



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

RECOURSE TO ARTICLE 22.6 OF THE DSU BY THE UNITED STATES

DECISION BY THE ARBITRATOR

Addendum

This *addendum* contains Annexes A to D to the Decision of the Arbitrator to be found in document WT/DS577/ARB.

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WORKING PROCEDURES OF THE ARBITRATOR

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ANNEX A-1

WORKING PROCEDURES OF THE ARBITRATOR

Adopted on 19 December 2024

General

1. (1) In this proceeding, the Arbitrator shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures apply.

(2) The Arbitrator reserves the right to modify these Working Procedures and adopt additional procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Arbitrator and the documents submitted to it shall be kept confidential. Members shall treat as confidential information submitted to the Arbitrator that the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Arbitrator, it shall also provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than ten days after the written submission in question is presented to the Arbitrator, unless a different due date is established by the Arbitrator upon written request of a party showing good cause.

(4) Upon request, the Arbitrator may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the substantive meeting of the Arbitrator with the parties, the European Union shall submit a communication explaining the basis for its request, including the methodology and data supporting it, in accordance with the timetable adopted by the Arbitrator.

(2) Each party shall also submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Arbitrator.

(3) The Arbitrator may invite the parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

(4) Each party is encouraged to be succinct in its submissions in the interest of prompt and efficient dispute settlement.

Preliminary rulings

4. (1) If a party considers that the Arbitrator should make a ruling before the issuance of the Decision that certain measures, claims or issues are not properly before the Arbitrator, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.
 - a. A party shall submit any such request for a preliminary ruling at the earliest possible opportunity. The other party shall submit its response to the request at a time to be determined by the Arbitrator in light of the request.
 - b. The Arbitrator may issue a preliminary ruling on the issues raised before, during or after the substantive meeting, or the Arbitrator may defer any ruling on the issues raised until it issues its Decision.
 - c. If the Arbitrator finds it appropriate to issue a preliminary ruling before the issuance of its Decision, the Arbitrator may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Decision.
- (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Arbitrator may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Arbitrator no later than during the substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for responses to questions or comments on responses provided by the other party. Additional exceptions may be granted upon a showing of good cause.
 - (2) If any new evidence has been admitted upon a showing of good cause, the Arbitrator shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Arbitrator may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.
 - (2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or the meeting (whichever occurs earlier) following the submission that contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with a submission was numbered EU-5, the first exhibit in connection with the next submission thus would be numbered EU-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate "exhibit withdrawn" or "exhibit intentionally left blank" on the cover page that contains the number of the exhibit concerned.
 - (2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.
 - (3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) Insofar as a party considers that the Arbitrator should take into account a document already submitted as an exhibit in the prior panel proceedings, it should resubmit that document as an exhibit for the purpose of this proceeding. In its list of exhibits, it should refer to the number of the original exhibit in the original panel proceeding (OP) and Article 21.5 panel proceedings (CP), if applicable (example: EU-1 (EU-21-OP)).

(5) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

Editorial Guide

8. In order to facilitate the work of the Arbitrator, each party is invited to make its submissions in accordance with the Editorial Guide (which is available in the Help & Resources section of the Disputes Online Registry Application (DORA)).

Questions

9. The Arbitrator may pose questions to the parties at any time, including:

a. Before the meeting, the Arbitrator may send written questions, or a list of topics it intends to pursue in questioning orally during the meeting. The Arbitrator may ask different or additional questions at the meeting.

b. The Arbitrator may put questions to the parties orally during the meeting, and in writing following the meeting, as provided for in paragraph 16 below.

Substantive meeting

10. The Arbitrator may open its meeting with the parties to observation by the public, subject to appropriate procedures to protect confidential information to be adopted by the Arbitrator after consulting with the parties.

11. The parties shall be present at the meeting only when invited by the Arbitrator to appear before it. As a general matter, the Arbitrator intends to conduct such meeting in person but may provide for remote participation, if needed, following consultation with the parties.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Arbitrator.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and of the submissions of the parties.

13. Each party shall provide the list of members of its delegation who will attend the meeting no later than 5:00p.m. (Geneva time) three working days before the first day of the meeting with the Arbitrator.

14. A request by a party for interpretation from one WTO working language to another should be made to the Arbitrator as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. There shall be one substantive meeting with the parties.

16. The substantive meeting of the Arbitrator with the parties shall be conducted as follows:

a. The Arbitrator shall invite the United States to make an opening statement to present its case first. Subsequently, the Arbitrator shall invite the European Union to present its opening statement. Before each party takes the floor, it shall provide the Arbitrator with a

provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters.

b. Each party should limit the duration of its opening statement to not more than 60 minutes. If either party considers that it requires more time for its opening statement, it should inform the Arbitrator and the other party at least 7 days before the meeting, together with an estimate of the expected duration of its statement. The Arbitrator will accord equal time to the other party.

c. After the conclusion of the opening statements, the Arbitrator shall give each party the opportunity to make comments or ask the other party questions.

d. The Arbitrator may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Arbitrator shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first. Before each party takes the floor, it should provide the Arbitrator and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement as delivered no later than 5:00p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting of the Arbitrator with the parties.

ii. Each party shall send in writing, within the timeframe established by the Arbitrator before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Arbitrator shall send in writing, within the timeframe established by the Arbitrator, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Arbitrator, and to any questions posed by the other party, within the timeframe established by the Arbitrator.

Descriptive part and executive summaries

17. The description of the arguments of the parties in the Decision of the Arbitrator shall consist of executive summaries provided by the parties, which shall be annexed as addenda to the Decision. These executive summaries shall not in any way serve as a substitute for the submissions of the parties in the Arbitrator's examination of the matter.

18. Each party shall submit one integrated executive summary. This integrated executive summary shall summarize the facts and arguments as presented to the Arbitrator. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Arbitrator.

19. Each integrated executive summary shall not exceed 15 pages.

Service of documents

20. The following procedures regarding service of documents apply to all documents submitted by parties during the proceeding:

a. Unless otherwise requested by the Arbitrator, the Secretary or the DS Registry, all communications with the Arbitrator shall take place via the Disputes Online Registry Application (DORA) <https://dora.wto.org>. All submissions shall be uploaded to the Documents tab by 5:00 p.m. (Geneva time) on the due dates established by the Arbitrator. The electronic version uploaded to DORA shall constitute the official version for the

purposes of submission deadlines and the record of the dispute. Upload of a document to DORA shall constitute electronic service on the Arbitrator, and the other party. Parties should upload all submissions in the Documents tab, not as attachments to messages transmitted via the Messages tab.

- b. The DS Registry is available to assist parties with DORA, including managing their DORA accounts and filing and downloading documents. The DS Registry is located in Room 2047 of the CWR building and is open from 9.30 a.m. to 12.30 p.m. and 2.30 p.m. to 5:00 p.m. The Registry can be reached by telephone or via email at DSRegistry@wto.org. A DORA User Guide for Members is available in the Help & Resources section of DORA.
- c. If a document is in a format that cannot be submitted electronically, then the party shall complete the Notice of Manual Filing (available in the Help & Resources section of DORA) and upload that Notice to DORA by 5:00 p.m. on the due date established by the Arbitrator. The party shall bring the physical document to the DS Registry by 5:00 p.m. (Geneva time) the next working day along with the documents described in subparagraph e.
- d. The parties should upload submissions in both Microsoft Word and PDF formats. To the extent possible, all documents in PDF format, including exhibits, should be searchable.
- e. Each party shall make an appointment with the DS Registry to file one paper copy of all documents it submits to the Arbitrator, including the exhibits. The DS Registry shall stamp the documents with the date and time of the submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format only. In this case, the cover page that contains the number of the exhibit concerned should indicate that the exhibit is only available in electronic format.
- f. The Arbitrator shall provide the parties with its Decision, as well as all other documents or communications issued by the Arbitrator during the proceeding, via DORA.
- g. If any party is unable to meet a deadline set by the Arbitrator because of technical difficulties in uploading any document to DORA that it cannot resolve with the assistance of the DS Registry, it shall submit the document(s) via email without delay and no later than by 6:00 p.m. on the due date. Any such email shall be addressed to the DS Registry, the Secretary, and the other party.
- h. In case any party is unable to access a document submitted via DORA because of technical difficulties, it shall promptly, upon becoming aware of the problem, inform the DS Registry, the Secretary, and the party that submitted the document, of the problem. The party that submitted the document(s) shall promptly provide an electronic version of the relevant document(s) to the affected party by email, with a copy to the DS Registry and the Secretary.

Correction of clerical errors in submissions

21. The Arbitrator may grant leave to a party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected and should be made promptly following the submission in question.

ANNEX A-2**ADDITIONAL WORKING PROCEDURES OF THE ARBITRATOR CONCERNING
BUSINESS CONFIDENTIAL INFORMATION****Adopted on 19 December 2024**

The following procedures apply to any business confidential information (BCI) submitted in the course of the proceedings under Article 22.6 of the DSU.

1. For the purposes of these proceedings, BCI includes:

- a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping and countervailing duty investigations at issue in this dispute unless the Arbitrator decides it should not be treated as BCI for purposes of these proceedings based on an objection by a party pursuant to paragraph 4 below.
- b. any other information designated as such by the party submitting it, unless the Arbitrator decides it should not be treated as BCI for purposes of these proceedings based on an objection by a party pursuant to paragraph 4 below.

2. Any information that is available in the public domain may not be designated as BCI. In addition, these procedures cease to apply to any BCI if the person that provided the information makes the information publicly available or agrees in writing to make the information publicly available.

3. If the United States intends to submit BCI from the anti-dumping and countervailing duty investigations at issue to the Arbitrator it shall, at the earliest possible date, obtain an authorizing letter from the entity that submitted the BCI and provide such authorizing letter to the Arbitrator, with a copy to the other party. If the European Union requires BCI from the anti-dumping and countervailing duty investigations at issue for the purpose of preparing its submissions or to submit that BCI to the Arbitrator, the United States shall, at the earliest possible date after being requested by the European Union, obtain an authorizing letter from the entity that submitted the BCI, provide such authorizing letter to the Arbitrator with a copy to the European Union, and provide the BCI to the European Union.

4. If a party considers that information submitted by the other party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Arbitrator and the other party, together with the reasons for the objection. Similarly, if a party considers that the other party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Arbitrator and the other party, together with the reasons for the objection. The Arbitrator, in deciding whether information subject to an objection should be treated as BCI for purposes of these proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.

5. No person may have access to BCI except an Arbitrator, member of the Secretariat assisting the Arbitrator, an employee of a party, or an outside advisor to a party for the purposes of this dispute.

6. A party having access to BCI in these proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

7. An outside advisor of a party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that

was/were the subject of the anti-dumping and countervailing duty investigations at issue in this dispute, or an officer or employee of an association of such enterprises.

8. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g., Exhibit EU-1 (BCI), Exhibit USA-1 (BCI)).

9. Documents previously submitted to or created by the investigating authority of the party complained against containing information that has been designated as confidential or business proprietary information for purposes of the anti-dumping and countervailing duty investigations at issue in this dispute, and marked as business proprietary information, or words to that effect (including headers and bracketing), that have also been designated as BCI in this dispute, shall be deemed to comply with the requirement set out in paragraph 8. When a party submits a document previously submitted to or created by the investigating authority concerned, that party shall mark on the cover of the document "This document was submitted to or created by the [name of investigating authority] and retains its original confidentiality markings."

