



**Alea iacta es: how Spanish olives will force a radical change of the CAP**  
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## Summary

The US imposition of anti-dumping (AD) and countervailing (CV) duties on imports of black olives from Spain has decided the European Commission to cross the Rubicon and sue the US at the WTO, claiming that its subsidies are perfectly complying with the WTO rules.

The petition of the Californian Coalition for Fair Trade in Ripe Olives was presented on 21 June 2017 to the US Department of Commerce (DoC) and the US International Trade Commission (USITC) after a lengthy investigation: submission of questionnaires to both parties, a preliminary USITC report in August 2017 and two lengthy hearings on July 12, 2017 and May 24, 2018, where the European Commission and a representative of the Spanish Embassy in the US also intervened.

A first issue was what was the concerned industry: for the defendants only the producers of processed ripe olives must be taken into account and not the growers of raw table olives. If USITC agreed to not include the US growers of raw olives, it nevertheless considered the Spanish growers of raw olives to be the main beneficiaries of the EU subsidies to the ripe olives exported to the US.

According to the GATT, a product is dumped when its export price is lower than its "normal value", the price charged for a like product in the domestic market of the exporting country in the ordinary course of trade. The assessment of dumping of the subject ripe olives was very difficult by lack of data in the EU and Spain, so that the petitioners had to use a constructed value approach in calculating normal value. On 18 June 2018 USITC concluded that the three main exporters were dumping at margins of 17.45%, 25.39%, and 16.83%, margins a little higher than those already imposed since 26 January 2018. The result, which has decided the EU to sue the US at the WTO, is that US imports of the subject ripe olives from Spain diminished by 41.4% in volume from January to August 2018 over the same period of 2017 and by 35.5 % in value, while imports from the whole world increased by 5.3%.

For the countervailing investigation, the WTO imposes that the subsidies must be "actionable", and product-specific (PS). The petitioners claimed that the full decoupling of direct aids since 2010 did not have any effect on the production of Spanish table olives because of the lack of alternatives in olive-growing groves. In total Spanish olive growers receive subsidies of 468 €/ha (excluding irrigation subsidies), around 40% of the market price, while the average subsidy per hectare for the whole Spanish agriculture is € 258. The USTR underscored that the subject imports receive actionable input subsidies and quoted an European Commission's report that *"the price of table olives is very low, making unsupported production uneconomic"*. The Spanish Government has itself recognized that the cost of production for table olives is at least 16.4% higher than the retail price.

If the defendants did not contest the amount of subsidies to the producers of raw table olives, they underscored that these subsidies are fully compatible with the WTO rules as they are decoupled, but the real issue was the loss of competitiveness of Californian processors on the US market, stemming from their growing structural handicaps: very high labor costs for the collection of table olives, which is only manual in the US while it is largely mechanized in Spain, a much lower profitability of table olives in California than that of almonds and of olives for oil, which has led to a sharp decline in the area of table olives. The Californian petitioners replied that it is the low price of ripe olives imported from Spain due to the low price of their subsidized raw olives which led to the cumulative decline of competitiveness of those of

California. The DoC released on 28 November 2017 a first assessment of CD to be paid by Spanish exporters and a final assessment on 12 June 2012, going from 7.52% to 27.02% among the main exporters.

However other much deeper arguments, not advanced explicitly by the parties to the case, need now to be taken into account.

The anti-dumping methodology of the European Commission considers that, for products to be sold at their "normal value", "*decisions of the firm regarding prices, costs and inputs are made in response to market signals reflecting supply and demand, and without significant state interference, and costs of major inputs substantially reflects market values*". It is clear that the EU agricultural prices have nothing to do with "*market prices without significant interference from the State*" as the successive reforms of the CAP from 1992 onwards have sharply reduced their intervention prices by offsetting them with direct aids, first coupled and then decoupled.

But it is necessary to challenge the very definition of dumping in the GATT that a product is dumped when its export price is lower than its "normal value", defined as the domestic price. This scandalous definition was at the origin of the reforms of the CAP and the US Farm Bill from the early 1990s: sharply reducing domestic prices and offsetting the reduction by direct aids would allow to export more and import less, to the detriment of developing countries that cannot subsidize significantly their large numbers of farmers.

Another major argument, not used explicitly in the US complaint, relates to the provisions of the Agreement on Agriculture (AoA) and the Agreement on Subsidies and Countervailing Measures (ASCM). This refers to Article 13 of the AoA on Due Restraint ("peace clause"), from which all Annex 2 subsidies – among which those to decoupled income subsidies – could have been sued since 2004 under the ASCM, provided they are product-specific (PS). If it is clear that the EU subsidies to the Ripe olives exported to the US are PS, this paper analyses the extent to which the EU notified subsidies for 2015-16 comply with the AoA rules.

The paradox is that the European Commission has always sold the decoupled payments implemented since the CAP reform of 2003 as allowing farmers to respond better to "market signals" and to follow a "market orientation" as they can choose what to produce by taking only current market prices into account, as direct payments are no longer a function of the nature of their productions. This mantra that the CAP is conducted by "*market orientation*" is risible, and appears in all the Commission reports, for instance 11 times in its impact assessment of the CAP 2021-27. The problem is that these prices on which the production choices of EU farmers are based would be much higher without the decoupled subsidies!

The paper checks all the AoA Annex 2 payments to identify which ones are PS and particularly the seven reasons why the BPS – basic payment scheme, as well as the SAPS (single area payment scheme for some new Member States) and the other decoupled direct payments since the 2015 CAP reform: redistributive payment, payment to young farmers, payment beneficial to the climate – are in fact coupled. And it concludes that almost all EU agricultural exports can be sued for dumping, even products which had never received blue direct payments, as long as their producers get also SBS or SAPS payments for other productions, which applies practically to all EU28 farms to-day.

The WTO Article 6.2 forces also the developed countries to notify in the amber box (AMS) all their input subsidies, which they do not, particularly the largest ones, those to feedstuffs. For

example, SOL has estimated that the subsidies to extra-EU28 exports of 5.494 Mt of dairy products in 2016 – or 30.2 Mt in milk equivalent – have reached € 2 bn, of which € 513 M in feed subsidies (17 €/t). Furthermore the EU does not notify any irrigation subsidy and tax rebate, particularly on agricultural fuel and on feedstocks for biofuels.

Notwithstanding the GATT definition of dumping, the WTO Appellate Body (AB) departed four times from this definition: in the cases on Dairy Products of Canada of December 2001 and December 2002, US Cotton of March 2005 and EU Sugar of April 2005, stating that any export of an agro-food company at a price lower than the average total production cost of the country without subsidies can be sued for dumping.

The best denial that most EU agricultural subsidies are decoupled made by Michel Jacquot, former director of the EAGGF (European Agricultural Guidance and Guarantee Fund), and two Spanish authors, Carlos Gasperin and Ivana Doporto Miguez.

The paper concludes that, as the EU complaint at the WTO against the US is almost sure to fall short, the EU must prepare a radical reform of the CAP on two fronts: deleting its dumping impact, particularly on developing countries, and rebuilding EU farm incomes on stable and remunerative prices.

The first thing is to eliminate the EU dumping, by taxing exports by the amount of subsidies, as proposed on 18 June 2018 by the French network "For another CAP", and also recommended by Peter Einarsson in 2000. It is of course necessary to stop imposing Economic Partnership Agreements (EPAs) to the former colonies of the ACP countries which will only push them further into misery and feed the flow of migrants that the EU does not want to welcome.

But this will not ensure a sufficient income to European farmers if they no longer benefit from subsidies on extra-EU exported products, particularly for wines and spirits, wheat, dairy products and pig meat. The case of wheat exports is analyzed specifically and the paper concludes with a preliminary scenario to rebuild the CAP on fair and stable farm prices. Of course higher agricultural prices than today – progressively raised over at least five years in parallel with the reduction of direct subsidies – will imply higher food prices, a perspective difficult to sell to the EU poor citizens, even if they have everything to gain in the long run.

Given that EU28 households have spent 14.6% of their budget on food on average from 2014 to 2017, that the agricultural production value was of 31.8% of consumers' food bill, or 4.7% of GDP, what should be the necessary rise in agricultural prices to offset the loss of annual direct payments of € 41.6 bn, given an expected rise of annual GDP of 2%? A preliminary calculation shows that allocating a share of GDP, decreasing from 0.30% in 2018 to 0.25% in 2030, could offset the loss of DP, which should not provoke a political revolution. But the solution should rather result from a progressive reduction of DP compensated by a progressive rise in farm prices so that the deleted DP could be used for other purposes: fostering agroecological systems of production and consumption (short circuits) and eliminating the detrimental impact of higher food prices on the deprived population through larger social benefits (minimum income), free or subsidized meals in canteens and even food stamps on the US model, but at a much more modest level, implying that the EU ceases to align its positions on the US on the issue of public stockholdings for food security purposes. In fact the third part of the paper should be the conclusion.

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The United States (US) confirmed on 25 July 2018<sup>1</sup> the imposition of anti-dumping duties (ADD) and countervailing duties (CD) on imports of Spanish subject so-called "ripe olives", after a lengthy investigation of the US Department of Commerce (DoC) and the US International Trade Commission (USITC) of the petition submitted on June 22, 2017 by the two California's producers.

This petition was revealed in an Euractiv article of 28 August 2017<sup>2</sup> and then in a more recent one of 10 July 2018<sup>3</sup> but they went unnoticed by the media because the additional duties that will result – of which a little more than € 130 million (M) of CD – appear negligible compared to the billions of euros threatening US imports of EU steel, aluminum and automobiles.

However this pursuit on Spanish olives could spell the end of the Common Agricultural Policy (CAP) in force since its profound reforms of 1992, 1999, 2003, 2005, 2008, 2014 and the new one from 2021 to 2027, as it has moved from a CAP where farm incomes were essentially based on remunerative prices for the vast majority of producers to a CAP where they are mainly based on public subsidies. As stated in the article of Euractiv of 10 July 2018, for Joao Pacheco, former Deputy Director General of DG Agriculture at the European Commission, "*The argument that the US is using to punish Spanish olives can be used systematically as the recipe for all the other sectors where farmers receive direct payments*". As for Jean-Luc Demarty, DG for trade and former DG for agriculture, he said on 20 June: "*In addition to the economic hardship for the Spanish farming communities directly affected by these abusive measures, we also fear the systemic consequences this decision can have... Our pleas not to open a Pandora's box on domestic support for farmers were bluntly ignored*"<sup>4</sup>. Esther Herranz, member of the Agriculture Committee of the European Parliament, confirms: "*It is deeply worrying that the USA is not respecting WTO rules. There is a strong fear that after Spanish olives, the next custom duties of the Trump governance may point to any European sector: French cheeses, Italian wines or German sausages could be targeted next*"<sup>5</sup>. The European Parliament had already stressed in March 2018 "*that there is the risk that other similar investigations might be undertaken by the US administration, thereby jeopardising bilateral agricultural trade relations and calling into question the whole European agricultural model*"<sup>6</sup>.

As underscored by the Bloomberg article, "*The Spanish association of table-olive exporters is pressing the EU to complain to the Geneva-based WTO. 'Bringing a case to the WTO is vital to protect the interests of Spanish ripe-olive producers,' said Antonio de Mora, secretary general of the association, which is known as Asemesa. 'It's also necessary to prevent the U.S. and trade authorities in other countries from using the American reasoning in the future for other agricultural products'*"<sup>5</sup>. In fact, Asemesa has already made a recourse to USITC in end September<sup>7</sup> and finds that the European Commission is not hurrying enough to sue the US at

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<sup>1</sup> [https://www.usitc.gov/secretary/fed\\_reg\\_notices/701\\_731/701\\_582\\_notice\\_07252018sgl.pdf](https://www.usitc.gov/secretary/fed_reg_notices/701_731/701_582_notice_07252018sgl.pdf)

<sup>2</sup> <https://www.euractiv.com/section/agriculture-food/news/commission-will-defend-spanish-olive-producers-against-us-tariffs/>

<sup>3</sup> Sarantis Michalopoulos, *US questions CAP's raison d'être with Spanish olives investigation*, 10 July 2018, <https://www.euractiv.com/section/agriculture-food/news/us-questions-caps-raison-detre-with-spanish-olives-investigation/>

<sup>4</sup> <https://www.bloombergquint.com/onweb/why-do-investors-hate-everything-maybe-paranoia-jpmorgan-says>

<sup>5</sup> *Spanish olives under US tariff attack, like steel, need protection*, <http://www.eppgroup.eu/press-release/Spanish-olives-under-US-attack>

<sup>6</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2018-0145+0+DOC+XML+V0//EN>

<sup>7</sup> <https://www.economista.es/empresas-finanzas/noticias/9467111/10/18/La-aceituna-urge-a-Europa-a-denunciar-a-EEUU-ante-una-caida-de-ventas-del-70.html>

the WTO, underlining that Spanish exports to the US have decreased by 35.7 % from January to August 2018, with a loss of sales of \$ 28.5 M.

This Asemesa plea was received by the European Agriculture Commissioner Phil Hogan who confirmed on 15 October 2018 that the Commission was preparing to file a formal complaint with the WTO against definitive anti-dumping and countervailing duties imposed by the US since 1 August on imports of black olives from Spain<sup>8</sup>.

Before analyzing in-depth this US decision, let us recall briefly the distinction between anti-dumping (AD) and countervailing duties (CD). According to Article 6 of the GATT and the WTO Anti-Dumping Agreement, a product is dumped when its export price is lower than its "normal value" (that the US prefers to call "fair value"), that is the price charged for a like product in the domestic market of the exporting country in the ordinary course of trade<sup>9</sup>. The objective of an anti-dumping duty (ADD) is to restore fair competition, the AD rate corresponding to the difference between the export price and the price paid for a like product in the domestic market of the exporting country.

