The European Commission has crossed the Rubicon on Spanish table olives

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Summary

On 28 January 2019 the European Commission (EC) requested consultations at the WTO with the United States to challenge the anti-dumping and countervailing duties imposed on its imports of Spanish so-called "ripe olives" since August 2018. The EC argues that subsidies to olive growers are not specific because they do not respect the definition of specificity in the Agreement on Subsidies. The paper shows that the subsidies to producers of raw olives are specific: they result from the specificity of tariffs; the EU single base payment (SBP) is not really decoupled; the SBP is an extension of previous coupled subsidies; the SBP to table olives has not benefited other products; olive growers receive additional specific subsidies; their subsidies are passed on to producers of ripe olives; there is evidence of damage to US producers of ripe olives.

As there is a large chance that the consultations would lead to a panel that the EU would lose, the consequences would be dramatic. In the short run, this will question the whole reform of the CAP (Common Agricultural Policy) 2020-2027 already largely prepared. In the medium run the condemnation of decoupled aid will oblige to rebase EU farmers' income, as before

1992, on remunerative and stable prices ensured by variable import levies for the vast majority of farmers, coupled subsidies being limited to products from deprived regions and not exported. This will imply higher food prices, even if the promotion of short circuits would reduce the share of added value accruing to agri-food industries and supermarkets and if the €35 billion of decoupled aid could be reallocated to increasing social minima, subsidising canteens and promoting agroecology.

Introduction

On 28 January 2019 the European Commission (EC) sent a request to the United States (EU) for consultations at the World Trade Organisation (WTO) to challenge the anti-dumping and countervailing duties imposed on their imports of Spanish so-called "ripe olives"[1] since August 2018[2]. This follows the complaint sent on 22 June 2017 to the Department of Commerce (DoC) and the US International Trade Commission (USITC) by the two producers – Bell-Carter Foods and the family company Musco – grouped together in the California Coalition for Fair Trade in Ripe Olives.

If these consultations do not resolve within 60 days, the EC is likely to request the Dispute Settlement Body (DSB) to establish a panel. The immediate reaction of 29 January by the Representative of the US Department of Commerce (USITC), Robert Lighthizer, leaves little doubt that a panel would be established: "*We believe that the EU's complaint is without merit and we intend to fight it very aggressively*"[3].

Let us recall briefly the distinction between anti-dumping and countervailing duties. 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" (the US prefers "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[4]. The objective of an anti-dumping duty is to restore fair competition, the 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.

The EC's criticisms focus on the following points:
- The subsidies to Spanish producers of raw table olives (olive growers) are not specific.
- It has not been demonstrated that they are passed on to producers of ripe olives.
- There is no evidence of injury to US producers of ripe olives linked to the volume of subsidised imports, their effect on prices in the USA and a causal link with Spanish subsidies.
- Anti-dumping subsidies are not justified because California's ripe olive processors have not suffered material injury.

[1] Ripe olives are produced from raw olives. As these are not edible, they are used for the production of table olives or olive oil. In the USA, the varieties of raw olives produced for ripe olives, Manzanillo and Sevillano, are not used for olive oil.
[2] https://www.wto.org/english/news_e/news19_e/ds577rfc_31jan19_e.htm
[3] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/january/ustr-statement-eu%E2%80%99s-consultation
[4] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1036&rid=1

These criticisms are analysed on the basis of the following legal references and publicly available arguments:
- the arguments developed by the EC and Spain during the investigation of the case since June 2017, in particular during the two lengthy hearings on 12 July 2017[5] and 24 May 2018[6];
- the arguments of the petitioners of the California Coalition for Fair Trade in Ripe Olives and the reports of 21 June 2017 prepared at its request by McDermott Will & Emery (McDermott to simplify) on the specificity and importance of EU subsidies for Spanish ripe olives;
- the USITC's preliminary detailed conclusions of August 2017 and final conclusions of May 2018.

Without going into detail on the analysis already made on 7 November 2018[7], it will be updated and supplemented, in particular on the specificity of subsidies to Spanish raw table olives, an aspect that the EC did not mention during the two hearings. It is clear that this analysis is limited by the impossibility of having access to the extensive confidential information between the parties to the proceedings.

I – <u>The subsidies to the producers of raw table olives are specific</u>

The European Commission (EC) argues that subsidies to olive growers are not specific because they do not respect the definition of specificity in the Agreement on Subsidies and Countervailing Measures (ASCM). In particular, the EC points out that "*These subsidy measures do not explicitly limit access to certain enterprises… as through the use of a programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts to certain enterprises, or the manner in which discretion has been exercised. No account or proper account has been taken of the extent of diversification of economic activities within the jurisdiction of the granting authority or the length of time during which the programmes have been in operation…* [or] *are not limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority. The determinations of specificity are not clearly substantiated on the basis of positive evidence*".

1.1 – <u>General information on the specific nature or not of agricultural subsidies</u>

It should be recalled that the Single Payment Scheme (SPS) – decoupled[8] by the reform of the Common Agricultural Policy (CAP) by the EU Council Regulation No 1782/2003 of 29 September 2003[9] – has been replaced, following Regulation (EU) No 1307/2013 of 17 September 2013[10], by the other decoupled aids that followed it: basic payment scheme (BPS), payment for farmers observing agricultural practices beneficial for the climate and the environment; voluntary redistributive payment; a payment for young farmers commencing their

[5] https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2017/Ripe%20Olives%20from%20Spain/Preliminary/ripe_olives_from_spain-conference.pdf
[6] https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2018/Ripe%20Olives%20from%20Spain/Final/ripe_olives-hearing-5-24-2018.pdf
[7] https://www.sol-asso.fr/wp-content/uploads/2017/01/Alea-iacta-es-how-Spanish-olives-will-force-a-radical-change-of-the-CAP-7-November-2018.pdf
[8] A subsidy is said to be decoupled when it is not linked to the current level of production or prices.
[9] https://publications.europa.eu/en/publication-detail/-/publication/2b580390-78c4-4ffd-b8e7-009d2b53be58/language-en
[10] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0608:0670:en:PDF

agricultural activity. In short, it is to all these decoupled aids that we will refer to for recent years using the terms SPS or BPS.

While detailed evidence of the specificity of EU subsidies to Spanish raw table olives was provided in the McDermott Cabinet report, there was very little discussion of this issue during the two public hearings on 12 July 2017[11] and 24 May 2018[12]. The only reference came from Jesus Zorilla of the EC on 12 July 2017: "*The other subsidies included in the petitions have no or at most minimal trade distorting effects on production pursuant to the relevant provisions of the WTO Agreement on agriculture. In addition, the subsidies are non-specific according to the agreement on subsidies. I would like to recall that the U.S. has not contested that non-distorting character of these subsidies in the WTO Monitoring Committee*". Here Mr Zorilla merely quotes Annex 2 of the WTO Agreement on Agriculture (AoA) on the assumption that, on the pretext that the EC has indeed unduly notified its so-called decoupled direct payments in the green box, the US shares this assertion despite it is the only WTO Member to have been condemned on 3 March 2005 in the cotton case on the grounds that its so-called decoupled direct payments could not be notified in the green box. This is why it has deleted all its decoupled payments in the 2014 Farm Bill.

According to the WTO Analytical Index on Article 2 of the ASCM, "*The plain words of Article 2.1 indicate that specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition. Whether a subsidy is specific can only be assessed on a case-by-case basis… The panel in US – Upland Cotton considered that 'an industry, or group of 'industries', may be generally referred to by the type of products they produce'; that 'the concept of an 'industry' relates to producers of certain products'; and that the 'breadth of this concept of 'industry' may depend on several factors in a given case*"'[13].

Let us already underline the fundamental contradictions between the so-called decoupled subsidies since the reform of the Common Agricultural Policy (CAP) of 29 September 2003, which created the decoupled Single Payment Scheme (SPS), with Article 3 of the ASCM on prohibited subsidies: "*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. 3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1*".

Indeed it is well known that this 1993 reform, which compensated the fall in guaranteed minimum agricultural prices (intervention prices) by coupled direct payments – known as blue box payments because they were granted under production-limiting programmes –, aimed to export more and import less[14], because of the absurd definition of dumping in Article VI of the

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11 https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2017/Ripe%20Olives%20from%20Spain/Preliminary/ripe_olives_from_spain-conference.pdf

12 https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2018/Ripe%20Olives%20from%20Spain/Final/ripe_olives-hearing-5-24-2018.pdf

13 https://www.wto.org/english/res_e/publications_e/ai17_e/subsidies_art2_jur.pdf

14 See in particular Pascal Lamy's, then the WTO Director-general, famous speech of 19 June 2003, addressing the General assembly of the Confederation of the EU Food and Drink Industries (CIAA) in Brussels on 19 June 2003: *From Doha to Cancun – Challenges and opportunities of the WTO negotiations for the food sector*, http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_113875.pdf.

GATT and the Anti-dumping Agreement for which there is no dumping as long as the products are exported at the domestic market price[15]. Therefore the SPS, and the other decoupled aids that have succeeded it since 2005, are part of the prohibited subsidies.

According to the report of the cotton panel of 8 September 2004 (WT/DS267/R) presenting the parties' arguments, "7.*1124 The United States submits that, in principle, a subsidy that is limited to a small proportion of United States commodities would be limited and thus "specific". However, the SCM Agreement does not establish any quantitative standard for determining when a subsidy is so limited, and the determination must be made on a case-by-case basis*".

