

***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)

**COMMENTS OF THE UNITED STATES OF AMERICA
ON THE EUROPEAN UNION’S RESPONSES TO THE QUESTIONS FROM
THE ARBITRATOR AFTER THE SUBSTANTIVE MEETING**

May 1, 2025

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<i>US – Gambling (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS285/ARB, 21 December 2007
<i>US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>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</i> , WT/DS217/ARB/EEC, 31 August 2004
<i>US – Ripe Olives from Spain (Panel)</i>	Report of the Panel, <i>United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain</i> , WT/DS577/R, 19 November 2021
<i>US – Ripe Olives from Spain (EU) (Article 21.5 – EU)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain – Recourse to Article 21.5 of the DSU by the European Union</i> , WT/DS577/RW and Add. 1, 20 February 2024
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USA-3	<i>Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States</i> , 102 F.4th 1252 (Fed. Cir. 2024)
USA-4	Ripe Olives From Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 Fed. Reg. 37,469 (July 25, 2018)
USA-5	Section 703 of the Tariff Act of 1930 (19 U.S.C. § 1671b)
USA-6	<i>US – Ripe Olives from Spain</i> , 12 November 2020 response to Panel question No. 12, para. 116
USA-7	Ministerio De Agricultura, Alimentación y Medio Ambiente, <i>Diagnóstico sobre el sector de la aceituna de mesa en España</i> , p. 28 (2016), https://www.mapa.gob.es/ca/agricultura/temas/producciones-agricolas/160427diagnosticoaceitunademesadefinitivo_tcm34-135524.pdf
USA-8	Courtesy Machine Translation of Relevant Excerpts from Exhibit USA-7
USA-9	Cooperativas Agro-Alimentarias España, <i>Consejo Sectorial Aceituna de Mesa</i> (Sep. 11, 2023)
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	Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community’s rights under international trade rules, in particular those established under the auspices of the World Trade Organization, 2014 O.J. (L 189)
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USA-20	Large Residential Washers, Inv. No. TA-201-076, USITC Pub. 4745 (December 2017)
USA-21	Anson Soderbery, <i>Estimating Import Supply and Demand Elasticities: Analysis and Implications</i> , 96 J. Int’l Econ. 1 (2015)
USA-22	Ripe Olives From Spain: Notice of Correction to Antidumping Duty Order, 83 Fed. Reg. 39,961 (Aug. 7, 2018)
USA-23	NAT’L AGRIC. STATISTICS SERV., U.S. DEP’T OF AGRIC., PRICE PROGRAM: HISTORY, CONCEPTS, METHODOLOGY, ANALYSIS, ESTIMATES, AND DISSEMINATION (2011)
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USA-26	Asociación para la Promoción de las Aceitunas Sevillanas de las variedades Manzanilla y Gordal, <i>Aceitunas Manzanilla y Gordal de Sevilla: evolución del cultivo, cadena de valor e indicaciones geográficas</i>
USA-27	Courtesy Machine Translation of Exhibit USA-26
USA-28	Aceituna, MINISTERIO DE AGRICULTURA, PESCA Y ALIMENTACIÓN, https://www.mapa.gob.es/va/ministerio/servicios/informacion/aceituna_tcm39-102885.pdf
USA-29	Rémi Avignon and Etienne Guigue, <i>Markups and Markdowns in the French Dairy Market</i> (2022)
USA-30	Submission of Factual Information by Musco Family Olive Company and Accompanying Relevant Exhibits, Ripe Olives from Spain, No. C-469-818 (Remand, Slip Op. 20-8) (Feb. 25, 2020)
USA-31	Agro Sevilla Aceitunas S.Coop. And.’s Olive Sourcing Questionnaire Response, Ripe Olives from Spain, No. C-469-818 (Aug. 14, 2017)
USA-32	Agro Sevilla Aceitunas S.Coop. And.’s Affiliations Questionnaire Response and Accompanying Relevant Exhibits, Ripe Olives from Spain, No. C-469-818 (Aug. 18, 2017)
USA-33	Ripe Olives from Spain Countervailing Duty Investigation: Placing Information on the Record, INT’L TRADE ADMIN., U.S. DEP’T OF COM., Ripe olives from Spain, No. C-469-818 (July 31, 2017)
USA-34	Response of the Government of Spain to the Department’s October 25, 2017 Supplemental Questionnaire, Ripe Olives from Spain, No. C-469-818 (Nov. 7, 2017)
USA-35	Section 129 Proceeding Regarding the Countervailing Duty Investigation of Ripe Olives from Spain: Placing Factual Information on the Record, INT’L TRADE ADMIN., U.S. DEP’T OF COM., Ripe olives from Spain, Section 129 Proceeding, No. C-469-818 (Sept. 23, 2022) (including relevant attachments)
USA-36	Timeline of Actions in Antidumping and Countervailing Duty Investigations on Ripe Olives from Spain

Exhibit No.	Description
USA-37	<i>Weights, Measures, and Conversion Factors for Agricultural Commodities and Their Products</i> , ECON. RES. SERV., U.S. DEP’T OF AGRIC., Agricultural Handbook Number 697 (1992)
U.S. Responses to Questions Following Substantive Meeting	
USA-38	Broda, Greenfield, & Weinstein, <i>From Groundnuts to Globalization: A Structural Estimate of Trade and Growth</i> , 71 Res. in Econ. 759 (2017)
USA-39	Hakan Yilmazkuday, <i>Importer-Specific Elasticities of Demand: Evidence from U.S. Export</i> , 35 Int’l Rev. of Econ. & Fin. 228 (2015)
USA-40	Hillberry & Hummels, <i>Trade Elasticity Parameters for a Computable General Equilibrium Model</i> , 1 Handbook of Computable General Equilibrium Modelling 1213 (2013)
USA-41	Underlying data for Figure 1
USA-42	Ahmad, Montgomery, & Schreiber, <i>A Comparison of Sectoral Armington Elasticity Estimates in the Trade Literature</i> , USITC J. of Int’l Com. & Econ. (2021)
USA-43	Bajzik et al., <i>Estimating the Armington Elasticity: The Importance of Study Design and Publication Bias</i> , 127 J. of Int’l Econ. 103383 (2020)
USA-44	Imbs & Mejean, <i>Elasticity Optimism</i> , 7 Am. Econ. J.: Macroeconomics 43 (2015)
USA-45	Anson Soderbery, <i>Trade Elasticities, Heterogeneity, and Optimal Tariffs</i> , 114 J. of Int’l Econ. 44 (2018)
USA-46	Janet E. Nelson, <i>California Table Olives: Marketing, Imports, and the Federal Marketing Order</i> , in U.C. Agric. & Nat. Resources, Olive Production Manual 11 (2005)
USA-47	California Olive Committee, <i>2016-2017 California Olive Committee Annual Report</i> (2017)
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USA-48	Section 705 of the Tariff Act of 1930 (19 U.S.C. § 1671d)
USA-49	<i>Albemarle Corp. & Subsidiaries v. United States</i> , 821 F.3d 1345 (Fed. Cir. 2016)
USA-50	Robert Feenstra, <i>New Product Varieties and the Measurement of International Prices</i> , 84 Am. Econ. Rev. 157 (1994)
USA-51	Technical Document for Econometric Estimation of the Elasticity of Substitution between U.S. Imports of Ripe Olives from Different Countries
USA-52	David Riker, <i>A Trade Cost Approach to Estimating the Elasticity of Substitution</i> , Office of Economics, U.S. International Trade Commission, Working Paper 2020-07-D (2020)
USA-53	Carolyn Fischer & Alan Fox, <i>How Trade Sensitive are Energy-Intensive Sectors?</i> , 108 Am. Econ. Ass’n 130 (2018)
USA-54	Data file (in .dta format) for Econometric Estimation of the Elasticity of Substitution between U.S. Imports of Ripe Olives from Different Countries (Exhibit USA-51)
USA-55	Modeling file (in .do format) for Econometric Estimation of the Elasticity of Substitution between U.S. Imports of Ripe Olives from Different Countries (Exhibit USA-51)

1 COUNTERFACTUAL

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

Comment:

1. As the United States explained in its responses to the Arbitrator’s Question 44, the European Union’s (“EU”) revised argument against the use of a counterfactual compliance scenario in which the United States reinterprets, amends, or replaces section 771B of the Tariff Act of 1930 (“Section 771B”) is not supported by the DSB recommendations in this dispute or by the findings of prior arbitrators, and must be rejected.³ Both the original and compliance panels were clear that the application of Section 771B is WTO-inconsistent because the law itself is WTO-inconsistent.⁴ The EU acknowledges this in its responses to the questions from the Arbitrator, where it states that the “as such” violation is the “underlying reason, or trigger, for the application of Section 771B which causes nullification or impairment”.⁵ Yet the EU proceeds to assert that a counterfactual in which the United States remedies the core WTO inconsistency covered by the DSB recommendations and the cause of any nullification or impairment would constitute a “‘double counterfactual’ for a single (as applied) inconsistency.”⁶ To the contrary, a counterfactual compliance scenario that addresses only the application of a WTO-inconsistent law but leaves intact the core WTO-inconsistency covered by the relevant DSB recommendations would be an incomplete counterfactual, if it could even be considered a counterfactual compliance scenario at all.

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

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

³ See U.S. responses to second set of questions from the Arbitrator, paras. 8-10.

⁴ See *US – Ripe Olives from Spain (Panel)*, para. 7.175; *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.79.

⁵ EU responses to second set of questions from the Arbitrator, para. 3.

⁶ EU responses to second set of questions from the Arbitrator, para. 3.

2. As past arbitrators have found, it is not appropriate for a DSU⁷ Article 22.6 arbitrator to prejudge how a Member would choose to come into compliance when constructing an appropriate counterfactual.⁸ Thus, even if simple removal of a WTO-inconsistent countervailing duty (“CVD”) order could constitute a counterfactual compliance scenario, reinterpretation, amendment, or repeal and replacement of Section 771B would also constitute an appropriate counterfactual. As the United States has explained, because hypothetical removal of CVD orders would not allow the United States to determine attribution of subsidy benefits for a large group of products, it is not reasonable and plausible to assume that is the compliance action the United States would take.⁹ On the other hand, reinterpretation, amendment, or repeal and replacement of Section 771B is a reasonable and plausible compliance scenario – in fact, it is the exact compliance action that the EU seeks.

3. Furthermore, the counterfactual compliance scenario proposed by the EU would give the EU benefits that are in excess of what it could legitimately expect under the covered agreements. It is therefore not a WTO-consistent counterfactual. As the arbitrator in *US – Washing Machines* explained, analysis of an appropriate counterfactual must focus on “the benefits that have been nullified or impaired.”¹⁰ The arbitrator went on to state:

the term “benefit” constitutes “an ‘advantage’ that is received (or legitimately expected), and it is this advantage that is being nullified or impaired.” Not all “negative result[s]” of an inconsistent measure are nullified or impaired benefits. Echoing the arbitrator in *US – Section 110(5) Copyright Act (Article 25)*, “it is necessary to proceed with caution” and consider only the benefits that Korea could have expected, “in good faith and taking account of all relevant circumstances”. Those circumstances include the recommendations and rulings adopted by the DSB in the underlying dispute, which we consider “to the extent relevant to our assessment of whether [the complainant’s] counterfactual accurately reflects the benefits accruing to it in this dispute”.¹¹

4. Here, the benefits that the EU could have expected in good faith and taking into account all relevant circumstances, including the recommendations adopted by the DSB, are not that the

⁷ *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

⁸ See *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.2 (“It is for the original respondent, here the United States, to determine how to implement the DSB recommendations and rulings in order to bring its measure into compliance with the covered agreements. Therefore, in determining a counterfactual, we will not prejudge how exactly the United States would have implemented the DSB recommendations and rulings at issue. Nor will we speculate on which compliance scenario would be the ‘most likely’. Rather, we will evaluate whether China’s proposed counterfactual reflects ‘at least a plausible or “reasonable” compliance scenario.’” (citing *US – Gambling (Article 22.6 – US)*, para. 3.27)).

⁹ See U.S. written submission, paras. 34-37.

¹⁰ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.15.