On the other hand, a countervailing duty (CVD) is intended to eliminate the effects of a subsidy, where the government of the exporting country provides, directly or indirectly, a financial advantage for the production, export or transport of any exported product, which entails a serious prejudice to other countries. The burden of demonstrating the occurrence of serious prejudice rests with the complainant, except in the situation contemplated by Article 6.3(b) of the SCM, as underlined by Chambovey: "*For homogeneous agricultural products, a significant undercutting claim under Article 6.3(c) is certainly easier to sustain than in the case of industrial products such as cars... Here, the complainant only needs to show that a product is actually subsidized and that the product's market share has increased over an appropriately representative period to make a prima facie case for displacement or impedance... This could amount to a reversal of the burden of proof. Specific Green Box subsidies granted to products that are massively exported and whose market share in a third country has increased over a representative period would be exposed to such claims*"<sup>10</sup>. Richard H. Steinberg and Timothy E. Josling add that "*Three alternatives tests can be used to establish serious prejudice, in the case of agriculture: displacement of imports in the market of the subsidizing member; displacement in third country markets; or price undercutting, suppression, depression or lost sales. The first task is to establish a prima facie case, after which the burden of proof shifts to the respondent for a rebuttal*"<sup>11</sup>.

We will first present the sequence of the investigation with the arguments put forward by the US petitioners and the European defendants, before enlarging the issue with more fundamental arguments and the consequences for the future of the CAP, particularly now that the European Commission (EC) has decided to sue the US at the WTO.

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<sup>8</sup> <https://agenceurope.eu/en/bulletin/article/12121/11>

<sup>9</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1036&rid=1>

<sup>10</sup> Chambovey D., 2002, *How the Expiry of the Peace Clause Might Alter Disciplines on Agricultural Subsidies in the WTO Framework*, Journal of World Trade, 36(2): 305–352.

<sup>11</sup> Richard H. Steinberg and Timothy E. Josling, *When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge*, 11 June 2003, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=413883](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=413883)

## **I – The sequence of the investigation and the arguments put forward by the protagonists**

The petition of the Californian Coalition for Fair Trade in Ripe Olives was presented on 21 June 2017 and prepared by the law firm McDermott Will & Emery and the defense of the Spanish Association of Spanish exporters and processing industries of table olives (Asemesa) was prepared by the law firm Curtis, Mallet-Prevost, Colt & Mosle LLP, and, to a lesser extent by the Association of US Food Industries importing Spanish Ripe olives and defended by the law firm Sandler, Travis & Rosenberg<sup>12</sup>. The DoC's and USITC's investigations of the case resulted in the submission of lengthy questionnaires to both parties<sup>13</sup>, a lengthy USITC report in August 2017<sup>14</sup> and two lengthy hearings on July 12, 2017<sup>15</sup> and May 24, 2018<sup>16</sup>, where the European Commission and a representative of the Spanish Embassy in the US also intervened.

There is a certain fuzziness over the years to which the complaint relates. In principle it is on the last years for which data are available, so rather 2014 to 2016 at the beginning of the instruction, then until 2017 during the debates that took place on May 24, 2018. These debates also underlined the fluctuation of production of raw olives, with a base cycle of two years (low production following high production) but sometimes with longer cycles, and several data were presented from 2013 to 2017 and some even over 10 years.

The EU information available on table olives is very scarce. Thus Eurostat only provides exports of Spanish table olives at the 6-digit code 200570, without details per 8 or 10-digit sub-codes like the USITC does. Likewise the TARIC (EU customs tariff) has only one customs duty (CD), of 12.8% ad valorem, for all imports of the 200570 code.

Table 1 shows Spain's leading position in EU28 table olive production and exports, and Table 2 shows Spanish exports to the US, and compares the first 8 months of 2017 and 2018.

Table 1 – EU and Spain's production and export of table olives: 2013-14 to 2016-17

1000 tonnes	2013-14	2014-15	2015-16	2016-17	Average 2014-16
Production					
EU28	793.9	868.1	886.5	841.9	847.6
Spain	572.2	555.6	601	596.1	581.2
Spain/EU28	72.07%	64%	67.79%	70.80%	68.57%
Exports					
Extra-E28	272.6	306.7	274.7	280.1	283.5
Spain	195.2	218.4	177.3	177.2	192
Spain/extra-EU28	71.61%	71.21%	64.54%	63.26%	67.72%

Source: International Oil Council, June 2018, <http://www.internationaloliveoil.org/estaticos/view/132-world-table-olive-figures>. The agricultural year goes from 1<sup>st</sup> October to 30 September.

<sup>12</sup> [https://www.usitc.gov/secretary/fed\\_reg\\_notices/service\\_lists/documents/701-582.pof\\_\\_0.pdf](https://www.usitc.gov/secretary/fed_reg_notices/service_lists/documents/701-582.pof__0.pdf)

<sup>13</sup> Useable questionnaire responses were received from 32 U.S. importers, representing 96.7 percent of subject imports from Spain in 2017, and from ten producers/exporters of ripe olives in Spain, accounting for approximately 87.9 percent of U.S. imports of subject merchandise in 2017 and approximately 44.5 percent of total production of ripe olives in Spain in 2017.

<sup>14</sup> [https://usitc.gov/publications/701\\_731/pub4718.pdf](https://usitc.gov/publications/701_731/pub4718.pdf)

<sup>15</sup>

[https://www.usitc.gov/trade\\_remedy/731\\_ad\\_701\\_cvd/investigations/2017/Ripe%20Olives%20from%20Spain/Preliminary/ripe\\_olives\\_from\\_spain-conference.pdf](https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2017/Ripe%20Olives%20from%20Spain/Preliminary/ripe_olives_from_spain-conference.pdf)

<sup>16</sup>

[https://www.usitc.gov/trade\\_remedy/731\\_ad\\_701\\_cvd/investigations/2018/Ripe%20Olives%20from%20Spain/Final/ripe\\_olives-hearing-5-24-2018.pdf](https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2018/Ripe%20Olives%20from%20Spain/Final/ripe_olives-hearing-5-24-2018.pdf)

Table 2 – Exports of Spanish table olives to the US from 2014 to 2017 and until August 2018

	2014	2015	2016	Average	2017	Jan-Aug. 2017	Jan-Aug. 2018	2018/2017
Tonnes	72822	80336	110973	88044	110016	50909	43739	-14.1%
1000 €	163842	179747	194860	179483	179430	87083	72496	-16.8%
FAB €/t	2250	2237	1756	2039	1631	1711	1657	-3.1%

Eurostat: code 200570

Before analyzing the anti-dumping and anti-subsidies investigations – which are complementary and use almost the same data – let us identify precisely the specific product of the case as there is a disagreement between the parties: raw olives or processed ripe olives?

### **1.1 – The products at issue: processed ripe olives, raw olives or both?**

There are apparent contradictions in the positions taken by the protagonists, including USITC, on the identification of the concerned domestic industry.

According to the US petition of 21 June 2017 on countervailable duties, *"US imports of ripe olives from Spain, the processed table olives subject to this Petition, benefit from substantial countervailable subsidies that are de jure and de facto specific to the Spanish olive industry... All subsidies to table olive growers addressed below are attributable to finished ripe olives, regardless of whether table olive processors are cross-owned with olive growers... The subsidies conferred to olive growers addressed below are actionable upstream subsidies under this authority because they bestow a competitive benefit on the subject merchandise and have a significant effect on the cost of producing the subject merchandise, ripe olives... US findings and EU assertions have confirmed that raw olives are provided by Spanish olive growers to processors at prices well below the costs that growers would incur but for the significant aid received under the subsidy programs described below... The EU has similarly affirmed that "the price of table olives is very low, making production without support uneconomic for farmers"<sup>17</sup>.*

The statement of Ms Grande of the Spanish Embassy in Washington in the first hearing of 12 July 2017 contradicts the petition: *"We do not agree with the broad definition of the domestic industry included in the petitioner allegation. From our perspective and in accordance with the common practice of WTO members, the concept of domestic industry should be limited to the producers of the product under investigation. In our understanding, only ripe olives producers must be taken into account and not growers of raw table olives, as it has been requested by the petitioners. It is clear that U.S. growers of raw olives do not process or pack ripe olives. And thus, they must be excluded from the domestic industry definition for the purpose of this injury analysis"<sup>18</sup>.*

The EU Commission's representative confirmed this statement in the same hearing: *"The nonspecific subsidies have been granted to Spanish farmers and not to Spanish producers and/or exporters of ripe olives. Petitioners have not provided evidence that the subsidies granted to Spanish farmers were passed through the processors and then to the producers of ripe olives and then exported to the U.S."*

<sup>17</sup> <https://www.law360.com/articles/937827/us-olive-producers-demand-duties-on-spanish-competitors>

<sup>18</sup>

[https://www.usitc.gov/trade\\_remedy/731\\_ad\\_701\\_cvd/investigations/2017/Ripe%20Olives%20from%20Spain/Preliminary/ripe\\_olives\\_from\\_spain-conference.pdf](https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2017/Ripe%20Olives%20from%20Spain/Preliminary/ripe_olives_from_spain-conference.pdf)



In its preliminary conclusions of August 2017, USITC presented the issue of the relevant domestic industry as follows: *"In cases involving processed agricultural products, section 771(4)(E) of the Tariff Act authorizes the Commission to include growers of a raw agricultural input within the domestic industry producing the processed agricultural product if: (a) the processed agricultural product is produced from the raw product through a single continuous line of production, and (b) there is a substantial coincidence of economic interest between the growers and producers of the processed product based upon the relevant economic factors... We find that the first prong of the grower/processor provision is satisfied because ripe olives are produced from raw table olives through a single, continuous line of production. Raw table olives are substantially or completely devoted to the production of ripe olives. Petitioner estimates that approximately 94 percent of domestically grown raw table olives are processed into ripe olives and respondents have not proffered another estimate. The percentage of the raw agricultural product devoted to the production of the processed agricultural product is sufficient to find the first prong of the grower/processor provision satisfied. By contrast, we find that the second prong of the grower/processor provision is not satisfied (i.e., whether there is a substantial coincidence of economic interests between olive growers and domestic producers of ripe olives)... and therefore have not included the growers in the domestic industry"*<sup>19</sup>.

The USITC position did not change in its final conclusion of July 2018: *"In the final phase of these investigations, Petitioner expressly indicated that it did not challenge the Commission's decision in the preliminary determinations not to include the growers in the domestic industry. None of the Respondents addressed this issue in their prehearing or posthearing briefs. In these final phase investigations, there is no new information that would warrant revisiting the issue. Therefore, for the same reasons set forth in the preliminary determinations, we do not include the growers in the domestic industry and limit the domestic industry to processors of ripe olives"*.

However these contradictions in the definition of the appropriate domestic industry are only apparent because, if USITC does not include the US growers of raw olives, it nevertheless considers the Spanish growers of raw olives to be the main beneficiaries of the EU subsidies to its exports of ripe olives to the US.

## **1.2 – The anti-dumping investigation**

An AD prosecution must be done by specific national companies and target specific foreign companies. The petition presented by the California Coalition for Fair Trade in Ripe Olives groups two companies: Bell-Carter Foods and the family-owned company Musco. The investigation concerned the Spanish exports of the subject ripe olives (black olives) from the sub-codes of the Harmonized Trade System (HTS) 20057002, 20057004, 20057050, 20057060, 20057070, 20057075, the other olives of code 200570 being excluded although some are also black olives but most are green olives. The investigation had to prove that the petitioners have suffered injury related to the US import of the subject ripe olives exported by the three Spanish companies Aceitunas Guadalquivir, Agro Sevilla Aceitunas and Angel Camacho, members of Asemesa, which account for 70% of Spanish exports of ripe olives to the US, and a dumping rate was deducted for all other Spanish exporters of the subject ripe olives.

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<sup>19</sup> [https://usitc.gov/publications/701\\_731/pub4718.pdf](https://usitc.gov/publications/701_731/pub4718.pdf)

In its preliminary analysis of August 2017, USITC stated that *"In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of subject imports, we consider all relevant economic factors that bear on the state of the industry in the United States. No single factor is dispositive, and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry"<sup>18</sup>.*

The assessment of dumping of the subject ripe olives by McDermott Will & Emery was very difficult due to lack of data, although it focused on olives of sub-code 20057060, which accounted for 96.3% of all the subject ripe olives (Table 3), exported by Agro Sevilla, the largest producer and exporter of ripe olives in the world: *"Petitioner has not been able to obtain any information relating to the prices charged for ripe olives in Spain or in any third country market. Furthermore, the HTS category which would capture Spanish exports of subject merchandise is significantly overbroad, as there is no distinction made between the ripe olives that fall under the scope of this petition and all other green and black table olives. Therefore, using export data would not yield a meaningful comparison to the imports of subject merchandise into the United States. Thus, because home market and third country prices were not reasonably available, Petitioner has relied upon a constructed value approach in calculating normal value. This is the best information reasonably available to Petitioner. Petitioner has relied upon Bell Carter's factor of production ("FOP") data from 2016 in order to estimate the quantities used in the constructed value calculation"<sup>20</sup>.*

The dumping margins of the subject ripe olives exported to the US – differences between the Spanish domestic price and the export price to the US – retained by the USITC were first published on 18 January 2018 and revised on 18 June 2018.

The analysis concluded that the dumping margins range from 84% to 232%. But the detailed exhibits on this constructed value are not available to the public. The result is that the Spanish exporters to the US will have to deposit this dumping margin on the USITC bank account.

Table 3 – Dumping margins decided by the USITC on 26 January and 18 June 2018

	26 January 2018	18 June 2018
Aceitunas Guadalquivir	16.80%	17.45%
Agro Sevilla	14.64%	25.39%
Angel Camacho S.L.	19.73%	16.83%
Toutes les autres entreprises	17.13%	19.98%

Sources: <https://www.federalregister.gov/documents/2018/01/26/2018-01447/ripe-olives-from-spain-preliminary-affirmative-determination-of-sales-at-less-than-fair-value#footnote-3-p3677>;  
<https://www.federalregister.gov/documents/2018/06/18/2018-12991/ripe-olives-from-spain-final-affirmative-determination-of-sales-at-less-than-fair-value>

Clearly this assessment of dumping has been strongly contested by the European Commission, the European Parliament<sup>21</sup> and the Spanish authorities and companies. Apart from the already analyzed disagreement on the specific domestic industry, the EU underscores two other disagreements: there is no longer any EU agricultural dumping as all export subsidies have been deleted since 2015; and there is no dumping linked to domestic subsidies to ripe olives as they are essentially decoupled from the level of production or market price and are notified in the

<sup>20</sup> Petition.olive2: <https://www.law360.com/articles/937827/us-olive-producers-demand-duties-on-spanish-competitors>

<sup>21</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2018-0145+0+DOC+XML+V0//EN>

WTO green box. However we postpone the analysis of these two fundamental arguments in the second part of this document. We will only consider now the other EU arguments.

