

***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)

**RESPONSES OF THE UNITED STATES OF AMERICA TO THE QUESTIONS FROM
THE ARBITRATOR AFTER THE SUBSTANTIVE MEETING**

April 17, 2025

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<i>EC and certain member States — Large Civil Aircraft (Panel)</i>	Report of the Panel, <i>European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, 30 June 2010
<i>US – 1916 Act (EC) (Article 22.6 – US)</i>	Decision by the Arbitrators, <i>United States – Anti-Dumping Act of 1916, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS136/ARB, 24 February 2004
<i>US – Anti-Dumping Methodologies (China) (Article 22.6 – US)</i>	Decision by the Arbitrators, <i>United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China – Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS471/ARB, and Add.1 circulated 1 November 2019
<i>US – Countervailing Measures (China) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS437/ARB, 26 January 2022
<i>US – Gambling (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS285/ARB, 21 December 2007
<i>US – Ripe Olives from Spain (Panel)</i>	Report of the Panel, <i>United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain</i> , WT/DS577/R, 19 November 2021
<i>US – Ripe Olives from Spain (EU) (Article 21.5 – EU)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain – Recourse to Article 21.5 of the DSU by the European Union</i> , WT/DS577/RW and Add. 1, 20 February 2024
<i>US – Supercalendered Paper (Canada) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/ARB and Add. 1, 13 July 2022

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<i>US – Washing Machines (Korea) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (Recourse to Article 22.6 of the DSU by the United States)</i> , WT/DS464/ARB, 8 February 2019

TABLE OF EXHIBITS

Exhibit No.	Description
U.S. Written Submission	
USA-1	Section 771B of the Tariff Act of 1930 (19 U.S.C. § 1677-2) (USA-1-OP)
USA-2	Legislative History of Section 771B (EU-9-CP)
USA-3	<i>Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States</i> , 102 F.4th 1252 (Fed. Cir. 2024)
USA-4	Ripe Olives From Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 Fed. Reg. 37,469 (July 25, 2018)
USA-5	Section 703 of the Tariff Act of 1930 (19 U.S.C. § 1671b)
USA-6	<i>US – Ripe Olives from Spain</i> , 12 November 2020 response to Panel question No. 12, para. 116
USA-7	Ministerio De Agricultura, Alimentación y Medio Ambiente, <i>Diagnóstico sobre el sector de la aceituna de mesa en España</i> , p. 28 (2016), https://www.mapa.gob.es/ca/agricultura/temas/producciones-agricolas/160427diagnosticoaceitunademesadefinitivo_tcm34-135524.pdf
USA-8	Courtesy Machine Translation of Relevant Excerpts from Exhibit USA-7
USA-9	Cooperativas Agro-Alimentarias España, <i>Consejo Sectorial Aceituna de Mesa</i> (Sep. 11, 2023)
USA-10	Courtesy Machine Translation of Relevant Excerpts from Exhibit USA-9
USA-11	U.S. Customs and Border Protection Ruling Letter N308088 (Dec. 23, 2019)
USA-12	Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union’s rights for the application and enforcement of international trade rules and amending Council

Exhibit No.	Description
	Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, 2014 O.J. (L 189)
USA-13	Ripe Olives from Spain, Inv. Nos. 701-TA-582, 731-TA-1377, USITC Pub. 5526 (July 2024) (Review)
USA-14	Data for Figure 1: Inputs for U.S. Ripe Olive Production
USA-15	Summary of Estimation Results for Two-Step Armington Model Employed by the United States
USA-16	U.S. Domestic Shipment and Import Data (Microsoft Excel File)
USA-17	Table of 8-digit and 10-digit HTSUS codes under HTS 2005.70 in 2016
USA-18	Paul Krugman, <i>Scale Economies, Product Differentiation, and the Pattern of Trade</i> , 70 Am. Econ. Rev. 950 (1980)
USA-19	Marc J. Melitz, <i>The Impact of Trade on Intra-Industry Reallocations and Aggregate Industry Productivity</i> , 71 Econometrica 1695 (2003)
USA-20	Large Residential Washers, Inv. No. TA-201-076, USITC Pub. 4745 (December 2017)
USA-21	Anson Soderbery, <i>Estimating Import Supply and Demand Elasticities: Analysis and Implications</i> , 96 J. Int'l Econ. 1 (2015)
USA-22	Ripe Olives From Spain: Notice of Correction to Antidumping Duty Order, 83 Fed. Reg. 39,961 (Aug. 7, 2018)
USA-23	NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., PRICE PROGRAM: HISTORY, CONCEPTS, METHODOLOGY, ANALYSIS, ESTIMATES, AND DISSEMINATION (2011)
USA-24	National Agricultural Statistics Service Price Index Data Series 2000-2023

Exhibit No.	Description
USA-25	U.S. Solution and Computer Code for the Armington Partial Equilibrium Model
U.S. Responses to First Set of Questions	
USA-26	Asociación para la Promoción de las Aceitunas Sevillanas de las variedades Manzanilla y Gordal, <i>Aceitunas Manzanilla y Gordal de Sevilla: evolución del cultivo, cadena de valor e indicaciones geográficas</i>
USA-27	Courtesy Machine Translation of Exhibit USA-26
USA-28	Aceituna, MINISTERIO DE AGRICULTURA, PESCA Y ALIMENTACIÓN, https://www.mapa.gob.es/va/ministerio/servicios/informacion/aceituna_tcm39-102885.pdf
USA-29	Rémi Avignon and Etienne Guigue, <i>Markups and Markdowns in the French Dairy Market</i> (2022)
USA-30	Submission of Factual Information by Musco Family Olive Company and Accompanying Relevant Exhibits, Ripe Olives from Spain, No. C-469-818 (Remand, Slip Op. 20-8) (Feb. 25, 2020)
USA-31	Agro Sevilla Aceitunas S.Coop. And.'s Olive Sourcing Questionnaire Response, Ripe Olives from Spain, No. C-469-818 (Aug. 14, 2017)
USA-32	Agro Sevilla Aceitunas S.Coop. And.'s Affiliations Questionnaire Response and Accompanying Relevant Exhibits, Ripe Olives from Spain, No. C-469-818 (Aug. 18, 2017)
USA-33	Ripe Olives from Spain Countervailing Duty Investigation: Placing Information on the Record, INT'L TRADE ADMIN., U.S. DEP'T OF COM., Ripe olives from Spain, No. C-469-818 (July 31, 2017)
USA-34	Response of the Government of Spain to the Department's October 25, 2017 Supplemental Questionnaire, Ripe Olives from Spain, No. C-469-818 (Nov. 7, 2017)
USA-35	Section 129 Proceeding Regarding the Countervailing Duty Investigation of Ripe Olives from Spain: Placing Factual Information on the Record, INT'L TRADE ADMIN., U.S. DEP'T OF COM., Ripe olives from Spain, Section 129 Proceeding, No. C-469-818 (Sept. 23, 2022) (including relevant attachments)
USA-36	Timeline of Actions in Antidumping and Countervailing Duty Investigations on Ripe Olives from Spain

Exhibit No.	Description
USA-37	<i>Weights, Measures, and Conversion Factors for Agricultural Commodities and Their Products</i> , ECON. RES. SERV., U.S. DEP'T OF AGRIC., Agricultural Handbook Number 697 (1992)
U.S. Responses to Questions Following Substantive Meeting	
USA-38	Broda, Greenfield, & Weinstein, <i>From Groundnuts to Globalization: A Structural Estimate of Trade and Growth</i> , 71 Res. in Econ. 759 (2017)
USA-39	Hakan Yilmazkuday, <i>Importer-Specific Elasticities of Demand: Evidence from U.S. Export</i> , 35 Int'l Rev. of Econ. & Fin. 228 (2015)
USA-40	Hillberry & Hummels, <i>Trade Elasticity Parameters for a Computable General Equilibrium Model</i> , 1 Handbook of Computable General Equilibrium Modelling 1213 (2013)
USA-41	Underlying data for Figure 1
USA-42	Ahmad, Montgomery, & Schreiber, <i>A Comparison of Sectoral Armington Elasticity Estimates in the Trade Literature</i> , USITC J. of Int'l Com. & Econ. (2021)
USA-43	Bajzik et al., <i>Estimating the Armington Elasticity: The Importance of Study Design and Publication Bias</i> , 127 J. of Int'l Econ. 103383 (2020)
USA-44	Imbs & Mejean, <i>Elasticity Optimism</i> , 7 Am. Econ. J.: Macroeconomics 43 (2015)
USA-45	Anson Soderbery, <i>Trade Elasticities, Heterogeneity, and Optimal Tariffs</i> , 114 J. of Int'l Econ. 44 (2018)
USA-46	Janet E. Nelson, <i>California Table Olives: Marketing, Imports, and the Federal Marketing Order</i> , in U.C. Agric. & Nat. Resources, Olive Production Manual 11 (2005)
USA-47	California Olive Committee, <i>2016-2017 California Olive Committee Annual Report</i> (2017)

1 COUNTERFACTUAL

41. **To the European Union:** With respect to the counterfactual for the “as such” violation, the United States argues in its response to Arbitrator question No. 4 that “the counterfactual proposed by the EU, which assumes that the USDOC would never be capable of conducting a WTO-consistent attribution analysis for any agricultural product that could be covered by Section 771B, is not reasonable or plausible”¹, and that “[e]xcluding any counterfactual WTO-consistent CVD rate or assuming it to be 0 in all cases, without justification or examination, would necessarily yield a level of suspension of concessions that is not equivalent to the level of nullification or impairment.”² Please explain your views on this argument by the United States.

Response:

1. This question is addressed to the European Union (“EU”).

42. **To the European Union:** In its response to Arbitrator question No. 4, the United States argues that the report of the arbitrator in *US – Offset Act (Byrd Amendment) (EC)* is instructive on the issue of using a proxy value for an attribution rate.³ Please explain:

- i. whether, in the European Union’s view, the use of a proxy value for the determination of a counterfactual in the present case could be reasonable or plausible; and
- ii. whether the approach taken by the arbitrator in *US – Offset Act (Byrd Amendment) (EC)* could be relevant for the present case.

Response:

2. This question is addressed to the EU.

43. **To the European Union:** Please comment on paragraph 16 of the United States’ response to Arbitrator question No. 4, where the United States suggests that, based on available economic analysis of the market for processed dairy products, 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.⁴

¹ U.S. responses to first set of questions from the Arbitrator, para. 12.

² U.S. responses to first set of questions from the Arbitrator, para. 14.

³ U.S. responses to first set of questions from the Arbitrator, para. 15.

⁴ U.S. responses to first set of questions from the Arbitrator, para. 16.

Response:

3. This question is addressed to the EU.

44. To the United States: In its response to Arbitrator question No. 1.a, the European Union maintains that the basic principle under WTO rules is that the pass-through of benefits cannot be presumed, and that it must be positively established by the investigating authority.⁵ Please indicate whether the United States considers that an analysis by the USDOC of pass-through in the case of ripe olives, based on the two factual circumstances listed in section 771B of the Tariff Act of 1930, in addition to the other facts discussed by the United States in its written submission, would be WTO-consistent. If so, please explain why.

Response:

4. As an initial matter, the United States is not requesting that the Arbitrator conduct a full attribution analysis in the same manner that an investigating authority would. Nor is the United States suggesting that the evidence that it has provided would necessarily be sufficient, in and of itself, for an investigating authority to determine attribution of subsidy benefits in a WTO-consistent manner. However, this is not the question before the Arbitrator. In order to fulfil its mandate under the DSU of accurately measuring the level of nullification or impairment of benefits accruing to the EU, the Arbitrator is not tasked with seeking to replicate the WTO-consistent attribution analysis the U.S. Department of Commerce (“USDOC”) would conduct. Nor is the United States required to present to the Arbitrator a WTO-consistent attribution analysis in order to justify the counterfactual that it has put forward. Rather, the question before the Arbitrator is whether the United States has presented sufficient evidence for the Arbitrator to conclude that it is reasonable and plausible that the USDOC would have determined that the entirety of subsidy benefits granted to Spanish raw olive growers are attributable to ripe olive processors if the USDOC had conducted a WTO-consistent attribution analysis.

