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# *United States - Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*

# *(DS577)*

# Oral Statement by the European Union

**19 October 2020**

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## I. INTRODUCTION

Mr Chairman, distinguished members of the Panel,

1. The European Union wishes to thank the Panel and the Secretariat for their continued commitment to solving the present dispute and the efforts they have deployed in making possible this substantive meeting despite the logistical difficulties due to the pandemic.

2. The EU will not reiterate the same points it already made in previous submissions but rather use this statement to present new arguments, address certain recent US arguments and further clarify certain legal or factual issues.

## II. CLAIMS RELATING TO THE USDOC'S FAILURE TO DEMONSTRATE THAT THE SUBSIDIES ARE SPECIFIC

### A. The US violated Articles 2.1, 2.1(a) and 2.4 of the SCM Agreement because it concluded that the SPS, BPS, and Greening programs are specific without examining the conditions of eligibility for those programs

#### *(1) Summary of EU claim*

3. The first claim raised by the EU takes issue with the fact that the USDOC determined that the SPS, BPS and Greening Programs are *de jure* specific without looking at the eligibility conditions for access to the subsidy, but by focussing exclusively on the rules for the determination of the amount of subsidy.

#### *(2) The US response*

4. In its first written submission the US claims that:

> the USDOC's examination revealed that … the eligibility criteria for subsidies conferred to olive growers under the BPS Programs remained linked to production of olives[1].

5. However, while it speaks about eligibility conditions, the US ends up referring to the calculation of the amount of subsidy to be granted to each eligible enterprise.[2] The US keeps constantly jumping from eligibility to amount,[3]

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1 US's FWS, para. 28. See also para. 29.
2 US's FWS, para. 57 (underlined added).
3 US's Responses to Panel Advanced Questions, paras 1-3. Also compare paras 13, 14, 16 clearly referring to eligibility criteria with para. 15 referring to the subsidy amount.

explaining that a limitation on access can be realised through the criteria for calculating the subsidy amount.[4]

*(3) Analysis of the US' arguments*

6. The EU has already abundantly explained that an explicit limitation on access to a subsidy program to certain enterprises is effected through criteria/conditions which define the group of certain enterprises that have access or are eligible to that program.

7. The US further attempts to demonstrate the contrary are of no use.

8. For instance, the US refers to the possibility of designing an umbrella subsidy program "that is broadly available, but that limits access to a component or subprogram of the broader subsidy program to certain favored enterprises"[5] using an amount based limitation.[6] However, it is clear that the US is referring to 2 subsidy programs, with the subprogram containing additional eligibility conditions (compared to the conditions of the umbrella program) which limit access to a smaller group of enterprises compared to the group of enterprises that are eligible under (or have access to) the umbrella program.

9. The same holds for the US ill-conceived analogy of access to a basketball stadium.[7] It is ill-conceived because people must purchase a ticket to get into the stadium, they do not get a subsidy for that. Moreover, if one really wants to run it, that analogy illustrates the fact that in order to have access to the courtsides of the stadium (to be eligible to get in that part) a person must purchase a specific type of ticket. So only people holding that type of ticket are eligible to the courtsides and have access to the advantage of watching the match from that position. Hence, there are different eligibility conditions for different parts of the stadium each of which limit access to a different group of viewers (depending on the ticket they hold).

10. The US' position is so untenable that the US itself contradicts it in the space of a few paragraphs. While it says that it does not "share the understanding that

4 US's Responses to Panel Advanced Questions, para 5.
5 US's Responses to Further Panel's questions, para. 2.
6 US's Responses to Further Panel's questions, para. 2.
7 US's Responses to Further Panel's questions, para. 3.

Article 2.1(a) refers to the eligibility criteria of a subsidy program"[8], the US explains that :

> *the USDOC took into account the Oils and Fats Program to the extent that it, through references in the later SPS Program and BPS Programs, continued to shape the **eligibility criteria governing access** to a discrete component of subsidy payments under those later programs*[9]

11. In conclusion, by arguing that a limitation on access can be realized also by granting different amount of subsidies to certain enterprises, the US confirms EU's claim according to which the USDOC de jure specificity findings are not based on an examination of the limitations on access or the eligibility conditions of the programs at issue, and therefore they are in violation of Articles 2.1 and 2.1(a) and 2.4 of the SCM Agreement.

## B. The US violated Articles 2.1, 2.1(a) and 2.4 of the SCM Agreement by finding that the SPS, BPS and Greening programs provided assistance coupled to the production of olives

### *(1) Summary of EU claim*

12. With its second claim the EU showed that the USDOC's de jure specificity findings according to which the SPS, BPS and Greening programs are tied or coupled to the production of olives are contradicted by positive evidence on the record.

13. Indeed, there is no such thing as assistance provided to olive growers under the SPS, BPS and Greening programs, but assistance granted to farmers. Under those programs, there is neither a legal obligation to continue growing the same crops that the farmer used to grow before the entry into force of any of them, nor to grow any crop at all. As a consequence, farmers that benefited from the COMOF Program may have switched to other crops when the SPS came into force or when the BPS and Greening become applicable more than ten years later (but the USDOC did not even consider this matter).

14. The EU underlined also that the US' approach is at odds with the very notion of decoupled income support under WTO law.

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8 US's Responses to Further Panel's questions, para. 4.

9 US's Responses to Further Panel's questions, para. 10 (emphasis added). See also the Remand Determination where the USDOC constantly uses the concepts of eligibility and access as synonyms, for instance page 19 "Such a conclusion would have ignored the fact that BPS legislatively incorporated by reference **eligibility criteria** from these earlier programs … 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 Program." (emphasis added)

*(2) The US response*

15. The US explains first that:

> The group of enterprises identified by the USDOC are those that were eligible to receive subsidy payments based on whether they satisfied the eligibility criteria during reference period of the Oils and Fats Program.[10]

16. The US adds that the "peace clause" expired long ago and therefore whether a subsidy program qualifies as "decoupled" income support under Annex 2 of the AA has no bearing on whether under the SCM Agreement a subsidy is deemed to exist.[11]

*(3) Analysis of the US' arguments*

17. It should be clarified as a preliminary matter that the EU has neither invoked before this Panel the so called "peace clause", nor has it argued that a decoupled subsidy can never be considered as specific for the purpose of the SCM agreement.

18. Instead, the EU has made a much more modest argument. This argument goes as follows: if an investigating authority finds that a subsidy is tied or coupled to the production of olives and for that reason specific to olive growers/farmers it cannot find at the same time that the subsidy is not coupled to the production of that crop. This is an objective question. Either access to a subsidy is conditioned on the production of a certain crop or it is not.

19. This plainly logical observation is buttressed by a contextual interpretation of what a decoupled income support measure is in WTO law, and notably under the AA. The EU has demonstrated that the SPS, BPS and Greening would qualify as decoupled income support measure under the AA (which the US does not contest), and nevertheless according to the USDOC they are programs coupled to the production of olives.

20. In the present case the USDOC has found at once that the SPS, BPS, and Greening are subsidy programs tied or coupled to the production of olives[12]

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10 US's Response to the Panel's Advanced Question, para. 28.
11 US's FWS, para. 66.
12 EU's Response to Panel's Question n. 9.

but at the same time eligibility under those programs is not conditioned upon continued olives production.[13]

21. Faced with that manifest contradiction, the US argues before this Panel that the USDOC did not find those subsidy programs to be de jure specific to olive growers/farmers under the BPS program but to certain undertakings that engaged in olive production during the COMOF Program.[14]

22. The EU has already shown that this new narrative is nothing but an ex-post rationalisation which contradicts the very terms of the USDOC Determinations[15].

23. The US confirmed this contradiction in the Remand Determination.[16] Indeed, referring to the analysis contained in the Preliminary Determination, the US explained that that analysis:

> was the basis of Commerce's finding that the BPS provided subsidies that are **de jure specific to olive growers**.

24. It also explained 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**.

25. Moreover, if the US ex-post rationalisation were correct it would imply an additional number of contradictions and legal errors. In particular, it would mean that the US is countervailing the products produced by a group of enterprises (those that are growing olives under the BPS Program), while it found that the subsidies were de jure specific to another group (those that grew olives under the COMOF), i.e. more than ten years before the entry into force of the BPS as well as more than ten years before the POI), and at the same time the US admits that those groups do not coincide[17]. Likewise, the USDOC never investigated if and to what extent the ripe olives that are exported to the US and are subject to the countervailing duties are produced by farmers that where engaged in olives production since the COMOF Program, or by farmers that started that production later on. Instead, the US is

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13 US's FWS, para. 63, which reads "although eligibility for subsidies under the SPS Program and BPS Programs was not based upon continued olive production".

14 US's Responses to Further Panel's questions, para. 11, US' Response to the Panel's Advanced Question, para. 28, US' first written submissions, para. 64;

15 EU's Responses to Panel's further questions, paras. 37-51. See also para 11 of the US' Responses to the Panel's Further Question, which reads "… consistent with the finding that SPS Program and BPS Programs are specific to olive growers.".

16 Exhibit EU-80, pages 8 and 9.

17 EU's Responses to Panel's further questions, para. 14.

countervailing any ripe olive from Spain as if any olive producers under the BPS had received a payment entitlement whose values depends on the amount of support received during the COMOF Program.

