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)

WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. On December 20, 2024, the European Union ("EU") submitted to the Arbitrator a Methodology Paper that explains the methodological basis and the process that the EU used when making its request to suspend concessions and related obligations in this dispute.[1] The EU's Methodology Paper demonstrates that, contrary to the requirements of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the level of suspension of concessions that the EU has requested[2] is not equivalent to the level of nullification or impairment. As the United States will show in this submission, the correct counterfactual compliance scenario for this arbitration reveals that the level of nullification or impairment is zero. The United States will also show why even the EU's counterfactual compliance scenario would yield a level of nullification and impairment that is no more than 6.15 million USD per year.

2. This submission is structured as follows. After presenting the relevant legal framework, the United States will first explain in Section III.B that the EU's approach to calculating nullification and impairment is premised upon an incorrect counterfactual compliance scenario. This is because the EU bases its request for suspension of concessions or other obligations on a counterfactual that terminates, without replacement, section 771B of the Tariff Act of 1930[3] ("Section 771B") following the expiration of the reasonable period of time ("RPT"). However, as the United States will show, it is neither plausible nor reasonable to assume that the United States would repeal Section 771B without retaining any authority for the USDOC to consider downstream attribution of subsidy benefits (also known as "pass-through") for the products covered by that statute. Therefore, the proper counterfactual to be applied for the purpose of this proceeding is one in which the USDOC has the ability to assess attribution of subsidy benefits for products subject to Section 771B, including ripe olives from Spain, in a WTO-consistent manner.

3. Next, in Section III.C, we explain that utilizing an appropriate counterfactual compliance scenario for this dispute would result in a finding that there is no nullification or impairment to the EU. As the United States will show, the evidence suggests that if the USDOC were to assess the level of benefits from subsidies granted to Spanish raw olive growers that are attributable to Spanish ripe olive processors in a WTO-consistent manner, it would continue to conclude that 100% of the benefits provided are attributable to the ripe olive processors. The United States will further note that the EU presents no justification for concluding that the USDOC would determine that there is zero attribution of benefits to ripe olive processors after conducting a WTO-consistent attribution analysis, nor does it present evidence for such a determination. Thus, in the appropriate counterfactual scenario where, as the United States will show, 100% attribution of subsidy benefits to downstream processors is properly determined, a WTO-consistent countervailing duty rate for ripe olives from Spain would not result in a different level

[1] *See* Methodology Paper Submitted by the European Union (Dec. 20, 2024) ("EU Methodology Paper").

[2] *See* Recourse to Article 22.2 of the DSU by the European Union, WT/DS577/20 (Nov. 15, 2024).

[3] 19 U.S.C. § 1677-2 (Exhibit USA-1).

of duties. Accordingly, the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. countervailing duty measures on ripe olives from Spain after the expiration of the RPT is zero.

4. In Section III.D, we then explain that even accepting the EU's incorrect counterfactual, the EU's Methodology Paper contains errors sufficient by themselves to reveal that the level of suspension of concessions the EU has requested far exceeds the level of nullification or impairment, contrary to the DSU. While the United States agrees with the EU that an Armington-based partial equilibrium model can be employed to determine the level of nullification or impairment in this dispute, the United States will show that the approach proposed by the EU is not adequate for achieving accurate results and contains structural and data input decisions that all improperly inflate the calculation of nullification and impairment. As a result, the EU overestimates the level of nullification or impairment attributable to the U.S. measures about which the Dispute Settlement Body ("DSB") adopted recommendations in this dispute.

5. Specifically, the United States demonstrates that despite having requested to suspend concessions or other obligations in an amount equivalent to the level of nullification or impairment of benefits accruing to the EU, the EU's proposed level of suspension in fact reflects the trade impacts to the Spanish market in isolation. Stated differently, the EU model fails to reconcile the impacts to the Spanish market with gains made by other EU countries in the same modeling exercise, thereby calculating a level of suspension that is in excess of the level of nullification and impairment experienced by the EU. As the United States will show, there is no basis for the EU to isolate one of its member state markets in calculating the level of nullification and impairment experienced by the EU and such an approach is not permissible under the DSU.

6. We also demonstrate that the EU's proposed model introduces unnecessary analytical complexity and additional data requirements by focusing on global trade flows, rather than the U.S. market directly impacted by the measures at issue, and that the EU's proposed model therefore excludes U.S. domestic production of ripe olives completely from its analysis. The EU's model suffers as a result of numerous other decisions that distort the outputs of the model in favor of the EU, such as using incorrect input values for the various elasticity parameters, and failing to account for the application of parallel anti-dumping duties on ripe olives from Spain. We finally discuss in Section III.D the proper application of an appropriate model for calculating nullification and impairment, correcting for these and other problems with the EU's proposed Armington-based partial equilibrium model, which shows that the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent U.S. countervailing duties on ripe olives from Spain after the expiration of the RPT on January 14, 2023 would be no more than 6.15 million USD per year. Accordingly, application of an appropriate corrected model once again demonstrates that the EU's request of 33.5 million USD per year is far in excess of the equivalent level of nullification or impairment, and thus contrary to the DSU.

7. In Section IV, we address the EU's request for authorization to suspend concessions or other obligations for future applications of Section 771B using a prospective formula. The EU does not propose a particular level of suspension of concessions resulting from the application by the USDOC of Section 771B to products other than ripe olives from Spain that are initiated after

the expiration of the RPT. Instead, the EU requests authorization to apply essentially the same economic framework and derived model that it proposes for ripe olives, which the United States considers to be conceptually flawed, so that the EU can determine for itself the level of suspension related to products other than ripe olives. The United States will demonstrate that here again, the EU's proposed level of suspension is contrary to the DSU. As the United States will show, the model that the EU proposes is lacking in detail and cannot meet the standard laid out by prior arbitrators for prospective formulas for calculating future nullification and impairment. Specifically, application of the EU's model to the wide variety of other products potentially covered by Section 771B (1) will not result in a predictable level of suspension; (2) is not practical to implement and will lead to controversies between the parties; (3) does not specify verifiable and readily available data sources; and (4) is not sufficiently generic to capture any variation in the types of products and markets potentially at issue. The United States will further show that the EU's model suffers from the same conceptual flaws and data input problems that are just as problematic whether the model is applied to ripe olives or products other than ripe olives.

8. Thus, in the discussion below, following a brief recounting of the procedural background of this proceeding, the United States explains the considerations to determine the correct level of nullification or impairment and why the approach taken by the United States is appropriate.

