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

(DS577)

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

February 25, 2021

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I. SPECIFICITY CLAIMS

Question 1 (*To both parties*) In paragraph 28 of its second written submission, the United States reiterates its position that the USDOC identified *a discrete component* of the BPS programme to which access was limited. Is such identification sufficient to establish *de jure* specificity under Article 2.1(a) of the SCM Agreement, which requires that access to *a subsidy* is explicitly limited?

Response:

1. Yes. As the question highlights, "limits access" is with respect to "a subsidy". The use of the indefinite article "a" and the noun "subsidy" does not indicate that the limit on access must be at the threshold point of eligibility for a subsidy, or that the limitation must exist with respect to an overall subsidy program rather than the specific subsidy at issue. Instead, the term "a subsidy", in conjunction with "such subsidy" in the next clause, serves to identify which subsidy is the subject of the inquiry under Article 2.1(a). The point is underscored by the erroneous argument made by the EU in this dispute,[1] rebutted by the United States,[2] that the USDOC should have made a supplementary specificity determination under Article 2.1(a) with respect to the Oils and Fats Program. "[A] subsidy" refers to *the* subsidy for which the investigating authority must make a finding.

2. The United States has explained at length that Article 2.1(a) does not prescribe a particular form in which the access to "a subsidy" must be limited.[3] For example, an explicit limitation on access to a subsidy need not be at the threshold point of eligibility for a subsidy program, as the EU argues.[4] Were that the case, Article 2.1(a) would include narrower conditions, such as those based on amount or eligibility, as found under Article 2.1(b). The more general language used in Article 2.1(a), "limits access", leaves open the possibility of other ways in which access to a subsidy could be limited to certain enterprises, such as through a discrete

[1] *See* EU FWS, paras. 284-288 (asserting that the USDOC's specificity determination lacks the requisite "foundation" because it did not include a supplementary specificity determination regarding the Oils and Fats Program); EU June 19 responses to Panel questions, para. 30.

[2] U.S. June 10 responses to Panel questions, para. 21; U.S. September 8 responses to Panel questions, paras. 6-11.

[3] *See* U.S. June 10 responses to Panel questions, paras. 3-15; U.S. September 8 responses to Panel questions, paras. 1-4; U.S. first virtual session opening statement, paras. 11-19; U.S. SWS, paras. 8-15.

[4] The EU protests that it has not used the phrase "limits threshold eligibility for any amount of subsidy under the program." EU second virtual session statement, para. 9. The substance of the EU's position speaks for itself. *See, e.g.*, EU June 10 responses to Panel questions, paras. 8-10 (surmising that "expressions like 'having access to a subsidy program' and 'being eligible for a subsidy program' have strictly speaking the same meaning: the eligibility criteria/conditions identify those who have access to the subsidy program and those who have not.'"); *see also* EU September 8 responses to Panel questions, paras. 16-18 (stating that it "has already abundantly explained than an explicit limitation on access to a subsidy program to certain enterprises is effected through criteria/conditions which define the group of certain enterprises that have access or are eligible to that program").

component of a subsidy.[5] Reinforcing this point, the United States recalls the dictionary definition of "access": the "right or opportunity to benefit from or use a system or service." A discrete component of a subsidy is one way that a granting authority could limit to certain enterprises a particular "right" or "opportunity to benefit from" a subsidy.[6] But neither it, nor eligibility at the threshold point for a subsidy program, is the *only* way the granting authority may limit access to a subsidy.

3. It is important to note that the inquiry is necessarily fact-specific. The investigating authority must base its determination on the record evidence and arguments before it, clearly substantiating that determination with positive evidence. However, in the case of an access limitation in the form of a discrete component of a subsidy, the record evidence more strongly supports this inquiry where, as here, (i) the component itself constituted a subsidy, which has been embedded within another subsidy (i.e., "a subsidy" under Article 2.1(a)); and (ii) access to the component was, and embedded within the other subsidy remains, explicitly limited to certain enterprises. In such a case, it is clear that the granting authority continues to limit access to a subsidy to certain enterprises. The difference between a discrete component of a subsidy program and a subsidy – and between the predecessor subsidy and the embedded component of the current subsidy program – is one of form rather than substance.

<u>Question 2</u> (*To the United States*) Article 2.1(a) of the SCM Agreement requires that access to a subsidy be *explicitly* limited. Please explain where in the relevant EU or Spanish legislation that explicit limitation to a discrete component of the BPS and Greening programmes is found and how specifically it is referred to and explained in the USDOC's determinations.

<u>Response:</u>

4. To begin with, the United States recalls that "explicitly limits" refers to "the legislation pursuant to which the granting authority operates." "The legislation" in this case, as reflected in the USDOC's final determination, consisted of the BPS Programs and the two predecessor programs under the CAP Pillar I – the Oils and Fats Program and the SPS Program.[7] In its preliminary and final determinations, the USDOC outlined the interoperation of these programs.[8] It explained how that interoperation limited access to a particular entitlement value – the one

[5] *See* U.S. June 10 responses to Panel questions, paras. 3-15; U.S. September 8 responses to Panel questions, paras. 1-4; U.S. first virtual session opening statement, paras. 11-19; U.S. SWS, paras. 8-15.

[6] *See* U.S. September 8 responses to Panel questions, paras. 1-2.

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

[8] The final determination, which addressed the interested parties' arguments, referred for support to the more extensive descriptions in the preliminary determination of the legislation pursuant to which the granting authority operated. *See* Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36; *see also* Preliminary Decision Memorandum (Exhibit EU-1), pp. 18-27.

based on historic subsidies for growing olives – and in so doing continued to subsidize certain enterprises.

5. Specifically, the USDOC explained that its *de jure* specificity finding was based on the manner in which Spain chose to implement the BPS Programs – i.e., relying on the operation of the Oils and Fats Program (and the intermediary SPS Program):

> the [Oils and Fats Program] 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 were based on whether the olives were used to produce olive oil or table olives.[9]

6. Because the grant amounts received under the SPS Program were based on a "reference period", which for olives and olive oil was from 1999 through 2002 when the Oils and Fats Program was providing benefits that were *de jure* specific to olive producers, the USDOC concluded that the SPS Program retained the *de jure* specificity inherent in the Oils and Fats Program.

7. The BPS Programs established an initial value of payment entitlements which was explicitly based on, *inter alia*, "[t]he amounts corresponding to the single payment scheme . . . ."[10] The preliminary determination[11] and final determination[12] show where in the text of the relevant EU and Spanish laws that explicit link to the SPS Program may be found. From there, the USDOC identified the express limitation to olive producers in the Oils and Fats Program, and how that limitation was explicitly carried through to the SPS Program and BPS Programs. The USDOC summarized its findings:

> [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

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

[10] *See* Final Issues and Decision Memorandum (Exhibit EU-2), p. 33; Royal Decree 1076/2014 (Exhibit EU-30).

