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 FIRST SET OF QUESTIONS FROM THE ARBITRATOR**

March 17, 2025

United States – Anti-Dumping and Countervailing Duties on
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EC – Hormones (US) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999
US – 1916 Act (EC) (Article 22.6 – US)	Decision by the Arbitrators, *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*, WT/DS136/ARB, 24 February 2004
US – Anti-Dumping Methodologies (China) (Article 22.6 – US)	Decision by the Arbitrators, *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,* WT/DS471/ARB, and Add.1 circulated 1 November 2019
US – Countervailing Measures (China) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 22.6 of the DSU by the United States*, WT/DS437/ARB, 26 January 2022
US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS217/ARB/EEC, 31 August 2004
US – Ripe Olives from Spain (Panel)	Report of the Panel, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/R, 19 November 2021
US – Ripe Olives from Spain (EU) (Article 21.5 – EU)	Panel Report, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain – Recourse to Article 21.5 of the DSU by the European Union*, WT/DS577/RW and Add. 1, 20 February 2024
US – Supercalendered Paper (Canada) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/ARB and Add. 1, 13 July 2022

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USA-3	*Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States*, 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	*US – Ripe Olives from Spain*, 12 November 2020 response to Panel question No. 12, para. 116
USA-7	Ministerio De Agricultura, Alimentación y Medio Ambiente, *Diagnóstico sobre el sector de la aceituna de mesa en España*, 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, *Consejo Sectorial Aceituna de Mesa* (Sep. 11, 2023)
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USA-11	U.S. Customs and Border Protection Ruling Letter N308088 (Dec. 23, 2019)
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USA-19	Marc J. Melitz, *The Impact of Trade on Intra-Industry Reallocations and Aggregate Industry Productivity*, 71 Econometrica 1695 (2003)
USA-20	Large Residential Washers, Inv. No. TA-201-076, USITC Pub. 4745 (December 2017)
USA-21	Anson Soderbery, *Estimating Import Supply and Demand Elasticities: Analysis and Implications*, 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)
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USA-26	Asociación para la Promoción de las Aceitunas Sevillanas de las variedades Manzanilla y Gordal, *Aceitunas Manzanilla y Gordal de Sevilla: evolución del cultivo, cadena de valor e indicaciones geográficas*
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, *Markups and Markdowns in the French Dairy Market* (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)
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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

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USA-37	*Weights, Measures, and Conversion Factors for Agricultural Commodities and Their Products*, ECON. RES. SERV., U.S. DEP'T OF AGRIC., Agricultural Handbook Number 697 (1992)

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1 COUNTERFACTUAL

1.   **To the European Union**: The Arbitrator notes the United States' statement that "the existence and extent of attribution of countervailable subsidy benefits to downstream processors is more likely than in their absence"[1] and that, accordingly, the presence of these two factual circumstances is consistent with "a higher degree of attribution of benefits to downstream processors."[2] The Arbitrator also notes the United States' statement that "there are other circumstances of the Spanish olive industry that demonstrate a high degree of attribution of benefits to downstream processors is reasonable in this case."[3] In this regard, please explain:

   a.   whether, for purposes of a WTO-consistent scenario, the European Union considers it appropriate and possible to estimate the likely existence and extent of pass-through of subsidy benefits.

   b.   If so, how this could be done.

   c.   Whether and, if so, how this approach could be implemented for the "as such" scenario".

   Response:

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

2.   **To the European Union**: The European Union argues that "based on the two panel reports in *US – Ripe Olives*, the only possible compliance scenario would be a formal amendment or repeal of Section 771B by the United States".[4] Please elaborate further on why this would be the only compliance scenario for purposes of the counterfactual. Please refer to the specific paragraphs in both the original and compliance panel reports supporting the European Union's view.

   Response:

2.   This question is addressed to the EU.

3.   **To the United States**: The United States refers variously to attribution of benefits to downstream processors being "more likely", at a "higher degree"[5] and to "a

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[1] U.S. written submission, para. 54.

[2] U.S. written submission, para. 54.

[3] U.S. written submission, para. 41.

[4] EU written submission, para. 19.

[5] U.S. written submission, para. 54.

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substantial degree"[6], and concludes that "it is both reasonable and plausible that the **Arbitrator assume that 100% of the benefit of the subsidies provided to Spanish raw olive producers are attributable to Spanish ripe olive processors".[7] Please explain whether and how the extent of attribution (pass-through) of the benefit of subsidies could be estimated more accurately, including how the United States moved in its submission from relative degrees of likelihood or extent to proposing an assumption that 100% of the benefit passed through.**

Response:

3.   As an initial matter, the United States clarifies the context of the statements referred to by the Arbitrator. First, the United States refers to attribution of benefits as being "more likely" and at a "higher degree" with respect to a situation, such as in the case of ripe olives from Spain, in which the two factual circumstances listed in section 771B of the Tariff Act of 1930[8] ("Section 771B") have been found to exist.[9] Second, the reference to a "substantial degree" of benefits being attributed to downstream processors is specifically referring to the fact demonstrated by the United States that the average prices for raw olive purchases were below the average costs of production in the year before provisional CVD duties on ripe olives from Spain went into effect (2016).[10] The United States ultimately reaches its conclusion regarding the proper counterfactual for attribution of subsidy benefits in the case of ripe olives on the basis of both of these two facts, in addition to other facts discussed and established by the United States in its written submission, including the prevalence of grower-processor cooperative structures in the production of Spanish ripe olives, the reliance of Spanish raw olive producers on Spanish ripe olive processors for purchasing the bulk of raw olive production, and the dependence of Spanish ripe olive processors on a steady supply of Spanish raw olives in order to continue to market their products as "Spanish" olives under appropriate rules of origin.[11]

4.   The evidence presented by the United States in its written submission, taken together, substantiates the counterfactual scenario proposed by the United States. First, the parties do not dispute that the USDOC established the existence of the two factual circumstances enumerated in Section 771B: (1) "the demand for the prior stage product is substantially dependent on the demand for the latter stage product"; and (2) "the processing operation adds only limited value to the raw commodity".[12] The United States understands that the existence of these two factual circumstances cannot, in and of themselves, establish 100 percent attribution of subsidy benefits under the relevant DSB recommendations. However, as the United States explained in its

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[6] U.S. written submission, para. 55.

[7] U.S. written submission, para. 58.

[8] Exhibit USA-1.

[9] U.S. written submission, para. 54.

[10] U.S. written submission, para. 55.

[11] *See* U.S. written submission, paras. 55-57.

[12] Exhibit USA-1.

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written submission, both the original panel and the EU have acknowledged that these two factors at least can be relevant to determining attribution of subsidy benefits.[13] In the context of the ripe olives market, it is intuitively clear that the existence of these two factors is relevant. The market for ripe olives is a perfect example of why the U.S. Congress focused on these two factors in formulating Section 771B. Raw olives destined for ripe olive production are inedible and have no utility other than as an input into ripe olive processing. Thus, raw olive farmers are completely dependent on a concentrated group of ripe olive processors in order to sell their crop at all. While processing is essential to convert the raw product into an edible product, the process itself is relatively simple and adds minimal value to the raw olive fruit. Accordingly, the ripe olive market presents a clear example of a situation where downstream processors hold significant market power and can exert pricing pressure on their suppliers (i.e., raw olive growers).[14]

5.   The data presented by the United States reflects this reality.[15] As the United States has shown, a comparison of total cost of production of raw olives for an average farm in 2016 (the year prior to imposition of provisional CVD duties) and the average price of raw olives for that same year indicates that the price of olives was below the cost of production, demonstrating downward pricing pressure exerted by ripe olives processors.[16] This finding is reinforced by other pertinent studies, including a study by the Association for the Promotion of Seville Olives of the Manzanilla and Gordal Varieties, which found that Spanish growers of Manzanilla and Gordal varieties of table olives were either not profitable or barely profitable without subsidies in the 2020-2021 and 2021-2022 harvest years.[17] The same study acknowledged the "remarkable bargaining power of the large olive processing industry" which allows it to "defer payments" to raw olive suppliers.[18] The result is that "farmers make losses" while large food companies

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[13] *See* U.S. written submission, para. 53.

[14] *See* EU written submission, para. 35 ("The European Union recalls that the original panel provided some examples of what may be relevant factors for a pass-through analysis, notably including 'the degree to which raw input sellers face pricing pressure, the market power of the different producers and processors, or the extent to which national or international competition could potentially affect the reliability of input pricing.'"). *See also US – Ripe Olives from Spain (Panel)*, para. 7.167.

[15] Given that the United States is relying heavily on Spanish Government data, it remains unclear why the EU insists on "refrain[ing] from analysing the information in any detail." EU written submission, para. 37. Exhibit USA-7 is a 2016 report from the Government of Spain's Ministry of Agriculture, Food, and Environment; the pricing data cited to in footnote 69 of the U.S. written submission is maintained by the regional government of Andalusia (this is apparent both from the URL and the bottom banner of the web page, both of which refer to "Junta De Andalucía"); and Exhibit USA-9 synthesizes data sourced from the Agencia de Información y Control Alimentarios (AICA), another Spanish government body.

[16] *See* U.S. written submission, para. 55.

[17] *See* Asociación para la Promoción de las Aceitunas Sevillanas de las variedades Manzanilla y Gordal, *Aceitunas Manzanilla y Gordal de Sevilla: evolución del cultivo, cadena de valor e indicaciones geográficas*, pp. 25-32 (2024) (Exhibit USA-26, courtesy translation included as Exhibit USA-27) (showing profitability without subsidy of 0.049 EUR/KG and -0.017 EUR/KG for the 2020-21 and 2021-22 harvest years, respectively, for Manzanilla olives and 0.33 EU/KG and 0.0054 EUR/KG for the same harvest years, respectively, for Gordal olives).

[18] Exhibit USA-27, at p. 55.

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selling ripe olives to supermarket chains achieve positive profit margins based on "maximizing sales and controlling production costs."[19]

6.   Furthermore, the benefit received by ripe olive processors and shown in the aforementioned pricing data is understated, as there is substantial loss and destruction through processing. The United States demonstrated that such loss and destruction was at least 13.35 percent, according to the relevant data.[20] However, as the United States alluded to in footnote 70 of its written submission, actual loss and destruction by weight is actually much higher as olives lose substantial weight after pitting and slicing.[21] In fact, Spanish government sources acknowledge that only 80 percent of the olive fruit by mass is edible, meaning that the actual loss or destruction ratio following pitting and slicing is more like 33.35 percent.[22] This means that ripe olive processors received the advantage of 133.35 metric tons of below-cost raw inputs to produce 100 metric tons of ripe olives, thus indicating an even higher attribution of subsidy benefits than that shown by the difference in price paid for raw olives and the cost of production.

7.   The United States 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. Specifically, the United States noted the prevalence of grower-processor cooperatives, raw olive purchasing volumes by processors that consistently eclipse annual raw olive production volumes, and customs rules of origin that require ripe olive processors to purchase their inputs from Spanish growers in order to continue to market their products as products of Spain.[23] These factors, particularly the fact that Spanish processors act as the main offtake partner for virtually all of the Spanish crop, further demonstrate that the consolidated group of Spanish ripe olive processors would have significant market power in their relationships with Spanish raw olive growers.

8.   Economists who have examined the attribution of EU agricultural subsidies in similar markets have measured the substantial attribution of subsidies from raw agricultural product producers to downstream processors. For example, a study of the impact of EU Common Agricultural Policy (CAP) subsidies on French dairy supply chains found that "for the marginal euro of subsidy given to farmers between 2005 and 2018, 65% of it is on average diverted from farmers due to processor buyer power."[24] In other words, the market power of dairy processors

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[19] Exhibit USA-27, at p. 62.

[20] *See* U.S. written submission, para. 55.

[21] *See* U.S. written submission, para. 55, n. 70.

