

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

Recourse to Article 22.6 of the DSU by the United States

(DS577)

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE MEETING OF THE PARTIES WITH THE ARBITRATOR**

March 25, 2025

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Mr. Chairperson, Members of the Arbitrator:

1. On behalf of the U.S. delegation, I would like to thank you, and the Secretariat staff assisting you, for your ongoing work in this arbitration. In particular, I would like to acknowledge and thank the Arbitrator, as members of the original panel and of the compliance panel, for its continued work throughout this dispute.

2. We begin our statement today by clarifying the task of the Arbitrator in this proceeding. At this stage of the dispute, the European Union (“EU”) has approached the Dispute Settlement Body (“DSB”) and sought authorization to suspend concessions or other obligations under Article 22.2 of the *Understanding on rules and procedures governing the settlement of disputes* (“DSU”). The United States, pursuant to Article 22.6 of the DSU, has objected to the level of suspension proposed by the EU, triggering these arbitration proceedings. Under Article 22.7 of the DSU, the role of the Arbitrator is simple and discreet – to determine whether the level of suspension requested by the EU is equivalent to the level of nullification or impairment of benefits accruing to the EU.¹ The DSU does not lay out any specific restrictions on how the Arbitrator should go about fulfilling this mandate.

3. At the outset of these proceedings, the EU explained its methodology for calculating the level of suspension that it has requested for the application of section 771B of the Tariff Act of 1930² (“Section 771B”) to U.S. imports of ripe olives from Spain. It also explained that it intends to adopt virtually the same methodology for calculating the level of suspension in the

¹ DSU, Art. 22.7.

² Exhibit USA-1.

event of any future applications of Section 771B to any other exports from the EU to the United States.³ As we have explained in our submission and responses to questions, the EU’s methodology contains numerous deficiencies and unsupportable design choices that cause it to fall woefully short of producing a level of suspension that could credibly be considered equivalent to the level of nullification or impairment. This runs directly contrary to the DSU and would cause the Arbitrator to act contrary to its mandate. The deficiencies inherent in the EU model are even more troubling given the EU’s suggestion that it be applied generally to any product potentially subject to a future application of Section 771B.

4. In our statement today, we will highlight several important issues addressed in the Parties’ written submissions and in their responses to the written questions of the Arbitrator. First, we will address the EU’s unreasonable and implausible counterfactual compliance scenario, which assumes that the United States could never have hypothetically complied with the DSB recommendations by the end of the reasonable period of time (“RPT”), and therefore necessarily produces an inflated estimate of nullification or impairment.

5. Second, we will address a number of the core deficiencies in the EU’s methodology which, when corrected, lower the estimate of nullification or impairment from the EU’s asserted level of \$33.5 million annually to no more than \$6.15 million annually.

³ See generally EU Methodology Paper.

6. Third, we will explain that the EU’s methodology, which by the EU’s own admission has been narrowly tailored to the case of ripe olives, cannot be used for application to any product potentially subject to future action under Section 771B.

I. THE EU’S PROPOSED COUNTERFACTUAL

7. In its Methodology Paper, the EU proposes to measure the level of nullification or impairment of benefits accruing to the EU using a partial equilibrium (PE) model.⁴ Such a model operates by constructing a hypothetical scenario in which the United States has complied with the relevant DSB recommendations by the end of the RPT, known as a counterfactual, and comparing that counterfactual to the real world in which the WTO-inconsistent measures were maintained. Thus, the purpose of a counterfactual is to construct a hypothetical compliance scenario to act as an input into a model. By definition, such a scenario will not have occurred in the real world, but it must be reasonable and plausible.⁵

8. The counterfactual proposed by the EU is plainly not reasonable or plausible. It is hardly a compliance scenario at all. Rather than grapple with the DSB recommendations at issue in this dispute, which laid out the specific and nuanced reasons that the panel considered cause Section 771B to be inconsistent with the relevant WTO agreements, the EU instead assumes that Section 771B and any CVD orders arising from it must necessarily be revoked.⁶ That assumption cannot

⁴ See EU Methodology Paper, para. 21.