¹¹ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.16 (citations omitted).

United States would abandon any ability to determine attribution of subsidy benefits for any product that falls within the scope of Section 771B. As the United States has repeatedly pointed out, both the original and compliance panels recognized that Members have wide discretion in how they assess attribution of indirect subsidy benefits.¹² Rather, the only benefits that the EU could legitimately expect are that the United State would determine the attribution of subsidy benefits for processed agricultural products using a WTO-consistent method. The United States would achieve that aim through reinterpreting or amending Section 771B such that it allows for a WTO-consistent attribution analysis, or by replacing Section 771B with an authority that allows for a WTO-consistent attribution analysis. The United States would not achieve that aim by adopting an attribution rate of zero for all processed agricultural goods. Thus, the counterfactual proposed by the EU would result in a level of nullification or impairment that does not accurately reflect the benefits accruing to the EU, and therefore would not be consistent with the DSU.

5. The EU refers to the arbitrators’ decisions in *US – Supercalendered Paper* and *US – Washing Machines* to support its arguments, but neither decision supports the proposition that a hypothetical counterfactual compliance scenario cannot remedy a WTO-inconsistency in a law, as opposed to just remedying the application of the WTO-inconsistent law. The fact that the measures at issue in *US – Supercalendered Paper* and *US – Washing Machines* may have allowed for WTO-consistent application means only that the appropriate counterfactual in those cases may not have required a change to those measures. It does not mean that an arbitrator can never rely on a counterfactual in which a Member hypothetically changes an “as such” WTO-inconsistent law.

6. Moreover, the EU’s reliance on the *US – Washing Machines* decision is particularly misplaced. In that case, the arbitrator was clear in finding that a counterfactual that “is premised on termination of an entire anti-dumping order, is not an accurate reflection of benefits accruing to Korea . . . and cannot be considered a reasonable or plausible counterfactual for the ‘as such’ measures.”¹³ The same is true here – the EU’s counterfactual, which is premised on the termination of CVD orders where Section 771B is applied in the underlying investigation, is not an accurate reflection of the benefits accruing to the EU and therefore is not a reasonable or plausible counterfactual.

7. In its responses to questions from the Arbitrator, the EU states “[t]he only way in which the US can act consistently as long as Section 771B exists in its current form, is by not applying Section 771B at all which also results in a zero attribution rate for pass-through.”¹⁴ Here again, the EU ignores that a counterfactual is a hypothetical compliance scenario. The United States has explained that the counterfactual that it proposes is one in which Section 771B is reinterpreted, amended, or replaced such that the U.S. Department of Commerce (“USDOC”)

¹² See, e.g., U.S. written submission, para. 30.

¹³ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.13.

¹⁴ EU responses to second set of questions from the Arbitrator, para. 6.

can carry out a WTO-consistent attribution analysis.¹⁵ Thus, the counterfactual presented by the United States explicitly contemplates that Section 771B would not “exist[] in its current form.”¹⁶

8. The EU also reiterates its arguments that Section 771B cannot be reinterpreted based on the findings of the compliance panel.¹⁷ However, the provision of the compliance panel report to which the EU cites states only that the compliance panel found that the United States had not presented sufficient evidence to substantiate its positions.¹⁸ The compliance panel did not find that Section 771B could not be reinterpreted to permit a WTO-consistent attribution analysis. To the contrary, the compliance panel explicitly rejected the EU’s argument that reinterpretation could never achieve compliance.¹⁹

9. The United States agrees with the EU that an “as such” WTO-inconsistency in a statute does not give rise to nullification or impairment simply by virtue of remaining in effect. The fact that the “as such” WTO-inconsistency in Section 771B does not cause nullification or impairment underscores that it is not proper under the DSU to authorize countermeasures arising from a hypothetical future application. To the contrary, the EU is correct that nullification or impairment will only arise from application of the WTO-inconsistent law. Accordingly, the DSU requires that the EU wait to request to suspend concessions or other obligations for a future case of nullification or impairment until that future application of Section 771B actually comes about. In case of disagreement, level of countermeasures can be accurately determined through Article 22.6 arbitration.

10. Finally, the EU presents an alternative scenario where the CVD rate does not become *de minimis* for one, several, or all EU exporters after removing the entirety of any attribution of subsidy benefits found through the application of Section 771B. In that scenario, the EU proposes that the level of nullification or impairment would be based on the difference between the actual CVD rate and the reduced CVD rate without pass-through benefit.²⁰ In order to determine whether the CVD rate without pass-through benefit is above the *de minimis* threshold, the EU recognizes that it would need to obtain business confidential information (BCI) from the United States “to calculate the CVD rate absent the pass-through benefit.”²¹ However, the EU does not explain how it would carry out such a calculation. USDOC CVD investigations require certain decisions with regard to the methodologies used in the application or removal of Section 771B, and the United States and EU may disagree on certain of those decisions. Accordingly,

¹⁵ See, e.g., U.S. written submission, para. 37; U.S. responses to first set of questions from the Arbitrator, para. 12; U.S. responses to second set of questions from the Arbitrator, para. 10.

¹⁶ EU responses to second set of questions from the Arbitrator, para. 6.

¹⁷ See EU responses to second set of questions from the Arbitrator, para. 12.

¹⁸ See *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.71.

¹⁹ See *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.16.

²⁰ See EU responses to second set of questions from the Arbitrator, para. 15.

²¹ EU responses to second set of questions from the Arbitrator, para. 16.

even if the USDOC shares the BCI data that the EU seeks, the EU’s calculation of the appropriate CVD rates could give rise to further controversies between the Parties.

11. The United States notes that the EU provided its own calculations for what, in its view, the CVD rates would be without the application of Section 771B in the case of ripe olives.²² Specifically, the EU presented that without the application of Section 771B, the subsidy rate would have been [[xxxxxx]] percent for Agro Sevilla Aceitunas S. Coop. Andalusia, [[xxxxxx]] percent for Angel Camacho Alimentación, S.L.U., and [[xxxxxx]] percent for Aceitunas Guadalquivir S.L.U. As previously indicated, the United States cannot speculate as to the accuracy of the EU’s calculations and whether these figures represent the CVD rates the USDOC would have calculated without the application of Section 771B. But even assuming, *arguendo*, that the EU’s calculations are accurate, a large amount of attribution would not be needed for CVD rates to be above the *de minimis* rate of 1.00 percent.²³ For example, the following calculation demonstrates that for Angel Camacho, which received a 13.76 percent rate in the CVD order,²⁴ the USDOC would only need to find [[xxxxxx]] percent attribution to reach an above *de minimis* CVD rate:

$$(1.00\% - [[xxxxxx]]\%) / (13.76\% - [[xxxxxx]]\%) = [[xxxxxx]]\%$$

12. In other words, even if we accept the EU’s calculations as accurate, for this producer or exporter, if [[xxxxxx]] percent of subsidies provided to raw olive growers were attributed to ripe olive processors, the CVD rate would be above *de minimis*. The United States has presented ample evidence demonstrating that under the facts of this case, there is 100 percent, or at least 65 percent, attribution of benefits, which is much higher than the [[xxxxxx]] percent necessary to reach an above *de minimis* CVD rate for at least one producer or exporter in the case of ripe olives.

42. To the European Union: In its response to Arbitrator question No. 4, the United States argues that the report of the arbitrator in *US – Offset Act (Byrd Amendment) (EC)* is instructive on the issue of using a proxy value for an attribution rate.²⁵ Please explain:

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

²² See EU Methodology Paper, para. 22.

²³ See Exhibit USA-5.

²⁴ See Exhibit USA-4.

²⁵ U.S. responses to first set of questions from the Arbitrator, para. 15.

Comment:

13. The United States agrees with the EU “that a proxy value may be used for the determination of a counterfactual in the present case.”²⁶ However, as explained in our comment on the EU’s response to the Arbitrator’s Question 41, the counterfactual proposed by the United States, in which the United States reinterprets, amends, or replaces Section 771B such that the USDOC can conduct a WTO-consistent attribution analysis, is the proper counterfactual in this dispute. By contrast, using a proxy value of zero, for ripe olives and for any future application of Section 771B, is equivalent to assuming the United States could never determine attribution of subsidy benefits for any processed agricultural product currently covered by Section 771B. That assumption is incorrect,²⁷ and would produce a level of nullification or impairment that does not accurately reflect the benefits accruing to the EU under the covered agreements.

14. The EU attempts to distinguish *US – Offset Act (Byrd Amendment) (EC)* on the basis that a different type of “pass-through” was at issue in that case, namely “whether, and to what extent, the CDSOA disbursements granted by the US government would be used by US companies to enhance their commercial position in the market.”²⁸ This is a distinction without a difference. First, whether in the context of an export subsidy, as in *US – Offset Act (Byrd Amendment) (EC)*, or a downstream subsidy, as in this dispute, the concept of “pass-through” is functionally identical. The arbitrator in *US – Offset Act (Byrd Amendment) (EC)* defined “pass-through” in that case as “the extent to which a CDSOA disbursement will be applied to reducing the price of a beneficiary firm’s products.”²⁹ Likewise, in the panel phase of this dispute, the EU argued that a proper pass-through analysis must examine “whether and to what extent the price of the input product is lowered vis-à-vis the alleged indirect beneficiary as a result of the subsidy.”³⁰ Thus, pass-through in the context of export subsidies and in the context of indirect subsidies, as understood by the EU, both focus on the price impacts of a subsidy received and in that regard are functionally identical.

15. Furthermore, *US – Offset Act (Byrd Amendment) (EC)* stands for the point that where the parties to an Article 22.6 arbitration have offered diverging proxies for an input into the Arbitrator’s analysis (such as zero percent versus 100 percent), and there is no better information available, the Arbitrator may select a proxy within the range given by the parties.³¹ Here, the United States has presented a reasonable range for a proxy for the WTO-consistent attribution rate of between 65 percent and 100 percent. The United States has supported both endpoints of

²⁶ EU responses to second set of questions from the Arbitrator, para. 18.

²⁷ See U.S. written submission, paras. 22-41.

²⁸ EU responses to second set of questions from the Arbitrator, para. 22.

²⁹ *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, para. 3.140.

³⁰ *US – Ripe Olives from Spain (Panel)*, para. 7.142.

³¹ See *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, paras. 3.141-44.

that range with evidence.³² The EU, on the other hand, has not provided any evidentiary support that would justify its presumption of an attribution rate of zero. Accordingly, should the Arbitrator determine that use of a proxy for the WTO-consistent attribution rate is appropriate, either for the case of ripe olives or for a prospective model, the Arbitrator should select such a proxy from within the range provided by the United States (i.e., between 65 and 100 percent).

43. To the European Union: Please comment on paragraph 16 of the United States' response to Arbitrator question No. 4, where the United States suggests that, based on available economic analysis of the market for processed dairy products, the Arbitrator could select a proxy value for attribution of subsidy benefits for processed agricultural goods subject to Section 771B between the values of 65 and 100 percent.³³

Comment:

16. As previously discussed in the foregoing comments, using a proxy value of zero, both in the case of ripe olives and for any future application of Section 771B, would produce a level of nullification or impairment that does not accurately reflect the benefits accruing to the EU under the covered agreements. While the EU argues that any counterfactual CVD rate above zero would “‘legalize’ . . . the WTO-inconsistent outcomes that result from the USDOC’s application of Section 771B” and would fail to provide “‘inducement for the US to comply and to amend Section 771B,’”³⁴ the EU is not entitled to countermeasures in excess of the level of nullification or impairment on the basis of reasons that are not in the DSU.³⁵

17. To the contrary, as the United States explained in its written submission, it is entirely possible and appropriate for a measure to be WTO-inconsistent but to also produce no nullification or impairment.³⁶ The EU admits as much when it argues that the “‘as such’ violation, in itself, does not cause nullification or impairment to the EU.”³⁷ Where a measure is WTO-inconsistent but causes no nullification or impairment, the prevailing party is not authorized to suspend concessions or other obligations under the DSU. Likewise, where a measure is WTO-inconsistent and causes nullification or impairment, the prevailing party is not entitled to suspend concessions or other obligations in excess of the level of nullification or impairment, regardless of the time and effort expended by the Parties in litigating the dispute.³⁸

³² See, e.g., U.S. written submission, paras. 53-58; U.S. responses to first set of questions from the Arbitrator, paras. 4-10.