[22] *See* Aceituna, MINISTERIO DE AGRICULTURA, PESCA Y ALIMENTACIÓN, https://www.mapa.gob.es/va/ministerio/servicios/informacion/aceituna_tcm39-102885.pdf (Exhibit USA-28, translation available at https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:d5e500ee-9ff5-4728-9da6-443949b35aff).

[23] *See* U.S. written submission, paras. 56-57.

[24] Rémi Avignon and Etienne Guigue, *Markups and Markdowns in the French Dairy Market* (2022), p. 64 (Exhibit USA-29).

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allows them to mark down the price of raw milk and, in doing so, benefit from the CAP subsidies provided to upstream farmers. For purposes of attribution, the French dairy market shares striking similarities to the Spanish ripe olives market including: the limited ability of raw milk producers to sell directly to consumers without intermediary processing, the ability of intermediate processors to supplement their raw materials with intermediate preserved goods, such as milk powder, in the same way that ripe olive processors can supplement inputs with provisionally preserved olives, and the prevalence of cooperative structures.[25]

9.　　　Ripe olive processors necessarily have <u>even more</u> market power than dairy processors because, whereas raw milk can serve as an input into a variety of different final and intermediate goods, raw olives are suitable for much more limited marketable end uses. The fact that ripe olive processors hold more market power over raw olive growers allows them to capture more of the benefits of the subsidies conferred to those growers. Thus, the 65 percent attribution rate found for dairy processing should be a <u>floor</u> when compared to the ripe olives industry.

10.　　　In sum, the conclusion that 100 percent attribution of benefits is reasonable and plausible is based on a number of factors together, including the establishment of the factual circumstances listed in Section 771B,[26] the specific characteristics of the Spanish olives industry,[27] and evidence that Spanish ripe olive processors in fact purchase raw olive inputs at prices below the actual cost of production, especially considering loss and destruction due to processing.[28] In addition, the United States has examined a benchmark attribution analysis concerning EU CAP subsidies in the similar industry for processed dairy products.[29] These factors together illustrate that (1) the relationship between Spanish raw olive producers and ripe olive processors is characterized by asymmetrical market power; (2) when raw olive producers receive subsidies, there are significant incentives for them to pass on those benefits to ripe olive processors; and (3) the raw olive producers in fact pass on those benefits in the form of below-cost pricing.

4.　　　**To the United States: Please explain whether the counterfactual proposed by the United States also applies to the "as such" WTO-inconsistencies and, if so, why this proposed counterfactual would be reasonable or plausible, and how it could be implemented in an economic model measuring prospective levels of nullification or impairment.**

　　　Response:

11.　　　That compliance does not require complete elimination of any CVD duties on processed agricultural goods subject to Section 771B, and that an accurate estimation of nullification or impairment must therefore consider an appropriate counterfactual CVD rate, apply equally, if not

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[25] *See* Exhibit USA-29, at pp. 10-11.

[26] *See* U.S. written submission, paras. 53-54.

[27] *See* U.S. written submission, paras. 56-57.

[28] *See* U.S. written submission, para. 55.

[29] *See generally* Exhibit USA-29.

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with more force, to the "as-such" WTO inconsistencies as to the "as applied" inconsistencies. This is because it would be unreasonable and implausible to assume that that the USDOC could never have complied with the DSB recommendations by the end of the reasonable period of time ("RPT") and therefore that the USDOC could never have calculated a WTO-consistent attribution rate for any product covered by Section 771B.

12.   On a related note, 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. The EU's counterfactual contradicts the findings of the original and compliance panels that the relevant WTO agreements do not "prescribe that a particular methodology must be followed to perform a pass-through analysis" and that 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."[30] Given the wide discretion afforded to Members in conducting attribution analyses, there is no reason that the USDOC would not be able to conduct a WTO-consistent attribution analysis in the <u>hypothetical compliance scenario</u> where Section 771B is appropriately reinterpreted, amended, or replaced by the end of the RPT.

13.   To be clear, the United States is not assuming that the USDOC would find 100 percent attribution of subsidy benefits to downstream processors for any product potentially covered by Section 771B. Rather, the United States argues that an assumption that the USDOC would find 100 percent attribution of benefits is reasonable and plausible in the case of ripe olives from Spain due to both the establishment of the specific factors enumerated in Section 771B <u>as well as</u> additional characteristics of the Spanish olives industry, which are discussed in the United States' written submission[31] and in its response to the Arbitrator's Question 3, above.

14.   Instead, 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 than ripe olives would require a procedure for calculating a WTO-consistent attribution rate. Excluding 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. For a more precise, but more labor intensive, process, the Arbitrator could adopt a procedure for examining the relevant indicia for attribution of subsidy benefits, using the best evidence 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. Such a process should take into consideration that the two factors enumerated in Section 771B, while not necessarily determinative, in and of themselves, of any specific level of attribution, will by definition have been established by the USDOC following an in-depth investigation. In fact, the <u>only</u> information we know with certainty about a future application of Section 771B is that the two factual criteria listed in the statute will have been established. The absence of any other

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[30] *See* U.S. written submission, para. 30 (quoting *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.28). *See also*, *US – Ripe Olives from Spain (Panel)*, para. 7.151.

[31] *See* U.S. written submission, paras. 55-58.

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information about a future application of Section 771B calls into question whether a prospective formula or model would be capable of generating an estimate of nullification or impairment that satisfies the equivalence requirements of Article 22 of the DSU – namely, that it is not overly speculative.

15.   The United States is aware that some past arbitrations have sought to overcome the inherently speculative nature of estimating nullification or impairment from future applications of a WTO-inconsistent measure through the use of a proxy value. Analogously, the Arbitrator under this approach would adopt some type of proxy value for use as an attribution rate for all processed agricultural products subject to Section 771B, or for categories of such products. In this regard, the United States would again refer the Arbitrator to the attribution analysis conducted for CAP subsidies in the market for processed dairy products, which yielded an attribution rate of 65 percent, as a value indicative of attribution for processed agricultural products potentially subject to Section 771B.[32] The report of the arbitrator in *US – Offset Act (Byrd Amendment) (EC)* is also instructive on the issue of using a proxy value for an attribution rate. In that case, the arbitrator was tasked with determining the level of pass-through in the context of export subsidies, to use as an input into its methodology for determining both past and future nullification or impairment arising from the measure at issue. The European Communities suggested that the arbitrator should assume 100 percent pass-through while the United States initially proposed zero pass-through and later acknowledged that a pass-through of 25 percent would be "reasonable".[33] Noting "the absence of precise information on the value of the pass-through", the arbitrator adopted the values proposed by the parties (100 percent and 25 percent, respectively) as the endpoints of a range for possible pass-through, and utilized an average of the middle values in that range (75 percent and 50 percent) to run its model.[34]

16.   Thus, under a proxy approach, if the Arbitrator finds that precise information to justify a specific rate of attribution in this dispute is not available, it could similarly use a value within the range of reasonable approximations of the level of attribution – i.e., 65 and 100 percent. As discussed in the response to Question 3, the baseline reasonable estimation for attribution of CAP subsidies to processors of agricultural goods should be 65 percent, based on available economic analysis of the market for processed dairy products. Thus, the Arbitrator could under this approach 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. However, in conducting such an analysis, the Arbitrator should caution against developing a proxy attribution rate that is too low, and instead err on the side of a higher rate. A rate that is too low would necessarily lead to suspension of concessions that are beyond the level of nullification or impairment and thus contravene the DSU. To be clear, the EU's presumed zero-percent attribution is unreasonable and could not be used to develop a proxy attribution value.

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[32] *See* Exhibit USA-29, at p. 64.

[33] *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, paras. 3.139-43.

[34] *See US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, paras. 3.145-46 and Table 3.

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5.   <u>**To the United States:**</u> **Is any of the information presented by the United States regarding the relevant economic data and structure of the Spanish olive industry reflected in the record of the underlying CVD investigation? If so, please point to the relevant evidence in the CVD investigation record and provide copies of that evidence.**

      <u>**Response**</u>:

17.   Yes, the majority of the information is either on the record or, in certain cases, directly supported and corroborated by record information. The underlying record of the CVD investigation, including the records for the proceedings conducted pursuant to court remand by the U.S. Court of International Trade and the Section 129 proceeding conducted to implement the original panel's recommendations and rulings, contains information relevant to the economic data and structure of the Spanish olive industry, including certain information presented by the United States in its written submission. Specifically, Exhibit USA-7 was submitted by the petitioner on the record of the first remand segment conducted by the USDOC.[35] Exhibit USA-30 consists of the petitioner's February 25, 2020 Submission and Exhibit 8 to that Submission is the same 2016 report from the Government of Spain's Ministry of Agriculture, Food, and Environment as was included as Exhibit USA-7 to the U.S. written submission. As discussed in the U.S. written submission, that report states that the estimated average total cost of table olive production is 0.67 Euros per kilogram (*i.e.,* 670 Euros per metric tons).[36] In addition, the record contained other relevant information regarding the economic data and structure of the Spanish olive industry that further supports the information discussed in the U.S. written submission. For example, the petitioner's February 25, 2020 submission included an olives factsheet published by the Province of Andalusia.[37] This factsheet includes pricing data for raw olives from the same source relied upon by the United States in its written submission for various harvest years, including a price of 0.63 Euros per kilogram for 2017/2018.[38] The average price of 0.63 Euros per kilogram is lower than the estimated average total cost of production of 0.67 Euros per kilogram. This information was on the record of the first remand segment conducted by the USDOC and further supports the United States' statement that the average prices for raw olive purchases were below the average cost of production, which is further indication that a substantial degree of the benefits from the subsidies at issue are attributable to downstream processors.[39]

18.   In its written submission, the United States also highlighted that much of Spain's table olive industry is structured in a way that requires and facilitates reliance between the Spanish

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[35] *See* 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) (Exhibit USA-30), at Exhibit 8.

[36] *See* Exhibit USA-30, at Exhibit 8, p. 28; Exhibit USA-7, at p. 28.

[37] *See* Exhibit USA-30, at Exhibit 9.

[38] Exhibit USA-30, at Exhibit 9, pp. 8-16.

[39] U.S. written submission, para. 55.

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olive growers and olive processors.[40] By way of example, the United States emphasized that Agro Sevilla and DCOOP are two-tiered cooperatives.[41] The record of the underlying CVD investigation before the USDOC contained information related to the structure of Spain's table olive industry.[42] Specifically, information provided by the Government of Spain in the underlying CVD investigation confirms that roughly 28% of Spain's olive industry is organized into cooperatives.[43]

19.   Finally, in its written submission, the United States examined that data for harvest years 2017/2018 through 2021/2022 indicate that Spanish ripe olive processors purchase raw olives at a rate roughly equivalent to domestic production.[44] The record of the Section 129 proceeding contained certain reports for harvest years 2017/2018, 2018/2019, and 2019/2020, which corroborate the harvest data presented in Exhibits USA-9 and USA-10 of the U.S. written submission.[45]

6.   **To the United States: Is there a provision in the relevant United States' laws or regulations that gathers together or aggregates AD and CV duties for margin or injury findings even if one or the other or both of them is *de minimis*?**

Response:

20.   No. We are not aware of a United States law or regulation that gathers together or aggregates AD and CV duties for margin or injury findings where either one or both are *de minimis*.

7.   **To both parties: The United States argues that the European Union's proposed counterfactual "assumes that there is no possible WTO-consistent attribution of benefits arising from countervailable subsidies granted to Spanish raw olive producers to downstream Spanish ripe olive processors".[46] How relevant for the assessment of the counterfactual is the fact that the compliance Panel in this dispute**

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[40] U.S. written submission, para. 56.

[41] U.S. written submission, para. 56.

[42] *See* Agro Sevilla Aceitunas S.Coop. And.'s Olive Sourcing Questionnaire Response, Ripe Olives from Spain, No. C-469-818 (Aug. 14, 2017) (Exhibit USA-31); 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) (Exhibit USA-32); 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) (Exhibit USA-33); and 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) (Exhibit USA-34).