[11] Pages 19 to 21 of the USDOC's preliminary determination (Exhibit EU-1) outlined the relevant passages of Regulation (EC) 1307/2013 (Exhibit EU-25) and Royal Decree 1076/2014 (Exhibit EU-30). The text of the Royal Decree 1076/2014 (Exhibit EU-30), which the USDOC cited at page 35 of its final determination, stated with respect to Spain's implementation of the BPS Programs:

> For the calculation of the initial unitary value, the level of payments received in the 2014 campaign, before deductions and exclusions, corresponding to the aid schemes paid in that campaign, amounts of which remain uncoupled or are partially or totally decoupled from 2015 onwards, shall be taken as a reference.

[12] *See* Final Issues and Decision Memorandum (Exhibit EU-2), pp. 34-35.

> 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.[13]

8. The USDOC further explained how the explicit and direct reliance of the SPS Program (and later BPS Programs) on the Oils and Fats Program, in turn, explicitly limited access to the SPS Program and BPS Programs. 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."[14] For olives and olive oil, "this reference period was from 1999 through 2002, when the [Oils and Fats Program] was in operation."[15] That explicit link between the entitlement value under the SPS Program and olive production-based payments under the Oils and Fats Program was elaborated upon in the USDOC's preliminary determination.[16] For example, the USDOC underlined the EU regulations which, under the SPS Program, explicitly limited access to an entitlement amount based whether or not a farmer had been granted a payment under specified support schemes, one of which was production aid for olive oil and table olives.[17]

9. Specifically, the USDOC cited the EU regulations establishing the SPS Program, which provide:

> Farmers shall have access to the single payment scheme if:
> (a) they have been granted a payment in the reference period referred to in Article 38 under at least one of the support schemes referred to in Annex VI, or, in the case of olive oil, in the marketing years referred to in the second subparagraph of Article 37(1).[18]

The USDOC specifically relied on Article 37 of these regulations, which states:

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

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

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

[16] *See* Preliminary Decision Memorandum (Exhibit EU-1), pp. 21-23. The USDOC cited this passage in its final determination. Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

[17] The USDOC cited in particular Council Regulation (EC) No. 1782/2003 (Exhibit EU-13), Art. 33 and Council Regulation (EEC) No. 136/66 (Exhibit EU-26), Art. 5. The USDOC also cited questionnaire responses of the EU and Spain concerning the interoperation of the BPS Program, SPS Program, and Oils and Fats Program. Preliminary Decision Memorandum (Exhibit EU-1), pp. 22-23, n. 118.

[18] Council Regulation (EC) No. 1782/2003 (Exhibit EU-13), Art. 33.

> The reference amount shall be the three-year average of the total amounts of payments, which a farmer was granted under the support schemes referred to in Annex VI, calculated and adjusted according to Annex VII, in each calendar year of the reference period referred to in Article 38.
>
> However, for olive oil the reference amount shall be the four-year average of the total amounts of payments which a farmer was granted under the olive oil support scheme referred to in Annex VI, calculated and adjusted according to Annex VII, during the marketing years 1999/2000, 2000/01, 2001/02 and 2002/03.[19]

10. In sum, the explicit access limitation under the Oils and Fats Program carried forward into the SPS Program and BPS Programs because, under those later programs, it continued to impact the amount of payments a farmer could access. Although the SPS Program and BPS Programs do not restate the access limitations under the Oils and Fats Program, they explicitly rely on the subsidy amounts conferred under it, as the USDOC documented. 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 entitlements was based on the assistance received under the SPS.[20] In explaining these connections, the USDOC identified the explicit access limitations in Spain's implementation of the SPS Program and BPS Programs.

Question 3 (*To the European Union*) In paragraphs 8 and 10 of its 3 February 2021 oral statement at the second substantive meeting of the Panel, the United States submits that: (i) access to the component of entitlement values based on historic olive production under the COMOF programme was not available to all farmers; and (ii) the European Union does not dispute that "certain entitlement holders, not all farmers, could under the BPS Program access that discrete component of the subsidy program". Pursuant to the legislation governing the BPS programme, could, in theory, any farmer have access to the "discrete component" discussed by the United States?

Response:

11. This question is addressed to the EU.

Question 4 In paragraph 101 of its 12 November 2020 responses, the European Union observes that the United States "marked no disagreement" with the interpretation of Article 2.1(b) of the SCM Agreement developed by the European Union.

a. (*To the United States*) Does the United States agree with the European Union's proposed interpretation of Article 2.1(b) of the SCM Agreement?

[19] Council Regulation (EC) No. 1782/2003 (Exhibit EU-13), Art. 37.

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

Response:

12. The United States outlined its understanding of Article 2.1(b) in its first written submission at paragraphs 39 and 79 to 80. That understanding is based on the text of Article 2.1(b). Because, like its interpretation of 2.1(a),[21] the EU's proposed interpretation of Article 2.1(b) departs from a text-based understanding, the United States does not agree.

13. For avoidance of doubt, we will make several observations regarding the EU's interpretation. These are exemplars and are not meant to exhaustively catalogue the errors in the EU's interpretation. Among other things, these interpretive errors elide and materially alter express requirements of the actual text.

14. First, as a general matter, the EU seeks to use dictionary definitions to rewrite the text of Article 2.1(b). Dictionary definitions are often the starting point for interpretations, but the EU transparently replaces the actual text of Article 2.1(b) with words that it has cherry-picked from certain dictionary definitions to arrive at a meaning inconsistent with the ordinary meaning of the terms in their context. For example, the EU replaces the adjective "objective", as in "objective criteria or conditions", with "facts external of the mind".[22] In the actual text, objective criteria or conditions are clearly defined in the text of footnote 2. They are "neutral", "do not favour certain enterprises over others", and "are economic in nature and horizontal in application" (e.g., "number of employees or size of enterprise"). The definition in the text on its face conflicts with the EU's proposed "facts external of the mind", which pertains to the consciousness of an individual person.[23]

15. This inconsistency, and the EU's effort to rewrite Article 2.1(b) to aid its arguments, are evident in paragraphs 273 and 274 of its first written submission. In paragraph 273, the EU makes claims concerning the text of the second sentence of Article 2.1(b), and from that concludes in paragraph 274 that "[t]hose criteria and conditions refer to facts external of the mind."[24] However, "facts external of the mind", and the factors the EU points to as evidence that criteria or conditions refer to such facts, are unrelated to the definition of objective criteria or conditions in footnote 2. Thus, the EU would introduce inconsistency between the subject of

[21] Specifically, rather than examine the actual text, or respond to the U.S. arguments concerning the actual text, the EU relies upon (i) dictionary definitions for terms absent from the text and (ii) conditions absent from the text (e.g., those relevant to the calculation of benefit or *de facto* specificity). *See, e.g.*, U.S. September 8 responses to Panel questions, para. 4 (outlining how the EU relies upon language which does not appear in Article 2.1(a) and which is not an appropriate substitute for the actual text); *see also* U.S. SWS paras. 9, 16-19.

