 3.1 and 3.2 of the ADA require an affirmative finding that subject import volumes increased in absolute and relative terms, and positive evidence supported the Commission’s finding that subject import volumes increased markedly within the retail segment. For the same reasons explained in Section V.A.1, the EU’s argument fails as it pertains to the Commission’s segmentation of the domestic market, and the EU has failed to demonstrate a breach of Article 15.4 of the ASCM and Article 3.4 of the ADA.

2. *The EU’s arguments that the Commission ignored the rest of the market and the overall market are factually incorrect*

219. The EU again wrongly contends that the Commission examined the retail segment of the market at the exclusion of the other two segments and the overall market in its analysis of impact.²⁹⁸ The EU argues that the Commission improperly extended its finding of impact through “volume effects” in the retail segment to the entire industry without any evidentiary basis, and therefore, that the impact analysis was not based on positive evidence.²⁹⁹ As with its arguments concerning the Commission’s discussions of volume and price effects, the EU’s claims cannot be reconciled with the Commission opinion.

220. Article 15.4 of the ASCM states the following with respect to an investigating authority’s examination of the impact of subject imports:

The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.³⁰⁰

²⁹⁸ EW FWS, paras. 590-592, 594-596.

²⁹⁹ EU FWS, para. 592.

³⁰⁰ Article 3.4 of the ADA is similar to Article 15.4 of the ASCM, but does not contain the reference to government support programs in cases concerning agriculture. Article 3.4 reads:

221. Article 15.4 of the SCM Agreement states that, in examining the impact of subsidized imports on the domestic industry, an investigating authority “shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry.” Article 15.4 lists numerous factors, but states that this list “is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.”

222. Rather than undertake a rote checklist as to whether each factor points to injury, an investigating authority “must consider, in light of the interaction among injury indicators and the explanations given” whether a domestic industry is injured.³⁰¹ Further, an investigating authority’s consideration of these criteria must be based on an “objective examination” of “positive evidence” in accordance with Article 15.1.³⁰²

223. The Appellate Body has previously considered that Articles 15.4 and 3.4 require an examination of the relationship between subject imports for the state of the domestic industry:

We recall that Articles 3.4 and 15.4 require an investigating authority to examine the *impact of subject imports on the domestic industry* on the basis of "all relevant economic factors and indices having a bearing on the state of the industry". Articles 3.4 and 15.4 thus do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 and 15.2. In other words, Articles 3.4 and 15.4 require an examination of the explanatory force of subject imports for the state of the domestic industry.³⁰³

224. The Appellate Body has also contrasted an investigating authority’s “examination” of the impact of subject imports on the domestic industry pursuant to Articles 15.4 and 3.4 with an

The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

³⁰¹ *EC – Bed Linen (21.5 India) (Panel)*, para. 6.163.

³⁰² *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.215 (stating that “an investigating authority must ensure that its determination of injury, and more specifically, its findings under SCM Articles 15.2, 15.4, and 15.5, are made on the basis of ‘positive evidence’ and involve an ‘objective examination’”).

³⁰³ *China – GOES (AB)*, para. 149.

authority’s obligation to “demonstrate” that subject imports are causing injury to the domestic industry as required by Articles 15.5 and 3.5.³⁰⁴

225. In its analysis of the impact of subject imports on the domestic industry, the Commission examined the explanatory force of subject imports on the state of the domestic industry.³⁰⁵ To conduct this examination, the Commission compiled data it collected from the domestic processors on production capacity, production, capacity utilization, commercial shipments, export shipments, and inventories; the number of production-related workers, hours worked, hours worked per production-related worker, 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.³⁰⁶

226. In assessing the impact of the subject imports on the domestic industry, the Commission considered all of the relevant data. It found that production factors, which it analyzed on an industry-wide basis, were mixed.³⁰⁷ It observed, however, that domestic producers’ inventories grew as they lost sales and market share to the lower-priced subject imports in the important retail sector.³⁰⁸ This inventory consisted of ripe olives that were processed and packaged for sale to the retail segment and could not simply be redirected for sale to other segments.³⁰⁹

227. Many of the domestic processors’ financial performance indicators, which the Commission also considered on an industry-wide basis, deteriorated over the POI, namely operating and net income, overall and as a ratio to net sales, capital expenditures, research and

³⁰⁴ *China – GOES (AB)*, para. 150. The Appellate Body previously considered, in *EC – Tube or Pipe Fittings (AB)*, that “because Articles 3.1 and 3.4 do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, we share the Panel’s conclusion that it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4. Whether a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case.” *EC – Tube or Pipe Fittings (AB)*, at para. 161.

³⁰⁵ *China – GOES (AB)*, para. 149.

³⁰⁶ USITC Pub. 4805 (Exhibit EU-5) at 22-24, Tables III-4, III-8, III-10, III-13, VI-1, VI-4, and C-1. See Blank U.S. Processors’ Questionnaire (Exhibit USA-16) at Parts II and III. These data were aggregated and compiled into data tables in USITC Pub. 4805 (Exhibit EU-5), including those cited in the first sentence.

³⁰⁷ The Commission acknowledged that production capacity was stable during the POI, whereas production and capacity utilization both increased. USITC Pub. 4805 (Exhibit EU-5) at 22-23. The domestic processors, it is recalled, were contractually obligated to purchase all of U.S. growers’ output of raw olives in any given year. *Id.* at 18.

³⁰⁸ USITC Pub. 4805 (Exhibit EU-5) at 22-24.

³⁰⁹ See USITC Hearing Transcript (Exhibit USA-17) at 257-258. Moreover, the Commission found that these elevated inventory levels contributed to the processors incurring higher borrowing costs from banks and the resultant higher interest costs. USITC Pub. 4805 (Exhibit EU-5) at 23-24 & n.139.

development expenses, and operating return on assets.³¹⁰ The Commission acknowledged that certain financial indicators trended upward, namely gross profit margins and net assets.³¹¹ The Commission specifically found, however, that the industry’s lost market share in the retail sector yielded adverse financial results, in the form of lost profits during the POI.³¹²

228. In assessing the impact of the subject imports on the domestic industry, the Commission considered all relevant data for all domestic production of ripe olives. As reflected in the questionnaires sent to U.S. producers, the Commission collected information for the producers’ entire ripe olives operations. The two domestic processors that accounted for virtually all domestic production of ripe olives provided these data for all of their ripe olives production operations. Both producers made sales to customers in the retail and distributor market segments, and reported all financial, production, or employment data on a firmwide, rather than a segmented, basis.³¹³

229. Contrary to the EU’s assumption, the Commission collected and considered industry-wide data.³¹⁴ The Commission analyzed the entire industry’s performance, based on the complete sets of data aggregated for the two domestic producers.³¹⁵ In particular, the Commission report indicates that the two domestic processors “provided usable financial data on their operations processing out-of-scope raw olives . . . into ripe olives” during the POI.³¹⁶ The principal table in the report concerning industry-wide financial data, which is the table the opinion’s discussion on financial indicators cites repeatedly,³¹⁷ is described as containing “aggregated data on U.S. producers’ operations in relation to ripe olives.”³¹⁸

³¹⁰ USITC Pub. 4805 (Exhibit EU-5) at 23-24.

³¹¹ USITC Pub. 4805 (Exhibit EU-5) at 23-26.

³¹² USITC Pub. 4805 (Exhibit EU-5) at 24.

³¹³ Indeed, both processors reported producing ripe olives for sale to different segments using the same manufacturing facilities, processes, and equipment. USITC Pub. 4805 (Exhibit EU-5) at 7. *See also* Blank U.S. Processors’ Questionnaire (Exhibit USA-16) at Parts II-3a, II-7, II-16, and III.

³¹⁴ *See e.g.*, USITC Pub. 4805 (Exhibit EU-5) at nn. 130-132, citing Table III-4 of the Commission report, which presents data on “Ripe olives: U.S. producers’ capacity, production, and capacity utilization, 2015-17.”

³¹⁵ USITC Pub. 4805 (Exhibit EU-5) at 22-24.

³¹⁶ USITC Pub. 4805 (Exhibit EU-5) at VI-1.

³¹⁷ USITC Pub. 4805 (Exhibit EU-5) at 23-24.

³¹⁸ USITC Pub. 4805 (Exhibit EU-5) at VI-1. Other compilations of information in Section VI of the Commission report, concerning the “Financial Conditions of U.S. Producers,” are described similarly. *See, id.*, the headings for Tables VI-2 (“Ripe olives: Changes in AUVs of U.S. producers, between calendar years”) and VI-3 (“Ripe olives: Selected results of operations of U.S. producers, by firm, 2015-17”); the references to “aggregate gross profit” and “aggregate operating income” at VI-3, the descriptions of Tables VI-5 (“Table VI-5 presents data on the U.S. producers’ assets for ripe olives, raw fruit, total assets, and their return on assets”), VI-6, and VI-7 (“[t]he Commission requested U.S. producers of ripe olives to describe any actual or potential negative effects of imports of ripe olives from Spain on their firms’ growth, investment, ability to raise capital, development and production effects, or the scale of capital investments. Table VI-6 tabulates the responses of the two responding U.S. producers and table VI-7 presents the detailed narrative responses of U.S. producers regarding actual and anticipated negative effects of subject imports”) at VI-4; and the headings for Tables VI-6 (“Ripe olives: U.S. producers’ actual and anticipated negative effects of imports on investment and growth and development”) and VI-7 (“Ripe olives: U.S.

230. In sum, in analyzing impact, the Commission considered all relevant factors and explained how it weighed the evidence pertaining to each of these factors. While the Commission acknowledged that not all trends were negative, it explained why subject imports had explanatory force for the industry’s declining output and financial performance.

231. The EU’s arguments that the Commission ignored data for the domestic market as a whole are simply incorrect.³¹⁹ As a result, its claims that the Commission impact analysis was inconsistent with Articles 15.1 and 15.4 of the ASCM and Articles 3.1 and 3.4 of the ADA fail.

D. The EU Has Failed to Show that the Commission Did Not Demonstrate a Causal Link between the Subject Imports and Injury to the Domestic Industry Consistent with Article 15.5 of the ASCM and Article 3.5 of the ADA

1. The EU’s consequential claim lacks predicate

232. The EU makes another consequential claim that the Commission’s causation determination lacks foundation due to its reliance on the Commission’s flawed volume, price effects, and impact analyses.³²⁰ For the reasons discussed in Sections V.A and V.B, the EU has failed to establish that the Commission’s analyses of volume and price effects were inconsistent with Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA. Similarly, for the reasons discussed in Section V.C, the EU has failed to establish that the Commission’s analysis of impact was inconsistent with Articles 15.1 and 15.4 of the ASCM and Articles 3.1 and 3.4 of the ADA. Accordingly, the EU’s consequential challenge to the Commission’s causation determination lacks basis.