5. The answer to that question is yes. The United States has presented compelling evidence supporting that the USDOC would find total attribution of subsidy benefits if it had hypothetically conducted a WTO-consistent attribution analysis.⁶ This evidence includes (1) establishment of the two factual circumstances under section 771B of the Tariff Act of 1930 (“Section 771B”),⁷ which both the Arbitrator and the EU have acknowledged may be relevant to attribution of subsidy benefits;⁸ (2) evidence of below cost purchases of Spanish raw olives by Spanish ripe olive processors;⁹ (3) evidence of reliance of Spanish raw olive growers on ripe

⁵ EU responses to first set of questions from the Arbitrator, paras. 7-9.

⁶ See U.S. written submission, paras. 52-58; U.S. responses to first set of questions from the Arbitrator, paras. 3-10.

⁷ Exhibit USA-1.

⁸ See U.S. written submission, para. 53; U.S. responses to first set of questions from the Arbitrator, para. 4.

⁹ See U.S. written submission, para. 55; U.S. responses to first set of questions from the Arbitrator, paras. 5-6.

olive processors, which speaks to the market power that ripe olive processors hold relative to raw olive producers;¹⁰ and (4) a benchmark analysis for processed dairy products, a comparable industry, which found attribution of Common Agricultural Policy (“CAP”) subsidies to downstream processors of 65 percent.¹¹ Accordingly, far from asking the Arbitrator to “presume”¹² the existence or degree of attribution of subsidy benefits, the United States has provided persuasive evidence to demonstrate that attribution of benefits exists and is between 65 and 100 percent.

6. Nonetheless, it is difficult for the United States to speculate as to whether the information it has provided in this arbitration would be sufficient, by itself, for the USDOC to conduct a WTO-consistent attribution analysis. As both the original and compliance panels have made clear, Members have significant discretion in designing an appropriate approach and methodology for determining the attribution of subsidy benefits.¹³ Therefore, the United States cannot say with certainty how the USDOC would determine attribution of subsidy benefits in a WTO-consistent manner or what information it would require for such an analysis. However, the USDOC certainly could, and likely would, rely on at least some of the same or similar information as has been presented by the United States because the information is pertinent for assessing attribution of subsidy benefits in the market for Spanish ripe olives. While the United States is not suggesting that the information that it has provided would necessarily be sufficient, alone, to support a WTO-consistent attribution analysis conducted by an investigating authority, it is more than sufficient to support that the counterfactual offered by the United States is both reasonable and plausible.

7. On the other hand, the EU has presented no evidence to support its implied assumption that there is no attribution of subsidy benefits in the market for ripe olives. Nor has it presented any evidence to rebut the evidence that we have provided. As past arbitrators have found, both parties have a duty to provide evidence to support the factual assertions they make, regardless of who bears the overall burden of proof.¹⁴ Thus, the evidence provided by the United States on the issue of attribution of subsidy benefits stands unrebutted and is therefore the best available evidence before the Arbitrator on the issue of the plausibility and reasonableness of the

¹⁰ See U.S. written submission, paras. 56-57; U.S. responses to first set of questions from the Arbitrator, para. 7.

¹¹ See U.S. responses to first set of questions from the Arbitrator, paras. 8-9.

¹² See EU responses to first set of questions from the Arbitrator, paras. 7-9.

¹³ See *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.28 (“The original panel also recognized that neither Article VI:3 of the GATT 1994 nor Article 10 of the SCM Agreement prescribe that a particular methodology must be followed to perform a pass-through analysis where one is required. Members have discretion in determining whether and to what extent the benefit of a subsidy provided directly to a producer of an upstream product has passed-through to the downstream product.” (citing *US – Ripe Olives from Spain (Panel)*, para. 7.151)).

¹⁴ See *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.3 (“Despite these rules on the general allocation of the burden of proof in Article 22.6 arbitrations, the duty rests on both parties to produce evidence and to collaborate in presenting evidence to the Arbitrator. In particular, ‘it is for each party to bring forward the elements to sustain the factual assertions it makes’, insofar as ‘[i]t is for the party alleging the fact to prove its existence’.” (citations omitted)).

appropriate counterfactual. This evidence demonstrates that the counterfactual offered by the United States is reasonable and plausible, while the counterfactual offered by the EU is not.

8. Rather than engage with the evidence presented by the United States or offer alternative evidence on the level of attribution of subsidy benefits, the EU revised its position in the meeting between the Parties and the Arbitrator. Specifically, the EU now argues that, because “[t]he ‘as such’ violation in itself does not cause nullification or impairment for the EU in this case . . . [t]here is no reason or justification to also take into account for the ‘as applied’ counterfactual, what would be the situation if the US had also complied with the ‘as such’ violation.”¹⁵ It further argues that a counterfactual of compliance in which the United States hypothetically remedies the “as such” inconsistency of Section 771B would create an impermissible “double counterfactual for a single inconsistency.”¹⁶ In other words, the EU’s position appears to be 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 that law, but not a situation in which the Member brings the law into compliance with the relevant DSB recommendations.

9. The EU’s revised argument is wholly unsupported by the *Understanding on rules and procedures governing the settlement of disputes* (“DSU”) and the specific DSB recommendations in this dispute. First, the EU’s position is predicated on the Arbitrator viewing the “as applied” and “as such” breaches as independent and unrelated – a view that is not reflected in the original or compliance panel reports. To the contrary, 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.¹⁷ Accordingly, the breach that is subject to DSB recommendations in this dispute is that Section 771B is inconsistent with the relevant WTO agreements and, as a consequence, the application of Section 771B in a particular instance is also WTO-inconsistent.

10. Second, the EU is suggesting that the United States cannot come into compliance with the relevant DSB recommendations in this dispute by remedying the inconsistency in the law despite that the inconsistency in the law was the basis for both the “as such” and the “as applied” findings of WTO inconsistency in the original and compliance panel reports. There is no support for such a proposition in the DSU. As 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.¹⁸ Rather, the task of the Arbitrator is to determine

¹⁵ Closing statement by the EU, paras. 4-5.

¹⁶ Closing statement by the EU, para. 5.

¹⁷ See *US – Ripe Olives from Spain (Panel)*, para. 7.175; *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.79.

¹⁸ See *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.2 (“It is for the original respondent, here the United States, to determine how to implement the DSB recommendations and rulings in order to bring its measure into compliance with the covered agreements. Therefore, in determining a counterfactual, we will not prejudge how exactly the United States would have implemented the DSB recommendations and rulings at issue.”)

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. In fact, the EU’s proposed hypothetical compliance counterfactual prevents the United States from taking the very compliance actions that the EU has sought in these proceedings, and has argued that the DSB recommendations at issue require.

45. To the United States: In its response to Arbitrator question No. 5, the United States asserts that “the majority of the information is either on the record or, in certain cases, directly supported and corroborated by record information”.¹⁹ In this respect:

- i. Please provide a list of relevant information that the United States states: (i) is on the record of the investigation; (ii) supports or corroborates record information; and (iii) is not on the record of the investigation. Identify where the information in each of these categories can be found.**

Response:

11. As discussed in response to Question 44, above, the Arbitrator has a responsibility to use the best available information to accurately approximate nullification or impairment,²⁰ and whether information is or is not on the record of an underlying WTO-inconsistent measure is therefore not relevant to an Article 22.6 arbitrator’s determination of the appropriate level of nullification or impairment.²¹ Having noted this, in response to the question, the following information is on the record of the underlying CVD investigation²²:

- The 2016 Spanish Ministry of Agriculture report referred to in paragraph 55 of the U.S. written submission, which the United States submitted as Exhibit USA-7, is also

Nor will we speculate on which compliance scenario would be the ‘most likely’. Rather, we will evaluate whether China’s proposed counterfactual reflects ‘at least a plausible or “reasonable” compliance scenario’.” (citing *US – Gambling (Article 22.6 – US)*, para. 3.27)).

¹⁹ U.S. responses to first set of questions from the Arbitrator, para. 17.

²⁰ See U.S. responses to first set of questions from the Arbitrator, para. 30 (quoting *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 3.4.).

²¹ See U.S. responses to first set of questions from the Arbitrator, paras. 29-31.

²² For purposes of our responses to the Arbitrator’s questions, references to the record of the underlying CVD investigation include the records for the segments of the ripe olives from Spain CVD proceeding that the USDOC conducted pursuant to a remand by the U.S. Court of International Trade and the Section 129 segment conducted to implement the original panel’s recommendations and rulings.

available on the record of the underlying CVD investigation. The United States included the record version of this document as Exhibit USA-30, at Exhibit 8.

- In paragraph 56 of the U.S. written submission, the United States discusses the prevalence of two-tiered grower and processor cooperative structures in the Spanish olives market, including by referring to Agro Sevilla as an example of a major Spanish two-tiered cooperative. Information regarding the prevalence of two-tiered cooperatives in the Spanish table olive industry is on the record of the underlying CVD investigation. First, Exhibit USA-34 is a questionnaire response from the Government of Spain which confirms that 28 percent of Spanish table olive producers are organized as cooperatives.²³ Second, specifically regarding Agro Sevilla, Exhibit USA-31 includes responses to a USDOC questionnaire and states that Agro Sevilla is part of a two-tiered grower-processor cooperative.²⁴ Further information regarding Agro Sevilla’s organizational structure is included in Exhibit USA-32,²⁵ and an organizational chart for Agro Sevilla is included at Exhibit AS-1 to Exhibit USA-32. Lastly, Exhibit USA-33 is a screenshot from Agro Sevilla’s website confirming that it is a cooperative.

12. The following information is corroborated by information that is on the record of the underlying CVD investigation:

- Paragraph 55 of the U.S. written submission relies on Spanish ripe olive prices from the Observatorio website. Screenshots from this same resource, albeit from different years, are on the record of the underlying CVD investigation, contained in Exhibit USA-30 at Exhibit 9. Although the prices for the 2015/2016 and 2016/2017 harvest years referred to in the U.S. written submission are not included in Exhibit USA-30, the information on the USDOC record corroborates the reliability of this source for this data and demonstrates that the same query can be run on the same website for the relevant years.

13. The following information is not on the record of the underlying CVD investigation:

- Paragraph 57 of the U.S. written submission refers to Exhibit USA-11, which is a U.S. customs ruling that establishes that the processing of olives does not constitute “substantial transformation” for purposes of determining country of origin. This information is not on the record of the underlying CVD investigation. Nonetheless, Exhibit USA-11 remains an authoritative U.S. customs ruling that speaks to the issue of the rules of origin for processed olives.
- Exhibit USA-9 is not on the record of the underlying CVD investigation. However, the United States understands the cited portions of this Exhibit to be a synthesis of data sourced primarily from the Agencia de Información y Control Alimentarios (AICA), a

²³ See Exhibit USA-34, p. 2 (p. 7 of the PDF).

²⁴ See Exhibit USA-31, p. 2 (p. 9 of the PDF).

²⁵ See, e.g., Exhibit USA-32, pp. 3-7 (pp. 9-13 of the PDF).

Spanish government agency. While the data included in Exhibit USA-9 is not on the record, other AICA reports for certain years are on the record of the underlying CVD investigation and are included in Exhibit USA-35.

ii. Please specify how the information that is on the record of the investigation was used by the USDOC in its determination of pass-through.

Response:

14. The USDOC considered all information on the record in analyzing and determining the attribution of subsidy benefits to downstream processors of ripe olives under Section 771B. The USDOC applied Section 771B as was required by U.S. law. When the USDOC found that both factors in Section 771B were met, and in assessing the record as a whole, the USDOC exercised its discretion to deem countervailable subsidies provided to producers of the raw agricultural product to be provided with respect to the manufacture, processing, or exportation of the processed product (i.e., ripe olives).