[22] EU FWS para. 269.

[23] The dictionary entry from which the EU appears to select "facts external of the mind" refers to the same concept as "[t]hat is or belongs to what is presented to consciousness, as opposed to the consciousness itself" and "that is the object of perception or thought, as distinct from the subject"). EU FWS para. 269 and n. 225 (citing https://www.oed.com/view/Entry/129634?redirectedFrom=objective#eid entry 3.b).

[24] EU FWS para. 274 (footnote omitted).

Article 2.1(b), objective criteria and conditions, and the definition of that subject. The EU proposal would introduce a similar inconsistency with Article 8.2(b) of the SCM Agreement, which defines objective (and neutral) criteria as those "which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities . . . ." Furthermore, the EU proposal is nonsensical because "the legislation" in question cannot have a state of mind or consciousness, let alone facts that are external or internal to it.

16. Second, what the EU proposes differs materially from what is actually in the text of Article 2.1(b). For example, in the place of "the legislation pursuant to which the granting authority operates", the EU inserts the narrower clauses: "for the subsidy" and "the legal framework of the subsidy".[25] As the United States has explained in the context of Article 2.1(a), the phrase "the legislation" encompasses all of the legal instruments pursuant to which the granting authority operates, not just the "legal framework" of "the subsidy" in question.[26]

17. As another example, the EU interpretation materially alters the clause "which do not favour certain enterprises over others", which is one of the requirements to qualify as objective criteria or conditions. First, the EU collapses that requirement with the separate requirement that the criteria or conditions be "neutral" (or, rather, the text that the EU has inserted in the place of "neutral").[27] Specifically, the EU defines the "which do not favour" condition in terms of "facts external of the mind and unbiased." These are separate requirements and the actual text does not indicate that satisfying one is sufficient to satisfy the other, as the EU's interpretation implies, so that interpretation is unacceptable. Second, the EU departs further from the actual text by replacing the comparative "over others" with the materially different and ambiguous term "inclined". The actual text makes clear that the inquiry concerns whether certain enterprises are favored *over others*. The EU's interpretation eliminates that inquiry, and replaces it with one whose ambiguity would make it difficult for investigating authorities to discern when, and how, it is satisfied. The EU bases its argument on that error when it argues that the criteria or conditions are "not inclined in favour of an enterprise or industry or group of enterprises or industries" because they "apply horizontally to the whole of the agriculture sector . . . ." The inquiry is not simply whether the subsidy *applies* but whether the criteria or conditions "*favour* certain enterprises *over others*."[28] The USDOC showed that it did, and the EU's argument to the contrary is not relevant under Article 2.1(b).

18. Turning to the last sentence of its interpretation, the EU replaces the adjectival phrase "horizontal in application" with the adjective "uniform".[29] Doing so materially alters the text by

[25] EU FWS, para. 269.

[26] U.S. June 10 responses to Panel questions, para. 21; U.S. September 8 responses to Panel questions, paras. 6-11.

[27] EU FWS, para. 269.

[28] SCM Agreement, Art. 2.1(b) (emphasis added).

[29] EU FWS, paras. 267-269.

reading out, without explanation, the words "in application". As a result, "horizontal", or rather the word the EU substitutes for "horizontal", is in the abstract rather than placed in the context expressed by the actual text. Similarly, the text "such as number of employees or size of enterprise", which is used to define "[o]bjective criteria or conditions . . . which are economic in nature and horizontal in application", is deleted, thus yielding a different and less precise definition.

19. In short, the EU presents an alternative, nontextual interpretation of Article 2.1(b). In evaluating the text of Article 2.1(b), the Panel should use the actual text, not the alternate language proposed by the EU. To that end, the Panel should refer to the text-based interpretation outlined in the U.S. first written submission.[30]

b. (*To both parties*) In paragraphs 274-275 of its first written submission, the European Union suggests that the amounts of support received in a previous period is a criterion which is economic in nature pursuant to footnote 2 of the SCM Agreement. (i) Please discuss whether "criteria or conditions" governing eligibility for, and the amount of, a subsidy, must meet *all* the conditions specified in footnote 2 of the SCM Agreement to be considered "objective" within the meaning of Article 2.1(b). (ii) Could an unbiased and objective investigating authority determine that the amount of support received under previous programmes is an "objective criteria or condition[]" governing the amount of a subsidy within the meaning of Article 2.1(b) of the SCM Agreement?

Response:

20. As to subpart (i), to qualify as "objective criteria or conditions", all of the criteria or conditions listed in footnote 2 must be satisfied. They must be "neutral", they cannot "favour certain enterprises over others", and they must be "economic in nature" and also "horizontal in application". That is because the list in footnote 2, which defines the "objective criteria or conditions", uses the conjunction "and" instead of "or". By contrast, where Article 2.1(b) requires that the "criteria or conditions" be "clearly spelled out in law, regulation, or other official document", the use of the conjunction "or" denotes that any one of the three is sufficient. The "criteria or conditions" need not be spelled out by means of all of the three.

21. Turning to subpart (ii), while that was not the case with the EU programs at issue here, theoretically an unbiased and objective investigating authority could determine that the amount of support received under previous programs is an "objective criteria or condition[]" governing the amount of a subsidy within the meaning of Article 2.1(b) of the SCM Agreement. To the extent that those previous programs are part of "the legislation pursuant to which the granting authority operates", the criteria or conditions of the previous subsidy programs could be relevant to the investigating authority's Article 2.1(b) evaluation. However, where the eligibility or amount of support received under previous programs operates to favor certain enterprises with

[30] *See* U.S. FWS paras. 39, 79-80.

access to subsidies under a new program, these criteria or conditions would not be objective within the meaning of Article 2.1(b).

22. The fact that they are previous programs, rather than currently operating programs, for example, would not alter this result – despite EU arguments to the contrary.[31] As the United States has explained, were that the case – and the text of Article 2.1(b) makes clear that it is not the case – then it would be easy for a granting authority to evade the disciplines of the SCM Agreement.[32] Specifically, the granting authority could simply design "the legislation pursuant to which the granting authority operates" so that the non-qualifying criteria or conditions are housed in a previous subsidy program.

Question 5 (*To both parties*) In paragraphs 102-104 of its 12 November 2020 responses, the European Union argues that the USDOC failed to evaluate in its remand redetermination whether the calculation criteria of the SPS, BPS and Greening programmes complied with *all* of the requirements of Article 2.1(b) of the SCM Agreement. Is an investigating authority required to evaluate whether a subsidy program complies with *all* the requirements under Article 2.1(b), assuming that it has properly established that at least one of the requirements is not met for a subsidy to be non-specific pursuant to Article 2.1(b)?

