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## The Olives of Others: The United States Anti-Dumping and Countervailing Duties on Ripe Olives from Spain

Gregory Frering

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# THE OLIVES OF OTHERS: THE UNITED STATES' ANTI-DUMPING AND COUNTERVAILING DUTIES ON RIPE OLIVES FROM SPAIN

GREGORY FRERING\*

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## I. INTRODUCTION

In 2017, the Coalition for Fair Trade in Ripe Olives (CFTRO), representing United States-based ripe olive producers, alleged that imports of ripe olives from Spain were sold below their fair value in the United States (US), thereby harming US producers.<sup>1</sup> The CFTRO petitioned the U.S. Department of Commerce (Commerce) to confirm these allegations.<sup>2</sup> The CFTRO also alleged that Spanish producers and exporters of ripe olives were benefiting from countervailable subsidies from Spain or the European Union (EU).<sup>3</sup>

Commerce’s investigations found the CFTRO’s allegations of sales at less than fair value and the use of countervailable subsidies to be true, the U.S. International Trade Commission (ITC) found that the domestic industry was materially injured, and Commerce consequently ordered anti-dumping and countervailing duties to be

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1. Ripe Olives from Spain: Initiation of Less-Than-Fair-Value Investigation, 82 Fed. Reg. 33,054, 33,054–55 (July 19, 2017).

2. *Id.*

3. Ripe Olives from Spain: Initiation of Countervailing Duty Investigation, 82 Fed. Reg. 33,050, 33,050, 33,052 (July 19, 2017).

assessed.<sup>4</sup> In response to Commerce's actions, the EU requested consultations at the World Trade Organization (WTO), alleging violations of various WTO agreements.<sup>5</sup> The US and EU were unable to resolve their dispute through bilateral consultations at the WTO, and, at the EU's request, the WTO established and constituted a Dispute Settlement Body panel to resolve the dispute.<sup>6</sup>

This Comment argues that the US met the requirements necessary to sustain an anti-dumping injury determination under Article 3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter "ADA"). Contrary to the EU's allegations that the US did not properly consider volume, price effects, and the causal relationship between the injury and the dumped imports, the US' anti-dumping determination is valid under the requirements of Article 3 of the ADA.<sup>7</sup> This Comment also argues that the injury the ITC found due to the subsidies granted to Spanish olive farmers is invalid under Article 2 of the Agreement on Subsidies and Countervailing Measures (hereinafter "SCM"). The US' countervailing duties on ripe olives imported from Spain, specifically those in response to subsidies to Spanish olive farmers

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4. See Ripe Olives from Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 Fed. Reg. 37,469, 37,470 (Aug. 1, 2018) (discussing the ITC's notice to Commerce that the olive imports from Spain did result in material injury, as alleged); Ripe Olives from Spain: Antidumping Duty Order, 83 Fed. Reg. 37,465, 37,465 (Aug. 1, 2018) (detailing the anti-dumping order issued by Commerce in response to the ITC's finding that a US industry was materially injured).

5. See Request for Consultations by the European Union, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, 1–2, WTO Doc. WT/DS577/1 (Jan. 31, 2019) (focusing primarily on GATT 1994 Article VI and the Agreement on Subsidies and Countervailing Measures).

6. See Request for the Establishment of a Panel by the European Union, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain* 1, WTO Doc. WT/DS577/3 (May 17, 2019) (requesting a panel due to the failure to resolve the dispute); Constitution of the Panel Established at the Request of the European Union, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WTO Doc. WT/DS577/4 (Oct. 21, 2019) (establishing said panel).

7. *But see* Request for Consultations by the European Union, *supra* note 5, at 2 (asserting that the ITC's claims and the antidumping orders are inconsistent with the parties' obligations under GATT and the Agreement on Subsidies and Countervailing Measures).

under the EU's Basic Payment Scheme (BPS) and the related Sustainable Land Use subsidy (hereinafter "Greening"), violate the SCM because the subsidies are not specific, as required by Article 2 of the SCM.

Part II of this Comment will discuss the details of the ITC's material-injury determination regarding dumped imports as well as Commerce's determination whether countervailable subsidies were involved in the production of Spanish ripe olives. The background discussion will also include facts and legal analyses from prior WTO disputes dealing with the validity of an anti-dumping injury determination and whether a subsidy is de jure specific. Part III of this paper will analogize and distinguish the facts of *US – Ripe Olives from Spain* from the prior WTO disputes that analyzed anti-dumping injury and de jure specificity determinations under Article 3 of the ADA and Article 2.1 of the SCM, respectively.

Part IV recommends a solution to the instant dispute and two forward-looking actions meant to reduce future ambiguity and potentially lower the odds of future trade disputes.

Finally, Part V concludes that the US' anti-dumping duties on ripe olives imported from Spain are valid, and unless the US rescinds its countervailing duties on the same goods, the US is in direct violation of the SCM.

## II. BACKGROUND

First, this section provides information on Commerce's anti-dumping and countervailing duty findings regarding ripe olives from Spain. Second, it provides details on the EU's Basic Payment Scheme and Greening subsidies that were at issue in this dispute. Third, it discusses the underlying law in the ADA Article 3 and the SCM Article 2.1. Fourth, it introduces prior WTO panel reports that clarify the Agreements applicable to this dispute.

### A. THE ITC FOUND DUMPED RIPE OLIVES FROM SPAIN TO BE MATERIALLY INJURING DOMESTIC RIPE OLIVE PRODUCERS.

The CFTRO petitioned Commerce to confirm whether imports of

ripe olives from Spain (“subject imports”) were sold below their fair value in the US, thereby harming US producers.<sup>8</sup> To calculate dumping margins that would confirm the existence of dumping, Commerce compared the export price and constructed export price of the subject goods to the normal value of ripe olives over the period of investigation (POI).<sup>9</sup> After Commerce found that ripe olives from Spain were, in fact, dumped on the US market, the ITC proceeded with an injury determination.<sup>10</sup> First, the ITC examined the volume of the dumped imports: during the POI, the volume of subject imports increased from 35,037 short tons in 2015 to 35,139 short tons in 2016, and then declined to 32,782 short tons in 2017.<sup>11</sup> Also examining market share in its volume analysis, the ITC looked at the different distribution channels of ripe olives in the US and found that the quantity of subject imports sold to the US retail sector increased during the POI.<sup>12</sup> Between 2015–2017, the volume of importers’ shipments to retailers increased from 2,231 short tons to 5,259 short tons, a 135% increase.<sup>13</sup> The ITC concluded the volume of subject imports from Spain was “significant in absolute terms and relative to both apparent U.S. consumption and U.S. production.”<sup>14</sup>

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8. See Ripe Olives from Spain: Initiation of Less-Than-Fair-Value Investigation, 82 Fed. Reg. 33,054, 33,054–55 (July 19, 2017); see also Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter Agreement on the Implementation of Article VI of the GATT] (defining “dumping”).

9. See U.S. DEP’T OF COM., INT’L TRADE ADMIN., Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Ripe Olives from Spain, 4–11 (Jan. 18, 2018), <https://enforcement.trade.gov/frn/summary/spain/2018-01447-1.pdf> (explaining that Commerce would begin its analysis by using a differential pricing analysis before moving to the standard average-to-average method as the latter has the potential to mask dumping in its calculations); see also Ripe Olives from Spain: Notice of Correction to Antidumping Duty Order, 83 Fed. Reg. 39,691, 39,692 (Aug. 10, 2018) (listing the weighed-average dumping margins in percentages, including 16.88% for Angel Camacho, 17.46% below for Aceitunas Guadalquivir, and 25.50% below for Agro Sevilla).

10. Ripe Olives from Spain, Inv. Nos. 701-TA-582 and 731-TA-1377, USITC Pub. 4805, at 1 (July 1, 2018) (Final) [hereinafter ITC Investigations].

11. *Id.* at 18.

12. *Id.* at 18–19.

13. *Id.* at IV-14.

14. *Id.* at 19.

Second, the ITC examined the dumped imports' effect on prices in the domestic market. Ripe olives from Spain, in thirty-seven out of forty-eight quarterly price comparisons, undersold US-produced ripe olives.<sup>15</sup> During the POI there were no significant changes in the price of domestically produced ripe olives (the domestic "like good") due to the imported ripe olives from Spain, either significantly depressing domestic ripe olive prices or preventing domestic ripe olive price increases that would have otherwise occurred.<sup>16</sup> While evaluating price effects, the ITC considered the substitutability (i.e., interchangeability) of Spanish and domestic ripe olives; the ITC found that they were highly substitutable, inclusive of different grades of ripe olives.<sup>17</sup> The substitutability of the grades of imported and domestic ripe olives allowed the ITC to compare Spanish and domestic prices without segmenting them by grade.<sup>18</sup>

Third, the ITC examined the state of the domestic ripe olive industry over the POI to determine the impact of the subject goods.<sup>19</sup> The ITC found stable production capacity, increased volume of production, increased capacity utilization, decreased domestic shipments, lower sales quantity and value, increased inventories, mixed employment metrics, lower net and operating incomes, lower capital expenditures, lower research and development expenditures, higher net assets, and lower operating return on assets.<sup>20</sup> For finding injury by the subject goods, the ITC focused on the lower sales, income, domestic shipments, and producers' increased inventories.<sup>21</sup>

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15. *Id.* at 20.

16. *Id.* at 21–22 (noting that prices of domestic ripe olives increased during the POI).

17. *See id.* at 17, I-10–I-11, II-11–II-12.

18. *See id.* (discussing the grades and substitutability of ripe olives, finding dumped and domestic ripe olives highly substitutable); *see also* Appellate Body Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubing (“HP-SSST”) from Japan*, ¶ 5.262, WTO Doc. WT/DS454/AB/R (adopted Oct. 14, 2015) [hereinafter Appellate Body Report, *China – HP-SSST*] (explaining that the “competitive relationship between products” must be assessed to determine whether the products fall within the same market and that no material injury could take place if the imported goods are not substitutable for the domestic, like goods).

19. ITC Investigations, *supra* note 10, at 22–24, n.139.

20. *Id.* at 22–24.

21. *Id.* at 23–24.



Though the Spanish olives had no effect on prices of US-produced ripe olives, the dumped imports captured market share from domestic producers, contributing to these negative indicia.<sup>22</sup> A high degree of substitutability between the Spanish and domestic ripe olives facilitated the market share capture because there was not much to differentiate the two goods other than price; apart from price, Spanish and US ripe olives are readily interchangeable.<sup>23</sup> The sale of dumped Spanish olives at prices lower than US-produced ripe olives was concurrent with increased volume of imports, increased Spanish shipments to retailers, and decreased US-producer share of shipments to retailers.<sup>24</sup>

In examining the impact of the subject goods on domestic producers, the ITC had to ensure it was not wrongly attributing ripe olives from Spain as the cause of the injuries to the domestic industry.<sup>25</sup> To ensure that it was not mistaken that the lower sales, income, domestic shipments, and producers' increased inventories were due to subject imports, the ITC examined other factors injuring the domestic industry during the POI, namely the decrease in domestic apparent consumption and increase in imports of ripe olives from countries other than Spain.<sup>26</sup> The ITC found neither of these other factors to explain US producers' decreased performance because the "relatively modest decline in apparent US consumption was smaller than the declines in shipments, net sales, and operating and net income experienced by the domestic industry," and non-subject imports captured market share from domestic producers only in the institutional distribution channel.<sup>27</sup> In addition, the respondents in the ITC investigation alleged the domestic industry suffered due to supply constraints, but the ITC found no supply constraints affecting domestic producers.<sup>28</sup>

After examining volume, price effects, and the state of domestic producers, the ITC found that the volume and low prices of imported

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22. *Id.* at 24.