2. The EU’s argument that the Commission’s causation determination is flawed because the Commission arbitrarily divided the domestic industry into different segments is unsupported by the ASCM and the ADA

233. The EU wrongly contends that the Commission erred in focusing on the retail segment of the market in its causation determination.³²¹ As the United States has set out above in Section V.A.1, the Commission reasonably focused aspects of its analysis on the retail segment and properly explained why it did so. Specifically, the retail segment was the primary segment in which domestically produced and subject imported ripe olives competed directly for sales in the U.S. market.

producers’ narratives relating to actual and anticipated negative effects of imports on investment and growth and development, since January 1, 2015”), *id.*

³¹⁹ See, e.g., EU FWS, para. 568 (alleging that the Commission analyzed “inventories” and “profit losses” only with respect to the retail segment).

³²⁰ EU FWS, paras. 601-610.

³²¹ EU FWS, paras. 611-615.

234. Article 3.5 of the ADA describes the investigating authority’s obligation to demonstrate a causal link between subject imports and injury to the domestic industry:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.³²²

235. The Appellate Body has observed that an investigating authority’s analysis of causation under the first two sentences of Article 3.5 of the ADA is broader in scope than its analyses of volume, price effects, and impact of the subject imports.³²³

236. As previously discussed, the Commission, in its analyses of volume and price effects, found that a significant volume of subject imports had undersold the domestic like product and captured market share from the domestic industry in the retail segment of the market. The Commission also found, in its analysis of impact, that subject imports had explanatory force for the industry’s increasing inventory, declining shipment, and deteriorating financial performance indicators.

³²² Article 15.5 of the ASCM similarly states:

“It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

FN47: As set forth in paragraphs 2 and 4.”

³²³ *Korea – Pneumatic Valves (AB)*, paras. 5.190 and 5.192 (footnotes omitted).

237. U.S. processors of ripe olives are contractually obligated to purchase all of U.S. growers' output of raw olives in any given year.³²⁴ As processors prefer to source olives domestically,³²⁵ they have refrained from asking growers to cut ripe olive cultivation.³²⁶ Domestic processors focus on processing ripe olives for sale to customers in the higher-priced retail segment of the market in an effort to maximize revenues and profits.³²⁷ Due to processing and packaging requirements specific to the retail segment, olives prepared for sale in that channel cannot be redirected to customers in other channels of distribution. Because the subject imports significantly undersold the domestic like product, taking away sales and market share from domestic producers in the retail segment, the domestic producers ended up with reduced sales and, *inter alia*, an increase in total net assets, as inventories, largely packaged for retail distribution, increased during the POI.³²⁸ Processors reported that decreased sales volume and increased inventory led to credit problems, cancelled or deferred projects, and other negative effects.³²⁹ The Commission found that as domestic processors' inventory increased due to sales lost to subject imports, they faced higher interest and borrowing costs from banks.³³⁰

238. The Commission concluded as follows on causation:

We find that subject imports from Spain had a significant impact on the domestic industry. As discussed above, the significant volumes of subject imports that undersold the domestic like product captured market share from the domestic industry in its largest sector of the market – the retail sector – and also resulted in U.S. processors of ripe olives carrying increasing inventories. There is evidence in the record indicating that the retail sector was the domestic industry's most important sector of the U.S. market for ripe olives and one in which the domestic industry lost profits during the POI. As a result, several of the domestic producers' indicators were worse than they would have been otherwise.³³¹

239. Thus, upon evaluation of all relevant evidence, the Commission properly linked its volume, price effects, and impact analyses in making a definitive determination that subject imports caused injury to the domestic industry. The EU has failed to show that the causal link

³²⁴ USITC Pub. 4805 (Exhibit EU-5) at 18. Production and capacity utilization increased during the POI. *Id.* at III-2.

³²⁵ USITC Pub. 4805 (Exhibit EU-5) at 16.

³²⁶ Petitioner's Posthearing Brief (Exhibit USA-10) at p. 31.

³²⁷ See USITC Hearing Transcript (Exhibit USA-17) at 41-43; Petitioner's Posthearing Brief (Exhibit USA-10) at p. 22.

³²⁸ USITC Pub. 4805 (Exhibit EU-5) at 23-24 n.139 and VI-4. These costs also prompted some accounting revisions at one of the processors, which impacted reported gross profit margins. USITC Hearing Transcript (Exhibit USA-17) at 71.

³²⁹ Petitioner's Prehearing Brief (Exhibit USA-11) at 35-36; USITC Hearing Transcript (Exhibit USA-17) at 71-72.

³³⁰ USITC Pub. 4805 (Exhibit EU-5) at 23-24 n.139.

³³¹ USITC Pub. 4805 (Exhibit EU-5) at 24.

established by the Commission was inconsistent with the first two sentences of Article 15.5 of the ASCM and Article 3.5 of the ADA.³³² The United States will also demonstrate below, in Section V.E, that the Commission’s non-attribution analysis conformed with the third sentences of these provisions.

E. The USITC’s Non-Attribution Analysis Complied with Article 15.5 of the ASCM and Article 3.5 of the ADA

1. The Commission properly separated and distinguished any injurious effects caused by factors other than subject imports

240. The EU argues that in conducting its causation analysis, the Commission was required to consider a number of factors other than subsidized imports that may have explained the injury to the domestic industry during the POI.³³³ It further argues that the Commission erroneously rejected two non-attribution factors: 1) decreasing consumption in the United States; and 2) non-subject imports during the POI.³³⁴ The EU argues that the Commission made no attempt to separate and distinguish the injury caused by these factors. The EU is wrong as a matter of legal interpretation and as a factual matter.

241. As set out above, Article 15.5 of the ASCM and Article 3.5 of the ADA require an investigating authority to examine any known factors other than the unfairly traded imports which at the same time are injuring the domestic industry, and not to attribute the injuries caused by these other factors to the unfairly traded imports.

242. The purpose of the non-attribution requirements is to ensure the existence of an unsevered causal link between the dumped or subsidized imports and the injury to the domestic industry. As the Appellate Body explained in *EC – Pipe or Tube Fittings*, the non-attribution requirement “obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, “causing injury” to the domestic industry.”³³⁵ In other words, an investigating authority’s non-attribution analysis ensures that dumped and subsidized imports are causing material injury to the domestic industry, and that the injury attributed to subject imports is not in fact caused by other known factors.

243. Neither Article 3.5 of the ADA nor Article 15.5 of the ASCM require investigating authorities to utilize any particular methodology in examining other known causal factors. In *EC – Pipe or Tube Fittings*, moreover, the Appellate Body explained that:

We underscored in *US – Hot-Rolled Steel . . .* that the *Anti-Dumping Agreement* does not prescribe the *methodology* by which

³³² *Korea – Pneumatic Valves (AB)*, para. 5.194.

³³³ EU FWS, para. 616.

³³⁴ EU FWS, para. 619.

³³⁵ *EC – Tube or Pipe Fittings (AB)*, para. 188.

an investigating authority must avoid attributing the injuries of other causal factors to dumped imports. . . . Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the “causal relationship” between dumped imports and injury.³³⁶

244. That is, investigating authorities have discretion to establish their own methodologies to examine other known causal factors and ensure that any injurious effects caused by those factors are not attributed to the dumped or subsidized imports.³³⁷

245. “Separating and distinguishing” is not text found in Articles 15.5 and 3.5. Rather, this phrase is an effort to explain the process by which authorities evaluate whether subject imports caused injury, and separately consider whether other factors cause injury at the same time.³³⁸

246. The panel in *US – Countervailing Duty Investigation on DRAMS* recognized “that the ITC was not required to quantify the injury caused by other factors in order to separate and distinguish it from the injurious effects of the alleged subsidized imports.”³³⁹ The panel then noted that “[t]he US asserts that its analysis demonstrated that subsidized imports had their own injurious effects, independent from the injurious effects of other factors.”³⁴⁰ Approving of the ITC’s non-attribution methodology, the panel found, with respect to the alleged other factor of non-subject imports, that:

By ascertaining that the price underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency of alleged subsidized imports between 2000 and 2002, and that the injurious price effects of non-subject imports were less pronounced than their absolute and relative volumes might otherwise indicate, the ITC effectively separated and distinguished the injurious price effects of alleged subsidized imports from the injurious price effects of the larger volume of non-subject imports.³⁴¹

³³⁶ *EC-Tube or Pipe Fittings (AB)*, para. 189 (citing *US-Hot-Rolled Steel (AB)*), para. 224. See also *US – Coated Paper (Indonesia)*, para. 7.207 (“The Antidumping and SCM Agreements do not specify how the non-attribution analysis is to be undertaken – they do not prescribe any methods or approaches by which an investigating authority may avoid attributing injuries caused by factors other than dumped or subsidized imports.”).

³³⁷ See, e.g., *EC-Tube or Pipe Fittings (AB)*, paras. 177, 178, and 193 (Appellate Body’s description of the EU’s methodology).

³³⁸ *US – Hot-Rolled Steel (AB)*, para. 223.

³³⁹ *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.353.

³⁴⁰ *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.354 (noting also that the complaining party did not challenge the propriety of that approach).

³⁴¹ *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.360.

247. In the *Olives* investigations, the Commission likewise assured that it did not attribute injury allegedly caused by other factors to the subject imports. Moreover, the Commission provided “a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports.”³⁴²

248. The Commission explicitly discussed each of the factors raised by respondents in its opinion and assured that it did not attribute any injury from such factors to the subject imports.³⁴³ The Commission provided a reasoned explanation of the nature and extent of the injurious effects, if any, of each of the identified factors other than subject imports at issue in the underlying investigations, namely SG&A expenses, shortages in supply, a decline in apparent consumption, and nonsubject imports. The Commission explained why these other factors could not account for the adverse effects that it had attributed to the subject imports.

249. With respect to the decline in apparent consumption, the Commission found that this decline, which it found to be modest, could not account for the magnitude of the industry’s declining output and financial performance:

As discussed above, apparent U.S. consumption decreased by *** percent during 2015 to 2017. However, this relatively modest decline in apparent U.S. consumption was smaller than the declines in shipments, net sales, and operating and net income experienced by the domestic industry.³⁴⁴

250. The Commission, accordingly, fully explained why the relatively modest decline in consumption did not correspond with reported declines in the industry’s shipments and financial performance indicators.

251. The Commission also considered and addressed the role of nonsubject imports. While noting that nonsubject imports were generally the lowest-priced sources of ripe olives, the Commission emphasized that these imports gained market share in the institutional/food segment, from which the domestic industry was largely absent,³⁴⁵ and had only a minimal presence in the retail segment of the market, in which the industry most keenly felt the adverse effects of subject imports.³⁴⁶ The Commission thus explained why subsequent declines in the domestic industry’s condition that corresponded with an increase in subsidized import volumes and market share could not be attributed to nonsubject imports from Morocco.

³⁴² See *US – Hot-Rolled Steel (AB)*, para. 228.

³⁴³ USITC Pub. 4805 (Exhibit EU-5) at 24-26.