⁵ See U.S. written submission, para. 20.

⁶ See EU Methodology Paper, para. 22.

be the basis of a reasonable or plausible compliance scenario. As explained in our submission,⁷ there is no reason to believe that the United States would decline to find any attribution of subsidy benefits for any processed agricultural product, especially considering that (1) Congress has specifically identified such products as being at a heightened risk for receiving indirect downstream subsidies⁸ and (2) as the previous panels in this dispute pointed out, WTO Members have substantial discretion in establishing and measuring attribution of subsidy benefits.⁹

9. Past arbitrators encountering the same counterfactual presented by the EU have rejected it, specifically in the reports of the arbitrators in *US – Washing Machines* and *US – Anti-Dumping Methodologies*.¹⁰ The EU suggests that in *US – Washing Machines* the counterfactual was rejected because the arbitrator was able to construct an alternative counterfactual compliance scenario by referencing analyses that were on the record of the underlying measure.¹¹ However, regardless of whether the record contains substantial information for constructing an appropriate counterfactual, as the record in this case indisputably does,¹² the task of an Article 22.6 arbitrator is not to weigh counterfactual compliance scenarios against one another.¹³ Therefore, the

⁷ See U.S. written submission, paras. 34-37.

⁸ See U.S. written submission, para. 35.

⁹ See *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.28.

¹⁰ See *US – Washing Machines (Korea) (Article 22.6 – US)*, paras. 3.20-24, 3.39-40; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.7-5.9.

¹¹ See EU written submission, paras. 28-29.

¹² See U.S. responses to questions from the Arbitrator, paras. 17-19.

¹³ See U.S. written submission, para. 33; EU written submission, paras. 15-16; EU responses to questions from the Arbitrator, paras. 2-3.

feasibility of constructing an alternative counterfactual is not something the Arbitrator need take into account in determining whether the proposed counterfactual is reasonable or plausible. This is consistent with the findings of the arbitrators in *US – Washing Machines* and *US – Anti-Dumping Methodologies*, who came to the conclusion that the counterfactual of complete removal of the orders at issue – the same counterfactual that the EU presents here – was not reasonable or plausible, independent of the availability of an alternative counterfactual.¹⁴

10. The only support that the EU provides for its unreasonable and implausible counterfactual are a set of circular arguments that boil down to the assertion that it was impossible for the United States to have ever complied with the DSB recommendations by the end of the RPT. But the DSU neither supports nor requires such an assumption. Rather, the procedures laid out in the DSU assume that parties are able to bring their measures into compliance prior to the imposition of countermeasures.¹⁵

11. More specifically, the EU argues that Section 771B could not have been reinterpreted, amended, or replaced by the end of the RPT.¹⁶ On the first issue – reinterpretation – the EU argues that the compliance panel definitively concluded that the language of Section 771B could never permit a WTO-consistent interpretation.¹⁷ This is incorrect. To the contrary, the panel explicitly rejected the EU’s argument that reinterpretation could never constitute a compliance

¹⁴ See *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.24; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.9.

¹⁵ See DSU Art. 22.2.

¹⁶ See EU written submission, para. 14.

¹⁷ See EU written submission, para. 18; EU responses to questions from the Arbitrator, paras. 19-26.

measure,¹⁸ finding only that the specific reinterpretation offered by the USDOC in the Section 129 proceeding was not sufficient to achieve compliance.¹⁹

12. The EU’s arguments on why the United States could not amend or replace Section 771B are also unavailing. Here 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.²⁰ 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 State cannot comply with a DSB recommendation. The EU apparently fails to appreciate that the purpose of a counterfactual is to construct a hypothetical compliance scenario. The EU has offered no further reason that amendment or replacement would not be a reasonable or plausible hypothetical compliance option for the United States.

13. Accordingly, the United States has succeeded in meeting its burden of showing that the EU’s counterfactual is not reasonable and plausible and would necessarily result in a level of suspension of concessions that is not equivalent to the nullification or impairment of benefits accruing to the EU.