II. PROCEDURAL BACKGROUND

9. At its meeting on December 20, 2021, the DSB adopted the panel report on *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain* (DS577).[4]

10. On July 1, 2022, the United States and the EU informed the DSB that, pursuant to Article 21.3(b) of the DSU, the United States and the EU had agreed that the RPT for the United States to implement the recommendations and rulings of the DSB in this dispute would be twelve months and twenty-five days from the day of adoption of the DSB recommendations and rulings on December 20, 2021.[5] Accordingly, the RPT expired on January 14, 2023.[6]

11. Before the expiration of the RPT, in order to bring the United States into compliance with the DSB's recommendations, the USDOC conducted proceedings pursuant to section 129 of the Uruguay Round Agreements Act (the "Section 129 proceedings"). The USDOC published a revised determination with respect to the countervailing duty ("CVD") investigation.

12. On July 14, 2023, the EU requested the establishment of a compliance panel pursuant to Article 21.5 of the DSU, alleging that the United States failed to comply with the recommendations and rulings of the DSB in relation to the inconsistency "as such" and "as applied" of Section 771B with Article VI:3 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 10 of the *Agreement on Subsidies and Countervailing Measures*

[4] *See* Action by the Dispute Settlement Body, WT/DS577/9 (Dec. 21, 2021).

[5] *See* Agreement Under Article 21.3(b) of the DSU, WT/DS577/12 (July 12, 2022).

[6] Agreement Under Article 21.3(b) of the DSU, WT/DS577/12 (July 12, 2022).

("SCM Agreement").[7] The compliance panel found that the United States had failed to bring its measures into conformity with the adopted recommendations and rulings of the DSB in relation to Section 771B.[8] Specifically, the compliance panel found that the USDOC's "re-interpretation", "re-evaluation", and "re-examination" of Section 771B in the Section 129 proceedings, as well as its reliance on those actions in applying Section 771B to ripe olives in the Section 129 proceedings, failed to "achieve the intended result of compliance" because the "USDOC's actions [did] not evidence the revised understanding of Section 771B, which interpretation the United States maintains has been adopted."[9] At its meeting on March 19, 2024, the DSB adopted the compliance panel report.[10]

13. On November 14, 2024, the EU requested authorization from the DSB to suspend the application of concessions or other obligations under the covered agreements pursuant to Article 22.2 of the DSU. On November 22, 2024, the United States objected to the level of suspension proposed by the EU, referring the matter to arbitration pursuant to Article 22.6 of the DSU.[11]

III. APPROPRIATE CALCULATION OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT FOR THE COUNTERVAILING DUTY MEASURES ON RIPE OLIVES FROM SPAIN

A. Article 22 of the DSU Requires that the Proposed Level of Suspension Be Equivalent to the Level of Nullification or Impairment

14. Pursuant to Article 22.4 of the DSU, the DSB will not authorize the suspension of concessions or other obligations unless "the level" of suspension is "equivalent" to the level of nullification or impairment.[12] Arbitrators in the past have recognized that "equivalence" is an exacting standard:

> [T]he ordinary meaning of the word "*equivalence*" is "equal in value, significance or meaning", "having the same effect", "having the same relative position or function", "corresponding to", "something equal in value or worth", also "something tantamount or virtually identical."[13]

15. Article 22.7 of the DSU further provides that where a matter is referred to arbitration, the arbitrator "shall determine whether the level of . . . suspension is equivalent to the level of

[7] *See* Request for the Establishment of a Panel, WT/DS577/16 (July 17, 2023).

[8] *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 8.1.

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

[10] *See* Action by the Dispute Settlement Body, WT/DS577/19 (Mar. 27, 2024).

[11] *See* Recourse to Article 22.6 of the DSU by the United States, WT/DS577/21 (Nov. 22, 2024).

[12] *See* DSU, Art. 22.4 ("The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.").

[13] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.1 (emphasis in original). *See also US – COOL (Article 22.6 – US)*, para. 4.3.

nullification or impairment."[14] The starting point in the analysis of a suspension request is to determine the extent to which a measure at issue is maintained following the expiration of the implementation period such that it nullifies or impairs benefits accruing to the complaining Member under the relevant covered agreement(s).

16. Thus, an analysis of the level of nullification or impairment must focus on the "benefit" accruing to the complaining Member under a covered agreement that is allegedly nullified or impaired as a result of the relevant breach found by the DSB.[15] Arbitrators in past proceedings have endeavored to rely on the best information or data that is available and have refused to "accept claims that are too remote, too speculative, or not meaningfully quantified."[16] As the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)* found, "we need to guard against claims of lost opportunities where the causal link with the inconsistent [measure] is less than apparent, i.e., where exports are allegedly foregone not because of the [inconsistent measure] but due to other circumstances."[17]

17. In addition, 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."[18]

18. Therefore, a determination of the level of nullification and impairment should result in a "reasoned estimate".[19] Although the determination will "rely[] on certain assumptions", "[s]uch

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[14] DSU, Art. 22.7.

[15] The concept of nullification or impairment derives from Article XXIII of the GATT 1994. Article XXIII provides: "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired . . . as a result of . . . the failure of another contracting party to carry out its obligations under this Agreement . . . ." This concept is then reflected in the DSU, including Article 3.3 ("The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members"), as well as Articles 3.5, 10.4, and 23. For example, in *US – Section 110(5) Copyright Act (Article 25)*, the arbitrator found that the analysis of nullification or impairment must focus on what benefits the EC would receive if the measure at issue – Section 110(5)(B) – were modified in accordance with the DSB recommendation. *See US – Section 110(5) Copyright Act (Article 25)*, paras. 3.20-3.35.

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

[17] *EC – Hormones (US) (Article 22.6 – EC)*, para. 41; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 40. *See also EC – Hormones (US) (Article 22.6 – EC)*, para. 77 (refusing to consider, as "too speculative," lost exports that would have resulted from foregone marketing campaigns).

[18] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para 3.5 (citing *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.8).

[19] *EC-Hormones (US) (Article 22.6 – EC)*, para. 41.

assumptions must, however, be reasonable and based on 'credible, factual and verifiable information', and 'not on speculation'."[20]

19. In previous Article 22.6 proceedings, the arbitrator has compared the level of trade for the complaining party under the measure at issue to what the complaining party's level of trade would be expected to be where the Member concerned has brought the measure into conformity following the expiration of the RPT. The situation in which the Member concerned has removed the WTO inconsistency is referred to as the "counterfactual." The difference in the level of trade under these two situations typically represents the level of nullification or impairment.