One can challenge the assertions made during the hearing of 28 May 2018 by Ms. Grande of the Spanish Embassy in Washington that *"there is no increase of the Spanish exports at the expense of the United States domestic industry during the analyzed period"*, and that of Sibylle Zitko from the European Commission Delegation to the US that *"the decrease of Spanish import volumes combined with an increase of Spanish Import prices puts into question any causal link between Spanish imports and any difficulty the industry may be experiencing. In these circumstances Spanish Imports cannot cause material injury"* (incidentally we should read *exports* rather than *imports*).

Indeed the USITC report of August 2017 indicates that *"The volume of subject imports increased over the period of investigation from 26,549 short tons<sup>22</sup> in 2013 to 29,735 short tons in 2014 to 35,037 short tons in 2015 and 35,139 short tons in 2016"*, representing an increase of 32.4% from 2013 to 2016 and of 40.5% in value when that coming from other sources decreased by 38.9% in volume and 43.8% in value.

Tables 4 to 8 below from the USITC data confirm that the imports of the subject ripe olives increased in volume and as a percentage of total imports of table olives from Spain from 2013 to 2016, even if they have decreased a little from 2016 to 2017. In the first 8 months of 2018, however, imports have fallen sharply, likely in connection with the collection of AD duties and countervailing duties (CD) since the end of 2017 (tables 9 and 10 below).

As for prices, if the CIF price actually increased from 2015 to 2016 while the euro-dollar exchange rate did not move (\$ 1.11 for 1 €), the current increase from 2016 to 2017 becomes a decrease in constant dollars: due to the depreciation of the dollar, the exchange rate increased to \$ 1.13, a decrease of 1.8%, and the CIF price would be of 2,122 \$/t instead of 2,292 \$/t.

Table 4 – US imports of subject ripe olives from Spain: 2007 to 2017

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Tonnes											
20057002									2	29	26
20057004									15	7	54
20057050	66	29	65	54	97	70	91	78	76	59	220
20057060	20900	19900	17200	20000	21500	24000	24000	26900	31700	31800	29500
20057070	31	8	33	103	222	283	240	45	50	208	54
20057075	2920	3380	5350	2360	926	693	598	427	471	934	350
Total	23917	23317	22648	22517	22745	25046	24929	27450	32314	33037	30204
1,000 dollars											
20057002									7	83	73
20057004									28	24	121
20057050	169	86	149	121	221	153	198	199	181	131	607
20057060	52000	53300	42400	47700	50200	48600	50000	56800	62800	70800	66900
20057070	78	66	133	707	1250	2190	2100	295	217	636	284
20057075	7540	9360	12800	5250	2150	1320	1330	1010	1120	2290	1220
Total	59787	62812	55482	53778	53821	52263	53628	58304	64353	73964	69205
CIF price in \$/tonne											
20057002									3500	2862	2808
20057004									1867	1429	2241
20057050	2561	2966	2292	2241	2278	2186	2176	2551	2382	2220	2759
20057060	2488	2678	2465	2385	2335	2025	2083	2112	1981	2226	2268
20057070	2516	8250	4030	6864	5631	7739	8750	6556	4340	3058	5259
20057075	2582	2769	2393	2225	2322	1905	2224	2365	2378	2452	3486
Total	2500	2694	2450	2388	2366	2087	2151	2124	1991	2239	2292

<sup>22</sup> A short ton represents 907.2 kg.

Source: USITC data base (<https://dataweb.usitc.gov/scripts/prepro.asp>);  
[https://www.usitc.gov/secretary/fed\\_reg\\_notices/701\\_731/701\\_582\\_notice\\_07252018sgl.pdf](https://www.usitc.gov/secretary/fed_reg_notices/701_731/701_582_notice_07252018sgl.pdf)

Table 5 – US imports of all table olives from Spain: 2007 to 2017

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Tonnes	67564	65589	67112	69865	65293	70067	67811	71664	77458	76508	74108
\$ 1,000	218234	233432	205042	208543	197630	190781	194146	221872	206100	215040	204744
CIF: \$/t	3230	3559	3055	2985	3027	2723	2863	3096	2661	2811	2763

Source: USITC data base (<https://dataweb.usitc.gov/scripts/prepro.a>)

\* Figures based on actual imports from January to May and extrapolated to the whole year

Table 6 also shows that the share of ripe olives in total imports of table olives from Spain increased sharply from 2012 to 2016 even though it declined in 2017. Tables 7 and 8 show that the share of imports of ripe olives in total imports of US table olives from all countries also increased until 2016.

Table 6 – Share of subject ripe olives imports in all table olives imports from Spain: 2007-2017

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Tonnes	35.4%	35.6%	33.7%	32.2%	34.8%	35.7%	36.8%	38.3%	41.7%	43.2%	40.8%
\$ 1,000	27.4%	26.9%	27.1%	25.8%	27.2%	27.4%	27.6%	26.3%	31.2%	34.4%	33.8%
CIF price \$/t	77.4%	75.7%	80.2%	80%	78.2%	76.6%	75.1%	68.6%	74.8%	79.7%	83%

Table 7 – US imports of all table olives (code 200570) from all countries: 2007-17

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Tonnes	130846	126155	125655	140678	128844	130598	131853	128823	136823	139360	137552
\$ 1,000	396521	427786	374303	400749	394743	378194	387817	426644	393886	417919	431889
CIF \$/t	3030	3391	2979	2849	3064	2896	2941	3312	2879	2999	3140

Tableau 8 – Share of US imports of ripe olives from Spain in table olives imports from all countries

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Tonnes	18,3%	18,5%	18%	16%	17,7%	19,2%	18,9%	21,3%	23,6%	23,7%	22%
\$ 1,000	15,1%	14,7%	14,8%	13,4%	13,6%	13,8%	13,8%	13,7%	16,3%	17,7%	16%
CIF \$/t	82,5%	79,4%	82,2%	83,8%	77,2%	72,1%	73,1%	64,1%	69,2%	74,7%	73%

Tables 9 and 10 show that the US imports of the subject Ripe olives from Spain diminished by 41.4% in volume from January to August 2018 over the same period of 2017 and by 35.5 % in value (by \$ 15.8 M). However US imports of the subject table olives from the EU28 diminished in volume by only 24.4% and those from the whole world increased by 5.3%. In value the imports from the EU28 diminished by only 24.4% and those from the whole world by only 1.3%, showing that the US importers found alternative sources to satisfy US consumers. The US imports from Spain of all table olives diminished much less than those of subject ripe olives. And the import price of the subject ripe olives coming from Spain has risen by 10.1% against by 15.4% for imports from the whole EU28 but have declined by 6.3% for all imports.

Table 9 – US imports of table olives from Spain, Jan-Aug 2017 and 2018, in tonnes

Tonnes	All imports			Imports from EU28			Imports from Spain		
	Jan-Aug 2017	Jan-Aug 2018	2018/ 2017	Jan-Aug 2017	Jan-Aug 2018	2018/ 2017	Jan-Aug 2017	Jan-Aug 2018	2018/ 2017
20057002	50	262	524%	26	206	792,3%	22	24	109,1%
20057004	170	121	71,2%	64	81	126,6%	44	24	54,5%
20057050	496	349	70,4%	336	251	74,7%	172	34	19,8%
20057060	25243	20924	82,9%	21651	13635	63%	19535	11470	58,7%
20057070	1099	979	89,1%	974	891	91,5%	30	55	183,3%
20057075	9701	16083	165,8%	7786	8243	105,9%	264	148	56,1%
Subjectcodes	36759	38718	105,3%	30837	23307	75,6%	20067	11755	58,6%
All imports	91972	91002	99%	76304	70436	92,3%	47402	39731	83,8%
Subject/all	40%	42,5%	106,5%	40,4%	33,1%	81,9%	42,3%	29,6%	69,9%

Source: USITC data base

Table 10 – US imports of table olives from Spain, Jan-Aug 2017 and 2018, in \$ 1,000

\$ 1,000	All imports			Imports from EU28			Imports from Spain		
	Jan-Aug 2017	Jan-Aug 2018	2018/ 2017	Jan-Aug 2017	Jan-Aug 2018	2018/ 2017	Jan-Aug 2017	Jan-Aug 2018	2018/ 2017
20057002	116	1015	875%	74	867	1171.6%	56	114	203.6%
20057004	296	355	119.9%	153	297	194.1%	64	79	123.4%
20057050	1576	1400	88.8%	1116	1107	99.2%	420	75	17.9%
20057060	55150	48730	88.4%	47748	33466	70.1%	43008	27539	64%
20057070	6091	6054	99.4%	5775	5769	99.9%	154	303	196.8%
20057075	49804	53997	108.4%	33898	35888	105.9%	757	568	75%
Subjectcodes	113033	111551	98.7%	88764	77394	87.2%	44459	28678	64.5%
All imports	281833	300862	106.8%	247010	254394	103%	129987	118128	90.9%
Subject/all	40.1%	37.1%	92.4%	35.9%	30.4%	84.7%	34.2%	24.3%	71%

Source: USITC data base

On 12 June 2018 USITC concluded that *"In the AD investigation, Commerce found that mandatory respondents, Aceitunas Guadalquivir S.L., Agro Sevilla Aceitunas S.COOP Andalusia, and Angel Camacho Alimentacion S.L. were dumping at margins of 17.46 percent, 25.50 percent, and 16.88 percent, respectively. Commerce established a final dumping margin of 20.04 percent for all other producers and exporters of ripe olives from Spain"*<sup>23</sup>.

And the USITC final conclusions of July 2018 stated that *"The pricing data show that subject imports from Spain undersold the domestic like product in 37 of 48 quarterly price comparisons. The margins of underselling ranged from 4.4 percent to 37.8 percent, with an average margin of underselling of 30.3 percent... Accordingly, based on the current record, we find that there was significant price underselling of the domestic like product by subject imports. As a result of this underselling, subject imports captured market share from the domestic industry in the large and important retail sector while maintaining their significant presence in the U.S. market for ripe olives throughout the POI. The low-priced subject imports consequently had significant adverse effects on the domestic industry... For the reasons stated above, we determine that an industry in the United States is materially injured by reason of subject imports of ripe olives from Spain found by Commerce to be sold in the United States at less than fair value and to be subsidized by the government of Spain"*.

We agree with these conclusions, even if they do not exclude the other difficulties affecting the profitability of Californian ripe table olives.

In addition, the tariff on imports of sub-code 20057060, which accounted for 97.5% of the volume and 96.8% of the value of imports of the subject ripe olives from 2014 to 2017, was of 10.1 \$/t, or 4.34% in ad valorem equivalent, on average from 2014 to 2017, which is 3.4 times less than the 12.8% of the EU tariff.

### **1.3 – The countervailing (or anti-subsidies) investigation**

The investigation concerned the same Spanish companies, and a subsidy rate for the other exporting companies was also deducted.

A requirement for a CD investigation is that subsidies must be "actionable". The WTO Agreement on Subsidies and Countervailing Measures (SCM) distinguishes between prohibited subsidies – those on exports or contingent on the use of domestic over imported goods – and those actionable which can be activated if they confer a competitive advantage to the recipient companies, by reducing their cost of production. The USTR points out that the subject imports

<sup>23</sup> <https://enforcement.trade.gov/download/factsheets/factsheet-spain-ripe-olives-ad-cvd-final-061218.pdf>

receive actionable input subsidies and quotes the European Commission's report that "*the price of table olives is very low, making unsupported production uneconomic*"<sup>24</sup>.

The Fair Trade Coalition of California Table Olives presented on June 23, 2017 a lengthy analysis of the EU subsidies to its table olive growers prepared by McDermott Will & Emery<sup>25</sup>. This assessment was very laborious, due to lack of sufficient data on the DG Agriculture and Eurostat websites as well as those available in Spain<sup>26</sup>. Table 11 presents McDermott Will & Emery's estimates of at least € 130 M in CAP subsidies from the 1st and 2nd pillars to the Spanish producers of raw table olives. SOL adds € 11.1 M in irrigation aid, based on the 2010 IISD study<sup>27</sup> and data on the irrigated area of Spain in 2016<sup>28</sup> (adding to the irrigated area of table olives alone half of the irrigated area of double-purpose olives, table or oil).

Table 11 – Estimates of subsidies to the raw table olives of Spain in 2016

Subventions	Spanish farmers	Olives producers	Table olives producers
1 <sup>st</sup> pillar (BPS, green payment)	€ 4.84 to 4.89 bn	€ 1.22 to 1.80 bn	Unpublished: at least €102 M
2 <sup>nd</sup> pillar : RDP	€ 9.45 bn (total 2014-20)	€ 2.4 bn to Andalusia	Unpublished: at least €24 M
Producers organisations	Unpublished	Unpublished: estimate €124 M	No data
Insurances to olive groves	at least € 200 M	Unpublished	Unpublished
Annual aids	at least € 6.44 bn	At least €1.22 to €1.80 M	At least € 130 M, surely more
SOL's estimates of irrigation subsidies			
Irrigated area in 2016	3663,990 ha	784,859 ha	44,916 ha
Subsidies to irrigation	€ 906 M	21.4%: € 194 M	1.23%: €11.1 M

The petitioners claimed that the full decoupling of direct aids since 2010 did not have any effect on the production of Spanish table olives because of the lack of alternatives to olive-growing groves. In total Spanish olive growers receive subsidies of 468 €/ha<sup>29</sup> (excluding irrigation subsidies), around 40% of the market price, while the average subsidy per hectare for the whole Spanish agriculture is € 258. In addition, the Spanish government has refused to converge per hectare direct aids for Spain as a whole, as recommended by the European Commission, but has maintained different levels of aid among regions.

The Spanish Government has confirmed that the cost of production for table olives is at least 16.4% higher than the retail price.