Response:

23. As an initial matter, the EU's contention is both misplaced and irrelevant to this dispute. The remand redetermination comprehensively addressed only those issues that were the subject of the U.S. Court of International Trade's remand order.

24. While the Panel need not consider this argument further, for completeness, the United States notes that if at least one requirement for non-specificity is not satisfied under Article 2.1(b), it is not necessary for an investigating authority to evaluate the others. As explained in response to question 2.a, "objective criteria or conditions" are those that satisfy each of the conditions listed in footnote 2. Similarly, each of the separate requirements identified in the text of Article 2.1(b) must be satisfied. Those include (i) "objective criteria or conditions governing the eligibility for, and the amount of, a subsidy"; (ii) "the eligibility is automatic"; (iii) "such criteria and conditions are strictly adhered to"; and (iv) the criteria or conditions are "clearly spelled out in law, regulation, or other official document, so as to be capable of verification." To reach the "specificity shall not exist" directive under Article 2.1(b), each of the listed requirements must be satisfied. If one or more of them is not, then it is not possible to reach the "specificity shall not exist" directive, so there is no reason under Article 2.1(b) to evaluate the other listed conditions.

[31] *See* U.S. first virtual session opening statement, para. 9 (citing Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36); U.S. September 8 responses to Panel questions, paras. 6-10; U.S. June 10 responses to Panel questions, paras. 12-15.

[32] *See* U.S. FWS, paras. 60-61; U.S. September 8 responses to Panel questions, paras. 6-10; U.S. June 10 responses to Panel questions, paras. 12-15.

25. Finally, we refer the Panel to paragraphs 78 through 84 of the U.S. first written submission, in which we explained why the EU's arguments concerning Article 2.1(b) lack merit.

Question 6 (*To both parties*) Is it correct to assume that a finding of specificity under Article 2.1(a) of the SCM Agreement can be reversed or overridden by a finding of non-specificity under Article 2.1(b)?

Response:

26. As the United States has explained, the USDOC found that "the legislation pursuant to which the granting authority operates" explicitly limited access to certain enterprises within the meaning of Article 2.1(a), and that the conditions under Article 2.1(b) were not satisfied.[33] Accordingly, the Panel need not reach the issue of whether an affirmative finding under Article 2.1(b) could reverse or override an affirmative finding under Article 2.1(a).

27. The United States also notes that both Article 2.1(a) and Article 2.1(b) are written as outcomes that "shall" occur if the conditions identified therein are satisfied. Because both use this definitive language, one does not operate to reverse or override the other.

28. In the abstract, it is difficult to imagine a case where an investigating authority could make a positive determination under both 2.1(a) and 2.1(b) on the same set of facts. For example, where access to a subsidy is limited to certain enterprises under Article 2.1(a), it seems unlikely that the criteria or conditions would "not favour certain enterprises over others", one of the requirements identified under footnote 2 of Article 2.1(b).

Question 7 (*To the European Union*) In paragraph 82 of its first written submission, the European Union explains that the payments newcomers receive under the SPS programme "are linked neither to their past production nor to any particular crop". Is the same true for the payments newcomers receive under the BPS programme? Please explain the rules for calculating amounts of assistance for newcomers under the (i) SPS programme; and (ii) the BPS programme, and where they can be found in the relevant legislation.

Response:

29. This question is addressed to the EU.

Question 8 (*To both parties*) Is an investigating authority able to consider a subsidy to be specific where objective criteria or conditions governing the eligibility for, and the amount of, the subsidy are not established by the granting authority or by the legislation pursuant to which the granting authority operates?

Response:

[33] *See, e.g.*, U.S. FWS, paras. 80-84 (rebutting the EU's arguments concerning Article 2.1(b)).

30. Yes, in such a case (i.e., where objective criteria or conditions are not established by the granting authority or relevant legislation) the investigating authority can consider a subsidy to be specific. Specifically, it can do so if it can demonstrate that, consistent with Article 2.1(a) of the SCM Agreement, access to a subsidy is explicitly limited to certain enterprises, as the USDOC did in its final determination.

31. Moreover, as explained in response to question 6, a non-specificity finding under Article 2.1(b) necessarily relates to a specificity finding under Article 2.1(a). The chapeau of Article 2.1 establishes that, to determine if a subsidy is specific to certain enterprises, three principles shall apply – i.e., those outlined in 2.1(a), (b), and (c). Two of those principles, Article 2.1(a) and Article 2.1(b), indicate whether the granting authority, or legislation, limits access to a subsidy in a manner that is specific or not. The Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* summarized the principles as "indicators as to whether the conduct or instruments of the granting authority discriminate or not . . . ."[34] For purposes of the *de jure* specificity analysis, Article 2.1(b) "indicates other legal and practical considerations relevant to the analysis . . . which centre on the manner in which the criteria or conditions of eligibility are prescribed and adhered to."[35] In this way, the requirements set forth in Article 2.1(b) complement and inform the understanding of "limits access" under Article 2.1(a).

32. The EU's nontextual interpretation of Article 2.1(a) would create a conflict with the principles expressed in Article 2.1(b). To recall, the EU interpretation would restrict the meaning of "limits access to a subsidy" to limitations that are based on eligibility at the threshold point of a subsidy.[36] More precisely, the EU interpretation would forbid investigating authorities from considering a limitation based on access to a particular component or amount of a subsidy, even if it is explicitly limited to certain enterprises. The EU interpretation thus presents a clear conflict with the "objective criteria or conditions" set forth under Article 2.1(b). To begin with, Article 2.1(b) specifies that both eligibility and amount-based criteria or conditions are relevant to the analysis. In addition, footnote 2 defines the relevant criteria or conditions as neutral, not in favor of certain enterprises, and economic in nature and horizontal in application. Limiting access to a subsidy at the threshold point of a subsidy program clearly is not the only way to favor certain enterprises over others. The EU has not disputed this point. Nor is it the only way

[34] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 367 (noting that "Article 2.1(a) describes limitations on eligibility that favour certain enterprises" and "Article 2.1(b) describes the criteria or conditions that guard against selective eligibility.").

[35] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368. The United States has already explained that the Appellate Body used the word "eligibility" to distinguish limitations as a matter of law from those based on the amount of subsidy in fact granted, not to signal that the word "eligibility" circumscribes the meaning of "access". *See* U.S. SWS, paras. 11-13. The point is underscored by the fact that the Appellate Body's report likewise uses "eligibility" as shorthand with respect to Article 2.1(b), which expressly covers *both* eligibility and amount-based conditions.

[36] As noted above, the EU has disclaimed the summary but not the actual substance of its interpretation of Article 2.1(a).

that criteria or conditions might not be neutral or economic in nature and horizontal in application.