20. Therefore, Article 22.6 arbitrators have recognized that a counterfactual is an appropriate method to calculate a level of nullification or impairment,[21] and the EU itself proposes the use of a counterfactual in this proceeding.[22] In assessing a counterfactual, "an Article 22.6 arbitrator should . . . evaluate whether the original complainant . . . has offered a plausible or reasonable counterfactual scenario."[23] Assumptions in the counterfactual should be reasonable such that the proposed level of suspension will accurately reflect the level of nullification or impairment.[24]

21. As detailed below, the United States agrees that the use of a counterfactual analysis is appropriate, but explains why the correct counterfactual in this dispute, in light of the findings of the original and compliance panels and the circumstances of production of Spanish table olives, requires that the Arbitrator determine that the appropriate level of nullification or impairment is zero.

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[20] *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12 (citing *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.54, 5.63; *US – COOL (Article 22.6 – US)*, para. 4.5; *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 5.16; *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 1.16).

[21] *See*, *e.g.*, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.50 ("Counterfactuals are tools commonly used by arbitrators acting under Article 22.6 of the DSU to determine the level of [nullification and impairment] caused by the WTO-inconsistent measures."); *US – Gambling (Article 22.6 – US)*, para. 3.14 ("the use of a counterfactual to assess the level of exports that would have accrued to Antigua, had the United States complied with the rulings, constitutes an appropriate basis for assessing the level of nullification or impairment of benefits accruing to Antigua in this dispute . . . ."); *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.9; *US – Offset Act (Byrd Amendment) (Canada) (Article 22.6 – US)*, para. 4.22; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 37; *EC – Bananas III (US) (Article 22.6 – EC)*, para. 7.1 *et seq*.; *US – Tuna II (Mexico) (Article 22.6)*, para. 4.4.

[22] *See* EU Methodology Paper, paras. 19-22.

[23] *See US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.50 (emphasis added). *See also, e.g.*, *US – Gambling (Article 22.6 – US),* para. 3.27 ("Nonetheless, the counterfactual should, in our view, reflect at least a plausible or 'reasonable' compliance scenario."); *US – Washing Machines (Korea) (Article 22.6 – US)*, paras. 3.10-3.11.

[24] *See, e.g.*, *US – Gambling (Article 22.6 – US),* para. 3.30; *US – Washing Machines (Korea) (Article 22.6 – US)*, paras. 3.10-3.11; *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.50, n. 143 (citing *US – Gambling (Article 22.6 – US),* para. 3.30).

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

22. The EU proposes to estimate the level of nullification or impairment based on a methodology that assumes that the entirety of the countervailing duties assessed in the compliance panel report must be reduced to zero. As the EU reasons in its Methodology Paper:

> The EU considers that these duties are WTO-inconsistent in their entirety. This results from the fact that around 95% of the total subsidies attributed to the companies in question were based on the WTO-inconsistent pass-through analysis pursuant to Section 771B. Without the presumed pass-through, the subsidy rate would have . . . amount[ed] to a *de minimis* level. This means that, had the United States complied with the DSB's recommendations and rulings by the end of the RPT, the countervailing duties should have been removed in full.[25]

23. In other words, the EU's proposed counterfactual assumes that there is no possible WTO-consistent attribution of benefits arising from countervailable subsidies granted to Spanish raw olive producers to downstream Spanish ripe olive processors. The EU's proposed counterfactual is not supported by the DSU or by the recommendations adopted by the DSB in this dispute.

24. Article 22.1 of the DSU provides that compensation and the suspension of concessions is available in the "event that the recommendations" of the DSB "are not implemented within a reasonable period of time."[26] Thus, Article 22.1 of the DSU directs an arbitrator to base an Article 22.6 decision on the "recommendations" of the DSB.

25. Similarly, Article 22.2 of the DSU, which is explicitly referenced in the first sentence of Article 22.6, limits the role of an arbitrator to assessing the effects of the WTO-inconsistent U.S. measures in accordance with the DSB's recommendations.[27] To go beyond the DSB recommendations, as the EU proposes, would be contrary to the DSU.

26. Past arbitrators have understood the DSU consistently on this point. In *US – Tuna II (Mexico) (Article 22.6 – US)*, the arbitrator explained:

> Read together, Articles 22.2 and 22.6 of the DSU thus establish that a complaining Member may seek authorization to suspend concessions in situations where the responding Member has failed, within the RPT, to bring into conformity a measure that has previously been found to be inconsistent with the covered agreements. It is therefore the continued WTO-inconsistency of

[25] EU Methodology Paper, para. 22.

[26] DSU, Art. 22.1.

[27] *See* DSU, Art. 22.2; Art. 22.6.

> the original or a compliance measure (where a compliance measure was taken within the RPT) at the time the RPT expires that forms the basis for any request for authorization to suspend concessions.[28]

Likewise, in *US – Washing Machines (Korea) (Article 22.6 – US)* the arbitrator stated:

> 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".[29]

27. The DSB recommendations at issue in this proceeding relate to the inconsistency of Section 771B with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. Section 771B states that countervailable subsidies provided to producers or processors of a raw agricultural product "shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product" where (1) "the demand for the prior stage product is substantially dependent on the demand for the latter stage product" and (2) "the processing operation adds only limited value to the raw commodity".[30]

28. The original panel found that Section 771B is "as such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement:

> because it *requires* the USDOC to *presume* that the *entire* benefit of a subsidy provided in respect of a raw agricultural input product passes through to the downstream processed agricultural product, based on a consideration of only the two factual circumstances prescribed in that provision, without leaving open the possibility of taking into account any other factors that may be relevant to the determination of whether there is any pass-through and, if so, its degree.[31]

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[28] *US – Tuna II (Mexico) (Article 22.6 – US),* para 3.20.

[29] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.16 (citing *US – Section 110(5) Copyright Act (Article 25)*, n. 43; *US – Gambling (Article 22.6 – US)*, para. 3.37).

[30] 19 U.S.C. § 1677-2 (Exhibit USA-1).

[31] *US – Ripe Olives from Spain (Panel)*, para. 7.170 (emphasis in original).

