

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

**Report of the Panel**  
**BCI deleted, as indicated [[\*\*\*]]**  
 WT/DS577/R and Add.1

*Adopted by the Dispute Settlement Body  
 on 20 December 2021*

### TABLE OF CONTENTS

|                                                                                                                         | Page |
|-------------------------------------------------------------------------------------------------------------------------|------|
| 1. INTRODUCTION .....                                                                                                   | 33   |
| 1.1 Complaint by the European Union .....                                                                               | 33   |
| 1.2 Panel Establishment and Composition .....                                                                           | 33   |
| 1.3 Panel Proceedings.....                                                                                              | 34   |
| 1.3.1 General .....                                                                                                     | 34   |
| 1.3.2 Preliminary ruling on the Panel's terms of<br>reference .....                                                     | 36   |
| 1.3.3 Request to address certain aspects of the<br>USDOC's Remand Redetermination of<br>29 May 2020.....                | 36   |
| 2. FACTUAL ASPECTS: THE MEASURES AT ISSUE .....                                                                         | 37   |
| 3. PARTIES' REQUESTS FOR FINDINGS AND<br>RECOMMENDATIONS.....                                                           | 38   |
| 4. ARGUMENTS OF THE PARTIES .....                                                                                       | 42   |
| 5. ARGUMENTS OF THE THIRD PARTIES .....                                                                                 | 43   |
| 6. INTERIM REVIEW .....                                                                                                 | 43   |
| 7. FINDINGS .....                                                                                                       | 43   |
| 7.1 General Principles Regarding Treaty Interpretation, the<br>Applicable Standard of Review, and Burden of Proof ..... | 43   |
| 7.1.1 Treaty interpretation .....                                                                                       | 43   |
| 7.1.2 Standard of review .....                                                                                          | 43   |
| 7.1.3 Burden of proof .....                                                                                             | 45   |

Report of the Panel

---

|           |                                                                                                                                                                                                   |    |
|-----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 7.2       | The European Union's Claims Concerning the USDOC's de jure Specificity Findings in the Ripe Olives Countervailing Duty Investigation .....                                                        | 45 |
| 7.2.1     | The European Union's request to address the USDOC's Remand Redetermination as it relates to its original <i>de jure</i> specificity findings.....                                                 | 45 |
| 7.2.2     | The European Union's claims under Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement .....                                                                                                        | 48 |
| 7.2.2.1   | Introduction .....                                                                                                                                                                                | 48 |
| 7.2.2.2   | Whether the USDOC was entitled under Article 2.1(a) of the SCM Agreement to determine <i>de jure</i> specificity based on rules governing the <i>amount of a subsidy</i> .....                    | 50 |
| 7.2.2.3   | The USDOC's conclusion that the BPS and GP programmes retained the inherent <i>de jure</i> specificity of the subsidies provided under the COMOF programme .....                                  | 55 |
| 7.2.2.3.1 | The USDOC's reliance on facts pertaining to past subsidy programmes .....                                                                                                                         | 55 |
| 7.2.2.3.2 | The USDOC's alleged finding that the SPS, BPS, and GP subsidies were <i>de jure</i> specific to <i>olive growers</i> because they were <i>coupled (or tied) to the production of olives</i> ..... | 60 |
| 7.2.2.3.3 | Entitlement values under the BPS programme for new farmers, farmers holding transferred entitlements, and farmers no longer growing olives .....                                                  | 69 |
| 7.2.2.3.4 | The USDOC's rejection of arguments concerning the "convergence" factor .....                                                                                                                      | 81 |
| 7.2.2.3.5 | The USDOC's analysis and findings with respect to the "regional rate" .....                                                                                                                       | 86 |
| 7.2.2.3.6 | The USDOC's alleged finding concerning differences in BPS                                                                                                                                         |    |

