

ensure, and take the necessary steps to ascertain as accurately as possible the amount of subsidization bestowed on the investigated products; and

- b. the USDOC relied upon the margin of subsidization incorrectly determined for Aceitunas Guadalquivir in its determination of the "all others" rate of countervailing duties imposed on exporters of ripe olives that were not individually investigated.

7.403. In the light of our findings with respect to the European Union's claims under Article VI:3, we do not believe that making further findings on the merits of the European Union's complaint that the same USDOC actions are also inconsistent with Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement would contribute to achieving a positive solution of this dispute. Accordingly, we decline to make findings with respect to these claims.

7.404. In relation to the European Union's procedural claims, we find that the USDOC acted inconsistently with the United States' obligations under:

- a. Article 12.1 of the SCM Agreement because the USDOC failed to notify the respondents that the USDOC required information regarding the volume of purchases of raw olives processed into ripe olives; and
- b. Article 12.8 of the SCM Agreement because the USDOC failed to inform interested parties before the final determination that the volume of purchases of raw olives processed into ripe olives was an "essential fact under consideration".

## 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. With respect to the European Union's claims regarding the USDOC's *de jure* specificity determination:
  - i. the European Union has demonstrated that the USDOC's 29 May 2020 Remand Redetermination as it relates to the USDOC's original findings of *de jure* specificity is a measure or is part of the measure that is before the Panel in this dispute;
  - ii. the European Union has not demonstrated that the USDOC acted inconsistently with Articles 2.1 and 2.1(a) of the SCM Agreement merely because the USDOC based its findings of *de jure* specificity in the ripe olives countervailing duty investigation on the rules in the relevant subsidy programmes governing the calculation of the amounts of subsidies available to eligible enterprises;
  - iii. the European Union has not demonstrated that the USDOC acted inconsistently with Article 2.1(a) of the SCM Agreement because the USDOC's determination of *de jure* specificity was dependent upon how certain alleged features of past subsidy programmes no longer in force were relied upon and integrated into the BPS programme;
  - iv. the European Union has not demonstrated that, as a matter of fact, the USDOC found that the BPS/GP and SPS subsidies were *de jure* specific to olive growers as a result of being coupled or tied to olive production;
  - v. the USDOC acted inconsistently with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement because:
    - (1) the USDOC did not properly examine and account for the rules governing the allocation and valuation of BPS entitlements with respect to new farmers, farmers holding entitlements transferred under the SPS programme, and farmers no longer growing olives;

- (2) the USDOC relied upon erroneous factual findings with respect to function and role of the so called "regional rate" to support its determination of *de jure* specificity; and
- (3) the USDOC did not properly examine and account for the rules governing the allocation and valuation of SPS entitlements with respect to farmers with SPS entitlements obtained via transfer, and farmers holding COMOF programme-based entitlements no longer producing olives.

For the reasons set out in (v)(1)-(3), the USDOC's determination of *de jure* specificity was not based on a reasoned and adequate explanation of why access to the BPS and SPS subsidies was explicitly limited to olive growers, within the meaning of Articles 2.1 and 2.1(a) of the SCM Agreement, and was not clearly substantiated on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;

- vi. the USDOC acted inconsistently with Article 2.4 of the SCM Agreement to the extent that the USDOC's determinations of *de jure* specificity with respect to the SPS and BPS/GP subsidies relied upon an erroneous factual finding concerning the calculation of assistance under the COMOF programme<sup>832</sup>;
- vii. the European Union has not demonstrated that the USDOC acted inconsistently with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement because, contrary to the European Union's assertions:
  - (1) the USDOC's rejection of the arguments concerning the application of the convergence factor under the BPS programme was supported by record evidence, and to this extent, reasonably and adequately explained and based on clearly substantiated positive evidence;
  - (2) the totality of the USDOC's discussion of the rules governing the calculation of SPS payments reveals that the USDOC correctly understood that SPS payments were made to farmers and that Spain did not implement the SPS programme on a regional basis; and
  - (3) the lack of a formal specificity finding under US law does not undermine the USDOC's determinations of *de jure* specificity with respect to the SPS, BPS, and GP programmes, given the absence of any suggestion on the part of the European Union that the COMOF programme subsidies were not *de jure* specific, and in the light of the fact that the USDOC considered it had made sufficient factual findings to satisfy itself that those subsidies would be *de jure* specific under its domestic legislation, had it been required to make such a determination.

viii. given our findings at paragraphs 8.1.a.v and vi, the Panel declines to make further findings under Articles 1.2, 2.1, 2.1(a), 2.1(b), and 2.4 of the SCM Agreement.