The panel went on to find that application of Section 771B to imports of processed olives from Spain, and the resulting CVD order, was also inconsistent with the same WTO obligations. The panel relied on its "as such" findings in making these "as applied" findings, stating:

> We have found above that Section 771B is inconsistent as such with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, because it directs the USDOC to *presume* the existence of pass-through between raw and processed agricultural products, whenever the two factual circumstances it prescribes are established, and to *avoid* consideration of additional factors that may potentially be relevant. We found this inconsistent with the obligations in Article VI:3 and Article 10 to establish the existence and extent of indirect subsidization (i.e. pass-through) taking into account facts and circumstances that are relevant to that exercise. As we already explained, this follows from the operation of the law itself. In view of this, we find the USDOC's determination in the ripe olives investigation to be inconsistent with Article VI:3 and Article 10 for the same reasons that Section 771B is inconsistent "as such" with those same provisions.[32]

29. Following the USDOC's Section 129 proceeding, the compliance panel considered whether the United States' compliance actions in the Section 129 proceeding – namely the USDOC's "re-interpretation," "re-evaluation," and "re-examination" of Section 771B and its reliance on those actions in applying Section 771B to the CVD order on ripe olives – served to bring the United States into compliance with its WTO obligations. The compliance panel ultimately found that these specific compliance actions taken by the USDOC were not sufficient because they did "not evidence the revised understanding of Section 771B, which interpretation the United States maintains has been adopted."[33] In making its findings, the compliance panel emphasized the original panel's finding that:

> the problem with Section 771B was that it directs the USDOC to find that the entire benefit of a subsidy provided to a raw agricultural input product passes through to the downstream processed agricultural product, without any necessary consideration of facts and circumstances for this purpose other than those specifically referred to in its two enumerated conditions.[34]

The compliance panel further explained the nature of Section 771B's inconsistency with the relevant WTO agreements, stating:

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[32] *US – Ripe Olives from Spain (Panel)*, para. 7.175 (underlined emphasis added).

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

[34] *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.48.

> Section 771B is structured and designed to direct that subsidies provided to the producer of an upstream raw agricultural product "shall be deemed" to be provided to the downstream processed product in cases in which the two factual circumstances are determined to exist. Other factors that might touch upon the question of *the extent* of any pass-through are not required to be considered and are irrelevant to the question of whether the countervailable subsidies provided to the producers have passed through to the processors where the two factual circumstances are found . . . . The point made by the original panel was that an evaluation limited to the two factual circumstances in Section 771B *alone* would not provide a sufficient basis to calculate with any precision *the degree or the extent of* pass-through.[35]

30. Thus, while both the original panel and the compliance panel found that Section 771B is inconsistent with the United States' WTO obligations, neither panel found that the application of any attribution analysis to the types of products covered by Section 771B, including Spanish ripe olives, is WTO-inconsistent. To the contrary, both panels observed that the GATT 1994 and the SCM Agreement do not prescribe how an attribution analysis must be conducted, recognizing that Members "have discretion in determining whether and to what extent the benefit of a subsidy provided directly to a producer of an upstream product has passed-through to the downstream product."[36]

31. In addition, the compliance panel declined to find that bringing Section 771B into compliance with the covered agreements would require a repeal of that provision. Instead, the compliance panel rejected the EU's argument that reinterpretation of Section 771B "could not even potentially constitute 'a measure taken to comply'" with the recommendations of the DSB for purposes of Article 21.5 of the DSU, explaining that "the DSU does not explicitly preclude the possibility that a Member may seek to achieve 'compliance' for the purpose of Article 21 of the DSU by 're-interpreting', 're-evaluating' and 're-examining', a domestic law found to be 'as such' inconsistent with its WTO obligations."[37]

32. Accordingly, the EU's assumption, without explanation, that compliance "with the DSB's recommendations and rulings by the end of the RPT" requires that "the countervailing duties should have been removed in full," goes beyond the recommendations adopted by the DSB.[38] Rather, as the original and compliance panels indicated, the correct counterfactual

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

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

[37] *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.16.

[38] EU Methodology Paper, para. 22.

compliance scenario requires only that U.S. law not direct the USDOC to allocate the entire benefit of subsidies provided to producers of raw agricultural products to downstream processors of those products based solely on the criteria contained in Section 771B, without the ability to consider other relevant factors. In no way does such a compliance scenario preclude the USDOC from conducting a WTO-consistent attribution analysis, taking all relevant factors into account, including, but not exclusively, those factual circumstances contained in Section 771B, and nonetheless determining that benefits from upstream subsidies are in fact attributable from Spanish raw olive producers to Spanish ripe olive processors. The USDOC has discretion under the covered agreements in how it conducts such an attribution analysis.[39]

33. Past arbitrators have observed that it is not for an Article 22.6 arbitrator to prejudge how a country would come into compliance when evaluating an appropriate counterfactual. Nor is it proper to speculate on which compliance scenarios are more or less likely. Rather, as described above, the Arbitrator's task is to determine whether the counterfactual scenario proposed by the EU is "plausible" or "reasonable".[40]

34. Here, the EU's proposed counterfactual, which would preclude a finding of any attribution of the relevant subsidy benefits to ripe olive processors, is neither plausible nor reasonable. Such a counterfactual assumes that in order to come into compliance with the DSB's recommendations, the United States would be required to either (1) repeal Section 771B without passing any WTO-consistent replacement authority, or (2) amend, replace, or reinterpret Section 771B with an authority (or interpretation) that forbids the USDOC from conducting any attribution analysis for Spanish ripe olives (or any other goods currently covered by Section 771B).

35. As the compliance panel recognized, Section 771B was enacted because existing legislation for determining the attribution of benefits from countervailable subsidies "was incompatible with the nature of agricultural commodity markets" and members of the U.S. Congress were concerned that applying existing legislation "to agricultural commodities would 'understate the magnitude of the subsidy and permit wholesale circumvention' of U.S. countervailing duty laws."[41] These same concerns would remain if Section 771B were simply eliminated without any replacement, as is suggested by the EU's counterfactual. There is no

[39] *See US – Ripe Olives from Spain (Panel)*, para. 7.151 ("neither Article VI:3 nor Article 10 of the SCM Agreement prescribe that a particular methodology must be followed to perform a pass-through analysis where one is required. To this extent, investigating authorities have a certain amount of discretion in evaluating whether and to what extent the benefit of a subsidy provided directly to a producer of an upstream product has passed-through to the downstream product produced by an unrelated enterprise (an indirect subsidy).").

[40] *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).