[43] Exhibit USA-34, at p. 2, Table 2.

[44] U.S. written submission, para. 57.

[45] *See* 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) (Exhibit USA-35).

[46] U.S. written submission, para. 23.

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found that, on an "as applied" basis, the United States had not complied with the recommendations and rulings arising from the original panel proceedings.

21.   The United States responds to questions 7 and 8 together, below.

8.   <u>**To both parties:**</u> **The United States argues that "the proper counterfactual to be applied for the purpose of this proceeding is one in which the USDOC has the ability to assess attribution of subsidy benefits for products subject to Section 771B, including ripe olives from Spain, in a WTO-consistent manner".[47] How relevant for the assessment of the counterfactual is the fact that Section 771B was found "as such" WTO-inconsistent by the original and compliance panels[48]?**

<u>Response</u>:

22.   The United States responds to questions 7 and 8 together.

23.   The compliance Panel found that the U.S. application of Section 771B in the Section 129 proceeding was not consistent with the covered agreements because "the USDOC found that subsidies granted to growers of raw olives in Spain could be attributed to three investigated ripe olive producers <u>based solely on its determination that both factual circumstances identified in Section 771B were established, without consideration of any other potentially relevant information relating to the market or the competitive conditions affecting the investigated product."[49]</u> Thus, the compliance Panel was clear that its "as applied" finding of non-compliance emanated from its findings that the USDOC's "re-interpretation", "re-evaluation", and "re-examination" of Section 771B in the Section 129 proceeding failed to bring Section 771B "as such" into compliance with the covered agreements.[50]

24.   However, as the United States explained in its written submission, neither the original nor the compliance Panel made any finding that subsidies granted to Spanish raw olive growers cannot be appropriately attributed to Spanish ripe olive processors at all, nor did they make any finding as to the level of attribution in the Spanish olive market.[51] Rather, the DSB recommendations in this dispute fully allow for the possibility that the USDOC could conduct a WTO-consistent attribution analysis should the appropriate changes be made to U.S. law or

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[47] U.S. written submission, para. 2.

[48] *See US – Ripe Olives from Spain (Panel)*, para. 7.170; *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 8.1.

[49] *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.79 (emphasis added).

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

[51] *See* U.S. written submission, paras. 30, 52.

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should the USDOC reinterpret, reevaluate, or reexamine Section 771B in a WTO-consistent manner.[52]

25.   The relevant DSB recommendations in this dispute accord with the counterfactual proposed by the United States, which provides that the USDOC may conduct a WTO-consistent attribution analysis for ripe olives. Furthermore, as demonstrated in the U.S. written submission, it is reasonable and plausible and that such an analysis would yield an attribution rate of 100 percent.[53] Both the "as applied" and "as such" findings of the original and compliance panels support such a counterfactual in that they make clear that the relevant deficiency in Section 771B is that it <u>requires</u> the USDOC to allocate the <u>entire</u> benefit of subsidies provided to producers of raw agricultural products to downstream processors of those products <u>based solely</u> on the criteria contained in Section 771B.[54]

26.   In other words, the "as such" findings of the original and compliance panels are relevant for constructing an appropriate counterfactual. Specifically, they make clear that WTO-consistency requires an attribution analysis that allows (1) for consideration of factors other than those enumerated in Section 771B and (2) the USDOC to attribute less than the entirety of the subsidy benefit to downstream processors. The "as applied" findings of the compliance Panel are only relevant insofar as they applied the "as such" requirements to the Section 129 proceedings on ripe olives from Spain. They do not, beyond the recommendations concerning the "as such" breach, impose further restrictions on the construction of an appropriate counterfactual, including on the amount of benefit allocated to downstream processors.

9.   **To both parties: Is there any relevance to exploring whether there is any evidence on record to allow USDOC to undertake a WTO consistent attribution analysis?**

27.   Unsurprisingly, certain information that could be relevant to a WTO-consistent attribution analysis is not on the record. The record in the underlying CVD investigation was developed by the USDOC for the purpose of carrying out an attribution determination that was found to be inconsistent with the covered agreements. Therefore, while the United States disagrees with those findings, the Arbitrator may consider that information that could be relevant to a WTO-consistent attribution analysis would not be present in the record, as it exists. This is an issue that is likely to be inherent in many Article 22.6 arbitrations utilizing a counterfactual to

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[52] *See US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.16 ("On its face, the DSU does not explicitly preclude the possibility that a Member may seek to achieve 'compliance' for the purpose of Article 21 of the DSU by 're-interpreting', 're-evaluating' and 're-examining', a domestic law found to be 'as such' inconsistent with its WTO obligations. . . . Accordingly, we are not convinced by the European Union's submission that the USDOC's 'revised understanding of Section 771B' could not even potentially constitute a 'measure taken to comply' for the purpose of Article 21.5 of the DSU.").

[53] *See* U.S. written submission, paras. 50-58. In addition, the EU has provided no evidence to support its assumption that zero percent of the benefits of the subsidies awarded to olive growers are attributed to ripe olive processors.

[54] *See, e.g.*, *US – Ripe Olives from Spain (Panel)*, para. 7.170; *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.48.

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assess nullification or impairment. By definition, if the parties are engaged in an Article 22.6 arbitration, a compliance panel has found that compliance was not achieved.

28.   Therefore, the underlying record can and should be used for evidence to assist the Arbitrator in constructing an appropriate counterfactual and, in that regard, is relevant. As the United States explains in its response to Question 5, above, the record of the underlying CVD investigation contains substantial information relevant to a WTO-consistent attribution analysis and supports the counterfactual scenario proposed by the United States. Nonetheless, there is no reason to assume that the record for the non-compliant measure constitutes the entire universe of available evidence from which the Arbitrator can draw in order to construct an appropriate counterfactual. In fact, the opposite may be true. As the arbitrator in *US – Supercalendered Paper* explained, "[p]revious arbitrators have endeavoured to rely on the best information or data that is available in pursuit of formulating [] a reasoned estimate" of the level of nullification or impairment.[55] While information found in the record of the underlying non-compliant measure may, in many cases, constitute the "best information or data that is available", an Article 22.6 arbitrator must look beyond that record to identify the best information or data that is available if the record of the underlying measure is silent or otherwise deficient on an issue.

10.   **To both parties: Please explain whether and, if so, why it would be appropriate for an Article 22.6 arbitrator to rely on information that is not part of the record of the underlying CVD investigation.**

29.   In its written submission, the EU states, without explanation or citation to the text of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), that "it would exceed the Arbitrator's mandate to carry out a pass-through analysis based on entirely new facts presented by the United States for the first time in these proceedings."[56] The EU goes on to state that "[t]he Arbitrator's task is to assess whether the European Union's counterfactual is 'reasonable' . . . . not to carry out a *de novo* investigation based on new - non-pertinent - facts presented by the United States in its submission."[57]

30.   The EU mischaracterizes the Arbitrator's mandate, which under Article 22 is to "determine whether the level of [] suspension is equivalent to the level of nullification or impairment."[58] The DSU is silent as to the types of information the Arbitrator may rely on to accurately calculate the level of nullification or impairment. Furthermore, as discussed in our response to Question 9, past arbitrators have found that fulfillment of their mandate requires them to "rely on the best information or data that is available in pursuit of formulating [] a reasoned estimate" of the level of nullification and impairment.[59] This is essential if an arbitrator is to fulfil its role in assisting the DSB in authorizing countermeasures that are not in excess of

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[55] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 3.4 (emphasis added).

[56] EU written submission, para. 39.

[57] EU written submission, para. 39.

[58] DSU, Art. 22.7.

[59] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 3.4.

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the level of nullification or impairment, including by ensuring that countermeasures are only applied to the extent that nullification or impairment continues to exist at the same level.[60] Thus, nothing in the DSU suggests that an Arbitrator is restricted to the administrative record of the relevant measure in formulating an appropriate, <u>hypothetical</u> WTO-consistent counterfactual for the purpose of measuring the level of nullification or impairment. To the contrary, to measure the level of nullification and impairment as accurately as possible, the DSU directs the Arbitrator to use the best information available to it.

31.   The EU also errs in stating that the "Arbitrator's task is to assess whether the European Union's counterfactual is 'reasonable'".[61] While the EU is correct that the United States bears the "overall burden" of showing that the EU's requested level of suspension is not equivalent to the level of nullification or impairment,[62] the United States has met this burden by demonstrating that the EU's proposed counterfactual, which would preclude the USDOC from conducting any WTO-consistent attribution analysis, is neither reasonable nor plausible.[63] Having met its burden, the United States also offered an alternative counterfactual that the USDOC would arrive at a 100 percent attribution rate through a WTO-consistent attribution analysis, which the United States demonstrated is reasonable and plausible.[64] Nonetheless, if the Arbitrator were to determine that the United States has not adequately substantiated its alternative counterfactual, the Arbitrator "would be called upon to go further" and construct its own counterfactual that it considers would best approximate the level of nullification and impairment.[65] In doing so, the Arbitrator would be free to use the best evidence available to it and is not bound to the existing record of the CVD measure.[66]

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[60] *See* DSU, Art. 22.8 ("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.").

[61] EU written submission, para. 39.

[62] *See* EU written submission, paras. 5-6 (quoting *US – Countervailing Measures (China) (Article 22.6)*, para. 3.2).

[63] *See* U.S. written submission, paras. 22-41.

[64] *See* U.S. written submission, paras. 50-58.

[65] *See, e.g.*, *US — Countervailing Measures (China) (Article 22.6 – US)*, para. 3.4 ("We also note that, in the event we conclude that China's proposed level of suspension of concessions or other obligations is not WTO-consistent, we cannot end our examination the way panels do. Instead, we would be called upon to go further, and, in pursuit of the basic DSU objectives of prompt and positive settlement of disputes, we would need to estimate the level of suspension we consider to be equivalent to the impairment suffered."); *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 3.4, n. 27; *US – Washing Machines (Korea) (Article 22.6 – US)*, paras. 1.15-16; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para.1.12.

[66] This issue becomes even more apparent in the context of a prospective formula for an "as such" breach, such as that proposed by the EU. There, by definition, the EU would be proposing to calculate nullification or impairment on the basis of a hypothetical WTO-inconsistent measure for an as-yet undetermined product or set of products. This issue again demonstrates the challenges inherent in accurately calculating nullification or impairment through a prospective formula in this case.

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11.   **To both parties: Can a counterfactual of compliance be constructed on decision-making conduct that is non-compliant?**

32.   In the Article 22.6 arbitration context, a counterfactual of compliance, which is a hypothetical scenario that by definition does not reflect the events that have actually taken place, must necessarily be constructed on the basis of evidence generated in the real world where compliance was not achieved. Accordingly, it is not only permissible, but it is to be expected, that a counterfactual of compliance will be constructed based on conduct that is not compliant. That is the entire purpose of using a hypothetical compliance scenario: to assess what the world would have looked like if compliance actions that were not taken, were in fact taken.

33.   The EU argues in its written submission that "it makes no sense to base a hypothetical counterfactual on a compliance scenario that cannot happen in practice at the end of the RPT." To the contrary, it is the EU's circular argument that does not make sense. What the EU argues <u>cannot</u> happen is what in fact <u>does</u> happen in every Article 22.6 arbitration. The parties are in an Article 22.6 arbitration because one of them has failed to bring a measure into compliance by the end of the RPT. The point of a counterfactual is to create a hypothetical scenario to examine what trade flows would have been had the offending party brought its measures into compliance by the end of the RPT. In that sense, a counterfactual of compliance <u>must</u> be constructed on the basis of decision-making conduct that is non-compliant.