³³ U.S. responses to first set of questions from the Arbitrator, para. 16.

³⁴ See EU responses to second set of questions from the Arbitrator, para. 25.

³⁵ See EU responses to second set of questions from the Arbitrator, para. 122.

³⁶ See U.S. written submission, paras. 43-49.

³⁷ EU responses to second set of questions from the Arbitrator, para. 3.

³⁸ See EU responses to second set of questions from the Arbitrator, para. 26.

18. As the United States has explained in prior submissions, it is not requesting that the Arbitrator “presume” the existence or degree of attribution of subsidy benefits.³⁹ Rather, the United States has presented a counterfactual compliance scenario that is supported with evidence. Such a counterfactual accurately reflects the actual benefits that the EU could legitimately expect had the United States come into compliance with the relevant WTO agreements by assessing attribution of subsidy benefits in a WTO-consistent manner. Meanwhile, the EU’s counterfactual assumes that the United States could not ever hypothetically determine attribution in a WTO-consistent manner, and has offered no evidence in support of such a counterfactual. In fact, the EU’s statement that it seeks an inducement for the United States “to amend Section 771B” demonstrates that amendment of Section 771B is not only an appropriate compliance action for constructing the Arbitrator’s counterfactual, it is precisely the compliance action that the EU seeks.⁴⁰ Thus, using a proxy value of zero for the counterfactual CVD rate would not reflect the compliance action that the EU itself requests.

19. The EU’s suggestion that USDOC refusing to conduct any CVD investigation into processed agricultural products, at all, could constitute a “reasonable counterfactual” is all the more baseless.⁴¹ As the United States explained in its written submission, Congress enacted Section 771B in the first place to address what it viewed as a serious gap in CVD enforcement regarding agricultural products.⁴² It is not reasonable to assume that the U.S. government would simply abandon its right to countervail subsidies conferred to downstream processed agricultural goods, nor is such a suggestion supported by the actions of the U.S. government in passing, administering, and defending Section 771B.

20. Finally, the EU’s criticisms of the study of the French dairy market submitted by the United States as Exhibit USA-29 are unavailing. First, while the EU takes issue with the study, it does not provide any alternative information on attribution of subsidy benefits for processed agricultural products. Accordingly, the study provided by the United States is the best available information on that subject and the best available source for a proxy WTO-consistent CVD rate. Second, the EU does not explain why the distinctions it draws between the French dairy market and the Spanish olive market render the attribution rate provided in the study an unreliable proxy. As the United States has explained, the parallels between the French dairy market and the Spanish ripe olives market support the use of the study.⁴³ The EU notes certain differences, such as that the study examines only one EU Member State and concerns livestock, but does not explain why these distinctions are relevant. Regarding the EU’s third criticism, that the French dairy market is characterized by “extreme asymmetry” and “atomistic” farmers facing demand from concentrated processors,⁴⁴ here again the French dairy industry mirrors the market for

³⁹ See, e.g., U.S. responses to second set of questions from the Arbitrator, paras. 4-5.

⁴⁰ See EU responses to second set of questions from the Arbitrator, para. 25.

⁴¹ See EU responses to second set of questions from the Arbitrator, para. 28.

⁴² See U.S. written submission, para. 35.

⁴³ See U.S. responses to first set of questions from the Arbitrator, paras. 8-9.

⁴⁴ EU responses to second set of questions from the Arbitrator, para. 29.

Spanish raw olives. For example, one study counted 7,694 table olive farms in the Province of Seville, versus 222 table olive processors in all of Andalusia, of which Seville is just one of eight provinces.⁴⁵ Accordingly, the Spanish olive industry is also characterized by “atomistic” farmers facing demand from a concentrated group of processors that wield substantial buyer power.

44. To the United States: In its response to Arbitrator question No. 1.a, the European Union maintains that the basic principle under WTO rules is that the pass-through of benefits cannot be presumed, and that it must be positively established by the investigating authority.⁴⁶ Please indicate whether the United States considers that an analysis by the USDOC of pass-through in the case of ripe olives, based on the two factual circumstances listed in section 771B of the Tariff Act of 1930, in addition to the other facts discussed by the United States in its written submission, would be WTO-consistent. If so, please explain why.

Response:

21. Response provided in U.S. responses to questions from the Arbitrator.

45. To the United States: In its response to Arbitrator question No. 5, the United States asserts that “the majority of the information is either on the record or, in certain cases, directly supported and corroborated by record information”.⁴⁷ In this respect:

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

Response:

22. Response provided in U.S. responses to questions from the Arbitrator.

46. To both parties: In its response to Arbitrator question No. 3, the United States argues that it “further demonstrated that the specific characteristics of the Spanish olives industry indicate a mutuality of reliance between raw olive growers and ripe

⁴⁵ See Exhibit USA-26, at pp. 36; 18-19. The 222 figure for table olive processors in Andalusia can be found in Table 4.9 on p. 36. The 7,694 figure for table olive farms in the Province of Seville is the sum of total farms for the 2021-2022 harvest year for the Manzanilla variety (6,139) found in Table 3.1 on p. 18 and total farms for the 2021-2022 harvest year for the Gordal variety (1,555) found in Table 3.2 on p. 19.

⁴⁶ EU responses to first set of questions from the Arbitrator, paras. 7-9.

⁴⁷ U.S. responses to first set of questions from the Arbitrator, para. 17.

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.”⁴⁸ Would an “inference” such as the one described by the United States be enough for a WTO-consistent pass-through analysis conducted by an investigating authority?

Comment:

23. As the United States explained in its response to Question 46, it is not suggesting in its counterfactual that the USDOC would “infer” the existence or degree of attribution of subsidy benefits.⁴⁹ To the contrary, the U.S. counterfactual is a hypothetical scenario in which the USDOC properly establishes the existence and degree of attribution of subsidy benefits through a WTO-consistent analysis. The United States has presented evidence that allows the Arbitrator to infer, based on supporting evidence, that complete attribution of subsidy benefits from raw olive growers to ripe olive processors in the Spanish market is a conclusion that the USDOC could reasonably and plausibly reach.⁵⁰

24. To support that analysis, the United States has presented substantial evidence on the Spanish olive industry and a study on the comparable French dairy industry. The EU continues to deride the evidence presented by the United States as “generic market information from the internet” without engaging with its substance or offering any alternative evidence on the level of attribution of subsidy benefits in the Spanish market for ripe olives.⁵¹ Accordingly, the evidence presented by the United States on this subject continues to be the best evidence available to the Arbitrator. Furthermore, the United States is not “mixing” the 100 percent and 65 percent figures as suggested by the EU.⁵² Rather, the United States has consistently argued that evidence from the Spanish ripe olives market supports that it is reasonable and plausible to assume that had the USDOC conducted a WTO-consistent attribution analysis it would have determined that subsidy benefits are attributed in their entirety. In addition, the United States has provided a benchmark study from the French dairy industry that provides an attribution rate of 65 percent, which should be viewed as a floor in the context of the ripe olives market and can be used as a proxy for other processed agricultural goods.⁵³

25. As the United States has previously explained, there is no restriction on the types of evidence or analyses that can be used by the Arbitrator to accurately determine the appropriate

⁴⁸ U.S. responses to first set of questions from the Arbitrator, para. 7.

⁴⁹ See U.S. responses to second set of questions from the Arbitrator, para. 15.

⁵⁰ See U.S. responses to second set of questions from the Arbitrator, para. 15.

⁵¹ EU responses to second set of questions from the Arbitrator, para. 31.

⁵² See EU responses to second set of questions from the Arbitrator, para. 31.

⁵³ See U.S. responses to first set of questions from the Arbitrator, para. 9.

level of nullification or impairment under the DSU.⁵⁴ Thus, there is no restriction in the DSU that requires that an Arbitrator avoid a “*de novo*” analysis in calculating the appropriate level of nullification or impairment. *US – Washing Machines* does not support the EU’s position in this regard. In that arbitration, the best available information for the construction of the counterfactual was an alternative analysis that had been conducted by the USDOC. Accordingly, the arbitrator found that “in the circumstances of this dispute, it would not be unreasonable or implausible to assume that compliance may have been achieved through the application of a normal comparison methodology, which would remove the source of inconsistency related to invoking and applying the exceptional comparison methodology.”⁵⁵ However, the arbitrator did not find that in the absence of a neatly packaged alternative WTO-consistent analysis, it would have been relieved from its responsibility to construct a counterfactual that accurately reflects the benefits accruing to the complaining Member. Nor did the arbitrator suggest that its responsibility to use the best information available would be limited by a restriction on conducting *de novo* analyses or considering new information.

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

Comment:

26. Again, the EU conflates the requirements for an investigating authority to establish attribution of subsidy benefits with the role of the Arbitrator in this dispute, which is to accurately measure the level of nullification or impairment.⁵⁶ In the context of the models proposed by the Parties in this dispute, accurately measuring nullification or impairment requires that the Arbitrator adopt a counterfactual that is reasonable and plausible. The Arbitrator is not an investigating authority and does not need to “establish” attribution of benefits in the way an investigating authority would in order to determine if a given counterfactual is reasonable or plausible.⁵⁷ Rather, the Arbitrator is free to rely on estimates, inferences, and proxies for determining the proper counterfactual, even if such evidence would not be sufficient for an investigating authority to make a specific attribution determination.

48. To both parties: The United States suggests a proxy value based on available economic analysis of the market for processed dairy products.⁵⁸ Is there any

⁵⁴ See, e.g., U.S. responses to first set of questions from the Arbitrator, paras. 29-30; U.S. responses to second set of questions from the Arbitrator, paras. 85-88.

⁵⁵ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.27.

⁵⁶ See U.S. responses to second set of questions from the Arbitrator, para. 4.

⁵⁷ EU responses to second set of questions from the Arbitrator, para. 33.

⁵⁸ U.S. responses to first set of questions from the Arbitrator, para. 16.

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

Comment:

27. As previously discussed, the United States proposes a counterfactual in which it reinterprets, amends, or replaces Section 771B such that Section 771B or its replacement authority are consistent with the relevant DSB recommendations. This is the compliance action that the EU seeks and that the United States would actually take, as opposed to abandoning the ability to assess attribution of subsidy benefits for processed agricultural products. On the other hand, the proxy value of zero proposed by the EU is equivalent to a counterfactual compliance scenario in which the United States cannot ever assess attribution of benefits for processed agricultural products. Such a counterfactual therefore does not reflect benefits that the EU can legitimately expect under the relevant WTO agreements and must be rejected.⁵⁹

2 PARTIES’ ECONOMIC MODELS FOR THE AS APPLIED INCONSISTENCY

49. To the European Union: Please clarify whether the average CVD rate in the European Union’s model is a simple, a weighted average, or a mixture of the two. Please provide details on how it was calculated. Please also comment on the United States’ approach to determining the level of CVD rates to be included in the economic model, whereby the United States adopts the rates for “All Others”, rather than using a simple average of the Section 129 rates.⁶⁰

Comment:

28. As explained further in the U.S. comment on Question 50, use of the “all others” CVD rate rather than a simple average of the company specific and “all others” rates, as proposed by the EU, is consistent with the approach taken by the arbitrator in *US-Countervailing Measures*.

29. Regardless of the approach taken by prior arbitrators, use of the “all others” rate is preferable to a simple average for a number of reasons. First, as the EU acknowledges, the “all others” rate is itself a weighted average and therefore takes into account associated trade flows whereas the EU’s proposal to use a simple average does not.⁶¹ The “all others” rate is therefore a more accurate estimated average than a simple average and is intended to be representative for all exporters.⁶² This is true for both CVD and antidumping (“AD”) duties. Second, “all others”

⁵⁹ See *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.16.

⁶⁰ U.S. written submission, para. 114.

⁶¹ See EU responses to second set of questions from the Arbitrator, para. 36.