[41] *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.59, n. 138 (citing Legislative History of Section 771B, p. 17766 (Exhibit USA-2)). *See also US – Ripe Olives from Spain (Panel)*, para. 7.164.

reason to believe that the U.S. government would allow for what it viewed as the "wholesale circumvention" of U.S. countervailing duty laws to continue unchecked. Therefore, it is not reasonable or plausible to assume that the United States would willingly cede its ability to ever analyze attribution of subsidy benefits for a large variety of products, which the U.S. Congress has specifically identified as at a heightened risk for elevated indirect subsidization.[42]

36. Indeed, the concerns of the U.S. Congress led it to confer upon the USDOC a certain amount of discretion to administer and interpret Section 771B. This was substantiated by the U.S. Court of Appeals for the Federal Circuit after issuance of the compliance panel's report.[43] The U.S. Congress's delegation of discretion to the USDOC further supports that the USDOC has the flexibility to evaluate case-specific information in addition to the two factors specifically enumerated in Section 771B, and to determine the appropriate manner in which to attribute subsidies to the manufacture, production, or exportation of the processed product, including whether less than 100% of benefits should be attributed to the downstream product. Although the United States acknowledges that the compliance panel did "not find compelling the United States' arguments that Section 771B bestows a broad discretion to determine not only the existence of, but also the *extent to which* pass-through occurs,"[44] U.S. law supports that the USDOC has discretion in its administration and interpretation of the various general terms in Section 771B. Thus, the EU's assumption that the appropriate counterfactual is one in which the USDOC is precluded from interpreting or administering Section 771B such that it could conduct an attribution analysis is incorrect and unreasonable.

37. As previously discussed, the original and compliance panels did not find that the United States cannot assess attribution of subsidy benefits for processed agricultural products – to the contrary, they acknowledged that the covered agreements provide substantial leeway to Members to assess attribution as they see fit. Accordingly, compliance with the recommendations of the DSB could be achieved by amending or reinterpreting the language of Section 771B such that U.S. law no longer requires the USDOC to automatically apply the entire benefit of a subsidy granted to raw agricultural producers to the downstream processors of those products if the two factual circumstances enumerated in Section 771B are present. There are myriad forms that such a change to U.S. law could take which would allow the USDOC to conduct a WTO-consistent attribution analysis for the products at issue. Amendment or reinterpretation of Section 771B is therefore a reasonable and plausible compliance scenario, especially compared to the scenario

[42] *See US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.24 (rejecting a proposed counterfactual that would require complete termination of the anti-dumping duties at issue on the basis that "it is not 'reasonable' to assume that a Member would 'take no action to address dumped imports', when Article VI of the GATT 1994 provides that dumping 'is to be condemned if it causes or threatens material injury'."). *US – Washing Machines (Korea) (Article 22.6 – US)* is discussed in further detail below in paragraphs 38-40.

[43] *See Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States*, 102 F.4th 1252, 1259 (Fed. Cir. 2024) (Exhibit USA-3) ("The statutory term 'substantially dependent' is general in nature, indicating that Congress intended to delegate the question of whether particular facts satisfy the statute's requirements to Commerce. 'Congress…may confer substantial discretion on executive agencies to implement and enforce the laws.' By using nonspecific statutory language, Congress invokes its 'ability to delegate power under broad general directives.'"). The U.S. Court of Appeals for the Federal Circuit issued its decision on May 20, 2024. No party appealed, and thus, under U.S. law, this is a final and binding judicial decision.

[44] *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.60.

suggested by the EU, which assumes without basis that the U.S. government would abandon the ability to conduct any attribution analysis whatsoever for processed agricultural products when doing so is not required by the DSB's recommendations or the covered agreements.

38. Arbitrators in recent Article 22.6 arbitrations have declined to assume that a counterfactual compliance scenario requires complete elimination of the offending measures, and instead have sought to determine what the appropriate counterfactual duty rate would be. For example, in *US – Washing Machines (Korea) (Article 22.6 – US)*, Korea, as the party seeking authorization to impose countermeasures, proposed a counterfactual that required the termination or withdrawal of the entire anti-dumping order that was issued by the United States as a result of the application of the WTO-inconsistent methodology. The United States argued that Korea's proposed counterfactual was not reasonable and could lead to a level of suspension that would be in excess of the level of nullification or impairment because "termination of the measures goes beyond what the United States is obligated to do under the WTO Agreement."[45] Instead, the United States argued that modification, rather than termination, of the anti-dumping orders was the appropriate counterfactual in the dispute.[46]

39. The arbitrator sided with the United States, finding as follows:

> Accordingly, we do not consider Korea's counterfactual scenario of withdrawal of the anti-dumping 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 [large residential washers]. 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.[47]

In so finding, the arbitrator noted that "the benefits accruing to Korea are not, as Korea seems to imply with its proposed counterfactual of withdrawal, that the USDOC would not assign an anti-dumping duty to any Korean exporter, but that the USDOC would *calculate* the margin underlying the duty . . . in a manner consistent with" the relevant WTO obligations.[48]

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[45] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.14.

[46] *See US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.14.

[47] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.21 (emphasis in original).

[48] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.20 (emphasis in original). The arbitrator in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* reached the same conclusion on similar facts, finding that "it would not be reasonable to assume that, had the USDOC ceased using the WTO-inconsistent [measures], it would have withdrawn the entirety of the anti-dumping orders, including the anti-dumping duties imposed on exporters whose dumping margins were not calculated using these WTO-inconsistent methodologies." *See US –*

40. The arbitrator's reasoning in *US – Washing Machines (Korea) (Article 22.6 – US)* is instructive for this dispute. Similar to the counterfactual proposed in *Washing Machines*, the EU's proposal implies that no countervailable subsidy imposed on a raw agricultural product could ever provide an indirect benefit to processors of that product – a position that clearly exceeds the scope of benefits accruing to the EU under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.[49] While the *Washing Machines* dispute concerned the calculation of dumping margins under the Anti-Dumping Agreement, rather than the calculation of attribution of indirect subsidy benefits under the GATT 1994 and the SCM Agreement, the reasoning is the same. Just as a counterfactual that assumed complete withdrawal of the anti-dumping orders at issue rather than recalculation of the implicated dumping margins in a WTO-consistent manner was neither plausible nor reasonable, so too should the Arbitrator find that it is not plausible or reasonable for the EU to assume in its proposed counterfactual that the United States would withdraw the CVD order issued under Section 771B in its entirety, rather than recalculate the level of attribution of benefits in a WTO consistent manner. As the arbitrator in *Washing Machines* put it, "the benefits accruing to [the EU] are not, as [the EU] seems to imply with its proposed counterfactual of withdrawal, that the USDOC would not assign [a CVD] duty to any [Spanish olive] exporter, but that the USDOC would *calculate* the [attribution of subsidy benefits] underlying the duty . . . in a manner consistent with" the United States' WTO obligations.[50]