---

 US - Ripe Olives from Spain
 

---

|           |                                                                                                                                                                                     |     |
|-----------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
|           | payments based on "the amount of grant money the different regions received under the SPS" .....                                                                                    | 90  |
| 7.2.2.3.7 | The USDOC's findings with respect to the SPS programme .....                                                                                                                        | 94  |
| 7.2.2.3.8 | The USDOC's findings with respect to the COMOF programme .....                                                                                                                      | 100 |
| 7.2.2.3.9 | Conclusion regarding the USDOC's findings that the BPS and GP programmes retained the inherent <i>de jure</i> specificity of the subsidies provided under the COMOF programme ..... | 104 |
| 7.2.3     | The European Union's claims under Articles 2.1, 2.1(b), and 2.4 of the SCM Agreement .....                                                                                          | 108 |
| 7.2.4     | The European Union's claim under Article 1.2 of the SCM Agreement .....                                                                                                             | 112 |
| 7.3       | The European Union's Claims in Relation to Section 771B of the Tariff Act of 1930 and its Application in the Ripe Olives Countervailing Duty Investigation .....                    | 112 |
| 7.3.1     | The European Union's complaint against Section 771B of the Tariff Act of 1930 "as such" .....                                                                                       | 113 |
| 7.3.1.1   | Legal requirements for conducting a pass-through analysis .....                                                                                                                     | 115 |
| 7.3.1.2   | Legal characterization of the operation of Section 771B of the Tariff Act of 1930 .....                                                                                             | 120 |
| 7.3.1.3   | Conclusion .....                                                                                                                                                                    | 125 |
| 7.3.2     | The European Union's challenge concerning the USDOC's application of Section 771B in the Spanish ripe olives countervailing duty investigation .....                                | 126 |
| 7.3.2.1   | The USDOC's determination of benefit in the Spanish ripe olives countervailing duty investigation .....                                                                             | 127 |
| 7.3.2.2   | Whether the USDOC's determination of benefit in the Spanish ripe olive                                                                                                              |     |

Report of the Panel

---

|         |                                                                                                                                                                                                                                        |     |
|---------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
|         | investigation complied with the applicable legal standard .....                                                                                                                                                                        | 128 |
|         | 7.3.2.3 Conclusion .....                                                                                                                                                                                                               | 128 |
| 7.4     | The USITC's Affirmative Final Injury Determination .....                                                                                                                                                                               | 129 |
| 7.4.1   | The United States' request for a preliminary ruling that claims under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement are outside the Panel's terms of reference .....                                 | 130 |
| 7.4.2   | The European Union's request that the Panel make adverse inferences concerning the United States' failure to provide certain information requested by the Panel.....                                                                   | 137 |
| 7.4.3   | The USITC's analysis of customer groups in its examination of volume and price effects under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement .....                                  | 139 |
| 7.4.3.1 | Whether the USITC conducted a "segmented analysis" of volume and price effects that was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.....                      | 140 |
| 7.4.3.2 | Whether the USITC's definition of the domestic industry made it improper to consider customer groups.....                                                                                                                              | 148 |
| 7.4.3.3 | Conclusion on the USITC's alleged "segmented analysis" of customer groups in its examination of volume and price effects under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement..... | 150 |
| 7.4.4   | The USITC's examination of the volume of dumped and subsidized ripe olives from Spain.....                                                                                                                                             | 151 |
| 7.4.4.1 | Whether the USITC failed to consider whether there has been a significant increase in dumped or subsidized imports as required by the first sentence in Article 3.2 of the                                                             |     |

|           |                                                                                                                                                                                                                            |     |
|-----------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
|           | Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.....                                                                                                                                                          | 151 |
| 7.4.4.2   | Whether the USITC's volume analysis was not based on an objective examination of positive evidence in violation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement..... | 155 |
| 7.4.4.2.1 | Factual background.....                                                                                                                                                                                                    | 156 |
| 7.4.4.2.2 | Whether the USITC only analysed the retail customer group and failed to consider the industry as a whole.....                                                                                                              | 157 |
| 7.4.4.2.3 | Whether the USITC improperly drew conclusions about the industry as a whole from the retail sector.....                                                                                                                    | 158 |
| 7.4.4.2.4 | Whether the USITC failed to consider the distributional and institutional customer groups in like manner as the retail customer group, without satisfactory explanation.....                                               | 159 |
| 7.4.4.2.5 | Whether the USITC failed to consider the distributional and institutional/food processor customer groups to the extent required for an objective examination based on positive evidence .....                              | 161 |
| 7.4.4.2.6 | Whether the USITC's volume analysis failed to provide a meaningful basis for causation .....                                                                                                                               | 163 |
| 7.4.4.3   | Conclusion on the USITC's volume analysis under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and                                                                                                                     |     |

