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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS577/R.

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WORKING PROCEDURES OF THE PANEL

Adopted on 6 January 2020

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures, as well as any additional working procedures, as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly provide a non-confidential summary to any Member requesting it, and if possible within 10 days of receiving the request.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the

Panel. The European Union shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the United States before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered EU-5, the first exhibit in connection with the next submission thus would be numbered EU-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. (1) The Panel may pose questions to the parties and third parties at any time.

(2) Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

(3) The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. At the parties' request, the Panel may open its meetings with the parties to observation by the public, either in whole or in part, subject to appropriate procedures to protect confidential information to be adopted by the Panel after consulting the parties. Otherwise, the Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the United States shall be given the opportunity to present its oral statement first. If the United States chooses not to avail itself of that right, the European Union shall present its opening statement first, followed by the United States. The party that presented its opening statement first shall present its closing statement first.

Third party session

17. Each third party may present its views orally during the third party session of the first substantive meeting. The Panel may open the third-party session to the public for those third parties wishing to make their statement public, subject to appropriate procedures to be adopted by the Panel after consulting the parties.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

20. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

21. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in reverse alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

c. Each third party should limit the duration of its statement to 15 minutes. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. on the first working day (Geneva time) following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit an integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions and in its oral statements. The integrated executive summary may also include a summary of the party's responses to questions following the first substantive meeting and its responses to the second set of questions and comments thereon following the second substantive meeting. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. Each integrated executive summary shall be limited to 20 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments unless that third party indicates that it does not wish for the submission and/or oral statement to serve as its executive summary, in which case it shall submit a separate executive summary.

Interim review

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel.

28. If no further meeting with the panel is requested, each party may submit written comments on the other party's written request for review. Such written comments shall be limited to the other party's written request for review and shall be submitted in accordance with the timetable adopted by the Panel.

Interim and Final Report

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).

b. Each party and third party shall submit one paper copy of its submissions and one paper copy of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format (email or on a CD-ROM or DVD). In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.

c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits on CD-ROMs or DVDs.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or other electronic format acceptable to the recipient without having to serve a paper copy, unless the recipient party or third party has requested a paper copy at least five working days before their filing. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

e. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

f. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS577.

1. For the purposes of these Panel proceedings, BCI includes:

   a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping and countervailing duty investigations at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 4 below.

   b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 4 below.

2. Any information that is available in the public domain may not be designated as BCI. In addition, these procedures cease to apply to any BCI if the person that provided the information makes the information publicly available or agrees in writing to make the information publicly available.

3. If the United States intends to submit BCI from the anti-dumping and countervailing duty investigations at issue to the Panel it shall, at the earliest possible date, obtain an authorizing letter from the entity that submitted the BCI and provide such authorizing letter to the Panel, with a copy to the other party. If the European Union requires BCI from the anti-dumping and countervailing duty investigations at issue for the purpose of preparing its submissions or to submit that BCI to the Panel, the United States shall, at the earliest possible date after being requested by the European Union, obtain an authorizing letter from the entity that submitted the BCI, provide such authorizing letter to the Panel with a copy to the European Union, and provide the BCI to the European Union.

4. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.

5. No person may have access to BCI except a Panelist, member of the Secretariat assisting the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. Where a third party receives written submissions pursuant to the Working Procedures, the third party shall receive a redacted version of any written submission containing BCI and redacted versions of exhibits thereto. The redacted versions of the parties' written submissions received by third parties pursuant to the Working Procedures and redacted versions of exhibits thereto shall be sufficient to convey a reasonable understanding of the nature of the information at issue. A third party may request access to BCI submitted to the Panel. A party requested by a third party to provide that third party with access to BCI must provide such access promptly.

6. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any

information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

7. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the anti-dumping and countervailing duty investigations at issue in this dispute, or an officer or employee of an association of such enterprises.

8. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g., Exhibit EU-1 (BCI), Exhibit USA-1 (BCI)).

9. Documents previously submitted to or created by the investigating authority of the party complained against containing information that has been designated as confidential or business proprietary information for purposes of the anti-dumping and countervailing duty investigations at issue in this dispute, and marked as business proprietary information, or words to that effect (including headers and bracketing), that have also been designated as BCI in this dispute, shall be deemed to comply with the requirement set out in paragraph 8. When a party submits a document previously submitted to or created by the investigating authority concerned, that party shall mark on the cover of the document "This document was submitted to or created by the [name of investigating authority] and retains its original confidentiality markings".

10. Any BCI that is submitted in binary-encoded or other electronic form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded or other electronic files.

11. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 8.

12. Any person authorized to have access to BCI under the terms of these procedures shall store all documents and electronic storage media containing BCI in such a manner as to prevent unauthorized access to such information.

13. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

14. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX A-3

COMMUNICATION FROM THE PANEL TO THE PARTIES OF 18 SEPTEMBER 2020 CONCERNING CERTAIN PROCEDURAL MATTERS

The Panel would like to inform the parties concerning the following requests raised in this dispute.

The United States' request for a preliminary ruling

In its first written submission, the United States requested a preliminary ruling that claims under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement are outside the Panel's terms of reference, arguing that neither claim was identified in the European Union's consultations request or panel request. The Panel asked the European Union to comment on the United States' preliminary ruling request and received those comments on 20 May 2020.

Having carefully considered the parties' arguments as well as the language contained in the European Union's panel request, the Panel has decided not to make the preliminary ruling that has been requested by the United States. In particular, the Panel considers that, in citing Article 15.1 of the SCM Agreement and Article 3.1 of the Anti-Dumping Agreement, and in referring to certain language contained in Article 15.1 and Article 3.1 to make an "objective examination of … the consequent impact of [subsidized/dumped] imports on domestic producers of such products", the European Union has provided a brief summary of the legal basis of the complaint sufficient to meet the minimum requirements of Article 6.2 of the DSU. The Panel thus considers the European Union's claims under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement to be within its terms of reference. The full rationale for the Panel's decision will be set out in its final report.

The Panel therefore invites the parties to further address these claims in their upcoming submissions to the Panel.

The European Union's request for leave to address the USDOC's *de jure* specificity remand redetermination

On 2 July 2020, the European Union requested leave from the Panel to address the results of a remand redetermination concerning the USDOC's *de jure* specificity determination, which was issued on 29 May 2020, following a 17 January 2020 remand order of the U.S. Court of International Trade. A copy of the remand redetermination was first submitted to the Panel on 6 June 2020 as Exhibit EU-80 with the European Union's responses to the Panel's advance questions. The Panel asked the United States to comment on the European Union's request and received those comments on 10 July 2020.

The Panel observes that the remand redetermination was published after the Panel was established. Notwithstanding, the Panel considers that the description of the challenged measures set out in the European Union's panel request is sufficiently broad to cover the remand redetermination. Moreover, a review of the content of the USDOC's *de jure* specificity redetermination reveals that the remand redetermination upholds and confirms the USDOC's analysis in the original determination, providing further clarification and explanation as to how the USDOC considers the granting authority expressly limits access to the subsidy. In these circumstances, the Panel considers that those aspects of the remand redetermination with respect to the matter of *de jure* specificity are within the Panel's terms of reference, despite the fact that the remand redetermination was not in existence at the time that this Panel was established.

Accordingly, the Panel allows the European Union to address the remand redetermination with respect to the matter of *de jure* specificity in its submissions, on the basis that the remand redetermination is a measure or is part of the measure that is before the Panel in this dispute. The full rationale for the Panel's decision will be set out in its final report.

ANNEX A-4

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING HOLDING A SUBSTANTIVE MEETING CONDUCTED VIA CISCO WEBEX

Adopted on 9 October 2020

General

1. These additional Working Procedures set out terms for holding a substantive meeting with the Panel via Cisco WebEx Events.

Definitions

2. For the purposes of these additional Working Procedures:

"DORA" means the Disputes Online Registry Application.

"Host" means the designated person within the WTO Secretariat responsible for the management of the platform for remote participants to participate in the meeting with the Panel.

"Participant" means any authorized person attending the meeting, either remotely or from the designated room at the WTO premises, including the Members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the meeting, members of the parties' and third parties' delegations, and interpreters.

"Platform" means the Cisco WebEx Events platform.

Equipment and technical requirements

3. Each party and third party shall be responsible for ensuring that the members of its delegation participating in the meeting with the Panel by remote means join the hearing using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.

4. To the extent possible, each party and third party shall ensure that each member of its delegation connecting to the meeting remotely:

(1) Uses a high-speed internet connection;

(2) Accesses the meeting via desktop or laptop computer rather than by smartphone or tablet;

(3) Ensures that the devices they use are adequately charged and that power cables or back-up batteries are available;

(4) Ensures that their microphone provides sufficient amplification and clarity;

(5) Ensures that their camera creates a sufficiently clear image;

(6) Eliminates any background noise; and

(7) Speaks slowly in their statements and interventions.

Technical support

5. (1) In light of the Secretariat's limited ability to offer remote assistance during, and in advance of the meeting, each party and third party is responsible for providing its own technical support to the members of its delegation.

(2) The host will assist participants in accessing and using the platform in preparation of, and during the course of, the meeting with the Panel.

Pre-meeting

Registration

6. Each party and third party shall provide to the Panel the list of the members of its delegation no later than 5.00 p.m. (Geneva time) 7 working days before the first day of the meeting with the Panel. Such list shall include all members of each party's and third party's delegation, and, to the extent possible, shall indicate whether they will be participating in the meeting remotely or from the designated room at the WTO premises. Each party and third party shall limit the number of members of its delegation participating at the WTO premises to no more than three persons.

Advance testing

7. Each group of remote participants (members of each party's and third party's delegation and interpreters) will hold two testing sessions with the Secretariat before the meeting with the Panel: a separate one for each group, and a joint session with all remote participants in the meeting. Such test sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. Remote participants should make themselves available for the test sessions.

Confidentiality and security

8. The meeting shall be confidential.

9. Each party and third party shall follow any security and confidentiality protocols and guidelines set by the Panel in advance of the meeting.

10. The remote participants shall connect to the meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

Conduct of the meeting

Recording

11. The meeting will be recorded in its entirety via the platform. The recording of the meeting will form part of the panel record.

12. The parties and third parties are strictly prohibited from:

(1) Recording, via audio, video or screenshot, the meeting or any part thereof; and

(2) Permitting any non-authorized person to record, via audio, video or screenshot, the meeting or any part thereof.

Access to the virtual meeting room

13. The participants shall access the virtual meeting room either remotely in accordance with paragraph 4 of these additional Working Procedures or from the designated room at the WTO premises.

14. (1) The host will invite remote participants via email to join the virtual meeting room.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password to unauthorized persons.

(3) Each party and third party shall ensure that only authorized participants from its delegation join the virtual meeting room.

Advance log-on

15. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of the meeting.

(2) In order to ensure that the meeting will start as scheduled, participants accessing the meeting remotely must login to the platform at least 30 minutes in advance of the scheduled start time of the meeting.

(3) Participants accessing the meeting remotely will be placed in a virtual lobby where they will remain until the Panel is ready to start the meeting, at which time the host will admit them to the meeting.

Document sharing

16. (1) Before each party or third party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement through DORA.

(2) Any participant wishing to share a document with the other participants during the meeting will do so through DORA.

Communication breakdown

17. Each party and third party will designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The parties and third parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the meeting. To do so, the party or third party that experiences the technical or connectivity issue shall:

(1) If possible, immediately intervene at the meeting and briefly state the nature of the issue experienced; or

(2) If doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform, by sending an email to olga.falquerasalamo@wto.org, or by calling at +41 22 739 6746.

18. The Panel may postpone the proceedings until the technical issue is resolved or continue the proceedings with those that continue to be connected or are physically present in the meeting room at the WTO.

Participation

19. (1) If a participant attending the meeting remotely wishes to take the floor, the participant should use the "raise a hand" function in the platform, so that the Panel can give the floor to the participant and allow the participant to unmute their microphone and turn their camera on.

(2) If a participant attending the meeting from the WTO premises wishes to take the floor, the participant should raise their placard/flag in the designated room at the WTO premises, so that the host can register the request on the virtual meeting platform and the Panel can give the floor to the participant. When the participant takes the floor, the camera will automatically move to the participant, once their microphone is turned on.

Structure of the substantive meeting with the parties

20. The substantive meeting of the Panel with the parties will be conducted as follows:

(1) On the first meeting day, the Panel will invite the European Union to make an opening statement to present its case first. Subsequently, the Panel will invite the United States to present its point of view. Before each party takes the floor, the party shall provide the Panel and other participants at the meeting with a provisional written version of its statement by uploading it to DORA. Each party should avoid lengthy repetition of the arguments in its

submissions. Each party shall limit the duration of its opening statement to 75 minutes. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments on the other party's statement.

(2) On the second meeting day, the Panel may pose questions to the parties, which were sent to the parties in advance. Once the questioning has concluded, the Panel will afford each party an opportunity to present a closing statement, with the European Union presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants with a provisional written version of its closing statement, if one is available, by uploading it to DORA. Each party shall limit the duration of its closing statement to 30 minutes.

(3) Following the meeting:

a. Each party shall submit the final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. By the same deadline, each party shall also submit the final written version of any prepared closing statement that it delivered at the meeting.

b. Each party may send in writing, no later than 5.00 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the other party to which it wishes to receive a response in writing.

c. The Panel will endeavour to send in writing, no later than 5.00 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the parties to which it wishes to receive a response in writing.

d. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the timeframe established by the Panel before the end of the meeting.

21. The above format and structure are without prejudice to how the Panel decides to conduct subsequent meeting(s) with the parties.

Structure of the third-party session

22. The third-party session will be conducted as follows:

(1) All parties and third parties may be present during the entirety of this session.

(2) The Panel will hear the oral statements of the third parties, who shall speak in reverse alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement by uploading it on DORA at the start of the third-party session. Each third party shall limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission.

(3) Following the third-party session:

a. Each third party shall submit the final written version of its oral statement no later than 5.00 p.m. (Geneva time) on the first working day following the third-party session.

b. Each party may send in writing, no later than 5.00 p.m. (Geneva time) on the fifth working day following the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

c. The Panel may send in writing, no later than 5.00 p.m. (Geneva time) on the fifth working day following the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

d. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Relationship with the Working Procedures of the Panel adopted on 6 January 2020

23. These additional Working Procedures complement the Working Procedures of the Panel adopted on 6 January 2020. To the extent that these additional Working Procedures conflict with the Working Procedures of the Panel, these additional Working Procedures shall prevail.

ANNEX A-5

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING HOLDING A SUBSTANTIVE MEETING CONDUCTED VIA CISCO WEBEX

Adopted on 30 November 2020

General

1. These additional Working Procedures set out terms for holding a substantive meeting with the Panel via Cisco WebEx Events.

Definitions

2. For the purposes of these additional Working Procedures:

"DORA" means the Disputes Online Registry Application.

"Host" means the designated person within the WTO Secretariat responsible for the management of the platform for remote participants to participate in the meeting with the Panel.

"Participant" means any authorized person attending the meeting, either remotely or from the designated room at the WTO premises, including the Members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the meeting, members of the parties' delegations, and interpreters.

"Platform" means the Cisco WebEx Events platform.

Equipment and technical requirements

3. Each party shall be responsible for ensuring that the members of its delegation participating in the meeting with the Panel by remote means join the hearing using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.

4. To the extent possible, each party shall ensure that each member of its delegation connecting to the meeting remotely:

(1) Uses a high-speed internet connection;

(2) Accesses the meeting via desktop or laptop computer rather than by smartphone or tablet;

(3) Ensures that the devices they use are adequately charged and that power cables or back-up batteries are available;

(4) Ensures that their microphone provides sufficient amplification and clarity;

(5) Ensures that their camera creates a sufficiently clear image;

(6) Eliminates any background noise; and

(7) Speaks slowly in their statements and interventions.

Technical support

5. (1) In light of the Secretariat's limited ability to offer remote assistance during, and in advance of the meeting, each party is responsible for providing its own technical support to the members of its delegation.

(2) The host will assist participants in accessing and using the platform in preparation of, and during the course of, the meeting with the Panel.

Pre-meeting

Registration

6. Each party shall provide to the Panel the list of the members of its delegation no later than 5:00 p.m. (Geneva time) 7 working days before the first day of the meeting with the Panel. Such list shall include all members of each party's delegation, and, to the extent possible, shall indicate whether they will be participating in the meeting remotely or from the designated room at the WTO premises. Each party shall limit the number of members of its delegation participating at the WTO premises to no more than three persons.

Advance testing

7. The Secretariat may, as appropriate, hold two testing sessions with each group of remote participants (members of each party's delegation) before the meeting with the Panel: a separate one for each group, and a joint session with all remote participants in the meeting. Such test sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. Remote participants should make themselves available for the test sessions.

Confidentiality and security

8. The meeting shall be confidential.

9. Each party shall follow any security and confidentiality protocols and guidelines set by the Panel in advance of the meeting.

10. The remote participants shall connect to the meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

Conduct of the meeting

Recording

11. The meeting will be recorded in its entirety via the platform. The recording of the meeting will form part of the panel record.

12. The parties are strictly prohibited from:

(1) Recording, via audio, video or screenshot, the meeting or any part thereof; and

(2) Permitting any non-authorized person to record, via audio, video or screenshot, the meeting or any part thereof.

Access to the virtual meeting room

13. The participants shall access the virtual meeting room either remotely in accordance with paragraph 4 of these additional Working Procedures or from the designated room at the WTO premises.

14. (1) The host will invite remote participants via email to join the virtual meeting room.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password with unauthorized persons.

(3) Each party shall ensure that only authorized participants from its delegation join the virtual meeting room.

Advance log-on

15. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of the meeting.

(2) In order to ensure that the meeting will start as scheduled, participants accessing the meeting remotely must login to the platform at least 30 minutes in advance of the scheduled start time of the meeting.

(3) Participants accessing the meeting remotely will be placed in a virtual lobby where they will remain until the Panel is ready to start the meeting, at which time the host will admit them to the meeting.

Document sharing

16. (1) Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement through DORA.

(2) Any participant wishing to share a document with the other participants during the meeting will do so through DORA.

Communication breakdown

17. Each party will designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the meeting. To do so, a party that experiences the technical or connectivity issue shall:

(1) If possible, immediately intervene at the meeting and briefly state the nature of the issue experienced; or

(2) If doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform, by sending an email to olga.falguerasalamo@wto.org, or by calling at +41 22 739 6746.

18. The Panel may postpone the proceedings until the technical issue is resolved or continue the proceedings with those that continue to be connected or are physically present in the meeting room at the WTO.

Participation

19. (1) If a participant attending the meeting remotely wishes to take the floor, the participant should use the "raise a hand" function in the platform, so that the Panel can give the floor to the participant and allow the participant to unmute their microphone and turn their camera on.

(2) If a participant attending the meeting from the WTO premises wishes to take the floor, the participant should raise their placard/flag in the designated room at the WTO premises, so that the host can register the request on the virtual meeting platform and the Panel can give the floor to the participant. When the participant takes the floor, the camera will automatically move to the participant, once their microphone is turned on.

Structure of the substantive meeting with the parties

20. The substantive meeting of the Panel with the parties will be conducted as follows:

(1) On the first meeting day, the Panel will invite the United States to make an opening statement to present its case first. Subsequently, the Panel will invite the European Union to present its point of view. If the United States chooses not to avail itself of that right, the European Union shall present its opening statement first, followed by the United States. Before each party takes the floor, the party shall provide the Panel and other participants at the meeting with a provisional written version of its statement by uploading it to DORA. Each party should avoid lengthy repetition of the arguments in its submissions. Each party shall limit the duration of its opening statement to 75 minutes. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments on the other party's statement.

(2) On the second meeting day, the Panel may pose questions to the parties, which were sent to the parties in advance. Once the questioning has concluded, the Panel will afford each party an opportunity to present a closing statement, with the party that presented its opening statement first presenting its closing statement first. Before each party takes the floor, it shall provide the Panel and other participants with a provisional written version of its closing statement, if one is available, by uploading it to DORA. Each party shall limit the duration of its closing statement to 30 minutes.

(3) Following the meeting:

a. Each party shall submit the final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. By the same deadline, each party shall also submit the final written version of any prepared closing statement that it delivered at the meeting.

b. Each party may send in writing, no later than 5.00 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the other party to which it wishes to receive a response in writing.

c. The Panel will endeavour to send in writing, no later than 5.00 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the parties to which it wishes to receive a response in writing.

d. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the timeframe established by the Panel before the end of the meeting.

21. The above format and structure are without prejudice to how the Panel decides to conduct any subsequent meeting(s) with the parties.

Relationship with the Working Procedures of the Panel adopted on 6 January 2020

22. These additional Working Procedures complement the Working Procedures of the Panel adopted on 6 January 2020. To the extent that these additional Working Procedures conflict with the Working Procedures of the Panel, these additional Working Procedures shall prevail.

ANNEX A-6

ADDITIONAL WORKING PROCEDURES OF THE PANEL: OPEN MEETINGS (DELAYED ONLINE BROADCAST)

Adopted on 25 June 2021

1. Pursuant to paragraphs 10 and 17 of the Working Procedures of the Panel adopted on 6 January 2020, and in light of the continuing COVID-19-related restrictions imposed on gatherings and international travel, the Panel has agreed to make the relevant portions of the recordings of the substantive meetings with the parties, and the third-party session (subject to agreement of the relevant third parties), available to the public in a delayed online broadcast format set out in this additional working procedures. Both substantive meetings were held in a virtual format with the possibility for limited participation on the WTO premises.

2. The Panel will make available to the public, via a registration process, the audio recordings of the relevant portions of the substantive meetings with the parties and the third-party session, together with the "as delivered" written versions of the parties' statements at the substantive meetings, the consenting third parties' statements at the third-party session, and the written versions of the parties' responses to the Panel's questions at the substantive meetings (Materials). The Materials will be available in English and no interpretation or translation will be provided.

3. The Materials will be available to the registered participants through a password-protected web-link during a limited period of 72 hours. At the beginning of the period, all registered participants will receive an email with the web-link and access credentials. The registered participants may access the web-link at any time within the period to listen to and/or read the Materials. At the end of the period, the Materials will no longer be accessible.

4. The parties shall inform the Panel by a deadline set by the Panel, which shall be no later than 2 weeks before the delayed online broadcast, whether any parts of their relevant Materials shall be redacted in order to protect private or confidential information.

5. All registered participants will be informed that sharing the web-link or access credentials with other persons and/or any form of recording or sharing the Materials with other persons is prohibited. However, the parties and the consenting third parties recognize that, given the format of the broadcast, the Panel and the WTO Secretariat cannot guarantee or supervise the registered participants' compliance with this rule.

6. Access to the Materials will be open to officials of WTO Members, Observers, staff members of the WTO Secretariat, journalists, representatives of non-governmental organizations, and the interested members of the public upon registration. No later than two weeks before the delayed online broadcast, the WTO Secretariat will place a notice on the WTO website informing the public of the delayed online broadcast. The notice shall include a link to register directly with the WTO. The notice shall also indicate the beginning, duration, and the end of the period during which the Materials will be available. The deadline for the registration shall be 10 days from the date of the publication. The WTO Secretariat will inform the parties and the consenting third parties of publishing the notice no later than 2 days before the publication.

ANNEX A-7

INTERIM REVIEW

1 INTRODUCTION

1.1. The Panel issued its Interim Report to the parties on 7 July 2021. Both parties submitted written requests for review of precise aspects of the Interim Report on 21 July 2021, and written comments on each other's written requests on 28 July 2021. Neither party requested the Panel to hold an interim review meeting.

1.2. In accordance with Article 15.3 of the DSU, this Annex responds to the issues raised by the parties in the context of the interim review. Apart from the specific changes described in the following section, we have also corrected a number of typographical errors and other non-substantive errors throughout the Report, including those identified by the parties, which are not referred to specifically below. The footnote numbers in the Final Report have changed due to these revisions. The text below refers to the numbering in the Final Report, with the numbering in the Interim Report in parentheses for ease of reference, if different. The paragraph numbers in the Final Report remain unchanged.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Paragraph 7.8

2.1. The United States requests the Panel to amend paragraph 7.8 to additionally indicate that, as part of the judicial review proceedings before the USCIT, the USDOC's Remand Redetermination further explained its interpretation of section 771(5A)(D)(i) of the Tariff Act of 1930 for the *de jure* specificity finding. According to the United States, as worded, paragraph 7.8 of the Interim Report incorrectly implies that the judicial review has ended, and that the USDOC affirmed its own determination.[1] The European Union did not comment on this request.

2.2. We have revised paragraph 7.8 in light of the United States' comments. In addition, we have clarified that the USDOC also made no changes to the amended final determination and countervailing duty order with its Remand Redetermination[2] and affirmed its finding made in the final determination that the BPS provides benefits that are *de jure* specific to olive growers.[3]

2.2 Footnote 63 (footnote 62 of the Interim Report)

2.3. The European Union requests the Panel to revise footnote 62 to indicate that the European Union could not have filed Exhibit EU-81 at an earlier stage and further indicate that the European Union provided reasons why it considered the contents of Exhibit EU-81 relevant for the present dispute.[4]

2.4. The United States objects to the European Union's request, arguing that the footnote already sufficiently explains the reasons for the Panel's rejection of Exhibit EU-81. Should the Panel make the proposed change, the United States requests the Panel to also reflect its argument that the USDOC's Remand Redetermination was not a measure at issue, and that the European Union had failed to identify any basis under the Working Procedures to accept the European Union's untimely submission of Exhibit EU-81.[5]

2.5. We reject the European Union's request. As currently drafted, the text emphasizes that the Panel's decision not to accept Exhibit EU-81 was based on the late timing of the submission. The text also makes clear that the decision was taken after hearing the parties' views.

[1] United States' request for interim review, para. 4.
[2] Remand Redetermination, (Exhibit EU-80), p. 2.
[3] Remand Redetermination, (Exhibit EU-80), p. 50.
[4] European Union's request for interim review, para. 4.
[5] United States' comments on the European Union's request for interim review, para. 12.

2.3 Paragraphs 7.16 and 7.34, and footnote 74 (footnote 73 of the Interim Report)

2.6. The United States requests the Panel to modify the reference in footnote 74 (footnote 73 of the Interim Report) to refer to the preliminary and final determinations. According to the United States, in the event that the third sentence of paragraph 7.16 intends to describe the USDOC's preliminary and final determinations, footnote 74 (footnote 73 of the Interim Report) should refer to those determinations, and not to the Remand Redetermination.[6] The United States further requests the Panel to modify the language used in the sixth sentence of paragraph 7.16 and the first sentence of paragraph 7.34 to indicate that the USDOC further explained and elaborated upon its original findings in the Remand Redetermination.[7] The European Union did not comment on this request.