³⁴⁴ USITC Pub. 4805 (Exhibit EU-5) at 25.

³⁴⁵ As previously stated, information on the record indicated that the domestic processors were driven out of the institutional/food segment of the market by subject imports prior to the POI. See, e.g., USITC Hearing Transcript (Exhibit USA-17) at 41-42, 51-52, 66-67, 13-133, and 215-216.

³⁴⁶ USITC Pub. 4805 (Exhibit EU-5) at 25-26 (Certain footnotes omitted).

2. *The EU has not established that the Commission attributed injury caused by other factors to the subject imports*

252. The EU’s arguments concerning non-attribution largely criticize the Commission majority for failing to adopt the rationale of the dissent.³⁴⁷ Presenting an alternative analysis of the facts cannot establish that the findings made by the Commission majority – the sole findings before the panel do not reflect an objective examination or are unsupported by positive evidence.³⁴⁸ The EU avoids addressing the actual rationale (discussed above) used by the Commission majority.

253. The EU also provides an alternative, and unsupported, view of the facts in its arguments concerning nonsubject imports from Morocco. The EU posits that because ripe olive sales are made principally on price, and the Commission acknowledged that nonsubject imports offered the lowest prices, increased volumes of low-priced nonsubject imports from Morocco led to the observed declines to the domestic industry’s output and financial performance indicators.³⁴⁹

254. As the Government of Spain itself argued at the Commission hearing: “Morocco . . . has proven to be a less reliable source of table olives in terms of quality or supply in comparison to Spain.”³⁵⁰ Questionnaire respondents confirmed this, reporting that nonsubject imports from Morocco were less substitutable with the domestic product than subject imports.³⁵¹

255. Moreover, the record indicated that nonsubject ripe olive imports altogether had a far smaller and narrower market presence in the United States than did subject imports.³⁵² And, the increase in nonsubject imports’ market share was most notable in the institutional/food channel of distribution, where the domestic industry had minimal presence.³⁵³ Indeed, as the Commission found, nonsubject imports from Morocco were not present at all in the retail channel of distribution, which was the focus of competition between the domestic like product and the subject imports.³⁵⁴

256. The Commission’s finding that nonsubject imports, including those from Morocco, could not explain the nature of the injury attributed to subject imports thus reflects an objective

³⁴⁷ Under U.S. law, USITC Commissioners make individual determinations and may issue separate, including dissenting, opinions. The dissent does not, however, form part of the Commission’s affirmative determination, which is the relevant USITC determination underlying the AD and CVD orders challenged by the EU in the present dispute.

³⁴⁸ See *US – Wool Shirts and Blouses (AB)*, p. 14; *US – Softwood Lumber VI (21.5) (AB)*, paras. 92-97.

³⁴⁹ See, e.g., EU FWS, para. 634.

³⁵⁰ USITC Hearing Transcript (Exhibit USA-17) at 25.

³⁵¹ USITC Pub. 4805 (Exhibit EU-5) at 17. In contrast, the evidence showed, and the Commission found, that subject imports were highly substitutable with the domestic like product.

³⁵² USITC Pub. 4805 (Exhibit EU-5) at 16.

³⁵³ USITC Pub. 4805 (Exhibit EU-5) at 25-26.

³⁵⁴ USITC Pub. 4805 (Exhibit EU-5) at 26 n.152.

examination and was supported by positive evidence. The Commission thus did not attribute to subject imports any injury caused by nonsubject imports.

257. The EU’s reliance on the dissent’s alternative weighing of the facts, and on its own alternative factual conclusions, does not establish a breach of Articles 15.1 and 15.5 of the ASCM and Articles 3.1 and 3.5 of the ADA.

258. For the reasons set out in Sections V.A through V.E of this submission, the Panel should dismiss the EU’s claims under Article 3 of the ADA and Article 15 of the ASCM in their entirety.

**VI. THE USDOC’S FINAL COUNTERVAILING DUTY RATE FOR
GUADALQUIVIR IS NOT INCONSISTENT WITH ARTICLE VI:3 OF THE
GATT 1994 AND ARTICLES 10, 12.1, 12.8, 19.1, 19.3, 19.4, AND 32.1 OF THE
SCM AGREEMENT**

259. The EU claims that the USDOC incorrectly calculated the final countervailing duty rate of one of the three individually examined respondents, Aceitunas Guadalquivir S.L.U. (“Guadalquivir”), because the USDOC calculated Guadalquivir’s rate based on all purchases of raw olives whether or not used to produce ripe olives rather than calculating the rate based only on purchases of raw olives used to produce ripe olives.³⁵⁵ According to the EU, “the scope of [USDOC’s] questionnaire (all supply of raw olives) was considerably broader than the raw olives processed into subject merchandise,”³⁵⁶ and that USDOC incorrectly used that information to calculate Guadalquivir’s final subsidy rate and therefore acted inconsistently with Articles 10, 12.1, 12.8, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement.

260. The EU’s claims rely upon an incomplete presentation of the factual record and must be rejected. As elaborated below, the USDOC expressly requested each mandatory respondent’s purchases of raw olives used to produce ripe olives and, prior to the final determination, made clear that this was an essential fact under consideration. In this way, the record reflects that the USDOC satisfied all notice and disclosure requirements and evaluated the evidence supplied by Guadalquivir in an unbiased and objective manner. This section addresses the EU’s arguments as follows.

261. First, Section VI.A demonstrates that, consistent with Article 12.1 of the SCM Agreement, the USDOC notified each of the three mandatory respondents that they must provide information on purchases of raw olives that were processed into ripe olives.

262. Second, Section VI.B rebuts the EU’s claims that, in applying the same calculation method to each of the three individually examined respondents – i.e., factoring into the benefit

³⁵⁵ See EU FWS, para. 640; see also *ibid.* paras. 639-728.

³⁵⁶ EU FWS, para. 650.

calculation each company’s reported purchases of raw olives processed into ripe olives – the USDOC imposed on Guadalquivir an excessive and discriminatory final subsidy rate.

263. Third, Section VI.C demonstrates that, consistent with Article 12.8 of the SCM Agreement, the USDOC disclosed to the three mandatory respondents that each company’s purchases of raw olives processed into ripe olives was an essential fact under consideration.

264. Fourth, Section VI.D addresses the EU’s claims under Article VI:3 of the GATT 1994 and Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement regarding the final countervailing duty rate imposed on all other producers and exporters of ripe olives from Spain that were not individually investigated. Because the EU has not demonstrated that the USDOC’s use of the mandatory respondents’ reported information on raw olives processed into ripe olives was WTO-inconsistent, the Panel should reject these consequential claims.

A. USDOC Properly Requested, and Permitted Interested Parties to Provide, Information on Purchases of Raw Olives Used to Produce Ripe Olives, Consistent with Article 12.1 of the SCM Agreement

265. The EU claims that the USDOC breached Article 12.1 of the SCM Agreement because it failed to properly notify Guadalquivir that the USDOC required information regarding Guadalquivir’s purchases of raw olives that were processed into ripe olives, the subject merchandise.³⁵⁷ The EU’s arguments rely on a misreading of USDOC’s questionnaire and an incomplete account of the factual record.

1. Article 12.1 requires an investigating authority to give notice of information required and ample opportunity for a respondent to submit relevant evidence

266. Article 12.1 of the SCM Agreement provides:

Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

267. Accordingly, as observed by the panel in *US – Anti-Dumping and Countervailing Duties (China)*, “Article 12.1 establishes two overarching requirements: that interested Members and parties be given (i) ‘notice’ of the information required of them by the authorities; and (ii) ‘ample

³⁵⁷ See EU FWS, paras. 712-18; see also EU’s request for the establishment of a panel, p. 3.

opportunity to present in writing all evidence which they consider relevant.”³⁵⁸ Although the two requirements are distinct, “each obligation imparts meaning to the other.”³⁵⁹

268. Article 12.1 does not specify the required form or timing of the notice, so there are numerous ways in which an investigating authority may satisfy the notice requirement.³⁶⁰ Because the structure of Article 12.1 links the notice requirement and the requirement to give ample opportunity to present relevant evidence, logically, the timing of the notice should be “sufficiently ‘in advance’ that . . . interested parties will be able to prepare and present evidence within the deadlines set by the investigating authority for submission of written evidence on, *inter alia*, the matters as to which information was sought.”³⁶¹

2. *The USDOC notified the mandatory respondents that it required information on purchases of raw olives used to produce ripe olives*

269. The EU argues that the USDOC “never gave ‘notice’ within the meaning of Article 12.1 of the SCM Agreement” that the mandatory respondents (namely, Guadalquivir) were required to provide purchase information for raw olives that were used to produce ripe olives, even though the information was “key information for its case.”³⁶² As explained below, the facts demonstrate otherwise.

a. The USDOC’s August 4, 2017, questionnaire specifically requested purchase information on raw olives used to produce ripe olives

270. Shortly after initiating the countervailing duty investigation on ripe olives from Spain,³⁶³ the USDOC selected for individual examination the three largest producers or exporters of subject merchandise: Agro Sevilla Aceitunas S.Coop.And. (“Agro Sevilla”), Angel Camacho

³⁵⁸ *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 15.23.

³⁵⁹ *China – Broiler Products (Article 21.5 – US) (Panel)*, para. 7.218.

³⁶⁰ *See China – Broiler Products (Article 21.5 – US) (Panel)*, para. 7.231 (“Form and modalities remain within the discretion of the investigating authority. There might be any number of ways for an investigating authority to give notice.”); *see also US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 15.23 (“In particular, the notice requirement places no limits on how, precisely, an investigating authority must request the information it requires, and thus seems to envisage different possible types of information requests.”); *Mexico – Olive Oil (Panel)*, para. 7.26 n. 63 (“We also note that other provisions in the *SCM Agreement* leave considerable discretion to Members to define their own procedures; e.g. Articles 12, 14 and 23. This leads us to believe that, in general, unless a specific procedure is set forth in the *Agreement* the precise procedures for how investigating authorities will implement those obligations are left to the Members to decide.”).

³⁶¹ *China – Broiler Products (Article 21.5 – US) (Panel)*, para. 7.230 (underline removed).

³⁶² EU FWS, paras. 716-717.

³⁶³ *See Ripe Olives from Spain: Initiation of Countervailing Duty Investigation*, 82 Fed. Reg. 33050 (July 19, 2017) (Exhibit EU-3); *see also Ripe Olives from Spain: Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as Amended: Volume I General Information and Injury (Exhibit EU-55); Petition for the Imposition of Antidumping and Countervailing Duties, Volume III (Exhibit USA-8).*

Alimentacion S.L. (“Angel Camacho”), and Guadalquivir.³⁶⁴ Because “most of the subsidy programs identified by Petitioner provide aid to olive growers in Spain,”³⁶⁵ on August 4, 2017, the USDOC issued a questionnaire to each mandatory respondent requesting information relating to their sources of raw olives that were processed into ripe olives.³⁶⁶ To this end, the cover page introducing the questionnaire, and explaining the reporting requirements, sought “information on your company’s sources of raw olives that were processed into ripe olives.”³⁶⁷

271. Except for the addressee information, the questionnaire sent to each of the three mandatory respondents was identical. Through the questionnaire, the USDOC notified each mandatory respondent that it must provide information regarding the volume of purchases of raw olives processed into ripe olives.³⁶⁸

272. The EU recognizes that the language of the cover page to the August 4, 2017, questionnaire refers to raw olives processed into ripe olives, but argues that the cover page is countermanded by the questions contained therein.

