WORLD TRADE ORGANIZATION

WT/DS577/R

19 November 2021

(21-8711)

Page: 1/146

Original: English

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

REPORT OF THE PANEL

BCI deleted, as indicated [[***]]

TABLE OF CONTENTS

LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
Australia – Anti-Dumping Measures on Paper	Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R and Add.1, adopted 28 January 2020
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – Broiler Products (Article 21.5 – US)	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS427/RW and Add.1, adopted 28 February 2018 DSR 2018:II, p. 839
China – Cellulose Pulp	Panel Report, *China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada*, WT/DS483/R and Add.1, adopted 22 May 2017, DSR 2017:IV, p. 1961
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573

Short Title	Full Case Title and Citation
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R, DSR 2015:IX, p. 4789
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, p. 1269
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
EU – Biodiesel (Argentina)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871

Short Title	Full Case Title and Citation
EU – Biodiesel (Indonesia)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/R and Add.1, adopted 28 February 2018 DSR 2018:II, p. 605
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
Indonesia – Chicken	Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017:VIII, p. 3769
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Pneumatic Valves (Japan)	Appellate Body Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/AB/R and Add.1, adopted 30 September 2019
Korea – Pneumatic Valves (Japan)	Panel Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/R and Add.1, adopted 30 September 2019, as modified by Appellate Body Report WT/DS504/AB/R
Korea – Stainless Steel Bars	Panel Report, *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars*, WT/DS553/R and Add.1, circulated to WTO Members 30 November 2020 [appealed by Korea 22 January 2021]
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, p. 3179
Morocco – Definitive AD Measures on Exercise Books (Tunisia)	Panel Report, *Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, WT/DS578/R and Add.1, circulated to WTO Members 27 July 2021 [appealed by Morocco 28 July 2021]
Morocco – Hot-Rolled Steel (Turkey)	Panel Report, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*, WT/DS513/R and Add.1, adopted 8 January 2020; appeal withdrawn by Morocco as reflected in Appellate Body Report WT/DS513/AB/R
Russia – Commercial Vehicles	Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/AB/R and Add.1, adopted 9 April 2018, DSR 2018:III, p. 1167
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701

Short Title	Full Case Title and Citation
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Anti-Dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
US – Canadian Pork	GATT Panel Report, *United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, DS7/R, adopted 11 July 1991, BISD 38S/30
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Carbon Steel (India) (Article 21.5 – India)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Recourse to Article 21.5 of the DSU by India*, WT/DS436/RW and Add.1, circulated to WTO Members 15 November 2019 [appealed by the United States 18 December 2019]
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373
US – Coated Paper (Indonesia)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R and Add.1, adopted 22 January 2018, DSR 2018:I, p. 273
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Countervailing Duty Investigation on DRAMS	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R, DSR 2005:XVII, p. 8243
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:I, p. 7
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3

Short Title	Full Case Title and Citation
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Pipes and Tubes (Turkey)	Panel Report, *United States – Countervailing Measures on Certain Pipe and Tube Products from Turkey*, WT/DS523/R and Add.1, circulated to WTO Members 18 December 2018 [appealed by the United States 25 January 2019 – the Division suspended its work on 10 December 2019]
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, p. 641
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Softwood Lumber VII	Panel Report, *United States – Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/R and Add.1, circulated to WTO Members 24 August 2020 [appealed by the United States 28 September 2020]
US – Supercalendered Paper	Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/R and Add.1, adopted 5 March 2020, as upheld by Appellate Body Report WT/DS505/AB/R
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299

Short Title	Full Case Title and Citation
US – Washing Machines	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R and Add.1, adopted 26 September 2016, DSR 2016:V, p. 2275
US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title (if any)	Description/Long title
EU-1	PIDM	Memorandum dated 20 November 2017 from J. Maeder to G. Taverman concerning the decision memorandum for the preliminary determination in the countervailing duty investigation of ripe olives from Spain
EU-2	FIDM	Memorandum dated 11 June 2018 from J. Maeder to G. Taverman concerning the issues and decision memorandum for the final determination in the countervailing duty investigation of ripe olives from Spain
EU-5	Injury Determination	USITC, Ripe Olives from Spain, Investigation Nos. 701-TA-582 and 701-TA-1377 (final), Publication 4805 (July 2018)
EU-10	Notice of determinations	Ripe Olives from Spain: Determinations, investigation Nos. 701-TA-582 and 731-TA-1377 (final), United States Federal Register, Vol. 83, No. 147 (31 July 2018), p. 36966
EU-14	Submission by the GOS in relation to the preliminary determination	Submission by the Government of Spain in relation to the preliminary determination (27 April 2018)
EU-15	GOS's response to supplemental questionnaire of 10 January 2017	Government of Spain's response to supplemental questionnaire (10 January 2017)
EU-17	Agro Sevilla response to the sourcing questionnaire (public version)	Agro Sevilla Aceitunas S.Coop. And.'s response to the USDOC's questionnaire concerning sources of raw and ripe olives (14 August 2017) (public version)
EU-18	EC internal convergence document	European Commission, "Direct payments: the Basic Payment Scheme from 2015 – Convergence of the value of payment Entitlements ('Internal Convergence')" (December 2015)
EU-19	Royal Decree 1075/2014	Ministry of Agriculture, Food and Environment, Royal Decree No. 1075/2014 of 19 December, concerning implementation, starting on year 2015, of direct payments to agriculture, farming and other aid schemes, as well as concerning management and control of direct payments and payments to rural development, Official Spanish Gazette, No. 307 (20 December 2014)
EU-21	Order AAA/544/2015	Ministry of Agriculture, Food and Environment, Order AAA/544/2015, of March 30th, establishing the distribution coefficients to be used for calculation of the initial value of the basic payment rights to carry out the first assignment of rights in the 2015 campaign in the event that the farmer declares surface in more than one region, Official Spanish Gazette, No. 78, Section I (1 April 2015) pp. 27642-27643
EU-22	USDOC verification report: European Commission	Memorandum dated 2 April 2018 concerning the countervailing duty investigation: ripe olives from Spain – verification report: European Commission
EU-23	Regulation 73/2009	Council Regulation (EC) No. 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No. 1290/2005, (EC) No. 247/2006, (EC) No. 378/2007 and repealing

Exhibit	Short Title (if any)	Description/Long title
		Regulation (EC) No. 1782/2003, Official Journal of the European Union, L Series, No. 30 (31 January 2009), p. 16
EU-24	Regulation 1782/2003	Council Regulation (EC) No. 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No. 2019/93, (EC) No. 1452/2001, (EC) No. 1453/2001, (EC) No. 1454/2001, (EC) 1868/94, (EC) No. 1251/1999, (EC) No. 1254/1999, (EC) No. 1673/2000, (EEC) No. 2358/71 and (EC) No. 2529/2001, Official Journal of the European Union, L Series, No. 270 (21 October 2003), p. 1
EU-25	Regulation 1307/2013	Regulation (EU) No. 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No. 637/2008 and Council Regulation (EC) No. 73/2009, Official Journal of the European Union, L Series, No. 347 (20 December 2013), p. 608
EU-26	Regulation 1638/98	Council Regulation (EC) No. 1638/98 of 20 July 1998 amending Regulation No. 136/66/EEC on the establishment of a common organization of the market in oils and fats, Official Journal of the European Communities, L Series, No. 210 (28 July 1998), p. 32
EU-30	Royal Decree 1076/2014	Ministry of Agriculture, Food and Environment, Royal Decree No. 1076/2014 of 19 December concerning allocation of basic payment scheme entitlements of the Common Agricultural Policy, Official Spanish Gazette, No. 307 (20 December 2014)
EU-31	Newsletter No. 2, Basic payment entitlement allocation	Newsletter No. 2, Basic payment entitlement allocation
EU-32	Order AAA/1747/2016	Ministry of Agriculture, Food and Environment, Order AAA/1747/2016, of 26 October, establishing the final regional average values and the maximum number of basic payment rights, established by initial allocation, that characterize each of the regions of the regional implementation model for the basic payment scheme, Official Spanish Gazette, No. 268, Section I (5 November 2016), p. 11361
EU-34	Preliminary determination on injury	USITC, Ripe Olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (Preliminary), Publication 4718 (August 2017)
EU-36	Aceitunas Guadalquivir preliminary determination	Memorandum dated 20 November 2017 concerning the preliminary determination calculations for Aceitunas Guadalquivir, S.L.U.
EU-37	Agro Sevilla preliminary determination	Memorandum dated 20 November 2017 concerning the preliminary determination calculations for Agro Sevilla Aceitunas S. Coop. And.
EU-38	Ángel Camacho preliminary determination	Memorandum dated 20 November 2017 concerning the preliminary determination calculations for Ángel Camacho Alimentación S.L.

Exhibit	Short Title (if any)	Description/Long title
EU-39	Agro Sevilla final determination	Memorandum dated 11 June 2018 concerning the final determination calculations for Agro Sevilla Aceitunas S. Coop. And.
EU-40	Ángel Camacho final determination	Memorandum dated 11 June 2018 concerning the final determination calculations for Ángel Camacho Alimentación S.L.
EU-41	Aceitunas Guadalquivir final determination	Memorandum dated 11 June 2018 concerning the final determination calculations for Aceitunas Guadalquivir, S.L.U.
EU-42 (BCI)	Agro Sevilla response to the sourcing questionnaire	Agro Sevilla Aceitunas S. Coop. And. response to the USDOC's questionnaire concerning sources of raw and ripe olives (14 August 2017)
EU-43 (BCI)	Extract from Agro Sevilla final calculation data	Extract from Agro Sevilla Aceitunas S. Coop. And. final calculation data, tab "AS Sales" (11 June 2018)
EU-44 (BCI)	Ángel Camacho response to the sourcing questionnaire	Ángel Camacho Alimentación, S.L.'s Olive sourcing questionnaire response (14 August 2017)
EU-45 (BCI)	Extract from Ángel Camacho final calculation data	Extract from Ángel Camacho Alimentación, S.L. final calculation data, tab SAIS suppliers (11 June 2018)
EU-47 (BCI)	Extract from Aceitunas Guadalquivir final calculation data	Extract from Aceitunas Guadalquivir, S.L.U final calculation data, tab BPS Growers (11 June 2018)
EU-49	19 USC 1677-1	United States House of representatives, Office of the Law Revision Counsel, United States Code, Title 19, Section 1677-1, Upstream Subsidies
EU-50	Asociación de Exportadores e Industriales de Mesa et al. v. United States	United States Court of International Trade, Slip Op. 20-8, Asociación de exportadores e industriales de Aceitunas de Mesa, Aceitunas Guadalquivir, S.L.U., Agro Sevilla Aceitunas S. Coop. And., and Ángel Camacho Alimentación, S.L. v. United States (17 January 2020)
EU-51	Frozen warmwater shrimp FIDM	Memorandum dated 12 August 2013 concerning the final determination in the Countervailing Duty investigation of certain frozen warmwater shrimp from the People's Republic of China
EU-52	19 USC 1677-2	Calculation of countervailable subsidies on certain processed agricultural products, US House of representatives, Office of the Law Revision Counsel, United States Code, Title 19, Section 1677-2
EU-58	Letter to Aceitunas Guadalquivir on questionnaire	Letter dated on 4 August 2017 from the USDOC to Aceitunas Guadalquivir, S.L.U., on questionnaire on sources of raw and ripe olives
EU-59	Aceitunas Guadalquivir fourth supplemental questionnaire response	Fourth supplemental questionnaire response of Aceitunas Guadalquivir S.L.U., Narrative part (5 January 2018)
EU-60	Letter from the USDOC on clarification	Letter dated 27 September 2017 from the USDOC on Ripe Olives from Spain countervailing duty investigation: clarification
EU-61	Reporting template for processors of ripe olives	Reporting template for processors of ripe olives, attached to the questionnaire on sources of raw and ripe olives (4 August 2017)
EU-62	Supplemental questionnaire to Aceitunas Guadalquivir	Countervailing Duty investigation of ripe olives from Spain: Supplemental questionnaire to Aceitunas Guadalquivir, S.L.U. (21 December 2017)
EU-63	Aceitunas Guadalquivir response to the sourcing questionnaire	Aceitunas Guadalquivir, S.L.U. olive sourcing questionnaire response (14 August 2017)

Exhibit	Short Title (if any)	Description/Long title
EU-64 (BCI)	Ángel Camacho revised olive sourcing data	Ángel Camacho Alimentación, S.L. revised olive sourcing data (6 October 2017)
EU-65 (BCI)	Agro Sevilla revised olive sourcing data	Agro Sevilla Aceitunas S. Coop. And. revised olive sourcing data (6 October 2017)
EU-68	Ángel Camacho response to the sourcing questionnaire (public version)	Ángel Camacho Alimentación, S.L. Olive sourcing questionnaire response (14 August 2017)
EU-69	Ministerial error memorandum	Memorandum dated 12 July 2018 on Ripe Olives from Spain: amended final determination of countervailing duty investigation pursuant to ministerial error allegation
EU-71 (BCI)	Aceitunas Guadalquivir comments for the final determination	Aceitunas Guadalquivir S.L.U, Ministerial error comments for the final determination (18 June 2018)
EU-76	Extract from Aceitunas Guadalquivir final calculation data, tab BPS Growers	Extract from Aceitunas Guadalquivir final calculation data, tab BPS Growers (11 June 2018)
EU-77	19 USCFR 351.525	United States Code of Federal Regulations, Title 19, Section 351.525, Calculation of ad valorem subsidy rate and attribution of subsidy to a product
EU-78	Ángel Camacho revised olive sourcing data (public version)	Ángel Camacho Alimentación, S.L. Revised Olive sourcing data (6 October 2017)
EU-79	Agro Sevilla revised olive sourcing data (public version)	Agro Sevilla Aceitunas S. Coop. And. Revised Olive sourcing data (6 October 2017)
EU-80	Remand Redetermination	USDOC, final results of Remand Redetermination, Asociación de Exportadores e Industriales de Aceitunas de Mesa, Aceitunas Guadalquivir, S.L.U., Agro Sevilla Aceitunas S. Coop. And., and Ángel Camacho Alimentación, S.L. v. United States (29 May 2020)
USA-4	Government of Spain's prehearing brief	Government of Spain's prehearing brief for the final phase in the investigation on ripe olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (17 May 2018)
USA-5	Report accompanying Government of Spain's prehearing brief	Government of Spain's report carried out by AGRIBUSINESS INTELLIGENCE-INFORMA for the final phase of the investigation on ripe olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (17 May 2018)
USA-6	Letter to Agro Sevilla on questionnaire	Letter dated 4 August 2017 from the USDOC to Agro Sevilla Aceitunas S. Coop. And. regarding questionnaire on sources of raw and ripe olives
USA-7	Letter to Ángel Camacho on questionnaire	Letter dated 4 August 2017 from the USDOC to Ángel Camacho Alimentación, S.L. regarding questionnaire on sources of raw and ripe olives
USA-9	Congressional record S8787-01	133 Congressional record S8787-01 (26 June 1987)
USA-14	Letter to Aceitunas Guadalquivir regarding questionnaire to unaffiliated suppliers	Letter dated 7 September 2017 from the USDOC to Aceitunas Guadalquivir, S.L.U. regarding questionnaire to unaffiliated suppliers
USA-18	Letter to Agro Sevilla regarding verification of questionnaire responses	Letter dated 2 February 2018 from the USDOC to Agro Sevilla Aceitunas S. Coop. And regarding verification of questionnaire responses

Exhibit	Short Title (if any)	Description/Long title
USA-19	Letter to Ángel Camacho regarding verification of questionnaire responses	Letter dated 2 February 2018 from the USDOC to Ángel Camacho Alimentación S.L. regarding verification of questionnaire responses
USA-20	Case brief of petitioner in Countervailing Duty Investigation of Ripe Olives from Spain (23 April 2018)	Case brief of petitioner in countervailing duty investigation of ripe olives from Spain (23 April 2018)
USA-21	Letter to Aceitunas Guadalquivir regarding verification of questionnaire responses	Letter dated 9 February 2018 from the USDOC to Aceitunas Guadalquivir, S.L.U. regarding verification of questionnaire responses
USA-22	Aceitunas Guadalquivir verification report	Memorandum dated 22 March 2018 regarding the verification of the questionnaire responses of Aceitunas Guadalquivir, S.L.U.
USA-24	Rebuttal brief	Rebuttal Brief of ASEMESA, Agro Sevilla Aceitunas S. Coop. And., Ángel Camacho Alimentación, S.L., and Aceitunas Guadalquivir S.L.U. (8 May 2018)
USA-29	Definition of "access" from The Oxford English Dictionary	Oxford Dictionaries online, definition of "access"
USA-33	Commission Implementing Regulation (EU) 2016/181	Commission Implementing Regulation (EU) 2016/181 of 10 February 2016 imposing a provisional anti-dumping duty on imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation, Official Journal of the European Union, L Series, No. 37 (12 February 2016), p. 1
USA-34	Commission Regulation (EC) 896/2007	Commission Regulation (EC) No. 896/2007 of 27 July 2007 imposing a provisional anti-dumping duty on imports of dihydromyrcenol originating in India, Official Journal of the European Union, L Series, No. 196 (28 July 2007), p. 3
USA-35	Commission Regulation (EC) 1611/2003	Commission Regulation (EC) No. 1611/2003 of 15 September 2003 imposing provisional anti-dumping duties on imports of certain stainless steel cold-rolled flat products originating in the United States of America, Official Journal of the European Union, L Series, No. 230 (16 September 2003), p. 9

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Aceitunas Guadalquivir	Aceitunas Guadalquivir, S.L.U.
Agro Sevilla	Agro Sevilla Aceitunas S. Coop. And.
Ángel Camacho	Ángel Camacho Alimentación, S.L.
BCI	Business confidential information
BPS	Basic Payment Scheme – Direct Payment
CAP	Common Agricultural Policy
COMOF	Common Organization of Markets in Oils and Fats
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
GOS	Government of Spain
GP	Basic Payment Scheme – Greening
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS	Single Payment Scheme
USCIT	United States Court of International Trade
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the European Union

1.1. On 28 January 2019, the European Union requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 20 March 2019 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 16 May 2019, the European Union requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 24 June 2019, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the European Union in document WT/DS577/3, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS577/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 8 October 2019, the European Union requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 18 October 2019, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Daniel Moulis
Members:	Mr Martin Garcia Ms Charis Tan

1.6. Australia, Brazil, Canada, China, India, Japan, Mexico, the Russian Federation, the Kingdom of Saudi Arabia, Switzerland, and Turkey notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties on 5 December 2019, the Panel adopted its Working Procedures[5], Additional Working Procedures on Business Confidential Information (BCI)[6], and timetable on 6 January 2020. The Panel revised its timetable during the panel proceedings in light of subsequent developments.[7]

1.8. The European Union submitted its first written submission on 27 January 2020, and the United States submitted its first written submission on 17 March 2020. On 26 March 2020, the Panel

[1] Request for consultations by the European Union, WT/DS577/1 (European Union's consultation request).
[2] Request for the establishment of a panel by the European Union, WT/DS577/3 (European Union's panel request).
[3] DSB, Minutes of the meeting held on 24 June 2019, WT/DSB/M/430.
[4] Constitution note of the Panel, WT/DS577/4.
[5] See Annex A-1.
[6] See Annex A-2.
[7] The timetable was updated and revised on 13 January, 21 July, 29 October 2020, and 9 June 2021.

postponed the original dates for the first substantive meeting due to the imposition of various restrictions on gatherings and international travel in relation to the COVID-19 pandemic. To facilitate its continued work on the dispute, on 18 May 2020 the Panel posed written questions to the parties and third parties concerning certain factual and legal issues, pursuant to its authority under paragraph 9(1) of the Working Procedures of the Panel and Article 13 of the DSU. The Panel received the parties' and certain third parties' responses to these questions on 10 June 2020. On 21 July 2020, the Panel requested the parties to comment on certain legal and factual issues raised by the parties' 10 June 2020 responses and received the parties' comments on 8 September 2020.

1.9. In light of the continuation of the restrictions imposed on gatherings and international travel in relation to the COVID-19 pandemic, the Panel determined that it would still not be possible to hold the first substantive meeting fully in person at the WTO premises within a reasonable timeframe. Accordingly, after several rounds of consultations with the parties, on 18 September 2020 the Panel decided to hold the first substantive meeting virtually through the Cisco Webex platform, with the possibility for limited participation on the WTO premises.[8] The Panel decided to proceed in this manner after careful consideration of the circumstances at hand. Since it did not appear likely that the parties and the Panel would be able to meet in person at the WTO premises in the foreseeable future, the Panel considered that conducting the first substantive meeting virtually was a reasonable and secure alternative that would comply with the requirements of the DSU, preserve the parties' due process rights, and avoid further delay in the proceedings.[9] For the purpose of conducting the first substantive meeting, and after consulting with the parties, the Panel adopted Additional Working Procedures of the Panel Concerning Holding a Substantive Meeting Conducted via Cisco Webex on 9 October 2020.[10] These procedures stipulated how the meeting would be conducted and set out certain technical and security requirements. In organizing the meeting, the Panel made its best efforts to accommodate the technological and logistical concerns raised by the parties. The Panel held the first substantive meeting with the parties on 19 and 22 October 2020. The third-party session of the first substantive meeting took place on 20 October 2020. On 29 October 2020, the Panel posed an additional set of written questions to the parties. The Panel received the parties' responses to these questions on 12 November 2020. The parties submitted their second written submissions on 10 December 2020.

1.10. Due to the continuing restrictions imposed on gatherings and international travel in relation to the COVID-19 pandemic, the Panel further determined that it would not be possible to hold the second substantive meeting in person within a reasonable timeframe. Therefore, after consultations with the parties, the Panel decided to hold the second substantive meeting in a virtual format with the possibility for limited participation on the WTO premises. For the purpose of this meeting, after consulting with the parties, the Panel adopted Additional Working Procedures of the Panel Concerning Holding a Substantive Meeting Conducted via Cisco Webex on 30 November 2020.[11] In organizing the meeting, the Panel again made its best efforts to accommodate the technological and logistical concerns raised by the parties. The Panel held its second substantive meeting with the parties on 3 and 4 February 2021. On 11 February 2021, the Panel posed a further set of written questions to the parties. The Panel received the parties' responses to these questions on 25 February 2021, and comments from the parties on these responses on 11 March 2021. The Panel posed a final set of written questions on 5 March 2021 and received responses on 26 March 2021, and comments on these responses on 13 April 2021.

1.11. At the request of the parties, the Panel's meetings with the parties were opened to the public. Due to the continuing restrictions imposed on gatherings and international travel, and after

[8] The virtual format allowed parties and third parties to participate in the meeting remotely through the Cisco Webex platform, while at the same time leaving open the possibility for a limited number of delegates to attend the meeting on the WTO premises.

[9] In this regard, Article 3.3 of the DSU contemplates the prompt settlement of disputes while Article 12 of the DSU provides panels with flexibility in terms of the procedures that govern the panel process. The European Union agreed that the Articles 12.1 and 12.2 of the DSU provide panels with flexibilities in terms of organising the panel process, provided that the principle of due process is respected. The United States did not consider that the proposed virtual format would be adequate to protect the parties' rights under the DSU because, among other things, capital-based delegates could not attend in person, thus preventing the contemporaneous oral exchange of views either amongst members of the delegation of the United States, or with the Panel or the European Union.

[10] See Annex A-4.

[11] See Annex A-5.

consulting with the parties, the Panel decided to webcast audio recordings of the meetings.[12] A portion of the Panel's meeting with the third parties was also opened to the public.[13]

1.12. On 9 June 2021, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 7 July 2021. On 19 August 2021, following a joint request by the parties, the Panel postponed the issuance of its final report until 16 September 2021. On 16 September 2021, following an additional request by the parties, the Panel further postponed the issuance of its final report until 3 November 2021.The Panel issued its Final Report to the parties on 3 November 2021.

1.3.2 Preliminary ruling on the Panel's terms of reference

1.13. With its first written submission on 17 March 2020, the United States requested a preliminary ruling pursuant to paragraph 4 of the Panel's Working Procedures 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, because those claims were not identified in the European Union's request for the establishment of a panel.[14]

1.14. At the Panel's invitation, on 20 May 2020, the European Union submitted a written response to the United States' request for a preliminary ruling.[15]

1.15. On 18 September 2020, the Panel informed the parties of its decision to deny the United States' request.[16] The Panel's underlying reasoning in relation to the United States' preliminary ruling request is set out in section 7.4.1 below.

1.3.3 Request to address certain aspects of the USDOC's Remand Redetermination of 29 May 2020

1.16. On 2 July 2020, the European Union requested to address in its remaining submissions certain aspects of the Final Results of Remand Redetermination, Asociación de Exportadores e Industriales de Aceitunas de Mesa, Aceitunas Guadalquivir, S.L.U. (Aceitunas Guadalquivir), Agro Sevilla Aceitunas S. Coop. And. (Agro Sevilla), and Ángel Camacho Alimentación, S.L. (Ángel Camacho) v. United States issued by the United States Department of Commerce (USDOC) on 29 May 2020 (Remand Redetermination). The Remand Redetermination did not exist at the time of establishment of the Panel.

1.17. At the Panel's invitation, on 10 July 2020, the United States commented on the European Union's request.[17]

1.18. On 18 September 2020, the Panel informed the parties of its decision to grant the European Union's request.[18] The Panel's underlying reasoning in relation to the European Union's request is set out in section 7.2.1 below.

2 FACTUAL ASPECTS: THE MEASURES AT ISSUE

2.1. The measures at issue in the present dispute concern countervailing and anti-dumping duties that the United States imposed in connection with its investigations concerning imports of ripe olives from Spain. In particular, the European Union's panel request refers to the following:

a. Ripe Olives from Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 FR 37469, 1 August 2018;

[12] Additional Working Procedures of the Panel: Open Meetings (Delayed Online Broadcast), Annex A-6.
[13] Canada consented to having audio recordings of their statements shared with the public. The Panel also provided the audience with written copies of the parties' and Canada's statements, and written copies of the parties' responses to the Panel's questions at the meeting.
[14] United States' first written submission, paras. 19-27.
[15] European Union's response to the United States' preliminary ruling request.
[16] Panel's communication of 18 September 2020, Annex A-3.
[17] United States' response to the European Union's request (10 July 2020).
[18] Panel's communication of 18 September 2020, Annex A-3.

b. Ripe Olives from Spain: Antidumping Duty Order, 83 FR 37467, 1 August 2018;

c. Ripe Olives from Spain: Final Affirmative Countervailing Duty Determination, C-469-818, DOC, 11 June 2018, 83 FR 28186, 18 June 2018;

d. Ripe Olives from Spain: Final Affirmative Determination of Sales at Less Than Fair Value, A-469-817, DOC, 11 June 2018, 83 FR 28193, 18 June 2018; and

e. Ripe Olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (Final), United States International Trade Commission (USITC), Publication 4805, July 2018.

2.2. The Panel also accepted the European Union's request[19] to address certain aspects of the USDOC's Remand Redetermination of 29 May 2020, reflected in the following document:

a. USDOC, Final Results of Remand Redetermination, Asociación de Exportadores e Industriales de Aceitunas de Mesa, Aceitunas Guadalquivir, S.L.U., Agro Sevilla Aceitunas S. Coop. And., and Ángel Camacho Alimentación, S.L. v. United States (29 May 2020).

2.3. The European Union also challenges "as such" Section 771B of the Tariff Act of 1930, relating to the calculation of countervailable subsidies on certain processed agricultural products.[20]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The European Union requests the Panel to find that the USDOC and the USITC acted inconsistently with the United States' obligations under the Anti-Dumping Agreement, the SCM Agreement, and the GATT 1994.

3.2. With respect to the USDOC's determination of *de jure* specificity, the European Union claims that the USDOC acted inconsistently with:

a. Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement by failing to examine the eligibility conditions governing the Single Payment Scheme (SPS), Basic Payment Scheme – Direct Payment (BPS), and Basic Payment Scheme – Greening (GP) programmes and to demonstrate that those conditions explicitly limited access to the subsidy to certain enterprises[21];

b. Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement by finding that the SPS, BPS, and GP programmes are *de jure* specific because the assistance provided to olive growers was tied to the production of olives[22];

c. Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement by grounding its *de jure* specificity analysis on the Common Organization of Markets in Oils and Fats (COMOF) programme, which was no longer in force, and building a link between that programme and the amount of assistance provided under the BPS and GP programmes, when the record evidence demonstrated no direct correlation between the current and past programmes[23];

d. Articles 2.1, 2.1(b), and 2.4 of the SCM Agreement by failing to analyse whether the criteria governing the eligibility for, and the amount of, the SPS, BPS, and GP programmes complied with the requirements of Article 2.1(b) of the SCM Agreement[24];

[19] See section 1.3.3 above.
[20] Section 771B is codified in 19 USC 1677-2, (Exhibit EU-52).
[21] European Union's first written submission, paras. 208-209.
[22] European Union's first written submission, para. 227.
[23] European Union's first written submission, paras. 240 and 246.
[24] European Union's first written submission, paras. 279-280.

e. Articles 2.1, 2.1(a), 2.1(b), and 2.4 of the SCM Agreement by failing to base its *de jure* specificity findings on positive evidence and to provide reasoned and adequate explanations for those findings[25]; and

f. Article 1.2 of the SCM Agreement by determining that the BPS and GP programmes are countervailable subsidies and subjecting them to Part V of the SCM Agreement without properly demonstrating that they were specific.[26]

3.3. With respect to the USDOC's determinations attributing subsidies granted to raw olive growers to ripe olive processors, the European Union claims that the USDOC acted inconsistently with:

a. Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement by failing to carry out a pass-through analysis for relevant arm's length transactions for the ripe olive processors under investigation, and imposing countervailing duties that went beyond offsetting the subsidy amount and were neither appropriate nor accurately determined[27]; and

b. Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement "as such", because Section 771B requires the USDOC to impose a countervailing duty on a processed agricultural product in the absence of an analysis of whether and to what extent any benefit passed-through from the raw input product, thereby mandating an approach that goes beyond offsetting a subsidy and in which the USDOC is unable to ensure an appropriate duty amount in each case or an accurate duty amount.[28]

3.4. With respect to the USITC's injury determination, the European Union claims that the USITC acted inconsistently with:

a. Articles 15.1 and 15.2 of the SCM Agreement, and Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by undertaking an analysis of the volume of ripe olives from Spain that was not objective and not based on positive evidence. In particular, because the USITC:

   i. based its analysis on an artificial market "segmentation" of the domestic industry that was not explained, meaningless and arbitrary and in contradiction to the USITC's own determinations[29];

   ii. only considered "volume effects" in the artificial retail "segment" and neither for the industry as a whole nor for the two other "segments"[30]; and

   iii. improperly extended conclusions concerning the "volume effect" in the retail "segment" to the domestic industry as a whole without any evidentiary basis.[31]

b. Articles 15.1 and 15.2 of the SCM Agreement, and Articles 3.1 and 3.2 of the Anti-Dumping Agreement, because the USITC did not consider a "volume effect" within the meaning of Article 15.2 of the SCM Agreement and Article 3.2 of the Anti-Dumping Agreement[32];

c. Articles 15.1 and 15.2 of the SCM Agreement, and Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by undertaking an analysis of the price effects of ripe olives from Spain that was not objective and not based on positive evidence. In particular, because the USITC:

[25] European Union's first written submission, para. 329.
[26] European Union's first written submission, para. 330.
[27] European Union's first written submission, para. 386.
[28] European Union's first written submission, paras. 419-421.
[29] European Union's first written submission, paras. 465 and 492.
[30] European Union's first written submission, paras. 465 and 511.
[31] European Union's first written submission, paras. 465 and 517.
[32] European Union's first written submission, paras. 465 and 525.

i. based the analysis of the price effects of ripe olives from Spain on an artificial market "segmentation" of the domestic industry that was meaningless, arbitrary, and in contradiction to the USITC's own determinations[33];

ii. only considered price effects in the retail "segment" and not at the level of the domestic industry as a whole[34];

iii. improperly extended its conclusions concerning the consideration of price effects in the retail "segment" to the domestic industry as a whole[35]; and

iv. concluded, without supporting evidence, that underselling by subject imports resulted in a loss of market share in the retail sector by the domestic industry.[36]

d. 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 each of the above alleged violations concerning the USITC's volume analysis and price effects analysis[37];

e. Articles 15.1 and 15.4 of the SCM Agreement, and Articles 3.1 and 3.4 of the Anti-Dumping Agreement, by undertaking an analysis of the consequent impact of ripe olives from Spain on the domestic industry that was not objective and not based on positive evidence.[38] In particular, because the USITC:

i. carried out its impact analysis with respect to the retail "segment", and neither with respect to the industry as a whole, nor with respect to the two other "segments"[39];

ii. failed to find a "volume effect" in its volume analysis that could have had a "consequent" impact on the domestic industry[40];

iii. failed to find a price effect with respect to the industry as a whole that could have had a "consequent" impact on the domestic industry[41];

iv. improperly extended the impact finding for "volume effects" in the retail "segment" to the industry as a whole without any evidentiary basis[42]; and

v. improperly extended the impact finding for "price effects" in the retail "segment" to the industry as a whole without any evidentiary basis.[43]

f. Article 15.5 of the SCM Agreement, and Article 3.5 of the Anti-Dumping Agreement, as a consequence of each of the above alleged violations concerning the USITC's impact analysis[44];

[33] European Union's first written submission, paras. 531 and 538.
[34] European Union's first written submission, paras. 531 and 550.
[35] European Union's first written submission, paras. 531 and 556.
[36] European Union's first written submission, para. 543; second written submission, para. 157. This argument is not presented in a separate section of the European Union's first and second written submissions, as are the European Union's other arguments. The European Union confirmed, however, in response to questions from the Panel, that this was a distinct claim. (European Union's 25 February 2021 response to Panel question No. 15, para. 106).
[37] In relation to the USITC's volume analysis, see European Union's first written submission, paras. 493, 512, 518, 560, 564, 600, and 610. In relation to the USITC's price effects analysis, see ibid. paras. 539, 551, 557, 560, 564, 600, and 610.
[38] As noted above, the Panel denied the United States' request for a preliminary ruling that the European Union's 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. (See section 1.3.2 above).
[39] European Union's first written submission, paras. 560 and 572.
[40] European Union's first written submission, paras. 560 and 581.
[41] European Union's first written submission, paras. 560 and 588.
[42] European Union's first written submission, paras. 560 and 592.
[43] European Union's first written submission, paras. 560 and 595-596.
[44] European Union's first written submission, paras. 565, 573, 582, 589, 593, 597, 600, and 610.

g. Articles 15.1 and 15.5 of the SCM Agreement, and Articles 3.1 and 3.5 of the Anti-Dumping Agreement, by undertaking a causation analysis that was not objective and not based on positive evidence. In particular, because the USITC:

   i. failed to carry out a causation assessment with respect to the domestic industry as a whole[45]; and

   ii. failed to separate and distinguish the injurious effects of the contraction of US demand and of non-subject imports from the injurious effects of Spanish imports.[46]

3.5. With respect to the calculation of the subsidy and countervailing duty rate for mandatory respondent Aceitunas Guadalquivir, the European Union claims that the USDOC acted inconsistently with:

a. Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement by basing the calculation of the amount of subsidy and the countervailing duty rate on Aceitunas Guadalquivir's overall purchases of raw olives, rather than on Aceitunas Guadalquivir's purchases of raw olives processed into ripe olives[47];

b. Article 12.1 of the SCM Agreement by failing to notify Aceitunas Guadalquivir that the USDOC required information regarding the respondent's volume of purchases of raw olives that were processed into ripe olives, which would be used in the determination of Aceitunas Guadalquivir's final subsidy rate[48];

c. Article 12.8 of the SCM Agreement by failing to disclose to Aceitunas Guadalquivir, before making a final determination, that the volume of purchases of raw olives processed into ripe olives was an essential fact under consideration[49]; and

d. Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement by calculating the "all others" rate of countervailing duties imposed on exporters of olives that are not individually investigated, based in part on the calculation of the amount of subsidy for Aceitunas Guadalquivir.[50]

3.6. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the United States bring its measures into conformity with its WTO obligations.

3.7. The United States requests that the Panel reject the European Union's claims in this dispute in their entirety.[51]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, Japan, Mexico, and Turkey are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1 to C-5). Australia, China, India, the Russian Federation, the Kingdom of Saudi Arabia, and Switzerland did not submit written or oral arguments to the Panel.

[45] European Union's first written submission, paras. 600 and 615.
[46] European Union's first written submission, paras. 600 and 638.
[47] European Union's first written submission, paras. 666 and 706-711.
[48] European Union's first written submission, paras. 712 and 716-718.
[49] European Union's first written submission, paras. 724 and 728.
[50] European Union's first written submission, para. 730.
[51] United States' first written submission, para. 337.

6 INTERIM REVIEW

6.1. On 7 July 2021, the Panel issued its Interim Report to the parties. On 21 July 2021, the European Union and the United States submitted their written requests for review. On 28 July 2021, the parties submitted comments on the other parties' written requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-7.

7 FINDINGS

7.1 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered Agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.[52]

7.2. Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

7.1.2 Standard of review

7.3. This dispute concerns claims raised by the European Union under the GATT 1994, the SCM Agreement, and the Anti-Dumping Agreement. Article 11 of the DSU sets out a general standard of review for panels, providing, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered Agreements.

7.4. The obligation to conduct an "objective assessment" has been found to require panels to evaluate whether the competent authorities provided a "reasoned and adequate explanation" as to (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.[53] Panels and the Appellate Body have understood this standard to mean that a panel may not undertake a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the investigation and must consider all such evidence submitted by the parties to the dispute.[54] At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[55] We agree with these findings, and do not understand the parties to take a different view.

---

[52] Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 104.

[53] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.

[54] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188. See also Panel Reports, *US – Softwood Lumber VII*, para. 7.5; *US – Pipes and Tubes (Turkey)*, para. 7.4; *US – Coated Paper (Indonesia)*, para. 7.7; *US – Washing Machines*, para. 7.5; *China – Autos (US)*, para. 7.5; *China – Broiler Products*, para. 7.5; and *China – GOES*, para. 7.4.

[55] Appellate Body Reports, *US – Softwood Lumber VI (Article 21*.5 – *Canada)*, para. 93; *US – Lamb*, paras. 106-107. See also Panel Reports, *US – Softwood Lumber VII*, para. 7.4; *US – Pipes and Tubes (Turkey)*, para. 7.4; *US – Coated Paper (Indonesia)*, para. 7.7; *US – Washing Machines*, para. 7.5; *China – Autos (US)*, para. 7.5; *China – Broiler Products*, para. 7.5; and *China – GOES*, para. 7.4.

7.5. In addition to the obligation to conduct an objective assessment under Article 11 of the DSU, in disputes concerning anti-dumping measures, Article 17.6(i) of the Anti-Dumping Agreement provides that:

> [I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned[.]

7.6. Although the SCM Agreement does not contain a similar provision, Members have declared that disputes arising from anti-dumping and countervailing duty measures should be resolved in a consistent manner.[56] Likewise, the parties have argued that the Panel should apply a consistent approach in resolving the claims at issue in this dispute, arguing, furthermore, that there is no conflict between Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU.[57] We share the parties' views about the absence of conflict between Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement, and we will conduct our review of the merits of the European Union's claims accordingly.

7.1.3 Burden of proof

7.7. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[58] Therefore, the European Union bears the burden of demonstrating that the challenged measures are inconsistent with the GATT 1994, the SCM Agreement, and the Anti-Dumping Agreement. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, without effective refutation by the defending party, requires a panel as a matter of law to rule in favour of the complaining party.[59] Each party asserting a fact should provide proof thereof.[60]

7.2 The European Union's claims concerning the USDOC's *de jure* specificity findings in the ripe olives countervailing duty investigation

7.2.1 The European Union's request to address the USDOC's Remand Redetermination as it relates to its original *de jure* specificity findings

7.8. As part of the judicial review proceedings in the United States Court of International Trade (USCIT), the USDOC's original determination of *de jure* specificity in the ripe olives countervailing duty investigation was remanded to the USDOC to conduct "further proceedings" and address the USCIT's opinion that the USDOC's findings had "not been sufficiently explained because [the USDOC] did not provide an interpretation of the statute in reaching its determination based on the record".[61] In the Remand Redetermination, the USDOC "further explain[ed] its interpretation of section 771(5A)(D)(i) of the [Tariff Act of 1930] for the *de jure* specificity finding", "affirm[ed] the finding that [the USDOC] made in the *Final Determination* that the BPS provides benefits that are *de jure* specific to olive growers", and "made no changes to the A*mended Final Determination and Countervailing Duty Order* with this [remand] redetermination".[62] The Remand Redetermination was issued on 29 May 2020, *after* the establishment of the Panel in this proceeding.[63]

---

[56] Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures.

[57] European Union's 8 September 2020 response to Panel question No. 5(a), para. 167; United States' 8 September 2020 response to Panel question No. 5(a), para. 60.

[58] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, p. 337.

[59] Appellate Body Report, *EC – Hormones*, para. 104.

[60] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, p. 335.

[61] Remand Redetermination, (Exhibit EU-80), pp. 1-2.

[62] Remand Redetermination, (Exhibit EU-80), pp. 2 and 50. (emphasis original)

[63] On 18 June 2021, the European Union informed the Panel of a USCIT remand decision of 17 June 2021 in connection with the USDOC's finding of *de jure* specificity contained in the Remand Redetermination, submitting the 17 June 2021 remand decision as Exhibit EU-81. After hearing the

7.9. In a letter of 2 July 2020, the European Union requested the Panel to grant it permission to address in its submissions the USDOC's Remand Redetermination, as it related to the USDOC's original findings of *de jure* specificity. The European Union argues that it is entitled to address the Remand Redetermination because: (a) the terms of its panel request are broad enough to bring it within the scope of the Panel's terms of reference; (b) the Remand Redetermination does not change the essence of the original measures identified in its panel request; and (c) consideration of the Remand Redetermination is necessary to secure a positive resolution to the dispute.[64]

7.10. The United States maintains that the European Union has failed to explain how its panel request should be understood to encompass the USDOC's Remand Redetermination as a measure at issue. Although the European Union's panel request refers to "any amendments, supplements, extensions, replacement measures, renewal measures and implementing measures", the United States argues that the European Union does not explain in what way the Remand Redetermination amends, supplements, extends, renews, or implements the measures at issue. The United States further contends that the European Union does not identify why that additional explanation contained in the Remand Redetermination does not constitute a changed, different measure, and that the European Union has also not demonstrated how a failure to make findings on the Remand Redetermination would undermine any findings and recommendation made in relation to the original measures in existence at the time of the Panel's establishment.[65]

7.11. A panel's terms of reference are defined by Articles 6.2 and 7.1 of the DSU. Pursuant to Article 7.1, a panel must "examine … the matter referred to the DSB" in the complaining party's panel request and "make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreements identified in the complaining party's panel request. In turn, Article 6.2 stipulates that a panel request must, *inter alia*, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint.[66] These requirements together constitute the "matter referred to the DSB" and form the basis of a panel's terms of reference under Article 7.1 of the DSU.[67]

7.12. We agree with previous panel and Appellate Body reports that Article 6.2 of the DSU does not categorically preclude the inclusion within a panel's terms of reference of measures that come into existence after the panel establishment is requested.[68] Rather, there may be circumstances in which it is necessary for a Panel to review measures enacted after its establishment so that it can make the findings and recommendations necessary to resolve the matter in dispute. This may include, for example, a measure that amends a measure that is explicitly identified in a panel request, without changing the essence of that original measure.[69]

7.13. The Remand Redetermination is not expressly identified in the text of the European Union's panel request, since it did not exist at the time that the European Union filed its panel request. The European Union's panel request identifies*, inter alia,* the following measures, which were in existence at the relevant time:

> [Countervailing] and [Anti-Dumping] duty orders issued on 1 August 2018 by the US Department of Commerce ([US]DOC) and applicable as from the same date, following final determinations by the [US]DOC and by the US International Trade Commission (ITC)[.][70]

parties' views, the Panel informed the parties of its decision not to accept the European Union's submission of Exhibit EU-81, because of the Panel's view that there was insufficient cause to do so under paragraph 5(1) of the Panel's Working Procedures, and because of the lateness of the European Union's submission and the imminent planned issuance of the interim report. (Panel's communications of 24 June 2021 and 29 June 2021).

[64] European Union's letter of 2 July 2020, pp. 1-2.

[65] United States' letter of 10 July 2020, paras. 8-11.

[66] Appellate Body Report, *US – Carbon Steel*, para. 125.

[67] Appellate Body Report, *Guatemala – Cement I*, para. 72.

[68] Appellate Body Reports, *US – Zeroing (Japan) (Article 21*.5 – *Japan)*, paras. 121 and 125; *EC – Chicken Cuts*, paras. 156-159; and *Chile – Price Band System*, paras. 126-144; Panel Report, *US – Washing Machines*, paras. 7.248-7.249.

[69] Appellate Body Reports, *Chile – Price Band System*, paras. 126-144; *EC – Chicken Cuts*, paras. 156-159.

[70] European Union's panel request, p. 1. (fns omitted)

7.14. We note, however, that the European Union's panel request also refers to "any amendments, supplements, extensions, replacement measures, renewal measures and implementing measures".[71] In our view, these terms are sufficiently broad to cover the challenged aspect of the Remand Redetermination because we consider the USDOC's Remand Redetermination supplements and reaffirms its original *de jure* specificity findings. In this regard, we note that the USDOC's analytical approach to the question of specificity in the Remand Redetermination remains fundamentally unchanged and its findings and analysis are not based on any new evidence introduced during the remand proceeding.[72] The USDOC's Remand Redetermination does not modify the USDOC's original findings and does not alter the essence of the reasoning set out in the preliminary and final issues and decision memoranda. In these circumstances, we consider that the Remand Redetermination is covered by our terms of reference, despite not existing at the time that this Panel was established. In addition, we share the European Union's view that given its close connection with the original findings, our consideration of the European Union's submissions with respect to the Remand Redetermination would assist the resolution of the specific claims in this dispute.

7.15. For these reasons, we decided to grant the European Union's request to address in its submissions the USDOC's 29 May 2020 Remand Redetermination with respect to the matter of *de jure* specificity, on the basis that the Remand Redetermination is a measure or is part of the measure that is before the Panel in this dispute.

7.2.2 The European Union's claims under Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement

7.2.2.1 Introduction

7.16. In its preliminary and final issues and decision memoranda, the USDOC found that subsidies provided to olive growers under the European Union's Common Agricultural Policy (CAP) Pillar I, the BPS and GP programmes, as implemented by the Government of Spain (GOS), were *de jure* specific.[73] The USDOC's determinations were grounded in its understanding of the *subsidy calculation rules* under the BPS. The USDOC found these rules expressly referred to and incorporated the criteria used to determine *subsidy amounts* under two predecessor programmes – the SPS and COMOF programmes, with the latter being considered to have provided crop-specific subsidies to olive growers.[74] The USDOC found that under the BPS programme, subsidy amounts for eligible farmers were determined based upon amounts of assistance received by olive growers under the predecessor SPS programme; and, in turn, that subsidy amounts provided under the SPS programme were based upon amounts of assistance received by olive growers under the COMOF programme, which the USDOC characterized as a programme that provided production-based *de jure* specific subsidies to olive growers. In short, the USDOC found that the subsidies provided to olive growers under the BPS and GP programmes[75] were *de jure* specific because the subsidy calculation rules resulted in annual grant amounts that were directly related to, and continued to retain, the *de jure* specificity of the grants provided to olive growers under the COMOF programme.[76] The USDOC further explained and elaborated upon its original findings in the Remand Redetermination, and affirmed the finding that the BPS and GP programmes provided benefits that were *de jure* specific to olive growers.

[71] European Union's panel request, p. 2.
[72] The USDOC's Remand Redetermination concerning its original *de jure* specificity findings is discussed in detail below.
[73] PIDM, (Exhibit EU-1), pp. 24-25; FIDM, (Exhibit EU-2), p. 36.
[74] PIDM, (Exhibit EU-1), pp. 23-27; FIDM, (Exhibit EU-2), pp. 32-36; and Remand Redetermination, (Exhibit EU-80), pp. 48-50.
[75] In analysing the GP programme, the USDOC considered that "a farmer who is entitled to a grant under the [BPS programme] is eligible for [GP] grants if the farmer undertakes agricultural practices beneficial for the climate and the environment"; that farmers of permanent crops (such as olives) are entitled to the GP programme "ipso facto"; and that "[t]he grant amount [under the GP programme] is a ratio established annually by the national authority and the ratio is usually 50 percent of the [BPS] grant amount". (PIDM, (Exhibit EU-1), p. 25). In light of these considerations, we understand the USDOC's findings concerning the GP programme are linked to and dependent upon its findings concerning the BPS programme, so we will assess the USDOC's *de jure* specificity findings accordingly.
[76] FIDM, (Exhibit EU-2), p. 36.

7.17. The European Union claims that the USDOC's *de jure* specificity findings with respect to the BPS programme, and consequently also the GP programme, are inconsistent with the United States' obligations under Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement. According to the European Union, the USDOC's finding of *de jure* specificity in relation to the BPS and GP programmes is inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement because, in its view, the key determinant of whether "access" to a subsidy is explicitly limited to certain enterprises, within the meaning of Article 2.1(a), is a programme's *eligibility criteria* (which the USDOC allegedly did not examine in establishing specificity of the SPS, BPS, and GP programmes), not the formula applied to calculate the amounts of subsidy available to eligible enterprises.

7.18. The European Union also claims that the USDOC's determination is inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement because the USDOC wrongly concluded that the BPS programme retained the *de jure* specificity of olive-grower-specific subsidies bestowed under the COMOF programme. The European Union advances multiple arguments in support of this aspect of its claims, including that the USDOC's determination (i) was not based on *the legislation* pursuant to which the countervailed subsidies were provided, but rather on the rules governing access to subsidies under the COMOF programme, which is no longer in force; (ii) erroneously found that assistance under the SPS, BPS, and GP programmes was tied to the production of olives; (iii) *misconstrued* or *did not account for* certain features of the relevant calculation and eligibility rules; and (iv) was not based on *positive evidence* or a *reasoned and adequate* explanation, in the light of the United States' obligations under the above-mentioned provisions of the SCM Agreement. We examine the merits of the European Union's claims in the sections that follow.

7.2.2.2 Whether the USDOC was entitled under Article 2.1(a) of the SCM Agreement to determine *de jure* specificity based on rules governing the *amount of a subsidy*

7.19. The first question we address is whether the USDOC was entitled under the terms of Article 2.1(a) of the SCM Agreement to find that the BPS and GP programmes provided *de jure* specific subsidies based on the *rules for calculating subsidy amounts*, as opposed to *the criteria governing the eligibility* for subsidies under those programmes. In essence, the European Union argues that it follows from the terms of Article 2.1(a) that a *de jure* specificity finding must be based on the *eligibility criteria* for a subsidy, and not on the rules governing the amounts of subsidy available to eligible enterprises.[77] The United States, however, argues that a finding that the eligibility criteria of a subsidy programme explicitly limit access to a subsidy to certain enterprises is not the only way to establish *de jure* specificity under the terms of Article 2.1(a). For the United States, an explicit limitation on access to a subsidy can manifest in different ways, including as a limitation on the *amounts* available under a subsidy programme.[78]

7.20. We start by reviewing the text of Article 2.1(a) of the SCM Agreement, which provides:

> In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> > Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

7.21. The European Union argues that the terms "access to a subsidy" found in Article 2.1(a) must be understood to mean that the central focus of a determination of *de jure* specificity is the criteria defining *eligibility* for a subsidy, as *eligibility* is what ultimately determines whether an entity has a

[77] European Union's first written submission, paras. 190-191, 196, and 203-204; 10 June 2020 response to Panel question No. 2, paras. 2-13; 8 September 2020 response to Panel question No. 1(a), para. 16; opening statement at the first meeting of the Panel, para. 6; 12 November 2020 response to Panel question No. 2, paras. 3 and 11-13; and second written submission, para. 13.

[78] United States' 10 June 2020 response to Panel question No. 2, paras. 3-8; 8 September 2020 response to Panel question No. 1(a), paras. 1-2; opening statement at the first meeting of the Panel, paras. 13-14; 12 November 2020 response to Panel question No. 2, paras. 9-10; second written submission, para. 8; and opening statement at the second meeting of the Panel, para. 4.

right to receive "access" to a subsidy.[79] The European Union draws support for its interpretation of Article 2.1(a) from parts of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, including the Appellate Body's statement that "the focus of the inquiry [under Article 2.1(a)] is on whether certain enterprises are eligible for the subsidy, not on whether they in fact receive it".[80]

7.22. The United States maintains that the text of Article 2.1(a) does not prescribe a particular form that a limit on "access" must take. While the United States accepts that such a limit may be found in the criteria determining *eligibility* for a subsidy, it also considers that the criteria determining the *eligibility for certain amounts* of a subsidy could be an explicit limitation on access to a subsidy.[81] In the view of the United States, 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 to use a subsidy.[82] The United States argues that the Appellate Body's statement from *US – Anti-Dumping and Countervailing Duties (China)*, which the European Union relies upon, does not preclude the possibility of making *de jure* specificity findings that are not based solely on eligibility criteria. This is because, according to the United States, the Appellate Body's reference to "eligibility" in the statements relied upon by the European Union, was merely shorthand for saying "qualified to access". Thus, the United States maintains that the Appellate Body's statement that "the focus of the inquiry is on whether certain enterprises are eligible for the subsidy, not on whether they in fact receive it", should not be understood to suggest that "access" in Article 2.1(a) means "eligibility".[83] In the view of the United States, if the drafters of the SCM Agreement had intended that the word "access" should be exclusively understood to mean "eligibility", they would have used that word instead of "access", in the same way that the word "eligibility" is explicitly used in the text of Article 2.1(b).[84]

7.23. Canada broadly agrees with the European Union, arguing that "access to a subsidy" refers to eligibility for a subsidy, not to distinctions that affect the amount of subsidy that an enterprise will receive.[85] According to Canada, this understanding is supported by the fact that Article 2.1(a) does not refer to "amount of subsidy", unlike other provisions of the SCM Agreement.[86]

7.24. Mexico also shares the European Union's views, arguing that the expression "explicitly limits access to a subsidy to certain enterprises" is necessarily linked to eligibility criteria for granting a subsidy. Mexico sees nothing in the text of Article 2.1(a) of the SCM Agreement suggesting that a subsidy may be specific when access is generalized but distinctions exist in relation to the amounts granted.[87]

7.25. We note that both the European Union and the United States agree that the ordinary meaning of the word "access" includes the "right or opportunity to benefit from or use a system or service".[88] We do not see anything inherent in this meaning, or in the terms of Article 2.1(a) more broadly, to suggest that the existence of an explicit limitation on access to a subsidy must be determined solely based on the eligibility criteria for any subsidy under a particular programme. Article 2.1(a) does not, for example, prescribe that any particular feature of the legislation pursuant to which the granting authority operates must be examined or be the source of an explicit limitation on access to a subsidy. On the contrary, the analysis that is called for under Article 2.1(a) simply focuses on the granting authority, or the legislation pursuant to which the granting authority operates, *without further precision or qualification*. In our view, this suggests that in principle any one or more aspects of the legislation pursuant to which the granting authority operates may potentially – and depending upon the facts – serve to demonstrate the existence of an explicit limitation on "access" to a subsidy.

[79] European Union's 10 June 2020 response to Panel question No. 2, paras. 2-9.
[80] European Union's first written submission, para. 207; 10 June 2020 response to Panel question No. 2, paras. 12-13 (both referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 368). See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.368.
[81] United States' 10 June 2020 response to Panel question No. 2, paras. 3-6.
[82] United States' 10 June 2020 response to Panel question No. 2, para. 5.
[83] United States' 10 June 2020 response to Panel question No. 8, fn 32.
[84] United States' 10 June 2020 response to Panel question No. 2, para. 6.
[85] Canada's third-party response to Panel question No. 2, para. 2.
[86] Canada's third-party response to Panel question No. 2, para. 3.
[87] Mexico's third-party response to Panel question No. 2, p. 2.
[88] European Union's 10 June 2020 response to Panel question No. 2, para. 4; United States' 10 June 2020 response to Panel question No. 2, para. 5 (both quoting Definition of "access" from The Oxford English Dictionary, (Exhibit USA-29)).

What matters under Article 2.1(a) is that the granting authority, or the *legislation* pursuant to which the granting authority operates, is shown to limit explicitly access to a subsidy. To this extent, we do not understand Article 2.1(a) to preclude the possibility of a finding of *de jure* specificity based on the rules governing the calculation of subsidy amounts available under a programme. However, at the same time, because the rules governing the calculation of the amount of a subsidy may not be the only feature of a subsidy programme bearing upon "the right or opportunity to benefit from or use" a subsidy, a finding of *de jure* specificity that ignores other relevant features of the subsidy programme would not be well-founded. Thus, although Article 2.1(a) does not exclude the possibility of grounding a finding of *de jure* specificity on the criteria or conditions governing the amount of a subsidy, any such reliance must not be selective in the light of other relevant *de jure* features of the subsidy programme.