10. Any BCI that is submitted in binary-encoded or other electronic form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded or other electronic files.

11. In the case of an oral statement containing BCI, the party making such a statement shall inform the Arbitrator before making it that the statement will contain BCI, and the Arbitrator will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Arbitrator shall be marked as provided for in paragraph 8.

12. Any person authorized to have access to BCI under the terms of these procedures shall store all documents and electronic storage media containing BCI in such a manner as to prevent unauthorized access to such information.

13. The Arbitrator will not disclose BCI, in its Decision or in any other way, to persons not authorized under these procedures to have access to BCI. The Arbitrator may, however, make statements of conclusion drawn from such information. Before the Arbitrator circulates its Decision to the Members, the Arbitrator will give each party an opportunity to review the Decision to ensure that it does not contain any information that the party has designated as BCI.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES FOR THE ARBITRATOR: OPEN MEETING

Adopted on 19 December 2024

1. The Arbitrator will start its substantive meeting with the parties (on the date of its substantive meeting provided for in its Timetable) with a session open to the public at which no confidential information shall be referred to or disclosed ("non-confidential session").
 2. At such a session, each party will be asked to make opening and closing statements which shall not include confidential information. After both parties have made their opening statements, each party will be given the opportunity to pose questions or make comments on the other party's statement, as described in paragraph 16 of the Working Procedures adopted by the Arbitrator. The Arbitrator may pose any questions or make any comments during such session. Such questions shall not include confidential information.
 3. To the extent that the Arbitrator or either of the parties considers it necessary, the Arbitrator shall proceed to a closed session ("confidential session"), during which the parties will be allowed to make additional statements or comments and pose questions that involve confidential information. The Arbitrator may also pose questions during the confidential session.
 4. During the confidential sessions referred to above, the following persons shall be admitted into the meeting room:
 - Members of the Arbitrator;
 - Members of the parties' delegations;
 - WTO Secretariat staff assisting the Arbitrator.
 5. As set out below in paragraph 6, a live closed-circuit television broadcast of the meeting to a separate viewing room in the WTO shall be used to allow other WTO Members, Observers, staff members, and registered members of the public to observe the non-confidential sessions.
 6. The viewings will be open to officials of WTO Members, Observers and staff members of the WTO Secretariat upon presentation of their official badges. Accredited journalists and representatives of relevant non-governmental organizations (NGOs) may indicate to the Secretariat (Information and External Relations Division) their interest in attending the viewing. No later than three weeks before the substantive meeting, the WTO Secretariat will place a notice on the WTO website informing the public of the non-confidential sessions. The notice shall include a link through which members of the public can register directly with the WTO. The date of the deadline for public registration will be informed to the parties as soon as it has been established.
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ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1**INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES****I. INTRODUCTION**

1. The European Union's ("EU") Methodology Paper demonstrates that, contrary to the requirements of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the level of suspension of concessions that the EU has requested is not equivalent to the level of nullification or impairment. The correct counterfactual compliance scenario for this arbitration reveals that the level of nullification or impairment is zero. Even using the EU's incorrect counterfactual compliance scenario, the level of nullification or impairment is no more than 6.15 million USD per year.

II. APPROPRIATE CALCULATION FOR NULLIFICATION OR IMPAIRMENT**A. The DSU Requires that the Proposed Level of Suspension Be Equivalent to the Level of Nullification or Impairment**

2. Pursuant to Article 22.4 of the DSU, the Dispute Settlement Body ("DSB") will not authorize the suspension of concessions or other obligations unless "the level" of suspension is "equivalent" to the level of nullification or impairment. Article 22.7 of the DSU further provides that where a matter is referred to arbitration, the arbitrator "shall determine whether the level of . . . suspension is equivalent to the level of nullification or impairment." Arbitrators in past proceedings have endeavored to rely on the best information or data that is available. In addition, while the purpose of suspension of concessions or other obligations is to induce compliance with WTO obligations, arbitrators have observed that obligations cannot be suspended in a "punitive" manner. Therefore, a determination of the level of nullification or impairment should result in a reasoned estimate.

3. In previous Article 22.6 proceedings, the arbitrator has compared the level of trade for the complaining party under the measure at issue to what the complaining party's level of trade would be expected to be where the Member concerned has brought the measure into conformity following the reasonable period of time ("RPT"), known as a counterfactual. The EU proposes the use of a counterfactual in this proceeding. In assessing a counterfactual, an Article 22.6 arbitrator should evaluate whether the Member has offered a plausible or reasonable counterfactual scenario. While the use of a counterfactual is appropriate, the correct counterfactual in this dispute requires that the Arbitrator determine that the appropriate level of nullification or impairment is zero.

B. The Appropriate Counterfactual Is Modification, Not Termination, of the Countervailing Duty Measures on Ripe Olives from Spain

4. The EU's proposed counterfactual assumes that there is no possible WTO-consistent attribution of benefits arising from the countervailable subsidies at issue. The EU's proposed counterfactual is not supported by the DSU or by the DSB recommendations in this dispute.

5. The DSB recommendations in this proceeding relate to the inconsistency of Section 771B with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. Neither the original nor the compliance panel found that the application of any attribution analysis to the types of products covered by Section 771B, including Spanish ripe olives, is WTO-inconsistent. To the contrary, both panels observed that the GATT 1994 and the SCM Agreement do not prescribe how an attribution analysis must be conducted, recognizing that Members have discretion in determining whether and to what extent the benefit of a subsidy has passed-through to the downstream product. In addition, the compliance panel rejected the EU's argument that reinterpretation of Section 771B "could not even potentially constitute 'a measure taken to comply'" with the recommendations of the DSB for purposes of Article 21.5 of the DSU.

6. Accordingly, the EU's assumption that compliance "with the DSB's recommendations and rulings by the end of the RPT" requires that "the countervailing duties should have been removed in full," goes beyond the recommendations adopted by the DSB. Rather, the correct counterfactual

compliance scenario requires only that U.S. law not direct the USDOC to allocate the entire benefit of subsidies provided to producers of raw agricultural products to downstream processors of those products based solely on the criteria contained in Section 771B, without the ability to consider other relevant factors. Such a compliance scenario does not preclude the USDOC from conducting a WTO-consistent attribution analysis and determining that benefits from upstream subsidies are attributable from Spanish raw olive producers to Spanish ripe olive processors.

7. Past arbitrators have observed that it is not for an Article 22.6 arbitrator to prejudge how a country would come into compliance when evaluating an appropriate counterfactual. Nor is it proper to speculate on which compliance scenarios are more or less likely. Rather, the Arbitrator's task is to determine whether the counterfactual scenario proposed by the EU is plausible or reasonable. Here, the EU's proposed counterfactual is not plausible or reasonable. Section 771B was enacted because the U.S. Congress was concerned that applying existing legislation to processed agricultural commodities would understate countervailable subsidies and permit circumvention of U.S. countervailing duty laws. These concerns would remain if Section 771B were eliminated without any replacement, as is suggested by the EU's counterfactual. There is no reason to believe that the U.S. government would allow this. Therefore, it is not reasonable or plausible to assume that the United States would willingly cede its ability to ever analyze attribution of subsidy benefits for a large variety of products, which the U.S. Congress has specifically identified as at a heightened risk for indirect subsidization.

8. Contrary to the EU's proposed counterfactual, compliance with the recommendations of the DSB could be achieved by amending or reinterpreting the language of Section 771B such that U.S. law no longer requires the USDOC to automatically apply the entire benefit of a subsidy to downstream processors if the two factual circumstances in Section 771B are present. Amendment or reinterpretation of Section 771B is therefore a reasonable and plausible compliance scenario.

C. Modifying the Countervailing Duty Measures on Ripe Olives from Spain Would Not Result in an Increase in the Level of Trade

9. Article 3.8 of the DSU provides for the possibility that a Member may rebut the presumption of the existence of nullification or impairment by putting forth evidence that a breach of WTO obligations does not have an adverse impact on the complaining Member. If a Member successfully rebuts the presumption, then there is no nullification or impairment even if the measure at issue continues to exist. Additionally, a Member may make such a rebuttal in the context of an arbitration under Article 22.6 of the DSU.

10. The evidence indicates that the level of trade in Spanish ripe olives exported to the United States would not have changed if the United States had complied with the relevant DSB recommendations following the expiration of the RPT, because a WTO-consistent attribution analysis would have determined that 100% of the benefits of the countervailable subsidies at issue are attributable to downstream Spanish ripe olive processors. If the USDOC were to properly determine that 100% of the benefits conferred on Spanish raw olive growers are attributable to Spanish ripe olive processors, the counterfactual countervailing duty ("CVD") rates for Spanish exporters of ripe olives would be the same as the current rates and no reduction in the level of trade in ripe olives could be expected. Therefore, the nullification or impairment to the EU would be zero.

11. The evidence suggests that it is reasonable to assume that, had the USDOC conducted a WTO-consistent attribution analysis, it would have found that 100% of the benefits of subsidies for Spanish raw olive producers are attributable to Spanish ripe olive processors. First, the two criteria contained in Section 771B are indicative of downstream attribution of subsidy benefits, even if the DSB recommendations require that they cannot be exclusively relied upon. Accordingly, the presence of these two factual circumstances in the market for Spanish ripe olives is consistent with attribution of benefits.

12. Second, the specific circumstances of the Spanish olive industry demonstrate that it is both reasonable and plausible for the Arbitrator to assume that 100% of subsidy benefits conferred on Spanish raw olive producers are attributable to Spanish olive processors. First, average prices for raw olive purchases were below average costs of production for the reference year, especially considering loss and destruction from processing. Thus, in the absence of the relevant subsidies,

Spanish processors would have had to pay higher prices to their grower suppliers to ensure that costs of production were covered.

13. In addition, much of Spain's table olive industry is structured in a way that requires and facilitates a mutuality of reliance between the Spanish growers and processors. As an example, much of Spain's table olive output is produced by "two-tiered" grower and processor cooperatives, which enable a seamless, mutually reliant line of production. This mutual reliance is apparent in purchasing trends. The support provided by the EU has allowed Spanish olive processors to purchase the vast majority of Spain's raw olive production, year over year. Thus, Spanish raw olive producers are substantially reliant on Spanish ripe olive processors to offtake their annual crop yields and Spanish processors do in fact purchase virtually all of this production. Furthermore, customs rules of origin mandate that the origin designation for table olives be the country of origin of the raw olives that comprise the table olives, providing yet another incentive for Spanish processors to purchase only Spanish raw olive inputs.

14. Accordingly, Spanish processors of table olives, being deeply reliant on a steady supply of Spanish raw olives in order to market their table olives as a Spanish product, repeatedly and consistently purchase virtually all of the Spanish raw olive crop, seemingly at prices well below the producers' cost of production, and often through two-tiered cooperative business structures. These purchases can only be sustained because of the support that Spanish olive processors received from the EU's subsidy scheme. Under such circumstances, it is both reasonable and plausible that the Arbitrator assume that 100% of the benefit of the subsidies provided to Spanish raw olive producers are attributable to Spanish ripe olive processors, resulting in a level of nullification or impairment of zero.