273. Because Guadalquivir and the other two mandatory respondents purchase raw olives from suppliers and process raw olives into ripe olives, question 6 in the August 4, 2017, questionnaire was the relevant question.³⁶⁹ Question 6 read:

If your company processes ripe olives and obtains its raw olives from suppliers that are affiliated with, but separately incorporated from your company or from suppliers that are not affiliated with your company, please complete the attached “Template for Suppliers of Raw Olives,” to include **all** of those suppliers. Please be sure to indicate whether the supplier(s) might be considered cross-owned with your company.³⁷⁰

³⁶⁴ See Countervailing Duty Investigation of Ripe Olives from Spain: Respondent Selection Memorandum (Exhibit USA-15).

³⁶⁵ See Petition for the Imposition of Antidumping and Countervailing Duties, Volume III (Exhibit USA-8), p. 2.

³⁶⁶ See Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58); Letter to Agro Sevilla re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-6); Letter to Angel Camacho re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-7).

³⁶⁷ Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58), p. 1; Letter to Agro Sevilla re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-6), p. 1; Letter to Angel Camacho re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-7), p. 1.

³⁶⁸ See *China – Broiler Products (Article 21.5 – US) (Panel)*, para. 7.230 footnote 383 (“In respect of the party from whom information is required, the notice of the information required is given through the information request itself.”).

³⁶⁹ See Guadalquivir Olive Sourcing Questionnaire Response, p. 2-3 (Exhibit EU-63); Agro Sevilla Olive Sourcing Questionnaire Response (Exhibit EU-17), p. 2-3; Angel Camacho Olive Sourcing Questionnaire Response (Exhibit EU-68), p. 2-3.

³⁷⁰ See, e.g., Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58), attachment I at p.2 (emphasis in original). The USDOC attached two reporting templates – “Template for

In turn, the attached template corresponding to question 6 contained a column labeled “Volume of Raw Olives Purchased.”³⁷¹

274. According to the EU, despite the language of the cover page, question 6 and the corresponding template “refer only to ‘raw olives’, and do not contain any limitation to only such raw olives which are processed into subject merchandise (ripe olives) . . . ,” such that they *could* be interpreted to suggest that respondents were instead to provide *all* raw olive purchases.³⁷² The text of the questionnaire refutes the EU argument in at least two ways.

275. First, the cover letter provided clear guidance regarding the questionnaire. Specifically, the cover letter established the parameters of the ensuing questions: to obtain “information on your company’s sources of *raw olives that were processed into ripe olives*.”³⁷³ The interpretation proposed by the EU conflicts with – and depends upon ignoring – the expressly stated purpose of the questionnaire.³⁷⁴

276. Second, the relevant question (i.e., question 6) directed the mandatory respondents to report purchases of raw olives used to produce ripe olives. The question begins: “If your company processes ripe olives and obtains its raw olives [from separately incorporated affiliated or unaffiliated suppliers]” By its express terms, the question sought information regarding ripe olive processors’ suppliers of raw olives. Similarly, the corresponding template to be completed was “to include all those suppliers.”³⁷⁵ The data of a ripe olive processor’s raw olive suppliers by definition refers to the purchase of raw olives for processing into ripe olives.

277. Although question 6 is the operative question, the EU argues that several other questions support its interpretation that, in question 6, the USDOC was not in fact seeking purchase information only for raw olives processed into ripe olives.³⁷⁶ As an initial matter, the EU overlooks that these are separate questions in which the USDOC used different language to solicit different information.³⁷⁷ For example, question 1 asked about the general corporate

Processors of Ripe Olives” and “Template for Suppliers of Raw Olives” – and whether the company is an exporter or processor of ripe olives dictated which template would need to be completed. *See, e.g.*, Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58), attachment I at questions 3 through 7 and attachments “Reporting Template for Processors of Ripe Olives” and “Reporting Template for Suppliers of Raw Olives” (Exhibit EU-61).

³⁷¹ *See, e.g.*, Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58), attachment I at p.2.

³⁷² EU FWS, paras. 644-646 and 698.

³⁷³ Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58), p. 1 (emphasis added); Letter to Agro Sevilla re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-6), p. 1; Letter to Angel Camacho re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-7), p. 1.

³⁷⁴ *See* EU FWS, para. 644 (acknowledging but failing to address the cover page’s limitation to “raw olives that were processed into ripe olives”).

³⁷⁵ *See, e.g.*, Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58), p. 2.

³⁷⁶ EU FWS, paras. 644-645.

³⁷⁷ *See* EU FWS, paras. 644-645.

organization and operations of each mandatory respondent.³⁷⁸ Moreover, the EU selectively quotes the text of the questions for support. For example, similar to question 6, question 5 was limited to raw olive supply information for processors of ripe olives.³⁷⁹ The EU cherry-picks a fragment of the text – i.e., “so that they can complete it with regard to their raw olives suppliers” – to convey the inaccurate impression that the question sought purchase information for all raw olives whether or not processed into ripe olives.³⁸⁰

278. Thus, the August 4, 2017, questionnaire identified in clear terms what the USDOC sought: purchase information for raw olives processed into ripe olives.

- b. Later requests for further information did not alter the meaning of the USDOC’s August 4, 2017, request for information on purchases of raw olives used to produce ripe olives

279. The EU also argues that USDOC’s actions after the August 4, 2017, questionnaire “show that Guadalquivir was correct in its understanding of the scope of the questions contained in that questionnaire.”³⁸¹ Two of the mandatory respondents indisputably provided the requested information regarding raw olives processed into ripe olives. Nothing in the later correspondence between the USDOC and these mandatory respondents changed the meaning of the USDOC’s original request for information regarding raw olives processed into ripe olives.

280. The EU argues that subsequent letters submitted by the mandatory respondents (September 18, 2017) and the Government of Spain (September 25, 2017) show that the parties understood the scope of the information requested in the USDOC’s August 4, 2017, letter was not limited to raw olives processed into ripe olives.³⁸² The EU argues that the letters clarify “that the scope of [the USDOC’s] questionnaire (all supply of raw olives) was considerably broader than the raw olives processed into subject merchandise.”³⁸³ However, in the first instance, neither the mandatory respondents nor Spain purported to speak on behalf of the USDOC, nor could they have, and thus could not have clarified the scope of the USDOC’s questionnaire for it.

281. Second, neither letter pertained to the USDOC’s August 4, 2017, questionnaire requesting mandatory respondents’ purchase information for raw olives processed into ripe olives. Instead, both letters concerned a separate questionnaire issued by the USDOC on

³⁷⁸ See, e.g., Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58), p. 1. The full text was: “Please explain how your company is organized; include an explanation of whether your company grows raw olives, processes raw olives into the subject merchandise, or both.” It concluded with a footnote setting forth the scope of the investigation.

³⁷⁹ See Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58), p. 2.

³⁸⁰ EU FWS, para. 645.

³⁸¹ See EU FWS, para. 699.

³⁸² See EU FWS, para. 649-51; see also Request for Limiting Olive Supplier Response Burdens (Exhibit EU-57); Countervailing Duties Investigation of Ripe Olives from Spain – Support for Respondents’ Request (Exhibit EU-56).

³⁸³ See EU FWS, para. 650 (emphasis original).

September 7, 2017,³⁸⁴ which requested that the mandatory respondents provide information on the subsidies provided to certain affiliated and unaffiliated raw olive suppliers.³⁸⁵

282. Third, the USDOC's separate letter to the mandatory respondents on September 27, 2017, did not change (or purport to change) the meaning of the USDOC's August 4, 2017, request. Specifically, in a request on September 27, 2017, the USDOC stated:

In addition, the respondents' counsel informed the Department that the information regarding the volume and value of raw olives supplied to Agro Sevilla by its member cooperatives and other suppliers was limited to olives used in the production of the ripe olives subject to this [countervailing duty] investigation. We now request that Agro Sevilla resubmit the information regarding its suppliers of raw olives to include the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used. If it is necessary to correct the reporting in this manner for the other two mandatory respondents, we request that the information be resubmitted.³⁸⁶

283. In this letter, the USDOC requested that Agro Sevilla resubmit its previously reported information “to include the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used.”³⁸⁷ The USDOC also instructed Guadalquivir and Angel Camacho to resubmit their information to include the volume and value of raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used, if necessary. This was a separate USDOC request for additional information. The September 27, 2017, request for additional information neither superseded nor otherwise revoked the USDOC's August 4, 2017, request. In sum, the USDOC's August 4, 2017, letter requested that the mandatory respondents submit the volume of raw olives purchased that were processed into ripe olives, and the USDOC's September 27, 2017, letter requested that the mandatory respondents submit information regarding raw olives purchased without regard to the olive product.

284. The responses provided by two mandatory respondents demonstrate that USDOC's requests were well understood. In response to the USDOC's September 27, 2017 request, Agro Sevilla and Angel Camacho provided their respective total purchases of raw olives, regardless of

³⁸⁴ See Request for Limiting Olive Supplier Response Burdens (Exhibit EU-57), p. 2; Countervailing Duties Investigation of Ripe Olives from Spain – Support for Respondents' Request (Exhibit EU-56), p. 1.

³⁸⁵ See Letter to Aceitunas Guadalquivir, S.L.U. re: Questionnaire to Unaffiliated Suppliers (Exhibit USA-14); Letter to Agro Sevilla Aceitunas S.Coop.And. re: Questionnaire to Affiliated Suppliers (Exhibit USA-12); Letter to Angel Camacho Alimentacion, S.L. re: Questionnaire to Unaffiliated Suppliers (Exhibit USA-13).

³⁸⁶ Ripe Olives from Spain Countervailing Duty Investigation: Clarification of the Department's September 26, 2017 Letter (Exhibit EU-60), p. 2.

³⁸⁷ Ripe Olives from Spain Countervailing Duty Investigation: Clarification of the Department's September 26, 2017 Letter (Exhibit EU-60), p. 2.

the olive product ultimately processed.³⁸⁸ Each company’s response delineated purchases of (i) raw olives that were processed into ripe olives and (ii) purchases of raw olives that were processed into other olive products. Accordingly, Agro Sevilla’s revised exhibits include a column labeled “Volume of Black Olives Purchased” (i.e., for purchases of raw olives processed into ripe olives) and a column labeled “Volume of Green Olives Purchased” (i.e., for purchases of raw olives processed into other olive products).³⁸⁹ Likewise, Angel Camacho’s revised exhibits included a column labeled “Quantity Raw for Ripe” (i.e., for purchases of raw olives processed into ripe olives) and a column labeled “Quantity Raw for No Ripe” (i.e., for purchases of raw olives processed into other olive products).³⁹⁰ Guadalquivir did not resubmit its information in response to the USDOC’s September 27, 2017, letter or seek clarification from the USDOC as to the requested information.