2.7. We have revised footnote 74 to refer to the preliminary and final issues and decision memoranda, while retaining the reference to the Remand Redetermination. We have also revised the sixth sentence of paragraph 7.16 and the first sentence of paragraph 7.34 to indicate that the USDOC further explained and elaborated upon its original *de jure* specificity findings in the Remand Redetermination. For the sake of clarity, we have also indicated that the Remand Redetermination affirmed the USDOC's finding that the BPS and GP programmes provided benefits that were *de jure* specific to olive growers.[8]

2.4 Paragraph 7.29

2.8. The European Union requests the Panel to delete the first sentence of paragraph 7.29, which reads: "[w]e do not understand the parties to disagree with either of these propositions". According to the European Union, it is not clear which are the two propositions the Panel refers to, contending that the preceding paragraph 7.28 appears to contain more than two propositions. The European Union also submits it does not share the views expressed by the Panel in paragraph 7.28, and therefore the paragraph incorrectly portrays the European Union as being in agreement with the Panel's views.[9]

2.9. The United States agrees with the European Union's request to delete the first sentence of this paragraph for the sake of clarity.[10]

2.10. We have made the requested change to enhance clarity.

2.5 Paragraph 7.35

2.11. The United States submits that paragraph 7.35 characterizes preceding excerpts from the Remand Redetermination but, as written, could be mistaken as describing the USDOC's legally distinct preliminary or final determinations. The United States requests the Panel to clarify that paragraph 7.35 only characterizes excerpts from the Remand Redetermination.[11] The European Union did not comment on this request.

2.12. We reject the United States' request. While the specific quotes reproduced in paragraph 7.34 of the Report are from the Remand Redetermination, these quotes summarize the USDOC's analysis in its earlier preliminary and final determinations. In this regard, paragraph 7.34 explains that "the USDOC recalls and explains the summary of the analysis set out in its earlier determinations". The quoted language from the Remand Redetermination also acknowledges this. The change proposed by the United States would therefore mischaracterize the Panel's assessment of the USDOC's *de jure* specificity findings, which was based on the totality of the USDOC's determinations. To further clarify the relationship between the statements in the Remand Redetermination and the USDOC's original determination, we have indicated in footnote 91 (footnote 90 of the Interim Report) that the final

[6] United States' request for interim review, para. 5.
[7] United States' request for interim review, paras. 5-6.
[8] See para. 2.2 above.
[9] European Union's request for interim review, para. 5 (referring to European Union's 25 February 2021 response to Panel question No. 6).
[10] United States' comments on the European Union's request for interim review, para. 13.
[11] United States' request for interim review, para. 7.

issues and decision memorandum contains language similar to the one reproduced in the first quote of paragraph 7.34 of the Report.

2.6 Paragraph 7.37

2.13. The European Union requests the Panel to delete the fourth sentence of paragraph 7.37, which reads: "unlike the European Union, we do not see in the terms of Article 2.1(a) any *per se* prohibition on the relevance and consideration of facts pertaining to a past subsidy programme no longer in force for the purpose of determining *de jure* specificity". The European Union contends that it did not argue that the terms of Article 2.1(a) of the SCM Agreement contain any *per se* prohibition on the relevance and consideration of facts pertaining to a past subsidy programme no longer in force for the purpose of determining *de jure* specificity. Rather, the European Union submits that its position is reflected in footnote 101 (footnote 100 of the Interim Report).[12]

2.14. The United States contends that the sentence accurately describes what the European Union argued in its first written submission.[13] The United States submits that, although the European Union now claims to hold a more nuanced view, the European Union did not retract the above argument in its subsequent submissions to the Panel. If the Panel were to consider making any change, the United States requests that the Panel only delete the language "[t]hus, unlike the European Union" at the outset of the paragraph, since the sentence reflects the Panel's finding and not solely the European Union's position.[14]

2.15. We have revised the fourth sentence of the paragraph by deleting "unlike the European Union" while retaining the remainder of the sentence that concerns the Panel's finding.

2.7 Paragraph 7.38

2.16. The European Union requests the Panel to add explanation to the second sentence of paragraph 7.38 indicating that the USDOC's *de jure* specificity determination was based exclusively on an analysis of the relevant legislation pursuant to which the granting authorities operate the subsidy programmes at issue, and not on acts of the granting authority.[15] The European Union submits that the proposed clarification should be added to avoid any potential misunderstanding.[16]

2.17. The United States contends that the first and second sentences of paragraph 7.38 already state that the USDOC's determination concerned the legislation (i.e. the BPS and GP programmes) pursuant to which the granting authority operates and therefore, the additional text proposed by the European Union is superfluous.[17]

2.18. The first sentence of paragraph 7.38 indicates that the USDOC's determination of *de jure* specificity concerned subsidies provided under the BPS and GP programmes, as implemented by the GOS. The second sentence further provides that the USDOC's factual finding that the BPS rules governing the amount of subsidy available to eligible farmers explicitly referred to and incorporated certain features of the SPS programme (and through the SPS programme, the COMOF programme). We consider the language in paragraph 7.38 clearly sets out the basis for the Panel's finding in relation to legislation governing the underlying programmes. Therefore, we see no basis to make the change requested by the European Union.

2.8 Paragraph 7.43

2.19. The European Union requests the Panel to quote language from Aceitunas Guadalquivir's preliminary determination calculation memorandum (Exhibit EU-36) and preliminary issues and decision memorandum (Exhibit EU-1) in paragraph 7.43 to clarify that the European Union's position is supported by certain passages from Aceitunas

[12] European Union's request for interim review, para. 6 (referring to fn 100 of the Interim Report; 10 June 2020 response to Panel question No. 4; and 8 September 2020 response to Panel question No. 1(b)).
[13] United States' comments on the European Union's request for interim review, para. 14 (referring to European Union's first written submission, para. 240).
[14] United States' comments on the European Union's request for interim review, para. 14.
[15] European Union's request for interim review, para. 7.
[16] European Union's request for interim review, para. 7.
[17] United States' comments on the European Union's request for interim review, para. 15.

Guadalquivir's preliminary determination calculation memorandum and the preliminary issues and decision memorandum, and not solely the USDOC's final issues and decision memorandum.[18]

2.20. The United States submits that, if the Panel makes the addition requested by the European Union, the Panel should also include the United States' explanations for why those references were irrelevant, i.e. because they concerned an evaluation under the conditions of the USDOC's attribution of benefit regulations, not *de jure* specificity. The United States asks the Panel to add this explanation in footnote 117 (footnote 116 of the Interim Report).[19]

2.21. We have decided to reject the European Union's request as we do not consider the proposed addition is directly relevant to the Panel's discussion in paragraph 7.43, which addresses statements made in the USDOC's final issues and decision memorandum as it relates to the Panel's finding on *de jure* specificity. The European Union's request relates to the following language from Aceitunas Guadalquivir's preliminary determination calculation memorandum:

> [W]e are attributing to Aceitunas Guadalquivir the benefits received by its cross-owned companies Coromar … and AGEA.
>
> … The benefits that Coromar reported receiving during the POI appear to be related to its olive production. That is, it qualified for such subsidies based on the fact that it is an olive grower.[20]

2.22. Similar language is contained in the preliminary issues and decision memorandum.[21] Paragraph 7.43 focuses on statements directly made in the context of the USDOC's *de jure* specificity discussion in the final issues and decision memorandum. As the United States has indicated, the referenced language relates to the USDOC's attribution of benefit, in particular of entities that are cross-owned with Aceitunas Guadalquivir. The referenced statements, however, are not necessarily indicative of the USDOC's findings regarding *de jure* specificity. While these statements may reflect the USDOC's view that certain entities were eligible for subsidies based on their status as olive growers, the Panel focused on the USDOC's findings made specifically in the context of *de jure* specificity analysis contained in the preliminary and final issues and decision memoranda, and the Remand Redetermination.

2.9 Paragraph 7.49

2.23. The European Union requests the Panel to delete a reference to the SPS programme from the first sentence of paragraph 7.49, contending that paragraph 7.49 only discusses subsidies provided during the period of operation of the BPS programme.[22]

2.24. The United States shares the European Union's view that the Panel's discussion in paragraph 7.49 should be clarified, but believes clarity would better be achieved by adding another reference to the SPS programme in the explanation of "the period of operation". This would clarify that the Panel's analysis contained in this paragraph applies to the period of operation of both the SPS and BPS programmes and would avoid altering the substance of the Panel's finding.[23]

2.25. We have decided to modify the first sentence of paragraph 7.49 in the manner suggested by the United States. We consider this change is appropriate in view of the subsequent quote from the verification report of the European Commission explaining that "[a] farmer's current production or lack of production was not a factor in the process or evaluation of a farmer's application for an income grant under SPS".[24]

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[18] European Union's request for interim review, para. 8.
[19] United States' comments on the European Union's request for interim review, para. 16 (referring to United States' opening statement at the second meeting of the Panel, para. 13).
[20] Aceitunas Guadalquivir preliminary determination, (Exhibit EU-36), p. 2.
[21] PIDM, (Exhibit EU-1), p. 9.
[22] European Union's request for interim review, paras. 9-10.
[23] United States' comments on the European Union's request for interim review, para. 17.
[24] Paragraph 7.49 of the Report (quoting USDOC verification report: European Commission, (Exhibit EU-22), pp. 2-3).

2.10 Paragraphs 7.59-7.76, 7.107-7.116, and 7.127

2.26. The European Union requests the Panel to make several additions and a deletion in paragraphs 7.59-7.76 to reflect that, apart from the three considerations discussed by the Panel in its assessment in these paragraphs, the Panel's analysis also applies with respect to a fourth situation, in which farmers started growing olives during the period of operation of the SPS or BPS programmes by switching their production from different crops. The European Union argues that the proposed changes are necessary for the sake of completeness and to assist the parties to resolve this dispute. The European Union submits that similar changes should be made in paragraphs 7.107-7.116 and 7.127, and further requests the corresponding conclusions be modified in section 8 of the Report.[25]

2.27. The United States contends that it "takes no position" on the European Union's request to include references to the argument that the European Union claims to have made concerning the possibility of a farmer to switch to production of olives during the operation of the SPS or BPS programmes.[26] The United States contends, however, that the European Union's requested additions are not supported by the language used in its submissions and further argues that the Panel should reject the proposed changes in paragraphs 7.71-7.75, 7.107-7.116, and 7.127 of the Report, as those latter modifications add no value and are duplicative.[27]

2.28. We have decided to reject the European Union's request because, although the European Union submits that it discussed in a number of its submissions the situation of farmers that started growing olives during the period of operation of the SPS or BPS programmes by switching their production from different crops[28], we fail to find any support that this potential fourth situation was specifically raised or discussed in the European Union's submissions.

2.29. The European Union points the Panel to several sections of its first written submission. Paragraphs 70-75 of the European Union's first written submission describe eligibility conditions for the SPS programme, and paragraphs 111-115 similarly discuss eligibility conditions for the BPS programme. However, these paragraphs discuss in general terms that production of any particular crop was not an eligibility condition to receive assistance under the SPS or BPS programmes and do not contain any explanations or description pointing to the fourth consideration that the European Union has asked to include in the Report. Paragraphs 244 and 245 of the European Union's first written submission describe, *inter alia*, a situation in which a farmer could have increased, decreased, or ceased olive production, or replaced it partly or completely with other crop or farming activities, but do not discuss a situation in which a farmer switched to producing olives after a different crop during the operation of the SPS or BPS programmes.

2.30. Paragraph 326 of the European Union's first written submission also discusses in general terms the possibility that current olive growers may not have been growing olives during the operation of the COMOF programme. However, this paragraph is most logically understood in the context of the European Union's arguments concerning olive growers who received entitlements via transfer or from the national reserve.

2.31. The European Union also points to its opening statement from the first substantive meeting. Paragraph 28 of the European Union's opening statement at the first meeting contains a "summary" of the European Union's position, and like its first written submission, discusses in general terms the possibility that current olive growers may not have been growing olives during the operation of the COMOF programme. Paragraph 37 of the European Union's opening statement in turn discusses entitlements that could have been bought, rented, or inherited, without discussing the possibility for a farmer switching their production from different crops to growing olives during the period of operation of the SPS or BPS programmes.

2.32. Finally, in its 12 November 2020 responses, the European Union responds to a hypothetical example involving a farmer who started growing olives in 2016 and received payment entitlements

[25] European Union's request for interim review, para. 11.
[26] United States' comments on the European Union's request for interim review, para. 18.
[27] United States' comments on the European Union's request for interim review, paras. 18-19.
[28] In particular, the European Union refers to its first written submission, paras. 70-75, 111-115, 244-245, and 326; opening statement at the first meeting of the Panel, paras. 28 and 37; and 12 November 2020 response to Panel question No. 8, paras. 42-44.

by transfer from a different farmer who did not receive any assistance under the COMOF programme in the past.[29] This relates to the situation of a farmer obtaining entitlements by transfer, not to the fourth circumstance that the European Union now requests us to add.

2.33. Absent a clear discussion of the fourth situation the European Union seeks to include, we have therefore decided to reject the European Union's request to make the requested modifications.

2.11 Paragraph 7.90

2.34. The United States requests the Panel to modify the first sentence of paragraph 7.90 to indicate that the errors concerning the USDOC's factual assessment were "alleged by the European Union". According to the United States, this change clarifies that it does not concede that the USDOC's factual assessment of the regional rate under the BPS programme contained the errors alleged by the European Union.[30] The European Union did not comment on this request.

2.35. We have revised the first sentence of paragraph 7.90 by adding "alleged" before "errors".

2.12 Paragraph 7.104

2.36. The European Union requests the Panel to add references to relevant paragraphs of the Report to the first sentence of paragraph 7.104 to improve readability.[31] The United States did not comment on this request.

2.37. We have added a reference to paragraph 7.58 in the first sentence of paragraph 7.104.

2.13 Paragraph 7.124

2.38. The European Union requests the Panel to delete paragraph 7.124 in its entirety, contending that this paragraph improperly comments on the compliance of the USDOC's determinations with US law. The European Union contends that the Panel should not comment on the compliance of the USDOC's determinations with US law, even as *obiter dictum*.[32]

2.39. The United States contends that the Panel should reject the European Union's request as the Panel makes clear in this paragraph that it was describing the USDOC's own evaluation of the COMOF programme under US law, without pronouncing on the USDOC's compliance with US law.[33]

2.40. We reject the European Union's request to delete this paragraph. Instead, we have revised the language in paragraphs 7.124, 7.127(e)(iii) and 8.1(a)(vii)(3) to clarify the Panel's observation that the USDOC considered that it had made sufficient factual findings with respect to the COMOF programme for purposes of its domestic law. However, this does not amount to a finding by the Panel concerning the USDOC's compliance with its domestic law.

2.14 Paragraphs 7.128-7.130 and footnote 270 (footnote 269 of the Interim Report)

2.41. The European Union requests the Panel to reconsider its decision set out in paragraphs 7.128-7.130 not to address the remaining arguments concerning the European Union's claims under Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement. The European Union does not propose specific changes to paragraphs 7.128-7.130, but submits that addressing its remaining arguments under Articles 2.1, 2.1(a), and 2.4 will provide the parties with the precise indications as to how the Panel's findings could be implemented. The European Union also asks the Panel to reassess whether footnote 270 (footnote 269 of the Interim Report) should cross-refer to footnotes 262 and 263 (footnotes 261 and 262 of the Interim Report).[34]

[29] European Union's 12 November 2020 response to Panel question No. 8, paras. 42-44.
[30] United States' request for interim review, para. 8.
[31] European Union's request for interim review, para. 12.
[32] European Union's request for interim review, para. 13.
[33] United States' comments on the European Union's request for interim review, para. 20.
[34] European Union's request for interim review, para. 14.

2.42. The United States contends that the Panel's exercise of judicial economy was appropriate, and that additional findings are not necessary for achieving a positive solution to the dispute.[35] In this respect, the United States submits that the Panel's exercise of judicial economy is both permitted under the DSU and is consistent with the panel's terms of reference. The United States further submits that additional findings are not required to assist the DSB in making its recommendations.[36]

2.43. We see no basis to grant the European Union's request. In this respect, we have made extensive findings concerning the inconsistency of the USDOC's determination, which we consider have achieved a positive resolution to the matter. We also agree with the observations made in prior panel and Appellate Body reports that a panel may exercise its discretion in addressing only those arguments it deems necessary to resolve a particular claim. As long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim was not specifically addressed in the "findings" section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the "objective assessment of the matter before it" as required by Article 11 of the DSU.[37]

2.44. We also note that footnote 270 (footnote 269 of the Interim Report) does not refer to footnotes 262 and 263 (footnotes 261 and 262 of the Interim Report). In case the European Union's comment concerned footnote 267 (footnote 266 of the Interim Report), the references to footnotes 262 and 263 (261 and 262 of the Interim Report) therein are correct.

2.15 Paragraph 7.135

2.45. The European Union requests the Panel to modify paragraph 7.135 and make findings concerning the European Union's claim that the USDOC's "non-specificity" analysis is inconsistent with Articles 2.1, 2.1(b), and 2.4 of the SCM Agreement. The European Union further requests the Panel to make corresponding adjustments to the conclusions and recommendations contained in section 8 of the Report.[38] The European Union submits that, considering that the USDOC's "non-specificity" analysis and findings are intrinsically based on the same alleged facts the USDOC relied upon to support its finding of *de jure* specificity, it necessarily follows that the USDOC's "non-specificity" analysis is inconsistent with Article 2.1(b) of the SCM Agreement.[39] The European Union further maintains that addressing its Article 2.1(b) claim would clarify that the USDOC's reliance on those facts was both insufficient to establish *de jure* specificity under Article 2.1(a) of the SCM Agreement, and also does not conform to the United States' obligations to conduct a proper "non-specificity" analysis under Article 2.1(b) of the SCM Agreement.[40]

2.46. The United States contends that, for similar reasons to those summarized in paragraph 2.42 above, the Panel's exercise of judicial economy was appropriate, and additional findings are not required to achieve a positive solution to the dispute.[41] The United States also submits that the European Union's proposed modifications to paragraph 7.135 are erroneous factually and legally, and should be rejected.[42] In any event, the United States contends that the European Union's assertion that the USDOC's "non-specificity" analysis is WTO-inconsistent is irrelevant to the question of whether the Panel has properly exercised judicial economy, as a panel's decision to exercise judicial economy does not turn on whether a particular claim would have led to a further finding of WTO-inconsistency.[43]

[35] United States' comments on the European Union's request for interim review, para. 4.
[36] United States' comments on the European Union's request for interim review, paras. 5-7 (referring to Articles 3.4, 3.7, 7.1, and 11 of the DSU).
[37] See e.g. Panel Reports, *Australia – Anti-Dumping Measures on Paper*, para. 7.134; *Korea – Stainless Steel Bars*, para. 7.183; Appellate Body Reports, *EC – Poultry*, para. 135; *EC – Fasteners (China)*, para. 511; and *US – COOL*, para. 414.
[38] European Union's request for interim review, paras. 15-16 and 19.
[39] European Union's request for interim review, para. 17.
[40] European Union's request for interim review, para. 18.
[41] United States' comments on the European Union's request for interim review, paras. 7-8 (referring to Panel Report, *Indonesia – Chicken*, para. 7.159).
[42] United States' comments on the European Union's request for interim review, para. 11.
[43] United States' comments on the European Union's request for interim review, para. 10.

2.47. We see no basis to make the requested changes. Similar to our observation that a panel need not address every argument raised by a party in addressing a particular claim[44], we agree with the observations made in prior panel and Appellate Body reports that a panel may refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute.[45] In this dispute, we consider the findings we have made adequately address the European Union's concerns and do not lead to a partial resolution of the matter, and therefore further findings are not necessary to resolve the matter at issue.[46]

2.16 Paragraph 7.138

2.48. The United States requests several changes to paragraph 7.138 to reflect more closely the text of Section 771B.[47] The European Union did not comment.

2.49. We have made the requested changes to reflect the text of Section 771B without altering the substance of this introductory paragraph.

2.17 Paragraph 7.142

2.50. The United States requests revising the last sentence of paragraph 7.142 to indicate that a comparison of prices for an input product provides the "only" appropriate method for conducting a pass-through analysis, rather than indicate that such an examination is "an" appropriate method for the purpose of assessing pass-through. The United States contends that statements in the European Union's submissions support making this change.[48]

2.51. The European Union asks the Panel to reject the requested change, contending that it has argued numerous times that its claims do not depend on whether price comparisons are the only approach to assess pass-through.[49] However, if the Panel were to make the proposed change, the European Union asks the Panel to add text and an accompanying footnote to paragraph 7.142 indicating that the European Union does not consider that this question of whether a price comparison is required is determinative for its claim.[50]

2.52. We have made the requested change to enhance consistency in reflecting the European Union's argumentation, including the reference at paragraph 7.142 of the Report to the European Union's characterization of input price comparisons as the only meaningful way to assess pass-through. This change is also consistent with the European Union's observation at paragraph 75 of its second written submission that a pass-through analysis in the case of input subsidies can *only* consist of some kind of a price comparison.[51]

2.53. We have also made the additional change requested by the European Union to reflect the European Union's position that the question of whether a price comparison is required is not determinative for its claim.[52]

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[44] See para. 2.43 above.

[45] See e.g. Appellate Body Reports, *US – Tuna II (Mexico)*, para. 403; *Canada – Wheat Exports and Grain Imports*, para. 133; Panel Reports, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.261; *Korea – Stainless Steel Bars*, para. 7.226; and *Indonesia – Chicken*, para. 7.159.

[46] See, e.g. Appellate Body Reports, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 340; *EC – Poultry*, para. 135; *US – Tuna II (Mexico)*, paras. 403-404; and *US – Upland Cotton*, para. 732; and Panel Reports, *US – Pipes and Tubes (Turkey)*, para. 7.343; *Indonesia – Chicken*, para. 7.159.

[47] United States' request for interim review, para. 9.

[48] United States' request for interim review, para. 10 (referring to European Union's first written submission, para. 407; and 10 June 2020 response to Panel question No. 14, paras. 90 and 92).

[49] European Union's comments on the United States' request for interim review, para. 2.

[50] European Union's comments on the United States' request for interim review, para. 3 (referring to European Union's second written submission, paras. 57-58, 74-75, and 77; opening statement at the first meeting of the Panel, paras. 78-83; and 10 June 2020 response to Panel question No. 13, para. 84).

[51] European Union's second written submission, para. 75 ("the EU also explained that a pass-through analysis in the case of input subsidies can only consist of some kind of a price comparison. The EU firmly maintains its position, even if it may not be determinative for this dispute" (fn omitted)).

[52] European Union's second written submission, para. 75.

2.18 Paragraph 7.155

2.54. The European Union requests adding language and an accompanying footnote after the second full sentence of paragraph 7.155 to specify that the Panel is not required to decide on the precise method to determine pass-through to resolve the dispute.[53]

2.55. The United States contends that this change is not necessary as the first two sentences in paragraph 7.155 outline the disagreement between the parties and the Panel's interpretation of the relevant legal standard.[54]

2.56. We have decided to reject this change, as paragraph 7.155 already indicates that the Panel is not required to decide whether price comparisons provide the only meaningful way to assess pass-through in order to resolve the European Union's claims. We have further added text to paragraph 7.142 to reflect the European Union's position that finding price comparison to be the only appropriate method of assessing pass-through is not necessary to determine its claim.

2.19 Paragraph 7.158

2.57. The United States requests modifying paragraph 7.158 to reflect more closely the text of Section 771B.[55] The European Union did not comment.

2.58. We have made the requested changes to reflect the text of Section 771B without altering the substance of the paragraph.

2.20 Paragraph 7.196

2.59. The United States requests the Panel amend the third sentence of paragraph 7.196 by adding to the end of the sentence "so that the Panel, the EU, and Third Parties, if they so request, are able to verify the factual basis upon which the U.S. determined injury and causation in the underlying administrative proceedings".[56] The United States argues that the amendment would more accurately reflect the European Union's submissions.[57]

2.60. The European Union did not comment on the United States' request.

2.61. We have decided to grant the United States request to more accurately reflect the European Union's submissions. We have also decided to implement an additional change to more specifically reflect the language of the European Union's submissions (relevantly, paragraph 424 of the European Union's first written submission), and to modify certain terms to ensure consistency in the Report, as follows:

> In its first written submission, the European Union indicated that it expected the United States to provide it and the Panel with an unredacted version of the USITC's determination so that the Panel, the European Union, and third parties, if they so requested, would be able to verify the factual basis upon which the United States determined, in particular, injury and causation in the underlying administrative proceedings.

2.21 Paragraph 7.203

2.62. The European Union requests the Panel amend the first sentence of paragraph 7.203 to distinguish between the arguments made by the United States in its first and second written submissions. In particular, the European Union requests the Panel note that the United States argued "in its first written submission that the USITC had carried out a 'segmented analysis' that was in line

[53] European Union's request for interim review, para. 20 (referring to European Union's second written submission, paras. 74-75; 12 November 2020 response to Panel question No. 16, paras. 134-135; and opening statement at the second meeting of the Panel, paras. 28-29).

[54] United States' comments on the European Union's request for interim review, para. 21.

[55] United States' request for interim review, para. 11.

[56] United States' request for interim review, para. 12.

[57] United States' request for interim review, para. 12 (referring to European Union's first written submission, para. 424).

with the legal requirements established by the Appellate Body in *US – Hot-Rolled Steel*" and that "[a]ccording to the United States, the USITC was entitled to give 'particular focus to the retail segment'".[58] The European Union argues that this change is required to reflect the "180-degree turnaround that the United States undertook between its first and second written submission with respect to the question whether the USITC undertook a segmented analysis under Articles 3 and 15".[59] The European Union maintains that the United States initially argued that "the USITC was entitled under that case law to carry out a segmented injury and causation analysis and could in that context pay particular focus on the retail 'segment'", in contrast to later arguing that the USITC did not conduct a segmented analysis.[60]

2.63. The United States objects to the European Union's request. The United States argues that the European Union mischaracterizes its arguments, and also improperly refers to prior Appellate Body decisions as "case law".[61]

2.64. We have decided to reject the European Union's request. We do not agree that there was a "180-degree turnaround" on the issue of whether the USITC conducted a segmented analysis. The United States asserted in its first written submission that the USITC was entitled to give "particular focus to the retail segment".[62] This assertion is consistent with the United States' second written submission, which stated that "there is no factual basis for the [European Union]'s attempt to recast [the USITC opinion] as one that alternated between holistic and segmented analyses".[63] We thus do not consider there to be persuasive reasons to accept the European Union's request.

2.22 Paragraph 7.206

2.65. The European Union requests the Panel amend the first sentence of paragraph 7.206 to distinguish between the arguments made by the United States in its first and second written submissions.[64] In particular, the European Union requests the Panel observe that the United States "argued in its first written submission that the USITC carried out a 'segmented analysis' focusing on the retail sector in line with WTO requirements". The European Union requests paragraph 7.206 be amended for the same reasons as paragraph 7.203.[65]

2.66. The United States did not comment on the European Union's request.

2.67. We have decided to reject the European Union's request for the same reason that we rejected the European Union's request regarding paragraph 7.203.