¹⁸ See *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.16.

¹⁹ See *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.21.

²⁰ See EU written submission, para. 19. See also EU responses to questions from the Arbitrator, paras. 31-32.

II. THE U.S. PROPOSED COUNTERFACTUAL

14. Having demonstrated that the counterfactual proposed by the EU is neither reasonable nor plausible and would result in a level of countermeasures that is not equivalent to the nullification or impairment, the United States has also proposed its own counterfactual, which it submits is both reasonable and plausible, based on a variety of economic and market evidence.²¹ As an initial matter, we note that the EU has mischaracterized the U.S. position as requesting that the Arbitrator weigh the EU's proposed counterfactual against the U.S. counterfactual and determine which is more likely.²² This is not the U.S. position. Rather, we have submitted arguments and evidence to first demonstrate the inadequacy of the EU counterfactual and then, as a separate matter, have submitted arguments and evidence in support of an alternative counterfactual. In this sense, the EU is correct that the reasonableness of its proposed counterfactual does not depend on the reasonableness of our counterfactual.

15. Regardless, the United States has presented a reasonable and plausible compliance scenario that the Arbitrator should adopt. As we have shown through our submission and responses to the questions from the Arbitrator, evidence from the Spanish olives industry demonstrates that substantial subsidy benefits are passed on from upstream raw olive growers to downstream ripe olive processors.²³ To be clear, the United States does not need to prove that 100 percent of subsidy benefits are in fact attributed to Spanish ripe olive processors. Rather, the question before the Arbitrator is as follows: is it reasonable and plausible to assume for the

²¹ See U.S. written submission, paras. 52-58; U.S. responses to questions from the Arbitrator, paras. 3-10.

²² See EU written submission, paras. 15-16.

²³ See U.S. written submission, paras. 52-58; U.S. responses to questions from the Arbitrator, paras. 4-10.

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?

16. The evidence presented by the United States reveals that the answer to that question is yes. In our submission and responses, we have presented evidence showing that: (1) Spanish olive processors purchase olives at prices below their cost of production, especially considering the losses due to processing and pitting;²⁴ (2) Spanish olive growers and Spanish olive processors are mutually reliant on one another due to pervasive cooperative structures, the fact that Spanish processors make yearly purchases that cover virtually all of the Spanish annual olive crop, and rules of origin that incentivize Spanish processors to purchase raw olives grown in Spain;²⁵ and (3) economic analysis of the analogous market for processed dairy products have demonstrated attribution of Common Agricultural Policy (“CAP”) subsidies to downstream processors estimated at 65 percent, which should be viewed as a floor for the Spanish olives industry.²⁶ In addition, we have explained that the fact that the two criteria in Section 771B, while not determinative of any specific level of attribution, have been established in this case suggests in

²⁴ See U.S. written submission, para. 55; U.S. responses to questions from the Arbitrator, paras. 5-6.

²⁵ See U.S. written submission, paras. 56-57; U.S. responses to questions from the Arbitrator, para. 7.

²⁶ See U.S. responses to questions from the Arbitrator, paras. 8-9.

the specific context of the ripe olives market that there is a high level of attribution of subsidy benefits.²⁷

17. The EU does not engage with this evidence at all, opting instead to dismiss it as the product of a “quick internet search,”²⁸ which may itself speak to the EU’s approach to this proceeding. To the contrary, the information relied upon by the United States is largely based on Spanish government sources or data, and most of it was either on the record of the underlying CVD investigation or is corroborated by information on the record of the CVD investigation.²⁹ Regardless, the origin of this information is not relevant for the task of the Arbitrator as long as it is reliable, and the EU has never asserted that it is not. Instead, in fulfilling its mandate to ensure that the level of suspension is equivalent to the level of nullification or impairment,³⁰ the Arbitrator, as have past arbitrators, should seek to rely on the best information or data that is available for formulating a reasoned estimate and the DSU does not contain any restrictions on the type or source of information that an Arbitrator can use for fulfilling its mandate.³¹

18. Accordingly, the Arbitrator should reject the unreasonable and implausible counterfactual proposed by the EU. In addition, the Arbitrator should adopt the counterfactual proposed by the United States and find that there is no nullification or impairment of benefits accruing to the EU

²⁷ See U.S. written submission, paras. 53-54; U.S. responses to questions from the Arbitrator, para. 4.