7.26. Turning to the immediate context of Article 2.1(a), we note that Article 2.1(b) of the SCM Agreement provides as follows:

> Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
>
> [2] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

7.27. The first sentence of Article 2.1(b) prescribes *inter alia* that specificity shall not exist where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy. Thus, like Article 2.1(a), Article 2.1(b) directs scrutiny towards *the granting authority or the legislation pursuant to which the granting authority operates*. However, in contrast to the principle set out in Article 2.1(a), which describes when a subsidy "*shall be specific*", Article 2.1(b) identifies when "*specificity shall not exist*".

7.28. In our view, the overlapping subject matter and binary nature of the purpose of the principles set out in Articles 2.1(a) and 2.1(b) suggest that they operate simultaneously. Under this reading of the two provisions, an indication of *non-specificity* under Article 2.1(b) would normally imply that the granting authority, or the legislation pursuant to which the granting authority operates, could *not* be found to explicitly limit access to a subsidy to certain enterprises, within the meaning of Article 2.1(a). The fact that the rules governing the eligibility for, and the amount of, a subsidy *do not* favour certain enterprises over others (within the meaning of footnote 2 of the SCM Agreement) would normally suggest that access to that subsidy was not explicitly limited to certain enterprises. Likewise, facts that would normally signal *an absence of non-specificity*, within the meaning of Article 2.1(b), could also drive a conclusion of specificity under Article 2.1(a). This could arise, for example, when the rules governing the *eligibility for a subsidy* are not neutral and favour certain enterprises (within the meaning of footnote 2).

7.29. The European Union's position implies that a determination of specificity under Article 2.1(a) cannot be based on only a finding that the rules governing the *amount of a subsidy* are not neutral and favour certain enterprises over others (within the meaning of footnote 2). While we understand the European Union to accept that such a factual scenario would establish an absence of non-specificity within the meaning of Article 2.1(b), the European Union does not consider it would be a sufficient basis to find the existence of an explicit limitation on access to a subsidy, under the terms of Article 2.1(a).

7.30. On balance, we are not convinced by the European Union's submission. We see no textual basis in the relevant provisions to limit the potential legal relevance of such evidence to a showing of the absence of non-specificity under Article 2.1(b) alone. Rather, in our view, the fact that Article 2.1(b) refers to rules governing the eligibility for, *as well as* the amount of, a subsidy, suggests that evidence of both factors may be important when considering the question of specificity under Article 2.1(a), given that both provisions direct scrutiny towards the same subject-matter, which is *the granting authority or the legislation pursuant to which a granting authority operates*.

Thus, in our assessment, Article 2.1(b) serves as important contextual support for an interpretation of Article 2.1(a) that does not preclude the legal possibility of establishing *de jure* specificity based on an "access" limitation found in the rules governing the amount of a subsidy provided under a subsidy programme.

7.31. We next examine Article 2.1(c) of the SCM Agreement, which provides as follows:

> If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.[89]

7.32. Article 2.1(c) prescribes that specificity may arise in situations where, notwithstanding any appearance of non-specificity resulting from the application of the principles in subparagraphs (a) and (b), there are reasons to believe that the subsidy may *in fact* be specific, based on a consideration of other factors, including "*the granting of disproportionately large amounts of subsidy to certain enterprises*". In our view, the fact that the drafters of the SCM Agreement explicitly envisaged the possibility of finding *de facto* specificity in situations where an otherwise neutral calculation methodology is applied in a manner that results in the granting of disproportionately large amounts of subsidy to certain enterprises, indicates that they did not intend to exclude a finding of *de jure* specificity under Article 2.1(a) when the legislation pursuant to which a granting authority operates expressly provides for *exactly the same outcome* by establishing rules governing the amount of a subsidy that favour certain enterprises over others. Accordingly, we find that Article 2.1(c) also supports the view that an explicit limitation on access to a subsidy for the purpose of Article 2.1(a) might well be found in the rules governing the amount of a subsidy, not only the criteria governing the eligibility for a subsidy.

7.33. Thus, in the light of the above considerations, we find that Article 2.1(a) of the SCM Agreement does not preclude reliance on criteria or conditions governing the amount of a subsidy to establish that access to a subsidy is explicitly limited to certain enterprises, within the meaning of that provision. We emphasize, however, that because the rules governing the calculation of the amount of a subsidy may not be the only feature of a subsidy programme bearing upon "the right or opportunity to benefit from or use" a subsidy, a finding of *de jure* specificity that ignores other relevant features of the subsidy programme would not be well-founded. Thus, although Article 2.1(a) does not exclude the possibility of grounding a finding of *de jure* specificity on the criteria or conditions governing the amount of a subsidy, any such reliance must not be selective in the light of other relevant *de jure* features of the subsidy programme. Accordingly, we find that the European Union has failed to establish that the United States 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.

7.2.2.3 The USDOC's conclusion that the BPS and GP programmes retained the inherent *de jure* specificity of the subsidies provided under the COMOF programme

7.2.2.3.1 The USDOC's reliance on facts pertaining to past subsidy programmes

7.34. As already noted, in the Remand Redetermination, the USDOC further explained and elaborated upon the findings of *de jure* specificity made in the final determination, and affirmed the finding that the BPS and GP programmes provided benefits that were *de jure* specific to olive growers. In part 1 of the analysis of the Remand Redetermination, the USDOC recalls the main elements of its findings. After explaining that its findings concerned the "programs implemented pursuant to the European Union's Common Agricultural Policy (CAP), which provided subsidies to olive growers, particularly under the Basic Payment Scheme (BPS)", the USDOC notes a

[89] Fn omitted.

consideration that lies at the centre of its *de jure* specificity determination – namely, that the "manner in which Spain implemented the BPS as it relates to the provision of, and the amount of benefits to, olive growers *relied heavily of* [*sic*] *the provision of benefits under two predecessor programs: the [COMOF programme] … and the Single Payment Scheme (SPS)*".[90] The USDOC then briefly describes how the alleged *de jure* specific nature of the subsidies provided to olive growers under the COMOF programme, was "preserved" through the operation of the SPS programme and "retained" in the BPS programme by virtue of its subsidy amount calculation rules. At the end of this section, the USDOC recalls and explains the summary of the analysis set out in its earlier determinations as follows:

> [The USDOC]'s analysis is summarized:
>
> In summary, the annual grant amount provided to olive farmers under BPS is based on the annual grant amount provided to olive farmers under SPS. The grant amount provided to olive farmers under SPS is based on the average grant amount olive farmers received in 1999 through 2002 under the [COMOF programme]. The grant amount provided in 1999 through 2002 to eligible farmers, which included olive farmers, was based on the type of crop grown and the production value created from the crop. Therefore, the annual grant amount provided under BPS {is} based on annual grant amounts that were crop-specific, thus the grant amounts received by olive growers under BPS in 2016 are directly related to the grant amount only olive growers received under the [COMOF programme].[91]
>
> This analysis was the basis of [The USDOC]'s finding that the BPS provided subsidies that are *de jure* specific to olive growers. Because: the [COMOF programme] was available only to olive growers (*i.e.,* access to its benefits was "expressly limited" to the olive sector); the SPS calculated the grant amount based on data regarding the type of crop, and the volume and value of production collected under the [COMOF programme] (*i.e.,* preserving the limited access to benefits available to the olive sector under the [COMOF programme]); and, by law, access to the SPS grants provided the foundation of the BPS subsidy payments, the BPS retained the *de jure* specificity inherent in the [COMOF programme].[92]

7.35. These passages reveal that the USDOC determined that the BPS subsidies were *de jure* specific because it found that, *as a matter of law*, BPS subsidy payments were fundamentally based on grants provided under the SPS programme, which in turn, were derived from olive-specific payments made under the COMOF programme.

7.36. The parties agree that a *de jure* specificity finding, within the meaning of Article 2.1(a), must be grounded in the "legislation pursuant to which the granting authority operates" or the acts of the granting authority itself.[93] On reading the USDOC's preliminary and final issues and decision memoranda, as well as the Remand Redetermination, it is apparent that the USDOC's findings were aimed at understanding whether the grants provided to farmers under the BPS programme pursuant to Regulation 1307/2013[94], as implemented by the GOS in Royal Decree 1075/2014[95] and Royal Decree 1076/2014[96], were *de jure* specific.[97] The USDOC's determinations reveal that its examination of these instruments was informed by how, in the USDOC's view, they integrated as a matter of law certain aspects of two predecessor subsidy programmes. The USDOC proceeded in this way because it found that the BPS subsidy calculation rules, as implemented by the GOS,

[90] Remand Redetermination, (Exhibit EU-80), p. 6. (emphasis added)
[91] Remand Redetermination, (Exhibit EU-80), pp. 8-9 (referring to PIDM, (Exhibit EU-1), p. 24) (fn omitted). The final issues and decision memorandum contains similar language. (FIDM, (Exhibit EU-2), p. 36).
[92] Remand Redetermination, (Exhibit EU-80), p. 9.
[93] European Union's first written submission, para. 235 (quoting Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 748, explaining that the source of any limitation is the legislation pursuant to which the granting authority operates, or the granting authority itself); United States' 10 June 2020 response to Panel question No. 2, paras. 4 and 8.
[94] Regulation 1307/2013, (Exhibit EU-25).
[95] Royal Decree 1075/2014, (Exhibit EU-19).
[96] Royal Decree 1076/2014, (Exhibit EU-30).
[97] PIDM, (Exhibit EU-1), pp. 20-21; FIDM, (Exhibit EU-2), pp. 34-35; and United States' first written submission, para. 53.

expressly relied upon particular aspects of those programmes to determine subsidy amounts available to eligible farmers. Among the passages from the USDOC's determinations that we believe confirm this understanding are the following from the Remand Redetermination:

> To determine access to payments under the BPS, and the criteria or conditions governing the eligibility for, and the amount of the subsidy, the BPS legislation expressly refers to prior legislation and incorporates by reference the eligibility criteria from the prior legislation. An examination of the prior legislation explicitly referenced in and incorporated by the BPS demonstrates a linkage between eligibility for the crop-specific payments provided under the prior legislation and the current payments provided under the BPS. This link continued to entrench limited access and favored the olive industry.
>
> … The legislation governing the BPS program may not have explicitly stated that it intended to benefit olive growers; however, the BPS program expressly references prior legislation that dictates the access to and amount of BPS payments that, by law, provides expressly limited access to subsidies to olive growers. The SPS and BPS programs, by law, rely on "historical" reference periods to preserve the benefit amounts provided to growers of certain crops under predecessor programs. The GOS, as required by legislation, relied on volume, value, and area data, and prior subsidy amounts that were developed on a product-specific basis for the purpose of determining the amount of the subsidies provided to olive growers under the SPS, thereby preserving access to the subsidy that was expressly limited under the [COMOF programme]. Similarly, the GOS once again, by law, relied on a historical reference period to determine benefits under the BPS program, and therefore, once again, by law, entrenched benefits received under these past programs on a crop-specific basis. By designing two consecutive benefit schemes in this manner, the express terms of the legislation pursuant to which the GOS operates demonstrate that the GOS administers the current BPS payments to limit access to certain benefits to a subsector of the Spanish agricultural industry, olives.[98]

7.37. We recall that Article 2.1(a) of the SCM Agreement provides that "where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific". Apart from its focus on the action of the "granting authority" and the "legislation" pursuant to which it operates, Article 2.1(a) does not refer to any particular facts or factors that may or may not be taken into account in order to make a finding of *de jure* specificity. Neither does it prescribe a particular methodology that must be followed. Thus, 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. On the contrary, we agree in this respect with the United States that a reading of Article 2.1(a) that would preclude the possibility of taking such information into account might create an exception (which the United States referred to as "a loophole") for subsidy programmes that favour certain enterprises based on explicit access limitations found in earlier laws or regulations or ones no longer in force.[99] Thus, in our view, it follows from the absence of any limitation in the text of Article 2.1(a) that an investigating authority is entitled to review and rely upon *any fact* it considers relevant to identifying and understanding whether the actions of the "granting authority" in providing the subsidy under investigation or the "legislation" pursuant to which it operates, explicitly limit "access" to a subsidy to certain enterprises.

7.38. In the ripe olives investigation, the USDOC's determination of *de jure* specificity concerned subsidies provided under the BPS and GP programmes, as implemented by the GOS.[100] 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) was central to its *de jure* specificity determination. In our view, the USDOC did not act inconsistently with Article 2.1(a) simply because its determination was dependent upon how certain alleged features of past subsidy programmes were relied upon and

[98] Remand Redetermination, (Exhibit EU-80), pp. 48-49.

[99] United States' 10 June 2020 response to Panel question No. 4, para. 18.

[100] FIDM, (Exhibit EU-2), p. 12. See also United States' second written submission, para. 17, explaining that "it was the BPS Programs that during the period of investigation conferred countervailable subsidies to olive growers" and that "the USDOC countervailed subsidies for the same programs (i.e., the BPS Programs) for which it made its determination of *de jure* specificity".

integrated into the countervailed subsidy programme. Moreover, we do not share the European Union's view that in order to properly base its *de jure* specificity finding upon such information, the USDOC was *required* to follow the particular analytical approach or methodology the European Union advances.[101] As already noted, Article 2.1(a) imposes no limits on the facts an investigating authority is entitled to rely upon; and it prescribes no particular analytical approach or methodology that must be followed in assessing those facts. Thus, in our view, the USDOC was entitled to rely on the combination of facts and particular analytical approach it considered relevant to answer the question it was investigating – whether the BPS and GP programmes, as implemented by the GOS, explicitly limited access to a subsidy to certain enterprises.

7.39. Having said that, a separate matter is whether the USDOC's findings in relation to the content and meaning of the BPS programme as implemented by the GOS (including as regards the allegedly referenced and incorporated features of past programmes) were properly supported by the facts, and whether the USDOC reasonably and adequately explained how those findings show that the BPS programme explicitly limited access to the subsidy under investigation to certain enterprises. On these questions, the European Union argues that the USDOC's factual findings and explanations fell short of the required standard. The United States argues that through some of these allegations the European Union seeks the Panel to conduct a *de novo* review of the USDOC's factual findings, which is inconsistent with the Panel's standard of review.[102] In accordance with our standard of review under Article 11 of the DSU[103], we address the European Union's specific criticisms in the sections that follow by evaluating whether the USDOC provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those factual findings supported the overall determination.

7.2.2.3.2 The USDOC's alleged finding that the SPS, BPS, and GP subsidies were *de jure* specific to *olive growers* because they were *coupled (or tied) to the production of olives*

7.40. One of the main aspects of the USDOC's *de jure* specificity determination contested by the European Union is the USDOC's repeated finding that the BPS, GP, and SPS subsidies to "olive growers" are *de jure* specific. The European Union argues that the various manifestations of these statements in the USDOC's determinations demonstrate that the USDOC considered that the SPS and BPS/GP subsidies were tied to continued olive production, revealing an erroneous understanding of the operation of the two programmes.[104] According to the European Union, the USDOC's findings contradict the positive evidence on the record showing that the subsidies under both programmes were not limited to olive growers, and were not tied to production, as there was neither a legal obligation on recipients to continue growing the same crops grown before the entry into force of the programmes, nor any requirement to grow any crop at all, in order to be eligible for assistance.[105] Accordingly, the European Union argues that the USDOC's *de jure* specificity findings misconstrue the relevant legal instruments, and for this reason are inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement.[106]

7.41. The United States denies that the USDOC's determinations of *de jure* specificity were based on findings that subsidy payments to olive growers were *tied to olive production* in the period of investigation. According to the United States, the USDOC's determinations were grounded in the fact

[101] European Union's 10 June 2020 response to Panel question No. 4, para. 34, arguing that if an investigating authority wants to determine that a subsidy programme "A" is *de jure* specific on the basis of a past programme "B" that is no longer in force, it will have to (i) demonstrate that the legislation governing programme "A" explicitly limits access to the subsidy to those undertakings that were eligible under programme "B"; and (ii) conclude that programme "B" was in itself specific and explain why it reached that finding.

[102] Including the ones discussed in sections 7.2.2.3.4, 7.2.2.3.5, 7.2.2.3.6, and 7.2.2.3.8 below. (United States' first written submission, para. 86).

[103] See section 7.1.2 above.

[104] European Union's first written submission, paras. 211 and 216; 10 June 2020 response to Panel question No. 9, para. 51; opening statement at the first meeting of the Panel, paras. 12 and 20; second written submission, paras. 35-36 and 40; and 11 March 2021 comments on the United States' 25 February 2021 response to Panel question No. 2, para. 10.

[105] European Union's first written submission, paras. 218-225; 10 June 2020 responses to Panel question No. 6, para. 39, and No. 10, paras. 55-56; 8 September 2020 response to Panel question No. 1(c), paras. 52-54; opening statement at the first meeting of the Panel, paras. 13 and 53-54; and 25 February 2021 response to Panel question No. 3, paras. 22-23.

[106] European Union's first written submission, para. 227; opening statement at the first meeting of the Panel, para. 26.

that the limit on access to subsidies provided under the COMOF programme, which favoured olive growers, continued to determine access to subsidies and subsidy amounts under the SPS and BPS/GP programmes.[107] While the United States acknowledges that the USDOC's determination identified a connection between the SPS/BPS subsidy recipients and olive production, the United States points out that this was only *historic* olive production during the COMOF programme reference period, not olive production during the operation of the BPS programme.[108] The United States argues, furthermore, that the focus of the USDOC's *de jure* specificity findings (i.e. the "certain enterprises" within the meaning of Article 2.1(a) identified in the USDOC's determinations) were holders of entitlements whose value derived from assistance received under the COMOF programme, *whether olive growers or not*.[109] In particular, the United States asserts that the USDOC found the BPS subsidies were *de jure* specific because 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".[110]

7.42. In our view, when considered in isolation, two passages from the USDOC's preliminary issues and decision memorandum identified by the European Union suggest that the USDOC did, in fact, find that the BPS subsidies were *de jure* specific to *olive growers because* they were *tied to contemporaneous olive production*. In particular:

> We further preliminarily determine that the grants provided under [the BPS programme] are specific within the meaning of section 771(5A)(D)(i) of the Act *because the crop type determines the grant amounts provided under this program* due to the direct reliance on the grant amounts provided under previous programs, which based grant amounts on the crop type. As such, the [BPS programme] is specific to *olive growers*.
>
> … Given that the assistance provided to *olive growers* is granted *because they are growing olives*, we preliminarily determine that the assistance is *tied to the production of olives*, according to 19 CFR 351.525(b)(5).[111]

7.43. We note, however, that the European Union does not point to any equivalent statements made in the USDOC's final issues and decision memorandum. Nevertheless, according to the European Union, the fact that the USDOC confirmed its preliminary determination in the conclusions reached in its final determination demonstrates that the USDOC continued to hold the same view.[112] The European Union finds support for this submission in the following passages from the USDOC's final issues and decision memorandum[113]:

> As we explained in the *Preliminary Determination*, our finding of *de jure* specificity is based on the manner in which Spain implemented the Pillar I programs with reference to the operations of its two predecessor programs, the [SPS programme] and the [COMOF programme], and the manner in which the amount of assistance was determined under these two programs. The earliest of these programs, the [COMOF programme], was in place from 1999 through 2003, and provided production aid in the

[107] United States' first written submission, para. 57; 10 June 2020 responses to Panel question No. 1, para. 2, No. 6, para. 24, No. 7, paras. 26-28, and No. 9, para. 36; 8 September 2020 response to Panel question No. 1(c), paras. 11-14; opening statement at the first meeting of the Panel, paras. 5-6; and 12 November 2020 response to Panel question No. 1, para. 2.

[108] United States' first written submission, paras. 63-64 and 100; 8 September 2020 response to Panel question No. 1(c), para. 14; opening statement at the first meeting of the Panel, paras. 11 and 21-24; 12 November 2020 response to Panel question No. 5, paras. 18-19; second written submission, paras. 21 and 27; opening statement at the second meeting of the Panel, para. 3; and 25 February 2021 response to Panel question No. 2, paras. 4-10.

[109] United States' 10 June 2020 responses to Panel question No. 6, para. 24, No. 7, para. 26, and No. 8, para. 29; 8 September 2020 responses to Panel question No. 1(c), para. 11, and No. 1(d), para. 16; opening statement at the first meeting of the Panel, paras. 21-23; and 12 November 2020 response to Panel question No. 5, para. 18.

[110] United States' second written submission, para. 28. See also United States' 8 September 2020 responses to Panel question No. 1(c), paras. 11-13, and No. 1(d), para. 16; 12 November 2020 responses to Panel question No. 1, para. 6, and No. 5, paras. 18-19 and 22; and opening statement at the second meeting of the Panel, paras. 11 and 15.

[111] PIDM, (Exhibit EU-1), p. 24. (emphasis added)

[112] European Union's first written submission, paras. 213-215.

[113] European Union's first written submission, paras. 213-215.

> form of annual grants to farmers on the basis of type of crop and the volume of production.
>
> … Because the [COMOF programme] provided benefits on a *de jure* specific basis, the benefits provided under the SPS retained the *de jure* specificity inherent in the [COMOF programme].
>
> …
>
> In summary, the annual grant amounts provided to olive farmers under [the BPS programme] and [the GP programme] derive from the amount of SPS grants that were provided to each farmer in 2013. As explained above, the calculation of the grant amount under SPS retains the *de jure* specificity inherent in the [COMOF programme]. Therefore, the annual grant amounts provided under [the BPS programme] and [the GP programme] in 2016 are directly related to, and continue to retain the *de jure* specificity of, the grants provided to olive growers under the [COMOF programme].[114]

7.44. The European Union places particular emphasis on the last part of the first passage reproduced above, where the USDOC explains that "aid" was provided "on the basis of type of crop and the volume of production", as well as the USDOC's statements in the two following passages where it concludes that SPS benefits "retained the *de jure* specificity inherent" in the COMOF programme, and that BPS payments "continue to retain the *de jure* specificity" of the COMOF programme. We note, however, that the statement from the first passage refers directly to the COMOF programme, and not the BPS or GP programme. Moreover, we do not understand the statements about the *retention* and *continuation* of the specificity inherent in the COMOF programme to indicate that the USDOC was of the view that the BPS and SPS subsidies were *de jure* specific to olive growers because those subsidies were tied to olive production, in the same way as the COMOF programme subsidies. Rather, the USDOC statements reflect its view that the BPS and SPS subsidies were *de jure* specific because they *derived* from the crop-specific COMOF programme assistance. As such, we do not understand the above passages to mean that the USDOC concluded that the BPS, SPS, and GP subsidies were *de jure* specific to olive growers because assistance received under those programmes was tied to olive production during the operation of the BPS programme.

7.45. The United States argues that "the final determination is clear in identifying that the 'certain enterprises' under Article 2.1(a) are holders of entitlements whose value derived from the [COMOF programme]".[115] The United States finds support for this submission in the following specific observation made by the USDOC in the final issues and decision memorandum, which we quote below in its context and emphasize in italics:

> As the EC points out, when the SPS program was implemented in Spain, the aid provided to farmers was converted into "entitlements," rights to receive payments, that were linked to land area and completely decoupled from production. That is, under SPS, 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*.[116]

7.46. The United States argues that the italicized text reveals how "the final determination reflected how the BPS Programs kept, from the [COMOF programme], the conditions that limited access to those subsidies as a discrete component of entitlement payments, whether the entitlement holders continued to grow olives or did something else".[117] We note, however, that the passage cited by the United States discusses the SPS programme, not the BPS programme. Moreover, in our view, the statement the United States relies upon does not support the view that the USDOC found that SPS subsidies were *de jure* specific to holders of entitlements whose value derived from the COMOF programme, *whether or not olive growers*. In this regard, we note that the only explicit statement of the USDOC's *de jure* specificity findings with respect to the SPS programme is found in the USDOC's preliminary issues and decision memorandum, which provides as follows:

[114] FIDM, (Exhibit EU-2), pp. 32, 33, and 36. (fns omitted; emphasis added)
[115] United States' opening statement at the first meeting of the Panel, para. 21.
[116] FIDM, (Exhibit EU-2) p. 33. (fn omitted; emphasis added)
[117] United States' opening statement at the first meeting of the Panel, paras. 22-23.

> We further preliminarily determine that the grants provided under [the SPS] program are specific within the meaning of section 771(5A)(D)(i) of the Act because *the crop type determines the grant amounts* provided under this program due to the direct reliance on the grant amounts provided under previous programs, which *based grant amounts on the crop type*. As such, the [SPS] program is specific to *olive growers*.
>
> … Given that the assistance provided *to olive growers* is granted *because they are growing olives*, we preliminarily determine that the assistance is *tied to the production of olives*, according to 19 CFR 351.525(b)(5).[118]

7.47. Rather than demonstrating that the USDOC found that the SPS subsidies were *de jure* specific to any farmers with entitlements based on the COMOF programme, these USDOC conclusions (which are identical to the USDOC statements we have quoted above in relation to the BPS and GP programmes) suggest that the USDOC did, in fact, find that the SPS subsidies were *de jure* specific to *olive growers because* they were *tied to contemporaneous olive production.*

7.48. More generally, the United States argues that the USDOC finding that "certain enterprises" for the purpose of Article 2.1(a) were holders of entitlements whose value derived from the COMOF programme, whether or not olive producers, is evident in the USDOC's preliminary and final determinations.[119] However, in making this submission, the United States does not point[120] to any specific statement or conclusion in the USDOC's preliminary or final determinations that explains the *de jure* specificity finding in these terms. Rather, referring to four pages in the USDOC's final issues and decision memorandum, the United States argues that the USDOC's analysis "identified that (i) the [COMOF programme] 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".[121]

7.49. We agree that when read in its totality, the analysis set out in the four pages of the USDOC's final issues and decision memorandum and other record evidence suggests that the USDOC understood that subsidies provided under the SPS, BPS, and GP programmes were *not* tied to olive production during the period of operation of the SPS programme or the BPS programme. Thus, for example, the USDOC observed in its verification report that:

> To receive an income grant [under the SPS programme], the farmer must annually "activate" the entitlements and the number of eligible hectares through an application process. The 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.
>
> …
>
> To be eligible for assistance under the BPS and [GP] programs, a recipient has to be an "active" farmer, meaning that *the farmer maintains the land in arable condition*. There are *no production requirements*.[122]

7.50. That the USDOC recognized that the BPS subsidies were not tied to contemporaneous olive production is also evident in the manner in which the USDOC responded to arguments about the "decoupled" nature of the programme made by the European Commission, the GOS, and the respondents:

> Despite the arguments from the EC, the GOS, and the respondents, that because the BPS programs provide benefits that have been decoupled from production, they are not

[118] PIDM, (Exhibit EU-1), p. 27. (emphasis added)
[119] United States' 8 September 2020 response to Panel question No. 1(c), para. 11.
[120] Except for the statement from the FIDM that "under SPS, 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", which, as we have explained, does not support the United States' argument.
[121] United States' 8 September 2020 response to Panel question No. 1(c), para. 11. See also United States' opening statement at the first meeting of the Panel, paras. 21-26; 12 November 2020 response to Panel question No. 5, paras. 18-22; and second written submission, para. 28.
[122] USDOC verification report: European Commission, (Exhibit EU-22), pp. 2-3. (emphasis added)

> specific, we continue to find that the reliance on earlier assistance programs that were specific to determine the amounts of assistance under the current program, renders specific the benefits under the BPS programs.[123]

7.51. In our view, the first set of quoted statements from the verification report reveals that the USDOC explicitly recognized that "production was not a factor" for being eligible to receive SPS payments, and that "no production requirements" were attached to eligibility for the BPS subsidies. In the second of the quoted passages, the USDOC did not deny the assertion that the BPS subsidies were "decoupled from production". Rather, the USDOC explained that the reason for its finding of specificity was the "reliance on earlier assistance programs that were specific to determine the amounts of assistance" under the BPS programme.

7.52. When considered in the light of the USDOC's other statements concerning the nature of the payments made under the COMOF programme (e.g. "the [COMOF programme] provided annual payments only to producers of oilseed crops, including olives"), and the relationship between these payments and the SPS/BPS programmes, it is reasonable to infer that the USDOC did *not* find that the SPS and BPS subsidies were *de jure* specific on a consideration that assistance under these programmes was tied to contemporaneous olive production. Rather, the USDOC's finding was that the SPS, BPS, and GP subsidies were specific because the assistance was tied to olive production in the *historic* period when olive growers received payments under the COMOF programme. Thus, notwithstanding the statements the European Union has pointed to suggesting the contrary, we believe that when read as a whole, the USDOC's determination is not based on a finding that the SPS, BPS, and GP subsidies were *de jure* specific *because they were tied to contemporaneous olive production*.

7.53. In contrast, the USDOC's preliminary and final determinations do not support the United States' submission that the USDOC found the "certain enterprises" for the purpose of Article 2.1(a) to be holders of entitlements whose value derived from the COMOF programme*, whether or not olive growers*. As already noted, the United States has not pointed to any specific statements in those determinations presenting the USDOC's findings in those terms; and we do not see how that conclusion can be inferred from a reading of the totality of the USDOC's analysis.

7.54. The United States argues that the Remand Redetermination is "straightforward in identifying the group of enterprises" under the BPS and GP programmes, and refers to the following italicized statements to support its position[124]:

> As has been discussed at length elsewhere in this redetermination, in identifying that *the value of entitlements under the BPS incorporates the value of olive production per hectare* (in that it relies on the calculation of benefits provided under the SPS), *as recorded under the [COMOF programme]*, the BPS continues to treat the agricultural sector on a non-uniform basis and thus limits access to certain benefits to olive growers. *Specifically, farmers on lands that produced olives during the reference period continue to have limited access to entitlement values, and therefore benefit amounts, that retain the historical difference, relative to other farmers on other lands, that was inherent in the crop-specific subsidies provided under the [COMOF programme]*. Thus, we find that this program is *de jure* specific to olive growers within the meaning of section 771(5A)(D)(i) of the Act.[125]

7.55. According to the United States, the italicized text in the above passage reveals how the USDOC "correctly observed" that by "incorporating the value of prior olive production into the entitlements under the BPS Programs, the BPS Programs are specific to *olive growers*".[126] In our view, this submission is difficult to reconcile with the United States' position that the "certain enterprises" identified in the USDOC's determinations were farmers whose BPS entitlement values were derived from historical olive production, *whether they grew olives or not*. Nevertheless, we believe it is a correct characterization of the USDOC's determination, as in the very next sentence at the end of the quoted passage the USDOC concludes its analysis by finding that "this program is

[123] FIDM, (Exhibit EU-2), p. 36.
[124] United States' opening statement at the first meeting of the Panel, para. 24. See also United States' 12 November 2020 response to Panel question No. 5, para. 21.
[125] Remand Redetermination, (Exhibit EU-80), pp. 58-59. (emphasis added)
[126] United States' opening statement at the first meeting of the Panel, para. 24. (emphasis added)

de jure specific to *olive growers*".[127] Indeed, essentially the same conclusion about the alleged limited access to the SPS and BPS subsidies afforded to *olive growers* can be found in other parts of the USDOC's Remand Redetermination, including in the following passages:

> [T]he SPS program preserved the access of *olive farmers* to the assistance previously available to them, on a *de jure* specific basis, under the [COMOF programme][.][128]
>
> [U]nder the SPS, access to a subsidy based on [COMOF programme] subsidies was expressly limited *to olive growers*[.][129]
>
> Information provided by the GOS and the EU indicated that access to, and the amount of, benefits provided to *olive growers* under the BPS, as a matter of law, relied for reference on the provision of benefits under the SPS and, in turn, access to and the amount of benefits provided to *olive growers* under the SPS was determined by reference to the benefits provided under the [COMOF programme].[130]
>
> [The USDOC] found that, as a result of the actions of the GOS and the EU in implementing the program, BPS subsidies were not uniformly available across the agricultural sector in Spain because access to the BPS subsidy for *olive growers* was, as a matter of law, based on eligibility for assistance provided under the [COMOF programme], which expressly limited access to *olive growers*.[131]
>
> An examination of the prior legislation explicitly referenced in and incorporated by the BPS demonstrates a linkage between eligibility for the crop-specific payments provided under the prior legislation and the current payments provided under the BPS. This link continued to entrench limited access and favored *the olive industry*.[132]
>
> By designing two consecutive benefit schemes [i.e. the SPS and BPS programmes] in this manner, the express terms of the legislation pursuant to which the GOS operates demonstrate that the GOS administers the current BPS payments to limit access to certain benefits to a subsector of the Spanish agricultural industry, *olives*.[133]

7.56. We note, moreover, that the sentence the United States relies upon from the above quoted passage in paragraph 7.54 of the USDOC's Remand Redetermination begins with the word "[s]pecifically".[134] In our view, this suggests that its contents is intended to elaborate and clarify the statements made in the preceding sentence. That sentence explains in general terms why the USDOC considers that "the BPS … limits access to certain benefits to *olive growers*".

7.57. Thus, we read the statement that "farmers on lands that produced olives during the [COMOF programme] reference period continue to have limited access to entitlement values" as the USDOC's elaboration of why it considered that BPS subsidies were limited to *olive growers*. In our view, this understanding of the USDOC's statement is consistent with the following USDOC observation made using very similar terms elsewhere in the Remand Redetermination:

> The SPS and BPS programs, by law, rely on "historical" reference periods to preserve the benefit amounts provided to growers of certain crops under predecessor programs. The GOS, as required by legislation, relied on volume, value, and area data, and prior subsidy amounts that were developed on a product-specific basis for the purpose of determining the amount of the subsidies provided *to olive growers* under the SPS,

[127] Remand Redetermination, (Exhibit EU-80), p. 59. (emphasis added)
[128] Remand Redetermination, (Exhibit EU-80), p. 8. (emphasis added)
[129] Remand Redetermination, (Exhibit EU-80), p. 16. (emphasis added)
[130] Remand Redetermination, (Exhibit EU-80), p. 15. (emphasis added)
[131] Remand Redetermination, (Exhibit EU-80), p. 15. (emphasis added)
[132] Remand Redetermination, (Exhibit EU-80), pp. 48-49. (emphasis added)
[133] Remand Redetermination, (Exhibit EU-80), p. 49. (emphasis added)
[134] We observe that the adverb "specifically" means "[i]n a specific or definite form or manner", or "[i]n something of the same kind". (Oxford Dictionaries online, definition of "specifically" https://www.oed.com/view/Entry/186003 (accessed 13 August 2021), adv., meanings 2 and 3).

> thereby preserving access to the subsidy that was expressly limited under the [COMOF programme].[135]
>
> [T]he entitlement values under the BPS for those farmers *that grow olives* retain the historical difference, relative to other farmers, that was inherent in the [COMOF programme].[136]

7.58. Accordingly, we do not understand the statement the United States relies upon to demonstrate that the USDOC found that the "certain enterprises", for the purpose of Article 2.1(a), are farmers whose entitlement values were derived from historical olive production, *irrespective of whether they are olive growers or not*. Rather, although not always expressed in exactly the same terms, we find that the USDOC's *de jure* specificity determination is best understood as a finding that the BPS subsidies were *de jure* specific to *olive growers* because "access to, and the amount of, benefits provided to *olive growers* under the BPS, as a matter of law, relied for reference on the provision of benefits under the SPS and, in turn, access to and the amount of benefits provided to *olive growers* under the SPS was determined by reference to the benefits provided under the [COMOF programme]".[137] Thus, we find that the USDOC determined that the SPS, BPS, and GP subsidies were *de jure* specific to *olive growers*, not because they were tied to the production of olives during the operation of the SPS and BPS programmes (as the European Union argues), but rather because, according to the USDOC, the SPS, BPS, and GP subsidies available to olive growers were tied to *historical* olive production during the COMOF programme reference period.

7.2.2.3.3 Entitlement values under the BPS programme for new farmers, farmers holding transferred entitlements, and farmers no longer growing olives

7.59. The European Union argues that the USDOC's finding of the existence of a direct correlation between, on the one hand, the amounts of assistance provided to olive growers under the BPS/GP, programmes and on the other hand, the amounts of assistance provided under the SPS and COMOF programmes, is erroneous and ignores relevant aspects of the record evidence demonstrating that no such direct correlation exists.[138] According to the European Union, the USDOC overlooked the following features of the relevant subsidy regime: (i) the rules governing the allocation and calculation of the value of payment entitlements of new farmers from the national reserve; (ii) the possibility of obtaining payment entitlements by transfer[139] from one or more other farmers; and (iii) the fact that a previously active olive farmer was entitled to receive assistance regardless of whether that farmer continued to produce olives.[140] The European Union submits that these alleged errors of appreciation demonstrate that the USDOC's determination of *de jure* specificity was not reasonably and adequately explained, and that it was grounded on an erroneous factual basis, and, therefore, is inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement.[141]

7.60. The United States argues that the USDOC appropriately factored into its analysis the operational link between the BPS and GP programmes, and the subsidies provided under the SPS and COMOF programmes.[142] The United States argues that the investigation record did not contain evidence of any assistance received under the BPS and GP programmes based on entitlements from the national reserve or transferred entitlements.[143] Moreover, according to the United States, the fact that entitlements could have been transferred does not sever the reliance on the COMOF programme that Spain elected to incorporate into the SPS programme, and by extension,

---

[135] Remand Redetermination, (Exhibit EU-80), p. 49. (emphasis added)
[136] Remand Redetermination, (Exhibit EU-80), p. 18. (emphasis added; original emphasis omitted)
[137] Remand Redetermination, (Exhibit EU-80), p. 15 (emphasis added). For a similar explanation, see also FIDM, (Exhibit EU-2), p. 36.
[138] European Union's first written submission, paras. 241-246.
[139] E.g. via inheritance, lease, purchase, or gift. (European Union's 25 February 2021 response to Panel question No. 7, para. 58).
[140] European Union's first written submission, para. 245; 10 June 2020 response to Panel question No. 10, paras. 58-60; opening statement at the first meeting of the Panel, paras. 28 and 37; 12 November 2020 response to Panel question No. 8, para. 42; and 25 February 2021 response to Panel question No. 3, paras. 22-23.
[141] European Union's first written submission, paras. 240 and 246; opening statement at the first meeting of the Panel, para. 43.
[142] United States' first written submission, para. 68.
[143] United States' 12 November 2020 response to Panel question No. 4, para. 16.

the successor BPS and GP programmes, as "only the legacy entitlement holders could apply for and receive the subsidy amounts reserved for that class of certain enterprises".[144]

7.61. We recall that the USDOC determined that subsidies provided to olive growers under the BPS programme were *de jure* specific because it found that "access to, and the amount of, benefits provided to olive growers under the BPS, as a matter of law, relied for reference on the provision of benefits under the SPS and, in turn, access to and the amount of benefits provided to olive growers under the SPS was determined by reference to the benefits provided under the [COMOF programme]".[145] The USDOC arrived at this conclusion after examining the operation of the BPS programme, including the rules governing the calculation of payment amounts. In its preliminary issues and decision memorandum, the USDOC explained its understanding of these rules in the following terms:

> The calculation begins with determining an "initial value," as instructed by Council Regulation (EC) 1307/2013 Article 26 and implemented by Royal Decree 1076/2014.
>
> Under Regulation (EU) 1307/2013, Article 26 (3) states that the initial value is
>
> > {a} fixed percentage of *the value of the entitlements*, including special entitlements, which the farmer held on the date of submission of his application for 2014 *under the single payment scheme*, in accordance with Regulation (EC) No 73/2009, shall be divided by the number of payment entitlements he is allocated in 2015, excluding those allocated from the national or regional reserves in 2015.
>
> The Spanish regulations regarding the implementation of BPS, Royal Decree 1076/2014, state that
>
> > {f}or the calculation of the initial unitary value, the level of payments received in the 2014 campaign, before deduction and exclusions, corresponding to the aid schemes paid in that campaign, amounts of which remain uncoupled or are partially or totally decoupled from 2015 onwards, shall be taken as a reference. These amounts correspond to the single payment scheme as a decoupled payment … [.]
>
> Based on these regulations, a region's value is the initial value multiplied by an adjustment coefficient divided by the number of hectares with entitlement values. These regulations also state that the initial value is based on the amounts provided under SPS, the annual grant-to-farmer program in place prior to the implementation of the BPS in 2015. These regulations also state that the adjusted coefficient incorporates into the equation the amount of payments received in 2014 under SPS. Therefore, the value that is divided by the number of eligible hectares to determine each region's value is based on the amount that farmer received per hectare in 2014 under SPS.[146]

[144] United States' 12 November 2020 response to Panel question No. 4, para. 17; first written submission, para. 72. We note that the United States also argues that it is similarly irrelevant whether a farmer may have switched some or all of the production to a different crop, as the group of enterprises for the purposes of the USDOC's specificity analysis was the holders of entitlements whose entitlement values derived from the assistance during the COMOF programme reference period, whether olive growers or not. (United States' opening statement at the first meeting of the Panel, para. 25; 10 June 2020 response to Panel question No. 6, para. 24). For reasons explained in section 7.2.2.3.2 of this Report, we have rejected this characterization of the USDOC's determination, finding instead that the USDOC concluded that BPS subsidies to olive growers were *de jure* specific because "access to, and the amount of, benefits provided to olive growers under the BPS programme, as a matter of law, relied for reference on the provision of benefits under the SPS and, in turn, access to and the amount of benefits provided to olive growers under the SPS was determined by reference to the benefits provided under the [COMOF programme]". (Remand Redetermination, (Exhibit EU-80), p. 15).

[145] Remand Redetermination, (Exhibit EU-80), p. 15.

[146] PIDM, (Exhibit EU-1), pp. 20-21. (emphasis original; fns omitted)

7.62. The USDOC went on to explain its understanding of how payment amounts to olive farmers were determined under the SPS programme, by reference to the COMOF programme, and how under the COMOF programme payments were crop specific. It then concluded:

> In summary, the annual grant amount provided to olive farmers under BPS is based on the annual grant amount provided to olive farmers under SPS. The grant amount provided to olive farmers under SPS is based on the average grant amount olive farmers received in 1999 through 2002 under the [COMOF] program. The grant amount provided in 1999 through 2002 to eligible farmers, which included olive farmers, was based on the type of crop grown and the production value created from the crop. Therefore, the annual grant amount provided under BPS are based on annual grant amounts that were crop specific, thus the grant amounts received by olive growers under BPS in 2016 are directly related to the grant amount only olive growers received under [the COMOF] program. All respondents and many of the olive growers that supply them, received benefits under this program during the [period of investigation].[147]

7.63. The USDOC's final issues and decision memorandum confirmed its preliminary findings and repeated much of the analysis set out in the preliminary issues and decision memorandum *verbatim*, including the above-quoted excerpts from Article 26.3 of Regulation 1307/2013 and Royal Decree 1076/2014[148], and similarly explained:

> Based on these regulations, a region's value is the initial value multiplied by an adjustment coefficient divided by the number of hectares with entitlement values. These regulations also state that the initial value is based on the amounts provided under SPS. These regulations also state that the adjusted coefficient incorporates into the equation the amount of payments received in 2014 under SPS. Therefore, the value that a farmer received per hectare in 2014 under SPS is used in calculating each region's value.
>
> …
>
> In summary, the annual grant amounts provided to olive farmers under [the BPS programme] and [the GP programme] derive from the amount of SPS grants that were provided to each farmer in 2013. As explained above, the calculation of the grant amount under SPS retains the *de jure* specificity inherent in the [COMOF programme]. Therefore, the annual grant amounts provided under [the BPS programme] and [the GP programme] in 2016 are directly related to, and continue to retain the *de jure* specificity of, the grants provided to olive growers under the [COMOF programme].[149]

7.64. In the Remand Redetermination, the USDOC explained and elaborated its earlier determinations, expressing the same understanding of the rules governing the calculation of the BPS payment entitlements:

> In its implementation of the BPS, the GOS, just as it did with the SPS program, [*sic*] the eligibility criteria that limited access to benefits provided under the [COMOF programme] were incorporated as a matter of law and embedded the historical differences in crop entitlement amounts among different agricultural products. As a result, farmers who received larger relative amounts of assistance under SPS continue to receive larger amounts of assistance under BPS. Therefore, the entitlement values under the BPS for those farmers that grow olives retain the historical difference, *relative to other farmers*, that was inherent in the [COMOF programme].[150]
>
> As explained above, benefits under the BPS were by law based on the benefits provided under the predecessor programs, which preserved the eligibility criteria for access to benefits provided under the [COMOF programme] and the historical differences in crop entitlement amounts among different agricultural products.[151]

[147] PIDM, (Exhibit EU-1), p. 24.
[148] FIDM, (Exhibit EU-2), pp. 34-35.
[149] FIDM, (Exhibit EU-2), pp. 35-36. (fns omitted)
[150] Remand Redetermination, (Exhibit EU-80), p. 18. (emphasis original)
[151] Remand Redetermination, (Exhibit EU-80), p. 19.

> To determine access to payments under the BPS, and the criteria or conditions governing the eligibility for, and the amount of the subsidy, the BPS legislation expressly refers to prior legislation and incorporates by reference the eligibility criteria from the prior legislation. An examination of the prior legislation explicitly referenced in and incorporated by the BPS demonstrates a linkage between eligibility for the crop-specific payments provided under the prior legislation and the current payments provided under the BPS. This link continued to entrench limited access and favored the olive industry.
>
> …
>
> The legislation governing the BPS program may not have explicitly stated that it intended to benefit olive growers; however, the BPS program expressly references prior legislation that dictates the access to and amount of BPS payments that, by law, provides expressly limited access to subsidies to olive growers. The SPS and BPS programs, by law, rely on "historical" reference periods to preserve the benefit amounts provided to growers of certain crops under predecessor programs. The GOS, as required by legislation, relied on volume, value, and area data, and prior subsidy amounts that were developed on a product-specific basis for the purpose of determining the amount of the subsidies provided to olive growers under the SPS, thereby preserving access to the subsidy that was expressly limited under the [COMOF programme]. Similarly, the GOS once again, by law, relied on a historical reference period to determine benefits under the BPS program, and therefore, once again, by law, entrenched benefits received under these past programs on a crop-specific basis. By designing two consecutive benefit schemes in this manner, the express terms of the legislation pursuant to which the GOS operates demonstrate that the GOS administers the current BPS payments to limit access to certain benefits to a subsector of the Spanish agricultural industry, olives.[152]

7.65. The European Union argues that the USDOC's analysis and findings reflect a "simplistic" understanding of the BPS programme that misdescribes, and fails to properly account for the rules governing the allocation and calculation of the value of payment entitlements, including with respect to new farmers, farmers possessing transferred entitlements, and farmers no longer growing olives.[153] We agree with the European Union that the USDOC's analysis and findings did not examine and properly account for record evidence that was relevant and important to understand how, as a matter of law, entitlement values were determined under the BPS programme.

7.66. We note that under the relevant terms of the BPS programme, as implemented by Spain, annual assistance in the form of direct payments was available in the period 2015-2020 to any "farmer" activating payment entitlements obtained through one or more of the following avenues: (a) "first allocation" in 2015; (b) allocation from the national or regional reserves; or (c) transfer of entitlements with or without land.[154] The BPS programme defines a "farmer" as any natural or legal person undertaking "an agricultural activity", including not only production, rearing and growing of agricultural products, but also "maintaining an agricultural area in a state which makes it suitable for grazing or cultivation" or "carrying out a minimum activity, defined by Member States, on agricultural areas naturally kept in a state suitable for grazing or cultivation".[155] Thus, direct payments under the BPS programme were not conditioned on a requirement to produce or to grow any crop. Rather, to qualify for direct payments, a "farmer" must have obtained entitlements through any one or more of the above three ways, and those entitlements must have been activated.[156]

[152] Remand Redetermination, (Exhibit EU-80), pp. 48-49.

[153] European Union's first written submission, para. 245; 10 June 2020 response to Panel question No. 10, paras. 58-60; opening statement at the first meeting of the Panel, paras. 28 and 37; 12 November 2020 response to Panel question No. 8, para. 42; and 25 February 2021 responses to Panel question No. 3, paras. 22-23, and No. 7, paras. 58-61.

[154] Regulation 1307/2013, (Exhibit EU-25), Articles 21.1 and 32.

[155] Regulation 1307/2013, (Exhibit EU-25), Articles 4.1(a), 4.1(c), and 9.

[156] To activate payment entitlements, a farmer must submit an aid application on an annual basis by a due date, declaring the amount of payment entitlements the farmer holds together with the corresponding number of eligible hectares. (Regulation 1307/2013, (Exhibit EU-25), Articles 32 and 33).

7.67. Although the USDOC recognized that the BPS subsidies to olive growers were not tied to contemporaneous olive production[157], the relevance to its findings of the legal possibility of obtaining entitlements through any one or more of the three methods prescribed in the BPS programme is not examined in its determinations. The USDOC's analysis is focused on the rules for calculating the value of entitlements prescribed in Article 26 of Regulation 1307/2013 and Spanish Royal Decree 1076/2014, which implemented the BPS programme. According to the USDOC, these rules prescribe that the starting point of the calculation (the "initial value") was a function of the value of SPS entitlements held by the relevant farmer. We note, however, that the value of entitlements obtained from the "national or regional reserves" was determined under a *different* set of provisions of Regulation 1307/2013 and Spanish Royal Decree 1076/2014. Entitlements obtained from the national or regional reserves were available to all qualifying farmers, but were to be used, as a matter of priority, to facilitate the participation of young farmers and farmers commencing their agricultural activity.[158] In Spain, the per unit value of entitlements from the national reserve for new or young farmers was set at the average value of all payment entitlements in the region of such farmer in the year of allocation.[159] This indicates that, *as a matter of law*, the BPS programme prescribed that the value of BPS payments to young and new farmers (including, potentially, *new olive growers*) was not directly tied to the value of SPS entitlements. The BPS programme, therefore, provided for the possibility that the value of entitlements obtained by such farmers would not be derived from the value of previously held SPS entitlements. In our view, the absence of any discussion or assessment of this feature of the BPS programme in the USDOC's analysis undermines the USDOC's determination that BPS payments to olive growers were *de jure* specific because "access to, and the amount of, benefits provided to olive growers under the BPS programme, as a matter of law, *relied for reference on the provision of benefits under the SPS*".[160]

7.68. Turning to the BPS calculation rules, we note that after quoting Article 26(3) of the BPS programme in its preliminary issues and decision memorandum, the USDOC referred to a passage from Royal Decree 1076/2014. According to the USDOC, the regulations revealed that "the initial value is based on the amounts provided under SPS", leading the USDOC to conclude that "the amount of assistance provided under [the BPS programme] and [the GP programme], is based on the annual grant amount provided per hectare under SPS".[161] However, the full text of the passage from Royal Decree 1076/2014 quoted by the USDOC reveals that, as implemented by Spain, the value of entitlements was to be determined not only as a function of payments received under the SPS programme:

> For the calculation of the initial unitary value, the level of payments received in the 2014 campaign, before deductions and exclusions, corresponding to the aid schemes paid in that campaign, amounts of which remain uncoupled or are partially or totally decoupled from 2015 onwards, shall be taken as a reference. These amounts correspond to the single payment scheme as a decoupled payment *and a certain percentage of the payments received for the suckler cow premium and the supplementary premium for the suckler cow, payments received on the basis of the national program for the promotion of crop rotations in dry agricultural land, payments received on the basis of the national program for the promotion of tobacco quality and payments received on the basis of the national program for the promotion of cotton quality, as payments that become decoupled in the new period.*[162]

[157] See para. 7.52 above.
[158] Regulation 1307/2013, (Exhibit EU-25), Article 30.6. See also Royal Decree 1076/2014, (Exhibit EU-30), Article 24.
[159] Article 26.1 of Royal Decree 1076/2014, (Exhibit EU-30), which provides that the value of such payment entitlements "will correspond to the average regional value of the entitlements in the year of allocation", and that "[t]he regional average value shall be calculated by dividing the regional ceiling corresponding to the basic payment for the year of allocation, by the total number of entitlements allocated for that region". The regional average values are set out in Order AAA/1747/2016, (Exhibit EU-32). See also Regulation 1307/2013, (Exhibit EU-25), Article 30.8; and GOS's response to supplemental questionnaire of 10 January 2017, (Exhibit EU-15), pp. 32-42, reproducing the relevant Spanish rules concerning payment entitlements from the national reserve and explaining that "the main difference with the normal BPS programme is that the value of the entitlements generated by the National Reserve if from the beginning the average value of the region where the entitlements is [*sic*] allocated". See also Newsletter No. 2, Basic payment entitlement allocation, (Exhibit EU-31).
[160] Remand Redetermination, (Exhibit EU-80), p. 15. (emphasis added)
[161] PIDM, (Exhibit EU-1), pp. 20-21.
[162] Royal Decree 1076/2014, (Exhibit EU-30), pp. 3-4. (emphasis added)

7.69. This accords with the European Union's assertion that Article 26.6 of Regulation 1307/2013 and Article 13 of Royal Decree 1076/2014 established that the payment amounts to be taken into account for the purpose of calculating the "initial value" of BPS entitlements included not only payments made under the SPS programme in 2014, but also payments made in the same year pursuant to a number of previously coupled aid schemes. For Spain, the previously coupled payments were defined as 51.32% of the suckler cow premium, the rain-fed rotation programme premium, the cotton quality premium, and the tobacco quality premium. In our view, these provisions reveal that the value of BPS payments could be determined based on payments received under programmes *other than* the SPS programme. The USDOC's determinations do not discuss the relevance of this aspect of the BPS calculation rules to its finding of *de jure* specificity, even despite the fact that during the investigation, the GOS provided the USDOC with information showing that the BPS payments for one of the mandatory respondents or its unaffiliated supplier was determined taking into account payments received under the national programme for the promotion of cotton quality.[163] Nevertheless, we do not find the absence of any discussion of this feature of the BPS programme in the USDOC's determination to undermine the USDOC's findings of *de jure* specificity because, ultimately, as already noted, the USDOC's findings were driven by the view that the availability of *COMOF programme-based payments via the SPS programme* was, as a matter of law, limited to olive growers. The fact that olive growers may have received BPS payments for *non-olive growing* activities under different programmes does not undermine the USDOC's position.

7.70. We note, furthermore, that while the relevant BPS calculation rules envisage that the value of SPS entitlements would be used to establish the "initial value" of a farmer's BPS entitlements, the corresponding rules of the SPS programme did not prescribe that the value of all such entitlements for olive growers were to be necessarily determined with reference to the COMOF programme.

7.71. Assistance under the SPS programme was available to any "farmer" holding entitlements obtained (a) during the relevant reference period under at least one of several prior support schemes (which included the COMOF programme); (b) by transfer or inheritance; or (c) from the national reserve.[164] This means that under the calculation rules of the BPS programme, the "initial value" of entitlements of a farmer that received assistance under the SPS programme was, at least in part[165], a function of the value of entitlements received via one or more of the above three methods. Thus, any SPS-based entitlements used to determine the "initial value" of an olive farmer's entitlements under the BPS programme do not appear to have been limited, *as a matter of law*, to those obtained through the operation of the COMOF programme. This is because it was legally possible for an olive farmer to obtain SPS entitlements by other means – namely, via transfer from a farmer of other products, or from the national reserve.

7.72. When an SPS entitlement was obtained by transfer, the original source of that entitlement could have been a support programme other than the COMOF programme, as in addition to olives, the previously existing support schemes relevant for establishing the initial value of the payment entitlements under the SPS programme included programmes providing assistance for arable crops, potato starch, grain legumes, rice, seeds, beef and veal, milk and milk products, sheepmeat and goatmeat, dried fodder, cotton, tobacco, hops, sugar beet, cane and chicory used for the production of sugar or inulin syrup, and bananas.[166] This suggests that, as a matter of law, the "initial value" of an olive grower's BPS entitlements could have been derived from non-COMOF programme-based SPS entitlements previously obtained via transfer from, for example, a cotton farmer. Conversely, the "initial value" of the BPS entitlements of a farmer that did not grow olives (for example, a grower

[163] European Union's first written submission, fn 101 (referring to GOS's response to supplemental questionnaire of 10 January 2017, (Exhibit EU-15), point A.2, p. 18).

[164] Regulation 1782/2003, (Exhibit EU-24), Article 33. Under the SPS programme, a newcomer could obtain a payment entitlement either from the reserve (Regulation 1782/2003, (Exhibit EU-24), Article 42.3; Regulation 73/2009, (Exhibit EU-23), Article 41.2), or by transfer (lease, sale, or inheritance) within the same member State (Regulation 1782/2003, (Exhibit EU-24), Article 46; Regulation 73/2009, (Exhibit EU-23), Article 43). According to the European Union, since Spain did not implement the SPS programme on a regional basis (unlike the BPS programme, as explained below), a farmer could sell, buy, or rent SPS entitlements and activate them in any eligible hectare in Spain. (European Union's 25 February 2021 response to Panel question No. 7, paras. 63-64).