2.23 Paragraph 7.209

2.68. The United States requests the Panel amend the third sentence of paragraph 7.209 by replacing "definite" with "affirmative, objective".[66] The United States argues that "definite" should be excluded from the definition of "positive evidence" because the "Panel's characterization of 'positive evidence' as 'definite' is in tension with the notion that reasonable inferences can be considered positive evidence".[67]

2.69. The European Union did not comment on the United States' request.

2.70. We have decided to accept the United States' request and agree with the United States' observation.

[58] European Union's request for interim review, paras. 21-22.
[59] European Union's request for interim review, para. 21.
[60] European Union's request for interim review, para. 21.
[61] United States' comments on the European Union's request for interim review, paras. 22-28.
[62] United States' first written submission, para. 175.
[63] United States' second written submission, para. 46.
[64] European Union's request for interim review, paras. 23-24.
[65] European Union's request for interim review, para. 23.
[66] United States' request for interim review, para. 13.
[67] United States' request for interim review, para. 13.

2.24 Paragraph 7.211

2.71. The European Union requests the Panel amend the fourth and final sentences of paragraph 7.211.[68] In relation to the fourth sentence of paragraph 7.211, the European Union requests the Panel to "replace the term 'consider' with the term 'examine' so that the term 'examine' is consistently used in this sentence for all trends".[69] The European Union further requests that the Panel delete the phrase "gathered data on" as the European Union argues that it did not contend "that the USITC was not entitled to 'gather data' per customer group".[70] The European Union also requests that the words "under Articles 3 and 15" be included, to clarify that the European Union "takes legal issue with the USITC's 'segmentation' by customer group in the context of Article [*sic*] 3 and 15".[71]

2.72. In relation to the final sentence of paragraph 7.211, the European Union requests the Panel observe that "the European Union does not contest that there was positive evidence that the different customer groups existed". The European Union also requests that the Panel specify that the European Union's arguments relate to the USITC's examination of customer groups "for the purpose of its injury and causation analysis under Article [*sic*] 3 and 15", as well as explain that the European Union alleges such examination was not based on an objective examination of positive evidence "because the USITC had defined a single like product of 'all ripe olives' purchased interchangeably by all customer groups". The European Union argues that the proposed changes to the final sentence of paragraph 7.211 would "more accurately reflect the [European Union]'s position".[72]

2.73. The United States objects to the European Union's request as duplicative and as an inaccurate characterization of the European Union's argument.[73] In particular, the United States argues the proposed change to the final sentence of paragraph 7.211 is an attempt to rewrite the Panel's analysis.[74] The United States maintains that the European Union's submission "does not acknowledge that there was 'positive evidence' of anything contrary to the language the [European Union] suggests adding to paragraph 7.211".[75]

2.74. We have decided to partially accept the European Union's request to amend the fourth sentence of paragraph 7.211, as follows:

> It is our understanding that the European Union describes the Injury Determination as involving a "segmented analysis" because the USITC did not just examine ~~consider~~ trends at the level of the market as a whole, but also ~~gathered data on, and~~ examined trends in relation to certain customer groups.

We consider that this amendment will enhance the clarity of the analysis. We have, however, decided to reject the European Union's other requests. We consider it is unnecessary to add "under Article [*sic*] 3 and 15" to the fourth sentence of paragraph 7.211. In our view, the fact that the USITC's examination is conducted under Articles 3 and 15 is already implied by the context. Additionally, we do not agree with the European Union's amendment to the final sentence of paragraph 7.211 as it is not consistent with our understanding of the European Union's first written submission. While the European Union acknowledged that the customer groups existed, the European Union argued that these groups were "meaningless", and that an "analysis based on customer groups in these circumstances makes no sense and is arbitrary".[76] As the United States observed, the European Union's submission thus "does not acknowledge that there was 'positive evidence' of anything".[77]

[68] European Union's request for interim review, paras. 25-28.
[69] European Union's request for interim review, para. 25.
[70] European Union's request for interim review, para. 25.
[71] European Union's request for interim review, para. 25.
[72] European Union's request for interim review, paras. 26-27.
[73] United States' comments on the European Union's request for interim review, paras. 29-33.
[74] United States' comments on the European Union's request for interim review, para. 32.
[75] United States' comments on the European Union's request for interim review, para. 32 (referring to of European Union's first written submission, para. 467).
[76] European Union's first written submission, para. 467.
[77] United States' comments on the European Union's request for interim review, para. 32.

2.25 Paragraph 7.213

2.75. The European Union requests the Panel amend the first sentence of paragraph 7.213 by deleting the specific references to the sections of the Injury Determination titled "Demand Conditions", "Supply Conditions", and "Substitutability and Other Conditions". The European Union also requests that the Panel specify that the USITC's examination of customer groups was "for its analysis under Article [*sic*] 3.2 and 15.2".[78] The European Union also requests certain amendments to footnote 424 (footnote 422 of the Interim Report).

2.76. The European Union requests that the phrase "for its analysis under Article [*sic*] 3.2 and 15.2" be added "since this is the core [European Union] argument concerning the (non-)relevance of the customer groups".[79] The European Union also argues that the word "determination" should be used in place of the specific sections of the Injury Determination referred to in paragraph 7.213 because the European Union's "argument was that the relevance of the customer groups for the injury and causation analysis was not explained *anywhere* in the determinations".[80]

2.77. The United States objects to the European Union's request. First, the United States asserts that, instead of the European Union's proposed change, the first sentence of paragraph 7.213 should begin with "[i]n its arguments under Articles 3.2 and 15.2".[81] Second, the United States opposes the deletion of the references to specific sections of the Injury Determination. The United States argues that the relevant paragraphs of the European Union's first written submission "did in fact make these arguments about the specific sections of the Views set out by the Panel in this paragraph".[82]

2.78. We have decided to reject the European Union's request. First, the addition of "for its analysis under Articles 3.2 and 15.2" is unnecessary as it is already implied in the context. Second, we consider the references to the relevant sections of the Injury Determination to be appropriate as these reflect the specific arguments made by the European Union.[83]

2.26 Paragraph 7.214

2.79. The European Union requests the Panel amend the second and eighth sentences of paragraph 7.214.[84] The European Union requests that "examination of" should be replaced by "USITC's analysis based on different" in both the second and eighth sentences of paragraph 7.214. The European Union argues this change should be made to reflect the fact that the European Union "did not take issue with the examination of customer groups *per se* or their presentation in the determinations", but rather "with the fact that the USITC based its injury and causation analysis on these customer groups".[85]

2.80. The European Union also requests that the eighth sentence specify that the retail sector was the "only sector where Spanish imports increased whereas Spanish imports decreased at industry level". The European Union argues that "[w]ithout this addition, it would remain unclear why the [European Union] considers that a volume effect was *artificially* created which is however a core argument by the [European Union] in this dispute".[86]

2.81. The United States did not object to the proposed replacement of "examination" with "analysis", but rejects the use of the modifier "different" as not accurately reflecting the European Union's submissions.[87] The United States also argues that the proposed amendment to the eighth sentence of paragraph 7.214 should reflect the language of paragraph 469 of the European Union's first written submission, where the European Union stated that the only purpose

[78] European Union's request for interim review, para. 29.
[79] European Union's request for interim review, para. 29.
[80] European Union's request for interim review, para. 29. (emphasis original)
[81] United States' comments on the European Union's request for interim review, para. 34.
[82] United States' comments on the European Union's request for interim review, para. 35 (referring to the European Union's first written submission, paras. 483-486).
[83] European Union's first written submission, paras. 483-486.
[84] European Union's request for interim review, para. 30.
[85] European Union's request for interim review, para. 30.
[86] European Union's request for interim review, para. 30. (emphasis original)
[87] United States' comments on the European Union's request for interim review, para. 36.

of segmentation was "to artificially create a volume effect that could not be established at the level of the industry as a whole because Spanish imports had decreased at the industry level".[88]

2.82. We have decided to reject the European Union's request. First, we do not consider there to be persuasive reasons to replace "examination of" with "USITC's analysis based on different". Second, we consider the proposed addition to the end of the eighth sentence of paragraph 7.214 is unnecessary as the European Union's argument concerning the significance of the change in the volume of ripe olives is addressed in section 7.4.4 of the Report.

2.27 Paragraph 7.218

2.83. The European Union requests the Panel amend the final sentence of paragraph 7.218.[89] The European Union requests that "a particular" be replaced with "the", and that the sentence conclude with "in which the domestic industry performs poorly".

2.84. The European Union argues that the proposed modifications are "important to reflect the [European Union's] consistent position throughout these proceedings that the United States considered an increase of volume in the retail sector, the only poorly performing part of the industry where Spanish imports increased, because the USITC did not – and could not – consider an increase at the industry level (where Spanish imports decreased)".[90]

2.85. The United States objects to the European Union's request. The United States asserts the language in the Report accurately reflects the European Union's submissions, and that the European Union's proposed changes are not reflected in the relevant paragraph 497 of the European Union's first written submission.[91]

2.86. We have decided to reject the European Union's request. First, the European Union's proposed replacement of "a particular" with "the" within the quotation marks would be to modify the original language of paragraph 497 of the European Union's first written submission. Second, the additional phrase at the end of the sentence "in which the domestic industry performs poorly" is not relevant to the analysis in paragraph 7.218.

2.28 Paragraph 7.219

2.87. The European Union requests the Panel amend the first sentence of paragraph 7.219. The European Union observes that "*US* –" should be added to the reference to "*Hot-Rolled Steel*".[92] The United States did not comment on the European Union's request.

2.88. We have amended the typographical error.

2.29 Paragraph 7.223

2.89. The European Union requests the Panel amend the fourth sentence of paragraph 7.223 by specifying that the analysis of market segments is "the USITC's" and deleting the general reference to a risk of distortion "to an investigating authority's injury investigation".[93] The European Union argues that the proposed amendments will clarify that the European Union "takes issue with the risk of distortion in the specific circumstances of this case".[94]

2.90. The United States objects to the European Union's request, arguing that through this request the European Union seeks to modify its "consistent position that an investigating authority's analysis of market segments necessarily poses a risk of distortion".[95]

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[88] United States' comments on the European Union's request for interim review, para. 37 (quoting European Union's first written submission, para. 469).
[89] European Union's request for interim review, para. 31.
[90] European Union's request for interim review, para. 31.
[91] United States' comments on the European Union's request for interim review, para. 38.
[92] European Union's request for interim review, para. 32.
[93] European Union's request for interim review, para. 33.
[94] European Union's request for interim review, para. 33.
[95] United States' comments on the European Union's request for interim review, para. 39.

2.91. We have decided to accept the European Union's request to increase the precision of the fourth sentence of paragraph 7.223.

2.30 Paragraph 7.227

2.92. The European Union requests the Panel amend the second sentence of paragraph 7.227, as well as to include an additional sentence at the conclusion of the paragraph.[96] In relation to the second sentence of paragraph 7.227, the European Union requests the Panel replace the existing quotation from paragraph 523 of the European Union's first written submission with a quotation from paragraph 525 of the European Union's first written submission that "the investigating authority must consider some sort of increase in [dumped or] subsidized imports". The European Union contends that the Report takes the relevant quotes out of context and misrepresents the position of the European Union.[97]

2.93. The European Union also requests that the Report include reference to two further arguments contained in its submissions at the conclusion of paragraph 7.227.[98] First, the European Union requests the inclusion of its argument at paragraph 151 of its first written submission that "the term 'increase' in Article 15.2 and Article 3.2 would be meaningless if the authority could consider a mere presence or decrease of [dumped or] subsidized imports". Second, the European Union requests reference to its observation at paragraphs 464 and 525 of its first written submission that "US legislation explicitly permits the consideration by the authority of a 'presence' of subject imports which is not the case under Article [*sic*] 15.2 and 3.2". The European Union also proposes deleting footnote 463 (footnote 461 of the Interim Report) and requests certain changes to footnote 464 (footnote 462 of the Interim Report).

2.94. The United States did not comment on the European Union's request regarding the second sentence of paragraph 7.227. The United States opposes the addition of two sentences at the end of paragraph 7.227. First, the United States asserts that the Panel already addressed the proper interpretation of "increase".[99] Second, the United States argues that reference to the domestic legislation of the United States is irrelevant.[100]

2.95. We have decided to reject the European Union's request. In relation to the second sentence of paragraph 7.227, the Report directly quotes the European Union's own submissions. We do not consider these quotations to be taken out of context. Furthermore, the European Union's clarification of its argument as being that "the investigating authority must consider some sort of increase" is already addressed at paragraph 7.231 of the Report. We also do not consider it necessary to include the additional sentences proposed at the end of paragraph 7.227. First, the European Union's argument that the word "increase" would be meaningless if an authority could consider a mere presence or decrease is already addressed in substance by the Panel's interpretation of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement in paragraph 7.229. Second, we consider the discussion of the domestic legislation of the United States not to be relevant to the Panel's consideration of what is required for the consideration of a significant increase in volume under Articles 3.2 and 15.2.

2.31 Paragraph 7.229

2.96. The European Union requests the Panel amend the first and the penultimate sentences of paragraph 7.229 by replacing the existing quotation from the European Union's submission with a quotation from paragraph 525 of the European Union's first written submission that the investigating authority "must consider some sort of *increase* in [dumped or] subsidized imports".[101] The European Union also proposes certain amendments to footnotes 467 and 470 (footnotes 465 and 468 of the Interim Report). The European Union requests the proposed modifications to paragraph 7.229 for the same reason as the proposed changes to paragraph 7.227.[102]

[96] European Union's request for interim review, paras. 34-36.
[97] European Union's request for interim review, paras. 34-35.
[98] European Union's request for interim review, para. 35.
[99] United States' comments on the European Union's request for interim review, para. 41.
[100] United States' comments on the European Union's request for interim review, para. 41.
[101] European Union's request for interim review, para. 37. (emphasis original)
[102] European Union's request for interim review, para. 37.

2.97. The United States objects to the proposed changes. The United States argues that the existing language is taken directly from the European Union's submissions, and there is thus no need to clarify the European Union's position.[103]

2.98. We have decided to reject the European Union's request for the same reasons that we rejected the European Union's request regarding paragraph 7.227.

2.32 Paragraph 7.230

2.99. The European Union requests the Panel amend the second sentence of paragraph 7.230 by deleting the existing characterization of the findings of the panel in *US – DRAMs* and replacing it with the "'panel's finding that' 'the consideration by the authority of 'the absolute volume of imports' does not form part of 'the three considerations envisaged by Article 15.2 of the SCM Agreement'".[104] The European Union argues that the amendments more accurately reflect the European Union's submissions.[105]

2.100. The United States did not comment on the European Union's request.

2.101. We have decided to reject the European Union's request. The existing sentence is based on direct quotations from the European Union's submissions and reflect the arguments by the European Union being addressed in paragraph 7.230. We thus see no persuasive reason to implement the proposed changes.

2.33 Paragraph 7.231

2.102. The European Union requests the Panel amend the third sentence of paragraph 7.231 by replacing "there was in fact a decrease" with "the authority only considers a decrease".[106] The European Union argues the amendment is appropriate to more accurately reflect the European Union's argument.[107] The European Union maintains that its position in relation to the first sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement is "not that there has to be an increase but that the authority must consider (or take into account) an increase which it cannot do if it only considers decreasing imports".[108]

2.103. The United States objects to the European Union's request. The United States argues that the change is inappropriate because that Panel is not merely restating the European Union's argument, but that it "is clear in the statement that this is its own view of the logical extension of the [European Union]'s arguments".[109]

2.104. We have decided to reject the European Union's request. As observed by the United States, the relevant sentence is framed as reflecting this Panel's understanding of the logical implications of the European Union's argument that "the USITC failed to consider a volume increase because it only considered a decrease".[110] We therefore see no persuasive reason to implement the requested change.

2.34 Paragraphs 7.229-7.301

2.105. The United States requests that, in paragraphs 7.299, 7.230, and 7.231, the Panel's interpretation of Articles 3.2 and 15.2 specifies that compliance with the requirement to consider whether there has been a significant increase in volume is unaffected by whether the imports in fact "increased, decreased, ~~or~~ remained stable, or fluctuated".[111] The United States argues

[103] United States' comments on the European Union's request for interim review, para. 43 (referring to the European Union's first written submissions, para. 524).
[104] European Union's request for interim review, para. 38 (relevantly referring to Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.234).
[105] European Union's request for interim review, para. 38.
[106] European Union's request for interim review, para. 39.
[107] European Union's request for interim review, para. 39.
[108] European Union's request for interim review, para. 39.
[109] United States' comments on the European Union's request for interim review, para. 44.
[110] European Union's second written submission, para. 148. (emphasis original)
[111] United States' request for interim review, paras. 14-16.

that the proposed amendment allows for the possibility that volume fluctuates during the period of investigation.[112]

2.106. The European Union did not comment on the United States' request.

2.107. We have decided to reject the United States' request. The issue of whether volume fluctuated was not at issue in these proceedings. Moreover, regardless of whether volume fluctuates over the course of the period of investigation, overall volume must increase, decrease, or remain stable. The existing language thus does not exclude circumstances where volume has fluctuated but has overall increased, decreased, or remained stable over the period of investigation. We therefore see no persuasive reason to implement the requested change.

2.35 Paragraph 7.232

2.108. The United States requests the Panel amend the sixth sentence of paragraph 7.232 by adding that the USITC also "found that the volume of subject ripe olives was significant relative to domestic production".[113] The United States requests the proposed amendment for completeness.[114]

2.109. The European Union did not comment on the United States' request.

2.110. We have decided to accept the United States' request as it accurately reflects the findings of the USITC.[115]

2.36 Paragraph 7.233

2.111. The European Union requests the Panel amend the second sentence of paragraph 7.233 by specifying that the European Union argues that the USITC failed to consider the industry as a whole and "in a like manner as the retail customer group, without satisfactory explanation".[116] The European Union also requests certain amendments to footnote 487 (footnote 485 of the Interim Report). The European Union did not provide an explanation for its requested amendment.

2.112. The United States did not comment on the European Union's request.

2.113. We have decided to reject the European Union's request. The European Union's second written submission asserts that the "USITC's assessment of the industry as a whole is also not done 'in like manner'".[117] This argument is not elsewhere developed, and its relationship with the relevant notion that market segments must be considered in "like manner" drawn from *US – Hot-Rolled Steel* is not explained.[118] There is no requirement that the Report explicitly refer to every different articulation of the European Union's arguments. We therefore see no persuasive reason to implement the requested change.

2.37 Paragraph 7.236

2.114. The United States requests the Panel amend the sixth sentence of paragraph 7.236 by adding that the USITC "found that the volume of subject imports was significant relative to domestic production".[119] The United States requests the proposed amendment for completeness.[120]

2.115. The European Union did not comment on the United States' request.

[112] United States' request for interim review, para. 14.
[113] United States' request for interim review, para. 17.
[114] United States' request for interim review, para. 17.
[115] Injury Determination, (Exhibit EU-5), pp. 18-19.
[116] European Union's request for interim review, para. 40.
[117] European Union's second written submission, para. 137.
[118] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 204, 211, and 214.
[119] United States' request for interim review, para. 18.
[120] United States' request for interim review, para. 18.

2.116. We have decided to accept the United States' request as it accurately reflects the USITC's findings.[121]

2.38 Paragraph 7.237

2.117. The European Union requests the Panel amend the third sentence of paragraph 7.237 by including the statement: the European Union reasons that "the second paragraph relating to the overall industry does not contain a consideration of a volume 'increase' within the meaning of Article 15.2".[122] The European Union also proposes certain amendments to footnote 503 (footnote 501 of the Interim Report). The European Union argues that the proposed amendments more accurately describe the European Union's arguments.[123] In particular, the European Union maintains that it "is clear from the [European Union]'s submissions that the [European Union] qualified the second paragraph about decreasing Spanish imports as mere factual description but not as relevant 'consideration' under Article [*sic*] 3.2 and 15.2 since these provisions require the consideration of an 'increase', not a 'decrease'".[124]

2.118. The United States opposes the proposed change as not accurately reflecting language from the European Union's submissions.[125]

2.119. We have decided to reject the European Union's request. The European Union's proposed amendment is drawn from paragraph 525 of the European Union's first written submission, which is not directly connected with the arguments based on paragraph 496 of the European Union's first written submission being addressed at paragraph 7.237 of the Report. We therefore see no persuasive reason to implement the requested change.

2.39 Paragraph 7.238

2.120. The European Union requests the Panel amend the final sentence of paragraph 7.238 by specifying that the USITC's conclusion refers to volume effects "within the meaning of Article [*sic*] 3.2 and 15.2".[126] The European Union also requests certain changes to footnote 506 (footnote 504 of the Interim Report Report). The European Union argues the amendment is required to clarify the European Union's position that "consideration of a decrease of imports cannot constitute a consideration of volume within the meaning of Article [*sic*] 3.2 and 15.2".[127]

2.121. The United States did not comment on the European Union's request.

2.122. We have decided to reject the European Union's request. The context of paragraph 7.238 already makes clear that the USITC's conclusions regarding volume effects are under Articles 3.2 and 15.2. We therefore see no persuasive reason to accept the requested change.

2.40 Paragraph 7.240

2.123. The United States requests the Panel amend the second sentence of paragraph 7.240.[128] First, the United States requests the Panel replace "analysis" with "discussion". Second, the United States requests the Panel replace "consider" with "address". The United States requests this amendment to "better reflect the fact that the USITC gave equal consideration to the trends in each sector".[129]

2.124. The European Union requests the Panel to reject the changes requested by the United States. The European Union argues the amendment should be rejected because "the sentence in question relates to the position by the [European Union] and by the Panel that no such equal consideration

[121] Injury Determination, (Exhibit EU-5), p. 18.
[122] European Union's request for interim review, para. 41.
[123] European Union's request for interim review, para. 41.
[124] European Union's request for interim review, para. 41.
[125] United States' comments on the European Union's request for interim review, para. 45.
[126] European Union's request for interim review, para. 42.
[127] European Union's request for interim review, para. 42.
[128] United States' request for interim review, para. 19.
[129] United States' request for interim review, para. 19.

was given whereas the proposed change would relate to the [United States]' (contrary) position which is not at issue".[130]

2.125. We have decided to reject the United States' request. We do not consider it suitable to implement alternative wording indicating that the USITC gave equal consideration to trends in each sector in considering volume, as the Report finds that the USITC did not give equal consideration to trends in each sector.[131] We therefore see no persuasive reason to implement the requested change.

2.41 Paragraph 7.242

2.126. The European Union requests the Panel amend the second last sentence of paragraph 7.242 by specifying that the European Union's argument concerns an authority's consideration of "increasing subject imports" and "in a situation where the authority considers that subject imports decrease at industry level".[132] The European Union contends the proposed amendment is required to more accurately reflect its arguments.[133]

2.127. The United States did not comment on the European Union's request.

2.128. We have decided to reject the European Union's request. The second last sentence of paragraph 7.242 directly reflects the language of paragraph 137 of the European Union's 8 September 2020 response to questions by the Panel. We therefore see no persuasive reason to implement the requested change.

2.42 Paragraph 7.244

2.129. The European Union requests the Panel amend the first sentence of paragraph 7.244 by adding, at the end of the Panel's characterization of the European Union's argument, that the USITC failed to consider the distributional and institutional/food processor customer groups to the extent required for an objective examination based on positive evidence, the words "despite those groups accounting for the majority of Spanish imports".[134] The European Union also requests the Panel include reference to an additional argument of the European Union, being that "[t]he European Union also contends that the USITC could not omit these two customer groups from consideration as they accounted for the vast majority (around 80%) of Spanish imports".

2.130. The European Union contends that the proposed amendment would more accurately reflect the European Union's arguments.[135] The European Union argues that this is necessary because the "fact that around 80% of Spanish imports occurred in the distribution and institutional customer groups is of key relevance in this dispute since an injury and causation analysis is about the effect and impact of all subject imports on the domestic industry and injury at industry level cannot be caused on the basis of only 20% of Spanish imports even if these 20% occur in the 'largest sector' for the domestic industry".[136]

2.131. The United States did not object to the European Union's request but requests an alternative amendment to the proposed additional sentence.[137]

2.132. We have decided to accept a modified version of the European Union's request to clarify that sales to the distributional and institutional customer groups represented a majority of Spanish imports. We thus amend the first sentence of paragraph 7.244 as follows:

> The European Union maintains that the USITC failed to consider the distributional and institutional/food processor customer groups to the extent required to constitute an

[130] European Union's comments on the United States' request for interim review, para. 4. (emphasis original)
[131] See paragraph 7.240 of the Report.
[132] European Union's request for interim review, para. 43. (emphasis omitted)
[133] European Union's request for interim review, para. 43.
[134] European Union's request for interim review, para. 44.
[135] European Union's request for interim review, para. 44.
[136] European Union's request for interim review, para. 44. (emphasis original)
[137] United States' comments on the European Union's request for interim review, para. 46.

objective examination based on positive evidence, despite those groups accounting for around 80% of Spanish imports.

2.43 Paragraph 7.249

2.133. The European Union requests the Panel amend the second sentence of paragraph 7.249 by including the statement that the European Union considers the USITC's analysis of price undercutting to be a "second volume analysis" "because the USITC considered a loss of market shares in the retail sector resulting from price undercutting".[138] The European Union also proposes certain modifications to footnote 539 (footnote 537 of the Interim Report). The European Union argues that the modification should be made to clarify why the European Union considers the USITC's consideration of price undercutting should be properly understood as a second volume analysis.[139]

2.134. The United States did not comment on the European Union's request.

2.135. We have decided to reject the European Union's request. The European Union's argument that the USITC's price effects analysis should be considered a second volume analysis are more fully described at paragraph 7.252. Paragraph 7.249 is an introductory paragraph identifying what arguments will be addressed in section 7.4.5 of the Report. We see no persuasive reason to provide further detail as to the European Union's arguments in this introductory paragraph.

2.44 Paragraph 7.252

2.136. The European Union requests the Panel amend paragraph 7.252 by including in parenthesis at the end of the sentence the observation that "domestic prices increased during the relevant period".[140] The European Union also requests additional references be added to footnote 544 (footnote 542 of the Interim Report), specifically to paragraph 528 of the European Union's first written submission and paragraph 154 of the European Union's second written submission. The European Union argues that the proposed amendment to the second sentence of paragraph 7.252 is "important to better understand the [European Union]'s position that there cannot be a (negative) price effect on domestic prices in view of Spanish imports because domestic prices actually increased during the POI".[141]

2.137. The United States did not comment on the European Union's request.

2.138. We have decided to reject the European Union's request to amend the second sentence of paragraph 7.252. We do not consider the proposed amendment relevant to the issues considered in section 7.4.5.1. We have, however, decided to accept the European Union's proposed amendments to footnote 544 (footnote 542 of the Interim Report), as the additional references complement the existing reference to paragraph 541 of the European Union's first written submission.