33. Thus, the EU interpretation would create a disjunction between what is relevant to the *de jure* specificity analysis under Article 2.1(a) versus what is relevant under Article 2.1(b). Specifically, whereas Article 2.1(b) broadly covers what Appellate Body reports have called "indicators as to . . . whether the granting authority discriminate[s] or not", the EU posits that under Article 2.1(a) only those indicators that are at the threshold point of eligibility for a subsidy are relevant. Under the proper interpretation, pursuant to which "limits access" under Article 2.1(a) is not circumscribed in the manner proposed by the EU, the two principles are complementary. Specifically, consistent with the criteria or conditions set forth in Article 2.1(b), the investigating authority's inquiry under Article 2.1(a) is not confined to whether eligibility is limited at the threshold point of a subsidy.

II. "PASS-THROUGH" OF BENEFIT CLAIMS

Question 9 (*To both parties*) Would it be sufficient to establish a law is WTO-inconsistent "as such" by showing that the law requires WTO-inconsistent conduct in certain situations in which it is applied, but not in all factual scenarios?

Response:

34. Where a complaining party challenges a law *as such*, it must demonstrate that the law itself does not allow the responding party to act in accordance with its WTO obligations. A law is not in itself inconsistent with a WTO Member's obligations unless that law necessarily leads to a breach of those obligations, or precludes WTO-consistent action. If the law does not necessarily lead to WTO-inconsistent action if applied, then it cannot be found to breach a commitment "as such".

35. It is not sufficient for a complaining party to hypothesize a number of facts that might exist, make a presumption that those facts would require certain treatment, and then assert that the treatment would be inconsistent. Nor is it sufficient to argue that the law could be applied in an inconsistent manner in some factual circumstances. That is, if the EU wished to show that the U.S. statute necessitates WTO-inconsistent action in certain factual circumstances, the EU has the burden to identify what those circumstances are and to explain why they demonstrate that, as a matter of law, the statute cannot be applied consistent with U.S. obligations. The EU has not done so, and therefore the Panel has no basis to test those factual circumstances under Section 771B. Indeed, the EU has not even explained why the factual circumstances of the olive market render the application of Section 771B WTO-inconsistent in the underlying investigation.

36. As the United States has explained, the legal justification for Section 771B derives from the flexibilities in the SCM Agreement, which do not prescribe or prohibit any specific methodology.[37] That is, the statute provides a basis to make a finding attributing benefit to a

[37] U.S. responses to post virtual session Panel questions, paras. 36-37.

downstream product, in the way that the "pass-through" concept has been understood. It contains a set of "cumulative conditions"[38] that must be fulfilled in order for the USDOC to attribute some portion of the benefit received by raw agricultural product producers to the producers of processed products.

37. The EU has failed to demonstrate why, for relevant agricultural products, an analysis of the conditions in the statute *cannot* represent a "proper examination" of whether some portion of benefit received by an upstream producer was conferred to downstream agricultural processors. The only argument the EU has made in this respect is that, in all cases, a price comparison is required – a claim with no basis in the SCM Agreement. Therefore, the EU has not met its burden to show that Section 771B necessarily leads to WTO-inconsistent action, or that it precludes the USDOC from acting consistently with WTO obligations.

Question 10 (*To both parties*) In paragraph 76 of the European Union's second written statement, it is said that the only way it can be established whether there was a pass-through of a subsidy on an input product is to assess whether, and to what extent, the price of the input was lowered as a result of the subsidy. This, it is said, should be done by comparing the actual input price with a market price. These questions arise:

> **a. Is it not fair to say that the receipt of a subsidy by a producer, or the promise of same, provides incentives to a producer that might cause it to produce an input when it otherwise might not have done so, even if the ultimate price at which the input was sold was a market price?**

Response:

38. Yes. The suggestion that a subsidy cannot impact incentives or production decisions unless the benefit manifests in some price effect is not tenable. The United States has explained that in the case of commodity products, price comparison may not be appropriate when analyzing whether a processed product has received a benefit.

39. In reality, producers make decisions on production quantity based on their *ex ante* expected revenue, which takes into account any subsidies received. Regardless of the realized sales price, the subsidy increases the producer's expected revenues, and thus may incentivize additional production, as the Panel's question suggests.

40. The production decisions of agricultural producers often occur well in advance of the point at which the final sales price is known. The presence of a subsidy may diminish uncertainty surrounding expected revenues and thus can influence the decisions of producer, *e.g.*, the decisions an olive producer makes with respect to how much to spend on pest control, watering, and other inputs to maintain the trees long before the olives are sold and harvested.

[38] EU FWS, para. 371.

41. The EU's argument that the "essence of pass-through" is to conduct some form of price comparison on the basis of a benchmark price ignores such factual and economic circumstances.[39]

b. Is the Panel asked to reassess what appears to be the established interpretation of the word "indirectly" in Article VI:3 of GATT 1994, which is that it serves as a rule requiring the measurement of the degree to which a subsidy "passes through" to the production of the (say) processed product, rather than it simply being a description of the subsidy that was wholly provided in the course of production of the processed product, even if not provided directly to the processor?

Response:

42. The United States notes initially that the Panel's question does not identify a particular dispute settlement report from which it derives an "established interpretation" in asking this question. Under DSU Article 11, the function of the Panel is to assist the DSB in discharging its responsibilities under the DSU, including by making an objective assessment of the applicability of and conformity with the covered agreements. DSU Article 3.2 establishes that WTO adjudicators are to make that assessment by applying customary rules of interpretation of public international law to the text of the covered agreements.

43. Therefore, it is not for the Panel to assess or reassess prior interpretations of Article VI:3, but to interpret that provision based on the ordinary meaning of its terms in their context. Article VI:3 of GATT 1994 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, and in particular the use of the term "indirectly", 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.[40] Likewise, Article VI:3 of the GATT 1994 provides that Members may impose countervailing duties when subsidies are bestowed "upon the manufacture, production or export" of a particular product. And duties may be imposed to offset subsidies conferred 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.

44. The United States notes that some prior dispute settlement reports considered a finding of pass-through may be required to determine if an indirect subsidy exists. This does not support the contention that Article VI requires "the measurement of the degree to which a subsidy

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

[40] *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*.").

"passes through" to the production of the (say) processed product". The EU has acknowledged that Article VI:3 does not set forth an obligation to determine pass-through benefit, nor any specific method to determine pass-through benefit for input subsidies.[41]

III. Injury

Question 11 (*To the United States*) In paragraph 138 of its second written submission, referring to footnote 624 of the panel report in *Mexico – Corn Syrup*, the European Union contends that "a previous panel already determined that the fact that a sector constitutes a major proportion of the domestic industry does not permit a focus of the analysis on that sector". Please comment.