D. The EU's Estimation is Premised on Flawed Methodologies, Incorrect Data Inputs, and Unreasonable Assumptions

15. An examination of the economic analysis proposed by the EU to determine the level of nullification or impairment further demonstrates that the EU's requested level of suspension is not equivalent to the level of nullification or impairment. The United States generally agrees that an Armington-based partial equilibrium ("PE") model is suitable for estimating nullification or impairment in this dispute. However, the EU model differs from methodologies used in previous arbitrations by examining the global trade reallocation effects of the measure across all countries rather than focusing on the specific market directly affected by the measure – that of the United States. To the contrary, the EU model excludes from its assessment U.S. domestic producers of ripe olives. These changes introduce unnecessary complexity and distort the estimation results for the level of nullification or impairment.

1. The EU Improperly Isolates the Spanish Market in Calculating Nullification and Impairment

16. As an initial matter, the EU's proposed methodology includes an unexplained and unsupportable scoping decision. The value of 33.5 million USD identified as the level of nullification or impairment by the EU is the level of alleged nullification and impairment for the Spanish market in isolation, not the EU market. There is no basis in the DSU or the DSB recommendations in this dispute for the EU to isolate the Spanish market when calculating nullification or impairment. Accordingly, the appropriate level of nullification or impairment to the EU under the EU's proposed methodology would be the combination of measured impacts on Spain (allegedly 33.5 million USD) and impacts on the rest of the EU (allegedly -7.92 million USD), resulting in a total value of 25.58 million USD.

17. As the EU correctly observes, "[t]he level of suspension of concessions or other obligations" must be "equivalent to the level of nullification or impairment of benefits accruing to the EU." Article 22.2 of the DSU, allows a "party having invoked the dispute settlement procedures [to] request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements." Once such a request is made, "the Member concerned" may "object[] to the level of suspension proposed", which objection automatically refers the matter to arbitration. In the ensuing arbitration, "[t]he arbitrator acting pursuant to paragraph 6 . . . shall determine whether the level of such suspension is equivalent to the level of nullification or impairment."

18. Here, the EU is the only "party having invoked the dispute settlement procedures" that has requested "authorization from the DSB to suspend application . . . of concessions or other obligations under the covered agreements." When it made its Article 22.2 request, the EU was unambiguous that it was requesting to suspend concessions and other obligations in an amount equivalent to the level of nullification and impairment experienced by the EU, not one of its Member States in isolation. The United States objected to the levels of suspension of concessions or other obligations "proposed by the European Union" in its Article 22.2 request, referring the matter to arbitration. Thus, under Article 22.7 of the DSU, the Arbitrator should determine whether the level of suspension requested by the EU is equivalent to the level of nullification or impairment experienced by the EU, not by one Member State only.

19. As the EU's Methodology Paper demonstrates, the level of suspension requested by the EU is not equivalent to the level of nullification or impairment to the EU as a whole. Rather, the EU attempts to isolate its assessment of nullification or impairment to one of its Member State markets while ignoring benefits gained by other Member States. In doing so, the EU puts forth a level of suspension that is necessarily in excess of the level of nullification or impairment experienced by the EU. In addition, the EU's proposal to isolate the nullification or impairment to Spain conflicts with its "as such" request. There, the EU makes clear its intent to use its proposed "as such" formula "for every future WTO-inconsistent application by the United States of Section 771B in investigations against EU industries", not just Spanish industries. In other words, the EU would assess nullification or impairment in the case of ripe olives by looking at the impacts to Spain, alone, but would reserve its right to bring an "as such" suspension request for application of Section 771B to exports from any EU Member State. Accordingly, the Arbitrator should reject the EU's proposal to isolate the Spanish market and must instead measure nullification or impairment to the EU market as a whole.

2. The EU Introduces Unnecessary Data Requirements and Analytical Complexity

20. The EU's PE model requires data on imports of in-scope ripe olives for each of three relevant entities by source. However, ripe olives subject to the relevant CVD duties fall under a subset of the 6-digit Harmonized Tariff Schedule ("HTS") code 2005.70. Because the description for olives subject to the CVD order does not tie directly to the HTS classification system, the best available level of detail for identifying in-scope olives is at the 10-digit HTS level, making it challenging to identify subject olives in the national tariff schedules of other countries. As a result, the EU calculates the proportion of eligible olives in U.S. imports under HTS 2005.70 from each of the three entities involved and then applies these percentages to determine the imports of eligible ripe olives by source for each of the three entities.

21. The global dimension of the EU model is unnecessary, overly complex, and extraneous because the dispute concerns CVD rates on U.S. imports from Spain. In addition, the estimation of eligible imports of ripe olives for each entity is equivalent to assuming that all three entities in the model have the same percentage of imported eligible ripe olives by source. This assumption is a substantial oversimplification which distorts the analysis.

3. The EU's Methodology Improperly Excludes U.S. Domestic Olive Production

22. The EU's exclusion of domestic ripe olive production in its proposed methodology is unsupported by prior arbitrations, factually suspect, and incompatible with the rationale behind imposing anti-dumping and countervailing duties on ripe olives from Spain in the first place. The EU acknowledges that its proposal to use a two-step Armington model that ignores domestic production of the subject good is not an approach that previous arbitrators have relied upon. Indeed, since the Armington model was first accepted by an arbitrator, no arbitrator has relied on a variant of the model that would exclude domestic production. In addition, the EU's justification for excluding U.S. domestic production is unfounded. The EU argues that its model does not take into account U.S. domestic production of ripe olives because of the arguably low supply elasticity of raw olives in the United States. This characterization fails to accurately reflect the input supply conditions for the U.S. ripe olive processing industry, which includes both domestic raw olives and imported raw and provisionally preserved olives. Contrary to the EU's assertions, the supply of olive inputs available to the U.S. ripe olive processing industry can adjust quickly if warranted by changes in market conditions.

23. Thus, the U.S. domestic supply of ripe olives can be significantly more elastic than assumed by the EU and the EU's assumption that U.S. domestic supply elasticity is essentially zero is unreasonable. To the contrary, according to estimates from U.S. International Trade Commission ("USITC"), the domestic supply elasticity for ripe olives should be in the range of 4 to 6 or 3 to 6. The improper exclusion of U.S. domestic production in the EU's model serves to inflate the market shares for Spain and other foreign countries at the expense of U.S. producers and leads to an overestimation of the level of nullification or impairment, as it suggests that any reduction in imports from countries subject to trade remedy actions would only be replaced by imports from non-subject countries.

4. The EU's Methodology Ignores Relevant Anti-Dumping Duties

24. The counterfactual market shares from the first step of the EU's two-step approach fail to adequately represent actual competitiveness, as the EU's simulation only considers the relevant CVD duties and ignores accompanying antidumping ("AD") duties impacting the same products during the same time period. Spain's market share in the reference year is distorted by the fact that Spanish firms were dumping ripe olives in the U.S. market, which is not in dispute in this proceeding. However, the EU excludes the AD duties from its calculation.

25. Failing to account for the AD duties and only including the CVD duties in the first step of the EU's approach generates counterfactual market shares that inflate Spain's market share and overstate its real underlying competitiveness in 2023, leading to an inappropriately high trade impact estimate that is not equivalent to the level of nullification or impairment. Because the appropriate counterfactual is the withdrawal of the WTO-inconsistent measures at the end of the RPT (and not the withdrawal or denial of other measures), the EU model's failure to account for the relevant AD duties that applied to Spanish ripe olives during the RPT creates an inaccurate picture of the relative competitiveness of Spanish ripe olive producers. The effect of this omission is that the constructed 2023 market is fundamentally distorted and significantly overstates the level of nullification or impairment.

26. The impact of the parallel AD duties placed on ripe olives from Spain is readily apparent. The Armington model proposed by the United States reveals that the counterfactual market share for Spain in the reference year declines from 35% to 26%, nearly 10 percentage points, when the relevant AD duties are added to the existing CVD duties. This results in a substantial reduction in total nullification and impairment of roughly 4.6 million USD annually. Accordingly, it is necessary to adjust the EU's proposed methodology in order to account for the effect of both the AD and CVD duties on the counterfactual market shares of involved entities in the U.S. market. This is the only way to represent the actual market conditions faced by all involved entities in 2023.

5. Proper Application of Two-Step Armington PE Methodology to Estimate Nullification or Impairment

27. In contrast to the PE model adopted by the EU that attempts to estimate hypothetical global trade flows, the U.S. model concentrates specifically on analyzing the U.S. market where the CVD duties were applied. Moreover, the United States applies both AD and CVD duties to generate the counterfactual market shares for Spain in 2023 in the first step. It further combines the impacts of removing the WTO-inconsistent CVD duties on Spain with the impacts on the rest of the EU to estimate the appropriate level of nullification and impairment for the EU as a whole. Furthermore, the United States corrects for EU errors in compiling certain data inputs and provides corrected data inputs needed for estimating nullification and impairment.

28. The EU sets the export supply elasticity to be infinite. This assumption suggests that foreign producers of ripe olives have an unlimited supply at a constant price, are extremely flexible in production, and thus can instantly adjust their output to meet market demand without changing the price. Under the EU's assumption of an infinite supply elasticity for Spanish olives, countervailing duties will be borne in their entirety by Spanish ripe olive processors, resulting in larger estimated trade impacts from the WTO-inconsistent CVD order and improperly inflating nullification or impairment. In the current proceeding, the United States proposes to use the approach followed in recent arbitrations and assumes the export supply elasticity to be 10.

29. The EU adopts the estimates of the Armington elasticity from Fontagné et al (2022) at the HTS 6-digit level and sets the value to be 12. This value is unreasonable as it is derived from global trade flows at a highly aggregated level rather than being specifically tied to the products covered in the current proceeding and is arrived at using sources and methodologies that have been rejected in prior arbitrations. Such unreasonably high proposed estimates for the Armington elasticity serve to significantly overstate nullification or impairment. The United States adopts estimates of the Armington elasticity for ripe olives at the HTS 10-digit level from Soderbery (2015), a peer-reviewed econometric study based specifically on U.S. import data. The simple average of the available elasticities for the relevant 10-digit HTS codes is 5.1 and aligns with the range of 4 to 7 estimated by the USITC. Thus, the United States proposes that the Arbitrator adopt the value of 5.1 for use as the elasticity of substitution.

30. Like the EU, the United States uses the CVD rates from the Section 129 proceedings for its WTO-inconsistent CVD duties. However, unlike the EU, the United States adopts the AD and CVD rates for "All Others" in the two-step approach, rather than using a simple average of the Section 129 rates. The use of the "All Others" rate is consistent with the approach adopted by the arbitrator in *US – Countervailing Measures (China)* (Article 22.6 – US).

31. Applying the two-step Armington approach with all the necessary corrections, and accepting the EU's unreasonable counterfactual scenario of complete elimination of the CVD order at issue, the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent CVD measure on Spanish olives, following the expiration of the RPT, is no more than 6.15 million USD per year. To the extent that the arbitrator believes that it is necessary or appropriate to adjust the annual level of nullification or impairment for inflation, the United States proposes using the "Producer Prices for Olives for Processing, Canned" as a price index, published by the National Agricultural Statistical Services ("NASS").