46. To both parties: In its response to Arbitrator question No. 3, the United States argues that it “further demonstrated that the specific characteristics of the Spanish olives industry indicate a mutuality of reliance between raw olive growers and ripe olive producers which, when combined with the evidence of below cost purchases of raw olives and the establishment by USDOC of the two factors in Section 771B, supports an inference of a 100 percent attribution of subsidy benefits.”²⁶ Would an “inference” such as the one described by the United States be enough for a WTO-consistent pass-through analysis conducted by an investigating authority?

Response:

15. As explained in our response to Question 44 above, the United States cannot speculate as to the information or analyses that would be sufficient for a specific WTO-consistent attribution methodology adopted by the USDOC. Both the original and compliance panels recognized that Members have substantial leeway in determining how to evaluate attribution of subsidy benefits.²⁷ However, the United States is not suggesting in its counterfactual that the USDOC would “infer” the existence or degree of attribution of subsidy benefits. To the contrary, the counterfactual presents a hypothetical scenario in which the USDOC properly establishes the existence and degree of attribution of subsidy benefits through a WTO-consistent analysis. The United States has presented evidence that allows the Arbitrator to infer that complete attribution

²⁶ U.S. responses to first set of questions from the Arbitrator, para. 7.

²⁷ See *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.28 (“The original panel also recognized that neither Article VI:3 of the GATT 1994 nor Article 10 of the SCM Agreement prescribe that a particular methodology must be followed to perform a pass-through analysis where one is required. Members have discretion in determining whether and to what extent the benefit of a subsidy provided directly to a producer of an upstream product has passed-through to the downstream product.” (citing *US – Ripe Olives from Spain (Panel)*, para. 7.151)).

of subsidy benefits from raw olive growers to ripe olive processors in the Spanish market is reasonable and plausible.

16. The evidence presented by the United States is equally relevant in demonstrating that the counterfactual offered by the EU is not reasonable or plausible. The EU has provided no evidence to support the notion that there is zero attribution of subsidy benefits in the market for Spanish olives, which is the assumption underpinning its counterfactual of complete removal of the relevant CVD order without replacement. Accordingly, a counterfactual that ignores the evidence and assumes the USDOC would simply abandon the ability to assess attribution of subsidy benefits for any product subject to Section 771B, would necessarily yield an overestimate the level of nullification or impairment and contravene the DSU.

47. To both parties: In connection with the previous question, please explain whether the fact that the hypothetical pass-through analysis proposed by the United States in its counterfactual relies on an *inference of the extent of pass-through* rather than a *calculated estimate of the extent of pass-through*, is relevant to the United States' approach being WTO-consistent.

Response:

17. The fact that the counterfactual proposed by the United States relies on an inference of the extent of attribution of subsidy benefits rather than a WTO-consistent calculation of the extent of attribution is not relevant to whether the counterfactual offered by the United States is WTO-consistent. As explained in our response to Question 44 above, neither the United States nor the Arbitrator are required to actually calculate the extent of attribution of subsidy benefits in the market for Spanish ripe olives in order to support the adoption of the counterfactual offered by the United States. Rather, the question before the Arbitrator is only to determine whether the United States has proposed a counterfactual that is reasonable and plausible.

18. The United States has offered evidence to demonstrate that it is reasonable and plausible to determine that had the USDOC conducted a WTO-consistent attribution analysis, it would have concluded that 100 percent of subsidy benefits are attributable from Spanish raw olive growers to Spanish ripe olive processors. Conversely, the EU has not presented any evidence that contradicts the evidence put forth by the United States or that supports a lower attribution rate. Accordingly, the evidence offered by the United States is the best evidence on attribution of subsidy benefits that is available to the Arbitrator, and it is proper for the Arbitrator to determine the reasonableness and plausibility of the counterfactuals before it on the basis of that evidence. In fact, it is necessary for the Arbitrator to consider this evidence in order to accurately measure the level of nullification or impairment in line with the DSU, even if a detailed calculation of the degree of attribution of subsidy benefits is not available.

48. To both parties: The United States suggests a proxy value based on available economic analysis of the market for processed dairy products.²⁸ Is there any

²⁸ U.S. responses to first set of questions from the Arbitrator, para. 16.

additional information on processed agricultural products that could be used by the Arbitrator to select a proxy value?

19. The United States has conducted a rigorous search and is not aware of any other literature which examines the issue of attribution of subsidy benefits for processed agricultural products. As the United States explained in its responses to the first set of questions from the Arbitrator, the study on the French dairy industry submitted as Exhibit USA-29 not only measures the attribution of subsidy benefits for a processed agricultural product but specifically does so in the context of CAP subsidies in an industry that is largely analogous to the market for processed olives.²⁹ It is therefore valuable evidence for the Arbitrator’s determination, including for the selection of a proxy value for a WTO-consistent attribution rate.

2 PARTIES’ ECONOMIC MODELS FOR THE AS APPLIED INCONSISTENCY

49. **To the European Union: Please clarify whether the average CVD rate in the European Union’s model is a simple, a weighted average, or a mixture of the two. Please provide details on how it was calculated. Please also comment on the United States’ approach to determining the level of CVD rates to be included in the economic model, whereby the United States adopts the rates for “All Others”, rather than using a simple average of the Section 129 rates.³⁰**

Response:

20. This question is addressed to the EU.

50. **To the European Union: In connection with the previous question, the United States argues that “the use of the “All Others” rate, rather than the simple average proposed by the EU, is consistent with the approach adopted by the arbitrator in the *US–Countervailing Measures (China) (Article 22.6 – US)* arbitration.”³¹ Please explain whether the approach taken by the arbitrator in *US–Countervailing Measures* could be relevant for the present case.**

Response:

21. This question is addressed to the EU.

51. **To the European Union: In its response to Arbitrator question No. 24, the United States argues that “[t]he EU has misinterpreted the scope of the relevant CVD investigation and resulting order as it argues that only ‘non-green’ canned olives as**

²⁹ See U.S. responses to first set of questions from the Arbitrator, paras. 8-9.

³⁰ U.S. written submission, para. 114.

³¹ U.S. written submission, para. 114.

defined by the HTS subheadings should be used in the model simulation”³² and that “the relevant CVD order is clear that ‘all colors of olives’, not just green olives, are within scope”.³³ Could the European Union please comment?

Response:

22. This question is addressed to the EU.

52. **To the United States:** In its response to Arbitrator question No. 28, the European Union maintains that “if the existence of the anti-dumping duties is included in the PE model, the reduction of the level of nullification or impairment resulting therefrom would not measure the ‘trade impact’ of the anti-dumping duties but would create an artificial reduction of the level of countermeasures because the counterfactual market share in 2016 would be artificially (and incorrectly) reduced.”³⁴ Please explain your views on this argument by the European Union.

Response:

23. The United States disagrees with the EU’s argument that accounting for the mere existence of AD duties would prevent a PE model from accurately measuring the “trade impact” attributable to those duties and would instead create an “artificial reduction” in the counterfactual market share for the reference year. The United States notes that the EU does not support the statement referenced by the Arbitrator with any evidence or further explanation.³⁵ Rather, as the United States explained in its response to the same Question 28, the opposite is true.³⁶ It would be unreasonable to ignore the existence of the AD duties and assume that the U.S. market for Spanish ripe olives was impacted by a CVD duty but not by an AD duty levied on the exact same products at the exact same time. Accordingly, ignoring the AD duties in determining benchmark market shares for the reference year (2016), as the EU proposes, would artificially inflate the relevant market shares, and thereby artificially inflate the level of countermeasures contrary to Article 22.4 of the DSU.

24. Contrary to the assertion made by the EU, the “trade impact” attributable to the AD duties is readily ascertainable by examining differences in modeling outcomes for the level of nullification or impairment between a model that accounts for both AD and CVD duties versus one that only accounts for the CVD duties. The United States provided such an analysis with its written submission as Exhibit USA-15. As explained further below in the response to Question 53, the calculation of the level of nullification or impairment is itself a product of modeling and

³² U.S. responses to first set of questions from the Arbitrator, para. 58.

³³ U.S. responses to first set of questions from the Arbitrator, para. 60.

³⁴ EU responses to first set of questions from the Arbitrator, para. 61 (referring to EU written submission, para. 74).

³⁵ See EU responses to first set of questions from the Arbitrator, para. 61.

³⁶ See U.S. responses to first set of questions from the Arbitrator, para. 68.

therefore it is entirely appropriate to use a modeling exercise to demonstrate the impacts of AD duties on the overall calculation of the level of nullification or impairment.

25. As the United States has explained in its written submission³⁷ and in its responses to the previous questions from the Arbitrator,³⁸ it is not reasonable to isolate CVD duties and the associated trade impact with precision without accounting for contemporaneous AD duties on the same products. Excluding the AD duties from the model would inappropriately attribute trade impact arising from the functionally identical AD duties to the CVD duties. In this way, isolation of the CVD duties will artificially inflate the level of nullification or impairment. Thus, it is mathematically both appropriate and necessary to consider the AD and CVD duties as a single duty and then reduce that single duty by its WTO-inconsistent CVD component in the counterfactual in order to generate an accurate reasoned estimate of the level of nullification or impairment.

53. To the United States: In its response to Arbitrator question No. 28, the European Union argues that “[t]he arbitrator found in *US – Countervailing Measures (China) (Article 22.6)* that ‘the United States needs to show more than the mere existence of the AD duties or that these may have an impact on Chinese imports’”³⁹ and that “[t]he US has not shown more than the existence of the AD duties in the present case.”⁴⁰ Please explain your views on this argument by the European Union.

Response:

26. The Arbitrator must make its assessment consistent with the requirements of the DSU, and not with the findings of previous arbitration reports. Therefore, to the extent the EU suggests that the Arbitrator must apply the findings of a previous report, the EU is simply incorrect. As the arbitrator in *US – Countervailing Measures (China) (Article 22.6 – US)* itself made clear, its findings were limited to the facts of the dispute before it and it was “not mak[ing] any principled statement as to the appropriateness of an Article 22.6 arbitration taking into account trade measures, such as AD duties, different from those at issue in a specific dispute.”⁴¹ With respect to whether the findings of the arbitrator in *US – Countervailing Measures (China) (Article 22.6 – US)* may nonetheless assist the Arbitrator in this dispute, we note that the circumstances in that dispute differed from those before the Arbitrator in important ways. The dispute in *US – Countervailing Measures (China) (Article 22.6 – US)* involved ten distinct and diverse manufactured products, each with their own respective CVD and AD orders.⁴² Importantly, seven of the ten products involved were also subject to parallel WTO dispute

³⁷ See U.S. written submission, paras. 85-87.

³⁸ See U.S. responses to first set of questions from the Arbitrator, paras. 47-50, 68-70.

³⁹ EU responses to first set of questions from the Arbitrator, para. 60.

⁴⁰ EU responses to first set of questions from the Arbitrator, para. 60.

⁴¹ *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.93.

⁴² See *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.86, Table 3.

settlement proceedings involving the application of AD methodologies that were found to be WTO-inconsistent in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*.⁴³ The present dispute does not include any of this complexity. Rather, there is a single product subject to parallel and contemporaneous AD and CVD orders. In addition, unlike in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, the WTO-consistency of the AD duties in the present dispute is not in question or subject to the relevant DSB recommendations.

27. Regardless, it is not clear what type of evidence the arbitrator in *US – Countervailing Measures (China) (Article 22.6 – US)* sought. As the United States explained in the meeting with the Arbitrator, 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.⁴⁴ 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. Accordingly, in the present dispute excluding the AD duties from the analysis adopted by the Arbitrator would result in an imprecise estimate of the trade impact attributable to the CVD duties and would necessarily overstate the level of nullification or impairment, contravening the DSU.