26. In summary, the Panel should conclude that the US has not advanced any argument capable of rebutting the EU's claim that the US violated Articles 2.1, 2.1(a) and 2.4 of the SCM Agreement by finding that the SPS, BPS and Greening programs provided assistance coupled to the production of olives.

### C. The US violated Articles 2.1, 2.1(a) and 2.4 of the SCM Agreement because it grounded its analysis on the eligibility conditions of a previous subsidy program, which is not in force anymore

#### *(1) Summary of EU claim*

27. With the third claim the EU demonstrated that the starting point of the specificity analysis of the USDOC is the COMOF Program and not the measure that has been determined to constitute a countervailable subsidy under Article 1.1 of the SCM Agreement, i.e. the BPS and Greening Programs.

28. The EU also added that the USDOC findings are based on purported direct correlation between the amount of support granted to a farmers growing olives during the COMOF Program and the amount of support granted to the same farmer under the SPS, BPS and Greening. But the legislation governing those programs (that was on the record) show that such direct correlation does not exist. Moreover, the USDOC findings ignore the fact that farmers growing olives during the COMOF Program were not necessarily growing olives during the SPS Program and are not necessarily growing olives during the BPS and Greening Programs, and viceversa, i.e. that farmers growing olives during the BPS programs (and the POI) may have never grown olives before.

#### *(2) The US response*

29. The US explains that "USDOC found that the specificity inherent in the earlier programs (namely, the Oils and Fats Program), forms a part of the BPS Programs and makes the BPS Programs specific, as a matter of law, in themselves."[18]

[18] US's FWS, paras. 63 and 69.

*(3) Analysis of the US' arguments*

30. The EU considers that the US arguments confirm that the starting point of the USDOC specificity analysis is the COMOF Program and not the measures that have been found to grant countervailable subsidies.

31. Paragraphs 59, 63 and 64 of the US' first written submission and paragraphs 13 and 24 of the US' Responses to the Panel's Advanced Questions show that indeed the USDOC looked first at the eligibility criteria of the COMOF Program. Second, it concluded that those eligibility criteria had been incorporated in the SPS and BPS Programs based on an alleged direct correlation of the amount of support received by olive growers under that old program and later under the SPS and BPS. The US explained indeed that:

> the annual grant amounts provided under [the BPS Programs] are **directly related** to, and continue to retain the de jure specificity of, the grants provided to olive growers under the COMOF Program[19]

32. At the same time, the US itself admits that the correlation is not direct because "other factors contributed to the calculation of the amount of support under the SPS Program"[20] and "the SPS Program and BPS Programs rely at least **in part** on the subsidies provided under [the COMOF Program] to olive growers".[21]

33. In any event that correlation (i) has nothing to do with access to the subsidy program, but with the criteria for the determination of the amount of support to be granted to each eligible farmer; (ii) it is based on a wrongful description of the legislation governing the programs at issue, so that in reality the correlation is anything but direct.

34. Faced with these errors and contradictions, the US argues before this Panel that the SPS and BPS are de jure specific to the holders of entitlements whose value derived from the COMOF Program. However, it is countervailing any Spanish ripe olive imported in the US regardless of the fact of whether or not

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19 US Responses to the Panel's Further Questions, para 12 quoting the Final Determination (emphasis added). See also US' Responses to the Panel's Advanced Questions, para. 24 which reads "For purposes of specificity under Article 2.1(a), the relevant group of enterprises is the holders of entitlements whose value derived from the Oils and Fats Program" and US' first written submissions, para. 59, which reads "For the SPS Program, the amount of each farmer's payment was based on the assistance received during the reference period when the Oils and Fats Program was in effect. For the BPS Programs, the value of each farmer's entitlement is related to the assistance received under the SPS Program" (see also para 82 in the same sense).

20 US's FWS, para. 71.

21 US's FWS, para. 82 (emphasis added).

it has been produced by an olive grower who holds an entitlement whose value derives from the COMOF program.

35. The US does not realise that its new narrative manifestly confirms that it found the BPS and Greening Programs to be specific (and therefore countervailable) by looking at the eligibility conditions of the COMOF Program.

36. Moreover, the US' arguments confirm that the USDOC's description and understanding of the legislation governing the SPS, BPS and Greening Programs is wrong. In this connection, we would like to draw the Panel's attention to the US' argument according to which "The fact that entitlements could have been bought, rented, or inherited does not sever the reliance on the [COMOF] Program that Spain elected to incorporate into the SPS Program (and by extension, the successor BPS Programs").[22]

37. The fact that entitlements can be bought, rented or inherited is perfectly capable of severing the relation between the amount of support granted to a farmer under the COMOF Program for olive production and the amount of support granted to the same farmer under the SPS and BPS program. Indeed, a farmer that produced olives under the COMOF programme may have transferred his payment entitlement to another farmer and still produce olives under the BPS and be eligible under that program. Likewise, a farmer that produced olives under the SPS or is producing olives under the BPS, may have access to those programs based on entitlements that it had bought, rented or inherited and whose value was not determined in relation to the quantity of olives produced under the COMOF Program.

38. The examples on which the Panel asked the parties to comment show the relevance of transferring the payment entitlements. The US admits so much when it recognises that "having transferred that entitlement component to another farmer, Farmer A would not have actually received subsidies under these programs and would not have factored into the benefit analysis".[23]

39. However, while it is correct that farmer A would not have received subsidy related to the production of olives under the COMOF Program he may very well have received subsidies pursuant to the BPS and Greening programs because he may hold some other payment entitlements.

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22 US's FWS, para. 73.
23 US's Responses to Panel Advanced Questions, para 18.

40. Since farmer A is an olive producer, those subsidies are factored into the benefit analysis because there is nothing in that analysis that seeks to distinguish between olive producers whose BPS' payment entitlements are linked to the COMOF and olive producers whose BPS' payment entitlements are not linked to that past program.

41. Not only that, but the olives of farmers A are subject to the US countervailing duties even though their production did not benefit of any subsidy whose amount is somehow connected to the amount of support received years before under the COMOF Program.

42. For the rest, the US conveniently avoids responding to example B which although formulated in abstract terms reflects the legislation governing the subsidy programs at issue and helps in highlighting the errors in the USDOC de jure specificity findings.

43. In conclusion, the US arguments rather than rebutting the EU claims confirm that the US violated Articles 2.1, 2.1(a) and 2.4 of the SCM Agreement because it grounded its analysis on the eligibility conditions of a previous subsidy program, which is not in force anymore and not on the eligibility conditions of the measures that it found to constitute a countervailable subsidy.

## D. The US violated Articles 2.1, 2.1(b) and 2.4 of the SCM Agreement because the eligibility conditions and the calculation criteria under the SPS, BPS and Greening programs exclude *de jure* specificity

### *(1) Summary of EU claim*

44. With its fourth claim the EU showed that by finding that the SPS, BPS and Greening programs are *de jure* specific the US violated Articles 2.1, 2.1(b) and 2.4 of the SCM Agreement, because it did not explore the question of compliance of the eligibility and calculation criteria of the SPS, BPS and Greening Programs with Article 2.1(b) of the SCM Agreement.

### *(2) The US response*

45. The US argues that support under the SPS and BPS Programs is based on the CMOF Program which explicitly favored olive growers[24]. In any case, because

[24] US's FWS, para. 81.

the SPS and BPS Programs continue to calculate the subsidies conferred to olive growers at least in part based on what olive growers produced, the "amount of" subsidies conferred necessarily is not based on objective criteria or conditions.[25]

46. In the Remand Determination the USDOC tries to fix its failure to explore compliance with the eligibility and calculation criteria[26]. It explains that it "will not regard a subsidy as being specific … solely because the subsidy is limited to the agricultural sector"[27] but it will seek to determine if any sub-sector is afforded special treatment.[28] Accordingly, the USDOC finds that olive growers continued to benefit as they had, **relative to other sub-sectors of the agricultural sector**, under the Common Market Program, under which access to the subsidy was expressly limited to olive growers.[29]

*(3) Analysis of the US' arguments*

47. From the US' attempts in the Remand Determination to demonstrate that it examined the subsidy programs at issue under Article 2.1(b) of the SCM Agreement it appears that the US agrees that it should have assessed those subsidy programs in light of that provision.

48. However, the US' argument that the SPS and BPS programs favoured olive growers over other farmers because the amount of assistance under these programs is based on assistance under the COMOF program, is grounded on at least four errors.

49. First, it creates a conceptual confusion between access/eligibility under the programs and calculation of the amount of support eligible enterprises can receive.

50. Second, access or eligibility under the SPS and BPS was not based on assistance granted under the COMOF program.

51. As regards the SPS, access or eligibility was based, *inter alia*, on the fact of having received a payment under at least one of the previous support schemes that were repealed by the SPS program (section IV.B.2 of the EU first

25 US's FWS, paras. 82-83.
26 Remand Determination, page 11.
27 Remand Determination, page 13.
28 Remand Determination, page 14.
29 Remand Determination, page 17. (emphasis added)

written submission). The USDOC affirms this fact at page 17 of the Remand Determination.