Response:

45. In making the statement to which the Panel's question refers, the EU relies on a snippet from a footnote in the *Mexico – Corn Syrup* panel report which it then takes out of context. This footnote is of limited relevance to the instant proceedings for several reasons. First, the legal question addressed in the *Mexico – Corn Syrup* report does not arise here. In that dispute, the Mexican authority acknowledged that it ignored all but one market segment in its price effects analysis. That is, it confined its price effects analysis to one market segment without addressing how that impacted the domestic industry as a whole or on a major proportion of the production of the like product of all producers.[42] In contrast, in this case, as the United States has emphasized and the EU appears to accept, the USITC's impact analysis was based on production and financial performance data for the entire industry.[43] Second, the Mexican authority in *Mexico – Corn Syrup* failed to consider any data concerning prices charged for non-industrial products in its analysis of likely price effects. In contrast, the USITC did not limit its data or analysis of price effects to a specific segment of the market.[44] Therefore, the EU's reliance on the findings in *Mexico – Corn Syrup* is unavailing.

Question 12 (*To the United States*) In paragraph 210 of its first written submission, the United States submits that "responding purchasers - upon whose data the Commission largely relied in assessing price effects - were predominantly distributors". Please indicate where in its injury determination did the USITC consider whether, or indicate that, the subject imports undersold the domestic like product specifically in the segment of the domestic industry comprising distributors (and not institutional customers or retailers).

Response:

[41] EU November 12 responses to Panel questions, para. 132.

[42] *Mexico – Corn Syrup (Panel)*, para. 7.154, n.624.

[43] U.S. SWS, para. 81; EU SWS, para. 174.

[44] U.S. SWS, para. 76.

46. The USITC did not calculate underselling margins specific to any channel of distribution. Rather, to analyze underselling, the USITC collected quarterly pricing data on four representative ripe olive pricing products covering a significant portion of subject import and domestic industry shipments.[45] As pricing data on subject imports were collected from importers (as opposed to purchasers), they do not reflect transactions by type of purchaser, as opposed to the type of product.[46] Moreover, none of the parties in the underlying investigations requested the USITC to collect data on such a basis.

Question 13 (*To the European Union*) In paragraph 196 of its 12 November 2020 responses, the European Union argues that "even if the US did use industry wide economic indicators, its actual impact analysis was also flawed, *inter alia*, because it failed to properly examine the explanatory force of subject imports for the state of the domestic industry. In fact, the US only examined the explanatory force of subject imports in the retail channel […]." Please explain if Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement support the separation of examination of economic indicators from what the European Union characterizes as the "actual impact analysis".

Response:

47. This question is addressed to the EU.

Question 14 (*To both parties*) In paragraph 196 of its 12 November 2020 responses, the European Union asserts that "the use of non-segmented economic indicators after the US 'segmented' the industry in the context of Article 15.2 SCMA is in itself WTO-inconsistent". Please comment on whether this assertion constitutes a claim distinct from the claims presented by the European Union in its first written submission concerning the USITC's impact analysis.

Response:

48. As the United States explained in its request for a preliminary ruling, the United States continues to be of the view that the EU's claims under Articles 3.4 and 15.4 are outside of the Panel's terms of reference.[47] Specifically, the EU's panel request fails to either identify any claim under Article 3.4 of the AD Agreement or Article 15.4 of the SCM Agreement, or raise any arguments with respect to the economic factors that an authority considers during an analysis of impact.[48]

49. To the extent the Panel determines that the EU may pursue its claims under Articles 3.4 and 15.4, the EU's claims concerning the USITC's "use of non-segmented economic indicators"

[45] USITC Pub. 4805 (Exhibit EU-5) at 19-20.

[46] USITC Pub. 4805 (Exhibit EU-5) at 19-20.

[47] U.S. FWS, at paras. 23-27.

[48] U.S. FWS, at para. 27.

after the USITC purportedly segmented the industry in its consideration of subject import volume is a claim distinct from those the EU elaborated upon in its first written submission, as the EU acknowledged in its oral response to the Panel's question at the second virtual session.

Question 15 (*To both parties*) In paragraph 125 of its 19 October 2020 oral statement at the first substantive meeting of the Panel, the European Union asserted that the USITC's finding of price undercutting by subject imports in the retail segment of the domestic industry was not supported by positive evidence. Please comment on whether this assertion constitutes a claim distinct from the claims presented by the European Union in its first written submission concerning the USITC's price effects analysis.

Response:

50. In its first written submission, the EU presented the following claims against the USITC's purportedly segmented analysis of price effects: (1) "[t]he USITC's analysis of price effects is flawed because the USITC arbitrarily divided the domestic industry into meaningless "segments" in order to artificially create a price effect; (2) "[t]he USITC's analysis of price effects is flawed because the USITC only considered effects for the retail "segment" not for the domestic industry as a whole; and (3) "[t]he USITC improperly extended its analysis concerning price effects in the retail "segment" to the domestic industry as a whole."[49]

51. These claims all relate to the EU's overarching contention that the USITC's injury determination improperly analyzed only one segment of the domestic industry rather than the industry as a whole. The EU's claim in its opening statement at the first virtual session that the USITC's price effects analysis lacked positive evidence is a wholly separate claim, as the EU acknowledged in its oral responses to the Panel's question at the second virtual session. This claim was not identified in the EU's request for establishment of a panel, and therefore falls outside the Panel's terms of reference in this dispute.

Question 16 (*To the United States*) In paragraph 48 of its 3 February 2021 oral statement at the second substantive meeting of the Panel, the European Union submits that "the existence of such uniform standards and of uniform processing requirements across distribution channels only confirms the EU's position that all ripe olives are homogeneous and substitutable and that no segmentation under Article 15 SCMA could be undertaken in these circumstances". Was there evidence on record to contradict this view?

Response:

52. As the United States previously explained, the EU's argument that the USITC's finding of a high degree of substitutability between domestically processed and subject imported ripe olives necessarily meant that all ripe olive products were perfect substitutes with each other ignores the context of this finding, namely the role of a Federal Marketing Order that created

[49] EU FWS, at iii-iv, 165-172.

mandatory uniform standards for all ripe olives.[50] Notwithstanding these uniform standards, purchasers in each channel of distribution purchased ripe olives conforming to distinct processing and packaging requirements, which reflected the different ways in which ripe olives were consumed by individual consumers in each sector. Evidence in the record of the USITC's *Ripe Olives* investigation demonstrates this.[51] These differences in consumption are also reflected in the pricing products that the USITC used to analyze price effects.[52] The EU's false assertions that the USITC artificially constructed distinct market sectors thus ignore the facts on the record before the USITC in the underlying investigations.