III. THE EU'S REQUEST TO SUSPEND CONCESSIONS FOR PRODUCTS OTHER THAN RIPE OLIVES IS CONTRARY TO THE DSU

32. The EU requests authorization to apply its methodology to products other than ripe olives from Spain, if and when a CVD order arising from Section 771B is applied to those products. The EU's proposed methodology for assessing nullification or impairment for future applications of Section 771B suffers from the same flaws, unreasonable assumptions, and data sourcing issues as demonstrated above. In addition, the EU's proposed methodology lacks sufficient detail and flexibility to accurately and predictably measure nullification or impairment for the wide variety of goods potentially subject to Section 771B.

A. The Methodology the EU Proposes to Determine Nullification or Impairment for Products Other than Ripe Olives Is Inadequate

33. Past arbitrators have laid out criteria to assess if a prospective model is suitable to determine the level of nullification or impairment. The methodology proposed by the EU falls short of satisfying any of these criteria. First, the EU provides little detail on how such a model would operate when applied to any of the myriad products that could be subjected to Section 771B, precluding a predictable level of suspension. Second, the aforementioned lack of detail renders the EU's proposed model impractical to implement and would generate future controversies between the parties. Third, the EU provides little guidance on what data should be relied upon to run its model. By failing to propose specific sources or protocols for determining those data inputs, it is not clear that the EU's proposed model would rely upon data that is verifiable and available to both parties. Finally, the EU's proposed formula is not sufficiently generic to capture any variation in the types of products and markets potentially subject to Section 771B because the EU's approach relies on a number of key assumptions that are not reasonable in the context of ripe olives and are equally or more unsupportable when applied in general to potentially any market for processed agricultural goods. These concerns demonstrate that the approach the EU proposes would result in a level of suspension of concessions that is not equivalent to the level of nullification or impairment.

B. The EU's Request to Suspend Concessions on the Basis of a Prospective Model in this Dispute Is Contrary to the DSU

34. The methodology the EU proposes to apply overstates the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the CVD measure on ripe olives from Spain. The same would be true if that methodology were applied for products other than ripe olives from Spain. Additionally, given the data input problems in the EU approach as well as the wide and diverse range of products and markets that are potentially covered by Section 771B, the adjustments to the EU's level of suspension of concessions made using the EU's proposed methodology would increase unpredictability substantially. Indeed, the level of suspension under the EU's proposed approach could not be predicted at all. For these reasons, the EU's request for authorization to suspend concessions on the basis of a formula in this dispute is contrary to the DSU.

IV. CONCLUSION

35. The United States respectfully requests that the Arbitrator find that the level of suspension of concessions requested by the EU is in excess of the appropriate level of nullification or impairment, and that the level of nullification or impairment is **zero**. If the Arbitrator does not agree that the level of nullification or impairment is zero, the United States requests that the Arbitrator find that the level of nullification or impairment is no more than **6.15 million USD** annually. Finally, the United States respectfully requests that the Arbitrator reject the EU's proposal to suspend concessions or other obligations on the basis of a formula for future applications of Section 771B to products from the EU.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO FIRST SET OF QUESTIONS

U.S. Response to Question 3

36. The context of the ripe olives market makes clear that the existence of the two Section 771B factors is relevant for determining attribution. Raw olives destined for ripe olive production are inedible and have no utility other than as an input into ripe olive processing. Thus, raw olive farmers are completely dependent on a concentrated group of ripe olive processors in order to sell their crop. While processing is essential to convert the raw product into an edible product, the process itself is simple and adds minimal value to the raw olive fruit. Accordingly, the ripe olive market presents a clear example of a situation where downstream processors hold significant market power and can exert pricing pressure on their suppliers.

37. In addition, economists who have examined the attribution of EU agricultural subsidies in similar markets have measured the substantial attribution of subsidies. For example, a study of the impact of EU Common Agricultural Policy subsidies on French dairy supply chains found attribution of 65 percent. The French dairy market shares striking similarities to the Spanish ripe olives market. In fact, ripe olive processors have even more market power than dairy processors because of the more limited marketable end uses for raw olives compared to raw milk. Thus, the 65 percent attribution rate found for dairy processing should be a floor when compared to the ripe olives industry.

U.S. Response to Question 4

38. A prospective formula for calculating the level of nullification or impairment arising from a future use of Section 771B would require a procedure for calculating a WTO-consistent attribution rate. For a more precise, but more labor intensive, process, the Arbitrator could adopt a procedure for examining the relevant indicia for attribution of subsidy benefits, using the best evidence available, and determining a suitable value for a WTO-consistent attribution rate. In addition, some past arbitrations have sought to overcome the inherently speculative nature of estimating nullification or impairment from future applications of a WTO-inconsistent measure through the use of a proxy value. Under a proxy approach, the Arbitrator could select a proxy value for attribution of subsidy benefits for processed agricultural goods subject to Section 771B between the values of 65 and 100 percent. The EU's presumed zero-percent attribution is unreasonable and could not be used to develop a proxy attribution value.

U.S. Response to Question 5

39. The majority of the information presented by the United States regarding the Spanish olive industry is either on the record or, in certain cases, directly supported and corroborated by information in the record of the underlying CVD investigation.

U.S. Response to Question 10

40. The Arbitrator's mandate under Article 22 of the DSU is to "determine whether the level of [] suspension is equivalent to the level of nullification or impairment." The DSU is silent as to the types of information the Arbitrator may rely on to accurately calculate the level of nullification or impairment. Furthermore, past arbitrators have found that fulfillment of their mandate requires them to "rely on the best information or data that is available in pursuit of formulating [] a reasoned estimate" of the level of nullification and impairment. Thus, nothing in the DSU suggests that an Arbitrator is restricted to the administrative record of the relevant measure in formulating an appropriate, hypothetical WTO-consistent counterfactual for the purpose of measuring the level of nullification or impairment.

41. While the EU is correct that the United States bears the "overall burden" of showing that the EU's requested level of suspension is not equivalent to the level of nullification or impairment, the United States has met this burden by demonstrating that the EU's proposed counterfactual is neither reasonable nor plausible. Having met its burden, the United States also offered an alternative counterfactual, which the United States demonstrated is reasonable and plausible. Nonetheless, if the Arbitrator were to determine that the United States has not adequately substantiated its alternative counterfactual, the Arbitrator would be called upon to construct its own counterfactual that it considers would best approximate the level of nullification and impairment. In doing so, the Arbitrator would be free to use the best evidence available to it and is not bound to the existing record of the CVD measure.

U.S. Response to Question 20

42. The fact that the breach of WTO obligations at issue stems from duties imposed on imports from a specific EU Member State is not relevant to the process for measuring nullification or impairment laid out in the DSU. If the EU had imposed WTO-inconsistent duties on U.S. exports originating from a specific U.S. state, the United States could not credibly assert that nullification or impairment arising from that measure should only be calculated with respect to the impacted state, ignoring the rest of the U.S. market. The fact that the EU's sub-jurisdictions are themselves sovereign states makes no difference.

U.S. Response to Question 21

43. Parallel AD duties are different in-kind from general macroeconomic shocks such as COVID-19 and strong inflation, which are properly excluded from the model. The AD investigation is wholly parallel to the CVD investigation: they were initiated on the same date; include largely the same Spanish exporters and producers; share an identical product scope; rely on the same injury determination by the USITC; have the same final determination and order dates; and require importers to post cash deposits for each duty when entering the U.S. market. Accordingly, in terms of how they impact the U.S. market, these duties function as a single combined duty on in-scope olive imports from Spain. Thus, AD duties cannot be isolated from the CVD duties in a way that would accurately yield a measurement of nullification or impairment attributable only to the CVD duties. The proposed models cannot be accurately allocate trade damage between two functionally identical contemporaneous measures.

U.S. Response to Question 24

44. The NASS data used in the U.S. model is consistent with the scope of the CVD order and is among the best available proxies for U.S. ripe olive production. There is no evidence to support that this data includes any significant quantity of olives which should be excluded from the U.S. domestic production data.

U.S. Response to Question 25

45. A decline in domestic production could result from reduced demand, insufficient supply, or a combination of both. Therefore, it is not appropriate to infer inelastic domestic supply based solely on the decline in domestic production seen in the data.

U.S. Response to Question 27

46. The economic literature provides foreign export elasticity estimates. The simple average of the five available elasticities for the relevant products is 23.5, and the weighted average, using imports at the 10-digit HTS level in 2016 as weights, is 12.3.

U.S. Response to Question 36

47. The triggering event for the use of a prospective model to calculate nullification or impairment would be the imposition of duties pursuant to a CVD order on exports of goods from the EU that attributes 100 percent of an upstream subsidy to downstream processors of the subject agricultural products through the application of Section 771B. The suspension of concessions should not exceed the length of time during which a WTO-inconsistent CVD rate imposed pursuant to Section 771B remains in place.

U.S. Response to Question 40

48. If the Arbitrator were to determine that conjecture renders a determination of equivalence under the DSU too remote or too speculative, the Arbitrator may decline to measure nullification or impairment as it relates to the overly speculative claim. Due to the lack of information on hypothetical future CVD investigations applying Section 771B, the Arbitrator could conclude that any prospective model for calculating future nullification or impairment is overly speculative. The Arbitrator should then decline to accept any such formula or model and instead require the EU to seek authorization for countermeasures from the DSB in the future if and when Section 771B is applied to another EU product exported to the United States.

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT AT MEETING OF THE PARTIES WITH THE ARBITRATOR

49. The EU argues that Section 771B could not have been reinterpreted, amended, or replaced by the end of the RPT. On reinterpretation, the compliance panel rejected the EU's argument that reinterpretation could never constitute a compliance measure, finding only that the specific reinterpretation offered by the USDOC in the Section 129 proceeding was not sufficient to achieve compliance. On amendment or replacement, the EU offers the circular argument that because the United States has not amended or replaced Section 771B by the end of the RPT, it could not have amended or replaced Section 771B by the end of the RPT. But the fact that the United States has not complied with a DSB recommendation – a fact that is by definition present in every Article 22.6 arbitration – is not evidence that the United States cannot comply with a DSB recommendation.

50. The United States does not need to prove that 100 percent of subsidy benefits are in fact attributed to Spanish ripe olive processors to justify the use of its counterfactual. Rather, the question before the Arbitrator is as follows: is it reasonable and plausible to assume for the purpose of constructing a hypothetical counterfactual compliance scenario that the U.S. Department of Commerce ("USDOC") would have determined that 100 percent of subsidy benefits are attributable to downstream ripe olive processors through a WTO-consistent attribution analysis? The evidence presented by the United States reveals that the answer to that question is yes.

51. The EU suggests that while the supply elasticity of U.S. olive production is zero, the supply elasticity of Spanish exports of the exact same product is infinity. These elasticity parameters are not supported by any sources, including in the economic literature. They are in obvious tension with one another, even accepting the basic premise that Spanish export supply is more elastic than U.S. domestic supply. It is not credible to suggest that the process for producing a ripe olive is so rigid that domestic supply cannot react at all to meet new demand, but at the same time suggest that Spanish export supply of the same product can immediately satisfy any new demand at any scale at a fixed price.