2 PARTIES' ECONOMIC MODELS FOR THE AS APPLIED INCONSISTENCY

12.   **To the European Union: The United States argues that "the EU never explains why a model that considers reallocation of trade among third countries <u>to the exclusion of</u> reallocation of trade between affected imports and domestic supply is more accurate for assessing nullification and impairment arising from the loss of market share <u>in the domestic market of the country imposing the measures</u>, especially when those measures are designed to provide relief to that industry."[67] Please provide your views on this argument by the United States.**

     Response:

34.   This question is addressed to the EU.

13.   **To the European Union:** *Isolation of Spanish market*: **Please explain whether, as the United States argues[68], the European Union is assessing nullification or impairment by looking at the impacts to Spain, alone, but reserving its right to bring an "as such" suspension request for application of Section 771B to exports from any European Union Member State. If this is the case, please explain why this would be appropriate.**

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[67] U.S. written submission, para. 74 (underline original).

[68] U.S. written submission, paras. 67.

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Response:

35.   This question is addressed to the EU.

14.   To the European Union: *Excluding AD duties:* **Please explain why "the anti-dumping duties constitute one of the other factors to be 'eliminated' in order to assess the trade effects of only the CVDs post-2016".[69]**

Response:

36.   This question is addressed to the EU.

15.   To the European Union: *Export supply elasticity*: **The European Union assumes that export supply of ripe olives can meet any level of demand at the same costs (i.e. has infinite elasticity). Such an assumption can be found in models where the country imposing an import duty is assumed to be "small", meaning that its demand is small compared to the total global demand for the product in question. Yet data provided by the European Union suggest that the United States' market accounts for almost a quarter of global imports of ripe olives.[70] In light of the above, please explain why the assumption of infinite export supply is appropriate in the context of this Arbitration.**

Response:

37.   This question is addressed to the EU.

16.   To the European Union: *Armington elasticity*: **The Armington elasticity of substitution is referred to as σ (sigma) in all the sources provided by the parties that spell out the Armington model in the form of equations (Balistreri and Rutherford, 2013; Fontagné et al., 2022; and in the United States' submission). The Arbitrator notes that the elasticity estimates reported in Fontagné et al. (2022) are a transformation of sigma, referred to as ε (epsilon). Specifically, $\varepsilon = 1 – \sigma$ (Fontagné et al., 2022, p.10). Therefore, the Armington elasticity can be obtained from the results reported in Fontagné et al. (2022) as:**

$\sigma = 1 – \varepsilon$.

The value of epsilon reported in Fontagné et al. (2022) for the product code 200570 is -12.3.[71] Based on those results, the Armington elasticity is $\sigma = 1 - (-12.3) = 13.3$. Rounded to the closest integer, the value is 13. In light of the foregoing discussion,

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[69] EU written submission, para. 68.

[70] Exhibit EU-14, p.7.

[71] Dataset referenced in Exhibit EU–12, accessed on 21 February 2025 at https://data.mendeley.com/datasets/8v4579gnvc/2, entitled "elasticity_for_publication_2021_09_29.dta".

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could the European Union clarify how it calculated sigma from the results reported in Fontagné et al. (2022), as they differ from the Arbitrator's own calculation?

Response:

38.   This question is addressed to the EU.

17.   **To the European Union:** *Price elasticity of demand*: **The European Union suggests that if domestic production is included in the model, the value of the price elasticity of demand "should be lower because domestic production (which constitutes around 45% of the total market in 2016 according to Exhibit USA-16) is inelastic so that the weighted average of the two components should be much lower".[72] Please explain the economic rationale behind this argument, and refer to the appropriate economic authority if necessary. In particular, what is the relationship between the price elasticity of demand and the elasticity of domestic supply?**

Response:

39.   This question is addressed to the EU.

18.   **To the European Union:** *The model implementation*: **The European Union's model differs from Armington models implemented in prior Arbitrations by including multiple markets, among other differences.[73] The Arbitrator understands that adjusting the European Union's model to include only the United States' market while maintaining all other assumptions would reduce Spain's nullification or impairment to $30.8 million.**

   a.   **Could the European Union please confirm this number, and if it obtains a different one, then provide a version of the model (in GAMS code) which includes only the United States' market? Would the European Union consider the Balistreri and Rutherford model, which was initially designed for considering multiple markets simultaneously, to still be appropriate in this case?**

   b.   **The Arbitrator understands that the United States' model results in a level of nullification or impairment of $25 million rather than $30.8 million for Spain when maintaining its focus on only the imports to the United States's market, but otherwise adjusted to incorporate the same inputs as those employed by the European Union.[74] The Arbitrator also notes that the structure of the**

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[72] EU written submission, para. 81.

[73] EU methodology paper, para. 32.

[74] That is, with market shares of 70%, 8%, and 17% in 2016 for Spain, REU, and RoW respectively, elasticity of supply of 99, elasticity of substitution of 12, the United States' import market size of 94.6 million in 2016 and 88.5 million in 2023, and considering only the impact of the 10.99% CVD.

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> **United States' model is functionally equivalent to that used in prior arbitrations such as *US – Washing Machines* (DS464), while the European Union's model differs from this previous arbitration. Could the European Union please indicate why the level of nullification or impairment resulting from its model differs from that of the United States' model when using the same inputs?**

> **Response:**

40.   This question is addressed to the EU.

19.   **To the United States: In relation to export supply elasticity, the United States provides examples of previous arbitrations where a value of 10 was used for a number of manufactured goods.[75] The United States also submits that "the export supply elasticity should be smaller for agricultural goods"[76], yet the United States also argues that it "assumes the export supply elasticity [for ripe olives] to be 10."[77] Please explain why the United States did not assume a lower value given its statement in paragraph 104 of its written submission.**

> **Response:**

41.   As the United States explains in its written submission, assuming an export supply elasticity of 10 provides a conservative estimate for nullification and impairment.[78] The United States adopted an export supply elasticity of 10 based on the values used in a number of prior arbitrations concerning manufactured goods and explained that the export supply elasticity should actually be lower for agricultural goods "because farmers are often constrained by factors such as natural growth cycles, climate conditions, and seasonal variations, making it difficult to rapidly change crop production in response to demand fluctuations."[79]

42.   The EU claims that there are no estimates for export supply elasticity in the literature,[80] but instead of adopting an estimate for a different type of good used in past arbitrations, opts to assume a facially extreme value of infinity, which is also unsupported by any economic analysis or evidence.[81]

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[75] U.S. written submission, para. 103.

[76] U.S. written submission, para. 104.

[77] U.S. written submission, para. 105.

[78] U.S. written submission, para. 105.

[79] U.S. written submission, para. 104.

[80] EU Methodology Paper, para. 38.

[81] *See* EU written submission, para. 83.

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43.   The assumption of a smaller elasticity value would imply a weaker response from Spanish producers to the changes in the CVD duties, resulting in a smaller estimate of nullification and impairment. This is demonstrated in the sensitivity analysis presented in Table 1 below, where the United States provides revised estimates for total nullification and impairment using export supply elasticities ranging from 8 to 12. Thus, the United States reiterates that its use of a value of 10 for the export supply elasticity is, in fact, conservative, while the EU's assumption of an infinite export supply elasticity is unsubstantiated and unreasonable by orders of magnitude.[82]

Table 1: Sensitivity Analysis for Export Supply Elasticity			
	Low	Currently used	High
Export Supply Elasticity	8	10	12
Increase in value of imports from Spain (in million USD)	$6.49	$6.65	$6.77
Increase in value of imports for the EU as a whole (in million USD)	$6.04	$6.15	$6.23

20.   **To the United States:** *Isolation of Spanish market*: **The European Union argues that "[t]he presumption in Article 3.8 of the DSU underlines that nullification or impairment is linked to a breach of the rules"[83] and that "in this case, the breach stems from the WTO-inconsistent duties imposed on imports from Spain."[84] Please explain whether the United States agrees with these statements by the European Union and, if so, what would be its relevance for the United States' argument that the European Union improperly isolates the Spanish market.**

        Response:

44.   The United States agrees with the above statements. However, they have no relevance to the U.S. argument that the plain text of Article 22 of the DSU requires the level of suspension of concessions or other obligations requested by a Member to be equivalent to the level of nullification or impairment suffered by that Member. Article 3.8 is not an exception to that, nor does it permit the Member requesting suspension of concessions or other obligations to isolate the calculation of nullification or impairment to a particular impacted sub-jurisdiction.

45.   As the United States explains in its written submission,[85] the text of Article 22 of the DSU is clear that "any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions

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[82] *See* U.S. written submission, paras. 100-105.

[83] EU written submission, para. 45.

[84] EU written submission, para. 45.

[85] *See* U.S. written submission, paras. 63-68.

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or other obligations under the covered agreements."[86] If the Member concerned objects to the level of suspension proposed, arbitration is triggered and the arbitrator "shall determine whether the level of such suspension is equivalent to the level of nullification or impairment."[87] Here, the EU is the only "party having invoked the dispute settlement procedures" that has requested "authorization from the DSB to suspend application . . . of concessions or other obligations under the covered agreements."[88] Furthermore, in making its Article 22.2 request, the EU was clear that it was requesting to suspend concessions and other obligations in an amount equivalent to the level of nullification and impairment experienced by the EU.[89] It repeats this request again in its recent written submission where it asks the Arbitrator "to determine that the level of suspension proposed by the European Union in the Methodology Paper is equivalent <u>to the level of nullification or impairment of benefits accruing to the European Union</u>", not to Spain.[90] The EU has not proposed any alternative interpretation of Article 22 of the DSU that would allow it to isolate the measurement of nullification and impairment to Spain, nor has it explained why it explicitly requested pursuant to Article 22.2 of the DSU to suspend concessions or other obligations in an amount "equivalent to the nullification or impairment of benefits <u>accruing to the European Union</u>." In fact, the EU ignores these arguments in its written submission.

46.   The fact that the breach of WTO obligations at issue stems from duties imposed on imports from a specific EU Member State is not relevant to the process laid out in the DSU. To illustrate the point, imagine if the EU had imposed WTO-inconsistent duties on U.S. exports originating from a specific U.S. state (perhaps due to some local support measure or trade barrier). In such a case, the United States could not credibly assert that nullification or impairment arising from that measure should only be calculated with respect to the impacted state, ignoring the rest of the U.S. market. The fact that the EU's sub-jurisdictions are themselves sovereign states makes no difference. Spain did not bring this dispute in its capacity as a WTO Member. Rather, the EU is the WTO Member that brought this dispute, litigated it through its various stages, and is now seeking authorization to suspend concessions or other obligations. Having made the decision to bring the dispute as the EU, the EU is now bound to see it through to its conclusion as the EU, including by accepting that nullification and impairment must be measured to the EU as a whole.

21.   **<u>To the United States</u>:** *Excluding AD duties:* **The European Union argues that "[t]he purpose of using the PE model in the present case is precisely to simulate the effect**

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[86] DSU, Art. 22.2.

[87] DSU, Art. 22.7.

[88] *See* Recourse to Article 22.2 of the DSU by the European Union, WT/DS577/20 (Nov. 15, 2024) ("The European Union hereby requests authorisation from the DSB to suspend the application to the United States of concessions or other obligations under the covered agreements, pursuant to Article 22.2 of the DSU.").

[89] *See* Recourse to Article 22.2 of the DSU by the European Union, WT/DS577/20 (Nov. 15, 2024) ("As required by Article 22.4 of the DSU, the annual level of suspension proposed is equivalent to the level of nullification or impairment of benefits accruing to the European Union from the United States' failure to bring the measure at stake into compliance with the recommendations and rulings of the DSB.").

[90] EU written submission, para. 125 (emphasis added).

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**of the WTO inconsistent measure only, i.e. CVDs, all other things being equal"[91]
and that "[i]f AD duties would have to be included there is no reason why all the
other factors/adjustments that might have an impact on market shares should be
excluded such as, e.g. the COVID 19 crisis and the strong inflation".[92] Please
respond to this argument by the European Union.**

Response:

47.   The United States generally agrees with the premise proposed by the EU that the purpose
of a partial equilibrium (PE) model is to isolate the trade impacts of WTO-inconsistent measures
while excluding the impact of other macroeconomic factors on the market at issue. However,
parallel AD duties are different in-kind from general macroeconomic shocks such as COVID-19
and strong inflation, which are properly excluded from the model. Parallel AD duties must be
included in order to accurately measure the level of nullification or impairment. This is because,
unlike other factors that the United States agrees must be excluded from the model, AD duties
are functionally identical to the WTO-inconsistent CVD duties that are the subject of the models
proposed in this dispute and therefore <u>cannot</u> be isolated from the CVD duties in a way that
would accurately yield a measurement of nullification or impairment attributable only to the
CVD duties.