It should be noted that the Spanish defendants and the European Commission did not contest the assessment made by McDermott Will & Emery of the amount of subsidies for producers of raw table olives, but only that these subsidies were fully compatible with the WTO rules, especially because they are essentially decoupled. We will discuss that issue in the second part of this document.

The DoC released on November 28, 2017 a first assessment of countervailing duties (CD) to be paid by Spanish exporters of the subject ripe olives and made a final assessment on 12 June 2012: "*In the CVD investigation, Commerce has calculated a final subsidy rate of 27.02 percent for mandatory respondent, Aceitunas Guadalquivir S.L.U.; 7.52 percent for Agro Sevilla Aceitunas S.Coop.And.; and 13.22 percent for Angel Camacho Alimentacion S.L.. All*

<sup>24</sup> <http://ec.europa.eu/environment/life/publications/lifepublications/lifefocus/documents/oliveoil.pdf>

<sup>25</sup> <https://www.law360.com/articles/937827/us-olive-producers-demand-duties-on-spanish-competitors>

<sup>26</sup> Petition.olive3: <https://www.law360.com/articles/937827/us-olive-producers-demand-duties-on-spanish-competitors>

<sup>27</sup> Javier Calatrava & Alberto Garrido, *Measuring Irrigation Subsidies in Spain: An application of the GSI Method for quantifying subsidies*, July 2010, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1656825](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656825)

<sup>28</sup> [http://www.mapama.gob.es/es/estadistica/temas/estadisticas-agrarias/boletin2017sm\\_tcm30-455983.pdf](http://www.mapama.gob.es/es/estadistica/temas/estadisticas-agrarias/boletin2017sm_tcm30-455983.pdf)

<sup>29</sup> <https://www.oliveoiltimes.com/olive-oil-business/europe/olive-regions-joint-strategy-eu-subsidies/25672>

other producers/exporters in Spain have been assigned a final subsidy rate of 14.75 percent"<sup>19</sup> (Table 12).

Table 12 – Rates of subsidies and countervailing duties on 28 November 2017 and 18 June 2018

	28 November 2017	18 June 2018
Aceitunas Guadalquivir	2.31%	27.02%
Agro Sevilla	2.47%	7.52%
Angel Camacho S.L.	7.24%	13.22%
All other companies	4.47%	14.75%

Sources: <https://docs.regulations.justia.com/entries/2017-11-28/2017-25660.pdf>;  
<https://www.federalregister.gov/documents/2018/06/18/2018-12990/ripe-olives-from-spain-final-affirmative-countervailing-duty-determination>

On the other hand, the European Commission has shown in a report of July 2012 that "*For the period 2006-09, total direct payments and subsidies represented on average 22% of the Spanish producers income (net value added per work unit)*"<sup>30</sup>, and there is no reason that this has changed since 2010 when all these subsidies were decoupled<sup>31</sup>.

We now present the other arguments put forward during the hearing of 24 May 2018 by the Spanish exporters of subject ripe olives as well as by the Californian petitioners.

For the Spanish defenders California's loss of competitiveness in the market for ripe olives consumed in the US has nothing to do with the subsidies enjoyed by Spanish producers of raw table olives, but stems from the growing structural handicaps of Californian processors, of which:

- Very high labor costs for the collection of table olives, which is only manual in the US while it is largely mechanized in Spain.
- A much lower profitability of table olives in California than that of almonds and also of olives for oil, which has led to a sharp decline in the area of table olives and the need to import raw or semi-processed olives, increasing the cost of production of ripe olives, which is also due to the low use of the equipment capacity while that of Spain turns at 80%.
- The prices of Spanish ripe olives are lower than those of Morocco, so that the sharp fall in Spanish exports to the US, linked to the AD and DC duties imposed on them, will not improve the competitiveness of Californian companies.

To these arguments of the Spanish respondents, the Californian petitioners reacted as follows:

- While the cost of labor has increased in California, this would not have been an issue without the imports of highly subsidized Spanish ripe olives as Californian ones could have been sold at profitable prices. Moreover, the yield of raw olives is almost three times higher than that of Spain. It is the low price of ripe olives imported from Spain due to the low price of their subsidized raw olives which led to the cumulative decline of competitiveness of those of California, hence their loss of market share in the US, the declining area of table olives and the need to maintain remunerative prices for olive producers to avoid they turn to other productions.
- The quality of ripe olives from Morocco is lower than that of Spain and California.
- Although table olives are much less profitable than almonds, with the successive droughts in California and the likely accentuation of climate change, olive trees are much less demanding in irrigation while almond trees must be irrigated every year.

<sup>30</sup> [http://ec.europa.eu/agriculture/rica/pdf/Olive\\_oil%20\\_report2000\\_2010.pdf](http://ec.europa.eu/agriculture/rica/pdf/Olive_oil%20_report2000_2010.pdf)

<sup>31</sup> [https://ec.europa.eu/agriculture/sites/agriculture/files/olive-oil/economic-analysis\\_fr.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/olive-oil/economic-analysis_fr.pdf)

In other words the two partners are sending the ball in the order of causality: the Spanish saying that it is the fall in table olive area in California that caused the rise in imports from Spain and Californians that it is the rise of these low-cost, subsidized imports, which resulted in declining acreage, declining profitability, and declining investments to improve their competitiveness.

Let us conclude, as for dumping, that whatever the other structural causes of the loss of competitiveness of Californian ripe olives on the US domestic market, it is not disputed that Spanish raw olives are heavily subsidized and that the subsidies do not comply with the WTO rules and Appellate Body rulings, even though their notification in the green box had not been pursued to date.

## **II – Complementary fundamental arguments and consequences for the future of the CAP**

Other much deeper arguments, not advanced explicitly by the parties to the Ripe olives case or considered by the US DOC and ITC, need now to be taken into account.

### **2.1 – Why the EU agricultural products are not exported at their "normal value"**

The anti-dumping methodology of the European Commission (like that of the US) considers that, for products to be sold at their "normal value", "*decisions of the firm regarding prices, costs and inputs are made in response to market signals reflecting supply and demand, and without significant state interference, and costs of major inputs substantially reflects market values*"<sup>32</sup>. But it is undeniable that the EU agricultural prices (like those of the US) have nothing to do with "*market prices without significant interference from the State*" as the successive reforms of the CAP from 1992 onwards have sharply reduced their (guaranteed or administered) prices (called intervention prices) by offsetting them with direct aids, first coupled (including export subsidies) and then mostly decoupled domestic subsidies.

But it is necessary to go further and challenge the very definition of dumping in the GATT referred to above, which is the basis for anti-dumping proceedings, namely that a product is dumped when its export price is lower than its "normal value", defined as the domestic price. This definition implies that, as long as the products are exported at the domestic price, there is no dumping. It is a truly scandalous definition that was at the origin of the reforms of the CAP and the US Farm Bill from the early 1990s: sharply reducing domestic agricultural prices and offsetting the reduction by direct aids would allow to export more and import less, to the detriment of developing countries that do not have the financial means to significantly subsidize their large numbers of farmers.

Pascal Lamy and Franz Fischler, former EU Trade and Agriculture Commissioners share an overwhelming responsibility in the radical change of the EU Council regulation 1782/2003 of 29 September 2003 having created the decoupled Single Payment Scheme (SPS).

Which was already attested by Pascal Lamy's famous speech of 19 June 2003, addressing the General assembly of the Confederation of the EU Food and Drink Industries (CIAA) in Brussels. After having presented three solutions to foster the competitiveness of EU agro-industries, he added: "*But of course there is a fourth solution, which is simply to obtain supplies on the internal market at competitive prices. This raises the issue of internal prices and the reforms needed to bring them down. Which brings us to internal support, which is also an issue*

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<sup>32</sup> [https://contenthub.herbertsmithfreehills.com/sites/contenthub\\_mothership/files/HSF%20EU%](https://contenthub.herbertsmithfreehills.com/sites/contenthub_mothership/files/HSF%20EU%20)



for the WTO. Thanks to a series of CAP reforms, internal prices have become highly competitive, especially for primary products such as wheat. And the performance of the processing industry bears witness to this. We must therefore persevere and also not lose sight of the need to overhaul our system of support so that it has a minimal impact on trade. That is why we have proposed the new CAP reforms and why they are so important in the WTO negotiations on internal support"<sup>33</sup>. On 8 September 2003, on the eve of the WTO Cancun Ministerial (10-14 September), Pascal Lamy co-signed with Franz Fischler an article in Le Figaro stating: "Maintaining border protections, for those who want it, is not only legitimate but also necessary... Together with the low income countries, we share the concern of not opening agriculture to the large winds of liberalism... If the 146 WTO Members... abandon the illusion that we will sacrifice the European agriculture for the success of the remainder of the Doha programme, we are convinced that we will make Cancun a success"<sup>34</sup>. However the same article defends the idea that the so-called decoupled direct payments decided in June 2003 have no dumping effect: "From now to 2013, Europe will support its agriculture through means which would be neutral for international trade and, through a better regulation of its production, it will be able to export products for which it is really competitive".

## **2.2 – Almost all EU product-specific agricultural domestic subsidies may be sued under the AoA and ASCM**

Another major argument, not appearing explicitly in the US anti-subsidy complaint, relates to the provisions of the Agreement on Agriculture (AoA) and the Agreement on Subsidies and Countervailing Measures (ASCM).

On the one hand, Article 3 of the ASCM states: "3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I; (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods". But the European Commission pretends to ignore that "Import substitution subsidies remain prohibited under Article 3.1(b) of the SCM Agreement, and all subsidies causing adverse effects to the interests of WTO members are now actionable under the SCM Agreement, and all subsidies causing injury to the domestic industries of WTO members may be subject to the imposition of countervailing duties by those members"<sup>35</sup>. This explicitly covers all domestic subsidies to import substitutes, but also to exported products when they cause injury to other WTO Members since the AoA does not address the domestic subsidies to exported products but only explicit export subsidies.

This is confirmed by Melaku Geboye Desta, specialist of WTO agricultural law: "The loopholes within the subsidies provisions of the Agreement on Agriculture are fulfilled primarily by resorting to the relevant provisions of the SCM Agreement... A study on the law of export subsidies in agricultural products under the multilateral trading system which does not cover

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<sup>33</sup> *From Doha to Cancun – Challenges and opportunities of the WTO negotiations for the food sector*, General assembly of the Confederation of the EU Food and Drink Industries (CIAA) - Brussels, 19 June 2003, [http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc\\_113875.pdf](http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_113875.pdf)

<sup>34</sup> Pascal Lamy, *Cancun: agriculture and liberalism*, [http://ec.europa.eu/archives/commission\\_1999\\_2004/lamy/speeches\\_articles/spla186\\_fr.htm](http://ec.europa.eu/archives/commission_1999_2004/lamy/speeches_articles/spla186_fr.htm)

<sup>35</sup> Laurent Bartels, *The Relationship between the WTO Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures*, July 2015, [https://www.oecd-ilibrary.org/commonwealth/trade/the-relationship-between-the-wto-agreement-on-agriculture-and-the-scm-agreement\\_5jm0qgkjsb41-en](https://www.oecd-ilibrary.org/commonwealth/trade/the-relationship-between-the-wto-agreement-on-agriculture-and-the-scm-agreement_5jm0qgkjsb41-en)

*at least the major features of the discipline governing the practice of export subsidies in general can only be incomplete... Subsidies for import substitution are strictly prohibited under the SCM Agreement and fall under the 'red light' category. They are part of domestic subsidies because their supply does not depend on export performance... The Agreement on Agriculture does not explicitly "provide" anything particularly concerning the use of import substitution subsidies"*<sup>36</sup>.

Indeed Article 13 of the AoA, on Due Restraint (also known as "peace clause"), states that *"During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):* (a) *domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be: (i) non-actionable subsidies for purposes of countervailing duties".* As the "implementation period" was the 9-year period from 1995 to 2003, all Annex 2 subsidies could have been prosecuted since 2004 under the ASCM, provided they are product-specific (PS).

Chambovey observes that *"once the Peace Clause is dropped, it should be noted that the URAA does not contain any provision dealing specifically with the imposition of countervailing duties... Therefore, as regards the imposition of countervailing duties, the only rules applicable to agricultural products are those of Article VI of the GATT 1994 and of the SCM Agreement that cover all products"*<sup>11</sup>. By the same token, *"There is nothing in the Agreement on Agriculture which exempts agricultural products from the application of the GATT 1994 Article VI and the Anti-Dumping Agreement"*.

That is why some statements of the EU Parliament are worth considering: *"E. whereas subsidies allocated from the CAP to primary producers of table olives in Spain would qualify as 'green box' support according to Annex II of the WTO Agreement on Agriculture, since they are decoupled from production and are non-trade-distorting; F. whereas those agricultural subsidies would not qualify as product-specific under Article 2 of the WTO Agreement on Subsidies and Countervailing Measures... There are serious doubts about whether the formula used by the US investigators to calculate the preliminary antidumping margin is compatible with the WTO rules"*<sup>37</sup>. The main issue here is the extent to which the EU decoupled subsidies are actually non-product specific (NPS) subsidies.

### **2.3 – Which subsidies are product-specific (PS)?**

According to E. Vermulst, *"There are four types of "specificity" within the meaning of the SCM Agreement: (1) enterprise-specificity: a government targets a particular company or companies for subsidization; (2) industry-specificity: a government targets a particular sector or sectors for subsidization; (3) regional specificity: a government targets producers in specified parts of its territory for subsidization; (4) prohibited subsidies: a government targets export goods or goods using domestic inputs for subsidization"*<sup>38</sup>.

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<sup>36</sup> Melaku Gebeye Desta, *The law of international trade in agricultural products. From GATT 1947 to the WTO Agreement on Agriculture*, Kluwer Law International, 2002.

<sup>37</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2018-0145+0+DOC+XML+V0//EN&language=en>

<sup>38</sup> E. Vermulst, *Dispute settlement. World Trade Organization. 3.7 Subsidies and Countervailing Measures*, UNCTAD, 2003.