53. Moreover, the EU's closing remark that "USITC may well have the dubious "honour" of being the first investigating authority that artificially segmented a market for an analysis under Article 15 SCMA where there was nothing to segment"[53] contradicts what the Spanish respondents themselves argued during the investigation. Specifically, ASEMESA emphasized the "distinct distribution channels" in the U.S. market as a "unique condition of competition."[54] What is more, the EU overlooks that, even aside from the USITC's investigation, Spanish producers separately reported their data for ripe (table) olive sales to the retail and food service channels.[55]

[50] U.S. SWS, para. 53.

[51] U.S. September 8, 2020 Responses to Panel Questions, paras. 29-31. *See also, e.g.*, the Spanish producers' statement that the *hojiblanca* olives they shipped to the U.S. market were ideal for slicing and chopping, and thus for placement as food toppings, while most of the domestically grown *manzanilla* olives were shipped by petitioners in whole pitted or unpitted form, and were thus ideal for sale in retail jars for direct consumption by end users. ASEMESA's Prehearing Brief (Exhibit USA-43) at 43-45; and petitioners' statement that larger cans of ripe olives are typically sold to restaurants for use in pizzas, sandwiches, salads and other institutional foods whereas smaller cans of olives are typically sold to stores that sell to retailers. Petition Vol. I (Exhibit USA-40) at 2. The existence of economically distinct channels of distribution in the ripe olives market was, accordingly, not in dispute by the parties in the underlying investigations.

[52] The four pricing products were: Product 1 (Retail Branded) - medium pitted black ripe olives in 300 cans, 24 cans per case, can size is 300 x 407, drain weight is 6 oz. per can, 144 oz. (4.08 kg) per case; Product 2 (Retail Private Label) - sliced black ripe olives in 211 cans, 24 cans per case, can size is 211 x 200, drain weight is 2.25 oz. per can, 54 oz. (1.53 kg) per case; Product 3 (Institutional) - sliced black ripe olives in #10 cans, 6 cans per case, can size is 603 x 700, drain weight is 55 oz. per can, 330 oz. (9.36 kg) per case; and Product 4 (Institutional) - sliced black ripe olives in retortable pouches, 10 pouches per case, drained weight is 33 oz. per pouch, 330 oz. (9.36 kg) per case. USITC Pub. 4805 (Exhibit EU-5) at 19-20 n.112.

[53] EU closing statement at the second virtual session, para. 22.

[54] ASEMESA's Prehearing Brief (Exhibit USA-43) at 5.

[55] *See* the attached ASEMESA presentation, which contains charts summarizing distribution channel and consumption data compiled by the Spanish Ministry of the Environment, and Rural and Marine Affairs ("MARM"). ASEMESA Slideshow: Table Olives Consumers' Profile in Spain (Exhibit USA-41) at Slides 7 and 10. Further, although not pertinent to the relevant inquiry for the Panel as to whether the USITC made an objective determination based on positive evidence in the record of its investigation of the conditions in the domestic market, the United States notes that the EU's fallacious comment that ripe olives markets are inherently homogenous is contradicted by public information about the nature of the EU olive industry. According to an April 2019 market

Question 17 (*To both parties*) In paragraph 32 of its 3 February 2021 oral statement at the second substantive meeting of the Panel, the United States observes that the conjunction "whether" in the first sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement contemplates one or more possible alternatives, and this relates to the directionality of subject import volume trends, which can decrease. Could this term alternatively be understood to refer to three alternatives that subject imports may either: (i) increase in absolute terms, (ii) increase relative to production, or (iii) increase relative to consumption in the importing Member?

Response:

54. The United States observes that the proposed interpretation of the first sentences of Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement contained in the question is one that neither Party has advanced and thus is not an issue the Panel needs to resolve in this dispute. However, in case of use to the Panel, the United States notes that this proposed interpretation is not a natural construction of the language in those provisions for several reasons. First, it is not logical to treat the conjunction "whether" in the first clause of the sentence as a disjunctive inquiry, as the provisions already use the conjunction "or" in the second clause to indicate that there are three distinct contexts in which an authority may consider subject import volume. Second, the proposed interpretation would appear to read the verb "consider" out of the first sentences, which would introduce a requirement to *find* an increase in the volume of unfairly traded imports. As the United States has previously explained, the obligation to "consider" means to "take something into account."[56] Third, the proposed interpretation would render meaningless the last sentences of Articles 3.2 and 15.2, which state that "no one or several of these factors [concerning volume and price effects] can necessarily give decisive guidance."[57] 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. Finally, the United States notes that elsewhere in the Agreements where trade negotiators wanted to impose a rigid obligation that an investigating authority find an increase in import volume, they did so explicitly.[58] For example, Article 2.1 of the Safeguards Agreement

study published by the Center for the Promotion of Imports ("CBI"), a European government trade promotion agency, table olive products, which include ripe olives, "reach different segments of the market" after importation into the EU. These include the large and important "retail segment" where, like the retail sector of the U.S. market, ripe olive products are packaged into "small retail bags" for sale as, inter alia, private label and branded products, and the "food service segment" dominated by restaurants and street vendors, where ripe olive products are sold in "big barrels." Canned Olives, cbi.eu market information paper (updated April 24, 2019), (Exhibit USA-42) at 5, 15-16.

[56] U.S. opening statement at the second virtual session, para. 30.

[57] U.S. opening statement at the second virtual session, para. 35; U.S. FWS, para. 184.

[58] *See US – DRAMS (CVD) (Panel)*, para. 7.319 n.283. Article 2.1 of the Safeguards Agreement provides that a Member may apply a safeguard measure to a product only if it determines "that such product is being imported into its territory *in such increased quantities*, absolute or relative to domestic production, and under such conditions as to cause, or threaten to cause injury to the domestic industry . . ." (Emphasis added). Additionally, Article 4.2 of that

requires a finding of "increased quantities [of imports], absolute or relative to domestic production." The same requirement is laid out explicitly in Article 4.2 of the Safeguards Agreement. In contrast to these two articles, there is no requirement in Articles 3.2 and 15.2 of the SCM Agreement to make a finding of significant increase in subject import volume.

55. For these reasons, the Panel should not determine that the conjunction "whether" in the first sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement refers to three alternatives suggested by the Panel's question.

Question 18 (*To the European Union*) In paragraph 45 of its 3 February 2021 oral statement at the second substantive meeting of the Panel, the United States submits that an analysis of impact under Articles 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement focuses on factors reflecting the state of the domestic industry during the POI that are distinct from those considered in its analysis of subject import volume in the first sentences of Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement, or an analysis of the effect of subject import prices on the domestic industry in the second sentences of Articles 3.2 and 15.2. Does this support the view that inquiries under Articles 3.2 and 3.4 can be undertaken independently?