48.   Unlike macroeconomic factors such as COVID-19 and inflation, which impacted
virtually all products and markets over a portion of the relevant time period, the AD duties on
ripe olives from Spain cover the exact same products as the WTO-inconsistent CVD duties, were
implemented at almost exactly the same time in 2017, and are designed to achieve the same
objective (providing relief to the domestic ripe olives industry from unfair trade practices)
through the same mechanism (a duty on imports). The AD investigation is wholly parallel to the
CVD investigation:[93] they were initiated on the same date;[94] include largely the same Spanish
exporters and producers;[95] share an identical product scope; rely on the same injury

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[91] EU written submission, para. 70.

[92] EU written submission, para. 70.

[93] Exhibit USA-36 presents a timeline for major milestones in both the AD and CVD investigations and actions
regarding ripe olives from Spain. As Exhibit USA-36 demonstrates, the two actions have proceeded in lockstep
since their joint initiation, often through the same Federal Register Notices.

[94] The AD and CVD investigation were both initiated on July 19, 2017. *See Ripe Olives from Spain: Initiation of
Less-Than-Fair-Value Investigation*, 82 Fed. Reg. 33,054 (Dep't of Commerce July 19, 2017), available at
https://www.federalregister.gov/documents/2017/07/19/2017-15142/ripe-olives-from-spain-initiation-of-less-than-
fair-value-investigation; *Ripe Olives from Spain: Initiation of Countervailing Duty Investigation*, 82 Fed. Reg.
33,050 (Dep't of Commerce July 19, 2017), available at
https://www.federalregister.gov/documents/2017/07/19/2017-15143/ripe-olives-from-spain-initiation-of-
countervailing-duty-investigation.

[95] For example, the first administrative review of the AD and CVD orders both examined the same companies: Agro
Sevilla Aceitunas S.COOP Andalusia, Angel Camacho Alimentacion S.L., and Alimentary Group DCoop S.Coop.
And. *See Ripe Olives from Spain: Final Results of Antidumping Duty Administrative Review; 2018–2019*, 86 Fed.
Reg. 35,068 (Dep't of Commerce July 1, 2021), available at

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determination by the U.S. International Trade Commission ("USITC"); have the same final determination and order dates; and require importers to post cash deposits for each duty when entering the U.S. market.[96] Accordingly, from the practical perspective of how they impact the U.S. ripe olives market, these duties function as <u>a single combined duty</u> on in-scope olive imports from Spain.

49.   In contrast, the COVID-19 pandemic did not begin until early 2020 and the World Health Organization declared it was no longer a global public health emergency in May 2023.[97] Similarly, inflation in the United States did not accelerate until 2021, peaked in 2022, and began to decline in late 2022.[98] Compared to the AD duties, which have been in effect since 2017, the impacts of the COVID-19 pandemic and inflation emerged much later and gradually dissipated during the relevant timeframe. In addition, the AD duties directly targeted the in-scope products whereas the impacts of the COVID-19 pandemic and inflation on the market for ripe olives were less direct.

50.   The EU does not explain by what mechanism a PE model can accurately attribute trade damage to one duty as opposed to another contemporaneous comparable duty on the exact same products. Despite the EU's claims of the purity of the PE approach, an economic model simply cannot be expected to achieve an accurate allocation of trade damage between two functionally identical contemporaneous measures. Even though these duties arose from distinct legal authorities and investigations, the reality is that they operate as a single duty on ripe olives from Spain in terms of their economic impact and effects on trade flows. There is no reason to believe that the market reacts any differently to a duty imposed to remedy dumping compared to a duty

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https://www.federalregister.gov/documents/2021/07/01/2021-14060/ripe-olives-from-spain-final-results-of-antidumping-duty-administrative-review-2018-2019; *Ripe Olives From Spain: Final Results of Countervailing Duty Administrative Review; 2017-2018*, 86 Fed. Reg. 35,266 (Dep't of Commerce July 2, 2021), available at https://www.federalregister.gov/documents/2021/07/02/2021-14142/ripe-olives-from-spain-final-results-of-countervailing-duty-administrative-review-2017-2018.

[96] The AD and CVD final determinations were published on June 18, 2018, and the AD and CVD orders were published on August 1, 2018. Both the AD and CVD orders share the same scope and the USDOC relied on the same injury findings by the USITC. *See Ripe Olives from Spain: Final Affirmative Determination of Sales at Less Than Fair Value*, 83 Fed. Reg. 28,193 (Dep't of Commerce June 18, 2018), available at https://www.federalregister.gov/documents/2018/06/18/2018-12991/ripe-olives-from-spain-final-affirmative-determination-of-sales-at-less-than-fair-value; *Ripe Olives from Spain: Final Affirmative Countervailing Duty Determination,* 83 Fed. Reg. 28,186 (Dep't of Commerce June 18, 2018), available at https://www.federalregister.gov/documents/2018/06/18/2018-12990/ripe-olives-from-spain-final-affirmative-countervailing-duty-determination; *Ripe Olives from Spain: Antidumping Duty Order*, 83 Fed. Reg. 37,465 (Dep't of Commerce Aug. 1, 2018), available at https://www.federalregister.gov/documents/2018/08/01/2018-16450/ripe-olives-from-spain-antidumping-duty-order; *Ripe Olives from Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 Fed. Reg. 37,469 (Dep't of Commerce Aug. 1, 2018), available at https://www.federalregister.gov/documents/2018/08/01/2018-16449/ripe-olives-from-spain-amended-final-affirmative-countervailing-duty-determination-and.

[97] *WHO chief declares end to COVID-19 as a global health emergency*, UNITED NATIONS (May 5, 2023), https://news.un.org/en/story/2023/05/1136367.

[98] *See* Federal Reserve Economic Data Graph, FEDERAL RESERVE BANK OF ST. LOUIS, https://fred.stlouisfed.org/graph/?g=rocU.

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imposed to remedy a countervailable subsidy. Nor does the EU argue that the market would react differently. Accordingly, it is more accurate from an economic modeling perspective to reduce the <u>combined</u> duty by the amount of its WTO-inconsistent component, rather than eliminate the WTO-inconsistent CVD duty while ignoring completely the parallel AD duty. This is exactly what the U.S. proposed model does and, as the United States has shown, the results demonstrate that failing to include contemporaneous AD duties covering the exact same product inaccurately inflates the estimate of nullification or impairment.[99]

22.   <u>To the United States</u>: *Inclusion of third markets*: The United States argues that "the EU's estimation results further demonstrate that the trade reallocation effects resulting from the U.S. CVD duties would predominantly impact Spanish exports, with <u>minimal consequences</u> for the other two entities included in the analysis".[100] Please clarify what is meant by "minimal consequences for the other two entities".

<u>Response</u>:

51.   The global dimension of the EU model is unnecessary because the EU's estimation results demonstrate that the trade reallocation effects resulting from the U.S. CVD duties would predominately impact U.S. imports from all three non-U.S. entities, i.e., Spain, other EU countries (REU), and the rest of the world (ROW), included in the U.S. model. Meanwhile, the changes in the imports in other countries or regions from all countries or regions would be negligible and therefore do not contribute to a more accurate measurement of nullification or impairment.

52.   For example, the EU's submission suggests that the REU's imports from REU would increase by $0.39 million (from $13.96 million to $14.35 million), increase by $0.91 million from ROW (from $66.6 million to $67.6 million), and decrease by $1.34 million from Spain (from $102.98 million to $101.65 million) because of the removal of the CVD duties. Similarly, the ROW's imports would decrease by $1.17 million from Spain (from $91.91 million to $90.75 million), increase by $0.24 million from REU (from $8.5 million to $8.7 million), and increase by $0.89 million from ROW (from $63.56 million to $64.45 million). Imports into the United States from all three entities would remain largely unchanged.[101]

53.   These minimal trade diversionary impacts between various foreign entities further support the validity of the U.S. model, which focuses specifically on analyzing the U.S. market where the CVD duties were applied, and therefore provides a comprehensive and accurate analysis of the complex market interactions between domestic and imported varieties in the U.S. market. It also underscores the point made by the United States that the EU's approach introduces unnecessary analytical complexity without any discernable benefit for measuring

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[99] *See* U.S. written submission, para. 86; Exhibit USA-15.

[100] U.S. written submission, para. 70 (referring to Exhibit EU-14, p.7) (underline original).

[101] *See* Exhibit EU-14, at p. 7.

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nullification or impairment arising from lost market share in the United States.[102]

23. **To the United States:** *Inclusion of third markets***:** **The Arbitrator notes that the European Union's model differs from models used in past Article 22.6 arbitrations by, on the one hand, including third markets (and thus imports from all regions to the other regions) and, on the other, excluding United States' domestic production. The United States argues that "the EU presents a <u>false choice</u> between the two options.[103]** **In referring to a "false choice" between two options, please clarify and elaborate on those options. For instance, does one of the options involve the inclusion of third markets (and thus imports from all regions to the other regions) or does that option instead involve imports from the rest of the world to the United States, which are two distinctly different matters?**

Response:

54.   One of the two options referred to by the United States is the model proposed by the EU, which includes not only U.S. imports from Spain, the rest of the EU, and the rest of the world, but also trade between third-country markets, while also excluding U.S. domestic production. As demonstrated in the response to Question 22 above, based on the EU model, the trade reallocation effects from the removal of the CVD duties would predominately impact U.S. imports from all three non-U.S. entities, while changes in the imports in other countries or regions would be negligible.

55.   The other option is the model proposed by the United States and used by arbitrators in past arbitrations, which considers the trade reallocation among U.S. imports and U.S. domestic production. This approach includes varieties or entities for (1) domestic production, (2) subject imports from the impacted Member, and (3) imports from the rest of the world, thus accounting for both trade diversion from the impacted Member to third countries (within U.S. imports) and the market share captured by U.S. domestic producers. In this way, the U.S. approach captures trade diversion between third countries in the only way that is relevant for assessing nullification or impairment arising from loss of market share in the U.S. market – as it relates to shares of U.S. imports.

56.   The EU never explains why its model is more accurate for assessing nullification or impairment than the Armington models adopted by Article 22.6 arbitrators in the past. While the EU claims that its approach is "more complete and hence more accurate" because it considers reallocation of trade among third countries,[104] it does not explain why reallocation of trade among third countries <u>outside of U.S. import flows</u> is relevant for measuring nullification or impairment <u>in the U.S. market</u>. The reality is that trade diversion that does not impact the U.S. market <u>is not</u> relevant for measuring nullification or impairment in this dispute.

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[102] *See* U.S. written submission, para. 69-71.

[103] U.S. written submission, para. 74 (underline original).

[104] *See* EU methodology paper, para. 32.

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24.   <u>To the United States:</u> *Domestic shipments***: The United States provides values of domestic shipments of ripe olives based on information from the United States Department of Agriculture's National Agricultural Statistical Services (NASS). It appears that the values that the United States proposes are for <u>total</u> domestic production. In such case, these values also include United States' exports and including them in the model could potentially inflate the United States' share of the domestic market and lead to a downward bias on the estimated NI. Moreover, as noted by the European Union, these values appear to include varieties of olives that are not included in the relevant trade flows (such as green olives).[105] This could further inflate the United States' share of the domestic market and lead to a downward bias on the estimated NI. In this respect:**

a.   **Please provide the exact path to the data source.**

<u>Response:</u>

57.   The USDA National Agricultural Statistics Service (NASS) is the source for the data on olive processed utilization for canning and limited use. The data is obtained from Quick Stats (https://quickstats.nass.usda.gov/), with a query based on the following categories of data: (1) Olives, processing, canned – prices received, measured in $/ton; (2) Olives, processing, limited – price received measured in $/ton; (3) Olives, processing, canned – production measured in tons; and (4) Olives, processing, limited – production measured in tons. These data are reported on a marketing year basis (August 1 to July 30).

b.   **If the values indeed refer to total domestic production and include varieties of olives that are not included in the relevant trade flows, please propose suitable adjustments.**

<u>Response:</u>

58.   The EU has misinterpreted the scope of the relevant CVD investigation and resulting order as it argues that only "non-green" canned olives as defined by the HTS subheadings should be used in the model simulation. This is inconsistent with the application of U.S. trade laws in AD and CVD investigations.