²⁸ EU written submission, para. 37.

²⁹ See U.S. responses to questions from the Arbitrator, paras. 5, n. 15, 17-19.

³⁰ See DSU, Art. 22.7.

³¹ See, e.g., *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.16.

in this case because it is reasonable and plausible to assume that if the USDOC had conducted a WTO-consistent attribution analysis, it would have determined that 100 percent of subsidy benefits are attributable to downstream ripe olive processors and the resulting CVD duties would have been the same.

III. THE EU’S “AS APPLIED” APPROACH IS CONTRARY TO THE DSU

19. The EU’s approach for calculating the level of suspension of concessions or other obligations is also untenable, because it reflects numerous structural flaws, unsupportable modeling decisions or omissions, and erroneous data inputs that have the effect of inflating the overall level of nullification or impairment. If the EU’s counterfactual were to be applied with these errors corrected, the overall level of nullification or impairment would fall from an estimated \$33.5 million to \$6.15 million.³² This demonstrates that the EU’s requested level of suspension is significantly in excess of the actual level of nullification or impairment of benefits accruing to the EU and therefore contravenes the requirements of Article 22.4 of the DSU.

20. Beginning with the fundamental structure of the EU’s model, the EU proposal deviates from prior Armington-based partial equilibrium (“PE”) models used in Article 22.6 arbitrations, using a model that focuses on the reallocation of trade for processed olives among third countries, rather than a model focusing on transfers of market share within the U.S. market.³³ In this way, the EU’s model measures trade diversion between Spain and third countries to the exclusion of considering any gains by U.S. domestic producers of ripe olives. The EU has not

³² See U.S. written submission, para. 122.

³³ See EU Methodology Paper, para. 32.

explained how trade diversion between third countries that has no impact on the U.S. market is relevant for directly measuring nullification or impairment arising from loss of market share in the United States. Indeed, nothing in the EU’s submissions supports that this information is relevant to the Arbitrator’s assessment. On the other hand, excluding a key participant in the U.S. market – domestic producers – from the model necessarily serves to inflate the calculation of nullification or impairment by artificially increasing the market shares of other participants.

21. Instead of identifying any coherent benefit for using its approach, the EU points to a lack of reliable data for domestic production in order to justify its decision to exclude a critical variable – domestic production. In this regard, the EU rejects the domestic production data provided by the United States because it is not aligned with the HTS codes that the EU uses to define the scope of trade flows in the EU model.³⁴ However, the EU errs here. As the CVD order makes clear, the HTS codes are provided only for convenience and are not determinative in defining the scope of the product subject to duties. Instead, it is the product description in the CVD order that is determinative. The CVD order clearly covers olives of all colors and thus is aligned with the domestic production data provided by the United States.³⁵ Accordingly, the EU’s justification for not including U.S. domestic production in its model fails.

³⁴ See EU written submission, para. 58; EU responses to questions from the Arbitrator, paras. 46, 77.

³⁵ See U.S. responses to questions from the Arbitrator, paras. 58-61.

22. Second, despite its assertions to the contrary,³⁶ the EU is not actually measuring the level of nullification or impairment of benefits accruing to the EU. Rather, it is measuring the level of nullification or impairment of benefits accruing to Spain. As the WTO Member who brought this dispute, the EU cannot isolate the measurement of nullification or impairment to one of its Member States rather than assessing the impacts on the EU as a whole. The EU has now had three opportunities to explain how such an approach is permissible under the plain text of the DSU, but has failed to do so.