[165] We recall that under the BPS programme, as implemented by Spain, the "initial value" of entitlements was to be determined not only as a function of 2014 SPS payments, but also payments made in the same year pursuant to a number of previously coupled aid schemes.

[166] Regulation 1782/2003, (Exhibit EU-24), Article 37 and Annex VI. See also European Union's first written submission, para. 79.

of citrus fruits) could have also been derived from COMOF programme-based SPS entitlements previously transferred from an olive grower.[167] In our view, these considerations suggest that the BPS programme did not legally tie the "initial value" of BPS entitlements for olive growers to the value of SPS entitlements derived from the COMOF programme assistance. While COMOF programme-based SPS entitlements may have served, *as a matter of fact*, as the basis for calculating the value of an olive grower's BPS entitlements, the BPS programme does not make this a legal requirement. Rather, when considered in the light of the relevant SPS rules discussed above, the BPS programme appears to leave open the possibility that the "initial value" of an olive grower's BPS entitlements could be determined as a function of SPS entitlements that were not derived from the COMOF programme. Likewise, when considered in the light of the same SPS rules, the BPS programme also seems to envisage that COMOF programme-based SPS entitlements could be enjoyed by any farmer (not only olive growers) that had previously obtained those entitlements via transfer under the SPS programme. In our view, these considerations suggest that the BPS programme did not *legally limit* the class of farmers that may benefit from the COMOF programme-based SPS programme, and by extension, BPS entitlements to olive growers. However, this aspect of the rules governing the allocation and calculation of BPS entitlements was not discussed or examined in the USDOC's determination of *de jure* specificity.[168]

7.73. The United States argues that the fact that entitlements could have been bought, rented, or inherited does not sever the reliance on the COMOF programme that Spain elected to incorporate into the SPS programme, and by extension, the successor BPS programme.[169] As already noted, however, the fact that COMOF programme-based SPS entitlements could be transferred under the SPS programme to farmers that did not grow olives suggests that access to, and the amount of, BPS entitlements derived from COMOF programme-based SPS entitlements was not legally limited to olive growers. Moreover, the fact that it was open under the SPS programme for olive farmers to obtain entitlements derived from non-COMOF programmes by way of transfer, suggests that BPS payments to the same olive farmers could be derived from programmes other than the COMOF programme.

7.74. Finally, we recall that to qualify for BPS assistance, a farmer was not required to produce any agricultural product. The same is true for assistance under the SPS programme, which defined a "farmer" as any natural or legal person undertaking "an agricultural activity", including not only production, rearing and growing of agricultural products, but also "maintaining the land in good

[167] While the United States argues that only the holders of legacy entitlements based on historic olive production subsidies could apply for and receive the subsidy amounts reserved for that class of certain enterprises (United States' 11 March 2021 comments on the European Union's 25 February 2021 response to Panel question No. 7, para. 36), nothing in the SPS or BPS rules limits such transfers to transactions between olive growers, making a transfer between an olive grower and a citrus fruits grower possible, as a matter of SPS or BPS legislation (subject to the rule that under the BPS programme in Spain, transfer is allowed within a region). Such transfer would, in turn, provide the citrus fruits grower with access to the subsidy amounts based on COMOF-related assistance, altering the scope of such access, contrary to the United States' argument.

[168] In our view, the same holds true in the context of the possibility to transfer payment entitlements under the BPS programme. The relevant BPS rules, as implemented by Spain, provide that BPS entitlements may be transferred (via sale, lease, or any other form foreseen by law) with or without land to any active farmer within the same region (as defined by Spain for the purpose of implementing the BPS programme). This indicates that, *as a matter of law*, an olive grower's BPS entitlements could have been obtained via transfer from a non-olive grower (provided that the two farmers are in the same region). Conversely, the value of BPS entitlements of a farmer that did not grow olives could have been derived from COMOF-based assistance, if transferred from an olive grower in the same region (assuming that the olive grower held COMOF-based SPS entitlements and subsequently obtained BPS entitlements via first allocation, meaning that the value of such BPS entitlements could, theoretically, be traced back to the COMOF programme). In our view, these considerations also suggest that the BPS legislation did not legally tie the value of BPS entitlements for olive growers to assistance received under the COMOF programme. While COMOF-based assistance may have been, *as a matter of fact*, the basis for calculating the value of an olive grower's SPS entitlements, and, in turn, this SPS assistance may have been the basis for calculating the value of an olive growers' BPS entitlements, the BPS legislation did not make this a legal requirement. The fact that it was legally possible to transfer any potentially existing COMOF-SPS-based entitlements to non-olive farmers under the BPS programme, suggests that the BPS programme did not explicitly limit access to the COMOF-based payments to olive growers. Other farmers could have obtained and benefited from such entitlements by transfer in the same way as olive growers holding the same entitlements. (Regulation 1307/2013, (Exhibit EU-25), Article 34; Royal Decree 1076/2014, (Exhibit EU-30), Article 28. See also European Union's first written submission, paras. 111(b) and 148, and fn 94; and 25 February 2021 response to Panel question No. 7, para. 60).

[169] United States' first written submission, para. 72.

agricultural and environmental condition".[170] Pursuant to the relevant legislation, SPS and BPS assistance was not conditioned on the production of any agricultural product. This indicates that, *as a matter of law*, it was entirely possible for a "farmer" to benefit from COMOF programme-based entitlements derived from *prior olive production*, even if it no longer produced olives during the period of operation of the relative programmes (either because, for example, it switched to growing a different crop or decided to pursue other qualifying farming activities). This is yet another feature of the relevant rules that suggests that the BPS programme did not, *as a matter of law*, limit the potential to benefit from COMOF programme-based entitlements to olive growers.

7.75. In our view, the above-examined features of the rules governing the allocation and calculation of BPS entitlements for new olive farmers, farmers with entitlements obtained via transfer under the SPS programme, and farmers holding COMOF programme-based SPS entitlements no longer producing olives, were relevant to the USDOC's determination of *de jure* specificity and should have formed part of the USDOC's analysis. The fact that the calculation rules specified that the value of BPS entitlements for *new farmers* (including, potentially new *olive* farmers) obtained from the national reserve were to be based on the average value of payments to farmers in the same region (not the value of SPS entitlements), indicates that, *as a matter of law*, BPS payments to olive farmers were not tied to the historical COMOF programme-based olive production. That the respondents or their unaffiliated suppliers in the USDOC's investigation may not have been "new farmers" and may not have received payments from the Spanish national reserve, *as a matter of fact*[171], does not mean that the BPS programme *legally* tied access to, and the amounts of, BPS payments for olive growers to COMOF programme-based SPS entitlements. Likewise, the fact that it was legally possible to *transfer COMOF programme-based SPS entitlements to non-olive farmers under the SPS programme*, suggests that the calculation rules of the BPS programme did not explicitly limit access to the COMOF programme-based portion of a BPS payment to olive growers. Other farmers could have obtained such entitlements by transfer under the SPS programme and then subsequently benefited from those under the BPS programme in the same way as olive growers holding the same entitlements. Finally, because crop production was not a precondition for a farmer to receive BPS payments, it was also legally possible for a farmer that obtained COMOF programme-based SPS entitlements during the operation of the SPS programme to continue to benefit from those entitlements even if *no longer producing olives* in the BPS period.

7.76. In conclusion, therefore, we find that the USDOC did not properly examine and account for the above-mentioned features of the rules governing the allocation and valuation of BPS entitlements in its determination of *de jure* specificity.

7.2.2.3.4 The USDOC's rejection of arguments concerning the "convergence" factor

7.77. The European Union argues that in establishing a link between the grant amounts under the SPS and BPS/GP programmes, the USDOC improperly rejected arguments concerning the annual adjustment of the value of each BPS payment entitlement to ensure convergence between farmers within Spanish regions.[172] According to the European Union, the fact that the BPS programme prescribed annual adjustments to achieve such convergence, when considered in the light of the other rules affecting the allocation and calculation of BPS entitlements, shows that there was only a remote connection between the BPS and SPS programmes (and the COMOF programme) payments, thereby undermining the USDOC's determination of *de jure* specificity.[173] The European Union maintains that the logic of the USDOC's view that the application of the convergence factor could not alter its finding of *de jure* specificity, simply because the initial value of an olive farmer's entitlement may have been derived from the SPS and the COMOF programmes, necessarily implies that such payments must always be *de jure* specific, regardless of the level of adjustment applied to harmonize them and distance them from the previous "coupled" payments.[174] The

[170] Regulation 1782/2003, (Exhibit EU-24), Articles 2(a), 2(c), and 5; Regulation 73/2009, (Exhibit EU-23), Articles 2(a), 2(c), and 6.
[171] United States' 12 November 2020 response to Panel question No. 4, paras. 16-17; 11 March 2021 comments on the European Union's 25 February 2021 response to Panel question No. 7, para. 34.
[172] European Union's first written submission, paras. 245, 247, and 296. "Spanish regions" refer to 50 regions defined by Spain for the purpose of implementing the BPS programme.
[173] European Union's first written submission, para. 245; 25 February 2021 response to Panel question No. 3, para. 20 (referring to the European Union's first written submission, paras. 105-106, 124-128, and 145-147).
[174] European Union's first written submission, paras. 248-251.

European Union argues that the USDOC's findings with respect to the issue of convergence were results-oriented and did not reflect the assessment of an objective and unbiased investigating authority.[175] Accordingly, the European Union claims that the USDOC's determination of *de jure* specificity was, to this extent, inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement.

7.78. The United States argues that the European Union mischaracterizes the USDOC's findings. According to the United States, the USDOC did not find that *de jure* specificity could never be removed by application of the convergence factor, and explained why it found unavailing the arguments concerning the convergence factor.[176] The United States refers to the USDOC's explanations and argues that it would have been premature for the USDOC to find that the application of the convergence factor eliminated the differences in assistance carried over from the COMOF programme for the period of investigation (from 1 January 2016 to 31 December 2016), since the convergence of the amounts of payment entitlements has been taking place over five stages from 2015 to 2019.[177] The United States further argues that, in light of the convergence method implemented by Spain, the convergence factor will not result in the complete elimination of the differences in the amounts of assistance, and that Spain's choice of the convergence approach "underscores" that the BPS programme in Spain has not eliminated the *de jure* specificity of the COMOF programme.[178]

7.79. The USDOC first discussed the application of the convergence factor in the final issues and decision memorandum when responding to interested party arguments:

> Moreover, we find unavailing the arguments that the application of a convergence factor over time is eliminating the disparities in payments among recipients and, therefore, the possibility of finding the assistance specific to olive growers. We understand that the application of the convergence factor results in adjustments to individual payments to bring them closer to an average over time by reducing the highest payments and increasing the lowest payments. However, the convergence factor is applied to payments to olive growers that retain the specificity inherent in the [COMOF programme]. Therefore, while any adjustments resulting from convergence may ultimately affect the final amount of assistance, the grant amounts awarded to farmers under the BPS program are still based on, and thus retain, the *de jure* specificity of prior programs as explained above.[179]

7.80. In the Remand Redetermination, the USDOC recalled and elaborated its explanations concerning the convergence factor as follows:

> Although the convergence factor was intended to bring the value of assistance to each farmer closer to the regional averages, it will not completely eliminate the differences in assistance. The BPS, as developed by the EU, gave Member States options for how to effect convergence; Spain elected not to use a flat rate multiplied by the number of eligible hectares, but rather elected to use the convergence step that it recognized would gradually reduce, but would not eliminate, the disparity in grant amounts. [The USDOC] found unavailing the argument that the application of a convergence factor eliminated the possibility of finding the assistance specific to olive growers.[180]
>
> The application of several adjustment factors, including the convergence factor and the across-the-board budgetary reduction cited by the GOS, seeks to align all farmers' payments with a regional average. However, as we did in the *Final Determination*, we continue to find parties' arguments on this matter to be unavailing. The GOS's explanation only serves to highlight the fact that even through the end of the operation of the BPS in its current form, at the end of 2019, there will continue to

[175] European Union's first written submission, paras. 294-296 and 329; opening statement at the first meeting of the Panel, paras. 62 and 75.
[176] United States' first written submission, paras. 74 and 94; 11 March 2021 comments on the European Union's 25 February 2021 response to Panel question No. 3, para. 10.
[177] United States' first written submission, para. 74; 11 March 2021 comments on the European Union's 25 February 2021 response to Panel question No. 3, para. 10. See also United States' first written submission, para. 94.
[178] United States' first written submission, para. 75. See also ibid. para. 94.
[179] FIDM, (Exhibit EU-2), p. 36.
[180] Remand Redetermination, (Exhibit EU-80), fn 60.

> be broad disparities in the assistance provided to farmers under the BPS. Farmers whose payments are above the average will have their payments reduced over time by 30 percent; farmers whose payments are less than 60 percent of the average will have their payments increased over time to reach the 60 percent target. In application, farmers who historically received the highest payments will continue to receive the highest payments (which, although even when reduced by the full 30 percent applicable, could remain well above the target of 60 percent of the average), and farmers who historically received the lowest payments will continue to receive the lowest payments, capped at 60 percent of the average. We continue to find that these factors support our conclusion in the *Final Determination*, and in this redetermination, that access to the subsidy for olive growers is limited such that the BPS program is *de jure* specific.[181]

7.81. Before addressing the merits of the European Union's complaint against the USDOC's findings, we first set out our understanding of the convergence process operating in Spain. In short, Article 25 of Regulation 1307/2013, as implemented in Spain by Article 16 of Royal Decree 1076/2014, required that the initial value of BPS entitlements were to be adjusted over time with a view to bringing them closer to average regional values.[182] Spain chose to apply the "tunnel model" of convergence[183], which sought to ensure that payment entitlements above and below a regional average would respectively decrease and increase over time towards that average. Through this mechanism, entitlements with an initial unit value *lower than* 90% of the regional average value in 2019[184] were to increase, in five equal steps beginning in 2015[185], by a total of one-third of the difference between their initial value and 90% of the regional average in that year.[186] Thus, for example, for a regional average value of 100 EUR/ha., a farmer holding payment entitlements with an initial value of 60 EUR/ha. would see the value of those entitlements gradually increase in five equal steps by a total of 10 EUR/ha. (one-third of the difference between 90% of the regional average value – i.e. 90 EUR/ha. – and the initial value of the farmers' entitlements), resulting in the following annual increases:

Table 1: Annual increases of entitlements

2015	2016	2017	2018	2019
62 EUR/ha.	64 EUR/ha.	66 EUR/ha.	68 EUR/ha.	70 EUR/ha.

Source: Hypothetical calculation based on Newsletter No. 2, Basic payment entitlement allocation, (Exhibit EU-31), example No. 1.

7.82. The increase in payments to effect this convergence was to be financed by reductions in the initial value of entitlements *above* the regional average, with the maximum deduction for such entitlements capped at 30%.[187] Thus, in the context of the same example set out above, a farmer holding payment entitlements with an initial value *above* 100 EUR/ha would see the value of those entitlements decrease, by no more than 30%, in order to finance the increase of entitlement values.[188]

[181] Remand Redetermination, (Exhibit EU-80), pp. 66-67, where the USDOC responded to comments of the GOS on the draft redetermination. (fns omitted)
[182] Regulation 1307/2013, (Exhibit EU-25), Article 25; Royal Decree 1076/2014, (Exhibit EU-30), Article 16.
[183] European Union's first written submission, para. 125 and fn 104 (referring to EC internal convergence document, (Exhibit EU-18)).
[184] The regional average values are set out in Order AAA/1747/2016, (Exhibit EU-32). See also European Union's first written submission, para. 139.
[185] Regulation 1307/2013, (Exhibit EU-25), Article 25.8; Royal Decree 1076/2014, (Exhibit EU-30), Article 16. See also European Union's first written submission, paras. 127 and 146.
[186] Regulation 1307/2013, (Exhibit EU-25), Article 25.4; Royal Decree 1076/2014, (Exhibit EU-30), Article 16. See also European Union's first written submission, paras. 126 and 146. Moreover, the relevant rules also prescribed that no payment entitlement in 2019 could have a unit value below 60% of the average regional unit value of the payment entitlements in 2019, thereby guaranteeing a minimum convergence regardless of the difference between the initial payments and the regional average. (Regulation 1307/2013, (Exhibit EU-25), Article 25.4; Royal Decree 1076/2014, (Exhibit EU-30), Article 16).
[187] For a specific (hypothetical) example of an upward convergence, see European Union's first written submission, paras. 127 and 146 (referring to Regulation 1307/2013, (Exhibit EU-25), Article 25.7; and Royal Decree 1076/2014, (Exhibit EU-30), Article 16).
[188] For a specific (hypothetical) example of a downward convergence, see Newsletter No. 2, Basic payment entitlement allocation, (Exhibit EU-31), example No. 2.

7.83. We note that the focus of the European Union's criticism of the USDOC's findings with respect to convergence is the USDOC's alleged view that the prescribed adjustments were applied to an entitlement value that was, in the first place, tied to historic olive production under the COMOF programme, thereby continuing the alleged *de jure* specificity of that programme, regardless of the adjustment. In our view, however, this would not be an accurate characterization of the reasons underlying the USDOC's rejection of the arguments concerning the convergence factor.

7.84. In the final issues and decision memorandum the USDOC not only identified the alleged existence of a continued connection between entitlement values and the COMOF programme, notwithstanding the convergence process, but it also recognized that adjustments would not lead to equality of payments – only convergence *towards* a regional average. This, we believe, follows from the USDOC's stated understanding of the impact of the application of the convergence factor to individual payments, which we recall was that it would "bring them *closer* to an average over time by reducing the highest payments and increasing the lowest payments".[189] This USDOC understanding was elaborated in the Remand Redetermination, where the USDOC explained that under the convergence model implemented by Spain differences in the amounts of assistance would not be completely eliminated by 2019. In particular, the USDOC found that: (a) the application of the convergence factor "will not completely eliminate the differences in assistance"[190]; (b) "Spain elected not to use a flat rate multiplied by the number of eligible hectares, but rather elected to use the convergence step that it recognized would gradually reduce, but would not eliminate, the disparity in grant amounts"[191]; and (c) "at the end of 2019, there will continue to be broad disparities in the assistance provided to farmers under the BPS".[192] To the extent that these USDOC statements reveal that it considered the convergence process in Spain was not designed to completely eliminate disparities between BPS payments, we find them to accurately reflect the rules governing the convergence process, as implemented by Spain.

7.85. Thus, we find that the logic underlying the USDOC's rejection of the arguments concerning the convergence factor was not simply that BPS payments to olive growers continued to be based on the SPS and the COMOF programmes, irrespective of adjustments. Although the USDOC made a statement to this effect in its findings, it also pointed out that the convergence process, as implemented by Spain, would not result in equivalence or removal of disparities in payments, which in the case of olive growers relative to other farmers the USDOC considered resulted from an alleged connection with the COMOF programme. In our assessment, it was the combination of both considerations that led the USDOC to dismiss the arguments concerning the impact of the convergence process on the "specificity" of BPS payments. We note, furthermore, that the USDOC expressed no opinion about whether any other type of convergence model[193] could potentially remove the disparities it found to result from the way BPS payments were calculated in Spain. Thus, we do not agree with the European Union's submission that the logic of the USDOC findings implies that it was of the view that BPS payments will always be *de jure* specific, regardless of the level of adjustment applied to harmonize them.

7.2.2.3.5 The USDOC's analysis and findings with respect to the "regional rate"

7.86. The European Union argues that additional errors in the USDOC's appreciation of the legal framework of the BPS programme that affected its findings of *de jure* specificity can be found in the USDOC's analysis and findings with respect to the "regional rate". According to the European Union, the USDOC's finding that a "regional rate" was "used to determine the value of each hectare of farmland's 'basic payment entitlement'" reveals a "serious misunderstanding" of the functioning of the BPS programme, because under the BPS programme, the value of the payment entitlements depends upon the amount of support received by a farmer in the previous period, and is not tied to any "regional rate".[194] Moreover, the European Union maintains that the USDOC was also incorrect when it found that "each basic payment entitlement amount will be weighted by the regional reference value to which it corresponds", because the European Union asserts that the regional

[189] FIDM, (Exhibit EU-2), p. 36. (emphasis added)
[190] Remand Redetermination, (Exhibit EU-80), fn 60.
[191] Remand Redetermination, (Exhibit EU-80), fn 60.
[192] Remand Redetermination, (Exhibit EU-80), p. 66.
[193] The European Union explains that Regulation 1307/2013, (Exhibit EU-25) allows member States to choose between three different convergence models: the flat rate from 2015, the flat rate by 2019, and the tunnel model (implemented by Spain). (European Union's first written submission, para. 125 and fn 103 (referring to EC internal convergence document, (Exhibit EU-18))).
[194] European Union's first written submission, paras. 301-302.

coefficient only applies when a farmer has lands in different regions to distribute the total value among those regions.[195] The European Union argues that these alleged errors of appreciation demonstrate that the USDOC's determination was not reasonably and adequately explained, and that it was grounded on an erroneous factual basis and, therefore, inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement.[196]

7.87. The United States maintains that the European Union's submissions concerning the USDOC's statements with respect to the regional coefficient do not undermine the USDOC's determination. The United States notes that the USDOC did not, in its final determination, elaborate upon the application of the regional coefficient in the circumstances where a farmer's lands are located in more than one region. However, according to the United States, such a distinction does not change the fact that the amount of assistance under the BPS programme is related to the *de jure* specific assistance allegedly provided under the COMOF programme.[197] The United States furthermore submits that even though the regional coefficient was not applied for every farmer, it was nevertheless "1" for permanent crops such as olives, implying that even where it did come into play, "it would effect no reduction, and guarantees, in the assistance allocated to olive growers".[198]

7.88. The European Union's submissions concern the italicized text in the following passages of the USDOC's determination, as set out in the preliminary and final issues and decision memoranda:

> To create each region, Spain used "the agricultural district, as a geographical reference unit … known by the agricultural sector, in which municipalities with similar agronomic characteristics are grouped together" as an administrative criterion. Each region's territorial definition is based on "their productive potential and the productive orientation determined in the 2013 campaign …" and this "productive orientation" is categorized as "rainfed land, irrigated land, permanent crops and permanent pastures." Olive groves are considered permanent crops. *This territorial definition determines each region's "regional rate," which is used to determine the value of each hectare of farmland's "basic payment entitlement." Because of this, each basic payment entitlement amount will be weighted by the regional reference value to which it corresponds.*[199]

> Each region has shared agronomic characteristics and a territorial definition based on its "productive potential and the productive orientation determined in the 2013 campaign … ." This "productive orientation" is categorized as "rainfed land, irrigated land, permanent crops and permanent pastures;" olive groves are considered permanent crops. *This territorial definition determines each region's "regional rate," which is used to determine the value of each hectare of farmland's "basic payment entitlement." As a result, each basic payment entitlement amount is weighted by the regional reference value to which it corresponds*.[200]

7.89. As the European Union asserts, Article 14.2(b) of the Spanish Royal Decree 1076/2014 and Order AAA/544/2015 together explain that a farmer's BPS payments would be multiplied by a relevant coefficient *in situations where a farmer declares areas in more than one region*.[201] The purpose of applying this coefficient was not to determine the intrinsic value of a farmer's entitlements, but rather to allocate a farmer's total eligible payments between the different regions in which it holds land, based on objective and non-discriminatory criteria. This coefficient, described by the USDOC as the "regional rate" and the "regional reference value", was not used to determine "each hectare of farmland's 'basic payment entitlement'"; nor was it used to weight a farmer's basic payment entitlement. Accordingly, the above-quoted USDOC's findings with respect to the role played by the "regional coefficient" are factually incorrect.

---

[195] European Union's first written submission, para. 304.
[196] European Union's first written submission, para. 329; opening statement at the first meeting of the Panel, para. 76.
[197] United States' first written submission, para. 96.
[198] United States' first written submission, para. 96.
[199] PIDM, (Exhibit EU-1), pp. 19-20. (emphasis added; fns omitted)
[200] FIDM, (Exhibit EU-2), p. 34. (emphasis added; fns omitted)
[201] European Union's first written submission, paras. 303-304 (referring to Royal Decree 1076/2014, (Exhibit EU-30), Articles 14.2(a) and 14.2(b); and Order AAA/544/2015, (Exhibit EU-21)).

7.90. The United States argues that these alleged errors in the USDOC's factual assessment do not undermine its ultimate determination. In our view, however, the following paragraphs from the explanation of the USDOC's original findings in the Remand Redetermination suggest that the USDOC did, in fact, rely upon its appreciation of the role of the "regional rate" in the calculation of BPS payments:

> In implementing the BPS, Spain used the data collected under the SPS to create 50 agricultural regions to facilitate payments. Each region was assigned a rate based on its productive potential and its productive orientation (*i.e.,* rainfed, irrigated, permanent crops, and permanent pasture). Olive groves are considered "permanent crops" and this designation is factored into the calculation of the regional rate, which, in turn, is used to determine each hectare of farmland's "basic payment entitlement" and whether, and to what extent, a farmer was eligible to receive grants under the BPS. Thus, [the USDOC] concluded that the regional variations in BPS payments were a result of the use of the historical regional data that had been used to calculate the crop-specific subsidy payments under the SPS. [The USDOC]'s analysis is summarized:
>
> > In summary, the annual grant amount provided to olive farmers under BPS is based on the annual grant amount provided to olive farmers under SPS. The grant amount provided to olive farmers under SPS is based on the average grant amount olive farmers received in 1999 through 2002 under the [COMOF programme]. The grant amount provided in 1999 through 2002 to eligible farmers, which included olive farmers, was based on the type of crop grown and the production value created from the crop. Therefore, the annual grant amount provided under BPS {is} based on annual grant amounts that were crop-specific, thus the grant amounts received by olive growers under BPS in 2016 are directly related to the grant amount only olive growers received under the [COMOF programme].[202]

7.91. In the first of the above-quoted paragraphs, the USDOC recalled its findings with respect to the role played by the "regional rate" in the calculation of BPS payments. The USDOC explained that the "regional rate" was established using *data collected under the SPS programme*, and that it was used to *determine BPS payments*. The USDOC similarly explained that BPS payments varied *by region* because they were the "*result of the use of historical regional data … used to calculate the crop-specific subsidy payments under the SPS*". The USDOC then quoted a summary of its original "analysis", from which it can be inferred that the USDOC was of the view that SPS payments were "crop-specific" because they were "based on the average amount olive farmers received … under the [COMOF programme]". Thus, we understand the USDOC to have found in this passage that BPS payments were determined through the application of a "regional rate" based on data used to calculate SPS payments, which derived from and was used to determine the crop-specific payments made under the COMOF programme. The USDOC in this way established a connection between the "regional rate" (which it had found was used to determine BPS payments) and the crop-specific payments made under the COMOF programme, thereby supporting its ultimate conclusion that the BPS rules governing the calculation of payment amounts continued the inherent *de jure* specificity of the COMOF programme. Accordingly, while we recognize that the USDOC's determination of *de jure* specificity was also based on other considerations[203], we find that the USDOC's erroneous factual findings with respect to the role of the "regional rate" in the calculation of BPS payments were also relied upon, and to this extent, detract from the USDOC's determination of *de jure* specificity.

7.92. Finally, as already noted, in responding to the European Union's submissions the United States observes that in cases in which the "regional rate" was applied, "it would effect no reduction, and guarantees, in the assistance allocated to olive growers" because it was set at a value

[202] Remand Redetermination, (Exhibit EU-80), pp. 8-9. (fns omitted)

[203] As we discussed above, the USDOC's *de jure* specificity determination is best understood as a finding that the BPS subsidies were *de jure* specific to olive growers because "access to, and the amount of, benefits provided to *olive growers* under the BPS, as a matter of law, relied for reference on the provision of benefits under the SPS and, in turn, access to and the amount of benefits provided to *olive growers* under the SPS was determined by reference to the benefits provided under the [COMOF programme]." (Remand Redetermination, (Exhibit EU-80), p. 15 (emphasis added)). See para. 7.58 above.

of "1" for permanent crops such as olives.[204] However, the European Union's criticism of the USDOC's determination does not concern any USDOC consideration of the potential effect of the application of the "regional rate" on BPS payments to olive farmers holding entitlements across different regions. Rather, the European Union's complaint concerns the USDOC's findings with respect to the *prescribed role* of the "regional rate" in the calculation of a farmer's BPS payments, which we have found were not supported by record evidence. The United States has not explained how the potential effect of the *application* of the "regional rate" to olive farmers holding entitlements across different regions shows that the USDOC's reliance on erroneous factual findings with respect to the *prescribed role* of the "regional rate" in the calculation of a farmer's BPS payments supports its determination of *de jure* specificity.

7.93. In conclusion, therefore, we find that the USDOC erred, as a matter of fact, when it found that the "regional rate" under the BPS programme, as implemented by Spain, was to be "used to determine the value of each hectare of farmland's 'basic payment entitlement'" and that "each basic payment entitlement amount will be weighted by the regional reference value to which it corresponds".[205] Furthermore, we find that the USDOC relied upon these erroneous factual findings to support its determination of *de jure* specificity.

7.2.2.3.6 The USDOC's alleged finding concerning differences in BPS payments based on "the amount of grant money the different regions received under the SPS"

7.94. Another alleged error of factual appreciation the European Union identifies in the USDOC's determination of *de jure* specificity concerns the following passage about the implications of the BPS subsidy calculation rules for two farms of the same size located in different regions of Spain from the USDOC's preliminary issues and decision memorandum:

> The application to receive grants under the [BPS programme] and [the GP programme] includes the total entitlement value for the farm and this determines the amount of assistance the farmer will receive under these two BPS subprograms. To calculate a farm's total entitlement value, the number of hectares is multiplied by that location's regional value. In summary, *two farms of the same size can have two different total entitlement values if there is a historical difference in the amount of grant money the different regions previously received under SPS*.[206]

7.95. The European Union argues that the emphasized statement is factually incorrect because payments under the SPS programme were granted to individual farmers, *not* regions, and because there was no such notion as "SPS regions" under that programme.[207] Moreover, according to the European Union, differences in BPS payments made to farmers operating in different BPS regions resulted, "in the first place", from the application of the "weighting coefficient", which was itself determined based on the contribution of the productive orientation of a region to the Spanish national agricultural income, and not any differences in payments made to "SPS regions".[208] The European Union claims that these alleged errors of appreciation demonstrate that the USDOC's determination was not reasonably and adequately explained, and that it was grounded on an erroneous factual basis and, therefore, inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement.[209]

7.96. The United States argues that the European Union's assertion regarding payments under the SPS programme being granted to farmers and not regions does not contradict the USDOC's findings. According to the United States, the European Union's argument fails to recognize that the differing payments received by farmers under the SPS programme resulted from the payments available under the predecessor programmes, and that the differing payments to farmers under the SPS programme could lead to different BPS entitlement values for farms in different regions, even if the regions themselves were not designated as separate regions until the BPS and

[204] United States' first written submission, para. 96.
[205] FIDM, (Exhibit EU-2), p. 34.
[206] PIDM, (Exhibit EU-1), p. 21. (emphasis added; fns omitted)
[207] European Union's first written submission, para. 309; opening statement at the first meeting of the Panel, fn 35 and paras. 67-68; and second written submission, para. 22.
[208] European Union's first written submission, para. 310 (referring to Order AAA/544/2015, (Exhibit EU-21)).
[209] European Union's first written submission, para. 329; opening statement at the first meeting of the Panel, para. 76.

GP programmes.[210] Furthermore, according to the United States, the European Union does not explain how the fact that the "weighting coefficient" represents the contribution of the productive orientation of a region to the national agricultural income in Spain undermines the USDOC's findings. The United States argues that such consideration is irrelevant for a *de jure* specificity analysis under Article 2 of the SCM Agreement.[211]

7.97. We agree with the European Union that the record evidence[212] shows that payments under the SPS programme were granted to farmers, and not regions, and that Spain did not implement the SPS programme on a regional basis. Thus, the USDOC's reference to "grant money *the different regions previously received under SPS*", would be factually incorrect if it were intended to mean that SPS payments were made to regions or that the SPS programme was implemented on a regional basis. In this respect, we note that the USDOC's discussion of the calculation of SPS payments, which immediately followed the section of the preliminary issues and decision memorandum containing the above-quoted statement, identifies *farmers*, not regions, as the recipients of SPS payments. For example, when discussing the operation of one of the relevant rules governing the calculation of payments under the SPS programme, the USDOC states:

> Once the value per hectare was determined using this calculation, *a farmer* would apply for an amount of aid equal to the number of hectares multiplied by the value of each hectare. … The average of four years of this total payment is the referenced amount used as the basis for the calculated amount *under the SPS annual grant-to-farmer program*. The individual, calculated BPS annual grant-to-farmer amount derives from the amount of *SPS grants were* [*sic*] *provided to each farmer* in 2013.[213]

7.98. We note, moreover, that the USDOC modified the contested statement in the final decision and issues memorandum, when it replaced the reference to "*grant money* the different regions previously received under the SPS" with "*assistance provided in* the different regions previously received under the SPS":

> Therefore, two farms of the same size can have two different total entitlement values if there is an historical difference in the amount of *assistance provided in the different regions* previously received under SPS.[214]

7.99. In our view, this statement does not suggest that the USDOC considered SPS payments were made to regions. Furthermore, the USDOC's discussion in the final issues and decision memorandum of how payments were calculated under the SPS programme confirms that it understood that SPS payments were made to farmers, and nothing in that discussion indicates that the USDOC considered the SPS programme to be implemented by Spain on a regional basis. For instance, the USDOC observed that:

> As the EC points out, when the SPS program was implemented in Spain, the aid provided *to farmers* was converted into "entitlements," rights to receive payments, that were linked to land area and completely decoupled from production. That is, under SPS, 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. Crucially, however, the amount of *each farmer's payment* was calculated as a percentage of the average annual grant payments previously provided over a reference period.[215]

7.100. Finally, we note that in the Remand Redetermination the USDOC quoted and relied upon the contested statement from the preliminary issues and decision memorandum to justify its finding that

---

[210] United States' first written submission, para. 97 (referring to the USDOC's statement in the FIDM, (Exhibit EU-2), pp. 35-36, that "two farms of the same size can have two different total entitlement values if there is an historical difference in the amount of assistance provided in the different regions previously received under SPS").

[211] United States' first written submission, para. 98.

[212] This evidence includes not only the rules of the SPS programme itself, but also a submission of the GOS in which it was explained that "[i]n Spain, the decision taken by the agricultural authorities was to apply the SPS as a historical model (and not a regional one)". (Submission by the GOS in relation to the preliminary determination, (Exhibit EU-14), p. 12).

[213] PIDM, (Exhibit EU-1), pp. 22-23. (emphasis added)

[214] FIDM, (Exhibit EU-2), pp. 35-36. (emphasis added)

[215] FIDM, (Exhibit EU-2), p. 33. (emphasis added; fns omitted)

the BPS subsidies were not uniformly available across the agricultural sector, and therefore, could not be "non-specific" within the meaning of the US domestic law.[216] However, we do not understand the USDOC's reliance upon the contested statement in this context to reflect a change in the USDOC's view about who were the recipients of SPS payments. Indeed, elsewhere in the Remand Redetermination the USDOC's discussions of the relevant rules explicitly recognize that SPS payments were made to farmers.[217]

7.101. In conclusion, we find that while on its own the contested statement from the USDOC's preliminary issues and decision memorandum could be interpreted to mean that the USDOC (erroneously) found that SPS payments were made to regions, when the same statement is considered in the light of the USDOC's surrounding analysis, the modification made to the relevant statement in the final issues and decision memorandum, as well as the discussion of the SPS programme in the Remand Redetermination, we are not convinced that it should be understood in that way. Rather, in the light of the totality of the USDOC's discussion of the rules governing the calculation of SPS payments, we find that the USDOC understood that SPS payments were made to farmers and that Spain did not implement the SPS programme on a regional basis, unlike the BPS programme. Having reached this conclusion, we do not believe it is necessary to address the European Union's additional argument in support of its claims that differences in SPS payments resulted, "in the first instance", from application of the "weighting coefficient" and not different payments made to SPS regions, because we have ultimately found that the USDOC did not make the latter finding.

7.2.2.3.7 The USDOC's findings with respect to the SPS programme

7.102. Similarly to its complaint against the USDOC's determination of *de jure* specificity with respect to the BPS and GP programmes, the European Union maintains that the USDOC's finding of the existence of a direct correlation between the amounts of assistance provided to olive growers under the SPS programme and the COMOF programme is erroneous, and ignores certain relevant aspects of the record evidence demonstrating that no such direct correlation exists. According to the European Union, the USDOC allegedly overlooked the following features of the relevant subsidy regime: (i) the fact that subsidy amounts were, as a matter of law, based on the "global" amount of support provided under multiple prior programmes, not only on assistance under the COMOF programme; (ii) the possibility of obtaining payment entitlements by transfer or by inheritance; (iii) the fact that a previously active olive farmer was entitled to receive assistance regardless of whether that farmer continued to produce olives; and (iv) the fact that support was available to new farmers via the national reserve.[218] The European Union submits that these alleged errors of appreciation demonstrate that the USDOC's determination of *de jure* specificity was not reasonably and adequately explained, was grounded on an erroneous factual basis, and, therefore, is inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement.

7.103. The United States argues that the European Union's arguments do not undermine the USDOC's conclusion that the SPS subsidies to olive growers were *de jure* specific in light of the reference to the COMOF programme.[219] The United States argues that the fact that entitlements could have been transferred does not sever the reliance on the COMOF programme that Spain elected to incorporate into the SPS programme.[220] Furthermore, according to the United States, despite the fact that other factors contributed to the calculation of the amount of support available under the SPS programme, nevertheless the amount of support was related to the support received

[216] Remand Redetermination, (Exhibit EU-80), p. 18 and fn 62, where the USDOC explains: "[a]s [the USDOC] concluded in the investigation, the result of the application of the legislatively preserved methodology regarding access to, and the distribution of, benefits was that 'two farms of the same size can have two different total entitlement values if there is a historical difference in the amount of grant money the different regions previously received under SPS.'"

[217] See, e.g. Remand Redetermination, (Exhibit EU-80), p. 16, where the USDOC states that "the SPS grant amounts were based on the amount of grants provided under the [COMOF programme] that were available only to olive growers, thereby entrenching the crop-specific nature of the subsidy under the [COMOF programme] into the criteria for determining the assistance that *a farmer would be eligible to receive under the SPS*". (emphasis added)

[218] European Union's first written submission, paras. 79-80 and 244; opening statement at the first meeting of the Panel, paras. 28 and 37; 10 June 2020 response to Panel question No. 10, para. 55; 12 November 2020 response to Panel question No. 8, para. 43; and 25 February 2021 responses to Panel question No. 3, paras. 9-11, and No. 7, para. 65.

[219] United States' first written submission, para. 71.

[220] United States' first written submission, para. 72; second written submission, para. 25.

under the *de jure* specific COMOF programme.[221] Finally, the United States also argues that the rules for calculating the amount of support available from the national reserve were not on the USDOC's record, and therefore were not among the "information and arguments" within the meaning of Article 12.2 of the SCM Agreement upon which the USDOC could base its determination.[222]

7.104. As noted in paragraph 7.58 of this Report, the USDOC determined that the SPS subsidies were *de jure* specific to olive growers because it found those subsidies to be legally tied to historic olive production under the COMOF programme. In the preliminary issues and decision memorandum, the USDOC described the relationship between the COMOF and the SPS programmes in the following manner:

> To determine the SPS entitlement per hectare value, the calculation relied on a "referenced amount." This referenced amount was the average of the total payment amounts under the annual grant-to-farmer program in place from 1999-2002, which for olive growers was the [COMOF programme].[223]

7.105. Similarly, in the final issues and decision memorandum, the USDOC explained:

> As the EC points out, when the SPS program was implemented in Spain, the aid provided to farmers was converted into "entitlements," rights to receive payments, that were linked to land area and completely decoupled from production. That is, under SPS, 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. Crucially, however, the amount of each farmer's payment was calculated as a percentage of the average annual grant payments previously provided over a reference period. In the case of olives and olive oil, this reference period was from 1999 through 2002, when the [COMOF programme] was in operation. Because the [COMOF programme] provided benefits on a *de jure* specific basis, the benefits provided under the SPS retained the *de jure* specificity inherent in the [COMOF programme].[224]

7.106. Finally, in the Remand Redetermination, the USDOC explained the relationship between the SPS and COMOF programmes in, *inter alia*, the following terms:

> [T]he SPS benefits were based on the value of each hectare in a farm, which was determined using the average amount of grants provided to that area from 1999 through 2002 (*i.e.,* when the [COMOF programme] was in operation). … [T]he SPS grant amounts were based on the amount of grants provided under the [COMOF programme] that were available only to olive growers, thereby entrenching the crop-specific nature of the subsidy under the [COMOF programme] into the criteria for determining the assistance that a farmer would be eligible to receive under the SPS. In this manner, the value of the grants provided under the [COMOF programme] (the access to which was expressly limited to the olive sector) was preserved in calculating the grants paid under the SPS. Thus, under the SPS, access to a subsidy based on the [COMOF programme] subsidies was expressly limited to olive growers.[225]

7.107. We recall that the rules governing the allocation and valuation of entitlements under the SPS programme did not prescribe that the value of all such entitlements for olive growers were to be determined with reference to the COMOF programme.[226] Entitlements under the SPS programme could be obtained in one of three ways: (a) as a result of receiving assistance under at least one of several prior support schemes (which included the COMOF programme)[227]; (b) by transfer or

[221] United States' first written submission, para. 71.
[222] United States' 11 March 2021 comments on the European Union's 25 February 2021 response to Panel question No. 7, para. 37.
[223] PIDM, (Exhibit EU-1), p. 22.
[224] FIDM, (Exhibit EU-2), p. 33. (fns omitted)
[225] Remand Redetermination, (Exhibit EU-80), p. 16. (fn omitted)
[226] See paras. 7.70-7.72 above.
[227] Regulation 1782/2003, (Exhibit EU-24), Article 33. See also European Union's first written submission, para. 70(b).

inheritance[228]; or (c) from the national reserve.[229] Thus, an olive farmer's entitlements do not appear to have been limited, *as a matter of law*, to those obtained through the operation of the COMOF programme, as it was legally possible for an olive farmer to obtain SPS entitlements by other means – namely, via transfer from a farmer of other products, or potentially from the national reserve.[230]

7.108. The European Union argues that the USDOC's assessment was "simplistic" because, *inter alia*, it ignored that the amount of support available to a farmer under the SPS programme was based on the *global* amount of support granted during the reference period, and not exclusively on the COMOF programme.[231] In this regard, the European Union asserts that if during the reference period a farmer was growing several crops (and not only olives), the farmer's entitled amount of assistance under the SPS programme would not be based exclusively on assistance received under the COMOF programme, but would also take into account past assistance received under other crop-specific programmes.[232] In the United States' view, this possibility does not affect that, in the case that a farmer was growing olives during the reference period, the amount of SPS support would be related to the support received under the *de jure* specific COMOF programme.[233]

7.109. We note that there is no discussion in the USDOC's determinations of the relevance to its findings of the possibility that an olive farmer's SPS payments may have been based on assistance received for non-olive growing activities under programmes other than the COMOF programme. However, we do not understand the USDOC to have ignored this possibility. Indeed, the USDOC appears to have recognized that SPS entitlements of farmers producing different crops would be based on non-COMOF programmes.[234] Thus, we do not find the absence of any discussion of this feature of the SPS programme in the USDOC's determination to undermine the USDOC's findings of *de jure* specificity because, ultimately, as already noted, the USDOC's findings were driven by the view that the availability of COMOF programme-based payments were, as a matter of law, limited to olive growers. The fact that olive growers may have received SPS payments for *non-olive growing* activities under different programmes does not undermine the USDOC's position.

7.110. Turning to the possibility of transfer, we recall that when an SPS entitlement was obtained by transfer, the original source of that entitlement could have been a support programme other than the COMOF programme, as in addition to olives, the previously existing support schemes falling within the scope of the SPS programme included programmes providing assistance for arable crops, potato starch, grain legumes, rice, seeds, beef and veal, milk and milk products, sheepmeat and goatmeat, dried fodder, cotton, tobacco, hops, sugar beet, cane and chicory used for the production of sugar or inulin syrup, and bananas.[235] This suggests that, *as a matter of law*, an olive grower's SPS entitlements could have been obtained via transfer from, for example, a cotton farmer, and therefore would have derived from non-COMOF-programme-based assistance. Conversely, the value of SPS entitlements of a farmer that did not grow olives (for example, a grower of citrus fruits) could have been derived from COMOF programme-based assistance and transferred from an olive grower. In our view, these considerations suggest that the SPS programme did not legally tie

[228] Regulation 1782/2003, (Exhibit EU-24), Article 46; Regulation 73/2009, (Exhibit EU-23), Article 43. According to the European Union, since Spain did not implement the SPS programme on a regional basis (unlike the BPS programme, as explained below), a farmer could sell, buy, or rent SPS entitlements and activate them in any eligible hectare in Spain. (European Union's first written submission, para. 83; 25 February 2021 response to Panel question No. 7, para. 64).

[229] Regulation 1782/2003, (Exhibit EU-24), Article 42.3; Regulation 73/2009, (Exhibit EU-23), Article 41.2. See also European Union's first written submission, paras. 70(b) and 83; and 25 February 2021 response to Panel question No. 7, para. 63.

[230] The extent to which the USDOC possessed relevant information about the rules governing the precise calculation of entitlement values potentially available to olive growers from the Spanish national reserve is discussed in more detail below. (See paras. 7.112-7.114 below).

[231] European Union's first written submission, para. 244.

[232] European Union's first written submission, para. 80 (referring to Submission by the GOS in relation to the preliminary determination, (Exhibit EU-14), pp. 12-13; and GOS's response to supplemental questionnaire of 10 January 2017, (Exhibit EU-15), p. 18).

[233] United States' first written submission, para. 71.

[234] See e.g. PIDM, (Exhibit EU-1), p. 22 and fn 116, where the USDOC explains that "[the] referenced amount was the average of the total payment amounts under the annual grant-to-farmer program in place from 1999-2002, which for olive growers was the [COMOF] program", and that "[o]ther products [than olives] used an average of payments received during 2000-2002".

[235] Regulation 1782/2003, (Exhibit EU-24), Article 37 and Annex VI. See also European Union's first written submission, para. 79.

the value of SPS entitlements for olive growers to the assistance received under the COMOF programme. While COMOF programme-based assistance may have been, *as a matter of fact*, the basis for calculating the value of an olive grower's SPS entitlements, the SPS programme did not make this a legal requirement. Rather, when considered in the light of the relevant SPS rules concerning the possibility of transferring entitlements, the SPS programme appears to leave open the possibility that the value of an olive grower's SPS entitlements could be a function of non-COMOF-programme-based historical assistance. Likewise, the SPS programme also seems to envisage that COMOF programme-based assistance could have been the basis of the SPS entitlements of any farmer (not only olive growers) if obtained via transfer. In our view, these considerations suggest that the SPS programme did not *legally limit* the class of farmers that may benefit from COMOF programme-based entitlements to olive growers. However, this aspect of the rules governing the allocation and calculation of SPS entitlements was not discussed or examined in the USDOC's determination of *de jure* specificity.

7.111. The United States argues that the fact that entitlements could have been bought, rented, or inherited does not sever the reliance on the COMOF programme that Spain elected to incorporate into the SPS programme.[236] As already noted, however, the fact that COMOF programme-based SPS entitlements could be transferred under the SPS programme to farmers that did not grow olives suggests that the access to, and the amount of SPS payments derived from COMOF-based assistance was not *legally* limited to olive growers. Moreover, the fact that olive farmers could have obtained entitlements under the SPS programme derived from non-COMOF-programme-based assistance by way of transfer, suggests that SPS payments to the same olive farmers could be, as a matter of law, derived from programmes other than the COMOF programme.

7.112. We furthermore recall that to qualify for SPS assistance, a farmer was not required to produce any agricultural product. As already explained, this indicates that, *as a matter of law*, it was entirely possible for a "farmer" to benefit from COMOF programme-based entitlements derived from *prior olive production*, even if it no longer produced olives during the period of operation of the SPS programme (either because, for example, it switched to growing a different crop or decided to pursue other qualifying farming activities). This is yet another feature of the relevant rules that suggests that the SPS programme did not, *as a matter of law*, limit the potential to benefit from COMOF programme-based entitlements to olive growers. While the USDOC recognized that the amount of support under the SPS programme is not dependent on the type or volume of production, the USDOC did not explain why this consideration would be irrelevant or would not undermine its *de jure* specificity findings.

7.113. Finally, we note that it was also possible for new farmers (including new olive farmers) to obtain SPS entitlements from the national reserve. The establishment of the national reserve and its intended purpose was set out in Article 42 of Regulation 1782/2003, which provided *inter alia* as follows:

> 1. Member States shall, after any possible reduction under Article 41(2), proceed to a linear percentage reduction of the reference amounts in order to constitute a national reserve. This reduction shall not be higher than 3 %.
>
> …
>
> 3. Member States may use the national reserve to grant, in priority, reference amounts to farmers who commence their agricultural activity after 31 December 2002, or in 2002 but without receiving any direct payment in that year, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions.[237]

7.114. We understand from these provisions that new farmers (including new olive farmers) could, as a matter of law, receive payments from the national reserve, which was to be constituted with the proceeds of a 3% reduction in SPS payments that would otherwise be made to farmers holding entitlements. This information was before the USDOC. However, as the United States points out, the rules governing the precise calculation of payments from the Spanish national reserve for new

[236] United States' first written submission, para. 72.
[237] Regulation 1782/2003, (Exhibit EU-24), Article 42.

farmers (including new olive farmers) was not before the USDOC.[238] This means that the information necessary to determine the extent to which such payments to new olive farmers may or may not have been tied to payments received by olive farmers during the COMOF programme reference period was not in the USDOC's possession.

7.115. Thus, with the exception that olive growers may have held SPS entitlements based on the global amount of support (and not only COMOF programme-related assistance) and the possibility of obtaining entitlements from the national reserve, we find that the above-examined features of the rules governing the allocation and calculation of SPS payments for farmers with SPS entitlements obtained via transfer, and farmers holding COMOF programme-based entitlements no longer producing olives, were relevant to the USDOC's determination of *de jure* specificity. The fact that it was legally possible to *transfer COMOF programme-based entitlements to non-olive farmers under the SPS programme* suggests that the SPS programme did not explicitly limit access to the COMOF programme-based payments to olive growers. Other farmers could have obtained and benefited from such entitlements by transfer in the same way as olive growers holding the same entitlements. Moreover, because crop production was not a precondition for a farmer to receive SPS payments, it was also legally possible for a farmer that obtained assistance under the COMOF programme to continue to receive SPS payments based on that assistance even if such farmer was *no longer producing olives* in the SPS period.

7.116. In conclusion, we find that the USDOC did not properly examine and account for the above-mentioned features of the rules governing the allocation and valuation of SPS entitlements in its determination of *de jure* specificity.

7.2.2.3.8 The USDOC's findings with respect to the COMOF programme

7.117. The European Union argues that the USDOC's analysis and statements with respect to the COMOF programme could not objectively serve as the "foundation" of the USDOC's *de jure* specificity findings with respect to the SPS and BPS programmes, because the USDOC never actually determined that the COMOF programme was *de jure* specific, but rather only stated that it "would find" the COMOF programme to be *de jure* specific.[239] The European Union maintains that the USDOC's reliance on this "would-be-finding" with respect to the COMOF programme reveals that the USDOC's *de jure* specificity findings in relation to the SPS and BPS programmes were not based on a reasoned and adequate explanation and, to this extent, were inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement.[240] In addition, the European Union argues that the USDOC's explanation of the calculation of assistance under the COMOF programme was factually incorrect, thereby rendering the USDOC's findings inconsistent with Article 2.4 of the SCM Agreement.[241]

7.118. The United States does not deny that the USDOC did not make a separate finding of specificity in relation to the COMOF programme under the US law. However, according to the United States, a separate *de jure* specificity determination with respect to the COMOF programme would have been meaningless and unnecessary, because (i) Article 2.1(a) of the SCM Agreement does not require an investigating authority to make separate specificity findings for each legal instrument that falls within the scope of the "the legislation" at issue, but only requires such determination with respect to the subsidy programme as defined in Article 1.1 of the SCM Agreement; and (ii) the COMOF programme was not the programme that conferred subsidies during the period of investigation.[242]

[238] United States' 11 March 2021 comments on the European Union's 25 February 2021 response to Panel question No. 7, para. 37 (referring to European Union's 25 February 2021 response to Panel question No. 7, para. 65).
[239] European Union's first written submission, paras. 282-289; opening statement at the first meeting of the Panel, para. 62.
[240] European Union's first written submission, para. 329; 10 June 2020 response to Panel question No. 4, para. 34; and opening statement at the first meeting of the Panel, para. 76.
[241] European Union's first written submission, paras. 315 and 329.
[242] United States' first written submission, para. 90; 10 June 2020 response to Panel question No. 5, para. 21.

7.119. We note that in the final issues and decision memorandum, the USDOC began its response to the interested parties' comments with respect to its preliminary determination of *de jure* specificity by highlighting the relevance of the COMOF programme subsidies to its overall findings:

> We continue to find, for purposes of this final determination, that assistance provided under the CAP Pillar I programs Basic Payment Scheme (BPS) and [the GP programme] is *de jure* specific and, therefore, countervailable. As we explained in the Preliminary Determination, our finding of *de jure* specificity is based on the manner in which Spain implemented the Pillar I programs with reference to the operations of its two predecessor programs, the Single Payment Scheme and the [COMOF programme], and the manner in which the amount of assistance was determined under these two programs. *The earliest of these programs, the [COMOF programme], was in place from 1999 through 2003, and provided production aid in the form of annual grants to farmers on the basis of type of crop and the volume of production. Both olive oil and table olives were specifically identified as products eligible to receive production aid under this program, and the payments provided during this period were based on whether the olives were used to produce olive oil or table olives. Specifically, the payment for hectares that grew olives for olive oil production used the equation "132.25/100kg" to calculate the value of the payment per hectare; the payment for hectares that grew olives to produce table olives used a different calculation, in which the ratio of 100 kg of processed table olives was equal to 11.5 kg of olive oil eligible for production aid. Once the value per hectare was determined using this calculation, a farmer would apply for aid in the amount of the number of hectares multiplied by the value of each hectare.*[243]

7.120. The USDOC then went on to make the statements that are the focus of the European Union's submissions:

> We recognize that the [COMOF programme] is no longer in operation and ceased providing benefits to olive growers in 2003, and *we are not rendering a decision* regarding whether the assistance provided under this program was specific under section 771(5A) of the Act. However, because the amount of assistance provided to olive farmers and the methodology for determining it under this program forms the foundation for determining the amount of assistance provided to olive farmers under the successor programs SPS and CAP Pillar I BPS and [the GP programme], *it is necessary to evaluate the specificity of this program separately*. In doing so, we consider that, because the [COMOF programme] provided annual payments only to producers of oilseed crops, including olives, *we would find this program to be de jure specific*, as explained in further detail below.[244]

7.121. As the European Union asserts, the USDOC explained in this paragraph that it would not be making a finding of specificity in relation to the COMOF programme under domestic law. However, the same passage also reveals that the USDOC considered that it "would find" the COMOF programme *de jure* specific because it "provided annual payments only to producers of oilseed crops, including olives". The USDOC then proceeds to explain that:

> [T]he amount of each farmer's payment [under the SPS programme] was calculated as a percentage of the average annual grant payments previously provided over a reference period. In the case of olives and olive oil, this reference period was from 1999 through 2002, when the [COMOF programme] was in operation. Because the [COMOF programme] provided benefits on a *de jure* specific basis, the benefits provided under the SPS retained the *de jure* specificity inherent in the [COMOF programme].[245]

7.122. Thus, after stating that it "would find" the COMOF programme *de jure* specific under the US law because of the crop-specific focus of its payments, the USDOC expressly stated that the COMOF programme "provided benefits on a *de jure* specific basis". The USDOC repeated this view

[243] FIDM, (Exhibit EU-2), pp. 32-33. (emphasis added; fns omitted)
[244] FIDM, (Exhibit EU-2), p. 33. (emphasis added)
[245] FIDM, (Exhibit EU-2), p. 33. (fn omitted)

in multiple parts of the Remand Redetermination, including in the following passages where it explained:

> [The COMOF programme] provided benefits on a *de jure* specific basis because access to the subsidy was expressly limited to olive growers. The benefits provided under this program were calculated with a rate of Euros per kilogram of a farmer's production of olives for oil and olives for table olive production (different rates were applied to olives for oil and olives for table olive production). This value is unique to, and only accessed by, farms that grow olives.
>
> …
>
> [T]he SPS grant amounts were based on the amount of grants provided under the [COMOF programme] that were available only to olive growers, thereby entrenching the crop-specific nature of the subsidy under the [COMOF programme] into the criteria for determining the assistance that a farmer would be eligible to receive under the SPS. In this manner, the value of the grants provided under the [COMOF programme] (the access to which was expressly limited to the olive sector) was preserved in calculating the grants paid under the SPS.[246]

7.123. We note that the European Union does not assert that interested parties had argued in the underlying investigation that the historical COMOF programme subsidies were not *de jure* specific within the meaning of Article 2.1(a) of the SCM Agreement. Neither does the European Union make that submission in these proceedings. Thus, we understand the European Union's complaint to focus on the absence of a formal specificity finding under the US law, and the implications of this for the consistency of the USDOC's determination with the United States' obligations under Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement.