59.   The U.S. Department of Commerce defined the scope of the merchandise subject to the relevant CVD order as follows:

> The products covered by this order are certain processed olives, usually referred to as "ripe olives." <u>The subject merchandise includes all colors of olives</u>; all shapes and sizes of olives, whether pitted or not pitted, and whether whole, sliced, chopped, minced, wedged, broken, or otherwise reduced in size; all types of

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[105] EU written submission, para. 79.

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packaging, whether for consumer (retail) or institutional (food service) sale, and whether canned or packaged in glass, metal, plastic, multilayered airtight containers (including pouches), or otherwise; and all manners of preparation and preservation, whether low acid or acidified, stuffed or not stuffed, with or without flavoring and/or saline solution, and including in ambient, refrigerated, or frozen conditions.

Included are all ripe olives grown, processed in whole or in part, or packaged in Spain. Subject merchandise includes ripe olives that have been further processed in Spain or a third country, including but not limited to curing, fermenting, rinsing, oxidizing, pitting, slicing, chopping, segmenting, wedging, stuffing, packaging, or heat treating, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in Spain.

Subject merchandise includes ripe olives that otherwise meet the definition above that are packaged together with non-subject products, where the smallest individual packaging unit (*e.g.*, can, pouch, jar, etc.) of any such product—regardless of whether the smallest unit of packaging is included in a larger packaging unit (*e.g.*, display case, etc.)—contains a majority (*i.e.*, more than 50 percent) of ripe olives by net drained weight. The scope does not include the non-subject components of such product.

Excluded from the scope are: (1) Specialty olives (including "Spanish-style," "Sicilian-style," and other similar olives) that have been processed by fermentation only, or by being cured in an alkaline solution for not longer than 12 hours and subsequently fermented; and (2) provisionally prepared olives unsuitable for immediate consumption (currently classifiable in subheading 0711.20 of the Harmonized Tariff Schedule of the United States (HTSUS)).

The merchandise subject to this order is currently classifiable under subheadings 2005.70.0230, 2005.70.0260, 2005.70.0430, 2005.70.0460, 2005.70.5030, 2005.70.5060, 2005.70.6020, 2005.70.6030, 2005.70.6050, 2005.70.6060, 2005.70.6070, 2005.70.7000, 2005.70.7510, 2005.70.7515, 2005.70.7520, and 2005.70.7525 HTSUS. Subject merchandise may also be imported under subheadings 2005.70.0600, 2005.70.0800, 2005.70.1200, 2005.70.1600, 2005.70.1800, 2005.70.2300, 2005.70.2510, 2005.70.2520, 2005.70.2530, 2005.70.2540, 2005.70.2550, 2005.70.2560, 2005.70.9100, 2005.70.9300, and 2005.70.9700.

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> <u>Although HTSUS subheadings are provided for convenience and
> U.S. Customs purposes, they do not define the scope of the order;
> rather, the written description of the subject merchandise is
> dispositive.</u>[106]

60.   Thus, the relevant CVD order is clear that "all colors of olives," not just green olives, are within scope, and that HTSUS subheadings "do not define the scope of the order."[107] Consequently, as long as the olives are considered ripe olives and are not of the excluded specialty types produced by fermentation, they are included in the scope of the investigations without regard to what HTS subheading they are classified under. Both non-green and green ripe olives are clearly within the scope of the CVD order.[108] While the USDOC lists HTS subheadings where the subject products are likely to be classified, the HTS numbers are not dispositive for determining whether specific imports will be subjected to duties. Rather, fully aware that official trade data may not necessarily correspond directly to the merchandise included in the scope of an order, USDOC and USITC use data collected through questionnaires and the investigation process (briefs and submissions) to support its preliminary and final determinations which are based on the appropriate definition of the scope.

61.   The NASS data used in the U.S. model, which covers both non-green and green ripe olive production, is thus consistent with the scope of the CVD order and is among the best available proxies for U.S. ripe olive production. NASS does not collect data on specific olive varieties, but information about the California olive sector supports the assumption that all, or nearly all, of the production reported is for ripe olives that would be covered in the scope of the CVD order. There is no evidence to support that the volume of U.S. olives for canned processing includes any significant quantity of olives that would be processed into "specialty olives," as defined in the CVD order, which should be excluded from the U.S. domestic production data. To the contrary, ripe olive processing in the United States relies heavily on curing, but not fermentation.[109]

62.   Regarding the Arbitrator's question on U.S. exports of ripe olives, it is not possible to suitably adjust the NASS data for U.S. exports of the subject merchandise because the NASS data on value of production is for raw olives utilized for canning and there is a lack of detailed data on U.S. domestic shipments (or sales), which would also reflect sales from inventories. NASS reports data on the production of, and price paid for, raw olives produced in the United States that are utilized for canning.[110] NASS does not collect data on the volume or value of

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[106] Exhibit USA-4, at p. 4 (emphasis added and footnotes omitted).

[107] Exhibit USA-4, at p. 4.

[108] Green ripe olives are processed slightly differently than the black ripe olives (skipping only the oxidation step) and are not the same as Spanish green olives which are fermented olives not within the scope of the CVD order. For details, *see* Exhibit EU-9 at p. I-12

[109] *See* Exhibit EU-9, at p. I-12.

[110] It should also be noted that NASS reports production volume (in pounds) on a fresh (or farm) weight basis, whereas the volume of canned ripe olives would be reported on a product-weight basis. USDA estimates that the

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production of canned ripe olives processed from raw olives. The production value of olives utilized for canning will be lower than the value of canned ripe olives because the former does not reflect the value that is added through processing and packaging, nor does it reflect the value of ripe olive production from imported raw or provisionally preserved olives.[111] Therefore, the NASS data used in the model already <u>understates</u> the value of U.S. canned ripe olive production. Nonetheless, given that no other publicly available data exists for the value of U.S. canned ripe olives, the NASS data the best available source for this analysis.

25.   **<u>To the United States</u>:** *Domestic supply elasticity:* **The European Union argues that the data which the United States provided with its submission confirm that "US domestic production is <u>inelastic</u> so that all reallocation occurs among third countries".[112] Specifically, the European Union argues that "Exhibit USA-16 shows that US production has decreased (both in terms of value and quantities) between 2016 and 2023 despite the imposition of duties"[113] and that "the share of ripe olives consumed in the United States that were imported went from 54% to 75%."[114] The European Union further argues that "the increase in the importation of provisionally preserved olives shown in figure 1 in the US submission does not seem to have affected the US production of canned and limited olives which has considerably decreased (by around 60%) over the same time period as the figures submitted by the United States in Exhibit USA-16 demonstrate".[115] Please provide your views on this argument by the European Union.**

   Response:

63.   Domestic ripe olive production is influenced by both supply and demand conditions in the domestic market, whereas the domestic supply elasticity (of ripe olives) primarily reflects domestic supply conditions. A decline in domestic production could result from reduced demand for ripe olives, insufficient supply, or a combination of both. Therefore, it is not appropriate to infer inelastic domestic supply based solely on the decline in domestic production.

64.   The relatively low domestic production during the relevant period can be partially attributed to decreased domestic demand. According to the 2024 USITC report, firms "had mixed responses regarding U.S. demand for ripe olives during the [period of investigation], with

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conversion between fresh-weight and product-weight is 1.06. *See Weights, Measures, and Conversion Factors for Agricultural Commodities and Their Products*, ECON. RES. SERV., U.S. DEP'T OF AGRIC., Agricultural Handbook Number 697 (1992), at p. 48, Table 38 (Exhibit USA-37).

[111] In 2016, the value of U.S. imports for consumption of olives, preserved/inedible (HS 0711.20) was $3.7 million. In 2024, the value was $17 million. *See* Global Agricultural Trade System, FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., available at https://apps.fas.usda.gov/gats/default.aspx.

[112] EU written submission, para. 55. (underline original)

[113] EU written submission, para. 55.

[114] EU written submission, para. 57.

[115] EU written submission, para. 61.

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a plurality reporting that demand fluctuated down or steadily decreased".[116] The USITC further reported that "[m]ost responding market participants do not expect demand conditions to improve in the reasonably foreseeable future".[117] The EU itself recognizes that trade flows for ripe olives were impacted by broader macroeconomic shocks during this period, such as COVID-19 and strong inflation, which likely influenced demand conditions.[118]

65.   In another report, the USITC specifically addressed if domestic ripe olive producers could maintain historic production levels and shipments, given potential issues related to the supply of raw olives from California growers in preceding years, such as California droughts and forest fires.[119] The USITC concluded that "the significant volumes of subject imports that undersold the domestic like product captured market share from the domestic industry in its largest sector of the market – the retail sector – and also resulted in U.S. processors of ripe olives carrying increasing inventories",[120] and that "the domestic industry possessed substantial excess production capacity in 2023".[121] In addition, the USITC concluded that despite the potential constraints on the supply of domestically grown raw olives available for processing, U.S. processors of ripe olives are able to supply the U.S. market at recent historical levels "using domestically grown raw olives, imports of raw olives, or from inventories of raw or ripe olives" if warranted by changes in market conditions, and "most purchasers (20 of 25) reported no supply constraints for ripe olives from any source".[122] Overall, as demonstrated in the U.S. written submission, the U.S. domestic supply of ripe olives should be more elastic than assumed by the EU, which is essentially zero.[123]

26.   **To the United States:** *Armington elasticity***: The United States notes that Soderbery (2015) estimates the Armington elasticities of substitution at the 8-digit HTS, but that it reports an estimate only for one of the two in-scope product codes (2005.70.50). The United States further notes that the United States' imports of ripe olives under 2005.70.50 represented only 2 percent of the total in-scope imports in 2016 and therefore the elasticity estimate for this product code is not representative of the elasticity for all in-scope products at the HTS-8 level.[124] The United States chooses to use a simple average of five elasticity estimates at the 10-digit HTS level available in Soderbery (2015).[125] Please provide the percentage of in-scope imports**

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[116] Exhibit USA-13, at p. 16.

[117] Exhibit USA-13, at p. 33.

[118] *See* EU methodology paper, para. 27.

[119] *See* Exhibit EU-9, at p. 25

[120] Exhibit EU-9. at p. 24.

[121] Exhibit USA-13, at p. 35.

[122] Exhibit EU-9, at p. 25.

[123] *See* U.S. written submission, paras. 75-80, 99.

[124] U.S. written submission, footnote 128.

[125] U.S. written submission, para. 111.

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that were covered by these five product codes in 2016. Please also provide a weighted average of the five elasticities, using imports at the 10-digit HTS level in 2016 as weights.

Response:

66.   As shown in Table 2 below, U.S. imports under these five 10-digit HTS product codes reached USD 92.1 million in 2016, accounting for 97.7 percent of the USD 94.2 million total imports under the seven in-scope 10-digit HTS codes. The weighted average of the five elasticities, using imports at the 10-digit HTS level in 2016 as weights, is 7.8.