Then, in their assessment of specificity, the panelists add: "*7.1148 Other measures before us pertain to a restricted number of agricultural products, but are not widely or generally available in respect of all agricultural production, let alone the entire universe of United States production of goods… These are the four types of domestic support which permit production flexibility (PFC, MLA, DP and CCP payments) that were or are provided in respect of certain agricultural production in a base period which satisfies certain eligibility criteria. These criteria have the effect of limiting eligibility to a subset of basic agricultural products, including upland cotton or certain other programme crops. We therefore find that these subsidies are "specific" within the meaning of Article 2. The fact that some of the subsidies go to farmers who may produce different commodities, or, in theory, may not produce a given commodity does not mean, by some process of reverse reasoning, that the specificity that is apparent from the face of the grant instrument no longer exists… 7.1151 In our view, the industry represented by a portion of United States agricultural production that is growing and producing certain agricultural crops (and certain livestock in certain regions under restricted conditions) is a sufficiently discrete segment of the United States economy in order to qualify as "specific" within the meaning of Article 2 of the SCM Agreement*"[16]. These conclusions, which have not been challenged by the Appellate Body, can be applied to the allegedly decoupled payments to EU agricultural products.

1.2 – <u>The specificity of subsidies results from the specificity of tariffs and total agricultural prices include subsidies</u>

1.2.1 – <u>Product-specific customs duties added to non-specific subsidies make them specific</u>

Paragraph 3 of Annex A of the Doha Work Programme (also known as the Framework Agreement) of the WTO General Council of 31 July 2004 on the "Framework for Establishing Modalities in Agriculture" states that "*Reforms in the three pillars form an interdependent whole and must be addressed in a balanced and equitable manner*". These three pillars are market access (i.e. import protection), export competition (mainly export subsidies) and domestic agricultural support. Now that WTO Members committed at the Nairobi Ministerial Conference in December 2015 to remove all explicit export subsidies, this implies that import protection must be considered in conjunction with domestic subsidies since they have an import substitution effect, as well as a dumping effect by allowing exports at prices below the average national cost of production without subsidies.

In practice, this means that we must add to the customs duty – converted into ad valorem equivalent (AVE) in the case of specific duty (per tonne or head of livestock) or mixed duty (ad valorem plus specific), which dominate for agricultural products imported by the EU – the

[15] https://www.sol-asso.fr/wp-content/uploads/2018/09/APAC-ROPPA-SOL-FRANCAIS-2FT-A4.pdf
[16] https://www.wto.org/french/tratop_f/dispu_f/cases_f/ds267_f.htm

AVE of subsidies to obtain the total protection rate. The WTO report on "World Trade in 2012"[17] cites the work of Kee et al. which states that "*For 36 percent of tariff lines receiving domestic support for agriculture, the AVE of such support is higher than the tariff... The countries with the highest AVE of domestic support for agriculture are EU members... In addition, the contribution of the main NTMs* [non-tariff measures] *and domestic agricultural support to the total protection rate (which includes customs duties) also increases with GDP per capita*"[18].

More importantly Article 1 on the definition of a subsidy by the ASCM shares the same view: "*(1.1) For the purposes of this Agreement, a subsidy shall be deemed to exist: (a) (2) if there is any form of income or price support in the sense of Article XVI of the GATT 1994; and (b) a benefit is thereby conferred*". It is clear that tariffs are an important form of support to domestic farmers by reducing competition from imported products.

Indeed the level of import protection, reflected mainly in tariffs but also in tariff quotas and other non-tariff measures, is very different among the various EU's raw or processed agricultural products, to which they provide different product-specific subsidies. This difference in customs duties per hectare among agricultural products dwarfs the EC claim that the so-called decoupled subsidies of the SPS-SBS are not specific on the pretext that they are identical per hectare (ha), all the more that they should converge per ha at the national and EU levels decided by Regulation No 1307/2013 of 17 September 2013.

For example, while the EU tariff on raw olives is of 4.5% ad valorem, that on common wheat of low and medium quality (code 100199) was of 48.7% in 2016 in AVE: on the 286 642 tonnes subject to a specific duty of 95 euros per tonne (€/t) for a CIF price (costs, insurance, freight) of 195 €/t, out of the tariff quota of 3.112 million tonnes (Mt) subject to a duty of 12 €/t. For an average yield of 5,553 tonnes/ha in 2016 the subsidy equivalent of the tariff was of 527.5 €/ha.

Paragraph (a) (1) (ii) of Article 1 of the ASCM on the definition of a subsidy reinforces this view: "*Government revenue that is otherwise due is foregone or not collected*", with its footnote: "*In accordance with the provisions of Article XVI of GATT 1994 (note to Article XVI) and the provisions of Annexes I to III to this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy*". This implies a contrario that tax reductions, which are also customs duties, are considered subsidies for imported products.

1.2.2 – **Agricultural subsidies must be internalised in agricultural prices**

The previous finding is in line with another proposal from researchers as well as from the US, OECD and World Bank to internalize agricultural subsidies in market prices to obtain total agricultural prices:

- The OECD did so in a 2011 report where the concept of domestic prices is defined as "*producer prices plus payments linked to the production of a specific commodity*"[19].

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[17] https://www.wto.org/french/res_f/booksp_f/anrep_f/world_trade_report12_f.pdf

[18] http://siteresources.worldbank.org/INTRES/Resources/OTRIpaper.pdf

[19] Jean-Pierre Butault, *Evolution of Agricultural Support in Real Terms in OECD Countries and Emerging Economies*, OECD, 2011, http://www.oecd-

- In the US cotton case, the Appellate Body's report underlined that "*During the oral hearing, the United States accepted that farmers decide what to plant based on expected market prices as well as expected subsidies*" (paragraph 440)[20]. Precisely the main subsidies that the US farmers were expecting for sure were the allegedly decoupled fixed direct payments, whereas the marketing loans benefits and countercyclical payments depended on the vagaries of market prices. The EU farmers can say the same with the SPS (Single Payment Scheme), which has become the Single Base Scheme (SBS) since October 2015.

- A FAPRI report of October 2013[21] assessing the two Farm Bills adopted in 2013 by the House of Representatives and the Senate presents tables of the expected "*average crop revenue in dollars per acre*"[22] for several crops for the period 2014-18. In these tables the expected subsidies – only coupled ones in the future as the two Bills and the final Farm Bill signed into law by the President the 7 February 2014 have eliminated the fixed direct payments – are added to market sales, which, divided by the yield per acre, give the *comprehensive price* or *full price* per crop, although FAPRI does not use this concept but that of "*revenue per acre*".

- A World Bank paper of November 2008 written by Kim Anderson and Signe Nelgen incorporates also the decoupled subsidies in their indicator of agricultural prices distortion – the NRA [nominal rate of assistance] – when they write: "*With this dollar value of decoupled payments, the NRA can be calculated by dividing the result by the value of production at undistorted prices. Since the decoupled part of support in agriculture is steadily increasing in high-income countries, it is of particular importance to integrate this part of support, even though it is less market- and resource-distorting than other distortion measures*"[23].

- Finally USDA has used extensively the concept of "*Net Budgetary Expenditures per Commodity*"[24] incorporating the subsidies to the farm price.

All these facts underscore that the "*current market prices*" at farm level of the developed countries are not real market prices without "*virtually no government involvement in setting prices*"[25]. They should therefore be corrected by adding the subsidies to get the *total prices* or, better, the actual *administered prices* comparable to prices of developing countries which cannot grant such payments to their so many farmers by lack of resources. And, as the prices are very specific to each agricultural product, their *total price* incorporating the subsidies becomes itself product specific.

ilibrary.org/docserver/download/5kgkdgf25x20.pdf?expires=1385386110&id=id&accname=guest&checksum=476FE82E1A92E7409C7AAE4E85F48958

[20] WT/DS267/AB/R, 3 March 2005

[21] US Research Center dependent from the US government.

[22] http://www.fapri.missouri.edu/outreach/publications/2013/FAPRI_MU_Report_06_13.pdf

[23] Kim Anderson and Signe Nelgen, "*Estimates of Distortions to Agricultural Incentives, 1955-2011*", updated in June 2013, http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/Note_summarizing_core_updated_database_0613.pdf; *Distortions to agricultural incentives in Asia*, http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:21960058~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html

[24] http://www.fsa.usda.gov/Internet/FSA_File/pb12_tbl35.pdf; http://www.fsa.usda.gov/FSA/webapp?area=about&subject=landing&topic=bap-bu-cc

[25] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1036&rid=1

1.3 – **The SPS-SBS subsidies are not really decoupled**

The so-called decoupled payments of the SPS-SBS are not actually decoupled because they do not meet the five conditions of paragraph 6 of Annex 2 of the AoA[26].

1) "*Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period*". The SPS (then SBS) contradicts this condition since it is based on the amount of Blue Box payments for the years 2000-2002, a criterion not provided for in this definition.

2) "*The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period*". As we have seen, these SPS-SBS are independent of what has been produced since the base period, but they are coupled since they coexist with the new voluntary coupled aids permitted by Regulation No 1307/2013 of 17 September 2013 which now concern the majority of agricultural products but whose amount is capped, while the SPS-SBS do not impose a ceiling and are unduly notified in the WTO green box.

3) "*The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period*". Perhaps but, given the high volatility of world prices, this is an economically absurd and socially unjustified condition when world prices are high while the SPS-SBS is insufficient to ensure a minimum income when prices are low.

More broadly, the two general conditions of Article 1 of Annex 2 of the AoA for notifying subsidies in the WTO's green box must be criticised:

"*a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers*": from a macroeconomic point of view, the distinction between "market price support" – financed by consumers - and "subsidy" - financed by taxpayers – is not convincing since the vast majority of taxes are ultimately passed on to consumers, particularly in the EU.

"*b) the support in question shall not have the effect of providing price support to producers*": these green box subsidies, including the SPS-SBS, provide clear price support to producers, in particular for Spanish raw table olives, since their prices would necessarily be higher in the absence of the SPS-SBS, as recognised by the EC when stating that "*the price of table olives is very low, making production without support uneconomic*"[27], and the Spanish Government has confirmed that the cost of production of table olives is at least 16.4% above the retail price[28].