7.124. In our view, the above excerpts demonstrate that the USDOC did, in fact, evaluate and express a position with respect to the specificity of the COMOF programme. While the USDOC did not render a *formal decision* under domestic law, we consider that the USDOC nevertheless established to its satisfaction the existence of all of the *factual elements* that it believed would have enabled it to find the COMOF programme subsidies *de jure* specific for the purpose of the USDOC's subsequent establishment of the alleged "operational link" between the COMOF, SPS, and BPS/GP programmes. In other words, the USDOC considered that it had made sufficient *factual findings* with respect to the COMOF programme to satisfy itself that the subsidies available under the COMOF programme would be *de jure* specific under its domestic legislation, had it been required to make such a finding *as a matter of domestic law*.

7.125. Finally, we turn to the European Union's submission regarding the factual accuracy of the USDOC's findings concerning the calculation of assistance under the COMOF programme.[247] According to the European Union, the USDOC's explanation that "[o]nce the value per hectare was determined [under the COMOF programme] a farmer would apply for an aid equal to the number of hectares multiplied by the value of each hectare"[248] is factually erroneous. The European Union explains that the support under the COMOF programme was provided in proportion to production quantity, and not in terms of an amount or value per hectare.[249] The United States has not specifically responded to this criticism of the USDOC's COMOF programme explanations.

7.126. We agree with the European Union that the USDOC's explanation of the calculation of the COMOF programme assistance is factually inaccurate. The relevant rule, which was on the record of the USDOC's investigation, prescribes that the amount of COMOF programme assistance was to be

[246] Remand Redetermination, (Exhibit EU-80), pp. 15-16.
[247] European Union's first written submission, para. 315.
[248] European Union's first written submission, para. 315 (quoting the language from PIDM, (Exhibit EU-1), p. 22, and noting that FIDM, (Exhibit EU-2), contains similar language). FIDM, (Exhibit EU-2), with respect to COMOF provides that "[o]nce the value per hectare was determined using this calculation, a farmer would apply for aid in the amount of the number of hectares multiplied by the value of each hectare". (FIDM, (Exhibit EU-2), p. 33).
[249] European Union's first written submission, para. 315.

calculated on the basis of production quantities.[250] The relevant calculation did not establish a "value per hectare", as stated in the USDOC's final issues and decision memorandum.

7.2.2.3.9 Conclusion regarding the USDOC's findings that the BPS and GP programmes retained the inherent *de jure* specificity of the subsidies provided under the COMOF programme

7.127. In the light of the foregoing analysis, we conclude as follows:

a. The European Union has *not demonstrated* that the USDOC acted inconsistently with Article 2.1(a) of the SCM Agreement because its 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.[251]

b. The European Union has *not demonstrated* that the USDOC's determinations of *de jure* specificity with respect to the BPS, GP, and SPS programmes were inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement because, contrary to the European Union's assertion, the USDOC *did not* find the BPS, SPS, and GP subsidies to be *de jure* specific to olive growers as a result of being *coupled or tied to olive production*. Rather, the USDOC determined that the SPS, BPS, and GP subsidies were *de jure* specific to *olive growers*, because, according to the USDOC, the SPS, BPS, and GP subsidies available to olive growers were tied to *historical* olive production during the COMOF programme reference period.[252]

c. The European Union *has demonstrated* that the USDOC's determination of *de jure* specificity was inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement because:

   i. 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. To this extent, we find that the USDOC's determination of *de jure* specificity was not based on a reasoned and adequate explanation of why access to the BPS subsidies was explicitly limited to olive growers, within the meaning of Articles 2.1 and 2.1(a), and was not clearly substantiated on the basis of positive evidence, as required by Article 2.4.[253]

   ii. 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. To this extent, we find that the USDOC's determination of *de jure* specificity was not based on a reasoned and adequate explanation of why access to the BPS subsidies was explicitly limited to olive growers, within the meaning of Articles 2.1 and 2.1(a), and was not clearly substantiated on the basis of positive evidence, as required by Article 2.4.[254]

   iii. 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. To this extent, we find that the USDOC's determination of *de jure* specificity was not based on a reasoned and adequate explanation of why access to the SPS subsidies was explicitly limited to olive growers, within the meaning of Articles 2.1 and

[250] Regulation 1638/98, (Exhibit EU-26), Article 5.1, provides that "[t]he aid shall be granted to olive growers on the basis of the quantity of olive oil they actually produce".
[251] See para. 7.37 above.
[252] See para. 7.52 above.
[253] See paras. 7.74-7.75 above.
[254] See para. 7.93 above.

2.1(a), and was not clearly substantiated on the basis of positive evidence, as required by Article 2.4.[255]

d. The European Union *has demonstrated* that the USDOC's determination of *de jure* specificity was inconsistent with Article 2.4 of the SCM Agreement because the USDOC's determinations of *de jure* specificity with respect to the SPS and BPS/GP programmes was not clearly substantiated on the basis of positive evidence, to the extent that those determinations relied upon the explanation that "[o]nce the value per hectare was determined [under the COMOF programme] a farmer would apply for an aid equal to the number of hectares multiplied by the value of each hectare"[256], which was factually inaccurate.[257]

e. The European Union has *not demonstrated* that the USDOC's determinations of *de jure* specificity with respect to the BPS, GP, and SPS programmes were inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement because:

i. Contrary to the European Union's submissions, 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.[258]

ii. 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 on a regional basis.[259]

iii. In the absence of any suggestion on the part of the European Union that the historical COMOF programme subsidies were not *de jure* specific, the lack of a *formal* specificity finding under the US law does not undermine the USDOC's determinations of *de jure* specificity with respect to the SPS and BPS programmes, given that the USDOC considered it had made sufficient factual findings with respect to the COMOF programme to satisfy itself that the subsidies available under the COMOF programme would be *de jure* specific under its domestic legislation, had it been required to make such a finding *as a matter of domestic law*.[260]

7.128. Finally, we note that in addition to the alleged inconsistencies we have addressed above, the European Union argues that a number of the USDOC's other findings and explanations are incoherent and inconsistent, sometimes plainly contradictory, not based on positive evidence on the record, or in cases they are, the content of that evidence is misinterpreted.[261] According to the European Union, the contested USDOC's explanations contain either logical errors[262] or errors of appreciation or misrepresentations of the legal framework of the subsidy programmes at issue.[263]

[255] See paras. 7.115-7.116 above.
[256] European Union's first written submission, para. 315 (quoting the language from PIDM, (Exhibit EU-1), p. 22, and noting that FIDM, (Exhibit EU-2), contains similar language). FIDM, (Exhibit EU-2), with respect to COMOF provides that "[o]nce the value per hectare was determined using this calculation, a farmer would apply for aid in the amount of the number of hectares multiplied by the value of each hectare". (FIDM, (Exhibit EU-2), p. 33).
[257] See para. 7.126 above.
[258] See para. 7.85 above.
[259] See para. 7.101 above.
[260] See paras. 7.123-7.124 above.
[261] European Union's first written submission, para. 281.
[262] The alleged "logical error" not addressed elsewhere in this Report concerns certain considerations regarding the decoupled nature of SPS and BPS assistance. (European Union's first written submission, paras. 290-292 and 298; opening statement at the first meeting of the Panel, para. 62 and fn 33).
[263] The alleged "errors of appreciation" not addressed elsewhere in this Report concern (a) data used by Spain for regional implementation of the BPS programme (European Union's first written submission, para. 299); (b) determination of the regional value under the BPS programme (ibid. paras. 305-306); (c) the notion of the "adjusted coefficient" (ibid. paras. 307-308); (d) the notion of value of entitlement per hectare (ibid. paras. 311-313); (e) the USDOC's explanations concerning the Aid to Olive Groves programme

The European Union argues that these alleged errors demonstrate that the USDOC's determination was not reasonably and adequately explained, and that it was grounded on an erroneous factual basis and, therefore, is inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement.[264]

7.129. According to the United States, the European Union's arguments variously mischaracterize or take out of context the USDOC's analysis of the *de jure* specificity of the programmes at issue.[265] With respect to certain alleged errors of appreciation or misrepresentations of the relevant legal framework, the United States argues that even accepting the European Union's allegations would not undermine the USDOC's finding that the BPS and GP programmes are *de jure* specific.[266]

7.130. Having found that the USDOC's *de jure* specificity findings are inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement for the reasons explained above, we do not consider it necessary for achieving a positive solution to this dispute to address the remaining European Union's arguments[267] in support of its claims under Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement.

7.2.3 The European Union's claims under Articles 2.1, 2.1(b), and 2.4 of the SCM Agreement

7.131. The European Union claims that the USDOC's determinations of *de jure* specificity in its final issues and decision memorandum and the Remand Redetermination are inconsistent with Articles 2.1, 2.1(b), and 2.4 of the SCM Agreement because the USDOC (i) failed to explore or properly evaluate whether the eligibility and subsidy calculation criteria under the SPS, BPS, and GP programmes were non-specific, within the meaning of Article 2.1(b) of the SCM Agreement; and (ii) ignored record evidence showing that this was the case.[268]

7.132. The United States argues that the eligibility criteria under the SPS, BPS, and GP programmes did not satisfy the non-specificity requirements of Article 2.1(b) of the SCM Agreement[269], and that, in any case, even assuming *arguendo* that the *eligibility criteria* of those programmes were based on objective criteria and conditions, the criteria governing the *amount* of the subsidies nevertheless inherently favoured olive growers, therefore precluding a finding of non-specificity.[270]

7.133. We note that the USDOC made no explicit findings in its preliminary and final determinations on the extent to which the SPS and BPS subsidies were "non-specific" within the meaning of the functional equivalent of Article 2.1(b) of the SCM Agreement under US law. The USDOC did, however, discuss and examine this possibility in the Remand Redetermination making the following findings:

> The grant amounts under SPS were not based on the total value of a farm's overall production, or given a flat rate based only on the size of the farm in hectares, or a combination of the two, or any other neutral or objective criteria pursuant to section 771(5A)(D)(ii) of the Act. Instead, the SPS grant amounts were based on the amount of grants provided under the [COMOF programme] that were available only to olive growers, thereby entrenching the crop-specific nature of the subsidy under the [COMOF programme] into the criteria for determining the assistance that a farmer would

(ibid. paras. 316-318); and (f) the USDOC's alleged consideration of existence of a legal requirement to continue olive production (ibid. paras. 319-329). See also European Union's first written submission, para. 298; and opening statement at the first meeting of the Panel, para. 62 and fn 35.

[264] European Union's first written submission, para. 329.

[265] United States' first written submission, para. 87.

[266] See e.g. United States' first written submission, paras. 95-96 and 98. In response, the European Union submits that, even admitting for the sake of argument that some of the alleged errors and contradictions taken individually might not be fatal, the number of them, taken together, demonstrates that the USDOC "failed to understand [the legislation governing the programmes at issue] or gave a biased description of its operation". (European Union's opening statement at the first meeting of the Panel, para. 64).

[267] See fns 262-263 above.

[268] European Union's first written submission, paras. 271-280; 10 June 2020 response to Panel question No. 3, para. 26; opening statement at the first meeting of the Panel, paras. 44 and 49-60; 12 November 2020 response to Panel question No. 9, paras. 96-104; and 11 March 2021 comments on the United States' 25 February 2021 response to Panel question No. 5, paras. 11-14.

[269] United States' first written submission, paras. 81 and 84.

[270] United States' first written submission, paras. 82-84; second written submission, para. 27.

> be eligible to receive under the SPS. In this manner, the value of the grants provided under the [COMOF programme] (the access to which was expressly limited to the olive sector) was preserved in calculating the grants paid under the SPS. Thus, under the SPS, access to a subsidy based on the [COMOF programme] subsidies was expressly limited to olive growers. In implementing the SPS, the GOS and the EU developed a system that applied conditions that were not neutral or objective such that [the USDOC] can consider the program to be not specific under section 771(5A)(D)(ii) of the Act; if a farm produced a product that received certain amounts of assistance prior to the implementation of SPS, those amounts were factored into, and therefore preserved in, the calculation of the grant amounts to which farmers had access under the SPS. In this way, the SPS did not apply uniform treatment across the agricultural sector; olive growers continued to benefit as they had, relative to other sub-sectors of the agricultural sector, under the [COMOF programme], under which access to the subsidy was expressly limited to olive growers.
>
> In implementing the BPS, the GOS again legislatively implemented a methodology regarding the distribution of benefits that relied on the access to grants provided under the SPS, not on any other neutral or objective criteria such as the total value of all crops produced on a farm, the area of the farm, the farmer's farm income, *etc.,* to determine the access to grants to provide under the BPS. … [The USDOC] is required to evaluate this evidence, pursuant to 19 CFR 351.502(d), in examining whether there is uniform treatment in the provision of benefits across the agriculture sector. [The USDOC] can find a subsidy to the agricultural sector to be not specific only if there is record evidence of such uniform treatment, or record evidence of neutral and objective criteria pursuant to section 771(5A)(D)(ii) of the Act. … In its implementation of the BPS, the GOS, just as it did with the SPS program, the eligibility criteria that limited access to benefits provided under the [COMOF programme] were incorporated as a matter of law and embedded the historical differences in crop entitlement amounts among different agricultural products. As a result, farmers who received larger relative amounts of assistance under SPS continue to receive larger amounts of assistance under BPS. Therefore, the entitlement values under the BPS for those farmers that grow olives retain the historical difference, *relative to other farmers*, that was inherent in the [COMOF programme].[271]

7.134. The USDOC provided additional explanations of its *de jure* specificity findings, including as regards its consideration of "non-specificity", in responding to certain comments made about the consistency of the draft Remand Redetermination with relevant provisions of US law. In particular, the USDOC explained as follows:

> [The USDOC] also undertakes the analysis of *de jure* specificity based upon the language set forth in section 771(5A)(D)(ii) of the [of the Tariff Act of 1930]. Under clause (ii) of section 771(5A)(D) of the Act, where the authority providing the subsidy (or the legislation pursuant to which the authority operates), establishes "objective criteria or conditions" governing the eligibility for, and the amount of the subsidy, the subsidy is not specific as a matter of law. These criteria are if: eligibility is automatic, the criteria or conditions for eligibility are strictly followed, and the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document so as to be capable of verification. The statute states that "the term 'objective criteria or conditions' means criteria or conditions that are neutral and that do not favor one enterprise or industry over another." The [Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (SAA)] states that clause (ii) is a corollary of the *de jure* test. Under clause (ii), a subsidy would not be *de jure* specific merely because it was bestowed pursuant to certain eligibility criteria; however, "the objective criteria or conditions must be neutral, and not favor certain enterprises or industries over another."
>
> Therefore, in our analysis of whether the BPS program is *de jure* specific, consistent with the explicit statutory language and SAA language, [the USDOC] analyzed whether the legislation pursuant to which the GOS operates in administering this subsidy expressly limited access to the subsidy as a matter of law and whether the criteria or

[271] Remand Redetermination, (Exhibit EU-80), pp. 16-18. (emphasis original; fns omitted)

> conditions for eligibility set forth in the legislation of this subsidy are neutral and do not favor one enterprise or industry over another. Under the statute, in the context of an agricultural program such as BPS, the analysis and the application of the term "expressly limits" necessarily involve an examination pursuant to both section 771(5A)(D(i) and (ii) because both clauses (i) and (ii) focus on the criteria governing access to the subsidy and define the test for *de jure* specificity.[157]
>
> …
>
> To determine access to payments under the BPS, and the criteria or conditions governing the eligibility for, and the amount of the subsidy, the BPS legislation expressly refers to prior legislation and incorporates by reference the eligibility criteria from the prior legislation. An examination of the prior legislation explicitly referenced in and incorporated by the BPS demonstrates a linkage between eligibility for the crop-specific payments provided under the prior legislation and the current payments provided under the BPS. This link continued to entrench limited access and favored the olive industry. Thus, the statutory definition of *de jure* specificity set forth under 771(5A)(D)(i) and (ii) is met.[272]

[157] In most instances of *de jure* specificity, clause (ii) need not be referenced because the language in the legislation creating the subsidy clearly does not include "objective criteria or conditions," as defined by the statute, e.g., the legislation enacting the program provides subsidies solely to the iron and steel industry, the high tech industry, or to state-owned enterprises, etc. Here, we are investigating an agricultural program, and 19 CFR 351.502(d) provides that agricultural subsidies will not be specific, either *de jure* or *de facto*, solely because the subsidy is limited to the agricultural sector. As explained in this redetermination, for the agricultural exception to apply, the agricultural subsidy program must include all agricultural products and there must be uniform treatment across all agricultural products. Therefore, the clause (ii) corollary of the *de jure* specificity test is critical for agricultural subsidies when it may not be necessary for examining subsidies to industries that do not have a regulatory exception for specificity.

7.135. We understand from the above passages that the USDOC's analysis of whether the SPS and BPS subsidies were "non-specific", within the meaning of Section 771(5A)(D)(ii) of the United States Tariff Act of 1930, was intertwined with, and inherently dependent upon, its findings of *de jure* specificity under Section 771(5A)(D)(i). The USDOC's rejection of the "non-specificity" of the SPS and BPS subsidies was driven by its finding that payments under those schemes were explicitly linked, as a matter of law, to crop-specific payments made under the COMOF programme. Having already concluded that this aspect of the USDOC's findings is inconsistent with the United States' obligations under Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement for multiple reasons, we do not believe it is necessary for the purpose of achieving a positive solution to this dispute to make additional findings concerning the consistency of the USDOC's "non-specificity" analysis and findings with Article 2.1(b) of the SCM Agreement. Indeed, given 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, which we have found in some cases were not properly established or reasonably and adequately explained, we do not see how making additional findings under Article 2.1(b) of the SCM Agreement would assist the parties in this dispute. Accordingly, we decline to make findings with respect to the merits of the European Union's claims under Articles 2.1, 2.1(b), and 2.4 of the SCM Agreement.

7.2.4 The European Union's claim under Article 1.2 of the SCM Agreement

7.136. The European Union claims that the United States acted inconsistently with its obligations under Article 1.2 of the SCM Agreement because the USDOC determined that the BPS and GP programmes are countervailable subsidies and subjected them to Part V of the SCM Agreement, without properly demonstrating that they were specific.[273] The United States argues that the USDOC substantiated its *de jure* specificity determination concerning the BPS and GP programmes on the basis of positive evidence, and asks the Panel to reject the European Union's consequential claim under Article 1.2 of the SCM Agreement.[274]

[272] Remand Redetermination, (Exhibit EU-80), pp. 47-49.
[273] European Union's first written submission, para. 330.
[274] United States' first written submission, para. 101.

7.137. Having found that the USDOC's *de jure* specificity findings are inconsistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement, we do not consider it necessary to achieve a positive resolution of this dispute to address the European Union's claim under Article 1.2 of the SCM Agreement.[275]

7.3 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

7.138. In its preliminary and final determinations in the Spanish ripe olives countervailing duty investigation, the USDOC determined that the benefit arising from subsidies granted to *raw olive growers* in Spain could be attributed to three investigated exporting Spanish *ripe olive producers*.[276] The USDOC attributed the benefit of such subsidies over relevant arm's length transactions between upstream raw olive growers and downstream ripe olive producers, in the full amount of the financial contribution made to the growers, based on a specific provision in the US law, Section 771B of the Tariff Act of 1930 (Section 771B). In short, Section 771B requires the USDOC to attribute the benefit arising from a subsidy granted to a raw agricultural product that is used as an input for a processed product if the following two criteria are met: (i) the demand for the prior stage product is "substantially dependent" on the demand for the latter stage processed product; and (ii) the processing operation adds only "limited value" to the raw commodity.

7.139. The European Union claims that Section 771B is "as such" inconsistent with Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement. In essence, the European Union alleges that under Section 771B the USDOC is required to impermissibly presume that where a subsidy is conferred on an upstream agricultural product in arm's length transactions between unrelated entities a benefit will also have been conferred indirectly to a downstream processor.[277] The European Union also claims that the USDOC's application of Section 771B to relevant arm's length transactions in the ripe olive investigation was inconsistent with these same provisions. The United States argues that each of the European Union's claims fails because the European Union misunderstands the relevant WTO obligations, the meaning of Section 771B, and its application in the underlying investigation.[278]

7.140. We begin by examining the merits of the European Union's claims concerning Section 771B "as such", before turning to its claims concerning the application of Section 771B in the ripe olives investigation. We understand the European Union's complaint in both cases to concern the question of pass-through in situations involving arm's length transactions between unrelated entities, and not transactions that are not at arm's length or transactions between related parties.[279]

7.3.1 The European Union's complaint against Section 771B of the Tariff Act of 1930 "as such"

7.141. The European Union alleges that Section 771B is "as such" inconsistent with the United States' obligations under Article VI:3 of the GATT and various provisions of the SCM Agreement because it improperly *mandates* an approach by the USDOC with respect to benefit that excludes the carrying out of a proper pass-through analysis.[280]

7.142. The European Union maintains that Article VI:3 of the GATT 1994 and Articles 10 and 32.1 of the SCM Agreement contain an obligation to conduct a pass-through analysis for downstream products[281] and specifically, an analysis of "whether and to what extent the price of the input product

[275] See e.g. Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.203.
[276] See section 7.3.2 below for further details.
[277] European Union's first written submission, paras. 334-336, 346, 357, 361-363, 369, 377, 380, 400-401, 414-415, and 417.
[278] United States' first written submission, paras. 102 and 104.
[279] The European Union acknowledges that a different US legal provision not at issue in this dispute (19 CFR §351.525(b)(6)) governs corporations with cross-ownership and therefore applies for transactions that are not at arm's length. Section 19 CFR 351.525(b)(6)(iv) applies in situations where two or more corporations exist and where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. (European Union's first written submission, para. 404 (referring to 19 USCFR 351.525, (Exhibit EU-77))).
[280] See, e.g. European Union's first written submission, paras. 335 and 387-418.
[281] European Union's first written submission, paras. 336-357.

is lowered vis-à-vis the alleged indirect beneficiary as a result of the subsidy".[282] The European Union submits that full pass-through cannot be presumed without undertaking the appropriate analysis.[283] The European Union acknowledges that Article VI:3 and the SCM Agreement do not set out a specific methodology for the pass-through analysis that must be followed in all cases. Nevertheless, the European Union considers that an examination of a decrease in the level of prices for the input product resulting from any subsidy granted to the input producers provides the only appropriate method for the analysis, as the purpose of a pass-through test should be to determine *whether and to what extent* the subsidies granted to the input product have passed-through to the downstream product.[284] The European Union, however, does not consider the question of whether a price comparison constitutes the only appropriate method to assess pass-through is determinative for resolving its claim.[285]

7.143. In addition to its claims under Article VI:3 of the GATT 1994 and Articles 10 and 32.1 of the SCM Agreement, the European Union also claims that Section 771B is inconsistent with Articles 19.1, 19.3, and 19.4 of the SCM Agreement. The European Union contends that Section 771B is also "as such" inconsistent with Articles 19.3 and 19.4 because Section 771B mandates an approach under which the USDOC is unable to ensure an "appropriate duty amount in each case" or an "accurate" duty amount, as is required by these provisions.[286] Section 771B would also consequently violate Article 19.1.[287]

7.144. The United States argues that the European Union has failed to establish that Section 771B is inconsistent with its obligations under the GATT 1994 and the SCM Agreement, and argues that, in order for the European Union to show otherwise, it must demonstrate that the law itself does not allow the United States to act in accordance with its WTO obligations. For the United States, this may be established by demonstrating that a law necessarily results in a violation of its obligations or does not allow the USDOC to act in accordance with the United States' obligations.[288] The United States contends that the European Union's legal interpretation lacks any basis in the text or negotiating history of the GATT 1994 or the SCM Agreement and is not supported by prior WTO dispute settlement reports. The United States argues that a plain reading of Article VI:3 demonstrates that there is no obligation to use a specific methodology to calculate the benefit conferred by the subsidy found to exist, much less a specific pass-through methodology. Moreover, based on this understanding, the United States contends that the European Union errs by insisting that a pass-through analysis must involve an analysis of price differentiation.[289]

7.145. The United States argues that the European Union's claims under Article 19 of the SCM Agreement as well as Articles 10 and 32.1 of the SCM Agreement should also be rejected because they are entirely dependent on the European Union's Article VI:3 claim.[290] The United States further maintains that the provisions of Article 19 of the SCM Agreement do not impose substantive requirements with respect to an investigating authority's calculation and determination of a countervailing duty rate but are "concerned with the primarily ministerial function of imposing and collecting [countervailing duties] *once those duties are already calculated and determined* in accordance with the obligations imposed by the preceding articles of the SCM Agreement".[291]

[282] European Union's first written submission, para. 372.
[283] European Union's first written submission, paras. 333-334 and 407-408.
[284] European Union's first written submission, para. 407; 10 June 2020 response to Panel question No. 14, paras. 90 and 92; and opening statement at the first meeting of the Panel, para. 87. Moreover, the European Union submits that the GATT panel in *US – Canadian Pork* has already previously established that the two conditions of Article 771B do not represent the factors that need to be assessed in order to examine whether benefit has passed-through. (See, e.g. European Union's first written submission, para. 372 (referring to GATT Panel Report, *US – Canadian Pork*, para. 4.10)).
[285] See, e.g. European Union's second written submission, para. 75.
[286] European Union's first written submission, paras. 386 and 420.
[287] Article 19.1 of the SCM Agreement requires an investigating authority to make a final determination of the amount of the subsidy and a final determination of injury prior to imposing a countervailing duty in accordance with the provisions of Article 19 of the SCM Agreement.
[288] United States' 25 February 2021 response to Panel question No. 9, paras. 35-37.
[289] United States' first written submission, paras. 105-113.
[290] United States' first written submission, paras. 108-123 and 132; 12 November 2020 responses to Panel question No. 12, para. 41, and No. 15, paras. 46-49.
[291] United States' 12 November 2020 response to Panel question No. 15, para. 46. (emphasis original)

7.146. We agree with past panel and Appellate Body reports that in order for an "as such" challenge against a provision of domestic legislation to succeed, the complaining Member must establish that the relevant provision of domestic law requires the responding Member to violate its obligations under the relevant covered agreement or otherwise restricts, in a material way, the responding Member's discretion to act in a manner that is consistent with those obligations.[292] Guided by this standard, we will review the merits of the European Union's "as such" claims in the sections that follow, by first identifying and considering the legal requirements for conducting a pass-through assessment that is consistent with the relevant provisions of the GATT and the SCM Agreement, and then by determining whether Section 771B *requires* the USDOC to act inconsistently with those requirements or whether it *materially restricts* any USDOC discretion to act consistently with the same requirements.

7.3.1.1 Legal requirements for conducting a pass-through analysis

7.147. There is no disagreement between the parties that where a producer of the upstream input product operates at arm's length from the producer of the downstream product produced using the upstream input, an investigating authority is required, under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, to establish that the benefit of the subsidy provided directly in respect of the upstream product has been passed-through to the downstream product in order to levy countervailing duties on imports of the downstream product.[293] The parties also agree that there is no prescribed methodology in either of these provisions for assessing pass-through.[294] Thus, we understand the parties to accept that investigating authorities retain a degree of discretion with respect to how to determine the existence and extent of the pass-through of indirect subsidies. We share the parties' views on all these points.

7.148. We note that Article VI:3 of the GATT 1994 provides as follows:

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

7.149. Article 10 of the SCM Agreement and footnote 36 provide:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty[36] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.[295]
>
> [36] The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

[292] See, e.g. Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172; *EU – Biodiesel (Argentina)*, para. 6.229; and *US – Carbon Steel*, para. 162.

[293] See, e.g. European Union's 10 June 2020 response to Panel question No. 14, para. 92 ("the EU acknowledges that an authority in principle has discretion regarding its method of analysis.") The United States maintains that Article 14 of the SCM Agreement further supports its position that no particular methodology is required for determining whether a benefit has passed-through to a downstream producer. In this respect, the United States refers to the *chapeau* of Article 14, which establishes "guidelines" to be followed in calculating the benefit to a recipient. (United States' 12 November 2020 response to Panel question No. 18, para. 52 (referring to Appellate Body Reports, *US – Softwood Lumber IV*, paras. 91-92; *Japan– DRAMs (Korea)*, para. 191; and Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.55)).

[294] See, e.g. European Union's first written submission, paras. 341-357; opening statement at the first meeting of the Panel, para. 79; and United States' first written submission, paras. 109-113.

[295] Fn omitted.

7.150. The first sentence of Article VI:3 establishes that no countervailing duty shall be levied on any imported product *in excess of* an amount equal to the subsidy *determined* to have been granted, *directly or indirectly*, on the manufacture, production, or export of that product. The second sentence of Article VI:3 as well as footnote 36 to Article 10 define a countervailing duty as a special duty levied *for the purpose of offsetting* any subsidy bestowed, directly or indirectly, upon the manufacture, production, or export of *any merchandise*. We agree with past panels and the Appellate Body that it follows from a combined reading of these two provisions that Members are entitled to offset "indirect" subsidization by imposing duties on imported products that benefit from subsidies conferred on "upstream" companies and products.[296] In our view, it also follows from the terms of Article VI:3 and, in particular, the requirement not to apply a countervailing duty *in excess of* the *estimated amount of subsidy* determined to have been granted on the imported product, that an importing Member is not entitled to simply presume that a subsidy bestowed on an input product passes through, in total or in part, to the processed imported product. Rather, an investigating authority must work out, as accurately as possible, how much of the subsidy has flowed indirectly from an input product to the downstream product, to ensure that any countervailing duty imposed on the downstream product is not in excess of the total amount of subsidies bestowed on the investigated product. To this end, an investigating authority must take into account all relevant facts and circumstances to ensure that a countervailing duty is not imposed in excess of the estimated subsidy. Thus, we agree with the Appellate Body that countervailing duties may not be applied on any amount of a subsidy that has not been found to have passed-through to the imported product.[297] We find this understanding to be consistent with the views of the GATT panel in *US – Canadian Pork*, which considered Canadian claims under Article VI:3 of the GATT 1947 with respect to the application of Section 771B in a USDOC countervailing duty investigation of subsidies granted to imports of fresh, chilled, and frozen pork from Canada.[298]

7.151. Having said that, we note that neither Article VI:3 nor Article 10 of the SCM Agreement prescribe that a particular methodology must be followed to perform a pass-through analysis where one is required. To this extent, investigating authorities have a certain amount of discretion in evaluating whether and to what extent the benefit of a subsidy provided directly to a producer of an upstream product has passed-through to the downstream product produced by an unrelated enterprise (an indirect subsidy). The parties in this dispute disagree, however, as to how that discretion can be exercised, and, in particular, as to the kind of considerations and factors that must, at a minimum, be included in a determination of the existence and extent of pass-through.

7.152. The European Union acknowledges that Article VI:3 and the SCM Agreement do not prescribe a specific methodology to assess pass-through. Nonetheless the European Union argues that, in the case of input subsidies, only an assessment of whether the purchase price of the input product has been lowered via "a price comparison of some sort"[299] can allow an investigating authority to meaningfully assess whether pass-through of benefit has occurred.[300] For the European Union, such an approach would be consistent with the meaning of "benefit" in Article 1.1(b) of the SCM Agreement. In this regard, the European Union submits that the determination of "benefit" seeks to identify whether the financial contribution has made the recipient "better off" than it would otherwise have been, absent that contribution.[301] Accordingly, for the

[296] Appellate Body Report, *US – Softwood Lumber IV*, para. 140 ("[t]he phrase 'subsid[ies] bestowed … *indirectly*', as used in Article VI:3, implies that financial contributions by the government to the production of *inputs* used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the *processed product*" (emphasis original)). See also Panel Reports, *US – Softwood Lumber IV*, para. 7.91; *US – Upland Cotton*, para. 7.1180; and *Mexico – Olive Oil*, paras. 7.137-7.139.

[297] The Appellate Body in *US – Softwood Lumber IV* found that only the amount by which an indirect subsidy granted to producers of inputs flows through to the processed product, together with the amount of subsidy bestowed *directly* on producers of the processed product, may be offset through the imposition of countervailing duties. (Appellate Body Report, *US – Softwood Lumber IV*, paras. 140-141).

[298] GATT Panel Report, *US – Canadian Pork*, para. 4.6 ("Article VI:3 stipulates that a countervailing duty levied on any product shall not exceed an amount equal to the subsidy granted directly or indirectly on the production of 'such product'. According to this clear wording, the United States may impose a countervailing duty on pork only if a subsidy has been determined to have been bestowed on the production of pork; the mere fact that trade in pork is affected by the subsidies granted to producers of swine is not sufficient.")

[299] European Union's 10 June 2020 response to Panel question No. 14, para. 92.

[300] European Union's first written submission, paras. 372 and 408; 10 June 2020 response to Panel question No. 14, para. 92; and second written submission, para. 76.

[301] European Union's second written submission, para. 77. See also Appellate Body Report, *Canada – Aircraft*, para. 157.

European Union, in order to determine whether a downstream product has benefited from the subsidies provided to an unrelated producer of the upstream input product, an assessment of whether the purchase price of the input product has been lowered relative to "market" prices would be appropriate. Finally, the European Union maintains that other considerations may also be relevant to the assessment, such as an evaluation of the concentration of the relevant markets, the market power of the different producers and processors, or the extent of national or international competition.[302]

7.153. The United States emphasizes that Article VI:3 of the GATT 1994 and the SCM Agreement are silent as regards the methodology for evaluating indirect subsidization. For the United States, this silence means that an investigating authority has discretion to decide how it should conduct a pass-through analysis in a particular factual circumstance.[303] The United States further argues that the European Union's focus on a price comparison is unsupported by prior WTO dispute settlement reports or the negotiating history of the GATT 1994 or the SCM Agreement, neither of which specify a methodology or indicate how an investigating authority should determine whether and to what extent a benefit is conferred to a downstream producer.[304]

7.154. In our view, the discretion afforded to an investigating authority under Article VI:3 for the purpose of establishing the pass-through of subsidies is not unfettered. As already noted, pursuant to Article VI:3 an investigating authority is required to analyse to what extent direct subsidies on inputs may have indirectly flowed to the processed investigated product where the respective producers operate at arm's length and which therefore may be included in the determination of the estimated total amount of subsidies bestowed on the investigated product. In our assessment, this means that an investigating authority must provide an *analytical basis* for its findings of the existence and extent of pass-through that takes into account *facts and circumstances* that are *relevant* to the exercise and that are directed to ensuring that any countervailing duty imposed on the downstream product is not in excess of the total amount of subsidies bestowed on the investigated product.[305] Thus, we do not understand an investigating authority's discretion in evaluating the pass-through of subsidies under Article VI:3 to be so wide as to permit it to exclude any consideration of facts and circumstances that may be relevant to the very analysis that it must perform.

7.155. Finally, we note the parties' disagreement about the role of the prices of a subsidized input product in a pass-through analysis, and the United States' objection to what it considers would be a "one-size-fits-all" approach to assessing pass-through.[306] Despite the European Union's characterization of input price comparisons as the only meaningful way to assess pass-through, we do not consider that any findings on our part with respect to this matter are necessary to achieve a positive solution to the parties' dispute. Accordingly, we will proceed to consider the European Union's claims guided by the understanding of the requirements of Article VI:3 and Article 10 we have set out above, namely, that an investigating authority must provide an *analytical basis* for its findings of the existence and extent of pass-through that takes into account *facts and circumstances* that are *relevant* to that exercise. The pass-through of a

[302] The European Union observes, for instance, that if the producers of the raw agricultural product could export their products internationally, this would reduce dependency on the domestic market. (European Union's first written submission, paras. 408 and 410-411; 12 November 2020 response to Panel question No. 12, para. 116).

[303] United States' first written submission, paras. 105-110 and 113 (quoting Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.87): "[t]he 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." (fn omitted)

[304] United States' first written submission, paras. 128-130 (referring to Appellate Body Report, *US – Softwood Lumber IV*, paras. 143 and 154; and GATT Panel Report, *US – Canadian Pork*, paras. 4.8-4.10).

[305] Contrary to the United States' assertions, we find this conclusion to be consistent with views expressed by Members during the Uruguay Round about the need to *investigate further* in cases where the market price is suspected of being unduly influenced by the subsidy on the input in question. (United States' first written submission, para. 127; GATT, Uruguay Round-Group of Negotiations on Goods-Negotiating Group on Subsidies and Countervailing Measures-Subsidies and Countervailing Measures, Note by the Secretariat, MTN.GNG/NG10/W/4, p. 17).

[306] The United States submits that a requirement to determine whether a decrease in the level of prices for the input product resulted from any subsidy granted to the input producers might lead to a situation where it would be impossible to countervail an indirect subsidy if a price differential could not be observed. (United States' first written submission, para. 127).

subsidy must be shown to exist by *determining* the extent to which subsidies on input products may have been *indirectly* bestowed upon the processed investigated products. In the sections that follow, we will examine the merits of the European Union's complaint by considering whether Section 771B *requires* the USDOC to act in a manner inconsistent with these obligations, and if not, whether it *materially restricts* any USDOC discretion to act consistently with the same requirements.

7.3.1.2 Legal characterization of the operation of Section 771B of the Tariff Act of 1930

7.156. We next evaluate the European Union's claim that Section 771B requires the USDOC to impermissibly presume pass-through of any subsidies granted to an upstream raw agricultural product to the downstream processed product in all cases where the producer of the raw agricultural product and the processor enter into arm's length transactions and the two conditions in Section 771B are met.[307]

7.157. Section 771B of the Tariff Act of 1930 provides as follows:

> In the case of an agricultural product processed from a raw agricultural product in which –
>
> (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and
>
> (2) the processing operation adds only limited value to the raw commodity,
>
> countervailable subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.[308]

7.158. The USDOC is directed to apply Section 771B in countervailing duty investigations involving an "agricultural product processed from a raw agricultural product". Section 771B stipulates that countervailable subsidies found to have been provided to the raw agricultural product "shall be deemed" to be provided to the agricultural processed product, when two cumulative factual circumstances exist: first, when the demand for the prior stage product is substantially dependent on the demand for the latter stage product; and second, when the processing operation adds only limited value to the raw commodity. In this way, Section 771B instructs the USDOC to find that subsidies have been provided to the manufacture, production, or exportation of the processed product when the two prescribed factual circumstances are fulfilled and without reference to, or consideration of, any other factors.

7.159. The European Union contends that the use of the auxiliary term "shall" in Section 771B signifies that Section 771B is a mandatory provision. Accordingly, the European Union contends that the USDOC has no margin of discretion in determining the amount of the subsidy that can be said to have passed through to the downstream product when the factual circumstances contained in Section 771B are fulfilled. For the European Union, this is confirmed from the determination in the underlying ripe olives investigation and in previous USDOC determinations involving Section 771B.[309]

7.160. At the core of its claim, the European Union considers that the two factual circumstances described in Section 771B – first, concerning whether demand for the input substantially depends on demand for the processed product, and second, whether processing adds only limited value – are *alone* inapt for determining the existence and precise amount of pass-through as required under the applicable legal standard. The European Union argues that Section 771B requires the USDOC to deem the *full amount* of subsidies granted to a raw agricultural product to have been granted to the processed product in all cases without considering any other factors, meaning that the USDOC must *presume* that the full amount of benefit passes through to the indirect subsidy recipient without any

[307] European Union's first written submission, paras. 334-336, 346, 357, 361-363, 369, 377, 380, 400-401, 414-415, and 417.
[308] 19 USC 1677-2, (Exhibit EU-52).
[309] European Union's first written submission, paras. 414-418. See also FIDM, (Exhibit EU-2), p. 43; and Frozen warmwater shrimp FIDM, (Exhibit EU-51), p. 43.

analysis of the precise benefit amount that passes through.[310] The European Union argues that such a presumption violates the requirements of Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. Hence, the European Union maintains that every application of Section 771B by the USDOC will necessarily lead to a violation of the applicable WTO provisions.[311]

7.161. We understand the United States' defence of Section 771B to rest on two main lines of argument. First, the United States argues that the legal justification for Section 771B derives from inherent flexibilities in the GATT 1994 and SCM Agreement, which do not prescribe or prohibit any specific methodology to determine pass-through.[312] Second, the United States argues that the two factual circumstances contained in Section 771B are *on their own* appropriate for establishing pass-through in the context of the special commercial and economic circumstances facing agricultural input products used to process downstream products.[313] The United States maintains that Section 771B thus "provides a basis to make a finding attributing benefit to a downstream product, in the way that the 'pass-through' concept has been understood".[314]

7.162. As we have discussed above[315], Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement do not prescribe a particular methodology for determining pass-through. However, whatever methodology is chosen, an investigating authority must analyse to what extent subsidies on inputs may be included in the determination of the total amount of subsidies bestowed upon processed products. This must be done to ensure that countervailing duties are not applied in an amount that is in excess of the estimated subsidy determined to have been granted to the investigated product. Therefore, to ensure compliance with the requirements of Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, an investigating authority must take into account facts and circumstances that may be relevant to that determination and is not entitled to exclude from its determination factors that are potentially relevant.[316]

7.163. The United States considers that Section 771B provides an appropriate alternative method in the context of raw agricultural commodities in light of the special commercial and economic circumstances present in markets for such commodities, namely that these markets are systematically characterized by "perfect competition". In such markets, where products are undifferentiated and market-entry is unrestricted, the United States contends that producers of the raw products have no choice but to accept the prevailing market price, rendering them "price takers" that are unable to charge a price higher than the price a processor could obtain from another homogenous producer (which may or may not be subsidized). In these circumstances, the United States argues that market prices could not be used to determine whether the benefit of a subsidy granted to the upstream raw input producer has passed-through to a downstream processor because there would be no price differentiation. Thus, the United States argues that, because a raw agricultural commodity is often devoted completely to the production of a processed product and a product processed from a raw agricultural commodity is often produced substantially from the raw

[310] The European Union submits that the question of whether an input subsidy passes through may depend on an array of factors affecting the competitive conditions in the market for the input product, including the level of concentration or fragmentation of the market on the seller and purchaser side, the market power of the different producers and processors, the existence of cooperatives or other joint representative bodies yielding market power via input producers, or the extent of national or international competition. The European Union submits that the two criteria in Section 771B may, at best, contribute to assessing the likelihood of pass-through benefit. However, the European Union argues that a likelihood of pass-through does not "establish", "find", or "determine" the existence of pass-through of benefit as required under the relevant provisions. (European Union's first written submission, paras. 407-408; second written submission, paras. 71-72; 12 November 2020 response to Panel question No. 12, para. 116; and 11 March 2021 comments on United States' 25 February 2021 response to Panel question No. 9, para. 36).

[311] European Union's first written submission, paras. 22, 335, and 390.

[312] United States' first written submission, paras. 109-132; 12 November 2020 response to Panel question No. 10, para. 36.

[313] United States' first written submission, paras. 135-140.

[314] United States' first written submission, para. 135; see also opening statement at the first meeting of the Panel, para. 34; and 12 November 2020 response to Panel question No. 10, para. 36.

[315] See section 7.3.1.1 above.

[316] We note that the GATT panel in *US – Canadian Pork* held the view that the words in Article VI:3 "to determine" and "estimated", as well as the practices of the contracting parties under that provision, indicated that the decision as to the existence of a subsidy must result from an examination of all relevant facts. (GATT Panel Report, *US – Canadian Pork*, para. 4.8).

product, whenever these two circumstances exist a subsidy that affects the production of the raw product necessarily affects trade in the product.[317]

7.164. The United States' explanation is reflected in the legislative history of the enactment of Section 771B, which the United States has cited in this dispute.[318] As discussed in the US Congressional record, in conducting a pass-through assessment for components used to produce finished manufactured products, the USDOC applies a different "upstream subsidies" test, as contained in Section 1677-1(b) of US law (Section 771A of the Tariff Act of 1930).[319] Pursuant to that test, the USDOC enquires into whether the subsidy bestows a "competitive benefit" on the manufactured product under investigation. A competitive benefit is found where the price paid for the input product is determined to have been lower than would otherwise be paid in an arm's length transaction with another seller.[320] The Congressional record excerpt shows that when Section 771B was enacted this type of test was considered to be incompatible with the nature of agricultural commodity markets, under the view that the price of products sold on a commodity basis would be essentially the same for all commodities sold at a given time in a given market.[321] Thus, it was argued that if Section 1677-1(b) were applied in the investigation of agricultural commodities, the USDOC would be unable to detect whether a subsidy has passed-through based on a price differentiation test, preventing the USDOC from countervailing those subsidies, and thereby "permit[ting] wholesale circumvention"[322] of US countervailing duty laws.

7.165. The European Union disagrees with the United States' contention that agricultural commodities are systematically characterized by "perfect competition". The European Union contends that certain agricultural markets may "at best, display certain features"[323] inherent to a perfectly competitive market, but that often conditions required for a perfectly competitive market do not exist in the agricultural sector. In this respect, the European Union submits that there are typically a limited number of buyers and sellers for many agricultural products, wherein cooperatives often exercise significant seller power over purchasers and there are constraints on entry and exit into the market.[324] The European Union further submits that the United States' "perfect competition" argument was rejected by the GATT panel in *US – Canadian Pork*.[325]

7.166. We are not convinced that input producers always will be "price takers" in all markets for all raw agricultural products falling within the scope of Section 771B. In this regard, we share the view of the European Union that it is reasonable to believe that variations may exist in the competitive conditions of different product markets, including in those for raw agricultural commodities, such that any given market may or may not be perfectly competitive. While the two factual circumstances identified in Section 771B may be relevant to an examination of whether a subsidy to a raw agricultural product has passed-through to a processed agricultural product, the probative value of those factors will, in our view, depend upon the specific facts of the situation in question, including the nature of the specific market for the input product at issue and all of the conditions of competition in that market.

7.167. Section 771B *does not leave open the possibility* for the USDOC to consider factors that may be affecting the market for the investigated product other than those Section 771B lists explicitly. For example, another factor could be the degree to which raw input sellers face pricing pressure – a feature the United States submits is systematically present in markets for all raw agricultural commodities. Likewise, Section 771B does not envisage that the USDOC should consider the market power of the different producers and processors, or the extent to which national or international competition could potentially affect the reliability of input product pricing. On the contrary,

[317] United States' first written submission, para. 139 (referring to Congressional record S8787-01, (Exhibit USA-9), p. S8815); 12 November 2020 response to Panel question No. 11, paras. 38-39.
[318] United States' first written submission, paras. 136-137 (referring to Congressional record S8787-01, (Exhibit USA-9), pp. S8814-S8815).
[319] 19 USC 1677-1, (Exhibit EU-49).
[320] Congressional record S8787-01, (Exhibit USA-9), p. S8815.
[321] Congressional record S8787-01, (Exhibit USA-9), p. S8815.
[322] Congressional record S8787-01, (Exhibit USA-9), p. S8815.
[323] European Union's second written submission, para. 65.
[324] The European Union submits that the US raw olive market provides an example of a market that is not perfectly competitive due to the fact that it has only two olive purchasers and prices are negotiated on behalf of growers by the Olive Growers Council. (European Union's second written submission, para. 65).
[325] European Union's second written submission, para. 63 (referring to GATT Panel Report, *US – Canadian Pork*, para. 3.15).

Section 771B *requires* the USDOC to make a determination of pass-through in the absence of any consideration of whether such facts and circumstances may be relevant to a showing of pass-through. To this extent, Section 771B operates as if perfect market conditions exist, as a matter of fact, in all cases involving investigated raw agricultural input products and downstream processed products. Section 771B, therefore, shuts out any consideration of the circumstances of any specific case other than the two circumstances that are mandated. Circumstances that are non-mandatory from the perspective of Section 771B are not able to be considered by the investigating authority, meaning that Section 771B limits the investigating authority's analysis of the factual extent of any pass-through.

7.168. Because Section 771B instructs the USDOC to make a determination of pass-through in the absence of any consideration of such potentially relevant factors, we consider that Section 771B directs the USDOC to *presume* the existence of pass-through between raw and processed agricultural products whenever the two factual circumstances it prescribes are established. We furthermore note that Section 771B directs the USDOC to simply "deem" countervailable subsidies found to have been provided to upstream producers of the raw agricultural product to have passed-through to the downstream processed product.[326] We understand this to mean that there is no possibility for the USDOC to attribute to the downstream processed product anything less than the full amount of the subsidies provided to upstream producers of the raw agricultural product.[327] We do not see how an evaluation of the two factual circumstances in Section 771B *alone* would provide a basis to calculate with any precision the degree or the extent of pass-through. Thus, not only does Section 771B require the USDOC to *presume* the existence of pass-through when the two designated factual circumstances are present, it also effectively requires the USDOC to treat the *full* amount of any countervailable subsidy provided to a raw agricultural input as if it had passed-through to the investigated processed product.

7.169. We have found above that under the terms of Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, an investigating authority is required to establish the existence and extent of indirect subsidization (i.e. pass-through of a benefit) taking into account *facts and circumstances* that are *relevant* to that exercise. An investigating authority is not entitled to exclude from its determination of pass-through factors that are potentially relevant to its determination and to proceed on the basis of a *presumption* of indirect subsidization. Accordingly, for these reasons, we find that Section 771B is inconsistent with Article VI:3 of the GATT and Article 10 of the SCM Agreement because it *does not leave open the possibility* for the USDOC to consider other factors affecting the market for the investigated product.

7.3.1.3 Conclusion

7.170. We conclude, for the reasons set forth above, that Section 771B is as such inconsistent with the United States' obligations under 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 the two factual circumstances prescribed in that provision, 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.

7.171. In addition to its claims under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, we recall that the European Union also grounds its claims against Section 771B under Articles 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement. The European Union argues that the USDOC acted inconsistently with Article 19.1 by imposing countervailing duties in the absence of a final determination of the existence and amount of a subsidy; with Article 19.3 by failing to levy countervailing duties in "appropriate amounts in each case"; and with Article 19.4 by levying countervailing duties in excess of the amount of the subsidy found to exist.[328] We understand the factual basis for each of these claims to be the same as the basis for the European Union's claims

[326] 19 USC 1677-2, (Exhibit EU-52).
[327] The United States has not argued that Section 771B leaves the USDOC with any discretion to attribute less than the full amount of subsidies found to have been provided to upstream producers.
[328] See, e.g. European Union's first written submission, para. 341.

under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.[329] The European Union also makes a claim under Article 32.1 that is consequential in nature.[330] Having found that the 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, we do not consider it necessary to make additional findings with respect to violations of other provisions contained in the SCM Agreement in the same factual circumstances. We therefore decline to make further findings as to whether Section 771B is also inconsistent with Articles 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement.

7.3.2 The European Union's challenge concerning the USDOC's application of Section 771B in the Spanish ripe olives countervailing duty investigation

7.172. The European Union claims that in applying Section 771B in the underlying ripe olives investigation, the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement. Not unlike its submissions with respect to its complaint against Section 771B "as such", the European Union argues that the USDOC acted inconsistently with the United States' WTO obligations in the underlying Spanish ripe olives investigation because it improperly *presumed* the attribution of the full amount of the benefit of the subsidies provided to raw olive producers for relevant arm's length transactions with ripe olives processors, without undertaking the requisite analysis.[331] The United States argues that the European Union has failed to demonstrate that the USDOC acted inconsistently with its obligations in applying Section 771B in the underlying investigation.

7.173. We first recall the USDOC's determination of the attribution of benefit in the underlying investigation and thereafter assess whether this determination was inconsistent with the applicable legal standard set forth in section 7.3.1.1 above.

7.3.2.1 The USDOC's determination of benefit in the Spanish ripe olives countervailing duty investigation

7.174. In its preliminary and final determinations in the Spanish ripe olives countervailing duty investigation, the USDOC found that subsidies granted to growers of raw olives in Spain could be attributed to three investigated ripe olive producers, Agro Sevilla, Ángel Camacho, and Aceitunas Guadalquivir.[332] In each case, the transactions between the growers and the producers were confirmed to have been carried out at arm's length with unaffiliated companies.[333] In making its determination, the USDOC found that both factual circumstances identified in Section 771B were established.[334] Regarding the first factual circumstance, the USDOC found that the demand for the prior stage product is substantially dependent on the demand for the latter stage product.[335]

[329] European Union's first written submission, paras. 382-383 and 420-421. The United States contends that the European Union's claims under Article 19 "appear entirely dependent" on its claim under Article VI:3 of the GATT 1994. (United States' first written submission, para. 108).

[330] Article 32.1 provides: "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

[331] See, e.g. European Union's first written submission, paras. 332 and 334.

[332] Agro Sevilla preliminary determination, (Exhibit EU-37), p. 2; Agro Sevilla final determination, (Exhibit EU-39); Ángel Camacho preliminary determination, (Exhibit EU-38), p. 2; Ángel Camacho final determination, (Exhibit EU-40); Aceitunas Guadalquivir preliminary determination, (Exhibit EU-36), p. 2; and Aceitunas Guadalquivir final determination, (Exhibit EU-41), pp. 2-3.

[333] Agro Sevilla response to the sourcing questionnaire (public version), (Exhibit EU-17), answers to questions 1, 6, and 8 and exhibit 2; Extract from Agro Sevilla final calculation data, (Exhibit EU-43 (BCI)); Ángel Camacho response to the sourcing questionnaire (public version), (Exhibit EU-68), answers to questions 1, 6, and 8 and exhibit 2; Extract from Ángel Camacho final calculation data, (Exhibit EU-45 (BCI)); Aceitunas Guadalquivir response to the sourcing questionnaire, (Exhibit EU-63), answers to questions 1, 6, and 8 and exhibit 2; and Extract from Aceitunas Guadalquivir final calculation data, (Exhibit EU-47 (BCI)).

[334] See the text of Section 771B in para. 7.157 above.

[335] The USDOC found that the percentage of raw olives that are used to produce table olives (including ripe olives) of 8% was "substantial" and therefore concluded that the demand for raw olives is "dependent" upon demand for table olives. (PIDM, (Exhibit EU-1), pp. 15-16; FIDM, (Exhibit EU-2), pp. 21-22). The respondents to the investigation subsequently challenged the USDOC's analysis before the USCIT. On 17 January 2020 the USCIT held that the USDOC had applied an impermissible interpretation of the term "substantially dependent" under Section 771B and had deviated from its past practice without adequate explanation in determining that the demand for raw olives is "substantially dependent" on the demand for table olives. The USCIT therefore remanded this aspect of the analysis to the USDOC for further consideration. The USCIT upheld the USDOC's finding under the second criterion of Section 771B that the processing of raw

Regarding the second factual circumstance, the USDOC found that the value for processing raw olives into subject merchandise "represents a limited value added to the raw commodity" and further found that "irrespective of the relationship between cost and value, the processing operation does not change the essential character of the olive".[336] Accordingly, the USDOC stated that it was "attributing … the benefits received by olive growers … under Section 771B of the Act".[337] The USDOC affirmed its findings in the final determination.[338]

7.3.2.2 Whether the USDOC's determination of benefit in the Spanish ripe olive investigation complied with the applicable legal standard

7.175. As reflected in its preliminary and final determinations, the USDOC made its determination of pass-through for three mandatory respondents Agro Sevilla, Ángel Camacho and Aceitunas Guadalquivir based on an evaluation of the two factual circumstances set out in Section 771B, without consideration of any other potentially relevant information relating to the market or the competitive conditions affecting the investigated product. We have found above that Section 771B is inconsistent as such with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, because it directs the USDOC to *presume* the existence of pass-through between raw and processed agricultural products, whenever the two factual circumstances it prescribes are established, and to *avoid* consideration of additional factors that may potentially be relevant. We found this inconsistent with the obligations in Article VI:3 and Article 10 to establish the existence and extent of indirect subsidization (i.e. pass-through) taking into account facts and circumstances that are relevant to that exercise. As we already explained, this follows from the operation of the law itself. In view of this, we find the USDOC's determination in the ripe olives investigation to be inconsistent with Article VI:3 and Article 10 for the same reasons that Section 771B is inconsistent "as such" with those same provisions.

7.3.2.3 Conclusion

7.176. We conclude, for the reasons set forth above, that through the application of Section 771B of the Tariff Act of 1930 in the Spanish ripe olives investigation the United States acted inconsistently with its obligations under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement to establish the existence and extent of indirect subsidization (i.e. pass-through) taking into account all relevant facts and circumstances.