52. As regards the BPS, access or eligibility is based, *inter alia,* on the fact that a farmer has received a direct payments in 2013 under the SPS (Sections IV.C.2).

53. Olive growers were not explicitly favoured as the same eligibility condition applied in respect to any farmer that received a payment under the SPS. The SPS Program, in turn, did not require the production of any particular crop as eligibility condition. The requirement of having received a payment under the SPS Program could not therefore imply any favourable access for olive growers.

54. Third, it is clear that the US assumes that farmers kept on growing olives from the COMOF Program all the way through the BPS Program, and that there are no olive growers under the BPS Program that started to grow that product after the COMOF Program. But as mentioned many times this assumption is unfounded in law and unsupported in fact.

55. Fourth, the US postulates that olive growers were favoured "over others" farmers or relative to other agricultural sub-sectors. However, there is no evidence that the USDOC ever investigated if and to what extent the COMOF Program was more generous to table olive producers than other product-specific subsidy programs (that were repealed and replaced by the SPS) were with respect to their beneficiaries.

56. In addition, with regard to the criteria for the calculation of the amount of support neither the SPS nor the BPS singled out olive growers.

57. Under the SPS the reference amount of each payment entitlement of each farmer was based on the total amounts of payments the farmer received under previous schemes during the reference period, which were decoupled and integrated into the SPS (such as oil and fats, arable crops, potato starch, grain legumes, rice, seeds, beef and veal, milk and dairy, sheep and goats).[30] Hence, this calculation criteria had nothing any more specific to olives production that it had to the production of any arable crops, potato starch, grain, legumes, rice, seeds, beef and veal, milk and dairy, sheep and goats. It was therefore a uniform and unbiased criteria, which did not favour olive

[30] EU's FWS, paras. 79 and 80.

growers any more than a myriad of other farmers producing a multitude of crops. It was an objective criteria because it was based on facts external of the mind and it was economic in nature as it referred to economic factors such as the global amount of support received by each farmer under different support schemes previously in force. This criteria is no less objective or economic in nature than the one proposed by the US such as the farmer's farm income (which obviously includes the subsidies received by that farm).

58. Under the BPS, pursuant to Article 26.2 of Regulation 1307/2013, the initial unit value of the payment entitlement shall be determined as "a fixed percentage of the payments the farmer received for 2014 under the single payment scheme. Moreover, Member States may also include into the initial BPS unit value other payments granted for the calendar year 2014 under a few residual coupled aid programs (such as suckler cow premium, the cotton quality premium, the tobacco quality premium, and the rain-fed rotation program premium), which from that moment, were also decoupled from the production of a specific agricultural product.[31]

59. Again, this calculation criteria is uniform and unbiased. It does not favour olive growers any more than the myriad of farmers that were eligible under the SPS because they had produced any agricultural product or simply maintained the land in good agricultural conditions (or one of the mentioned sectoral scheme). It is an objective criteria because it is based on facts external of the mind and it is economic in nature as it refers to economic factors such as the global amount of support received by each farmer in a previous period for producing whatever crop or no crop at all.

60. It is clear therefore that by finding that the SPS, BPS and Greening programs are *de jure* specific to olive growers the US violated Articles 2.1, 2.1(b) and 2.4 of the SCM Agreement.

### E. The US violated Articles 2.1, 2.1(a) and (b) and 2.4 of the SCM Agreement because its *de jure* specificity findings are not based on positive evidence and because it did not provide reasoned and adequate explanation for those findings

61. Under this claim the EU has gathered a number of arguments showing that the explanations in the USDOC Determinations do not reasonably support its findings of de jure specificity.

[31] EU's FWS, paras. 123 and 142.

62. In particular, the EU showed that the "foundation" of the USDOC's reasoning about de jure specific is a finding that the USDOC explicitly chose not to render[32]. The EU showed the contradiction between the USDOC's argument that the specificity element inherent in the COMOF Program transited into the SPS program and then into the BPS Program and the finding that both the SPS and BPS Programs are completely decoupled from production, and accessible to farmers in general.[33] The EU also highlighted the contradiction in how the USDOC took account of the convergence process[34] and demonstrated a number of USDOC's errors of appreciation of the legislation governing the subsidy program at issue.[35]

63. The US, rather than demonstrating that the USDOC did not err in describing the legislation governing the subsidy programs at issue, tend to downplay the importance of those errors or the importance of the contradictions highlighted by the EU.

64. Even admitting for the sake of argument that some of those errors and contradictions taken individually might not be fatal, they are so many that when taken together they clearly show that the USDOC failed to understand that legislation or gave a biased description of its operation.

65. In any event the arguments of the US are essentially a hopeless attempt to hide those errors behind ex-post rationalisations or they contradict the terms of the USDOC Determinations. They do not stand a chance.

66. In what follows the EU will not recall and rebut each punctual argument of the US because most of them have already been rebutted in previous submissions or in this oral statement. The EU will rather focus on a few remarkable points.

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32 EU's FWS, paras. 282-289.
33 EU's FWS, paras. 290-292.
34 EU's FWS, paras. 293-294.
35 Those errors are illustrated in the following paragraphs of the EU's FWS:
- 299 (about which data Spain used for the regional implementation of the BPS),
- 300-303 (how the value of the payment entitlements of each farmer is calculated and whether or not it is associated with a given hectare of farmland),
- 304 (the role of the regional reference value in the calculation of the value of the payment entitlements of a farmer),
- 305-306 (how the regional value is determined),
- 307-308 (the notion of "adjusted coefficient" invented by the USDOC),
- 309-310 (the USDOC invented notion of SPS regions),
- 311-313 (the invented notion of value of entitlement per hectare),
- 315 (how the grant amount was determined under the COMOF Program),
- 316-318 (the biased presentation of the Aid to Olive Groves Program), and
- 319-329 (the fact that the USDOC reasoning is predicated on the existence of a legal requirement to continue olive production from the days of the COMOF Program that does not exists and was not investigated by the USDOC).

67. In the first place, it is worthwhile to spend a few more words on the USDOC's error according to which the SPS was implemented on a regional basis. The US admits this finding is an error but it argues that it is not material because "the differing payments under the SPS Program could lead to different entitlement values for farms in different regions, even if the regions themselves were not designated as separate regions until the BPS Programs".[36]

68. However, this explanation is not contained in the USDOC Determinations. In any event, this convoluted statement is just another confirmation of the inadequate explanation on which the USDOC based its specificity findings. The EU still struggles to understand what is the relevance of the reasoning above.

69. On a more general level the EU struggles to understand the relevance of the various arguments relating to regional differences, "regional coefficients" [37], or "regional weighting coefficients" [38] and the like[39] in the reasoning of the USDOC supporting the findings that the subsidy programs at issue are de jure specific to olive growers. The USDOC did not find those programs to be specific on a regional basis but based on the eligibility conditions under the Oils and Fats Program.[40]

70. At the same time, it is undisputed that, whatever methodology Spain used to define the 50 BPS regions, Spanish farmers are legally free to grow whatever crops pleases them in whatever region and eligibility under the programs at stake is not conditioned on growing any specific crop. Hence, how can regional variations in the amount of subsidies granted under the BPS lead to de jure specificity for olive growers if in each region farmers can grow whatever they want?

71. Moreover, the US argues now that "If, for example, a region was comprised entirely of olive growers, the assistance provided under the Oils and Fats Program could have ultimately resulted in a higher average for that region."[41] However, this hypothetical reasoning is no more than an argument elaborated ex-post whose relevance remains mysterious. The USDOC neither enquired about the different crops cultivated in each Spanish agricultural region, nor did

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36 US's FWS, para. 97.

37 US's FWS, para. 96

38 US's FWS, para. 98.

39 US's FWS, para. 96 "the coefficient is higher for irrigated crops and permanent crops (e.g., olives) than it is for rainfed land and permanent pastures"

40 US's FWS, para. 44.

41 US's FWS, para. 76.

it explore if the assistance provided under the Oils and Fats Program resulted in a higher average support for olive farmers compared to the support granted to farmers growing other crops. It did not even explore whether or not there exists a region growing only olives. In summary, the US did not find the subsidies to be specific to the olive growers of any Spanish agricultural region.

72. On the other hand, the undisputable fact is that, contrary to what the USDOC found, the SPS Program was not implemented on a regional basis. Not even the COMOF Program was implemented on a regional basis. These are errors in the description of the legislation pursuant to which the granting authority operates the subsidy programs at stake that are not innocent, as it is the US itself that keeps on relying on them to try to justify the USDOC findings.

73. It is also appropriate to repeat that the EU did not argue that "decoupling" from production precludes an affirmative finding of *de jure* specificity.[42] It is the USDOC that found the subsidies to be tied or coupled to the production of olives and therefore de jure specific to farmers growing olives.[43] As the US recalls "the USDOC's examination revealed that ... the eligibility criteria for subsidies conferred to olive growers under the BPS Programs remained linked to production of olives."[44] Accordingly, it could not find (at the same time and without contradicting itself) that the programs were decoupled from production of any crop.

74. Indeed, if the SPS and BPS Programs are completely decoupled from production and accessible to farmers in general[45] (also to those that do not produce any crop), how can they be de jure specific to olives farmers or olives growers as the USDOC finds in its Determinations?