- b. With respect to the European Union's claims in relation to Section 771B of the Tariff Act of 1930 and its application in the ripe olives countervailing duty investigation:
  - i. Section 771B of the Tariff Act of 1930 is as such inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement because it requires the USDOC to presume that the entire benefit of a subsidy provided in respect of a raw agricultural input product passes through to the downstream processed agricultural product, based on a consideration of only two factual circumstances, without leaving open the possibility of taking into account any other factors that may be relevant to the determination of whether there is any pass-through and, if so, its degree;

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<sup>832</sup> See para. 7.127(d) above.

- ii. the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement regarding its application of Section 771B of the Tariff Act of 1930 in the Spanish ripe olives countervailing duty investigation because it failed to establish the existence and extent of indirect subsidization taking into account all relevant facts and circumstances; and
  - iii. given our findings at paragraphs 8.1.b.i and ii, the Panel declines to make further findings under Articles 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement, either with respect to Section 771B of the Tariff Act of 1930 as such or the USDOC's application of Section 771B of the Tariff Act of 1930 in the in the Spanish ripe olives countervailing duty investigation.
- c. With respect to the European Union's claims regarding the USITC's Injury Determination:
- i. with respect to the United States' request for a preliminary ruling, the United States has not demonstrated that the European Union's claims under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement are not properly before the Panel;
  - ii. the European Union has not demonstrated that the USITC acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement, and Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by failing to undertake an analysis of the volume of ripe olives from Spain based on an objective examination of positive evidence;
  - iii. the European Union has not demonstrated that the USITC acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement, and Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by failing to consider a "volume effect" within the meaning of Article 15.2 of the SCM Agreement and Article 3.2 of the Anti-Dumping Agreement;
  - iv. the European Union has not demonstrated that the USITC acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement, and Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by failing to undertake an analysis of the price effects of ripe olives from Spain that was based on an objective examination of positive evidence;
  - v. given our findings at paragraphs c.ii-iv, the European Union has not demonstrated that the USITC acted inconsistently with Articles 15.4 and 15.5 of the SCM Agreement, and Articles 3.4 and 3.5 of the Anti-Dumping Agreement, as a consequence of alleged violations concerning the USITC's volume analysis and price effects analysis;
  - vi. the European Union has not demonstrated that the USITC acted inconsistently with Articles 15.1 and 15.4 of the SCM Agreement, and Articles 3.1 and 3.4 of the Anti-Dumping Agreement, by failing to undertake an analysis of the consequent impact of ripe olives from Spain on the domestic industry that was based on an objective examination of positive evidence;
  - vii. given our findings at paragraph c.vi, the European Union has not demonstrated that the USITC acted inconsistently with Article 15.5 of the SCM Agreement, and Article 3.5 of the Anti-Dumping Agreement, as a consequence of alleged violations concerning the USITC's impact analysis; and
  - viii. the European Union has not demonstrated that the USITC acted inconsistently with Articles 15.1 and 15.5 of the SCM Agreement, and Articles 3.1 and 3.5 of the Anti-Dumping Agreement, by failing to undertake a causation analysis that was based on an objective examination of positive evidence.
- d. With respect to the European Union's claims concerning Aceitunas Guadalquivir's final subsidy margin and countervailing duty rate calculation:
- i. the USDOC acted inconsistently with Article VI:3 of the GATT 1994 because, by relying on the volume of Aceitunas Guadalquivir's raw olive purchases reported in its response

to the initial 4 August 2017 questionnaire to determine Aceitunas Guadalquivir's final subsidy margin and countervailing duty rate, the USDOC did not ensure, and take the necessary steps to ascertain as accurately as possible the amount of subsidization bestowed on the investigated products;

- ii. the USDOC acted inconsistently with Article VI:3 of the GATT 1994 because the USDOC relied upon the margin of subsidization incorrectly determined for Aceitunas Guadalquivir in its determination of the "all others" rate of countervailing duties imposed on exporters of ripe olives that were not individually investigated;
- iii. given our findings at paragraphs 8.1.d.i and ii, the Panel declines to make further findings that the same USDOC actions are also inconsistent with Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement;
- iv. the USDOC acted inconsistently with Article 12.1 of the SCM Agreement because the USDOC failed to notify the respondents that the USDOC required information regarding the volume of purchases of raw olives processed into ripe olives; and
- v. the USDOC acted inconsistently with Article 12.8 of the SCM Agreement because the USDOC failed to inform interested parties before the final determination that the volume of purchases of raw olives processed into ripe olives was an "essential fact under consideration".

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the GATT 1994, the SCM Agreement and Anti-Dumping Agreement, they have nullified or impaired benefits accruing to the European Union under that agreement.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under the GATT 1994, the SCM Agreement, and the Anti-Dumping Agreement.

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