4) "*The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period*". The SPS-SBS does not

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[26] "*The EU notified and actual agricultural supports (AMS and OTDS) in 2013-14*", SOL, April 30, 2017: https://www.sol-asso.fr/wp-content/uploads/2017/01/The-EU-actual-agriculrural-supports-AMS-and-OTDS-in-2013-14.pdf
[27] http://ec.europa.eu/environment/life/publications/lifepublications/lifefocus/documents/oliveoil.pdf
[28] https://www.law360.com/articles/937827/us-olive-producers-demand-duties-on-spanish-competitors

meet this condition because it remains coupled to the agricultural area since farmers must show each year that they have eligible ha, each SPS-SBS right corresponding to one ha.

5) "*No production shall be required in order to receive such payments*". Regulation 1782/2003 of 29 September 2003 article 5 stipulates that, to get direct payments, "*Member States shall 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 a "*Minimum livestock stocking rate*", which is clearly a production. Even if Regulation 1783/2003 has been deleted and replaced by Regulation N° 73/2009 of 19 January 2009, its annex III provides equivalent requirements.

Beyond the fact that the SPS-SBS does not comply with the 5 conditions of Annex 2 of the AoA on "*decoupled income support*", it also violates other articles of the AoA, in particular Article 6.2 since a large part of the SPS-SBS and Blue Box payments are granted to feed inputs (EU cereals, oilseed meals and pulses) and those processed into agrofuels (oil, cereals, sugar beets), huge inputs to be notified in the Amber Box of coupled support for developed countries, of which the EU and US, but they do not notify them[29].

Finally, since SPS-SBS payments cannot be attributed to a particular product, they can be attributed to any product whose selling price is lower than its "*average national total cost of production*", a definition given for a dumping price by the WTO Appellate Body in its December 2001 and December 2002 reports in the Dairy Products of Canada case. As a result, all EU agricultural exports can be sued for dumping, even those products that have never received SPS-SBS since their producers get SPS-BPS for other products, which concerns almost all farms in the EU28 today.

The panel's report in the US cotton case stated that all types of subsidies should be considered as a whole when assessing their impact on prices: "*Thus, in our price suppression analysis under Article 6.3(c), we examine one effects-related variable – prices – and one subsidized product – upland cotton. To the extent a sufficient nexus with these exists among the subsidies at issue so that their effects manifest themselves collectively, we believe that we may legitimately treat them as a "subsidy" and group them and their effects together. We derive contextual support for this view from Article 6.1 and Annex IV*[30]*, which referred to the concept of total ad valorem subsidization and envisaged that, "[i]n determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated"* (paragraph 7.1192)[31].

It is as if EU farmers are not aware that the SPS-SBS they receive each year, on almost all their hectares now, come from the sum of the SPSs allocated to specific products as coupled payments have been transformed into decoupled payments, and their profitability calculations are made by comparing the production costs of each product with its market price alone. European taxpayers thus make a huge collective bounty to their farmers every year, which

[29] https://www.sol-asso.fr/wp-content/uploads/2017/01/The-EU-actual-agriculrural-supports-AMS-and-OTDS-in-2013-14.pdf

[30] As we have already stated, this provision has lapsed, but may still be relevant in indicating the original architecture of the Agreement.

[31] https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds267/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#

amounted to €35.4 billion in 2017 (€35.2 billion in 2016) for decoupled payments alone[32], of which €4.056 billion for the 469,887 Spanish beneficiaries, or €8,631 per beneficiary. It is an economically irrational and socially unjustified gift when market prices are high and insufficient when they are low. According to the same source, all direct payments, coupled and decoupled, reached €41.558 billion in 2017, of which €5.064 billion for the 729,603 Spanish beneficiaries, or €6,941 per beneficiary. However, according to the EAGF report for 2017, Spain received €5.620 billion or €7,703 per beneficiary, excluding EAFRD payments (second pillar of the CAP).

In addition, according to a 2018 World Bank study, "*The most recent modeling estimates suggest that… on average, decoupled payments are capitalized at a rate of 47 percent… This implies that a large share of the CAP subsidies — estimated at 25 percent — does not reach the intended beneficiaries, but rather benefits non-farming land owners and investors*"[33]. And farmers have often invested the rest of the SPS in the most profitable non-agricultural activities (including urban real estate), when they have not over-equipped themselves, with perverse effects on agricultural prices, for example in dairy production.

1.4 – The decoupled payments to olive growers are the same as previous coupled payments

Although all EU subsidies under the first pillar to raw olive growers were supposedly fully decoupled from the 2010/11 marketing year, following the decision of the CAP's "Health Check" of 20 November 2008, their amount is the same as the coupled blue box payments received from 1999 to 2003[34], which were specific within the meaning of the Agreement on Agriculture (AoA) since olives had to be produced in order to receive the payments and because olive grove land is very unsuitable for other production (more on that below).

Moreover, the subsidy differs from one olive grower to another since the decoupling was based on the individual historical references for the period 1999-2003. McDermott added: "*SPS subsidies to Spain's olive industry amount{ed} to in the order of €468 per hectare (per year)... disproportionately higher than the average payment of €258 per hectare paid to its other agricultural sectors*"[35]. We will see that other coupled aids are to be added.

1.5 – The false decoupling of Andalusian cotton subsidies

SPS payments were not fully decoupled for cotton as decoupling has only been applied since 2006 to 65% of the payments received until 2005, with one third remaining coupled. Indeed, the SPS, which received 65% of the previous coupled subsidies of the Amber Box[36], is itself coupled because it coexists with the coupled Blue Box aid. Indeed, according to Article 6.5 of the AoA, Blue Box subsidies are granted "*under production-limiting programmes*" while the

[32] https://ec.europa.eu/agriculture/sites/agriculture/files/cap-funding/beneficiaries/direct-aid/pdf/direct-aid-indicative-figures-2017_en.pdf

[33] http://documents.worldbank.org/curated/en/892301518703739733/pdf/123443-repl-PUBLIC.pdf

[34] According to the Agrosynergie report for the European Commission of November 2009, "*Olive growers receive a flat-rate payment calculated on the basis of the average amount of production-related subsidies they received from 1999 to 2003... There is no significant decrease in the share of aid in crop profitability with the reform since the change of regime does not change the overall level of support*": tps://ec.europa.eu/agriculture/sites/agriculture/files/evaluation/market-and-income-reports/2009/oilseeds/fulltext_fr.pdf

[35] https://www.oliveoiltimes.com/olive-oil-business/europe/olive-regions-joint-strategy-eu-subsidies/25672

[36] Subsidies coupled to prices or production, or inputs, not capped as in the blue box but subject to reduction by the AoA.

SFP allows to produce any product – otherwise farmers would not have full production flexibility – including cotton, whose production support is limited. This is totally contradictory with the fact that the supported production of cotton is capped at 301 342 ha (Article 58 of EU Regulation No 1307/2013 of 17 December 2013): if the ceiling is exceeded the subsidy is reduced accordingly[37]. It should be noted that the text is contradictory, as it does not in fact limit production, but only the amount of aid. Spanish cotton farmers benefiting from SPS-SBS who would like to produce more cotton, as well as other farmers who would like to grow cotton, can only do so at the world market price since the tariff on raw cotton is zero.

It should be noted that the coexistence of decoupled direct aids with coupled direct aids is not limited to cotton, since €3.9 billion were allocated to EU voluntary coupled direct payments in 2017, the majority of agricultural products being eligible, of which olives. These coupled payments are notified in the blue box as Regulation n° 1307/2013 provides that "*5. Coupled support may only be granted to the extent necessary to create an incentive to maintain current levels of production in the sectors or regions concerned. Coupled support shall take the form of an annual payment and shall be granted within defined quantitative limits and be based on fixed areas and yields or on a fixed number of animals. 9. In order to ensure efficient and targeted use of Union funds and to avoid double funding under other similar support instruments, the Commission shall be empowered to adopt delegated acts in accordance with Article 70 laying down: the conditions for granting coupled support; rules on consistency with other Union measures and on the cumulation of support*".

This is all the more important because Andalusia is both the region where olives and cotton play the largest role in Spain since, according to Eurostat, it concentrated 62% of the country's acreage in olive trees on average from 2015 to 2017 (62.5% in 2017) with 79.2% of production[38], including 80% of table olives[39], and 100% of cotton production (including 91.5% irrigated at a yield of 2 827 kg of fibre cotton per ha against 1 603 kg/ha without irrigation)[40]. This means that the so-called decoupled SPS subsidies to olive growers are particularly specific in Andalusia since they are very different from those to cotton on the same territory. In addition, the distribution of cotton and table olive production by municipality in Andalusia is almost identical, as can be seen on the maps[41]. It is very likely that a number of olive growers in Andalusia, or certain owners who rent the land to them while receiving the decoupled aid, will also receive it on other parcels dedicated to cotton.

However, the aid is extremely different for these two crops since the per hectare (ha) payment of cotton was of €3,193 in 2017, 6.8 times higher than the €468/ha[42] (excluding irrigation subsidy) of the olive payment: total payment for cotton was €195.2 million in 2017, of which €60.2 million for coupled aid – €1267.5 million/ha corresponding to €362.15 per tonne multiplied by a fixed yield of 3.5 tonnes/ha for a maximum base area of 48 000 ha – and €135 million for decoupled aid (corresponding to €1,509/ha multiplied by the average of 89 667 ha from 2000 to 2002). While the average decoupled aid for Spanish agriculture as a whole is

[37] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1307&from=EN

[38] https://www.juntadeandalucia.es/export/drupaljda/Subprograma%20Tematico%20del%20sector%20del%20olivar%20Junio%202015.pdf

[39] https://agroalimentarias-andalucia.coop/aceituna-de-mesa

[40] https://agroalimentarias-andalucia.coop/aceituna-de-mesa

[41] https://www.juntadeandalucia.es/organismos/agriculturapescaydesarrollorural/consejeria/sobre-consejeria/estadisticas/paginas/agrarias-superficies-producciones-aforos.html

[42] https://www.oliveoiltimes.com/olive-oil-business/europe/olive-regions-joint-strategy-eu-subsidies/25672

€258/ha[43]. But obviously the production costs are higher for cotton because it is totally irrigated and needs a lot of pesticides and chemical fertilizers.