28. Furthermore, the United States has demonstrated “whether and, if so, in what manner or degree any trade impact of these AD duties would alter the level of [nullification or impairment] resulting from the CVDs”⁴⁵ by providing modeled estimates of the level of nullification or impairment comparing an improper isolation of the CVD rates versus an appropriate inclusion of the combined AD/CVD rate, which yield significantly different results.⁴⁶ While the United States understands that the arbitrator in *US – Countervailing Measures (China) (Article 22.6 – US)* rejected similar arguments based on modeling outcomes, estimates of nullification or impairment are themselves the product of a modeling exercise. It is therefore unclear how a Member could demonstrate that a specific factor, such as a contemporaneous duty, impacts the appropriate measurement of nullification or impairment outside of making an adjustment to the modeling approach and examining the differences in outcomes. Therefore, the findings in *US – Countervailing Measures (China) (Article 22.6 – US)* are not persuasive and would be of little assistance to the Arbitrator considering the facts before it. Based on the evidence and arguments

⁴³ See *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.83 (“In addition, China argues that incorporating the parallel AD duties would require the Arbitrator to evaluate the trade effects and the WTO-consistency or inconsistency of measures that were not subject to the recommendations and rulings of the DSB in this dispute, noting that seven of the ten products at issue underlying these proceedings were also at issue in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* and involved the USDOC’s application of WTO-inconsistent anti-dumping methodologies. Thus, China argues, incorporating the WTO-inconsistent AD duties analysed in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* would imply rewarding the United States for its WTO-inconsistent actions.”).

⁴⁴ See U.S. written submission, para. 115, Table 2. As explained in the U.S. written submission, the United States follows the approach of the arbitrator in *US – Countervailing Measures (China) (Article 22.6 – US)* by using the “all others” CVD rate for its model and therefore uses the “all others” AD rate as well, for consistency. See U.S. written submission, para. 114.

⁴⁵ *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.89.

⁴⁶ See Exhibit USA-15.

already provided, the United States has met its burden of demonstrating that the parallel AD duties on ripe olives from Spain must have an impact on the market for Spanish ripe olives and that failing to include the AD duties in measuring nullification or impairment would overstate the nullification or impairment of benefits accruing to the EU.

54. To the United States: In connection to the previous question, is it possible to determine whether and, if so, in what manner or degree, any trade impact of parallel AD duties would alter the level of nullification or impairment resulting from the CVDs? If so, how can this be assessed?

Response:

29. Yes. As explained in the responses to the foregoing questions, the level of nullification or impairment is the product of a modeling exercise. Accordingly, it is possible and appropriate to measure how excluding the trade impact of the parallel AD duties from the model will impact the level of nullification or impairment by running the model taking into account the existence of the parallel AD duties and running the model without taking into account the existence of the parallel AD duties. This is precisely what the United States has done as demonstrated in Exhibit USA-15. As shown in Exhibit USA-15, running the model using only the CVD rates and reducing the CVD rate to zero for the counterfactual, versus using a combined AD/CVD rate and reducing the combined rate by its WTO-inconsistent CVD component, demonstrates that the inclusion of parallel AD duties reduces the overall level of nullification or impairment by roughly \$4.6 million annually. Thus, including AD duties in the model, which more accurately reflects the U.S. market share of Spanish ripe olive producers in the reference year, yields a significantly different result for the level of nullification or impairment.

30. In addition, and as previously explained in the response to Question 53, above, the AD duties demonstrably had an impact on trade in ripe olives over the relevant time period. The EU does not dispute this fact. The relevant “all others” rates for the AD duties were higher than the rates for the CVD duties and both duties were imposed at the same time on the exact same products. Considering that the purpose of these proceedings is to measure the “trade impact” of the CVD duties, if the Arbitrator finds that the CVD duties do create a “trade impact” it would be clear that the same type of measure imposed on the same products at the same time, but at a higher rate, would also generate a “trade impact.”

55. To the United States: Please explain whether the anti-dumping duties on ripe olives changed from the time they were initially imposed to the end of the RPT. If so, what is the relevance of such change for the proposed inclusion by the United States of the anti-dumping duties on the economic model?

Response:

31. Certain of the AD and CVD rates have changed over time, because subsequent administrative reviews of each order modify the rates for those companies for which a review is requested. These changes are not relevant to the inclusion of the AD duties in the U.S. model,

however, because the United States uses the final “all others” rate for executing its model, which was calculated during the investigation. This approach is consistent with the approach taken by the arbitrator in *US – Countervailing Measures (China) (Article 22.6 – US)*.⁴⁷

56. To the United States: Could the United States please advise whether the subsidy had an impact on the level of the anti-dumping margin for any of the selected exporters or on the “all others” rate?

Response:

32. In calculating the AD margin, the United States included an offset to the margin for a separate export subsidy calculated in the companion CVD investigation. The relevant offset was for an export subsidy that is unrelated to the USDOC’s Section 771B determination. The amount of the offset was 0.06%, which reduced the “all others” rate in the AD order from 20.04% to 19.98%.⁴⁸

57. To the United States: The European Union maintains, in its response to Arbitrator question No 13, that: “[t]he level of nullification or impairment accruing to the EU arising from the CVDs on imports of ripe olives is linked to the scope of those measures. The United States’ investigation and the scope of the ensuing CVDs concerned ripe olives from Spain. Therefore, only the impact on the trade flows from the relevant Spanish ripe olive producers to the US is relevant to calculate the level of nullification or impairment of benefits accruing to the EU resulting from those CVDs.”⁴⁹ Please explain your views on this argument by the European Union.

Response:

33. As the United States explained in its written submission⁵⁰ and in its responses to prior questions from the Arbitrator,⁵¹ under the DSU the measurement of nullification or impairment of benefits is tied to a request for suspension of concessions or other obligations by “any party having invoked the dispute settlement procedures.”⁵² The party that has invoked the dispute settlement procedures and made a request for suspension of concessions or other obligations in this dispute is the EU, not Spain. Therefore, the mandate of the Arbitrator is to accurately measure the nullification or impairment of benefits accruing to the EU (i.e., the only “party

⁴⁷ See U.S. written submission, para. 114.

⁴⁸ See Exhibit USA-22.

⁴⁹ EU responses to first set of questions from the Arbitrator, para. 48.

⁵⁰ See U.S. written submission, paras. 63-68.

⁵¹ See U.S. responses to first set of questions from the Arbitrator, paras. 44-46.

⁵² DSU, Art. 22.2.

having invoked the dispute settlement procedures”), not Spain. The EU recognizes this repeatedly in its submissions.⁵³

34. Nonetheless, the EU continues assert that the Arbitrator should isolate the nullification or impairment of benefits accruing to the Spanish market and ignore the offsetting gains made by other ripe olive producers within the rest of the EU market. The EU has never explained how this approach is permissible under the plain text of the DSU. It points to the scope of the CVD order on ripe olives but fails to explain why the scope of the CVD order is relevant under the process laid out by the DSU. To the contrary, the fact that a WTO-inconsistent measure covers a specific set of producers or a specific geographic location within a WTO Member does not allow an Arbitrator to isolate its estimate of nullification or impairment to only those producers or that region to the exclusion of the rest of the requesting WTO Member. As the United States explained in its responses to prior questions from the Arbitrator and in the meeting with the Arbitrator, this argument would fail if submitted by any other WTO Member.⁵⁴ For example, if a WTO-inconsistent measure were directed at a specific U.S. state, the United States could not argue that nullification or impairment of benefits accruing to the United States should be measured only with respect to that state, ignoring offsetting gains made by producers in other U.S. states. The EU as the requesting WTO Member is not entitled to special treatment under the DSU because of its political structure.

35. The EU seemed to acknowledge in the meeting between the Parties and the Arbitrator that it would be appropriate to offset losses made by certain Spanish olive producers with gains made by other Spanish olive producers in order to accurately measure the level of nullification or impairment of benefits accruing to the Spanish market. This is in fact what the EU’s proposed methodology does by looking at trade flows from the Spanish market, as a whole. The problem is that the EU is examining the wrong market. Given that the relevant WTO Member in this dispute is the EU, not Spain, the same approach must be taken for the EU. As the only WTO Member who brought this dispute and that is now making a request to suspend concessions or other obligations, nullification or impairment must be measured with respect to the EU market as a whole, taking into account both losses in exports from Spain due to the WTO-inconsistent measures and any gains made by other EU Member States that export ripe olives to the United States. Isolating the losses while ignoring offsetting gains within the same EU market would necessarily overstate the level of nullification or impairment of benefits accruing to the EU and thus contravene Article 22.4 of the DSU.

58. To the United States: Is there any reliable empirical evidence that the Armington elasticity of processed agricultural products significantly varies across import markets?

⁵³ 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.

⁵⁴ See U.S. responses to first set of questions from the Arbitrator, para. 46.

Response:

36. The United States is not aware of any empirical evidence focusing specifically on the Armington elasticity for processed agricultural products. However, there is ample empirical evidence demonstrating that Armington elasticities could vary significantly across importing countries.

37. For example, using United Nations import data for all goods at the HTS-6 level for 73 countries, Broda et al (2006) finds that the average Armington elasticity in the United States is 4.2, smaller than the average Armington elasticity of 6.8 for the typical country in the sample, suggesting that U.S. consumers tend to value variety more.⁵⁵ Yilmazkuday (2015) applies the U.S. goods export at the SITC4 level to 237 destination countries and finds that the import demand elasticity decreases significantly in GDP per capita and distance to the United States of the importer country.⁵⁶ Finally, Hillberry and Hummels (2013) provides a comprehensive review of the literature estimating trade elasticities and attributes the variations in import demand elasticities across countries to two factors: the difference in the composition of trade within a specific product category, and the difference in the underlying market structure (such as the number of competing firms). The authors caution against the blanket application of a single elasticity across all countries and recommend practitioners to allow the elasticity parameters to be specific to individual countries.⁵⁷

38. In the current proceedings, the economic model proposed by the United States involves U.S. consumers substituting between in-scope products from different sources. Thus, the Armington elasticity estimates from Soderbery (2015), which are not only derived using U.S. imports, specifically, but also are tied directly to the in-scope products, align well with the underlying modeling approach. The Soderbery (2015) estimates therefore offer a better fit than the estimates relied upon by the EU presented in Fontagne et al (2022), which are based on global trade flows at a much more aggregated HTS-6 level, and vary across products but not across countries.⁵⁸

59. To the United States: To calculate in-scope trade flows to markets other than the United States, the European Union adopts the assumption that the share of in-scope imports in total ripe olives imports (HS 200570) in the United States is representative of this share in other import markets.⁵⁹

⁵⁵ Broda, Greenfield, & Weinstein, *From Groundnuts to Globalization: A Structural Estimate of Trade and Growth*, 71 Res. in Econ. 759 (2017) (Exhibit USA-38).

⁵⁶ Hakan Yilmazkuday, *Importer-Specific Elasticities of Demand: Evidence from U.S. Export*, 35 Int'l Rev. of Econ. & Fin. 228 (2015) (Exhibit USA-39).

⁵⁷ Hillberry & Hummels, *Trade Elasticity Parameters for a Computable General Equilibrium Model*, 1 Handbook of Computable General Equilibrium Modelling 1213, at 1244-1246 (2013) (Exhibit USA-40).

⁵⁸ See U.S. Written Submission, paras. 106-07.

⁵⁹ EU Methodology Paper, para. 34.

a. Is there any empirical evidence that this assumption is not reliable?

Response:

39. Yes, there is sufficient empirical evidence to support that the EU’s assumption is not reasonable. By making this assumption, the EU assumes that production and consumption patterns (and therefore import patterns) for table olives, including in-scope olive products, in the United States is representative for all other regions and countries. The EU’s own statements belie the reasonableness of such an assumption. For example, the EU acknowledges in its responses to prior questions from the Arbitrator that “in 2022/2023 the US has consumed more than it produced while the EU and the Rest of the World produced more than they consumed”.⁶⁰ Specifically, based on the data provided by the EU in Exhibit EU-19, in 2022/2023, the U.S. production of table olives (18,000 tonnes) was about 10% of U.S. consumption (176,000 tonnes), suggesting that the U.S. had a table olives shortage and relied heavily on imports from foreign countries to meet its domestic demand. By contrast, the EU production (830,000 tonnes) was about 40% above its consumption (593,500 tonnes), and the ROW production (2,381,000 tonnes) was 12% above its consumption (2,125,500 tonnes), suggesting that both the EU and ROW had table olive surpluses and relied on foreign markets to sell their table olives.⁶¹ Thus production and consumption patterns in the United States versus the EU and ROW are not the same.