⁶² Under the Tariff Act of 1930, the “all others” rate is a weighted average of the exporters of subject merchandise that were individually examined, which are typically the exporters accounting for the largest volume of exports. See, e.g., section 705(c)(5)(A) (Exhibit USA-48). See also *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1353 (Fed. Cir. 2016) (“The very fact that the statute contemplates using data from the largest volume

AD and CVD rates are published by the USDOC and are readily available to the Parties, thereby eliminating the need for the Parties to carry out an additional calculation which could give rise to uncertainty or controversies, for example due to the presence of outliers. It would therefore be simpler for both the analysis of ripe olives and for any prospective “as such” approach adopted by the Arbitrator for the Parties to use a readily available rate published by the USDOC which itself is already a weighted average.

50. To the European Union: In connection with the previous question, the United States argues that “the use of the “All Others” rate, rather than the simple average proposed by the EU, is consistent with the approach adopted by the arbitrator in the *US–Countervailing Measures (China) (Article 22.6 – US)* arbitration.”⁶³ Please explain whether the approach taken by the arbitrator in *US–Countervailing Measures* could be relevant for the present case.

Comment:

30. As the United States explained in its written submission⁶⁴ and at the meeting between the Parties and the Arbitrator, the arbitrator in *US–Countervailing Measures* used the “all others” CVD rates for running its model. The United States is happy to provide the “further explanation” requested by the EU on how the Annexes to the arbitrator’s report show this.⁶⁵

31. Annex C-9 of the Addendum to the arbitrator’s report is the GAMS code for the two-step Armington model used by the arbitrator. The first page of Annex C-9 (page 57 of the arbitrator’s Addendum) lists under “item data items” certain input types into the model and the corresponding identifiers used for those inputs. The identifier “tau_ocvd” represents the “Original CVD rate”.

32. Annex C-10 lists the “Data Inputs Used to Implement the Armington Model Under the Two Steps”. Annex C-10 contains a row for “tau_ocvd” (the “Original CVD rate”) and contains the following data inputs for each of the products evaluated in the model: 1.1, 36.35, 13.3, 12.26, 27.64, 28.9, 19.46, 7.37, 15.81, and 15.24. The various products at issue are identified in Annex C-10 using 3-digit product codes which also are explained on the first page of Annex C-9, under “set case cases”. For example, 931 represents “C-570-931 Pressure Pipe”, 936 represents “C-570-936 Line Pipe”, and so on.

33. Finally, Annex C-3 lists the “WTO-inconsistent CVD rates” for each product for both respondent companies and “all others”. For each product, the “all others” rate in Annex C-3 corresponds exactly to the “tau_ocvd” data input used in the arbitrator’s model. For example,

exporters suggests an assumption that those data can be viewed as representative of all exporters.”) (Exhibit USA-49).

⁶³ U.S. written submission, para. 114.

⁶⁴ U.S. written submission, para. 114.

⁶⁵ EU responses to second set of questions from the Arbitrator, para. 45.

the “all others” rate for “Pressure Pipe” in Annex C-3 is 1.10, which is the “tau_ocvd” (“Original CVD rate”) data input for product 931 (“C-570-931 Pressure Pipe”) in Annex C-10. This is true for every product – for each product code listed in Annex C-10, the “tau_ocvd” value corresponds exactly to the “all others” rate for that product listed in Annex C-3. Thus, the arbitrator in *US-Countervailing Measures* used the “all others” rates for every product at issue as the WTO-inconsistent CVD rate in running its two-step Armington model.

34. Although the arbitrator did not explicitly discuss this decision in its report, the rationale behind using the “all others” rate is sound. As explained in our comment on Question 50, the “all others” rate presents a public and readily available rate that is itself a weighted average representative of the rates paid by the relevant industry. Accordingly, it is an appropriate value to use as the original duty rate for running a two-step Armington model.

51. To the European Union: In its response to Arbitrator question No. 24, the United States argues that “[t]he EU has misinterpreted the scope of the relevant CVD investigation and resulting order as it argues that only ‘non-green’ canned olives as defined by the HTS subheadings should be used in the model simulation”⁶⁶ and that “the relevant CVD order is clear that ‘all colors of olives’, not just green olives, are within scope”.⁶⁷ Could the European Union please comment?

Comment:

35. The EU and the United States appear to agree that the purpose of using HTS codes to define the scope of trade flows in the approach of the Arbitrator is to approximate the share of imports that are covered by the scope of the CVD order, without bringing into the analysis significant volumes of out-of-scope products. Likewise, the purpose of using the NASS domestic production data is to approximate the volume of domestically produced olives that are within the scope of the CVD order. The United States has provided evidence to support the conclusion that all, or nearly all, of the reported production included in the NASS data is for in-scope ripe olives. This is because “specialty olives” excluded from the CVD order are not produced in significant quantities in the United States and U.S. domestic production only covers a fraction of domestic demand, so there is no reason to believe that the United States exports ripe olives in any significant quantity.⁶⁸ Nor has the EU presented any evidence to demonstrate that the NASS data includes out-of-scope olives. Accordingly, the NASS data is a reliable proxy and is the best information that is available to the Arbitrator on in-scope U.S. domestic production of ripe olives.

36. The EU focuses on the notion that these two proxy inputs do not “match” and are “incongruous”.⁶⁹ However, there is no methodological reason that two independent proxy values

⁶⁶ U.S. responses to first set of questions from the Arbitrator, para. 58.

⁶⁷ U.S. responses to first set of questions from the Arbitrator, para. 60.

⁶⁸ See U.S. responses to second set of questions from the Arbitrator, paras. 67-69.

⁶⁹ EU responses to second set of questions from the Arbitrator, paras. 51-52.

need to neatly “match” with one another in order to run the Arbitrator’s model. In fact, it is unreasonable to expect that these values would match each other because, generally speaking, U.S. domestic production of a good is not classified by import code and therefore cannot “match” one-to-one with the import data organized according to the HTS. Rather, the Arbitrator’s goal should be that each proxy is as accurate as possible in approximating the scope of goods, whether domestic production or imports, that are covered by the description in the CVD order.

37. Because matching these data sets is not necessary, any attempt to distort one proxy to achieve some artificial “congruence” would be inappropriate. Accordingly, the notion advanced by the EU that the Arbitrator might expand the scope of HTS codes to include codes that are known to include out-of-scope products to satisfy an arbitrary matching principal must be rejected.⁷⁰ The CVD order is clear that the additional trade flows included under the six-digit HTS code 200570 would include out-of-scope products. The fact that total imports would rise from less than 100 million USD in both 2016 and 2023 to over 400 million USD in those same years, as stated by the EU, indicates that the volume of out-of-scope products in these additional HTS codes could be enormous.⁷¹ Expanding the scope of the HTS codes to include codes that are known to have out-of-scope products would amount to deliberately distorting the accuracy of one proxy input in order to achieve unnecessary “congruence” with another proxy input that has not been shown to be unreliable. Such an approach would necessarily distort the quantification of nullification or impairment.

38. In any event, relying on this data set is still preferable to the alternative proposed by the EU, which would be excluding U.S. domestic production from the analysis entirely. As the United States has explained, excluding U.S. domestic production from the Arbitrator’s analysis is unsupported by prior arbitrations, factually suspect, and incompatible with the rationale behind imposing antidumping and countervailing duties on ripe olives from Spain in the first place.⁷² Accordingly, the Arbitrator should include U.S. domestic production in its analysis, even if the best available data on such production is imperfect.

52. To the United States: In its response to Arbitrator question No. 28, the European Union maintains that “if the existence of the anti-dumping duties is included in the PE model, the reduction of the level of nullification or impairment resulting therefrom would not measure the ‘trade impact’ of the anti-dumping duties but would create an artificial reduction of the level of countermeasures because the counterfactual market share in 2016 would be artificially (and incorrectly) reduced.”⁷³ Please explain your views on this argument by the European Union.

Response:

⁷⁰ See EU responses to second set of questions from the Arbitrator, para. 51.

⁷¹ See EU responses to second set of questions from the Arbitrator, para. 51.

⁷² See U.S. written submission, para. 72-80.

⁷³ EU responses to first set of questions from the Arbitrator, para. 61 (referring to EU written submission, para. 74).

39. Response provided in U.S. responses to questions from the Arbitrator.

53. **To the United States:** In its response to Arbitrator question No. 28, the European Union argues that “[t]he arbitrator found in *US – Countervailing Measures (China) (Article 22.6)* that ‘the United States needs to show more than the mere existence of the AD duties or that these may have an impact on Chinese imports’”⁷⁴ and that “[t]he US has not shown more than the existence of the AD duties in the present case.”⁷⁵ Please explain your views on this argument by the European Union.

Response:

40. Response provided in U.S. responses to questions from the Arbitrator.

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

Response:

41. Response provided in U.S. responses to questions from the Arbitrator.

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

Response:

42. Response provided in U.S. responses to questions from the Arbitrator.

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

Response:

43. Response provided in U.S. responses to questions from the Arbitrator.

57. **To the United States:** The European Union maintains, in its response to Arbitrator question No 13, that: “[t]he level of nullification or impairment accruing to the EU

⁷⁴ EU responses to first set of questions from the Arbitrator, para. 60.

⁷⁵ EU responses to first set of questions from the Arbitrator, para. 60.

arising from the CVDs on imports of ripe olives is linked to the scope of those measures. The United States’ investigation and the scope of the ensuing CVDs concerned ripe olives from Spain. Therefore, only the impact on the trade flows from the relevant Spanish ripe olive producers to the US is relevant to calculate the level of nullification or impairment of benefits accruing to the EU resulting from those CVDs.”⁷⁶ Please explain your views on this argument by the European Union.

Response:

44. Response provided in U.S. responses to questions from the Arbitrator.

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

Response:

45. Response provided in U.S. responses to questions from the Arbitrator.

59. To the United States: To calculate in-scope trade flows to markets other than the United States, the European Union adopts the assumption that the share of in-scope imports in total ripe olives imports (HS 200570) in the United States is representative of this share in other import markets.⁷⁷

- a. Is there any empirical evidence that this assumption is not reliable?**
- b. Is there any other approach that could be taken to estimate accurately the shares of imports in other markets?**

Response:

46. Response provided in U.S. responses to questions from the Arbitrator.

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

Comment:

47. The United States agrees with the EU that “the trade data to be fed into the model should only include the ‘in-scope’ codes that are fully covered by the CVD order.”⁷⁸ As the United

⁷⁶ EU responses to first set of questions from the Arbitrator, para. 48.

⁷⁷ EU Methodology Paper, para. 34.

⁷⁸ EU responses to second set of questions from the Arbitrator, para. 26.

States explained in its comment on Question 51 above, there is no evidence that the NASS data provided by the United States contains significant quantities of out-of-scope products. There is also no methodological reason that these two proxy datasets need to “match” or be “congruent” with one another.⁷⁹ Nor should one expect for it to be possible to use HTS codes to “determine the amount of domestic production”, as is suggested by the EU, because HTS codes are not used to classify domestically produced products.⁸⁰ Expanding the scope of HTS codes to include codes that are known to include out-of-scope products would amount to deliberately distorting one data input in order to achieve unnecessary “congruence” with another, independent, data input that has not been shown to be unreliable.

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

Comment:

48. The United States is not aware of any sources in the economic literature that would support an argument that one of the methodologies discussed in the Arbitrator’s Question delivers estimates that are more reliable or appropriate than the other for assessing the impact of duties in a partial equilibrium (“PE”) Armington model. The EU does not provide any such sources in its response to Question 61. Furthermore, the United States disagrees with the EU’s flawed interpretation of the methodological differences between the Fontagné et al. (2022) and Soderbery (2015) papers. Conceptually, each approach has its limitations and there is no consensus in the economic literature on a preferred approach.⁸¹ In the current proceeding, the country-specific estimates from Soderbery (2015) provide many advantages over the estimates from Fontagné et al. (2022), which are based on global trade flows at an aggregated HTS-6 level.