75. Finally, allow me to comment also on how the US took into account the convergence process. The USDOC rejected categorically the idea that the convergence process could have any impact on its specificity findings[46] Despite

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42 US's FWS, paras. 91-92.

43 US's FWS, para. 56, which reads "the BPS Program subsidies continue to be specific to olive producers". Remand Determination, page 8 which refers to the "the crop-specific subsidy payments under the SPS"

44 US's FWS, para. 28 (underlined added). See also Exhibit EU-1, page 24, Exhibit EU-2, pages 15, 32 and 33 that confirm the Preliminary Determination, and the passages of the US FWS recalled in para 51 of the EU responses to the Panel Advanced Questions.

45 See US's Responses to Panel Advanced Question para. 22 which reads "…under the SPS Program and BPS Programs "entitlements" were generally available to all farmers"" as well as para. 25 Which reads "the SPS Program and BPS Programs provided certain subsidy payments to farmers generally".

46 Exhibit EU-2, p. 36.

the US' attempt to nuance that categorical statement[47], nowhere the USDOC explained that the convergence process had just started during the POI, or that such a process might have affected its conclusion about de jure specificity some years later but "it would still be premature to make such a finding for the period of investigation"[48].

76. The EU therefore maintains that the USDOC's explanations are not reasonably capable of supporting its findings about de jure specificity of the subsidy programs at issue.

## III. PASS-THROUGH BENEFIT

77. Regarding the issue of pass-through benefit, the EU's claim is that the US violated WTO law through its application of Section 771B when it attributed to ripe olive processors the full amount of subsidies granted to olive growers. The US presumed the existence of pass-through benefit without carrying out an examination whether and to what extent the benefit was actually passed through to the processors.[49] The EU also demonstrated that Section 771B is as such inconsistent with WTO law because it mandates the presumption of pass-through in situations where WTO law would require a pass-through analysis.[50]

### A. The US's main argument on pass-through benefit is directed against a claim the EU did not make

78. The US devotes 8 out of 13 pages on pass-through benefit in its first written submission arguing against an alleged EU "[claim] that the GATT 1994 and the SCM Agreement Require a Particular Methodology for Conducting a Pass-Through Analysis".[51] According to the US, the EU would assert "that a conjoint reading of these provisions[52] would oblige an authority to carry out a pass-through analysis based on price differentiation".[53] The US could have saved itself some paper. The EU makes no such claim, not even such an argument. The EU explicitly so stated in response to the US's first written submission[54] but the US continues to deliberately misrepresent the EU's pass-through

47 US's FWS, paras. 74, 93-94.
48 US's FWS, para. 74.
49 EU's FWS, paras. 21 and 358-386.
50 EU's FWS, paras. 22 and 387-421.
51 US's FWS, paras. 103 and 106-132. US's reply to question of the Panel of 10 June 2020, paras. 45-48.
52 Article VI:3 GATT 1994 and Articles 10, 19, 32.1 SCMA.
53 US's FWS, para. 107.
54 EU's reply to question 14 of the Panel of 10 June 2020, paras 92-93.

claim.[55] The US also misrepresents several of the EU's injury claims[56] and seems to prefer defending itself against fictitious EU claims rather than against the EU's actual claims.

79. The EU nowhere claims or argues that the provisions of the GATT 1994 and the SCM Agreement referenced by the US would require a specific methodology of price differentiation in the context of a pass-through analysis. The actual claim – as made by the EU - is clearly set forth in the EU's panel request[57] and repeated on several occasions in the EU's first written submission.[58] The EU's claim is that the US was under a legal obligation under Article VI:3 of the GATT 1994 and Articles 10, 19 and 32.1 of the SCM Agreement to demonstrate whether and to what extent benefit passed through from the raw olive growers to the ripe olive processors. The US failed to do so by presuming full pass-through of benefit when applying the two conditions of Section 771B, a provision which is as such WTO-inconsistent. This is the EU's claim that the US may consider defending itself against from now on.

80. The EU did provide explanations and arguments as to why a proper pass-through analysis for input subsidies requires "some form of price comparison on the basis of a benchmark price."[59] However, the EU provided those considerations in order to counter US arguments that the two conditions of Section 771B constitute a pass-through analysis.[60] The EU offered its views on what would be positively required for an appropriate pass-through analysis (i.e. some form of price comparison) to demonstrate that Section 771B – which does not look at the price of the input product at all -, is inapt to determine the existence and extent of pass-through benefit.

81. The EU's arguments with respect to price comparisons include (i) basic economic and subsidy law principles which dictate that only a price comparison of some form with respect to the input product can meaningfully determine the existence and amount of pass-through benefit for input subsidies,[61] (ii)

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55 US reply to question II c of the Panel of 8 September 2020, para. 26.
56 EU's reply to question 3 c of the Panel of 8 September 2020, paras. 114 and 120-122.
57 EU's Panel Request of 16 May 2019: "the DOC did not carry out a pass-through analysis to assess to what extent subsidies to olive growers…pass through to the processors of ripe olives".

58 EU's FWS, paras. 21-22, paras. 332-335, para. 386 and paras. 419-421.
59 EU's FWS, paras. 406 to 412; EU's reply to question 13 of the Panel of 10 June 2020, paras. 81, 95.
60 US's FWS, paras. 104-105.
61 EU's FWS, para. 408. EU's reply to question 13 of the Panel of 10 June 2020, paras. 81, 85, 93; EU's reply to question 2b of the Panel of 10 September 2020, paras. 81-84.

Appellate Body case law stating that the term "benefit" implies some kind of comparison,[62] (iii) the GATT Panel Report in *US – Canadian Pork*,[63] (iv) the US's own legislation which *prescribes* price comparisons to determine pass-through benefit for non-agricultural input subsidies,[64] and (v) the US's position in a previous WTO dispute where it agreed that price comparisons are the correct means to determine pass-through benefit for input subsidies.[65] The EU's views on price comparisons were also fully supported by those Third Parties that expressed a view on pass-through benefit.[66] Importantly, none of the EU's arguments on price comparisons was premised on an interpretation of the provisions of the GATT 1994 or the SCM Agreement cited to by the US, to the effect that they would require a specific pass-through methodology.

82. Therefore, the US's lengthy considerations as to why the GATT 1994 and the SCM Agreement cannot be interpreted to require a specific method for a pass-through analysis[67] including the US's extensive arguments on the WTO's negotiating history[68] are made "into the void". They do not address any argument made by the EU, let alone any claim by the EU to that effect. The EU trusts that the Panel will draw the appropriate conclusions as to the relevance of the US's argument for this dispute.

83. For the same reasons, the Panel does not need to decide in this case whether the GATT 1994 and the SCM Agreement require a specific methodology for determining pass-through benefit. The EU neither claimed nor argued that they did.

### B. Section 771B does not contain a pass-through analysis

84. In the context of the EU's as such claim, the EU demonstrated that the factual situations covered by Section 771B do require a pass-through analysis under WTO law[69], that Section 771B is a mandatory provision[70] and that Section

62 EU's reply to question 13 of the Panel of 10 June 2020, para. 82 with reference to Appellate Body Report, *Canada – Aircraft*, para. 157; EU's reply to question 14 of the Panel of 10 June 2020, para. 97.
63 EU's FWS, para. 407.
64 EU's FWS, para. 409 and Exhibit EU-49.
65 EU's reply to question 14 of the Panel of 10 June 2020, para. 96 with reference to Canada's Third Party Written Submission, para. 20, referring to the US's Second Written Submission before the panel in *US – Softwood Lumber IV (Article 21.5 - Canada*) dated March 31, 2005, Exhibit CAN-001, para. 35.
66 EU's reply to question 14 of the Panel of 10 June 2020, para. 93 with references to the third party written submissions of Canada, Japan and Turkey.
67 US's FWS, paras. 109-132.
68 US's FWS, paras. 124-127.
69 EU's FWS, Section V.C.2.
70 EU's FWS, Section V.C.4.

771B does not contain a pass-through analysis because the two conditions are inapt to determine the existence and extent of pass-through benefit.[71] The EU therefore demonstrated that Section 771B violates WTO law as such and its application in the present case was also WTO-inconsistent.

85. The EU will focus in this oral statement on the US's argument that the two conditions in Section 771B contain a pass-through analysis adapted "to the economic realities of trade in raw agricultural products and in processed downstream products."[72] The EU recalls that Section 771B only looks at two elements: (i) the prior stage product must be substantially dependent on the demand for the latter stage product and (ii) the processing operation adds only limited added value. If those two conditions are fulfilled the authority "shall" deem that the entire benefit was conferred to the processor. Put differently, if the two conditions of Section 771B are fulfilled, the US will presume a full pass-through of benefit.

86. In the following, the EU will briefly recall why some form of price comparison is required to determine pass-through benefit for input subsidies and that Section 771B, by entirely disregarding the price of the input product, does not contain a pass-through analysis. The EU will then demonstrate that the alleged "particularities" of agricultural commodities underlying Section 771B do not reflect economic reality.