Table 2: Elasticities of Substitution by HTS Code			
US HTS 10-digit code	**Elasticity of Substitution**	**U.S. Import Values in 2016, USD**	**Share in the Total Imports for All Seven In-scope 10-digit HTS Products**
2005.70.5030	4.3	1,837,483	2.0%
2005.70.5060	Not Reported	276,086	0.3%
2005.70.6020	2.2	9,991,909	10.6%
2005.70.6030	1.8	7,293,620	7.7%
2005.70.6050	9.5	72,675,141	77.1%
2005.70.6060	7.5	304,826	0.3%
2005.70.6070	Not Reported	1,847,750	2.0%

27.   **To the United States: In respect of export supply elasticity, the Arbitrator notes the European Union's assertion that "[b]y proposing this value [of 10 for manufacturing goods], the United States implicitly recognizes that there are no estimates in the literature concerning the value of this elasticity with regard to agricultural goods".[126] Does the United States agree that there are no such estimates in the literature? If not, please provide the available estimates and their sources.**

Response:

67.   Soderbery (2015) provides the inverse foreign export elasticity estimates denoted as ω in their paper.[127] Table 3 below lists the export supply elasticity estimates for five of the seven in-scope 10-digit HTS codes (calculated as $1/\omega$). The simple average of the five available elasticities is 23.5, and the weighted average of the five elasticities, using imports at the 10-digit HTS level in 2016 as weights, is 12.3.

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[126] EU written submission, para. 83.

[127] *See* Exhibit USA-21. The elasticity estimates are available at https://web.ics.purdue.edu/~asoderbe/elasticities/liml/.

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Table 3: Export Supply Elasticities by HTS Code			
US HTS 10-digit code	**Foreign Export Supply Elasticity**	**U.S. Import Values (USD) in 2016**	**Share in the Total Imports for All Seven In-scope 10-digit HTS codes**
2005.70.5030	0.0004	1,837,483	2.0%
2005.70.5060	Not Reported	276,086	0.3%
2005.70.6020	113.2105	9,991,909	10.6%
2005.70.6030	4.2086	7,293,620	7.7%
2005.70.6050	0.0010	72,675,141	77.1%
2005.70.6060	0.0007	304,826	0.3%
2005.70.6070	Not Reported	1,847,750	2.0%

28.   **To both parties:** *Excluding AD duties***: The European Union argues that "[t]he United States asks the Arbitrator to include the existence of the anti-dumping duties in the PE model"[128], and that "[t]he 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"[129]. 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 NI resulting from the CVDs. If so, how can this be assessed?**

Response:

68.   In response to Question 21 above, we address the EU's arguments that it would be improper to include the existence of AD duties in a PE model. As explained, the AD and CVD duties on ripe olives from Spain cover the same products and are contemporaneous. They therefore operate as a single combined duty in terms of their economic impact on the market for ripe olives. Accordingly, the correct counterfactual 2016 market share should reflect the realities of this combined duty in order for the PE model to yield an accurate estimate of nullification or impairment. Ignoring the AD duties, on the other hand, would artificially inflate the market share in 2016, and thereby artificially inflate the level of countermeasures beyond what is equivalent to the level of nullification or impairment experienced by the EU.

69.   By examining different modeling scenarios, it is possible to determine whether and in what manner or degree any trade impact of parallel AD duties would alter the level of nullification or impairment resulting from the CVD measures. As an initial matter, it is important to recall that arbitrators have consistently acknowledged that "[a]ny determination of [nullification or impairment], because it is based on assumptions, is necessarily a reasoned

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[128] EU written submission, para. 74.

[129] EU written submission, para. 74.

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estimate."[130] Thus, economic models, including PE models used to approximate nullification and impairment, are imperfect representations, based on assumptions, that rely on the best available evidence to ascertain a reasoned estimate of the desired outputs. Because contemporaneous duties on the exact same products are functionally equivalent, as previously discussed, the impact of failing to account for the AD duties can be seen in the difference in the level of nullification or impairment yielded by running the proposed models in two different scenarios: first, a scenario in which the combined duty is reduced by its WTO-inconsistent component; and second, a scenario in which the CVD duty alone is eliminated without accounting for AD duties. The results of these two modeling scenarios are presented in Exhibit USA-15, which demonstrates that failing to account for the combined impact of the AD and CVD duties on ripe olives from Spain artificially inflates the level of nullification and impairment yielded by the U.S. proposed model by over USD 4.6 million (an increase in the total amount of nullification and impairment of roughly 75%).

70.   The United States is aware that the arbitrator in *US — Countervailing Measures (China)* declined to rely on modelling outcomes to justify the inclusion of parallel AD duties in the PE model at issue in that dispute. However, the arbitrator declined to make "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" and further declined to "address whether, as a matter of principle, it may or may not be appropriate to consider, in the specific context of applying the two-step Armington model, measures other than those at issue in a specific dispute."[131] Furthermore, many of the AD duties discussed in *US — Countervailing Measures (China)* were themselves the subject of WTO dispute settlement and found to be WTO-inconsistent.[132] Here, the WTO-consistency of the AD duties on ripe olives from Spain is not contested. Nonetheless, the United States disagrees with the conclusions of the *US — Countervailing Measures (China)* arbitrator that modelling outcomes for measuring nullification or impairment cannot be relied upon to demonstrate the impacts of including or failing to include parallel AD duties on the overall estimation of nullification and impairment. Rather, such modelling discrepancies are the most reliable evidence to demonstrate that treatment of functionally identical AD and CVD duties as a single duty creates a significant difference in the overall estimation of nullification and impairment when compared to arbitrary isolation of the CVD duties using the same modelling methodology.

3 PARTIES ECONOMIC MODELS FOR THE AS SUCH INCONSISTENCY

29.   **<u>To the European Union</u>: The Arbitrator notes that the two most recent arbitrations dealing with the issue of calculating prospective levels of nullification or impairment arising from the future application of a measure presented two generally distinct approaches: one used an approximation approach relying on a formula (*US – Washing Machines*), while the other an exact solution approach, relying on a**

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[130] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 3.4.

[131] *US – Countervailing Measures (China) (Article 22.6)*, para. 3.93.

[132] *See US – Countervailing Measures (China) (Article 22.6)*, para. 3.83.

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computer-run model (*US – Supercalendered Paper*). The Arbitrator also notes that, in its recourse to Article 22.2 of the DSU, the European Union requests authorization to suspend concessions and related obligations at an annual level based on a formula[133], but that its methodology paper suggests using a computer-run model to be solved exactly. Please clarify the approach the European Union is proposing.

Response:

71.   This question is addressed to the EU.

30.   To the European Union: The European Union states that "any future trade measures would be applied on specific US import flows reported according to well-known USHTS codes".[134] In this connection, what is the scope of the products that should be covered by the economic methodology to calculate the level of nullification or impairment relating to the "as such" inconsistency? In replying, please rely on the relevant USHTS codes or range(s) of codes.

Response:

72.   This question is addressed to the EU.

31.   To the European Union: Should the economic model ultimately chosen to calculate the nullification or impairment relating to the "as such" inconsistency take into account inflation? If so, how should this be implemented in the model?

Response:

73.   This question is addressed to the EU.

32.   To the European Union: Regarding the price elasticity of export supply, the European Union argues that should there be factual and verifiable estimates for such elasticity with regards to products affected by future applications of Section 771B, then the European Union would suggest to use those values.[135] Please explain how exactly the European Union proposes to do so, including where should such values be searched for, and which protocols should be followed for the use of such data in the prospective model.

Response:

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[133] Recourse to Article 22.2 of the DSU by the European Union, WT/DS577/20, p. 2.

[134] EU written submission, para. 112.

[135] EU written submission, para. 117.

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74.   This question is addressed to the EU.

33.   To the European Union: The European Union suggests that import data could be obtained from the Global Trade Atlas or any "equivalent publicly available" source of trade flows.[136] In this connection, what criteria or instructions could the Arbitrator adopt to search for and use "equivalent publicly available" sources of trade flows?

Response:

75.   This question is addressed to the EU.

34.   To the United States: With reference to paragraph 123 of the European Union's written submission, please elaborate on which precise aspects of the European Union's model are not sufficiently generic for the model to be applied in the future.

Response:

76.   The EU makes a fundamental structural decision in its model to exclude completely U.S. domestic production. This is the core difference between the EU's proposed model and the model proposed by the United States, as well as the core difference between the EU model and all other Armington-based PE models used in prior Article 22.6 arbitrations.[137] The EU acknowledges that its decision to exclude U.S. domestic production deviates from the models used by prior arbitrators.[138] The EU explains its deviation from past practice based solely on the specific circumstances of ripe olive cultivation, stating "[i]n the case of ripe olives, this element does not contribute much to the determination of the impact of tariffs on imports because of the very low United States domestic supply elasticity of raw olives which are used to produce ripe olives."[139] The EU goes on to describe the specific growing cycles of raw olive trees in order to assert that U.S. domestic supply elasticity for raw olives is so low that U.S. domestic production of ripe olives need not be considered in its model at all.[140] Thus, the EU justifies its fundamental structural modeling decision by pointing to what it casts as the entirely unique circumstances and features of raw olive production in the United States.

77.   As explained in the U.S. written submission, the United States disagrees with the EU's characterization of the domestic supply elasticity of ripe olive production in the United States and with the EU's decision to exclude domestic production from its approach to calculating

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[136] EU written submission, para. 118.

[137] *See, e.g.*, *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.119 (applying Armington model using "the total United States' market for [large residential washers]", rather than just U.S. imports of large residential washers); *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.5; *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.327-28; *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 7.91.

[138] EU methodology paper, para. 32.

[139] EU methodology paper, para. 32 (emphasis added).

[140] EU methodology paper, para. 32.

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nullification or impairment for the "as applied" DSB recommendations.[141] Specifically, the
United States demonstrated that the EU's position of implicitly assuming a domestic supply
elasticity of zero for <u>ripe</u> olives, based on purported supply constraints on <u>raw</u> olives, is not
supportable because of the ability of the U.S. ripe olive industry to substitute domestically
produced raw olive inputs with imported raw olives and provisionally preserved olives.[142]
Accordingly, the United States demonstrated that the domestic supply elasticity value of zero,
implicitly assumed by the EU through its exclusion of U.S. domestic production, is
unreasonable, and instead proposed a domestic supply elasticity of 4.5 based on USITC
estimates.[143]

78.   Even accepting the EU's assertion that the U.S. domestic supply of ripe olives is
completely inelastic, the EU does not present any reason to assume that supply conditions for all
other processed agricultural products possibly covered by Section 771B would similarly be
inelastic. Indeed, it would be reasonable to assume the opposite – that domestic production
would be relevant for most, if not all, processed agricultural products that could be covered by
Section 771B, the purpose of which is to provide relief to domestic agricultural producers
harmed by the impacts of illegally subsidized imports.

79.   Thus, the most important structural modeling choice made by the EU can only be
justified based on the unique characteristics of U.S. domestic olive production as represented by
the EU. In this way, the structure of the model is, by the EU's own description, narrowly
tailored to olives and is not sufficiently generic to accommodate other products.

**35.   To both parties: The Arbitrator understands that the European Union proposes
         basically the same economic model to calculate the level of nullification or
         impairment arising from the "as such" and "as applied" inconsistencies. In this
         connection:**

   **a.   Should the Arbitrator use the same approach or allow for the possibility that
           two different economic models may be employed to calculate nullification or
           impairment in those two scenarios?**

   Response:

80.   The United States is comfortable using the same economic model for both the "as such"
and "as applied" DSB recommendations, as long as the model is capable of capturing the variety
of products and scenarios that could arise in a future application of Section 771B. In this regard,
the United States has designed its proposed model, which is based on models used by past
arbitrators, to be used both for the application of Section 771B to ripe olives from Spain and for
potential future applications of Section 771B to other goods from the EU. Thus, if the Arbitrator
adopts the U.S. proposed approach for calculating nullification and impairment for the "as

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[141] *See* U.S. written submission, paras. 72-80.

[142] *See* U.S. written submission, paras. 75-77.

[143] *See* U.S. written submission, paras. 79, 99.

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applied" breach, the United States is comfortable with the Arbitrator using that same approach for the "as such" breach.