23. *Id.* at II-17–II-19.

24. *Id.* at 24.

25. *Id.* at 25–26.

26. *Id.* at 24–26.

27. *Id.*

28. *Id.*

ripe olives from Spain had a significant impact on the domestic injury, especially in the retail sector, the most important sector for domestic producers.<sup>29</sup> Specifically, the ITC found that domestic ripe olive producers lost profit during the POI and had to carry increased inventories, and were, therefore, materially injured.<sup>30</sup>

B. COMMERCE FOUND THAT ACCESS TO BPS AND GREENING WAS LIMITED TO SPANISH OLIVE FARMERS BECAUSE OF HISTORIC TIES TO FORMER SUBSIDIES THAT WERE FOR OLIVE FARMING.

Two of the subsidies that Commerce investigated were BPS and Greening.<sup>31</sup> The CFTRO alleged that these subsidies were reducing financial performance and reducing production in the domestic industry.<sup>32</sup> BPS and Greening are programs under the EU's Common Agricultural Policy that pay income support directly to farmers; BPS is the foundational means of income support for farmers and Greening is for farmers to use to meet the EU's environment and climate goals.<sup>33</sup>

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29. *Id.* at 24, 26.

30. *Id.*

31. See Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, As Amended, Volume III at 10, Ripe Olives from Spain, DOC Inv. No. C-469-818 (June 21, 2017) (asking for the investigation of BPS and related programs).

32. Ripe Olives from Spain: Initiation of Countervailing Duty Investigation, 82 Fed. Reg. 33,050, 33,052 (July 19, 2017) (alleging “reduced market share, underselling and price suppression or depression, lost sales and revenues, adverse impact on the domestic industry, including financial performance, production, and capacity utilization, and reduction in olive acreage under cultivation”).

33. See *Income Support Explained*, EUR. COMM'N, [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/income-support/income-support-explained\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/income-support/income-support-explained_en) (last visited July 23, 2020) (discussing the purpose of providing direct payments to farmers throughout the EU); *Sustainable Land Use (Greening)*, EUR. COMM'N, [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/income-support/greening\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/income-support/greening_en) (last visited July 23, 2020) (explaining that farmers are rewarded for preserving natural resources and providing public goods through crop diversification, maintenance of permanent grassland, and dedication of arable land to improve biodiversity); *The Basic Payment*, EUR. COMM'N, [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/income-support/basic-payment\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/income-support/basic-payment_en) (last visited July 23, 2020) (elucidating that farmers are granted funding through the annual activation of payment entitlements); see also Regulation 1307/2013, of the European Parliament and of

BPS and Greening have historical ties to subsidies coupled to production of particular agricultural goods, and this is what led Commerce to consider BPS and Greening to be specific subsidies.<sup>34</sup> When BPS and Greening took effect in 2015, Spain, like each EU member state, had to set the subsidy rates per hectare (the “entitlement rate”).<sup>35</sup> The entitlement rates under BPS were derived from BPS’s predecessor subsidies received by the particular farmer: that is, the Single Payment Scheme (SPS) and its predecessor, in the case of olive farmers, the Common Organization of Markets in Fats and Oils, which was a specific subsidy.<sup>36</sup> Greening payments are an annually adjusted percentage of the BPS payment, typically around fifty percent.<sup>37</sup> However, eligibility for BPS and Greening is not limited to farmers of a specific agricultural product; the farmers need only undertake agricultural activity on one or more hectares of land.<sup>38</sup>

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the Council of 17 December 2013 on Establishing Rules for Direct Payments to Farmers under Support Schemes within the Framework of the Common Agricultural Policy and Repealing Council Regulation 637/2008 and Council Regulation 73/2009, 2013 O.J. (L 347) 608, 613 (stating that the farming practices supported by Greening are compulsory in EU member states).

34. See U.S. DEP’T OF COM., INT’L TRADE ADMIN., Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain, 24, 26 (Nov. 20, 2017), <https://enforcement.trade.gov/frn/summary/spain/2017-25660-1.pdf> [hereinafter Preliminary Countervailing Memo] (“[B]ecause the crop type determines the grant amounts provided under this program due to the direct reliance on the grant amounts provided under previous programs, which based grant amounts on the crop type. As such, the program is specific to olive growers.”).

35. See Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14 (B.O.E. 2014, 1076) (Spain) (laying out the calculation of the BPS entitlements for farmers in Spain).

36. See Council Regulation 864/2004, 2004 O.J. (L 161) 48, 60 (EC) (showing that the initial SPS legislation was amended in 2004 to base the preceding subsidies reference period for olive farmers on the four “marketing years” of 1999–2000, 2000–01, 2001–02, and 2002–03, instead of the original 2000–03 period for all farmers); see also Preliminary Countervailing Memo, *supra* note 34, at 22 (indicating that farmers growing olives for oil received a subsidy rate per hectare of 132.25/100kg and farmers growing olives for eating (i.e., table olives) received a rate per hectare that was equal to 11.5% of the olive oil rate, which equates to 15.2/100kg); Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14 (implementing the BPS in Spain).

37. Preliminary Countervailing Memo, *supra* note 34, at 25.

38. See Royal Decree Concerning Implementation of Direct Payments to

C. THE INVESTIGATING AUTHORITY NEED ONLY ADHERE TO THE REQUIREMENTS OF ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT FOR ITS ANTI-DUMPING DUTIES TO NOT BE FOUND WTO-INCONSISTENT ON THE BASIS OF THE INVESTIGATING AUTHORITY'S INJURY DETERMINATION.

Article 3 of the ADA provides the parameters an investigating authority must adhere to in its assessment of whether dumped imports caused injury to the domestic industry.<sup>39</sup> The ADA does not require the investigating authority to use a specific methodology in determining whether the dumped goods injured domestic producers; the investigator need only adhere to the requirements of Article 3.<sup>40</sup>

Article 3 is divided into eight parts, and the relevant parts for the injury determination in this case are 3.1, 3.2, 3.4, and 3.5.<sup>41</sup> Article 3.1 sets the tone for the investigating authority's analyses under sections 3.2, 3.4, and 3.5: "A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination. . . ."<sup>42</sup>

The first step of Article 3.2 requires a consideration of the volume of dumped imports, specifically, "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member."<sup>43</sup>

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Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14 (B.O.E. 2014, 1075) (Spain) (defining agricultural activity as: "production, rearing[,] or agricultural product cultivation, including harvesting, milking, animal husbandry, keeping of animals for agricultural purposes[,] or maintenance of an agricultural area in a suitable state for pasture or cultivation, without any preparatory measure beyond the methods and agricultural machinery normally employed.").

39. Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.

40. See Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.141.

41. Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.

42. *Id.* art. 3.1; see also Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶¶ 192–93, WTO Doc. WT/DS184/AB/R (adopted July 24, 2001) [hereinafter Appellate Body Report, *United States – Hot-Rolled Steel*] (explaining that all evidence examined under the successive articles, 3.2–3.5, must be positive, meaning that it is affirmative, objective, verifiable, and credible).

43. Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.2; see Panel Report, *China – Anti-Dumping Measures on Imports of*

For example, in *China – Cellulose Pulp*, the panel upheld the Chinese Ministry of Commerce's (MOFCOM) volume analysis in which MOFCOM found the increase in volume to be significant for both absolute volume of dumped cellulose pulp (up 43.82%) and its market share (up by 1.31 percentage-points), even though MOFCOM never expressly labeled the increases as "significant."<sup>44</sup> Similarly, the panel in *Guatemala – Cement II* sustained Guatemala's finding of a significant absolute increase in dumped cement imports from 140 tons to 25,079 tons, and a significant relative increase as a part of domestic consumption from 1% to 21%, even though Guatemala looked at only a one-year period.<sup>45</sup> In addition, in *Thailand – H-Beams*, the panel affirmed Thailand's determination that the volume of dumped H-beams from Poland increased significantly, from 48% to 57%, relative to all other imports of H-beams.<sup>46</sup>

The second step of Article 3.2 requires an investigation of price effects by the dumped goods.<sup>47</sup> Price effects occur when "there has been a significant price undercutting by the dumped imports . . . or [when] the [dumped imports] depress [domestic like good] prices to a significant degree or prevent [domestic like good] price increases, which otherwise would have occurred, to a significant degree."<sup>48</sup> When an investigating authority alleges that there is price undercutting, it needs to compare the price of the subject import with

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*Cellulose Pulp from Canada*, ¶ 7.39, WTO Doc. WT/DS483/R (adopted May 23, 2017) [hereinafter Panel Report, *China – Cellulose Pulp*] (stating that the investigating authority may rely on any one of the three volume analyses under Article 3.2).

44. Panel Report, *China – Cellulose Pulp*, *supra* note 43, ¶¶ 7.46–7.48.

45. Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, ¶¶ 8.262–8.266, WTO Doc. WT/DS156/R (adopted Oct. 24, 2000).

46. Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, ¶¶ 7.164–7.172, WTO Doc. WT/DS122/R (adopted Sept. 28, 2000) (noting that contextualizing the data relative to other imports of the like good implicitly indicated the significance of the Polish imports' volume increase).

47. Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.2.

48. *Id.*; see Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.155–5.161 (determining that a finding of significant price undercutting does not have to be found, only that it resulted in domestic price decreases or prevented increases).

the price of the domestic good, which will contextualize the price relationship between the two goods and thereby demonstrate the extent to which the subject import was priced lower than the domestic good.<sup>49</sup> As an example of an improper finding of price undercutting, in *China – HP-SSST*, MOFCOM found significant undercutting of HP-SSST Grades B and C compared to domestic HP-SSST, but MOFCOM did not compare the price difference between the subject imports and domestic goods, particularly between dumped Grades B and C, and Grade A that comprised most of the domestic industry output.<sup>50</sup> Regardless of which price effect the investigating authority is examining, it is permitted to look at more than just the difference in price to determine what the price effects of the dumped import is.<sup>51</sup> For example, though the panel in *China – Cellulose Pulp* quashed MOFCOM's conclusion that parallel price movements between the subject and like goods were a contributing factor to decreasing prices of the like good over the POI, it did not invalidate the other factors China used to make its price effects determination that the subject imports depressed the price of the domestic pulp.<sup>52</sup> The other factors indicating price effects that MOFCOM examined were: 1) price competition between subject and domestic pulp, 2) a 43% increase in the volume of dumped pulp, 3) a decline in domestic pulp prices, 4) pricing documents and meeting minutes, and 5) significant dumping margins.<sup>53</sup>

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49. See Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.161.

50. *Id.* ¶¶ 5.161, 5.163–5.164 (noting that whether the price undercutting is significant depends on the facts of the case, and the investigating authority may base its determination on all the positive evidence it has, including the size and duration of the price undercutting, the type and nature of the goods at issue, and the goods' market share).

51. See Panel Report, *China – Cellulose Pulp*, *supra* note 43, ¶¶ 7.69–7.72, 7.109–7.112 (detailing the aspects examined by MOFCOM); see also Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.161 (listing elements which an investigating authority may consider with regard to price undercutting).

52. See Panel Report, *China – Cellulose Pulp*, *supra* note 43, ¶¶ 7.69–7.72, 7.109–7.112, n. 122 (“It seems clear that the greater the effect of dumped imports in terms of price undercutting, price depression, or price suppression, the greater the likely impact of those dumped imports with respect to factors such as lost sales and market share and consequent financial effects such as deteriorating company profits and profitability, as well as on factors such as inventories, production capacity, and so on.”).

53. *Id.* ¶ 7.109.