Response:

56. This question is addressed to the EU.

Question 19 (*To the European Union*) In paragraph 46 of its 3 February 2021 oral statement at the second substantive meeting of the Panel, the United States also argues that the text of the Agreements does not support the contention that Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement are consequential in a like manner to Articles 3.5 and 15.5. The United States submits that this is because a causal analysis under Articles 3.5 and 15.5 requires an investigating authority to examine "all relevant [record] evidence," which is broader in scope than an authority's impact analysis under Articles 3.4 and 15.4. Please comment.

Response:

57. This question is addressed to the EU.

IV. Calculation of Guadalquivir's Subsidy Rate

Question 20 (*To the United States*) In its 8 September 2020 response to question 4(b), the European Union refers to page 7 of Guadalquivir's verification report (Exhibit USA-22) in which the USDOC stated:

Agreement describes the competent authorities' obligations "[i]n the investigation to determine *whether increased imports* have caused or are threatening to cause serious injury to a domestic industry . . ." (Emphasis added).

> **We also reviewed [Guadalquivir's] reported sales of olive derived products. These include sales of oil produced that is not suitable for consumption and olives that are destined for the mill ("molino"), which are olives that do not meet the standard to sell as a ripe or table olive; these olives are processed into an industrial olive oil not suitable for consumption. We observed no inconsistencies with the information reported in the questionnaire responses. (original footnote omitted)**

What is meant by the statement "[w]e observed no inconsistencies with the information reported in the questionnaire responses"? Does the discovery of "olives that are destined for the mill ('molino')" mean that the USDOC became aware or should have become aware at verification or during the investigation that Guadalquivir reported raw olive purchases in its 4 August 2017 questionnaire responses that were not used to produce ripe olives? Please explain why or why not.

Response:

58. As an initial matter, the EU's reliance on the quoted passage from Guadalquivir's verification report is misplaced because the passage concerns the USDOC's verification of Guadalquivir's reported *sales* of processed olive products, not the USDOC's verification of Guadalquivir's reported *purchases* of raw olives processed into ripe olives. The first sentence in the quoted passage confirms that it relates to Guadalquivir's "reported sales of olive derived products."[59] The USDOC's verification of Guadalquivir's reported sales of processed olive products other than ripe olives (e.g., industrial olive oil not suitable for consumption) indicates nothing about the purchase volume information that Guadalquivir submitted in response to the USDOC's August 4, 2017 questionnaire.

59. As the United States has explained, the purpose of the USDOC's verification of Guadalquivir's questionnaire responses was to spot check the accuracy and completeness of the information the USDOC anticipated relying on as the basis for its final determination.[60] The USDOC stated in its verification agenda that it was "reviewing information provided by Aceitunas Guadalquivir, its cross-owned affiliates, and its unaffiliated suppliers" and listed the factual submissions to be verified.[61] The list included Guadalquivir's submissions in which it reported its "[t]otal quantities of raw olives used for specific types of finished products (i.e., ripe olives, other table olives, olive oil, other)" and its "[t]otal sales value for ripe olives sold and total olives sold."[62] As explained in the U.S. first written submission, each company's reported

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

[60] U.S. September 8 responses to Panel questions, paras. 47-48.

[61] Verification of Aceitunas Guadalquivir, S.L.U.'s Questionnaire Responses (Exhibit USA-21), p. 6.

[62] Verification of Aceitunas Guadalquivir, S.L.U.'s Questionnaire Responses (Exhibit USA-21), p. 8.

purchases of raw olives processed into ripe olives, and reported sales of ripe olives, were used in the USDOC's calculation method to measure benefit.[63]

60. The statement that the USDOC "observed no inconsistencies" with Guadalquivir's reported *sales* of olive-derived products, including sales of olives destined for the mill, in no way suggests that the USDOC became aware or should have become aware that Guadalquivir's reported *purchase* information included purchases of raw olives other than those used to produce ripe olives. Rather, the statement merely indicated that the USDOC was able to tie Guadalquivir's reported sales of processed olive products, including the sales of industrial olive oil not suitable for consumption, to the company's underlying books and records. Our response to question 21 provides additional explanation as to why it was reasonable for the USDOC to conclude that Guadalquivir's verified purchases of raw olives included only those purchases of raw olives that were used to produce ripe olives.

Question 21 (*To both parties*) Related to the preceding question, at page 3 of the 12 July 2018 Ministerial Error Memorandum (Exhibit EU-69), the USDOC states:

> **At verification, we reviewed purchase invoices to confirm the reported volume of purchases. Although invoices included in the verification exhibits use the word "Molino" to describe the olives, which, according to Aceitunas Guadalquivir, are olives destined for processing into olive oil, company officials did not clarify at verification that the volume originally reported as raw to ripe actually represented all olives purchased regardless of olive product produced.**

Although the USDOC states that "company officials did not clarify at verification", is it reasonable that the USDOC concluded that Guadalquivir had reported "raw to ripe" olives only, if the quantities for "molino" olives were verified to have been included in the volume reported in Guadalquivir's 4 August 2017 questionnaire responses? Please explain.

Response:

61. Yes, it was reasonable for the USDOC to conclude that Guadalquivir had reported "raw to ripe" olives only, as the verification report makes clear. The verification report indicates that the purchase invoices in question derived from two purchases of raw olives that the USDOC had preselected for verification.[64] Those invoices recorded the volumes of raw olives purchased and indicated the type of raw olive purchased.[65] One such type of raw olive was described as "molino" olives.

[63] U.S. FWS, paras. 302-303.

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

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

62. However, the record information from Guadalquivir's verification did not indicate that Guadalquivir's purchases of these raw "molino" olives were processed into a product other than ripe olives. To the contrary, statements from Guadalquivir officials confirmed their understanding that the USDOC had "requested only purchases of ripe olives [(i.e., raw olives processed into ripe olives)]" and stated that Guadalquivir "reported only olives purchased in acetic acid" and "not . . . olives purchased in brine" because "brine olives must become green olives."[66] This clarification from company officials clearly communicated to the USDOC that Guadalquivir's response to the August 4, 2017, questionnaire did not include all purchases of raw olives regardless of use. In fact, as Guadalquivir confirmed to USDOC officials during verification, Guadalquivir took steps to ensure that the raw olive purchase volume reported included only raw olives used to produce ripe olives.

63. The USDOC's conclusion that the information submitted by Guadalquivir represented the company's purchases of raw olives processed into ripe olives is one any other unbiased and objective investigating authority, examining the same evidence, could have reached.

Question 22 (*To the European Union*) In paragraph 708 of its first written submission, the European Union argues that the calculation of the countervailing duty rate for Guadalquivir "differs" from the calculation of those imposed on Agro Sevilla and Camacho, and thus, the USDOC acted inconsistently with the obligations in Article 19.3 of the SCM Agreement to apply countervailing duties "on a non-discriminatory basis". Does the requirement to levy duties on a non-discriminatory basis concern the data that is used, the amount that is calculated, the methodology that is applied, or something else?

Response:

64. This question is addressed to the EU.

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