52. A future application of Section 771B could cover virtually any processed agricultural good, and therefore presents a significant degree of variability. It is not clear how the Arbitrator could construct a formula or model that would (1) be practically useable without giving rise to further controversies between the parties, and (2) produce an estimate of nullification or impairment that satisfies the requirements of the DSU. To the extent that the Arbitrator lacks confidence that a prospective model or formula can produce a level of countermeasures that is equivalent with the level of nullification or impairment, it would not be permissible under the DSU to adopt one.

53. The EU accepts that domestic production data could be taken into account in its prospective model "if relevant and reliable data is publicly available or is made available by the US" but the EU never explains how such data could actually be incorporated into its model when the entire architecture of the model is designed to exclude U.S. domestic production. The EU also claims that its assumption of an infinite export supply elasticity for ripe olives should be applied to any product potentially subject to Section 771B, without providing any basis to assume that any processed agricultural product that could be subject to Section 771B should have an infinite export supply elasticity. Thus, the EU carries over two of its most extreme assumptions for ripe olives – an implied domestic supply elasticity of zero and an assumed export supply elasticity of infinity – and assumes without providing any evidence that these baseless values can be applied in the future to any processed agricultural good.

EXECUTIVE SUMMARY OF U.S. CLOSING STATEMENT AT MEETING OF THE PARTIES WITH THE ARBITRATOR

54. The counterfactual is only relevant to these proceedings insofar as it is a necessary input into a modeling approach that both the EU and the United States have offered. The EU improperly conflates the requirements for an investigating authority to conduct a WTO-consistent attribution analysis with the task before the Arbitrator, which is to craft a reasonable and plausible counterfactual to serve as an input into a model. Accordingly, neither the United States nor the Arbitrator is required to replicate a WTO-consistent attribution analysis that would be carried out by an investigating authority. Rather, the only thing that the Arbitrator must determine is whether the counterfactuals presented by the parties are reasonable and plausible based on the best evidence that is available.

55. While the initial burden in this proceeding may be on the United States as the objecting party, it is fundamental to any adjudicatory system for a party to put forth evidence to support the factual assertions it makes. To fulfil its mandate, the Arbitrator must use the best evidence available to it. In multiple instances in this proceeding, including for the counterfactual, domestic supply, and export supply elasticity, the United States has provided evidence while the EU has provided none. Accordingly, the Arbitrator should rely on the information provided by the United States.

56. If the Arbitrator lacks confidence that a prospective approach can produce an accurate estimate of the level of nullification or impairment in the case of any future application of Section 771B, it must decline to adopt that approach. In such event, the EU would not be left without a remedy. If Section 771B were applied in the future to an EU product, the EU could seek authorization to suspend concessions at that time. If the United States considered the request to be excessive, the parties could have recourse to limited arbitration to determine the appropriate level with accuracy.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO SECOND SET OF QUESTIONS

U.S. Response to Question 43

57. The EU's position is that if a law is "as such" WTO-inconsistent, then a hypothetical compliance counterfactual can only consist of a situation in which the Member involved remedies the application of the law, but not a situation in which the Member brings the law into compliance with the relevant DSB recommendations. This argument is not supported by the DSU or the specific DSB recommendations in this dispute. First, both the original panel and the compliance panel were clear that the "as applied" breach in this dispute emanates from, and is dependent on, the finding that Section 771B is "as such" inconsistent with the relevant WTO agreements. Second, past arbitrators have found, it is not appropriate for an Article 22.6 arbitrator to prejudge how a Member would choose to come into compliance when constructing an appropriate counterfactual. Rather, the task

of the Arbitrator is to determine whether the counterfactual before it is reasonable and plausible. Accordingly, a counterfactual in which the United States reinterprets, amends, or replaces Section 771B, thereby addressing the root "as such" inconsistency as well as any consequential "as applied" inconsistencies, is both reasonable and plausible. While removal of WTO-inconsistent CVD orders would eliminate any nullification or impairment arising from the breach, it would nonetheless leave the "as such" WTO-inconsistency found by the panel in place and the United States would continue to be non-compliant with the DSB recommendations in that regard. Thus, the EU's proposed hypothetical compliance counterfactual prevents the United States from taking the very compliance actions that the EU seeks.

U.S. Response to Question 53

58. The AD duties in this dispute are contemporaneous with the CVD duties and the "all others" AD rate is significantly higher than the "all others" CVD rate. Thus, if the CVD duties are found to create a trade impact, then the contemporaneous and higher AD duties necessarily would also impact trade in the same good.

U.S. Response to Question 58

59. There is ample empirical evidence in the relevant economic literature demonstrating that Armington elasticities could vary significantly across importing countries. The U.S. model uses Armington elasticity estimates derived using U.S. imports and tied directly to the in-scope products while the estimates relied upon by the EU are based on global trade flows at a higher HTS aggregation level, and vary across products but not across countries.

U.S. Response to Question 59

60. The EU assumes that the share of in-scope imports in total ripe olive imports in the United States is representative of this share in other import markets. Empirical evidence demonstrates that the EU's assumption is not reasonable. Production and consumption patterns for ripe olives in the United States versus the EU and ROW are not the same.

U.S. Response to Question 60

61. The HTS codes used in the U.S. model (which are also used by the EU) are the best available proxy for in-scope products subject to the CVD order. Likewise, the domestic production data supplied by the United States is the best available proxy for U.S. domestic production that would be subject to the CVD order. There is no reason to expect two proxies, even two extremely reliable proxies, to be completely aligned with one another in a modeling exercise. Nor is it necessary for two proxy values used as inputs to be aligned with one another for a model to produce a reasoned result.

U.S. Response to Question 73

62. Because Section 771B's requirement to automatically attribute the entirety of upstream subsidy benefits is core to the DSB recommendations in this dispute, any CVD order issued where the USDOC did not apply Section 771B in this manner might not be subject to the DSB recommendations. Rather, there would be a genuine question as to whether such an order contravenes the covered agreements that would need to be settled before the EU could suspend concessions under the DSU. The DSU does not allow an Article 22.6 arbitrator to adopt an "as such" model that could automatically authorize suspension of concessions for a measure that may not be subject to DSB recommendations. Accordingly, the Arbitrator must decline to adopt an "as such" model that could encompass measures that are not subject to the DSB recommendations in this dispute, including orders that do not automatically attribute the entirety of the subsidy benefit to downstream processors of agricultural products.

U.S. Response to Question 75

63. The DSU does not discuss prospective formulae or "as such" models. The DSU contains its own system for arriving at the appropriate level of countermeasures for a specific WTO-inconsistent measure: limited and expedited arbitration. In this way, any future WTO-inconsistent CVD order

issued under Section 771B could be individually analyzed and the level of suspension could, consistent with the requirements of the DSU, be definitively and accurately determined.

U.S. Response to Question 78

64. The DSU provides express limitations on the suspension of concessions or other obligations. Thus, the DSU contemplates that suspension of concessions or other obligations within the bounds of the limitations laid out in the DSU are sufficient and appropriate to achieve the goal of inducing compliance. Any additional action by Members above and beyond such suspension might be described as "punitive." Under the DSU, the role of an Article 22.6 arbitrator is limited to determining "whether the level of [] suspension is equivalent to the level of nullification or impairment." In this way, the arbitrator is tasked with ensuring the requirement of Article 22.4 of the DSU that the level of suspension "shall be equivalent to the level of nullification or impairment." Any action or consideration by an Article 22.6 arbitrator that amplifies the level of suspension beyond what is equivalent to the level of nullification or impairment, whether to apply pressure to induce compliance by the Member involved or to achieve some other goal, would be inconsistent with the express requirements of the DSU.

ANNEX B-2**INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION****I. Introduction**

1. The United States ("US") has not brought Section 771B of the Tariff Act of 1930 ("Section 771B") and its application in the ripe olives CVD investigation into compliance with its WTO obligations.
2. Therefore, the European Union ("EU") requested authorization to suspend concessions or other obligations at an annual level of 30.1 million USD in view of the "as applied" violation.
3. The requested amount of suspension is equivalent to the level of nullification or impairment resulting from the United States' failure to comply with the findings of the panels.
4. The European Union also requested authorization to suspend in case of possible nullification or impairment the EU would suffer if the "as such" violation continued to exist and Section 771B was applied to other exports from the EU in the future.

II. Counterfactual*A. Counterfactual for the "as applied" inconsistency regarding ripe olives*

5. Previous arbitrations have defined a counterfactual scenario as a hypothetical scenario that describes what would have happened in terms of trade flows had the responding party implemented the DSB recommendations and rulings by the end of the RPT. The counterfactual serves as a basis to calculate the value by which Spanish imports of ripe olives would have increased had the United States implemented the DSB recommendations and rulings by the end of the RPT.
6. The EU's counterfactual scenario assumes that implementing the DSB recommendations and rulings requires removing the WTO-inconsistent duties imposed on ripe olive producers in full and the termination of the CVD duties.
7. The counterfactual proposed by the EU is not only "reasonable and plausible" as required under the case law but it is in fact the only legally possible counterfactual in light of the panels' findings in *US – Ripe Olives from Spain*.
8. Both the original panel and the compliance panel in *US – Ripe Olives from Spain* established that Section 771B is "as such" inconsistent "by operation of the law itself". Both panels found that Section 771B only permits the USDOC to take into account two factually limited circumstances and does not allow the USDOC to consider other elements that are relevant for pass-through. Section 771B *presumes* the existence and the 100% degree of pass-through in violation of WTO rules according to which pass-through benefit must be *established* by the investigating authority. Both panels held that Section 771B "requires" or "directs" the USDOC to act inconsistently whenever it applies Section 771B.
9. In light of the fact that by the end of the RPT Section 771B remained unchanged and hence the application of Section 771B would result in the inconsistency of the pass-through analysis in its entirety, the only way for the US to comply in the "as applied" counterfactual is to apply a value of zero for pass-through benefit. Since pass-through benefit amounts to 95% of the total subsidy amount for the three ripe olive producers, the subsidy margins become *de minimis* (below 1%) for each of the three producers.
10. According to the US, the "as applied" counterfactual should take into account a possible re-interpretation, amendment or repeal of Section 771B – i.e. a counterfactual compliance with the "as such" inconsistency – that would allow the USDOC to carry out a WTO-consistent pass-through analysis.