---

 Report of the Panel
 

---

|         |                                                                                                                                                                                                                                                     |     |
|---------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
|         | Articles 15.1 and 15.2 of the<br>SCM Agreement.....                                                                                                                                                                                                 | 164 |
| 7.4.5   | The USITC's examination of the price effects of<br>dumped and subsidized ripe olives from Spain.....                                                                                                                                                | 164 |
| 7.4.5.1 | Whether the USITC's examination of<br>price undercutting constituted a second<br>volume analysis.....                                                                                                                                               | 165 |
| 7.4.5.2 | Whether the USITC's price effects<br>analysis was not based on an objective<br>examination of positive evidence in<br>violation of Articles 3.1 and 3.2 of the<br>Anti-Dumping Agreement and<br>Articles 15.1 and 15.2 of the<br>SCM Agreement..... | 170 |
|         | 7.4.5.2.1 Factual background .....                                                                                                                                                                                                                  | 171 |
|         | 7.4.5.2.2 Whether the USITC<br>concluded that underselling<br>resulted in a loss of market<br>share in the retail sector<br>without adequate<br>supporting evidence.....                                                                            | 172 |
|         | 7.4.5.2.3 Whether the USITC only<br>considered price effects in<br>the retail sector and not at<br>the level of the domestic<br>industry as a whole .....                                                                                           | 176 |
|         | 7.4.5.2.4 Whether the USITC<br>improperly extended its<br>conclusions concerning the<br>consideration of price<br>effects in the retail sector to<br>the domestic industry as a<br>whole .....                                                      | 178 |
| 7.4.5.3 | Conclusion on the USITC's price effects<br>analysis under Articles 3.1 and 3.2 of<br>the Anti-Dumping Agreement and<br>Articles 15.1 and 15.2 of the<br>SCM Agreement.....                                                                          | 179 |
| 7.4.6   | The USITC's examination of the consequent<br>impact of dumped and subsidized ripe olives from<br>Spain .....                                                                                                                                        | 180 |
| 7.4.6.1 | Whether the USITC could have made a<br>finding of consequent impact on the                                                                                                                                                                          |     |

|           |                                                                                                                                                                                                                                                                            |     |
|-----------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
|           | basis of its findings concerning volume and price effects.....                                                                                                                                                                                                             | 180 |
| 7.4.6.2   | Whether the USITC's impact analysis was not based on an objective examination of positive evidence in violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement.....                                                 | 182 |
| 7.4.6.2.1 | Factual background.....                                                                                                                                                                                                                                                    | 183 |
| 7.4.6.2.2 | Whether the USITC's impact analysis only examined the retail sector and not the industry as a whole .....                                                                                                                                                                  | 184 |
| 7.4.6.2.3 | Whether the USITC's impact analysis improperly extended the USITC finding of market share losses in the retail sector to the industry as a whole.....                                                                                                                      | 185 |
| 7.4.6.3   | Conclusion on the USITC's impact analysis under Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement.....                                                                                                                    | 187 |
| 7.4.7     | The USITC's causation analysis of dumped and subsidized ripe olives from Spain.....                                                                                                                                                                                        | 187 |
| 7.4.7.1   | Whether the USITC's non-attribution analysis of the decline in apparent consumption was not based on an objective examination of positive evidence in violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement..... | 188 |
| 7.4.7.2   | Whether the USITC's non-attribution analysis of non-subject imports from Morocco was not based on an objective examination of positive evidence in violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and                                                     |     |

