Summary of "Analysis and impacts of the US complaint on the dumping of Spanish ripe table olives and on the future of the Common Agricultural Policy"

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The United States (US) imposed on 25 July 2018 anti-dumping (AD) and countervailing (CV) duties on imports of Spanish so-called "ripe olives", after a lengthy investigation of the US Department of Commerce (DoC) and International Trade Commission (ITC) of the petition submitted on June 22, 2017 by the California Fair Trade Coalition of Table Olives, composed of two companies Bell-Carter Foods and Musco.

This attack of Spanish olives could spell the end of the Common Agricultural Policy (CAP) in force since its profound reforms begun in 1992 before which farm incomes were essentially based on remunerative prices and after which they were mainly based on public subsidies. 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*". Let us remind that 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 AD duty corresponding to the difference between the export price and the price paid in the domestic market. A countervailing duty is intended to eliminate the effects of a subsidy, when the government of the exporting country provides, directly or indirectly, a financial advantage to the production of an exported product.

The DoC and ITC investigation of the case resulted in the submission of lengthy questionnaires to both parties, an ITC report in August 2017 and two lengthy hearings on 12 July 2017 and 24 May 2018, where the European Commission and the Spanish Embassy in the US also intervened. The respondents were three Spanish companies (Aceitunas Guadalquivir, Agro Sevilla Aceitunas and Angel Camacho) members of ASEMESA, Association of Spanish exporters and processing industries of table olives. The subject ripe olives (black olives) concerned were those of the sub-codes of the Harmonized Trade System 20057002, 20057004, 20057050, 20057060, 20057070, 20057075.

Due to a lack of data the assessment of dumping by McDermott Will & Emery had to use a constructed value and concluded that the dumping margins ranged from 84% to 232%. However the margins retained by the ITC on 18 June 2018 was on average of 19.98%.

These AD duties have been strongly contested by the European Commission and Parliament, the Spanish authorities and companies. Their criticism focuses on two main points: there is no dumping as all agricultural export subsidies have been deleted since 2015 and there is no dumping linked to domestic subsidies as they are essentially decoupled from the level of production or the market price and are notified in the WTO green box.

The DoC had already replied that the full decoupling of direct aids to table olives since 2010 was the same as the coupled aids obtained from 2000 to 2002 and there is no 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.

But other much deeper arguments were not advanced by this strict analysis of production costs of raw olives. The AD methodology of the European Commission (as 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*". It is undeniable that the EU (and US) 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 intervention prices by offsetting them with direct aids, first coupled and then mostly decoupled.

But it is necessary to challenge the very definition of dumping in the GATT and WTO antidumping agreement that, as long as products are exported at domestic prices, there is no dumping. This scandalous definition was at the origin of the reforms of the CAP and US Farm Bills in the 1990's: sharply reducing domestic prices and offsetting the reduction by direct aids has allowed to export more and import less, to the detriment of developing countries that did not have the financial means to significantly subsidize their large numbers of farmers.

Another major argument not taken into account in the anti-subsidy investigation is that, despite the specific provisions on export subsidies of the Agreement on Agriculture (AoA), Article 3 of the Agreement on subsidies and countervailing measures (SCM) 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 explicitly address domestic subsidies. The more so as Article 13 of the AoA on Due Restraint (known as "peace clause"), stating that "*During the implementation period… domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be non-actionable subsidies for purposes of countervailing duties*" had no effect since 2004 as the implementation period expired in 2003, so that all Annex 2 subsidies could have been prosecuted since 2004 under the SCM Agreement.

Moreover, notwithstanding the highly dubious definition of dumping in the GATT and the AD Agreement, the WTO Appellate Body departed from this definition four times: 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. As a result, any export of an agro-food enterprise at a price lower than the average total production cost of the country without subsidies can be sued for dumping.

And, contrary to the allegations of the European Commission there are seven reasons why the BPS (basic payment scheme) is not decoupled because it contradicts the six conditions of paragraph 6 of the AoA Annex 2 on "decoupled income support".

For all these reasons the subject Spanish ripe olives are not exported at their normal value to the US but are dumped, even if that does not exclude the other difficulties affecting the profitability of California's ripe olives.

For an anti-subsidy investigation the subsidies must be "actionable". The SCM Agreement 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 ITC pointed out that the subject imports receive actionable input subsidies (to the raw olives) and quoted the European Commission's report that "*the price of table olives is very low, making unsupported production uneconomic*".