49. The EU mischaracterizes the limitations of Soderbery (2015). The EU identifies alleged measurement errors caused by using unit values as a proxy for prices,⁸² but these issues have largely been addressed in Feenstra (1994), upon which Soderbery (2015) builds its approach.⁸³ In addition, contrary to the EU’s misinterpretation,⁸⁴ the main contribution of Soderbery (2015) lies in the fact that its hybrid method significantly outperforms the standard method adopted by Feenstra (1994) and Broda et al. (2006) in mitigating bias arising from potential endogeneity

⁷⁹ See EU responses to second set of questions from the Arbitrator, paras. 51-52.

⁸⁰ EU responses to second set of questions from the Arbitrator, para. 55.

⁸¹ See U.S. responses to second set of questions from the Arbitrator, paras. 47-49.

⁸² See EU responses to second set of questions from the Arbitrator, para. 59.

⁸³ See Robert Feenstra, *New Product Varieties and the Measurement of International Prices*, 84 Am. Econ. Rev. 157, at pp. 163-65 (1994) (Exhibit USA-50).

⁸⁴ See EU responses to second set of questions from the Arbitrator, para. 58.

issues in small samples (under the simultaneous equation system approach), especially when demand and supply errors are negatively correlated.⁸⁵ The EU's claim that Fontagné et al. (2022) is better at addressing endogeneity than Soderbery (2015) is baseless.

50. Contrary to the EU's representation, the methodology adopted by Fontagné et al. (2022) itself has many inherent limitations. For example, the authors admit that their approach doesn't control for country-pair fixed effects or unobserved time-varying trade costs, such as changes in shipping cost between countries over time. It finds that even partially controlling for these omissions (by including either country-pair fixed effects or country-pair specific time trends) would lower the average Armington elasticity, and make the majority of the elasticity estimates statistically insignificant.⁸⁶

51. Equally important as the methodological difference, these two studies also diverge in terms of data aggregation levels and the selection of sample countries, which could significantly impact the elasticity estimates as well.⁸⁷ The economic literature cautions against the blanket application of a single elasticity across all countries, a practice adopted by the EU in its proposed approach, and recommends instead to allow the elasticity parameters to be specific to individual countries, as is reflected in the U.S. approach.⁸⁸

52. To illustrate the importance of using country-specific Armington elasticity estimates, the United States submits as Exhibit USA-51 an independent analysis based on a trade cost approach similar to that used in Fontagné et al. (2022), but relying solely on U.S. import data for the in-scope products at the HTS-10 level during the 2017-2023 period. The analysis in Exhibit USA-51 finds a statistically significant point estimate of the Armington elasticity for the in-scope products, calculated at 4.5 with a 95% confidence interval ranging from 2.6 to 6.4.⁸⁹ This estimate aligns more closely with the simple average elasticity of 5.1 and the trade-weighted average elasticity of 7.8 based on the HTS-10 estimates from Soderbery (2015) compared to the values offered by Fontagné et al. (2022).

53. Overall, in the current proceeding, Soderbery (2015) estimates are based on a well-established methodology in the literature, providing a unified estimator of import supply and demand elasticities. Derived using U.S. imports specifically, tied directly to the in-scope products, and aligned well with the underlying modeling approach, they offer a better option than the estimates from Fontagne et al. (2022), which are derived based on global trade flows at a much more aggregate HTS-6 level, and don't vary across countries.⁹⁰

⁸⁵ See Exhibit USA-21, at p. 13.

⁸⁶ See Exhibit EU-27, p. 22.

⁸⁷ See U.S. responses to second set of questions from the Arbitrator, para. 49.

⁸⁸ See U.S. responses to second set of questions from the Arbitrator, paras. 36-38.

⁸⁹ See Exhibit USA-51.

⁹⁰ See U.S. responses to second set of questions from the Arbitrator, paras. 36-38.

62. To both parties: During the substantive meeting, the European Union drew attention to the fact that Soderbery (2015) states that his estimates of export supply elasticity may be biased.⁹¹ The Arbitrator notes the existence of a later Soderbery study (2018)⁹² that addresses one of the possible sources of bias in Soderbery (2015) and provides exporter-specific estimates of export supply elasticities. Can the parties please advise whether Soderbery (2018) therefore provides a more reliable measure of export supply elasticity compared with Soderbery (2015)?

Comment:

54. Although the United States generally agrees with the EU that Soderbery (2018) does not provide more reliable estimates for export supply elasticities than Soderbery (2015) in the current proceeding, we disagree with the EU’s argument that the export supply elasticity estimates from Soderbery (2015) are not reliable. The diverging export elasticity estimates for in-scope products in Soderbery (2015) indicates the existence of outliers, a common challenge in the economic literature estimating trade elasticities. In fact, the variability in the Soderbery (2015) export supply elasticity estimates for in-scope products is driven by a single outlier value of 113.21 for an HTS code representing only 10.6 percent of relevant trade flows. The range of export supply elasticity estimates for the remaining reported codes ranges from roughly 0 to roughly 4.2, a range that is hardly indicative of excessive variability.⁹³

55. The presence of a single outlier value does not undermine the credibility of the Soderbery (2015) estimates. Outliers often arise due to substantial variation in observed trade flows across sectors and time periods, and structural differences across countries in terms of trade cost, production structures, and market access. In fact, outliers exist in Fontagne et al. (2022) as well, in which the estimated Armington elasticities for 97 products, or about 2% of all HTS-6 products, were positive and statistically significant,⁹⁴ and were substituted by the corresponding average elasticity at the HTS-4 level in the online version of the elasticity database published by the authors.⁹⁵

56. Even if Soderbery (2015) yields limited robustness improvements in export supply elasticity estimates compared to the previous literature, it still represents a better option than the unsupported assumption of an infinite export supply elasticity proposed by the EU, which is typically only applied to small economies within single-country models. There is little theoretical foundation to extend this assumption to a major producer and exporter of ripe olives like Spain, in a multi-country framework such as those advanced by the Parties in the current

⁹¹ Exhibit USA-21, p.13.

⁹² Soderbery, Anson, “Trade Elasticities, Heterogeneity, and Optimal Tariffs”, *Journal of International Economics*, 114, September 2018: pp 44-62.

⁹³ See U.S. responses to second set of questions from the Arbitrator, para. 67, Table 3.

⁹⁴ See Exhibit EU-27, p. 11, n. 45.

⁹⁵ Available at https://www.cepii.fr/cepii/en/bdd_modele/bdd_modele_item.asp?id=35 (see “Description”).

proceeding. To this date, the EU has provided no empirical evidence to support its position that an infinite export supply elasticity would be appropriate.

57. Overall, it is not reasonable to treat the limitations of Soderbery (2015) – which are common in the literature and, in some cases, also present in Fontagne et al. (2022) – as sufficient grounds to dismiss its credibility, especially given that both papers were published in the same top peer-reviewed academic journal. To mitigate the issue of outliers, the United States suggests to follow the common practice in the literature and drop the export elasticity estimate of 113.2 for HTS code 2005.70.6020, which only accounts for 10.6% of U.S. imports of in-scope products, in calculating the export supply elasticity input in the modeling analysis.⁹⁶

63. To both parties: With respect to the argument by the United States that the “EU improperly isolates the Spanish market in its analysis and ignores gains accruing to other EU Member States in calculating nullification and impairment”⁹⁷, please comment on:

- i. whether this is a novel issue or whether there has been in the past a similar situation that may be illustrative for the dispute at issue;**
- ii. the relevance of Spain’s membership of the WTO, in its own right, as stated by the European Union during the substantive meeting; and**
- iii. the relevance of the fact that the CVD investigation at issue concerned exports from one European Union Member, namely Spain, and was accepted and conducted on that basis by USDOC.**

Comment:

58. The EU is correct that the notion that nullification or impairment is based on the trade flows of the WTO Member “concerned” (i.e., the WTO Member engaged in the dispute) is not a novel issue.⁹⁸ However, its reliance on *US – Washing Machines* is misplaced. In that dispute, the arbitrator measured nullification or impairment based on imports from Korea not because the measures at issue were directed at Korea, but because Korea was the party requesting to suspend concessions or other obligations under the DSU. The arbitrator was abundantly clear on that point, stating “[t]hus, our task in these proceedings is to examine whether the level of suspension proposed by Korea is equivalent to the level of nullification or impairment sustained by Korea ‘as a result of the failure of the responding party to bring its WTO-inconsistent measures into compliance’”.⁹⁹

⁹⁶ See U.S. responses to second set of questions from the Arbitrator, para. 67, Table 3.

⁹⁷ U.S. written submission, paras. 63-68.

⁹⁸ EU responses to second set of questions from the Arbitrator, para. 69.

⁹⁹ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 1.14.

59. This is consistent with every case that the United States has examined, where nullification or impairment is measured with respect to the market of the WTO Member that has made a request to suspend concessions or other obligations, as is required by the plain text of the DSU. Conversely, the United States is not aware of any case in which, as proposed by the EU, nullification or impairment has been measured with respect to a WTO Member that is not a party to the dispute and has not made a request to suspend concessions or other obligations under the DSU. Thus, *US – Washing Machines* and all other arbitrators’ decisions that the United States has examined, as well as the plain text of the DSU, support that nullification or impairment must be measured with respect to the trade flows for the WTO Member that has requested authorization to suspend concessions or other obligations. That WTO Member in this dispute is the EU, not Spain.

60. In its response to questions from the Arbitrator, the EU again states that nullification or impairment “must be assessed with respect to the WTO Member(s) concerned by the investigation.”¹⁰⁰ There is no basis for this statement in the text of the DSU. Rather, as the United States has explained,¹⁰¹ the DSU is clear that nullification or impairment is measured with respect to the “party having invoked the dispute settlement procedures” that has requested “authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”¹⁰² Here, that WTO Member is the EU. The scope of the WTO-inconsistent measure does not factor into the process laid out in the DSU for determining nullification or impairment.

61. Furthermore, the EU’s claim that “it is not possible to limit a CVD investigation to imports originating in a territorial sub-division of a WTO Member such as, e.g., a US State” is misleading.¹⁰³ Regional sub-governments can issue subsidies and investigating authorities can and do countervail those subsidies when used by producers and exporters consistent with the covered agreements. Regardless, WTO-inconsistent measures outside of the realm of CVD actions could conceivably have an impact only on a specific locality within a WTO-Member. For example, it would be easy to conceive of a WTO-inconsistent SPS measure that only impacts a specific region within a WTO Member. In such a case, nullification or impairment would be assessed with regard to the WTO Member requesting authorization to suspend concessions, as a whole, not to the impacted sub-market of that Member, in isolation.

62. Contrary to the EU’s assertion, the fact that the EU and its Member States are WTO Members, with all of the same rights and obligations under the DSU as other WTO Members, does not put EU Member States “at a serious disadvantage vis-à-vis other WTO Members.”¹⁰⁴ Rather, EU Member States may choose how they wish to scope the assessment of nullification or impairment by either deciding to bring a dispute themselves or having the EU bring a dispute.

¹⁰⁰ EU responses to second set of questions from the Arbitrator, para. 70.

¹⁰¹ See, e.g., U.S. written submission, para. 64.

¹⁰² DSU, Art. 22.2.

¹⁰³ EU responses to second set of questions from the Arbitrator, para. 70.

¹⁰⁴ EU responses to second set of questions from the Arbitrator, para. 71.

As WTO Members in their own right, EU Member States are entitled to initiate a WTO dispute, in which case any consequent measurement of nullification or impairment would be assessed with respect to the Member State market alone. However, where, as here, a decision is made for the EU to bring a dispute, nullification or impairment must be measured with respect to the EU as a whole.

63. The EU’s analogy of the United States offsetting losses with Mexico or Canada is inapposite since Mexico and Canada are not part of the U.S. market and the United States cannot bring a dispute against a measure on the basis that it impacts goods from Canada or Mexico. The United States similarly cannot request to suspend concessions or other obligations for nullification or impairment of benefits accruing to Canada or Mexico. The opposite is true for the relationship between Spain and the EU. Spain is a part of the EU, the Spanish market is part of the EU market, and the EU can and has initiated a dispute for a measure directed at Spanish exports. The fact that Spain itself is a WTO Member does not alter its character as part of the EU and part of the EU market. Accordingly, nullification or impairment must be measured to the EU market as a whole, including by offsetting losses incurred by Spanish exporters of ripe olives with gains made by other EU Member States that export ripe olives to the United States.