7.177. As we noted above in respect of the European Union's "as such" claims, the European Union also raises claims under Articles 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement concerning the USDOC's determination of benefit in the Spanish ripe olives investigation. The factual basis for each of these claims appears to be the same as the basis for the European Union's claims under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. In light of this, we do not consider it necessary to make additional findings about whether the same factual circumstances give rise to violations of other provisions contained in the SCM Agreement and therefore decline to make further findings under Articles 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement.

7.4 The USITC's affirmative final injury determination

7.178. In this section we will address the European Union's challenge to the USITC's affirmative final injury determination concerning dumped and subsidized ripe olives from Spain (Injury Determination).[339] The European Union claims that the Injury Determination was

---

olives into ripe olives adds only limited value. (Asociación de Exportadores e Industriales de Mesa et al. v. United States, (Exhibit EU-50), pp. 18-40). On 29 May 2020, the USDOC issued a remand redetermination reaffirming its initial findings. (Remand Redetermination, (Exhibit EU-80), p. 24).

[336] PIDM, (Exhibit EU-1), p. 16; FIDM, (Exhibit EU-2), pp. 22-24. The USDOC observed the record evidence showing a 3% value for processing the raw input. (PIDM, (Exhibit EU-1), p. 16).

[337] Agro Sevilla preliminary determination, (Exhibit EU-37), p. 2; Ángel Camacho preliminary determination, (Exhibit EU-38), p. 2; and Aceitunas Guadalquivir preliminary determination, (Exhibit EU-36), p. 2. No changes occurred in the final determinations. (Agro Sevilla final determination, (Exhibit EU-39); Ángel Camacho final determination, (Exhibit EU-40); and Aceitunas Guadalquivir final determination, (Exhibit EU-41)).

[338] FIDM, (Exhibit EU-2), p. 26.

[339] Injury Determination, (Exhibit EU-5). See also Notice of determinations, (Exhibit EU-10); and Preliminary determination on injury, (Exhibit EU-34).

inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.[340]

7.179. This section will first explain the rationale of our decision to deny the United States' request for a preliminary ruling that the European Union's claims under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement are outside the Panel's terms of reference.[341] We will then address the European Union's request that the Panel make adverse inferences concerning the United States' failure to provide certain information requested by the Panel.[342]

7.180. Thereafter, we will review the European Union's allegation that the consideration of customer groups in the USITC's volume and price effects analyses constituted a "segmented analysis" of the ripe olive market that was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[343] We will then consider the European Union's specific challenges to the USITC's analyses of volume, price effects, impact, and causation. The European Union alleges each of these component parts of the injury investigation was inconsistent with relevant provisions of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.[344] Finally, we will address certain consequential arguments made by the European Union.[345]

7.181. We note that the European Union alleges that each of its arguments establishes a violation of both Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement. As the terminology and structure of the relevant provisions of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement are substantially similar, we understand these to contain the same substantive obligations for the purpose of the European Union's claims.[346] This is consistent with the approach the parties have adopted in presenting their positions in this dispute.[347]

7.4.1 The United States' request for 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

7.182. In its first written submission the United States requested the Panel to preliminarily rule that the European Union's 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

[340] European Union's panel request, p. 2; first written submission, sections VI-VII; and second written submission, sections IV-V.
[341] See Annex A-5. See also United States' first written submission, paras. 19-27.
[342] European Union's 25 February 2021 comments on United States' 4 February 2021 letter, paras. 5-6 and 13. See also European Union's second written submission, para. 86.
[343] European Union's first written submission, paras. 466-493 and 532-539; second written submission, paras. 101-124 and 153.
[344] European Union's first written submission, sections VII(B)(2-4), VII(C)(2-3), and VII(D-E); second written submission, sections V(B)(2-4), V(C)(2-3), and V(D-E).
[345] In relation to the USITC's volume analysis, see European Union's first written submission, paras. 493, 512, 518, 560, 564-565, 600, and 610. In relation to the USITC's price effects analysis, see European Union's first written submission, paras. 539, 551, 557, 560, 564-565, 600, and 610.
[346] We agree with the observation by the Appellate Body in *US – Offset Act (Byrd Amendment)* that, with respect to provisions of the Anti-Dumping Agreement and the SCM Agreement with identical terminology and structure, there is a strong interpretive presumption that the provisions set out the same substantive obligations. (Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 268). The European Union has claimed parallel violations of Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement. Articles 3.1, 3.2, and 3.5 of the Anti-Dumping Agreement and Articles 15.1, 15.2, and 15.5 of the SCM Agreement are substantially identical except that those under the Anti-Dumping Agreement concern dumped imports while those under the SCM Agreement concern subsidized imports. Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement also contain certain differences, however these are not significant for the issues raised by the European Union. On this basis, unless otherwise indicated, we treat the obligations contained in Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement as the same as those contained in Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.
[347] See, e.g. European Union's first written submission, para. 436; and United States' first written submission, paras. 168-171.

identified in the European Union's consultations request or panel request.[348] This request was based on the argument that the European Union raised a series of arguments in its first written submission contending that the USITC's injury determination is inconsistent with both Article 15.4 and Article 3.4,[349] even though these provisions are not explicitly mentioned in either the European Union's request for consultations[350] or panel request.[351] The European Union's panel request contains the following language in relation to the USITC's injury determination:

> The EU is concerned that [the challenged] measures appear to be inconsistent with:
>
> > Article VI:3 of the GATT 1994, and Articles 15.1, 15.2 and 15.5 of the SCM Agreement, as a consequence of one or both of the preceding [bases] and because, in any event, the [US]ITC did not properly factor into the determination of injury the evolution in the volume of subsidized imports, or the effect of the subsidised imports on prices, and did not demonstrate the required causal relationship between subsidized imports and injury to the domestic industry, also taking into account non-attribution factors. The injury determination is not based on positive evidence and does not involve an objective examination of the volume of the subsidized imports and their effects on prices, and the consequent impact on the domestic producers. Moreover, in the absence of relevant information, which was redacted from the report of the [US]ITC, the US did not disclose all relevant information as required under Article 22.5 of the SCM Agreement, including during the consultations. For the same reasons, the dumping measures appear to be inconsistent with Articles VI:1 and VI:2 of the GATT 1994, and Articles 3.1, 3.2 and 3.5, and Article 12.2.2 of the Anti-Dumping Agreement.[352]

7.183. Thus, with respect to claims raised under Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement, the European Union's panel request explicitly mentions Articles 15.1, 15.2, and 15.5 and Articles 3.1, 3.2, and 3.5, but does not mention Article 15.4 or Article 3.4.[353]

7.184. The United States argues that the European Union's panel request identifies the specific aspects of the USITC's analysis that are alleged to be inconsistent. According to the United States, these aspects are "specifically that 'the [USITC] did not properly factor into the determination of injury the evolution in the volume of subsidized imports, or the effect of the subsidised [*sic*] imports on prices, and did not demonstrate the required causal relationship between subsidized imports and injury to the domestic industry, also taking into account non-attribution factors.'"[354] The USITC's injury determination in respect of dumping is alleged to be inconsistent for the same reasons.[355]

7.185. The United States argues, however, that the European Union's panel request does *not* identify a claim under either Article 15.4 of the SCM Agreement or Article 3.4 of the Anti-Dumping Agreement, and further does not raise any arguments with respect to the economic factors to be considered during an examination of the impact of dumped/subsidized imports on the domestic industry, i.e. those factors contained in Article 15.4 and Article 3.4. Thus, the United States considers that the European Union's legal claims with respect to injury are limited to its assertion

[348] United States' first written submission, section II. In its first written submission, the European Union advances a number of claims under Article 15.4 and Article 3.4 in relation to the USITC's volume analysis and price effects findings, as well as an alleged failure by the USITC to examine the impact of the dumped and subsidized imports on the domestic industry as a whole. We understand that the United States' preliminary ruling request concerns all claims that are alleged in connection with Article 15.4 and Article 3.4.

[349] See, e.g. European Union's first written submission, paras. 558-596.

[350] European Union's consultation request, p. 2.

[351] European Union's panel request, p. 2.

[352] European Union's panel request, p. 2.

[353] The European Union's request for consultation similarly mentions claims in respect of Articles 15.1, 15.2, and 15.5 and Articles 3.1, 3.2, and 3.5, but does not explicitly mention Article 15.4 or Article 3.4. (European Union's consultation request, p. 2).

[354] United States' first written submission, para. 24 (quoting European Union's panel request, p. 2).

[355] United States' first written submission, para. 24.

set out in its request for the establishment of a panel, to the exclusion of claims under Article 15.4 and Article 3.4.[356]

7.186. The European Union acknowledges that its panel request does not specify either Article 15.4 or Article 3.4, and that normally, compliance with Article 6.2 of the DSU requires that only the specific provisions mentioned in the panel request may fall within the panel's terms of reference. Notwithstanding that, the European Union argues that the circumstances permit validly including claims in connection with Article 15.4 and Article 3.4 within the panel's terms of reference, and that this is consistent with the approach followed by prior panels. As its main contention, the European Union argues that the narrative language of its panel request clearly states that the European Union takes issue with the fact that the USITC did not carry out an objective examination of the "consequent impact" on the domestic producers. According to the European Union, the reference to the examination of impact logically cannot constitute a stand-alone claim under Article 15.1 or Article 3.1, but necessarily presupposes a claim under Article 15.4 and Article 3.4 because those provisions speak to the examination of impact.[357] This, says the European Union, is due not only to the fact that the term "impact" appears in Article 15.1 and Article 3.1, as well as in Article 15.4 and Article 3.4, but also because Article 15.1 and Article 3.1 provide "overarching general guidance"[358], while Article 15.4 and Article 3.4 contain the "specific guidance" concerning the impact examination.[359]

7.187. The European Union rejects the United States' contention that the lack of a reference in the narrative of its panel request to the USITC's consideration of the economic factors during its examination of impact means that the European Union's claims should be limited. In this respect, the European Union argues that there is no requirement in Article 6.2 of the DSU to set out arguments in a panel request. In any event, the European Union maintains that its Article 15.4 and Article 3.4 claims are not directed at the USITC's consideration of the economic factors but instead challenge "the overall impact analysis" carried out by the USITC.[360]

7.188. Finally, the European Union argues that its Article 15.4 and Article 3.4 claims rely on "the same legal reasoning" that form the basis of its claims under Article 15.2 and Article 3.2, and therefore the United States would not be prejudiced by the inclusion of the European Union's Article 15.4 and Article 3.4 claims.[361]

7.189. We recall that a panel's terms of reference are defined by Articles 6.2 and 7.1 of the DSU. Pursuant to Article 7.1, a panel is "[t]o examine … the matter referred to the DSB" by the complaining party's panel request and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreement(s) related to the complaining party's claims. Article 6.2 of the DSU states as relevant:

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

7.190. We share the views of past panel and Appellate Body reports that the terms of Article 6.2 establish that a complainant must satisfy two key requirements in its panel request, namely, the

[356] United States' first written submission, para. 25.
[357] European Union's response to the United States' preliminary ruling request, para. 24.
[358] The European Union does not consider relevant the fact that its panel request excludes a general reference to either Article 15 or Article 3 under the view that Article 15.1 and Article 3.1, respectively, constitute overarching provisions comparable to a reference to Article 15 or Article 3. (European Union's response to the United States' preliminary ruling request, para. 18).
[359] European Union's response to the United States' preliminary ruling request, para. 24 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.102). The European Union also argues that there is a further "close relationship and interlink" between Articles 15.5 and 15.4, and Articles 3.5 and 3.4, as evident from language in Article 15.5 and Article 3.5 (which are identified in its panel request) requiring an investigating authority to demonstrate that subsidized/dumped imports are, "through the effects of subsidies/dumping as set forth in paragraphs 2 and 4", causing injury. The European Union argues that this provides further support that its Article 15.4 and Article 3.4 claims fall within the Panel's terms of reference. (European Union's response to the United States' preliminary ruling request, para. 19).
[360] European Union's response to the United States' preliminary ruling request, para. 29.
[361] European Union's response to the United States' preliminary ruling request, para. 27.

"identification of the specific measures at issue", and "the provision of a brief summary of the legal basis of the complaint (or the claims)".[362] The two elements together constitute the "matter referred to the DSB" and form the basis for the Panel's terms of reference under Article 7.1 of the DSU. These requirements are therefore central to the establishment of a panel's jurisdiction.[363] The panel request also serves a due process function, providing the respondent and third parties notice as to the nature of the complainant's case[364], enabling them to respond accordingly.[365] We agree with the Appellate Body that a panel must therefore determine whether the panel request, read as a whole and as it existed at the time of filing[366], is "sufficiently clear" or "sufficiently precise", based on an "objective examination" of the same.[367]

7.191. In order to "provide a brief summary of the legal basis of the complaint", the panel request must set out the claims so as to "present the problem clearly".[368] We do not understand the parties to disagree with the view that a "claim" in this context is an allegation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement"[369]; and that "arguments", by contrast, are statements put forth by a complaining party "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".[370] Whether such a brief summary is "sufficient to present the problem clearly" is to be assessed on a case-by-case basis, keeping in mind the nature and scope of the provisions of the covered agreements alleged to have been violated.[371]

7.192. Having carefully considered the parties' arguments as well as the relevant language contained in the European Union's panel request, 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, with respect to claims under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement.

7.193. Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement govern the determination of injury and causation in countervailing and anti-dumping proceedings in almost identical terms. There is undoubtedly a close normative relationship between the different subparagraphs within each set of these provisions, which together operate to establish the relevant legal framework and disciplines for investigating authorities to follow when conducting an injury and causation analysis. Within this framework, we consider that Article 15.1 and Article 3.1 each function as an overarching provision that is directly linked with the more detailed obligations set forth in

[362] Appellate Body Report, *US – Carbon Steel*, para. 125.

[363] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 639-640 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and *Australia – Apples*, para. 416); *US – Countervailing and Anti–Dumping Measures (China)*, para. 4.6; and *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186.

[364] Appellate Body Reports, *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186; *US – Carbon Steel*, para. 126; and *EC and certain member States – Large Civil Aircraft*, para. 640.

[365] Appellate Body Reports, *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186; *Chile – Price Band System*, para. 164; *US – Continued Zeroing*, para. 161; and *Thailand – H-Beams*, para. 88.

[366] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

[367] Appellate Body Reports, *EC – Bananas III*, para. 142; *EC and certain member States – Large Civil Aircraft*, para. 641; *US – Carbon Steel*, para. 127; *US – Continued Zeroing*, para. 161; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8; *US – Oil Country Tubular Goods Sunset Reviews*, para. 169; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108. Parties' subsequent submissions and statements, therefore, cannot "cure" defects in panel requests. (Appellate Body Reports, *China – Raw Materials*, para. 220; *EC – Bananas III*, para. 143; *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Carbon Steel*, para. 127; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9).

[368] Appellate Body Report, *EC – Selected Customs Matters*, para. 167.

[369] Appellate Body Report, *Korea – Dairy*, para. 139.

[370] Appellate Body Report, *Korea – Dairy*, para. 139. A panel request need not, however, include arguments seeking "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision". A party's arguments may be presented and clarified over the course of the proceeding. (Appellate Body Report, *Korea – Dairy*, para. 139 (referring to Appellate Body Reports, *EC – Bananas III*, para. 141; *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156)).

[371] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.

provisions such as Article 15.4 and Article 3.4[372], and the inquiries foreseen under the subparagraphs that follow serve as elements of a single, overall analysis addressing the question of whether subsidized or dumped imports are causing injury.[373] In light of this, there is a distinct possibility that a claim under Article 3.1 and Article 15.1 may need to be resolved by assessing compliance with a more specific provision, such as Article 15.4 and Article 3.4, in respect of assessing the WTO-consistency of an investigating authority's examination of impact. Indeed, in prior disputes, panels have shared this view, finding that a claim of inconsistency with Article 15.1 or Article 3.1 will not normally be made or resolved independently of other provisions of Article 15 or Article 3, respectively.[374] We therefore consider that by referring to both Article 15.1 and Article 3.1 and stating that the Injury Determination "does not involve an objective examination of … *the consequent impact on the domestic producers*"[375], the European Union's panel request signals to the United States the likelihood that the European Union intended to pursue a claim in respect of Article 15.4 and Article 3.4, and that compliance with those articles was necessarily concomitant with the claims under Article 15.1 and Article 3.1 respectively, as specifically adverted to in the panel request by the use of the words "consequent impact".[376]

7.194. We further disagree with the United States that the European Union's panel request should be understood as limiting the European Union's complaint to the Injury Determination in respect of the volume of subsidized imports or the effect of the subsidized/dumped imports on prices and the assessment of causation.[377] As we have noted, while flagging concerns with these aspects of the USITC's Injury Determination, the panel request also states that the Injury Determination "does not involve an objective examination of … the consequent impact on the domestic producers". In making its argument the United States fails to acknowledge this additional language in the European Union's panel request. We also disagree that the absence of any reference to economic factors to be considered during an examination of the impact of dumped/subsidized imports on the domestic industry precludes the possibility of addressing claims in relation to Article 15.4 and Article 3.4, as there may be other considerations relevant to the examination of impact that could form the basis for a claim under either provision.[378]

7.195. For the reasons set forth above, we therefore conclude 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

[372] We note that the Appellate Body made a similar observation in the context of Article 3 of the Anti-Dumping Agreement. (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.580).

[373] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141. See also Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.193; and *Russia – Commercial Vehicles*, para. 5.54.

[374] Panel Report, *China – Cellulose Pulp*, para. 7.13. See also Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.33. Certain panels have found that Article 15.1 and Article 3.1 can be infringed independently of obligations in other subparagraphs under Article 15 or Article 3. (Panel Reports, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.146, 7.151, and 7.219 (finding that Article 3.1 can be violated independently when an erroneous act or omission, such as an erroneous finding that the domestic industry in question is unestablished, taints the overall injury analysis); *Argentina – Poultry Anti-Dumping Duties*, paras. 7.283-7.286 (finding a stand-alone violation of Article 3.1 of the Anti-Dumping Agreement, and further determining that it did not have to examine the part of the same claim concerning Article 3.4); and *EC – Countervailing Measures on DRAM Chips*, fn 218 (stating that an investigating authority may act inconsistently with Article 15.1 if it lacks positive evidence and has not examined the evidence before it objectively)).

[375] Emphasis added.

[376] We note in *Thailand – H-Beams*, the panel similarly found references in the panel request to the language "positive evidence", "objective examination" and "enumerated factors such as import volume, price effects, and the consequent impact of such imports on the domestic industry", met the minimum requirements of Article 6.2 DSU with respect to the complainant's claims under Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement, even though the panel request did not explicitly list these specific provisions. The panel request referred to Article 3 of the Anti-Dumping Agreement generally. (Panel Report, *Thailand – H-Beams*, para. 7.36; see also Appellate Body Report, *Thailand – H-Beams*, para. 90).

[377] United States' first written submission, para. 24 (referring to European Union's panel request, p. 2).

[378] For instance, in *Morocco – Hot-Rolled Steel (Turkey)*, the panel concluded that the Turkish investigating authority acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement, *inter alia*, by disregarding the captive market in its injury analysis. (Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.223, 7.262, 7.278, and 7.288). In *China – Cellulose Pulp*, the panel found that Canada had failed to establish that China's investigating authority's examination of the impact was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement, because it failed to objectively examine the domestic industry's market share. (Panel Report, *China – Cellulose Pulp*, paras. 7.113, 7.126, and 7.138).

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 with respect to claims under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement.

7.4.2 The European Union's request that the Panel make adverse inferences concerning the United States' failure to provide certain information requested by the Panel

7.196. Throughout these proceedings the Panel has had access to only the public version of the Injury Determination. This document redacts certain information that was deemed confidential by the USITC in the investigation. 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.[379]

7.197. Following the first substantive meeting, the Panel requested the United States to provide certain redacted information.[380] The United States informed the Panel that the requested information was subject to an administrative protective order under domestic law that required authorization from relevant parties to disclose.[381] The United States stated it was seeking such authorization.[382] The United States did not ultimately provide the Panel with the requested information, but instead supplied several tables depicting trends related to the requested data.[383] The European Union subsequently requested the Panel to draw adverse inferences from the United States' failure to provide the requested information.[384] Notwithstanding this, the European Union maintains that the resolution of its arguments does not depend on the Panel having access to the redacted information.[385]

7.198. Following the second substantive meeting, the Panel posed supplemental questions to the United States addressing certain issues affected by an absence of unredacted data.[386] In response to these supplemental questions, the United States made a number of factual clarifications.[387] The European Union was provided with an opportunity to comment on the United States' factual statements and did not challenge their accuracy.[388]

7.199. We recall that Article 13.1 of the DSU provides:

> Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary

[379] European Union's first written submission, para. 424.
[380] 29 October 2020 Panel question No. 40 (requesting the unredacted version of Injury Determination, (Exhibit EU-5), tables II-1, III-4, III-8, IV-2, IV-5, IV-6, IV-7, IV-8, and C-1).
[381] United States' 12 November 2020 response to the Panel question No. 40, paras. 82-84.
[382] United States' 12 November 2020 response to the Panel question No. 40, para. 84.
[383] United States' letter to the Panel dated 4 February 2021 (providing revised public versions of Injury Determination, (Exhibit EU-5), tables IV-6, IV-7, IV-8, and C-1).
[384] European Union's 25 February 2021 comments on United States' 4 February 2021 letter, paras. 5-6 and 13. See also European Union's 13 April 2021 comments on the United States' 26 March 2021 responses to Panel question No. 2(h), para. 18, No. 3, para. 20, and No. 4, para. 23.
[385] European Union's 25 February 2021 comments on United States' 4 February 2021 letter, para. 4; see also European Union's second written submission, para. 85 (stating that "the EU emphasizes that the success of the EU's claims and the resolution of this dispute does not hinge on the receipt of the BCI requested by the Panel").
[386] 5 March 2021 Panel questions.
[387] United States' 26 March 2021 responses to Panel questions Nos. 1-4.
[388] European Union's 13 April 2021 comments on the United States' 26 March 2021 response to Panel questions. We note that the European Union contested the United States arguments in response to questions Nos. 1, 2(a), 2(g)-(h), 3, and 4. The European Union's comment in relation to the United States' responses to questions Nos. 2(b)-(f) was in each case that it had no observations, although noting that "[t]he fact that the EU has no observations does not signify agreement with the US's statements". We do not understand the European Union to challenge the factual statements made by the United States, however, although the European Union clearly does in certain circumstances challenge the arguments made by the United States on the basis of those factual statements.

> and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

7.200. Article 13.1 of the DSU thus allows a Panel to request information "from any individual or body which it deems appropriate" and indicates that a "Member should respond promptly and fully to any request by a panel". We agree with prior panel and Appellate Body reports that Article 13.1 grants discretionary authority to panels to seek information from relevant sources.[389] We further agree that as part of its objective assessment of the facts under Article 11 of the DSU a panel is entitled to draw adverse inferences from a party's refusal to provide information.[390]

7.201. Taking into account the course of events described above, we decline to draw adverse inferences from the United States' failure to provide the requested redacted information in full. First, we note that the United States clarified a number of factual issues in response to questions from the Panel following the second substantive meeting.[391] The accuracy of these factual statements has not been challenged by the European Union, and the United States' clarifications are of assistance to us in resolving certain issues in dispute between the parties.[392] Second, the European Union has explained that additional factual information is not necessary, in its view, to make out its claims in relation to the Injury Determination.[393] For these reasons, we decline the European Union's request to draw adverse inferences from the United States' failure to provide the Panel with the requested information.

7.4.3 The USITC's analysis of customer groups in its examination of volume and price effects under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.202. The European Union puts forward two lines of argument challenging the USITC's analysis of customer groups in its examination of volume and price effects. The European Union first argues that the USITC's examination of the volume and price effects of ripe olives from Spain was based on a "segmented analysis" of customer groups in the ripe olive market that was "arbitrary, meaningless and in contradiction to the USITC's own determinations".[394] Second, the European Union argues that the USITC's consideration of customer groups was inappropriate because an "authority cannot define the domestic industry in a non-segmented manner and then carry out an injury analysis on the basis of a segmented industry".[395] The European Union thus claims that the Injury Determination was not based on an objective examination of positive evidence in violation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[396]

7.203. The United States argues that the USITC did not conduct a "segmented analysis", but rather based its injury analysis on data pertaining to the ripe olive market as a whole.[397] In relation to the European Union's second argument, the United States responds that prior WTO dispute settlement

[389] See, e.g. Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84.
[390] See, e.g. Appellate Body Report, *US – Wheat Gluten*, paras. 172-173.
[391] United States' 26 March 2021 response to Panel questions; European Union's 13 April 2021 comments on the United States' 26 March 2021 response to Panel questions.
[392] See discussion of these factual statements in paras. 7.267-7.275 and fn 585 below. We note that in one instance there is a conflict between certain factual statements in the European Union's first written submission in the context of its arguments regarding causation, and the factual clarifications on that point made by the United States in its comments to the European Union's 26 March 2021 reply to Panel questions on 13 April 2021. As this statement was made in the United States' comments, the European Union did not have an opportunity to respond. As discussed below, we do not consider that the relevant factual issue would affect our finding, and thus have not sought additional comments from the parties. (See discussion below, para. 7.315).
[393] European Union's second written submission, para. 85; 25 February 2021 comments on letter from United States of 4 February 2021, para. 4.
[394] European Union's first written submission, para. 465.
[395] European Union's second written submission, para. 102. See also European Union's first written submission, paras. 497-502; and second written submission, para. 162.
[396] European Union's first written submission, paras. 465, 492-493, and 538-539.
[397] United States' first written submission, paras. 164-180 and 207-208; second written submission, paras. 46-60.

reports that the European Union relies upon to support its claims clearly allow for a consideration of market segments.[398]

7.204. We examine the merits of the European Union's claims in the sections that follow.

7.4.3.1 Whether the USITC conducted a "segmented analysis" of volume and price effects that was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.205. The European Union argues that the USITC's examination of the volume and price effects of ripe olives from Spain was based on a "segmented analysis" of customer groups in the ripe olive market that was "arbitrary, meaningless and in contradiction to the USITC's own determinations".[399] The European Union maintains that "only the domestic industry as a whole"[400] was relevant for the USITC's analysis because ripe olives are a "homogenous product"[401] purchased by "all customer groups interchangeably".[402] The European Union asserts that the USITC's examination of volume and price effects was based on this allegedly arbitrary "segmentation" and was thus not an objective examination based on positive evidence in violation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[403]

7.206. The United States responds that the USITC did not conduct a "segmented analysis", but rather based its injury analysis on data pertaining to the ripe olive market as a whole.[404] The United States maintains that the USITC's examination of trends concerning retailers, distributors, and institutional/food processors was objective and based on positive evidence.[405]

7.207. In the Injury Determination the USITC determined that ripe olives were generally sold to purchasers categorized as retailers, distributors, and institutional/food processors.[406] The USITC described these customer groups as "channels of distribution".[407] The USITC prepared data concerning sales and market share of domestic, Spanish, and other imported ripe olives based on sectors defined by each customer group.[408] The USITC then examined trends relating to these customer groups, particularly retailers, in its injury analysis.

7.208. In the analysis that follows we will refer to "customer groups" or "channels of distribution" interchangeably as indicating the set of purchasers categorized by the USITC as retailers, distributors, and institutional/food processors (e.g. the "retail customer group" or the "retail channel

---

[398] United States' first written submission, para. 173 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 204; and European Union's first written submission, para. 499).

[399] European Union's first written submission, para. 465. See also European Union's first written submission, paras. 466-493 and 532-539; and second written submission, paras. 101-124 and 153.

The European Union variously alleges the USITC's examination of customer groups was "arbitrary" (e.g. European Union's first written submission, paras. 465, 467, 469, and 492), "meaningless" (e.g. European Union's first written submission, paras. 465, 467, 472, and 476), "in contradiction to the USITC's own determinations" (e.g. European Union's first written submission, paras. 465 and 492; second written submission, paras. 104 and 106), "artificial" (e.g. European Union's first written submission, paras. 465 and 476), "makes no sense" (e.g. European Union's first written submission, paras. 467 and 472), "superfluous" (e.g. European Union's first written submission, para. 472), and "not supported by evidence on the record" (European Union's second written submission, para. 104; see also ibid. para. 106). We understand these various allegations are different ways of articulating the European Union's argument that the USITC's consideration of customer groups was not based on an objective examination of positive evidence. We therefore do not consider it necessary to respond to each of these allegations individually, but rather address them collectively by responding to the substantive arguments put forward by the European Union.

[400] European Union's first written submission, para. 483. (emphasis omitted)

[401] European Union's first written submission, para. 466.

[402] European Union's first written submission, para. 468 (emphasis omitted); see also ibid. paras. 462, 474, and 536.

[403] European Union's first written submission, paras. 492 and 538.

[404] United States' second written submission, paras. 46-48.

[405] United States' first written submission, paras. 166-167 and 189. See also United States' first written submission, paras. 164-180; and second written submission, paras. 46-54.

[406] Injury Determination, (Exhibit EU-5), e.g. pp. 14-15.

[407] Injury Determination, (Exhibit EU-5), e.g. pp. II-1-3 and table II-1.

[408] Injury Determination, (Exhibit EU-5), e.g. tables II-1 and IV-6-8.

of distribution"). We will also refer to "sector" as the subsection of the whole market defined by sales to a particular customer group (e.g. the "retail sector").

7.209. Before addressing the European Union's substantive complaint, we briefly review Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and Articles 15.1 and 15.2 of the SCM Agreement. Article 3.1 and Article 15.1 provide that:

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

In our view "positive evidence" must be evidence that is affirmative, objective, and capable of credibly supporting the injury determination.[409] To be "objective", an investigating authority's examination must be impartial and supported by reasoning that is coherent and internally consistent.[410] We consider the obligation to conduct an objective examination based on positive evidence in Article 3.1 and Article 15.1 to be an overarching requirement that applies to every aspect of an injury determination.

7.210. Article 3.2 and Article 15.2 set forth more detailed requirements relating to the examination of the volume of the dumped or subsidized imports and their effect on prices in the domestic market of the like product. Article 3.2 and Article 15.2 provide:

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

We observe that Article 3 and Article 15 do not direct investigating authorities to address parts, sections, or segments of a market in a particular way when undertaking an injury investigation. In our view, the absence of guidance in this respect indicates that an investigating authority has discretion to examine parts, sections, or segments of a market as the investigating authority deems appropriate. An analysis of parts, sections, or segments of a market must, nonetheless, be based on an objective examination of positive evidence.

7.211. We note, further, that the term "segmented analysis" is not contained in Articles 3.1 and 3.2, or Articles 15.1 and 15.2, or any other provision of the Anti-Dumping Agreement or the SCM Agreement. In our view the rights and obligations contained in Articles 3.1 and 3.2, and Articles 15.1 and 15.2, thus apply equally to a determination of injury that is labelled as involving a "segmented analysis", as to one that is not so characterized.[411] We acknowledge that there may be

[409] We base this understanding on the ordinary meaning of "positive", which includes "admitting no question; stated, express, definite, precise; emphatic" and "providing support for a particular hypothesis, esp[ecially] one concerning the presence or existence of something". (Oxford Dictionaries online, definition of "positive" https://www.oed.com/view/Entry/148318?rskey=3r7q5h&result=1&isAdvanced=false#eid (accessed 7 July 2021), adj., meaning A.I.2 and A.II.4.c).

[410] We base this understanding on the ordinary meaning of "objective", which includes "not influenced by personal feelings or opinions in considering and representing facts; impartial, detached". (Oxford Dictionaries online, definition of "objective" https://www.oed.com/view/Entry/129634?redirectedFrom=objective#eid (accessed 7 July 2021), adj., meaning 8.a).

[411] In support of its argument the European Union refers to the Appellate Body Report *US – Hot-Rolled Steel*. (European Union's first written submission, paras. 450-454). This report discusses circumstances under the Anti-Dumping Agreement in which investigating authorities may "examine a domestic industry by part, sector or segment". (Appellate Body Report, *US – Hot-Rolled Steel*, para. 204). The Appellate Body does not

determinations that would be usefully described as involving a "segmented analysis", and that such a description could assist a panel's assessment of the consistency or otherwise of that determination with Article 3 and Article 15.[412] It is our understanding that the European Union describes the Injury Determination as involving a "segmented analysis" because the USITC did not just examine trends at the level of the market as a whole, but also examined trends in relation to certain customer groups. However, in the circumstances of the current dispute, we do not consider it is useful to describe the Injury Determination as a "segmented analysis" merely because the USITC analysed trends in different customer groups. We consequently do not adopt the European Union's characterization of the Injury Determination as a "segmented analysis" for the purpose of reviewing the merits of its claims.[413] We will instead focus our examination in this section on the European Union's substantive complaint that the USITC's examination of customer groups was, in the context of the ripe olives market, not based on an objective examination of positive evidence.

7.212. Turning to the European Union's substantive argument, in our view the customer groups examined by the USITC were not, as the European Union alleges, "meaningless"[414] or "arbitrary".[415] Rather, the customer groups were based on unique purchasers and distinct products, and with each customer group holding different levels of importance for the domestic industry and importers of Spanish ripe olives. The USITC identified that ripe olives were generally sold to retailers, distributors, and institutional/food processors.[416] These customer groups were composed of unique purchasers.[417] For example, the USITC identified that retailers included firms such as Walmart and Kroger, while institutional/food processors included restaurants, schools, and commercial food processors.[418] The USITC also collected pricing data on institutional and retail products with distinct packaging characteristics.[419] For example, the drained weight of institutional pricing products per can or pouch was between 33-55 ounces, substantially larger than the drained weight of retail pricing products of between 2.25-2.26 ounces.[420] Furthermore, it is clear that the three customer groups had different levels of importance for the domestic industry and importers of Spanish ripe olives. In relation to Spanish ripe olives, the USITC noted that as a "share of total reported shipments between 2015 and 2017, U.S. importers' U.S. commercial shipments of ripe olives from Spain ranged from 79.7 percent to 88.8 percent for distributors, 7.3 percent to 17.0 percent for retailers, and 3.3 percent to 4.0 percent for institutional/food processors".[421] In contrast, the USITC noted that "[d]omestically produced ripe olives were largely sold to retailers over the [period of investigation]".[422] This evidence establishes that the customer groups identified by the USITC were not "arbitrary, meaningless and in contradiction to the USITC's own determinations".[423] Rather, there was a credible basis of facts for the construction of each customer group. We thus consider that the customer groups examined by the USITC were not arbitrary but based on positive evidence.

7.213. The European Union also alleges that the USITC failed to explain the relevance of the different customer groups in the sections of the Injury Determination titled "Demand Conditions", "Supply Conditions", and "Substitutability and Other Conditions".[424] However, the Panel notes that each of these customer groups and their general purchasing patterns are clearly identified in the

indicate in this report that the term "segmented analysis" has a particular legal meaning under the Anti-Dumping Agreement. (Appellate Body Report, *US – Hot-Rolled Steel*, paras. 193-206).

[412] We also do not consider the fact that the term "segmented analysis" has been used descriptively by a number of prior panels means that the term has any particular legal meaning under the Anti-Dumping Agreement or SCM Agreement. (See, e.g. Panel Report, *China – X-Ray Equipment*, para. 7.187).

[413] The European Union asserts that "the USITC invents a so-called 'segmentation' of the domestic industry along customer groups". (European Union's first written submission, para. 460). The USITC does not, in fact, use this terminology in its report.

[414] European Union's first written submission, para. 467.

[415] European Union's first written submission, para. 467.

[416] Injury Determination, (Exhibit EU-5), e.g. pp. 14-15.

[417] United States' second written submission, para. 83; 8 September 2020 response to Panel question No. III(a), para. 29.

[418] Injury Determination, (Exhibit EU-5), p. 14.

[419] Injury Determination, (Exhibit EU-5), pp. 19-20 and fn 112.

[420] Injury Determination, (Exhibit EU-5), fn 112.

[421] Injury Determination, (Exhibit EU-5), fns 68 and 105.

[422] Injury Determination, (Exhibit EU-5), p. 14.

[423] European Union's first written submission, para. 465.

[424] European Union's first written submission, paras. 483-486 (referring to Injury Determination, (Exhibit EU-5), pp. 15-17).

section of the Injury Determination titled "Demand Conditions".[425] Furthermore, the USITC's explanation made it reasonably clear that the customer groups were based on unique purchasers and distinct products, and that each customer group held different levels of importance for the domestic industry and importers of Spanish ripe olives.[426] We thus find that the USITC reasonably explained the relevance of the customer groups and reject the European Union's argument to the contrary as unpersuasive.

7.214. We are further of the view that the relative uniformity of ripe olives does not establish that the USITC's examination of customer groups was not objective. The European Union contends that the examination of customer groups was not objective because ripe olives are a homogenous product purchased interchangeably by all customer groups.[427] We note that the USITC found ripe olives to be a relatively uniform product, concluding that despite differences in size and presentation, "all ripe olives within the scope were at least somewhat interchangeable, and were perceived to be the same product by market participants".[428] Similarly, the USITC found that domestically produced ripe olives and those from Spain had a "high degree of substitutability".[429] Beyond observing these statements by the USITC, we do not consider it necessary to make findings as to the extent of substitutability and product differentiation in the ripe olives market.[430] This is because our conclusion does not depend on the exact degree to which ripe olives are substitutable or differentiated. The European Union's argument is premised on the view that the USITC "could not 'segment' the industry by distribution channel" because all ripe olives are a homogenous product that "compete with each other across the three distribution channels and hence across the entire industry".[431] The European Union argues on this basis that the examination of customer groups was not objective because "the only conceivable purpose of the USITC's 'segmentation' was to artificially create a volume effect".[432] The European Union does not, however, allege that the USITC selectively collected data from particular customer groups or that the three customer groups do not collectively reflect the whole market. On the contrary, the Injury Determination makes clear that the USITC gathered data from domestic processors and importers on their commercial shipments across all three customer groups.[433] An objective examination of trends in these three customer groups would thus be consistent, in aggregate, with an examination of the whole market. We do not think that the "only conceivable purpose" for an investigating authority to examine customer groups collectively accounting for the whole market would be to artificially construct volume changes and price effects. Rather, an objective investigating authority could reasonably choose to examine trends within these customer groups to ascertain whether there are any pertinent volume changes or price effects not apparent from the aggregate data. Even if ripe olives were perfectly homogenous, we do not consider that the USITC's examination of customer groups would establish by itself a lack of objectivity, as the three customer groups analysed by the USITC collectively account for the whole ripe olives market. We thus reject the European Union's argument that the uniformity of ripe olives as a product establishes that the USITC's analysis of customer groups was not based on an objective examination of positive evidence.

7.215. We note that our conclusion is consistent with the observations of the panel in *Mexico – Corn Syrup* concerning an investigating authority's examination of market segments. The European Union maintains that the panel's findings in *Mexico – Corn Syrup* imply that there must "be conditions of competition that are different per segment in order for the segmentation to serve as [a] valid basis for the injury analysis".[434] We do not agree with the European Union's interpretation of that report. The *Mexico – Corn Syrup* dispute concerned anti-dumping duties imposed by Mexico against imports of high-fructose corn syrup from the United States. In that case the Mexican investigating authority defined the domestic like product as sugar, and the domestic industry as "manufacturers of cane

[425] Injury Determination, (Exhibit EU-5), pp. 14-15.
[426] See para. 7.212 above.
[427] European Union's first written submission, paras. 466-468.
[428] Injury Determination, (Exhibit EU-5), p. 7 (adopting the findings of the Preliminary determination on injury, (Exhibit EU-34), p. 8).
[429] Injury Determination, (Exhibit EU-5), p. 17.
[430] United States' first written submission, para. 237; 8 September 2020 response to Panel question No. III(a), para. 29; European Union's second written submission, para. 119; and 10 June 2020 response to Panel question No. 21, paras. 108 and 110.
[431] European Union's opening statement at the first meeting of the Panel, para. 98.
[432] European Union's first written submission, para. 469.
[433] United States' first written submission, para. 175 (referring to Injury Determination, (Exhibit EU-5), tables II-1 and IV-5–IV-8).
[434] European Union's 12 November 2020 response to Panel question No. 21, para. 161.

sugar".[435] The United States argued that the Mexican investigating authority's determination was inconsistent with various provisions of Article 3 of the Anti-Dumping Agreement because the investigating authority focused solely on the industrial market for sugar.[436] The panel found that the Mexican investigating authority had "explicitly stated that it excluded from its consideration sugar sold in the household market, and limited its examination to sugar sold in the industrial market, despite the fact that it had determined that there was only one like product at issue, sugar, and one industry, cane sugar producers".[437] As the industrial sector of the Mexican sugar market only accounted for 53% of total sugar consumption, the panel concluded that the Mexican investigating authority's injury determination was not based on consideration of the domestic industry as a whole.[438] The panel did not, however, make any findings that would support the European Union's claim that "segmentation" is only valid where conditions of competition differ between segments. On the contrary, the panel took pains to distinguish between the notion of an injury determination made "on the basis of information regarding only production sold in one specific market sector, to the exclusion of the remainder of the domestic industry's production", and an investigating authority's "consideration of factors relevant to the injury analysis on a sectoral basis, so as to gain a better understanding of the actual functioning of the domestic industry and its specific markets".[439] As regards the examination of factors on a sectoral basis, the panel stated that there "is certainly nothing in the [Anti-Dumping] Agreement which precludes a sectoral analysis of the industry and/or market" and that "in many cases, such an analysis can yield a better understanding of the effects of imports, and more thoroughly reasoned analysis and conclusion".[440] The panel's interpretation of the Anti-Dumping Agreement in *Mexico – Corn Syrup* is thus consistent with our view that an investigating authority has discretion to examine parts, sections, or segments of a market when undertaking an injury investigation as long as such examination is based on an objective examination of positive evidence.[441] On this basis, it is our view that even if the conditions of competition did not differ between customer groups, this would not establish that the Injury Determination was not objective, as the customer groups were based on positive evidence and collectively represented the whole market.[442]

7.216. The European Union maintains that the USITC commissioner that dissented against the Injury Determination, Commissioner Broadbent, "seems to share [the] view" that the USITC could

[435] Panel Report, *Mexico – Corn Syrup*, para. 7.148.
[436] Panel Report, *Mexico – Corn Syrup*, paras. 7.143-7.144.
[437] Panel Report, *Mexico – Corn Syrup*, para. 7.158.
[438] Panel Report, *Mexico – Corn Syrup*, para. 7.153.
[439] Panel Report, *Mexico – Corn Syrup*, para. 7.154.
[440] Panel Report, *Mexico – Corn Syrup*, para. 7.154.
[441] See para. 7.210 above.
[442] The European Union also notes that the United States submitted into evidence three examples of determinations by an investigating authority of the European Union. (European Union's opening statement at the first meeting of the Panel, para. 100 (referring to Commission Implementing Regulation (EU) 2016/181 (Exhibit USA-33); and Commission Regulation (EC) 1611/2003 (Exhibit USA-35))). The European Union maintains that these determinations "vividly illustrate the difference between the WTO-consistent market segmentations carried out by the EU and the WTO-inconsistent market 'segmentation' carried out by the US in the present case". (European Union's opening statement at the first meeting of the Panel, para. 100 (referring to Commission Implementing Regulation (EU) 2016/181 (Exhibit USA-33); and Commission Regulation (EC) 1611/2003 (Exhibit USA-35))); see also European Union's second written submission, para. 110; and United States' 8 September 2020 response to Panel question No. III(a), para. 33.
Exhibit USA-33 contains Commission Regulation (EU) 2016/181 of 10 February 2016 imposing a provisional anti-dumping duty on imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation. This is subject to an ongoing dispute before a WTO panel. (Russia's panel request, WT/DS521/2; Constitution note of the Panel, WT/DS521/3).
Exhibit USA-34 contains Commission Regulation (EC) 896/2007 of 27 July 2007 imposing a provisional anti-dumping duty on imports of dihydromyrcenol originating in India. Exhibit USA-35 contains Commission Regulation (EC) 1611/2003 of 15 September 2007 imposing a provisional anti-dumping duty on imports of certain stainless-steel cold-rolled flat products originating in the United States. Neither of the measures contained in Exhibit USA-34 or Exhibit USA-35 have been the subject of dispute resolution at the WTO.
We recall that our terms of reference are "to examine … the matter referred to the DSB by the European Union" in its request for the establishment of a panel. (Constitution note of the Panel, WT/DS577/4). The European Union's request for establishment of a panel contains reference to the Injury Determination but makes no mention of the measures by the European Union contained in Exhibits USA-33, USA-34, and USA-35. (European Union's panel request, p. 2). We have thus not been directed to examine the WTO consistency of these measures, which are unrelated to the Injury Determination. We consequently decline to examine whether the European Union's investigating authority conducted "WTO-consistent market segmentations" in the measures contained in Exhibits USA-33, USA-34, and USA-35.

only meaningfully assess volume for the industry as a whole.[443] The European Union supports this assertion with a block quote from the dissenting opinion.[444] We recall that the European Union, as the complainant, bears the onus of establishing that the Injury Determination (as represented by the decision of the majority of commissioners) was not based on an objective examination of positive evidence.[445] The mere fact that a dissenting view exists does not establish that the majority's findings were not based on an objective examination of positive evidence. Rather, to demonstrate the merits of its claims, the European Union must explain what it is about the views expressed by the dissenting commissioner that shows that a reasonable and objective investigating authority could not arrive at the same conclusion as the majority. There is nothing that has been brought to the Panel's attention with respect to the dissent of that commissioner that would cause us to consider that the majority's finding was not objective.

7.217. Therefore, based on the above, we reject the European Union's argument that the USITC's examination of the volume and price effects of ripe olives from Spain was based on a "segmented analysis" of customer groups in the ripe olive market that was "arbitrary, meaningless and in contradiction to the USITC's own determinations".[446]

7.4.3.2 Whether the USITC's definition of the domestic industry made it improper to consider customer groups

7.218. In the Injury Determination the USITC defined the domestic industry as "all U.S. processors of ripe olives".[447] The European Union argues that the USITC's consideration of customer groups was inappropriate because an investigating authority is "bound" by its definition of the domestic industry and "cannot define the domestic industry in a non-segmented manner and then carry out an injury analysis on the basis of a segmented industry".[448] The European Union bases this argument on the observation that Article 4.1 and footnote 9 of the Anti-Dumping Agreement, as well as Article 16.1 and footnote 45 of the SCM Agreement, together require that a finding of injury be a determination that "domestic producers as a whole" or those domestic producers representing "a major proportion of the total domestic production" have been injured.[449] The European Union argues that the reason for this is that a selective definition of the domestic industry would give rise to a material risk of distortion.[450] The European Union argues by analogy that "the same risk of distortion arises if the investigating authority first defines the domestic industry in a certain manner (here: all ripe olives) but subsequently carries out its injury and causation analysis only in a particular segment of that domestic industry (here: the retail 'segment')".[451]

7.219. The United States considers that the European Union's argument is inconsistent with the European Union's explicit agreement with the Appellate Body's statements in *US – Hot-Rolled Steel* concerning an investigating authority's analysis of market segments, in particular that "it may be

[443] European Union's first written submission, para. 475.
[444] European Union's first written submission, para. 475 (referring to Injury Determination, (Exhibit EU-5), p. 28 (dissenting view)).
[445] See para. 7.7 above.
[446] European Union's first written submission, para. 465.
[447] Injury Determination, (Exhibit EU-5), p. 10.
[448] European Union's second written submission, para. 102. See also European Union's first written submission, paras. 497-502; and second written submission, para. 162.
We note that the European Union placed this argument in the section VII(B)(2) of its first written submission titled "The USITC's analysis of volume effects is flawed because the USITC only analysed volume effects for the retail 'segment' of the domestic industry, not for the industry as a whole". (European Union's first written submission, paras. 494-512). We address other arguments in section VII(B)(2) of the European Union's first written submission below. (See paras. 7.236-7.237 below). It is our view, however, that the argument that an investigating authority is "bound" by its definition of the domestic industry is a stand-alone argument that is most logically addressed in this section along with the European Union's argument that the USITC's consideration of customer groups was not based on an objective examination of positive evidence.
[449] European Union's first written submission, para. 497.
[450] European Union's first written submission, para. 497 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 419).
[451] European Union's first written submission, para. 497.

highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment".[452]

7.220. The Anti-Dumping Agreement and the SCM Agreement contain guidance on the required scope of an injury determination. Footnote 9 of the Anti-Dumping Agreement and footnote 45 of the SCM Agreement provide:

> 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.

7.221. Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement further provide that, subject to certain exceptions, the term "domestic industry" shall "be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products".

7.222. The term "injury" is thus defined as "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry".[453] The "domestic industry" is, in turn, defined as the "domestic producers as a whole of the like products" or those domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production".[454] A finding of injury must consequently be a determination that "domestic producers as a whole" or those domestic producers representing "a major proportion of the total domestic production" have been injured.[455]

7.223. Our interpretation of these provisions is consistent with the European Union's assertion that an injury determination must concern the domestic industry as defined by the relevant investigating authority in accordance with Article 4.1 and Article 16.1.[456] We find no support, however, for the different proposition espoused by the European Union, which is that an investigating authority may only consider sections of a *market* while undertaking an injury analysis when it has explicitly identified these sections in the definition of the *domestic industry*. There is no reason that an investigating authority's analysis of *market segments* would necessarily imply that the final injury determination was not made with respect to the *domestic industry* as defined by the investigating authority. We therefore disagree that the USITC's analysis of market segments posed a risk of distortion. In particular, in this case the three customer groups collectively represented the whole market. Their analysis by the USITC would thus not necessarily leave parts of the domestic industry unexamined.[457] We therefore do not see any material risk of distortion arising from the fact that the USITC did not incorporate into its definition of the domestic industry reference to the various market segments it later analysed.

7.224. We consequently reject the European Union's claim that the USITC was prevented from considering customer groups because such customer groups were not explicitly referred to in the definition of the domestic industry.

---

[452] United States' first written submission, paras. 173-174 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 204; and European Union's first written submission, para. 499).

[453] Anti-Dumping Agreement, fn 9 and SCM Agreement, fn 45.

[454] Anti-Dumping Agreement, Article 4.1 and SCM Agreement, Article 16.1.

[455] See, e.g. Panel Report, *Mexico – Corn Syrup*, para. 7.147. (emphasis omitted)

[456] Our view is also consistent with prior reports. See, e.g. Panel Report, *Mexico – Corn Syrup*, para. 7.147 (referring to Article 4.1 and fn 9 of the Anti-Dumping Agreement and stating "[t]hese 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, that is, the domestic producers of the like product as a whole, or those of them whose collective output of the like product constitutes a major proportion of the domestic production of the like product").

[457] See para. 7.214 above.

7.4.3.3 Conclusion on the USITC's alleged "segmented analysis" of customer groups in its examination of volume and price effects under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.225. We find that the European Union has not demonstrated that the USITC's analysis of customer groups was not based on an objective examination of positive evidence. We find further that the USITC's consideration of customer groups was not improper in light of the definition given to the domestic industry. On this basis, we conclude that the European Union has not demonstrated that the USITC's consideration of customer groups in its examination of volume and price effects was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

7.4.4 The USITC's examination of the volume of dumped and subsidized ripe olives from Spain

7.226. In relation to the USITC's volume analysis, the European Union raises two distinct lines of argument. First, the European Union argues the USITC failed to consider whether there had been a significant increase in dumped or subsidized imports as required by the first sentence of Article 3.2 and Article 15.2.[458] Second, the European Union argues the USITC's volume analysis was not based on an objective examination of positive evidence.[459] The European Union asserts that the USITC thus acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[460] The United States asks the Panel to reject the European Union's arguments in their entirety.[461] We examine the merits of the European Union's claims in the sections that follow.

7.4.4.1 Whether the USITC failed to consider whether there has been a significant increase in dumped or subsidized imports as required by the first sentence in Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement

7.227. The European Union argues that the USITC's volume analysis failed to comply with the requirement in Article 3.2 and Article 15.2 to "consider whether there has been a significant increase in [dumped or] subsidized imports" because the USITC's "conclusion simply states that volumes of Spanish imports were significant".[462] The European Union maintains that the USITC's conclusion was inadequate as the "text of [Article 3.2 and] Article 15.2 unequivocally stipulate[s] that a volume effect requires an increase of [dumped or] subsidized imports"[463], and that "the authority must show a growth in [dumped or] subsidized imports".[464] The European Union alleges that the USITC failed to meet the requirements of Article 3.2 and Article 15.2 because it "only considered a significant *presence* of Spanish imports in the domestic industry".[465]

---

[458] European Union's first written submission, paras. 519-521. See also European Union's second written submission, paras. 146-152.

[459] European Union's first written submission, sections VII(B)(2)-VII(B)(3); second written submission, sections V(B)(2)-(3).

[460] European Union's first written submission, paras. 511, 517, and 525; second written submission, paras. 144-145 and 152.

[461] United States' first written submission, paras. 164-195; second written submission, paras. 49-74.

[462] European Union's first written submission, para. 521. See also European Union's second written submission, paras. 146-152.

[463] European Union's first written submission, para. 523.

[464] European Union's first written submission, para. 524. We note that the European Union specifically argues that "the USITC did not consider a volume effect within the meaning of [Article 3.2 of the Anti-Dumping Agreement and] Article 15.2 of the SCM Agreement". (European Union's first written submission, para. 519). The European Union repeatedly refers to the concept of "volume effect" throughout its submissions. See, e.g. European Union's first written submission, paras. 431, 453, 460, 465, 468, and 487. The concept of "volume effect" is not found in the Anti-Dumping Agreement or the SCM Agreement. We understand the European Union to not have intended any particular technical meaning to attach to this term. This is confirmed by the European Union in its second written submission, where it observes that the distinction between "volume analysis" and "volume effects analysis" is "a purely terminological issue and entirely irrelevant for the resolution of this dispute". (European Union's second written submission, para. 150). We therefore will not refer to "volume effects" except if contained in a quotation from the European Union.

[465] European Union's first written submission, para. 525. (emphasis original)

7.228. The United States responds that Article 3.2 and Article 15.2 do not require an investigating authority to find an absolute or relative increase in the volume of subject imports.[466]

7.229. We recall that the first sentence in Article 3.2 and Article 15.2 sets out the requirements for the examination of the volume of dumped or subsidized imports:

> With regard to the volume of the [dumped or subsidized] imports, the investigating authorities shall consider whether there has been a significant increase in [dumped or subsidized] imports, either in absolute terms or relative to production or consumption in the importing Member.

In our view the European Union's argument that an investigating authority "must show a growth in [dumped or] subsidized imports"[467] to "consider whether" there has been a significant increase in volume is based on an erroneous construction of the term "consider whether" in Article 3.2 and Article 15.2. These provisions instruct an investigating authority to "consider whether" there has been a significant increase in volume. As noted above, the ordinary meaning of "consider" includes "[t]o view or contemplate attentively, to survey, examine" and "[t]o contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of".[468] To "consider" indicates a requirement that an investigating authority take something into account in reaching its decision, not a requirement to arrive at a particular conclusion.[469] This understanding is supported by the contrast between the obligation to "consider" that is contained in the first sentence of Article 3.2 and Article 15.2, and the use of the more definitive term "demonstrate" in Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement, which state "[i]t must be demonstrated that the [dumped or subsidized] imports are, through the effects of [dumping or subsidies] … causing injury". Moreover, the first sentence in Article 3.2 and Article 15.2 qualifies the instruction to "consider" with the word "whether". Thus the ordinary meaning of "consider", its contrast with more definitive language used in other provisions of Article 3 and Article 15, and the qualification "whether", are incompatible with the European Union's interpretation that an investigating authority may only successfully "consider whether" there has been a significant increase in volume in circumstances where the investigating authority can "show a growth in [dumped or] subsidized imports".[470] Rather, the language of the first sentence of Article 3.2 and Article 15.2 makes clear that an investigating authority's consideration of whether there has been a "significant increase" in volume may be evidenced by an examination of the change in volume, regardless of whether volumes in fact increased, decreased, or remained stable.