Nevertheless, the 2014 Agrosynergie report on cotton for the EC concludes that "*Based on a simulation of the FADN data, it is possible to show the high dependence of cotton production on aid, and in particular on cotton-specific aid: it is estimated that 79% of farms and 65% of areas would on average be unprofitable if cotton-specific aid were integrated into the SPS. Thus, the decoupling of the specific aid would lead to the overall disappearance of cotton production in Europe. The other coupled aids (MAE*[agri-environmental measure], *Integrated production, Article 68), which represent 20% of the coupled aids received, would contribute, according to the simulation, to maintaining 11% of the areas in Andalusia but their effect is negligible in Greece*"[44].

1.6 – <u>SPS subsidies for olives have not really benefited other products</u>

In its request for WTO consultations, the EC stresses that "*No account or proper account has been taken of the extent of diversification of economic activities within the jurisdiction of the granting authority*", suggesting that the SPS for Spanish raw olives substantially benefit other products in olive groves. This suggestion is not verified.

According to Eurostat, the table olive acreage represented on average 6.52% of the total olive acreage from 2015 to 2017 (165,333 ha out of 2,534,340 ha) and, since Andalusia accounts for 79.2% of Spanish production, it can be attributed an at least equal percentage of the subsidies, both of the first and second pillar. According to the Ministry of Agriculture, "*For the 2015/2016 marketing year, national table olive production amounted to 601,830 tonnes, according to the survey of the Food Information and Control Agency (AICA). Andalusian production amounted to 463,947 tonnes, or 77% of national production*"[45].

As Eurostat indicates that 91.7% of the area of olive farms in Andalusia was devoted to olive trees in 2017 and only 8.3% to other crops, this reinforces the specificity of subsidies to olive growers. Especially since the Andalusian Rural Development Plan (RDP) for olive groves gives a percentage of only 6.67% (80,000 ha out of a total of 1.2 million ha) for the area of olive groves with very high productivity, with intensive use of inputs and a high degree of mechanisation, so that one could think this is an area more likely to have a diversified production. Another factor that would go in the opposite direction is the decrease in the percentage of irrigated table olive areas, from 48.34% in 2010 to 45.04% in 2017, a decrease by 18.21% against by 6.66% for the dry area as we could consider that the diversification of production is more likely to occur on irrigated areas[46].

However, according to a study by José D. Sanchez-Martinez and Antonia Paniza Cabrera concerning the province of Jaen in Andalusia, "*The traditional association of olive trees with other herbaceous or woody crops (vines, almond trees, fruit trees, etc.) has practically disappeared. This type of diversified agriculture is apparently no longer viable in a context of increasing specialisation, where Spanish agriculture is exclusively focused on the market, a*

[43] https://www.oliveoiltimes.com/olive-oil-business/europe/olive-regions-joint-strategy-eu-subsidies/25672
[44] https://ec.europa.eu/agriculture/sites/agriculture/files/evaluation/market-and-income-reports/2014/cotton/fulltext_fr.pdf
[45] http://xn--alimentacionenespaa-d4b.es/ae/pdfs/Sectores/Olivar.pdf
[46] http://xn--alimentacionenespaa-d4b.es/ae/pdfs/Sectores/Olivar.pdf

process that has coincided with a massive exodus from rural areas"[47]. At first sight this observation might seem paradoxical since "*While in 1970, only 7.35% of the province's olive groves were irrigated, by 2012, this figure had risen to 46.8%*". But this paradox is only apparent because farms with a strong intensification of production, particularly with a strong motorization (for production and harvesting), are not adapted to associated crops.

This low presence of alternative crops in olive groves, which confirms the specific nature of aid to raw table olives, is reinforced by the classification of specialised holdings by the Farm Accountancy Data Network (FADN). The Commission's Implementing Regulation (EU) 2015/220 of 2 February 2015[48] considers that holdings are specialised in olive cultivation (code 370) when olives account for two thirds of the holding's total standard production[49]. This is obtained by multiplying the standard production of each of the crop and livestock characteristics by the number of corresponding units.

According to McDermott, "*The lack of crop alternatives in the olive-growing sector causes the direct payments, even though they are decoupled from production, to have a greater impact on production than payments given to farmers on land suitable for multiple crops. Typically, farmers base their production decisions on the relative profitability of existing crops compared with available alternatives. But if farmers have no alternatives and are tied to a single crop, they are likely to produce it even when market conditions are difficult. In the case of EU olive farmers, many continue to harvest olives despite costs that are at or above market prices (before support payments are included in their income) because they have no flexibility to move to alternative crops*"[50].

The above data show that Spanish olive-growing holdings are essentially specialised and that, consequently, the so-called decoupled aid received is specific.

Already from 2002 to 2005, according to Agrosynergie, "*The weight of aid varies in the net value added of olive growers from 26% to 39% depending on the sub-regions of Andalusia in the period 2002-05*"[51]. Then, in the period before preceding total decoupling, from 2004/05 to 2009/10, two categories of olive trees were selected for coupled aid which covered 40% of the total in Andalusia: category 1) for olive groves located in municipalities where the olive grove area exceeds 80% of the total agricultural used area of the municipality; category 5) for olive groves located in municipalities with a olive growing tradition but not included in the previous category. The coupled aid in 2008 was €75/ha in category 1 and €50/ha in category 5[52].

The total decoupling implemented since the 2010/11 marketing year, when all first pillar aid was decoupled, has gone further in differentiating aid by sub-region. But Spain has not really embarked on the regional convergence of aid required by Article 25.3 of EU Regulation 1307/2013 according to which "*From claim year 2019 at the latest, all payment entitlements in a Member State or, where Article 23 is applied, in a region shall have a uniform unit value*"[53].

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[47] http://www.eurogeographyjournal.eu/articles/EJG020603CABRERA.pdf
[48] https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32015R0220&from=EN
[49] https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32015R0220&from=EN
[50] https://www.law360.com/articles/937827/us-olive-producers-demand-duties-on-spanish-competitors
[51] https://ec.europa.eu/agriculture/sites/agriculture/files/evaluation/market-and-income-reports/2009/oilseeds/fulltext_fr.pdf
[52] https://ec.europa.eu/agriculture/sites/agriculture/files/evaluation/market-and-income-reports/2009/oilseeds/fulltext_fr.pdf
[53] http://eur-lex.europa.eu/legal-content/fr/TXT/PDF/?uri=CELEX:32013R1307

On the contrary, according to the European Court of Auditors, "*Spain introduced 50 new BPS regions which the national authorities defined on the basis of agronomic characteristics and their 2013 land use. These regions extended across some 316 'comarcas agrarias' meaning that land belonging to a single BPS region could be found in several comarcas and Autonomous Communities across mainland Spain. However, in many of the regions the average unit values of BPS entitlements varied only marginally. While this regionalisation complied with the EU legal framework, it added complexity to land management. Farmers could only use their entitlements in the region for which they had originally been allocated which could concern individual agricultural parcels in the same village… The design of the 50 regions resulted in 50 different 2019 target unit values ranging from around 60 euros to 1,430 euros. The amounts redistributed to farmers under convergence between 2015 and 2019 represents only 5.9 % of the Spanish BPS ceiling*".

The European Court of Auditors adds: "*As a scheme essentially related to areas, the BPS tends to favour larger farms. Due to the design of the BPS and other area related support payments, the Commission expects that the 2013 CAP reform will be associated with a further increase of the capitalisation of decoupled support in land values, which benefits owners of agricultural land*", and the same applies to olive groves in Spain.

Moreover, according to Eurostat, the olive yield per hectare of table olives was 10% higher on average than that of oil olives from 2010 to 2017, of which by 14.9% from 2015 to 2017, of which by 19.7% in 2017, although the decoupled subsidy per hectare is the same, especially since some varieties of olives are for dual use (table and oil). Indeed Annex XI and XII of Regulation 73/2009 of 19 January 2008 mention "*aid to olive groves*" without distinguishing between table and oil olives. Similarly, average olive yields in kg per hectare vary considerably according to region and rainfall, for example in 2009 yields were at 1,049 kg in Catalonia, 1,063 kg in Castile La Mancha, 1,368 ha in Extremadura and 3,569 ha in Andalusia. But we also know that, since olive trees are a very perennial crop, olive growers cannot quickly change their production orientation.

1.7 – <u>Spanish olive growers receive other specific aids, in addition to the so-called decoupled first pillar aid</u>

In addition to the decoupled and coupled aid under the first pillar of the CAP, olive growers receive various European and national aids under the second pillar. McDermott has grouped them under three programmes: the Rural Development Plan (RDP) 2014-2020 co-financed by the EU and Spain, aid to producer organisations and aid for agricultural insurance.

According to McDermott, "*the Board of Andalusia Order of May 26, 2015 ("2015 Order"), authorizes €86,119,045 in EU funding to olive farmers for the Sustainable Olive Systems program and €8,020,258 in funding for the Organic Farming and Olive Groves programs from 2014 to 2020.* [113] *The larger of the two programs, Sustainable Olive Systems, supports farm improvements aimed at sustainable production. The 2015 Order authorizes payments to olive farmers from €110.28 to €277.15 per hectare annually depending on acreage, the slope of the land, and other factors. Farmers are eligible for payments in that range if they cultivate olives on at least one hectare of land and have land with a slope of at least 8% and are eligible for even more support if their land slope is greater than 20%. According to the US Government, at least half the olive growers in Andalusia may be eligible for the higher RDF payments… Conservatively applying the average of this range (€193.71) to the 125,025 hectares of table olives grown in Andalusia 124 yields an annual contribution of approximately €24.22 million* *for table olive growers, which constitutes a financial contribution under 19 USC 1677(5)(D)(i)*". Since Andalusia's share of the national table olive area is 79%, it can be deduced that the national RDP allocates €30.66 million to table olive aid.