41. Further, the EU's assertion that "[w]ithout the presumed pass-through, the subsidy rate would have . . . amount[ed] to a *de minimis* level" is unsupported.[51] The USDOC calculated subsidy rates of 7.52%, 13.76%, and 11.63% for each of the mandatory respondents in the underlying investigation.[52] A *de minimis* subsidy rate in a CVD investigation is 1.00%.[53] As discussed throughout this submission, the record does not support the EU's hypothetical conclusion that there should be zero attribution. In addition, as discussed further in Section III.C.2 below, not only are the two enumerated criteria contained in Section 771B, which were

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Anti-Dumping Methodologies (China) (Article 22.6 – US), para. 5.7. Furthermore, the arbitrator made clear that simplicity alone is not an appropriate basis to assume full withdrawal of offending measures in a counterfactual where withdrawal is not required by the DSB's recommendations, stating that an arbitrator "cannot let simplicity outweigh our guiding principle that the counterfactual must represent a reasonable or plausible compliance scenario." *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.8.

[49] Article VI:3 of the GATT 1994 requires that countervailing duties not be levied on a product "in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product . . . ." Similarly, Article 10 of the SCM Agreement requires that countervailing duties are imposed "in accordance with the provisions of the GATT 1994 and the terms of this Agreement." Neither provision eliminates the ability for a Member to assess attribution of indirect subsidies and impose an appropriate resulting duty on processors of raw agricultural products.

[50] *See US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.20 (emphasis in original).

[51] EU Methodology Paper, para. 22.

[52] *See* Ripe Olives From Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 Fed. Reg. 37,469 (July 25, 2018) (Exhibit USA-4). The USDOC updated the rate calculated for Aceitunas Guadalquivir from 27.02% to 11.63% as a result of the Section 129 proceeding. *See* Exhibit EU-15 at p. 29.

[53] 19 U.S.C. § 1671b(b)(4)(A) (Exhibit USA-5).

met in this case, indicative of a high degree of indirect subsidization, but there are other circumstances of the Spanish olive industry that demonstrate a high degree of attribution of benefits to downstream processors is reasonable in this case. Thus, even in the hypothetical scenario of some alternate level of attribution of benefits, the CVD rates would likely have exceeded the *de minimis* threshold.

C. Modifying the U.S. Countervailing Duty Measures on Ripe Olives from Spain following the Expiration of the RPT Would Not Result in any Increase in the Level of Trade of Ripe Olives from the EU to the United States

42. As explained below, the correct counterfactual scenario in this case should assume that a WTO-consistent attribution analysis conducted by the USDOC would determine that 100% of the benefits from countervailable subsidies provided to Spanish raw olive producers are attributable to Spanish ripe olive processors. Therefore, overall CVD duties imposed on Spanish ripe olives would not have changed in a WTO-consistent counterfactual scenario and the level of nullification or impairment to the EU is zero. Such a result is consistent with the DSU and DSB recommendations in this dispute and is evidenced by the specific features of ripe olive production in Spain.

1. The DSU Permits the Arbitrator to Find that a Measure Causes No Nullification or Impairment

43. As an initial matter, Article 3.8 of the DSU provides that:

> In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.[54]

44. Therefore, Article 3.8 of the DSU plainly provides for the possibility that the Member concerned may rebut the presumption of the existence of nullification or impairment by putting forth evidence that a breach of WTO obligations does not have an adverse impact on the complaining Member.[55] This is because nullification or impairment and breach are two separate

[54] DSU, Art. 3.8 (emphasis added).

[55] *See also* DSU, Art. 23.2(a). Article 23.2(a) provides that "Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding". Article 23.2(a) distinguishes between a Member's determination "to the effect that a violation has occurred" and a Member's separate determination "that benefits have been nullified or impaired," as well as a third type of determination "that the attainment of any objective of the covered agreements has been impeded".

concepts.[56] As the arbitrator in *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, explained:

> A violation generates, pursuant to Article 3.8 of the DSU, a *presumption* of nullification or impairment. Article 3.8 does not treat violation as *a form* of nullification or impairment. Article 3.8 merely exempts the party having demonstrated the violation from also having to demonstrate nullification or impairment. It does not modify the fundamental requirement that what is ultimately to be demonstrated is nullification or impairment.
>
> This is confirmed by the last sentence of Article 3.8, which provides the opportunity for the alleged violating party to rebut the presumption of nullification or impairment. If violation was conceptually equated by Article 3.8 to nullification or impairment, there would be no reason to provide for a possibility to rebut the presumption. The theoretical possibility to rebut the presumption established by Article 3.8 can only exist because violation and nullification or impairment are two different concepts.[57]

45. Therefore, although Article 3.8 of the DSU permits a presumption of nullification or impairment, "a Member's legal interest in compliance by other Members does not . . . automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU."[58] Thus, if the Member concerned successfully rebuts the presumption, then there is no nullification or impairment even if the measure at issue continues to exist.[59]

46. Additionally, nothing in Article 3.8 of the DSU, which is one of the "General Provisions" of the DSU, limits the opportunity of the Member concerned to make such a rebuttal only during the original panel phase of a dispute settlement proceeding. Indeed, in the original panel proceeding, the original panel did not make a finding that the United States failed to rebut the

[56] *See*, *e.g.*, *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, paras. 3.20, 3.36.

[57] *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, paras. 3.22-3.23 (underlined emphasis added).

[58] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.10.