7.230. In support of its interpretation, the European Union argues that the panel in *US – DRAMs* explicitly concluded that the "mere consideration of a presence – or decrease – of imports is inconsistent with Article 15.2 SCM [Agreement]".[471] The European Union finds support for this assertion in the panel's finding that "[a]lthough the [USITC] found that 'the absolute volume of subject imports … is significant' it did not determine that the increase in the absolute volume of subsidized imports was significant".[472] The panel's conclusion was, however, based on a factual determination that there was no evidence that the investigating authority had considered whether there was a significant increase in the absolute volume of subject imports.[473] Moreover, the panel did not conclude that this failure to determine a significant increase was inconsistent with Article 15.2 of the SCM Agreement. Rather, the Panel observed that "[s]ince Article 15.2 provides that '[n]o one or several of these factors can necessarily give decisive guidance', the fact that the [USITC] did not find that there was a significant increase in the absolute volume of subsidized imports is not *per se*

[466] United States' first written submission, paras. 181-195.
[467] European Union's first written submission, para. 524. We note that the European Union clarified that it does not argue that volume of imports of Spanish ripe olives was not significant. (European Union's opening statement at the second meeting of the Panel, para. 54).
[468] Oxford Dictionaries online, definition of "consider" https://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid (accessed 7 July 2021), v., meaning 3.a.
[469] For a similar view, see Appellate Body Report, *China – GOES*, para. 130.
[470] European Union's first written submission, para. 524.
[471] European Union's opening statement at the second meeting of the Panel, para. 56.
[472] European Union's second written submission, para. 151 (referring to Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.234). (emphasis original)
[473] Panel Report, *US – Countervailing Duty Investigation on DRAMs*, fn 226.

inconsistent with Article 15.2 of the SCM Agreement".[474] The panel continued that "Article 15.2 [of the SCM Agreement] does not require a determination that there has been a significant increase in subsidized imports".[475] The panel observed, instead, that Article 15.2 of the SCM Agreement "simply requires investigating authorities to 'consider' whether there has been such an increase".[476] Consistent with our analysis above, the panel in *US – DRAMs* further suggested that "an injury determination may be consistent with Article 15 of the SCM Agreement even in the absence of a determination that (as opposed to consideration whether) there has been a significant increase in the volume of subsidized imports".[477] The panel's observations in *US – DRAMs* are therefore consistent with our interpretation that compliance with Article 3.2 and Article 15.2 is unaffected by whether the volume of dumped or subsidized imports in fact increased, decreased, or remained stable.

7.231. We note that the European Union argues that the United States misrepresents the European Union's argument as being that Article 3.2 and Article 15.2 require an investigating authority to "find" or "determine", as opposed to "consider whether", there has been a significant increase in the volume of dumped or subsidized imports.[478] Despite alleging this, the European Union nevertheless maintains that its argument is that "the USITC failed to consider a volume increase because it only considered a decrease".[479] The European Union appears to suggest that an investigating authority cannot, by definition, *consider* whether there was a "significant increase" in circumstances where there was in fact a decrease. As previously stated, we do not agree with this interpretation because an investigating authority's compliance with the first sentence of Article 3.2 and Article 15.2 is not dependent on whether the volume of imports increased, decreased, or remained stable.

7.232. On the basis of our interpretation as set out above, we now turn to consider whether the USITC's assessment of the volume of ripe olives satisfied the requirements of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. We agree with the view of the panel in *Thailand - H-Beams* that to establish compliance with the first sentence of Article 3.2 and Article 15.2, "it must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms".[480] The USITC identified that the volume of ripe olives from Spain decreased from 35,037 tonnes to 32,782 tonnes during the period of investigation.[481] The USITC then identified the changes in the market share of Spanish ripe olives during the period of investigation.[482] The USITC also examined the change in market shares in the retail sector.[483] The USITC concluded that the volume of ripe olives was significant on an absolute and relative basis, and found that the volume of subject ripe olives was significant relative to domestic production.[484] The USITC's examination of the changes in volume and market share of Spanish ripe olives, coupled with the assessment of the significance of these imports, shows that the USITC considered whether there was a significant increase on an absolute and relative basis. We find that the European Union has thus not established that the USITC failed to consider whether there was a significant increase in the volume of Spanish ripe olives.[485]

---

[474] Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.234. The panel did, however, find that the investigating authority had found that the increase in volume of subsidized imports was significant relative to domestic production and consumption. (Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.234).

[475] Panel Report, *US – Countervailing Duty Investigation on DRAMs*, fn 224.

[476] Panel Report, *US – Countervailing Duty Investigation on DRAMs*, fn 224.

[477] Panel Report, *US – Countervailing Duty Investigation on DRAMs*, fn 224.

[478] European Union's second written submission, paras. 147-148.

[479] European Union's second written submission, para. 148 (emphasis original); see also ibid. para. 149.

[480] Panel Report, *Thailand – H-Beams*, para. 7.161.

[481] Injury Determination, (Exhibit EU-5), p. 18.

[482] Injury Determination, (Exhibit EU-5), p. 18.

[483] Injury Determination, (Exhibit EU-5), pp. 18-19.

[484] Injury Determination, (Exhibit EU-5), pp. 18-19.

[485] We also reject the European Union's argument that, because the USITC's concluding sentence does not contain the word "increase", there is therefore "no indication that the USITC considered any increasing trends in volumes concerning Spanish imports for the industry as a whole". (European Union's first written submission, para. 521). Article 3.2 and Article 15.2 do not contain a formal requirement that the conclusion of an investigating authority's volume analysis contain the word "increase". We accordingly reject the European Union's argument that the absence of the word "increase" from the USITC's concluding sentence

7.4.4.2 Whether the USITC's volume analysis was not based on an objective examination of positive evidence in violation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.233. The European Union argues that the manner in which the USITC conducted its examination of the volume of ripe olives was not based on an objective examination of positive evidence.[486] The European Union argues that this is because the USITC (a) only analysed the retail customer group and failed to consider the industry as a whole[487]; (b) improperly drew conclusions about the industry as a whole from the retail sector[488]; (c) failed to consider the distributional and institutional customer groups in a like manner as the retail customer group, without satisfactory explanation[489]; (d) failed to consider the distributional and institutional/food processor customer groups to the extent required for an objective examination based on positive evidence[490]; and (e) failed to provide a meaningful basis for causation.[491] The European Union asserts that the USITC thus did not conduct an objective examination based on positive evidence in violation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[492] The United States requests that the Panel reject the European Union's arguments in their entirety.[493]

7.234. In respect of the analysis below, we recall that an investigating authority's analysis of the volume of dumped or subsidized imports pursuant to Article 3.2 and Article 15.2 must comply with the overarching requirement contained in Article 3.1 and Article 15.1 that a determination of injury must be based on an objective examination of positive evidence.

7.4.4.2.1 Factual background

7.235. The section of the Injury Determination titled "Volume of Subject Imports" provides as follows:

> Section 771(7)(C)(i) of the Tariff Act provides that the "Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."
>
> Subject imports had a significant presence in the U.S. market throughout the [period of investigation] on both an absolute and relative basis. The volume of subject imports increased from 35,037 short tons in 2015 to 35,139 short tons in 2016, and then declined to 32,782 short tons in 2017. As observed above, subject imports' market share increased from *** percent in 2015 to *** percent in 2016 and then declined to *** percent in 2017.
>
> As discussed above, ripe olives are generally sold to distributors, retailers, and institutional/food processors. During the [period of investigation], the retail sector was the largest sector of the market for the domestic industry accounting for between *** percent and *** percent of U.S. processors' commercial shipments of ripe olives. Subject imports increasingly entered the retail sector during the [period of investigation] as U.S. importers' commercial U.S. shipments from Spain increased *** percent, allowing subject imports to capture *** percentage points of market share directly at the expense of the domestic industry in this sector between 2015 and 2017. U.S. importers' U.S. commercial shipments of ripe olives from Spain to retailers as a share of their total reported shipments increased from *** percent in 2015 to *** percent in 2016 and *** percent in 2017; by contrast, U.S. producers' U.S. commercial shipments of ripe olives declined from *** percent in 2015 to *** percent in 2016 and

establishes that the USITC did not "consider whether there has been a significant increase" in dumped or subsidized imports.

[486] European Union's first written submission, paras. 494-518; second written submission, paras. 127-145.
[487] European Union's first written submission, para. 494.
[488] European Union's first written submission, paras. 513-518; second written submission, para. 145.
[489] European Union's second written submission, paras. 127-140.
[490] European Union's first written submission, paras. 505-507.
[491] European Union's second written submission, paras. 141-144.
[492] European Union's first written submission, paras. 511 and 517.
[493] United States' first written submission, paras. 164-180.

*** percent in 2017. The record also indicates that, as a share of U.S. commercial shipments to retailers of private label and branded products, subject imports captured *** percentage points and *** percentage points respectively of market share from the domestic industry between 2015 and 2017.

In light of the foregoing, we find that the volume of subject imports from Spain is significant in absolute terms and relative to both apparent U.S. consumption and U.S. production.[494]

7.4.4.2.2 Whether the USITC only analysed the retail customer group and failed to consider the industry as a whole

7.236. The European Union argues that even if this Panel does not find the USITC's volume analysis flawed as a result of the allegedly arbitrary "segmentation", it is "in any event WTO inconsistent because instead of analysing volume effects for the domestic industry *as a whole*, the USITC only analysed the retail 'segment'".[495] We are unpersuaded by this argument, as in our view the USITC's volume analysis clearly examined the industry as a whole. This is evidenced by the second paragraph of the section of the Injury Determination titled "Volume of Subject Imports", as extracted above.[496] In that paragraph, the USITC described the change in the total volume of ripe olives from Spain during the period of investigation.[497] The USITC relevantly stated that the "volume of subject imports increased from 35,037 short tons in 2015 to 35,139 short tons in 2016, and then declined to 32,782 short tons in 2017".[498] The USITC then observed that "subject imports' market share increased from *** percent in 2015 to *** percent in 2016 and then declined to *** percent in 2017", and found that the volume of subject imports was significant relative to domestic production.[499] The USITC also stated that "[s]ubject imports had a significant presence in the U.S. market throughout the [period of investigation] on both an absolute and relative basis".[500] The USITC thus clearly examined the change in volume of Spanish ripe olives in the market as a whole in its volume analysis.

7.237. The extract above shows that the USITC's analysis of the change in total volume of Spanish ripe olives in the second paragraph of the section titled "Volume of Subject Imports" was followed by a third paragraph in which the USITC focused on changes in volume and market share in the retail sector.[501] The European Union maintains that "[t]he USITC's volume effects analysis is contained in the third paragraph since the fourth paragraph only sets forth the conclusion".[502] The European Union reasons that the USITC only considered the retail customer group as "nothing is said in the third paragraph about volume effects with respect to the domestic industry as a whole".[503] We are not persuaded by the European Union's reading of the Injury Determination. The European Union provides no explanation as to why we should understand the USITC's volume analysis to be confined to the third paragraph of the section titled "Volume of Subject Imports". Absent a persuasive explanation otherwise, in our view the USITC's volume analysis comprises all four paragraphs of the section titled "Volume of Subject Imports".[504] In particular, the USITC's volume analysis includes the examination of change in the total volume and market share of Spanish ripe olives in the second paragraph of that section. As the USITC considered the industry as a whole in the second paragraph, the European Union's argument that the third paragraph does not address the market as a whole does not establish that the USITC only considered the retail customer group.

[494] Injury Determination, (Exhibit EU-5), pp. 18-19. (fns omitted; redacted original)
[495] European Union's first written submission, para. 494. (emphasis original)
[496] Injury Determination, (Exhibit EU-5), p. 18.
[497] Injury Determination, (Exhibit EU-5), p. 18.
[498] Injury Determination, (Exhibit EU-5), p. 18.
[499] Injury Determination, (Exhibit EU-5), p. 18. (redacted original)
[500] Injury Determination, (Exhibit EU-5), p. 18.
[501] Injury Determination, (Exhibit EU-5), p. 18.
[502] European Union's first written submission, para. 496.
[503] European Union's first written submission, para. 496.
[504] Injury Determination, (Exhibit EU-5), pp. 18-19.

7.4.4.2.3 Whether the USITC improperly drew conclusions about the industry as a whole from the retail sector

7.238. The European Union argues that the USITC "extended its analysis of volume effects for the retail 'segment' to the entire domestic industry without any evidence, reasoning or explanation".[505] The European Union asserts this is because, in its view, the reference to "the foregoing" in the USITC's conclusion "only refers to volume effects in the retail 'segment' not to volume effects in the industry as a whole".[506]

7.239. We note that the USITC concludes its volume analysis by stating that, "[i]n light of the foregoing, we find that the volume of subject imports from Spain is significant in absolute terms and relative to both apparent U.S. consumption and U.S. production".[507] In our view, the phrase "the foregoing" includes reference to the analysis of the total volume and market share of Spanish ripe olives in the second paragraph of the volume analysis, as well as the consideration of the retail customer group in the third paragraph of the analysis. The European Union provides no reason why the analysis covered by "the foregoing" would include only the immediately preceding paragraph, and not the other paragraphs of the USITC's volume analysis. Accordingly, we find that the European Union has not established that the reference to "the foregoing" in the USITC's conclusion shows that the USITC improperly extended its conclusions regarding the retail sector to the whole industry.[508]

7.4.4.2.4 Whether the USITC failed to consider the distributional and institutional customer groups in like manner as the retail customer group, without satisfactory explanation

7.240. The European Union additionally argues that the USITC failed to consider the distributional and institutional/food processor customer groups in like manner as the retail customer group and failed to provide a satisfactory explanation for not doing so.[509] We agree with the European Union that the USITC's volume analysis did not consider the distributional and institutional/food processor customer groups in the same detail as the retail customer group. The USITC did, however, provide an explanation for its focus on the retail customer group. The USITC observed that "ripe olives are generally sold to distributors, retailers, and institutional/food processors", and explained that "the retail sector was the largest sector of the market for the domestic industry" during the period of investigation.[510] While the percentage share of sales of each customer group by the domestic industry is redacted in the USITC report that was placed before us, the United States has referred to a submission from the GOS from the underlying investigation that indicated that the domestic industry's sales to customers in the retail segment accounted for between 85.3% to 87.1% of total annual shipments during the 2015-2017 period.[511] The retail sector thus clearly represents the vast

[505] European Union's first written submission, para. 513.
[506] European Union's first written submission, para. 514.
[507] Injury Determination, (Exhibit EU-5), p. 19.
[508] The European Union further claims that the USITC's volume analysis improperly equated the retail customer group with the whole market because the retail segment represents only around 20% of Spanish imports, and thus "cannot be representative for effects for the whole industry". (European Union's first written submission, para. 502). We do not consider that the small proportion of Spanish imports sold into the retail customer group establishes that the USITC simply equated the retail customer group with the whole market. As noted above, the USITC considered the change in volume and market share at the level of the market as a whole. (See para. 7.236 above). The USITC explained its subsequent focus on the retail customer group on the basis that the retail sector was significant to the domestic industry, not because it represented a high proportion of sales for importers of Spanish ripe olives. (Injury Determination, (Exhibit EU-5), p. 20). In our view, the explanation that the retail sector represents most of the domestic industry's sales provides a reasonable justification for the USITC's focus on that sector, as the domestic industry would be particularly sensitive to developments in that sector. We therefore consider the European Union's argument to be unpersuasive.
[509] European Union's second written submission, para. 130 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 204) and para. 138; see generally ibid. paras. 127-139.
[510] Injury Determination, (Exhibit EU-5), p. 18.
[511] United States' first written submission para. 175 and fn 242 (referring to Government of Spain's prehearing brief, (Exhibit USA-4), pp. 10-11; and Report accompanying Government of Spain's prehearing brief, (Exhibit USA-5), pp. 28-29). The European Union argues that the proportion of sales by the domestic industry to the retail sector could not be above 83% because the Injury Determination indicates that ripe olives from Spain commanded a 17% market share in the retail customer groups in 2017. (European Union's 8 September 2020 response to Panel question No. 3(c), para. 140). The European Union,

majority of the domestic industry's sales and in our view this provides a reasonable justification for the USITC's focus on the retail sector. We thus find that the USITC's observation regarding the importance of the retail customer group to the domestic industry constitutes a satisfactory explanation for the particular focus given to that sector.

7.241. The European Union maintains that the significance of retailers to the domestic industry was not an appropriate explanation for the USITC's focus on that customer group.[512] We are not persuaded by the European Union's argument that the USITC's identification of the retail customer group as representing the largest sector for the domestic industry was "a mere factual statement … not an explanation".[513] Rather, we consider the USITC's observation of the fact that the retail customer group was the most important for the domestic industry also served as an explanation of the USITC's focus on that section of the market.[514] We also reject the European Union's contention that the United States' submission that the USITC "had an economic basis to focus on the retail segment, where the domestic industry was concentrated" was an *ex post* justification.[515] We find the United States' assessment is clearly reflected in the USITC's observation that "the retail sector was the largest sector of the market for the domestic industry".[516]

7.242. We are furthermore not convinced by the European Union's reliance on the report of the panel in *Mexico – Corn Syrup* for the proposition that the importance of a particular sector cannot justify an investigating authority's focus on that sector in its injury examination.[517] As discussed above, in that case the panel found that the Mexican investigating authority had only assessed one sector and "took no account of the fact that almost half of production" was sold in a second sector.[518] The panel observed that Mexico had argued that the market sector focused on by the Mexican investigating authority constituted a "major proportion" of domestic production and was thus consistent with Article 4.1 of the Anti-Dumping Agreement. The panel rejected this argument, finding that, while Article 4.1 of the Anti-Dumping Agreement allows for consideration of producers whose collective output of the like product constitutes a major proportion of domestic production of that product, Article 4.1 does not allow an injury determination to be made simply with respect to a major proportion of production.[519] The panel based its observation in that case on the fact that the Mexican investigating authority had expressly excluded from consideration a sector representing a substantial portion of domestic production.[520] We do not believe the panel's observation supports the European Union's proposition that an investigating authority cannot give particular consideration to a specific sector where that sector is especially important to the domestic industry. Moreover, the facts before that panel were different to those before us, as the customer groups examined by the USITC represent the *whole* ripe olive market, and the European Union has not established that the USITC excluded from consideration data relating to any particular customer group.[521]

7.243. We are therefore unpersuaded by the European Union's various arguments that the USITC's observation that the "the retail sector was the largest sector of the market for the domestic industry" did not satisfactorily explain and thereby justify the USITC's focus on the trends in market share in the retail sector in its volume analysis.

---

however, misunderstands the relevant footnote and table of the Injury Determination. These indicate that, in 2017, 17% of all Spanish imports were sold to the retail customer group. (Injury Determination, (Exhibit EU-5), fn 104 and table II-1). This does not mean that 17% of all sales to the retail customer group were of ripe olives from Spain. The range of 75-80% suggested by the European Union as "more likely" is, in any event, consistent with the USITC's observation that "the retail sector was the largest sector of the market for the domestic industry". (European Union's 8 September 2020 response to Panel question No. 3(c), para. 140; Injury Determination, (Exhibit EU-5), p. 18).

[512] European Union's second written submission, para. 138; 8 September 2020 response to Panel question No. 3(c), paras. 133 and 137.

[513] European Union's second written submission, para. 138.

[514] Injury Determination, (Exhibit EU-5), p. 18.

[515] European Union's 8 September 2020 response to Panel question No. 3(c), para. 133. See also United States' first written submission, para. 175.

[516] Injury Determination, (Exhibit EU-5), p. 18.

[517] European Union's 8 September 2020 response to Panel question No. 3(c), para. 137 (quoting Panel Report, *Mexico – Corn Syrup*, para. 7.154 and fn 624).

[518] Panel Report, *Mexico – Corn Syrup*, para. 7.154.

[519] Panel Report, *Mexico – Corn Syrup*, para. 7.154 and fn 624.

[520] Panel Report, *Mexico – Corn Syrup*, para. 7.158; see also ibid. paras. 7.150-7.152.

[521] See para. 7.214 above.

7.4.4.2.5 Whether 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

7.244. 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 objective examination based on positive evidence, despite those groups accounting for around 80% of Spanish imports.[522] In particular, the European Union asserts that the fact that the "shares of imports of Spanish ripe olives decreased" in the distributional and institutional customer groups is "entirely and conveniently omitted" by the USITC.[523] The European Union argues that such "selective analysis" fell short of the requirement to conduct an objective examination based on positive evidence.[524]

7.245. We agree that the USITC did not describe the change in market share of Spanish ripe olives in the distributional and institutional customer groups. Furthermore, the revised public versions of tables IV-6 and IV-8 provided by the United States confirmed the European Union's argument that the Spanish market share in the distributional and institutional customer groups trended down over the period of investigation.[525] However, the mere fact that there was a decrease in market share in the distributional and institutional customer groups by ripe olives from Spain does not establish that the USITC's analysis was not based on an objective examination of positive evidence. As observed above, the USITC described the change in volume with regard to the whole market, then gave additional consideration to trends in the retail sector.[526] The USITC explained its focus on retailers on the basis of the importance of that channel of distribution to the domestic industry.[527] In our view, the USITC's observation that the retail sector was particularly important to the domestic industry implies that the distributional and institutional/food processor customer groups were not as important. We find further support for the conclusion that the USITC's approach was reasonable in the fact that the USITC had already observed that the absolute volume of subject imports decreased over the period of investigation.[528] Moreover, as the United States observes, the data cited to support the USITC's discussion of the change in volume and market share in the retail sector also included supporting data on the distribution and institutional/food sectors.[529] We consequently disagree with the view that the USITC did not conduct an objective examination based on positive evidence simply because the USITC chose not to describe the change in market share of Spanish ripe olives in the distributional and institutional customer groups.

7.246. Finally, we observe that the European Union also cites the opinion of the dissenting USITC commissioner, in which the commissioner rejects the view that Spanish ripe olives gained market share in the retail customer group at the expense of the domestic industry.[530] The European Union states that the dissenting commissioner "referred to the 'industry's overall market shares' and dismissed the relevance of increased sales of Spanish ripe olives to retail customers".[531] We recall

[522] European Union's first written submission, paras. 505-507. See also European Union's second written submission, para. 134.

[523] European Union's first written submission, para. 506; see also ibid. para. 504, table titled "U.S. importers' U.S. commercial shipments of ripe olives from Spain" (based on Injury Determination, (Exhibit EU-5), table II-1, p. II-2).

[524] European Union's first written submission, para. 507.

[525] United States' letter to the Panel dated 4 February 2021 (providing revised public versions of Injury Determination, (Exhibit EU-5), tables IV-6, IV-7, IV-8, and C-1).

In its first written submission, the European Union relied on table II-1 in the Injury Determination to show that Spanish ripe olives lost 9.1% of market share in the distributional customer group and 0.7% of market share in the institutional customer group. (European Union's first written submission, para. 504). As discussed above, total quantity and market share of all sales to each customer group are not identified in table II-1. (See fn 511 above). Rather, table II-1 describes the proportion of Spanish imports directed to each customer group each year (for a total of 100% in any year). A decrease of 9.1 percentage points in the distributional customer group, therefore, indicates that there was a decrease in the proportion of Spanish imports sold to that customer group. This does not establish the direction or magnitude of the change in market share of Spanish imports, as that depends on the extent of corresponding changes in the total volume of domestic and other importer ripe olives sold to each customer group in the period of investigation.

[526] Injury Determination, (Exhibit EU-5), p. 18.

[527] Injury Determination, (Exhibit EU-5), p. 18.

[528] Injury Determination, (Exhibit EU-5), p. 18.

[529] United States' first written submission, para. 178; Injury Determination, (Exhibit EU-5), p. 18 and fns 104-105 (referring to table II-1).

[530] European Union's first written submission, para. 510 (quoting Injury Determination, (Exhibit EU-5), p. 28 (dissenting view)).

[531] European Union's first written submission, para. 510.

our view that the mere fact that a dissenting view exists does not establish that the majority's findings were not based on an objective examination of positive evidence.[532] We do not find the European Union's observation that the dissenting commissioner approached the volume analysis in a different manner to the majority alters our conclusions set out above. We note, moreover, that the dissenting opinion ultimately arrived at the same conclusion as the majority of commissioners that "the volume of subject imports, in absolute terms and relative to U.S. consumption, is significant".[533]

7.4.4.2.6 Whether the USITC's volume analysis failed to provide a meaningful basis for causation

7.247. The European Union also maintains that the USITC's examination of volume could not form a "meaningful basis" for causation and was thus inconsistent with Article 3.2 and Article 15.2.[534] The European Union bases this argument on the proposition that an investigating authority's volume analysis "must provide 'explanatory force' for the occurrence of a significant volume increase".[535] In making this argument, the European Union notes the observation by the Appellate Body in *China – GOES* that, when examining price suppression or depression under Article 3.2 and Article 15.2, "an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices".[536] The European Union argues that "there is no reason" why this obligation is not equally applicable to an investigating authority's consideration of whether there was a significant increase in the volume of dumped or subsidized imports.[537] We note that, in relation to volume, an investigating authority is simply directed by Article 3.2 and Article 15.2 to "consider whether there has been a significant increase in [dumped or subsidized] imports". The investigating authority's inquiry regarding volume only concerns the identification of the change in the volume of imports and an assessment of its significance. There is no further requirement to use this data to consider some further phenomena such as an effect on prices. We therefore disagree with the European Union's assertion that an investigating authority's volume analysis must provide "explanatory force" for the occurrence of a significant volume increase. Accordingly, we reject the European Union's argument made on that basis.

7.4.4.3 Conclusion on the USITC's volume analysis under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.248. For the reasons set out above, we find that the European Union has not demonstrated that the USITC improperly considered whether there had been a significant increase in the volume of dumped or subsidized ripe olives from Spain, as required by the first sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. We find further that the European Union has not demonstrated that the USITC's volume analysis was not based on an objective examination of positive evidence. On this basis, we conclude that the European Union has not demonstrated that the USITC's volume analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

7.4.5 The USITC's examination of the price effects of dumped and subsidized ripe olives from Spain

7.249. The European Union argues that the USITC's consideration of price undercutting by ripe olives from Spain was not based on an objective examination of positive evidence, and thus is in violation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[538] The European Union's arguments are premised on the view that the USITC's consideration of price undercutting should be properly understood as a "second volume

[532] See para. 7.216 above.
[533] Injury Determination, (Exhibit EU-5), p. 28 (dissenting view).
[534] European Union's second written submission, paras. 141-142; first written submission, para. 517.
[535] European Union's second written submission, para. 142 (referring to Appellate Body Report, *China – GOES*, para. 154).
[536] European Union's second written submission, para. 141 (quoting Appellate Body Report, *China – GOES*, para. 154).
[537] European Union's second written submission, para. 142.
[538] European Union's first written submission, section VII(C)(2)-(3); second written submission, section V(C)(2)-(3).

analysis".[539] In this section we will consequently first address the question of whether the USITC conducted a "second volume analysis". We will then consider the European Union's various arguments in support of its view that the USITC's consideration of price undercutting was not based on an objective examination of positive evidence.[540]

7.250. The United States maintains that the European Union's arguments are based on a misconstruction of Article 3.2 and Article 15.2, and the USITC did not conduct a second examination of the volume of ripe olives from Spain.[541] The United States further responds that the USITC's price effects analysis was based on an objective examination of positive evidence.[542]

7.251. We examine the merits of the European Union's claims in the sections that follow.

7.4.5.1 Whether the USITC's examination of price undercutting constituted a second volume analysis

7.252. The European Union argues that the USITC "did not carry out a price effect analysis in the context of price undercutting" but rather "carried out a – second – volume analysis".[543] The European Union alleges the USITC's analysis of price undercutting could "not consider a price effect in the form of an effect on the price of the domestic industry" because the USITC found no significant price suppression or price depression.[544] The European Union asserts the USITC instead considered the effect of price undercutting through changes in market share in the retail sector.[545] The European Union maintains that changes in market share are a "volume effect" and thus that the "USITC nowhere considered … that domestic prices were affected by subject imports".[546]

7.253. The United States responds that the European Union's argument is based on a misconstruction of Articles 3.1 and 3.2 and Articles 15.1 and 15.2.[547] The United States argues that these provisions provide that price undercutting is, in and of itself, a price effect.[548] The United States thus maintains that the USITC properly considered the effect of dumped and subsidized ripe olives on prices in the domestic market through its analysis of price undercutting.[549]

7.254. We observe that in the section of the Injury Determination titled "Price Effects of the Subject Imports", the USITC examined the price effects of dumped and subsidized ripe olives from Spain during the period of investigation. The USITC first found that there was significant underselling by Spanish ripe olives.[550] The USITC concluded that Spanish ripe olives did not have the effect of significantly depressing the prices of domestic ripe olives, or of preventing price increases that would otherwise have occurred to a significant degree.[551]

7.255. We note that the USITC employed the term "undersold" and "underselling" in place of "undercut" and "undercutting" in Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. We employ these terms interchangeably throughout.

7.256. The European Union's characterization of the USITC's analysis of price undercutting as a second volume analysis raises a range of complex interpretative questions. These include whether

[539] European Union's second written submission, paras. 162 and 164; see also ibid. para. 155 (alleging the "USITC undertook a somewhat bizarre (and highly WTO-inconsistent) hybrid price/volume analysis in the context of 'price undercutting'") and para. 160 (alleging "the USITC undertook a volume analysis that was window-dressed as a price undercutting analysis"). The arguments that flow from the European Union's characterization of the USITC's examination of price undercutting as a second volume analysis are addressed at paragraphs 7.263-7.281 below.
[540] European Union's first written submission, section VII(C)(2)-(3); second written submission, section V(C)(2)-(3).
[541] United States' first written submission, section V(B); second written submission, section IV(C).
[542] United States' first written submission, section V(B); second written submission, section IV(C).
[543] European Union's second written submission, para. 154.
[544] European Union's first written submission, paras. 528 and 541; second written submission, para. 154.
[545] European Union's first written submission, para. 542.
[546] European Union's second written submission, para. 154.
[547] United States' first written submission, paras. 196-206.
[548] United States' first written submission, para. 199.
[549] United States' first written submission, paras. 201-205; second written submission, paras. 75-79.
[550] Injury Determination, (Exhibit EU-5), p. 21.
[551] Injury Determination, (Exhibit EU-5), p. 21.

such a "hybrid price/volume analysis"[552] is something conceived of and permitted by the agreements. We do not consider it necessary to discuss all these issues because we disagree with the central premise of the European Union's argument: the proposition that price undercutting is not, in and of itself, an effect on domestic prices.[553] For the reasons that follow, we find that the text of Articles 3.1 and 3.2 and Articles 15.1 and 15.2 does not support this interpretation. Rather, in our view, those provisions recognize that consideration of significant price undercutting under the second sentence of Article 3.2 and Article 15.2 on its own constitutes an "examination of … the effect of the dumped imports on prices in the domestic market for like products" under Article 3.1 and Article 15.1.

7.257. We first observe that Article 3.1 and Article 15.1 direct an investigating authority to examine the "effect of the [dumped or subsidized] imports on prices in the domestic market for like products". We next recall that the second sentence of Article 3.2 and Article 15.2 states:

> With regard to the effect of the [dumped or subsidized] imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the [dumped or subsidized] 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.

The second sentence of Article 3.2 and Article 15.2 thus describes what an investigating authority should examine "[w]ith regard to the effect of the [dumped or subsidized] imports on prices". While the second sentence in Article 3.2 and Article 15.2 does not specify which "prices" are the object of the enquiry, we understand this to be a reference to "prices in the domestic market for like products". We consider this to be correct based on the clear cross-reference to Article 3.1 and Article 15.1. This is also supported by the parallel manner in which the examination of volume is treated in the first sentence of Article 3.2 and Article 15.2. To make the same point from a different perspective, an interpretation of the term "prices" in the second sentence as referring not to "prices in the domestic market for like products", but to some other prices, would seem to contradict the otherwise logical progression of analysis presented in Article 3 and Article 15 by leaving unspecified what an examination of subject imports effect on domestic prices requires.[554] We are thus of the view that the second sentence in Article 3.2 and Article 15.2 is intended to detail what actions by an investigating authority constitutes an examination of the effect on domestic prices as required by Article 3.1 and Article 15.1.

7.258. Article 3.2 and Article 15.2 instruct an investigating authority to consider whether the dumped or subsidized imports result in any of three phenomena, i.e. significant price undercutting, significant price depression, or significant price suppression. The use of the disjunctive "or" between these three phenomena indicates that they are independent lines of inquiry. A view that only price depression and price suppression constitute price effects would read out of the text the option to consider price undercutting as an independent channel of inquiry. This would be inconsistent with the requirement that effect be given to all terms of a treaty.[555] We thus interpret Article 3.2 and Article 15.2 to mean that a consideration of any of the three price effects can independently satisfy the requirement in Article 3.1 and Article 15.1 to examine the "effect … on prices in the domestic market for like products".[556]

7.259. The European Union maintains that, even if Article 3.2 and Article 15.2 provide for three different price effects, only price depression and price suppression are "'true' stand-alone price effects".[557] The European Union argues that price undercutting cannot itself be an "effect … on prices" because it is only through price depression or suppression that "the price curve of the

[552] European Union's second written submission, para. 155.
[553] European Union's first written submission, para. 541; second written submission, para. 158.
[554] For a similar view about the logical progression of analysis in Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement, see, e.g. Appellate Body Report, *China – GOES*, paras. 128 and 143.
[555] Appellate Body Report, *US – Gasoline*, DSR 1996:1, p. 21.
[556] Similar conclusions are arrived at in prior reports, such as Appellate Body Report, *China – GOES*, para. 137; and Panel Reports, *China – Autos (US)*, para. 7.255; *China – Cellulose Pulp*, para. 7.63; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.129.
[557] European Union's 26 March 2021 response to Panel question No. 1, para. 7.

domestic industry's prices" can be impacted.[558] In the European Union's view, then, "price undercutting requires, at least factually, the existence of price depression and/or price suppression".[559] However, we consider that such a narrow interpretation of "effect … on prices" is neither required by the definition of "effect" nor consistent with the structure of the provisions. The ordinary meaning of an "effect" is, *inter alia*, "[s]omething accomplished, caused, or produced; a result, consequence".[560] This definition indicates that the examination of the "effect" of subject imports on domestic prices required by Article 3.1 and Article 15.1 must entail an examination of whether there has been some result or consequence with respect to domestic prices that was caused by subject imports. We do not see any reason that such a result or consequence may only be in the form of a change in the *price of the domestic like product*. It is our view, rather, that such a result or consequence could be in the form of a change in the *relative prices of domestic like product and the products with which it competes*. Such changes could impact the competitiveness of the price of the domestic like product, even if there is no evidence during the period of investigation that the price of the domestic like product is significantly depressed or suppressed. We find this broader view to be consistent with the structure of the second sentence in Article 3.2 and Article 15.2, which as explained above, provides for three separate channels of inquiry. In contrast, the European Union's narrow interpretation would in practice read price undercutting out of Article 3.2 and Article 15.2 as an independent line of inquiry. Informed by the principle that an interpretation must be above all based on the text of the treaty[561], we conclude that the broader understanding of the meaning of an "effect … on prices" must be the correct interpretation. We therefore reject the European Union's argument that price undercutting is not a "'true' stand-alone" price effect and find that the USITC's analysis of price undercutting is properly characterized as an examination of price effects.

7.260. We find our position is consistent with the findings by the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)*. The European Union quotes the observation by the Appellate Body in that report that "an inquiry into price undercutting … is not satisfied by a static examination of whether there is a mathematical difference at any point in time during the [period of investigation] without any assessment of whether or how these prices interact over time".[562] The European Union further quotes the Appellate Body's view that an investigating authority must instead conduct a "dynamic assessment of price developments and trends in the relationship between the prices of the dumped [or subsidized] imports and those of domestic like products over the duration of the [period of investigation]".[563] Based on these observations, the European Union asserts that the USITC conducted a "static examination" of various instances of price undercutting, but then failed to conduct a "dynamic assessment" of the interaction of the prices of Spanish imports and of domestic prices.[564] The European Union asserts that the USITC's alleged failure to conduct a "dynamic assessment" means the USITC "did not consider price effects … in the context of its price undercutting analysis".[565]

7.261. In our view, the European Union's submissions are based on a misunderstanding of the Appellate Body's finding in *China – HP-SSST (Japan) / China – HP-SSST (EU)*. In that case, the Appellate Body found that the Chinese investigating authority had failed to properly explain the basis of its finding that a certain grade of dumped imports were underselling the domestic like product.[566] In particular, the Appellate Body expressed concern that the Chinese investigating authority had failed to explain how significant underselling could be found to exist given that the price of the domestic like product had more than doubled during the course of one year, while the price of dumped imports had fallen.[567] The Appellate Body based this finding on the view that an objective examination of price undercutting should take into account any relevant trends across the period of

[558] European Union's first written submission, fn 467.
[559] European Union's 26 March 2021 response to Panel question No. 1, para. 7.
[560] Oxford Dictionaries online, definition of "effect" https://www.oed.com/view/Entry/59664?rskey=HPLU9L&result=1&isAdvanced=false#eid (accessed 7 July 2021), n., meaning b.
[561] See, e.g. Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:I, p. 105.
[562] European Union's second written submission, para. 159 (quoting Appellate Body Reports, *China - HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.160).
[563] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161. See also European Union's second written submission, para. 159.
[564] European Union's second written submission, para. 159.
[565] European Union's second written submission, para. 159. (emphasis original)
[566] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.168-5.171.
[567] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.168.

investigation, as well as the duration of any identified price undercutting. As the Appellate Body explained, "an objective examination would have taken into account all the positive evidence relating to, *inter alia*, the contrary price movements of the [subject] imports and domestic [like product], as well as the limited period during which the perceived mathematical difference occurred".[568]

7.262. We agree with the Appellate Body's interpretation that an analysis of price undercutting must be objective and must take into account all relevant evidence. The Appellate Body's rejection of a mere "static examination", however, concerned whether the Chinese investigating authority's examination of price undercutting was based on an objective examination of positive evidence. The Appellate Body's statements were unrelated to the question of whether a price effect identified through a consideration of price undercutting may only be in the form of price suppression or price depression. On the contrary, the Appellate Body clearly held the same view as this Panel, having emphasized that, "[w]e do not read Article 3.2 as suggesting that the 'effect' of price undercutting must either be price depression or price suppression". The Appellate Body observed that, "while price undercutting by imports *may* lead to price depression or price suppression, 'there is *no requirement* in Article 3.2 to demonstrate the existence of these other phenomena when considering the existence of price undercutting'".[569] This is consistent with our understanding of Article 3.2 and Article 15.2 and does not support the European Union's position that price undercutting is not, in and of itself, a price effect. We therefore do not agree with the European Union's characterization of the USITC's analysis of price undercutting as a second volume analysis, and do not consider it relevant to further examine that proposition.

7.4.5.2 Whether the USITC's price effects analysis was not based on an objective examination of positive evidence in violation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.263. In the previous section we disagreed with the European Union's characterization of the USITC's examination of price undercutting as a second volume analysis. Having rejected this view, we now directly address the European Union's various arguments in support of its position that the USITC's price undercutting analysis itself was not based on an objective examination of positive evidence, and thus violated Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[570] We approach these arguments based of our understanding that the USITC's analysis of price undercutting was an examination of price effects, not a volume analysis.

7.264. The European Union argues the USITC failed to conduct an objective examination of price effects based on positive evidence because the USITC (a) concluded that underselling resulted in a loss of market share in the retail sector without adequate supporting evidence[571]; (b) only considered price effects in the retail sector and not at the level of the domestic industry as a whole[572]; and (c) improperly extended its conclusions concerning price effects in the retail sector to the

[568] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.169.
[569] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.156. (emphasis original)
[570] European Union's first written submission, paras. 550-551 and 556-557; second written submission, para. 157.
[571] European Union's first written submission, para. 543; second written submission, para. 157; and opening statement at the first meeting of the Panel, para. 125.
We note that the United States asserted following the second Panel meeting that the European Union's argument that the USITC's price effects analysis was unsupported by positive evidence is outside the Panel's terms of reference, alleging that arguments to this effect constitute a "wholly separate claim" that was not identified in the European Union's panel request. (United States' 25 February 2021 response to Panel question No. 15, para. 51). We reject the United States' assertion. The European Union's request for establishment clearly identified a claim that "the USITC's price effects analysis lacked positive evidence". (European Union's panel request, p. 2). This description is sufficient to identify the claim. Furthermore, no due process issues arise, as the European Union raised its arguments in its opening statement at the first meeting of the Panel and the United States had the opportunity to respond, which it did in its second written submission. (United States' second written submission, paras. 75-79).
[572] European Union's first written submission, paras. 531 and 540-551.

domestic industry as a whole.[573] The United States responds that the USITC's price effects analysis was based on an objective examination of positive evidence.[574]

7.265. In respect of the analysis below, we recall that an investigating authority's analysis of the effect of dumped or subsidized imports on prices in the domestic market for like products pursuant to Article 3.2 and Article 15.2 must comply with the overarching requirement contained in Article 3.1 and Article 15.1 that a determination of injury must be based on an objective examination of positive evidence.

7.4.5.2.1 Factual background

7.266. In the section of the Injury Determination entitled "Price Effects of the Subject Imports", the USITC recounted that it had collected pricing information on 4 products using data from 23 importers and 2 domestic producers.[575] The USITC observed that these data showed ripe olives from Spain undersold the domestic like product in 37 of 48 quarterly comparisons, with an average underselling margin of 30.3%.[576] The USITC stated that ripe olives from Spain "undersold the domestic like product and captured market share in the retail sector of the market".[577] The USITC then examined the loss of market share in the retail branded and retail private label sectors.[578] The USITC observed that the data concerning lost sales "provides further support for the proposition that subject imports were sold at low prices and as a result captured market share from the domestic industry".[579] The USITC concluded that the underselling by ripe olives from Spain was significant because of the following factors:

> (1) [T]he predominant underselling by subject imports on a per instance and volume basis; (2) the high degree of substitutability between the domestic like product and subject imports; (3) the importance of price in purchasing decisions; (4) the underselling by subject imports which enabled them to capture market share from domestic industry in the important retail sector; and (5) the reports of lost sales.[580]

7.4.5.2.2 Whether the USITC concluded that underselling resulted in a loss of market share in the retail sector without adequate supporting evidence

7.267. We begin with the European Union's assertion that the USITC concluded that underselling resulted in a loss of market share in the retail sector without adequate supporting evidence. The European Union challenges four aspects of the data relied upon by the USITC in drawing that conclusion. These are that (a) the purchasers responding to questionnaires used to identify lost sales were mainly distributors[581]; (b) the identified underselling was concentrated in the institutional channel[582]; (c) there were instances of overselling in the retail channel in two out of three years[583]; and (d) the USITC failed to produce a price undercutting margin specifically for the retail channel.[584] We consider each of these in turn.[585]

---

[573] European Union's first written submission, paras. 531 and 552-556.
[574] United States' second written submission, paras. 75-79; 26 March 2021 responses to Panel question No. 1, paras. 1-6, and No. 2, paras. 7-23; and 13 April 2021 comments on the European Union's 26 March 2021 response to Panel question No. 1, paras. 9-18.
[575] Injury Determination, (Exhibit EU-5), pp. 19-20.
[576] Injury Determination, (Exhibit EU-5), p. 20.
[577] Injury Determination, (Exhibit EU-5), p. 20.
[578] Injury Determination, (Exhibit EU-5), pp. 20-21. The United States clarified in response to Panel questions that the "retail branded sector" refers to domestic shipments of branded product to retailers, that references to the "retail private label sector" refer to domestic shipments of private label product to retailers, and that references to the "retail sector" reflect the sum of the prior two categories. (United States' 26 March 2021 response Panel question No. 2, para. 15).
[579] Injury Determination, (Exhibit EU-5), p. 21.
[580] Injury Determination, (Exhibit EU-5), p. 21.
[581] European Union's second written submission, para. 157.
[582] European Union's second written submission, para. 157.
[583] European Union's second written submission, para. 157.
[584] European Union's second written submission, para. 157.
[585] We note that paragraphs 7.267-7.275 include a discussion of factual statements made by the United States in response to questions from the Panel following the second Panel meeting. (United States' 26 March 2021 response to Panel questions). As discussed above, these factual statements

7.268. We observe that Article 3.2 and Article 15.2 do not specify what methodology an investigating authority must employ when considering price undercutting.[586] Whatever methodology is adopted, however, is subject to the overarching requirement contained in Article 3.1 and Article 15.1 that it be objective and based on positive evidence.[587] We recall that, to perform an objective examination, an investigating authority must support its findings with reasoning that is coherent and internally consistent.[588] We further recall that, while we must address the European Union's argument through a critical analysis of the USITC's examination of price undercutting, a panel is not to undertake a *de novo* review of the investigation, nor substitute its judgment for that of the investigating authority.[589]

7.269. The European Union first alleges that the lost sales data referred to by the USITC do not support the USITC's findings concerning the retail sector because purchasers responding to questionnaires used to identify lost sales were mainly distributors, not retailers.[590] We recall that the USITC observed that data concerning lost sales "provides further support for the proposition that subject imports were sold at low prices and as a result captured market share from the domestic industry".[591] Most relevantly, the USITC observed that of 25 responding purchasers (a) 13 reported that they had purchased subject imports instead of domestically produced product since 2015; (b) 12 of these 13 purchasers reported that subject import prices were lower than those for the domestically produced product; and (c) 6 of the 13 purchasers reported that price was a primary reason for its decision to shift its purchases from the domestic like product to subject imports.[592] In response to questions the United States clarified, however, that of the 13 purchasers who reported that they purchased subject imports rather than the domestic product, 6 were retailers.[593] The United States also clarified that of the 12 purchasers who reported that the subject imports were lower priced than the domestic like product, there were also 6 retailers.[594] The United States further explained that, of the 6 purchasers who reported that lower prices were the primary reason that they purchased subject imports rather than the domestic like product, 4 were retailers.[595] It is clear, therefore, that a large portion of purchasers in each relevant category of the lost sales data were retailers. We consequently find that an objective investigating authority could have treated the lost sales data as supporting the USITC's conclusion that underselling by subject imports resulted in a loss of market share by the domestic industry in the retail sector.

7.270. The European Union's second argument is that the fact that the underselling was concentrated in the institutional sector means there was no evidence supporting the finding that underselling resulted in a loss of market share in the retail sector by the domestic industry.[596] Of the four pricing products used by the USITC to collect pricing data, two were retail products (Products 1 and 2) and two were institutional products (Products 3 and 4).[597] The European Union argues that,

---

were made by the United States in response to questions from the Panel intended to clarify certain data redacted in the version of the Injury Determination available to the Panel. (See paras. 7.196-7.201 above). The United States did not provide the unredacted Injury Determination in support of these factual statements. The European Union was provided with an opportunity to comment on the United States response, however, and did not challenge the accuracy of the relevant factual statements made by the United States. (European Union's 13 April 2021 comments on the United States' 26 March 2021 response to Panel questions). In light of the fact that the United States has access to the unredacted version of the Injury Determination, and the absence of any challenge by the European Union to the accuracy of such factual statements, we will treat the factual statements by the United States discussed in paragraphs 7.267-7.275 as provided in good faith and accepted by the parties for the purpose of this dispute.

[586] This view is shared by prior panels. For example, the panel in *EC – Tube or Pipe Fittings* stated that "Article 3.2 requires the investigating authorities to consider whether price undercutting is 'significant' but does not set out any specific requirement relating to the calculation of a margin of undercutting, or provide a particular methodology to be followed in this consideration." (Panel Report, *EC – Tube or Pipe Fittings*, para. 7.281. See also, e.g. Panel Reports, *Thailand – H-Beams*, para. 7.159; *EU – Biodiesel (Indonesia)*, para. 7.137; and *EC – Countervailing Measures on DRAM Chips*, para. 7.334).

[587] For a similar conclusion, see, e.g. Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 204; and *China – GOES*, para. 130.

[588] See para. 7.209 above.

[589] See para. 7.4 above.

[590] European Union's second written submission, para. 157.

[591] Injury Determination, (Exhibit EU-5), p. 21.

[592] Injury Determination, (Exhibit EU-5), p. 21.

[593] United States' 26 March 2021 response to Panel question No. 2, para. 22.

[594] United States' 26 March 2021 response to Panel question No. 2, para. 22.

[595] United States' 26 March 2021 response to Panel question No. 2, para. 22.

[596] European Union's second written submission, para. 157.

[597] Injury Determination, (Exhibit EU-5), fn 112.

while the USITC observed an average underselling margin of 30.3%, "footnote 117 [of the Injury Determination] makes clear that such underselling was 'concentrated' in the institutional sector and hence could not lead to any market share losses – the effect that the USITC is considering – since the USITC only found such share loss for the retail 'segment'".[598] The actual text of this footnote, however, does not support the European Union's assertion that underselling by Products 1 and 2 in the retail sector "could not lead to any share losses". The relevant part of footnote 117 of the Injury Determination reads: "[w]e recognize that on an overall volume basis the underselling by subject imports was concentrated in Products 3 and 4 (i.e., institutional), the two pricing products involving the largest quantities of subject imports during the [period of investigation] and in the sector of the market where subject imports had a large presence".[599] In our view, the mere fact that the *volume* of underselling was concentrated in the institutional products (Products 3 and 4) does not support the conclusion that there was no underselling by the retail products (Products 1 and 2), or that such underselling could not result in a loss of market share in the retail sector. On the contrary, it is unsurprising that the volume of underselling would be concentrated in the pricing products involving the largest quantities of subject imports (i.e. Products 3 and 4). Accordingly, we do not agree with the European Union's characterization of the implications of the USITC's statements in footnote 117.

7.271. The European Union thirdly argues that the USITC's finding was unsupported by evidence because "there were even instances of overselling in the retail channel in two out of three years".[600] We agree that the Injury Determination confirms the existence of overselling in two years, stating "[i]nstances of overselling occurred in products 1-2 (retail products) in 2015 and 2016 only".[601] There was thus no overselling in 2017, the final year of the period of investigation for the Injury Determination. In total, the USITC identified 11 instances of overselling with an average overselling margin of 10.9%.[602] However, in our view, the mere fact that there was overselling does not establish that underselling could not have resulted in market share loss by the domestic industry. The Injury Determination indicates that Product 1 recorded four-quarters of underselling and eight-quarters of overselling, while Product 2 recorded nine-quarters of underselling and three-quarters of overselling.[603] Products 1 and 2 undersold the domestically produced product in 54% of quarterly comparisons, which reflected 62% of the total import shipments of those two pricing products.[604] For each product, the average underselling margin exceeded the average overselling margin.[605] There was thus a greater volume of underselling, and at greater margins, than of overselling. Furthermore, the underselling was more concentrated towards the end of the period of investigation, as instances of overselling occurred in Products 1 and 2 in 2015 and 2016, but not 2017.[606] In light of these facts we conclude that an objective investigating authority could have reasonably treated the underselling data concerning Products 1 and 2 as supporting the conclusion that underselling resulted in a loss of market share in the retail sector.[607]

7.272. Lastly, the European Union argues that the USITC "provided no undercutting margin for the retail channel in its analysis, only an average industry-wide margin of 30.3 percent", and that this was insufficient to show underselling in the retail channel.[608] The European Union correctly observes that the price undercutting margins were not prepared on the basis of the retail sector, but in relation to each pricing product.[609] As the United States conceded, the USITC's pricing data were based on

[598] European Union's first written submission, para. 543.
[599] Injury Determination, (Exhibit EU-5), fn 117 and p. 20.
[600] European Union's second written submission, para. 157. (emphasis original)
[601] Injury Determination, (Exhibit EU-5), p. V-11.
[602] Injury Determination, (Exhibit EU-5), p. V-11, table V-10.
[603] Injury Determination, (Exhibit EU-5), p. V-11, table V-10.
[604] United States' 26 March 2021 response to Panel question No. 2, para. 23.
[605] United States' 26 March 2021 response to Panel question No. 2, para. 23.
[606] Injury Determination, (Exhibit EU-5), p. V-11.
[607] We agree with the panel's observation in *EC – Tube Fittings*, the "fact that certain sales may have occurred at 'non-underselling prices' does not eradicate the effects in the importing market of sales that *were* made at underselling prices", given that "there might be a considerable number of sales at undercutting prices which might have had an adverse effect on the domestic industry". (Panel Report, *EC – Tube or Pipe Fittings*, para. 7.277 (emphasis original)).
[608] European Union's second written submission, para. 157.
[609] In addition to stating the average industry-wide price undercutting margin of 30.3%, the USITC also refers to table V-10 which contains price undercutting margins specific to each pricing product. (Injury Determination, (Exhibit EU-5), table V-10). While the price undercutting margins specific to each pricing product are redacted in the version of the Injury Determination available to the Panel, we have not reason to doubt that these were calculated by the USITC.

product type, not purchaser, and "[t]he USITC did not calculate underselling margins specific to any channel of distribution".[610] In other words, the two relevant retail pricing products, Products 1 and 2, were sold to both retailers and distributors.

7.273. We observe that the USITC did not prepare data specifically for sales to retailers and thus did not have a price undercutting margin specific to the retail sector, despite relying on this data to conclude that there had been significant underselling in the retail sector.[611] The European Union maintains that the USITC's conclusions as to price undercutting in the retail sector were thus unsupported, as the data concerning price undercutting did not specifically relate to the retail channel.[612] The European Union seeks to support this assertion by observing that a price undercutting margin at the industry level could mask overselling in a particular sector, such as the retail channel.[613] The United States, however, responds that the relevant pricing data were collected uniformly at the same level of trade, specifically the first arm's length sale from the importer or producer to the purchaser.[614] The United States asserts that there was no evidence indicating that the prices of those products would be different when sold to retailers and distributors.[615]

7.274. As noted above, Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement do not specify what methodology an investigating authority must employ when considering price undercutting.[616] In our view an objective investigating authority could reasonably have treated the underselling by Products 1 and 2, being *retail* products, as supporting an inference that such underselling occurred in the retail sector, thus resulting in the identified loss of market share. This inference was also consistent with evidence of lost sales, as discussed above.[617] We thus find that the European Union has not established that an objective investigating authority could not have concluded that the underselling identified in Products 1 and 2 resulted in the domestic market's loss of market share in the retail sector.

7.275. On the basis of the reasons above, we therefore conclude that the European Union has not established that the USITC's finding that price undercutting resulted in a loss of market share in the retail sector was unsupported by evidence.

7.4.5.2.3 Whether the USITC only considered price effects in the retail sector and not at the level of the domestic industry as a whole

7.276. We next turn to the European Union's argument that the USITC only considered price effects in the retail customer group and not in the whole market.[618] In particular, the European Union asserts that the USITC's price effects analysis only examined the loss of market share in the retail sector. The European Union argues that the loss of market share was "the 'effect[]' that the USITC chose to consider in the context of its price effect analysis for price undercutting" and that the USITC was thus "obliged to consider [the loss in market share] for the … industry *as a whole*".[619]

7.277. In our assessment, the European Union's argument is premised on a misconstrued understanding of the USITC's price effects analysis *as a second volume analysis*, and the erroneous view that the USITC's specific consideration of the loss of market share in the retail sector in a portion of the price effects analysis was the *entire* second volume analysis.[620] But this is not how the USITC undertook its price effects analysis. The USITC's price effects analysis did not only examine the retail sector, but compared quarterly prices across four pricing products and assessed lost sales data from a range of purchasers.[621] The four pricing products represented sales across all customer groups and accounted for a significant portion of all sales of Spanish ripe olives. For example, in 2017 alone, the sales data for the pricing products was based on approximately 65.5%

[610] United States' 25 February 2021 response to Panel question No. 12, para. 46.
[611] United States' 25 February 2021 response to Panel question No. 12, para. 46.
[612] European Union's second written submission, para. 156.
[613] European Union's second written submission, para. 156.
[614] United States' 26 March 2021 response to Panel question No. 2, para. 19.
[615] United States' 26 March 2021 response to Panel question No. 2, para. 19.
[616] See para. 7.268 above.
[617] See para. 7.269 above.
[618] European Union's first written submission, para. 540.
[619] European Union's first written submission, para. 546. (emphasis original)
[620] See, e.g. European Union's second written submission, para. 164.
[621] Injury Determination, (Exhibit EU-5), pp. 18-20.

of reported shipments of subject imports from Spain.[622] The USITC's examination of price undercutting was thus not limited to a consideration of the price of sales to retailers, but rather took into account the prices across the whole market. The European Union's argument that the USITC's price effects analysis only considered the retail sector is thus not factually supported and fails.[623]

7.278. The European Union also argues that the view of the dissenting USITC commissioner "fully supports" the argument that the USITC's price effects analysis failed to properly consider the market as a whole.[624] The European Union argues that this is because the dissenting commissioner "focused her analysis under 'Price Effects of Subject Imports' on the *overall* market shares, not the retail segment".[625] The European Union then quotes three paragraphs of the dissenting commissioner's analysis in their entirety and concludes that the commissioner's statements "speak for themselves".[626] We agree that the dissenting commissioner concluded that the underselling by Spanish ripe olives was not significant.[627] However, both the majority and the dissent employed the same market-wide data regarding price comparisons and lost sales to assess the existence and significance of price undercutting.[628] Therefore we disagree that the dissenting commissioner's analysis establishes that the majority failed to properly consider the market as a whole, and consequently reject the European Union's argument to that effect.