Mc Dermott also reported many other aids within the RDP, including those for investments by olive growers and ripe oil canneries, not to mention tax deductions that are impossible to quantify.

McDermott also estimates that the annual subsidies under the Olive Growers' Organisations Programme to cover the costs of their eligible work programmes amount to €10 million.

Although McDermott was unable to identify agricultural insurance subsidies, those programmed for the 39th insurance plan in 2016 were of €216 million, representing an average subsidy rate of 28.84% of the amount of the claim[54], with rates ranging up to 75% depending on the policies taken out (when the loss rate is higher than 30% on the entire farm). The annual report for 2017 indicates that olive growers received €15 million in compensation due to drought[55], which corresponds to €1 million for table olives since they represented only 6.54% of the total olive area from 2015 to 2017.

But the MCDermott firm does not mention irrigation subsidies, which is a very sensitive issue in all countries, particularly in California. They mainly take the form of a significant reduction in the price of water paid by irrigators, which is not unique to Spain. According to Leandro Del Moral Ituarte, "*The use of groundwater has certain costs for the farmer. This cost is in the order of 0.12 €/m3 in many parts of the country. Yet irrigators continue to pay barely €0.006 to €0.012/m3 in most traditional irrigation areas and in new state-funded surface water irrigation. Even more serious, water is paid for at a single rate per hectare in many cases, which does not encourage water savings and efficient use*"[56].

According to the 2010 IISD study "*In total, subsidies to irrigated agriculture are over €906 million per year (as this report has evaluated under conservative assumptions), and below €1,120 million per year (a total 55 per cent subsidy rate); the latter is the Ministry's own evaluation*"[57]. Irrigation subsidies can be allocated to products according to the amount of irrigated water per hectare of the different crops, as is done in US farm irrigation surveys, so that they may be considered specific. As data on irrigated areas for table olives exist for Spain (by adding to the irrigated area for single-use table olives the irrigated area for dual-use table olives or oil)[58], this corresponds to €13.7 million in aid for irrigation of table olives in 2016[59].

[54] https://www.mapa.gob.es/gl/enesa/plan_de_seguros_agrarios_y_subvenciones/plan_2018/boe_39plan_2018_tcm37-436484.pdf

[55] https://www.mapa.gob.es/gl/enesa/plan_de_seguros_agrarios_y_subvenciones/plan_2018/enesa_guia_plan_seguros_18_web_tcm37-436481.pdf

[56] https://idus.us.es/xmlui/bitstream/handle/11441/49316/L_irrigation_en_Espagne_et_son_avenir_Re.pdf?sequence=1

[57] http://www.iisd.org/gsi/sites/default/files/irrig_Spain.pdf

[58] https://www.mapa.gob.es/es/estadistica/temas/estadisticas-agrarias/agricultura/superficies-producciones-anuales-cultivos/

[59] http://www.mapama.gob.es/es/estadistica/temas/estadisticas-agrarias/boletin2017sm_tcm30-455983.pdf

Besides, on 2 April 2012, "*according to Spain's new Minister for Agriculture, Food and Environmental Affairs, Miguel Arias Cañete, the Spanish olive oil sector alone is currently subsidized for 40 percent of the value of the oil market: "We are talking about aid worth €1 billion ($1.3 billion) and about €468 per hectare (per year), he told the Spanish Parliament last month*"[60]. And the EC acknowledged that "*For the period 2006-2009, total direct payments and subsidies represented on average and as a percentage of income (net value added per work unit): 22% in Spain*"[61].

Let us summarize all the subsidies to Spanish raw table olives:

- For Mc Dermott, "*According to the US Government, the EU granted Spain €4.9 billion in annual SPS aid. Since the average net annual direct payments to olive growers under the 2005-2014 Scheme programs were €1.28 billion, those payments represented roughly 25% of the total annual agricultural aid to Spain during this period. By point of comparison, Spain's olive production has consistently represented about 3% of the country's total agricultural output in recent years. Using those same funding figures, Spain's table olive sector, representing approximately 8% of total Spanish olive production, received about €102 million in annual combined SPS and Aid for Olive Grove payments over this period*". As the share of table olives was in fact 7.73% of total olive production on average from 2015 to 2017, this corresponds to €98.9 million.

- Adding €30.7 million for the RDP, €13.7 million for irrigation, €10 million for producer organisations and €1 million for agricultural insurance, we arrive at a total of €154.3 million, significantly more than the €130 million provided by McDermott, that he presented as a very conservative estimate. Related to the 165,353 ha of table olives on average from 2015 to 2017, this makes an average subsidy of 933 €/ha, almost twice the 468 €/ha advanced by the Minister of Agriculture in 2012, even if it was probably for decoupled aid alone. But it is true that the same minister also stated that "*Spain's olive oil sector alone is currently subsidised to the tune of 40 percent of the value of the olive oil market*"[62]. In relation to the average production of 518,883 tonnes of raw table olives, the €154.3 million corresponds to an average aid of €297.4 per tonne from 2015 to 2017 (section 1.6 on page 14), i.e. 26.2% of the producer price of €778.5/t (table 4 below)! And we do not take into account the tax reductions that Spanish olive growers also enjoy, which are part of the subsidies according to the ASCM.

II – Subsidies to producers of raw table olives are passed on to producers of ripe olives

2.1 – The arguments of the European Commission and Spain

Ms. Grande of the Spanish Embassy in Washington said at the first hearing on July 12, 2017: *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*

[60] https://www.oliveoiltimes.com/olive-oil-business/europe/olive-regions-joint-strategy-eu-subsidies/25672
[61] https://ec.europa.eu/agriculture/sites/agriculture/files/olive-oil/economic-analysis_fr.pdf
[62] https://www.oliveoiltimes.com/olive-oil-business/europe/olive-regions-joint-strategy-eu-subsidies/25672

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"[63].

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.*".

In its request for consultations of 28 January 2019, the EC added: "*The DOC* [Department of Commerce] *did not carry out a pass-through analysis to assess to what extent subsidies to olive growers, the direct recipients of the benefit conferred by the subsidy programmes and the subsidies, passthrough to the processors of ripe olives*"[64].

2.2 – <u>The arguments of the USITC and of the California's plaintiffs</u>

2.2.1 - <u>The USITC agrees that the subject products are ripe olives, not raw olives</u>

This assertion should satisfy the EC, but it does not solve the issue. In its preliminary submissions of August 2017, the 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*"[65].

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*

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63 https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2017/Ripe%20Olives%20from%20Spain/Preliminary/ripe_olives_from_spain-conference.pdf

64 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds577/*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#

65 https://usitc.gov/publications/701_731/pub4718.pdf

include the growers in the domestic industry and limit the domestic industry to processors of ripe olives"[66].

2.2.2 – <u>The producers of raw olives are nevertheless the beneficiaries of the subsidies</u>

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.

2.2.2.1 – <u>Although the USITC underestimates the links between raw olive growers and mainly cooperative canneries</u>

The USITC's argument that there is no "*substantial coincidence of economic interests between olive growers and domestic producers of ripe olives*" is unfounded since the majority of the production of raw table olives is processed in ripe olive cooperatives, as stated by the Andalusian Agri-food Cooperatives: "*The sector is very cooperative, with cooperatives representing more than 30 % of industries and more than 50 % of total production. In concrete terms, in the Agro-food Cooperatives there are about 70 cooperatives associated with the olive dressing activity and a turnover of about 350 million euros per year. One of the characteristics of Andalusian cooperativism in the table olive sector is its size, with three major groups: Agro Sevilla, Dcoop and Manzanilla Olive*"[67].

Agro Sevilla, the main cooperative and exporter of ripe olives in the world, in particular to the US, and which is the main defendant in the present proceedings, has close relations with its 4 000 members who produce raw olives: "*Established in Andalusia since 1977 as a second-level cooperative, Agro Sevilla is the largest olive producer, packager and exporter in the world. Created by an organisation of agricultural cooperatives, Agro Sevilla controls each stage of the olive and olive oil production process: from the cultivation of olive groves and the harvesting of olives to the production, distribution and marketing of the finished product, which guarantees rigorous traceability and increased quality control at all stages of the production chain, from origin to final destination. Currently, Agro Sevilla is part of 13 cooperatives and more than 4,000 member farmers, reaching an annual production of more than 80,000 tons of olives and exporting our olives to more than 70 countries around the world*"[68]. Naturally, as in all agricultural cooperatives in the world, there is always tensions in the distribution of net value added between farmers (initial purchase price, possible rebates or even interest on shares), employees, investments and reserves.

Already the 2009 Agrosynergie report for the EC noted that, for Spanish table olives, "*Half of the production is sold directly by individual producers to canneries, the rest is sold through producer cooperatives*"[69].

A 2012 study by the University of Wageningen carried out for the EC on support for agricultural cooperatives stated that the market share of Spanish olive oil cooperatives was 70% but was

[66] https://www.usitc.gov/publications/701_731/pub4805.pdf
[67] https://agroalimentarias-andalucia.coop/aceituna-de-mesa
[68] http://codegenil.es/en/nuestra-cooperativa-se-integra-en-agro-sevilla-aceitunas-sca-2/
[69] https://ec.europa.eu/agriculture/sites/agriculture/files/evaluation/market-and-income-reports/2009/oilseeds/fulltext_fr.pdf

declining, although the study does not specify whether this concerned both table olives and oil olives[70].