40. To further illustrate the flaws in the EU’s assumption, we provide the following two examples. In its Methodology Paper, the EU calculates that in-scope olive products accounted for about 22.6% of U.S. imports of table olives (HS 200570) from the world in 2016, and applies this share to Spain’s imports, suggesting that 22.6% of Spain’s imports of table olives, or \$3.86 million, were for in-scope products.⁶² However, according to the investigation conducted by the U.S. International Trade Commission (“USITC”), the Spanish domestic market for in-scope products “is a small market that is highly competitive with many suppliers and low prices,” and all responding Spanish producers “reported that they do not face import competition in their home market”.⁶³

41. Additionally, the chart below compares the shares based on the EU’s assumption with those based on USITC survey data for other EU imports of in-scope products from Spain for the period of 2018-2022, the only years for which the data is available.⁶⁴ The gap between these two sets of shares suggests that the EU’s assumption may deviate significantly from reality. Given the critical role these shares play in the EU’s economic modeling analysis, these discrepancies

⁶⁰ EU responses to first set of questions from the Arbitrator, para. 54.

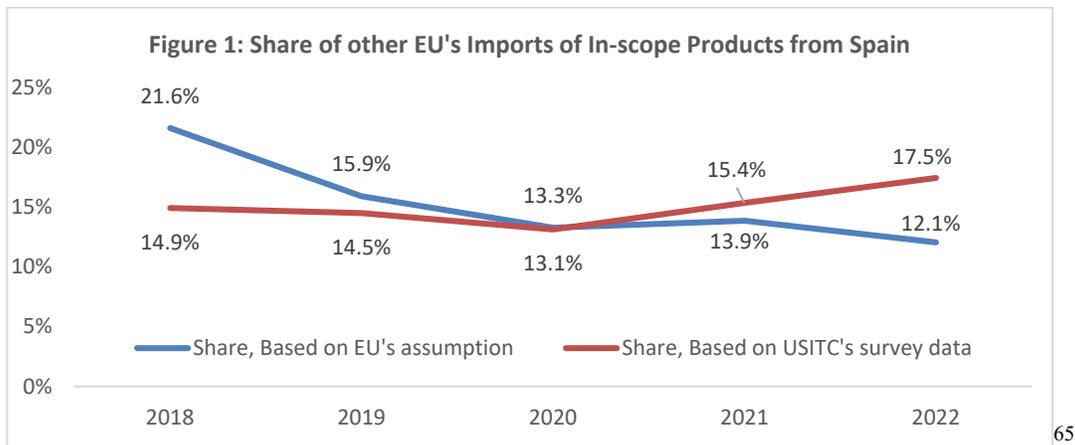
⁶¹ See EU responses to first set of questions from the Arbitrator, Table 1.

⁶² See Exhibit EU-14, p. 5, which provides a value for Spain’s total imports under HTS 200570 in 2016 of \$17.08 million. 22.6% of \$17.08 million is \$3.86 million.

⁶³ Exhibit USA-13, p. II-6.

⁶⁴ For the assumed shares by the EU for the period of 2018-2022, see Exhibit EU-14, p. 3. For Spain’s exports of in-scope olive products to the EU based on USITC survey data, see Exhibit USA-13, Table IV-17. The values of Spain’s exports of table olives (HS 200570) to the EU are sourced from Global Trade Atlas.

give rise to significant questions regarding the accuracy of the EU’s nullification and impairment measurements.



b. Is there any other approach that could be taken to estimate accurately the shares of imports in other markets?

Response:

42. As discussed above, we do not believe that in-scope import shares in the U.S. market are an accurate representation of in-scope import shares in other markets. Such an assumption would significantly distort the estimates of in-scope imports in other markets given the vastly different production and consumption patterns for table olives between the United States and other markets. We are not aware of any other approach that could be taken to improve the accuracy of the estimated import shares for the benchmark year of 2016.

43. However, as stated in the U.S. written submission, the global dimension of the EU model is unnecessary, overly complex, and extraneous because the dispute only concerns the impact of CVD rates on imports from Spain into the U.S. market.⁶⁶ By contrast, the U.S. model concentrates specifically on analyzing the U.S. market where the CVD duties were applied, and enables precise analysis of both the interaction between domestic production and total imports, as well as the redistribution of trade flows among various foreign sources, within U.S. imports. As a result, it requires only U.S. market share data as a model input, which can be accurately estimated using available data.

60. To both parties: Considering the United States’ response to Arbitrator question No. 24, should the data for the economic model be expanded to include all HTSUS categories (or their domestic equivalents) specified in the relevant CVD order?

⁶⁵ The underlying data for Figure 1 is provided in Exhibit USA-41.

⁶⁶ See U.S. written submission, paras. 69-71.

Response:

44. No. Under the text of the CVD order, a large subset of the listed HTS codes represent codes under which “subject merchandise may also be imported”.⁶⁷ Including those HTS codes without a reliable way to determine the proportion of subject merchandise included in those codes would be overinclusive and would improperly assume that duties apply to a host of products that are outside the scope of the CVD order, thus overstating nullification or impairment.

45. Because it is not possible to determine with complete accuracy the import flows of in-scope ripe olive products, the use of a proxy is necessary. The HTS codes used in the U.S. model (which are also used by the EU) are the best available proxy which is not over or underinclusive of in-scope products subject to the CVD order. The USITC’s investigation report also states that “the merchandise subject to these investigations is primarily imported” under the 7 HTS-10 codes used in both the U.S. and EU models.⁶⁸

46. 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. As the United States has explained in its responses to prior questions from the Arbitrator,⁶⁹ there is no reason to believe that the domestic production data supplied by the United States includes significant volumes of out-of-scope products and the EU has not presented any evidence suggesting that it does. 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. Deviating from either proxy for a less reliable proxy or source – or worse, excluding completely domestic production from the analysis, as proposed by the EU – would significantly distort nullification or impairment estimates and thereby contravene the DSU.

61. To both parties: The methodology adopted by Fontagné et al. (2022) identifies the estimates of the Armington elasticity from changes in *tariffs* while the methodology adopted by Soderbery (2015) relies on changes in *prices*. Are there any sources in the economic literature that would argue that one of the methodologies delivers estimates that are more reliable and appropriate for the assessment of the impact of duties in a partial equilibrium Armington model?

Response:

47. There are several prominent methodologies in the trade literature to estimate the Armington elasticity, but there is no consensus on the preferred approach. Specifically, the Fontagné et al. (2022) methodology belongs to the trade cost approach, which exploits the price

⁶⁷ U.S. responses to first set of questions from the Arbitrator, para. 59 (quoting Exhibit USA-4, at p. 4) (emphasis added).

⁶⁸ Exhibit EU-9, p. I-8.

⁶⁹ See U.S. responses to first set of questions from the Arbitrator, paras. 60-62.

variations induced by trade costs (proxied by tariffs and transportation cost, etc.) to identify sectoral-level elasticities. However, the Soderbery (2015) methodology belongs to the system-of-equation approach which identifies structural import demand and supply elasticities in a system of simultaneous equations without the need for any external instrument variables. In general, the trade cost approach tends to produce higher estimates compared to the system-of-equation approach, irrespective of the data aggregation level.⁷⁰

48. It is worth pointing out that the system-of-equation approach to which Soderbery (2015) belongs is distinct from the import price approach, which relies on time-series variation in the price and quantity of imports in each industry to estimate the elasticity, and is therefore more likely to suffer from measurement errors and other econometric challenges than either of the two approaches discussed above.⁷¹

49. Besides the methodological difference, these two studies also differ in terms of the level of data aggregation and the selection of sample countries, which could have significantly impacted the elasticity estimates, as suggested by Bajzik et al (2020), Imbs and Mejean (2015), and Ahmad et al. (2021).⁷² In the context of the current proceedings, using estimates from Soderbery (2015) will limit potential bias in the analysis, because the estimates are based on U.S. import data at the same disaggregation level as other data inputs used in the model. The Soderbery (2015) estimates also specifically measure the degree of substitutability for in-scope products among different sources from the perspective of U.S. consumers. By contrast, the estimates from Fontagné et al. (2022) are based on global trade flows at a much more aggregated level, and should be interpreted as the global average substitutability for table olives overall, rather than for the in-scope products in the U.S. market, specifically.

62. To both parties: During the substantive meeting, the European Union drew attention to the fact that Soderbery (2015) states that his estimates of export supply elasticity may be biased.⁷³ The Arbitrator notes the existence of a later Soderbery study (2018)⁷⁴ that addresses one of the possible sources of bias in Soderbery (2015) and provides exporter-specific estimates of export supply elasticities. Can the parties please advise whether Soderbery (2018) therefore provides a more reliable measure of export supply elasticity compared with Soderbery (2015)?

⁷⁰ See Ahmad, Montgomery, & Schreiber, *A Comparison of Sectoral Armington Elasticity Estimates in the Trade Literature*, USITC J. of Int'l Com. & Econ., at p. 9 (2021) (Exhibit USA-42).

⁷¹ See Exhibit USA-42, pp. 3-4.

⁷² See Bajzik et al., *Estimating the Armington Elasticity: The Importance of Study Design and Publication Bias*, 127 J. of Int'l Econ. 103383 (2020) (Exhibit USA-43); Imbs & Mejean, *Elasticity Optimism*, 7 Am. Econ. J.: Macroeconomics 43 (2015) (Exhibit USA-44); Exhibit USA-42.

⁷³ Exhibit USA-21, p.13.

⁷⁴ Soderbery, Anson, "Trade Elasticities, Heterogeneity, and Optimal Tariffs", *Journal of International Economics*, 114, September 2018: pp 44-62.

Response:

50. Foreign export supply elasticities can be challenging to estimate. Soderbery (2015) contributes to the system-of-equations approach by correcting biases in demand elasticity estimates, even though it yields limited robustness improvement in supply elasticity estimates. Despite the limitation, the estimates from Soderbery (2015) still represent a better option than the unsupported assumption of an infinite export supply elasticity proposed by the EU, which is typically only applied to small economies within single-country models. There is little theoretical foundation to extend this assumption to a major producer and exporter of ripe olives, like Spain, in a multi-country framework such as that advanced by the Parties in the current proceeding. Furthermore, the EU has provided no evidence to support its position that an infinite export supply elasticity would be appropriate.

51. Soderbery (2018) builds on Soderbery (2015) by leveraging variations in prices and quantities across multiple markets to consistently estimate heterogenous supply and demand elasticities simultaneously.⁷⁵ However, there are trade-offs involved in using export supply elasticity estimates from Soderbery (2018) instead of those from Soderbery (2015) in the current proceeding. First, the heterogenous export supply elasticity in Soderbery (2018) is not consistent with either the U.S. or the EU modeling framework in which the export supply elasticity does not vary by exporter. Second, the estimates from Soderbery (2018) are provided at the more aggregated HTS-4 level, compared to the HTS-8 or HTS-10 level in Soderbery (2015).⁷⁶ Finally, Soderbery (2018) doesn't provide an export supply elasticity estimate for Spain, specifically. Instead, Spain is grouped with Southern and Eastern European countries, and thus the estimate should be interpreted as a group average. For the current proceeding, Soderbery (2018) reports an elasticity of 1.09 for the relevant HTS-4 code 2005 (with the United States as the importer and Southern and Eastern Europe as the exporter),⁷⁷ compared to a simple average of 23.5 and a trade-weighted average of 12.3 for the export supply elasticity for the in-scope products from Soderbery (2015).⁷⁸ In both the U.S. and EU models, all else being equal, applying a smaller foreign export supply elasticity would lead to lower nullification or impairment estimates for Spain and the EU, because exports from Spain and the EU would be less responsive to changes in prices.

63. To both parties: With respect to the argument by the United States that the “EU improperly isolates the Spanish market in its analysis and ignores gains accruing to

⁷⁵ Anson Soderbery, *Trade Elasticities, Heterogeneity, and Optimal Tariffs*, 114 J. of Int'l Econ. 44 (2018) (Exhibit USA-45).