285. Thus, consistent with the questions actually asked by the USDOC, both Agro Sevilla and Angel Camacho understood that the USDOC’s August 4, 2017, and September 27, 2017, letters collectively requested two pieces of information: (i) the volume of purchases of raw olives processed into ripe olives and (ii) the total volume of purchases of raw olives, without regard to the end product. The EU is therefore incorrect that “[t]he only acceptable interpretation of [the USDOC’s September 27, 2017, letter] is that Agro Sevilla was wrong to limit its initial response to the purchases of olives which are processed into ripe olives.”³⁹¹ Rather, in its September 27, 2017, letter, the USDOC was requesting information additional to that originally requested in its August 4, 2017, questionnaire.

- c. The EU fails to show that the USDOC’s questionnaires gave no notice that the mandatory respondents were to provide purchase information for raw olives processed into ripe olives

286. Consistent with Article 12.1 of the SCM Agreement, the USDOC’s August 4, 2017, questionnaire notified the parties that the USDOC required information on their purchases of raw olives processed into ripe olives. The EU’s effort to cast the USDOC’s later September 27, 2017, request for additional information as altering the scope of that earlier request conflicts with the record evidence. In fact, two mandatory respondents correctly understood that the later, additional request would have them present information both on purchases of raw olives for processing into ripe olives and purchase of raw olives for other uses. Therefore, the EU has failed to demonstrate that the USDOC did not request information on purchases of raw olives for processing into ripe olives. Accordingly, the Panel should reject the EU claim that the USDOC acted inconsistently with Article 12.1 by failing to notify respondents of the information required of them.

³⁸⁸ See Agro Sevilla Revised Olive Sourcing Data (Exhibit EU-65 (BCI) and Exhibit EU-79); Angel Camacho Revised Olive Sourcing Data (Exhibit EU-64 (BCI) and Exhibit EU-78)

³⁸⁹ See Agro Sevilla Revised Olive Sourcing Data (Exhibit EU-65 (BCI) and Exhibit EU-79).

³⁹⁰ See Angel Camacho Revised Olive Sourcing Data (Exhibit EU-64) (BCI) and (Exhibit EU-78).

³⁹¹ EU FWS, para. 701.

B. The EU’s Claims Have No Merit Because the USDOC Applied the Same Calculation Method to Each Mandatory Respondent and Used Each Mandatory Respondent’s Reported Information

287. The EU asserts that, in response to the August 4, 2017 questionnaire described above, Guadalquivir reported its “overall purchase of raw olives (rather than only the purchase of the raw olives processed into ripe olives)”.³⁹² Thus, the EU argues, the USDOC should not have used Guadalquivir’s reported information in the final determination because “[t]he methodology adopted by the investigating authority . . . reflects this limitation to the specific subject merchandise” rather than all raw olive purchases.³⁹³ According to the EU, several claims arise from this defect. First, “[b]y basing its calculation of . . . Guadalquivir’s final subsidy amount on the overall purchases of raw olives as input (namely a too high value),” the USDOC breached Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.³⁹⁴ Second, the USDOC’s approach “violates the obligation, contained in Article 10 of the SCM Agreement to ‘take all necessary steps’ to ensure that the imposition of the duties complies with Article VI:3 of the GATT 1994 and the SCM Agreement.”³⁹⁵ Third, the EU argues that “the calculation of the countervailing duty rate for Guadalquivir differs from the calculation of those imposed on Agro Sevilla and C[a]macho, without any justification,” thus violating the requirement under Article 19.3 of the SCM Agreement to apply countervailing duties on a non-discriminatory basis.”³⁹⁶

288. The record of the investigation refutes each of these arguments. As described above, the USDOC requested from each mandatory respondent (including Guadalquivir) purchase information for raw olives processed into ripe olives. The information that each respondent reported in response to the USDOC’s request was used by the USDOC to calculate the final subsidy rate for each respondent. In this way, the USDOC used a uniform calculation method as to each of the three mandatory respondents to calculate each company’s final subsidy rate. Moreover, the USDOC provided a reasoned and adequate explanation, based on positive record evidence, to support using the purchase information submitted by each of the three companies.

1. The proper legal framework to understand the obligations in Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement

289. Article II:2(b) of the GATT 1994 provides that “[n]othing in this Article shall prevent any contracting party from imposing at any time on the importation of any product . . . any anti-dumping or countervailing duty applied consistently with the provisions of Article VI.”

³⁹² EU FWS, para. 690.

³⁹³ See EU FWS, para. 692.

³⁹⁴ EU FWS, para. 706.

³⁹⁵ EU FWS, para. 710.

³⁹⁶ EU FWS, para. 708. For avoidance of doubt, the EU also claims that the USDOC breached Articles 19.1 and 32.1 of the SCM Agreement, but does not explain why. Similar to the more fully developed claims addressed in this section, the EU fails to demonstrate that the USDOC’s final determination of the existence and amount of the subsidies to Guadalquivir breached Article 19.1 or Article 32.1 of the SCM Agreement.

290. Article VI:3 provides:

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of offsetting any bounty, or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

291. Articles II:2 and VI:3 of the GATT 1994 together affirm Members’ authority to levy duties that “offset” subsidies in an amount not in excess of the subsidy determined to have been granted, directly or indirectly, on the manufacture, production, or export of a product.

292. Article 10 of the SCM Agreement requires, in part, that Members take all necessary steps to ensure that “imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement.”

293. Article 19.4 reads: “No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.” The main clause of Article 19.4 makes clear that countervailing duties cannot be levied “in excess of” the “amount of the subsidy found to exist” by the investigating authority. “Amount” means “[t]he total to which anything amounts; the total quantity or number.”³⁹⁷ Therefore, a Member may not levy countervailing duties greater than the quantity of subsidy found to have been granted on the manufacture, production, or export of the product in question.³⁹⁸ As such, a Member cannot collect countervailing duties on subsidies alleged but not demonstrated, or levy punitive duties.

294. The second part of Article 19.4 calls for a calculation “in terms of subsidization per unit of the subsidized and exported product.” Subsidization “per unit” indicates that the level of duty

³⁹⁷ Definition of “appropriate” from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2 (Exhibit USA-28), p. 103.

³⁹⁸ See *US – Upland Cotton (Panel)*, para. 7.1176 (“[T]he general rationale of a unilateral countervailing duty investigation is to determine whether or not a countervailable subsidy exists and, if so, to ensure that any countervailing duty levied on any import is not in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of subsidized and exported product. Logically, should a Member make an affirmative determination that a countervailable subsidy exists, these provisions in Part V necessitate calculation of the amount of the subsidy before a countervailing duty may be imposed.”).

is linked to the total subsidy amount allocated to the product benefitting from the subsidy.³⁹⁹ The “subsidization” – in this context, the “amount of subsidy found to exist” by the investigating authority – would be expressed as a ratio, reflecting the amount of subsidy attributed to each “unit” of product.⁴⁰⁰

295. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not dictate precisely how an investigating authority should determine the appropriate denominator for a given numerator when calculating countervailing duty ratios.⁴⁰¹ The elements of the numerator and denominator must be determined, however, so as to ensure that the level of duty does not exceed the amount of subsidy, in terms of subsidization per unit.

296. Similarly, Article 19.3 of the SCM Agreement does not speak to the substantive issue of what a subsidy is and how a benefit is found to exist. Article 19.3 provides, in relevant part:

When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

297. As discussed in greater detail above, where a Member has decided to impose countervailing duties, Article 19.3 of the SCM Agreement requires the Member to levy duties on imports from all sources found to be subsidized and causing injury: (i) on a non-discriminatory basis on imports from those sources; and (ii) “in the appropriate amounts.” Importing Members cannot discriminate between 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 determined to exist.

298. Importantly, it is other provisions in the SCM Agreement that provide the substantive rules against which “the appropriate amounts in each case” may be understood. Article 14 of the SCM Agreement speaks directly to the notion of calculating the amount of benefit in terms of the benefit to the recipient. The EU has not raised any of its arguments in the context of Article 14, and therefore has not properly challenged the calculation of the “amount” of the underlying subsidy in the determination at issue. In any event, the text of Article 14 refers to “guidelines,”

³⁹⁹ *US – Washing Machines (AB)*, para. 5.267.

⁴⁰⁰ *See US – Upland Cotton (Panel)*, para. 7.1176 (Article 19.4 “require[s] the calculation of [the amount of the subsidy] to be performed in a certain way: ‘in terms of subsidization per unit of the subsidized and exported product.’”).

⁴⁰¹ *See US – Washing Machines (AB)*, para. 5.269 (“Within these confines, the SCM Agreement does not dictate any particular methodology for calculating subsidy ratios, and does not specify explicitly which elements should be taken into account in the numerator and the denominator.”).

which leave significant scope for an investigating authority to seek the appropriate methodology to measure benefit.

2. *The EU fails to demonstrate that the USDOC's final determination was inconsistent with Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement*

299. The crux of the EU's claims under Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement is that, because the USDOC supposedly did not actually ask for information on raw olives processed into ripe olives, and for that reason Guadalquivir did not provide that information, by using Guadalquivir's reported information in its final determination the USDOC did not ensure that the countervailing duties imposed were not discriminatory or in excess of the amounts required to offset the subsidies granted.⁴⁰² The EU's premise is wrong, and it accordingly fails to support these claims.

300. Similar to its claim under Article 12.1 of the SCM Agreement, the EU bases its arguments on an incomplete representation of the investigation record – in particular, the questions posed by the USDOC and the mandatory respondent's responses to those questions. As reflected in the relevant record information, any unbiased and objective investigating authority could have determined, as the USDOC did, that the information reported by Guadalquivir represented its purchases of raw olives that were processed into ripe olives. The United States demonstrates below that the USDOC: (a) applied the same benefit calculation method to each mandatory respondent and (b) in applying that method to Guadalquivir in the final determination, properly relied upon the purchase information supplied by Guadalquivir.

- a. Because the USDOC used the same method to calculate each mandatory respondent's final subsidy rate, the EU has not established any breach of Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement

301. The EU fails to show that the USDOC breached Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement. In particular, as demonstrated below, the USDOC applied the same calculation methodology to Guadalquivir as it did the other two mandatory respondents. Moreover, although the EU contests the facts surrounding how the USDOC solicited information from the mandatory respondents and ultimately relied upon that information (discussed further in the next section), the EU fails to establish that the USDOC calculated excessive or discriminatory final subsidy rates, or that it somehow erred imposing duties based upon those rates to the mandatory respondents.