81.   However, if the Arbitrator determines that the EU's proposed model should be used to calculate nullification or impairment for the "as applied" breach, the United States would insist that a different model be used for the "as such" breach. This is because, as discussed in the U.S. written submission[144] and in its response to Question 34 above, the EU's proposed model for calculating nullification or impairment for the CVD order on ripe olives is not sufficiently generic to capture other products that could be subject to future CVD orders pursuant to Section 771B. Specifically, the EU's model incorporates a fundamental structural decision to exclude completely domestic U.S. production, which cannot be assumed to be appropriate for every processed agricultural product potentially subject to Section 771B. Thus, if the Arbitrator were to adopt the EU's approach for the "as applied" breach, the United States suggests that a separate model, akin to that proposed by the United States and used in past Article 22.6 arbitrations, should be adopted for the "as such" breach.

>   **b.   If, in your view, the Arbitrator should apply two different economic models, what would be the key differences between the models to be used in those two scenarios?**

82.   If the Arbitrator were to adopt two different models, the Arbitrator should use aspects of the U.S. approach whenever possible because it was designed to accommodate both the "as applied" breach as well as the "as such" breach.

83.   As previously discussed, the most important aspect of the U.S. model that should be incorporated into an "as such" model is the inclusion of domestic production. Without the inclusion of domestic production, the model will not be sufficiently generic to capture the variety of products potentially subject to CVD orders under Section 771B. However, the "as such" model should also take into account other facets of the U.S. approach, including: (1) measuring nullification or impairment to the EU as a whole, rather than to the market or markets from which the subject goods are being exported, in isolation;[145] (2) the incorporation of counterfactual CVD rates in order to accurately reflect the appropriate counterfactual compliance scenario where Section 771B is reinterpreted, amended, or replaced, rather than repealed without replacement;[146] and (3) incorporating any parallel AD duties imposed on the same goods.[147]

84.   Finally, the Arbitrator should adopt specific data sources or data sourcing protocols for application of the "as such" 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

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[144] *See* U.S. written submission, paras. 132-133.

[145] *See* U.S. written submission, paras. 63-68.

[146] *See* U.S. written submission, paras. 22-41.

[147] *See* U.S. written submission, paras. 81-87.

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trade flows align with the scope of the relevant CVD order. This is because under U.S. law, it is 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.

36.   **To both parties: The arbitrator in *US – Supercalendered Paper* set out instructions on when and how to apply the prospective model, particularly relating to triggering events[148] and the duration and timing of the suspension.[149] In this connection:**

   a.   **What are the triggering events that the Arbitrator should set out for the European Union to use a potential model to calculate prospective nullification or impairment? In your response, please discuss the scope of the covered products, their origin (i.e., Spain, the European Union, etc.), and any other factual circumstances relevant for the determination of the triggering events.**

   Response:

85.   The triggering event for the use of a model to calculate prospective nullification or impairment from a future use of Section 771B 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. In other words, a prospective model should only be used once duties are actually applied to exports, pursuant to final affirmative USDOC and USITC determinations, from the EU under Section 771B in a WTO-inconsistent manner.

86.   Such an approach is consistent with that used by the arbitrator in *US – Supercalendered Paper*, in which "a triggering event . . . occurs when the United States applies the [WTO-inconsistent measure] . . . in any US CVD proceeding <u>and then imposes a CVD rate to Canadian goods that is affected by that application</u>."[150] Furthermore, this approach makes administration of the prospective formula for calculating nullification and impairment simple compared to any triggering event that would precede the issuance of a CVD order. This is because the relevant CVD order will define the scope of the covered products and their origin, allowing for certainty in application of the prospective model and minimizing the risk of controversies between the parties.[151] For the avoidance of doubt, any CVD order issued pursuant to Section 771B that applies to exports from countries that are not Member States of the EU would not trigger application of the prospective model.

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[148] Decision by the Arbitrator, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, section 6.2.1.

[149] Decision by the Arbitrator, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, section 6.2.2.

[150] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.49.

[151] As previously discussed in the U.S. written submission and in its response to Question 20, while the origin of the products impacted by the WTO-inconsistent CVD duties may be relevant for constructing the model, the DSU requires that nullification or impairment be measured for the EU market, as a whole.

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> **b.**   **Should there be any limits on the duration and timing of the suspension of concessions arising from calculating the level of nullification or impairment using the prospective model?**

> **Response:**

87.   Yes, the suspension of concessions should not exceed the length of time during which a WTO-inconsistent CVD rate imposed pursuant to Section 771B remains in place.

88.   If a WTO-inconsistent CVD rate is removed or is reduced to reflect an attribution rate of less than 100 percent, then the suspension of concessions must stop. This is consistent with the approach of the arbitrator in *US – Supercalendered Paper*, which stated that "Canada may, with respect to a given level of [nullification or impairment], continue to suspend concessions for a maximum period of time equal to the period of time during which the relevant affected CVD rate (or rates) that yielded the relevant level of [nullification or impairment] was (or were) in place."[152]

89.   The approach proposed by the United States differs in one necessary regard with the approach adopted by the arbitrator in *US – Supercalendered Paper*. The arbitrator in *US – Supercalendered Paper* allowed the party suspending concessions or other obligations to extend suspension past the removal of an offending CVD order in the amount of time that it takes to calculate and impose suspension of concessions following a triggering event. The United States disagrees with this approach for two reasons. First, it removes an incentive for the parties to cooperate to calculate nullification or impairment and impose suspension as quickly and efficiently as possible. Second, and more importantly, as the EU points out in its written submission, "the purpose of suspension of concessions or other obligations is to 'induce compliance.'"[153] However, once the CVD order is no longer in place, the suspension of concessions or other obligations no longer serves this purpose. Rather, the only reason to retain suspension of concessions or other obligations beyond the recission of the WTO-inconsistent CVD order is to recuperate economic losses or to punish the non-compliant Member, neither of which are legitimate bases for suspension of concessions.

37.   **To both parties: If the Arbitrator were to include domestic production in the prospective model relating to the "as such" inconsistency, what could be the source for this data?**

> **Response:**

90.   Because Section 771B necessarily only applies to processed agricultural products, data from the U.S. Department of Agriculture (USDA) would be the most precise and reliable data for measuring domestic production of products that could be subject to a future application of Section 771B. In this regard, the United States suggests first relying on value of production data

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[152] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.49.

[153] EU written submission, para. 9 (quoting *US – Supercalendered Paper (Canada) (Article 22.6 – US),* para. 3.5).

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sourced from NASS (available at https://quickstats.nass.usda.gov/). As an alternative, if NASS data is unavailable for a specific product, the United States suggests using cash receipt data by commodity from the USDA's Economic Research Service as a secondary option (available at https://data.ers.usda.gov/reports.aspx?ID=4057).

4 POSSIBLE ADJUSTMENTS DUE TO INFLATION

38.   **To the European Union: The United States argues that while the European Union submits it intends to suspend benefits at an annual level equivalent to the nullification or impairment and states that the amount "may be adjusted for inflation for the year 2024 and on an annual basis thereafter"[154], the European Union does not specify any methodology, including a price index, for calculating the inflation adjustment.[155] To the extent that the Arbitrator believes that it is necessary or appropriate to adjust the annual level of nullification or impairment for inflation, the United States proposes using the "Producer Prices for Olives for Processing, Canned" as a price index, published by the NASS, a statistical agency under the U.S. Department of Agriculture.[156] Please explain whether the European Union considers that the United States' proposal is appropriate. If not, please explain why not and provide details of an index or similar that the Arbitrator could use.**

     Response:

91.   This question is addressed to the EU.

5 BURDEN OF PROOF

39.   **To both parties: Regarding paragraph 125 of the European Union's written submission, does the European Union's criticism that the United States, as the party objecting to the level of suspension of concessions, has not met its burden of proof in rebutting a claim or claims made by the European Union need to be predicated by a finding that the European Union, as the party requesting the suspension of concessions, has established a *prima facie* case for the claim concerned in the first place? If so, would "mere assertion" on the part of the European Union be enough to establish a *prima facie* case?**

     Response:

92.   Article 3.8 of the DSU states that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to

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[154] U.S. written submission, para. 123 (referring to EU methodology paper, para. 13).

[155] U.S. written submission, para. 123.

[156] U.S. written submission, para. 124.

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constitute a case of nullification or impairment."[157] The original Panel cited Article 3.8 in observing that "to the extent that the measures at issue are inconsistent with the GATT 1994, the SCM Agreement and Anti-Dumping Agreement, they have nullified or impaired benefits accruing to the European Union under that agreement."[158] Thus, under the DSU and as observed by the original Panel, a *prima facie* case for nullification or impairment exists and the EU does not need to further establish one. However, as explained in the United States written submission, the United States may rebut the presumption that nullification or impairment exists under the DSU.[159]

6 LEVEL OF SUSPENSION

40.   **To both parties:** Article 22.4 of the DSU requires *"[t]he level of the suspension of concessions or other obligations authorized by the DSB [to] be equivalent to the level of the nullification or impairment."* **Could there ever be a situation in which conjecture would deprive the Arbitrator of the ability to determine the equivalence that is called-for by this Article?**

       Response:

93.   It is possible that conjecture could deprive the Arbitrator of the ability to determine the equivalence called for by Article 22.4 of the DSU with sufficient confidence. Such circumstances have arisen in numerous past Article 22.6 arbitrations in which the arbitrators have "declined to accept claims that are too remote, too speculative, or not meaningfully quantified."[160] For example, in *US – 1916 Act (EC) (Article 22.6 – US)* the arbitrator declined to accept claims for nullification or impairment based on a "deterrent or 'chilling'" effect from the measures at issue or for litigation costs relating to the measures at issue because such claims were not meaningfully quantifiable.[161] Similarly, in *EC – Hormones (US) (Article 22.6 – EC)*, the arbitrator declined to take into account lost exports due to foregone marketing campaigns because "the causal link between the [measure at issue] and the allegedly lost exports" was "too remote" and thus taking such lost exports into account would "be too speculative."[162]

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[157] DSU, Art. 3.8.

[158] *US – Ripe Olives from Spain (Panel)*, para. 8.2.

[159] *See* U.S. written submission, paras. 43-49.

[160] *See, e.g.*, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 3.4. *See also US – 1916 Act (EC) (Article 22.6 – US)*, paras. 6.10 ("The Arbitrators recall that they cannot accept claims that are 'too remote', 'too speculative', or 'not meaningfully quantified.'"), 5.54 ("In determining the level of nullification or impairment . . . we need to rely, as much as possible, on credible, factual, and verifiable information. We cannot base any such estimates on speculation.") and 5.69 ("We are of the view that any claim for a deterrent or 'chilling effect' by the European Communities in the present case would be too speculative, and too remote.").

[161] *See US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.64-79.

[162] *EC – Hormones (US) (Article 22.6 – EC)*, para. 77.

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94.   Thus, if the Arbitrator were to determine that conjecture renders a determination of equivalence under Article 22.4 of the DSU too remote or too speculative, the Arbitrator may decline to measure nullification or impairment as it relates to the overly speculative claim. In such circumstances, the United States will have met its burden of establishing that the level of suspension requested by the EU is not equivalent to the level of nullification or impairment, as required by Article 22.4 of the DSU. If it found otherwise, the Arbitrator would risk 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.[163] For example, due to the lack of any information on hypothetical CVD investigations on unidentified products and the wide scope of products potentially subject to Section 771B, the Arbitrator could conclude that any prospective formula or model for calculating nullification or impairment for a future application of Section 771B is overly speculative. The Arbitrator should then decline to accept any such prospective formula or model and instead require the EU to seek authorization for countermeasures from the DSB in the future if and when Section 771B is applied to another EU product exported to the United States.

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[163] *See, e.g.*, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.22 ("any suspension of obligations in excess of the level of nullification or impairment would be punitive. We recall that both parties to this dispute accept the proposition, with which we fully agree, that punitive sanctions are prohibited by Article 22.4.").