The Fair Trade Coalition of California Table Olives presented on 23 June 2017 a lengthy analysis of the EU subsidies to its table olive growers prepared by McDermott Will & Emery and showed

that the subsidies have caused significant material injury to the US producers of the subject ripe olives, estimated at least at € 130 M in CAP aid from the 1st and 2nd pillars to the Spanish producers of raw table olives, implying an average subsidy of 468 €/ha, around 40% of the market price, while the average subsidy per hectare for the whole Spanish agriculture is € 258.

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 insisted that they conform to the WTO rules, as essentially decoupled.

The DoC made a final assessment on 18 June 2018 of an average CV duty of 14.75%.

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 to the Spanish producers of raw olives, but stems from the growing structural handicaps of Californian processors, of which: i) very high labour costs for the collection of table olives, which is only manual in the US while it is largely mechanized in Spain; ii) a much lower profitability of table olives in California than that of almonds and 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; iii) the prices of Spanish ripe olives are lower than those of Morocco, so that the fall in Spanish exports to the US, linked to the AD and DC duties, will not improve the competitiveness of Californian companies.

The Californian petitioners reacted as follows: i) the higher cost of labour would not have been be an issue without the imports of subsidized Spanish ripe olives as Californian ones could have been sold at profitable prices. It is the low price of ripe olives imported from Spain which led to the cumulative decline of competitiveness of California, hence the 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; ii) even if table olives are much less profitable than almonds, with the successive droughts in California and the likely accentuation of climate change, olives are much less demanding in irrigation than almonds and the competitiveness gap will shrink.

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 that, whatever the other structural causes of the loss of competitiveness of Californian ripe olives on the US market, Spanish raw olives are heavily subsidized and the subsidies do not comply with the WTO Appellate Body rulings, even though their notification in the green box had not been sued to date.

Now, what consequences to draw for the future of the CAP? The unanimous reaction of all the European organizations to sue at the WTO the US AD and CD duties on exports of Spanish ripe olives to the US is extremely risky. Because, if is true that WTO Members do not feel bound by the decisions of the Dispute Settlement Body (DSB), the judges of panels and Appellate Body (AB) must take into account the case law of previous panels and AB decisions, as this has been clearly seen in the AB rulings in the Dairy Products of Canada case, the EU Sugar case of April 2005 and the US cotton case of March 2005, so that the EU would have the largest change to lose its case against the US AD and CV duties.

On the other hand, if the European Commission prefers refraining to sue the US at the WTO this would be seen as a recognition 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 also other WTO Members to do the same.

Indeed, the EU subsidies to its producers of table olives are minimal compared to those going to most EU agricultural exports, the extreme case being that of Greek and Andalusian cotton whose subsidy level per tonne is twice the FOB price. Subsidies to EU animal products – meat, eggs and dairy products – are also very high, the more so if we include the massive subsidies to feedstuffs of EU origin, allowing the producers of animal products to purchase their feed at a price that would be much higher if the EU producers of cereals, oilseeds and pulses ceased to receive the subsidies hidden in the decoupled BPS (basic payment scheme).

In the US also, Tim Wise and his colleagues of Tufts University have published many reports showing that US animal feed subsidies have allowed to export animal products at less than their total production cost.

Since this US decision calls into question the whole CAP, the first thing to do is to eliminate the dumping, either by ceasing to export or by taxing exports by the amount of subsidies. But this will not be enough to ensure sufficient income to European farmers if they no longer benefit from subsidies on exported products. All the more that subsidies to EU products competing with imports should also be abolished to comply with the GATT principle of "national treatment" as reflected in the SCM Agreement. In other words, this will lead to a radical change in the CAP by rebasing agricultural incomes, as before the first reform of 1992, essentially on remunerative prices ensured by variable import levies for the vast majority of farmers, coupled subsidies being limited to products in regions with major handicaps and 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, the existence of higher prices than today would be accompanied by a fair distribution of production rights among States and holdings, with the requirement to use agroecological and labour-intensive production systems and by selling through short circuits.

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. Higher food prices will already be needed to reduce food waste and halve the consumption of animal products by 2050 (Afterres2050 scenario), whose cost of production will increase sharply if we stop importing GM soybeans and maize from the Americas, reducing also greenhouse gas emissions.

But, to be bearable by the EU deprived consumers, a higher food share of households' budget will imply to raise minimal income benefits and subsidize the canteens, partly by the savings made on the CAP current budget. We could also consider the distribution of food stamps on the US model but at a much lower scale. This implies that the EU stops aligning itself on the US stance refusing to change the present AoA rule considering as trade-distorting subsidies the gap between the remunerative prices at which developing countries purchase basic staples to farmers, for public stocks subsequently distributed at low prices to disadvantaged consumers, and their border prices in the 1986-88 period.