87. In case of input subsidies, the subsidies are provided to input producers (here olive growers) and these inputs are subsequently sold to processors (here ripe olive producers). In such a scenario, the investigating authority is under a legal obligation to establish, based on evidence, whether and to what extent the benefit is passed-through from the grower to the processor in case of arm's length transactions.[73] The US does not dispute the existence of this legal obligation under the Agreements, it only challenges - into the void - that the Agreements require a specific method. However, if the authority is supposed to determine whether the benefit to the grower was transferred to the processor, how else can the authority proceed other than by assessing whether and to what extent the benefit is reflected in the <u>price</u> of the input (raw olive) sold to

[71] EU's FWS, Section V.C.3.

[72] US's FWS, paras. 137, 139, 140, 151. US's reply to question 15 of the Panel of 10 June 2020, paras. 49-52.

[73] See, e.g., Appellate Body Report, *US – Softwood Lumber IV*, paras. 142 and 143. EU's FWS, paras. 348-357.

the processor?[74] The benefit can only "travel" with the input product concerned and the benefit can only be "reflected" (or not) in the price of the input product concerned. If the price of the input product is lower than the market price as a result of the subsidy, there is pass-through. If the input is sold at a market price, there is no pass-through. What method other than a price comparison can there be to establish pass-through benefit under these circumstances? And indeed, US legislation even *prescribes* a price comparison for products other than agricultural products.

88. In view of the above, it is clear that Section 771B does not contain a proper pass-through test. The EU refers to the arguments it previously made, notably to the fact that Section 771B cannot establish the existence of pass-through benefit because it does not look at the price of the input product at all, let alone contains a price comparison. In addition, Section 771B is unable to determine the extent of pass-through benefit because it only allows to attribute the full amount of benefit but does not permit any calibration of the amount of pass-through benefit as required by the case law.[75] The EU also agrees with Canada's similar explanations in this respect.[76]

89. The EU further submits that the entire underlying economic premise behind Article 771B is fundamentally flawed. Section 771B is based on the alleged need to avoid circumvention of duties in the agricultural sector which would occur where there is (i) substantial dependency of demand of the raw product on the processed product and (ii) the processing adds limited value. Ripe olives are actually not a good example because the two conditions of Section 771B are not fulfilled as confirmed earlier this year by a US court.[77]

90. The EU will therefore look at the frozen raspberry example that has been frequently cited, for example before US Congress[78] to justify the need for Section 771B. The raspberry example is also referred to by the US in its

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74 Also see the EU's example in the EU's reply to question 14 of the Panel, para. 87.

75 Appellate Body Report, *US – Softwood Lumber IV*, para. 143: "provided it can be established that the benefit…is passed through, at least in part…"; Panel Report, *United States – Softwood Lumber III*, para. 7.71: an investigating authority should "examine whether and to what extent the subsidies bestowed on the upstream producers benefited the downstream producers."

76 Canada's Third Party Written Submission, paras. 24-25.

77 The US Court of International Trade (USCIT) in its Opinion of 17 January 2020 found that the USDOC's interpretation of "substantially dependent" under Section 1677-2(1) (i.e. Section 771B) in the ripe olive investigation was "arbitrary" (p. 21 of the Opinion) (Exhibit EU-50).

78 Petition at Exhibit III-19, 133 Congressional Record S8815, Senator Baucus (1987), Barcode: 3583402-11 (Exhibit EU-48).

determinations[79] and in its first written submission.[80] As the story goes, foreign farmers growing raspberries could easily avoid duties on their fresh raspberries by freezing them and selling frozen raspberries to the US. Section 771B and its presumption of pass-through benefit would be needed to address that risk of circumvention. A US Senator explained: "Let's say I am a [subsidized] foreign producer of raspberries…Now if I sent those raspberries to the United States, I have to pay a tariff to offset the subsidy. But if I freeze the raspberries, I pay no tariff…Does that make sense?"[81] Actually, yes, it makes perfect sense. What does not make sense is the US Senator's economic premise of the example. The Senator seems to assume that in case of duties on raspberries, farmers would simply stick fresh raspberries into their kitchen freezers and ship plastic bags of frozen raspberries to the US instead of fresh raspberries.

91. It is obvious that this simplistic assumption has nothing to do with economic reality. Raspberry growers cannot enter the separate market of frozen raspberries by using their farmhouse freezers. Instead, raspberry growers would have to invest large amounts of money into professional cooling equipment complying with strict hygiene regulations, invest into packaging and labelling machinery, they would need to hire additional staff for these new facilities, they would have to find new customers for frozen raspberries in the US and they would need to invest into expensive advertising campaigns to establish themselves in the US frozen raspberry market. What is the actual risk of this type of circumvention occurring? Indeed, essentially zero. Farmers will not undertake expensive high-risk investments and enter the entirely new and separate market of processed products only because one country decides to impose duties on their raw products. Raspberry farmers would simply sell their fresh raspberries to countries other than the US.

92. Therefore, even the very basic frozen raspberry example shows that there is no specific risk of circumvention for agricultural commodities. On the contrary, the example confirms that the economic situation for agricultural commodities is no different from other products where the raw product and the processed product are in separate industries. One important reason why separate

[79] Issues and Decision Memo (Preliminary), 20 November 2017, p. 15 (Exhibit EU-1).
[80] US's FWS, para. 146, footnote 211.
[81] Petition at Exhibit III-19, 133 Congressional Record S8815 (1987), Barcode: 3583402-11 (Exhibit EU-48).

industries exist is precisely that it takes more than just "minor processing"[82] to enter a separate market.

93. Therefore, the relevant economic premise is not the "inextricable link"[83] between the input product and the processed product or the circumvention logic[84] of Section 771B. Agricultural commodities are no different than any other products when it comes to input subsidies. The relevant economic premise is that where an input producer and a processor are in separate markets and operate at arm's length, the input producer has an economic interest to retain the subsidy.[85] It is therefore for the authority to establish in a particular case whether and to what extent benefit was passed-through to the processor despite the economic incentive for the input producer to keep it. The authority can only do so by carrying out a price comparison of some form with a benchmark price for the input product. Section 771B is unable to fulfil that function.

94. For the reasons set forth in this oral statement and in the EU's prior submissions, the US violated Article VI GATT 1994 and the SCM Agreement both as applied and as such.

## IV. INJURY

95. The EU demonstrated that the US's injury and causation analysis under Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement[86] is riddled with numerous inconsistencies from start to finish. Rather than going through each of the EU's numerous injury claims, the EU will focus in its oral statement on the US's flawed market "segmentation" and on its flawed volume and price effect analysis which form the basis of the US's injury and causation findings.

### A. The US's market "segmentation" by distribution channels is not supported by evidence, meaningless and arbitrary

96. The US's injury and causation analysis is fundamentally based on its "segmentation" of the ripe olive industry by distribution channels. However, the EU has demonstrated that the US's "segmentation" is not based on

82 US's FWS, para. 137.
83 US's FWS, para. 139.
84 US's FWS, para. 136.
85 EU's FWS, paras. 334, 361, 372. Canada's Third Party Written Submission, para. 7.
86 For ease of reading, the EU will in the following only refer to relevant provisions of the SCM Agreement but these provisions should be read to include the corresponding provisions of the Anti-Dumping Agreement.

positive evidence and is contradicted by the findings in the US's determinations.[87] According to the evidence on record and the US's own findings, all ripe olives are "highly substitutable" and hence imported and domestic ripe olives are in competition across all three distribution channels. The US's alleged "segmentation" by distribution channels therefore had no relevance whatsoever for the assessment of the competitive relationship between imported and domestic ripe olives and hence for the US's injury analysis; it could not form the basis of such analysis.

97. An investigating authority does not have unlimited discretion to segment a market in the context of Article 15 SCMA. A market "segmentation" in the context of Article 15 SCMA serves to better understand the competitive relationship between imported and domestic products.[88] A market segmentation may be relevant, for example, where the product concerned is a differentiated product and not all product sub-types (e.g. high-end and low-end products) compete with each other to the same degree.[89] Similarly, several WTO disputes concerned injury determinations where authorities explained that specific market segments were not subject to competition from imports, notably so-called captive markets.[90] In these scenarios, it may be relevant for the authority to segment the industry in order to better assess, for example, whether and to what extent imported high-end products compete with domestic low-end products or *vice versa*; the underlying premise being that injury is caused by subsidized imports to domestic products that are "like products".[91]

98. In the present case, the US found that "all ripe olives" constituted the single like product.[92] Hence the US considered that the relevant product was homogeneous and there was no further product differentiation. The determinations also clearly establish that all ripe olives, whether domestic or imported, "have a high degree of substitutability".[93] Purchasers (i.e. the distribution channels) consider that all ripe olives, whether imported or

87 EU's FWS, Section VII. B 1.
88 Appellate Body Report*, China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.262; Appellate Body Report, *US – Hot Rolled Steel*, para. 198; Appellate Body Report, *China – GOES*, para. 210.
89 Appellate Body Report, *China – HP-SSST (Japan) /China – HP-SSST (EU)*, paras. 5.262-5.263. EU's reply to question 3.c of the Panel of 8 September 2020, paras.101-102.
90 Appellate Body Report, *US – Hot Rolled Steel*, para. 198. Also see the examples of EU segmentations in Exhibits USA-33 to USA-35 and the examples in the EU's reply to question 3 c of the Panel of 8 September 2020, para. 102, footnote 86.
91 Article 15.1 SCMA and footnote 46 of the SCM Agreement.
92 USITC Publication 4805, July 2018, p. 7 (Exhibit EU-5). EU's FWS, para. 461.
93 USITC Publication 4805, July 2018, p. 17 (Exhibit EU-5). EU's FWS, paras. 485-486.

domestic, are fully substitutable which means that there is demand-side substitutability.[94] Ripe olive suppliers explicitly confirmed that they can and do supply all three distribution channels with all ripe olives so that there is also full supply-side substitutability.[95] In other words, all ripe olives, whether imported or domestic, compete with each other across the three distribution channels and hence across the entire industry. Hence there exists only one single relevant market segment for the purpose of Article 15 SCMA – all ripe olives, i.e. the "like product". Under such circumstances, the US could not "segment" the industry by distribution channel. The US had to carry out its injury and causation analysis for the ripe olive industry as a whole.