Article 3.4 requires an investigating authority to examine “the impact of the dumped imports on the domestic industry . . . including an evaluation of all relevant economic factors and indices having a bearing on the state of the industry.”<sup>54</sup> The relevant economic factors and indices enumerated in Article 3.4 are required to be evaluated, though the list is not exhaustive and no one factor or combination of factors is dispositive.<sup>55</sup> The investigating authority must determine the “importance and weight” to be ascribed to each of the relevant factors; this determination is based on the “bearing” each relevant factor has “on the state of the domestic industry.”<sup>56</sup> In *China – HP-SSST*, MOFCOM’s 3.4 analysis was invalid because MOFCOM only asserted that the dumping margins being greater than de minimis resulted in impact to the domestic industry; MOFCOM did not discuss the bearing the dumping margins had on the domestic industry.<sup>57</sup>

For its Article 3.4 impact analysis, an investigating authority can ascertain the state of the domestic industry by looking separately at the market segments that compose that industry.<sup>58</sup> However, the primary goal is for the investigating authority to ascertain the

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54. Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.4.

55. See Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.202–5.203 (listing relevant economic factors); Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.4 (“[A]ctual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.”); Appellate Body Report, *United States – Hot-Rolled Steel*, *supra* note 42, ¶ 194.

56. Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.207.

57. *Id.* ¶¶ 5.208–5.212 (holding that China failed its Article 3.4 obligations because MOFCOM’s analysis did “not assess in any way the relevance of the margins of dumping . . . or indicate what weight it attributed to the margins of dumping”).

58. See *id.* ¶ 5.204 (holding that evaluating the state of a domestic industry by examining its various sectors is permissible under Article 3.4, and may help paint an economic picture of the whole domestic industry); see also Appellate Body Report, *United States – Hot-Rolled Steel*, *supra* note 42, ¶¶ 198–99 (considering whether the US could direct the ITC to examine the structure of a domestic industry and the importance of certain segments, which did not compete with the subject goods, to the whole industry, the Appellate Body found nothing prohibiting this in the ADA).

relationship between the dumped goods and the economic performance of the whole domestic industry, not just of individual sectors.<sup>59</sup> For example, in *US – Hot-Rolled Steel*, the US contravened Article 3.4 by analyzing the whole domestic hot-rolled steel market and the sector of the market that competed with the dumped goods, but not analyzing the segment that did not compete with the dumped goods.<sup>60</sup>

The relationship between the prices of the subject goods and the domestic goods analyzed under Article 3.2 can be used in the 3.4 analysis of the impact of the dumped goods.<sup>61</sup> In *China – HP-SSST*, MOFCOM's 3.4 analysis failed to use its 3.2 findings of price undercutting of HP-SSST Grades B and C to evaluate the state of the domestic industry, both segmented by grade and as a whole.<sup>62</sup> Even if the 3.2 analysis did not indicate there were price effects due to dumped goods in all segments of the domestic industry, as was the case with HP-SSST Grade A, the investigating authority should still apply the 3.2 results to the whole domestic industry in the 3.4 analysis.<sup>63</sup>

Under Article 3.5, the investigating authority must demonstrate “that the dumped imports are, through the effects of dumping, as set forth in [Articles 3.2 and 3.4], causing injury within the meaning of this Agreement.”<sup>64</sup> First, the investigating authority's report containing the injury determination must expressly discuss the nature

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59. See Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.204 (highlighting the need to assess the industry as a whole); Appellate Body Report, *United States – Hot-Rolled Steel*, *supra* note 42, ¶¶ 190, 204.

60. Appellate Body Report, *United States – Hot-Rolled Steel*, *supra* note 42, ¶¶ 211–13.

61. See Appellate Body Report, *China – HP-SSST*, ¶ 5.209 (allowing that the results of the 3.2 analysis can inform the market share and domestic price factor analyses under 3.4).

62. *Id.* ¶¶ 5.206–5.221.

63. See *id.* ¶¶ 5.206–5.212 (“Depending on the particular circumstances of each case, an investigating authority may therefore be required to take into account, as appropriate, the relative market shares of product types with respect to which it has made a finding of price undercutting; and, for example, the duration and extent of price undercutting, price depression or price suppression, that it has found to exist.”).

64. Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.5.



and scope of the injury for the anti-dumping duties to be upheld at the WTO.<sup>65</sup> In *China – HP-SSST*, MOFCOM never explained in its determination report whether HP-SSST Grades B and C, the dumped grades, were substitutable with Grade A, the grade that primarily composed domestic HP-SSST production.<sup>66</sup> MOFCOM's failure to determine whether Grades B and C were substitutable with Grade A deprived MOFCOM of the positive evidence it needed to find injury because an investigating authority must base its injury determination on positive evidence and an objective examination.<sup>67</sup> Additionally in *China – HP-SSST*, the panel questioned MOFCOM's objectivity because MOFCOM's Article 3.5 analysis did not consider the changes in the dumped goods' market share over the POI; MOFCOM merely found injury on the basis that the market share of the dumped goods over the POI was, in its view, high.<sup>68</sup>

Finally, under Article 3.5, the investigating authority must "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."<sup>69</sup> The other factors injuring the domestic industry must be separated and distinguished from the injury caused by the dumped imports.<sup>70</sup> In *US – Hot-Rolled Steel*, the ITC looked at two other factors that were injuring the domestic industry: increased production capacity and increased intra-industry competition.<sup>71</sup> The US found

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65. See Appellate Body Report, *China – HP-SSST*, ¶ 5.276 (finding no error in the Panel's decision to question the lack of examination or analysis of the nature or scope of the injury).

66. *Id.* ¶¶ 5.259, 5.263.

67. *Id.*; see Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.1 ("A determination of injury . . . shall be based on positive evidence . . .").

68. Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.215–5.216.

69. Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.5.

70. See Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, ¶ 151, WTO Doc. WT/DS414/AB/R (adopted Oct. 18, 2012) (requiring the separation and distinguishing of injurious effects from dumped imports and from other factors).

71. Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶¶ 7.240–7.241, WTO Doc. WT/DS184/R

increased production capacity was offset proportionally by increased consumption over the POI, and the increased intra-industry competition throughout the POI did not stop the industry from performing well in one of the years of the POI; therefore, neither factor fully explained the performance declines over the POI.<sup>72</sup>

It is essential for ruling out the other factors that the investigating authority, earlier in its Article 3.5 injury analysis, thoroughly explains the injury it found.<sup>73</sup> In *China – HP-SSST*, MOFCOM examined the decline in apparent consumption and the increase in domestic production capacity as two factors other than the subject goods that were injuring the domestic industry.<sup>74</sup> Though MOFCOM found that the decrease in price of HP-SSST Grade A could only be explained by dumped Grades B and C, the WTO panel held this finding invalid because MOFCOM did not earlier explain how dumped Grades B and C injured an industry primarily producing Grade A.<sup>75</sup>

The foregoing cases illustrate the application of Article 3 of the Anti-Dumping Agreement. The investigating authority's injury determination will not be found to be inconsistent with the WTO Agreements if the investigator met the requirements of Article 3, outlined above.<sup>76</sup>

D. A SUBSIDY IS DE JURE SPECIFIC UNDER THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES ARTICLE 2.1(A)-(B) IF ACCESS TO THE SUBSIDY IS LIMITED TO “CERTAIN ENTERPRISES.”

In its request for establishment of a Dispute Settlement Body panel, the EU alleged the US contravened SCM Article 2.1(a)-(b) by

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(adopted Feb. 28, 2001).

72. *See id.*

73. *See* Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.258 (“Rather, it is the task of a panel to examine whether the *investigating authority* has adequately performed its investigative function . . .”).

74. *Id.* ¶ 5.285.

75. Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubing (“HP-SSST”) from Japan*, ¶ 7.203, WTO Doc. WT/DS454/R (adopted Feb. 13, 2015).

76. *See* Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.14 (finding that the investigation does not have to follow a specific methodology or template, so long as it follows Article 3).

finding that BPS and Greening were de jure specific subsidies.<sup>77</sup> A subsidy cannot be countervailed if it is not specific under SCM Article 2.1; that is, whether access to the subsidy is limited to certain enterprises in law or in fact.<sup>78</sup> De jure specificity exists under Article 2.1(a) “[w]here the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises. . . .”<sup>79</sup> However, under 2.1(b), if the subsidy eligibility criteria are “clearly spelled out in law, regulation, or other official document” and “are neutral, . . . do not favour [sic] certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise,” de jure specificity shall not exist.<sup>80</sup>

A subsidy is de jure specific if its use is expressly limited to certain enterprises, meaning it is not broadly available.<sup>81</sup> WTO Dispute Settlement Body panels and the Appellate Body have repeatedly stated that what constitutes “certain enterprises” depends

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77. Request for the Establishment of a Panel by the European Union, *supra* note 6, at 1; *cf. Preliminary Countervailing Memo, supra* note 34, at 24, 26; First Written Submission of the United States of America, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, ¶¶ 28–29, WTO Doc. WT/DS577 (Mar. 17, 2020), [https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.fin\\_4.pdf](https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.fin_4.pdf) (“[P]ositive record evidence supported the USDOC’s determination that eligibility for subsidies conferred under the BPS Programs was explicitly limited to certain enterprises or industries . . .”).

78. Agreement on Subsidies and Countervailing Measures arts. 2.1, 8.1(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

79. *Id.* art. 2.1(a).

80. *Id.*, art. 2.1(a) – (c), n.2 (adding that if not *de jure* specific, a subsidy can still be *de facto* specific based on other factors such as “use of a subsidy programme [sic] by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.”).

81. See Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 373, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011) [hereinafter Appellate Body Report, *United States – AD/CVD (China)*] (finding that Article 2.1(a) focuses on whether access to the subsidy is limited, not whether the certain enterprises received the subsidy).

on the facts of each case.<sup>82</sup> In *US – Upland Cotton*, the panel held the contested subsidies to be limited to certain enterprises because the “user marketing payments” were expressly dependent on the use or export of Upland Cotton, and the other subsidies were expressly limited to a small basket of agricultural goods, including Upland Cotton.<sup>83</sup> In *US – Anti-Dumping and Countervailing Duties (China)*, China’s Eleventh Five-Year Plan named certain projects to promote economically, one of which was advanced radial tires, and other projects to exclude.<sup>84</sup> The panel held the preferential loans off-the-road tire manufacturers received from state-owned commercial banks to be specific subsidies because the Five-Year Plan documents enumerated which projects to support and which to exclude, many from within the same parts of the economy, such as the chemicals sector.<sup>85</sup>

Similarly, in *US – Large Civil Aircraft (2nd Complaint)*, the panel found specificity of tax credits for computer programs used in the design and development of commercial airplanes, and preproduction development and property tax credits for manufacturers of airplanes or their components.<sup>86</sup> The implementing legislation expressly made the tax credits available to businesses in the aerospace industry, and viewing the implementing legislation in the context of the entire state tax code did not negate the specificity; the aerospace tax credits were not one part of a broadly available subsidy implemented piecemeal.<sup>87</sup> Conversely, in *US – Large Civil Aircraft (2nd Complaint)*, the panel found payments made to Boeing under Commerce’s Advanced

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82. See, e.g., *id.*; Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 7.1236, WTO Doc. WT/DS353/R [hereinafter Panel Report, *US – Large Civil Aircraft*]; Panel Report, *United States – Subsidies on Upland Cotton*, ¶ 7.1142, WTO Doc. WT/DS267/R (adopted Sept. 8, 2004) [hereinafter Panel Report, *US – Upland Cotton*].

83. Panel Report, *US – Upland Cotton*, *supra* note 82, ¶¶ 7.1121, 7.1147–7.1148.

84. Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, ¶¶ 9.56–9.71, WTO Doc. WT/DS379/R (adopted Mar. 25, 2011) [hereinafter Panel Report, *US – AD/CVD (China)*] (explaining that off-the-road tires are a type of advanced radial tire).

85. *Id.* ¶¶ 9.61–9.71, 9.96–9.105.