2.45 Paragraph 7.257

2.139. The United States requests the Panel amend the first sentence of paragraph 7.257, by extending the quotation of Article 3.2 and Article 15.2 to include "as compared with the price of the like product of the importing Member".[142] The United States requests the proposed amendment for completeness.[143]

2.140. The European Union did not comment on the United States' request.

2.141. We have decided to reject the United States' request. The purpose of the sentence that the United States proposed to modify is not to describe the substantive obligation contained in Articles 3.2 and 15.2, but rather to describe the textual connection between Articles 3.1 and 15.1

[138] European Union's request for interim review, para. 45.
[139] European Union's request for interim review, para. 45.
[140] European Union's request for interim review, para. 46.
[141] European Union's request for interim review, para. 46.
[142] United States' request for interim review, para. 20.
[143] United States' request for interim review, para. 20.

and Articles 3.2 and 15.2. The proposed amendment would not clarify the meaning of the sentence, and we thus see no persuasive reason to accept the request.

2.46 Paragraph 7.276

2.142. The European Union requests the Panel amend the first sentence of paragraph 7.276 by replacing "price effects" with effects "in the form of volume (loss of market shares)".[144] The European Union request this amendment "to reflect the [European Union]'s consistent position that the USITC considered volume and not a price effect in the context of price undercutting".[145]

2.143. The United States objects to the European Union's request. The United States asserts there is no need to clarify the European Union's argument, as the present language accurately reflects the language in paragraph 540 of the European Union's first written submission, as referred to by the first sentence of paragraph 7.276.[146]

2.144. We have decided to reject the European Union's request. Section 7.4.5.1 addressed and rejected the European Union's argument that the USITC's price effects analysis should be considered a second volume analysis. Section 7.4.5.2 (of which paragraph 7.276 is part) specifies in its introductory paragraph (paragraph 7.263) that the European Union's substantive arguments will be addressed on the premise that the Panel has rejected the notion that the price effects analysis should be considered as a second volume analysis. We do not see any persuasive reason to again refer to the European Union's argument that the USITC's price effects analysis should be considered a second volume analysis in paragraph 7.276.

2.47 Paragraph 7.287

2.145. The European Union requests the Panel amend the fourth sentence of paragraph 7.287.[147] First, the European Union request the Panel replace "assumption that only findings concerning" with "contention that in the absence of". Second, the European Union request the Panel replace "can be pertinent for an impact analysis" with "there could be no impact". The European Union requests this amendment to more accurately reflect the European Union's position.[148] In particular, the European Union maintains that it "does not take the position that the absence of volume and price effects for the whole industry will always exclude an impact but the [European Union]'s argument is specifically made in the circumstances of the ripe olive investigations".[149]

2.146. The United States did not comment on the European Union's request.

2.147. We have decided to accept the European Union's request to increase the precision of the fourth sentence of paragraph 7.287.

2.48 Paragraph 7.291

2.148. The European Union requests the Panel amend paragraph 7.291.[150] First, the European Union requests the Panel to replace the first sentence with "[w]e first address the European Union's argument that while the USITC examined economic factors for the industry as a whole, it also examined, in addition, certain economic factors only for the retail sector which were determinative for the USITC's impact analysis and therefore the USITC did not conduct an objective examination". Second, the European Union requests inserting "concluding" before "paragraph" and replacing "were only examined with respect to" with "related" in the third sentence. Third, the European Union requests the Panel to add at the end of the final sentence the statement, "nor why it did not examine any relevant factors for the two other 'segments'". The European Union also proposes certain amendments to footnote 651 (footnote 649 of the Interim Report). The

[144] European Union's request for interim review, para. 47.
[145] European Union's request for interim review, para. 47.
[146] United States' comments on the European Union's request for interim review, para. 47.
[147] European Union's request for interim review, para. 48.
[148] European Union's request for interim review, para. 48.
[149] European Union's request for interim review, para. 48.
[150] European Union's request for interim review, para. 49.

European Union argues that the proposed amendments more accurately reflect the European Union's arguments.[151]

2.149. The United States opposes the proposed change. The United States asserts the existing language is an accurate reflection of the European Union's position.[152]

2.150. We have decided to reject the European Union's request. The present wording of paragraph 7.291 accurately reflects the European Union's arguments at paragraphs 566 and 568 of its first written submission. Additionally, the European Union's acknowledgement that the USITC also considered economic factors at the level of the industry as a whole is already noted in paragraph 7.292, which states that "[t]he European Union itself acknowledges that, in the paragraphs preceding the USITC's discussion of the loss of market share in the retail sector, the USITC 'assessed economic factors for the industry as a whole'". We therefore see no persuasive reason to provide further detail as to the European Union's arguments in this introductory paragraph.

2.49 Paragraph 7.292

2.151. The European Union requests the Panel amend paragraph 7.292 by deleting "only" before "considered" and inserting "certain" before "economic factors".[153] The European Union argues that these proposed changes would more accurately "reflect that the [European Union] acknowledged that the [United States] considered economic factors for the industry as a whole – and not 'only for the retail sector'".[154]

2.152. The United States does not object to the addition of the word "certain" but opposes the deletion of "only".[155]

2.153. We have decided to reject the European Union's request for the same reasons as we rejected the European Union's request in relation to paragraph 7.291.

2.50 Paragraph 7.300

2.154. The European Union requests that the Panel introduce the following sentence at the start of paragraph 7.300: "[t]he European Union argues that the USITC could not find causation in a situation where Spanish imports decreased at industry level, domestic prices increased and non-subject imports increased massively".[156] The European Union requests this modification be made to more accurately reflect its position on causation.[157]

2.155. The United States objects to the European Union's request. The United States asserts that the proposed addition is not relevant to the consideration of the USITC's non-attribution analysis in this section of the Report.[158]

2.156. We have decided to reject the European Union's request. The European Union requests that the characterization of its arguments in paragraph 7.300 include reference to the decrease of Spanish imports at the industry level, increase in domestic prices and increase in non-subject imports. We do not consider this necessary as the changes in volume of Spanish imports and non-subject imports are addressed fully in section 7.4.7.2 of the Report.

2.51 Paragraph 7.302

2.157. The United States requests the Panel amend paragraph 7.302.[159] First, the United States requests the Panel insert "U.S." between "apparent consumption" in the first sentence of paragraph 7.302. Second, the United States requests that the Panel rephrase the third sentence of

[151] European Union's request for interim review, para. 49.
[152] United States' comments on the European Union's request for interim review, para. 48.
[153] European Union's request for interim review, para. 50.
[154] European Union's request for interim review, para. 50.
[155] United States' comments on the European Union's request for interim review, para. 49.
[156] European Union's request for interim review, para. 51.
[157] European Union's request for interim review, para. 51.
[158] United States' comments on the European Union's request for interim review, para. 50.
[159] United States' request for interim review, para. 21.

paragraph 7.302 so that it describes the United States' argument as being "that the USITC's findings were fully supported by the fact that the decline in apparent consumption was modest and could not account for the magnitude of the reported declines in the industry's shipments and financial performance indicators". The United States argues that the proposed modifications more accurately reflect the arguments made by the United States.[160]

2.158. The European Union did not comment on the United States' request.

2.159. We have decided to accept the United States' request to more accurately reflect the language of paragraphs 249 and 250 of the United States' first written submission.

2.52 Paragraph 7.312

2.160. The United States requests the Panel amend the third sentence of paragraph 7.312.[161] First, the United States requests that "lack of penetration" be replaced with "absence". Second, the United States requests that "non-subject imports into the retail sector" be characterized as "non-subject imports from Morocco in the retail sector". Third, the United States requests the inclusion of "overall" between "small volume". The United States argues that the proposed modifications more accurately reflect the United States' submissions.[162]

2.161. The European Union did not comment on the United States' request.

2.162. We have decided to accept the United States request so that paragraph 7.312 more accurately reflects the United States' submissions.

2.53 Paragraph 7.314

2.163. The United States requests the Panel amend the third and fourth sentences of paragraph 7.314.[163] First, the United States requests that the third sentence be modified to read "[t]he table, as filled in by the EU, also purports to show that Moroccan imports increased 100.28% (from a significantly lower base)". Second, the United States requests the fourth sentence be modified to read "[t]he United States, in contrast, confirms that the actual data collected from importers' questionnaires and contained in the USTIC's [*sic*] investigation record show that, when properly reported, Moroccan imports increased less than 20% during the period of investigation". The United States requests the proposed amendments for "completeness and to reflect that these are tables created by the [European Union] rather than directly from the USITC's injury determination".[164]

2.164. The European Union did not comment on the United States' request.

2.165. We have decided to partially accept the United States' request regarding the fourth sentence of paragraph 7.314, to more accurately reflect the language of paragraph 20 of the United States' 13 April 2021 comments which this sentence refers to. The amended sentence thus reads: "[t]he United States, in contrast, asserts that Moroccan imports ~~only~~ increased less than ~~around~~ 20% during the period of investigation". We have, however, decided to reject the United States' other requests as unnecessary for the analysis in paragraph 7.314.

2.54 Paragraph 7.316

2.166. The European Union requests the Panel amend paragraph 7.316.[165] First, the European Union requests that "Spanish imports" be described as "decreasing". Second, the European Union requests that certain quotation marks be moved. Third, the European Union requests the Panel to add at the end of the sentence "whereas Spanish imports lost market share at industry level".

[160] United States' request for interim review, para. 21. (emphasis omitted)
[161] United States' request for interim review, para. 22.
[162] United States' request for interim review, para. 22.
[163] United States' request for interim review, para. 23.
[164] United States' request for interim review, para. 23.
[165] European Union's request for interim review, para. 57.

2.167. The European Union requests the amendment to more accurately reflect the European Union's argument. In particular, the European Union maintains that the amendments would illustrate the European Union's argument that "the USITC could not find causation through market share losses at industry level where it explicitly found that Spanish imports did not cause market share losses for the overall industry (Spanish market shares decreased) while the USITC explicitly found that nonsubject imports did cause market share losses at industry level".[166]

2.168. The United States objects to the European Union's request. In particular, the United States observes that it is unnecessary to move the quotation marks as the existing quotation accurately reflects the European Union's submissions.[167]

2.169. We have decided to reject the European Union's request. First, the Panel already established in paragraph 7.316 that the context of the European Union's argument is that Spanish imports were decreasing and lost market share at the industry level. Additionally, as the United States observe, the present placement of quotation marks accurately reflects the European Union's submissions.

2.55 Heading 7.4.7.2, and paragraphs 7.300 and 7.312-7.316

2.170. The European Union requests the Panel amend heading 7.4.7.2, and paragraphs 7.300, 7.312-7.313 and 7.315-7.316, variously through the deletion of the qualification of non-subject imports as "from Morocco", the replacement of "Moroccan imports" with "non-subject imports", and the introduction of the qualification that non-subject imports are "mostly" from Morocco.[168] The European Union also proposes the addition of "and other nonsubject imports increased 13.96%" to the second last sentence of paragraph 7.314.[169] The European Union also requests that "and other non-subject imports from 6,169 to 7,030" be included after "period of investigation" in paragraph 7.315.[170] The European Union requests this change because "the [European Union]'s argument concerns non-subject imports from all sources, not only from Morocco".[171]

2.171. The United States objects to the European Union's request. The United States instead suggests that paragraph 7.300 could be amended to state, "notably from Morocco".[172]

2.172. We have decided to implement an alternative change to that requested by the European Union to clarify that the Panel's findings are not affected by the alleged change in non-subject imports from sources other than Morocco. We have thus included a footnote at the conclusion of paragraph 7.315 as follows:

> We note that the European Union also alleges that non-subject imports from sources other than Morocco also increased during the period of investigation from 6,169 tonnes to 7,030 tonnes. (European Union's first written submission, para. 633 (Table 2: Import sources during the POI (short tonnes dry weight))). We do not consider that this relatively small increase in non-subjects imports from sources other than Morocco could establish that the USITC's non-attribution was not based on an objective examination of positive evidence, either by itself or in combination with the increase in Moroccan imports alleged by the European Union.

2.173. We have further decided to adopt the United States' suggested amendment to paragraph 7.300, as it reflects the language of the European Union's own submissions.

2.56 Paragraph 7.366

2.174. The United States requests modifying paragraph 7.366 to avoid making a categorical statement that "molino" olives cannot be processed into ripe olives, contending that the investigation record does not support this conclusion. The United States also contends that its 25 February 2021

[166] European Union's request for interim review, para. 57. (emphasis omitted)
[167] United States' comments on the European Union's request for interim review, para. 54.
[168] European Union's request for interim review, paras. 51-57.
[169] European Union's request for interim review, para. 55.
[170] European Union's request for interim review, para. 56.
[171] European Union's request for interim review, para. 51.
[172] United States' comments on the European Union's request for interim review, para. 51.

responses do not support the statement that "molino" olives are not processed into ripe olives. In particular, the United States requests striking language in the sixth sentence indicating that "molino" olives are not processed into ripe olives. The United States further requests adding language in the seventh sentence that "molino" olives are "normally" processed into an industrial olive oil not suitable for consumption as they do not meet the standard to sell as a ripe olive. Finally, the United States asks the Panel to delete language from the eighth sentence indicating that "molino" olives could not be used to produce ripe olives.[173]

2.175. The European Union did not comment.

2.176. We have removed language in the sixth sentence of paragraph 7.366 indicating that "molino" olives are not processed into ripe olives. However, we reject the United States' requests to specify that "molino" olives are "normally" processed into industrial olive oil not suitable for consumption. In its 25 February 2021 response to Panel question No. 21, the United States argues that "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".[174] However, this argument contrasts with language in Guadalquivir's verification report, in which the USDOC stated that sales of olives that are destined for the mill (i.e. "molino" olives) "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".[175] We have additionally clarified language in the eighth sentence of paragraph 7.366 to indicate that the USDOC had observed that "molino" olives identified in Aceitunas Guadalquivir's invoices did not meet the standard to sell as a ripe olive and were processed into industrial olive oil not suitable for consumption.

2.57 Paragraph 7.368

2.177. The United States requests the Panel to modify paragraph 7.368 to state that the USDOC did not "adequately" address Aceitunas Guadalquivir's submission that the "comparatively small" volume of reported sales of ripe olives relative to the reported volume of purchases of raw olives demonstrated that the reported volume of raw olives represented a volume greater than the purchases of "raw to ripe", rather than simply stating that the USDOC did not address this point. The United States contends that this would more accurately reflect the administrative record.[176]

2.178. The European Union did not comment.

2.179. We have made the requested change to reflect that the USDOC acknowledged Aceitunas Guadalquivir's argument regarding the discrepancy although the Panel considers that the USDOC did not adequately consider the reasons for the existence of the discrepancy.

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[173] United States' request for interim review, para. 24.
[174] United States' 25 February 2021 response to Panel question No. 21, para. 62.
[175] Aceitunas Guadalquivir verification report, (Exhibit USA-22), p. 7.
[176] United States' request for interim review, para. 25.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. SPECIFICITY CLAIMS

1. The EU raised five claims concerning the USDOC findings according to which the SPS, BPS are *de jure* specific subsidy programs.

2. With the first claim, the EU takes issue with the fact that the USDOC determined that the SPS, BPS Programs are *de jure* specific without looking at the eligibility conditions for access to the subsidy, but by focussing exclusively on the rules for the determination of the amount of subsidy. Indeed, the textual interpretation of Article 2.1(a) of the SCM Agreement, consistent WTO jurisprudence and even the US' Statement of Administrative Action Accompanying the Uruguay Round Agreements Act confirms that 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.

3. The US raised several arguments against the EU's claim.

4. In the first place, the US argued that it looked at the eligibility conditions, but in reality it ended up referring to the criteria for the calculation of the amount of subsidy to be granted to each eligible enterprise. Second, the US created a conceptual confusion between the concept of access to a subsidy program (which has to do with eligibility) and the determination of the amount of support to be granted to the enterprises that have access (i.e. are eligible) to that program. It then explained that a limitation on access can be realized through the criteria for calculating the subsidy amount. Third, the US accused the EU of adopting a notion of *de jure* specificity not based on the treaty text, when it is the US which reads the word 'amount' in the text of Article 2.1(a) of the SCM Agreement when such word is not there. Fourth, it explained that its interpretation of Article 2.1(a) of the SCM Agreement is necessary to avoid a loophole, but no such loophole exists. Fifth, the US argued that the USDOC found that there is an explicit limitation to a subcomponent of the subsidy programs (which constitute a subsidy program in itself) when neither the USDOC findings nor Article 2.1(a) ever mention any subcomponent.

5. The reality is much simpler than that pictured by the US. The BPS Programs (and the SPS) do not grant support specifically to olive growers. These programs are designed to be the central element of the basic income support system for all EU farmers and hence virtually any farmer has access to those programs. The eligibility and subsidy calculation criteria under those programs are the same for all EU farmers. Under those programs, neither eligibility nor subsidy amount is in any way linked to what a farmer decides to produce, if anything.

6. In conclusion, by raising a riddle of alternative arguments to try to justify the USDOC findings (that have little to no connection with what is explained in the USDOC Determinations), the US confirms the EU's claim according to which the USDOC *de jure* specificity findings are not based on an examination of the limitations on access or the eligibility conditions of the programs at issue, and therefore they are in violation of Articles 2.1 and 2.1(a) and 2.4 of the SCM Agreement.

7. With the second claim as regards *de jure* specificity, the EU showed that the USDOC considered that the SPS, BPS are subsidy programs coupled to the production of olives and therefore *de jure* specific. However, that finding is undoubtedly contradicted by positive evidence on the record and by the USDOC itself that acknowledged that support under those programs is not linked to the continued production of olives or any other crop. Therefore, the USDOC findings are erroneous and contradictory since, as a matter of plain logic, either access to a subsidy is conditioned on the production of a certain crop or it is not. Faced with that manifest contradiction, the US denied that it found the subsidy programs at issue to be tied to the production of olives or even to farmers that grew olives during the POI when the BPS applied. Instead, the US came up with the "alternative narrative" arguing that the USDOC found the SPS and BPS Programs to be *de jure* specific to certain undertakings that engaged in olive production during the COMOF Program, whatever they may have produced subsequently either during the SPS or during the POI when the BPS Programs applied.

However, the USDOC found explicitly that the subsidy programs at issue are *de jure* specific to farmers growing olives under the SPS and BPS programs and it repeated that finding in many places in its Determinations.

8. In any event, this alternative narrative cannot be found in the USDOC determinations and therefore is an ex-post rationalisation. This simple observation confirms that the USDOC *de jure* specificity findings are not based on positive evidence and do not contain an adequate explanations of how that evidence supports those findings, because the US seeks to justify those findings with a new line of argument.

9. Moreover, if the alternative narrative were correct it would imply an additional number of manifest contradictions and legal errors. In particular, it would mean that the US is countervailing the products produced by a group of enterprises (those that are growing olives under the POI when the BPS Program applied), while it found that the subsidies were *de jure* specific to another group (those that grew olives under the COMOF Program), i.e. more than ten years before the entry into force of the BPS as well as more than ten years before the POI. Likewise, the USDOC explicitly confirmed that it never investigated if and to what extent the ripe olives that are exported to the US and are subject to the countervailing duties are produced by farmers that were either engaged in olives production since the COMOF Program~~,~~ or ~~by farmers~~ that started that production later on. Instead, the US is countervailing any ripe olive from Spain as if any olive producers under the BPS had been producing olives during the COMOF Program or at least had received a payment entitlement whose values is somehow linked to the amount of support received during the COMOF Program. The US argues that it was not presented with evidence that any olive grower under the BPS and during the POI may hold a payment entitlement which is not linked to the COMOF Program. However, this argument is clearly incorrect because that is a situation that can arise under the normal operation of the legislation that governs the COMOF, SPS, BPS Programs and on which the USDOC based its specificity findings. The USDOC was even provided with a concrete example of an olive grower during the POI holding payment entitlement that did not derive from assistance granted under the COMOF Program.

10. In summary, while the US denies that it found the subsidy at issue to be coupled to the production of olives and therefore specific, the explanations contained in the USDOC determination show that this is indeed what the USDOC erroneously concluded and therefore violated Articles 2.4, 2.1 and 2.1(a) of the SCM Agreement.

11. With the third claim about specificity, the EU explained that consistent WTO jurisprudence clarified that under the SCM Agreement an investigating authority must find specific the subsidy program that it intends to countervail. Therefore its reasoning should start from the conditions limiting access to that program not those of a different one. However, the starting point of the specificity analysis of the USDOC is the COMOF Program and not the measure that has been determined to constitute a countervailable subsidy, i.e. the BPS Programs. In an attempt to justify this "reversed engineering" findings, the USDOC construed artificially a direct correlation between the amount of support granted to a farmer growing olives during the COMOF Program and the amount of support granted to the same farmer under the SPS and BPS Programs. But the legislation governing those programs (that is on the USDOC record) shows that such direct correlation does not exist. Rather the "direct correlation" is the result of a number of errors of appreciation of the relevant EU legislation by the USDOC. Moreover, farmers growing olives during the BPS Programs (and the POI) may have never grown olives before, so the support they receive sometimes cannot be related in any way to the COMOF Program.

12. Faced with these errors and contradictions, once again the US came up with the alternative narrative according to which the SPS and BPS are *de jure* specific to the holders of entitlements whose value derived from the COMOF Program. However, these alternative narrative manifestly confirms that the USDOC found the BPS Programs to be specific (and therefore countervailable) by looking at the eligibility conditions of the COMOF Program, and not at the eligibility conditions of the BPS Programs.

13. It follows therefore that that the US has violated Articles 2.1 and 2.1(a) of the SCM Agreement by determining that the BPS Programs are *de jure* specific not by looking at those programs (and the respective eligibility conditions) but by grounding its analysis first on a subsidy program that had ceased to apply 13 years before the POI and then by building a link between that gone-by program and the amount of assistance granted under the BPS as of 2015.

14. With its fourth claim, the EU showed that by finding that the SPS and BPS Programs are *de jure* specific, the US violated Articles 2.1, 2.1(b) and 2.4 of the SCM Agreement, because it did not explore the question of compliance of the eligibility and calculation criteria of the SPS and BPS Programs with Article 2.1(b) of the SCM Agreement. The EU showed, moreover, that the eligibility and amount calculation criteria of the SPS and BPS Programs comply with the requirements of Article 2.1(b). In particular, as regards the calculation of the amount of support neither the SPS nor the BPS singled out the olive sector. The amount of support to be granted to farmers growing olives under the SPS or BPS Programs was calculated according to the same criteria applicable to farmer growing any other crop.

15. The US argued that the SPS and BPS Programs are based on the COMOF Program which explicitly favored olive growers, and, because the SPS 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. Moreover, while the US disagrees with the EU's interpretation of Article 2.1(b) of the SCM Agreement, it does not deny that it should have examined the subsidy programs at issue under that provision, too. Accordingly, in the Remand Determination the US tried to fix its failure to apply that provision and argued that olive growers continued to receive a favourable treatment relative to other sub-sectors of the agricultural sector.

16. However, the EU demonstrated that access or eligibility under the SPS and BPS is not based on assistance granted under the COMOF Program. The EU also demonstrated that the US postulates that farmers were legally required and kept on growing olives from the COMOF Program all the way through the BPS Program, when there is no such legal requirement. Finally, the USDOC explicitly confirmed that it never investigated if olive growers were favored compared to other sub-sectors of the agricultural sector.

17. With the fifth claim concerning the USDOC *de jure* specificity findings, the EU showed that the explanations in the USDOC Determinations do not reasonably support its findings of *de jure* specificity. Those explanations are contradictory and based on many errors of appreciation of the relevant legislation. Some of those errors have been exposed in the discussion of the previous EU's claims. Instead of demonstrating that it committed no error of appreciation, the US tried to explain that those errors are not material. To name just a few of those contradictions and errors, it should be recalled that the very foundation of the USDOC's reasoning about *de jure* specific (i.e. that the COMOF Program would be a *de jure* specific subsidy program) is a finding that the USDOC explicitly chose not to render. That reasoning therefore cannot stand. Second, the USDOC contradicts itself arguing that the specificity element inherent in the COMOF Program transited into the SPS Program and then into the BPS Program but then finding at the same time that both the SPS and BPS Programs are completely decoupled from production, and accessible to farmers in general. Third, the USDOC explained that the convergence process could remove *de jure* specificity but categorically denied the same idea a few lines later. Fourth, the US found that the SPS was implemented on a regional basis and it argued that there could have been regions producing just olives. However, the simple reality is that the SPS was not implemented on a regional basis, the USDOC never enquired about the different crops cultivated in each Spanish agricultural region or if there had ever been a region growing only olives, and in any event Spanish farmers both under the SPS and under the BPS Programs are legally free to grow whatever crops pleases them in whatever region.

18. The EU therefore maintains that the USDOC's explanations are not reasonably capable of supporting its findings about *de jure* specificity of the subsidy programs at issue. Those findings moreover are not based on positive evidence. Therefore, the US violated its obligations under Articles 2.1, 2.1(a) and (b) and 2.4 of the SCM Agreement also for these reasons.

19. It follows, moreover, that by determining that the BPS and Greening are countervailable subsidies and subjecting them to Part V of the SCM Agreement, without properly demonstrating that they are specific, the US violated also Article 1.2 thereof.

II. PASS-THROUGH BENEFIT CLAIMS

1. The EU's as applied claim

20. The EU demonstrated that the USDOC failed to carry out an analysis to determine the existence and extent of pass-through benefit as required under WTO law in the Spanish ripe olive investigation. The USDOC simply attributed the full subsidy amounts granted to raw olive producers to the processors of ripe olives which are the subject of the US investigation. The USDOC did so by relying on the WTO-inconsistent presumption in Section 771B according to which the *full* amount of subsidies granted to the producers of a raw agricultural product "shall be deemed to be provided" to the processed product if (i) the demand of the raw product is substantially dependent on the demand for the latter stage product and (ii) the processing only adds limited value. Rather than determining - in view of the specific circumstances of this case - whether and to what extent Spanish ripe olive processors were "better off" as a result of the subsidies granted to olive producers, the USDOC mechanistically applied the two formalistic conditions in Section 771B – which have nothing to do with benefit - and on that basis *presumed* that the entire amount of benefit passed through to the ripe olive processors. It is noteworthy that the USDOC even failed to properly apply the two conditions in Section 771B in the present case since the demand of raw olives is substantially dependent – by more than 90% - on olive oil, not on ripe olives as alleged by the USDOC, and the industrial processing of raw olives adds much more than just "limited value".

21. The EU demonstrated that WTO law, notably Article VI:3 of the GATT of 1994 and Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement, requires a pass-through analysis – a *determinatio*n by the authority of the existence and extent of benefit - in instances where, as in the present case, the authority intends to attribute benefit granted to an input producer and direct subsidy recipient to an indirect recipient and where the input product is purchased by the processor in arm's length transactions. Section 771B neither constitutes nor replaces a pass-through test and hence by applying Section 771B the US violated the above-referenced provisions.