64. Finally, as previously explained by the United States, the target of the WTO-inconsistent measure is not relevant to defining the scope of the measurement of nullification or impairment under the DSU.¹⁰⁵

64. To both parties: In its response to the Arbitrator’s question No. 12, the European Union argues that “the available data on domestic production presented by the United States does not match the products under the trade codes fully covered by the measures.”¹⁰⁶ In an effort to more closely match the scope of the domestic production data and the import data, would the parties be open to matching fully in-scope USHTS codes to North American Industry Classification System (NAICS) codes, and then calculating the United States’ domestic market share of in-scope products using the United States Bureau of Economic Analysis’ input-output tables or the United States Census Bureau’s Annual Survey of Manufacturers?

Comment:

65. The United States disagrees with the EU’s argument that inclusion of U.S. domestic production in its PE model would automatically simulate an increase in domestic production in response to a change in import duties.¹⁰⁷ The model proposed by the EU, in which U.S. domestic production is excluded, is inappropriate because it lacks a transmission mechanism through which U.S. domestic production can respond to changes in import duties. In contrast,

¹⁰⁵ See, e.g., U.S. responses to second set of questions from the Arbitrator, para. 55; U.S. written submission, paras. 63-66.

¹⁰⁶ EU responses to first set of questions from the Arbitrator, para. 46.

¹⁰⁷ See EU responses to second set of questions from the Arbitrator, para. 74.

the U.S. model, which includes domestic production, is appropriate for this case because its transmission mechanism correctly allows for changes in U.S. domestic production in response to changes in import duties. The justification provided by the EU for this modeling choice is the incorrect assumption that U.S. domestic production is inelastic.¹⁰⁸ As the United States has explained in its responses to prior questions from the Arbitrator, the fact that domestic production may have decreased over the relevant time period is not an appropriate basis to assume a domestic supply elasticity of zero.¹⁰⁹ Rather, real domestic production can be, and likely was, impacted by both changes in demand and supply constraints that are not tied to a low domestic supply elasticity.¹¹⁰ The EU’s argument becomes self-contradictory when it simultaneously claims that the U.S. domestic production is inelastic and therefore need not be included in the modeling framework, while also suggesting there is an implicit and automatic channel through which U.S. domestic production can adjust.

66. Nonetheless, the United States agrees with the EU that the methodology proposed by the Arbitrator in Question 64 would generate a less reliable proxy for domestic production than the NASS data submitted by the United States.¹¹¹ The United States refers the Arbitrator to its response to Question 64 in that regard.¹¹²

3 PARTIES’ ECONOMIC MODELS FOR THE AS SUCH INCONSISTENCY

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

Comment:

67. While the United States agrees with the EU in principle that a price index could be used to adjust the annual level of nullification or impairment for inflation, we disagree with the EU’s argument that the price adjustment should be calculated on the basis of a broader category of products, such as the price index for all olives, rather than the “Producer Prices for Olives for Processing, Canned” proposed by the United States.

68. The EU argues that the price index for canned olives does not correspond to the in-scope olive products for the current proceeding, is based on data only from California, and includes

¹⁰⁸ See U.S. written submission, paras. 75-79.

¹⁰⁹ See U.S. responses to first set of questions from the Arbitrator, paras. 63-65.

¹¹⁰ See U.S. responses to first set of questions from the Arbitrator, paras. 63-65.

¹¹¹ See EU responses to second set of questions from the Arbitrator, para. 76.

¹¹² See U.S. responses to second set of questions from the Arbitrator, paras. 56-57.

both “canned” and “limited” olive products.¹¹³ As explained in the U.S. written submission, the vast majority of U.S. ripe olives are produced in California, making the price index from that state a reasonable proxy for the nation-wide price.¹¹⁴ In addition, the canned price index excludes limited olives, for which the NASS publishes a separate price index. Furthermore, although canned olives may not be an exact match to the in-scope products, they represent the closest available approximation. It is puzzling that the EU criticizes the U.S. proposed source for not representing a perfect match to the in-scope products, while simultaneously advocating for a price index that encompasses an even broader range of olive products.

66. To the European Union: In its response to Arbitrator question No. 32, the European Union suggests that an infinite export supply elasticity should be used.¹¹⁵ However, and as noted in the original question by the Arbitrator, the European Union had originally submitted that should there be factual and verifiable estimates for such elasticity with regard to products affected by future applications of Section 771B, then the European Union would suggest to use those values.¹¹⁶

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

Comment:

69. As the United States explained in its response to the Arbitrator’s Question 71, the EU’s assumption that all products subject to Section 771B should have the highest possible export supply elasticity is not supportable. It is not justified by the data that the EU has provided for ripe olives, which shows that excess production over consumption for the entire EU, let alone production intended for export from Spain, only eclipses U.S. domestic consumption by a modest margin.¹¹⁷ It is all the more unreasonable to assume for any product that could be subject

¹¹³ See EU responses to first set of questions from the Arbitrator, para. 80.

¹¹⁴ See U.S. written submission, para. 124. According to USDA, as of 2015 95 percent of ripe olives grown in the United States came from California. See “USDA Marketing Order Provides Ingredients for Olive Industry’s Success”, U.S. DEP’T OF AGRIC. (Apr. 16, 2015), available at <https://www.usda.gov/about-usda/news/blog/usda-marketing-order-provides-ingredients-olive-industrys-success>.

¹¹⁵ EU responses to first set of questions from the Arbitrator, para. 67.

¹¹⁶ EU written submission, para. 117.

¹¹⁷ See U.S. responses to second set of questions from the Arbitrator, para. 65.

to a future investigation in which Section 771B is applied, based only on the assumption that “future investigations applying Section 771B will target processed products from the EU that are exported in significant numbers to the US.”¹¹⁸ This is not a reasonable assumption and the threshold for determining when products are exported in “significant” enough numbers to justify application of an infinite export supply elasticity is undefined and subjective.¹¹⁹

70. As discussed in the U.S. comments on the EU’s response to Question 62, the assumption of an infinite export supply elasticity is typically only applied to small economies within single-country models in the economic literature. If we accept the EU’s assumption that Section 771B is likely to target products exported in “significant numbers to the US”, there would be little theoretical foundation to apply an assumed infinite export supply elasticity to a major producer and exporter of such products from an EU Member State like Spain, in a multi-country framework such as those advanced by the Parties in the current proceeding. To this date, the economic literature provides ample evidence of positive but limited export supply elasticities,¹²⁰ and the EU has provided no empirical evidence to support its position that an infinite export supply elasticity would be appropriate.

71. As discussed in the U.S. responses to and comments on Question 61, there is no consensus in the economic literature on the preferred approach in estimating trade elasticities, and it is baseless for the EU to claim that Fontagné et al. (2022) addresses the common endogeneity issues better than Soderbery (2015), especially when both papers were published in the same peer-reviewed academic journal and have similar limitations which are common in empirical studies.¹²¹ To the contrary, the estimates from Soderbery (2015) represent a better option than Fontagné et al. (2022) in the current proceeding when all factors that can impact the accuracy of the nullification or impairment calculation, including reliability, verifiability, the level of data aggregation, and the country-specific nature of the estimates, are taken into consideration.

72. The EU claims that it will “apply estimates for export supply elasticity from economic literature whenever these are reliable and verifiable and concern the same or sufficiently comparable products addressed by future applications of Section 771B.”¹²² But the EU’s approach to the issue of export supply elasticity in this case suggests that there will never be information available that is to the EU’s satisfaction. In fact, the EU seems to be deliberately setting a standard for this data input that it knows cannot be met by the available economic literature in order to justify resorting to its “fall-back” value of infinity for all cases, a value that is unreasonable.¹²³ At this point, the United States has submitted estimates for export supply

¹¹⁸ EU responses to second set of questions from the Arbitrator, para. 81.

¹¹⁹ See U.S. responses to second set of questions from the Arbitrator, para. 66.

¹²⁰ For a detailed discussion of the export supply elasticity literature, see Exhibit USA-40, at pp. 34-45.

¹²¹ See U.S. responses to second set of questions from the Arbitrator, paras. 47-49.

¹²² EU responses to second set of questions from the Arbitrator, para. 80.

¹²³ EU responses to second set of questions from the Arbitrator, para. 81.

elasticity based on values used by past arbitrators for manufactured products,¹²⁴ and from the economic literature for the exact 10-digit HTS codes used in both the U.S. and EU models.¹²⁵ The EU has rejected both of these approaches in favor of a blanket application of an infinite export supply elasticity.

73. Whatever arguable deficiencies there may be in the export supply elasticity parameters submitted by the United States, they are objectively more reasoned than the EU's "fall-back" value of infinity. Accordingly, the Arbitrator should reject the EU's proposal to apply an infinite export supply elasticity as a default, both in the case of ripe olives and in a future application of Section 771B.

67. To the European Union: In its response to Arbitrator question No. 33, the European Union suggests that possible data sources to obtain trade flows could be the Global Trade Atlas (GTA), the Trade Data Monitor (TDM), or the Trade Map.¹²⁶ Are there any particular criteria to choose one source over the other? What instructions should the Arbitrator set out in its Decision relating to the use of these data sources?

Comment:

74. The United States cannot comment on the comparative reliability of these databases, which are subscription-based commercial services. However, the United States points out that use of these subscription-based databases is only necessary if the Arbitrator were to adopt the EU's global approach. As the United States has explained, the EU's global approach is overly complex without any discernable benefit and would distort the level of nullification or impairment by excluding completely U.S. domestic production.¹²⁷ Instead, the Arbitrator should adopt the U.S. approach, which focuses only on the trade impacts to the U.S. market. Such an approach relies on the official and public trade data that is regularly published by the U.S. government and allows for analysis of products at a more precise level of disaggregation. Accordingly, an added benefit of the U.S. approach is that it would not rely on third-party, subscription-based trade data, which is only available at a higher HTS aggregation level.

68. To the European Union: Please comment on paragraph 14 of the United States' response to Arbitrator question No. 4, where the United States argues that "a prospective formula for calculating the level of nullification or impairment arising from a future use of Section 771B with regard to processed agricultural goods other than ripe olives would require a procedure for calculating a WTO-consistent attribution rate."¹²⁸

¹²⁴ See U.S. written submission, paras. 100-105.

¹²⁵ See U.S. responses to first set of questions from the Arbitrator, para. 67.

¹²⁶ EU responses to first set of questions from the Arbitrator, para. 68.

¹²⁷ See, e.g., U.S. written submission, paras. 69-80.

¹²⁸ U.S. responses to first set of questions from the Arbitrator, para. 14.

Comment:

75. As the United States has explained in its comment on the EU's response to Question 41 above, the counterfactual proposed by the United States is one in which it reinterprets, amends, or replaces Section 771B such that the USDOC can determine the attribution of subsidy benefits in a WTO-consistent manner. Such a counterfactual would address the full scope of the DSB recommendations, while removal of the relevant CVD order(s) would not. In such a hypothetical scenario, Section 771B would not "remain[] in existence" in its current form, and may not be in existence at all.¹²⁹ Therefore, the United States would be free to calculate attribution of subsidy benefits in a WTO-consistent manner.

76. More importantly, any counterfactual that does not allow the United States to determine the proper level of attribution of subsidy benefits to downstream processors, as permitted by the WTO agreements, would generate a level of nullification or impairment that does not accurately reflect the benefits that the EU can legitimately expect. This is true both in the case of ripe olives and for any future application of Section 771B to EU products. Accordingly, the Arbitrator must establish a method for determining the appropriate WTO-consistent attribution rate for a future application of Section 771B in order to ensure that the level of suspension does not exceed the level of nullification or impairment. If doing so is not possible or would be overly speculative, the Arbitrator should decline to adopt a prospective model for automatically authorizing suspension of concessions and instead require the EU to make a new request for suspension if and when Section 771B is applied to EU products in the future.