11. However, the EU does not request nullification or impairment for the "as such" inconsistency as regards ripe olives. The EU requests nullification or impairment for the "as applied" inconsistency. The "as applied" and "as such" inconsistencies are different violations with different legal requirements. Importantly, "as such" inconsistencies are relevant to prevent *future* violations of WTO rules whereas "as applied" inconsistencies concern past or ongoing violations. Therefore, logically, no counterfactual can be constructed for an "as such" violation (which prevents future violations) when nullification or impairment is sought for a past "as applied" violation, as is the case for ripe olives. In addition, the US is in fact asking for two separate counterfactuals (one for the "as applied" inconsistency, one for the "as such" inconsistency) for nullification or impairment based only on the "as applied" violation. There is no justification for such a "double" counterfactual and the US provides none. Nor was such a "double counterfactual" adopted in previous arbitrations, notably in *US – Washing Machines*.
12. The US further argues that the EU's counterfactual of zero pass-through and CVD duty termination for ripe olives would be "punitive" because it cannot be assumed that the USDOC would give up addressing pass-through benefit for agricultural products. The US proposes a counterfactual where the two factual circumstances of Section 771B would be applied and, in addition, the arbitrator would take into account certain market information on the specificities of the Spanish olives market provided by the US in its written submission. According to the US, from this information it can be inferred that 100% of pass-through benefit would pass through from olive growers to ripe olive producers.
13. The market information submitted by the US is based on an internet search and only contains generic and publicly available information. It contains no company specific information e.g. on prices, nor does it assess the competitive conditions in the Spanish olive market. The market information is entirely unsuited for a pass-through analysis.
14. The consideration of this information prepared specifically by the US for the arbitration proceedings, much of which is not part of the record of the ripe olive investigation, would also amount to a *de novo* consideration of new evidence by the Arbitrator and exceed the Arbitrator's mandate.
15. The proposed US counterfactual would also be WTO-inconsistent – which is expressly acknowledged by the US in these proceedings - because it would be based on an "inference" of pass-through based on the very limited and generic "market information" in combination with the two elements in Section 771B. Case law has established that an inconsistent WTO counterfactual is not "reasonable or plausible".
16. The two elements in section 771B in combination with the "market information" presented by the US would presume pass-through, they do not "establish" the existence or degree of pass-through in compliance with WTO rules. The US suggests that the Arbitrator may nevertheless consider this "market information" for the counterfactual (the USDOC cannot do so because it is limited to the two elements in Section 771B). However, the Arbitrator cannot act as investigating authority and cannot act in a manner that is WTO inconsistent when constructing a counterfactual. In addition, the US fails to explain why the Arbitrator should be legally permitted to consider elements beyond the two circumstances in Section 771B whereas the USDOC legally cannot do so. It is the task of the WTO Member to comply (in this case by amending Section 771B), not the task of the Arbitrator to help a Member circumventing that Member's obligation to comply.

B. Counterfactual for the future applications of Section 771B (prospective model)

17. The EU's proposed counterfactual for future applications of Section 771B is essentially the same as for the "as applied" counterfactual in ripe olives. Also in future applications of Section 771B the nullification or impairment will be based on the "as applied" inconsistency, not on the "as such" inconsistency. When the USDOC applies Section 771B in the future in a given case, its pass-through analysis will necessarily be inconsistent in its entirety (because Section 771B "requires" the USDOC to act inconsistently) and hence the amount of pass-through benefit will be zero in a counterfactual under the prospective model. Like in the case

of ripe olives, the only way to comply for the US is not to find any pass-through benefit regarding future applications of Section 771B.

18. The zero pass-through proxy value can lead to two outcomes for future applications of Section 771B. It can either result in the termination of the CVD order(s) concerned in the event that the subsidy margin becomes *de minimis* without the pass-through benefit (like for ripe olives). Or it can lead to a reduction of the CVD rate(s) (e.g. from 15% to 3%) where the absence of pass-through benefit does not result in a *de minimis* rate.
19. The EU proposes that the US provides the necessary data to the EU to calculate the effect of the absence of pass-through benefit on the respective CVD rate(s) in the first place, or otherwise that the EU attempts to obtain the necessary data from the affected EU exporters. In the event that the data cannot be obtained by the EU, the EU proposes that the default should be CVD duty termination because subsidies in the field of agriculture are generally granted to the farmers (e.g. olive growers), not to processing companies which means that subsidies attributed to processing companies will be overwhelmingly based on pass-through subsidies. This assumption is supported by the two cases in which Section 771B came before WTO adjudicators. In *US – Canadian Pork*, the pass-through benefit amounted to 99% of the total amount of subsidies, in *US – Ripe Olives from Spain*, the pass-through benefit amounted to 95% of the total amount of subsidies, in each case resulting in *de minimis* CVD rates.
20. The US argues that the proxy value of zero for pass-through benefit in the EU counterfactual for future applications of Section 771B would be "punitive" and proposes to apply a minimum pass-through rate of 65% based on a study concerning the French dairy market.
21. The US proposal is to be rejected. The US counterfactual would be WTO-inconsistent because it would be based on the two elements enumerated in Section 771B and an inference of a 65% pass-through rate. Therefore, the US counterfactual would be based on a presumption of the existence and degree of pass-through which runs afoul of WTO rules. Furthermore, the US does not explain how a 65% pass-through rate could be considered in application of Section 771B in a counterfactual, either by the US or by the Arbitrator, when the two panel reports in *US – Ripe Olives from Spain* found that Section 771B does not permit the consideration of other elements and can only lead to a 100% degree of pass-through (i.e. not 65%). The consideration of the dairy study, which is also entirely unsuited for most agricultural products covered by Section 771B as it covers only products from livestock, would amount to a *de novo* consideration of evidence by the Arbitrator.

III. Parties' economic models for the as applied inconsistency

22. The requested authorization to suspend concessions or other obligations at an annual level of 30.1 million USD, to be adjusted for inflation, is equivalent to the level of nullification or impairment resulting from the US failure to comply with the "as applied" findings of the panels. It corresponds to the value of additional trade the EU could have expected had the US removed the WTO-inconsistent CVDs on imports of ripe olives from Spain by the end of the reasonable period of time.
23. To calculate this nullification or impairment, the European Union proceeded in five steps: (1) It determined the actual market share of Spanish imports in the baseline year of 2016. (2) It simulated the impact of the CVDs on this 2016 market share. (3) It applied this hypothetical 2016 market share to the total US imports in 2023 to determine hypothetical 2023 imports from Spain with the CVDs in place. (4) It simulated the trade flow in 2023 for Spanish imports with the CVDs removed. (5) It established the additional trade flow for Spanish imports in 2023 with CVDs removed. This additional trade flow amounts to 30.1 million USD, which constitutes the nullification or impairment for the "as applied" case.
24. Steps 2 and 4 require simulating the trade effects of the WTO-inconsistent CVDs with a partial equilibrium model. Such a double application of a partial equilibrium model corresponds to the approach of previous Article 22.6 DSU arbitrations. The partial equilibrium model quantifies the impact of the price change resulting from the CVDs on trade flows. It consists of four basic equations defined by Balisteri and Rutherford (2013).

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25. The US allegation that the EU economic model is premised on *flawed methodologies* is without merit.
 26. Contrary to what the US claims, the EU does not improperly isolate the Spanish market.
 27. In particular, Article 3.8 and Article 22.6 of the DSU underline that nullification or impairment is linked to a breach of the rules, which in this case stems from the WTO-inconsistent duties imposed on imports from Spain. The US could have opened an investigation against ripe olives importers from the entire European Union, but deliberately decided to narrow its case to Spanish ripe olives. That choice must determine not only the scope of the measures at issue but also impact the subsidization and injury determinations. Therefore, any alleged gains by other exporting EU Member States are immaterial.
 28. The US proposal would disregard the fact that the relevant trade flows affected by the CVD duties are those from Spain, in line with the US determination. It is normal that companies in other countries react to such duties and may "take over" the market shares of the companies affected by the duties. This does not change the fact that the relevant trade flows (here from Spain) would be adversely impacted. The US proposal of "offsetting" would therefore lead to an artificial reduction of the EU's nullification or impairment and would run counter the objective of "inducing compliance".
 29. The US argument also disregards the fact that both Spain and the EU are WTO Members in their own right. The US likens the situation in the present case to a situation where losses for producers in a US State would have to be offset against gains by producers in another US State. However, contrary to Spain, a US State is not a WTO Member in its own right. The US does not dispute that Spain is a WTO Member and that offsetting for nullification or impairment takes place within the borders of a WTO State (e.g. within the US). Therefore, any offsetting in the present case can only take place within the borders of Spain.
 30. Under the US position, the EU Member States would be at a serious disadvantage vis à vis other WTO Members because they would have to offset losses and gains with up to 26 other EU Member States. The US position would also be entirely formalistic. The fact that the EU, under its political structure, brings the case on behalf of Spain and requests the suspension of concessions or other obligations due to the nullification or impairment accruing to the EU, does not change the fact that the US investigation concerned only Spain and that all relevant data concern the Spanish market. The US claims that the EU focuses "on the wrong market" for nullification or impairment (i.e. Spain). However, the Spanish market is the only market for which data exist under the US investigation and the US itself focuses on the Spanish market in its submission. The US argument is therefore contradictory and has no merit.
 31. The US errs when it claims that the EU model incorrectly includes global trade reallocation across Spain, the Rest of EU and Rest of the World and introduces unnecessary analytical complexity.
 32. The EU assumption that the share of in-scope imports in total ripe olive imports (HS 200570) in the US is representative of this share in other import markets is plausible and reasonable. The EU model rightly focusses on import demand and export supply, including all bilateral trade between all importers and exporters in the world, because this is the most accurate possible representation of the relevant ripe olive trade and it is necessary to fully quantify the full re-allocation of trade following the imposition of a tariff.
 33. The EU model correctly excludes US domestic production of ripe olives from its analysis.
 34. Contrary to the situation in *US – Washing Machines* or *US – Anti-Dumping Methodologies* which concerned manufacturing products with a high domestic production elasticity, the domestic production of ripe olives in the United States is inelastic. Including domestic production in the model would produce distorted results that are far away from reality. Given the model set-up and its equations, the model would automatically simulate an increase of domestic production in reaction to the CVDs (as the US model does). At the same time, actual data shows that domestic production of ripe olives decreased between 2016 and 2023 despite the duties.

35. In addition, there is no reliable data on relevant domestic production. The NASS production data presented by the US does not correspond to the trade data, i.e. HTSUS codes fully covered by the measures. Therefore, the US claim that it is an appropriate "proxy" is wrong.
36. Finally, the EU model by focusing on imports already "discounts" for the part of US demand that is met by domestic production because the part of domestic consumption not served by imports is met by domestic production. The EU model therefore implicitly considers the part of the US demand that is met by domestic producers.
37. The US proposes to "adjust" the EU model to account for the effect of both the AD duties and CVDs on the counterfactual market shares. Such proposed "adjustment" must be rejected.
38. Such adjustment would go against the purpose of the PE model which is to simulate the effects of the CVDs only, and not of other factors such as COVID-19, inflation or parallel anti-dumping duties. Combining the effect of CVDs and anti-dumping duties in the model would only make sense if one wanted to simulate the effects of both the CVDs and the anti-dumping duties together. Treating both as a "single combined duty" would result in an artificial reduction of the level of nullification or impairment.
39. Incorporating parallel anti-dumping duties was already rejected by the arbitrator in *US – Countervailing Measures* because their mere existence did not demonstrate whether or how they affect the nullification or impairment resulting from the CVDs at issue. The United States has not shown more than the existence of the parallel anti-dumping duties.
40. The US also erroneously suggested that the EU used *incorrect data inputs or unreasonable assumptions*.
41. Only concerning price elasticity of demand, the US agrees with the EU that the value should be set at 1.
42. As regards the elasticity of substitution (Armington elasticity), the EU set the value, based on estimates by Fontagné et al (2022) at 13.3.
43. The US suggests a lower value based on a study by Soderbery (2015). The EU considers the underlying estimates in that study unreliable. First, the study comes to very diverging estimates for very similar products without any plausible explanation. Secondly, the study acknowledges that its estimates suffer from bias regardless of method. A subsequent study, Soderbery (2018), does not provide reliable estimates of export supply elasticity, either. This results, inter alia, from its reliance on prices (unit values) to estimate import demand and supply elasticities, which is prone to measurement errors.
44. Concerning export supply elasticity, the US claims that the value for export supply elasticity set by the EU (infinite, i.e. 99) is too high. The US proposes a lower value of 10 which has been used for manufacturing goods in the past.
45. The European Union considers that, in the absence of reliable estimates for export supply elasticity for agricultural goods, it is more reasonable to set it to infinite than applying values developed for manufactured goods. Contrary to an argument by the US, assuming an infinite export supply elasticity for Mediterranean countries (i.e. Spain, relevant other EU and rest-of-the-world) is not contradicted by the constraints of US domestic production. Compared to the US, these countries have a much higher ability to increase exports and reallocate them to the US and the export supply elasticity represents this high export propensity.