99. To be very clear, the EU does not assert – as the US incorrectly contends[96] - that an authority may not segment a market for the purpose of an injury and causation analysis.[97] The EU itself carries out such market segmentations in the appropriate circumstances.[98] Nor does the EU challenge that – factually – there are different distribution channels with different customers in the present case; different distribution channels exist for almost any product.[99] What the EU does challenge is that the US based its injury and causation analysis on a market "segmentation" in the context of Article 15 SCMA where such "segmentation" was not supported by evidence and where it had no relevance whatsoever for assessing the competitive relationship between domestic and imported products since all ripe olives competed across the entire industry and across all distribution channels. In addition, the relevance of the "segmentation" for the US's injury and causation analysis is nowhere explained in the determinations.

100. The US in its replies to the second round of questions from the Panel provided as Exhibits three examples of EU determinations where the EU segmented markets in subsidy investigations. These would contradict the EU's arguments

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94 USITC Publication 4805, July 2018, p. 17 (Exhibit EU-5); EU's FWS, paras. 485-486. For the concept of demand-side substitutability see Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1121 and the EU's reply to question 5 b of the Panel of 8 September 2020, para. 173.

95 USITC Publication 4805, July 2018, pp. 15-18 (Exhibit EU-5); EU's FWS, para. 484; EU's reply to question 3a of the Panel of 8 September 2020, paras. 89-91. For the concept of supply-side substitutability see Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1121; EU's reply to question 5 b of the Panel of 8 September 2020, para. 173.

96 US's reply to question III a of the Panel of 8 September 2020, para. 33.

97 EU's FWS, para. 470; EU's reply to question 3 c of the Panel of 8 September 2020, para. 99.

98 See the examples provided by the US in its reply to question III a of the Panel of 8 September 2020, para. 33 (Exhibits USA-33 to USA-35).

99 EU's FWS, para. 483.

on segmentation.[100] In fact, the EU is very grateful to the US for these examples because they 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.

101. The first EU case concerns cold-rolled flat steel products. In the determinations, the EU makes a distinction between two segments, the captive and the free market. The EU explains that "[t]he distinction between captive and free market is relevant for the injury analysis because products destined for captive use are not exposed to direct competition from imports…By contrast, production destined for the free market is in direct competition with imports of the product concerned."[101] The two other examples concern different products but also distinguish between the captive and the free market and explain the relevance of the market segmentation for the injury analysis in terms almost identical to the first example.[102]

102. In each of the three EU determinations, the segmentation was relevant to assess the competitive relationship between imported and domestic products. Imported products only competed with domestic imports in the free market segment, not in the captive market segment. Hence there were no uniform conditions of competition. In each example, the EU segmented the market precisely because it was relevant for the assessment of the competitive relationship between imported and domestic products in view of the differing competitive conditions. In each example, the EU provided an explanation why the segmentation was relevant for the competitive relationship and hence why the segmentation was relevant for the injury analysis.

103. By contrast, in the ripe olive investigation, conditions of competition are demonstrably uniform across the entire ripe olive industry. According to the US's determinations, there is one single like product[103] - "all ripe olives" - and domestic and imported ripe olives are "highly substitutable". Both domestic and imported ripe olives are sold in all three distribution channels. In other words, every imported Spanish ripe olive competes with every domestic ripe olive, irrespective of the distribution channel in which it is sold. The US's

[100] US's reply to question III a. of the Panel of 8 September 2020, para. 33 (Exhibits USA-33 to USA-35).
[101] Exhibit USA-33, para. 101.
[102] Exhibit USA-34, para. 30; Exhibit USA-35, para. 34.

[103] For the relevance of footnote 46 of the SCM Agreement ("like product"), see EU reply to question 3 c of the Panel of 8 September 2020, para. 100.

"segmentation" along distribution channels for Article 15 SCMA was therefore not supported by the evidence and irrelevant to assess the competitive relationship between domestic and imported ripe olives.

104. Contrary to the EU examples, the US nowhere in its determinations explains why a "segmentation" along distribution channels would be relevant for its injury analysis. The US keeps repeating in the determinations that the retail "segment" is the "largest segment" for the US producers[104] but that is not an explanation or basis for a market segmentation by distribution channel. Imported Spanish and US ripe olives compete as much in the retail "segment" – with high US shares - as they do e.g. in the distribution segment – with high Spanish shares. The existing competition in all three channels is further evidenced by the fluctuating sales shares in recent years. In view of the uniform conditions of competition across the entire relevant industry, the US could, in the specific circumstances of this case, only assess injury and causation for the ripe olive industry *as a whole*.

105. In fact, in its reply to question 20 of the Panel, the US expressly admits that when "segmenting" the ripe olive industry the USITC disregarded its finding of a single domestic like product ("all ripe olives") and its finding that all ripe olives are "highly substitutable".[105] However, it is precisely these findings that demonstrate that all ripe olives, whether imported or domestic, compete with each other, irrespective of the distribution channel. Contrary to the US's assertion[106], the Appellate Body found that substitutability is highly relevant for an assessment of the competitive relationship between imported and domestic products and hence for a segmentation in the context of an injury analysis under Article 15 SCMA.[107]

106. In the same reply, the US also expressly acknowledges that the only relevant factor for its "segmentation" was the mere fact that competition between imported and domestic products "was concentrated and intensified" in the retail "segment".[108] Apart from the fact that this statement is factually incorrect (competition is "concentrated" and "intense" in all three channels), the US cannot have it both ways. It cannot make findings to the effect that all ripe olives are highly substitutable and hence compete across the three

[104] USITC Publication 4805, July 2018 (Exhibit EU-5), e.g. pp. 18, 20, 24.
[105] US's reply to question 20 of the Panel of 10 June 2020, para. 61.
[106] US's replies to further questions of the Panel, III. a, para. 29, footnote 45.
[107] Appellate Body Report, *China – GOES*, para. 5.262; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1118-1121
[108] US reply to question 20 of the Panel, para. 61.

distribution channels while at the same time arguing that the industry needs to be segmented by distribution channels for the injury analysis which plainly contradicts its substitutability finding. Whether, and to what extent, domestic and imported ripe olives compete depends on their substitutability[109], not on whether the domestic industry has high shares or loses shares in a given distribution channel.

107. The US's alleged market "segmentation" along distribution channels is therefore nothing but a smoke and mirrors trick in order to be able to carry out the injury and causation in the retail "segment" which – surprise, surprise! - happens to be the only "segment" where Spanish imports increased. The US's market "segmentation" for the purpose of assessing the competitive relationship between domestic and imported ripe olives in the context of its injury analysis is not supported by the facts and evidence and its relevance for the injury analysis is nowhere explained in the determinations. A volume and price effect analysis based on such unfounded, biased and arbitrary "segmentation" does not amount to an objective examination and violates Articles 15.1 and 15.2 SCMA. As a result, the US's entire injury and causation analysis, which is fundamentally based on the US's artificial "segmentation", is WTO inconsistent.

B. <u>The US failed to carry out an injury and causation analysis for the industry as a whole</u>

108. The EU recalls that it brought a number of individual claims under the different provisions of Article 15 SCMA to the effect that the US only carried out its injury and causation analysis for the retail "segment" but failed to examine the industry as a whole and the two other "segments" in like manner. The EU will begin with setting out certain uncontested facts which will help illustrating the flaws of the US's approach.

109. It is undisputed that Spanish imports decreased at the level of the industry as a whole by 6.4% during the period of investigation.[110] It is also undisputed that there was no significant increase of volume of Spanish imports in absolute or relative terms at the level of the industry as a whole.[111] It is further undisputed that there was no price suppression and no price depression for

[109] Appellate Body Report, *China – GOES*, para. 5.262; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1117-1129.
[110] USITC Publication 4805, July 2018, p. 18 (Exhibit EU-5).
[111] EU's FWS, paras. 577 to 580 with references to the US's determinations.

the industry as a whole;[112] this necessarily means that prices of the domestic industry cannot have been affected by subject imports.[113] In other words, according to the US's own findings, Spanish imports affected neither the volume nor the prices of US producers when looking at the industry as a whole. Spanish imports therefore could not have caused injury to the US domestic industry. Faced with these inconvenient facts and findings, the USITC resorted to a magic trick. Instead of carrying out an injury and causation analysis for the industry as a whole the US carried out its assessment in the retail "segment", the only "segment" where Spanish imports increased. And where there was an empty magician's hat before with no effects and no causation, that hat was now suddenly filled with volume and price effects and with causation for the retail "segment".