It is interesting to underline that, during the Uruguay Round negotiations, *"The U.S. did not propose that specificity be a condition to countervailability. Instead the U.S. defined an actionable subsidy generally as "any government action or combination of government actions which confers a benefit on the recipient firm(s)"*<sup>39</sup>. As much interesting is the fact that, during the SCM Committee meeting of 25 October 1990, *"The representative of the United States pointed out that the concept of specificity was not referred to in the General Agreement or in the Subsidies Code [of the Tokyo Round]... His delegation had, over the past several months, intensively analysed this concept, and had concluded that it had no economic justification... Obviously, the specificity concept was still embedded in US law and regulations. However, the United States had concluded that the concept, which it had created and promoted, did not have the degree of attractiveness once attributed to it. The United States had the intellectual honesty to so admit, and it would seek to convince others in the proper negotiating forum of that change in view"*<sup>40</sup>.

It is clear that the EU subsidies to the Ripe olives exported to the US are PS even if their level is the same as for all table olives. But let's us look also at the AoA definition of "basic agricultural product".

For the AoA article 1 a *"basic agricultural product" in relation to domestic support commitments is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material*". And the AoA Annex 3 paragraph 6 states: *"For each basic agricultural product, a specific AMS shall be established, expressed in total monetary value terms"*, paragraph 7 adding: *"The AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products"*.

The EU Schedule of commitments on domestic agricultural subsidies<sup>41</sup> notified to the WTO at the end of the Uruguay Round mentions 59 basic agricultural products – among which processed animal products (meats, dairy products) and olive oil but not table olives –, so that the PS character of table olives subsidies is not based on the EU Schedule. Which implies that no commitment was taken to limit the domestic subsidies to the EU table olives.

However the regulation n°1308/2013 of 17 December 2013 on the common organisation of the markets for agricultural products establishes a shorter list of 24 grouped agricultural products, among which "olive oil and table olives". As for the 20 grouped agricultural products mentioned in the Schedule of commitments on export subsidies, only olive oil is mentioned. Incidentally table olives and olive oil are not mentioned in the US Schedule of commitments on domestic supports, which contains only 17 products.

One can conclude that the EU commitments to the WTO do not impose to reduce the subsidies to the subject table olives, which are nevertheless clearly PS, even if they are the same for all Spanish table olives or oil olives.

But we should enlarge the issue and consider that PS subsidies should be attributed to the end processed products, what SOL has done for several food exports, particularly for cereals, meats

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<sup>39</sup> Patrick J. McDonough, *Subsidies and countervailing measures*, in Terence P. Stewart, editor, *The GATT Uruguay Round. A negotiating history (1986-1992à, Volume I: Commentary*, Kluwer, 1993, p. 899.

<sup>40</sup> *Id.* p. 900.

<sup>41</sup> [https://www.wto.org/english/tratop\\_e/agric\\_e/supporting\\_tables\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/supporting_tables_e.htm)

and dairy. For instance PS subsidies to cereals should not only be attributed to exports of raw cereals but also to exports of cereals incorporated in exports of processed cereals: flour, groats, pasta, couscous, malt, starch, gluten, other cereals preparations (bread, cakes, biscuits...), beer, whisky, vodka, gin and genever, which added 25% more raw cereals equivalent (RCE) to the extra-EU28 exports in 2013<sup>42</sup>, and 30.3% to the EU28 exports to West Africa in 2016<sup>43</sup>. And the same for subsidies to dairy products for which we calculate the subsidies per tonne of milk equivalent (ME), without forgetting to add the subsidies to the feed consumed by milk cows<sup>44</sup>. The same also for detailed meat processed products for which we calculate subsidies per tonne of carcass equivalent (CE).

## **2.4 – The case of the EU alleged PS decoupled direct payments**

### **2.4.1 – Spanish ripe olives receive fully decoupled PS subsidies**

The DoC had shown that direct payments to table olives are fully decoupled since 2010 and that they were the same as their coupled aids from 2000 to 2002, which therefore did not change the PS character of these aids, especially as there is little alternative production possible in the areas with olive groves, except to make olives for oil instead of table olives, but the level of aid per hectare is identical. However this claim is not fully valid as intensification of production systems has increased in the flat areas where olives could be irrigated<sup>45</sup>. From 2010 to 2017 the area of table olives has increased by 10.1% (adding half of the area with double-purpose olives, for table or oil, to the specific area of table olives) against by 3% only for the whole area of olives<sup>46</sup>. Which does not reinforce the idea that the expanded area of table olives has been used to grow other products than olives, so that the subsidies to table olives, which are the same than for oil olives, have remained essentially PS.

But what about potential investigations against other EU alleged decoupled subsidies to other agricultural products as this could imply a radical reform of the CAP?

### **2.4.2 – Why the other EU agricultural subsidies are not decoupled but are essentially PS**

#### **2.4.2.1 – The mixed behaviour of the guardians of the temple of decoupled subsidies**

The assertions, from the European Commission and Parliament and the economists they rely on, that the end of the explicit export subsidies decided in 2015 at the WTO Ministerial Conference in Nairobi has eliminated the EU dumping is unfounded and would be easily challenged at the WTO as it does not take into account the dumping effect of domestic subsidies.

For Alan Matthews, *"The agreement at the Nairobi WTO Ministerial Conference in December 2015 to prohibit the payment of export subsidies on agricultural products (albeit with a*

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<sup>42</sup> <https://www.sol-asso.fr/wp-content/uploads/2016/03/The-EU28-subsidies-in-2013-to-its-exports-of-cereals-meats-and-dairy.pdf>

<sup>43</sup> <https://www.sol-asso.fr/wp-content/uploads/2017/01/The-subsidies-to-the-EU-exports-of-cereal-products-to-West-Africa-in-2015-and-2016-February-172017.pdf>

<sup>44</sup> <https://www.sol-asso.fr/wp-content/uploads/2017/01/The-huge-dumping-of-extra-EU-exports-of-dairy-products-and-to-the-4-African-EPAS.pdf>

<sup>45</sup> <http://whc.unesco.org/fr/listesindicatives/6169/>

<sup>46</sup> <https://www.mapa.gob.es/es/estadistica/temas/estadisticas-agrarias/agricultura/esyrce/resultados-de-anos-antiores/>

*transitional period) shows that multilateral trade rules continue to play a role in constraining agricultural policy decisions in the EU*"<sup>47</sup>.

For Jean-Christophe Bureau, "After more than 25 years of profound reforms, many of the weaknesses in which the CAP had fallen have been solved... It no longer has the negative effects on producers in third countries suffering from competition of subsidized exports"<sup>48</sup>.

For Jonathan Peel of the EU's Economic and Social Committee, "The EU has played a leading role in Nairobi, and the decision to effectively eliminate all agricultural export subsidies is already one of the main objectives set for SDG 2, the elimination of hunger, and this decision has also shown that the WTO remains a viable and effective forum for multilateral trade negotiations"<sup>49</sup>.

For Philippe Chalmin, President of the French Observatory of prices and margins, "At the time of the "first CAP", it could be argued that the administered prices of Brussels, resulting from political power struggles, were almost "fair prices" even if originally set at the highest price level of the less efficient farmers in the Europe of the Six. They offered a high protection as the agricultural world had never known. But that time is over. Producers of "agricultural commodities", as analyzed by the Observatory's report, depend mainly on markets governed solely by the logic of supply and demand"<sup>50</sup>.

The worst is the conclusion of the Director-General of the WTO, Roberto Azevedo, in his closing speech of the Ministerial Conference in Nairobi on December 15, 2015: "The decision you have taken today on export competition is truly historic. It is the WTO's most significant outcome on agriculture. The elimination of agricultural export subsidies is particularly significant. WTO members — especially developing countries — have consistently demanded action on this issue due to the enormous distorting potential of these subsidies for domestic production and trade. In fact, this task has been outstanding since export subsidies were banned for industrial goods more than 50 years ago. It removes the distortions that these subsidies cause in agriculture markets, thereby helping to level the playing field for the benefit of farmers and exporters in developing and least-developed countries"<sup>51</sup>.

However, these conventional economists themselves have admitted that the alleged decoupled payments are not fully decoupled, with the following arguments:

- Wealth effects inducing production increases: reducing risk aversion and pushing farmers to produce more, including on marginal lands or lands environmentally fragile – one of the findings of the report of the US Government Accounts Office (GAO) in 2012<sup>52</sup> – and also by facilitating access to credit and hence to investment.

- The decoupled payments were partly capitalized into land rents, not only enriching the owners but also reducing possibilities of setting up young farmers, hence with varying effects on production and prices. According to a World Bank study of 2018 "The most recent estimates suggest that in NMS [New Member States], an additional one Euro of area-based payments increases land rental rates by 70 cents: the capitalization rate is over 70 percent. On average,

<sup>47</sup> <http://capreform.eu/how-external-influences-have-shaped-the-cap/>

<sup>48</sup> <file:///D:/PAC/PourunePACrenouvelee-Bureau-mai2018.pdf>

<sup>49</sup> <http://www.euractiv.com/section/development-policy/opinion/the-eu-must-take-the-lead-in-linking-agricultural-trade-to-the-sdgs/>

<sup>50</sup> [http://www.franceagrimer.fr/content/download/56889/551149/file/OFFM\\_2018\\_Rapport\\_final.pdf](http://www.franceagrimer.fr/content/download/56889/551149/file/OFFM_2018_Rapport_final.pdf)

<sup>51</sup> [https://www.wto.org/english/news\\_e/spra\\_e/spra108\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra108_e.htm)

<sup>52</sup> GAO, *Farm Programs, Direct Payments Should Be Reconsidered*, July 2012, <http://www.gao.gov/products/GAO-12-640>

*across the EU, decoupled payments are capitalized at a rate of 47 percent. An estimated 25 percent of payments benefit non-farming landowners and investors, instead of the farmers they are supposed to benefit*<sup>53</sup>.

- Direct payments were not really decoupled because the beneficiaries did not enjoy a full production flexibility, hence their condemnation by the WTO (see below).

- Besides Harry de Gorter<sup>54</sup> showed that decoupled payments have 4 distorting effects, unidentified so far in the literature, related to the concepts of cross-subsidization and deterrence effect to leave farming:

- o farmers (or their landlords) should maintain the land in good agricultural condition to benefit from direct aid;

- o as they were not allowed to produce fruit and vegetables and wild rice it follows that the direct aid subsidized other productions that would not have been subsidized in the absence of the ban. He calls this an "infra-marginal" cross-subsidy;

- o because they were encouraged to produce to benefit from the expected increase in the base area and/or base yields, as occurred in successive Farm Bills. This is also what is called the deterrence effect to leave farming.

#### **2.4.2.2 – The EU mantra that decoupled subsidies imply a market orientation of the CAP**

The paradox, not to say the lie, is that the European Commission has always sold the decoupled payments implemented since the CAP reform of 2003 as allowing farmers to respond better to "market signals" and to follow a "market orientation" as they can choose what to produce by taking only current market prices into account, as direct payments are no longer a function of the nature of their productions. However we should not mix up coupled subsidies with PS subsidies and decoupled subsidies with NPS (non-product specific) subsidies.

But this mantra that the CAP is conducted by "*market orientation*" is risible, and appears in all the Commission reports, for instance 11 times in its impact assessment of the CAP 2021-27: "*Over the past 25 years, the CAP has undergone successive reforms which have increased its market orientation and removed its trade distorting features, eliminated export subsidies, eliminated or reduced to safety net levels market support prices, and decoupled direct payments from production*", and also 6 times in Maria Blanco's report to the EU Parliament of February 2018 on the impact of the CAP on developing countries, for instance: "*The EU's abolition of export subsidies and reduction of market-distorting measures have led to greater market orientation*". The problem is that these prices on which the production choices of EU farmers are based would be much higher without the decoupled subsidies! In addition, there is another major interference by the European Commission on the level of domestic agricultural prices: tariffs, which are necessary and legitimate to ensure a minimum level of food sovereignty to the EU, provided it does not destroy that of other States by the dumping of its exports.

#### **2.4.2.3 – The reasons why the EU agricultural subsidies are not decoupled but mainly PS**

Let us present the distribution of the main components of the EU28 agricultural Budget outturn (actual payments) from 2014 to 2017. We see that the reduction of the decoupled payments after 2015 has been largely offset by the increase of coupled payments (mainly the "voluntary support scheme", VSS) so that the addition of decoupled payments to coupled payments of

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<sup>53</sup> <http://documents.worldbank.org/curated/en/892301518703739733/pdf/123443-repl-PUBLIC.pdf>

<sup>54</sup> Harry de Gorter, *The distribution structure of US green box subsidies*, in Ricardo Melendez-Ortiz, Christophe Bellmann, Jonathan Hepburn, *Agricultural subsidies in the WTO green box*, Cambridge University Press, 2009, pp.304-26.

2016 and 2017 were only lower by 3% to those of 2014 and 2015. Besides the OECD gives the data of the EU VSS subsidies per product.

Table 11 – Main components of the EU28 agricultural Budget outturn from 2014 to 2017

Euro million	2014	2015	2016	2017	Average	2017/average
Total budget	55769	57093	57208	56168	56560	99.3%
Direct payments (DP)	41660	42169	40984	41551	41592	99.9%
Decoupled DP	38201	38293	35204	35366	36766	96.2%
Coupled DP	3459	3876	5780	6185	4826	128%
Market interventions	2478	2666	3164	2956	2816	105%
Rural development	11186	11788	12365	11109	11612	95.7%

Let us consider in detail all the AoA Annex 2 payments to check which ones are product-specific (PS), comparing them with the last EU28 notifications of domestic subsidies to the WTO for 2015-16, the first with data for the new CAP since 2015:

1) Several items of paragraph 2 on general services were PS: "*research programmes relating to particular products*"; "*product-specific pest and disease control measures*"; "*training services, including both general and specialist training facilities*"; "*inspection of particular products for health, safety, grading or standardization purposes*"; "*marketing and promotion services, but excluding expenditure for unspecified purposes that could be used by sellers to reduce their selling price or confer a direct economic benefit to purchasers*", without forgetting that paragraph 13 of Annex 3 provides that "*marketing-cost reduction measures*" are "*non-exempt measures*". Based on the last EU notifications of its agricultural domestic supports of 23 August 2018 for the marketing year 2015-16, for conservative reasons, let us assume that half of the subsidies of these items were PS, at € 1.744 bn.