23. Instead, the EU focuses on the scope of the CVD investigation, suggesting that because the CVD investigation was focused on imports from Spain and on Spanish companies, the countermeasures should be based on damage to Spain, alone.³⁷ But the scope of USDOC's investigation does not change the requirement in the DSU that nullification or impairment must be measured with respect to the "party having invoked the dispute settlement procedures" that has requested authorization from the DSB to suspend concessions or other obligations.³⁸ The "party" in this dispute is the EU, not Spain. As the United States explained in its response to the questions from the Arbitrator, it would not be appropriate for another WTO Member to argue that because a WTO-inconsistent measure was directed at a specific region or set of companies within the Member, nullification and impairment should be measured only with respect to that

³⁶ See, e.g., Recourse to Article 22.2 of the DSU by the European Union, WT/DS577/20 (Nov. 15, 2024); EU Methodology Paper, para. 19; EU written submission, para. 125; EU responses to questions from the Arbitrator, para. 57.

³⁷ See EU written submission, paras. 46-49; EU responses to questions from the Arbitrator, para. 48.

³⁸ See DSU, Art. 22.2.

region or those companies.³⁹ Similarly, the political structure of the EU does not alter its treatment under the DSU.

24. Third, as already alluded to, the EU makes the surprising decision to exclude completely U.S. domestic production from its model, deviating from the models used by prior arbitrators.⁴⁰ The EU seeks to justify this decision by arguing that domestic raw olive production in the United States is completely inelastic and cannot react to capture market share from Spanish imports subject to CVD duties.⁴¹ However, as we explained in our written submission, even if raw olive production is inelastic, ripe olive production is not similarly constrained. Ripe olive producers can and do supplement inputs of domestic raw olives with inventories from prior harvests, imports of raw olives from other countries, and imports of provisionally preserved olives. These circumstances informed USITC estimates for the domestic supply elasticity of ripe olives ranging from 3 to 6 and 4 to 6, significantly higher than the value of zero implicitly assumed by the EU.⁴²

25. Likely recognizing the shortcomings of its argument, in more recent submissions the EU has attempted to justify its exclusion of U.S. domestic production by pointing to a general decline in ripe olive production over a portion of the relevant time period.⁴³ However, a general

³⁹ See U.S. responses to questions from the Arbitrator, para. 46.

⁴⁰ See, e.g., EU Methodology Paper, para. 32.

⁴¹ See EU Methodology Paper, para. 32.

⁴² See U.S. written submission, paras. 75-79.

⁴³ See, e.g., EU written submission, para. 57; EU responses to questions from the Arbitrator, para. 45.

decline in domestic ripe olive production over a specific time period does not support the conclusion that ripe olive production is completely inelastic. As the EU recognizes in its submissions, the relevant time period was heavily distorted by significant macroeconomic shocks including the COVID-19 pandemic and inflation.⁴⁴ These factors had an impact on the demand for ripe olives, which can explain declining production without necessarily indicating a supply constraint. That is actually what the data shows – while U.S. domestic production decreased over the relevant time period, so did total imports, including from Spain, as well as overall olive consumption in the U.S. market in general, indicating a reduction in demand.⁴⁵ Accordingly, the EU’s focus on general production trends to support an assumed domestic supply elasticity of zero cannot be justified.

26. Fourth, the EU approach fails to account for the AD duties on ripe olives from Spain, further inflating the estimation of nullification or impairment. To support this decision, the EU asserts that the purpose of a PE model is to isolate the trade impacts of the measure at issue, while excluding other factors that could have had an impact on market shares in the subject market over the same time period.⁴⁶ We generally agree with the EU about the goals and benefits of a PE model. For that reason, we agree that general macroeconomic shocks that impacted the market for olives over the relevant time period, such as COVID and inflation, are properly excluded from this exercise.

⁴⁴ See EU Methodology Paper, paras. 26-27.

⁴⁵ See Exhibit USA-15; Exhibit USA-16.

⁴⁶ See EU written submission, para. 70; EU responses to questions from the Arbitrator, paras. 51-52.