22. The USDOC in its determinations explicitly rejected the need to carry out a pass-through analysis under WTO law "in light of the applicability of Section 771B" in response to arguments raised in this respect by interested parties. The USDOC stated that "a pass-through analysis that would be conducted in the context of an upstream subsidy investigation is <u>not relevant</u> to whether respondents received a benefit". [emphasis added]. The opposite is true. A pass-through benefit analysis in the Spanish ripe olive investigation would have been highly relevant and, more importantly, was also legally required under WTO law. WTO law does not contain an exception for agricultural products with respect to which the requirement to carry out a pass-through analysis would not apply in case of input subsidies. The USDOC dismissed the legal obligation under WTO law to carry out a pass-through analysis by explaining in the determinations that only US law has direct legal effect for its investigation and "not the WTO Agreements or WTO reports". This demonstrates that the USDOC knowingly and intentionally disregarded WTO obligations when applying Section 771B.

23. The USDOC at no point assessed whether - and to what extent - Spanish ripe olive processors were "better off" as a result of the subsidies granted to raw olive producers as would be required under any assessment of benefit. The USDOC did not at all look at specific factual circumstances such as e.g. the price or competitive market conditions for raw olives. In particular, the USITC did not assess whether the price of raw olives purchased by the processors was lower than the market price for raw olives would have been absent the input subsidies as would be expected for a benefit analysis in these factual circumstances. Instead the USDOC simply looked at a demand relationship and at an "added value" relationship between two products. This obviously has nothing to do with benefit within the meaning of Article 1 SCMA. By limiting the USDOC's assessment to formalistic conditions concerning two specific aspects of a relationship between two products, Section 771B was unable to take into account the specific facts of the case and in particular those elements that would matter for a benefit analysis such as price and competitive market conditions. Lastly, the USDOC also failed to assess the precise amount of benefit in the Spanish ripe olive investigation as it simply presumed, based on Section 771B, that the <u>entire</u> amount of benefit passed through to the ripe olive producers. The USDOC failed to precisely determine the benefit amount since Section 771B simply does not allow for such an assessment. Section 771B will, in all circumstances, presume that the *entir*e amount of benefit passes through to the processor. No calibration of the benefit amount is possible under Section 771B and hence the USDOC did not – and could not - "ascertain as accurately as possible the amount of subsidization" as required under WTO law.

24. The US explicitly acknowledged in these proceedings the existence of the obligation to determine pass-through benefit. The US also expressly agreed that no special rules apply in this regard to agricultural input products even though Section 771B is exactly that, a special rule for agricultural input products. The US has not presented any arguments with respect to the EU's as applied pass-through claim other than contending that Section 771B would contain a special pass-through analysis for agricultural input products that would be justified in view of the "flexibilities" of the SCM Agreement. However, Section 771B does not contain a pass-through test as the EU demonstrated (see below) and as already a GATT panel established 30 years ago in *US – Canadian Pork*. The USDOC's application of Section 771B in the Spanish ripe olive investigation was therefore WTO-inconsistent.

2. The EU's as such claim

25. The EU demonstrated that Section 771B violates WTO law as such, notably Article VI:3 of the GATT of 1994 and Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement.

26. The EU showed that Section 771B applies in situations of arm's length transactions between the input producer and the processor which is where WTO law requires an analysis of pass-through benefit. The EU also showed that Section 771B is a mandatory provision that obliges the USDOC to apply the presumption of full pass-through benefit whenever the two conditions in Section 771B are fulfilled. The USDOC has no discretion. These aspects of the EU's claim are not disputed by the US.

27. The only disputed question in the context of the EU's as such claim concerns the issue whether the two very narrowly tailored conditions in Section 771B somehow contain an assessment of pass-through benefit specifically for agricultural input subsidies. The EU has shown that the reason for the US legislator to adopt Section 771B was precisely to avoid the USDOC having to carry out such a pass-through analysis for agricultural input subsidies. Therefore, the whole *raison d'être* of Section 771B is for the USDOC not to carry out a pass-through assessment – which US law requires for all other products - and to replace such an assessment with two narrow and formalistic conditions that are only based on the demand and added-value relationship between two products. This has nothing to do with an assessment of pass-through benefit.

28. In view of the clear legislative intention underlying Section 771B (avoidance of a pass-through analysis) and the clear WTO-inconsistent content of Section 771B (no assessment whether recipient is "better off", no pass-through benefit analysis, mere assessment of relationship between two products and presumption based thereupon), the US resorted to a deliberate misrepresentation of the EU's as such claim as its primary defence. The US has been arguing – without any factual basis in the EU's panel request, in the EU's first written submission or in subsequent EU submissions - that the EU would claim that the relevant provisions in the SCM Agreement require a specificprice comparison method for input subsidies. The EU nowhere made such a claim. The EU's claim, clearly reflected in the panel request and in the EU's submissions, is that the relevant provisions require a "determination" of the existence and extent of pass-through benefit and that the two conditions in Section 771B are unsuitable for this purpose for a number of reasons.

29. **First**, Section 771B is based upon a WTO-inconsistent presumption. The US expressly agrees that benefit must be determined and *cannot be presumed* by the authority. However, whenever the two formalistic conditions in Section 771B are fulfilled the USDOC "shall deem" – i.e. shall presume – that the entire amount of benefit was passed through from the input producer to the processor without any consideration of relevant factual circumstances. This constitutes a WTO-inconsistent legislative presumption of pass-through benefit. Whenever the two conditions of Section 771B are fulfilled, the US therefore necessarily violates WTO law by applying this presumption. The US has not presented any valid argument against the EU's claim in this respect.

30. **Second**, Section 771B does not permit the investigating authority to determine the precise amount (or extent) of benefit. Section 771B contains an "all-or-nothing rule". Either the two conditions are fulfilled, in which case the full amount of benefit must be presumed by the USDOC to have passed through. Or, the two conditions are not fulfilled in which case Section 771B does not apply and no benefit passes through under this provision. Section 771B therefore does not allow to determine the "extent" of benefit as required under the relevant provisions as clarified by the Appellate Body. Whenever the two conditions of Section 771B are fulfilled, the US necessarily violates WTO law by failing to determine the precise extent of pass-through benefit as the USDOC always presumes full pass-through. The US has not presented any valid argument against the EU's claim in this respect.

31. **Third**, Section 771B does not contain a pass-through analysis that would allow to determine the *existence* of benefit since the two conditions are unsuitable for that purpose. In fact, Section 771B has nothing to do with benefit and is inapt for a pass-through analysis for many reasons.

32. First, the Appellate Body clarified that the determination of "benefit" under Article 1.1(b) SCMA seeks to identify whether the financial contribution has made "the recipient 'better off' than it would otherwise have been, absent that contribution". The Appellate Body also clarified that the assessment of benefit is "one that is financial in nature" and one that "implies some kind of comparison" with the market. The two conditions in Section 771B concern (i) the dependence of demand between the raw and the processed product and (ii) the question whether processing adds limited value. Clearly, these two conditions have nothing to do with an assessment as to whether the recipient of a financial contribution is "better off". They have nothing to do with "an assessment that is financial in nature". They have nothing to do with a "comparison with the market". In short, the two conditions in Section 771B are entirely inapt to determine benefit within the meaning of Article 1 SCMA.

33. Second, the two conditions in Section 771B are only two conditions out of a whole range of market conditions (e.g. competitive market situation) that would be relevant, if at all, to assess a likelihood of pass-through benefit. Therefore, in themselves these two conditions are entirely unsuited to even assess any remote likelihood of benefit.

34. Third, the two conditions in Section 771B may, at most, contribute to an assessment of a likelihood of pass-through benefit. A likelihood does not "establish", "find" or "determine" the existence of pass-through benefit as required under the relevant provisions.

35. Fourth, the GATT Panel in *US – Canadian Pork* confirmed already 30 years ago that Section 771B does not assess all the facts that are relevant for a pass-through analysis, a standard that even the US agrees with.

36. Fifth, Section 771B entirely disregards the price of the agricultural input product which is the obvious key indicator for benefit where an input product is sold for a price to an alleged indirect beneficiary and where that price is the only means to reflect, or not, the subsidy in question.

37. Sixth, Section 771B does not "calculate" benefit as Article 14 SCMA indicates would be required by way of comparison with the market. Section 771B only looks at the factual relationship between two products and then presumes benefit. There is no comparison with any market benchmark whatsoever.

38. Seventh, Section 771B does not allow for a comparison of the price of the subsidized input product with a market price which would be the proper way of determining pass-through benefit in the situations covered by Section 771B. The question of "price comparisons" constitutes one of the (many) EU's arguments as to why Section 771B does not contain a pass-through analysis. It is not even a determinative argument. Contrary to repeated US allegations, the EU never brought a *claim* that the relevant provisions would stipulate a price comparison method. The fact that the EU's argument on price comparisons is correct is even reflected in US legislation which provides – for situations other than those covered by Section 771B - for a "price comparison" method to determine the existence and extent of pass-through benefit for input subsidies. Hence a price comparison is clearly the "normal" way of determining benefit even under US law for input subsidies. The fact that a price comparison method is apt for determining pass-through benefit is derived from the uncontested obligation under the Agreements to determine the precise amount pass-through benefit, in combination with the uncontested meaning of the term "benefit" in Article 1 SCMA (requiring a comparison with the market) and in combination with the specific factual circumstances of input subsidies. In any event, it is sufficient for the EU to have established that Section 771B is an unsuitable method; it is not required for the EU to also establish which precise pass-through method would be the correct one for its claim to succeed.

39. Lastly, the only argument presented by the US was that Section 771B constitutes a special pass-through analysis in view of the specific circumstances that would allegedly surround agricultural input commodities. At first, the US argued that Section 771B was needed in order to avoid that foreign farmers would circumvent duties imposed on raw agricultural products by exporting those products in processed form (e.g. raspberries would be exported as frozen raspberries). The EU has shown that farmers cannot turn into industrial processors and hence there is no such risk of circumvention. In view of the weakness of its circumvention argument, the US subsequently switched to an alternative reasoning. The US contended that all agricultural input markets in the world are "systemically perfectly competitive". Apart from this sweeping assumption being without

any factual basis, the EU has also shown that perfectly competitive markets do not exist in the real world. Perfectly competitive markets are a hypothetical economic theorem which cannot justify Section 771B. The US's arguments in defence of Section 771B are therefore fundamentally flawed and, as a result, every single application of Section 771B will be flawed as well. Fact is, there is nothing special about agricultural input commodities. They must be treated like any other input product. And while there may be special rules under US law for agricultural input products, there certainly are no special rules for agricultural input commodities under WTO law. Which is precisely one of the reasons why Section 771B violates WTO law as such.

40. The EU therefore established that Section 771B *necessarily* violates WTO law every time it is applied on three separate grounds, i.e. even under the strictest possible legal standard. The Appellate Body clarified that such a high standard is not even required. Section 771B therefore *a fortiori* violates WTO law as such under any less stringent legal standard.

III. INJURY CLAIMS

41. The USITC's injury determinations are riddled with numerous WTO-inconsistencies from start to finish. The fundamental flaw of the USITC's causation analysis is that the USITC attempted to "find" causation in a situation where the volume of Spanish ripe olives decreased at industry level and where domestic prices only displayed positive trends (domestic prices increased). It is obvious that in the absence of both volume and price effects, there cannot be causation of injury for the domestic industry by subject imports. This is, quite simply, impossible legally and economically. In order to camouflage this fundamental flaw, the USITC resorted to all sorts of WTO-inconsistent tricks and shortcuts throughout its injury "analysis". For example, the USITC artificially "segmented" the market along distribution channels in order to subsequently carry out its injury and causation analysis only for the retail channel which accounted for less than 20% of Spanish imports.

1. Volume effects: Article 15.1 and 15.2 SCMA/Article 3.1 and 3.2 ADA

42. ***Arbitrary "segmentation" of the market.*** The EU demonstrated that the USITC had no factual or evidentiary basis for its "segmentation" according to distribution channels. The "segmentation" was contrary to the USITC's own findings, was nowhere explained and ran contrary to the (non-segmented) definition of the domestic industry in Article 16.1 SCMA / Article 4.1 ADA. Not only could the market not be "segmented" according to distribution channels by the USITC for the purpose of Article 15 SCMA / Article 3 ADA, the USITC under these circumstances could only consider a volume increase for the industry *as a whole* under Article 15.2 SCMA / Article 3.2 ADA which it failed to do because Spanish imports decreased at industry level.

43. The EU does not – and never did – question the factual existence of the three distribution channels. Different distribution channels factually exist for virtually every single product in the world. However, the factual existence of different distribution channels does not mean that an industry can automatically be segmented by the authority along those lines under Article 15 SCMA / Article 3 ADA. This will depend on the facts of the case, in particular whether and to what extent conditions of competition differ across the alleged segments. If conditions of competition are uniform and homogeneous across the industry like in the ripe olive investigation, the authority can *only* assess injury and causation for the industry as a whole since there simply are no segments. All the numerous examples of previous industry segmentations that were presented by the EU and the US in these proceedings concerned segmentations where indeed conditions of competition between imported and domestic products differed by segment (e.g. because there was no competition with imported products in the captive segment of the market or because certain product categories of imported and domestic products did not compete with each other) and where the authority explained the segmentation in the determinations and also specifically explained the relevance of the segmentation for the causation analysis. This is not the case for Spanish ripe olives.

44. The USITC defined one single like product - all ripe olives. The USITC defined one single domestic industry of ripe olives producers. The determinations show that all ripe olives are"highly substitutable" and hence every single imported ripe olive competes with every single domestic ripe olive. A ripe olive is a ripe olive is a ripe olive. Hence there was nothing to "segment" for the USITC – conditions of competition were uniform across the entire industry. The EU's position is confirmed by case law according to which "the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1" – the USITC defined the industry in a non-segmented manner. The EU's position is also supported by Appellate Body case law emphasizing the importance of substitutability for a causation analysis.

45. Lastly, the USITC failed to provide any explanation – let alone a reasoned and adequate explanation – for its alleged "segmentation" along distribution channels. This is all the more striking in view of the fact that this so-called "segmentation" constitutes the centerpiece of the USITC's entire causation analysis. And yet the "segmentation" by distribution channels is not worth a single sentence of explanation in the determinations.

46. The US argued that there would be certain elements which would show limitations of substitutability (e.g., alleged different processing and packaging requirements per segment, the existence of "unique" purchasers per segment etc.). The EU rebutted these arguments. These US's arguments are in any event rebutted also by the USITC's own determinations as well as by the overwhelming evidence on file (e.g. statements by customers and petitioners) which show that all ripe olives are interchangeably purchased by all distribution channels (demand-side substitutability) and all producers supply all types of ripe olives (supply-side substitutability). The USITC's artificial and arbitrary segmentation without positive evidence was therefore WTO-*inconsistent per se*.

47. ***Failure to consider an increase of volume for the industry as a whole.*** The USITC only considered a volume increase of subject imports for the retail channel. As the EU just explained, the USITC could only consider such volume increase for the industry *as a whole* in view of the specific factual circumstances of this case, notably in light of the uniform conditions of competition across the entire industry (i.e. no segments) and the non-segmented definition of the domestic industry. The consideration of only the retail channel by the USITC therefore in itself violated Article 15.2 SCMA / Article 3.2 ADA.

48. However, even hypothetically assuming that the USITC was entitled in principle to carry out a segmented volume analysis (*quod non*), the USITC's segmented analysis is WTO-inconsistent. The US expressly agreed with Appellate Body case law in *US – Hot Rolled Steel* that a segmented analysis under Article 15.2 SCMA / Article 3.2 ADA requires that all industry segments must be considered *in like manner* unless the authority provides a satisfactory explanation. That case law makes eminent sense since otherwise an authority risks overlooking positive trends by focusing only on the poorly performing industry parts – which is exactly what happened in the present case.

49. The US explicitly acknowledged in its first written submission that it carried out a segmented analysis even if it later attempted to backtrack from this express acknowledgment. It is in any event plainly obvious from the determinations that the USITC's volume analysis is "segmented" as it only focuses on the retail "segment" and completely disregards the other two channels which are not even mentioned. The industry as a whole is only mentioned in passing in one sentence stating that subject imports *decreased*. This is not a segmential analysis of all industry parts in like manner complying with WTO law. The USITC provided no explanation, let alone a satisfactory explanation, as to why it did not need to consider the other industry parts. The US attempts to portray as an explanation certain references by the USITC in the determinations to the "large size" of the retail channel for the domestic industry. However, these references are merely factual statements explaining absolutely nothing. The panel in *Mexico – Corn Syrup* also found that the size of a segment for the domestic industry is not relevant in this regard. The US *ex post* attempted to provide an explanation that "actual competition" only took place in the retail channel. However, not only is that explanation factually incorrect (competition took place in all three channels), that alleged "explanation" invoked by the US was explicitly rejected by the USITC in its determinations!

50. The US's attempts to equate a mere listing of data for the other two distribution channels and the industry in some annexed tables as "consideration" despite the complete absence of any discussion or analysis of such data equally fail as already established by previous panel reports.

51. In addition, the USITC's consideration of volume only in the retail channel (accounting for less than 20% of subject imports) did not form a "meaningful basis" for causation regarding the domestic industry and the USITC disregarded clear evidence that there was no increase of volume. Both aspects violate Article 15.2 SCMA / 3.2 ADA as clarified by the Appellate Body.

52. ***Improper extension of volume effects to the industry as a whole.*** The USITC, without any positive evidence, reasoning or explanation, simply extended its volume analysis for the retail channel to the industry as a whole which violates Article 15.2 SCMA / Article 3.2 ADA. The US has not presented any valid arguments in this respect.

53. ***Failure to consider a volume increase for the industry.*** The USITC failed to consider an increase of subject imports for the industry. The text of Article 15.2 SCMA / Article 3.2 ADA and case law make crystal clear that only three types of volume increase exist: a volume increase in absolute terms or relative to domestic production or consumption. The USITC only considered a decrease of volume of Spanish imports as the US expressly acknowledges in its submissions. The US's only argument is a reference to a footnote in panel report *US – Countervailing Duty Investigation on DRAMS* which actually fully supports the EU's position. Even more importantly, the same panel report – relied on by the US – explicitly confirms that the consideration of a mere presence or decrease of subject imports does not amount to a consideration of volume under Article 15.2 SCMA / 3.2 ADA. The US's interpretation would also render a consideration of a volume "increase" devoid of any meaning.

2. "Price" effects: Article 15.1 and 15.2 SCMA / Article 3.1 and 3.2 ADA

54. ***Arbitrary "segmentation" of the industry.*** See above under 1 where the EU explained why the USITC's "segmentation" was *per se* WTO-inconsistent. In view of the uniform conditions of competition and the non-segmented definition of the domestic industry, the USITC could *only* consider effects under Article 15.2 SCMA / 3.2 ADA for the industry as a whole and not, as it did once again in the context of "price" effects, focus on the retail channel while ignoring the other industry parts.

55. ***Failure to consider effects for the industry as a whole.*** Even hypothetically assuming that the USITC could carry out a segmented analysis in the specific circumstances of this case (*quod non*), its segmential analysis focusing only on the retail channel is highly WTO-inconsistent.

56. The EU demonstrated that the USITC – somewhat bizarrely – carried out a (second) volume analysis under the heading "price effects" since the USITC considered a loss of volume in the retail channel allegedly resulting from price undercutting. The US keeps referring to a consideration by the USITC of "price effects" but the EU showed that the USITC nowhere carried out a proper price undercutting analysis. To start with, the USITC did not even have positive evidence for instances of price undercutting specifically in the retail channel which was required as the USITC was purporting to consider volume effects in the retail channel resulting from price undercutting. Also, the USITC's few instances of price undercutting do not amount to a consideration of price undercutting as the Appellate Body clarified. Even more importantly, the USITC nowhere considered price effects within the meaning of Article 15.2 SCMA / 3.2 ADA, i.e. negative effects on *domestic prices*. The USITC only considered positive price trends regarding domestic prices because domestic prices increased and there was no price depression and no price suppression. Just like a consideration of a decrease of volume constitutes no consideration of a volume increase, a consideration of positive price trends constitutes no consideration of price effects under Article 15.2 SCMA / 3.2 ADA since such positive price trends can never form the basis for causation through price effects. Perhaps realizing the absence of price effects, the USITC simply stopped its "price effect" analysis half-way, did not "bother" any longer about negative effects on domestic prices and instead switched to a (second) volume analysis (!). It is noteworthy that the US failed to carry out a price undercutting analysis even by its own standard as set out in its submissions (requiring a dynamic assessment of price developments of import and domestic prices - which is entirely lacking in this case).

57. The USITC's *second* volume analysis is based on an alleged loss of market share in the retail channel. The EU demonstrated that the USITC was obliged to *only* consider volume for the industry as a whole in view of the specific circumstances of this case (non-segmented industry). The consideration of volume only in the retail channel is therefore in itself WTO-inconsistent. In any event, even assuming that a segmential analysis is in principle permitted (*quod non*) the USITC's exclusive focus on the retail channel does not amount to a segmential analysis complying with *US – Hot Rolled Steel* which the US itself accepts as legal standard (even if that acceptance is not decisive). The US also explicitly acknowledged that its second volume analysis concerning market share was "limited to the retail channel of distribution". Hence the USITC did not consider all industry parts in like manner, in fact, the USITC completely ignored the other industry parts.

58. In addition, the USITC's consideration of volume in the retail channel did not form a "meaningful basis" for causation regarding the domestic industry as a whole and the USITC disregarded clear evidence that there was no increase of volume at industry level, against Appellate Body case law.

59. ***Improper extension of "price" effects to the industry as a whole.*** The USITC, without any positive evidence, reasoning or explanation, simply extended its analysis for the retail channel to the industry as a whole which violates Article 15.2 SCMA / Article 3.2 ADA. The US has not presented any valid arguments in this respect.

3. Impact analysis: Article 15.1 and 15.4 SCMA / Article 3.1 and 3.4 ADA

60. ***US's preliminary ruling request.*** The EU demonstrated that its claims under Article 15.4 SCMA / 3.4 ADA fall within the Panel's terms of reference, *inter alia* because of the very close interlinkage of the various provisions under Article 15 SCMA / 3 ADA and the explicit reference to the "consequent impact" (under Article 15.4 SCMA / 3.4 ADA) in the EU's panel request. The US's preliminary ruling request therefore is to be rejected.

61. ***Consequential violations.*** The EU demonstrated that the violations of Article 15.2 SCMA / 3.2 ADA resulted in a consequential violation of Article 15.4 SCMA / 3.4 ADA.

62. ***Failure to examine impact for the industry as a whole.*** The EU demonstrated that while the USITC may have assessed economic indicators for the industry as a whole, the USITC also examined certain economic indicators only for the retail channel (notably market shares, inventories and profits). Both the determinations and the US's submissions demonstrate that it was in fact these indicators for the retail channel that were decisive for the outcome of the impact analysis. The US itself expressly acknowledged that the USITC "focused aspects of its [impact] analysis on the retail segment". However, as explained previously, a segmental analysis must be carried out for all industry parts in like manner whereas the USITC entirely disregarded, without explanation, many indicators for the retail channel and all indicators for the two other channels. The USITC only cherry-picked those indicators from the retail channel that would support its analysis. This is clearly WTO-inconsistent.

63. The USITC also failed to examine the explanatory force of subject imports for the state of the domestic industry which refers to the industry as a whole. However, the USITC only examined the relationship between subject imports in the retail channel (accounting for less than 20% of subject imports) and the state of the industry as regards the retail channel. Once again, the USITC's focus of analysis is only on the retail channel. The USITC then simply extended its finding of impact for the retail channel to the industry as a whole without any positive evidence, reasoning or explanation. Such segmental analysis only for one channel does not provide explanatory force for the state of the industry as a whole and is not carried out in like manner.

64. ***Lack of volume effect at industry level.*** The determinations show – and the US acknowledged – that the volume of subject imports did not increase at industry level. On the contrary, subject imports decreased. A decrease of subject imports logically cannot lead to a "consequent" impact under Article 15.4 SCMA / 3.4 ADA. In a similar vein, an authority cannot disregard evidence that subject imports have no impact on the domestic industry. Decreasing subject imports are the clearest evidence that subject imports have no impact for a causation analysis based on volume effects.

65. ***Improper extension of impact analysis to the industry as a whole.*** The USITC, without any positive evidence, reasoning or explanation, simply extended its impact analysis for the retail channel to the industry as a whole which violates Article 15.4 SCMA / Article 3.4 ADA.

4. Causation: Article 15.1 and 15.5 SCMA / Article 3.1 and 3.5 ADA

66. ***Consequential violations.*** The EU demonstrated that the US's violations of Articles 15.2 SCMA / 3.2 ADA and 15.4 SCMA / 3.4 ADA resulted in consequential violations of Articles 15.5 SCMA / 3.5 ADA.

67. The EU also explained that *decreasing* Spanish imports that have no negative effect on domestic prices cannot cause injury.

68. ***Failure to assess causation for the industry as a whole.*** The determinations show - and the US expressly acknowledged - that it focused its causation analysis on the retail channel and

hence the USITC did not carry out a WTO-consistent segmential causation assessment for all industry parts in like manner.

69. ***Failure to separate and distinguish other factors.*** The EU demonstrated that it was the decline in US consumption rather than decreasing Spanish imports that caused injury. The EU also demonstrated that it was massively increasing low priced non-subject imports rather than decreasing Spanish imports that caused injury. The determinations also expressly stated that non-subject imports "captured market share from the domestic industry" while the determinations state – and the US expressly acknowledges – that Spanish imports did not capture market share. Since the US case is built on loss of market share, its non-attribution analysis is evidently flawed. And once again the USITC's non-attribution assessment is limited to the retail channel rather than the industry as a whole.

IV. CLAIMS CONCERNING GUADALQUIVIR'S SUBSIDY RATE

1. Factual Background

70. The USDOC addressed a questionnaire to the three mandatory respondents on 4 August 2017 on their sources of raw olives. Properly understood, that questionnaire requested the three companies to submit the volume of all raw olives purchased by them, and not only (as the US is arguing in the present dispute) only the volume of such raw olives which are processed into subject merchandise (ripe olives).

71. This interpretation of the 4 August 2017 questionnaire is confirmed by further documents – and in particular a USDOC memorandum of 27 September 2017. While the US argue that the 27 September 2017 memorandum was a distinct, second request for information, this interpretation cannot be reconciled with the evidentiary record of the case.

72. In its final determination of 11 June 2018, USDOC employed a calculation methodology which differed from the one set forth in the preliminary determination. This new methodology made reference to the volume of such raw olives which are processed into ripe olives. In applying this methodology, USDOC used Guadalquivir's replies to the 4 August 2017 questionnaire, stating that USDOC had requested the volume of such raw olives which are processed into ripe olives. As Guadalquivir's reply was not so limited – based on its understanding of that questionnaire – the subsidy rate calculated for Guadalquivir was higher than it would have been had only the volume of such raw olives which are processed into ripe olives been used in the calculation.