[59] *See US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, para. 3.26 ("We accept the view that some nullification or impairment should exist if it has not been rebutted.") (emphasis added).

charge.[60] Rather, the panel assumed that the breach was considered *prima facie* to constitute nullification or impairment under Article 3.8 of the DSU.[61]

47. The more logical time for a Member concerned to make such a rebuttal would be in the context of an arbitration under Article 22.6 of the DSU. In the countermeasures arbitration, the question of the level of nullification or impairment – including whether there is any nullification or impairment at all – is placed squarely before the adjudicator that is tasked by the DSU with evaluating the equivalency of the proposed level of suspension and the nullification or impairment – *i.e.,* the DSU Article 22.6 arbitrator.[62]

48. Furthermore, the factual circumstances related to a WTO-inconsistent measure's impact on the complaining Member might change over time, including after a panel report is circulated and before a suspension request is made under Article 22.2 of the DSU. In an arbitration under Article 22.6 of the DSU, it is incumbent upon the arbitrator to establish the level of nullification or impairment following the end of the RPT, so as to ensure that the level of suspension authorized by the DSB does not exceed the level of nullification or impairment. As the arbitrator in *US – 1916 Act (EC) (Article 22.6 – US)* concluded, "any suspension of obligations in excess of the level of nullification or impairment would be punitive", and "punitive sanctions are prohibited by Article 22.4."[63]

49. Accordingly, it is necessary for the Arbitrator to determine in this proceeding the trade or economic effects on the EU of the maintenance of the WTO-inconsistent aspects of the U.S. CVD measure on ripe olives from Spain after the expiration of the RPT on January 14, 2023.[64] As the EU suggests in its Methodology Paper, the task for the Arbitrator in this proceeding is to

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[60] *US – Ripe Olives from Spain (Panel)*, para. 8.2 ("Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the GATT 1994, the SCM Agreement and Anti-Dumping Agreement, they have nullified or impaired benefits accruing to the European Union under that agreement."). *Cf. US – 1916 Act (EC) (Article 22.6 – US)*, para. 2.4 (stating that the original panel found, "since violations have been established that have not been rebutted by the United States, the United States nullifies or impairs benefits accruing to the European Communities under the WTO Agreement.") (emphasis added).

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

[62] The DSU does not support the findings of past arbitrators that "[i]t is a panel that 'deals with the establishment of the existence of nullification or impairment'." *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.49, n. 142 (citing *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, para 3.24). As highlighted above, the text of Article 3.8 of the DSU does not state that a Member's rebuttal of the presumption of nullification or impairment is limited to a panel proceeding. Further, an interpretation that diminishes Article 3.8 of the DSU is contrary to Article 3.2 of the DSU, which prohibits WTO adjudicators from "add[ing] to or diminish[ing] the rights and obligations provided in the covered agreements."

[63] *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.22.

[64] *See US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.23. *See also US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.27 ("The *US – Section 110(5) of the US Copyright Act (Article 25.3)* arbitrators . . . observed that the object of the proceeding was to 'quantify the economic harm suffered by the European Communities' as a consequence of the continued application of the US legislation.") (citing *US – Section 110(5) of the US Copyright Act (Article 25.3)*, n. 38).

determine the "level of trade that the EU could have expected had the United States complied with the DSB's recommendations and rulings by the end of the RPT, i.e. on 14 January 2023."[65] As explained in the following section, the evidence indicates that the level of trade in Spanish ripe olives exported to the United States would not have changed at all if the United States had complied with the relevant DSB recommendations following the expiration of the RPT, because a WTO-consistent attribution analysis would have determined that 100% of the benefits of the countervailable subsidies at issue are attributable to downstream Spanish ripe olive processors, leaving the CVD rates applied to exports of Spanish ripe olives unchanged.

2. The Level of Nullification or Impairment is Zero

50. As discussed above, the DSB recommendations in this dispute do not require that the USDOC forego an attribution analysis for Spanish ripe olives, and the EU's assumption that the USDOC would not conduct an attribution analysis at all is neither reasonable nor plausible. Rather, the proper counterfactual should assume that the USDOC would in fact conduct an attribution analysis and that it would have discretion in how it conducts such an analysis.

51. Given that the correct counterfactual assumes that the USDOC would analyze attribution of benefits from Spanish raw olive growers to downstream ripe olive processors, it follows that any reduction in the level of trade in ripe olives that the EU could have expected had the United States brought Section 771B into compliance by the end of the RPT would be inversely proportional to the level of subsidy benefits attributable to ripe olive processors that the USDOC would determine through a WTO-consistent attribution analysis. If the USDOC were to conduct a WTO-consistent attribution analysis and find that 100% of the benefits conferred on Spanish raw olive growers are attributable to Spanish ripe olive processors, the counterfactual CVD rates for Spanish exporters of ripe olives would be the same as the current rates developed through application of Section 771B. In such a scenario, no reduction in the level of trade in ripe olives could be expected and, therefore, the level of nullification and impairment to the EU would be zero.

52. Here, the evidence suggests that it is reasonable to assume that, had the USDOC conducted a WTO-consistent attribution analysis, it would have nonetheless found that 100% of the benefits of direct subsidies bestowed upon Spanish raw olive producers are indirectly attributable to Spanish ripe olive processors. Such a result is consistent with the relevant DSB recommendations in this dispute as neither the original nor the compliance panel found that, as a matter of fact, Spanish ripe olive processors do not receive the entirety of the benefit of subsidies bestowed on Spanish raw olive producers.

53. First, it is important to note that the two enumerated criteria contained in Section 771B are indicative of a high degree of downstream attribution of countervailable subsidy benefits, even if the DSB recommendations require that they cannot be <u>exclusively</u> relied upon to determine attribution in a WTO-consistent manner. This is precisely why the U.S. Congress included these two factual considerations in Section 771B in the first place. The original panel acknowledged that these two factual considerations "may be relevant to an examination of

[65] EU Methodology Paper, para. 20.

whether a subsidy to a raw agricultural product has passed-through to a processed agricultural product" while noting that "the probative value of those factors . . . depend[s] upon the specific facts of the situation in question . . . ."[66] Likewise, the EU accepted in prior submissions before the original panel that the conditions in Section 771B "may play a role for assessing whether market conditions make it more likely or less likely that benefit may pass through", but argued that they fall short of taking into account "all relevant facts".[67]

54. Thus, neither the original panel nor the EU have suggested that the two conditions enumerated in Section 771B are irrelevant to an attribution analysis. To the contrary, where, as in the case of Spanish ripe olives, these two conditions have been established by the USDOC, the existence and extent of attribution of countervailable subsidy benefits to downstream processors is more likely than in their absence. Accordingly, the presence of these two factual circumstances in the market for Spanish ripe olives is itself consistent with a higher degree of attribution of benefits to downstream processors.