69. To the European Union: In connection with the previous question, the United States suggests in its response to Arbitrator question No. 4 that "[f]or a more precise, but more labor intensive, process, the Arbitrator could adopt a procedure for examining the relevant indicia for attribution of subsidy benefits, using the best evidence conceivably available for processed agricultural products subject to Section 771B, and determining to the best of the parties' ability a suitable value for a WTO-consistent attribution rate."¹³⁰ Please explain whether, in the European Union's view, the approach suggested by the United States would be appropriate and workable.

Comment:

77. The EU's response to this question refers to its response to Question 77. The United States likewise refers the Arbitrator to its comment on the EU's response to Question 77.

70. To the European Union: The Arbitrator notes that some of the public data sources mentioned by the European Union in response to Arbitrator question No. 33 are published or updated with uncertain regularity. Should these issues on the

¹²⁹ EU responses to second set of questions from the Arbitrator, para. 88.

¹³⁰ U.S. responses to first set of questions from the Arbitrator, para. 14.

timeliness, and consequent availability, of import data present issues when running the prospective model? How could these be addressed?

Comment:

78. In its Methodology Paper, the EU makes clear that its approach would require using the year prior to the imposition of the relevant CVD order as the baseline year.¹³¹ Yet in its response to Question 70, the EU now states that there could be a gap of up to two years between the baseline year and the year in which duties were imposed, due to data availability.¹³²

79. Data from two years prior to the implementation of CVD orders does not provide an accurate proxy for the real competitiveness of an EU Member State in the U.S. market. This is likely to introduce significant distortion into any estimate of nullification or impairment generated by a prospective model as market shares can change significantly in a year for reasons unrelated to the measures at issue. By contrast, the U.S. model concentrates specifically on analyzing the U.S. market where the CVD duties were applied, and requires only U.S. market share data, which can be accurately estimated using annual data from one-year prior, timely published by the U.S. Census Bureau. Thus, the United States emphasizes that the lack of available and timely data for all countries and regions favors adoption of the U.S. approach rather than the EU’s overly complex global model.

71. To the United States: Please comment on the European Union’s response to Arbitrator question No. 32, where the European Union suggests that an infinite export supply elasticity should be used in the context of the “as such” scenario.¹³³

Response:

80. Response provided in U.S. responses to questions from the Arbitrator.

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

The EU notes that publicly available data sources for US domestic production of agricultural products do not classify at the level of aggregation that can be correctly matched to the corresponding trade flows at tariff level (HTSUS 10 digit). Thus, the USDA National Agriculture Statistics Survey data are collected with a product classification that cannot be predictably matched one-to-one to the USHTS tariff lines, with no available official conversion table.¹³⁴

¹³¹ EU Methodology Paper, para. 50 (“taking as a baseline the imports and market shares in the year before the imposition of the duties, the EU would simply apply the partial equilibrium model as in step two above.”).

¹³² EU responses to second set of questions from the Arbitrator, para. 90.

¹³³ EU responses to first set of questions from the Arbitrator, para. 67.

¹³⁴ EU responses to first set of questions from the Arbitrator, para. 79 (footnote omitted).

Response:

81. Response provided in U.S. responses to questions from the Arbitrator.
73. **To both parties: The European Union and the United States have described in different terms the triggering event that the Arbitrator should set out in its Decision. For the European Union, a triggering event would be “any application of Section 771B against an ‘agricultural product processed from a raw agricultural product’ imported from the EU, i.e. from one, several or all of its Member States depending on the scope of the measure concerned”.¹³⁵ On the other hand, the United States suggests that a triggering event would be “the imposition of duties pursuant to a U.S. CVD order on exports of goods from the EU that attributes 100 percent of an upstream subsidy to downstream processors of the subject agricultural products through the application of Section 771B.”¹³⁶ In this connection:**
- i. **Please comment on any potential differences and similarities between these two descriptions.**
 - ii. **Does the European Union agree with the United States in using a CVD order as the starting point of the triggering event, so as to reflect when duties are actually applied to imports?**
 - iii. **Please comment on the appropriateness of only including CVD measures under Section 771B that attribute 100% of the subsidy to downstream processors.**

Comment:

82. As explained in the U.S. response to the Arbitrator’s Question 73, there are legal and practical reasons that the triggering event cannot include a CVD order that attributes less than 100 percent of subsidy benefits to downstream processors.¹³⁷ Most notably, it would not be clear that such an order falls under the relevant DSB recommendations and therefore it would be improper under the DSU for the Arbitrator to adopt a system that would automatically authorize suspension of countermeasures in an instance where there could be a genuine question as to the WTO-consistency of the measure involved.¹³⁸

83. The EU claims that the original and compliance panel reports support the notion that any CVD order arising from an application of Section 771B, irrespective of the rate of attribution, is

¹³⁵ EU responses to first set of questions from the Arbitrator, para. 73.

¹³⁶ U.S. responses to first set of questions from the Arbitrator, para. 85.

¹³⁷ See U.S. responses to second set of questions from the Arbitrator, paras. 72-76.

¹³⁸ See U.S. responses to second set of questions from the Arbitrator, paras. 74-76.

WTO-inconsistent.¹³⁹ However, the United States notes that the EU does not provide any citation to either panel report to support its assertions in this regard. On the other hand, the U.S. response to Question 73 provides support from both panel reports demonstrating that the requirement under Section 771B that the USDOC attribute the entirety of a subsidy benefit to downstream processors was a core component of both the original and compliance panel findings.¹⁴⁰ Accordingly, a CVD order that does not attribute 100 percent of the subsidy benefit to downstream processors may not be covered by the DSB recommendations. That is not to say that such an order would always be WTO-consistent, but there would be a genuine question in that regard that would foreclose an automatic authorization for suspension of concessions.

84. Finally, the EU argues that requiring certainty that the CVD order at issue is actually covered by the DSB recommendations “would open the door for easy circumvention by the US” by allowing the USDOC to apply “alleged ‘discretion’ [to] determine a pass-through rate of 99% instead of 100%.”¹⁴¹ However, the EU’s example contradicts the EU’s continued position that “Section 771B ‘by operation of the law itself’ does not permit to arrive at a pass-through rate of less than 100%.”¹⁴² Thus, the scenario that the EU fears is impossible according to the EU. This is exactly the point. If the USDOC were to attribute 99 percent of subsidy benefits instead of 100 percent, it would not be exercising “alleged ‘discretion’”, it would be exercising actual discretion under the law. In such a case, the USDOC would be acting in a way that is not contemplated by the DSB recommendations in this dispute and that the EU claims is not possible due to the text of Section 771B. It would therefore be necessary to determine that the CVD order is nonetheless WTO-inconsistent before the EU can be entitled to suspend concessions under the DSU.

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

Comment:

85. To the extent that a prospective Armington model is adopted, such a model may require the input of certain calculations or data. At this time, the United States cannot speculate as to what calculations or data would be necessary or whether such calculations or data would contain BCI or publicly available information. To the extent that BCI is required to be transmitted between the Parties, appropriate procedures must be adopted to ensure the protection of such information from unauthorized disclosure.

86. Accordingly, it is not possible to anticipate the specific modalities for data sharing that might be necessary for a future application of Section 771B to an as-yet unknown processed

¹³⁹ See EU responses to second set of questions from the Arbitrator, para. 96.

¹⁴⁰ See U.S. responses to second set of questions from the Arbitrator, paras. 72-73.

¹⁴¹ EU responses to second set of questions from the Arbitrator, para. 97.

¹⁴² EU responses to second set of questions from the Arbitrator, para. 116.

agricultural product. In this regard, the United States reiterates its position that the Arbitrator should reject the application of a prospective model or formula for automatically authorizing suspension of concessions or other obligations and instead require the EU to make a future request to suspend concessions or other obligations if and when Section 771B is applied to EU products in the future.

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

Comment:

87. As an initial matter, the EU is incorrect that “the US has not even suggested that such instructions were needed in this case.” The United States has repeatedly emphasized beginning with its first written submission that the EU approach for the “as such” breach is inadequate because the EU fails “to propose specific sources or protocols for determining [] data inputs.”¹⁴³ Thus, the United States has been consistent that instructions similar to the ones adopted in *US – Supercalendered Paper* would be necessary if the Arbitrator were to adopt a prospective model or formula in this case because the absence of such instructions would lead to future controversies between the parties.¹⁴⁴

88. Regardless, the instructions laid out by the EU for sourcing data inputs for its “as such” approach repeat the same deficiencies that the United States has highlighted. Beginning with data for trade flows, as the United States explained in its comment on the EU’s response to Question 67, the use of third-party subscription databases is only necessary for the EU’s global trade model, which improperly excludes U.S. domestic production and introduces complexity with no discernable benefit. On the other hand, the U.S. model requires only trade flow data for the U.S. market, which is regularly published by the U.S. government at a more precise level of product aggregation. Putting aside the unreasonableness of excluding U.S. domestic production, the mere fact that the EU model relies on data that may not be available for the year prior to the imposition of the CVD duties introduces substantial uncertainty and potential inaccuracy that should cause the Arbitrator to reject it.

89. Regarding domestic production data, the United States reiterates that it is not reasonable to exclude U.S. production from a future assessment of nullification or impairment for every product that could be subject to a future Section 771B action. As the United States explained in its comment on the EU’s response to Question 51, it is not necessary that domestic production

¹⁴³ U.S. written submission, para. 131. See also, U.S. responses to first set of questions from the Arbitrator, para. 84; U.S. responses to second set of questions from the Arbitrator, para. 77.

¹⁴⁴ See U.S. responses to second set of questions from the Arbitrator, para. 77.

data be “congruent” with data on trade flows, nor is it reasonable to expect that domestic production data will match one-to-one to the HTS system used to classify imports. Rather, what is important is that the domestic production data used is the best available proxy for U.S. domestic production for products that would be covered by the scope of the CVD order. Furthermore, while the EU has accepted that future application of an “as such” model may need to take into account domestic production,¹⁴⁵ it has never explained how domestic production could be integrated into its proposed approach, which is structured to only examine trade diversion in global trade flows.

90. Regarding the counterfactual CVD rate, as the United States explains in its comments on the EU’s responses to Questions 41, 42, 43, 77, and 78, the counterfactual CVD rate must account for the WTO-consistent level of attribution of subsidy benefits. Otherwise, the level of nullification or impairment calculated would not reflect the benefits that the EU could legitimately expect under the covered agreements. In addition, as explained in our comment on the EU’s response to Question 49, the “all others” rate should be used for any CVD or AD rate inputs rather than a simple average. The model must account for corresponding AD rates and should do so by combining the AD and CVD rates for the WTO-inconsistent duty and reducing that combined duty by its WTO-inconsistent component (i.e., the difference between 100 percent attribution and a WTO-consistent attribution rate for the product at issue) to arrive at the counterfactual combined AD/CVD rate.

91. The elasticities used in the model, including the elasticity of substitution, the export supply elasticity, and the domestic supply elasticity, should be sourced from economic literature that is reliable, verifiable, tied as directly as possible to the in-scope products, and aligned as closely as possible with the underlying modeling approach. In the current proceeding, Soberbery (2015) presents a better option than Fontagné et al. (2022) when all these factors are taken into consideration. Accordingly, the United States disagrees with the EU that Fontagné et al. (2022) should be the default source for the Armington elasticities in all future Section 771B cases, and that the default value for export supply elasticity should be set to infinity, as this is unsupported by both economic theory and empirical evidence.

4 LEVEL OF SUSPENSION

76. To both parties: In its response to Arbitrator question No. 40, the United States refers to the risk of the Arbitrator “permitting a suspension of concessions or other obligations that is in excess of the actual level of nullification or impairment, which would amount to an impermissible punitive sanction on the Member concerned”.¹⁴⁶ In this respect:

¹⁴⁵ See EU responses to first set of questions from the Arbitrator, paras. 76-79.

¹⁴⁶ U.S. responses to first set of questions from the Arbitrator, para. 94.

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

Comment:

92. The EU’s assertion that “[t]he only possible way for the US to comply is to refrain from making any pass-through findings regarding products falling within the scope of Section 771B”¹⁴⁷ does not square with its admission that it seeks an “inducement for the US to comply and to amend Section 771B”¹⁴⁸ in these proceedings. Accordingly, the EU attempts to bar the very compliance action that it purports to seek in the construction of a counterfactual compliance scenario. There is no coherent reason that this would be required under the DSU. Thus, the counterfactual proposed by the United States in which the United States reinterprets, amends, or replaces Section 771B with a WTO-consistent authority for determining attribution of subsidy benefits is not only a reasonable and plausible counterfactual compliance scenario, it is the compliance scenario that reflects the very compliance action that the EU is requesting.