302. In its final determination, the USDOC measured the benefit conferred from subsidies provided to raw olive growers "by multiplying the weighted average per kilogram benefit by the volume of each respondent's purchases of raw olives to produce subject merchandise [i.e., ripe

⁴⁰² See EU FWS, paras. 690-707, 709-711.

olives], and to divide the resulting benefit by the sales of subject merchandise [i.e., ripe olives].”⁴⁰³ The USDOC applied this methodology to each of the three mandatory respondents. The numerator in the benefit calculation was the “weighted average per kilogram benefit” – i.e., the weighted-average benefit for each kilogram of raw olives – that is multiplied by each mandatory respondent’s reported volume of purchases of raw olives that were processed into ripe olives.⁴⁰⁴ The denominator was each mandatory respondent’s reported sales of ripe olives.⁴⁰⁵

303. To summarize, the USDOC calculated the benefit conferred from subsidies provided to raw olive growers as follows:

- The USDOC calculated a figure that represented the weighted-average benefit for each kilogram of raw olives (i.e., the weighted-average per kilogram benefit), which involved the following steps: (1) divide each grower’s benefit by its production volume in kilograms of raw olives; (2) weight each grower’s benefit by its share of the total volume purchased by the mandatory respondents; and (3) sum the weighted benefits to determine a weighted average benefit per kilogram of raw olives.⁴⁰⁶
- For the numerator of the calculation, the USDOC multiplied the weighted-average per kilogram benefit by the volume of purchases of raw olives that were processed into ripe olives (based on the volume reported by each mandatory respondent).⁴⁰⁷
- For the denominator of the calculation, the USDOC used each mandatory respondent’s sales of ripe olives.⁴⁰⁸
- The following equation encapsulates the USDOC’s method:

$$\frac{\text{Weighted-Average Per KG Benefit} \times \text{KG of Raw Olives Purchased for Ripe Olives}}{\text{Sales of Ripe Olives}}$$

⁴⁰³ See Final Issues and Decision Memorandum, p. 44 (Exhibit EU-2).

⁴⁰⁴ See, e.g., Final Determination Calculations for Aceitunas Guadalquivir, S.L.U., p. 2 (Exhibit EU-41); Guadalquivir Final Calculation Data, BPS Growers tab (Exhibit EU-47 (BCI) and Exhibit EU-76).

⁴⁰⁵ See, e.g., Final Determination Calculations for Aceitunas Guadalquivir, S.L.U., p. 2 (Exhibit EU-41); Guadalquivir Final Calculation Data, BPS Growers tab (Exhibit EU-47 (BCI) and Exhibit EU-76).

⁴⁰⁶ See Preliminary Determination Calculations for Aceitunas Guadalquivir, S.L.U., pp. 2-3 (Exhibit EU-36); Final Determination Calculations for Aceitunas Guadalquivir, S.L.U., p. 2 (Exhibit EU-41); see also Guadalquivir Final Calculation Data, BPS Growers tab (Exhibit EU-47 (BCI) and Exhibit EU-76).

⁴⁰⁷ See Final Issues and Decision Memorandum, pp. 43-44 (Exhibit EU-2); see also Final Determination Calculations for Aceitunas Guadalquivir, S.L.U., p. 2 (Exhibit EU-41); Guadalquivir Final Calculation Data, BPS Growers tab (Exhibit EU-47 (BCI) and Exhibit EU-76).

⁴⁰⁸ See Final Issues and Decision Memorandum, pp. 43-44 (Exhibit EU-2); see also Final Determination Calculations for Aceitunas Guadalquivir, S.L.U., p. 2 (Exhibit EU-41); Guadalquivir Final Calculation Data, BPS Growers tab (Exhibit EU-47 (BCI) and Exhibit EU-76).

304. Accordingly, the EU errs in its assertion that “the calculation of the countervailing duty rate for Guadalquivir differs from the calculation of those imposed on Agro Sevilla and C[a]macho.”⁴⁰⁹ The calculation method described above was uniformly applied to each mandatory respondent. The numerator incorporated each mandatory respondent’s reported information in response to the USDOC’s August 4, 2017 letter regarding their purchases of raw olives that were processed into ripe olives. Accordingly, for Guadalquivir’s numerator, the USDOC relied on the purchase volume that Guadalquivir reported in response to the USDOC’s August 4, 2017 letter because Guadalquivir’s “originally reported information is indicative of its raw olives purchases that were used to produce subject merchandise.”⁴¹⁰

305. Accordingly, in calculating, imposing, and collecting duties, the USDOC used the same calculation method, which incorporated the information supplied by respondents in response to the same question. As the EU’s claims that the USDOC’s final determination was inconsistent with Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement are premised on different calculations being applied to different respondents, its claims necessarily fail on that basis.

- b. The factual assertions supporting the EU’s claims that the USDOC breached Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement are incorrect

306. The preceding section demonstrated the inadequacy of the EU’s claims regarding Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement. In this section, the United States shows that the EU’s claims also lack a factual basis in asserting that the USDOC used an incorrect volume of raw olive purchases.

307. The EU argues that with respect to Guadalquivir the USDOC improperly “used the (higher) volume of all purchases of raw olives,”⁴¹¹ but fails to acknowledge that the value for purchases used was that reported by the respondent itself. The EU relies for support on three supposed actions by the USDOC: (i) its failure to indicate that its August 4, 2017 questionnaire was “limited to only such raw olives which are processed into ripe olives”;⁴¹² (ii) its suggestion in later correspondence that it “understood the scope of its questionnaire of 4 August 2017 to refer to the purchases of all olives”;⁴¹³ and (iii) evidence in the final determination that it knew or should have detected that Guadalquivir had failed to limit the scope of its response to raw olives processed into ripe olives. As demonstrated below, and addressed in the USDOC’s final determination and ministerial error memorandum, the relevant record evidence supported the USDOC’s determination to use Guadalquivir’s reported purchase information.

⁴⁰⁹ EU FWS, para. 708.

⁴¹⁰ Final Issues and Decision Memorandum (Exhibit EU-2), p. 44.

⁴¹¹ See EU FWS, para. 694.

⁴¹² EU FWS, para. 698.

⁴¹³ See EU FWS, paras. 699, 703.

308. First, as elaborated in Section VI.A.2.a above, on August 4, 2017, the USDOC issued a questionnaire instructing each mandatory respondent to provide its sources of raw olives that were processed into ripe olives.⁴¹⁴ To summarize: the cover letter and question 6 (i.e., the operative question) directed each company to report its volume of purchases of raw olives that were processed into ripe olives.⁴¹⁵ The EU’s assertion that “it cannot be argued that the data used by USDOC in this respect was ever indicated by Guadalquivir as being the volume of raw olives processed into ripe olives”⁴¹⁶ simply cannot be reconciled with the actual text of the questionnaire, let alone the fact that the other two mandatory respondents, in response to same question, supplied the requested information.

309. Moreover, contrary to the EU’s arguments,⁴¹⁷ the responses received by the USDOC did not indicate that the information provided by the three mandatory respondents failed to respond to the USDOC’s August 4, 2017 request for each company’s purchases of raw olives that were processed into ripe olives. To the contrary, the record reflects that the mandatory respondents understood the USDOC’s August 4, 2017 to require them to submit the volume of their respective purchases of raw olives that were processed into ripe olives. The companies responded to question 6 by providing exhibits tabulating their purchases of raw olives from affiliated and unaffiliated suppliers that were processed into ripe olives.⁴¹⁸ Angel Camacho’s submission relabeled the relevant column from the template as “Volume of Raw Olives Purchased (only for Ripe Olives)” to reinforce that, as requested by the USDOC, its reported information was limited to purchases of raw olives processed into ripe olives.⁴¹⁹ Similarly, Agro Sevilla reiterated to the USDOC that “the information regarding the volume and value of raw olives . . . was limited to olives used in the production of the ripe olives subject to this [countervailing duty] investigation.”⁴²⁰

310. Similarly, Guadalquivir’s response to question 6 of the August 4 questionnaire did not convey to the USDOC that, unlike the other mandatory respondents and contrary to the USDOC’s request, Guadalquivir was providing total raw olive purchase information.⁴²¹ In fact,

⁴¹⁴ See Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58); Letter to Agro Sevilla re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-6); Letter to Angel Camacho re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-7).

⁴¹⁵ *China – Broiler Products (Article 21.5 – US) (Panel)*, para. 7.230 n. 383 (“In respect of the party from whom information is required, the notice of the information required is given through the information request itself.”).

⁴¹⁶ EU FWS, para. 695.

⁴¹⁷ EU FWS. 648 and 697.

⁴¹⁸ See Guadalquivir Olive Sourcing Questionnaire Response, p. 3 and Exhibits 1 and 2 (Exhibit EU-46 (BCI) and Exhibit EU-63); Agro Sevilla Olive Sourcing Questionnaire Response, p. 3 and Exhibits 1 and 2 (Exhibit EU-42 (BCI) and Exhibit EU-17); Angel Camacho Olive Sourcing Questionnaire Response, p. 3 and Exhibits 1 and 2 (Exhibit EU-44 (BCI) and Exhibit EU-68).

⁴¹⁹ See Angel Camacho Olive Sourcing Questionnaire Response, Exhibits 1 and 2 (Exhibit EU-44 (BCI) and Exhibit EU-68).

⁴²⁰ Ripe Olives from Spain Countervailing Duty Investigation: Clarification of the Department’s September 26, 2017 Letter (Exhibit EU-60), p. 2.

⁴²¹ See Guadalquivir Olive Sourcing Questionnaire Response (Exhibit EU-46 (BCI), p. 3.

in responding to the USDOC’s request for information on purchases of raw olives processed into ripe olives, Guadalquivir simply noted that it was providing information regarding its affiliated and unaffiliated suppliers of raw olives.⁴²² Moreover, when the USDOC later conducted a verification of the information supplied by Guadalquivir, Guadalquivir “explained that because Commerce requested only purchases of ripe olives, [Guadalquivir] reported only olives purchased in acetic acid; [Guadalquivir] did not report olives purchased in brine, because, as they explained, brine olives must become green olives.”⁴²³

311. Second, the USDOC’s September 27, 2017 letter did not, as the EU argues, “affirmatively establish[]” that the USDOC expected the mandatory respondents to respond to the August 4, 2017 questionnaire with data regarding all raw olive data sources.⁴²⁴ Rather, the USDOC requested that Agro Sevilla resubmit its previously reported information “to include the volume and value of raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used.”⁴²⁵ As explained in Section VI.A.2.b above, the USDOC’s August 4, 2017 and September 27, 2017 questionnaires collectively requested two sets of purchase volume information: (i) raw olives processed into ripe olives (i.e., the August 4 questionnaire) and (ii) all raw olives without regard to use (i.e., the September 27 letter).