2) We can assume that 2/3 of the subsidies of paragraph 7 on "*Government financial participation in income insurance and income safety-net programmes*" and paragraph 8 on "*Payments for relief on national disasters*" notified in the green box (GB) for 2015-16, at €433.5 M, as those notified as NPS de minimis, for € 338.6 M, are also PS. Incidentally let us remind that all US agricultural insurances subsidies have been notified as PS since the 2012 marketing year. The proposal for the PAC 2021-27 states that they should be notified in the AMS as the subsidies would be triggered by a production loss of 20% instead of 30% required in the AoA.

3) The subsidies of paragraph 11 on "*Structural adjustment assistance provided through investment aids*" are very often PS and are limited to those "*in response to objectively demonstrated structural disadvantages*" and "*to the amount required to compensate for the structural disadvantage*". Furthermore the AoA article 6.2 provides that investment subsidies to farmers of developed countries must be notified in the AMS. Let us assume, for conservative reasons, that 2/3 of these subsidies, or € 2.762 bn, were also PS, the more so as we do not include the subsidies to "*infrastructural services*" notified at € 1.1 bn.

But the EU notifies all its investments subsidies in the green box (in the CAP second pillar on rural development) without any consideration of farmers' "structural disadvantages". The evaluation report of the EAFRD from 2007 to 2013 shows that € 25.3 bn or 26.3% of all rural development funds of € 96.2 bn were devoted to "*productive investment support to private beneficiaries*" (not counting "Improving the economic value of forests", "Diversification into non-agricultural activities" and "Encouragement of tourism activities"), "*modernisation of agricultural holdings*" (€ 7.8 bn), "*setting up of young farmers*" (€ 2 bn) and "*Adding value to agricultural and forestry products*" (€ 2.8 bn) having received the bulk of investment

subsidies<sup>55</sup>. And the CAP did not put any ceiling in the subsidies available per farm, except for State aids, so that, with the on-going concentration of farms the larger farms have received much more subsidies, implying that the EU did not comply with the condition that, to be in the GB, the investment subsidies must go to farmers in "structural disadvantages".

If there might be alternative productions possible in many EU agricultural areas so that the subsidies would not be PS, the main fact is that all the EU alleged decoupled direct payments do not comply with the six conditions of the AoA Annex 2 paragraph 6 on "decoupled income support". Indeed there are seven reasons why the BPS – basic payment scheme, as well as the SAPS (single area payment scheme for some new Member States) and the other decoupled direct payments since the 2015 CAP reform: redistributive payment, payment to young farmers, payment beneficial to the climate – are in fact coupled:

- The BPS contradicts conditions a) as it is based on the amount of blue box subsidies, which are PS, of the 2000-02 years, a criterion not mentioned.

- The BPS coexists with blue box payments for the same products. Indeed, according to the AoA article 6.5, blue box payments are granted "*under production-limiting programmes*" – which, by the way, implies to limit the reduction in prices, in contradiction with Annex 2 paragraph 1 – whilst the BPS (and previously the SPS) allows to produce any product, otherwise it will not enjoy a full production flexibility. Now that the production quotas have been deleted for milk, sugar, and plantation rights of vines, blue box subsidies still concern in 2018 the crop-specific payment for cotton (1/3 of the total cotton subsidies, 2/3 being decoupled), the voluntary coupled support scheme, the small farmers scheme, and the POSEI payments to the EU ultra-marine territories. For André Nassar et al., "*if the green box decoupled subsidy is given to the same producer receiving a coupled subsidy, and the decoupled income support is based on historical planted area, then this subsidy will cause the same distorting effects as the coupled subsidy. There is an over-subsidisation of the commodity being subsidized in the coupled programme and then more distortive subsidies in place*"<sup>56</sup>.

- The BPS contradicts condition e) stating that "*No production shall be required in order to receive such payments*". But the EU Council regulation n° 1782/2003 of 29 September 2003 states that farmers getting SPS must "*ensure that all agricultural land, especially land which is no longer used for production purposes, is maintained in good agricultural and environmental condition*". Annex 4 of the regulation specifies that this implies not only "*Avoiding the encroachment of unwanted vegetation on agricultural land*" but also "*Protection of permanent pasture*" and "*Minimum livestock stocking rates*", which is clearly a production attracting PS subsidies.

- The BPS contradicts the condition d) as it remains coupled to agricultural area as farmers must show they have eligible hectares (ha) to get their payments – indeed each SBS right corresponds to one ha.

- A large part of the BPS is granted to feed (EU cereals, oilseeds meals and pulses or COPs) as we have just seen, but also to feedstocks for agrofuels (vegetable oil, cereals and sugarbeet), which are both input subsidies in the amber box for developed countries (AoA article 6.2): 12.6 Mt of cereals and 127,000 t of sugar were devoted to bioethanol in 2017-18. Even if biodiesel is not an agricultural product for the WTO, contrary to bioethanol, the AoA Annex IV paragraph

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<sup>55</sup> [http://ec.europa.eu/agriculture/evaluation/rural-development-reports/2014/investment-support-rdp/fulltext\\_en.pdf](http://ec.europa.eu/agriculture/evaluation/rural-development-reports/2014/investment-support-rdp/fulltext_en.pdf)

<sup>56</sup> André Nassar, Maria Elba-Rodriguez-Alcala, Cinthia Costa and Saulo Nogueira, *Agricultural subsidies in the WTO green box: opportunities and challenges for developing countries*, in Ricardo Ricardo Melendez-Ortiz, Christophe Bellmann, Jonathan Hepburn, *Agricultural subsidies in the WTO green box*, Cambridge University Press, 2009, pp.329-368.



4 on the AMS calculation states that "*Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products*", which is all the more obvious as the agrofuels boom has increased much the prices of vegetable oils and cereals from 2007 to 2014. And 5.1 Mt of rapeseed oil of EU origin was devoted to biodiesel in 2017-18<sup>57</sup>.

- Last, but not least, as the BPS cannot be assigned to a particular product, it can be attributed to any product of which it lowers the sale price below its EU average total production cost.

Therefore almost all EU agricultural exports can be sued for dumping, even products which had never received blue direct payments, as long as their producers get also BPS or SAPS payments for other productions, which applies practically to all EU28 farms to-day.

Apart from the BPS other decoupled payments were product-specific (PS) up to the 2015 as seen in the EU Budget outturn: separate payments for sugar, fruits and vegetables and soft fruit. And almost all the other coupled direct payments were PS.

#### **2.4.2.4 – The case of input subsidies**

The WTO Article 6.2 forces also the developed countries to notify in the amber box (AMS) all their input subsidies, which they do not, particularly the largest ones, those to feedstuffs. The fact that the EU has notified in its AMS some secondary feed subsidies – to dried fodder and skimmed-milk fed to calves – attest that it is perfectly aware that feed subsidies are coupled input subsidies but it has refused to notify its huge subsidies to feed cereals, oilseeds and pulses (COPs) of EU origin. We can say the same for the US where the Congressional Research Service has acknowledged that "*program commodities such as corn are feed inputs for livestock*"<sup>58</sup> and OECD has also stated that "*Input subsidies are typically explicit or implicit payments reducing the price paid by farmers for variable inputs (for example... feed)*"<sup>59</sup>.

Tim Wise and his colleagues of Tufts University have made a long series of articles to show how the US large feed subsidies have allowed the US to export its animal products at below full production cost<sup>60</sup>.

SOL has estimated that the subsidies to extra-EU28 exports of 5.494 Mt of dairy products in 2016 – or 30.2 Mt in milk equivalent – have reached € 2.030 bn<sup>61</sup>, of which € 513 M in feed subsidies (17 €/t<sup>62</sup>). And the feed subsidies included in the EU28 dairy exports to the four regions of West Africa, SADC, CEMAC and EAC were 54.7 M € in 2016 for € 216.3 million in total subsidies to dairy products<sup>63</sup>. EU28 feed subsidies on meat and poultry and egg exports to the six SADC countries reached € 41.443 M in 2016 (120 €/t of carcass equivalent or shell

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<sup>57</sup> [https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Biofuels%20Annual\\_The%20Hague\\_EU-28\\_7-3-2018.pdf](https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Biofuels%20Annual_The%20Hague_EU-28_7-3-2018.pdf)

<sup>58</sup>

[http://wikileaks.org/wiki/CRS:\\_Potential\\_Challenges\\_to\\_U.S.\\_Farm\\_Subsidies\\_in\\_the\\_WTO:\\_A\\_Brief\\_Overview,\\_June\\_1,\\_2007](http://wikileaks.org/wiki/CRS:_Potential_Challenges_to_U.S._Farm_Subsidies_in_the_WTO:_A_Brief_Overview,_June_1,_2007)

<sup>59</sup> <http://www.oecd.org/agriculture/agricultural-policies/1937457.pdf>

<sup>60</sup> *Feeding the factory farm*, [http://www.ase.tufts.edu/gdae/policy\\_research/BroilerGains.htm](http://www.ase.tufts.edu/gdae/policy_research/BroilerGains.htm)

<sup>61</sup> <https://www.sol-asso.fr/wp-content/uploads/2017/01/The-truth-about-the-European-Union-food-deficit-and-the-dumping-impact-of-its-domestic-subsidies-June-26-2018.pdf>

<sup>62</sup> <https://www.sol-asso.fr/wp-content/uploads/2012/03/Calculation-of-the-EU-feed-subsidies-by-type-of-animal-products.pdf>

<sup>63</sup> <https://www.sol-asso.fr/wp-content/uploads/2017/01/The-huge-dumping-of-extra-EU-exports-of-dairy-products-and-to-the-4-African-EPAS.pdf>

egg equivalent) for an average dumping rate of 19% (ratio of total subsidies to the FOB export value)<sup>64</sup>.

The EU feed subsidies transferred to the SPS from their level in 2000-02, were of about €15 bn in 2010, of which € 11.6 bn for the EU15 and € 3.2 bn for the EU12 new member States (Croatia joined the EU only in July 2013), as calculated in July 2012 per type of animal product, hence as PS input subsidies as the mixture of COPs used as feed is not the same for all animal products. For instance 56.4% of EU cereals, for 173,231 tonnes<sup>65</sup>, were used as feed in 2017-18, of which 33% were consumed on farm and 28% by the feed industry making compound feed<sup>66</sup>, implying subsidies of around 60 €/t, or € 10.4 bn. And the EU production of oilseeds meals and pulse of EU origin was of 16.4 Mt in 2016-17<sup>67</sup>, and this without adding the transversal NPS subsidies. SOL has done the same in January 2016 for the US from 1995 to 2014<sup>68</sup>.

Table 12 – Distribution of all US feed subsidies (cereals, soybean, hay) by type of animal

\$M	95-00	01-04	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	Average	%
Milk cow	566,8	657,2	618,4	834	538,37	496	418,1	385,1	556,6	789,2	575,8	501,8	587,1	11,1%
Beef	1454,2	1574,4	1624	2193,3	1423,8	1310,5	1108,2	1016,8	1404,8	1900	1365,7	1208,1	1478,9	27,8%
Hogs	1115,5	1459,7	1287,7	1790,6	1145,4	1088,5	849,6	788,8	1225,3	1803,7	1247,9	1077,4	1241,8	23,4%
Poultry	1634,1	2706,4	1886,8	2515,6	1885,5	1737,1	1141,2	1170,2	1845,7	2638,5	1982,3	1710,2	1957,2	36,9%
Others	47,3	45,9	48,2	61,5	42,3	39,3	35,2	32,7	43	57,6	45	40,7	45,6	0,9%
Total	4817,9	6443,6	5465,1	7395	5035,37	4671,4	3552,3	3393,6	5075,4	7189	5216,7	4538,2	5310,7	100%

Source: *Time is up for Developing countries to sue the US agricultural domestic subsidies*, SOL, 14 January 2016.

For 2015-16 the EU28 total notifications of agricultural domestic support to the WTO reached € 73.004 bn corresponding to subsidies of only € 66.195 bn because the actual subsidies in the PS AMS were of only € 293 M and not of € 7.1 bn as € 6.8 bn were fake subsidies notified as market price support (MPS) not implying actual payments<sup>69</sup>. The difference between the total notified amount and the EU28 agricultural budget was mostly represented by the States aids agricultural budgets.

Table 13 – The main components of the EU28 notifications for 2015-16

€ million	Total	GB	BB	AMS	less MPS	PS AMS	NPS de minimis
	73,004	60,828	4,331	7,102	6,809	293	742

GB: green box; BB: blue box; AMS: amber box; MPS: market price support; NPS: non product-specific

Furthermore many actual subsidies were not notified or were largely under-notified, including when compared to those published by OECD. For instance, whereas tax rebates are considered subsidies by the ASCM, the EU does not notify the fuel tax rebates for agriculture, which were of € 3.3 bn on average in 2015 and 2016 according to OECD. Are they PS subsidies? They could be if we allocate them among products according to their output value.

The same for irrigation: the EU has never notified any irrigation subsidy although they are quite huge on its 10 million ha of irrigated agricultural area, particularly in Spain (3 million ha), Italy (2.4 million ha), France (1.6 million ha) and Greece (1 million ha). For Spain alone *"subsidies to irrigated agriculture may be between €906 million per year (as this report has evaluated*

<sup>64</sup> *The EU28 subsidies on its exports of poultry meat and eggs to SADC in 2016*, SOL, March 24, 2017: <https://www.sol-asso.fr/analyses-politiques-agricoles-jacques-b-2/>

<sup>65</sup> [https://ec.europa.eu/agriculture/market-observatory/crops/cereals/balance-sheets\\_en](https://ec.europa.eu/agriculture/market-observatory/crops/cereals/balance-sheets_en)

<sup>66</sup> <https://www.fefac.eu/files/83625.pdf>

<sup>67</sup> [https://ec.europa.eu/agriculture/market-observatory/crops/oilseeds-protein-crops/balance-sheets\\_en](https://ec.europa.eu/agriculture/market-observatory/crops/oilseeds-protein-crops/balance-sheets_en)

<sup>68</sup> <https://www.sol-asso.fr/wp-content/uploads/2016/06/Time-is-up-for-Developing-countries-to-sue-the-US-domestic-subsidies-Solidarit%C3%A9-January-14-2016.pdf>

<sup>69</sup> <https://www.sol-asso.fr/wp-content/uploads/2017/01/L.-Brink-and-D.-Orden-at-the-rescue-of-the-US-proceeding-against-India-and-China-MPS-on-wheat-and-rice.pdf>

*under conservative assumptions), and €1.120 million per year (a 55 per cent per cent subsidy rate—costs not recovered), which is the Ministry's own evaluation"*<sup>70</sup>. And these irrigation subsidies could be allocated to the benefitting products according to the amount of irrigated water per hectare of the different crops, as it is done in the US Farm and Ranch Irrigation Surveys, so that they may be considered PS. At least the data of the irrigated area of table olives exist for Spain<sup>71</sup>.