86. Panel Report, *US – Large Civil Aircraft*, *supra* note 82, ¶¶ 7.195, 7.210–7.211.

87. *Id.* ¶¶ 7.195–7.211.

Technology Program to not be specific.<sup>88</sup> The express limit of the program to “high risk, high pay-off, emerging and enabling technologies” did not facially “operate[] as a significant limitation” to certain enterprises.<sup>89</sup> The same panel made a similar finding for another subsidy: the Triad Grant made via the High Growth Job Training Initiative was not specific because while the Triad Grant was targeted to the aerospace industry, it was just one of the industries falling under the program’s broad “high growth industries and economic sectors” express access limitation.<sup>90</sup>

Article 2.1(b) is the other half of the *de jure* specificity analysis when the documents promulgating the subsidy outline criteria for eligibility.<sup>91</sup> Specificity shall not exist when the eligibility is automatic, and the criteria are objective, “strictly adhered to,” and enumerated in an official document.<sup>92</sup> For example, in *China – GOES*, the panel found that a subsidy to a GOES producer that sponsored a retiree healthcare plan was not specific because the eligibility criteria were objective: 1) the recipient must be a sponsor of a retiree healthcare plan, and 2) the retiree healthcare plan must include a qualified prescription drug benefit.<sup>93</sup> Similarly, in *United States – Large Civil Aircraft (2nd Complaint)*, the Appellate Body found the eligibility criterion for the Washington State tax credit to

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88. *Id.* ¶¶ 7.1228, 7.1255.

89. *Id.* ¶ 7.1242.

90. *Id.* ¶¶ 7.1367–7.1375.

91. Agreement on Subsidies and Countervailing Measures, *supra* note 78, art. 2.1(b); see Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, ¶¶ 4.119–4.120, WTO Doc. WT/DS437/AB/R (adopted Dec. 18, 2014) [hereinafter Appellate Body Report on Certain Products from China] (noting that a finding of *de jure* specificity under 2.1(b) can be an alternative to finding *de jure* specificity under 2.1(a) if there is no explicit limitation of access to subsidy, but there are criteria for eligibility); Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 754, WTO Doc. WT/DS353/AB/R (adopted Mar. 12, 2012) [hereinafter Appellate Body Report on Large Civil Aircraft] (finding that, after analysis under Article 2.1(a), a panel must also consider whether 2.1(b) or 2.1(c) are applicable).

92. See Appellate Body Report, *United States – AD/CVD (China)*, *supra* note 81, ¶ 367.

93. Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, ¶¶ 7.64–7.65, WTO Doc. WT/DS414/R (adopted June 15, 2012).

not be objective because recipients had to be “engaged in activities of commercial aircraft or component manufacturers.”<sup>94</sup>

The two foregoing fact patterns are the only examples in WTO jurisprudence where the panel or Appellate Body directly analyzed eligibility criteria under Article 2.1(b). However, there are two additional instances in *US – Large Civil Aircraft (2nd Complaint)* in which the panel noted eligibility criteria as objective, but did not do so directly under 2.1(b).<sup>95</sup> First, the eligibility criteria under Commerce’s Advanced Technology Program used broad verbiage to describe what would qualify for the subsidy, such as “highly innovative” technology, “challenging” research, aims to “overcome an important problem(s),” and significant potential contributions to the “US scientific and technical knowledge base.”<sup>96</sup> Second, the eligibility criteria for the High Growth Job Training Initiative were similarly broad: it was available to “business or business-related nonprofit[s],” “education and training providers,” “economic development agencies,” and entities that “administer[ed] the workforce investment system.”<sup>97</sup>

A subsidy can only be countervailed if it is specific under SCM Article 2.1, meaning access to the subsidy is limited to certain enterprises.<sup>98</sup> Because, in the *US – Ripe Olives from Spain* dispute, Commerce found BPS and Greening to be de jure specific under SCM Articles 2.1(a) and 2.1(b), a finding the EU contends, whether the WTO will find the countervailing duties consistent with the US’ WTO obligations turns on the issue of specificity.<sup>99</sup>

### III. ANALYSIS

This Part first argues that the US was not in violation of Article 3

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94. Appellate Body Report on *Large Civil Aircraft*, *supra* note 91, ¶ 857 (analyzing, *sua sponte*, the subsidy under Article 2.1(b) and noting that the criterion was not objective because it favored certain enterprises over others).

95. Panel Report, *US – Large Civil Aircraft*, *supra* note 82, ¶¶ 7.1243, 7.1367–7.1369.

96. *Id.* ¶ 7.1243 (quoting § 295.6 of the ATP rules).

97. *Id.* ¶¶ 7.1367–7.1369 (quoting 29 U.S.C. § 2916a(3)).

98. Agreement on Subsidies and Countervailing Measures, *supra* note 78, arts. 2.1, 8.1(a).

99. See *Preliminary Countervailing Memo*, *supra* note 34, at 24, 26.

of the Anti-Dumping Agreement because its anti-dumping injury determination met all of the Article's requirements. This Part then argues that Commerce erroneously found de jure specificity in Spain's implementing legislation for the Basic Payment Scheme and Greening and that Commerce misconstrued what "access" to a subsidy means in making its de jure specificity finding.

A. BECAUSE THE ITC FULLY CONSIDERED ALL THE FACTORS REQUIRED BY ADA ARTICLE 3 IN MAKING ITS INJURY DETERMINATION, A WTO PANEL WILL NOT QUESTION THE INJURY DETERMINATION AND ON THOSE GROUNDS, IT WILL NOT FIND THE ANTI-DUMPING DUTIES ON RIPE OLIVES FROM SPAIN TO BE INCONSISTENT WITH THE WTO AGREEMENTS.

*i. As required by ADA Article 3.2, the ITC's analysis fully considered volume and price effects of the subject goods within the context of the domestic market over the POI.*

The ADA does not require the investigating authority to use a specific methodology, calculation, or bright-line rule in determining whether the dumped goods injured domestic producers; the investigator need only adhere to the procedural requirements of Article 3.<sup>100</sup> The first step of Article 3.2 requires a consideration of the volume of dumped imports, specifically, "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member."<sup>101</sup> In accordance with Article 3.2 of the ADA, the United States fully considered whether there had been a significant increase in volume of dumped ripe olives over the POI, concluding that despite a decrease in overall import volume, there had been a significant increase of imports in the retailer market segment relative to the decrease in US producers' shipments to retailers.<sup>102</sup> Like in *China* –

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100. See Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.141.

101. *Agreement on the Implementation of Article VI of the GATT*, *supra* note 8, art. 3.2; see Panel Report, *China – Cellulose Pulp*, *supra* note 43, ¶ 7.39 (holding that the investigating authority may rely on any one of the three volume analyses under Article 3.2).

102. ITC Investigations, *supra* note 10, at 18–19 (choosing not to discuss a bright-line threshold for when volume increase becomes significant); *cf.*

*Cellulose Pulp* in which MOFCOM looked at the change in absolute volume of the dumped cellulose pulp from 421,000 to 605,500 metric tons over the POI and the 1.31-point market share increase, Commerce considered absolute and relative volume and found an overall decrease from 35,037 short tons to 32,782 short tons of total subject goods imported, but an increase in volume of dumped olives in the retail segment by 135.7% over the POI.<sup>103</sup> The panel in *Guatemala – Cement II* similarly did not find inconsistent Guatemala’s determination that the absolute increase of dumped cement from 140 tons to 25,079 tons, and the relative increase as a part of domestic consumption from 1% to 21%, were significant.<sup>104</sup> In addition, the ITC’s finding that the volume of dumped olives to US retailers increased significantly from 7.3% to 17% is a similar contextualization to that which was upheld in *Thailand – H-Beams*, in which Thailand found a significant increase in the volume of H-beams from Poland, from 48% to 57%, relative to other imports of H-beams.<sup>105</sup>

The second step of Article 3.2 required the ITC to examine three

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*Agreement on the Implementation of Article VI of the GATT, supra* note 8, art. 3.2 (suggesting that the investigating authority should consider whether there was a significant increase in volume of dumped imports by looking at absolute volume, volume relative to domestic production, or volume relative to domestic consumption); Panel Report, *China – Cellulose Pulp, supra* note 43, ¶ 7.39 (noting that the investigating authority need only use one of the three volume analyses under Article 3.2).

103. ITC Investigations, *supra* note 10, at 15, 18–19, IV-14, n.105 (finding that despite the changes in volume, a plurality of importers and purchasers (e.g., retailers) reported that US demand for ripe olives did not change over the POI, despite a decrease in apparent consumption of ripe olives in the US); *see also* Panel Report, *supra* note 43, ¶¶ 7.46–7.48 (upholding that MOFCOM considered whether the increase in volume was significant even though MOFCOM never expressly labeled its finding of a 43.82% absolute volume increase and 1.31 percentage-point market share increase as “significant” increases).

104. Panel Report, *supra* note 45, ¶¶ 8.262–8.266 (holding the significant increase finding as valid even though Guatemala examined only a single year of imports of the subject good, from June 1995 to May 1996).

105. *See* Panel Report, *supra* note 46, ¶¶ 7.164–7.172 (noting that contextualizing the data relative to other, non-subject imports of the good implicitly indicated the significance of the Polish imports’ volume increase); ITC Investigations, *supra* note 10, at IV-14, n.105 (finding a 135% increase compared to the 6.4% decrease in short tons imported from Spain during the same period, 2015–17).



price effects: “[1] whether there has been a significant price undercutting by the dumped imports . . . [2] whether the [dumped imports] depress [domestic like good] prices to a significant degree or [3] prevent [domestic like good] price increases, which otherwise would have occurred, to a significant degree.”<sup>106</sup> The ITC’s price effects analysis was thorough and complied with Article 3.2; it first considered price undercutting and contextualized the undercutting within the domestic market.<sup>107</sup> Unlike *China – HP-SSST*, in which MOFCOM found significant price undercutting based only on the magnitude of undercutting in 2010, a non-contextual analysis that did not examine change over time, the ITC looked at the price difference between the imported and domestic ripe olives over three full years.<sup>108</sup> Ripe olives from Spain, in thirty-seven out of forty-eight quarterly price comparisons, undersold US-produced ripe olives, averaging 30.3% below in price throughout the three-year POI.<sup>109</sup>

The ITC’s Article 3.2 undercutting analysis was also thorough because it did not need to analyze the price undercutting on a per-grade basis.<sup>110</sup> In *China – HP-SSST*, when MOFCOM determined there was significant price undercutting by imports of Grades B and C HP-SSST, MOFCOM did not consider the relative market shares between grades of HP-SSST sold in China, and whether the relative market shares caused dumped Grades B and C to also undercut domestic Grade A.<sup>111</sup> The ITC considered the different grades of ripe

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106. *Agreement on the Implementation of Article VI of the GATT*, *supra* note 8, art. 3.2; see Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.155–5.161 (establishing that investigating authorities do not have to find that significant price undercutting resulted in domestic price decreases or prevented increases, but they still must examine whether the latter two resulted).

107. ITC Investigations, *supra* note 10, at 20–21.

108. Compare Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.163–5.164 with ITC Investigations, *supra* note 10, at 20–21.

109. ITC Investigations, *supra* note 10, at 20–21.

110. ITC Investigations, *supra* note 10, at 17, I-10–I-11, II-11–II-12 (discussing the grades and substitutability of ripe olives and finding dumped and domestic ripe olives highly substitutable); see Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.262 (“[A]nalysis of ‘substitutability’ . . . may well be required in cases . . . involving a dumped product and a like domestic product consisting of a range of different product types that are distinguished by considerable price differences. . .”).

111. Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.163–5.164

olives in its substitutability analysis because quality is a condition affecting whether goods are interchangeable; it found that the quality of the Spanish and American ripe olives provided a high degree of substitutability.<sup>112</sup> Unlike the different grades of HP-SSST, the substitutability of which China never addressed in its injury determination, the ITC's finding of high substitutability allowed the ITC to compare imported and domestic prices for undercutting without segmenting them by grade.<sup>113</sup>

Not only did the ITC contextualize Article 3.2 price undercutting by analyzing the price difference over the POI and the substitutability of the dumped and domestic olives, but it also contextualized the price undercutting with its effects on market share.<sup>114</sup> Similar to *China – Cellulose Pulp*, in which the panel did not invalidate MOFCOM's consideration of non-price factors contributing to price undercutting, such as the 43% increase in volume of dumped pulp and information in meeting minutes of Chinese pulp producers showing they were forced to decrease their prices due to competition from lower-priced Canadian pulp, the ITC considered the 7.3% to 17% increase in captured retailer market share by the dumped olives as an effect of the price undercutting by dumped olives.<sup>115</sup>

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(holding that China's analysis was inconsistent with Article 3.2 by not considering these market shares, nor the differences in price between each domestically produced grade, both of which are relevant evidence to a price undercutting analysis).

112. ITC Investigations, *supra* note 10, at 17, I-10–I-11, II-11–II-12 (choosing not to explicitly compare prices of different grades).

113. *Compare* Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.262 with ITC Investigations, *supra* note 10, at 17, I-10–I-11, II-11–II-12 (discussing the grades and substitutability of ripe olives, finding dumped and domestic ripe olives highly substitutable).

114. ITC Investigations, *supra* note 10, at 20–21 (“[S]everal factors support our finding of significant underselling including: . . . (4) the underselling by subject imports which enabled them to capture market share from domestic industry in the important retail sector. . .”).

115. *Compare* Panel Report, *supra* note 43, ¶¶ 7.58, 7.109 (invalidating MOFCOM's price effects analysis solely on the basis that parallel pricing factor did not work because the price of the dumped good was higher than the domestic good) and *id.* n.122 (“It seems clear that the greater the effect of dumped imports in terms of price undercutting, price depression, or price suppression, the greater the likely impact of those dumped imports with respect to factors such as lost sales

After finding there was significant price undercutting, the ITC looked at the remaining two price effects, as required by Article 3.2.<sup>116</sup> During the POI there were no significant changes in the price of domestically produced ripe olives due to the imported ripe olives from Spain, either 1) significantly depressing prices, or 2) preventing price increases that would have otherwise occurred.<sup>117</sup> By considering the remaining two types of price effects, and seeing whether either had occurred, the ITC completed its price effects analysis required under ADA Article 3.2.<sup>118</sup>

*ii. The ITC fulfilled the requirements of Article 3.4 by considering all the indicia relevant to the state of the domestic ripe olive industry to determine the impact of the imported olives on the domestic industry.*

Article 3.4 required the ITC to examine “the impact of the dumped imports on the domestic industry . . . including an evaluation of all relevant economic factors and indices having a bearing on the state of the industry.”<sup>119</sup> In its impact analysis, the ITC examined all the factors required by Article 3.4 and noted those bearing greater

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and market share. . . .”) with ITC Investigations, *supra* note 10, at 20–21, n.105 (“[S]everal factors support our finding of significant underselling including: (1) the predominant underselling by subject imports on a per instance and volume basis; (2) the high degree of substitutability between the domestic like product and subject imports; (3) the importance of price in purchasing decisions; (4) the underselling by subject imports which enabled them to capture market share from domestic industry in the important retail sector; and (5) the reports of lost sales.”).

116. See Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3; Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.155–5.161 (explaining that the investigating authority does not have to find that significant price undercutting resulted in domestic prices decreases or prevented increases, but it still must examine whether the latter two resulted).

117. ITC Investigations, *supra* note 10, at 21–22 (noting that prices of domestic ripe olives increased during the POI).

118. See Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3; Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.155–5.161 (explaining that the investigating authority does not have to find that significant price undercutting resulted in domestic prices decreases or prevented increases, but it still must examine whether the latter two resulted).

119. Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.4.

impact on the domestic industry's health.<sup>120</sup> Unlike MOFCOM in *China – HP-SSST*, which claimed that the domestic industry was impacted by the dumping margins that were greater than de minimis, but did not discuss the importance of this metric on the domestic industry, the ITC noted that several factors had greater bearing than others.<sup>121</sup> Unlike MOFCOM's 3.4 analysis, the ITC noted the greater bearing of the retailer distribution channel because it was the most important market segment to domestic ripe olive producers, the retailer channel lost market share to the subject imports, and producers held increased inventories.<sup>122</sup> The bearing that the ITC ascribed to the retailer market segment is supportable because unlike *US – Hot-Rolled Steel*, in which the US examined only one market segment but not the other, the ITC also looked at the ripe olives distributors and institutional segments.<sup>123</sup>

The ITC further examined factors having a bearing on the domestic industry by applying its Article 3.2 underselling findings to the Article 3.4 impact analysis.<sup>124</sup> Dissimilar to MOFCOM in *China – HP-SSST*, which did not use its 3.2 findings to evaluate the impact of the dumped goods on the domestic industry, the ITC related the

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120. *See id.* (“[A]ctual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.”); ITC Investigations, *supra* note 10, at 22–24 (examining production capacity, production volume, capacity utilization, US shipments by quantity, inventories, number of production and related workers (PRWs), total hours worked, hours worked per PRW, wages paid, hourly wages, worker productivity, net income, operating income, net income and operating income ratioed to net sales, capital expenditures, research and development expenses, total net assets, and operating return on assets).

121. *Compare* Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.208–5.212 (holding that China did not meet its obligations under Article 3.4 because it did not discuss the bearing of the indicators of health of the domestic industry) *with* ITC Investigations, *supra* note 10, at 24.

122. ITC Investigations, *supra* note 10, at 24.

123. *Compare* Appellate Body Report, *United States – Hot-Rolled Steel*, *supra* note 42, ¶¶ 211–13 (finding the analysis inconsistent with the Agreement because the ITC did not examine the hot-rolled steel market segment that did not compete with the dumped imports) *with* ITC Investigations, *supra* note 10, at 24, II-2 (discovering that, while the retailers segment was not the largest domestic market segment, it was the market segment that domestic producers primarily sold to).

124. ITC Investigations, *supra* note 10, at 24.

significant volume and underselling of ripe olives to the loss of market share in the retailer distribution channel and the resultant changes of the industry's economic indicators.<sup>125</sup> The Appellate Body in *China – HP-SSST* also noted that MOFCOM should have applied its Article 3.2 findings to its impact analysis to both per segment and to the whole market, especially because only Grades B and C were dumped, but domestic producers primarily made Grade A.<sup>126</sup> Unlike MOFCOM, the ITC discussed how the impact of the volume and underselling of ripe olives on the retailer segment affected the whole domestic industry because the retailer segment was the primary recipient of domestically produced ripe olives.<sup>127</sup>

By examining indicia of the state of the domestic industry, including those enumerated by Article 3.4, noting which indicia had the greatest bearing on the health of the domestic industry, and by also assessing the impact of the volume and price effects found in its Article 3.2 analysis, the ITC fulfilled its obligations under Article 3.4.<sup>128</sup>

*iii. The ITC fulfilled the requirements of Article 3.5 by expressly stating the nature and scope of the injury caused by the subject goods, and separating and distinguishing that injury from those caused by concurrent injuring factors.*

Under Article 3.5, the ITC needed to demonstrate “that the dumped imports are, through the effects of dumping, as set forth in [Article 3.2 and 3.4], causing injury within the meaning of this Agreement.”<sup>129</sup> The ITC's Article 3.5 analysis determined that ripe

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125. Compare Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.206–5.221, (holding that China did not meet its obligations under Art. 3.4 because it did not perform the required segmented impact analysis, which was required based on the results of the Art. 3.2 analysis that showed there was dumping and price undercutting on only two of the three grades of HP-SSST, and the different grades of HP-SSST comprised different market shares and had different prices) with ITC Investigations, *supra* note 10, at 24.

126. Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.206–5.212.

127. ITC Investigations, *supra* note 10, at 24.

128. See Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.4; ITC Investigations, *supra* note 10, at 22–24.

129. Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.5.

olives from Spain injured the domestic industry.<sup>130</sup> First, the ITC's report containing the injury determination needed to expressly discuss the nature and scope of the injury for the anti-dumping duties to be upheld at the WTO.<sup>131</sup> As noted by the Appellate Body in *China – HP-SSST*, MOFCOM's injury determination never expressly discussed the nature and scope of the injury; MOFCOM merely said there was injury because the dumping margin was large.<sup>132</sup> Unlike MOFCOM's injury determination in *China – HP-SSST*, which never discussed how dumped Grades B and C injured a domestic industry primarily producing Grade A, the ITC expressly said that the volume and undercutting of the dumped olives captured market share in the retailer segment, resulting in increased inventories and lost profits.<sup>133</sup> China's report never discussed whether Grades B and C were substitutable with Grade A, which would have offered evidence of potential injury, but conversely, the ITC noted that Spanish and American ripe olives were highly substitutable and implied that the only remaining major factor differentiating them was price.<sup>134</sup>

Second, not only did the ITC expressly identify the injury caused by dumped imports, but the ITC's injury determination under Article 3.5 comported with the objectivity and positive evidence requirements of Article 3.1: "A determination of injury [under the ADA] shall be based on positive evidence and involve an objective examination."<sup>135</sup> The market share that MOFCOM used in *China – HP-SSST* to determine injury was based on the market share at only one point during the POI, which the Appellate Body held to negate

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130. ITC Investigations, *supra* note 10, at 24.

131. See Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.276 (emphasizing the need for evidence of injury to the industry).

132. *Id.* ¶¶ 5.215–5.216, 5.249.

133. Compare *id.* ¶ 5.262 with ITC Investigations, *supra* note 10, at 24.

134. Compare Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.262–5.263 with ITC Investigations, *supra* note 10, at 17, II-12–II-14 ("The degree of substitution between domestic and imported ripe olives depends upon such factors as relative prices, quality [(i.e., grade)] . . . , and conditions of sale. . . . Based on available data, [ITC] staff believes that there is high degree of substitutability between domestically produced ripe olives and ripe olives imported from Spain.").

135. Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.1; ITC Investigations, *supra* note 10, at IV-14.

objectivity.<sup>136</sup> Unlike MOFCOM, the ITC looked at the market share of the dumped olives at multiple points in the POI as the volume sold to the retailer channel increased from 2,231 short tons in 2015, to 3,679 in 2016, and 5,259 in 2017, comparing those figures to the volumes distributed by US producers to the retail market segment.<sup>137</sup>

Third, the ITC completed its Article 3.5 analysis by ensuring that it was not mistakenly attributing the injury to the dumped goods, separating and distinguishing concurrent injuries from other factors.<sup>138</sup> In *US – Hot-Rolled Steel*, the ITC was able to eliminate the two other injuring factors it identified: 1) increased production capacity because it was proportional to increased consumption, and 2) increased intra-industry competition because in one of the years of the POI, the whole industry performed well despite the intra-industry competition.<sup>139</sup> Similar to *US – Hot-Rolled Steel*, in which the other factors did not fully explain the performance declines over the POI, the ITC was able to eliminate the decrease in apparent consumption and the third-country, non-subject imports of ripe olives.<sup>140</sup> This elimination was possible because the decline in apparent consumption was smaller than the domestic producers' declines in shipments, net sales, and operating and net income; the non-subject imports were also eliminated because they comprised a much smaller market share than the subject goods, even though non-subject

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136. Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶¶ 5.215–5.216, 5.249 (“[W]hile an investigating authority might properly determine, given the necessary facts, that high market shares exacerbate the price effects of dumped imports, an objective and impartial investigating authority would also consider whether the fact that import market shares are declining significantly indicates that the price effects are in fact somewhat attenuated.”).