⁷⁶ Soderbery (2018) notes that HTS-6 estimates are also considered, but only the HTS-4 estimates are available on the author's website. Exhibit USA-45, p. 48, n. 7.

⁷⁷ The elasticity estimates at the HTS-4 level are available at <https://web.ics.purdue.edu/~asoderbe/elasticities/het-elasticities/>. Soderbery (2018) provides the inverse foreign export supply elasticity (ω), so the 1.09 is calculated as $1/\omega$.

⁷⁸ See U.S. responses to first set of questions from the Arbitrator, para. 67.

other EU Member States in calculating nullification and impairment”⁷⁹, please comment on:

- i. whether this is a novel issue or whether there has been in the past a similar situation that may be illustrative for the dispute at issue;**
- ii. the relevance of Spain’s membership of the WTO, in its own right, as stated by the European Union during the substantive meeting; and**

Response:

52. The United States responds to Questions 63.i and 63.ii, together. The United States is not aware of any other instance in which a WTO Member requesting to suspend concessions or other obligations has attempted to isolate the measurement of nullification or impairment to a specific region or sub-jurisdiction within it. To the contrary, in the prior Article 22.6 arbitrations that the United States has examined, nullification or impairment has been measured with respect to the market as a whole of the WTO Member requesting to suspend concessions or other obligations. Here, that WTO Member is the EU, not Spain, and accordingly nullification or impairment must be measured with respect to the EU market as a whole.

53. It should be noted that this situation could only come about with respect to the EU because both the EU and its Member States are WTO Members. Here, the EU seeks to use its unique political structure to act as the EU when it suits it to do so, such as in requesting relief for any EU Member State for a future “as such” breach, but to act as an individual Member State (in this case Spain) to the exclusion of the rest when that is to its advantage. In this regard, *EC and certain member States — Large Civil Aircraft (Panel)* is instructive. In that dispute, the United States initiated dispute settlement proceedings against the European Communities, as well as against the governments of Germany, France, the United Kingdom, and Spain, in their own rights as WTO Members.⁸⁰ The European Communities asserted that it was the only proper respondent in the dispute but at the same time declined to accept responsibility for representing the interests of the four Member States properly named by the United States in its requests for consultations and for the establishment of a panel.⁸¹ The panel disagreed with the European Communities, finding that both the European Communities and each of the four designated Members States “is, in its own right, a Member of the WTO, with all the rights and obligations pertaining to such membership, including the obligation to respond to claims made against it by another WTO Member.”⁸²

54. In this dispute, Spain, as a Member of the WTO in its own right, could have requested consultations with the United States, litigated the dispute through the panel and compliance

⁷⁹ U.S. written submission, paras. 63-68.

⁸⁰ See *EC and certain member States — Large Civil Aircraft (Panel)*, paras. 7.170-71.

⁸¹ See *EC and certain member States — Large Civil Aircraft (Panel)*, paras. 7.171-72.

⁸² *EC and certain member States — Large Civil Aircraft (Panel)*, paras. 7.174.

stages, and requested authorization from the DSB to impose countermeasures. If it had done so, the Arbitrator’s mandate would be to ensure that the countermeasures requested by Spain do not exceed the nullification or impairment of benefits accruing to Spain. However, the EU brought this dispute in its own capacity as a Member of the WTO. This being the case, the DSU requires the Arbitrator to assess nullification or impairment of benefits accruing to the EU market, as a whole, and not to the Spanish market, alone.

- iii. **the relevance of the fact that the CVD investigation at issue concerned exports from one European Union Member, namely Spain, and was accepted and conducted on that basis by USDOC.**

Response:

55. As explained in the response to Question 57, above, and in our responses to prior questions from the Arbitrator,⁸³ the fact that the USDOC’s CVD investigation focused on ripe olive exports from Spain is not relevant to the issue of how the Arbitrator should measure nullification or impairment of benefits accruing to the EU. Under the DSU, the scope of the measurement of nullification or impairment is defined with respect to the party that invoked dispute settlement procedures and later made a request to suspend concessions or other obligations.⁸⁴ Nothing in the DSU suggests that the measurement of nullification or impairment of benefits accruing to a Member should be adjusted because the other Member’s measure focuses on a specific region within that Member, even if that region itself is a WTO Member. Nor would such an adjustment make sense under the circumstances. If the EU imposes countermeasures as a result of these proceedings, those countermeasures would not apply to U.S. exports coming into Spain only, but to exports coming into any EU Member State. The fact that U.S. law permits the USDOC to focus its investigation and apply a CVD order against Spain only does not change the scope of the EU’s rights and obligations under the DSU, or the nature and effect of any countermeasures the EU could impose. Accordingly, the level of suspension requested by the EU must be equivalent to the level of nullification or impairment of benefits accruing to the EU. The focus of the WTO-inconsistent measure is irrelevant to this analysis.

64. **To both parties: In its response to the Arbitrator’s question No. 12, the European Union argues that “the available data on domestic production presented by the United States does not match the products under the trade codes fully covered by the measures.”⁸⁵ In an effort to more closely match the scope of the domestic production data and the import data, would the parties be open to matching fully in-scope USHTS codes to North American Industry Classification System (NAICS) codes, and then calculating the United States’ domestic market share of in-scope products using the United States Bureau of Economic Analysis’ input-output tables or the United States Census Bureau’s Annual Survey of Manufacturers?**

⁸³ See U.S. responses to first set of questions from the Arbitrator, paras. 44-46.

⁸⁴ See DSU, Art. 22.2.

⁸⁵ EU responses to first set of questions from the Arbitrator, para. 46.

Response:

56. The methodology offered by the Arbitrator in Question 64 would result in a less precise estimate of U.S. domestic production of in-scope products than the NASS production data submitted by the United States. Specifically, in this proceeding, all in-scope products defined in the relevant CVD order correspond to the same 6-digit NAICS code, 311421 (representing the most disaggregated NAICS codes available) based on the 2016 concordance between the HTS-10 import codes and NAICS codes provided by the U.S. Census Bureau.⁸⁶ As shown in the concordance, NAICS 311421 (classified as “Fruit and Vegetable Canning”) includes not only in-scope ripe olive products, but also a broad range of other fruits and vegetables, such as provisionally preserved fruits, cucumbers, artichokes, beans, walnuts, tomato sauces, and juices.

57. In addition, the most detailed input-output (“I-O”) table from the USDOC Bureau of Economic Analysis (“BEA”) is the benchmark table at the NAICS-6 level which is released every five years, with the most recent release being in 2017. However, that BEA table only has production data for NAICS 311420 (classified as “fruit and vegetable canning, pickling, and drying”), and the production value of \$33.5 billion for this industry includes not only NAICS 311421, but also NAICS 311422 (specialty canning), and NAICS 311424 (dried and dehydrated food manufacturing).⁸⁷ The Annual Survey of Manufacturers (“ASM”) from the U.S. Census Bureau does have shipment data for NAICS 311421, which was \$25.5 billion in 2016 and \$26.6 billion in 2021, the latest year available.⁸⁸ We are not aware of any reliable way to accurately estimate the share of in-scope products within this industry’s total shipment data. For all of the foregoing reasons, the approach proposed by the Arbitrator would provide a less reliable proxy value for U.S. domestic production of in-scope ripe olives than the NASS data provided by the United States.

3 PARTIES’ ECONOMIC MODELS FOR THE AS SUCH INCONSISTENCY

65. To the European Union: In connection with the European Union’s response to Arbitrator question No. 31, please elaborate on which price indexes the Arbitrator should consider when setting out a possible adjustment for inflation. Should the Arbitrator rely on the data provided by the US Department of Agriculture, as suggested by the European Union in response to question No. 38 regarding the “as applied” inconsistency?

Response:

⁸⁶ The concordance file can be found at <https://www.census.gov/foreign-trade/schedules/b/2016/imp-code.txt>.

⁸⁷ The 2017 I-O table can be found at <https://www.bea.gov/industry/input-output-accounts-data> under “Supply Tables”.

⁸⁸ The shipment data from the ASMs for 2016 and 2021 can be found at <https://www.census.gov/data/tables/time-series/econ/asm/2013-2016-asm.html> (under “Value of Product Shipment”) and <https://data.census.gov/table/ASMAREA2017.AM1831BASIC01?q=AM1831BASIC&n=311421>.

58. This question is addressed to the EU.

66. To the European Union: In its response to Arbitrator question No. 32, the European Union suggests that an infinite export supply elasticity should be used.⁸⁹ However, and as noted in the original question by the Arbitrator, the European Union had originally submitted that should there be factual and verifiable estimates for such elasticity with regard to products affected by future applications of Section 771B, then the European Union would suggest to use those values.⁹⁰

- i. **Could the European Union confirm that it suggests that an infinite export supply elasticity should be used across the board for all products that could be potentially subject to CVD measures under Section 771B?**
- ii. **If not, please explain how exactly the European Union proposes to do so, including where such values should be searched for, and which protocols should be followed for the use of such data in the prospective model.**
- iii. **Please comment on the source of estimates that the United States presents in its answer to question No. 27.**

Response:

59. This question is addressed to the EU.

67. To the European Union: In its response to Arbitrator question No. 33, the European Union suggests that possible data sources to obtain trade flows could be the Global Trade Atlas (GTA), the Trade Data Monitor (TDM), or the Trade Map.⁹¹ Are there any particular criteria to choose one source over the other? What instructions should the Arbitrator set out in its Decision relating to the use of these data sources?

Response:

60. This question is addressed to the EU.

68. To the European Union: Please comment on paragraph 14 of the United States' response to Arbitrator question No. 4, where the United States argues that "a prospective formula for calculating the level of nullification or impairment arising from a future use of Section 771B with regard to processed agricultural goods other

⁸⁹ EU responses to first set of questions from the Arbitrator, para. 67.

⁹⁰ EU written submission, para. 117.

⁹¹ EU responses to first set of questions from the Arbitrator, para. 68.

than ripe olives would require a procedure for calculating a WTO-consistent attribution rate.”⁹²

Response:

61. This question is addressed to the EU.

69. **To the European Union: In connection with the previous question, the United States suggests in its response to Arbitrator question No. 4 that “[f]or 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 conceivably available for processed agricultural products subject to Section 771B, and determining to the best of the parties’ ability a suitable value for a WTO-consistent attribution rate.”⁹³ Please explain whether, in the European Union’s view, the approach suggested by the United States would be appropriate and workable.**

Response:

62. This question is addressed to the EU.

70. **To the European Union: The Arbitrator notes that some of the public data sources mentioned by the European Union in response to Arbitrator question No. 33 are published or updated with uncertain regularity. Should these issues on the timeliness, and consequent availability, of import data present issues when running the prospective model? How could these be addressed?**

Response:

63. This question is addressed to the EU.

71. **To the United States: Please comment on the European Union’s response to Arbitrator question No. 32, where the European Union suggests that an infinite export supply elasticity should be used in the context of the “as such” scenario.⁹⁴**

Response:

64. The use of an infinite export supply elasticity for ripe olives is the most extreme possible value the EU could suggest and is completely unsupported by any literature or evidence. It is

⁹² U.S. responses to first set of questions from the Arbitrator, para. 14.

⁹³ U.S. responses to first set of questions from the Arbitrator, para. 14.

⁹⁴ EU responses to first set of questions from the Arbitrator, para. 67.

orders of magnitude higher than the values used by past arbitrators (10)⁹⁵ and the values found in the economic literature (weighted average of 12.3).⁹⁶

65. The only support that the EU provides for using an infinite export supply elasticity for ripe olives is an argument that because the United States consumes more ripe olives than it produces and the EU and ROW produce more than they consume, U.S. demand for ripe olives can be fully satisfied by Spain regardless of price.⁹⁷ However, the data that the EU presents does not support this assumption. As shown in the EU’s responses to prior questions from the Arbitrator, excess production above domestic consumption for the entire EU, not just Spain, only eclipses U.S. consumption by about 60,000 tons.⁹⁸ Exports from Spain should only account for a subset of the total excess production, which would also include exports from other EU countries producing ripe olives (such as Italy or Greece) and ripe olives used for other non-consumption purposes (such as inventories). Accordingly, the mere fact that total excess ripe olive production from the EU covers total consumption in the United States by a modest margin in no way justifies applying an infinite export supply elasticity to ripe olives from Spain. Such an assumption is unreasonable when applied to ripe olives, and is not supported by the data put forth by the EU.