IV. Parties' economic models for the as such inconsistency

46. The EU also requests the authorization to suspend in case of possible nullification or impairment it would suffer if the "as such" violation continued to exist and Section 771B was applied to other imports from the EU in the future. The *methodology* for calculating the level of nullification and impairment would be similar to the one used for the "as applied" inconsistency, with certain adaptations.

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47. The right to suspend would be triggered by future application by the United States of Section 771B in investigations against EU industries leading to the application of CVDs. The two parties largely agree on the triggering event. However, the EU emphasizes that the triggering event would be the imposition of CVD duties in line with the previous arbitration in *US – Calendered Paper*, not the "actual application" of CVD duties as proposed by the US.
 48. The calculation of the nullification or impairment would involve the following steps. Once CVDs based on the application of Section 771B are in place, the EU would simulate their impact on the relevant EU exports, based on the baseline year, i.e. the year before imposition of the duties. This simulation via the PE model would yield a hypothetical value for the EU exports after the imposition of the duties. Then, the hypothetical value of exports simulated via the model would be subtracted from the actual value of EU exports in the year before the imposition of the duties. This would be the level of nullification or impairment. As the reasonable period of time already expired in January 2023, the simulation via the PE model would only need to be performed once, corresponding to step 2 in the calculation for the "as applied" inconsistency. There would be no need for a double application of the model.
 49. The simulation needed for the calculation of the nullification or impairment arising from the "as such" inconsistency can be based on the same PE model as the one proposed for the "as applied" case.
 50. As for the "as applied" inconsistency, running the model to calculate the level of nullification or impairment arising from future applications of Section 771B also requires certain data inputs. The European Union considers that such data based on factual and verifiable information is available to both parties.
 51. The values of demand and substitution elasticity can be obtained from the same sources, i.e. the studies of Kee et al. (2008) and of Fontagné et al. (2022). If there are reliable estimates for the export supply elasticity of the relevant product, the European Union will use these. Otherwise, it would be reasonable to set the value of export supply elasticity at infinite, like in the case of ripe olives, since future CVDs applying Section 771B can be expected to target processed EU products exported in significant numbers to the US.
 52. Trade flow data will be obtained from sources that include all the trade flows available (full matrix) at the most disaggregate level of national classification available (tariff line level). Any future WTO-inconsistent CVD order applying Section 771B would identify the relevant codes for those products according to the USHTS classification. The EU would use the USHTS codes listed in the CVD order. The EU recognises the possibility that not all the exporters of a specific USHTS tariff line would be covered by the measures at issue but does not see any reliable alternative to using the USHTS codes as listed in the respective CVD order. The EU notes that the arbitrator in *US – Supercalendered paper (Article 22.6 DSU)* followed the same approach of using the USHTS codes listed in the CVD order to identify relevant imports in searches of US customs data.
 53. The rate of future CVDs will be set by the United States.
 54. As publicly available data sources for US domestic production of agricultural products do not classify at the level of aggregation that can be correctly matched to the corresponding trade flows at tariff level (HTSUS 10 digit), the prospective model should exclude domestic production and focus on reallocation among third countries – as in the case of ripe olives.
 55. Concerning the duration, the EU requests authorization to suspend concessions as long as a CVD based on Section 771B is in place, i.e. for the duration of the measure.
 56. The US also argues that the EU prospective model fails to meet the *four legal requirements* for prospective models set out by the Arbitrator in *US – Washing Machines (Korea)(Article 22.6 – US)*. These allegations are unfounded.
 57. First, the calculation results in a predictable level of suspension. The EU Methodology Paper clearly sets out that the same partial equilibrium model as the one used for ripe olives will be used. The calculation of the level of nullification and impairment will depend only on the

values of the relevant trade flows, the elasticities and the duties. Knowing this input, the calculations will be fully predictable.

58. Second, the method is practical to implement and limits the risk of potential controversies between the parties. The EU set out the approach in sufficient detail. It specified the model, the steps of the calculation, the necessary inputs, all on the basis of sound economic theory. With regard to the product scope, future CVD orders would concern specific US import flows reported according to well-known USHTS codes.
59. Third, the data relied on is verifiable and available to both parties. As stated above, this applies to the values of demand, substitution and export supply elasticity, the trade flow data and the rate of future CVDs.
60. Fourth, the method is sufficiently generic to capture any variation in the types of products and markets. All elements of the EU calculation can be applied to any raw agricultural product that falls within the scope of Section 771B. Data on trade flows and elasticities are available for any agricultural traded product.

V. Conclusion

61. The European Union requests the Arbitrator to reject the US objection to the level of the proposed suspension and to determine that the level of suspension proposed by the European Union is equivalent to the level of nullification or impairment of benefits accruing to the European Union.
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ANNEX C

COMPUTER CODES AND DATA INPUTS

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ANNEX C-1**GENERAL ALGEBRAIC MODELING SYSTEM (GAMS) CODE TO IMPLEMENT THE ARBITRATOR'S ECONOMIC MODEL FOR RIPE OLIVES**

**To run the code, press F9 or select "File/Run". The value of nullification or impairment is written in the results file as "NI".*

** To calculate the adjusted level of NI when duty rates are modified, replace the value of the parameter t1_cvd for Spain with the modified value of the single representative actual CVD rate.*

** If the modified value of the single representative counterfactual CVD rate is different from zero, replace also the value of t1('S') in STEP 2 with the modified value.*

Set

```
i  suppliers      /D  Domestic,
                   S   Spain,
                   OEU  Other European Union member States,
                   ROW  Rest of the world
                   /;
```

** STEP 1 SIMULATION **

Parameter

```
epsilon  Price elasticity of demand      /-1/
sigma    Armington elasticity of substitution /8/
eta(i)   Price elasticity of supply      /D 4.5, S 12.8, OEU 12.8, ROW 12.8/
m(i)     Initial supplier(i)'s market share /D 0.37, S 0.47, OEU 0.05, ROW 0.11/
Y0       Initial total market value in USD 1000 /149311/
t0(i)    Step 1 initial duty rate        /D 0.0, S 0.0, OEU 0.0, ROW 0.0/
t1_add(i) Step 1 ADD rate                /D 0.0, S 0.0686, OEU 0.0, ROW 0.0/
t1_cvd(i) Step 1 CVD rate                /D 0.0, S 0.1108, OEU 0.0, ROW 0.0/
t1(i)    Step 1 counterfactual duty rate
a(i)     Supply parameter;
```

** Calculate initial supply parameters*

$a(i) = Y0 * m(i) * (1 + t0(i)) ** eta(i);$

** Calculate the total counterfactual duty rate*

$t1(i) = t1_add(i) + t1_cvd(i);$

** Solve model under Step 1*

Positive Variable

```
p(i)      Price
p0(i)     Price (initial)
PP        Aggregate price index
PP0       Aggregate price index (initial)
Q         Quantity
Q0        Quantity (initial)
qD(i)     Quantity demanded
qD0(i)    Quantity demanded (initial)
qS(i)     Quantity supplied;
```

Variable

Util Utility variable;

** Equations for Step 1*

Equations

eqnPP Aggregate price index equation
 eqnQ Quantity equation
 eqnqD(i) Demand equations
 eqnqS(i) Supply equations
 CLEAR(i) Market clearing condition
 OBJ Utility function;

eqnPP.. PP =E= (SUM(i, m(i) * p(i) ** (1 - sigma))) ** (1 / (1 - sigma));
 eqnQ.. Q =E= Y0 * PP ** epsilon;
 eqnqD(i).. qD(i) =E= Q * m(i) * (PP / p(i)) ** sigma;
 eqnqS(i).. qS(i) =E= a(i) * (p(i) / (1 + t1(i))) ** eta(i);
 CLEAR(i).. qD(i) =E= qS(i);
 OBJ.. Util =E= (SUM(i, m(i) * qD(i) ** ((sigma - 1) / sigma))) ** (sigma / (sigma - 1));

p0.l(i) = 1;
 p.l(i) = p0.l(i);
 PP0.l = 1;
 PP.l = PP0.l;
 Q0.l = Y0;
 Q.l = Q0.l;
 qD0.l(i) = m(i) * Y0;
 qD.l(i) = qD0.l(i);
 qS.l(i) = a(i);

Model ARM1 /eqnPP, eqnQ, eqnqD, eqnqS, CLEAR, OBJ/;

Solve ARM1 maximizing Util using nlp;

** Save results from Step 1 for use in Step 2*

Parameter

p1(i) Prices from Step 1
 qD1(i) Quantity demanded from Step 1
 qS1(i) Quantity supplied from Step 1
 PP1 Price index from Step 1
 Q1 Total output from Step 1;

p1(i) = p.l(i);
 qD1(i) = qD.l(i);
 qS1(i) = qS.l(i);
 PP1 = PP.l;
 Q1 = Q.l;

** STEP 2 SIMULATION **

** Update parameters*

**** Total market value in 2023, in USD 1000**
 Y0 = 108026;

**** Calculate new market shares based on quantities from Step 1**
 Scalar Total_value_step1;
 Total_value_step1 = SUM(i, qD1(i)*p1(i));

$m(i) = (qD1(i) * p1(i)) / \text{Total_value_step1};$

*** Step 2 initial duty rate for Spain is the CVD rate*
 $t0('S') = t1_cvd('S');$

*** Step 2 counterfactual WTO-consistent CVD rate*
 $t1('S') = 0.0;$

** Calculate initial supply parameters*
 $a(i) = Y0 * m(i) * (1 + t0(i)) ** \text{eta}(i);$

** Solve model under Step 2*

Positive Variable

p2b(i) Price in Step 2
 p2a(i) Price (initial) in Step 2
 PP2b Aggregate price index in Step 2
 PP2a Aggregate price index (initial) in Step 2
 Q2b Quantity in Step 2
 Q2a Quantity (initial) in Step 2
 qD2b(i) Quantity demanded in Step 2
 qD2a(i) Quantity demanded (initial) in Step 2
 qS2(i) Quantity supplied in Step 2;

Variable

Util2 Objective function in Step 2;