### **2.4.3 – The WTO Appellate Body has departed from the GATT definition of dumping**

Notwithstanding the highly dubious definition of dumping in the GATT and the AD Agreement, the WTO Appellate Body (AB) departed four times from this definition: in the cases on Dairy Products of Canada of December 2001<sup>72</sup> and December 2002<sup>73</sup>, US Cotton of March 2005<sup>74</sup> and EU Sugar of April 2005<sup>75</sup>. As a result, any export of an agro-food company at a price lower than the average total production cost of the country without subsidies can be sued for dumping.

Furthermore, in December 2001 the Appellate Body stated: "91- *We consider that the distinction between the domestic support and export subsidies disciplines in the Agreement on Agriculture would also be eroded if a WTO Member were entitled to use domestic support, without limit, to provide support for exports of agricultural products... 96- The average total cost of production would be determined by dividing the fixed and variable costs of producing all milk, whether destined for domestic or export markets, by the total number of units of milk produced for both these markets*". In April 2005 it stated: "279... *The Appellate Body has also held that economic effects of WTO-consistent domestic support may "spill over" to benefit export production. Such spill-over effects may arise, in particular, in circumstances where agricultural products result from a single line of production that does not distinguish between production destined for the domestic market and production destined for the export market. 280... In this case, we note that C sugar is produced and exported in huge quantities, and that there is a considerable difference between the world market price and the average total cost of production of sugar in the European Communities*".

### **2.4.4 – The best rebuttals of the assertion that the EU subsidies are decoupled NPS**

The best denial that most EU agricultural subsidies are decoupled comes from Michel Jacquot, member of the French Academy of Agriculture and former director of the EAGGF – the European Agricultural Guidance and Guarantee Fund, which managed the budget of European agriculture – from 1987 to 1997: "*All these people are still living in the simplistic scheme that was sold to them in 1992 (notably by the Commission), when the WTO Agreement on Agriculture was established, according to which there were direct export subsidies (in jargon "refunds") and direct income aids, which were also to be reduced, unless they were decoupled. This scheme was not based on anything just: how can one imagine that a subsidy (SPS or BPS)*

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<sup>70</sup> [http://www.iisd.org/gsi/sites/default/files/irrig\\_Spain.pdf](http://www.iisd.org/gsi/sites/default/files/irrig_Spain.pdf)

<sup>71</sup> <https://www.mapa.gob.es/es/estadistica/temas/estadisticas-agrarias/agricultura/superficies-producciones-anuales-cultivos/>

<sup>72</sup> [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(%20wt/ds103/ab/rw\\*%20not%20rw2\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIClanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20wt/ds103/ab/rw*%20not%20rw2*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIClanged=true#)

<sup>73</sup> [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(%20wt/ds103/ab/rw2\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIClanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20wt/ds103/ab/rw2*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIClanged=true#)

<sup>74</sup> [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds267\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm)

<sup>75</sup> [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds265\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds265_e.htm)

*does not affect exports (or imports)... Crap! Total Blindness! It took at the EEC level that the WTO Appellate Body on Sugar (April 2005)... wrote roughly that "any payment financed by virtue of a government measure in the form of resource transfers through cross-subsidization is an export subsidy" to open their eyes. But this, the Commission has never said openly, the decoupling has been presented – and continues to be – as the magic potion to say and assert, as the FOLL said, that "we"... were no longer subsidizing exports. Up to when will we continue to lie? When will it be known that European negotiators have been fooled by their American colleagues? When is the hour of truth?"<sup>76</sup>. It seems that this hour has come to ring!*

Another rebuttal on the alleged NPS of decoupled payments comes from the very interesting article of Carlos Gasperin and Ivana Doporto Miguez in a book devoted to the green box, underscoring the cumulative effect of coupled and decoupled subsidies, among which the case of livestock, so that their alleged NPS character is meaningless: *"The farmer may receive payments for the livestock – the direct subsidy – and buy feed from the producers, who have been the beneficiaries of subsidies for its production (therefore the price of the feed may be lower than in a situation without this support) – the indirect subsidy. An example of the third type also may be the case of livestock and feed, but from the feed's producer perspective: the feed producer benefits from the support to the feed production – the direct subsidy – and also from increased demand for the producer's product due to the subsidies given to users of this commodity as feed – the indirect subsidies"*<sup>77</sup>. And they go on: *"This analysis may grow in complexity if a farmer produces different goods, where the type of subsidy for each product may differ in the category of box and the degree of the distorting effect. Here, the transference of subsidies is among products of the same farm; that is, part of payments for a product may be transferred for covering costs of another product. Another possible situation of transference is the case of the producer of two commodities – one with subsidies and another without – that shares some inputs, such as land and machinery: payments for the first commodity can be used for paying the cost of the joint inputs, thus reducing production costs of the commodity without subsidies"*.

Our partial conclusion: 1) given that most alleged decoupled subsidies receive at the same time coupled PS subsidies (in direct payments, market intervention subsidies or input subsidies), all these subsidies become coupled PS subsidies. 2) If you can allocate the alleged NPS subsidies to any agricultural product, paradoxically this has the same effect as if all products receive coupled PS subsidies.

As mentioned at the beginning of this paper, the European Commission and Parliament, the Spanish politicians and European agricultural unions (notably COPA-COGECA federating the conservative farmers unions and cooperatives) have rightly pointed out that this AD case on Spanish ripe olives and the subsidies they received could be extended to all agricultural products exported by the EU.

But the unanimous request of all these European organizations wanting to sue at the WTO the US-imposed ADDs and CDs on exports of Spanish ripe olives to the US is extremely risky for the future of the CAP. As Jacques Carles and Frédéric Courleux of Agriculture Stratégies wrote on 16 July 2018, *"wanting to retort by seizing the Dispute Settlement Body of the WTO would be a strategic mistake for the European Union... Paradoxically, this episode can be a chance*

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<sup>76</sup> <http://blogs.mediapart.fr/blog/j-berthelot/260514/les-subventions-de-lue-lexportation-suite>

<sup>77</sup> Carlos Gasperin and Ivana Doporto Miguez, *Green box subsidies and trade-distorting support: is there a cumulative impact?* In Ricardo Melendez Ortiz, Christophe Bellmann and Jonathan Hepburn, *Agricultural subsidies in the WTO green box*, Cambridge University Press, 2009, pp.239-57.

*for the CAP if the end-to-end defense of decoupling gives way to an aggiornamento likely to overhaul the CAP and reposition the European Union in agricultural multilateralism*"<sup>78</sup>.

Even if the history of WTO proceedings shows that Members do not feel bound by the decisions of the Dispute Settlement Body (DSB), whether in the first instance by the panels or on appeal, on the contrary, Panel and Appellate Body (AB) judges must themselves take into account the case law of previous panels and AB decisions. At the plenary session of the WTO Public Forum on 30 October 2015, J. Berthelot questioned the AB representative, Ms. Yuejiao Chang who was a panelist, on this issue. She confirmed that WTO Members are not obliged to recognize the jurisprudential value of previous panels and AB rulings, but the judges of panels and AB are obliged to consider these decisions when they judicate on similar cases<sup>79</sup>.

This was clearly seen in the December 2002 AB ruling in the Dairy Products of Canada case, which echoed the AB arguments and conclusion of December 2001, and in turn, the AB in the EU Sugar case of April 2005 repeated the same arguments as in December 2001 and 2002, even if the product in question was different. However, in light of the precedent of the AB ruling of 3 March 2005 in the US Cotton case – where the so-called fixed direct payments were judged not to be decoupled and could not therefore be notified in the green box, as the farmers receiving them for their annual crops did not enjoy a full production flexibility, being denied to grow fruits and vegetables and wild rice, it is almost certain that, as the European Commission is now determined to sue at the WTO the AD and CV duties imposed by the US on Spanish exports of ripe olives to the US, it would have the largest change to lose the case, which would explode the whole CAP.

Even if Tomas Garcia Azcarate was right to declare on August 13, 2017 that a possible proceeding of the European Commission at the WTO against the US could be a weapon of mass destruction for the CAP, he was wrong to question the impartiality of the judgements of the Dispute Settlement Body, influenced by the fact that, as a high ranking civil servant at DG Agri, he had always defended the legitimacy of decoupling: *"A Court of Justice is founded on law and precedents. It analyzes whether the measure adopted is consistent with the understanding of the corresponding law. This may be unfair, but if it conforms to the legal text, it should be legal. A WTO panel is something completely different: if it acts as a "Court of Justice", which can happen, it will examine the EU subsidy system and check whether it complies with the wording of the "green box". In that instance, I can be reasonably confident that he should conclude that this is the case*"<sup>80</sup>.

This is why, scalded by the condemnation of the US alleged decoupled subsidies in the cotton case in 2005 at the WTO, Congress decided to abolish these decoupled aids in the 2014 Farm Bill, while the USDA had already advocated doing so in the previous Farm Bill of 2008, or at least to give a full production flexibility to farmers by removing the ban on producing fruits and vegetables and wild rice to qualify for decoupled aid, but it was not followed by Congress<sup>81</sup>. Randy Schnep, WTO Specialist at the USDA, wrote on April 22, 2015: *"Because the United States is a major producer, consumer, exporter, and/or importer of many agricultural commodities, the SCM is relevant for most major U.S. agricultural products. If a particular*

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<sup>78</sup> <http://www.agriculture-strategies.eu/en/2018/07/will-spanish-ripe-olives-puncture-the-pac/>

<sup>79</sup> [https://www.wto.org/english/forums\\_e/public\\_forum15\\_e/webcasting\\_e.htm](https://www.wto.org/english/forums_e/public_forum15_e/webcasting_e.htm)

<sup>80</sup> *US antidumping and antisubsidy investigations on Spanish olive: a potential trade negotiation weapon of mass destruction*, 3 August 2017, <http://tomasmgarciaazcarate.com/post/us-antidumping-and-antisubsidy-investigations-on-spanish-olive-a-potential-trade-153632>

<sup>81</sup> [http://farmpolicy.typepad.com/farmpolicy/files/crs\\_report\\_farm\\_commodity\\_program\\_in\\_o8\\_fb.pdf](http://farmpolicy.typepad.com/farmpolicy/files/crs_report_farm_commodity_program_in_o8_fb.pdf)

*U.S. farm program is deemed to result in a market distortion that adversely affects other WTO members—even if it is within agreed-upon AoA spending limits—then that program may be subject to challenge under the WTO dispute settlement*"<sup>82</sup>.

On the other hand, if the European Commission refrained from suing the US AD and CV duties at the WTO this would be seen as an agreement of the legitimacy of these AD and DC duties and of the illegality of its decoupled subsidies. This would encourage the US federations of other agricultural products to initiate AD and anti-subsidy petitions against EU competing agricultural products and it would also encourage other WTO Members to do the same. Either way the EU Commission is now caught in the net.

Indeed, the EU subsidies to its producers of table olives are minimal compared to those going to most EU agricultural exports. The extreme case is that of the EU (Greek and Andalusian) cotton total subsidies of € 731.7 M, with a subsidy per tonne 1,8 times the FOB price in 2015-16 (2,623 €/t against 1,456 €/t) and 1,7 times in 2016-17 (2,565 €/t against 1,512 €/t).

Subsidies to EU animal products – meat, eggs and dairy products – are also very high. The French economists Jean-Christophe Bureau, Lionel Fontagné and Sébastien Jean acknowledge that, in France *"In 2013, these aids represented for an average farm 84% of its farm income. Animal products are particularly dependent, the various subsidies representing 89% of income in milk and 169% in the beef sector. Extreme case: an Alpine type sheep farm receives about 59 000 euros of public transfers to generate a net income of less than 19 000 euros. Agricultural products where the value added without subsidies is negative some years are not rare: intermediate consumptions exceeds the product value, a paradoxical situation for a productive sector"*<sup>83</sup>.

And yet, these estimates are very undervalued for animal products because they do not take into account the massive subsidies to feedstuffs of EU origin on the pretext that they are received by European producers of cereals, oilseeds and protein crops (COP), allowing the producers of animal products to purchase their feed at a price that would be much higher if COP producers ceased to receive the subsidies, which are hidden in the decoupled BPS (basic payment scheme)<sup>84</sup>.

### **III – The consequences to draw to delete dumping and to build a totally new CAP**

Since the EU has now decided to sue at the WTO the US AD and CD on imports of the subject ripe olives from Spain, and that it is most likely to lose the case – if the Trump's Administration ceases to block the nomination of four of the seven Appellate Body's judges –, the EU must prepare a radical reform of the CAP on two fronts: deleting its dumping impact, particularly on developing countries, and rebuilding EU farm incomes on stable and remunerative prices.

#### **3.1 – Deleting the dumping impact of EU exports, particularly to developing countries**

The EU should comply with the objective of policy coherence for development (PCD), implying to reaching the SDGs for developing countries (particularly SDG-2 on food security) and of the Paris agreement on the environment.

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<sup>82</sup> <https://fas.org/sgp/crs/misc/R43817.pdf>

<sup>83</sup> <http://www.cae-eco.fr/IMG/pdf/cae-note027v2.pdf>

<sup>84</sup> <https://www.sol-asso.fr/wp-content/uploads/2017/01/La-v%C3%A9rit%C3%A9-sur-le-dumping-des-exportations-alimentaires-li%C3%A9-%C3%A0-ses-subsidies-internes-26-juin-2018.pdf>

For this the EU should act on two fronts: changing the definition of dumping at the WTO and putting it immediately into practice.