312. In response to the USDOC’s September 27, 2017 questionnaire, Agro Sevilla and Angel Camacho resubmitted raw olive supply information to include purchases from affiliated and unaffiliated suppliers, regardless of the olive product for which the raw olives were used.⁴²⁶ The resubmitted information delineated each company’s purchases of raw olives that were processed into ripe olives and purchases of raw olives that were for other olive products. Contrary to the EU’s arguments,⁴²⁷ Guadalquivir’s silence and decision not to respond did not inform the USDOC that what Guadalquivir reported in response to the USDOC’s August 4, 2017 questionnaire reflected the company’s total purchases of raw olives. As the USDOC summarized in its ministerial error memorandum:

On August 4, 2017, we asked all three mandatory respondents to “provide the requested information on your company’s sources of raw olives *that were processed into ripe olives . . .*” All three respondents reported a volume of olives they purchased. On September 27, 2017, counsel for the respondents called Commerce and requested that counsel resubmit the table included in response to Commerce’s August 4, 2017 questionnaire on the sources of raw and ripe olives. That same day, in a memorandum to the file, we

⁴²² See Guadalquivir Olive Sourcing Questionnaire Response (Exhibit EU-46 (BCI), p. 3.

⁴²³ Verification of the Questionnaire Responses of Aceitunas Guadalquivir, S.L.U. (Exhibit USA-22), p. 7.

⁴²⁴ EU FWS, para. 701.

⁴²⁵ Ripe Olives from Spain Countervailing Duty Investigation: Clarification of the Department’s September 26, 2017 Letter (Exhibit EU-60), p. 2.

⁴²⁶ See Agro Sevilla Revised Olive Sourcing Data (Exhibit EU-65 (BCI) and Exhibit EU-79); Angel Camacho Revised Olive Sourcing Data (Exhibit EU-64 (BCI) and Exhibit EU-78).

⁴²⁷ See EU FWS, paras. 654 and 702.

explained Agro Sevilla’s call and asked Agro Sevilla, and any other respondent to who this applied, to revise its purchase data to include all raw olive purchases. Agro Sevilla and Angel Camacho updated their data and provided a breakdown of their purchases, separately reporting the volume of raw to ripe, raw to table, etc. Aceitunas Guadalquivir did not update its information. Because Aceitunas Guadalquivir did not revise its data, we understood that Aceitunas Guadalquivir’s reported volume represented purchases of raw to ripe because the initial question we asked was for the volume of purchases of raw to ripe. The totality of the evidence on the record did not suggest that Aceitunas Guadalquivir’s initial reporting was incorrect or was otherwise not responsive to the question asked.⁴²⁸

313. Third, similarly, the EU incorrectly argues that the USDOC’s December 21, 2017, letter to Guadalquivir “unambiguously shows that [the USDOC] knew that Guadalquivir’s reply to the questionnaire of 4 August 2017” was not limited to raw olives processed into ripe olives.⁴²⁹ The USDOC’s question and Guadalquivir’s reply showed no such thing. The USDOC stated:

3. In your questionnaire response of August 14, 2017 at Exhibit 2, [Guadalquivir] provided a list of unaffiliated suppliers and total purchases of raw olives.... Confirm that this number includes purchases of all raw olives regardless of the processed olive product for which the raw olives were used. Explain if these purchases are made on a gross or net basis, that is, with or without sticks, leaves, and other debris and culls. Explain how the purchased volumes are recorded in your accounting system and explain whether you apply a standard yield loss ratio in recording the purchased volume of raw olives.⁴³⁰

314. Guadalquivir responded that the reported purchase volume “represents all raw olive receipts as recorded in the ERP system in 2016.”⁴³¹ This response supplied information regarding Guadalquivir’s system of recordation but did not confirm whether the reported purchase volume represented only purchases of raw olives that were processed into ripe olives or all purchases of raw olives without regard to the end product. Guadalquivir could have confirmed that its response to question 6 in USDOC’s August 4, 2017 questionnaire included all purchases of raw olives, and was not limited to those purchases of raw olives that were processed

⁴²⁸ Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), pp. 4-5 (emphasis original; citations omitted).

⁴²⁹ See EU FWS, para.703.

⁴³⁰ Countervailing Duty (CVD) Investigation of Ripe Olives from Spain: Supplemental Questionnaire to Aceitunas Guadalquivir S.L.U. (Exhibit EU-62)

⁴³¹ Fourth Supplemental Questionnaire Response of Aceitunas Guadalquivir S.L.U. (Exhibit EU-59), p. 6.

into ripe olives (e.g., “Yes, the volume of raw olive purchases reported in Guadalquivir’s August 14, 2017 questionnaire response includes all raw olive purchases regardless of the processed olive product for which the raw olives were used.”). It did not do so.

315. Finally, the EU argues that the USDOC “knew that Guadalquivir’s reply to [the August 4, 2017 questionnaire] could never properly be understood as indicating the volume of ripe olives processed into ripe olives”⁴³² or that the USDOC at least should have discerned as much from Guadalquivir’s responses.⁴³³ In particular, the EU argues that because of the difference between what Guadalquivir reported in response to the USDOC’s request for purchases of raw olives and its reported sales of ripe olives, “the investigating authority could not regard the data chosen as being ‘indicative’ in the sense of being an acceptable proxy for the data set which its methodology called for.”⁴³⁴ The USDOC addressed this argument in its ministerial error memorandum:

Aceitunas Guadalquivir argues that Commerce should use the volume of subject merchandise sold during the period of investigation as a proxy for the volume of raw to ripe; however, there is no information on the record to substantiate the validity of this volume as a proxy for raw olive purchases. Also, it is possible that sales volume would not be representative of purchase volume; we would likely have to consider yield and loss factors, as well as product characteristics (with pits or without) and the long shelf life of the subject merchandise to determine whether this volume could serve as a proxy.⁴³⁵

316. Furthermore, the USDOC’s verification of Guadalquivir’s questionnaire responses further supported that Guadalquivir’s response to the USDOC’s August 4, 2017 letter reflected the company’s volume of purchases of raw olives that were processed into ripe olives. At verification, the USDOC reviewed Guadalquivir’s purchases of raw olives and the USDOC recorded the following observations in Guadalquivir’s verification report:

...[Guadalquivir] reminded Commerce that it has only reported purchases of raw olives and not purchases of any “semi-processed” or “processed” olives that are to become or already are green olives. For example, although purchases of what [Guadalquivir] defined as a “semi-processed” olive were included if they ultimately became ripe olives, they were not included if they ultimately became green olives. Thus, [Guadalquivir] explained that because Commerce requested only purchases of ripe olives,

⁴³² EU FWS, paras. 703-705.

⁴³³ EU FWS, para. 705.

⁴³⁴ EU FWS, para. 705.

⁴³⁵ Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), pp. 5-6.

[Guadalquivir] reported only olives purchased in acetic acid; [Guadalquivir] did not report olives purchased in brine, because, as they explained, brine olives must become green olives.

...

We preselected two of [Guadalquivir’s] purchases of raw olives for the [period of investigation] for further examination.... The quantities reported on the invoices matched [Guadalquivir’s] reporting in its questionnaire responses, furthermore we were able to trace these volumes by their corresponding values through to [Guadalquivir’s] general ledger.⁴³⁶

317. In short, the USDOC discovered additional purchases of olives at verification; however, Guadalquivir explained that it did not report these purchases because the USDOC’s August 4, 2017 letter requested purchases of raw olives that were processed into ripe olives and the additional unreported purchases of olives were ultimately processed into green olives, i.e., non-subject merchandise. The EU’s position that Guadalquivir’s reported purchase volume included the company’s total purchases of raw olives, regardless of the processed olive product for which the raw olives were used, is thus inconsistent with the USDOC’s observations at the on-site verification of Guadalquivir’s questionnaire responses.

318. The USDOC additionally explained how the on-site verification of Guadalquivir’s questionnaire responses supported the USDOC’s use of Guadalquivir’s reported information as the volume of purchases of raw olives that were processed into ripe olives:

At verification, we discovered a considerable volume of additional unreported olive purchases. Aceitunas Guadalquivir explained that these were not “raw” olive purchases; and these olives were ultimately processed into non-subject merchandise. Thus, we understood that the originally reported volume of olives purchased represented purchases of raw to ripe and the additional volume of olive purchases not reported represented olives purchased for the production of non-subject merchandise. At no point did Aceitunas Guadalquivir alert Commerce that the volume originally reported was inclusive of raw olives used to produce both subject and non-subject merchandise.⁴³⁷

319. The EU additionally suggests that the USDOC would have determined a lower countervailing duty rate for Guadalquivir “[h]ad the calculation of the subsidy rate been based on

⁴³⁶ Verification of the Questionnaire Responses of Aceitunas Guadalquivir, S.L.U. (Exhibit USA-22), p. 7.

⁴³⁷ Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), p. 5 (citations omitted).

the correct value (i.e., only the purchase of raw olives processed into ripe olives).”⁴³⁸ However, as the USDOC noted in its ministerial error memorandum, the allegedly “correct” volume information is not on the record.⁴³⁹ Specifically: “the absence of an alternative volume of olive purchases on the record highlights that this . . . was a reporting error made by the respondent, which the respondent did not alert Commerce to during the course of the investigation or prior to the issuance of the *Final Determination*.”⁴⁴⁰

320. Thus, the record reflects that the USDOC took the steps needed to ensure that the duties imposed did not exceed the amounts required to offset the subsidies granted. The EU’s argument that Guadalquivir’s final subsidy rate was “excessive and inappropriate”⁴⁴¹ is at odds with the record information supplied by Guadalquivir and speculative. The USDOC’s conclusion that the information submitted by Guadalquivir represented the company’s purchases of raw olives that were processed into ripe olives is one that could have been reached by any other unbiased and objective investigating authority examining the same evidence. Accordingly, the Panel should reject the EU’s claims that the USDOC breached Article VI:3 of GATT 1994, and Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement.

C. Consistent with Article 12.8 of the SCM Agreement the USDOC Informed All Parties of the Essential Facts Under Consideration

321. The EU argues that the USDOC breached Article 12.8 of the SCM Agreement because it did not disclose “the fact that it was going to use the volume of olives processed into ripe olives in its determination of the amount of subsidisation before making its final determination.”⁴⁴² As explained below, the USDOC disclosed the essential facts under consideration. It did so months before the final determination, thereby permitting the parties to defend their interests, which they in fact did.

1. Article 12.8 requires an investigating authority to disclose the essential facts under consideration

322. Article 12.8 of the SCM Agreement provides:

The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether

⁴³⁸ EU FWS, para. 641.

⁴³⁹ See Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), p. 5.

⁴⁴⁰ Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), p. 5.

⁴⁴¹ EU FWS, para. 706.

⁴⁴² EU FWS, para. 724.

to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

323. The “essential facts under consideration” include competing sources of information that may serve as the basis for the final determination, and not necessarily a single set of facts upon which the final determination will rely.⁴⁴³ Because “fact” is preceded by the adjective “essential”, the Article 12.8 disclosure obligation extends only to the “essential” facts that the investigating authority considers in determining whether to apply definitive measures, not all facts.