---

 Report of the Panel
 

---

|           |                                                                                                                                                                        |     |
|-----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
|           | Articles 15.1 and 15.5 of the<br>SCM Agreement.....                                                                                                                    | 191 |
| 7.4.7.3   | Conclusion on the USITC's causation<br>analysis under Articles 3.1 and 3.5 of<br>the Anti-Dumping Agreement and<br>Articles 15.1 and 15.5 of the<br>SCM Agreement..... | 193 |
| 7.4.8     | Consequential claims .....                                                                                                                                             | 194 |
| 7.4.9     | Conclusion in relation to the USITC's Injury<br>Determination.....                                                                                                     | 194 |
| 7.5       | The European Union's Claims Concerning Aceitunas<br>Guadalquivir's Final Subsidy Margin and Countervailing<br>Duty Rate Calculation .....                              | 194 |
| 7.5.1     | Introduction.....                                                                                                                                                      | 194 |
| 7.5.2     | The USDOC's calculation of Aceitunas<br>Guadalquivir's final subsidy margin and<br>countervailing duty rate .....                                                      | 196 |
| 7.5.2.1   | The legal basis of the<br>European Union's claims in relation to<br>the calculation of Aceitunas<br>Guadalquivir's subsidy margin and<br>countervailing duty rate..... | 197 |
| 7.5.2.2   | Whether the USDOC properly<br>determined Aceitunas<br>Guadalquivir's subsidy margin and<br>corresponding countervailing duty rate.....                                 | 199 |
| 7.5.2.2.1 | The USDOC's initial<br>4 August 2017<br>questionnaire .....                                                                                                            | 201 |
| 7.5.2.2.2 | The USDOC's information<br>requests following the<br>4 August 2017<br>questionnaire .....                                                                              | 205 |
| 7.5.2.2.3 | Aceitunas Guadalquivir's<br>verification report .....                                                                                                                  | 210 |
| 7.5.2.2.4 | Aceitunas Guadalquivir's<br>submissions on the reported<br>volume of raw olive<br>purchases after the final<br>determination.....                                      | 213 |
| 7.5.2.2.5 | Conclusion.....                                                                                                                                                        | 215 |
| 7.5.3     | The USDOC's calculation of an "all others" rate .....                                                                                                                  | 216 |



|    |       |                                                                                                                                                                  |     |
|----|-------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
|    | 7.5.4 | Whether the USDOC properly requested information on purchases of raw olives used to produce ripe olives consistently with Article 12.1 of the SCM Agreement..... | 216 |
|    | 7.5.5 | Whether the USDOC informed interested parties of the essential facts under consideration consistent with Article 12.8 of the SCM Agreement.....                  | 219 |
|    | 7.5.6 | Conclusion.....                                                                                                                                                  | 227 |
| 8. |       | CONCLUSIONS AND RECOMMENDATION .....                                                                                                                             | 227 |

## LIST OF ANNEXES

### ANNEX A

#### PANEL DOCUMENTS

|           | <b>Contents</b>                                                                                                                             | <b>Page</b> |
|-----------|---------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Annex A-1 | Working Procedures of the Panel                                                                                                             | 234         |
| Annex A-2 | Additional Working Procedures concerning Business Confidential Information                                                                  | 243         |
| Annex A-3 | Communication from the Panel to the parties of 18 September 2020 concerning certain procedural matters                                      | 246         |
| Annex A-4 | Additional Working Procedures of the Panel concerning holding a Substantive Meeting Conducted via Cisco Webex – Adopted on 9 October 2020   | 248         |
| Annex A-5 | Additional Working Procedures of the Panel concerning holding a Substantive Meeting Conducted via Cisco Webex – Adopted on 30 November 2020 | 254         |
| Annex A-6 | Additional Working Procedures of the Panel: Open Meetings (Delayed Online Broadcast)                                                        | 259         |
| Annex A-7 | Interim Review                                                                                                                              | 261         |