7.4.5.2.4 Whether the USITC improperly extended its conclusions concerning the consideration of price effects in the retail sector to the domestic industry as a whole

7.279. Finally, the European Union argues the USITC "improperly extend[ed] its consideration of price effects for the retail 'segment' to the entire domestic industry without any evidence, reasoning or explanation".[629] The European Union bases this argument on the language of the USITC's concluding paragraph of its price effects analysis.[630] The USITC concluded:

> Accordingly, based on the current record, we find that there was significant price underselling of the domestic like product by subject imports. As a result of this underselling, subject imports captured market share from the domestic industry in the large and important retail sector while maintaining their significant presence in the U.S. market for ripe olives throughout the [period of investigation]. The low-priced subject imports consequently had significant adverse effects on the domestic industry, which are described further below.[631]

7.280. The European Union argues that the reference in the first sentence of this extract to "the current record" is a reference only to "price effects (in the form of volume effects) in one out of three 'segments' (retail) and not in the industry as a whole".[632] The European Union argues that the reference to "underselling of the domestic like product by subject imports" in the first sentence, and the statement that subject imports had adverse effects "on the domestic industry" in the final

[622] Injury Determination, (Exhibit EU-5), p. 20.
[623] The European Union further argues that the USITC failed to consider the distributional and institutional customer groups in a like manner as the retail customer group, without satisfactory explanation. (European Union's second written submission, paras. 163-169). As discussed above in relation to the USITC's volume analysis, however, we consider the USITC to have provided a satisfactory explanation for its particular focus on the retail sector. (See para. 7.240 above). In particular, the USITC observed in its examination of price undercutting that "[o]f particular note is that subject imports undersold the domestic like product and captured market share in the retail sector of the market, which was the largest and most important sector of the U.S. market for the domestic industry". (Injury Determination, (Exhibit EU-5), p. 20). We consider the USITC to have thus provided a clear and satisfactory explanation of its decision to focus on the retail sector as the largest and most significant sector for the domestic industry.
[624] European Union's first written submission, paras. 548-549 (referring to Injury Determination, (Exhibit EU-5), pp. 29-31 (dissenting view)).
[625] European Union's first written submission, para. 548. (emphasis original)
[626] European Union's first written submission, paras. 548-549.
[627] Injury Determination, (Exhibit EU-5), p. 31 (dissenting view).
[628] Compare Injury Determination, (Exhibit EU-5), pp. 20-21 (majority view) with pp. 29-30 (dissenting view).
[629] European Union's first written submission, para. 552.
[630] European Union's first written submission, para. 553.
[631] Injury Determination, (Exhibit EU-5), p. 22.
[632] European Union's first written submission, para. 553.

sentence, are both references to the domestic industry as a whole, and are thus unsupported by the USITC's findings in relation to underselling in the retail sector.[633]

7.281. We recall that we have already found above that the USITC's price effects analysis concerned the whole market and therefore related to the industry as a whole. Thus we consider that "the current record" referred to in the first sentence of the extract includes the USITC's analysis of *the whole market*, as opposed to just the section in which the USITC examined changes in market share in the retail sector. We also note that the USITC's statement in the final sentence that there were certain consequential adverse impacts on the domestic industry is based on an analysis "described further below". By "described further below", we understand the USITC to be referring to its impact and causation analysis in the following sections. This sentence, then, merely indicates the outcome of the forthcoming analysis, rather than being a conclusion that would appropriately be challenged on the basis of the USITC's price effects analysis. Consequently, we find that the European Union has failed to establish that the concluding paragraph of the USITC's price effects analysis shows that the analysis was not based on an objective examination of positive evidence.[634]

7.4.5.3 Conclusion on the USITC's price effects analysis under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.282. For the reasons above, we find that the European Union has not established that the USITC's examination of price undercutting should be characterized as a second volume analysis. We find further that the European Union has not demonstrated that the USITC's price effects analysis was not based on an objective examination of positive evidence. On this basis, we conclude that the European Union has not demonstrated that the USITC's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

7.4.6 The USITC's examination of the consequent impact of dumped and subsidized ripe olives from Spain

7.283. The European Union argues that the USITC's impact analysis was not based on an objective examination of positive evidence, and was thus inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement.[635] The European Union first argues that the USITC's findings concerning volume and price effects were not at the level of the industry as a whole and thus could not support a conclusion that ripe olives from Spain had a consequent impact on the domestic industry.[636] The European Union also argues that the USITC's impact analysis was itself not based on an objective examination of positive evidence.[637] The United States requests the Panel to reject the European Union's arguments in their entirety.[638] We examine the merits of the European Union's claims in the sections that follow.

[633] European Union's first written submission, para. 554.
[634] The European Union also asserts that the USITC's consideration of price effects provided no meaningful basis for causation regarding the domestic industry as a whole. (European Union's second written submission, para. 170; see also 10 June 2020 response to Panel question No. 22, para. 119 (referring to Appellate Body Reports, *China - HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.180); 8 September 2020 response to Panel question No. 3(c), paras. 92-95; and 12 November 2020 response to Panel question No. 29, para. 187). This argument is, however, based on the European Union's prior assertion that the "USITC considered a volume increase of Spanish imports only in the retail channel and considered a mere presence of Spanish imports for the industry as a whole". (European Union's second written submission, para. 170). We have already found that the USITC's volume and price effects analyses were not exclusively limited to the retail sector, and that there is no requirement to find an increase in volume under Article 3.2 and Article 15.2. (See paras. 7.226-7.282 above). The European Union's argument thus fails.
[635] European Union's first written submission, section VII(D); second written submission, section V(D).
[636] European Union's first written submission, paras. 574-589; second written submission, paras. 179-182.
[637] European Union's first written submission, paras. 566-573 and 590-597; second written submission, paras. 173-178 and 183-185.
[638] United States' first written submission, section V(C); second written submission, section IV(D).

7.4.6.1 Whether the USITC could have made a finding of consequent impact on the basis of its findings concerning volume and price effects

7.284. The European Union argues that the USITC did not make any findings concerning the volume and price effects of ripe olives from Spain at the "level of the domestic industry as a whole".[639] In relation to volume, the European Union observes that the USITC did not find an increase in subject imports in absolute terms, or relative to domestic consumption or production across the market as a whole.[640] In relation to price effects, the European Union observes that the price undercutting identified by the USITC only resulted in a loss of market share in the retail sector. The European Union asserts that such findings do not concern the domestic industry as a whole, and thus the USITC could not establish a consequent impact on the domestic industry.[641] The United States argues that the European Union's arguments are based on a misinterpretation of the relationship between the provisions of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.[642]

7.285. We recall that pursuant to Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement, a determination of injury must involve an objective examination based on positive evidence of both (a) the volume of the dumped or subsidized imports and the effect of the dumped or subsidized imports on prices in the domestic market for like products; and (b) the consequent impact of these imports on domestic producers of such products. Article 3.2 and Article 15.2 detail what is required for an examination of volume and price effects. Article 3.4 and Article 15.4 set forth the requirements for this examination of the impact of the dumped or subsidized imports. Article 3.4 of the Anti-Dumping Agreement provides that:

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

7.286. The list of economic factors and indices in Article 3.4 of the Anti-Dumping Agreement is the same as in Article 15.4 of the SCM Agreement, except that Article 15.4 changes the order of certain listed economic factors and indices, excludes "the magnitude of the margin of dumping", and includes a specific indicator concerning agriculture. We consider the obligations arising from the two provisions to be the predominantly the same for the purpose of addressing the arguments raised by the European Union.

7.287. The European Union's argument concerns the relationship between the findings an investigating authority makes in its examination of volume and price effects under Article 3.2 and Article 15.2, and the investigating authority's subsequent examination of the consequent impact of such volume and price effects under Article 3.4 and Article 15.4. We understand the European Union to contend that the USITC's finding that underselling resulted in a loss of market share by the domestic industry in the retail sector concerns only one sector of the market as a whole, and thus not the domestic industry as a whole. This argument relates to the requirement identified in prior Appellate Body reports, with which we agree, that an investigating authority must assess the impact of subject imports on the domestic industry as a whole.[643] We disagree, however, with the

[639] European Union's first written submission, paras. 574, 581, and 583. We note that the European Union's first written submission separates its argument that the USITC did not make any findings concerning the volume and price effects of ripe olives at level of the domestic industry as a whole into a section on volume and a section on price effects. (European Union's first written submission, section VII(D)(3), paras. 574-582 (regarding volume), and section VII(D)(4), paras. 583-589 (regarding price effects)). We will address these arguments together as, in our view, the substantive issues are the same.

[640] European Union's first written submission, para. 574.

[641] European Union's first written submission, paras. 574, 581, and 583.

[642] United States' first written submission, para. 216.

[643] We agree with the view of the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* that an impact analysis must be carried out with respect to the industry as whole. As the Appellate Body said: "while there is no exclusive methodology prescribed for an investigating authority to conduct an

European Union's contention that in the absence of volume and price effects "at the level of the domestic industry as a whole" there could be no impact.[644] We do not see any reason why findings concerning volume and price effects that relate to one sector cannot have consequent impacts on the industry as a whole. A deterioration in one sector could clearly impact the domestic industry as a whole. In our view, there is no need for every sector to be negatively impacted for the domestic industry's economic and financial indicia to deteriorate, although the degree of any such deterioration will be determined by the combined influence of developments in all sectors. We therefore reject the European Union's argument that the USITC's lack of findings concerning volume and price effects "at the level of the domestic industry as a whole" could not result in any consequent impact.

7.4.6.2 Whether the USITC's impact analysis was not based on an objective examination of positive evidence in violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement

7.288. The European Union makes two arguments that the USITC's impact analysis was itself not based on an objective examination of positive evidence. First, the European Union argues this is because the USITC failed to consider the ripe olive market as a whole.[645] Second, the European Union argues that the USITC improperly drew conclusions about the ripe olive industry as a whole from the retail sector.[646] The United States requests the Panel to reject the European Union's arguments in their entirety.[647]

7.289. In respect of the analysis below, we recall that an investigating authority's analysis of the consequent impact of dumped or subsidized imports on the domestic industry pursuant to Article 3.4 and Article 15.4 must comply with the overarching requirement contained in Article 3.1 and Article 15.1 that a determination of injury must be based on an objective examination of positive evidence.

7.4.6.2.1 Factual background

7.290. In the section of the Injury Determination titled "Impact of the Subject Imports", the USITC examined the consequent impact of Spanish ripe olives on the domestic industry. The USITC relevantly stated:

> U.S. processors' output indicia were mixed from 2015 to 2017. On the one hand, U.S. processors' production capacity was stable between 2015 and 2017, production increased by *** percent, and capacity utilization increased by *** percentage points. On the other hand, U.S. processors' U.S. shipments (by quantity) declined by *** percent. Inventories generally increased from 2015 to 2017.
>
> U.S. processors' employment-related data also were mixed. The number of production and related workers ("PRWs"), total hours worked, and hours worked per PRW each declined overall from 2015 to 2017. However, wages paid, hourly wages, and worker productivity each increased overall between 2015 and 2017.
>
> Many of the U.S. processors' financial performance indicia deteriorated over the [period of investigation]. Net income fell by *** percent from 2015 to 2017 while operating income declined by *** percent during the same period. As a ratio to net sales, net income and operating income also both declined, by *** percentage points and *** percentage points, respectively. Capital expenditures fell by *** percent, and research

examination under Article 3.4, an investigating authority's examination of the relationship between the dumped imports and the state of the domestic industry must be one that enables the investigating authority to derive an understanding about the impact of the dumped imports on the domestic industry as a whole". (Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.204 (emphasis omitted)).

[644] European Union's first written submission, paras. 574, 581, 583, and 588.

[645] European Union's first written submission, paras. 566-573.

[646] European Union's first written submission, paras. 590-597; second written submission, paras. 177-178 and 183-185.

[647] United States' first written submission, paras. 219-231.

> and development expenses also declined. Although total net assets increased, the operating return on assets declined from 2015 to 2017.
>
> We find that subject imports from Spain had a significant impact on the domestic industry. As discussed above, the significant volumes of subject imports that undersold the domestic like product captured market share from the domestic industry in its largest sector of the market – the retail sector – and also resulted in U.S. processors of ripe olives carrying increasing inventories. There is evidence in the record indicating that the retail sector was the domestic industry's most important sector of the U.S. market for ripe olives and one in which the domestic industry lost profits during the [period of investigation]. As a result, several of the domestic producers' indicators were worse than they would have been otherwise.[648]

7.4.6.2.2 Whether the USITC's impact analysis only examined the retail sector and not the industry as a whole

7.291. We first address the European Union's argument that the USITC only examined the retail sector and not the industry as a whole, and therefore did not conduct an objective examination.[649] The European Union bases its argument on the fourth paragraph of the USITC's impact analysis extracted above. The European Union maintains that the economic indicia of market shares, inventories, and lost profits referred to in that paragraph were only examined with respect to the retail sector.[650] The European Union asserts that "there is no explanation by the USITC why three negative economic factors related to the retail segment should impact the domestic industry as a whole".[651]

7.292. In our view, the European Union's argument misconstrues the Injury Determination. The European Union's reading of the determination fails to consider the context of the USITC's discussion of the loss of market share in the retail sector within the broader impact analysis. The USITC indicated that the loss of market share in the retail sector resulted in increased inventories and lost profits. The USITC observed that "[a]s a result, several of the domestic producers' indicators were worse than they would have been otherwise". The USITC does not specify which indicators it refers to here, but in our view this statement clearly relates to, and is consistent with, the USITC's identification in the immediately preceding paragraph that "[m]any of the U.S. processors' financial performance indicia deteriorated over the [period of investigation]", including net income, operating income, capital expenditure, research and development expenses, and operating return on assets.[652] These indicators were all considered on an industry wide basis in the preceding paragraph. The 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".[653] In our view, the USITC's discussion of the domestic industry's loss of market share and consequent increase in inventories and loss of profits was clearly linked with the identified deterioration of a range of economic indicators affecting the whole domestic industry. We are therefore not convinced by the European Union's assertion that the USITC only considered economic factors related to the retail sector, as it ignores the clear connection drawn by the USITC between the loss of market share in the retail sector and the deterioration of a range of industry wide economic indicators.

7.293. The European Union also observes in support of its argument that the USITC's impact analysis exclusively considered the retail sector the fact that the "dissenting opinion equally found that there was no impact on the domestic industry as a whole".[654] As we addressed above, we do not consider the mere fact that a dissenting view exists to establish that the majority's findings were not based on an objective examination of positive evidence.[655] The European Union has provided no further explanation as to why the dissenting commissioner's conclusion that there was no significant

[648] Injury Determination, (Exhibit EU-5), pp. 22-24. (fns omitted; redacted original)
[649] European Union's first written submission, para. 566.
[650] European Union's first written submission, para. 568.
[651] European Union's first written submission, para. 568.
[652] Injury Determination, (Exhibit EU-5), pp. 23-24.
[653] European Union's second written submission, para. 174; see also further discussion of this at United States' first written submission, para. 229.
[654] European Union's first written submission, para. 570 (referring to Injury Determination, (Exhibit EU-5), p. 32 (dissenting view)).
[655] See para. 7.216 above.

impact on the domestic industry as a whole establishes that the majority's impact analysis only considered the retail sector. Rather, as discussed above, in our view, the majority connected the domestic industry's loss of market share, and consequent increase in inventories and loss of profits, with the deterioration of a range of economic indicators affecting the whole domestic industry. As such, we do not consider that the European Union's reference to the dissenting opinion of one of the commissioners sufficient to establish that the majority's impact analysis was not based on an objective examination of positive evidence.[656]

7.4.6.2.3 Whether the USITC's impact analysis improperly extended the USITC finding of market share losses in the retail sector to the industry as a whole

7.294. We next consider the European Union's argument that the USITC's conclusion in the impact section improperly extended the USITC's findings concerning the impact of market share losses in the retail sector to the industry as a whole without any evidentiary basis.[657] The European Union bases this argument on the last two sentences of the section of the Injury Determination titled "Impact of the Subject Imports", where the USITC stated:

> Thus, other factors cannot explain the domestic industry's market share losses in the retail sector and overall financial performance declines.
>
> Accordingly, for the above reasons, we conclude that subject Imports [*sic*] had a significant adverse impact on the domestic industry.[658]

7.295. In relation to these final sentences, the European Union argues that the USITC did not explain how its findings concerning a loss of market share in the retail sector could impact the industry as a whole.[659] For the reasons discussed above, we find this argument to be unpersuasive, as we found the USITC to have connected the increase in inventories and lost profits resulting from a loss of market share in the retail sector with the identified deterioration in certain industry wide financial indicators.[660]

7.296. The European Union also argues that the USITC failed to explain how it could arrive at its finding of significant impact when only around 20% of Spanish imports were sold into the retail

---

[656] In its second written submission the European Union recharacterizes its argument that the USITC failed to examine the consequent impact on the domestic industry as a whole by distinguishing between concerns relating to the USITC's "assessment of the economic factors" and the "assessment of the relationship between subject imports and the state of the domestic industry (consequent impact)". (European Union's second written submission, paras. 174-178). We understand the arguments made in relation to the "assessment of the relationship between subject imports and the state of the domestic industry (consequent impact)" to be the same in substance as the European Union's argument that the USITC improperly drew conclusions about the ripe olive industry as a whole from the retail sector, which we dismiss at paras. 7.294-7.297 below.

In relation to the USITC's "assessment of economic factors", the European Union also introduced a separate line of argument that "the use of non-segmented economic indicators after the US 'segmented' the industry in the context of Article 15.2 [of the SCM Agreement] is in itself WTO-inconsistent". (European Union's 12 November 2020 response to Panel question No. 31, para. 196; see also second written submission, para. 176). As discussed above, we do not adopt the European Union's characterization of the Injury Determination as based on a "segmented analysis", nor do we consider the European Union to have established that the USITC's consideration of customer groups was, in and of itself, not based on an objective examination of positive evidence. (See paras. 7.205-7.217 above). We thus disagree with the premise of the European Union's argument and reject it on that basis.

[657] European Union's first written submission, paras. 591-597. We note that the European Union divide this argument into two sections. The first of these concerns the USITC's allegedly improper extension of its "findings of an impact through *volume effects* in the retail 'segment' to the industry as a whole". (European Union's first written submission, section VII(D)(5) (emphasis added)). The second concerns the USITC's allegedly improper extension of its "findings of an impact through *price effects* in the retail 'segment' to the industry as a whole". (European Union's first written submission, section VII(D)(6) (emphasis added)). As the European Union observes, however, the considerations underlying both these arguments are the same. (European Union's first written submission, para. 595). We have thus decided to treat these two arguments together as concerning the USITC's relevant finding that significant price undercutting resulted in a loss of market share in the retail sector, and consequently led to a deterioration of certain of the domestic industry's financial performance indicators. (Injury Determination, (Exhibit EU-5), pp. 23-24).

[658] Injury Determination, (Exhibit EU-5), p. 26.

[659] European Union's first written submission, paras. 591 and 595.

[660] See para. 7.293 above.

sector, and in circumstances where the volume of Spanish imports was decreasing at the industry level.[661] We do not agree that these facts would prevent an objective investigating authority arriving at the USITC's findings concerning impact. The USITC connected the domestic industry's loss of market share, and consequent increase in inventories and loss of profits in the retail sector, with the deterioration of a range of economic indicators affecting the whole domestic industry.[662] The facts observed by the European Union do not negate the impact on the domestic industry identified by the USITC resulting from a loss of market share in the retail sector, by far the largest market for the domestic industry.

7.297. We therefore reject the European Union's argument that the USITC's impact analysis was not based on an objective examination of positive evidence because the USITC improperly extended findings of market share losses in the retail sector to the industry as a whole without any evidentiary basis.

7.4.6.3 Conclusion on the USITC's impact analysis under Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement

7.298. For the reasons above, we find that the USITC's findings concerning volume and price effects did not prevent the USITC from properly examining the consequent impact of dumped and subsidized ripe olives from Spain, as required by Article 3.4 and Article 15.4. We find further that the European Union has not demonstrated that the USITC's impact analysis was not based on an objective examination of positive evidence. On this basis, we conclude that the European Union has not demonstrated that the USITC's impact analysis was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement, and Articles 15.1 and 15.4 of the SCM Agreement.

7.4.7 The USITC's causation analysis of dumped and subsidized ripe olives from Spain

7.299. In the section of the Injury Determination titled "Impact of the Subject Imports", the USITC additionally examined whether dumped and subsidized ripe olives from Spain were causing injury to the domestic industry. The USITC examined, *inter alia*, whether the injury identified as resulting from Spanish ripe olives should in fact be attributed to either a decline in apparent consumption or an increase in non-subject imports.[663] The USITC concluded that neither of these factors explained the injury experienced by the domestic industry.[664]

7.300. The European Union challenges the USITC's non-attribution analysis regarding the decline in apparent consumption[665] and the USITC's non-attribution analysis of non-subject imports, notably from Morocco.[666] The European Union alleges the USITC's non-attribution analyses were not based on an objective examination of positive evidence, inconsistently with Articles 3.1 and 3.5, and Articles 15.1 and 15.5.[667] The United States asks the Panel to reject the European Union's arguments in their entirety.[668]

7.301. We examine the merits of the European Union's claims in the sections that follow.

[661] European Union's second written submission, para. 184.
[662] Injury Determination, (Exhibit EU-5), pp. 23-24.
[663] Injury Determination, (Exhibit EU-5), pp. 25-26.
[664] Injury Determination, (Exhibit EU-5), p. 26.
[665] European Union's first written submission, paras. 620-630.
[666] European Union's first written submission, paras. 631-638.
[667] The European Union also claims that the USITC failed to carry out its causation assessment with respect to the domestic industry as a whole. (European Union's first written submission, para. 612). This argument concerns the same paragraph of the Injury Determination discussed at paras. 7.291-7.293 above in relation to the USITC's impact analysis. The European Union's couches its argument in essentially the same terms. We thus do not give separate consideration to the European Union's argument that the causation analysis failed to consider the domestic industry as a whole. This argument fails for the same reasons the argument concerning the impact analysis failed.
[668] United States' first written submission, section V(D); second written submission, section V(E).

7.4.7.1 Whether the USITC's non-attribution analysis of the decline in apparent consumption was not based on an objective examination of positive evidence in violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

7.302. The European Union claims that the USITC's non-attribution analysis regarding the decline in apparent US consumption of ripe olives during the period of investigation was not based on an objective examination of positive evidence.[669] The European Union maintains that the information available in the Injury Determination makes clear that any injury resulted from the decline in apparent consumption.[670] The United States argues 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.[671] The United States maintains that the USITC's non-attribution analysis regarding the decline in apparent consumption was therefore based on an objective examination of positive evidence.[672]

7.303. The USITC's analysis regarding the decline in apparent consumption of ripe olives was summarized as follows:

> As discussed above, apparent U.S. consumption decreased by *** percent during 2015 to 2017. However, this relatively modest decline in apparent U.S. consumption was smaller than the declines in shipments, net sales, and operating and net income experienced by the domestic industry.[673]

7.304. The USITC thus concluded that the "relatively modest" decline in apparent consumption was not the cause of the injury to the domestic industry because the decline in apparent consumption was less than the declines in (a) shipments, (b) net sales, and (c) operating and net income experienced by the domestic industry.[674]

7.305. Article 3.5 of the Anti-Dumping Agreement provides:

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

Article 15.5 of the SCM Agreement is substantially similar to Article 3.5 of the Anti-Dumping Agreement, with the exception that Article 15.5 concerns "subsidized imports".

7.306. Article 3.5 and Article 15.5 require an investigating authority to ascertain whether the dumped or subsidized imports are causing injury to the domestic industry. As part of that causation analysis, the investigating authority must "examine any known factors other than the [dumped or subsidized] imports which at the same time are injuring the domestic industry" and "the injuries caused by these other factors must not be attributed to the [dumped or subsidized] imports" (non-attribution). Article 3.5 and Article 15.5 do not set out a specific methodology for investigating authorities when undertaking a non-attribution analysis. However, the methods applied by an

[669] European Union's first written submission, paras. 620-630.
[670] European Union's first written submission, para. 623.
[671] United States' first written submission, paras. 240-250.
[672] United States' first written submission, paras. 240-250.
[673] Injury Determination, (Exhibit EU-5), p. 25. (fn omitted; redacted original)
[674] Injury Determination, (Exhibit EU-5), p. 25.

investigating authority must comport with the overarching obligation in Article 3.1 and Article 15.1 to undertake an objective examination based on positive evidence.

7.307. Relying on the analysis by the dissenting USITC commissioner, the European Union asserts that "the decline in US consumption can perfectly explain the 'slight' decrease of sales by US producers and any alleged injury resulting therefrom".[675] The European Union asserts "the dissenting opinion … clearly explains" that "the factors invoked by the USITC, when looked at more closely and when put into their proper economic context, do not show that it was Spanish imports rather than declining US consumption that caused injury".[676] The European Union continues that "[o]n the basis of [the dissenting commissioner's] explanations it becomes evident … that it was the decline in consumption that caused injury, if any".[677]

7.308. The dissenting commissioner's analysis of the decline in consumption involved a consideration of the decline in apparent consumption against different factors to those focused on by the majority. The dissenting commissioner stated that, "despite the domestic industry selling and shipping slightly lower volumes over the [period of investigation], it did so at higher unit values and maintained steady and improving gross profitability during a period of declining apparent U.S. consumption".[678] The dissenting commissioner thus emphasized that the domestic industry's lower sales and shipment volumes were to some extent compensated for by higher unit values and improved gross profitability.[679]

7.309. The panel notes that the factual accuracy of the USITC's finding that the decline in apparent consumption was less than the decline in shipments, net sales, and operating and net income experienced by the domestic industry was not challenged by the dissenting commissioner nor by the European Union in its submissions.[680] We agree with previous Appellate Body and panel reports that Article 3.5 and Article 15.5 do not require that subject imports be the sole cause of injury to the domestic industry.[681] We consider that an objective investigating authority could reasonably rely on the fact that the decline in apparent consumption was less than in other key indicators to conclude that the decline in consumption was not the sole cause of the injury experienced by the domestic industry. In our view, then, the European Union has not established that an objective investigating authority could not have determined, as the majority did, that the decline in apparent consumption was not the sole cause of injury to the domestic industry.

7.310. The European Union alleges that the USITC failed to give proper consideration to certain facts observed by the dissenting commissioner, in particular the increase in unit values of domestic shipments during the period of investigation[682] and that the "domestic industry's gross income as a ratio to net sales actually increased during the [period of investigation]".[683] However, no substantive argument was presented to the Panel explaining why an objective investigating authority would have to give these factors the weight accorded to them by the dissenting commissioner when conducting the non-attribution analysis of the decline in apparent consumption.

7.311. Without wishing to overstate the point, we recall that the mere fact that a dissenting view exists does not establish that the majority's findings were not based on an objective examination of positive evidence.[684] Absent any persuasive reasons to conclude that an objective investigating authority would necessarily have considered the domestic industry's higher unit values and improved gross profitability when conducting the non-attribution analysis, and have concluded that the injury could not be attributed to the dumped and subsidized imports, our view is that the European Union's argument fails.

---

[675] European Union's first written submission, para. 628 (referring to Injury Determination, (Exhibit EU-5), p. 32 (dissenting view)).
[676] European Union's first written submission, para. 623.
[677] European Union's first written submission, para. 623. (fn omitted)
[678] Injury Determination, (Exhibit EU-5), p. 32 (dissenting view).
[679] Injury Determination, (Exhibit EU-5), p. 32 (dissenting view).
[680] Injury Determination, (Exhibit EU-5), p. 25.
[681] Appellate Body Reports, *US – Wheat Gluten*, para. 67; *US – Line Pipe*, para. 209. See also Panel Report, *China – Autos (US)*, para. 7.322.
[682] Injury Determination, (Exhibit EU-5), p. 32 (dissenting view).
[683] European Union's first written submission, para. 626 (referring to Injury Determination, (Exhibit EU-5), p. 32 (dissenting view)).
[684] See para. 7.216 above.

7.4.7.2 Whether the USITC's non-attribution analysis of non-subject imports from Morocco was not based on an objective examination of positive evidence in violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

7.312. The European Union claims that the USITC's non-attribution analysis regarding non-subject imports from Morocco was not based on an objective examination of positive evidence.[685] In particular, the European Union argues that an objective investigating authority would attribute injury to the increase of non-subject imports from Morocco over the period of investigation.[686] The United States argues that the USITC's findings were supported by the absence of non-subject imports from Morocco in the retail sector, and the comparatively small overall volume of Moroccan ripe olives.[687] The United States thus maintains that the USITC's analysis was based on an objective examination of positive evidence.[688]

7.313. The USITC's non-attribution analysis regarding non-subject imports from Morocco was summarized as follows:

> While nonsubject imports were generally the lowest-priced and captured market share from both the domestic industry and subject imports, subject imports had a substantially larger presence in the U.S. market than nonsubject imports throughout the [period of investigation]. Moreover, the record indicates that nonsubject imports captured market share from subject imports in the institutional sector of the U.S.[689]

7.314. The European Union argues that the "available import figures make crystal clear that it was the significant increase in non-subject imports that caused injury to the domestic industry, if any, not the decreasing Spanish imports".[690] The European Union finds support for this argument in data drawn from the records of relevant harmonized tariff schedule codes on the USITC's Dataweb platform.[691] A table contained in the European Union's first written submission and based on these data shows that Spanish imports decreased by 6.44% during the period of investigation, while Moroccan imports increased 100.28% (from a significantly lower base).[692] The United States, in contrast, asserts that Moroccan imports increased less than 20% during the period of investigation.[693]

7.315. We do not consider the fact that Spanish imports decreased while Moroccan imports increased at a whole market level implies that an objective investigating authority could not have attributed the loss of market share identified in the retail sector resulting from underselling by Spanish imports and consequent deterioration of certain economic indices. While Moroccan imports increased during the period of investigation, the absolute volume of non-subject imports was less than subject imports. Even relying on the higher rate of increase asserted by the European Union, Moroccan imports increased only from 5,633 tonnes to 11,282 tonnes during the period of investigation.[694] This volume was far below that of Spanish ripe olives, even with Spanish imports per annum declining from 35,037 tonnes to 32,782 tonnes across the period of investigation.[695] Furthermore, the USITC observed that increasing Moroccan imports captured market share from Spanish ripe olives in the institutional sector, not from domestic ripe olives in the retail sector.[696] We thus consider that an objective investigating authority could have arrived at the

[685] European Union's first written submission, paras. 631-638.
[686] European Union's first written submission, para. 633.
[687] United States' first written submission, paras. 252-258.
[688] United States' first written submission, paras. 252-258.
[689] Injury Determination, (Exhibit EU-5), p. 25. (fns omitted)
[690] European Union's first written submission, para. 636.
[691] European Union's first written submission, para. 633 (table 2: Import sources during the POI (short tonnes dry weight)).
[692] European Union's first written submission, para. 633 (table 2: Import sources during the POI (short tonnes dry weight)).
[693] United States' 13 April 2021 comments on European Union's 26 March 2021 response to Panel question No. 3, para. 20.
[694] European Union's first written submission, para. 633 (table 2: Import sources during the POI (short tonnes dry weight)).
[695] European Union's first written submission, para. 633 (table 2: Import sources during the POI (short tonnes dry weight)).
[696] Injury Determination, (Exhibit EU-5), pp. 25-26.

USITC's conclusion, regardless of whether the increase in volume of Moroccan imports was consistent with the figures presented by the United States or the European Union.[697]

7.316. The European Union also argues that the USITC's observation that "the record indicates that nonsubject imports captured market share from subject imports in the institutional sector" does not support the USITC's finding that Moroccan imports did not cause injury to the domestic industry.[698] In particular, the European Union argues that, for purposes of establishing causation, it is "irrelevant that Moroccan imports are mostly present in the institutional/food channel" because "Moroccan ripe olives are substitutable with domestic ripe olives".[699] This argument relies on the European Union's assertion that "Spanish imports cannot have caused injury to the domestic industry through market share losses" while non-subject imports "increased massively", were "cheaper", and were acknowledged by the USITC as having taken market share from both the domestic industry and subject imports.[700] We recall, however, that Article 3.5 and Article 15.5 do not require that subject imports be the sole cause of injury to the domestic industry.[701] We are further of the view that an objective investigating authority could find that evidence that increasing Moroccan imports captured market share in a sector in which the domestic industry had relatively few sales reasonably supports the USITC's conclusion. Consequently, we see no grounds to find that the USITC's consideration of non-subject imports was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

7.4.7.3 Conclusion on the USITC's causation analysis under Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

7.317. For the reasons above, we find that the European Union has not demonstrated that the USITC's non-attribution analysis of the decline in apparent consumption was not based on an objective examination of positive evidence. We further find that the European Union has not established that the USITC's non-attribution analysis of non-subject imports was not based on an objective examination of positive evidence. We thus find that European Union has not demonstrated that the USITC's causation analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

7.4.8 Consequential claims

7.318. In addition to its substantive arguments, the European Union argues that each of its allegations concerning the USITC's volume and price effects analyses resulted in consequential violations in subsequent parts of the USITC's injury investigation.[702] Having found that the European Union has failed to establish the merits of its substantive arguments concerning the USITC's analysis of volume and price effects, we similarly find that the European Union's consequential claims must also fail.

7.4.9 Conclusion in relation to the USITC's Injury Determination

7.319. For the reasons above, we thus conclude that the European Union has not demonstrated that the USITC's Injury Determination violated Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement or Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

---

[697] 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-subject imports from sources other than Morocco could establish that the USITC's non-attribution analysis 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.

[698] European Union's second written submission, para. 191.

[699] European Union's second written submission, para. 191.

[700] European Union's second written submission, para. 192.

[701] Appellate Body Reports, *US – Wheat Gluten*, para. 67; *US – Line Pipe*, para. 209. See also Panel Report, *China – Autos (US)*, para. 7.322.

[702] In relation to the USITC's volume analysis, see: European Union's first written submission, paras. 493, 512, 518, 560, 564-565, 600, and 610. In relation to the USITC's price effects analysis, see: European Union's first written submission, paras. 539, 551, 557, 560, 564-565, 600, and 610.

7.5 The European Union's claims concerning Aceitunas Guadalquivir's final subsidy margin and countervailing duty rate calculation

7.5.1 Introduction

7.320. In this section the Panel addresses the European Union's claims concerning the USDOC's calculation of the final subsidy margin and countervailing duty rate for one of the three individually examined respondents, Aceitunas Guadalquivir. The focus of the European Union's complaint is the USDOC's decision to rely upon information reported in Aceitunas Guadalquivir's response to the initial exporter's questionnaire to represent *different* values in the calculation of Aceitunas Guadalquivir's preliminary and final subsidy margin and countervailing duty rate.

7.321. In its preliminary determination, the USDOC calculated the subsidy margin and countervailing duty rate of each respondent by multiplying the weighted average per kilogram benefit by the volume of purchases of raw olives, *regardless of end-use* (the numerator), and then dividing that amount by sales of olives and olive products.[703] The USDOC determined Aceitunas Guadalquivir's numerator by relying upon the volume of raw olive purchases reported by Aceitunas Guadalquivir in response to the USDOC's initial 4 August 2017 questionnaire. The USDOC modified its calculation methodology in the final determination. In particular, the USDOC calculated the subsidy margin and countervailing duty rates by multiplying the weighted average per kilogram benefit by the volume of raw olives *used to produce subject merchandise*, and then dividing that amount by sales of subject merchandise.[704] For Aceitunas Guadalquivir, the USDOC once again used the volume of raw olive purchases reported by Aceitunas Guadalquivir in the 4 August 2017 questionnaire in calculating the numerator.

7.322. The European Union argues, as Aceitunas Guadalquivir did in the investigation[705], that the USDOC's initial 4 August 2017 questionnaire, properly understood, asked the respondents to report their total volume of raw olive purchases *regardless of end-use*, not the narrower subcategory of raw olive purchases *processed into subject merchandise*.[706] The European Union argues that the USDOC's actions after the 4 August 2017 questionnaire – including a 27 September 2017 request for the respondents to resubmit information regarding their suppliers of raw olives, and the USDOC's decision in its preliminary determination to calculate subsidy margins for the respondents based on raw olive purchases regardless of end-use[707] – show that Aceitunas Guadalquivir was correct in its understanding of the scope of the questions contained in the initial questionnaire.[708] In these circumstances, the European Union claims that the USDOC's final calculation of Aceitunas Guadalquivir's subsidy margin and countervailing duty rate was inconsistent with Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 the SCM Agreement, and that the USDOC failed to comply with the procedural obligations under Articles 12.1 and 12.8 of the SCM Agreement in relation to that calculation.[709] The European Union further claims consequential violations of Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement due to the USDOC's reliance on Aceitunas Guadalquivir's final subsidy margin in calculating the "all others" rate applied to all exporters and producers that were not individually investigated.[710]

7.323. The United States argues that the European Union's claims rely upon an incomplete presentation of the factual record. Contrary to European Union's assertions, the United States maintains that, in the initial 4 August 2017 questionnaire, the USDOC expressly requested each mandatory respondent to report purchases of raw olives *used to produce ripe olives* and, prior to the final determination, made clear that this was an essential fact under consideration. In doing so, the United States argues that the record reflects that the USDOC evaluated the evidence supplied

[703] PIDM, (Exhibit EU-1), p. 17; Aceitunas Guadalquivir preliminary determination, (Exhibit EU-36), pp. 2-3.
[704] FIDM, (Exhibit EU-2), p. 44.
[705] FIDM, (Exhibit EU-2), p. 41; Ministerial error memorandum, (Exhibit EU-69), p. 3.
[706] European Union's first written submission, para. 698.
[707] PIDM, (Exhibit EU-1); Aceitunas Guadalquivir preliminary determination, (Exhibit EU-36), p. 2.
[708] European Union's first written submission, paras. 699-704.
[709] European Union's first written submission, paras. 639-728.
[710] European Union's first written submission, paras. 729-730.

by Aceitunas Guadalquivir in an unbiased and objective manner and satisfied all notice and disclosure requirements.[711]

7.324. We begin by examining the European Union's substantive claims concerning the USDOC's calculation of Aceitunas Guadalquivir's final subsidy margin and countervailing duty rate, before turning to address the European Union's procedural claims.[712]

7.5.2 The USDOC's calculation of Aceitunas Guadalquivir's final subsidy margin and countervailing duty rate

7.325. The European Union asserts that the USDOC improperly based its calculation of Aceitunas Guadalquivir's final subsidy margin and corresponding countervailing duty rate on Aceitunas Guadalquivir's reported volume of purchases of raw olives, regardless of end-use, which was a purportedly larger volume than its purchases of raw olives processed into the subject merchandise, being ripe olives. The European Union claims that, in doing so, the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement, and consequently, Articles 19.1 and 32.1 of the SCM Agreement, because the USDOC failed to calculate precisely the amount of the subsidy granted on the imported product, leading the USDOC to impose countervailing duties on Aceitunas Guadalquivir in excess of what was required to offset the subsidies granted.[713] Moreover, to the extent that the USDOC's calculation is based on Aceitunas Guadalquivir's reported volume of purchases of raw olives, regardless of end-use, the European Union asserts that the calculation of Aceitunas Guadalquivir's countervailing duty rate differs from the calculation of the rates imposed on the mandatory respondents Agro Sevilla and Ángel Camacho without any justification, and thus is inconsistent with the requirement in Article 19.3 of the SCM Agreement to apply countervailing duties on a non-discriminatory basis.[714] Finally, the European Union also claims that the USDOC's approach to calculating the countervailing duty rate for Aceitunas Guadalquivir also violates the obligation contained in Article 10 of the SCM Agreement to "take all necessary steps" to ensure that the imposition of the duties complies with Article VI:3 of the GATT 1994 and the SCM Agreement.[715]

7.326. The United States argues that the record of the investigation refutes each of the European Union's claims. The United States argues that the USDOC, in its initial 4 August 2017 questionnaire, requested from each mandatory respondent (including Aceitunas Guadalquivir) purchase information for their raw olives processed into ripe olives. The United States contends that the USDOC used the information that each respondent reported in response to the USDOC's questionnaire to calculate the final subsidy rate for each respondent. In this way, the United States contends that the USDOC used a uniform calculation method to calculate each respondent's final subsidy rate and that the USDOC provided a reasoned and adequate explanation, based on positive record evidence, to support using the purchase information submitted by each of the three companies.[716]

7.327. The United States further contends that the European Union has not raised any of its arguments in the context of Article 14 of the SCM Agreement and therefore has not properly challenged the method for determining the subsidy "amount" in the determination at issue. In this regard, the United States argues that Article 14 of the SCM Agreement "speaks directly to the notion of calculating the amount of benefit in terms of the benefit to the recipient", and thus provides substantive rules against which "the appropriate amounts in each case" discussed in Article 19.3

[711] United States' first written submission, para. 260.
[712] We note that, although the European Union's panel request also refers to Article 12.5 of the SCM Agreement, the European Union did not subsequently pursue a claim under this provision in its submissions to the Panel. We therefore do not address this provision in our findings. (European Union's panel request, p. 2).
[713] European Union's first written submission, paras. 706-707. See also ibid. paras. 683 and 689.
[714] European Union's first written submission, para. 708.
[715] European Union's first written submission, para. 710.
[716] United States' first written submission, para. 288.

may be understood.[717] By failing to raise any of its arguments in the context of Article 14, the United States contends that the European Union's complaint must fail.[718]

7.328. We begin by addressing the United States' assertion that the European Union has not properly challenged the USDOC's determination of Aceitunas Guadalquivir's subsidy margin by failing to raise a claim under Article 14 of the SCM Agreement.

7.5.2.1 The legal basis of the European Union's claims in relation to the calculation of Aceitunas Guadalquivir's subsidy margin and countervailing duty rate

7.329. The United States argues that the European Union has not properly challenged the USDOC's determination of Aceitunas Guadalquivir's subsidy amount because the relevant provision under the SCM Agreement governing such calculations is Article 14, which the European Union has not relied upon. The United States maintains that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, which are the main legal bases of the European Union's claims, do not dictate precisely how an investigating authority should determine the appropriate denominator for a given numerator when calculating countervailing duty ratios. Rather, the United States maintains that these provisions only prescribe that the elements of the numerator and denominator must be determined so as to ensure that the level of duty does not exceed the amount of subsidy, in terms of subsidization per unit.[719] Similarly, the United States contends that the other provision the European Union relies upon, Article 19.3 of the SCM Agreement, does not speak to the substantive issue of what a subsidy is and how a benefit is found to exist.[720]

7.330. The European Union disagrees that it needed to bring a claim under Article 14 of the SCM Agreement in order to challenge the USDOC's calculation of Aceitunas Guadalquivir's subsidy margin, arguing that a determination of the amount of a subsidy benefit can comply with the specific guidelines in Article 14 but nonetheless contravene other disciplines, such as those in Article VI:3 of the GATT 1994 or Article 19 of the SCM Agreement. Thus, insofar as the USDOC's determination is inconsistent with *other* disciplines such as the calculation of benefit, there was no requirement for the European Union to bring a claim under Article 14.[721]

7.331. We note that Article 14 sets out disciplines and guidelines for the calculation of the amount of a subsidy in terms of benefit to the recipient. The *chapeau* to Article 14 provides in general terms that "any method used" to determine the benefit to the recipient shall be provided for in national legislation or implementing regulations; that the application of that method shall be transparent and adequately explained; and that the method must be consistent with the guidelines in subparagraphs (a)-(d).[722] These guidelines concern the following six types of financial contributions: government provision of equity capital, a government loan, a loan guarantee by a government, and the provision of goods and services or purchase of goods by a government. We see nothing in the terms of the *chapeau* of Article 14, or in the guidelines it prescribes, to suggest that it was intended to exhaustively define the Members' obligations with respect to the determination of the amount of a subsidy benefit. For example, Article 14 does not provide specific guidance with respect to how to determine the amount of a subsidy provided in the form of a grant to a recipient that produces input products alleged to indirectly subsidize a downstream imported processed product, which is the issue we are confronted with in this dispute. In this regard, we recall

[717] United States' first written submission, para. 298. The United States contends that Article 19 of the SCM Agreement is concerned with the primarily ministerial function of imposing and collecting countervailing duties once those duties are already calculated and determined in accordance with the obligations imposed by the preceding articles of the SCM Agreement. (United States' 12 November 2020 response to Panel question No. 15, paras. 46-49).

[718] United States' first written submission, para. 298; second written submission, paras. 105-107.

[719] United States' first written submission, para. 294 (referring to Appellate Body Report, *US – Washing Machines*, para. 5.269 ("[w]ithin these confines, the SCM Agreement does not dictate any particular methodology for calculating subsidy ratios, and does not specify explicitly which elements should be taken into account in the numerator and the denominator."))

[720] United States' first written submission, paras. 296-297. See also United States' 12 November 2020 response to Panel question No. 15, para. 46 ("Article 19 is concerned with the primarily ministerial function of imposing and collecting [countervailing duties] *once those duties are already calculated and determined* in accordance with the obligations imposed by the preceding articles of the SCM Agreement. Article 19 does not impose substantive requirements with respect to an investigating authority's calculation and determination of a [countervailing duty] rate" (emphasis original)).

[721] European Union's 12 November 2020 response to Panel question No. 41, paras. 215-218.

[722] Appellate Body Report, *Japan – DRAMS (Korea)*, para. 190.

our previous finding that under the terms of Article VI:3, an investigating authority considering how to countervail indirect subsidies must analyse whether and *to what extent* subsidies on inputs may have indirectly flowed to the processed product and, thereby, be included in the *determination of the total amount of subsidies* bestowed on the investigated product.[723] An investigating authority is required to make this determination in order to ensure that countervailing duties are not applied in an amount that is in excess of the estimated subsidy determined to have been granted to the investigated product. To this extent, we agree with previous Appellate Body reports that, under the terms of Article VI:3, an investigating authority is required to ascertain as accurately as possible the amount of subsidization bestowed on the investigated products to ensure that countervailing duties are not applied in excess of the subsidization of the subsidized product on the per unit basis adopted.[724]

7.332. Thus, we agree with the European Union that it was not required to bring a claim under Article 14 of the SCM Agreement in challenging the USDOC's determination of Aceitunas Guadalquivir's subsidy amount and corresponding countervailing duty rate. Accordingly, we see no reason to reject the European Union's claims simply because they were not raised under Article 14 of the SCM Agreement.

7.5.2.2 Whether the USDOC properly determined Aceitunas Guadalquivir's subsidy margin and corresponding countervailing duty rate

7.333. The European Union claims that the USDOC incorrectly determined Aceitunas Guadalquivir's final subsidy margin and corresponding countervailing duty rate when it used Aceitunas Guadalquivir's reported volume of purchases of raw olives, *regardless of end-use* – a purportedly larger volume of purchases than the volume of raw olive purchases used to process the subject merchandise. According to the European Union, the USDOC's reliance on this value in this way led it to erroneously calculate the numerator of Aceitunas Guadalquivir's final subsidy calculation, which the USDOC sought to determine by multiplying the weighted average per kilogram benefit by the volume of purchases of raw olives *that were processed into ripe olives*.[725] In the denominator of the calculation, the USDOC used Aceitunas Guadalquivir's sales of ripe olives.[726] Thus, the European Union contends that the resulting final margin and corresponding countervailing duty rate is "excessive and inappropriate".[727]

7.334. As we did in relation to the European Union's complaint against the USDOC's determination of pass-through, we begin our assessment of the European Union's claims with respect to the USDOC's calculation of Aceitunas Guadalquivir's final subsidy margin and countervailing duty rate by focusing on Article VI:3 of the GATT 1994. We recall that Article VI:3 of the GATT 1994 provides:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.[728]

7.335. Article VI:3 establishes that WTO Members may levy duties that "offset" subsidies in an amount not in excess of the estimated subsidy determined to have been granted, directly or indirectly, on the manufacture, production, or export of a product. Thus, under the terms of Article VI:3, an unbiased and objective investigating authority must ensure, and take the necessary

[723] See section 7.3.1.1 above.
[724] Appellate Body Reports, *US – Countervailing Measures on Certain EC Products*, para. 139; *US – Washing Machines*, para. 5.268.
[725] FIDM, (Exhibit EU-2), pp. 43-44; see also Aceitunas Guadalquivir final determination, (Exhibit EU-41), p. 2; Extract from Aceitunas Guadalquivir final calculation data, (Exhibit EU-47 (BCI)); and Extract from Aceitunas Guadalquivir final calculation data, tab BPS Growers, (Exhibit EU-76).
[726] FIDM, (Exhibit EU-2), pp. 43-44; see also Aceitunas Guadalquivir final determination, (Exhibit EU-41), p. 2; Extract from Aceitunas Guadalquivir final calculation data, (Exhibit EU-47 (BCI)); and Extract from Aceitunas Guadalquivir final calculation data, tab BPS Growers, (Exhibit EU-76).
[727] European Union's first written submission, para. 706.
[728] Fn omitted.

steps to ascertain as accurately as possible the amount of subsidization bestowed on the investigated products. In our view, this implies that an investigating authority's subsidy margin and countervailing duty calculations must be based on appropriate input values that are as accurate as possible. We examine whether the USDOC fulfilled this requirement when it relied upon the volume of raw olive purchases reported in Aceitunas Guadalquivir's 4 August 2017 questionnaire response, to determine its final subsidy margin and countervailing duty rate.

7.336. The parties disagree as to what information the USDOC solicited from the respondents in its initial 4 August 2017 questionnaire. They have also expressed different views about the nature of the raw olive purchases information Aceitunas Guadalquivir reported, as well as the extent to which subsequent USDOC requests for information and verification of Aceitunas Guadalquivir's questionnaire responses clarify and confirm the nature of Aceitunas Guadalquivir's reported purchases information.

7.5.2.2.1 The USDOC's initial 4 August 2017 questionnaire

7.337. The European Union argues that Aceitunas Guadalquivir correctly understood the 4 August 2017 questionnaire[729] as requesting information about the volume of raw olive purchases regardless of the processed olive product for which the raw olives were used.[730] Although the European Union acknowledges that the cover letter of the 4 August 2017 questionnaire instructs the respondents to provide the "requested information on your company's sources of raw olives that *were processed into ripe olives*"[731], the European Union asserts that the specific questions that followed (contained in attachment I to the questionnaire) were entitled "Sources of Raw and Ripe Olives" and did not direct the respondents to limit or separately report data with respect to the volume of raw olives purchased that are processed into ripe olives.[732]

7.338. The cover letter to the 4 August 2017 questionnaire describes the purpose behind the USDOC's initial enquiry in the following terms:

> The [USDOC] asks that you respond to the questions outlined in Attachment I to this letter and provide the requested *information on your company's sources of raw olives that were processed into ripe olives* during the period of investigation (POI) January 1, 2016, through December 31, 2016.[733]

7.339. This statement from the cover letter suggests that the USDOC was seeking information on the sources of raw olives used for ripe olive processing. At the same time, we note that the relevant questions attached to the cover letter were not drafted with the same distinction or qualification and did not direct the respondents to provide the volume of raw olives purchased that were *used to process ripe olives*. The United States argues that the "relevant"[734] question in this regard, was question 6 of the 4 August 2017 questionnaire. This question set out as follows[735]:

> *If your company processes ripe olives and obtains its raw olives from suppliers* that are affiliated with, but separately incorporated from your company or from suppliers that are not affiliated with your company, please *complete the attached "Template for*

[729] The USDOC's 4 August 2017 questionnaire and accompanying cover letter to Aceitunas Guadalquivir are contained in: Letter to Aceitunas Guadalquivir on questionnaire, (Exhibit EU-58). See also Letter to Agro Sevilla on questionnaire, (Exhibit USA-6); and Letter to Ángel Camacho on questionnaire, (Exhibit USA-7).

[730] European Union's first written submission, paras. 697 and 716; second written submission, para. 195. Thus, the European Union argues that "it cannot be argued that the data used by USDOC [to calculate Aceitunas Guadalquivir's subsidy] was ever indicated by [Aceitunas] Guadalquivir as being the volume of raw olives processed into ripe olives". (European Union's first written submission, para. 695).

[731] European Union's first written submission, paras. 643 and 698 (emphasis added). We note that this is also the position of the United States. (United States' first written submission, paras. 276-277 (referring to Letter to Aceitunas Guadalquivir on questionnaire, (Exhibit EU-58), p. 1)).

[732] European Union's first written submission, paras. 643 and 698.

[733] Letter to Aceitunas Guadalquivir on questionnaire, (Exhibit EU-58), p. 1 (emphasis added). See also Letter to Agro Sevilla on questionnaire, (Exhibit USA-6); and Letter to Ángel Camacho on questionnaire, (Exhibit USA-7).

[734] United States' first written submission, para. 276.

[735] Letter to Aceitunas Guadalquivir on questionnaire, (Exhibit EU-58), attachment I.

> *Suppliers of Raw Olives," to include all of those suppliers*. Please be sure to indicate whether the supplier(s) might be considered cross-owned with your company.[736]

7.340. On its own, we do not understand this question to have directed the respondents to report the volume of purchases of raw olives processed into ripe olives. Rather, what is required by this question is information about the suppliers of raw olives, in accordance with the "Template for Suppliers of Raw Olives". That template did not ask the respondents to distinguish and separately report data with respect to the volume of raw olives purchased to process ripe olives and the volume of raw olive purchased for any end-use.[737] Rather, the heading in this template concerning the volume of purchases simply calls for data about the "volume of raw olives purchased", without distinction or qualification.[738]

7.341. We recognize, however, that when read in conjunction with the cover letter, a respondent could well have understood question 6 to be asking for information about raw olive purchases that were used to process ripe olives. This appears to have been the understanding of two of the three mandatory respondents, Agro Sevilla and Ángel Camacho, who initially submitted only information on volumes of purchases of raw olives used to produce ripe olives.[739] Nevertheless, in our view, the fact that "Template for Suppliers of Raw Olives" simply asked for data on the "volume of raw olives purchased", without distinction or qualification, means that question 6 could have also been reasonably understood as asking for the volume of raw olives purchased, regardless of end-use.

7.342. The remaining questions in the 4 August 2017 questionnaire seeking purchase and production information are framed in a similarly general manner, and do not indicate whether information about purchases or production of raw olives must be limited to raw olives used to process into ripe olives. Question 7 provides:

> *If your company processes ripe olives* and you have no suppliers that are separately incorporated or unaffiliated, *please confirm that the raw olives your company processes into ripe olives are produced within your company* (that is, none of your suppliers are separately incorporated) and *report the quantity of raw olives produced by your company*. If not, please explain the sources of the raw olives you process.[740]

7.343. Question 8 provides:

> *If your company processes ripe olives* and produces raw olives, but you also have outside suppliers of raw olives, please complete the attached "Template for Suppliers of Raw Olives," for your outside purchases. Please also *report the quantity of raw olives produced by your company*.[741]

7.344. Both questions 7 and 8 sought information from responding companies that processed ripe olives from raw olives produced in-house. The first instruction in question 7 directs such companies to "confirm that the raw olives your company processes into ripe olives are produced within your

[736] Original emphasis omitted; emphasis added.
[737] Aceitunas Guadalquivir response to the sourcing questionnaire, (Exhibit EU-63); Agro Sevilla response to the sourcing questionnaire (public version), (Exhibit EU-17); and Ángel Camacho response to the sourcing questionnaire (public version), (Exhibit EU-68).
[738] Reporting template for processors of ripe olives, (Exhibit EU-61).
[739] In its response to the 27 September 2017 request (discussed below), Agro Sevilla submitted updated information to the USDOC, delineating between "[v]olume of Black Olives Purchased" (i.e. for purchases of raw olives processed into ripe olives) and "[v]olume of Green Olives Purchased" (i.e. for purchases of raw olives processed into other olive products). (Agro Sevilla revised olive sourcing data, (Exhibit EU-65 (BCI)); Agro Sevilla revised olive sourcing data (public version), (Exhibit EU-79)). Ángel Camacho submitted updated information also delineating between "[q]uantity Raw for Ripe" (i.e. for purchases of raw olives processed into ripe olives) and a column labelled "[q]uantity Raw for No Ripe" (i.e. for purchases of raw olives processed into other olive products). (Ángel Camacho revised olive sourcing data, (Exhibit EU-64 (BCI)); Ángel Camacho revised olive sourcing data (public version), (Exhibit EU-78)). For both Agro Sevilla and Ángel Camacho, figures for raw olives processed into ripe olives in their 27 September 2017 responses align with figures reported in response to the USDOC's 4 August 2017 questionnaire. (See also Agro Sevilla response to the sourcing questionnaire, (Exhibit EU-42 (BCI)); Agro Sevilla response to the sourcing questionnaire (public version), (Exhibit EU-17); Ángel Camacho response to the sourcing questionnaire, (Exhibit EU-44 (BCI)); and Ángel Camacho response to the sourcing questionnaire (public version), (Exhibit EU-68)).
[740] Letter to Aceitunas Guadalquivir on questionnaire, (Exhibit EU-58), attachment I. (emphasis added)
[741] Letter to Aceitunas Guadalquivir on questionnaire, (Exhibit EU-58), attachment I. (emphasis added)

company". This initial part of question 7 clearly states that the information the USDOC was requesting concerned in-house production of raw olives *processed into ripe olives*. In contrast, the second part of question 7 is expressed in more general terms, simply asking companies to report the "quantity of raw olives produced by your company". While it is possible to read this second instruction, in the light of the first, to be limited to raw olives processed into ripe olives, the fact that the USDOC decided not to specify, for example, that it was requesting information on the "quantity of raw olives produced [for this purpose] by your company", leaves open another reasonable interpretation – that is, that the USDOC wanted companies to report the volume of raw olives produced in-house for any end-use. In our view, question 8 offers even less clarity in this regard, as it simply asks for relevant respondent companies to complete the same template as question 6 (which we recall did not distinguish between end-uses for which raw olives were processed), and to report the "quantity of raw olives produced by your company", without distinction or qualification. Thus, we find that questions 7 and 8 do not help a reasonable respondent to understand whether the purchase information the USDOC requested in question 6 was limited to the volume of raw olives processed into ripe olives. In this respect, we find these questions to be as unspecific as question 6.