324. Moreover, the reference to facts “under consideration” is not the same as the facts “finally determined” to be the proper basis for the determination. The term “consideration” is defined as “the action of taking into account.”⁴⁴⁴ Thus, an investigating authority’s obligation under Article 12.8 is limited to disclosing the essential facts – not its reasoning or conclusions – before a final determination is made.⁴⁴⁵

325. Under Article 12.8, disclosure should occur “in sufficient time for the parties to defend their interests” but does not prescribe a particular manner for disclosure. Interpreting the equivalent provision in the Anti-Dumping Agreement, a panel has observed that disclosure “in sufficient time” “may be complied with in a number of ways,” including record documents “such as verification reports, a preliminary determination, or correspondence exchanged between the investigating authorities and individual exporters”⁴⁴⁶

326. The investigating authority therefore is to disclose the information in such time and manner that interested parties have the opportunity to defend their interests.

2. *The EU fails to show that the USDOC did not disclose the essential facts under consideration or denied parties sufficient time to defend their interests*

327. The EU argues that the USDOC failed to disclose to Guadalquivir one essential fact under consideration: “that [the USDOC] was going to use the volume of olives processed into ripe olives in its determination”⁴⁴⁷ For support, the EU cites (1) that the preliminary

⁴⁴³ See *China – GOES (AB)*, para. 240.

⁴⁴⁴ Definition of “consideration” from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, pp. 485-86 (Exhibit USA-27).

⁴⁴⁵ The panel in *China – GOES* observed this distinction: “the disclosure obligation does not apply to the *reasoning* of the investigating authorities, but rather to the ‘essential facts’ underlying the reasoning.” *China – GOES (Panel)*, para. 7.407.

⁴⁴⁶ *Argentina – Ceramic Tiles*, para. 6.125. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement differ in that, under the latter, investigating authorities should inform interested Members of the essential facts under consideration in addition to interested parties.

⁴⁴⁷ EU FWS at 724. Specifically, the volume of purchases of raw olives used to produce ripe olives was used in the numerator used calculate the benefit from subsidies conferred to the individually examined exporters and producers.

determination took into account all raw olive purchases and (2) the USDOC’s questionnaires of August 4, 2017 and December 21, 2017 conveyed to Guadalquivir the impression that the USDOC “did not regard the value of raw olives processed into ripe olives as a [sic] relevant information.”⁴⁴⁸ The investigation record refutes these arguments.

328. On at least three occasions before the final determination, the USDOC disclosed to the interested parties (including Guadalquivir) that the essential facts under consideration included the volume of raw olives processed into ripe olives. The facts under consideration as variables in the benefit calculation for the final determination were extensively addressed in the record and parties had sufficient time to – and in fact did – defend their interests.

329. First, as explained in Section VI.A.2.b above, through its August 4, 2017 and September 27, 2017 questionnaires the USDOC requested the volume of purchases of both (i) raw olives that were processed into ripe olives and (ii) all raw olives whether or not used to produce ripe olives.⁴⁴⁹ In particular, the August 4, 2017 questionnaire directed the mandatory respondents, including Guadalquivir, to provide “information on your company’s sources of raw olives that were processed into ripe olives...”⁴⁵⁰ USDOC’s questionnaires disclosed to the parties that both sets of raw olive purchase information – i.e., that were used to produce ripe olives and regardless of use – would be under consideration in determining whether to apply definitive measures. Moreover, the responses to those questions were submitted on August 14, 2017 and October 6, 2017, at least eight months before the date the USDOC issued its final determination (i.e., June 11, 2018). Those responses were served on all interested parties through USDOC’s electronic service system.

330. Second, in February 2018, the USDOC notified each mandatory respondent of the agenda for USDOC’s on-site verification of each company’s questionnaire responses, including all information that the USDOC anticipated relying upon as the basis for the final determination. In at least two ways, the verification agenda disclosed that purchase volumes for raw olives were essential facts under consideration. For one, each letter listed the factual submissions to be verified, including the August 4, 2017 questionnaire requesting information regarding mandatory respondents’ purchases of raw olives used to produce ripe olives purchases.⁴⁵¹ In addition, the section entitled “Sales and Export Information” directed parties to be prepared to present information regarding “[t]otal quantities of raw olives used for specific types of finished

⁴⁴⁸ EU FWS at 726-727.

⁴⁴⁹ See Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58); Letter to Agro Sevilla re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-6); Letter to Angel Camacho re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-7); Ripe Olives from Spain Countervailing Duty Investigation: Clarification of the Department’s September 26, 2017 Letter (Exhibit EU-60), p. 2.

⁴⁵⁰ Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58).

⁴⁵¹ See Verification of Aceitunas Guadalquivir, S.L.U.’s Questionnaire Responses (Exhibit USA-21), p. 6; Verification of Agro Sevilla Aceitunas S.Coop.And. Questionnaire Responses (Exhibit USA-18), p. 5; Verification of Angel Camacho Alimentacion S.L. Questionnaire Responses (Exhibit USA-19), p. 5.

products (i.e., ripe olives, other table olives, olive oil, other).⁴⁵² The passage informed the parties that the total purchases of raw olives and those purchases of raw olives used for specific types of products, such as ripe olives, were essential facts under consideration.

331. Third, Guadalquivir’s verification report, issued March 22, 2018, shows that the USDOC reviewed Guadalquivir’s purchases of raw olives and, more specifically, Guadalquivir’s purchases of raw olives that were processed into ripe olives.⁴⁵³ In this way, the verification report was another notice to the parties that the volume of purchases of raw olives that were processed into ripe olives was an essential fact under consideration.

332. Thus, at multiple junctures in the investigation, the USDOC disclosed that the volume of purchases of raw olives used to produce ripe olives was an essential fact under consideration. Those disclosures took “place in sufficient time for the parties to defend their interests”, as evidenced by written and oral advocacy presented by the interested parties between the preliminary and final determinations. In affirmative case and rebuttal briefs,⁴⁵⁴ the petitioner and mandatory respondents (including Guadalquivir), presented arguments as to whether, in the final determination, the benefit calculation should use a “ripe olives-only methodology” – i.e., multiply the weighted-average per kilogram benefit by each mandatory respondent’s volume of purchases of raw olives that were processed into ripe olives and divide the result by each mandatory respondent’s sales of ripe olives.⁴⁵⁵ The parties also availed themselves of the opportunity to defend their interests at the public hearing, which was held on May 16, 2018.⁴⁵⁶

333. Finally, the EU appears to conflate any differences that may exist between a preliminary and final determination with the Article 12.8 requirement to disclose the essential facts under consideration.⁴⁵⁷ A preliminary determination is by definition *preliminary* and subject to change in the final determination. The USDOC’s November 20, 2017 preliminary determination underscored the preliminary nature of its findings. For example, the preliminary determination contemplated a separate “final determination” which would take into account additional arguments (i.e., affirmative and rebuttal written briefs and an oral hearing) and on-site

⁴⁵² See Verification of Aceitunas Guadalquivir, S.L.U.’s Questionnaire Responses (Exhibit USA-21), p. 8; Verification of Agro Sevilla Aceitunas S.Coop.And. Questionnaire Responses (Exhibit USA-18), p. 8; Verification of Angel Camacho Alimentacion S.L. Questionnaire Responses (Exhibit USA-19), p. 7.

⁴⁵³ Verification of the Questionnaire Responses of Aceitunas Guadalquivir, S.L.U. (Exhibit USA-22), pp. 6-8.

⁴⁵⁴ See U.S. Department of Commerce Briefing Schedule (Exhibit USA-3).

⁴⁵⁵ See Case Brief of Petitioner (Exhibit USA-20), pp. 6-12; Rebuttal Brief of ASEMESA, Agro Sevilla Aceitunas S.Coop.And. (“Agro Sevilla”), Angel Camacho Alimentacion, S.L. (“Angel Camacho”) and Aceitunas Guadalquivir S.L.U. (“Guadalquivir”) (Exhibit USA-24), pp. 6-9.

⁴⁵⁶ See U.S. Department of Commerce Public Hearing Transcript (Exhibit USA-23), pp. 6-7. The hearing “provide[d] parties with an opportunity to present issues raised in their case and [] rebuttal briefs” – e.g., a benefit calculation methodology that would incorporate purchases of raw olives used to produce ripe olives.

⁴⁵⁷ See EU FWS, paras. 724-726. In particular, the EU argues that “[i]t is apparent from the record in this case that the investigating authority did not make available to Guadalquivir the fact that it was going to use the volume of olives processed into ripe olives in its [final] determination. . . [and]the methodology stated in [the] preliminary determination referred to the overall amount of olives purchased.” EU FWS, paras. 724-726.

verification of the respondents' information.⁴⁵⁸ As explained above, in its final determination, the USDOC determined it necessary to alter the benefit calculation to measure more accurately the subsidies conferred upon the subject merchandise.⁴⁵⁹ An investigating authority's obligation under Article 12.8 is limited to disclosing the "essential facts under consideration" – not all reasoning or conclusions – before a final determination is made.

334. The USDOC's disclosure of the essential facts under consideration, as outlined above, was consistent with Article 12.8 of the SCM Agreement. Accordingly, the Panel should reject the EU's claim that the USDOC failed to disclose the essential facts under consideration.

D. Because The USDOC Properly Calculated the "All Others" Rate, the EU Has Failed To Show That That Rate Is Inconsistent with Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement

335. Finally, the EU argues that, because Guadalquivir's subsidy rate was used to calculate the all-others rate applied to all exporters and producers that were not individually investigated, the all-others rate is necessarily incorrect for the same reason Guadalquivir's rate is incorrect.⁴⁶⁰

336. Because the EU has not demonstrated the inconsistency of Guadalquivir's final subsidy rate under the above provisions, the EU's claims regarding the all-others rate also fail. As explained above, the countervailing duty rate calculated for Guadalquivir is not erroneous. Therefore, the United States respectfully requests that the Panel reject the EU's consequential claims regarding the all-others rate.

VII. CONCLUSION

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

⁴⁵⁸ See Preliminary Decision Memorandum (Exhibit EU-1), pp. 31-32.

⁴⁵⁹ See Final Issues and Decision Memorandum (Exhibit EU-2), pp. 43-44; see also *Mexico – Olive Oil (Panel)*, para. 7.26 n. 63 ("We also note that other provisions in the *SCM Agreement* leave considerable discretion to Members to define their own procedures; e.g. Articles 12, 14 and 23. This leads us to believe that, in general, unless a specific procedure is set forth in the *Agreement* the precise procedures for how investigating authorities will implement those obligations are left to the Members to decide.").

⁴⁶⁰ See EU FWS, paras. 729-30 (arguing that the all-others rate violates Articles 10, 19.1, 19.3, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994).