93. Past arbitrators have explained that a counterfactual is “a hypothetical scenario that describes what would have happened in terms of trade flows had the responding party implemented the DSB recommendations and rulings.”¹⁴⁹ As previously explained in our comment on the EU’s response to Question 41, above, and in our response to Question 44,¹⁵⁰ the relevant DSB recommendations in this case include that Section 771B is “as such” WTO-inconsistent. Accordingly, the appropriate counterfactual CVD rate must take into account the USDOC’s ability in a hypothetical compliance scenario to assess attribution of subsidy benefits in a WTO-consistent manner. A counterfactual that ignores this right by assuming a proxy attribution rate of zero would generate a level of nullification or impairment that does not reflect the benefits that the EU could legitimately expect under the covered agreements.

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

¹⁴⁷ EU responses to second set of questions from the Arbitrator, para. 116.

¹⁴⁸ EU responses to second set of questions from the Arbitrator, para. 25.

¹⁴⁹ See *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.50 (quoting *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.7).

¹⁵⁰ See U.S. responses to second set of questions from the Arbitrator, paras. 8-10.

Comment:

94. As previously explained in our comment on the EU’s response to Question 41, the “as such” WTO-inconsistency of Section 771B is the core component of the DSB recommendations in this case and therefore an appropriate counterfactual should address the “as such” breach. Furthermore, to the extent that the EU now argues that it is “not requesting nullification or impairment for future ‘as such’ inconsistencies”, the Arbitrator should decline to adopt an “as such” model or formula at all and instead require the EU to request authorization to suspend concessions or other obligations in the future if there is a future application of Section 771B to products from the EU.¹⁵¹

95. As explained in our response to Question 77, the DSU does not impose any restrictions on the types of information or analyses that an Article 22.6 arbitrator can rely upon to fulfil its mandate of accurately measuring nullification or impairment. Rather, an Article 22.6 arbitrator has a responsibility to rely on the best information or data that is available in formulating a reasoned estimate of the level of nullification or impairment.¹⁵² Accordingly, contrary to the EU’s assertions, the DSU contains no concept of an “impermissible *de novo* consideration by the Arbitrator”.¹⁵³

96. Furthermore, the United States is not asking the Arbitrator “to step into the shoes of the USDOC” in calculating a WTO-consistent counterfactual CVD rate.¹⁵⁴ Rather, as the United States has explained,¹⁵⁵ the question before the Arbitrator is only to assess whether the counterfactuals before it are reasonable and plausible. The counterfactual put forth by the EU is not reasonable and plausible because it is based on an assumption that the USDOC would not or could not ever determine attribution of subsidy benefits in a WTO-consistent manner for any products currently subject to Section 771B. Therefore, the counterfactual proposed by the EU would benefit it beyond what is permitted under the covered agreements and is inappropriate.

97. This situation mirrors the situation in *US – Washing Machines* in which the arbitrator declined to adopt Korea’s proposed counterfactual of complete termination of the relevant measures, because it would not “accurately reflect the nature of nullification or impairment of benefits accruing to Korea under” under the relevant agreements.¹⁵⁶ Likewise, here the EU “could not reasonably expect that the benefits accruing under [the relevant WTO agreements] . . . amount to termination of the entire [CVD] order and duties assigned to all [EU] exporters.”¹⁵⁷ Furthermore, contrary to the EU’s suggestion, the arbitrator in *US – Washing*

¹⁵¹ EU responses to second set of questions from the Arbitrator, para. 117.

¹⁵² See U.S. responses to second set of questions from the Arbitrator, para. 85.

¹⁵³ EU responses to second set of questions from the Arbitrator, para. 119.

¹⁵⁴ EU responses to second set of questions from the Arbitrator, para. 119.

¹⁵⁵ See, e.g., U.S. responses to second set of questions from the Arbitrator, para. 4.

¹⁵⁶ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.21.

¹⁵⁷ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.21.

Machines did not lay out any requirements for the type of evidence that can be relied upon in crafting an appropriate counterfactual. After rejecting the counterfactual of complete withdrawal of the inconsistent orders (the same counterfactual here proposed by the EU), the arbitrator then assessed an appropriate alternative counterfactual. In doing so, the arbitrator relied on an alternative WTO-consistent analysis that had been conducted by the USDOC and particularly noted that this analysis was valuable to the arbitrator in part because it was “calculated for reasons unrelated to this Arbitration.”¹⁵⁸ However, the arbitrator never stated that it would be improper to rely on *de novo* evidence or analyses if that was the best evidence available for constructing an appropriate counterfactual. To the contrary, the absence of a neatly packaged alternative counterfactual in the record of the underlying investigation does not relieve the Arbitrator from its responsibility to use the best evidence that is available to ensure that the level of suspension requested does not exceed the level of nullification or impairment of benefits accruing to the complaining Member, as is required by the DSU.

98. The EU argues that determination of an appropriate WTO-consistent attribution rate for purposes of constructing an accurate hypothetical compliance counterfactual to serve as an input into the Arbitrator’s model would amount to “using the Arbitrator to circumvent” the findings of the original and compliance panels.¹⁵⁹ However, the EU is not entitled to suspend concessions or other obligations in excess of the actual level of nullification or impairment that it incurs simply because the EU has expended time and resources in litigating a dispute that it chose to bring. The United States has a right under the relevant agreements to determine attribution of subsidy benefits for the products currently subject to Section 771B. Any hypothetical compliance scenario in which the United States does not exercise that right is not reasonable and plausible. Accordingly, in order to accurately determine the level of nullification or impairment in this dispute, the Arbitrator must approximate, to the best of its ability and using the best evidence available to it, what the WTO-consistent CVD rate would be, including by incorporating the WTO-consistent level of attribution. Anything less would generate a level of nullification or impairment that does not reflect the benefits accruing to the EU under the covered agreements and would therefore run afoul of Article 22.4 of the DSU.

78. To both parties: In its written submission, the United States argues that “while the purpose of suspension of concessions or other obligations is to induce compliance with WTO obligations, arbitrators have repeatedly observed ‘that the concept of equivalence referred to in Article 22.4 of the DSU means that obligations cannot be suspended in a ‘punitive’ manner.’”¹⁶⁰ Please comment on the interaction between the purpose of “inducing compliance” and the concept that obligations cannot be suspended in a “punitive manner”.

¹⁵⁸ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.31.

¹⁵⁹ See EU responses to second set of questions from the Arbitrator, paras. 123.

¹⁶⁰ U.S. written submission, para. 17 (referring to *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 3.5 (citing *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.8).

Comment:

99. As the United States has explained in previous comments, the use of a proxy value of zero for the WTO-consistent attribution rate, both in the case of ripe olives and for future applications of Section 771B, does not reflect the benefits that the EU can legitimately expect under the covered agreements. Both the original and the compliance panels have recognized that WTO Members have significant discretion in determining attribution of subsidy benefits.¹⁶¹ Accordingly, the EU cannot “legitimately expect” that the United States would decline to measure and apply attribution of subsidy benefits to downstream recipients of indirect subsidies for any processed agricultural product currently subject to Section 771B.¹⁶² Thus, by adopting a blanket proxy value of zero for the counterfactual attribution rate for all products currently subject to Section 771B, the EU’s approach would necessarily generate a level of nullification or impairment that does not “accurately reflect[] the benefits accruing to it in this dispute.”¹⁶³ As a consequence, adopting the EU’s “approach of ‘withdrawal’ of the entire order would risk determining a level of suspension in excess of the level of nullification or impairment, one that may be ‘punitive’”.¹⁶⁴

100. This is exactly the situation that was present in *US – Washing Machines*. The EU suggests that the reasoning in *US – Washing Machines* is not relevant on the basis that the measure “found to be ‘as such’ inconsistent could also result in WTO-consistent outcomes in a future application,” but that finding by the arbitrator was not the basis for its rejection of Korea’s counterfactual.¹⁶⁵ Rather, the arbitrator in *US – Washing Machines* was clear that its analysis of the “as such” claim in that dispute was based on the same reasoning as its analysis for the “as applied” claim, in which it found that a counterfactual of withdrawal of the relevant AD order would not reflect the benefits that Korea could legitimately expect and therefore did not constitute a reasonable and plausible counterfactual. Specifically, the arbitrator found:

we recall our analysis of the benefits accruing to Korea in the counterfactual section pertaining to LRWs, in paragraph 3.30, and the reasoning developed, above, related to Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement. There, we stated that Korea would expect the USDOC to appropriately identify and address targeted dumping in a WTO-consistent manner. In ‘taking account of all relevant circumstances’, we consider that Korea’s expectation of benefits accruing under Article 2.4.2 of the Anti-Dumping

¹⁶¹ See U.S. written submission, para. 30.

¹⁶² See *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.16 (“the term ‘benefit’ constitutes ‘an “advantage” that is received (or legitimately expected), and it is this advantage that is being nullified or impaired.’” (quoting *US – COOL (Article 22.6 – United States)*, paras. 5.15 and 5.16)).

¹⁶³ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.16 (quoting *US – Gambling (Article 22.6 – US)*, para. 3.37).

¹⁶⁴ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.22.

¹⁶⁵ EU responses to second set of questions from the Arbitrator, para. 127.

Agreement would be the same for the DPM, which is the analytical framework for deciding whether the application of the exceptional W-T comparison methodology is valid, and with regard to the future application of the W-T comparison methodology.

We do not agree that a counterfactual of removal of an entire anti-dumping order, in each instance of the application of DPM, would accurately reflect the scope of benefits that accrue to Korea under Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement. We refer to our reasoning above in section 3.2.2, which applies equally here, but respond to arguments raised by the parties with respect to the ‘as such’ measures.¹⁶⁶

101. Section 3.2.2, incorporated by reference in the arbitrator’s discussion of the “as such” inconsistent DPM, analyzes the counterfactual of withdrawal proposed by Korea for application of the W-T comparison methodology.¹⁶⁷ In that section of the arbitrator’s report, the arbitrator concluded:

we do not consider Korea’s counterfactual scenario of withdrawal of the antidumping order to accurately reflect the nature of nullification or impairment of benefits accruing to Korea under the Anti-Dumping Agreement. Korea’s proposal implies that no anti-dumping duty would be applied to any Korean exporter of LRWs. In our view, however, Korea could not reasonably expect that the benefits accruing under Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement – which concern the calculation of dumping margins for specific exporters – amount to termination of the entire anti-dumping order and duties assigned to all Korean exporters. Korea’s position clearly exceeds the scope of those benefits. In this regard, we agree with the United States that adopting Korea’s counterfactual ‘could appear to assume that the Member concerned has obligations beyond what is reflected in the recommendations adopted by the DSB, which is for the Member to comply with WTO rules.’¹⁶⁸

102. Thus, the fact that the DPM allowed for WTO-consistent behavior was not the basis for the arbitrator’s finding “that Korea’s counterfactual of ‘ceased to use the [relevant measure]’, to the extent that it is premised on termination of an entire anti-dumping order, is not an accurate reflection of benefits accruing to Korea under [the covered agreements] and cannot be

¹⁶⁶ *US – Washing Machines (Korea) (Article 22.6 – US)*, paras. 4.8-4.9.

¹⁶⁷ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.13.

¹⁶⁸ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.21.

considered a reasonable or plausible counterfactual for the ‘as such’ measures.”¹⁶⁹ Instead, the arbitrator’s finding was based on the notion that the counterfactual of complete withdrawal of the “as such” inconsistent measure at issue exceeded the benefits that Korea could expect under the covered agreements. The same is true here for the EU’s proposed counterfactual, which amounts to a withdrawal of Section 771B without providing any replacement authority to determine attribution of subsidy benefits for processed agricultural products. For the same reasons discussed by the arbitrator in *US – Washing Machines*, such a counterfactual is not reasonable and plausible.

¹⁶⁹ *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.13.