### **3.1.1 – Changing the definition of dumping at the WTO and complying with the Appellate Body's rulings**

We just remind here what was developed in sections 2.1 and 2.4.3 above:

- Changing the definition of dumping in the GATT and the antidumping agreement – there is no dumping as long as products are exported at domestic prices – by adding: "*providing the reduction of domestic prices is not offset by domestic subsidies*", as SOL has argued at the WTO Public Forum on 2 October 2018<sup>85</sup>.

- Complying with the Appellate Body definition of dumping: when exports are made at prices lower than the average total production cost of the country without subsidies.

### **3.1.2 – The EU should immediately delete its dumping, particularly on developing countries**

The first thing to do is to eliminate the EU dumping, either in ceasing to export subsidized products or already by taxing them by the amount of subsidies. This was proposed on 18 June 2018 by the French network "For another CAP" in its document "Our 12 priorities for the post-2020 CAAP": "*Put an end to the imports and exports that harm farmers in the countries of the South and the North, rejecting any new free-trade agreement and putting in place a mechanism to reimburse CAP subsidies to raw materials exported outside the EU*"<sup>86</sup>. Indeed most poor DCs, particularly in Sub-Saharan Africa (SSA), cannot raise their applied tariffs – as their Regional economic communities (RECs) are not WTO Members, hence do not avail of bound duties allowing them to raise their applied duties as the EU, and as the use of CV is too difficult for them to trigger, lacking the SSM (special safeguard mechanism) requested for the Doha Round, blocked by the developed countries.

Such reimbursement was already recommended in 2000 by Peter Einarsson of the Swedish NGO Forum Syd: "*All forms of direct payments function as a dumping mechanism to the extent that the production supported results in products for export. When border protection is reduced and replaced with direct payments (as required by the AoA), the result is lower prices in protected markets. The gap between the protected internal price level and world market prices is reduced, and the need for export subsidies thus reduced correspondingly (again in conformity with the AoA). But for the importing country, there is no difference. Whether the export price is artificially reduced by export subsidies or by direct payments, the dumping effect is the same... Export of a product benefiting from any combination of public support (direct payments, export credits, free public services, or other) would be allowed only if the exporting country applied an export levy equaling the value of that support*"<sup>87</sup>.

A fortiori the EU must stop signing free trade agreements in which it refuses to question the dumping impact of its domestic agricultural subsidies. This is even more the case of the Economic Partnership Agreements (EPAs) still in negotiation or already implemented with its

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<sup>85</sup> <https://www.sol-asso.fr/wp-content/uploads/2018/09/APAC-ROPPA-SOL-ANGLAIS-2FT-A4.pdf>

<sup>86</sup> <https://www.sol-asso.fr/wp-content/uploads/2018/06/12-priorit%C3%A9s-PACpost2020.pdf>

<sup>87</sup> Peter Einarsson, *Agricultural trade policy as if food security and ecological sustainability mattered*,

Forum Syd, Stockholm, November 2000, [https://iatp.org/files/Agricultural\\_Trade\\_Policy\\_As\\_If\\_Food\\_Security\\_.pdf](https://iatp.org/files/Agricultural_Trade_Policy_As_If_Food_Security_.pdf)

former colonies of the ACP (Africa-Caribbean-Pacific) countries, which would only impoverish more these countries, beyond the issue of agricultural subsidies<sup>88</sup>.

### **3.2 – Rebuilding the CAP on food sovereignty**

Preventing exports from causing detrimental dumping in poor DCs is one thing, but it will not be enough to ensure a sufficient income for European farmers if they no longer benefit from subsidies on extra-EU exported products, particularly for those depending largely on these exports, among which wines and spirits, wheat, dairy products and pig meat. Indeed the share of extra-EU28 exports over those of extra+intra EU28 exports was in 2017 of 28% for all agricultural products, of which of 42% for wheat (50% in 2016), 48,3% for beverages (of which 53% for wines, 82% for spirits (of which 85% for cognac and 65% for whisky), 33% for dairy and 28% for pig meat.

#### **3.2.1 – The example of wheat trade**

Let us deepen the case of wheat (soft and hard) as an example and, given the high drought in 2016 and the corresponding low production and export, let us take the averages from 2014 to 2017, when extra-EU28 exports of 29.6 Mt accounted for 19.3% of the production of 153.5 Mt (Eurostat data), with an average farm price of 178.8 €/t for the average of common wheat plus durum wheat (OECD data). The average subsidy of around 60 €/t accounted for 32% of the average FOB price of 187.6 €/t, for a total of € 1.776 bn (over total exports of € 5.554 bn). Without these extra-EU28 exports, and other things being equal, production outlets would fall to 123.9 Mt and, if the € 1.776 bn of subsidies were reimbursed to cereal growers, this would improve their farm price by € 14.3 €/t.

But of course the objective is not to ensure the same farm price to EU producers of wheat if exports are reduced but to induce them to grow more oilseeds (for vegetable oil and meals) and pulses. The objective is also to induce SSA to diminish its imports of wheat to foster the production and consumption of local staples – tropical cereals (maize, millet, sorghum, fonio) as well as roots (tapioca, yam) and plantains –, to foster rural employments and reduce food imports. Indeed imports of wheat have been growing at 4.2% per year from 2014-15 to 2017-18, of which per capita imports at 2.2%, to reach 31.9 Mt in 2017-18. At this growth rate imports would reach 119 Mt in 2050, which would be impossible to finance because wheat yields of exporting countries, of which the EU28 which accounted for 17.2% of global exports during this period, have almost reached a plateau since 15 years and they would diminish with the reduction of chemical fertilizers and pesticides demanded by consumers, not to speak of the impact of climate change. Faced with a declining supply, wheat prices would explode as the Arab and West Asian countries, which lack the ecological potential of SSA to diversify their food production, will have more purchasing power to import wheat so that they would outcompete SSA<sup>89</sup>.

However, with much higher international wheat prices in the long run, the EU should be able to compete without subsidies and to increase again its exports without dumping. Nevertheless this should not solve the problem of SSA, particularly in West Africa and Central Africa which

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<sup>88</sup> Jacques Berthelot, *Did you say FREE trade? The Economic 'Partnership' Agreement, European Union-West Africa*, L'Harmattan, September 2017; *Vous avez dit LIBRE échange ? L'Accord de 'Partenariat' Economique Union européenne-Afrique de l'Ouest*, L'Harmattan, juin 2018.

<sup>89</sup> <https://www.sol-asso.fr/wp-content/uploads/2017/01/The-subsidies-to-the-EU-exports-of-cereal-products-to-West-Africa-in-2015-and-2016-February-172017.pdf>



do not grow any wheat, and which will still have good reasons to develop its production and consumption of rice, tropical cereals, tubers and plantains.

### **3.2 – A preliminary scenario to rebuild the CAP on fair and stable farm prices**

Once the EU decoupled payments condemned at the WTO, the CAP would have to rebuild agricultural incomes, as before the first reform of 1992, essentially on remunerative and stable prices ensured by variable import levies<sup>90</sup> for the vast majority of farmers, coupled subsidies being limited to products in regions with major handicaps and which are not exported.

But, unlike the situation before 1993 and to avoid overproduction beyond the needs of the EU domestic market and the concentration of production in the most competitive farms, higher prices than today would be accompanied by an equitable distribution of production rights among Member States and holdings (to stop the decrease in agricultural jobs) and with the requirement to use agroecological (including biological) and labor-intensive production systems and to sell through short circuits. Unfortunately the French law to promote balanced commercial relationships between farmers, agri-food industries and large supermarkets would not change anything on farmers' prices as long as the European Commission's proposals for the future CAP would not change the EU trade policy and would continue to rely on decoupled payments to ensure minimum farm incomes.

Higher agricultural prices than today for EU farmers – which would be progressively raised over at least five years in parallel with the reduction of direct subsidies, if possible over the new post-2020 CAP period, – will necessarily imply higher food prices, even if the promotion of short circuits should reduce the share of added value going to agro-processing industries and supermarkets. A lower consumption of highly processed food products is also desirable for health reasons. Higher food prices are also needed to reduce food waste and halve the consumption of animal products by 2050 (Afterres2050 scenario<sup>91</sup>), given that their cost of production will increase sharply if the EU stop importing GM soybeans and maize from the Americas, which will also go in the right direction to reduce greenhouse gas (GHG) emissions.

At a time when EU food purchases are increasing in hard-discount stores and where the crisis has reduced the purchasing power of many unemployed consumers, convincing them that rebuilding the CAP on food sovereignty implying higher food prices seems impossible.

Fortunately, we can convince them that they have everything to gain. Indeed they will pay much lower taxes to finance the CAP, once direct payments are deleted; there will be more farmers, hence more jobs, as 80% of direct payments are presently going to 20% of farmers, which will revitalize the rural areas; the environment will be improved as well as the quality of food.

Before explaining how higher farm prices could progressively offset reduced subsidies, let us show how the expected rise in real GDP could already offset them. OECD shows that the share of the EU28 households' consumption expenditures going to food (with alcoholic beverages) was of 14.64%<sup>92</sup> on average from 2014 to 2017 and Eurostat that the agricultural gross value added accounted for 2.59% of the GDP (expenditures approach), which real growth rate has

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<sup>90</sup> J. Berthelot, *Réguler les prix agricoles*, L'Harmattan 2013. An informal English version (*How to regulate agricultural prices*) is available at: <https://www.sol-asso.fr/wp-content/uploads/2013/05/How-to-regulate-agricultural-prices-J.-berthelot-2013.pdf>; see also ROPPA, *Let us dare to reform the WTO for an equitable development*, 2015: [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/roppappmc10\\_e.pdf](https://www.wto.org/english/thewto_e/minist_e/mc10_e/roppappmc10_e.pdf)

<sup>91</sup> <https://afterres2050.solagro.org/2017/01/transparence-et-pedagogie/>

<sup>92</sup> [https://stats.oecd.org/Index.aspx?DataSetCode=SNA\\_TABLE5#](https://stats.oecd.org/Index.aspx?DataSetCode=SNA_TABLE5#)

been of 2.2% from 2014 to 2017, and is expected to be of 2.1% in 2018 and 2% in 2019<sup>93</sup> (table 14). The share of agricultural production value in real terms accounted for 31.82% of the food consumption value on average from 2014 to 2017. Furthermore let us assume that the CAP reform will delete only direct payments, which accounted for € 41.6 bn on average from 2014 to 2017 (table 11), or 11.7% of agricultural production value, but the continuous rise in annual real GDP by 2% in the middle run could offset the elimination of direct payments (table 15).

Table 14 – The EU28 food consumption, GDP, agricultural production and direct payments: 2014-17

Euros billion	2014	2015	2016	2017	Average
Final consumption expenditures	7388389	7543338	7723607	7873519	7632213
Food consumption	1080838	1121547	1123334	1144055	1117444
Food/total consumption	14.63%	14.87%	14.54%	14.53%	14.64%
GDP constant prices: expend. approach	13285063	13592707	13868088	14205038	13737724
Real agricultural prod° value (RAPV)	366221	352859	344354	358900	355584
°/GDP	2.76%	2.60%	2.48%	2.53%	2.59%
Real GDP growth rate	2.2%	2.2%	2.2%	2.2%	2.2%
Real agric. value in food consumption	33.88%	31.46%	30.65%	31.37%	31.82%
Agri. share of food consumption/GDP	4.96%	4.68%	4.46%	4.56%	4.67%
Direct payments	41660	42169	40984	41551	41592
Ag prod° value-direct payment: APV-DP	324561	310690	303370	317349	313992
Ratio of RAPV/APV-DP	112.84	113.57	113.51	113.09	113.25

Source: OECD and Eurostat

Table 15 – The rise in real GDP could offset the elimination of direct payments

	2018	2019	2020	2021	2022	2023	2024	2025	2030
Real GDP	14026216	14306740	14592875	14884733	15182428	15486077	15795799	16111715	16433949
DP	41592	41592	41592	41592	41592	41592	41592	41592	41592
DP/Real GDP	0.30%	0.29%	0.29%	0.28%	0.27%	0.27%	0.26%	0.26%	0.25%

Source: OECD and Eurostat

Given that consumers spend 14.64% of their budget on food, that the agricultural production value was of 31.82% of consumers' food bill, or 4.67% of GDP, what should be the necessary rise in agricultural prices to offset the loss of annual direct payments of € 41.6 bn?

Table 15 shows that already allocating a declining share of the expected rising GDP, from 0.30% in 2018 to 0.25% in 2030, could offset the loss of DP. However these calculations are only made to show that deleting DP could be solved without implying a political revolution, but it is clear that the solution should rather result from a progressive reduction of DP compensated by a progressive rise in farm prices so that the deleted DP could be used for other purposes: fostering agroecological systems of production and consumption (short circuits) and eliminating the detrimental impact of higher food prices on the deprived population through several means: increase of social benefits (minimum income), free-meals in canteens and maybe even food stamps on the US model but at a much lower level.

This presupposes that the EU stops aligning itself on the US position which considers that the purchase of basic staples from farmers at remunerative prices to build public stocks subsequently distributed to disadvantaged consumers should be considered trade-distorting subsidies<sup>94</sup>.

<sup>93</sup> [https://ec.europa.eu/info/sites/info/files/economy-finance/ip084\\_en.pdf](https://ec.europa.eu/info/sites/info/files/economy-finance/ip084_en.pdf)

<sup>94</sup> *Reconciling the views on a permanent solution to the issue of public stockholding for food security purposes*, <https://www.sol-asso.fr/wp-content/uploads/2017/10/Reconciling-the-views-on-a-permanent-solution-to-the-issuue-of-public-stockholding-for-food-security-purposes-1.pdf>; *SOL's proposal to solve the Public Stockholding's impasse*, <https://www.sol-asso.fr/wp-content/uploads/2017/01/SOLs-proposal-to-solve-the-Public-Stockholdings-impasse-December-13-2017.docx.pdf>