2.2.2.2 – <u>The lack of cooperation between producers of raw and ripe olives would not prevent subsidies to the former from benefiting the latter</u>

The EC's request for consultations also refers to Article 771B of the US Customs Act of 1930. According to the MCDermott Report on subsidies: "*If the Department finds that the Spanish olive processors selected for investigation are not cross-owned with olive growers, the Department should nevertheless investigate subsidies provided to olive growers and deem those subsidies to be provided with respect to (the manufacture, production, or exportation of processed olives under section 771B of the Act, 19 USC 1677-2: In the case of an agricultural product processed from a raw agricultural product in which- (l) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and (2) the processing operation adds only limited value to the raw commodity…*

The Department has found that demand for the prior stage product is dependent on the demand for the latter stage product when less than half of a raw product goes towards further processing. Here, because raw olives are inedible without further processing, all raw olives go towards processing… growers and processors of table olives effectively work in a continuous line of production to make finished ripe olives. Since the demand for raw olives is "substantially dependent" on demand for processed olives, the section 771B(l) criterion is satisfied.

The second criterion of section 771B is equally satisfied because processing raw olives into edible table olives adds only "limited value" within the meaning of the statute… The processing operation for raw olives leaves the raw product essentially unchanged in composition and character… the processing of table olives involves curing in a debittering solution and water rinses to render the raw olives edible. These steps bring out the natural character of the olives and reduce and control the level of bitterness that naturally exists in raw olives, but in no way change their essential character. The remaining operations to prepare the olives for final sale to consumers entail various packaging steps, including canning, which simply allow the product to be marketed in edible form at commercial prices without changing its essential character. Moreover, based on industry information, the cost of processing ripe olives, not including the costs related to packaging, amounts to less than 3% of total costs, and the cost of raw olives is the single largest cost component, roughly 40% of the processed product. Because the cost of processing olives is considerably less than the cost of the raw olives and because the processing leaves the essential character of the raw olives intact, ripe olive production satisfies the applicable standards under section 771B(2)".

III – <u>There is evidence that the US producers of subject olives have suffered a damage</u>

The EC argues that "*The ITC did not properly factor into the determination of injury the evolution in the volume of subsidized imports, or the effect of the subsidised imports on prices, and did not demonstrate the required causal relationship between subsidized imports and injury to the domestic industry, also taking into account non-attribution factors. The determinations of specificity are not clearly substantiated on the basis of positive evidence… [and] is not based on positive evidence and does not involve an objective examination of the volume of the*

[70] https://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2012/support-farmers-coop/fulltext_en.pdf

subsidized imports and their effects on prices, and the consequent impact on the domestic producers".

3.1 – Changes in the volume, value and price of subsidised imports

At the first hearing on 12 July 2017, the defendants of the EC and Spain complained that the applicants did not clearly identify the only subject imports – those of HTS codes 20057002, 20057004, 20057050, 20057060, 20057070 and 20057075 – but sometimes used all table olive imports from Spain.

For their part, the applicants complained about the increasing volumes imported at hugely decreasing prices because of their subsidisation.

Tables 1 to 5, which cover all years from 2010 to 2018, put each other's positions into perspective. For 2018, when USITC data were available for only 11 months, the average for the first 11 months was multiplied by 12 to extrapolate to the full year.

With respect to Table 1, Jennifer Lutz of Informa Agribusiness Consulting, supporting the Spanish defendants, argued in July 2017 that imports of subject ripe olives increased by 30% from 2013 to 2016, which is correct (in fact by 32.6%) and that the share of subject imports in total imports of table olives (code 200570) was 75% in 2015 and 2016, which is incorrect since it was only by 42.5% in volume and 29.1% in value. He also said that imports were made at very low prices, which is not verified from 2013 to 2016 since the FOB Spain price increased by 4.1% even though it had decreased by 7.4% from 2013 to 2015.

Table 1 – Imports from Spain of subject and total table olives, 2010-18

$ 1,000	2010	2011	2012	2013	2014	2015	2016	2017	2018	2018/17	2018/15
Tonnage of imports of subject ripe olives and of total ripe olives (code 200570) imports from Spain from 2010 to 2018											
Subject	22551	22773	25022	24924	27447	32323	33039	30172	16699	-46,7%	-48,3%
Total	69865	65293	70067	67811	71664	77458	76508	74108	61043	-11,6%	-20,1%
% subject	32,3%	34,9%	35,7%	36,8%	38,3%	41,7%	43,2%	40,7%	27,4%		
Customs value FOB Spain											
Subject	53788	53839	52273	53576	58291	64330	73922	69222	40869	-41%	-36,5%
Total	208543	197630	190781	194146	221872	206100	215040	204744	180190	-12%	-12,6%
% subject	25,8%	27,2%	27,4%	27,6%	26,3%	31,2%	34,4%	33,8%	22,7%		
Spain's FOB prices in dollars per tonne											
Subject	2385,2	2364,2	2089,1	2149,6	2123,8	1990,2	2237,4	2294,2	2447,4	+6,7%	+23%
Total	2984,9	3026,8	2722,8	2863	3096	2660,8	2810,7	2762,8	2951,9	+6,8%	+10,9%
% subject	79,9%	78,1%	76,%	75,1%	68,6%	74,8%	79,6%	83%	82,9%		
Volume of California's raw table olive production in 1000 tonnes[71]											
2009: 26,3	170	29,2	86	91	37,3	78	67,1	90,7	30		

Source: USITC

During the second hearing on 24 May 2018, Ms Grande of the Spanish Embassy in Washington stated that "*In any case, there is no increase of the Spanish exports at the expense of the United States domestic industry during the analyzed period*", bearing in mind that it was agreed at that hearing that the analysed period should be 2015 to 2017. This is true for exports by volume of the ripe olives in question, which fell by 6.7% (after having increased by 2.2% from 2015 to 2016), but it is false for exports in value, which increased by 7.6% from 2015 to 2017 (and by

71 https://www.nass.usda.gov/Statistics_by_State/California/Publications/Specialty_and_Other_Releases/Olives/2018/201808olvpb.pdf; the amount for 2018 is a forecast

14.9% from 2015 to 2016) because the FOB (free on board) price in Spain rose by 15.3% from 2015 to 2017.

Mr. Zitko of the European Commission in Washington also stated that "*In any event, 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*". While the volume of subject imports from Spain declined from 2015 to 2017, it had steadily increased from 2010 to 2016. A partial reason for the decline in imports in 2017 is already explained by the imposition of countervailing duties of 4.47% from 28 November 2017. While it is also true that prices of subject imports from Spain increased from 2015 to 2017, Table 2 shows that they increased by only 6.7% from 2013 to 2017 when prices of subject imports from the rest of the world increased by 11.4%.

However, in order to properly assess the loss of competitiveness of California's ripe olives, it is necessary to analyse the situation over a longer period. Table 1 shows the evolution of tonnages, values in $1000 at the FOB Spain stage and FOB Spain prices in €/t of the table olives in question and total (code 200570) imported into the USA from 2010 to 2018. It is necessary to use USITC data as Eurostat data only gives 6-digit exports (code 200570).

Table 1 shows that, undoubtedly, the tonnages of the subject olives imports from Spain increased in volume by 33.8% from 2010 to 2017 for a Spain FOB value up by 28.7% with a decrease in FOB prices of 3.8%. But the subject imports fell by 6.7% in volume from 2015 to 2017, although they increased in value by 7.1% and collapsed by more than 40% in both volume and value in 2018 compared to both 2017 and 2015, obviously due to the anti-dumping duties, which fell from 17.1% in January 2018 to around 20% (as they vary according to Spanish exporting companies) and anti-subsidy duties, from 4.47% at the end of November 2017 to around 15% since August 2018.

On the other hand, imports of all types of ripe olives from Spain fell by a factor of three, both in volume and value. A factor to be taken into account in these developments, beyond the taxation of imports of the subject olives alone, is the high variability of production, as shown in the last row of Table 1, which responds to a basic cycle of 2 years but which can go up to 4 years, depending on climatic hazards and recent successive years of drought in California.

Table 2 compares imports of the only subject ripe olives from Spain and from the rest of the world (RoW). Those from all over the world increased in volume by only 4% from 2010 to 2015 and continued to increase until 2017 (from 10.9% from 2010 to 2017 and from 4.7% from 2015 to 2017) and declined relatively little in 2018 (from 7.2% from 2017 to 2018 and from 2.8% from 2015 to 2018) compared to the very sharp fall in those from Spain. A parallel observation is true for imports in value. As a result, imports from the RoW increased from 2000 to 2014, declined in 2015 and 2016, before increasing in 2017 and 2018.

But the most important thing to stress is that the price of subject imports from Spain has always been significantly lower, from 20% to 33% from 2010 to 2017, than that of subject imports from the RoW, and this price remained 19.5% lower in 2018 despite anti-dumping and anti-subsidy duties, or perhaps because of these duties in order not to lose the American market, which is by far the largest for the Spanish exports.