137. ITC Investigations, *supra* note 10, at IV-14.

138. ITC Investigations, *supra* note 10, at 24–26; *see* Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.5 (“Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.”).

139. Panel Report, *supra* note 71, ¶¶ 7.240–7.241 (holding that the ITC properly separated and distinguished injury from increased production capacity and intra-industry competition from injury caused by dumped hot-rolled steel from Japan).

140. *Compare id. with* ITC Investigations, *supra* note 10, at 25–26.

imports did also capture market share from domestic producers.<sup>141</sup>

The ITC facilitated its non-attribution injury analysis by clearly explaining earlier in its Article 3.5 analysis the injury it found the dumped ripe olives to have caused.<sup>142</sup> In *China – HP-SSST*, MOFCOM identified a decline in apparent consumption and an increase in domestic production capacity as two factors that were also injuring the domestic industry but never established how dumped Grades B and C were injuring an industry that primarily produced Grade A.<sup>143</sup> The panel clarified that it was not possible to separate and distinguish these other injuring factors if MOFCOM had never clearly explained how the injury from the dumped goods occurred.<sup>144</sup> Unlike MOFCOM, the ITC stated that domestic ripe olive producers were injured by subject imports because they captured retailer market share, causing increased inventories and lost profits.<sup>145</sup>

For the foregoing reasons, the ITC fully complied with the requirements set out for an injury determination in Article 3 of the ADA, and the anti-dumping duties will not be found to be WTO-inconsistent based on the ITC's injury determination.<sup>146</sup>

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141. ITC Investigations, *supra* note 10, at 25–26.

142. *Id.* at 24.

143. Appellate Body Report, *China – HP-SSST*, *supra* note 18, ¶ 5.285; see Panel Report, *supra* note 75, ¶ 7.203 (explaining how a failure to account for how dumped Grades B and C affected domestic Grade A rendered the non-attribution analysis moot).

144. Panel Report, *supra* note 75, ¶ 7.203 (declaring inadequacy in MOFCOM's injury finding due to the fact that the prices of Grades A, B, and C all fell at the same rate).

145. ITC Investigations, *supra* note 10, at 24.

146. Agreement on the Implementation of Article VI of the GATT, *supra* note 8, art. 3.



B. THE DEPARTMENT OF COMMERCE INCORRECTLY DETERMINED THAT THE BASIC PAYMENT SCHEME AND GREENING WERE DE JURE SPECIFIC SUBSIDIES UNDER ARTICLE 2.1 OF THE SCM; THEREFORE, THE US' COUNTERVAILING DUTIES ON RIPE OLIVES ARE WTO-INCONSISTENT.

*i. BPS and Greening are not de jure specific subsidies under SCM Article 2.1(a) because the language of the implementing legislation restricting subsidy access to "agricultural activity" confers broad availability.*

BPS and Greening are not specific subsidies because access to them is not limited to "certain enterprises," as characterized in the Agreement on Subsidies and Countervailing Measures (SCM) Article 2.1(a).<sup>147</sup> There were two US Federal programs examined in *US – Large Civil Aircraft (2nd Complaint)* that the WTO panel found to not be specific subsidies.<sup>148</sup> The panel considered that the payments to Boeing from Commerce's Advanced Technology Program were broadly available.<sup>149</sup> The express restriction in the Advanced Technology Program was to "high risk, high pay-off, emerging and enabling technologies," which the panel held to not be a significant limitation on access to the subsidy under Commerce's program.<sup>150</sup> Elsewhere in *US – Large Civil Aircraft (2nd Complaint)*,

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147. Agreement on Subsidies and Countervailing Measures, *supra* note 78, art. 2.1(a) (finding that *de jure* specificity exists under Article 2.1(a) "[w]here the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises. . ."); see Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14 (B.O.E. 2014, 1075) (Spain) (defining agricultural activity as "production, rearing[,] or agricultural product cultivation, including harvesting, milking, animal husbandry, keeping of animals for agricultural purposes[,] or maintenance of an agricultural area in a suitable state for pasture or cultivation, without any preparatory measure beyond the methods and agricultural machinery normally employed."); Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14 (B.O.E. 2014, 1076) (Spain) (making eligible all farmers owning one or more hectares of land used for "agricultural activity").

148. Panel Report, *US – Large Civil Aircraft*, *supra* note 82, ¶¶ 7.1228, 7.1255, 7.1367–7.1375.

149. *Id.* ¶¶ 7.1228, 7.1255.

150. *Id.* ¶ 7.1242 (noting that, per the ATP Rules §§ 295.1(a)(3) and 287n(a), limiting funding to emerging and enabling technologies makes the program

the panel similarly found broad, restrictive language that granted access to a payment, made under the Department of Labor's High Growth Job Training Initiative, to a community college that trained Boeing employees.<sup>151</sup> The restrictive language of the program limited receipt to "high growth industries and economic sectors," which enabled a wide range of enterprises to receive program payments.<sup>152</sup> The broad availability of these two US Federal programs is similar to BPS and Greening, which are available to farmers growing any kind of crop or raising any kind of livestock.<sup>153</sup>

Typically, an express restriction creating a specific subsidy is manifested by a cherry-picking of subindustries targeted for government support, unlike BPS and Greening, which are available to the whole Spanish agriculture industry.<sup>154</sup> For example, in *US – Upland Cotton* the subsidies were expressly dependent on the use or export of Upland Cotton, or were expressly limited to a small group of agricultural goods that included Upland Cotton; thus, they were specific subsidies.<sup>155</sup> Payments under BPS and Greening, on the other hand, are available to any kind of farmer in Spain.<sup>156</sup> In *US – Anti-*

available to a "wide breadth of potential application[s]" and the Commerce Secretary "shall assure that the Program . . . avoids providing undue advantage to specific companies").

151. *Id.* ¶¶ 7.1367–7.1375 (finding that the Triad Grant was given to Edmonds Community College specifically to train Boeing 787 workers).

152. *Id.* (listing other industries that received grants under the High Growth Job Training Initiative including energy, financial services, healthcare, hospitality, and retail).

153. *See* Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14 (B.O.E. 2014, 1075) (Spain).

154. *E.g.*, Panel Report, *supra* note 84, ¶¶ 9.61–9.71, 9.96–9.105 (finding an express restriction when certain industries were allowed to participate while others were not); Panel Report, *US – Large Civil Aircraft*, *supra* note 82, ¶¶ 7.195, 7.210–7.211.

155. Panel Report, *US – Upland Cotton*, *supra* note 82, ¶¶ 7.1121, 7.1147–7.1148 (noting that the subsidies that benefitted upland cotton were: user marketing (Step 2) payments to domestic users and exporters, marketing loan program payments, production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance subsidies, cottonseed payments).

156. *See* Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14; Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common

*Dumping and Countervailing Duties (China)*, the WTO panel found a subsidy conferred by China's Eleventh Five-Year Plan to be specific because it named certain projects, such as advanced radial tires, to promote economically and other projects to exclude, many from within the same industries.<sup>157</sup> The Five-Year Plan, by including and excluding projects from within the same industries, created an express restriction under which only certain enterprises could access the preferential loans given out by state-owned commercial banks.<sup>158</sup> This express restriction that created a specific subsidy is unlike the BPS and Greening implementing legislation that conferred the subsidy to all farmers and did not exclude certain types of agricultural activity from accessing the subsidy.<sup>159</sup>

Also showing a cherry-picking of subindustries to support, thereby resulting in specific subsidies, are the Washington State tax credits at issue in *US – Large Civil Aircraft (2nd Complaint)*.<sup>160</sup> The Washington State computer program tax credit was limited to applications for the design and development of commercial airplanes, and the preproduction and property tax credits were similarly restricted to manufacturers of airplanes or their components.<sup>161</sup> All three of these Washington State tax credits targeted the airline manufacturing subindustry within the broader manufacturing industry, rendering them specific subsidies, which is

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Agricultural Policy §§ 13–14 (B.O.E. 2014, 1076) (Spain).

157. Panel Report, *supra* note 84, ¶¶ 9.56–9.71 (finding that off-the-road tires are a type of advanced radial tire, which was a specific project promoted in the Five-Year Plan).

158. *Id.* ¶¶ 9.61–9.71, 9.96–9.105 (noting that Chinese commercial banking law required commercial banks to consider the Chinese government's macroeconomic policies when making loans, and the government encouraged these banks to only lend to industries or projects promoted in the government's policies).

159. See Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14; Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14.

160. Panel Report, *US – Large Civil Aircraft*, *supra* note 82, ¶¶ 7.195, 7.210–7.211.

161. *Id.* ¶¶ 7.195–7.211 (looking for links between tax credits such as “the timing of their introduction, their purpose[,] or in their levels,” which would indicate the existence of a broadly available subsidy program, but the other tax credits in the code were introduced at various times and for various purposes).

dissimilar to BPS and Greening because the latter are not limited to any particular agriculture subindustries.<sup>162</sup>

For the foregoing reasons, the language in the Spanish legislation implementing BPS and Greening that expressly restricts the availability of these two subsidies to any farmer in Spain does not create a *de jure* specific subsidy under SCM Article 2.1(a).<sup>163</sup> With BPS and Greening, there is not the cherry-picking of subindustries that the WTO has found to constitute specific subsidies in other disputes.<sup>164</sup>

*ii. BPS and Greening are not de jure specific subsidies under SCM Article 2.1(b) because eligibility based on owning land for agricultural activity is an objective criterion.*

BPS and Greening are also not *de jure* specific subsidies when their eligibility criteria are reviewed for objectivity under SCM Article 2.1(b), the other method for finding *de jure* specificity, because eligibility based on owning land used for agricultural activity does not favor subsidy access for some farmers over others.<sup>165</sup> In *China – GOES*, the panel found a subsidy to a GOES producer was not *de jure* specific because the eligibility criteria were

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162. *Id.* ¶¶ 7.195, 7.210–7.211.

163. See Agreement on Subsidies and Countervailing Measures, *supra* note 78, art. 2.1(a); Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14; Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14.

164. *E.g.*, Panel Report, *US – AD/CVD (China)*, *supra* note 84, ¶¶ 9.61–9.71, 9.96; Panel Report, *US – Large Civil Aircraft*, *supra* note 82, ¶¶ 7.195, 7.210–7.211; Panel Report, *US – Upland Cotton*, *supra* note 82, ¶¶ 7.1121, 7.1147–7.1148.

165. See Agreement on Subsidies and Countervailing Measures, *supra* note 78, art. 2.1(b) (“Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist. . . .”); Appellate Body Report on Certain Products from China, *supra* note 91, ¶¶ 4.119–4.120 (noting that a finding of *de jure* specificity under Art. 2.1(b) can be an alternative to finding *de jure* specificity under Art. 2.1(a) if there is no explicit limitation of access to a subsidy, but there are criteria for eligibility); Appellate Body Report on Large Civil Aircraft, *supra* note 91, ¶ 754 (stating that, following analysis under Art. 2.1(a), a panel must also consider whether Arts. 2.1(b) or 2.1(c) are applicable).

objective: 1) the recipient must be a sponsor of a retiree healthcare plan, and 2) the retiree healthcare plan must include a qualified prescription drug benefit.<sup>166</sup> This language in *China – GOES* is broad and objective, similar to the criteria in the BPS and Greening implementing legislation that permits anyone who owns land that is used for “agricultural activity” to be eligible for BPS and Greening.<sup>167</sup> Conversely, the Washington business and occupation tax credits’ eligibility criterion was “[engagement] in activities of commercial aircraft or component manufactur[ing],” which the Appellate Body deemed to not be objective because the criterion significantly limited the availability of the subsidy to a discrete group.<sup>168</sup> This commercial aircraft or component manufacturing eligibility criterion expressly excluded other types of recipients from within the manufacturing industry, thereby limiting eligibility to a single subindustry, unlike BPS and Greening, which made eligible any landowning farmer in the agriculture industry.<sup>169</sup>

The *US – Large Civil Aircraft (2nd Complaint)* panel made two additional findings of objective eligibility criteria that are similar to the BPS and Greening ownership of land for agricultural activity criterion, but the panel did not do so under an express 2.1(b) analysis.<sup>170</sup> First, the eligibility criteria under Commerce’s Advanced Technology Program used broad verbiage to describe what would qualify for the subsidy, such as “highly innovative” technology, “challenging” research, aims to “overcome an important problem(s),” and significant potential contributions to the “US

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166. Panel Report, *supra* note 93, ¶¶ 7.64–7.65.