7.345. Thus, we disagree with the United States that the 4 August 2017 questionnaire *clearly* identified that the USDOC was requesting the respondents to report purchase information for raw olives processed into ripe olives.[742]

7.346. The United States argues that the USDOC had no obligation to investigate whether Aceitunas Guadalquivir provided different information than what the USDOC had allegedly asked for in the 4 August 2017 questionnaire, and that Aceitunas Guadalquivir should have asked for clarification if it considered the questionnaire was ambiguous. In this connection, the United States refers to the cover page of the questionnaire, which instructed respondents to consult with the officials in charge if there were questions during the investigation. Thus, according to the United States, not having received questions from Aceitunas Guadalquivir regarding its request for information, an unbiased and objective investigating authority could have concluded, as the USDOC did, that the information submitted by Aceitunas Guadalquivir in response to the 4 August 2017 questionnaire represented the company's purchases of raw olives that were processed into ripe olives.[743]

7.347. We agree with the underlying concern raised by the United States and accept that an investigated company should consult with officials to clarify any doubts about its understanding of information it is expected to provide. However, given our view that the 4 August 2017 questionnaire could have been reasonably interpreted by Aceitunas Guadalquivir in the way it was, there was no reason for Aceitunas Guadalquivir to have recognized that there was any ambiguity or to have sought clarification. The absence of any request on the part of Aceitunas Guadalquivir for clarification of question 6 of the 4 August 2017 questionnaire says nothing about the reliability of the information submitted by Aceitunas Guadalquivir. In our view, it only indicates that the three respondents held different understandings about what was being requested.

[742] On 7 September 2017 the USDOC sent a supplemental questionnaire requesting the respondents' largest unaffiliated suppliers to provide questionnaire responses regarding their raw olive sources and sales to the respondents. Questions contained in that request similarly do not ask suppliers to provide information on raw olives supplied to respondents for processing subject merchandise only. (See, e.g. Letter to Aceitunas Guadalquivir regarding questionnaire to unaffiliated suppliers, (Exhibit USA-14), p. 12, general question A ("[i]f your company only supplies raw olives sourced from growers, please identify the growers from whom your company sources raw olives, and the volume and value of raw olives sourced from each supplier during the [period of investigation]"); and general question B ("[p]lease provide the following information for your company **for the** [**period of investigation**]. … The quantity and f.o.b. value of your operations's [*sic*] production and sales of raw olives. … The quantity and f.o.b. value of raw olives sold to [Aceitunas Guadalquivir]. Please report the sale value on an f.o.b. (factory) basis" (emphasis original))).

[743] United States' 12 November 2020 responses to Panel question No. 44, paras. 89-91, and No. 45, para. 94. The United States emphasizes that the other two mandatory respondents did seek clarification or additional guidance from the USDOC. (United States' 12 November 2020 response to Panel question No. 46, para. 98 (referring to Letter from the USDOC on clarification, (Exhibit EU-60), pp. 1-2)). Counsel for the three mandatory respondents Agro Sevilla, Ángel Camacho, and Aceitunas Guadalquivir had contacted the USDOC to discuss a USDOC letter, dated 26 September 2017, regarding a request for information contained in supplier questionnaire for the respondents' largest suppliers. (Letter from the USDOC on clarification, (Exhibit EU-60), p. 1).

7.5.2.2.2 The USDOC's information requests following the 4 August 2017 questionnaire

7.348. Several exchanges between the USDOC and the respondents after the issuance of the 4 August 2017 questionnaire help to shed light on the nature of the information the respondents had in fact submitted. We find particularly instructive a 27 September 2017 memorandum addressed to the file, in which the USDOC recorded its exchange with the respondents' counsel, including the following:

> In addition, the respondents' counsel informed the [USDOC] that the information regarding the volume and value of raw olives supplied to Agro Sevilla by its member cooperatives and other suppliers was limited to olives used in the production of the ripe olives subject to this [countervailing duty] investigation. We *now* request that Agro Sevilla *resubmit* the information regarding its suppliers of raw olives to include the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used. *If* it is necessary to *correct* the reporting in this manner for the other two mandatory respondents, we request that the information be *resubmitted*.[744]

7.349. Two respondents, Agro Sevilla and Ángel Camacho, responded to the USDOC's 27 September 2017 request by the 6 October 2017 deadline and resubmitted revised and additional raw olives data, including the volume and value of raw olives purchased from each supplier *regardless of end-use*.[745] Aceitunas Guadalquivir, however, did not resubmit revised or additional information or otherwise respond to this request.

7.350. The European Union argues that the only plausible interpretation of the 27 September 2017 request is that Agro Sevilla (and any other respondent) needed to resubmit raw olives purchased from each supplier regardless of end-use, *if they had not already done so*, and hence, that it had been *incorrect* of them to limit their initial responses to the 4 August 2017 questionnaire to providing information on their raw olive purchases that were processed into ripe olives. Furthermore, the European Union contends that Aceitunas Guadalquivir's lack of a response should have signalled to the USDOC that Aceitunas Guadalquivir had already reported its overall raw olive purchases from each supplier regardless of end-use. Hence, Aceitunas Guadalquivir did not need to submit new or updated information.[746]

7.351. The United States rejects the European Union's assertion that the 27 September 2017 request somehow revoked or superseded the USDOC's 4 August 2017 request for respondents to report their raw olive purchases processed into ripe olives. Likewise, the United States does not accept that Aceitunas Guadalquivir's silence and decision not to respond should have led the USDOC to believe that Aceitunas Guadalquivir's reporting in response to the 4 August 2017 questionnaire reflected the company's purchases of raw olives regardless of end-use.[747]

7.352. In our assessment, the USDOC's 27 September 2017 request indicates that it invited Ángel Camacho and Aceitunas Guadalquivir, "if it is necessary", to "correct" and "resubmit" raw olive purchase information reported to include *the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used*. We consider that Aceitunas Guadalquivir's conduct in not responding to the USDOC's 27 September 2017 request signalled that Aceitunas Guadalquivir's reporting already included "the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used". No evidence is before the Panel to indicate that Aceitunas Guadalquivir was an uncooperative respondent.

7.353. We note that prior to the final determination, the petitioner had argued to the USDOC that Aceitunas Guadalquivir had "not reported its purchased olive volumes used only for making ripe olives", and that "[i]n the absence of this information, [the USDOC] should derive an approximation

[744] Letter from the USDOC on clarification, (Exhibit EU-60), p. 2. (emphasis added)
[745] Ángel Camacho revised olive sourcing data, (Exhibit EU-64 (BCI)); Agro Sevilla revised olive sourcing data, (Exhibit EU-65 (BCI)).
[746] European Union's first written submission, paras. 701-702; 10 June 2020 response to Panel question No. 29, para. 145.
[747] United States' first written submission, paras. 283 and 311-312.

for Aceitunas Guadalquivir using a yield ratio based on Angel Camacho's purchases".[748] In rejecting the petitioner's assertion in its final issues and decision memorandum, the USDOC stated that in its 4 August 2017 questionnaire it had asked all companies to provide information on their "sources of raw olives that were processed into ripe olives during the period of investigation" and that "[a]ll companies responded to this questionnaire by reporting their raw olive purchases".[749] Then, referring to the 27 September 2017 information request, the USDOC noted that Agro Sevilla and Ángel Camacho found it necessary to submit additional information, while Aceitunas Guadalquivir did not. Without further explanation, the USDOC concluded: "[t]hus, Aceitunas Guadalquivir's originally reported information is indicative of its raw olives purchases that were used to produce subject merchandise".[750]

7.354. Similarly, in its 12 July 2018 Ministerial error memorandum (filed after the final determination), the USDOC summarized its decision to base Aceitunas Guadalquivir's final subsidy margin and countervailing duty rate on Aceitunas Guadalquivir's volume of raw olive purchases reported in its responses to the 4 August 2017 questionnaire, characterizing Aceitunas Guadalquivir's decision not to respond to the USDOC's 27 September 2017 request to resubmit information as follows:

> Because Aceitunas Guadalquivir did not revise its data [in response to the 27 September 2017 request], we understood that Aceitunas Guadalquivir's reported volume represented purchases of raw to ripe because the initial question we asked was for the volume of purchases of raw to ripe. The totality of the evidence on the record did not suggest that Aceitunas Guadalquivir's initial reporting was incorrect or was otherwise not responsive to the question asked.[751]

7.355. The USDOC states in this passage that it understood that Aceitunas Guadalquivir's reported purchases "represented purchases of raw to ripe" *because of Aceitunas Guadalquivir's decision not to revise that information in the light of the 27 September 2017 memorandum*. We recall, however, that the 27 September 2017 request sought information on total purchases of raw olives, regardless of end-use, and not purchases of raw to ripe. Furthermore, in its preliminary determination, which was issued on 20 November 2017, the USDOC treated Aceitunas Guadalquivir's reported purchases as if they represented purchases of raw olives *regardless of end-use*.[752] Thus, the record shows that shortly after Aceitunas Guadalquivir's non-response to the 27 September 2017 memorandum, the USDOC *did not* treat Aceitunas Guadalquivir's reported purchases of raw olives as if they represented its purchases of raw olives *processed into ripe olives*. To this extent, the USDOC's subsequently stated understanding of the implications of Aceitunas Guadalquivir's decision not to respond to the 27 September 2017 memorandum is inconsistent both with the information requested in that memorandum and with its reliance on Aceitunas Guadalquivir's reported information to determine Aceitunas Guadalquivir's preliminary subsidy margin and countervailing duty rate, which was based on total olive purchases, regardless of end-use.

7.356. According to the United States, however, Aceitunas Guadalquivir's response to a supplemental questionnaire that the USDOC sent exclusively to Aceitunas Guadalquivir on 21 December 2017 (that is, after the USDOC's preliminary determination) shows that the USDOC was entitled to understand that Aceitunas Guadalquivir had reported only purchases of raw olives processed into ripe olives. On 21 December 2017, the USDOC sought the following confirmation from Aceitunas Guadalquivir:

> In your questionnaire response of August 14, 2017 at Exhibit 2, [Aceitunas Guadalquivir] provided a list of unaffiliated suppliers and total purchases of raw olives to be [] kilograms. *Confirm that this number includes purchases of all raw olives regardless of the processed olive product for which the raw olives were used*. Explain if these purchases are made on a gross or net basis, that is, with or without sticks, leaves,

[748] FIDM, (Exhibit EU-2), p. 41. See also Case brief of petitioner in Countervailing Duty Investigation of Ripe Olives from Spain (23 April 2018), (Exhibit USA-20), p. 11.
[749] FIDM, (Exhibit EU-2), p. 44.
[750] FIDM, (Exhibit EU-2), p. 44.
[751] Ministerial error memorandum, (Exhibit EU-69), pp. 4-5.
[752] FIDM, (Exhibit EU-2), p. 44 ("[i]n the *Preliminary Determination*, when calculating the weighted average per kilogram benefit using the information provided by all the reporting olive growers, *we did not limit our calculations to the raw olives used to produce ripe olives*" (emphasis added)). See also Aceitunas Guadalquivir preliminary determination, (Exhibit EU-36), pp. 2-3.

> and other debris and culls. Explain how the purchased volumes are recorded in your accounting system and explain whether you apply a standard yield loss ratio in recording the purchased volume of raw olives.[753]

7.357. On 5 January 2018, Aceitunas Guadalquivir responded as follows:

> [Aceitunas] Guadalquivir only records the value of its raw olive purchases in its accounting system. Raw olive quantities are recorded in an ERP system as they are weighed when they enter the factory or when purchased from storage throughout the year. Weight is recorded in the ERP system on a net basis (i.e., net of other debris). Specifically, each delivery is evaluated by a [Aceitunas] Guadalquivir employee to assess the volume of raw olives for processed olive production relative to other materials, such as leaves sticks, leaves, and other debris and culls. These other materials are not recorded as part of raw olive volume in the ERP system. The [ ] kilograms represents all raw olive receipts as recorded in the ERP system in 2016.[754]

7.358. The United States maintains that Aceitunas Guadalquivir's response fails to confirm whether the reported purchase volume represented all purchases of raw olives without regard to the end-product.[755] According to the United States, Aceitunas Guadalquivir's statement that it "only records the value of its raw olive purchases in its accounting system"[756], was in response to the USDOC's request to "[e]xplain how the purchased volumes are recorded in your accounting system"[757] and shows that its accounting system records only the value, and not the quantity, of its raw olive purchases.[758] The United States considers that Aceitunas Guadalquivir's statement that "[t]he [redacted] kilograms represents all raw olive receipts as recorded in the ERP system in 2016"[759] provides information regarding Aceitunas Guadalquivir's recording system but does not mean that the raw olive purchase information the company submitted in response to the 4 August 2017 questionnaire included purchases of raw olives that were used to produce products other than ripe olives.[760]

7.359. We note that the USDOC did not comment on, or refer to, Aceitunas Guadalquivir's 5 January 2018 response in its final issues and decision memorandum. However, the USDOC addressed Aceitunas Guadalquivir's response to its 21 December 2017 request in the 12 July 2018 Ministerial error memorandum, where it clarified as follows:

> With regard to the post-preliminary supplemental question to confirm that the reported purchases represented all purchases regardless of the processed product, Aceitunas Guadalquivir again did not specify that the volume they reported was of raw to ripe, or otherwise of total purchases. Rather, Aceitunas Guadalquivir stated that number was indicative of all raw olive purchases in their system; again, based on their response to our original question, we understood this to mean that all of their raw olive purchases were for ripe olives.[761]

7.360. Thus, consistent with the United States' position, the USDOC explained in its Ministerial error memorandum that it was of the view that Aceitunas Guadalquivir had not confirmed, in its 5 January 2018 response, whether the reported purchases represented all purchases of raw olives regardless of end-use. In addition, the USDOC explained that it had understood *from Aceitunas Guadalquivir's response to the original questionnaire* that "all of [Aceitunas Guadalquivir's] raw olive

---

[753] Supplemental questionnaire to Aceitunas Guadalquivir, (Exhibit EU-62), p. 4. (fn omitted; emphasis added)

[754] Aceitunas Guadalquivir fourth supplemental questionnaire response, (Exhibit EU-59), p. 6.

[755] The United States submits that Aceitunas Guadalquivir could have clearly stated, as specifically prompted in the USDOC's question, that its response had included all purchases of raw olives and was not limited to those purchases of raw olives that were used to produce ripe olives. (United States' first written submission, para. 314; 10 June 2020 response to Panel question No. 24, para. 77).

[756] Aceitunas Guadalquivir fourth supplemental questionnaire response, (Exhibit EU-59), p. 6.

[757] Supplemental questionnaire to Aceitunas Guadalquivir, (Exhibit EU-62), p. 4.

[758] United States' 10 June 2020 response to Panel question No. 24, para. 78.

[759] Aceitunas Guadalquivir fourth supplemental questionnaire response, (Exhibit EU-59), p. 6.

[760] United States' 10 June 2020 response to Panel question No. 24, para. 79.

[761] Ministerial error memorandum, (Exhibit EU-69), p. 5. (fn omitted)

purchases were for ripe olives".[762] In other words, the USDOC found Aceitunas Guadalquivir's response to the supplemental questionnaire to be inconclusive, revealing only, according to the USDOC, "that [the] number was indicative of all raw olive purchases in their system".[763] The USDOC then reiterated its position that "based on their response to our original question" (i.e. the questionnaire of 4 August 2017), the USDOC considered that Aceitunas Guadalquivir had reported its purchase of raw olives processed into ripe olives.

7.361. Again, we find the USDOC's position to be in tension with what transpired prior to the 21 December 2017 request. Notably, Aceitunas Guadalquivir did not resubmit its reported purchase information in reaction to the USDOC's 27 September 2017 request "to correct the reporting" in the same manner as Agro Sevilla. We recall that Agro Sevilla had been asked to "resubmit the information regarding its suppliers of raw olives to include the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used".[764] Moreover, and significantly, the USDOC had used Aceitunas Guadalquivir's reported figures in calculating Aceitunas Guadalquivir's preliminary subsidy margin and countervailing duty rate without "limit[ing] [its] calculations to the raw olives used to produce ripe olives".[765] The USDOC offers no explanation for why, if it had understood Aceitunas Guadalquivir to have reported purchases of raw olives processed into ripe olives, it decided to rely on Aceitunas Guadalquivir's raw olive purchases reported in response to the 4 August 2017 questionnaire as the basis for its preliminary determination of Aceitunas Guadalquivir's subsidy margin and countervailing duty rate, which were based on the total purchases regardless of end-use.

7.5.2.2.3 Aceitunas Guadalquivir's verification report

7.362. We also find the USDOC's stated understanding of Aceitunas Guadalquivir's reported purchase information to be at odds with Aceitunas Guadalquivir's verification report. We note that in the section of the verification report where the USDOC reviewed "the total purchases of olives by supplier", the USDOC made the following observations:

> However, [Aceitunas Guadalquivir] reminded [the USDOC] that it has only reported purchases of raw olives and not purchases of any "semi-processed" or "processed" olives that are to become or already are green olives. For example, although purchases of what [Aceitunas Guadalquivir] defined as a "semi-processed" olive were included if they ultimately became ripe olives, they were not included if they ultimately became green olives. Thus, [Aceitunas Guadalquivir] explained that because [the USDOC] requested only purchases of ripe olives, [Aceitunas Guadalquivir] reported only olives purchased in acetic acid; [Aceitunas Guadalquivir] did not report olives purchased in brine, because, as they explained, brine olives must become green olives. [Aceitunas Guadalquivir] explained that they do not consider themselves the processors of these green olives that they purchase; however, when asked if they would consider themselves the resellers of the product, they stated no because we "process them." They clarified that they may change the brine, make an analysis, or prepare them by stuffing them, or pitting or slicing them. These olives account for an additional [ ] kilograms of purchases.
>
> …
>
> We preselected two of [Aceitunas Guadalquivir's] purchases of raw olives for the [period of investigation] for further examination. … The quantities reported on the invoices matched [Aceitunas Guadalquivir]'s reporting in its questionnaire responses,

[762] On its face, this statement could be read to mean that the USDOC considered that all of Aceitunas Guadalquivir's purchased raw olives were processed into ripe olives. However, we do not understand this to be the USDOC's position, as other record evidence shows that the USDOC was aware that Aceitunas Guadalquivir processed raw olives into other end-products. Thus, we understand the USDOC's statement to mean that the USDOC considered that Aceitunas Guadalquivir's *reported volume of purchases* of raw olives, represented its purchases of raw olives processed into ripe olives.

[763] United States' 10 June 2020 response to Panel question No. 24, para. 79 (quoting Ministerial error memorandum, (Exhibit EU-69), p. 5).

[764] Letter from the USDOC on clarification, (Exhibit EU-60), p. 2.

[765] FIDM, (Exhibit EU-2), p. 44.

> furthermore we were able to trace these volumes by their corresponding values through to [Aceitunas Guadalquivir]'s general ledger.[766]

7.363. The United States argues that the USDOC's stated understanding of the purchase information submitted in Aceitunas Guadalquivir's response to the 4 August 2017 questionnaire is consistent with observations made in these passages.[767] According to the United States, the verification report reveals that Aceitunas Guadalquivir had selectively reported its purchases of "semi-processed" and "processed" olives (i.e. reporting them only when they were processed into ripe olives), logically implying that Aceitunas Guadalquivir must have also only reported its raw olive purchases used to process ripe olives. The United States maintains that Aceitunas Guadalquivir's decision not to report purchases of "semi-processed" and "processed" olives that could no longer become subject merchandise demonstrates that the USDOC was correct in observing that it "understood that the originally reported volume of olives purchased represented purchases of raw to ripe [(i.e. purchases of raw olives used to produce ripe olives)] and the additional volume of olive purchases not reported represented olives purchased for the production of non-subject merchandise".[768]

7.364. The European Union rejects the United States' understanding of Aceitunas Guadalquivir's verification report. The European Union contends that it is clear from the opening sentence in the first cited passage that the entire explanation refers to olives that are not "raw", but that are already semi-processed or processed, and thus, does not speak to Aceitunas Guadalquivir's reporting of raw olives.[769] The European Union also refers to the following passage in the same section of the verification report:

> We also reviewed [Aceitunas Guadalquivir's] reported sales of olive derived products. These include sales of oil produced that is not suitable for consumption and olives that are destined for the mill ("molino"), which are olives that do not meet the standard to sell as a ripe or table olive; these olives are processed into an industrial olive oil not suitable for consumption. We observed no inconsistencies with the information reported in the questionnaire responses.[770]

7.365. The European Union argues that this passage conclusively demonstrates that the USDOC knew that Aceitunas Guadalquivir's production was not limited to subject merchandise and that some of the raw olives purchased by Aceitunas Guadalquivir were used to produce goods other than subject merchandise.[771]

7.366. We do not share the United States' characterization of the verification report. As an initial matter, we note that the cited passage in paragraph 7.362 above addresses Aceitunas Guadalquivir's reporting of its purchases of *semi-processed* and *processed* olives, not its reporting of purchases of *raw* olives. Thus, on its own, the observation that Aceitunas Guadalquivir did not report purchases of semi-processed and processed olives that could not be processed into ripe olives (but could only become green olives), does not demonstrate that Aceitunas Guadalquivir must have taken the same approach with respect to its reporting of raw olive purchases. The United States argues that the same passage from the verification report reveals that Aceitunas Guadalquivir confirmed its understanding that the USDOC had "requested only purchases of ripe olives [(*i.e. raw olives processed into ripe olives*)]".[772] We note, however, that the United States misreads the relevant statement, which does not clarify that Aceitunas Guadalquivir's reference to "purchases of ripe olives" should be understood to mean "raw olives *processed into ripe olives*".[773] In this regard, the European Union argues that the reference to "purchases of *ripe* olives" in the verification report is incorrect, suggesting that this can only be understood to mean purchases of raw olives, as it is

[766] Aceitunas Guadalquivir verification report, (Exhibit USA-22), pp. 7-8. (fn omitted)
[767] Ministerial error memorandum, (Exhibit EU-69), p. 5 ("based on [Aceitunas Guadalquivir's] response to our original question, we understood this to mean that all of their raw olive purchases were for ripe olives.")
[768] United States' 10 June 2020 response to Panel question No. 24, para. 81 (referring to Ministerial error memorandum, (Exhibit EU-69), p. 5).
[769] European Union's 10 June 2020 response to Panel question No. 26, para. 130.
[770] Aceitunas Guadalquivir verification report, (Exhibit USA-22), p. 7. (fns omitted)
[771] European Union's 8 September 2020 response to Panel question No. 4(b), paras. 150-152; 11 March 2021 comments on United States' 25 February 2021 response to Panel question No. 20, para. 90.
[772] United States' 25 February 2021 response to Panel question No. 21, para. 62. (emphasis added)
[773] Emphasis added.

uncontested that the USDOC asked for purchase information with respect to raw olives.[774] However, contrary to the United States' reading, other information from the verification report reveals that the USDOC had, in fact, verified that reported purchases of raw olives included "molino" olives.[775] As the USDOC indicated in the verification report (cited in paragraph 7.363 above), these olives do not meet the standard to sell as a ripe olive and are instead processed into an industrial olive oil not suitable for consumption.[776] In our view, the fact that the USDOC was aware that Aceitunas Guadalquivir used raw olives to produce products other than ripe olives, and the fact that the USDOC observed that certain raw olives ("molino" olives) identified in Aceitunas Guadalquivir's invoices did not meet the standard to be sold as ripe olives, and were processed into industrial olive oil not suitable for consumption, undermine the United States' reading of the verification report.[777] Moreover, as further discussed below, information on record also revealed a significant discrepancy between the volume of raw olives purchased by Aceitunas Guadalquivir and the sales of ripe olives.

7.5.2.2.4 Aceitunas Guadalquivir's submissions on the reported volume of raw olive purchases after the final determination

7.367. Finally, the European Union maintains that the USDOC also had before it information showing that Aceitunas Guadalquivir's reported volume of raw olives purchased was significantly larger than its reported volume of its sales of ripe olives.[778] Given the size of this difference, the European Union argues that the USDOC could not properly have regarded Aceitunas Guadalquivir's reported data as being "indicative" of raw olive purchases solely to process ripe olives.[779] The USDOC's 12 July 2018 Ministerial error memorandum reveals that Aceitunas Guadalquivir made the same point, commenting that, due to the "comparatively small volume" of Aceitunas Guadalquivir's sales of subject merchandise relative to Aceitunas Guadalquivir's reported volume of purchases contained in its responses to the 4 August 2017 questionnaire, the USDOC should have known that the reported volume of purchases did not represent the volume of raw olives purchased to produce ripe olives.[780] Consequently, Aceitunas Guadalquivir requested the USDOC to use the volume of Aceitunas Guadalquivir's ripe olives *sales* during the period of investigation as a proxy to derive the volume of raw olive purchases to process into ripe olives.

7.368. The USDOC rejected Aceitunas Guadalquivir's request on the grounds that, for the reasons set out above[781], it had understood Aceitunas Guadalquivir to have provided information on its purchase of raw olives for processing into ripe olives. The USDOC then went on to note that even if the volume originally reported did not represent raw olive purchases to process ripe olives, then the "correct" volume was not on the record. The USDOC further characterized the situation as "a reporting error made by the respondent, which the respondent did not alert [the USDOC] to during the course of the investigation or prior to the issuance of the Final Determination" and observed that the absence of an alternative volume of olive purchases on the record was not a ministerial error eligible for correction.[782] We note, however, 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'".[783]

---

[774] European Union's 10 June 2020 response to Panel question No. 26, para. 132 ("[i]t is apparent that the wording of the verification is incorrect, as it refers to a request for 'purchases of ripe olives'. It is however uncontested between the United States and the EU that the investigating authority did not request information on purchases of ripe olives, but only on purchases of raw olives" (emphasis omitted)).

[775] United States' 25 February 2021 response to Panel question No. 21, para. 62.

[776] After issuance of the final determination, Aceitunas Guadalquivir argued to the USDOC that this part of the verification report demonstrated that the USDOC had verified and, therefore, should have known that its reported purchases included raw olives purchased to produce products other than ripe olives. (Ministerial error memorandum, (Exhibit EU-69), p. 3).

[777] United States' 25 February 2021 response to Panel question No. 21, para. 62.

[778] The European Union has submitted that in 2016 the volume of raw olives purchased by Aceitunas Guadalquivir was [[***]] kilograms while the volume of its *sales* of ripe olives was [[***]] kilograms, representing a relative difference of [[***]]%. (European Union's first written submission, para. 663 (referring to Aceitunas Guadalquivir comments for the final determination, (Exhibit EU-71 (BCI)), p. 4)).

[779] European Union's first written submission, para. 663.

[780] Ministerial error memorandum, (Exhibit EU-69), p. 3.

[781] See paras. 7.354 and 7.359 above.

[782] Ministerial error memorandum, (Exhibit EU-69), p. 5.

[783] Ministerial error memorandum, (Exhibit EU-69), p. 3.

7.369. We recall that the USDOC's Ministerial error memorandum was issued *after* the final determination in this dispute. Under US law the purpose of such memoranda is to correct any error "in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which [the USDOC] considers ministerial".[784] The USDOC found that its reliance on Aceitunas Guadalquivir's volume of raw olives purchases, as reported in its response to the 4 August 2017 questionnaire, was not a ministerial error, and the European Union has not challenged that characterization. We accept that there is a point in every investigation when the exchange between interested parties and an investigating authority with respect to matters addressed in a proceeding must come to an end. However, in the light of the events that transpired prior to the final determination, we believe that, overall and on balance, the record of the investigation shows that there were multiple indications that the volume of purchases of raw olives reported by Aceitunas Guadalquivir in its response to the 4 August 2017 questionnaire *did not* represent only Aceitunas Guadalquivir's purchases of raw olives processed into ripe olives.

7.370. First, we recall our finding that the USDOC's initial request for information in the 4 August 2017 cover letter and questionnaire could reasonably have been understood in two ways, including in the manner interpreted by Aceitunas Guadalquivir. Second, Aceitunas Guadalquivir did not "correct" and "resubmit" its reported purchase information in response to the USDOC's 27 September 2017 request "to correct the reporting" so as to "resubmit the information regarding its suppliers of raw olives to include the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used"[785], conduct that confirmed that Aceitunas Guadalquivir had already reported its total raw olive purchases in response to the 4 August 2017 questionnaire. Third, and in our view, significantly, the USDOC treated Aceitunas Guadalquivir's reported figures as representing its volume of purchases of raw olives for processing into any end-product when it calculated Aceitunas Guadalquivir's preliminary subsidy margin and countervailing duty rate. Finally, verification revealed that the reported volume of purchases of raw olives included "molino" olives (which are not processed into ripe olives), and record evidence showed that there was a [[***]]% difference between the reported volume of raw olives purchased by Aceitunas Guadalquivir and the reported volume of Aceitunas Guadalquivir's sales of ripe olives.[786]

7.5.2.2.5 Conclusion

7.371. Thus, in the light of the above considerations, we find that, 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 acted inconsistently with the requirement in Article VI:3 of the GATT 1994 to ensure and take the necessary steps to ascertain, as accurately as possible, the amount of subsidization bestowed on the investigated products.

7.372. Having found that the United States acted inconsistently with Article VI:3 of the GATT 1994, we believe that it is not necessary to achieve a positive solution to this dispute to make additional findings in relation to these claims under Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement. We therefore decline to address these claims.

7.5.3 The USDOC's calculation of an "all others" rate

7.373. The European Union claims that the United States acted inconsistently with its obligations under Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement, due to the manner in which the USDOC calculated the "all others" rate of

[784] The 12 July 2018 ministerial memorandum notes in this regard that Section 705(e) of the Act and 19 CFR 351.224(f) define a "ministerial error" as an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the USDOC considers ministerial. (Ministerial error memorandum, (Exhibit EU-69), p. 2).

[785] Letter from the USDOC on clarification, (Exhibit EU-60), p. 2.

[786] According to the European Union, such a discrepancy means that Aceitunas Guadalquivir's reported purchases could not be reasonably construed as "indicative" of its raw olives purchases that were used to produce subject merchandise. (European Union's first written submission, para. 663 (referring to the same submission made by Aceitunas Guadalquivir to the USDOC in Aceitunas Guadalquivir comments for the final determination, (Exhibit EU-71 (BCI)), p. 4)).

countervailing duties imposed on exporters of ripe olives not individually investigated. The USDOC calculated the "all others" rate of countervailing duties as the weighted average of the countervailing duties imposed on the three mandatory respondents, Agro Sevilla, Ángel Camacho, and Aceitunas Guadalquivir.[787] The European Union argues that to the extent that the USDOC incorrectly calculated Aceitunas Guadalquivir's subsidy margin and countervailing duty rate, then the "all others" rate must also be inconsistent with the same obligations.

7.374. We agree with the European Union that an inconsistency arising in respect of the calculation of Aceitunas Guadalquivir's subsidy margin and corresponding countervailing duty rate necessarily has implications for the "all others" rate, as the USDOC calculated this rate as the weighted average of the duties imposed on the three mandatory respondents. In the preceding analysis we found that the USDOC's calculation of Aceitunas Guadalquivir's final subsidy margin and corresponding countervailing duty rate was inconsistent with Article VI:3 of the GATT 1994. Accordingly, we find that the USDOC's calculation of the "all others" rate was, consequently, also inconsistent with Article VI:3 of the GATT 1994.

7.375. Having reached this finding, we do not further address the European Union's claims under Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement in respect of the USDOC's calculation of the "all others" rate, as we do not consider it necessary to do so for purposes of resolving the dispute before us.

7.5.4 Whether the USDOC properly requested information on purchases of raw olives used to produce ripe olives consistently with Article 12.1 of the SCM Agreement

7.376. The European Union claims that the USDOC acted inconsistently with Article 12.1 of the SCM Agreement by allegedly failing to properly notify Aceitunas Guadalquivir that the USDOC required information regarding Aceitunas Guadalquivir's volume of purchases of raw olives that were processed into the subject merchandise, ripe olives.[788] The United States argues that the European Union's claim relies on a misreading of the USDOC's initial 4 August 2017 questionnaire and an incomplete account of the factual record and therefore should be rejected.[789]

7.377. Article 12.1 of the SCM Agreement provides:

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

7.378. We agree with the parties, as well as past panel and Appellate Body reports, that Article 12.1 of the SCM Agreement sets out fundamental due process rights, in particular, for an interested party to be given adequate notice of any information the investigating authority requires and an adequate opportunity to provide the requested information.[790] The particular information that an investigating authority requires from interested parties will determine what the notice must convey and will vary with the circumstances. In this regard, we share the view expressed by the panel in *China – Broiler Products* that, "[a]t a minimum, a notice must convey an understanding of what information is required in order to enable all interested parties to prepare and submit relevant written evidence regarding the matters as to which information is sought."[791]

7.379. The European Union's claim derives from its argument that the USDOC's initial 4 August 2017 questionnaire requested respondents to report the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used. The European Union submits that Aceitunas Guadalquivir correctly understood the questionnaire as asking for this information and further submits that the USDOC's actions after the

[787] PIDM, (Exhibit EU-1), p. 31.
[788] European Union's first written submission, paras. 712-718.
[789] United States' first written submission, para. 265.
[790] European Union's first written submission, para. 715; United States' first written submission, para. 268. See, e.g. Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.
[791] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.232.

4 August 2017 questionnaire demonstrate that Aceitunas Guadalquivir's understanding was correct.[792]

7.380. The United States maintains that the 4 August 2017 questionnaire requested the respondents' purchase information on raw olives used to produce ripe olives, thereby notifying the mandatory respondents that the USDOC required this information.[793] The United States also emphasizes that the other two mandatory respondents, Agro Sevilla and Ángel Camacho, responded to the initial questionnaire by reporting their raw olive purchases used to process subject merchandise.[794]

7.381. As we found above[795], we disagree with the United States' assertion that the 4 August 2017 questionnaire identified in clear and unambiguous terms that the USDOC was requesting the respondents to report purchase information for raw olives processed into ripe olives. On the one hand, we found that if read in connection with the language in the questionnaire's cover letter, a respondent could have reached the understanding that it was supposed to report its raw olive purchases that were used to process ripe olives. The two respondents, Agro Sevilla and Ángel Camacho, did in fact submit information only on raw olive purchases to produce subject merchandise. On the other hand, as we noted above, based on their wording, the relevant questions could also plausibly have been understood by a reasonable interested party to have asked for information on raw olive purchases regardless of end-use. In this regard, we recall that the referenced "[t]emplate for Suppliers of Raw Olives" did not ask the respondents to distinguish and separately report data with respect to the volume of raw olives purchased that are processed into ripe olives, and raw olive purchases regardless of the processed olive product for which the raw olives were used. Nor do we think that the ambiguity should have led Aceitunas Guadalquivir to have sought clarification as to what was being requested. Accordingly, we disagree that the 4 August 2017 questionnaire provided the requisite notice.

7.382. Moreover, the USDOC did not at any subsequent point prior to the final determination[796] request that Aceitunas Guadalquivir report its raw olive purchases that were used to process ripe olives, or suggest that Aceitunas Guadalquivir should have reported its raw olive purchases that were used to process ripe olives. As explained above[797], in its 27 September 2017 request the USDOC alerted the respondents that the legal counsel for Agro Sevilla had informed the USDOC that the volume and value of raw olives that Agro Sevilla had reported in response to the 4 August 2017 questionnaire was limited to olives used in the production of the ripe olives. The USDOC requested that Agro Sevilla "resubmit" the information regarding its suppliers of raw olives to include the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used, and also requested the other respondents to "resubmit" and "correct" their reporting in this manner, if it was necessary to do so.[798] Aceitunas Guadalquivir did not resubmit any new information. Subsequently, the USDOC used information on the *volume of raw olives purchased, irrespective of end-use*, submitted by Agro Sevilla and Ángel Camacho in response to the 27 September 2017 request, and reported by Aceitunas Guadalquivir in its responses to the 4 August 2017 questionnaire, to determine preliminary subsidy margins of the three respondents.[799] Then, on 21 December 2017[800], the USDOC requested Aceitunas Guadalquivir to confirm that information reported by Aceitunas Guadalquivir in its responses to the 4 August 2017 questionnaire included purchases of all raw olives regardless of the processed olive product for which

[792] European Union's first written submission, paras. 643-665; second written submission, para. 195.
[793] Letter to Aceitunas Guadalquivir on questionnaire, (Exhibit EU-58); Letter to Agro Sevilla on questionnaire, (Exhibit USA-6); and Letter to Ángel Camacho on questionnaire, (Exhibit USA-7).
[794] United States' first written submission, paras. 284-285. As explained in fn 739 above, in response to the USDOC's 27 September 2017 request, both Agro Sevilla and Ángel Camacho each replied by resubmitting the template for their raw olive suppliers, delineating their purchases of raw olives that were processed into ripe olives and purchases of raw olives that were processed into other olive products. The information confirms that Agro Sevilla and Ángel Camacho responded to the USDOC's 4 August 2017 questionnaire by submitting purchases of raw olives that were processed into ripe olives.
[795] See paras. 7.337 and 7.347 above.
[796] In its final issues and decision memorandum the USDOC stated that the cover letter to the initial 4 August 2017 questionnaire had "asked all companies to provide information on their 'sources of raw olives that were processed into ripe olives during the period of investigation'". (FIDM, (Exhibit EU-2), p. 44).
[797] See paras. 7.348-7.355 above.
[798] Letter from the USDOC on clarification, (Exhibit EU-60), p. 2.
[799] PIDM, (Exhibit EU-1), p. 17. See also Aceitunas Guadalquivir preliminary determination, (Exhibit EU-36), pp. 2-3.
[800] See paras. 7.356-7.361 above.

the raw olives were used, without asking Aceitunas Guadalquivir to report its raw olive purchases that were used to process ripe olives.[801]

7.383. In light of the above, we disagree that the USDOC properly notified interested parties of the required information on purchases of raw olives. As we have explained, neither in the initial 4 August 2017 questionnaire nor subsequently, did the USDOC clearly, and unambiguously, convey an understanding to the respondents that they were required to submit information on raw olive purchases used *to process ripe olives*. Indeed, the actions of the USDOC after issuance of the initial questionnaire appeared to confirm that the required information was the volume of raw olives purchased regardless of end-use. Accordingly, we find that the USDOC failed to notify the respondents within the meaning of Article 12.1 of the SCM Agreement that the USDOC required information regarding the volume of purchases of raw olives that were processed into the subject merchandise, ripe olives.

7.5.5 Whether the USDOC informed interested parties of the essential facts under consideration consistent with Article 12.8 of the SCM Agreement

7.384. The European Union claims that the USDOC acted inconsistently with Article 12.8 of the SCM Agreement because the USDOC allegedly failed to disclose, before its final determination, that the volume of purchases of raw olives processed into ripe olives was an "essential fact" for its determination of Aceitunas Guadalquivir's final subsidy rate.[802] The United States argues that the European Union's claim should be rejected as the USDOC disclosed the essential facts under consideration "months before the final determination", thus permitting the parties to defend their interests.[803]

7.385. Article 12.8 of the SCM Agreement provides:

> The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.386. Article 12.8 does not specifically define the "essential facts under consideration" that an investigating authority must disclose prior to its final determination. However, it follows from the fact that they must be those "which form the basis for the decision whether to apply definitive measures", that not all facts considered by an investigating authority need to be disclosed. Rather, we agree with prior panels and the Appellate Body, that the "essential facts" that must be disclosed are "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures".[804] In our view, given that the margin or amount of subsidization lies at the centre of a decision of whether or not to apply definitive measures, facts relating to the calculation of the margin or amount of subsidization are "essential facts" within the meaning of Article 12.8 of the SCM Agreement.[805] We also note that Article 12.8 directs investigating authorities to inform interested parties of those facts *in sufficient time* to ensure they can *defend their interests*. In our view, this means that the disclosure of "essential facts" must be done in such a way that permits an interested party to understand how they have been used and potentially relied upon by an investigating authority. In this regard, we share the view expressed by the Appellate Body that authorities must disclose the "essential facts under consideration" in a "coherent way" so that interested parties can understand the basis for the decision whether to apply definitive measures.[806]

---

[801] Supplemental questionnaire to Aceitunas Guadalquivir, (Exhibit EU-62), p. 4.
[802] European Union's first written submission, para. 728.
[803] United States' first written submission, para. 321.
[804] Appellate Body Report, *China – GOES*, para. 240. See also Panel Reports, *US – Supercalendered Paper*, para. 7.82; and *China – Broiler Products (Article 21*.5 – *US)*.
[805] For a similar view, see Panel Report, *China – GOES*, para. 7.463 (stating that the essential facts underlying an investigating authority's conclusions regarding the amount of subsidization should also be disclosed under Article 12.8 as the rate of subsidization also forms the basis of the decision whether to apply definitive measures). See also Panel Report, *Mexico – Olive Oil*, para. 7.110. Similarly, in the context of anti-dumping, the Appellate Body has found that the calculation methodology used by an investigating authority may constitute an essential fact, within the meaning of Article 6.9 of the Anti-Dumping Agreement. (Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.218).
[806] Appellate Body Report, *China – GOES*, para. 240.

7.387. The European Union's claim concerns the alleged failure of the USDOC to inform the respondents, prior to making a final determination, that their final subsidy margins would be calculated by relying on each respondent's volume of purchases of raw olives processed into ripe olives. As discussed above[807], in its calculation of final subsidy margins the USDOC used what it considered to be each respondent's volume of purchases of raw olives processed into ripe olives to determine the subsidy amount (i.e. the numerator in its calculation).[808] In its preliminary determination, however, the USDOC had calculated subsidy margins for the respondents based on a different methodology that relied upon the respondents' reported volume of overall purchases of raw olives, regardless of the end-product they were used to produce.[809]

7.388. Not unlike its argument under Article 12.1 of the SCM Agreement, the European Union submits that the USDOC's initial questionnaire was correctly understood as asking the respondents to report their overall raw olive purchases. Thus, the European Union contends that the USDOC could not have disclosed to the respondents through the initial questionnaire that the volume of purchases of raw olives processed into ripe olives was an "essential fact" that would be used to determine each of the respondents' final subsidy margins. In addition, the European Union argues that the USDOC did not at any subsequent point prior to the final determination disclose to the respondents that the volume of purchases of raw olives processed into ripe olives was going to be used to determine the respondents' final subsidy margins. To the contrary, the European Union submits that the USDOC's entire "approach" up to the point of adoption of the final determination suggested that the volume of purchases of all raw olives, regardless of end-use, was the decisive value. Thus, according to the European Union, the only reasonable inference of the USDOC's actions was that the USDOC did not regard the value of raw olives processed into ripe olives as a relevant fact and as a result, the respondents were not able to effectively defend their interests.[810]

7.389. The United States denies that the respondents were not aware that their raw olive purchases used to process ripe olives was an essential fact under consideration or that the respondents could not effectively defend their interests. In this respect, the United States submits that the USDOC disclosed to interested parties on at least three occasions before the final determination that the essential facts under consideration included the volume of raw olives processed into ripe olives: first, through its 4 August 2017 and 27 September 2017 questionnaires; second, through the USDOC's February 2018 notification agenda for on-site verification; and finally, through verification reports subsequently sent to the parties. Thus, the United States contends that the facts under consideration, as variables in the benefit calculation for the final determination, were extensively addressed in the record and interested parties had sufficient time to – and in fact did – defend their interests.[811] In this regard, the United States maintains that the written and oral advocacy presented by the interested parties between the preliminary and final determinations demonstrates that the necessary disclosure took "place in sufficient time for the parties to defend their interests".[812]

7.390. We understand that the obligation in Article 12.8 requires an investigating authority to disclose the essential facts in such a way that permits an interested party to understand the basis for the decision that will be reached by the investigating authority and defend its interests. We do not exclude the possibility that an investigating authority's request for information in an initial questionnaire may serve this purpose. However, whether such a request will provide the requisite notice will depend on how the questionnaire is drafted and the particular circumstances in which it is issued. The fact that requested information may have been provided does not necessarily imply that an investigating authority has informed a party of the essential facts. Were this to be the case, the obligation in Article 12.8 would be arguably reduced to ensuring that an investigating authority did not rely on any fact that had not been solicited from a party during the investigation. In other words, Article 12.8 would not require any action on the part of an investigating authority other than simply requesting information.

7.391. Turning to the 4 August 2017 questionnaire, we recall that, in the context of addressing the European Union's other claims, including its Article 12.1 claim[813], we disagreed with the

[807] See para. 7.321 above.
[808] FIDM, (Exhibit EU-2), p. 44.
[809] See para. 7.321 above. See also PIDM, (Exhibit EU-1), p. 17; and Aceitunas Guadalquivir preliminary determination, (Exhibit EU-36), pp. 2-3.
[810] European Union's first written submission, paras. 722-728.
[811] United States' first written submission, paras. 329-331.
[812] United States' first written submission, para. 332.
[813] See para. 7.381 above.

United States' assertion that it identified in clear terms that the USDOC was requesting the respondents to report purchase information for raw olives processed into ripe olives. Accordingly, we do not consider that the 4 August 2017 questionnaire can be found to have informed the respondents that the essential facts under consideration included the volume of raw olives processed into ripe olives or that those facts would form the basis of the USDOC's calculation of subsidization amounts in its final determination.

7.392. We are also of the view that the USDOC's 27 September 2017 request did not disclose to the respondents that both sets of raw olive purchase information – i.e. raw olives that were used to produce ripe olives and raw olives regardless of their use – would be under consideration in determining whether to apply definitive measures.[814] We recall that the 27 September 2017 memorandum stated the following:

> In addition, the respondents' counsel informed the [USDOC] that the information regarding the volume and value of raw olives supplied to Agro Sevilla by its member cooperatives and other suppliers was limited to olives used in the production of the ripe olives subject to this [countervailing duty] investigation. We *now* request that Agro Sevilla resubmit the information regarding its suppliers of raw olives to include the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used. If it is necessary to correct the reporting in this manner for the other two mandatory respondents, we request that the information be resubmitted.[815]

7.393. As discussed in the context of addressing the European Union's other claims, rather than disclosing to the respondents that their raw olive purchases used to process ripe olives would form the basis of their subsidy calculations, the 27 September 2017 request suggested that the volume and value of all raw olives purchased from each supplier *regardless of end-use*, was the information sought by the USDOC. As already explained[816], upon being alerted that Agro Sevilla had reported the volume and value of raw olives used to process ripe olives in response to the 4 August 2017 questionnaire, the USDOC requested Agro Sevilla to "resubmit" information regarding its purchases of all raw olives, regardless of the processed olive product for which the raw olives were used. The USDOC also requested the other respondents to "resubmit" and "correct" their reporting in this manner if it was necessary to do so. The United States emphasizes that the 4 August 2017 and 27 September 2017 questionnaires were separate requests for information and that the 27 September 2017 request did not withdraw or alter the 4 August 2017 request.[817] In addition, the United States submits that, in asking the respondent companies to "correct" and "resubmit" their purchase volume information "*to include* the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used"[818], the 27 September 2017 request asked the respondents to supplement – not replace – the previously reported information on purchases of raw olives that were used to produce ripe olives.[819] We note, however, that the 27 September 2017 request directs the respondents to resubmit information only *if it was necessary to do so*. Furthermore, in its request, the USDOC did not explicitly instruct the respondents to ensure that *both* figures were on record.[820] Therefore, based on our reading of the USDOC's request, if a respondent had already submitted their overall raw olive purchases without regard to end-use (as opposed to its raw olive purchases used to process ripe olives), that respondent could have reasonably understood that there was no obligation to "resubmit" and "correct" reported information. We fail to see how a respondent in that situation would have

[814] United States' first written submission, para. 329.
[815] Letter from the USDOC on clarification, (Exhibit EU-60), p. 2. (emphasis added)
[816] See also paras. 7.348-7.355 above.
[817] United States' first written submission, paras. 283 and 311-312; 8 September 2020 response to question No. IV(a), para. 38.
[818] Letter from the USDOC on clarification, (Exhibit EU-60), p. 2. (emphasis added)
[819] United States' 8 September 2020 response to question No. IV(a), para. 39.
[820] The United States emphasizes that the respondents Agro Sevilla and Ángel Camacho each submitted revised exhibits that delineated each company's purchases of raw olives that were processed into ripe olives, purchases of raw olives that were processed into other olive products, and total purchases of raw olives without regard to use. (United States' 8 September 2020 response to question No. IV(a), para. 40). However, in its 27 September letter, the USDOC requested that Agro Sevilla "resubmit the information regarding its suppliers of raw olives to include the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used". The USDOC requested the other respondents to resubmit information "[i]f it is necessary to correct the reporting in this manner". (Letter from the USDOC on clarification, (Exhibit EU-60), p. 2).

necessarily understood that both sets of raw olive purchase information – i.e. raw olives that were used to produce ripe olives and raw olives regardless of use – were essential facts under consideration.

7.394. As discussed in detail in the preceding sections of our analysis, the USDOC used information submitted by Agro Sevilla and Ángel Camacho in response to the 27 September 2017 request, and information reported by Aceitunas Guadalquivir in its responses to the initial 4 August 2017 questionnaire, to determine preliminary subsidy margins for the three respondents.[821] On 21 December 2017[822], the USDOC further requested Aceitunas Guadalquivir to confirm that the information reported by Aceitunas Guadalquivir in its responses to the 4 August 2017 questionnaire included purchases of all raw olives regardless of the processed olive product for which the raw olives were used.[823] Based on this build-up of events, we share the European Union's view that up to that point, the USDOC's approach suggested that the volume of purchases of raw olives regardless of end-use was the decisive value in determining the respondents' subsidy margins.

7.395. The other occasions in which the United States considers that the USDOC gave the relevant notice to interested parties concern the USDOC's on-site verification of each company's questionnaire responses.

7.396. The United States argues that the USDOC's 9 February 2018 notification agenda for on-site verification disclosed to the parties in at least two ways that purchase volumes of raw olives used to produce ripe olives were essential facts under consideration. First, the United States maintains that each respondent's agenda listed the factual submissions to be verified, including the 4 August 2017 questionnaire requesting information regarding mandatory respondents' purchases of raw olives used to produce ripe olives purchases. In addition, the United States maintains that the section in the agenda entitled "Sales and Export Information" directed parties to be prepared to present information regarding "[t]otal quantities of raw olives used for specific types of finished products (i.e., ripe olives, other table olives, olive oil, other)", thus informing the parties that the total purchases of raw olives and those purchases of raw olives used for specific types of products, such as ripe olives, were essential facts under consideration.[824]

7.397. We recall that we have already found that the 4 August 2017 questionnaire did not inform the respondents that the essential facts under consideration included the volume of purchases of raw olives processed into ripe olives.[825] We note also that the United States considers the language in the verification agenda informed the respondents that the total purchases of raw olives and purchases of raw olives used for specific types of products, such as ripe olives, were essential facts under consideration.[826] In our view, the fact that the verification agenda revealed that the USDOC wanted to verify "[t]otal quantities of raw olives used for specific types of finished products (i.e., ripe olives, other table olives, olive oil, other)" is not a notification that the USDOC intended to use, or was considering to use, only the volume of raw olives purchased for processing into ripe olives in its calculation of the subsidy margin. In the absence of any explanation as to why the USDOC wanted the responding parties to be prepared for verification of the listed information, the agenda item (to the extent that it referred to *all finished products*) could have also been understood as a means for the USDOC to verify the reported volumes of purchases of raw olives *regardless of end-use*. Indeed, such an understanding would have been consistent with events preceding the on-site verification, which as we have already noted suggested that the volume of purchases of raw olives regardless of end-use would be the value used in the USDOC's determination of the respondents' subsidy margins.

[821] PIDM, (Exhibit EU-1), p. 17. See also Aceitunas Guadalquivir preliminary determination, (Exhibit EU-36), pp. 2-3.
[822] See paras. 7.356-7.361 above.
[823] Supplemental questionnaire to Aceitunas Guadalquivir, (Exhibit EU-62), p. 4.
[824] United States' first written submission, para. 330. See also Letter to Aceitunas Guadalquivir regarding verification of questionnaire responses, (Exhibit USA-21), p. 6; Letter to Agro Sevilla regarding verification of questionnaire responses, (Exhibit USA-18), p. 5; and Letter to Ángel Camacho regarding verification of questionnaire responses, (Exhibit USA-19), p. 5.
[825] We recall our view, as set out above, whether an investigating authority's request for information in a questionnaire may serve to disclose to interested parties which are the essential facts under consideration will depend on the circumstances. (See para. 7.390 above).
[826] United States' first written submission, para. 330 (referring to Letter to Aceitunas Guadalquivir regarding verification of questionnaire responses, (Exhibit USA-21), p. 8).

7.398. The United States also refers to Aceitunas Guadalquivir's verification report, which the United States argues "shows that the USDOC reviewed Aceitunas Guadalquivir's purchases of raw olives and, more specifically, Aceitunas Guadalquivir's purchases of raw olives that were processed into ripe olives".[827] The section of the verification report cited by the United States addresses Aceitunas Guadalquivir's purchases of olives by supplier, both cross-owned and unaffiliated, as well as the purchase terms of raw olives. Relevant portions of this section are quoted in paragraphs 7.362 and 7.363 above. As the report confirms, Aceitunas Guadalquivir representatives explained how they collected the information on olive purchases which were reported in its questionnaire responses. The USDOC also reviewed Aceitunas Guadalquivir's reported sales of olive-derived products.[828] Similar to our view on the USDOC's 9 February 2018 notification agenda, we do not see how the verification of Aceitunas Guadalquivir's reported purchase information provides clear notification that the USDOC intended to use, or was considering to use, the volume of raw olives purchased for *processing into ripe olives* in its calculation of the subsidy margin, particularly in the absence of any explanation as to why the USDOC wanted to verify the listed information.

7.399. Finally, we recall that the United States submits that the written and oral advocacy presented by the interested parties between the preliminary and final determinations *evidences* that the necessary disclosure of essential facts took place in time for the respondents to defend their interests.[829]

7.400. As the United States points out, prior to the final determination the petitioner asked the USDOC to modify the methodology it had used to determine the respondents' preliminary subsidy margins, and to use instead a "ripe olives-only methodology".[830] The respondents (including Aceitunas Guadalquivir), urged the USDOC to reject the petitioner's request on both factual and legal grounds.[831] We see nothing in the reasons and arguments advanced by the respondents to suggest that the USDOC had previously disclosed that the volume of purchases of raw olives processed into ripe olives was an "essential fact under consideration" for the purpose of its final determination of the respondents' margins of subsidization. We note, for example, that the respondents' submissions make no reference to any prior statements or specific requests made by the USDOC that would suggest that they had been informed of this possibility. Rather, the respondents' rebuttal is focused entirely on addressing the reasons advanced in the petitioner's request. In our view, the exchange between the petitioner and the respondents, in the light of the preceding events in the underlying investigation, does not demonstrate that the USDOC had previously disclosed that it would use, or was in fact considering to use, a ripe olives-only methodology, or, in other words, that the USDOC had previously disclosed that the volume of purchases of raw olives processed into ripe olives was an "essential fact under consideration" for the purpose of Aceitunas Guadalquivir's final subsidy margin.

7.401. For the foregoing reasons, we find that the 4 August 2017 questionnaire and 27 September 2017 memorandum, and the USDOC's 9 February 2018 verification agendas and verification reports sent to the respondents, did not inform the respondents that the volume of purchases of raw olives processed into ripe olives were "essential facts under consideration" within the meaning of Article 12.8. Accordingly, by failing to provide this information, we find that the USDOC acted inconsistently with the United States' obligations under Article 12.8 of the SCM Agreement.

7.5.6 Conclusion

7.402. In relation to the European Union's substantive claims, we find that the USDOC acted inconsistently with the United States' obligations under Article VI:3 of the GATT 1994 because:

a. 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

[827] United States' first written submission, para. 331 (referring to Aceitunas Guadalquivir verification report, (Exhibit USA-22), pp. 6-8).
[828] Aceitunas Guadalquivir verification report, (Exhibit USA-22), p. 7.
[829] United States' first written submission, para. 332.
[830] Case brief of petitioner in Countervailing Duty Investigation of Ripe Olives from Spain (23 April 2018), (Exhibit USA-20), pp. 6-12.
[831] Rebuttal brief, (Exhibit USA-24), pp. 6-9.

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[832];

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;

[832] 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.

_____