Table 2 – Subject imports from Spain and from the rest of the world (RoW), 2010-18

$ 1,000	2010	2011	2012	2013	2014	2015	2016	2017	2018	2018/17	2018/15
Tonnage of subject imports from Spain and from the RoW from 2010 to 2018											
Spain	22551	22773	25022	24924	27447	32323	33039	30172	16699	-46,7%	-48,3%
World	56685	56433	56568	56442	58969	58949	62662	61722	57292	-7,2%	-2,8%
RoW	34134	33660	31546	31518	31522	26626	29623	31550	40593	+28,7%	+52,5%
Spain/RoW	66,1%	67,7%	79,3%	79,1%	87,1%	121,4%	111,5%	95,6%	41,1%	-57%	-66,1%
Customs value FOB Spain and FOB RoW											
Spain	53788	53839	52273	53576	58291	64330	73922	69222	40869	-41%	-36,5%
World	151505	152742	144823	144627	158147	143867	162485	170725	164305	-3,8%	+14,2%
RoW	97717	98903	92550	91051	99856	79537	88563	101503	123436	+21,6%	+55,2%
Spain/RoW	55%	54,4%	56,5%	58,8%	58,4%	80,9%	83,5%	68,2%	33,1%	-51,5%	-59,1%
FOB price Spain and the RoW in dollars per tonne ($/t)											
Spain	2385,2	2364,2	2089,1	2149,6	2123,8	1990,2	2237,4	2294,2	2447,4	+6,7%	+23%
World	2672,8	2706,6	2560,2	2562,4	2681,9	2440,5	2593	2766	2867,8	+3,7%	+17,5%
RoW	2862,7	2938,3	2933,8	2888,9	3167,8	2987,2	2989,7	3217,2	3040,8	-5,5%	+1,7%
Spain/RoW	83,3%	80,5%	71,2%	74,4%	67%	66,6%	74,8%	71,3%	80,5%	+12,9%	+20,9%

Source: USITC

Table 3, which results from the comparison of Tables 1 and 2, shows that Ms Grande of the Spanish Embassy in Washington made a big mistake by stating during the public hearing in May 2018 that "*the Spanish imports only replace the non-subject imports of the United States market. Thus, they did not have an impact on the situation of the domestic industry. The ITC should therefore analyze those other imports since they accounted for 25 percent of total imports and were priced three to five percent lower than the Spanish imports in both 2016 and 2017*". Indeed, the US total imports of subject ripe olives from Spain on average from 2015 to 2017 were of 31,845 t tonnes or 2.1 times larger than the 14,914 tonnes of non-subject imports from all origins. Ms. Grande also made a significant error in comparing the prices of subject imports with those of non-subject imports, since the price of subject imports was on average 52% higher than that of non-subject imports from 2015 to 2017.

Table 3 – Imports (M) from Spain and the world of subject and non-subject ripe olives, 2010-18

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2017/15	2018/15
Imports in tonnes											
Total M (200570)	69865	65293	70067	67811	71664	77458	76508	74108	61043	-9,6%	-21,2%
Total subject M	56685	56433	56568	56442	58969	58949	62662	61722	57292	+4,7%	-2,8%
Total non subject M	13180	8860	13499	11369	12695	18509	13846	12386	3751	-35,1%	-79,7%
Non-subject/total	18,9%	13,6%	19,3%	16,8%	17,7%	23,9%	18,1%	16,7%	6,1%		
Subject from Spain	22551	22773	25022	24924	27447	32323	33039	30172	16699	-6,7%	-48,3%
Subject-non subject	9371	13913	11523	13555	14752	13814	19193	17786	12948	+28,8%	-6,3%
Subject/non subject	241%	164%	217%	184%	186%	234%	172%	170%	129%		
Imports in value: $ 1,000											
Total M (200570)	208543	197630	190781	194146	221872	206100	215040	204744	180190	-0,7%	-12,6%
Total subject M	151505	152742	144823	144627	158147	143867	162485	170725	164305	+14,2%	-3,8%
Total non subject M	57038	44888	45958	49519	63725	62233	52555	34019	15885	-74,5%	-53,3%
Non-subject/total	37,6%	29,4%	31,7%	34,2%	40,3%	43,3%	32,3%	19,9%	8,8%		
Subject from Spain	53788	53839	52273	53576	58291	64330	73922	69222	40869	-36,5%	-41%
Subject-non subject	-3250	8951	6315	4057	-5434	2097	21367	35203	24984	+1191%	-19%
Subject/non subject	-1655%	601%	828%	1321%	-1073%	3068%	346%	197%	257%		
Imports in value: € 1,000											
Echange rate $/€	1,33	1,39	1,29	1,33	1,33	1,11	1,11	1,13			
Total M (200570)	156799	142180	147892	145974	166821	185676	193730	181189	158061	-0,7%	-12,6%
Total subject M	113914	109886	112266	108742	118908	129610	146383	151084	144127	+14,2%	-3,8%
Total non subject M	42886	32294	35626	37232	47914	56066	47347	30105	13934	-74,5%	-53,3%
Non-subject/total	37,60%	29,40%	31,70%	34,20%	40,30%	43,30%	32,30%	19,90%	8,8%		
Subject from Spain	40442	38733	40522	40283	43828	57955	66596	61258	35850	-36,5%	-41%
Subject-non subject	-2444	6439	4896	3051	-4086	1889	19249	31153	21916	+1191%	-19%
Subject/non subject	-1655%	601%	828%	1321%	-1073%	3068%	346%	197%	257%		
FOB prices from World and Spain in €/t											
Total M (200570)	2244	2178	2111	2153	2328	2397	2532	2445	2589	+8%	+5,9%
Total subject M	2010	1947	1985	1927	2016	2199	2336	2448	2516	+14,4%	+2,8%
Total non subject M	3254	3645	2639	3275	3774	3029	3420	2431	3715	+22,6%	+52,8%
Non-subject/total	+37,6%	+29,4%	+31,7%	+34,2%	+40,3%	+43,3%	+32,3%	+19,9%	+43,5%		
Subject from Spain	1793	1701	1619	1616	1597	1793	2016	2030	2147	+17,9%	+5,8%
Subject-non subject	-1461	-1944	-1020	-1659	-2177	-1236	-1404	-401	1693		
Subject/non subject	181%	214%	163%	203%	236%	169%	170%	120%	173%		

Source: USITC

Ms. Grande's error of appreciation is confirmed by the USITC's July 2018 final report: " *While nonsubject imports were generally the lowest-priced and captured market share from both the domestic industry and subject imports, subject imports had a substantially larger presence in the U.S. market than nonsubject imports throughout the period of investigation*".

It is also interesting to note that one of the four USITC Commissioners, Ms. Meredith M. Broadbent – which disassociated herself from the other three by concluding that the imports of subject olives from Spain had not caused material injury to California olive growers – also erred in stating that *"Imports from nonsubject sources, primarily from Morocco, increased in absolute terms by… percent during 2015-2017, and the market share of nonsubject imports increased from… percent in 2015 to… percent in 2017* [blanks are due to the fact that the USITC report was required not to disclose confidential data not publicly available]. *Thus, the record demonstrates that the domestic industry lost a small amount of market share to imports from nonsubject sources, but not to subject imports... Nonsubject imports, rather than subject imports, caused the slight changes in overall market share that occurred during the period of investigation*". But Table 3 above shows that non-subject imports fell by 34.1% from 2015 to 2017 compared to 6.7% for subject imports.

We also know that Spanish exporters, specifically Acorsa USA, a subsidiary of the Dcoop cooperative, are playing a double game by recently taking control of 20% of the capital of Bell-Carter, the main producer in California and initiator of the lawsuit against imports from Spain, with the objective of increasing its shareholding to 50% and finally taking control of Bell Carter, as it did for Californian olive oil Pompeian ![72]

3.2 - Changes in the area, production costs and producer prices of raw table olives

Tables 3 and 4 compare the prices paid to producers of raw table olives in California and Andalusia, in euros per tonne. In California prices depend on the size of the olive, a minimum size being required for canning, while in Spain prices depend on the variety, Hojiblanca having constituted 58% of the total in 2017-18 against 27% for Manzanilla and 11% for Gordal which, as its name suggests, represents the largest olives, hence with a higher price.

Table 4 – Producer's price of raw table olives in Spain and California, 2010-2018

	2010	2011	2012	2013	2014	2015	2016	2017	2017/15	Moyenne
Acreage, production, yield, value and price of raw table olives in Spain (Eurostat)										
1000 ha	166,01	165,76	166,68	163,80	164,38	163,41	165,65	167,00	+2,2%	165,3
1000 tonnes	515,59	467,36	400,65	483,71	434,81	540,48	511,12	505,05	-6,6%	482,3
Yield: t/ha	3106	2819	2404	2953	2645	3308	3086	3024	-8,6%	2918,1
Value in € million	280,61	198,72	206,47	229,82	242,30	431,20	394,07	386,52	-10,4%	296,2
Value in €/ha	1690	1199	1239	1403	1474	2639	2379	2314	-12,3%	1792,1
Price in €/t	544,3	425,2	515,3	475,1	557,3	797,8	771	765,3	-4,1%	606,4
Price of raw table olives of Andalusia in €/t										
Hojiblanca	350	360	410	340	410	570	570	630	+10,5%	455
Manzanilla	570	400	520	460	490	730	750	730	0%	581,3
Gordal	560	620	670	1110	1130	1020	640	620	-39,2%	796,25
Price of raw table olives of California in $/t and €/t										
Canning size	1040	1165	1150	1150	1207	1320	1354	1320	0%	1213
Limited size	378	370	334	385	419	640	751	720	+12,5%	500
Exchange rate €/$	1,33	1,39	1,29	1,33	1,33	1,11	1,11	1,13	+1,8%	
Canning size	782	838	891	865	908	1190	1220	1168	-1,8%	982,8
Limited size	284	266	259	289	315	577	677	637	+10,4%	413

Source : http://calolive.org/wp-content/uploads/COC-Annual-Report-2016-17.pdf; Eurostat; http://www.juntadeandalucia.es/agriculturaypesca/observatorio/servlet/FrontController?action=List&ec=subsector&subsector=946728&table=11030&page=1&CODTIPOESTUDIO=3

[72] https://back.dcoop.es/files/5bbe28a89f61cRev%2080%20web.pdf

It is clear that prices to olive growers in Spain are significantly lower than in California, largely due to the so-called decoupled subsidies and other additional coupled subsidies.

Even if this is also explained by the much higher production cost in California due to the low mechanisation of the harvest and the need to pay sufficient wages to the labour force, which is scarce, while the loss of market share and therefore of the income of ripe olives canneries limits their possibilities to invest in mechanisation, which would often require new plantations, as has been done for oil olives.

Since total subsidies, coupled and decoupled, to Spanish raw table olives averaged 297.4 €/t from 2015 to 2017 (section 1.7 on page 15), they represented 26.2% of the producer price of 778.5 €/t (table 4)! This average price fell by 4.1% from 2015 to 2017, when the price to his Californian colleague was 15.8% higher and increased by 7% to €901.6/t (Table 5).