167. See Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14; Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14.

168. Appellate Body Report on *Large Civil Aircraft*, *supra* note 91, ¶ 857 (noting that the criterion was not objective because it favored certain enterprises over others).

169. Compare *id.* with Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14 and Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14.

170. Panel Report, *US – Large Civil Aircraft*, *supra* note 82, ¶¶ 7.1243, 7.1367–7.1369.

scientific and technical knowledge base.”<sup>171</sup> Second, the eligibility criteria for the High Growth Job Training Initiative were similarly broad: the subsidy was available to “business or business-related nonprofit[s],” “education and training providers,” “economic development agencies,” and entities that “administer[ed] the workforce investment system.”<sup>172</sup> Eligibility for these two US Federal programs was objective and did not limit access to the subsidies by favoring one or more subindustries over others, similar to BPS and Greening not limiting eligibility to only certain agriculture subindustries.<sup>173</sup>

For the foregoing reasons, the eligibility criterion in the Spanish legislation implementing BPS and Greening, which confers eligibility for these two subsidies to any landowner in Spain carrying out agricultural activity, does not create a de jure specific subsidy under SCM Article 2.1(b).<sup>174</sup>

*iii. BPS’s and Greening’s historical ties to specific subsidies that were coupled to olive production do not limit access to BPS and Greening solely to olive farmers, and thus do not render them specific subsidies.*

Language in the implementing legislation for BPS and Greening that based the subsidy rates off prior subsidy programs that had ties to de jure specific subsidies from the 1990s does not restrict access to BPS and Greening to certain enterprises.<sup>175</sup> As the Appellate Body described in *US – Anti-Dumping and Countervailing Duties (China)*,

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171. *Id.* ¶ 7.1243 (quoting § 295.6 of the ATP rules).

172. *Id.* ¶¶ 7.1367–7.1369 (quoting 29 U.S.C. § 2916a(3)).

173. Compare *id.* with Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14 and Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14.

174. See Agreement on Subsidies and Countervailing Measures, *supra* note 78, art. 2.1(b); Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14; Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14.

175. See Council Regulation 864/2004, *supra* note 36, at 60 (basing BPS’ predecessor on how the olive market was doing); Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14 (setting the subsidy rates per hectare).

SCM Article 2.1(a) and (b) focus on eligibility for a subsidy, which means access to the subsidy.<sup>176</sup> Merriam-Webster defines “access” as the “freedom or ability to obtain or make use of something.”<sup>177</sup>

Commerce argued there was de jure specificity because BPS and Greening subsidy rates have a historical basis in the Organization of Markets in Fats and Oils, which was a specific subsidy coupled to olive production.<sup>178</sup> Even if the way subsidy rates were set under BPS and Greening led to olive farmers receiving higher than average BPS and Greening payments, as alleged by the US, the BPS and Greening implementing legislation is the opposite of the Washington State tax credits in *US – Large Civil Aircraft (2nd Complaint)* because olive farmers are not the only farmers who can access BPS and Greening.<sup>179</sup> The tax credits for the aerospace industry were implemented in individual pieces of legislation; the panel looked at the individual legislation within the universe of Washington State tax credits and found nothing to suggest the aerospace tax credits were part of a more broadly available subsidy program, which would render the aerospace tax credits non-specific subsidies.<sup>180</sup> The implementing legislation for BPS and Greening in Spain was just the opposite: Spain did not implement BPS and Greening in separate

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176. Appellate Body Report, *United States – AD/CVD (China)*, *supra* note 81, ¶¶ 368, 372–73 (failing to define “access”).

177. *Access*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/access> (last accessed July 12, 2020).

178. *Preliminary Countervailing Memo*, *supra* note 34, at 24, 26 (“[B]ecause the crop type determines the grant amounts provided under this program due to the direct reliance on the grant amounts provided under previous programs, which based grant amounts on the crop type. As such, the program is specific to olive growers.”); see First Written Submission of the United States of America, *supra* note 77, ¶¶ 28–29 (“[P]ositive record evidence supported the USDOC’s determination that eligibility for subsidies conferred under the BPS Programs was explicitly limited to certain enterprises or industries.”).

179. See Panel Report, *US – Large Civil Aircraft*, *supra* note 82, ¶ 7.195 (finding that HB 2294, the implementing legislation for the disputed business and occupation tax credits, contained express language indicating the reduced rates were for businesses involved in airplane manufacturing or the supply chain).

180. *Id.* ¶¶ 7.195–7.211 (noting that if the aerospace tax credits were part of a broadly available subsidy program in the Washington tax code, there would be evidence of links between the subsidies comprising the program, such as “the timing of their introduction, their purpose[,] or in their levels,” but the other tax credits in the code were introduced at various times and for various purposes).

legislation for each type of farmer; instead, BPS and Greening were instituted for all Spanish farmers together.<sup>181</sup> Every farmer in Spain who owns land used for agricultural activity has the “freedom or ability to obtain or make use of” BPS and Greening; no one’s access is restricted because they do not farm olives.<sup>182</sup>

For the foregoing reasons, the implementing language of BPS and Greening in Spain did not expressly limit subsidy access to “certain enterprises,” nor did the “agricultural activity” eligibility criterion limit access to “certain enterprises.”<sup>183</sup> Therefore, BPS and Greening are not *de jure* specific subsidies under Article 2.1(a)-(b) of the Agreement on Subsidies and Countervailing Measures and the US’ countervailing duties on ripe olives from Spain are WTO-inconsistent.<sup>184</sup>

#### IV. RECOMMENDATIONS

This section makes three recommendations. First, the US should rescind its countervailing duties because they are in violation of Article 2.1 of the Agreement on Subsidies and Countervailing Measures. Second, Spain should accelerate the convergence of its fifty agricultural regions used to assign entitlement rates, which will align it with other EU member states, and remove the appearance of non-objectivity in making Basic Payment Scheme and Greening payments. Third, the WTO should develop and publish a clear test that WTO members can use to determine whether a subsidy is restricted to certain enterprises and is not broadly available, which

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181. See Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14 (B.O.E. 2014, 1076) (Spain) (making eligible all farmers owning one or more hectares of land used for “agricultural activity”).

182. Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14 (B.O.E. 2014, 1075) (Spain); *cf. Access, supra* note 177.

183. See Agreement on Subsidies and Countervailing Measures, *supra* note 78, art. 2.1(a)–(b); Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14; Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14.

184. See Agreement on Subsidies and Countervailing Measures, *supra* note 78, art. 2.1(a)–(b).



could increase WTO dispute resolution efficiency.

A. THE US SHOULD RESCIND ITS COUNTERVAILING DUTIES ON RIPE OLIVES FROM SPAIN, BUT MAINTAIN THE ANTI-DUMPING DUTIES.

As a Member of the WTO, the US should not abuse its discretion to implement trade remedies.<sup>185</sup> The WTO's Anti-Dumping and Subsidies and Countervailing Measures Agreements govern how WTO Members respond to dumped and subsidized imports.<sup>186</sup> However, it is the Member State's choice to respond to dumped and subsidized imports.<sup>187</sup> Because whether the Member State responds is at its discretion, the Member State should honor the privilege of autonomy by not implementing frivolous trade remedies.

To honor this privilege, the US should rescind its countervailing duties on ripe olives from Spain without the WTO Dispute Settlement Body panel having to rule against the US. As discussed in Section III of this Comment, one of the reasons the US found the BPS and Greening subsidies to be countervailable with respect to ripe olives was because it deemed BPS and Greening to be *de jure* specific subsidies;<sup>188</sup> that is, "the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises."<sup>189</sup> Commerce's finding of

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185. See *Members and Observers*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last accessed Nov. 6, 2020).

186. *Understanding the WTO – Anti-Dumping, Subsidies, Safeguards: Contingencies, etc.*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm) (last accessed June 24, 2020) [hereinafter *Understanding the WTO*].

187. See *id.* ("[T]he WTO agreement allows governments to act against dumping . . ." (emphasis added)).

188. See U.S. DEP'T OF COM., INT'L TRADE ADMIN., *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain*, 32–34 (June 11, 2018) (public document), <https://enforcement.trade.gov/frn/summary/spain/2018-12990-1.pdf> [hereinafter *Final Countervailing Memo*] ("As we explained in the Preliminary Determination, our finding of *de jure* specificity is based on the manner in which Spain implemented [BPS and Greening] with reference to the operations of its two predecessor programs, the Single Payment Scheme and the Common Organisation [sic] of Markets in Oils and Fats . . . , and the manner in which the amount of assistance was determined under these two programs.").

189. Agreement on Subsidies and Countervailing Measures, *supra* note 78, art.

specificity hinged on a conflation of “access” to BPS and Greening and the subsidy rate received by farmers under these programs.<sup>190</sup> Commerce’s conflation of access to a subsidy and the subsidy rate, in finding specificity, contravened both the plain meaning of “access” as well as the clarification of “limits access to a subsidy to certain enterprises” by prior Dispute Settlement Body panels.<sup>191</sup>

The US’ finding of specificity based on conflation of terms and the resultant implementation of countervailing duties is unconscionable and not in the spirit of the discretion granted to WTO members to implement countervailing duties within the confines of the SCM.<sup>192</sup> The US should preemptively rescind its countervailing duties on ripe olives from Spain before the WTO panel renders its decision.

B. SPAIN SHOULD ACCELERATE THE CONVERGENCE OF THE  
SUBSIDY RATES OF ITS FIFTY AGRICULTURAL REGIONS TO  
ELIMINATE HISTORICAL INFLUENCE ON RATES FROM PAST SUBSIDY  
PROGRAMS THAT WERE COUPLED TO SPECIFIC AGRICULTURAL  
OUTPUT.

Spain has far more BPS and Greening subsidy regions than other EU Member States, which means that the criteria for each region are more granular than they would be if there were only one or two regions for the whole country. This granularity has the potential to confer an appearance that the subsidy rates of each region are tied to particular crop types, which could render a subsidy specific.<sup>193</sup> When

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2.1(a)–(b).

190. See *Final Countervailing Memo*, *supra* note 188, at 32–34; Agreement on Subsidies and Countervailing Measures, *supra* note 78, art. 2.1 (highlighting “access” as being the key term in SCM Article 2.1 deciding subsidy specificity).

191. See Agreement on Subsidies and Countervailing Measures, *supra* note 78, art. 2.1(a); Panel Report, *supra* note 84, ¶ 9.106 (finding that Chinese state-owned commercial banks gave preferential lending to projects identified by the government for “encouragement” and that the government’s list of specific projects to support prevented non-encouraged projects from using the preferential loans, thus restricting access to the subsidy); *Access*, *supra* note 177 (“to be able to use, enter, or get near something”).