2. The EU's Claims

(1) Violation of Article VI:3 of the GATT 1994, and of Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement

73. The products covered by the investigation and the determination of the USDOC are (only) ripe olives. The methodology adopted by the investigating authority in its final determination reflects this limitation to the specific subject merchandise.

74. In the case of Guadalquivir, the investigating authority used Guadalquivir's overall purchase of all raw olives for the calculation of the final subsidy amount for that respondent which was then allocated to the turnover of ripe olives only. As those purchases are higher than only Guadalquivir's purchases of raw olives processed into ripe olives, this approach of the investigating authority leads to a determination of the subsidies purportedly received by Guadalquivir which is too high and therefore to a countervailing duty which is too high as well. Both the amount of subsidy determined in this manner and therefore the countervailing duty is therefore excessive and inappropriate and inconsistent with the aforementioned disciplines of the GATT 1994 and the SCM Agreement.

75. The US argues that the 4 August 2017 questionnaire should properly be understood as having requested the volume of only such raw olives which are processed into ripe olives. This reading cannot be sustained on the basis of the evidentiary record before USDOC and now before the Panel.

(2) Violation of Article 12.1 of the SCM Agreement

76. USDOC's procedure was also inconsistent with Article 12.1 of the SCM Agreement, as Guadalquivir was never given appropriate notice of the information required (i.e. the volume of only such raw olives which are processed into ripe olives).

(3) Violation of Article 12.8 of the SCM Agreement

77. USDOC clearly regarded the volume of such raw olives which are processed into ripe olives as "essential information" within the meaning of Article 12.8 of the SCM Agreement. It is however apparent from the record that USDOC did not make available to Guadalquivir 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. The US' argument that the agenda for the verification visit represent the information on the "essential information" within the meaning of Article 12.8 of the SCM Agreement is unpersuasive.

(4) Violation concerning the "all others" rate

78. The incorrect determination of Guadalquivir's subsidy and counterveiling duty rate leads to a consequential incorrect determination of the "all others" rate.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

I. THE USDOC'S *DE JURE* SPECIFICITY DETERMINATION WAS CONSISTENT WITH THE SCM AGREEMENT

1. 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. In particular, the USDOC's finding reflects that access to benefits under the BPS Programs, and the predecessor 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.

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

2. The USDOC's finding that the BPS Programs (and 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).

3. 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). 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. 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. 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. 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).

4. To reach its determination, the USDOC analyzed the EU and Spain's questionnaire responses, the relevant EU regulations, and the Royal Decrees implementing the assistance programs in Spain. 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 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. To arrive at the determination, the USDOC analyzed the EU and Spain's questionnaire responses, the relevant EU regulations, and the Royal Decrees implementing the assistance programs in Spain. 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. 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.

5. 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 certain enterprises under the BPS Programs depended on earlier eligibility criteria. The EU does not dispute that olive production was among the eligibility criteria under the Oils and Fats Program. 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". The USDOC further explained how the SPS Program and BPS Programs' incorporation of this element of the Oils and Fats Program was 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". 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".

6. The EU similarly argues that, in failing to identify any explicit BPS eligibility limitations, the USDOC ignored record evidence concerning eligibility conditions. The USDOC's final determination refutes this characterization. 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. 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.

7. 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 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.

B. 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

8. 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. 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.

9. First, 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. 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. 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.

10. In addition, 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 [Agreement on Agriculture ("AoA")]". The EU's argument fails because it conflicts with the texts of the AoA and SCM Agreements in at least the following two ways. 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. 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. 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. 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.

C. 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

11. 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. 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.

12. 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. The USDOC did not examine the BPS Programs in isolation given the programs' "reference to the operations of its two predecessor programs" (i.e., the Oils and Fats Program and SPS Program). The 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. 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.

13. 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. 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.

D. 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

14. 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. The SPS Program and BPS Programs did not satisfy the Article 2.1(b) criteria for at least the following two reasons.

15. 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. 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". 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.

16. 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. As the USDOC detailed in its preliminary 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 ...". 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. Indeed, elsewhere in its first written submission, the EU appears to concede this point. 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."

E. The USDOC's *De Jure* Specificity Finding Is Based on Positive Evidence and Supported by Reasoned and Adequate Explanations, Consistent with the SCM Agreement

17. 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. A Panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action". 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. 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.

18. 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 of enterprises. 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.

19. The USDOC explained its understanding that the "convergence factor results in adjustments to individual payments to bring them closer to an average over time ...". The USDOC thus understood that the convergence factor did not completely eliminate deviations from the national, or even regional, average for the period of investigation. The 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. Spain chose to implement a convergence factor that would not fully align the assistance under the BPS Programs. 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 ...".

II. 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

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

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

21. 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.

22. Article VI:3 of the 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 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". 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.

23. Article 10 of the SCM Agreement incorporates Article VI of the GATT 1994 and 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.

24. 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" regarding how a pass-through analysis should be conducted in a particular factual circumstance.

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

25. 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. 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". 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.

26. Section 771B of the Act address the calculation of countervailable subsidies on certain processed agricultural products and 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" 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.

27. The mechanism under Section 771B recognizes the economic realities of 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.

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

28. 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. Rather, an investigating authority must "demonstrat[e] that the benefit has passed through to the processed product and thus benefits it indirectly".

29. 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.

30. 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 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 producer confers a benefit to a downstream producer.

31. 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.

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

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

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

33. The EU's basic theory is that the USITC 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 USITC 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. However, 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.

34. The EU further contends that the USITC's segmentation of the domestic industry represents a "partial" analysis, and is "entirely meaningless and unsuited for a volume effect analysis". The EU also asserts that the USITC only evaluated the retail segment and ignored 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. The EU is wrong as a factual matter.

35. The EU's position 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 has no basis in the text of the ASCM or the ADA.

36. 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. These include the obligations to consider whether there has been a significant increase in the volume of subsidized and/or dumped 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".

37. The EU also errs in arguing that the USITC'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. The EU's argument is unsupported by the texts of those provisions. 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.

38. 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.

39. 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. 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.

40. In the *Olives* investigations, the USITC considered the volume of subject imports in a manner consistent with Articles 15.2 and 3.2. The USITC 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.

41. The USITC found the volume of subject imports during the POI to be significant on several bases. One basis was on an absolute level; the USITC acknowledged that subject import volume fluctuated on an annual basis over the course of the POI. The USITC 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. The USITC also found that the ratio of subject imports to U.S. production was significant.

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

42. The USITC properly considered whether prices of unfairly traded imports significantly undercut those of the domestic like product, and the EU's argument that the USITC 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. The EU argues that the USITC's finding of no price depression or suppression in the underlying investigations necessarily means that the USITC could not have properly determined that subject imports had adverse price effects. 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. 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.

43. 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. 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 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.

44. Furthermore, the EU's argument that the USITC's analysis of price effects is flawed. The EU argues that the USITC'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. However, neither the ASCM nor the ADA restricts an investigating authority from focusing its analysis on a particular segment of the domestic market. Here, the USITC 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.

45. Similar to its arguments concerning the USITC's volume analysis, the EU inaccurately contends that the USITC 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. Again, the EU variously argues that the USITC 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.

46. The USITC'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 confirmed lost sales from purchasers.

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

47. The United States noted in its preliminary ruling request that 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. Nevertheless, the EU has failed to show any breach of Articles 15.4 and 3.4.

48. The EU's arguments that the USITC's analysis of impact is flawed because the USITC arbitrarily divided the domestic industry into different segments are unsupported by the ASCM and the ADA. As with its arguments concerning volume and price effects, the EU wrongly contends that the USITC erred in focusing on the retail segment of the market in its analysis of impact. 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. The USITC 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.

49. The EU's arguments that the USITC ignored the rest of the market and the overall market are factually incorrect for the same reasons they fail with respect to the USITC's volume and price analysis. 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".

50. Therefore, an investigating authority "must consider, in light of the interaction among injury indicators and the explanations given" whether a domestic industry is injured. 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. In assessing the impact of the subject imports on the domestic industry, the USITC considered all of the relevant data. It found that production factors, which it analyzed on an industry-wide basis, were mixed. 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. 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.

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

52. In its analyses of volume and price effects, the USITC 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. It 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.

53. Upon evaluation of all relevant evidence, the USITC 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 established by the USITC was inconsistent with the first two sentences of Article 15.5 of the ASCM and Article 3.5 of the ADA.

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

54. The EU argues that in conducting its causation analysis, the USITC 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. It further argues that the USITC erroneously rejected two non-attribution factors: 1) decreasing consumption in the United States; and 2) non-subject imports during the POI. The EU argues that the USITC 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. The USITC properly separated and distinguished any injurious effects caused by factors other than subject imports.

55. The purpose of the non-attribution requirements is to ensure the existence of an un-severed causal link between the dumped or subsidized imports and the injury to the domestic industry. The non-attribution requirement 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. 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.

56. In the *Olives* investigations, the USITC assured that it did not attribute injury allegedly caused by other factors to the subject imports. Moreover, it 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". The USITC fully explained why the relatively modest decline in consumption did not correspond with reported declines in the industry's shipments and financial performance indicators and considered and addressed the role of nonsubject imports.

57. The EU's arguments concerning non-attribution largely criticize the USITC majority for failing to adopt the rationale of the dissent. Presenting an alternative analysis of the facts cannot establish that the findings made by the USITC majority – the sole findings before the Panel do not reflect an objective examination or are unsupported by positive evidence. 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.

IV. 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

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

58. 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". The facts demonstrate otherwise.

59. On 4 August 2017, the USDOC issued a questionnaire to each of the three mandatory respondents requesting information relating to their sources of raw olives that were processed into ripe olives. 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". 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. The text of the questionnaire refutes the EU argument in at least two ways.

60. 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".

61. Second, the relevant question (i.e., question 6) directed the mandatory respondents to report purchases of raw olives used to produce ripe olives. 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". 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.

62. The EU argues that subsequent letters submitted by the mandatory respondents (18 September 2017) and the Government of Spain (25 September 2017) show that the parties understood the scope of the information requested in the USDOC's 4 August 2017, letter was not limited to raw olives processed into ripe olives. 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. Second, neither letter pertained to the USDOC's 4 August 2017, questionnaire requesting mandatory respondents' purchase information for raw olives processed into ripe olives. Third, the USDOC's separate letter to the mandatory respondents on 27 September 2017, did not change (or purport to change) the meaning of the USDOC's 4 August 2017, request.

63. Furthermore, consistent with the questions actually asked by the USDOC, the other two mandatory respondents, Agro Sevilla and Angel Camacho, understood that the USDOC's 4 August 2017, and 27 September 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.

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

64. 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.

65. 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 olives], and to divide the resulting benefit by the sales of subject merchandise [i.e., ripe olives]". The USDOC applied this methodology to each of the three mandatory respondents. Accordingly, for Guadalquivir's numerator, the USDOC relied on the purchase volume that Guadalquivir reported in response to the USDOC's 4 August 2017 letter because Guadalquivir's "originally reported information is indicative of its raw olives purchases that were used to produce subject merchandise".

C. Consistent with Article 12.8 of the SCM Agreement the USDOC Informed All Parties of the Essential Facts Under Consideration

66. The USDOC disclosed the essential facts under consideration months before the final determination, thereby permitting the parties to defend their interests, which they in fact did. 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.

67. First, as explained above, through its 4 August 2017 and 27 September 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. 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. The verification agenda disclosed that purchase volumes for raw olives were essential facts under consideration. Third, Guadalquivir's verification report, issued 22 March 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. 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.

68. Furthermore, 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.

U.S. 10 JUNE RESPONSES TO THE PANEL'S QUESTIONS

Summary of U.S. Response to Panel Question 2

69. The requirement that the granting authority or relevant legislation "explicitly limits access to a subsidy" does not restrict an investigating authority to one or the other of the above criteria. The plain language of Article 2.1 indicates that specificity is a general concept and that "limits access" under Article 2.1(a) is not limited in meaning to one particular type of eligibility. Article 2.1(a) qualifies the term "access" in two ways: (i) it must be limited "to certain enterprises" and (ii) it must be expressed "explicitly" by the granting authority or the relevant legislation. The text does not, however, prescribe a particular form that the limit on "access" must take – whether it be criteria that determine eligibility for the subsidy or criteria that determine eligibility for certain amounts of the subsidy.

70. Nor does the use of the term "access" in Article 2.1(a) restrict an investigating authority to evaluating the conditions of a subsidy program in a particular way. "Access" means the "right or opportunity to benefit from or use a system or service". The "right or opportunity to benefit from or use" a subsidy could be determined by eligibility for that subsidy. However, limiting eligibility for subsidies under a program is not necessarily the only way that the "right or opportunity to benefit from or use" subsidies may be limited. A limit based on distinctions that differentiate the amount of subsidies that certain enterprises are eligible to receive vis-à-vis other enterprises could similarly differentiate the right or opportunity to benefit from or use a subsidy.

71. Articles 2.1(a) and (b) together set forth the conditions to distinguish cases where, as a matter of law, the granting authority discriminates in favor of certain enterprises, from cases where subsidies are generally available. Clearly, a granting authority or relevant legislation may impose

limitations that discriminate in favor of certain enterprises through criteria that determine eligibility to receive certain amounts of subsidies under the program in question. Similarly, Article 2.1(b) calls for "objective criteria or conditions" – i.e., "criteria or conditions which are neutral, which do not favour certain enterprises over others ...". Criteria limiting access either to threshold eligibility for the subsidy program itself or to certain subsidy amounts under that program would not be neutral and would favor certain enterprises over others.

U.S. 8 SEPTEMBER RESPONSES TO THE PANEL'S QUESTIONS

Summary of U.S. Response to Panel Question 1.c

72. The "certain enterprises" for purposes of Article 2.1(a) were the holders of entitlements whose value derived from the Oils and Fats Program. That finding is evident in the USDOC's preliminary and final determinations and consistent with the finding that the SPS Program and BPS Programs are specific to olive growers. The USDOC identified that (i) the Oils and Fats Program conferred subsidies based on historic olive production and (ii) the SPS Program and BPS Programs preserved the conditions that limited access to those subsidies as a discrete component of entitlement payments, whether the holders of those entitlements continued olive production or replaced that production.

73. In its final determination, the USDOC encapsulated its *de jure* specificity finding: "the annual grant amounts provided under [the BPS Programs] 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. In its preceding explanations, the USDOC explained precisely how the BPS Programs "are directly related to" and "continue to retain the *de jure* specificity of" olive-specific subsidies under the Oils and Fats Program. Specifically, the USDOC explained how the entitlement values were derived from using historic information (i.e., from the 1999-2002 reference period). The regional data used to generate the "basic payment entitlement" under the BPS Programs included "the area in hectares, the types of crops, and the volume of production during the period 1999 to 2002 or 2000 to 2002, and the amount provided under the annual grant-to-farmer program for those same periods". Similarly, 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" (i.e., 1999-2002 for olive-specific subsidies under the Oils and Fats Program).

74. Thus, under the SPS Program and BPS Programs, a farmer could hold an entitlement with a component based on historic olive production regardless of whether or if the land was later switched to a different use. The USDOC was clear on this point: "the amount of the payment is dependent on the annual activation of the entitlement, and is not dependent on the type or volume of crop produced".

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. THE USDOC'S *DE JURE* SPECIFICITY DETERMINATION WAS CONSISTENT WITH THE SCM AGREEMENT

A. The EU has failed to demonstrate that certain extra-textual conditions modify Article 2.1(a) of the SCM Agreement

75. In its previous submissions, the United States has explained why, contrary to the EU's position, the term "limits access" does not mean only *limits threshold eligibility for any amount of subsidy under the program*. Below we address points raised by the EU in its statements at the virtual session and its written responses after that session.

76. First, the Panel need not reach the EU's arguments that "continuity and consistency" compel the Panel to adopt the EU interpretation, because the supposed "consistent jurisprudence" on this issue does not exist. Prior dispute settlement reports have not addressed whether the meaning of "limits access" under Article 2.1(a) is restricted in the manner that the EU proposes. The EU relies on the fact that past reports have used the word "eligibility" in referring to the limit described in Article 2.1(a). In *US – Large Civil Aircraft (2nd complaint)*, the compliance panel used and emphasized the word "*eligibility*" to draw the distinction between whether certain enterprises have "access" to subsidies versus whether "they in fact receive it". The panel in *US – Upland Cotton* observed that "specificity is a general concept, and the breadth or narrowness of specificity is not

susceptible to rigid quantitative definition". The EU's argument highlights a needless conceptual complication that its interpretation would create. Under the EU interpretation, investigating authorities (and reviewing panels) would need to determine whether the access limits in question are better categorized as eligibility or amount-based, and whether those limits are better categorized as at the threshold point of the program or within the program.

77. Second, in its post-virtual session responses, the EU proposes another extra-textual requirement for Article 2.1(a): that "[c]ompanies that do not form part of the class of (benefit) recipients" correspondingly "cannot be included in the benefit analysis". The relevant question under Article 2.1(a) is whether access is explicitly limited as a matter of law to certain enterprises. That evaluation does not involve an analysis of the amounts actually received and by whom, which is instead relevant to inquiries concerning *de facto* specificity and the calculation of benefit.

78. Third, the EU has presented an incoherent response to the text-based arguments concerning Article 2.1(a). The EU noted that Article 2.1(a) "does not refer to amount" and "refers to limitation on access, period". That is exactly the point. Article 2.1(a) refers neither to "amount" nor to "eligibility" – in contrast to Article 2.1(b) – so to limit Article 2.1(a) to either term would conflict with the text. For the EU to establish that "limits access" under Article 2.1(a) is modified by language that was not used in the provision, it must do more than refer to other language that does not appear under the provision.

B. The EU has failed to demonstrate that the USDOC's determination relied on "coupled" production and therefore breached Articles 2.1, 2.1(a), or 2.4 of the SCM Agreement

79. In its opening statement, the EU backpedals from its earlier claims, proposing a "much more modest argument" that "if an investigating authority finds that a subsidy is tied or coupled to production" it cannot "find at the same time that the subsidy is not coupled to the production of that crop". In the first instance, the EU repeats its arguments that the USDOC did not establish a link between olive production-based subsidies under the Oils and Fats Program and the limitation on access identified under the BPS Programs. However, it is not in dispute that only certain entitlement holders could access the entitlement component that was based upon subsidies conferred under the Oils and Fats Program (i.e., the certain enterprises for purposes of Article 2.1(a)). The USDOC did not base its *de jure* specificity findings on whether or not subsidies under the BPS Program are coupled to olive production, nor did it need to. The EU argues that its claim is "buttressed by a contextual interpretation" that the BPS Programs would qualify as "decoupled income support" under the Agreement on Agriculture. As the United States has explained, the concept of "decoupling" appears nowhere in the SCM Agreement and is not relevant to the analysis under Article 2.1(a). The EU has not explained how, despite the irrelevancy of the concept of "decoupling" under Article 2.1(a), it nonetheless provides relevant context for that article.

80. The EU makes a conceptually similar argument that the ability to transfer an Oils and Fats Program-based entitlement "severs" its relationship to the Oils and Fats Program. However, as the United States has explained, even where certain entitlements might have been inherited or transferred, this would not sever the link to the access limitation identified by USDOC in its determination. Under the law, only the entitlement holders could apply for and receive the subsidy amounts reserved for the identified certain enterprises. That entitlement holders might themselves transfer these rights does not alter the scope of access, and the resulting specificity, as a matter of law.

C. The USDOC based its specificity analysis on the legislation that under the BPS Programs limited access to certain enterprises, consistent with Article 2.1(a) of the SCM Agreement

81. To evaluate the legislation pursuant to which the granting authority administered the BPS Programs, the USDOC considered how the BPS Programs incorporated by reference the eligibility criteria of the two predecessor CAP Pillar I programs – the Oils and Fats Program and the SPS Program. The EU has offered several additional arguments, which the United States addresses below.

82. First, the EU argues that the "alleged direct correlation" between the Oils and Fats Program and the BPS Programs conflicts with the statement that the "BPS Programs rely at least in part on the subsidies provided under the Oils and Fats Program". In the first place, the salient point is that the BPS Programs continued to provide subsidies using information from the reference period during which the Oils and Fats Program operated, which based assistance on olive production and necessarily limited access to certain entitlement holders, as the USDOC identified. That limitation on access does not depend on whether or not the BPS Programs took into account any other factors. In any event, the EU's attempt to identify an inconsistency, albeit an irrelevant one, fails.

83. Second, in its responses to the Panel's questions, the EU labels an "alternative explanation" the U.S. descriptions of the USDOC's specificity finding. In essence, the EU fixates on one aspect of "the legislation" identified by the USDOC, the olive production-based subsidies under the Oils and Fats Program, to the exclusion of how that program interoperated with the succeeding SPS Program and BPS Programs. The United States has explained how the USDOC identified that access to a discrete component of the BPS Programs – i.e., entitlement values from historic olive production-based subsidies – was limited to farmers on lands that qualified them for these entitlements. The United States has identified where this evaluation is evident. To the extent the EU's arguments address one phrase to the exclusion of the USDOC's full findings, those arguments are not relevant to the dispute and should be rejected.

II. THE EU FAILED TO ESTABLISH ITS AS SUCH CHALLENGE TO SECTION 771B OF THE TARIFF ACT OF 1930 AND THAT THE USDOC WAS REQUIRED TO CONDUCT A PRICE DIFFERENTIATION ANALYSIS UNDER THE WTO PROVISIONS THE EU CITES

A. The EU asserts that it is not arguing that the USDOC was required to apply a specific methodology to determine whether a benefit has passed through, but the EU's own statements belie that assertion.

84. The EU emphatically states in its second written submission that it "nowhere claims or argues that the provisions of the GATT 1994 and the SCM Agreement referenced by the US would require a specific methodology of price differentiation in the context of a pass-through analysis". The EU further emphasizes that none of its arguments on price comparisons are premised on an interpretation of the provisions under which it brought claims in this dispute.

85. Instead, the EU directs the Panel to weigh its arguments that Section 771B does not contain a pass-through analysis because the two conditions therein are "inapt" to determine the existence and extent of the benefit conferred to downstream ripe olives processors. In the EU's view, the only apt condition would be that the price of the input product is lower than the market price as a result of the subsidy, and, quoting the EU, that no "method other than a price comparison" is appropriate for making a determination of whether and to what extent a benefit is conferred to downstream processors. The legal provisions cited by the EU do not support the EU position and each of the EU's claims therefore must fail.

B. The EU has failed to show that a price comparison, as opposed to the conditions in Section 771B, is the only method of analysis suitable to determine whether and to what extent a benefit is conferred on downstream processed products

86. While the EU appears to acknowledge that the GATT 1994 and SCM Agreement create no requirements or specific conditions, and that there are many conditions that may be considered in making a pass through determination, it nevertheless claims that application of the conditions reflected in Section 771B necessarily and in every instance breach those same provisions. The United States fails to see how such statements can be reconciled with the EU's clear position that no other "method other than a price comparison" is appropriate for making a determination of whether and to what extent a benefit is conferred to downstream processors.

87. Rather than attempt to bolster its claims with an analysis of the obligations in the SCM Agreement, the EU provides hypothetical scenarios where a price comparison might be relevant. However, an investigating authority's analysis should be based on the distinct factual and economic circumstances facing the industry at issue. The EU errs in asserting that because a price comparison might be relevant in some circumstances, it must be required in every circumstance.

The EU's reliance on this assertion is misguided, and does not reflect the flexibilities that exist in the SCM Agreement.

88. Markets for raw agricultural commodities are characterized by "perfect competition". Perfect competition exists in markets where there are many producers making virtually identical products for which sellers and buyers have all of the relevant information on which to base a purchase, and entry and exit into the market is not restricted. Producers in perfectly competitive markets are known as "price takers". This market characteristic is a systematic feature of markets in the agricultural sector, and therefore affect the relationship between producers and processors of raw agricultural products. Given these underlying market conditions, under Section 771B, where an agricultural commodity market also exhibits certain additional characteristics – i.e., where in addition to perfect competition there is *also* substantial dependence and limited value added – the benefit of a subsidy provided to an agricultural producer will be determined to have passed through to a processed agricultural product.

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

A. The USITC conducted an objective examination of the industry as a whole

89. The central premise of the EU's challenge to the injury determination is that the USITC engaged in selective "segmented" analyses. Quite simply, this is incorrect. A careful reading of the USITC opinion confirms that there is no factual basis for the EU's attempt to recast it as one that alternated between holistic and segmented analyses. The USITC based its injury analyses on data pertaining to the market as a whole. These included the USITC's analyses of volume, price effects, and impact. In conducting its analyses of volume and price effects, the USITC provided information concerning trends in the retail channel of distribution, which is the channel of the market in which competition between domestically processed and subject ripe olives actually occurred during the period of investigation, and the channel on which all parties to the underlying investigations focused their volume and price-effects-related arguments.

90. Even if the Panel determines that the USITC conducted an analysis that could be characterized as a "market segment" analysis (a term that does not appear in the relevant Agreements), the EU has not demonstrated that the examination and findings of the USITC in this investigation do not comport with the requirements of the AD and SCM Agreements. In this regard, the United States notes that the EU's own definition of the supposed "market segment" analysis and requirements shifted throughout these proceedings.

91. The EU initially argued, in its first written submission, that "segmented" analyses were *per se* inconsistent with Article 3 of the AD Agreement and Article 15 of the SCM Agreement. This position has no basis in the text of the Agreements. The EU then posited that a segmented analysis was *per se* inconsistent with the Agreements "in a situation where one single uniform and homogeneous product (with no further product differentiation) was found to be 'highly substitutable' and was sold interchangeably in all distribution channels".

92. The EU later conceded that a segmented analysis of homogeneous products would not be precluded, provided that "there must still be conditions of competition that are different per segment in order for segmentation to serve as valid basis [*sic*.] for the injury analysis". The EU presented hypotheticals of what it purports would constitute appropriate circumstances for a segmented analysis, including where there are distinctions in domestic and imported products, such as that of an investigating authority comparing imported high-end products with domestic low-end product. However, the EU still fails to provide any textual basis supporting such an obligation.

93. The USITC's close examination of trends in each channel of distribution, where subject ripe olives products competed with domestically processed ripe olives of equivalent size and presentation, was in full accord with the USITC's like product determination and its obligation to base its injury analyses on positive evidence following an objective examination of the record.

B. The USITC conducted a proper analysis of volume

94. While most of the EU's challenges to the USITC's analysis of volume are tied to its general argument concerning market segmentation, it does raise two independent arguments. First, it contends that the USITC erred in finding the volume of unfairly traded imports significant when it declined in absolute and relative terms during the period of investigation. Additionally, it contends that the USITC failed to conduct an "objective examination 'of the explanatory force of subject imports for the state of domestic industry as a whole'" on the premise that subject import volume sold to the retail channel amounted to a small proportion of total subject import shipments. However, the USITC opinion fully discharged the obligation to consider the "significance" of subject import volume.