66. It is all the more unreasonable to assume that an infinite export supply elasticity can be applied to all products that could be subject to Section 771B. The EU explains this blanket assumption only by asserting that “[i]t is reasonable to assume that future US CVD investigations applying Section 771B would target processed products from the EU that are exported in significant numbers to the US.”⁹⁹ That assumption is not reasonable. There is no way to predict with any degree of confidence that a future subject of a Section 771B action will be “exported in significant numbers to the US.”¹⁰⁰ Furthermore, the EU provides no indication for when exports would cross the subjective threshold of being “significant” enough to justify the use of the extreme infinite export supply elasticity value. The EU’s argument for a blanket application of an infinite export supply elasticity to any product potentially subject to Section 771B is therefore untenable and should be rejected.

72. To the United States: Please comment on the European Union’s statement at paragraph 79 of its response to Arbitrator question No. 37, which reads as follows:

The EU notes that 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

⁹⁵ See U.S. written submission, para. 103.

⁹⁶ See U.S. responses to first set of questions from the Arbitrator, para. 67.

⁹⁷ See EU responses to first set of questions from the Arbitrator, para. 54.

⁹⁸ EU responses to first set of questions from the Arbitrator, para. 54, Table 1.

⁹⁹ EU responses to first set of questions from the Arbitrator, para. 67.

¹⁰⁰ EU responses to first set of questions from the Arbitrator, para. 67.

(HTSUS 10 digit). Thus, the USDA National Agriculture Statistics Survey data are collected with a product classification that cannot be predictably matched one-to-one to the USHTS tariff lines, with no available official conversion table.¹⁰¹

Response:

67. The EU’s assertion is beside the point. As the United States has discussed in its responses to prior questions from the Arbitrator, HTS codes are not determinative of the scope of a CVD order and are therefore not expected to be tied “one-to-one” with products subject to a relevant CVD order.¹⁰² Therefore, for the purposes of the models proposed by both the EU and the United States, the HTS codes are used to generate a proxy for in-scope import flows which is the best information that is available for determining imports subject to the CVD order.

68. Similarly, domestic shipments of in-scope products can only be approximated through a proxy value which is expected to track as closely as possible the coverage of the relevant CVD order. In the current proceeding, the NASS production data is consistent with the scope of the CVD order and is the best available data for U.S. domestic production of ripe olives. While NASS does not collect data on specific olive varieties, information about the U.S. olive industry supports the assumption that all, or nearly all, of the production reported is for ripe olives that would be covered by the scope of the CVD order. This is because no evidence has been presented by the EU to suggest that the volume of U.S. olives destined for canned processing includes any significant quantity of olives that would be processed into “specialty olives,” which are excluded from the CVD order.¹⁰³ Nor has any evidence been presented to suggest that the United States exports olives in any significant quantity, especially given that, as the EU acknowledges, U.S. domestic production of ripe olives can satisfy only a fraction of U.S. consumption of ripe olives.¹⁰⁴ Accordingly, the NASS production data is a reliable proxy for in-scope U.S. domestic ripe olive production and relying on this data will produce a more accurate estimate of the level of nullification or impairment than the alternative proposed by the EU, which is to exclude U.S. domestic production from the analysis entirely.

69. It is not reasonable to expect a one-to-one match between the NASS production data used in the U.S. model and the identified in-scope HTS tariff lines, which do not define the scope of the investigation and are provided only for convenience and U.S. customs purposes. The fact

¹⁰¹ EU responses to first set of questions from the Arbitrator, para. 79 (footnote omitted).

¹⁰² See U.S. responses to first set of questions from the Arbitrator, paras. 58-62.

¹⁰³ According to the University of California’s Olive Production Manual, the dominant product of California’s olive industry is canned, black-ripe olives, accounting for 80-85 percent of California fresh olives grown in the state. See Janet E. Nelson, *California Table Olives: Marketing, Imports, and the Federal Marketing Order*, in U.C. Agric. & Nat. Resources, Olive Production Manual 11, at p. 11 (2005) (relevant excerpt provided as Exhibit USA-46). The California Olive Committee also reports that over 90 percent of the California crop is processed as black and green ripe olives. See California Olive Committee, *2016-2017 California Olive Committee Annual Report*, at p. 6 (2017) (Exhibit USA-47).

¹⁰⁴ See EU responses to first set of questions from the Arbitrator, para. 54, Table 1.

that these two proxy values do not neatly align with one another is not relevant to the Arbitrator’s assessment. Both inputs are approximations of the coverage of the CVD order and the Arbitrator’s goal should be only that each proxy used is as accurate as possible in that regard.

73. To both parties: The European Union and the United States have described in different terms the triggering event that the Arbitrator should set out in its Decision. For the European Union, a triggering event would be “any application of Section 771B against an ‘agricultural product processed from a raw agricultural product’ imported from the EU, i.e. from one, several or all of its Member States depending on the scope of the measure concerned”.¹⁰⁵ On the other hand, the United States suggests that a triggering event would be “the imposition of duties pursuant to a U.S. 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.”¹⁰⁶ In this connection:

- i. Please comment on any potential differences and similarities between these two descriptions.**

Response:

70. We understand from our exchanges with the Arbitrator and with the EU during the in-person meeting that the United States and the EU largely agree on what the triggering event would be, with the sole exception of what should occur if the USDOC were to issue a CVD order under Section 771B that attributed less than 100 percent of subsidy benefits to the downstream processor of the product at issue. The EU’s description of the triggering event quotes the text of Section 771B and applies it to products from the EU. The United States agrees with the EU on its description of the text of Section 771B and that a triggering event would occur when Section 771B is applied to imports from an EU Member State. The U.S. description simply provides more detail concerning when in the process of applying Section 771B a triggering event would occur. In our view, there is no nullification or impairment of benefits, and therefore no grounds to request suspension of concessions or other obligations, until duties are actually applied pursuant to a WTO-inconsistent CVD order issued where the USDOC applied Section 771B in the underlying investigation. This is consistent with the approach taken by the Arbitrator in *US – Supercalendered Paper (Canada) (Article 22.6 – US)* and we understand that the EU agrees that the triggering event would occur only when duties are actually applied.

- ii. Does the European Union agree with the United States in using a CVD order as the starting point of the triggering event, so as to reflect when duties are actually applied to imports?**

Response:

¹⁰⁵ EU responses to first set of questions from the Arbitrator, para. 73.

¹⁰⁶ U.S. responses to first set of questions from the Arbitrator, para. 85.

71. This question appears to be addressed to the EU. However, the United States would clarify that its position is that application of duties pursuant to a WTO-inconsistent CVD order would be the triggering event, not the mere issuance of the CVD order.

iii. Please comment on the appropriateness of only including CVD measures under Section 771B that attribute 100% of the subsidy to downstream processors.

Response:

72. Both the original and compliance panels were clear that their findings that Section 771B requires the USDOC to automatically attribute the entirety of the benefit of a subsidy to downstream processors based only on the two factors listed in Section 771B was the basis for the conclusion that Section 771B is “as such” inconsistent with the relevant WTO agreements. Specifically, the original panel found as follows:

We conclude, for the reasons set forth above, that Section 771B is as such inconsistent with the United States’ obligations under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement because it *requires* the USDOC to *presume* that the *entire* benefit of a subsidy provided in respect of a raw agricultural input product passes through to the downstream processed agricultural product, based on a consideration of only the two factual circumstances prescribed in that provision, without leaving open the possibility of taking into account any other factors that may be relevant to the determination of whether there is any pass-through and, if so, its degree.¹⁰⁷

73. Thus, the core “as such” finding of the original panel was that Section 771B is WTO-inconsistent because it requires the USDOC to automatically attribute the entirety of the benefit of a subsidy to a downstream processed agricultural product based only on the two criteria listed in Section 771B. The fact that Section 771B requires attribution of the entirety of the subsidy benefit is a fundamental component of this finding. This understanding is confirmed by the findings of the compliance panel, which state:

The original panel found that the problem with Section 771B was that it directs the USDOC to find that the entire benefit of a subsidy provided to a raw agricultural input product passes through to the downstream processed agricultural product, without any necessary consideration of facts and circumstances for this purpose

¹⁰⁷ US – Ripe Olives from Spain (Panel), para. 7.151 (emphasis in original).

other than those specifically referred to in its two enumerated conditions.¹⁰⁸

The compliance panel went on to state as follows:

The point made by the original panel was that an evaluation limited to the two factual circumstances in Section 771B alone would not provide a sufficient basis to calculate with any precision *the degree or the extent of pass-through*. Thus, we do not find compelling the United States’ arguments that Section 771B bestows a broad discretion to determine not only the existence of, but also the *extent to which* pass-through occurs (including an amount *less than* the full amount of subsidies provided to upstream producers of the raw agricultural product).¹⁰⁹

The findings of the compliance panel confirm that Section 771B’s constraint on the USDOC’s ability to determine the extent of attribution of subsidy benefits, including by attributing an amount less than the full amount of the subsidies provided to upstream producers, is fundamental to the DSB recommendations in this dispute and is a requirement for definitively establishing inconsistency with the WTO agreements.

74. Because Section 771B’s requirement to automatically attribute the entirety of upstream subsidy benefits based only on the two factual circumstances in the statute is core to the DSB recommendations in this dispute, it follows that any CVD order issued where the USDOC did not apply Section 771B in this manner would not be subject to the DSB recommendations in this dispute. That is not to say that such an order would always be WTO-consistent, but 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 or other obligations with respect to that order under the DSU.

75. It is worth noting that according to the EU’s arguments in this proceeding, this situation should not be possible. The EU has repeatedly argued that reinterpretation of Section 771B is not possible and that the plain text of Section 771B requires the USDOC to automatically attribute 100 percent of the subsidy benefit to downstream producers of processed agricultural products.¹¹⁰ Thus, if such an order were to be issued, the EU’s characterization of the findings of the original and compliance panels would necessarily be wrong.

¹⁰⁸ *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.48 (emphasis added).

¹⁰⁹ *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.60 (emphasis in original).

¹¹⁰ *See, e.g.*, EU responses to first set of questions from the Arbitrator, paras. 24-25 (arguing that the compliance panel “confirmed that Section 771B ‘directs’ the USDOC to find 100% pass-through whenever the two enumerated criteria are fulfilled” and that “[t]he key terms in Section 771B” that require 100 percent attribution of subsidy benefits are not subject to re-interpretation.).

76. The DSU does not allow an Article 22.6 arbitrator to adopt an “as such” formula or model that could automatically authorize suspension of concessions or other obligations for a measure that may not be subject to DSB recommendations. Article 22.2 of the DSU only allows a Member to request to suspend concessions or other obligations with respect to a measure that is inconsistent with the covered agreements or otherwise non-compliant with the recommendations and rulings of the DSB.¹¹¹ If the USDOC were to issue a CVD order where the USDOC applied Section 771B in the underlying investigation that attributes less than the entirety of subsidy benefits to downstream producers of processed agricultural products, the USDOC would be acting in a manner that is not contemplated by the DSB recommendations in this dispute and there would be a genuine question as to the WTO-consistency of that order. In such a case, it would be improper for an “as such” formula or model to automatically authorize a level of countermeasures before any disagreement regarding the compliance or non-compliance of the order with the WTO agreements is settled. Accordingly, the Arbitrator must decline to adopt an “as such” formula or model that could encompass measures that are not subject to the DSB recommendations in this dispute, including orders issued where the USDOC applied Section 771B in the underlying investigation that do not automatically attribute the entirety of the subsidy benefit to downstream processors of agricultural products.