110. However, as the EU explained in its first written submission, it is not a very good magic trick. It is rather black magic because, as a result, the US imposed countervailing duties with respect to the entire ripe olive industry even though the retail "segment" accounted for only 17% of Spanish imports.[114] However, an assessment of whether an industry is injured by subject imports cannot be answered on the basis of an analysis of one single "segment" which accounts for less than 20% of subject imports. This would completely ignore the volume trends of more than 80% of subject imports. It is clear that a volume increase in the "segment" accounting for 17% of subject imports can easily be nullified by a decrease in the other industry parts accounting for 83% of subject imports (as was the case for Spanish ripe olives whose overall volume decreased).[115] As a matter of common sense, an authority in such circumstances must assess volume and price effects, impact and causation with respect to the industry as whole, certainly absent any explanation. And yet, for ripe olives, the US found injury and causation on the basis of an increase of Spanish imports in the retail "segment" which accounted for only 17% of Spanish ripe olives sales in the US. In other words, the US carried out its entire injury and causation analysis with a complete disregard for 83% of

[112] USITC Publication 4805, July 2018, pp. 21-22 (Exhibit EU-5).
[113] EU's FWS, para. 541.
[114] USITC Publication 4805, July 2018, p. II-2, Table II-1 (Exhibit EU-5). Most of the remaining Spanish imports are sold in the distribution "segment".
[115] See the EU's reply to question 3.c of the Panel of 8 September 2020, paras. 139-141, for further explanations.

Spanish imports. The US even explicitly acknowledged that Spanish imports decreased at industry level.[116] This simply cannot be right.

111. And indeed, Appellate Body case law confirms that the US's segmential analysis in the present case is WTO-inconsistent. The Appellate Body explicitly found that "the investigation and examination must focus on the totality of the domestic industry and not simply on one part, sector or segment of the domestic industry."[117] While a segmential analysis may be "highly pertinent", the Appellate Body explained that an objective examination under Article 15.1 SCMA requires that if an authority undertakes an examination of one part of a domestic industry, it should also examine, in like manner, all of the other parts as well as the industry as a whole. Or, in the alternative, the authority must provide a satisfactory explanation why it is not necessary to examine the other industry parts. This is because the examination of only the poorly performing parts of the industry risks giving a misleading impression for the industry as a whole.[118] Similarly, the Appellate Body found that the effect analysis under 15.2 SCMA must provide a "meaningful basis" for causation[119] and the impact analysis under Article 15.4 SCMA "requires an examination of the explanatory force of subject imports for the state of the domestic industry."[120] It is obvious that an analysis with respect to only 17% of subject imports neither constitutes an "examination of the totality of the domestic industry", nor provides a "meaningful basis" for causation nor has "explanatory force" for the state of the industry. Such a partial analysis carries a high risk of creating a false positive. This case is a prime example.

112. The EU has demonstrated in its first written submission that the US's entire injury and causation analysis is limited to the retail "segment" and that the US failed to examine the other parts of the industry and the industry as a whole in like manner.[121] The EU will illustrate the US's flawed approach on the basis of

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[116] USITC Publication 4805, July 2018, p. 18 (Exhibit EU-5).

[117] Appellate Body Report, *US – Hot Rolled Steel*, paras. 190, 204; Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.204; Panel Report, *Mexico – Corn Syrup*, para. 7.147. The same requirement to examine the industry as a whole also applies under the Safeguards Agreement, see e.g. Panel Report, *Korea-Dairy Safeguard,* para. 7.58 and Panel Report, *Argentina - Footwear Safeguard*, para. 8.137 and footnote 514.

[118] Appellate Body Report, *US - Hot Rolled Steel*, para. 204 [emphasis added]. EU's FWS, paras. 450-451.

[119] Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.180.

[120] Appellate Body Report, *China – GOES*, para. 149.

[121] EU's FWS, Section VII.B.2 (volume effects under Articles 15.1 and 15.2 SCMA); Section VII. C.2. (price effects under Articles 15.1 and 15.2 SCMA); Section VII.D.2. (impact analysis

the US's volume and price effect assessments under Articles 15.1 and 15.2 SCMA.

***The US failed to consider volume for the industry as a whole and for the two other "segments"***

113. Regarding the consideration of volume effects under Article 15.2 SCMA, the US explicitly acknowledges that it gave "particular focus" to the retail "segment" in its volume analysis.[122] At the same time, the US accepts that a sectoral examination requires that where the authority examines one part of a domestic industry, it must examine the other industry parts in a like manner or, otherwise, provide an explanation why this is not required.[123]

114. The US argues that it considered all "segments" as well as the industry as a whole in the context of its volume analysis in like manner.[124] However, a consideration "in like manner" by its own terms would require a consideration of all industry parts that is comparable in quantity and quality to the consideration of the retail "segment".

115. Let us therefore compare the US's consideration of volume for the retail "segment" with the US's consideration of volume for **the other two "segments"** in its analysis. The US's entire volume analysis covers around ¾ of a page. The US devotes around half a page for its discussion and analysis of the volume of Spanish imports in the retail "segment". For example, it sets out shares of US and Spanish producers in the retail "segment" during the period of investigation and provides data and analysis concerning increasing Spanish imports, also by retail sub-segments. By contrast, there is not a single word, let alone any analysis, about the distribution and institutional "segments", even though they cover 83% of Spanish imports.[125] There is not even a footnote. There is simply nothing. This is a textbook example of a WTO-inconsistent segmential analysis.

116. The US argues that the existence of various tables with volume data for the other two "segments" would amount to a consideration of volume.[126] The EU

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under Articles 15.1 and 15.4 SCMA); and Section VIII.E.2 (causation under Articles 15.1 and 15.5 SCMA).

122 US's FWS, paras. 172, 175, 177.

123 US's FWS, para. 174 with reference to Appellate Body Report, *US – Hot Rolled Steel*, para. 204. US's reply to question 23 of the Panel, para. 72.

124 US's reply to question 23 of the Panel of 10 June 2020, para. 72 with further references (the reference to para. 178 and footnote 251 of the US's FWS concerns specifically the volume analysis).

125 USITC Publication 4805, July 2018, pp. 18-19 (Exhibit EU-5). EU's FWS, paras. 495-496.

126 US's FWS, para. 178 and footnote 252.

explained in detail that simply putting volume data into tables, all the more so data evidencing a decrease of subject imports, without discussing or analysing them and without putting them into relation with the other part(s) of the industry is not sufficient under Article 15.2 SCMA.[127] Listing data in tables does not evidence whether and how such data have been "considered" or "taken into account" by the authority within the meaning of Article 15.2 SCMA;[128] the authority's consideration must be verifiable for interested parties.[129] Nor does the mere listing of data in tables amount to an "examination" under Article 15.1 SCMA which requires an "evaluation" of such data.[130] And where the relevant data show a decrease of volumes in the other industry parts as in this case,[131] the hiding of such data in tables is certainly not "objective" under Article 15.1 SCMA; it is biased. If the US's view would be correct, an authority could simply place inconvenient volume or pricing data into tables and limit itself to analysing and discussing those data that yield the desired result. Obviously, this cannot be correct and would make a mockery of the legal obligations in Article 15 SCMA. In short, there is no consideration of the other "segments" and, in any event, merely placing information into tables for the other industry parts would not constitute a consideration "in like manner".

117. Let us now look at the **industry as a whole**. The only relevant information contained in the US's analysis is that the volume and market share of subject imports significantly decreased during the period of information at industry level; there is no consideration of a significant increase of volume of Spanish imports as required by Article 15.2 SCMA. Logically, the US cannot consider a volume "increase" under Article 15.2 by considering a volume "decrease". The US's assessment is also not done "in like manner" in the absence of any analysis of the relevance of the volume decrease.

118. It is also telling that even though the US claims that it considered all parts of the industry in like manner – and hence no explanation should be needed in the determinations why it focused on the retail "segment" – the US argues that its determinations nevertheless do include such an explanation.[132] This is obviously contradictory. What is there to explain if the US allegedly considered industry parts in like manner? In fact, the US's argument constitutes an

[127] EU's reply to question 22 of the Panel of 10 June 2020, paras. 116-121.
[128] Panel Report, *Thailand – H-Beams*, para. 7.161.
[129] Appellate Body Report, *China – GOES*, para. 131; Panel Report, *Thailand – H-Beams*, para. 7.161; Panel Report, *Korea – Certain Paper*, para. 7.253.
[130] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[131] EU's FWS, para. 504, Table 1.
[132] US's FWS, para. 177.

acknowledgement that its consideration of the other "segments" and of the industry as a whole was *not* carried out in a like manner and that therefore an explanation was needed for the US's focus on the retail "segment". The US cannot have its cake and eat it. It cannot argue that it considered all industry parts in like manner while at the same time claiming that it provided an explanation for not considering all industry parts in like manner.