Equations

eqnPP2 Aggregate price index price equation in Step 2
 eqnQ2 Quantity equation in Step 2
 eqnqD2(i) Demand equations in Step 2
 eqnqS2(i) Supply equations in Step 2
 CLEAR2(i) Market clearing condition in Step 2
 OBJ2 Utility function in Step 2;

eqnPP2.. PP2b =E= (SUM(i, m(i) * p2b(i) ** (1 - sigma))) ** (1 / (1 - sigma));
 eqnQ2.. Q2b =E= Y0 * PP2b ** epsilon;
 eqnqD2(i).. qD2b(i) =E= Q2b * m(i) * (PP2b / p2b(i)) ** sigma;
 eqnqS2(i).. qS2(i) =E= a(i) * (p2b(i) / (1 + t1(i))) ** eta(i);
 CLEAR2(i).. qD2b(i) =E= qS2(i);
 OBJ2.. Util2 =E= (SUM(i, m(i) * qD2b(i) ** ((sigma - 1) / sigma))) ** (sigma / (sigma - 1));

p2a.l(i) = 1;
 p2b.l(i) = p2a.l(i);
 PP2a.l = 1;
 PP2b.l = PP2a.l;
 Q2a.l = Y0;
 Q2b.l = Q2a.l;
 qD2a.l(i) = m(i) * Y0;
 qD2b.l(i) = qD2a.l(i);
 qS2.l(i) = a(i);

Model ARM2 /eqnPP2, eqnQ2, eqnqD2, eqnqS2, CLEAR2, OBJ2;
Solve ARM2 maximizing Util2 using nlp;

** Calculate NI in USD 1000*

Parameter

NI(i) The value of nullification and impairment;

$$NI(i) = qD2b.l(i)*p2b.l(i)/(1+t1(i))-qD2a.l(i)*p2a.l(i)/(1+t0(i));$$

execute_unload "results.gdx" NI;

ANNEX C-2**GENERAL ALGEBRAIC MODELING SYSTEM (GAMS) CODE TO IMPLEMENT THE ARBITRATOR'S PROSPECTIVE ECONOMIC MODEL**

**To run the code, press F9 or select "File/Run". The value of nullification or impairment is written in the results file as "NI".*

Set

i suppliers /D Domestic,
EU The European Union member State subject to the WTO-inconsistent CVD
order,
ROW Rest of the world
/;

**If there are multiple European Union member States subject to CVDs, then a separate entry must be added for each additional member State.*

**These additional entries should be made here to the suppliers Set, as well as to the definitions of eta(i), m(i), t0(i), and t1(i) in the Parameters section below.*

**For instance, define EU2 as the second European Union member state subject to CVDs. Then the definition of the suppliers Set changes to: /D EU EU2 ROW/; eta(i) changes to: /D 4.5, EU 10, EU2 10, ROW 10/; etc.*

Parameter

**For the below parameters, see section 7.3.4 of WT/DS577/ARB for further details on their values.*

epsilon Price elasticity of demand /-1/
**replace the value of epsilon with the value from the USITC investigation report*
sigma Armington elasticity of substitution /8/
**replace the value of sigma with the value from Fontagné et al. (2022)*
eta(i) Price elasticity of supply /D 4.5, EU 10, ROW 10/
**replace the value of eta(D) with the value from the USITC investigation report;*
**the values of eta(EU) and eta(ROW) remain always 10*
m(i) Initial supplier(i)'s market share /D 0.0, EU 0.0, ROW 0.0/
**replace the values of m(i) with the trade shares in the baseline year*
Y0 Initial total market value in USD 1000 /0/
**replace the value of Y0 with the market size in the baseline year*
t0(i) Initial duty rate /D 0.0, EU 0.0, ROW 0.0/
**the values of t0 remain always zero*
t1_a(i) Actual duty rate - simulation A /D 0.0, EU 0.0, ROW 0.0/
**replace the value of t1_a(EU) with the actual CVD rate*
**the values of t1_a(D) and t1_a(ROW) remain always zero*
t1_b(i) Counterfactual duty rate - simulation B /D 0.0, EU 0.0, ROW 0.0/
**replace the value of t1_b(EU) with the counterfactual WTO-consistent CVD rate*
**the values of t1_b(D) and t1_b(ROW) remain always zero*
a(i) Supply parameter;

** Calculate initial supply parameters*

$a(i) = Y0 * m(i) * (1 + t0(i)) ** eta(i);$

** SIMULATION A **

** Solve the model*

Positive Variable

p(i)	Price
p0(i)	Price (initial)
PP	Aggregate price index
PP0	Aggregate price index (initial)
Q	Quantity
Q0	Quantity (initial)
qD(i)	Quantity demanded
qD0(i)	Quantity demanded (initial)
qS(i)	Quantity supplied;

Variable

Util	Utility variable;
------	-------------------

Equations

eqnPP	Aggregate price index equation
eqnQ	Quantity equation
eqnqD(i)	Demand equations
eqnqS(i)	Supply equations
CLEAR(i)	Market clearing condition
OBJ	Utility function;

```
eqnPP..  PP =E= (SUM(i, m(i) * p(i) ** (1 - sigma))) ** (1 / (1 - sigma));
eqnQ..   Q  =E= Y0 * PP ** epsilon;
eqnqD(i).. qD(i) =E= Q * m(i) * (PP / p(i)) ** sigma;
eqnqS(i).. qS(i) =E= a(i) * (p(i) / (1 + t1_a(i))) ** eta(i);
CLEAR(i).. qD(i) =E= qS(i);
OBJ..    Util =E= (SUM(i, m(i) * qD(i) ** ((sigma - 1) / sigma))) ** (sigma / (sigma - 1));
```

```
p0.l(i) = 1;
p.l(i) = p0.l(i);
PP0.l = 1;
PP.l = PP0.l;
Q0.l = Y0;
Q.l = Q0.l;
qD0.l(i) = m(i) * Y0;
qD.l(i) = qD0.l(i);
qS.l(i) = a(i);
```

Model ARM /eqnPP, eqnQ, eqnqD, eqnqS, CLEAR, OBJ/;

Solve ARM maximizing Util using nlp;

Parameter

NI_a(i) Change in the value of imports (excluding tariffs) from simulation A;

```
NI_a(i) = [qD.l(i)*p.l(i)/(1+t1_a(i))-qD0.l(i)*p0.l(i)/(1+t0(i))];
```

```
*****
* SIMULATION B      *
*****
```

* Solve the model

Positive Variable

p_b(i)	Price
p0_b(i)	Price (initial)
PP_b	Aggregate price index
PP0_b	Aggregate price index (initial)
Q_b	Quantity
Q0_b	Quantity (initial)

qD_b(i) Quantity demanded
 qD0_b(i) Quantity demanded (initial)
 qS_b(i) Quantity supplied;

Variable

Util_b Utility variable;

Equations

eqnPP_b Aggregate price index equation
 eqnQ_b Quantity equation
 eqnqD_b(i) Demand equations
 eqnqS_b(i) Supply equations
 CLEAR_b(i) Market clearing condition
 OBJ_b Utility function;

eqnPP_b.. PP_b =E= (SUM(i, m(i) * p_b(i) ** (1 - sigma))) ** (1 / (1 - sigma));
 eqnQ_b.. Q_b =E= Y0 * PP_b ** epsilon;
 eqnqD_b(i).. qD_b(i) =E= Q_b * m(i) * (PP_b / p_b(i)) ** sigma;
 eqnqS_b(i).. qS_b(i) =E= a(i) * (p_b(i) / (1 + t1_b(i))) ** eta(i);
 CLEAR_b(i).. qD_b(i) =E= qS_b(i);
 OBJ_b.. Util_b =E= (SUM(i, m(i) * qD_b(i) ** ((sigma - 1) / sigma))) ** (sigma / (sigma - 1));

p0_b.l(i) = 1;
 p_b.l(i) = p0_b.l(i);
 PP0_b.l = 1;
 PP_b.l = PP0_b.l;
 Q0_b.l = Y0;
 Q_b.l = Q0_b.l;
 qD0_b.l(i) = m(i) * Y0;
 qD_b.l(i) = qD0_b.l(i);
 qS_b.l(i) = a(i);

Model ARM_b /eqnPP_b, eqnQ_b, eqnqD_b, eqnqS_b, CLEAR_b, OBJ_b/;

Solve ARM_b maximizing Util_b using nlp;

Parameter

NI_b(i) Change in the value of imports (excluding tariffs) from simulation B;

$NI_b(i) = [qD_b.l(i) * p_b.l(i) / (1 + t1_b(i)) - qD0_b.l(i) * p0_b.l(i) / (1 + t0(i))];$

** Calculate NI in USD 1000*

Parameter

NI(i) The value of nullification and impairment in USD 1000;

$NI(i) = - (NI_a(i) - NI_b(i));$

execute_unload "results.gdx" NI;

**If there are multiple European Union member States subject to CVDs, then the total NI is the sum of the values of NI of all affected member States.*

ANNEX C-3

COMBINED LIST OF PROCESSED AGRICULTURAL PRODUCTS

Pages offset (excel file attached in English only).

ANNEX D

BCI UNDERSTANDING

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ANNEX D-1

**UNDERSTANDING BETWEEN THE EUROPEAN UNION AND THE UNITED STATES
CONCERNING PROCEDURES TO APPLY TO BUSINESS CONFIDENTIAL INFORMATION
TO THE EXTENT NECESSARY TO APPLY THE DSB AUTHORIZATION
CONSISTENT WITH THE ARBITRATOR'S DECISION**

Agreed on July 17, 2025

1. The European Union and the United States (the parties) have reached an understanding concerning the following procedures to apply to business confidential information (BCI) for the purposes of and to the extent necessary for applying the DSB authorization consistent with the Arbitrator's decision in *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain (Article 22.6 – US)* (Arbitrator's decision).¹

2. For the purposes of applying the DSB authorization consistent with the Arbitrator's decision, BCI is defined as any information that has been designated as such by a party. The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by US Customs and Border Protection (CBP) as confidential or proprietary. BCI may also include information that was previously treated by the US Department of Commerce (USDOC) as confidential or proprietary information protected by Administrative Protective Order in the course of a countervailing duty proceeding. In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of a USDOC countervailing duty proceeding has agreed in writing to make the information publicly available.

3. Where it is necessary, for the purposes of applying the DSB authorization consistent with the Arbitrator's decision, to use BCI as defined above from an entity in the European Union that submitted that information in a USDOC countervailing duty proceeding, the European Union shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the United States. The authorizing letter from the entity shall authorize both the European Union and the United States to use, in accordance with these procedures and for the limited purposes of applying the DSB authorization consistent with the Arbitrator's decision, any confidential information submitted by that entity in the course of the identified USDOC countervailing duty proceeding.

4. No person may have access to BCI except an employee of a party, or an outside advisor to a party for the purposes of applying the DSB authorization consistent with the Arbitrator's decision. However, an outside advisor to a party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of an identified USDOC countervailing duty proceeding, or an officer or employee of an association of such enterprises.

5. A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Each party is responsible for ensuring that its employees and/or outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of applying the DSB authorization consistent with the Arbitrator's decision and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information and shall be properly destroyed when access by a party to such information is no longer required.

6. A party transmitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information

¹ WT/DS577/ARB

on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

7. Where BCI is transmitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

8. If a party considers that information provided by the other party should have been designated as BCI and objects to its transmission without such designation, it shall forthwith bring this objection to the attention of the other party, together with the reasons for the objection. Similarly, if a party considers that the other party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the other party, together with the reasons for the objection. The parties shall consult and mutually agree whether information subject to an objection will be treated as BCI for the purposes of applying the DSB authorization consistent with the Arbitrator's decision on the basis of the criteria set out in paragraph 2.

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