192. See *Final Countervailing Memo*, *supra* note 188, at 32–34; *Understanding the WTO*, *supra* note 186.

193. Jabier Ruiz, *Distribution of Direct Payments: The Peculiar Case of the Spanish Model*, CAP REFORM (Nov. 20, 2019), <http://capreform.eu/distribution-of->

Spain implemented the EU's BPS and Greening subsidies, it had to set the initial rate of each farmer's subsidy entitlements.<sup>194</sup> In implementing BPS and Greening, the Government of Spain created fifty agricultural subsidy regions in the country based on combinations of characteristics such as whether the land was rain-fed or irrigated, and whether the land was used for permanent crops or permanent pastures.<sup>195</sup> Most EU Member States have only one or two subsidy regions, even large Member States like Italy and France.<sup>196</sup>

Spain's large number of agricultural subsidy regions divide the country into enough small pieces that the regions may appear to be based on crop type.<sup>197</sup> For example, Andalucía is one of the primary olive-growing regions in Spain, and Andalucía is divided into at least five subsidy regions that all share similar agronomic conditions and farming practices.<sup>198</sup> The multiple, small subsidy regions within a larger, geographic region allow the government to more precisely assign farms to a region.<sup>199</sup> In Jaraíz de la Vera, two farmers whose lands are adjacent, where one farms tobacco in the permanent crop region of Jaraíz de la Vera, and the other raises cattle in the pastures region, could be receiving widely different subsidy rates.<sup>200</sup> While BPS and Greening are not specific subsidies and are not coupled to production of any one type of agricultural good, the precision with which each farm is categorized into the fifty regions could imply that the value of the entitlements is based on crop type and thus may appear coupled to production.<sup>201</sup> This appearance is not aided by the

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direct-payments-the-peculiar-case-of-the-spanish-model/ (citing to the European Court of Auditors).

194. Regulation 1307/2013, *supra* note 33, at 611.

195. See *Preliminary Countervailing Memo*, *supra* note 34, at 19–20; Ruiz, *supra* note 193.

196. See Ruiz, *supra* note 193 (citing to the European Court of Auditors).

197. *Id.* (“Rain-fed and irrigated arable land uses were sometimes grouped together in a single region, while permanent crops and permanent pastures were always kept separate from each other and from arable land regions.”).

198. *Id.*

199. *Id.*

200. *Id.* (“[T]he average value of entitlements in other basic payment regions in the farming county of Jaraíz de la Vera are €60/ha (pastures), €106/ha (rainfed arable) and €167/ha (permanent crops).”).

201. See Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14 (B.O.E. 2014, 1075)

BPS entitlement rates being based, in part, on preceding subsidy rates.<sup>202</sup> BPS rates partially derive from the Single Payment Scheme, the rates of which were partially based on the preceding subsidy rates of programs like the Common Market in Fats and Oils, which were specific and expressly coupled to production.<sup>203</sup>

To eliminate the potential appearance of BPS and Greening being coupled to agricultural production, and therefore specific, Spain should accelerate the convergence of the fifty agricultural regions.<sup>204</sup> The rates in Spain were supposed to converge automatically between 2015–2019, but that goal was not met.<sup>205</sup> Spain should make rate convergence its priority for the next EU Common Agricultural

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(Spain) (allowing farmers to be eligible for BPS payments if they own a hectare or more of land used for agricultural activity); *id.* (“[T]here is an extreme outlier of €1430/ha for one single region: Region 24.1 of Irrigated arable land in the county of Jaraíz de la Vera, in Extremadura. The singularity of the irrigated agriculture in this area is the cultivation of tobacco, which takes up approximately 8,500 ha (more than half of the 15,678 entitlements available in Region 24.1).”). *But see id.* (“However, even within [Andalucía, which is predominately olive farms], the most favoured [sic] region averages €504/ha, another one €410/ha and the other three between €300/ha and €340/ha. Considering that they share similar agronomic conditions and farming practices, these differences are very difficult to explain.”).

202. *See* Regulation 864/2004, *supra* note 36, at 60 (showing that the entitlement rates under BPS were derived from BPS’s predecessor subsidies received by the particular farmer: SPS and its predecessor, in the case of olive farmers, the Common Organization of Markets in Fats and Oils, which was directly coupled to olive production); Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14 (B.O.E. 2014, 1076) (Spain) (setting the subsidy rates per hectare (the “entitlement rate”)).

203. Regulation 864/2004, *supra* note 36, at 60 (amending the Single Payment Scheme); *Preliminary Countervailing Memo*, *supra* note 34, at 22 (illustrating that farmers growing olives for oil received a subsidy rate per hectare of 132.25/100kg and farmers growing olives for eating (i.e., table olives) received a rate per hectare that was equal to 11.5% of the olive oil rate, which works out to a rate of 15.2/100kg).

204. *See Preliminary Countervailing Memo*, *supra* note 34, at 24, 26 (“We further preliminarily determine that the grants provided under this program are specific . . . because the crop type determines the grant amounts provided under this program due to the direct reliance on the grant amounts provided under previous programs, which based grant amounts on the crop type. As such, the program is specific to olive growers.”).

205. Ruiz, *supra* note 193.

Policy budget period from 2021–2027.<sup>206</sup>

C. THE WTO SHOULD PUBLISH A CLEAR TEST FOR WHETHER A SUBSIDY IS LIMITED TO “CERTAIN ENTERPRISES” UNDER SCM ARTICLE 2.1, AND NOT LEAVE THE LINE BETWEEN BROADLY AND LIMITEDLY AVAILABLE SUBSIDIES TO BE DETERMINED BY PANELS CASE-BY-CASE.

Article 2.1(a) of the Agreement on Subsidies and Countervailing Measures states that a subsidy will be specific if access to the subsidy is limited to “certain enterprises.”<sup>207</sup> China challenged the application of “certain enterprises” in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>208</sup> The Appellate Body clarified that “certain enterprises” referred to “a single enterprise or industry or a class of enterprises or industries that are known and particularized.”<sup>209</sup> The Appellate Body acknowledged that this was not a bright-line definition and a determination of “certain enterprises” would have to be made on a case-by-case basis.<sup>210</sup>

While it may never be possible to create a definition that works perfectly in all cases, the WTO should author a clear test for determining limitation to “certain enterprises” that offers greater concreteness than what is found in WTO jurisprudence. For example, in *US – Anti-Dumping and Countervailing Duties (China)*, the US found that China granted preferential credit access to the off-the-road tire subindustry, and that it was a specific subsidy.<sup>211</sup> The panel

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206. *Future of the Common Agricultural Policy*, EUR. COMM'N, [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/future-cap\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/future-cap_en) (last accessed Nov. 6, 2020).

207. Agreement on Subsidies and Countervailing Measures, *supra* note 78, art. 2.1(a).

208. Appellate Body Report, *United States – AD/CVD (China)*, *supra* note 81, ¶ 386.

209. *Id.* ¶ 373.

210. *Id.*; see also Panel Report, *US – Upland Cotton*, *supra* note 82, ¶ 7.1142 (“At some point that is not made precise in the text of the [SCM], and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products.”).

211. Appellate Body Report, *United States – AD/CVD (China)*, *supra* note 81, ¶ 397.

upheld the US' specificity determination because the Chinese policy planning documents contained lists of projects to include or exclude in China's economic support programs, often including and excluding projects from within the same economic sectors.<sup>212</sup> Including and excluding different projects from within the same economic sectors was illustrative of the subsidies being available to only a discrete segment of the economy.<sup>213</sup>

The policy planning documents in *US – Anti-Dumping and Countervailing Duties (China)*, with their express segmentation language, made it readily apparent the subsidies were for a discrete segment of the economy.<sup>214</sup> But what about a case like *US – Ripe Olives from Spain*? BPS and Greening are available to the whole agriculture sector, but is agriculture still not a discrete segment of the economy?<sup>215</sup> Agriculture is but one industry in Spain that comprises only 2.6% of its gross domestic product and BPS and Greening are not available to the services and manufacturing sectors.<sup>216</sup> Is agriculture not a discrete segment because there are thousands of different products within the “agriculture” umbrella?<sup>217</sup>

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212. Panel Report, *US – AD/CVD (China)*, *supra* note 84, ¶¶ 9.61–9.72.

213. *See id.* (showing that the subsidies were not broadly available throughout the economy).

214. *See id.* (highlighting that the restrictions to access were expressly stated in the policy planning documents).

215. *See* Royal Decree Concerning Implementation of Direct Payments to Agriculture, Farming, and Other Aid Schemes §§ 3, 13–14 (B.O.E. 2014, 1075) (Spain) (defining agricultural activity as: “production, rearing[,] or agricultural product cultivation, including harvesting, milking, animal husbandry, keeping of animals for agricultural purposes[,] or maintenance of an agricultural area in a suitable state for pasture or cultivation, without any preparatory measure beyond the methods and agricultural machinery normally employed.”); Royal Decree Concerning Allocation of Basic Payment Scheme Entitlements of the Common Agricultural Policy §§ 13–14 (B.O.E. 2014, 1076) (Spain) (making eligible all farmers owning one or more hectares of land used for “agricultural activity”).

216. *See* *Income Support Explained*, *supra* note 33 (explaining that BPS and Greening are forms of income support under the EU's Common Agriculture Policy); *Spain*, CIA WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/countries/spain> (last visited July 25, 2020) (stating that, in 2017, agriculture comprised 2.6% of Spain's GDP).

217. *See* 7 U.S.C. § 1518 (2018) (“‘Agricultural commodity,’ as used in this subchapter, means wheat, cotton, flax, corn, dry beans, oats, barley, rye, tobacco, rice, peanuts, soybeans, sugar beets, sugar cane, tomatoes, grain sorghum, sunflowers, raisins, oranges, sweet corn, dry peas, freezing and canning peas,

WTO jurisprudence does not readily provide answers to these questions.<sup>218</sup> It would be prudent for the WTO to set clear guidance for determining what constitutes “certain enterprises” so the ambiguity is not left to be resolved through WTO panels on a case-by-case basis.<sup>219</sup> Having a clear test for whether a subsidy is limited to certain enterprises will aid countries to more accurately implement countervailing duties, which will result in fewer disputes before the WTO and allow the WTO to use its dispute resolution resources more efficiently.

## V. CONCLUSION

Because the US’ material injury determination adhered to the requirements of Article 3 of the Anti-Dumping Agreement, the US’ anti-dumping duties on ripe olives from Spain are not inconsistent with its WTO obligations. However, the US’ countervailing duties on ripe olives from Spain are inconsistent with Article 2 of the Agreement on Subsidies and Countervailing Measures. The countervailing duties are in violation of Article 2 because the countervailed subsidies, the Basic Payment Scheme and Greening, are not specific subsidies. A decision by the *US – Ripe Olives from Spain* WTO Dispute Settlement Body panel to this effect will reinforce a plain-meaning interpretation of what “access” to a subsidy means under SCM Article 2. The US should rescind its countervailing duties, but maintain the anti-dumping duties, on ripe olives from Spain.

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forage, apples, grapes, potatoes, timber and forests, nursery crops, citrus, and other fruits and vegetables, nuts, tame hay, native grass, hemp, aquacultural species (including, but not limited to, any species of finfish, mollusk, crustacean, or other aquatic invertebrate, amphibian, reptile, or aquatic plant propagated or reared in a controlled or selected environment), or any other agricultural commodity, excluding stored grain, determined by the Board, or any one or more of such commodities, as the context may indicate.”).

218. See, e.g., Panel Report, *US – Large Civil Aircraft*, *supra* note 82; Panel Report, *US – AD/CVD (China)*, *supra* note 84; Panel Report, *US – Upland Cotton*, *supra* note 82.

219. See, e.g., Panel Report, *US – Large Civil Aircraft*, *supra* note 82; Panel Report, *US – AD/CVD (China)*, *supra* note 84; Panel Report, *US – Upland Cotton*, *supra* note 82.