119. In any event, the US provided no "satisfactory explanation"[133] for its focus on the retail "segment" in the determinations. The US claims that it "properly explained" why it focused on the retail "segment".[134] Unsurprisingly, there is no reference from the determinations cited to that statement. The US attempts to provide an *ex post* explanation in its first written submission, arguing that the US focused on the retail "segment" because competition "intensified" in this "segment".[135] The US could be alluding to its statement that "the retail sector was the largest sector of the market for the domestic industry".[136] However, this is not an explanation why other industry parts accounting for more than 80% of subject imports did not need to be considered.[137] It is a purely factual statement.

120. The US's partial volume analysis limited to the retail "segment" therefore did not amount to an objective examination and violated Articles 15.1 and 15.2 of the SCM Agreement. This inconsistency also invalidates the US's entire injury and causation analysis based thereupon.

***The US failed to consider price effects for the industry as a whole***

121. Regarding the US's consideration of price effects in the context of price undercutting, it is important to recall that the US had expressly found that there was neither price suppression nor price depression at industry level.[138] This necessarily means that prices of the domestic industry cannot have been affected by subject imports.[139] And indeed, prices of the domestic industry increased during the period of investigation.[140] However, causation can only occur "through the effects as set forth in paragraphs 2 and 4" as stipulated in

133 Appellate Body Report, *US – Hot Rolled Steel*, para. 204.
134 US's FWS, para. 177.
135 US's FWS, para. 176.
136 USITC Publication 4805, July 2018, p. 18 (Exhibit EU-5).
137 Panel Report, *Mexico – Corn Syrup*, para. 7.154, footnote 624. On the issue of absence of explanation, see in detail the EU's reply to question 3.c of the Panel of 8 September 2020, paras. 131-141 and EU's reply to question 23 of the Panel of 10 June 2020, paras. 122-125..
138 USITC Publication 4805, July 2018, pp. 21-22 (Exhibit EU-5).
139 EU's FWS, para. 541.
140 USITC Publication 4805, July 2018, p. 21 (Exhibit EU-5).

Article 15.5 SCMA - in other words, through volume or price effects. Subject imports must either affect the prices of the domestic industry to a significant degree or the volume of subject imports must increase significantly. These are the only two available options. It is therefore legally and economically inconceivable that there is causation if (i) prices of the domestic industry are not affected by subject imports and (ii) the volume of subject imports does not increase significantly. Hence an authority must consider one of the two phenomena or both in the context of Article 15.2 SCMA, otherwise its analysis cannot form a "meaningful basis" for causation.[141]

122. In the present case, the USITC had explicitly excluded that price undercutting affected the prices of the domestic industry since there was no price depression and no price suppression. The price curve of the domestic industry could not have been negatively impacted by Spanish imports. Therefore, the only other option for the US was to consider price undercutting through a volume effect. This is also what the US attempted to demonstrate by considering "the capturing of market shares".[142] However, if the US was going to consider price undercutting through a volume effect, it logically had to consider such volume effect for all parts of the industry in a like manner as explained above, not only for the retail "segment". The US failed to do so. The text of the determinations plainly shows that the US only considered relevant effects in the retail "segment": "the underselling by subject imports enabled them to capture market share from domestic industry in the important retail sector."[143] There is not a single word in the analysis about the consideration of any market share losses in the other two "segments" or for the industry as a whole; nor any explanation as to why such consideration would not be necessary. In fact, the US in its first written submission explicitly acknowledges that the USITC did not consider volume effects (lost market shares) in the context of its price undercutting analysis for the industry as a whole or for the two other "segments":

> These conclusions about lost market share – as opposed to its findings on underselling generally – were limited to the retail channel of distribution. [144]

[141] Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.180.
[142] USITC Publication 4805, July 2018, pp. 20-22 (Exhibit EU-5).
[143] USITC Publication 4805, July 2018, p. 21 (Exhibit EU-5). [emphasis added]

[144] US's FWS, para. 213. [emphasis added]

123. In the specific circumstances of this case, where the consideration of price undercutting was based on volume, a volume analysis limited to the retail "segment" did not amount to a consideration of all industry parts in like manner.

124. The US argues that it properly considered the two other "segments" and the industry as a whole because it considered instances of undercutting for the retail "segment" and for the other industry parts.[145]

125. Before explaining why the US's argument is legally incorrect, the EU notes that the US's consideration of instances of undercutting for the retail "segment" even seems to lack any factual basis and appears not to be based on positive evidence. The US states that "responding purchasers – upon whose data the Commission largely relied in assessing price effects – were predominantly distributors."[146] The US also "recognize[s] that on an overall volume basis the underselling by subject imports was concentrated in Products 3 and 4 (i.e. institutional), the two pricing products involving the largest quantities of subject imports during the POI and in the sector of the market where subject imports had a large presence."[147] The US further finds that there were instances of overselling in the retail "segment" in 2015 and 2016.[148] However, if the responding purchasers were mainly distributors, if the underselling was concentrated in the institutional "segment" and if there were even instances of overselling in the retail "segment" in two out of three years, on what factual basis did the US actually consider the alleged "pervasive underselling"[149] in the retail "segment"?

The US's findings for the retail "segment" therefore appear contradictory and not based on positive evidence but the EU is unable to verify this point because the US did not provide any BCI information. The EU respectfully requests the US to provide the necessary clarifications in the course of this hearing or the Panel may ask the US pertinent questions. For example, how many retailers responded to the respective questionnaires, how many instances of undercutting and reports of lost sales did the US identify for the retail "segment" and what were the specific undercutting margins in the retail

[145] US's FWS, paras. 202-105.
[146] US's FWS, para. 210 with reference to Table II-1. [emphasis added]
[147] USITC Publication 4805, July 2018, p. 20, footnote 117 (Exhibit EU-5). [emphasis added]
[148] USITC Publication 4805, July 2018, p. V-11 (Exhibit EU-5). [emphasis added]
[149] USITC Publication 4805, July 2018, p. 20 (Exhibit EU-5). The "pervasive underselling" includes 2016 even though the US found that there was "overselling" in 2016 in the retail "segment".

"segment" during the period of investigation? It is obvious that instances of undercutting in the institutional or distribution "segments" or an industry-wide aggregate undercutting margin do not form a sufficient factual basis for the US's consideration of the alleged loss of shares through undercutting specifically in the retail "segment".

## V. CLAIMS CONCERNING THE CALCULATION OF GUADALQUIVIR'S SUBSIDY RATE

126. Finally, the EU will briefly address the calculation of Guadalquivir's subsidy rate.

127. The record is clear: the investigating authority never properly requested the key data, namely the volume of those raw olive purchases which were then processed into subject merchandise. The record and the evidence is before this panel, and it is unambiguous.

128. As the panel knows from the written submissions, the key document in this respect is the August 4, 2017 questionnaire, which is before you as Exhibit EU-58. As the European Union has spelled out in its submissions, this questionnaire clearly requested the respondents to indicate their overall purchases of raw olives. The request was not limited to only such raw olives which were processed into ripe olives.

129. We know that this is the proper reading of this questionnaire because this is how the investigating authority *itself* understood it. The investigating authority's September 27, 2017 memorandum (in Exhibit EU-60) conclusively shows that.

130. Agro Sevilla and Angel Camacho replied to the August 4, 2017 questionnaire by submitting the volume of raw olives processed into subject merchandise. By its September 27, 2017 memorandum, the investigating authority requested Agro Sevilla to correct this reply, and to resubmit the information, namely the overall volume of all raw olives purchased. The United States contend that this September 27, 2017 memorandum represents a second request, independent of the August 4, 2017 questionnaire.

131. The record tells us otherwise. The first sentence of the September 27, 2017 memorandum reads:

> "On September 27, 2017, Department officials spoke with [the counsel of the respondents] […] and requested that counsel resubmit the table included in the Department's questionnaire on the source of raw and ripe olives of August 2017"[150]

132. The use of the words 'resubmit' and 'correct' in this memorandum shows that the investigating authority was *not* making a separate request – as the United States now contend – but was referring to the original August 4, 2017 questionnaire.

133. The verification report (which is before the panel as Exhibit US-22) does not alter this conclusion. As the European Union has explained in its written submission, that report – properly understood – fully supports the fact that the investigating authority did *not* request the information which it then used in its subsidy and countervailing duty calculation.

134. The record of this case being clear, the European Union requests this panel to find that the claims raised by the EU in this respect are well founded.

## VI. CONCLUSION

135. As noted by the Panel, the remand redetermination upholds and confirms the USDOC's analysis in the original determination, providing further clarification and explanation as to how the USDOC considers the subsidy programs at issue de jure specific. However, that clarification and explanation is affected by the same legal errors of the Preliminary and Definitive Determination and it is also in contradiction with the new narrative about de jure specificity developed by the US in this dispute.

136. For the reasons set forth in the course of this dispute, the European Union respectfully requests the Panel to find that the US's measures, as set out above (including the Remand Determination), are inconsistent with the US's obligations under the GATT 1994, the SCM Agreement and the Anti-Dumping Agreement. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommends that the United States bring its measures into conformity with the GATT 1994, the SCM Agreement and the Anti-Dumping Agreement

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[150] Exhibit EU-60, page 2.