95. The USITC directly addressed the evolution of subject import volume during the period of investigation, and acknowledged that this volume did not increase on either absolute or relative bases. In addition to evaluating volume data for the overall market, the USITC also considered subject import volume trends in the three channels of distribution. It observed that subject imports increasingly penetrated the retail channel, which was the predominant channel for the domestic industry. The USITC also found that subject imports captured market share from the domestic industry in the retail channel, including in both the retail private label and retail branded subchannels. The USITC, weighing the record evidence and considering the arguments of the parties, reasonably concluded, on the basis of positive evidence and without favoring the interests of any particular party to the proceedings, that subject import volume was significant.

C. The USITC conducted a proper analysis of price effects

96. In addition to the EU's challenges tied to its general argument concerning market segmentation, the EU raises further arguments challenging the USITC's conclusion that underselling of the domestic product by the unfairly traded imports was significant.

97. Based on its review of pricing data for four specific pricing products, the USITC found that subject imports pervasively undersold domestic pricing products, in 37 of 48 available quarterly price comparisons, including in the retail channel, where subject imports captured market share from the domestic industry. The USITC also considered information on the record regarding lost sales, which indicated that 12 of 25 responding purchasers reported that subject import prices were lower than those for domestically processed ripe olives. The USITC, weighing the record evidence and considering the arguments of the parties, reasonably concluded, on the basis of positive evidence and without favoring the interests of any particular party to the proceedings, that subject import underselling was significant.

D. The USITC conducted a proper impact analysis

98. The EU argues that conceptually the "intensification" of competition in the retail channel is inconsistent with principles of open market competition. The EU's suggestion that the domestic processors could have simply directed sales to the distribution channel, or re-enter the institutional/food channel in which subject imports had displaced them prior to the period of investigation does not reflect what actually occurred during the period of this investigation, and ignores the USITC's record-supported findings regarding conditions of competition in the market. Specifically, the USITC found that there were distinct market channels, and each channel involved unique customers that purchased ripe olive products prepared to meet requirements specific to each channel. Based on these conditions, the USITC determined that sales and market share that the domestic industry lost to subject imports led to an increase in their inventories, which consisted largely of ripe olive products prepared for sale to retail purchasers.

IV. THE USDOC'S FINAL COUNTERVAILING DUTY RATE FOR GUADALQUIVIR WAS NOT INCONSISTENT WITH THE GATT 1994 OR THE SCM AGREEMENT

A. The EU has not demonstrated that the USDOC failed to request information on purchases of raw olives used to produce ripe olives

99. The EU has acknowledged that the USDOC's 4 August 2017 letter is "the key document" on the issue of whether the USDOC asked Guadalquivir to provide purchase information for raw olives

used to produce ripe olives. However, the EU has tried to shift attention to a separate letter which the USDOC issued on 27 September. In its post-virtual session responses, the EU made two additional, flawed arguments related to the USDOC's 4 August and 27 September letters. First, concerning the disclosure of "essential facts" under Article 12.8, the EU argues that "the fact that information was asked for in an initial questionnaire is [not] sufficient to establish that the information is an essential fact ...". As the United States has explained, the USDOC disclosed that purchases of raw olives processed into ripe olives was an essential fact under consideration; it did so through its initial questionnaire and, in any event, on two other occasions (i.e., the verification agenda and the verification report).

100. Second, the EU argues that the "natural interpretation of the sequence" of the 4 August and 27 September letters demonstrates that the 4 August letter "clearly was limited to requesting information on the volume of all raw olives". When the USDOC issued its 4 August letter, it was not planning for its meaning to be understood in terms of a later-issued letter. Similarly, in responding to the 4 August letter, Guadalquivir and the other mandatory respondents were not doing so in the context of the 27 September letter. If the 4 August letter provided notice that the USDOC required purchase information for raw olives processed into ripe olives, the 27 September letter did not somehow countermand that notice. The EU refers to the fact that the 27 September letter "represents an answer to a specific query of respondent's counsel". To be clear, Guadalquivir did not seek clarification or additional guidance from the USDOC.

B. The EU has not properly challenged the calculation of the amount of benefit

101. Several of the EU's claims with respect to Guadalquivir pertain to the calculation of the amount of benefit. However, the EU did not bring a claim under Article 14 of the SCM Agreement. Asked about its omission, the EU argued that it did not need to bring a claim under Article 14 because "a determination of benefit conferred can comply with these specific disciplines [set] out in Article 14 of the SCM Agreement and nonetheless contravene other disciplines ...". At their core, the EU's claims are about the calculation of the amount of benefit. The EU summarized in its first written submission: "In conclusion, the calculation of Guadalquivir's subsidy rate (and consequently of its countervailing duty rate) violates Articles VI:3 of the GATT 1994, and Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement". However, it is Article 14 which speaks directly to calculating the amount of benefit in terms of the benefit to the recipient.

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ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil welcomes the opportunity to present its views as a third party in this dispute. In this submission, Brazil will focus on certain aspects of the European Union's claim that the United States violated Articles 2.1 and 2.4 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") because the United States Department of Commerce (the "USDOC") failed to demonstrate that the subsidies at issue are specific.

2. There appear to be two elements that are relevant to an assessment of the specificity of the subsidies at issue in this dispute. The first element relates to *eligibility*, namely to the question of whether the programs limit access to the subsidies to "an enterprise or industry or group of enterprises or industries", or whether the criteria or conditions governing eligibility for the subsidy are "objective" in the sense of footnote 2 to the SCM Agreement. The second element relates to the subsidy *amount*, and relates, inter alia, to an assessment of whether the criteria or conditions governing the amount of the subsidy are also "objective" in the sense of footnote 2 to the SCM Agreement.

3. In this submission, Brazil will focus on the issue of *eligibility*. The European Union (the "EU") argues that, in the case of the SPS Program, four cumulative conditions define which entities are entitled to benefit from the scheme: (i) classify as a farmer; (ii) hold a payment entitlement; (iii) declare an eligible hectare; and (iv) activate the payment entitlement.[1] With respect to the BPS Program, the EU explains that "the eligibility criteria under the BPS resemble those of the SPS".[2] The EU argues that these requirements "make clear that the production of any agricultural product (let alone of olives) is not an eligibility condition under the SPS". The EU makes a similar argument with respect to BPS.[3]

4. This argument, however, is not directly relevant to an inquiry of specificity under Article 2 of the SCM Agreement as far as eligibility to the benefits is concerned. The inquiry is not whether payments are "coupled to" or "decoupled from" current production. The question is rather whether the benefit is generally available, or whether access to the subsidy is limited to "an enterprise or industry or group of enterprises or industries".

5. One should thus ascertain whether one or more of the four above-mentioned conditions operate so as to limit access to the subsidy to "an enterprise or industry or group of enterprises or industries". In particular, condition (ii) – the holding of a payment entitlement – seems to introduce a narrow limitation. This is because the holder of a payment entitlement must have received a payment in a reference period under at least one of previous support schemes.[4] Brazil understands that, in the case of the SPS Program, for example, these support schemes are exhaustively listed in Annex VI of Regulation 1782/2003.

6. Condition (ii) thus operates as a "filter". A relevant question is then whether entities which received payments under at least one of the listed support schemes - and therefore fulfill condition (ii) above - form a group that qualifies as "an enterprise or industry or group of enterprises or industries" within the meaning of Article 2 of the SCM Agreement. Another relevant question would be whether the criterion of "holding a payment entitlement" meets the conditions of Article 2.1(b) of the SCM Agreement. For example, does the criterion "favour certain enterprises over others"? Is it "economic in nature and horizontal in application"?

7. Regarding the SPS Program, for instance, the EU notes that, "[as] of 2004 more and more support schemes coupled to production converged into the SPS by successive reforms of a particular market organization. Already in 2004, pursuant to Regulation 864/2004, payments for olives, arable crops, rice, grain legumes, rice, seeds, dried fodder, milk and milk products, as well as some beef

[1] First Written Submission by the European Union, para. 70.
[2] First Written Submission by the European Union, para. 115.
[3] First Written Submission by the European Union, paras. 71 and 115.
[4] The EU explains that an entity may also have received the holding or part of the holding by way of actual or anticipated inheritance by a farmer who met the above condition, or may have received a payment entitlement from the national reserve or by transfer (First Written Submission by the European Union, para. 70). These possibilities do not seem to meaningfully alter the scope of eligible beneficiaries of the programs.

and veal payments were replaced by the SPS".[5] To Brazil, this is not a clear indication that the benefits of the SPS and BPS programs were or are widely available throughout the EU's economy so as to render them not "specific" within the meaning of Article 2 of the SCM Agreement.

8. In that regard, the Panel may find some guidance in the findings of the panel in the *US – Cotton* dispute. In that dispute, there was a question as to whether crop insurance subsidies were specific under Article 2 of the SCM Agreement. That panel noted the following:

> "At some point that is not made precise in the text of the [SCM] agreement, and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products. The plain words of Article 2.1 indicate that specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition. Whether a subsidy is specific can only be assessed on a case-by-case basis".[6]

> "Crop insurance subsidies are, generally, available for most crops but they are not generally available in respect of the entire agricultural sector in all areas. Each insurance plan is available for a defined list of crops to which the FCIC determines that it is adapted. The proportion of the premium borne by the FCIC is set out in each plan. The major plan type (actual production history) is available for approximately 100 agricultural commodities, and specifies upland cotton as one of them. The other four plan types (group risk, crop revenue coverage, income protection and revenue assurance) are available only for a limited number of eight commodities or less and they each specify upland cotton as one of them. Certain sample policy provisions specify 'cotton'. There are no subsidized crop insurance policies on the record available to all agricultural producers. They are therefore, in fact, not even generally available to the industry which can be categorized as the agricultural industry".[7]

> "In our view, the industry represented by a portion of United States agricultural production that is growing and producing certain agricultural crops (and certain livestock in certain regions under restricted conditions) is a sufficiently discrete segment of the United States economy in order to qualify as "specific" within the meaning of Article 2 of the SCM Agreement".[8]

9. Following the reasoning of that panel, in the case of the SPS Program, a relevant question is then whether entities which received payments under at least one of the support schemes listed in Annex VI of Regulation 1382/2003 - and therefore fulfill condition (ii) indicated in paragraph 3 above - form a group that qualifies as "a sufficiently discrete segment of the [EU's] economy in order to qualify as 'specific' within the meaning of Article 2 of the SCM Agreement".

10. The EU does not seem to address this question. In referring to the SPS Program, the EU asserts that this program "does not grant payments to olive farmers specifically but to farmers that may have been growing olives in the past and may not continue growing that crop under the SPS".[9] The EU then affirms that "[the] USDOC finding would have some chances of being considered correct had farmers growing olives under the Common Market Program be legally required to grow olives also under the SPS and then legally required to continue growing olives under the BPS in order to be entitled for support under those programs. In such scenario, the grant amounts received by olive growers under BPS in 2016 might be considered as directly related to the grant amount they received under the Common Market Program [footnote omitted] and tied to the production of olives".[10]

11. Again, the relevant inquiry is not whether grant amounts are "tied" to continued production of a specific crop. The fact that the SPS Program "does not grant payments to olive farmers specifically but to farmers that may have been growing olives in the past and may not continue growing that crop under the SPS" does not in itself render the program non-specific. To the extent that farmers held entitlements under the SPS Program because they grew olives under the Common Market Program, those farmers may constitute "certain enterprises" within the meaning of Article 2.1

[5] First Written Submission by the European Union, para. 60.
[6] Panel Report, *US – Upland Cotton*, para. 7.1142.
[7] Panel Report, *US – Upland Cotton*, para. 7.1150.
[8] Panel Report, *US – Upland Cotton*, para. 7.1151.
[9] First Written Submission by the European Union, para. 323.
[10] First Written Submission by the European Union, para. 327.

of the SCM Agreement for the purposes of the BPS Program, regardless of whether they continue to grow olives under that program.

12. In Brazil's view, the EU often appears to conflate concepts defined under the Agreement on Agriculture with the concept of "specificity" as defined in the SCM Agreement. For example, the EU argues that "[the] USDOC approach [to specificity] is at odds with the very notion of decoupled income support under WTO law".[11] According to the EU, the Agreement on Agriculture "follows a reasonable approach and recognises the obvious: direct payments to farmers do not come out of the blue. They must be based on some objective criteria".[12] For the EU, "despite [the fact that the SPS, BPS and Greening programs] would classify as decoupled income support measure under the [Agreement on Agriculture], according to the US they retain the de jure specificity element inherent in the Common Market Program, i.e. the fact of being coupled to the production of olives. Simply put, the US logic is absurd".[13]

13. Brazil does not take a position as to whether the programs at issue would qualify as "decoupled income support" under the Agreement on Agriculture. At any rate, to the extent that the EU is suggesting that "direct payments to farmers" or "decoupled income support" are *ipso facto* not "specific" within the meaning of the SCM Agreement, Brazil disagrees. Nothing in Article 2 of the SCM Agreement requires that agricultural subsidies be "tied" or "coupled" to production for those subsidies to be specific. Notably, the drafters of the Agreement on Agriculture recognized, in Article 13 thereof, that subsidies that conformed fully to the provisions of Annex 2 (and were thus "exempted from reduction commitments") could be "actionable for purposes of countervailing duties" after the end of the nine-year implementation period that commenced in 1995, and hence specific within the meaning of Article 2 of the SCM Agreement.

[11] First Written Submission by the European Union, para. 228.
[12] First Written Submission by the European Union, para. 232.
[13] First Written Submission by the European Union, para. 234.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. ARTICLE VI:3 OF THE GATT 1994 AND ARTICLES 1, 10 AND 19 OF THE SCM AGREEMENT REQUIRE AN INVESTIGATING AUTHORITY TO DETERMINE THE EXISTENCE AND AMOUNT OF AN INDIRECT SUBSIDY PRIOR TO IMPOSING COUNTERVAILING DUTIES

1. The obligation to determine the existence and amount of a subsidy to the recipient is a cornerstone of the GATT 1994 and the SCM Agreement. For a potentially countervailable subsidy to exist under Article 1.1 of the SCM Agreement, there must be a financial contribution by a government that confers a benefit to a recipient. If the investigating authority has not determined the existence and amount of the subsidy to the recipient, there is no subsidy to offset and no countervailing duty may be imposed under Article VI:3 of the GATT 1994 and Articles 10 and 19 of the SCM Agreement.

2. Where a subsidy is granted to an upstream producer of an input product—who is not subject to the investigation—and that upstream producer sells the input to an unrelated downstream producer of the product under investigation, economics dictates that the rational upstream producer will seek to retain some, if not all, of the benefit associated with the financial contribution. In this circumstance, to fulfill its obligations under the GATT 1994 and SCM Agreement, the investigating authority must ensure that the recipient, the downstream producer, actually received a subsidy before imposing a countervailing duty.

3. The SCM Agreement provides, and the Appellate Body has found, that a "benefit" conferred by a subsidy, as defined in Article 1.1(b), does not exist in the abstract and must be conferred on the recipient. Investigating authorities are required to establish that the essential elements of the subsidy definition in Article 1 of the SCM Agreement are present prior to imposing countervailing duties. On this basis, the Appellate Body found in *US – Softwood Lumber IV* that, absent the establishment of evidence to the contrary, an investigating authority may not deem that a downstream producer, who did not directly receive a financial contribution, nevertheless received all of the benefit conferred on an unrelated upstream processor.

4. The obligation to determine the existence and amount of a subsidy is found in GATT Article VI:3, which does not allow an investigating authority to levy countervailing duties in excess of an "amount" equal to the subsidy "determined" to have been granted on the product under investigation. The word "determine[]" indicates that an investigating authority is obligated to examine all relevant facts to ascertain the existence and amount of a subsidy granted to the product under investigation prior to imposing countervailing duties. The word "amount" requires an investigating authority to quantify, in terms of its financial value, the subsidy bestowed on the product under investigation. GATT Article VI:3 is clear that this principle applies both to indirect and direct subsidies.

5. Consequently, as the Appellate Body explained in its analysis of GATT Article VI:3 in *US – Softwood Lumber IV*, an investigating authority must establish "whether, and in what amount, subsidies bestowed on the producer of the input flowed through, downstream, to the producer of the product processed from that input" because "Members must not impose duties to offset an amount of the input subsidy that has *not* passed through to the countervailed processed products".[1]

6. Article 10 of the SCM Agreement incorporates GATT Article VI:3 into the SCM Agreement and provides that an investigating authority must "take all necessary steps to ensure that the imposition of a countervailing duty on any product […] is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement". As a result, the investigating authority must be proactive in determining the existence and amount of a subsidy to the recipient.

[1] Appellate Body Report, *US – Softwood Lumber IV*, para. 141.

7. Articles 19.1 and 19.4 of the SCM Agreement separately confirm the "clear nexus" between the investigating authority's determination of the existence and amount of a subsidy to the recipient and the imposition of countervailing duties.[2] Article 19.1 provides that if a "Member makes a final determination of the existence and amount of the subsidy" it may "impose a countervailing duty in accordance with the provisions of [Article 19]". Article 19.4 echoes the language of GATT Article VI:3 and provides that "[n]o 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". Article 19.4 thus indicates that an investigating authority may not presume, but must "calculate", the subsidy per unit of the product under investigation. If the investigating authority has not determined the existence and amount of an indirect subsidy received by the downstream producer and has not calculated the amount of subsidy attributed to the investigated product, it cannot levy a countervailing duty pursuant to Articles 19.1 and 19.4.

8. The above principles are borne out by the context of these provisions, which indicates that an investigating authority is required to calculate the amount of the subsidy to the recipient. Article 14 of the SCM Agreement provides relevant context to the meaning of "benefit" under Article 1.1(b), and makes clear that the investigating authority must "calculate" the amount of benefit to the recipient. It is not sufficient to simply presume or deem a recipient "better off" when a financial contribution is provided to an unrelated producer of an input product.

9. The United States claims that the GATT 1994 and SCM Agreement do not prescribe a particular methodology for calculating the benefit. Canada agrees that these provisions do not prescribe a particular methodology. However, they do place meaningful limitations on the methodology that an investigating authority may use. An investigating authority may not satisfy its obligations under the GATT 1994 and SCM Agreement by merely asserting its countervailing duty is a reasonable approximation of the subsidy; it must calculate the countervailing duty based on the record evidence particular to the amount of the subsidy.

10. In cases where an investigating authority is evaluating whether a subsidy has "passed through" when a downstream producer of the product under investigation purchases a subsidized input product from an unrelated upstream producer, the record evidence particular to the amount of the subsidy is the price of the input product. In accordance with GATT Article VI:3 and Articles 10 and 19 of the SCM Agreement, the investigating authority must determine, or calculate, whether and to what extent the price paid for the input product by the downstream producer includes a subsidy. This determination necessarily involves the input product's price.

11. Likewise, the price of the allegedly subsidized input is necessary to determine whether the purchase of that input conferred a "benefit" under Article 1.1(b) of the SCM Agreement. As the Appellate Body stated in *Canada – Aircraft*, the word "benefit", as used in Article 1.1(b), implies some kind of comparison. In a transaction between a downstream producer and an unrelated upstream producer, the "benefit" is reflected in what the downstream producer paid for the subsidized input, relative to what it would have otherwise paid. If the price of an input does not confer a benefit, no benefit "passed through" from the upstream subsidy recipient to the unrelated downstream producer of the product under investigation.

12. Finally, Canada agrees with the European Union that where there are multiple transactions between unrelated parties in a supply chain, an investigating authority must examine whether a benefit was conferred at each level of the supply chain in its analysis of the existence and amount of the subsidy bestowed on the product under investigation.

II. SECTION 771B DOES NOT ALLOW FOR AN ANALYSIS CONSISTENT WITH THE GATT 1994 AND SCM AGREEMENT

13. The dispute between the European Union and the United States focuses on whether Section 771B of the U.S. *Tariff Act of 1930* ("Section 771B") is capable of establishing that a subsidy provided to the producer of an input product has "passed through" to benefit the purchaser of that input product. When a subsidy is provided to a raw agricultural product, Section 771B deems that the subsidy has "passed through" to the downstream processed agricultural product under investigation when two conditions are met: (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product and (2) the processing operation

[2] Panel Report, *US – Lead and Bismuth II*, para. 6.52.

adds only limited value to the raw commodity. By providing that the United States Department of Commerce ("Commerce") "shall" deem the existence of a countervailable subsidy when these two conditions are met, it appears to Canada that Commerce has no discretion under Section 771B to conduct other analyses or necessary steps to determine the existence and amount of subsidy.

14. In order to "determine" and "calculate" the subsidy to the recipient, it is necessary for an investigating authority to consider what the recipient actually received. Accordingly, when determining whether the purchase of an input product conferred a subsidy, and calculating its amount, it is necessary for an investigating authority to evaluate the price paid for the input product. Section 771B precludes such an evaluation because the two conditions set out in Section 771B do not evaluate the price paid for the input product. As a result, Section 771B does not allow Commerce to determine whether the purchase of the input product conferred a benefit to the purchaser or to calculate the amount of subsidy conferred by virtue of the input product's price.

15. The conclusions of the GATT panel in *US – Canadian Pork* with respect to Section 771B apply equally in this case. That panel found that an analysis prescribed by Section 771B precluded Commerce from conducting an analysis of whether a subsidy was granted on the product under investigation and was thus inconsistent with GATT Article VI:3.

16. The United States argues that Section 771B is a valid methodology through which to measure whether a benefit was received because of the particular factual circumstances associated with agricultural products. Canada does not agree that the economics of pass-through is inherently different for agricultural producers than any other producer.

III. *DE JURE* SPECIFICITY UNDER ARTICLE 2.1(A) OF THE SCM AGREEMENT

17. Article 2.1(a) provides that a subsidy is *de jure* specific where there is an explicit limitation on "access" to "certain enterprises". The term "access" within Article 2.1(a) means "[t]he right or opportunity to benefit from or use a system or service".

18. The question of whether an enterprise has a right to benefit from a subsidy does not exist on a spectrum. It is a yes-no question. Even if an enterprise receives a lower amount of subsidy by virtue of a distinction in the relevant legislation, that enterprise still has access to the subsidy by virtue of having the "right or opportunity to benefit" from it. Therefore, the inquiry under Article 2.1(a) is not whether there is an explicit limitation that "favours" certain enterprises. Instead, Article 2.1(a) asks whether there is an explicit limitation on access to a subsidy to "certain enterprises", which necessarily means that the subsidy is not accessible outside of that defined group of "certain enterprises".

19. In addition, the "explicit limitation" on access must identify "certain enterprises". On the basis of the definitions of "explicit" and "explicitly", the Appellate Body has found that the limitation on access must be "express, unambiguous, or clear from the content of the relevant instrument, and not merely 'implied' or 'suggested'".[3] The word "to" prior to "certain enterprises" in Article 2.1(a) shows that the explicit limitation on access to a subsidy must identify certain enterprises or industries. If the granting authority or its legislation does not expressly limit access to "certain enterprises", and therefore exclude other enterprises by not granting them access, the subsidy is not *de jure* specific pursuant to Article 2.1(a).

20. The ordinary meaning of Article 2.1(a) does not allow governments to evade the subsidy disciplines of the SCM Agreement. If a subsidy does not contain an explicit limitation on access, but instead "favours" certain enterprises by granting those enterprises disproportionately large amounts of subsidy, an investigating authority could conduct a *de facto* specificity analysis pursuant to Article 2.1(c). Article 2.1(c) expressly provides that an investigating authority may consider "the granting of disproportionately large amounts of subsidy to certain enterprises" as a factor in a *de facto* specificity analysis. To consider this factor under Article 2.1(a) would render Article 2.1(c) redundant and *inutile*.

[3] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 372.

IV. ARTICLES 12.1 AND 12.8 REQUIRE AN INVESTIGATING AUTHORITY TO GIVE NOTICE OF INFORMATION REQUIRED AND INFORM INTERESTED PARTIES OF THE ESSENTIAL FACTS UNDER CONSIDERATION

21. Articles 12.1 and 12.8 of the SCM Agreement provide that an investigating authority must give respondents appropriate notice of required information and ample opportunity to present all relevant evidence, and inform respondents of the essential facts under consideration.

22. Article 12.1 requires an investigating authority to notify an interested party of the information required and provide the party ample opportunity to present the relevant information. The panel in *China – Broiler Products (Article 21.5 – US)* found that obligation entails reaching out and making all interested parties aware of the information in question. While this requirement is assessed on a case-by-case basis, for a "notice" under Article 12.1 to have any meaning, the required information must be apparent from the investigating authority's request for information.

23. Article 12.8 provides for the disclosure of "essential facts" under consideration which form the basis for the decision to apply definitive measures. Disclosing these essential facts is critical to ensuring that interested parties are able to defend their interests before an investigating authority makes its final determination. In Canada's view, the evidence forming the basis of an investigating authority's calculation of subsidization is an "essential fact" that must be disclosed prior to the final determination.

24. The timing of an investigating authority's disclosure of essential facts is critical to determining whether that disclosure satisfies the requirements of Article 12.8. Article 12.8 provides that the disclosure of essential facts under consideration which form the basis for the decision whether to apply definitive measures "should take place in sufficient time for the parties to defend their interests". If a party does not have an opportunity to respond to the disclosed essential facts with evidence, the disclosure has not taken place in sufficient time for that party to defend its interests.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. THE REQUIREMENT FOR A PASS-THROUGH ANALYSIS

1. Japan generally agrees with the European Union that the essence of the pass-through analysis in a CVD case 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 [sic] sources of supply".[1] Japan disagrees with the United States' argument that Article VI:3 of the GATT 1994 presupposes that the determination of benefit has already been made,[2] and that there is no need to assess the input price in absence of the subsidy in the pass-through situation.[3]

2. Contrary to a prohibited/actionable subsidies case under Article XVI of the GATT 1994, in a CVD case, a pass-through analysis and an estimated quantification of the amount of pass-through is required because of Article VI:3 of the GATT 1994, which provides that a countervailing duty should not be imposed "in excess of" the "estimated" subsidy. Considering that the benefit of upstream subsidies would be conferred to downstream producers only through the lowered price of the input, an estimated quantification of how much the input price is lowered by the upstream subsidy is logically required to assess the benefit conferred to the downstream producers, so the downstream producers can lower the price of their products by using such benefit.

3. That said, as no particular pass-through methodology to calculate the benefit is prescribed by any provision of the GATT 1994 or SCM Agreement, the rigid calculation of an actual amount of subsidy that passes through should not be required. Quantification of pass-through, which may include confirmation of its existence, in CVD investigations may be based on reasonable inferences or presumptions supported by all relevant facts in a particular case.[4]

4. In this regard, Japan considers that certain elements may indicate the existence of pass-through or a high degree of pass-through. Depending on the particular facts of the case, in some circumstances it may also be presumed that *all* of the benefit received by an upstream input supplier is passed through to the downstream producer. One such exceptional example may be where both upstream and downstream producers are considered a single entity due to their capital structure or other relationship.