27. However, AD duties are categorically different from other factors such as COVID or inflation, or even other factors specific to olives, such as variations in harvest quality. From an economic perspective, AD duties are indistinguishable in terms of their impact from the CVD duties at issue. In the case of ripe olives, they are the same type of measure, imposed at the same time, covering the same product, arising from investigation of the same companies.⁴⁷ In that sense, the AD and CVD duties essentially operate as a single duty on ripe olives from Spain. The EU has not explained by what mechanism a PE model can accurately attribute market share impact to one duty as opposed to a functionally identical parallel duty imposed at the same time on the same products. As helpful of a tool as the PE model is, the reality is that it cannot do that.

28. Given that these duties apply as a combined duty on Spanish imports of ripe olives, the only accurate way to adequately assess the nullification or impairment arising from the CVD order is to reduce the combined AD/CVD duties by the WTO-inconsistent CVD component in the counterfactual compliance scenario. This is precisely what the United States proposes in its approach and, as demonstrated by the United States, it results in a substantially lower estimate of the total nullification and impairment.⁴⁸

29. Finally, the EU proposes to use a number of erroneous data inputs that have the effect of inflating the overall level of nullification and impairment. This is most apparent in the EU's proposals for the various elasticity parameters. We have already addressed that the EU model implies an extreme value of zero for the domestic supply elasticity. The EU proposes a similarly

⁴⁷ See U.S. responses to questions from the Arbitrator, paras. 48-49; Exhibit USA-36.

⁴⁸ See U.S. written submission, para. 86; Exhibit USA-15.

extreme value for the export supply elasticity, albeit in the opposite direction. Specifically, 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.⁴⁹ These over-the-top elasticity parameters proposed by the EU 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 simply 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.

30. The EU’s proposed elasticity of substitution is similarly flawed. The substitution elasticity proposed by the EU is so high that the EU initially invoked the so-called “rule of two” as a means of justifying its proposed value.⁵⁰ The EU later acknowledged that the “rule of two” is not applicable to its model,⁵¹ but the invocation of the rule in the first place seems to be a tacit acknowledgment that the value proposed by the EU for the elasticity of substitution is roughly double what it should be. This is consistent with the values proposed by the United States based on Soderbery (2015), which range from 1.8 to 9.5 with a simple average of 5.1 and a weighted average of 7.8, as well as the range estimated by the USITC, which is from 4 to 7.⁵² All of these

⁴⁹ See EU Methodology Paper, para. 38.

⁵⁰ See EU Methodology Paper, para. 37.

⁵¹ See EU written submission, para. 88.

⁵² See U.S. written submission, para. 111.

values are substantially below the EU’s proposed value of 12, and thus yield a lower estimate of the nullification and impairment.

31. As discussed in our written submission, the elasticity of substitution proposed by the EU is drawn from Fontagné et al (2022) based on global trade flows at the 6-digit HTS level. Accordingly, the estimates from Fontagné et al (2022) not only improperly encompass out-of-scope products but also reflect a global average substitution elasticity for this broader product category.⁵³ In contrast, the estimate from Soderbery (2015) is derived from the U.S. import data at the more detailed 10-digit HTS level, specifically for in-scope products. Therefore, the Soderbery (2015) values more accurately capture the substitutability of ripe olives among different sources in the U.S. market.

32. In sum, the EU’s proposed approach for calculating nullification and impairment is wholly unsupported. From the structure of the model, to decisions on what variables to include or exclude, to the specific data inputs selected, the EU model appears aimed at artificially inflating the measurement of nullification or impairment in multiple ways. Accordingly, the EU’s proposed approach for calculating nullification or impairment of benefits accruing to the EU does not satisfy the requirements of Article 22.4 of the DSU and should be rejected in favor of the U.S. proposed model.

⁵³ See U.S. written submission, paras. 106-107.