Table 5 – US area, production, yield, price and value of table olives and oil olives

	2010	2011	2012	2013	2014	2015	2016	2017	2017/15	moyenne
Acreage, tonnage, yield, tonnes of roil olives and table olives										
Hectares	14569	15783	16997	16187	14973	14569	14973	14569	0	15328
Tonnes	186880	64592	145150	150593	86183	162386	149595	174452	+9,1%	139979
Yield in kg/ha	10088	1650	4531	5005	2205	4645	3944	5436	+17%	9133
Tonnes for oil	32659	38102	67132	68039	52345	91626	88632	91626	0	66270
Tonnes for table	146963	26036	77020	81012	33022	67676	59058	79197	+17%	71248
Tonnage of olives for canneries, total value and per tonne to producer, in $ and €										
Tonnes canneries	113398	24040	71214	71486	27669	54431	48988	63503	+16,7%	59341
Producer price $/t	731,9	808	896,2	896,2	853,2	985,5	948	1073,7	+8,9%	899
Producer price €/t	550,3	581,3	694,7	673,8	641,5	887,8	854,1	950,2	+7%	729
Value in $ 1,000	83000	19425	63821	64064	23607	53640	46440	68180	+27,1%	52772
Value in € 1,000	62406	13975	49474	48168	17750	48324	41838	60336	+24,9%	42784

Source: https://www.ers.usda.gov/data-products/fruit-and-tree-nut-data/fruit-and-tree-nut-yearbook-tables/

It is also known that it took 2.386 million working days for the 96,400 ha of table olives in Andalusia that produced 466,478 tonnes of olives in 2016, i.e. 24.8 days/ha (including 17.3 days/ha for harvesting) and 5.1 days/t. Even if these 24.8 days/ha are valued on the basis of the minimum monthly wage of €707.6 in 2016 and if the harvest period is between 2 and 3 months, this represents only a low income for olive growers, hence the importance of European aid for survival. Similarly, if we value the 5.1 days/t on the basis of the minimum daily wage of €21.84 in 2016, this makes only €111.6/t.

Hence also the pass-through of these producer prices of raw olives to the Spanish FOB prices to the US of ripe olives, which are generally lower than the prices of California ripe olives, as noted by the USITC in its May 2018 report: "*Prices for product imported from Spain were below those for U.S.-produced product in 37 of 48 instances, with margins of underselling ranging from 4.4 percent to 37.8 percent. In the remaining 11 instances *** prices for product from Spain were between 0.5 percent and 21.5 percent above prices for the domestic products*". This is confirmed by Tables 1 to 3 above.

IV – <u>Anti-dumping subsidies are justified</u>

For the EC " *the dumping measures appear to be inconsistent with Articles VI:1 and VI:2 of the GATT 1994, and Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement*".

According to Article VI:1 of GATT 1994, "*a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the* *ordinary course of trade, for the like product when destined for consumption in the exporting country*" and, according to article VI:2, "*In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph*".

For the EC, in order that its products be sold at their "normal value" ("fair value" for the US), "*A product is to be considered as being dumped if its export price to the Union is less than a comparable price for a like product, in the ordinary course of trade, as established for the exporting country… Decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in that regard, and costs of major inputs substantially reflect market values*"[73].

However, it is indisputable that EU agricultural prices (like those of the US) have nothing to do with "*market prices without significant State interference*" since the successive reforms of the CAP from 1992 onwards have significantly reduced intervention prices, and correlatively agricultural producer prices, by compensating them with direct aid that was first coupled and then largely decoupled. This outrageous definition of dumping has allowed developed countries, including the EU and the US, to export more and import less, to the detriment of developing countries that do not have the financial means to significantly subsidise their large numbers of farmers.

Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement are as follows:
"*3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.*

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities".

[73] Regulation n° 2016/1036 of 8 June 2016 on protection against dumped imports from countries not members of the European Union: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:176:FULL&from=EN

The analysis of the previous Tables 1 to 5 already largely meets these requirements of the Anti-dumping Agreement and respond to the EC's criticisms which need not be repeated here. Since the producer prices of raw olives are reflected in production costs and prices of ripe olives, the significantly higher level of producer prices of California's raw olives compared to Spain has reduced the competitiveness of California's ripe olives on those imported, resulting in significant losses in market shares.

For the USITC, domestic consumption of ripe table olives fell from 2015 to 2017 as well as the market shares of Californian producers, but the confidentiality of the data does not allow us to be more precise. But USITC adds that "*Domestic capacity utilization fluctuated, but increased overall from *** percent in 2015 to *** percent in 2017, as a result of fluctuating production. This relatively low level of capacity utilization suggests that U.S. producers may have substantial ability to increase production of ripe olives in response to an increase in prices*".

We will limit ourselves to reproducing large extracts from the USITC's July 2018 conclusions justifying the final imposition of anti-dumping and anti-subsidy duties: "*Other information in the record regarding lost sales provides further support for the proposition that subject imports were sold at low prices and as a result captured market share from the domestic industry. Of the 25 responding purchasers that responded to the Commission's lost sales and lost revenue survey, 13 reported that they had purchased subject imports instead of domestically produced product since 2015. Twelve of these 13 purchasers reported that subject import prices were lower than those for the domestically produced product and six of these purchasers reported that price was a primary reason for its decision to shift its purchases from the domestic like product to subject imports. Of the 24 responding purchasers, two of the largest purchasers (***) reported that U.S. producers had reduced prices ranging from 6.9 percent to 15 percent in order to compete with subject imports, 13 reported that they did not know whether U.S. producers had lowered prices to compete with subject imports, and nine reported that U.S. producers had not reduced prices in order to compete with subject imports.*

Considering all of the data in the record, we find the underselling by subject imports to be significant. As discussed above, several factors support our finding of significant underselling including: (1) the predominant underselling by subject imports on a per instance and volume basis; (2) the high degree of substitutability between the domestic like product and subject imports; (3) the importance of price in purchasing decisions; (4) the underselling by subject imports which enabled them to capture market share from domestic industry in the important retail sector; and (5) the reports of lost sales…

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"[74].

[74] https://www.usitc.gov/publications/701_731/pub4805.pdf

Conclusion

By asking the US on 28 January 2019 to open consultations at the WTO, the European Commission is rushing forward, which has the greatest chance of radically challenging the fundamentals of the CAP in force since the first reform in 1992, amplified by the so-called decoupling of direct payments since the 2003 reform. Because the Commission's arguments are not solid, it has the greatest chance of losing the panel whose request for constitution to the Dispute Settlement Body (DSB) should be made no later than 60 days later, on 29 March.

As the Commission's highest officials have rightly pointed out, the likely confirmation of the legality of US anti-dumping and anti-subsidy duties under WTO rules could extend to all CAP products. Joao Pacheco, former Deputy Director General of DG Agriculture, stated on 10 July 2018: "*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*"[75]. 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*"[76].

Because the six-month period taken by the Commission before requesting consultations at the WTO, despite pressures from Spanish producers of ripe olives, attests to the weakness of the arguments it can put forward, while claiming that its decoupled aid is in conformity with the WTO, which it had finally convinced itself of since no WTO Member had challenged it since its implementation in 2005. But it was clear that since the US had removed them from the 2014 Farm Bill, this would happen sooner or later.

This will have profound consequences in the short and long term. In the short term, this calls into question the whole reform of the CAP 2020-2027 already largely prepared, even if the Commission will obviously appeal to the DSB for its very likely condemnation by the panel, which could lead the US to quickly authorise the appointment of judges of the Appellate Body which it has blocked for two years.

On the other hand, the condemnation of decoupled aid is an opportunity to radically reform the CAP, by rebuilding agricultural incomes, as before the first reform in 1992, essentially on remunerative and stable prices ensured by variable import levies[77] for the vast majority of farmers, coupled subsidies being limited to products from regions with handicaps and not exported. This will necessarily imply higher food prices, although the promotion of short circuits should reduce the share of added value accruing to the agri-food industries and supermarkets and if the significant savings achieved by the elimination of the €35 billion of decoupled aid can be reallocated to increasing social minima, subsidising canteens and promoting agroecology.

[75] https://www.bloombergquint.com/onweb/why-do-investors-hate-everything-maybe-paranoia-jpmorgan-says
[76] *Spanish olives under US tariff attack, like steel, need protection,* http://www.eppgroup.eu/press-release/Spanish-olives-under-US-attack
[77] J. Berthelot, *Réguler les prix agricoles*, L'Harmattan 2013; ROPPA, *Osons réformer l'OMC pour un développement durable,* https://www.sol-asso.fr/wp-content/uploads/2015/12/Roppa-livret_sur_5_regles_de_l_OMC_a_changer_pour_la_souverainete_alimentaire.pdf

Lower consumption of highly processed food products is desirable for health, to reduce food waste and consumption of animal products (Afterres2050 scenario[78]) whose production cost will increase if the EU stops importing transgenic soya and maize from the Americas, which will go in the right direction to reduce greenhouse gas emissions.

This would put an end to dumping to developing countries if the French Platform Pour une autre PAC proposal to reimburse domestic subsidies for exported agricultural products is put in place[79].

It will also make it possible to propose a profound reform of the WTO Agreement on Agriculture by submitting it to a hierarchy of norms where its trade rules would be subject to respect for human, social and environmental rights[80].

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[78] https://afterres2050.solagro.org/2017/01/transparence-et-pedagogie/

[79] https://drive.google.com/file/d/1ZqtkBoUCtnw4ajBSxCIlHs0ttbi4o61-/view

[80] *Rebuilding the WTO for a sustainable global development*, SOL, 9 January 2019, https://www.sol-asso.fr/wp-content/uploads/2019/01/Rebuilding-the-WTO-for-a-sustainable-global-development-9-January-2019.pdf; *Agreement on agriculture and food*, SOL, 22 January 2019, https://www.sol-asso.fr/wp-content/uploads/2019/01/Agreement-on-Agriculture-and-Food-AoAF-SOLs-proposal-of-22-January-2019.pdf