5. Also, the structure, nature, or objective of the subsidy may be highly relevant. Upstream subsidies granted under industrial policies aimed at promoting certain manufacturing industries tend to be structured to lower the input price (and/or to increase the input production) rather than to allow the upstream producers to pocket the benefit. Other factors may also support the inference or presumption of pass-through, such as whether: (a) the upstream and downstream producers are affiliated;[5] (b) the subsidized upstream producers are dominant suppliers in the input market; (c) the subsidized inputs are commodities; and/or (d) the subsidized products are raw inputs that would be processed exclusively into the subject downstream products.

6. Having said that, these factors are not decisive by themselves. For example, even when the subsidized inputs are commodities, depending on how the price of such commodities are formed in the market, pass-through of the benefit may not be lightly inferred. Namely, if downstream

[1] European Union's first written submission, para. 407 (*citing* GATT Panel Report, *US – Canadian Pork*, para. 4.9).

[2] United States' first written submission, para. 111.

[3] United States' first written submission, paras. 131-132; and United States' responses to the panel's questions as of 10 June 2020, para. 45 (Q12(b)).

[4] *See* GATT Panel Report, *US – Canadian Pork*, para. 4.8 ("the words in Article VI:3 'to determine' and 'estimated' as well as the practices of the contracting parties under that provision, as reflected in Part I of the Subsidies Code, indicate that the decision as to the existence of a subsidy must result from an examination of all relevant facts").

[5] *See* Appellate Body Report, *US – Softwood Lumber IV*, para. 146; and Panel Report, *Mexico – Olive Oil*, para. 7.142.

producers have access to low-priced imports that are substitutable for the domestic input produced by subsidized upstream producers, then an upstream subsidy may not change the input price to be paid by the subject downstream producers. In that case, the benefit of the upstream subsidy would not pass through to the downstream producers.

II. THE INJURY ANALYSIS

7. We now address the appropriate injury analysis pursuant to Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement. We will reference these provisions interchangeably and draw on jurisprudence under either set of provisions, as needed.

1. The Segmented Analysis

8. With regard to the nature of the required injury analysis in any CVD or AD investigation, the analysis of volume, price, impact, and causation must proceed in a "logical progression" ultimately resulting in a conclusion as to whether subject imports are causing injury to the domestic industry as a whole.[6] Based on this principle and the fact that nothing in Article 15 of the SCM Agreement or Article 3 of the Anti-Dumping Agreement precludes a segmented analysis of any kind, Japan considers that, even with a single like product, a segmented analysis is allowed, as long as: (i) ultimately the investigating authority reaches a conclusion on injury to the domestic industry *as a whole*;[7] and (ii) the investigating authority adequately demonstrates why its segmented analysis is appropriate in the circumstances of a given case. In particular, in the case of a single like product, a panel should examine whether the investigating authority has reasonably explained the meaningful existence of each segment used in the injury analysis (e.g., by confirming distinguishable different purchase patterns), such that its segmented analysis is reasonably warranted.

9. Moreover, once an investigating authority determines to undertake a segmented analysis of the injury components, it must carry out that segmented analysis throughout its injury inquiry in a manner that proceeds in a "logical progression" and leads to an injury conclusion for the domestic industry as a whole. For example, an investigating authority may not cherry-pick and conduct a segmented analysis under volume but an overall analysis under price and impact. Instead, it must conduct its subsequent analyses on the basis of the same market segmentation and integrate its analyses at the end to determine whether subject imports are a cause of material injury to the domestic industry *as a whole*.

2. The Volume Analysis and the Price Analysis Under Article 15.2 of the SCM Agreement and Article 3.2 of the Anti-Dumping Agreement

10. Japan considers that the volume analysis under Article 15.2 of the SCM Agreement and Article 3.2 of the Anti-Dumping Agreement must examine whether there has been a significant increase in subject imports, and not merely the presence of subject imports, which includes two inquiries: first, whether subject imports have gone up; and second, whether subject imports have replaced domestic like products. The result of both inquiries must be affirmative in order to conclude that there has been a "*significant increase*" in subject import volumes.

11. Similarly, the price effects analysis under the same provisions requires an inquiry into the competitive relationship between subject imports and domestic like products, including whether subject import prices may result in reduced prices or sales of domestic like products, to establish any price effects are *significant*.

12. In short, this is because Article 15.2 of the SCM Agreement and Article 3.2 of the Anti-Dumping Agreement call for a "significant" volume increase and a "significant" price effect in the context of the "logical progression" through the series of inquiries from volume and price effects, to impact and causal link.[8] Such requirement necessitates the investigating authority to objectively examine: interactions in the market between the volume/price of the subject imports and that of the domestic like products, as appropriate in the context of each specific case and reflected in the

[6] *See* Appellate Body Report, *China – GOES*, para. 128.

[7] Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.204 (*citing* Appellate Body Report, *US – Hot-Rolled Steel*, para. 195) (emphases in original).

[8] *See* Appellate Body Report, *China – GOES*, paras. 128 and 138; Panel Report, *China – X-Ray Equipment*, para. 7.49.

trends of each; and any additional positive evidence pertaining to the degree of the competitive relationship between the subject imports and the domestic like products.

13. By doing so, the investigating authority can ascertain whether subject imports have been *replacing* domestic like products during the POI, such that any volume increase may be considered "significant". This also allows the investigating authority to ascertain whether price undercutting may have a "significant" "effect" on the price of the domestic like product, which may be (i) an actual decrease or prevention of increase in the prices of a domestic like product, or (ii) in the absence of such phenomena of domestic price, lost sales or a decrease in the volume or market share of a domestic like product caused by the lower priced imports.

14. Without a positive finding on such "significant" volume increase or price effects due to the subsidies or dumping, a concluding finding that subject imports have had an adverse impact on the domestic industry under Article 15.4 of the SCM Agreement or Article 3.4 of the Anti-Dumping Agreement would lack the aforementioned "logical progression" from the assessment of volume and price, and consequently would not be reasoned and adequate.

III. STANDARD OF REVIEW

15. Lastly, Japan would like to make a few comments on the standard of review for a panel's review of CVD measures, which the parties discuss in their answers to the Panel's questions.

16. First, Japan considers that the standard of review is essentially the same irrespective of whether a panel reviews CVD measures or AD measures. Article 17.6(i) of the Anti-Dumping Agreement does not conflict with Article 11 of the DSU which stipulates the standard of review under any of the covered agreements. The former provision reflects closely the obligation of "objective assessment" imposed under the latter provision, and the text of both provisions requires panels to actively review or examine the pertinent facts.[9] Moreover, the structure of review on a trade remedy measure (whether it be a CVD measure, AD measure, or safeguard measure) is essentially the same – that is, when a panel reviews the WTO-consistency of a Member's trade remedy measure, a panel must look into the determination by an investigating authority which is at the basis of the measure taken. Further, when a panel is reviewing a single injury determination concerning both subsidized and dumped imports and claims involving identical or almost identical provisions of the SCM Agreement and Anti-Dumping Agreement, it should seek to avoid inconsistent conclusions.[10]

17. Second, while a *de novo* review is prohibited, a panel must nonetheless make an objective assessment under Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement. In this regard, Japan recalls the following relevant findings by the Appellate Body:

> [*T]he panel conducts an "objective assessment" of whether the investigating authority provided a reasoned and adequate explanation of (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination.… Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in light of that alternative explanation*.[11]

18. As a panel must not conduct a *de novo* review of the evidence before the competent authority whose determination is subject to a WTO dispute,[12] a panel may not reach an alternative finding when both the investigating authority's finding and such alternative finding are among competing reasoned and adequate findings, and it may not reexamine the investigating authority's determination on the basis of new facts or evidence. However, a panel also may not completely

[9] Appellate Body Report, *US – Hot-Rolled Steel*, para. 55.
[10] *See* Panel Report, *US – Softwood Lumber VI*, para. 7.18.
[11] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.164.
[12] Ibid. (citing Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; *US – Countervailing Duty Investigation on DRAMS*, paras. 183 and 186-188; *US – Lamb*, para. 106.

defer to an investigating authority.[13] Instead, it is possible and moreover required under Article 11 of the DSU for panels to critically examine whether the investigating authority's finding is reasoned and adequate. In other words, under the applicable standard of review, a panel must still examine whether the investigating authority's finding does not contain a substantial logical flaw, based on the underlying explanations and facts.

[13] *See* Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.8.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO

Mexico's responses to certain questions from the Panel to the parties in advance of the first substantive meeting

1 SPECIFICITY CLAIMS

Question 2: Article 2.1(a) of the SCM Agreement refers to legislation which "explicitly limits access" to a subsidy. Under a proper interpretation of Article 2.1(a), does "access" refer to:

a. criteria that determines eligibility for the subsidy (i.e., whether certain enterprises can or cannot receive the subsidy); and/or

b. criteria that determines the amount of the subsidy (i.e., distinctions that affect amounts of subsidy that those enterprises will receive).

Please state your position and explain why.

Reply:

In our opinion, the phrase "explicitly limits access to a subsidy to certain enterprises" should be understood as referring to the existence of mechanisms or directives through which the subsidy is accessible only to the "certain enterprises" (the enterprise, industry, enterprises or industries) allegedly receiving the subsidy, something that is necessarily linked to eligibility criteria for the granting of the subsidy. In other words, the meaning of this expression implies that only certain enterprises that meet the criteria may receive the subsidy. We do not see anything in the text of the provision that refers to the subsidy being specific when access is generalized but distinctions exist in relation to the amount granted.

Question 3: Does Article 2.1(a) of the SCM Agreement establish a legal requirement for an investigating authority to review the eligibility criteria of a particular subsidy programme to establish that access to a subsidy is expressly limited within the meaning of that provision? Did the USDOC undertake such a review and did it rely on eligibility criteria in arriving at its finding of specificity?

Reply:

Article 2.1(a) establishes that for there to be specificity, the granting authority, or the legislation pursuant to which the granting authority operates, must explicitly limit access to a subsidy to certain enterprises. This means that for the investigating authority to be able to objectively determine that the limitation is indeed explicit and the subsidy therefore specific, it is obliged to analyse the eligibility requirements for the granting of a certain subsidy. We see no other way to conclude that the limitation on a subsidy is explicit than by analysing the conditions attached to the granting of the subsidy.

Question 4: Does the fact that a past subsidy programme was established under a legal instrument no longer in force mean that the past programme cannot serve as a basis for a *de jure* specificity determination? Please explain taking into account that Article 2.1(a) of the SCM Agreement states that "the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises".

Reply:

Mexico notes that, in principle, for an subsidy to be considered *de jure*, it is vital that it be established under a legal instrument. That legal instrument may be a law, a regulation, or even an administrative decree issued by the administrative authority empowered to do so. In that context, we do not believe

that Article 2.1(a), in mentioning "legislation", is referring exclusively to the rules emanating strictly from a body of legislation, but instead to any rule that may constitute a legal basis for validly taking action. We therefore consider that while a *de jure* subsidy may be established on any type of relevant legal basis, the fact that it is provided for on that legal basis and that the legal basis is in force, is absolutely necessary in order for the subsidy to be considered *de jure*.

Question 8: Could a finding that a subsidy programme is *de jure* specific to "certain enterprises" within the meaning of Article 2.1 of the SCM Agreement, (i.e., to olive growers as determined by the USDOC in the present dispute), be consistent with Article 2.1(a) of the SCM Agreement, if the evidence demonstrates that other enterprises (i.e., not only olive growers) were eligible for the payments under the same subsidy programme?

Reply:

Article 2.1 of the SCM Agreement clearly establishes that in order to determine whether a subsidy is specific to certain enterprises, various aspects must be considered. One such aspect is set out in Article 2.1(a), which requires that the authority or legislation explicitly limit access to the subsidy. Therefore, in order for the subsidy to be *de jure* specific in accordance with Article 2.1(a) of the SCM Agreement, there must be clear and explicit limitations in respect of the eligibility criteria that determine the "certain enterprises" that have access to the subsidy; thus, if the evidence demonstrates that other enterprises are eligible under the programme, the explicit limitations provided for in Article 2.1(a) of the SCM Agreement cannot exist at the same time. The determination that the subsidy is *de jure* would therefore be inconsistent with that Article.

In this regard, in *US – Countervailing Measures (China)*, the Appellate Body established the following:

> "In cases where an examination of the nature and content of the challenged measure indicates that access to a subsidy is *explicitly* limited to certain enterprises […] that are spelled out in *law, regulation, or other* official *document*, an investigating authority will normally begin by examining this evidence in the light of subparagraphs (a) and (b) in order to determine whether the subsidy is *de jure* specific. This analysis under subparagraphs (a) and (b) may lead an investigating authority to conclude that a subsidy is *de jure* specific within the meaning of Article 2.1(a), or that a subsidy is *not de jure* specific because there are objective criteria or conditions that are clearly spelled out in law, regulation, or other official document."[1]

Furthermore, in EC and certain member States – Large Civil Aircraft, the Panel determined that:

> "The specificity principle set out in Article 2.1(a) focuses on whether the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises. It follows […] that it is not any limitation on access to a subsidy to certain enterprises that will make it specific within the meaning of Article 2.1(a), but only a limitation that '{d}istinctly express{es} all that is meant; leaving nothing merely implied or suggested'; a limitation that is 'unambiguous' and 'clear'."[2]

In other words, if the corresponding legal instrument does not clearly establish the limitation on access to the subsidy for certain enterprises, or if it is ambiguous or leaves room for other enterprises to access the programmes, the subsidy cannot be considered *de jure* specific in accordance with Article 2.1(a) of the SCM Agreement.

It is therefore clear that a *de jure* specific subsidy for "certain enterprises" must be explicit, with limitations on access to the programme that are clearly defined in the corresponding legal instruments, and that if the eligibility analysis demonstrated, through evidence, that other enterprises were also eligible, the finding of *de jure* specificity would be inconsistent with Article 2.1(a) because the limitations did not exist or were not clear and unambiguous.

[1] Appellate Body Report, *US – Countervailing Measures (China)* (DS437), para. 4.120.
[2] Panel Report, *EC and certain member States – Large Civil Aircraft* (DS316), para. 7.919.

2 "PASS-THROUGH" OF BENEFIT CLAIMS

Question 14: In paragraphs 124-127 of its first written submission, the United States argues that the negotiating history of Article VI:3 of the GATT 1994 and the SCM Agreement supports a finding that no specific methodology is required with respect to the issue of pass-through.

(a) Please comment on the negotiating history to which the United States refers.

(b) How should Article VI:3 of the GATT 1994 and the relevant provisions of the SCM Agreement be interpreted in respect of whether any (and if so, what) methodology is required on the issue of pass-through?

Reply:

In our view, neither Article VI:3 of the GATT, nor the provisions of the SCM Agreement, nor WTO jurisprudence, have established any particular methodology to be used by an investigating authority to corroborate the pass-through of benefits, and merely indicate that it is the authority's obligation to conduct the relevant analysis to demonstrate the existence of that pass-through. What has been established, however, is that it is not enough to presume the existence of that pass-through, and that an analysis must be conducted to confirm the pass-through and, in turn, the impact on the price of the end product, unless the recipients of the subsidy are vertically integrated with the producers of the product subject to the countervailing duty, as in this case there is a direct link in the pass-through of the subsidy and its benefits, which does not occur when the producers (of the input and the end product) are not linked, in which case it is necessary to analyse and determine whether the subsidy on the inputs really affects (and to what extent) the end product subject to the countervailing duty determination.[3]

3 INJURY CLAIMS

Question 23: Could a requirement to examine other segments of the domestic industry, as well as the industry as a whole, be waived if an investigating authority explains why such examination is not necessary, as suggested in paragraph 204 of the Appellate Body report in *US – Hot-Rolled Steel*?

Reply:

In Mexico's view, the fact that the Appellate Body, in its report in *US – Hot-Rolled Steel*, established that in the event of a sectoral examination of the domestic industry "[one possibility is that] the investigating authorities […] provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry" does not mean that the investigating authority can simply provide an explanation, as could be inferred from the question, but rather that the explanation must be "satisfactory". In our opinion, this means that the explanation must be sufficiently detailed, structured and substantiated to constitute an explanation that properly justifies why the authority would not conduct an examination of the other segments of the domestic industry.

[3] Panel Report, *Mexico – Olive Oil* (DS341), paras. 7.136-7.140.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. INTRODUCTION

1. Turkey will, in the following paragraphs, refer to the relevant provisions (Articles 3.1, 3.2, 3.4, 3.5 and 4.1) of the Anti-Dumping Agreement and will not repeat the corresponding provisions (Articles 15.1, 15.2, 15.4, 15.5 and 16.1) of the Agreement on Subsidies and Countervailing Measures due to the parallelism between the relevant articles in both agreements.

II. CLAIMS RELATING TO THE PASS-THROUGH ANALYSIS

2. Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the General Agreement on Tariffs and Trade (GATT) require a pass-through analysis. Taking into account the abovementioned Articles, to apply an appropriate countervailing duty on imports, a member must conduct an investigation in all aspects to understand whether and to what extent a subsidy passed through from a grower of an agricultural product to the exported merchandise.

3. In *US – Softwood Lumber IV* the Appellate Body found that:[1]

> "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. Where the producer of the input is not the same entity as the producer of the processed product, it cannot be presumed, however, that the subsidy bestowed on the input passes through to the processed product. In such case, it is necessary to analyze to what extent subsidies on inputs may be included in the determination of the total amount of subsidies bestowed upon processed products. For it is only the subsidies determined to have been granted upon the processed products that may be offset by levying countervailing duties on those products."

4. In order to make a pass-through analysis that is required by the aforementioned Articles, an investigating authority should investigate whether processors have made purchases from the input producers through an arm's length transaction. An examination of whether a transaction is made at arm's length requires a look into whether there is price differentiation and as well as an analysis as to whether and to what extent a subsidy granted to an input product lowers its price and thus benefit passes through to processors. Although it appears that Section 771B does not call for an automatic application of pass through analysis in agricultural products and neither GATT and SCM Agreement require a particular methodology for conducting a pass through analysis, we think that there is no provision in SCM that differentiate agricultural products for an alternative and limited methodology in pass through analysis.

5. Furthermore, even if a subsidy provided to a grower of an agricultural product can pass-through to the exported goods by lowering raw product's prices, this is not a black and white issue. The investigating authority has to establish what amount of subsidy to the grower can pass through to processors. In doing this calculation an investigating authority shall take into account all parties, including growers and distributors to calculate the appropriate amount.

III. CLAIMS UNDER ARTICLES 3.1 AND 4.1 OF THE ANTI-DUMPING AGREEMENT

6. Article 4.1 of the Anti-Dumping Agreement defines the term "domestic industry" either as "the domestic producers as a whole of the like products" or "those producers whose collective output of the products constitutes a major proportion of the total domestic production of those products".

[1] Appellate Body Report, *US – Softwood Lumber IV*, para 140.

Turkey understands that Article 4.1 does not provide a specific methodology to define the domestic industry[2] and the investigating authority may choose to define it on either basis. However, Turkey understands that the investigating authority should identify the domestic producers as precisely as possible which, in turn, depends on the structure of the market of the like product and the number of producers in this market.

7. In case that the domestic industry does not refer to "the domestic producers as a whole", the investigating authority has a duty to define it as a "representative of the total domestic production"[3] so that the major proportion of the total production of the like product is reflected in definition of the domestic industry. Similarly, The Appellate Body in *EC – Fasteners (China)* stated that

> "… a domestic industry defined on the basis of a proportion that is low, or defined through a process that involves active exclusion of certain domestic producers, is likely to be more susceptible to a finding of inconsistency under Article 4.1 of the Anti-Dumping Agreement."[4]

8. On the other hand, the Panel in *Mexico – Corn Syrup (US)* stressed that "the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1".[5] Turkey understands that an adequate determination of the "domestic industry" is essential for an objective injury determination based on positive evidence.

9. Footnote 9 to Article 3 of the Anti-Dumping Agreement indicates that:

> Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to *a domestic industry*, threat of material injury to *a domestic industry* or material retardation of the establishment of *such an industry* and shall be interpreted in accordance with the provisions of this Article. (*emphasis added*)

10. The Panel in *Russia – Commercial Vehicles (EU)* stated that "… producers of domestic like products may not be left out of the definition of domestic industry on the basis of considerations or selection methods that, by their nature, are likely to distort the subsequent injury determination".[6] In a similar vein, the Appellate Body in *US – Hot Rolled Steel (Japan)* emphasized that "an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of objectivity in Article 3.1 of the Anti-Dumping Agreement".[7]

11. The investigating authority has to define the domestic industry in a manner that does not give rise to a material risk of distortion and ensure the accuracy of an injury determination.[8] When the investigating authority does not provide a satisfactory and reasonable explanation for definition of the domestic industry which is determined on the basis of a region, sub-sector, customer group etc., the domestic industry as such appears to be "selected among domestic producers based on their data to ensure a particular outcome".[9] Turkey understands that the risk of distortion in the injury determination would be less likely to occur if the universe of domestic producers is defined as adequately as possible and encompasses those producers whose data enable an objective analysis of the injury based on positive evidence.[10]

IV. CLAIMS UNDER ARTICLES 3.1, 3.2, 3.4 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

12. Turkey regards that objective evaluation of volume and price effects and impact analysis based on positive evidence are the milestones of the injury analysis within the legal framework of the Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement. As clearly stipulated in these articles,

[2] Panel Report, *China – Autos (US)*, para. 7.212.
[3] Appellate Body Report, *Russia – Commercial Vehicles (EU)*, para. 5.40.
[4] Appellate Body Report, *EC – Fasteners (China)*, para. 419.
[5] Panel Report, *Mexico – Corn Syrup (US)*, para. 7.147.
[6] Panel Report, *Russia – Commercial Vehicles (EU)*, para. 7.11.
[7] Appellate Body Report, *US – Hot Rolled Steel (Japan)*, para. 206.
[8] Appellate Body Report, *EC – Fasteners (China)*, para. 414.
[9] Panel Report, *Russia – Commercial Vehicles (EU)*, para. 7.15.
[10] Appellate Body Report, *EC – Fasteners (China)*, para. 414; Panel Report, *China – Broiler Products (US)*, para. 7.413.

investigating authorities are obliged to examine objectively and based on positive evidence whether "… there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member"[11] And whether "… there has been a significant price undercutting by the 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 prevent price increases, which otherwise would have occurred, to a significant degree"[12] and "… the consequent impact of these imports on domestic producers of such products"[13]

13. Turkey also understands that there is a high degree of interrelationship among Articles 3.1, 3.2, 3.4 and Article 4.1 as objective evaluation of volume and price effects and impact analysis based on positive evidence linked to adequate and objective determination of the domestic industry. As underlined in paragraph 9 of this submission, the Panel in *Mexico – Corn Syrup (US)* reiterates such understanding by referring to footnote 9 to Article 3 in construing the Article 4.1;[14] "These two provisions inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1".

14. In this regard, selective construction of the domestic industry based on certain subjective criteria and carrying out evaluation of volume and price effects and impact analysis relying upon only that limited definition of the domestic industry has a risk of materially distorting the injury analysis. The Appellate Body in *Russia – Commercial Vehicles (EU)* articulates a similar argument:[15]

> "… the non-inclusion of this category of producers could make the domestic industry definition no longer representative of the total domestic production, thereby undermining the accuracy of the injury analysis."

15. As implied by the Panel in *Morocco – Hot-Rolled Steel (Turkey)* by pointing out to a possible risk of material distortion where an investigating authority, relying arbitrarily upon only a certain limited definition of the domestic industry, may well increase the likelihood of existence of volume and price effects and their impact on domestic producers, thereby that of a non-objective conclusion that domestic industry is injured.[16]

16. However, such an approach should not be understood that Turkey overlooks the possibility of evaluation of volume and price effects and impact analysis based on a special definition of the domestic industry, i.e. segmentation into sub-parts. As several WTO disputes accredit the possibility of special definition of the domestic industry based on segmentation[17], Turkey acknowledges the validity of such analyses with regards to a segmented domestic industry, considering one of the two possible alternative steps explained by The Appellate Body in *US – Hot-Rolled Steel (Japan)* is taken:[18]

> "… where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry."

17. Turkey also would like to emphasize that since the Article 3.1, as the chapeau-like provision of the Article 3, stipulates inclusive obligations for evaluation of volume and price effects and impact analysis, a flawed or a biased determination on any kind of these three analyses may also violate the overarching requirements of "objective examination" based on "positive evidence". Illustrating

[11] Anti-Dumping Agreement, Article 3.2.
[12] Ibid.
[13] Ibid., Article 3.1.
[14] Panel Report, *Mexico – Corn Syrup (US)*, para. 7.147.
[15] Appellate Body Report, *Russia – Commercial Vehicles (EU)*, para. 5.21.
[16] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.272.
[17] Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.263; Panel Report, *China – X-Ray Equipment*, para. 7.88; Panel Report, *EC – Fasteners (China)*, para. 7.410.
[18] Appellate Body Report, *US – Hot-Rolled Steel (Japan)*, para. 204.

this argument, the Panel in *Mexico – Steel Pipes and Tubes (Guatemala)* makes a similar conclusion:[19]

> "In brief, examining only a part of the industry as defined by the investigating authority is not an *objective examination of positive evidence* since it is not representative of the overall state of the domestic industry." (*emphasis added*)

18. Article 3.5 provides that an investigating authority must establish a causal relationship between dumped imports and the injury to the domestic industry. In this respect, it imposes two conditions to establish a causal relationship between the two. First, the investigating authority is obliged to demonstrate the link between the "dumped imports" and "injury" by evaluating the volume and price effects of dumped imports as well as the impact of dumped imports on the domestic industry. Second, the investigating authority is under the responsibility to evaluate any known factors other than the dumped imports that contribute to the injury and shall refrain from attributing the impact of other factors to the dumped imports.

19. The Panel in *EC – Salmon (Norway)* stated that "where an investigating authority makes injury and causation determination on the basis of information related to an improperly defined domestic industry, it acts inconsistently with various provisions of Article 3".[20] Turkey agrees that an injury and causation determination should be based on positive evidence belonging to an adequately defined domestic industry. Yet, as long as the investigating authority refrains from materially distorting the injury and causation determination, Turkey does not underestimate the specific circumstances of a case which necessitate a special definition of the domestic industry.

V. CONCLUSION

20. With these comments, Turkey expects to contribute to the legal debate in this case, and would like to express again its appreciation for this opportunity to share its points of views.

[19] Panel Report, *Mexico – Steel Pipes and Tubes* (*Guatemala*), para. 7.328.
[20] Panel Report, *EC – Salmon (Norway)*, para. 7.124.