74. To both parties: Please comment on the necessity and potential modalities of data sharing from the United States to the European Union to facilitate the selection of the inputs to the prospective Armington model, if necessary, in the future.

Response:

77. Without clear directions from the Arbitrator on the structure of a prospective model that is sufficiently generic to capture any variation in the types of products and markets in future cases, it would be challenging to provide meaningful input on the necessity and potential modalities of data sharing to facilitate future data inputs selection. As the United States has suggested in its written submission and responses to prior questions from the Arbitrator,¹¹² it is necessary for the Arbitrator to adopt specific data sources or data sourcing protocols for application of any prospective model in order to minimize the likelihood of future controversies between the Parties. Key among the necessary clarifications is laying out a protocol for defining the scope of relevant trade flows to be used as an input into the model and ensuring that such trade flows align with the scope of the future CVD order that applies Section 771B. This is because under U.S. law, it is the written description in the CVD order that is dispositive in determining the scope of products to which duties apply, not the HTS codes. The Arbitrator should also designate appropriate data sources for other key inputs such as the various elasticity parameters and domestic production data.¹¹³

¹¹¹ See DSU, Art. 22.2.

¹¹² See U.S. written submission, paras. 130-31; U.S. responses to first set of questions from the Arbitrator, para. 84.

¹¹³ See U.S. responses to first set of questions from the Arbitrator, para. 84.

75. To both parties: The Arbitrator notes that the arbitrator’s decision in *US – Supercalendered Paper* set out instructions and suggestions relating to the application of the prospective model, including on issues relating to data sourcing and on potential notifications to the DSB when a suspension of concessions is going to be applied as a result of the application of the prospective model. What are the parties’ views as to whether such instructions and suggestions would be relevant and necessary in the context of this arbitration?

Response:

78. As the United States explained in its written submission, the arbitrator in *US – Supercalendered Paper (Canada) (Article 22.6 – US)* set out four criteria for evaluating whether a prospective model or formula is capable of adequately determining the level of nullification or impairment: 1) that the calculation results in a predictable level of suspension; 2) that the method be practical to implement and limit the risk of controversies between the parties; 3) that the data used be, as much as possible, verifiable and available to both parties; and 4) that the method be sufficiently generic to capture variations in the types of products or markets to which the measure could be applied.¹¹⁴ In order to ensure that these criteria were satisfied, the arbitrator laid out rigorous and detailed instructions for sourcing data inputs and applying the prospective model.

79. Such instructions are necessary in order to ensure that any prospective model will be predictable, workable, and accurate in the wide range of possible product contexts to which it could be applied. Without detailed instructions from the Arbitrator, controversies between the Parties are certain to arise with respect to how to source data inputs and apply the prospective model if Section 771B were to be applied to an as-yet unidentified processed agricultural product. Even more concerning, a lack of detailed instructions on how a prospective model should be applied would give rise to substantial risk that the model will be applied in a way that does not produce an accurate estimate of nullification or impairment. Thus, by adopting a prospective methodology that lacks the necessary details, the Arbitrator could inadvertently authorize a system for automatically authorizing suspension of concessions or other obligations in an amount that violates the requirements of Article 22.4 of the DSU.

80. To the extent that the Arbitrator does not believe it is possible to design a prospective model or formula with the requisite detail for ensuring that the level of nullification or impairment is accurately estimated for any future application of Section 771B, it should decline to adopt a prospective model or formula at all. This is the approach that is actually contemplated by the text of the DSU. The DSU says nothing about prospective formulae or “as such” models. To the contrary, the DSU contemplates that when a “measure” is found to be WTO-inconsistent and is not brought into compliance by the end of the RPT, the Member that invoked dispute settlement can request authorization to suspend concessions or other obligations in a specific

¹¹⁴ See U.S. written submission, para. 128 (quoting *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.23). See also *US – Washing Machines (Korea) (Article 22.6 – US)*, paras. 4.49-4.53.

amount.¹¹⁵ If the Member that instituted the measure disagrees with the amount requested, they can object triggering arbitration on the discreet issue of the appropriate level of countermeasures.¹¹⁶ Thus, the DSU contains its own system for arriving at the appropriate level of countermeasures for a specific WTO-inconsistent measure: limited and expedited arbitration.

81. Applying the system contemplated by the DSU to the instant dispute, if, in the future, the United States were to issue a WTO-inconsistent CVD order where the USDOC applied Section 771B in the underlying investigation, the EU would then be entitled under Article 22.2 of the DSU to request authorization from the DSB to suspend concessions or other obligations. The United States could then object to the amount requested or accept the level of suspension proposed. If it were to object, there would be a bespoke arbitration proceeding whose sole purpose would be to determine whether the level of suspension requested is equivalent to the level of nullification or impairment of benefits arising from the CVD order at issue. 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.

4 LEVEL OF SUSPENSION

76. **To both parties: In its response to Arbitrator question No. 40, the United States refers to the risk of the Arbitrator “permitting a suspension of concessions or other obligations that is in excess of the actual level of nullification or impairment, which would amount to an impermissible punitive sanction on the Member concerned”.¹¹⁷ In this respect:**

- i. **Would the Arbitrator be constructing a punitive counterfactual by taking into account the established pattern of Section 771B findings, which in all cases have led to a 100% pass-through, including in this case?**
- ii. **Could the Arbitrator consider a demonstration of compliance being the gateway to a counterfactual which assumes the possibility of something less than 100% pass-through?**

Response:

82. The United States responds to Questions 76.i and 76.ii together. Under the DSU, the role of an Article 22.6 arbitrator is simple and discreet: to “determine whether the level of [] suspension is equivalent to the level of nullification or impairment.”¹¹⁸ Thus, the Arbitrator’s

¹¹⁵ See DSU, Art. 22.2.

¹¹⁶ See DSU, Arts. 22.6, 22.7.

¹¹⁷ U.S. responses to first set of questions from the Arbitrator, para. 94.

¹¹⁸ DSU, Art. 22.7. The Arbitrator may also “determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement” and examine a claim “that the principles and procedures set

task is limited to an accurate mathematical measurement of the level of nullification or impairment of benefits accruing to the EU. Any considerations that do not impact the level of nullification or impairment of benefits accruing to the EU cannot be factored into the Arbitrator's analysis. Doing so would necessarily distort the level of suspension authorized by the DSB and violate Article 22.4 of the DSU by yielding a level of suspension that is not equivalent to the level of nullification or impairment.

83. Accordingly, the Arbitrator would exceed its mandate under the DSU by taking into account that Section 771B has in all cases led to a 100 percent attribution of subsidy benefits, when measuring the appropriate level of nullification or impairment. As an initial matter, this pattern should not come as a surprise given that the original panel found that Section 771B “requires the USDOC to presume that the entire benefit of a subsidy provided in respect of a raw agricultural input product passes through to the downstream processed agricultural product,” which was the basis for its finding that Section 771B is “as such” WTO inconsistent.¹¹⁹ Regardless, past applications of Section 771B are only relevant to the appropriate measurement of nullification or impairment in that they inform the WTO-inconsistent rates to be used in the relevant modeling approach. Both the United States and the EU agree that the WTO-inconsistent rates should reflect a 100 percent attribution of subsidy benefits. Any other consideration of a past pattern of Section 771B findings would not be relevant to an accurate measurement of nullification or impairment and would thus be improper.

84. The same is true for the “demonstration of compliance” referred to in the Arbitrator's question. Again, the Arbitrator's sole mandate in this case is to evaluate whether the level of suspension asserted by the EU is equivalent to the level of nullification or impairment. It is beyond the scope of that mandate to factor the likelihood of future compliance into the Arbitrator's analysis, including by considering any sort of “demonstration of compliance” by a Member. Suspension of concessions or other obligations in an amount equivalent to the level of nullification or impairment, alone, is the only inducement towards compliance that is authorized by the DSU. Any attempt by an Article 22.6 arbitrator to create an additional incentive to pressure a Member to comply with the DSB recommendations would amount to punitive action and would contravene the DSU, as further discussed in response to Question 78.

77. To both parties: Please explain whether a model for future levels of nullification or impairment for an “as such” inconsistency such as the one suggested by the United States, which requires the determination of a suitable value for a WTO-consistent attribution rate, is an impermissible *de novo* consideration by the Arbitrator of the amount of pass-through.

Response:

forth in paragraph 3 [of the DSU] have not been followed,” but neither of these tasks are involved in the present proceedings.

¹¹⁹ *US – Ripe Olives from Spain (Panel)*, para. 7.151 (emphasis in original).

85. As the United States explained in its responses to prior questions from the Arbitrator, the DSU does not impose any restrictions on the types of information or analyses that an Article 22.6 arbitrator can rely upon to fulfil its mandate of accurately measuring nullification or impairment.¹²⁰ Rather, an Article 22.6 arbitrator should rely on the best information or data that is available in formulating a reasoned estimate of the level of nullification or impairment.¹²¹ This is equally true for a prospective formula or model that generates an estimate of the level of nullification or impairment for a future breach as it is for measuring the level of nullification or impairment for a past breach. Accordingly, there is no “impermissible *de novo* consideration” limitation in measuring nullification or impairment under the DSU, either for a past “as applied” breach or for a prospective “as such” breach.

86. If anything, a future application of a prospective formula or model would be more likely to require some sort of “*de novo* consideration” than analysis of a known past breach. This is because it is impossible to know at present what information will be available for measuring nullification or impairment for an as-yet undefined CVD order on an as-yet unidentified product, or whether that information will be sufficient to accurately determine the level of nullification or impairment in accordance with the DSU. Furthermore, adopting an “as such” prospective formula or model that does not allow for even the possibility of a WTO-consistent attribution rate would be equivalent to assuming that all products potentially subject to Section 771B have an attribution rate of zero. That unreasonable assumption would lead to a systemic overestimate of the level of nullification or impairment in the prospective model or formula.

87. The United States recognizes the practical difficulty of creating a prospective model or formula that accurately determines the level of attribution of subsidy benefits for all products potentially subject to future action under Section 771B. For this reason, the United States has proposed that the simplest and most accurate approach under the DSU is to decline to adopt a prospective model or formula at all. Rather, in the event that Section 771B is applied in the future to imports of another EU product, the EU should make an additional request for authorization to suspend concessions or other obligations. The appropriate level of suspension for such a request can be resolved with precision based on the specific facts of the situation at hand through future Article 22.6 arbitration proceedings, if necessary, as is contemplated by the DSU.

88. Without that precision or the ability to determine a suitable WTO-consistent attribution rate, the suspension of concession would not be equivalent to the level of nullification or impairment. It would instead risk being punitive, as discussed in response to Question 78.

78. To both parties: In its written submission, the United States argues that “while the purpose of suspension of concessions or other obligations is to induce compliance with WTO obligations, arbitrators have repeatedly observed ‘that the concept of equivalence referred to in Article 22.4 of the DSU means that obligations cannot be

¹²⁰ See U.S. responses to first set of questions from the Arbitrator, paras. 29-30.

¹²¹ U.S. responses to first set of questions from the Arbitrator, para. 30 (quoting *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 3.4.).

suspended in a ‘punitive’ manner.”¹²² Please comment on the interaction between the purpose of “inducing compliance” and the concept that obligations cannot be suspended in a “punitive manner”.

Response:

89. The United States agrees that the purpose of suspending concessions or other obligations pursuant to the process and conditions laid out in the DSU is to induce compliance with WTO obligations. For this reason, the DSU allows Members to request authorization from the DSB to suspend concessions or other obligations and lays out a process for doing so. However, the DSU also provides express limitations on the suspension of concessions or other obligations, such as that “[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment”¹²³ and that the “suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.”¹²⁴ Thus, the DSU contemplates that suspension of concessions or other obligations within the bounds of the express 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.”

90. 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.”¹²⁵ 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.

¹²² U.S. written submission, para. 17 (referring to *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para 3.5 (citing *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.8).

¹²³ DSU, Art. 22.4.

¹²⁴ DSU, Art. 22.8.

¹²⁵ DSU, Art. 22.7.