IV. THE EU’S PROSPECTIVE APPROACH FOR THE “AS SUCH” BREACH CANNOT RELIABLY PRODUCE A REASONED ESTIMATE OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT

33. For many of the same reasons, the EU’s approach also cannot provide a reasoned estimate of the nullification or impairment arising from a future application of Section 771B to an as-yet unknown processed agricultural good. In fact, many of the most troubling deficiencies in the EU’s approach would be even more concerning if incorporated into a model or formula generally applicable to the wide range of products covered by Section 771B.

34. Given the nature of Section 771B, the Arbitrator should be cautious in identifying any formula or model of general applicability in this case. 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.

35. In any event, it is clear that the model proposed by the EU for the “as applied” breach cannot accurately apply to any of the myriad agricultural products potentially subject to a future application of Section 771B. The EU justified many of its design decisions on the basis of specific characteristics of the market for ripe olives, and therefore even under the EU’s logic, these decisions cannot be assumed for any other product. The most obvious such issue is the rationale for focusing only on trade diversion between third countries and excluding U.S.

domestic production in its proposed model, which the EU justifies by pointing to the specific growing conditions for ripe olives.⁵⁴ The EU even states in its responses to the questions from the Arbitrator that this novel modeling structure is only more accurate “in the specific circumstances of the present case”.⁵⁵ Yet without further explanation, the EU doubles down and insists that “the Arbitrator should apply the same basic model in both [the “as such” and “as applied”] scenarios.”⁵⁶

36. The EU also admits that there could be situations where “future applications of Section 771B concern other processed agricultural products the domestic production of which is more elastic than ripe olives.”⁵⁷ It goes on to accept that domestic production data could be taken into account in the prospective model “if relevant and reliable data is publicly available or is made available by the US.”⁵⁸ 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. If we were to find ourselves in the situation the EU contemplates – where Section 771B is applied to a product whose supply is more elastic than olives and for which reliable production data is available – the approach proposed by the EU could not in fact be appropriately adjusted.

⁵⁴ EU Methodology Paper, para. 32. *See also* U.S. responses to questions from the Arbitrator, paras. 76-79.

⁵⁵ EU responses to questions from the Arbitrator, para. 44.

⁵⁶ EU responses to questions from the Arbitrator, para. 69.

⁵⁷ EU responses to questions from the Arbitrator, para. 78.

⁵⁸ EU responses to questions from the Arbitrator, para 79.

37. Exclusion of domestic production is not the only unreasonable assumption carried over from the EU’s “as applied” methodology to its “as such” approach. 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.⁵⁹ There is no 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 patently baseless values can be applied in the future to any processed agricultural good.

38. Therefore, the EU’s proposed approach for estimating the level of appropriate countermeasures arising from a future application of Section 771B cannot produce a reasoned estimate that can credibly be deemed equivalent with the nullification or impairment of benefits accruing to the EU, and should be rejected. For all of these reasons, the Arbitrator should find that any prospective approach cannot at this time meet the requirements of the DSU to ensure that the level of suspension does not exceed the level of nullification or impairment. Even were the Arbitrator to adopt the approach proposed by the United States, the risk of excess WTO-inconsistent suspension would be reduced but could not be entirely eliminated.

⁵⁹ EU responses to questions from the Arbitrator, para. 67.

V. CONCLUSION

39. As we have demonstrated, the EU’s request to suspend concessions or other obligations in the amount of \$33.5 million annually for the “as applied” breach is not equivalent to the nullification or impairment of benefits accruing to the EU. Accordingly, the United States respectfully requests that the Arbitrator determine that the appropriate level of nullification or impairment is zero. Even simply correcting the unreasonable and egregious choices made by the EU in its flawed model would lead to a level of no more than \$6.15 million annually.

40. Similarly, the United States respectfully requests that the Arbitrator reject the EU’s request to apply a prospective model or formula to measure the appropriate level of suspension of concessions or other obligations arising from a future application of Section 771B. Such an approach cannot produce at this time a reasoned estimate of the level of nullification or impairment consistent with the DSU.

41. This concludes the U.S. opening statement. We look forward to responding to the Arbitrator’s questions. Thank you.