55. Second, the specific circumstances of the Spanish olive industry demonstrate that it is both reasonable and plausible for the Arbitrator to assume that 100% of subsidy benefits conferred on Spanish raw olive producers are attributable to Spanish olive processors. This is apparent both from the relevant economic data on purchases of raw olives by Spanish olive processors and from the structure of the Spanish industry for table olives. Beginning with the relevant economic data, a 2016 study published by Spain's Ministry of Agriculture, Food and Environment estimated the average total cost of production for table olives as 670 EUR per metric ton of olives produced.[68] Comparing this to the average prices paid for raw olives in the relevant years reveals that average prices for raw olive purchases were below average costs of production for the reference year used by the EU's proposed methodology (2016).[69] This fact alone reveals that a substantial degree of the benefits from the subsidies at issue are attributable to downstream processors. In fact, on an absolute tonnage basis, due to the considerable loss and destruction that occurs when Spanish raw table olives are processed into ripe table olives, the EU's subsidy payments have in practice delivered an additional benefit to the Spanish processors

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[66] *US – Ripe Olives from Spain (Panel)*, para. 7.166.

[67] *See US – Ripe Olives from Spain*, 12 November 2020 response to Panel question No. 12, para. 116 (Exhibit USA-6); *See also US – Ripe Olives from Spain (Panel)*, para. 7.160, n. 310 ("The European Union submits that the two criteria in Section 771B may, at best, contribute to assessing the likelihood of pass-through benefit. However, the European Union argues that a likelihood of pass-through does not 'establish', 'find', or 'determine' the existence of pass-through of benefit as required under the relevant provisions.") (emphasis added).

[68] Ministerio De Agricultura, Alimentación y Medio Ambiente, *Diagnóstico sobre el sector de la aceituna de mesa en España*, p. 28 (2016), https://www.mapa.gob.es/ca/agricultura/temas/producciones-agricolas/160427diagnosticoaceitunademesadefinitivo_tcm34-135524.pdf (Exhibit USA-7, courtesy translation of relevant excerpts included as Exhibit USA-8).

[69] *See* Aceituna de Verdeo, OBSERVATORIO DE PRECIOS Y MERCADOS, https://www.juntadeandalucia.es/agriculturaypesca/observatorio/servlet/FrontController?action=Static&subsector=946728&producto=60001&url=generadorInformesOR.jsp (select "Por campaña" in the drop down menu for "Selecciona el tipo de informe y período", select "Campaña 2016/2017" in the drop down menu for "Campañña/s", and then click "Generar Informe". The resulting page will show a weighted average price (precio medio ponderado) of 0.61 EUR/kg. Conducting the same query for "Campaña 2015/2016" yields a weighted average price of 0.65 EUR/kg.)

relative to the growers. From the 2017/2018 harvest year through the 2021/2022 harvest year, for example, the Spanish processors' five-year average loss/destruction percentage was 13.35%, which meant by way of illustration that processors received the advantage of 113.5 metric tons (mt) of below-cost subsidized raw product to produce 100 mt of Spanish ripe olives.[70] Thus, in the absence of the relevant subsidies, Spanish processors would have had to pay higher prices to their grower suppliers simply to ensure that their grower suppliers minimally covered their costs of production and remained economically viable as a source of Spanish raw table olive supply.

56. The structure of the Spanish olive industry provides further support for the assumption that EU subsidies are attributed in their entirety from Spanish raw olive producers to ripe olive processors. Much of Spain's table olive industry is structured in a way that requires and facilitates a mutuality of reliance between the Spanish growers and processors. As an example, much of Spain's table olive output is produced by "two-tiered" grower and processor cooperatives. Agro Sevilla, for example, which is a major Spanish ripe olive exporter to the United States, is a two-tiered cooperative, as is DCOOP, a major Spanish olive producer.[71] The industry's pervasive cooperative structures have been established and maintained precisely to enable a seamless, mutually reliant line of production between the table olive growers and processors.

57. This mutual reliance between table olive producers and ripe olive processors is again apparent in purchasing trends. The support provided by the EU has allowed Spanish olive processors to purchase the vast majority of Spain's raw olive production, year over year. For example, data on annual purchases of raw olives by Spanish olive processors reveal that such purchases are nearly identical to Spanish raw olive production figures on a five-year average basis for harvest years 2017/2018 through 2021/2022, indicating that Spanish ripe olive processors purchase raw olives at a rate equivalent to domestic production.[72] Thus, Spanish raw

[70] *See* Cooperativas Agro-Alimentarias España, *Consejo Sectorial Aceituna de Mesa* (Sep. 11, 2023) (Exhibit USA-9, courtesy translation of relevant excerpts included as Exhibit USA-10) at p. 16 (showing five-year average raw olive production volume of 563.174 thousand tons and five-year average adjustments and losses volume of 75.203 thousand tons for harvest years 2017/2018 through 2021/2022). This figure does not take into account the loss of weight that accompanies pitting or slicing olives during processing, which further increases the loss percentage associated with olive processing.

[71] *See Agrosevilla Group*, AGROSEVILLA, https://agrosevilla.com/en/agrosevilla-group/ (last visited Jan. 26, 2025) ("Agrosevilla is currently made up of 12 cooperative societies and more than 4,000 associated olive-growers, and has an annual production figure of over 80,000 tons of olives."); *Who We Are*, DCOOP, https://www.dcoop.es/the-cooperative (last visited Jan. 26, 2025) ("We are a big agrifood cooperative of thousands of farmers and stock breeders who work together to offer their products.").

[72] *See* Cooperativas Agro-Alimentarias España, *Consejo Sectorial Aceituna de Mesa* (Sep. 11, 2023) (Exhibit USA-9, courtesy translation of relevant excerpts included as Exhibit USA-10) at pp. 14, 16. Page 16 shows a five-year average raw olive production volume of 563.174 thousand tons while page 14 shows a five-year average volume of total "Net Raw Olive Input" for processing of 563.063 thousand tons (calculated by averaging the values for the same five harvest years). In addition, page 16 shows that the five-year average of imports of raw olives into Spain (34.068 thousand tons) only accounts for about 6% of average olive purchases by processors over that same time period (563.063 thousand tons, calculated as previously explained). Taking these data points together indicates that on average over the five-year period from harvest year 2017/2018 through 2021/2022, purchases by Spanish olive processors accounted for virtually all of Spain's raw olive production and supplementation of raw olive supplies through imports was negligible.

olive producers are substantially reliant on Spanish ripe olive processors to offtake their annual crop yields and Spanish processors do in fact purchase virtually all of this production, further demonstrating that Spanish olive processors' purchasing decisions are enabled and supported by the EU's subsidy support policies. Furthermore, customs rules of origin mandate that the origin designation for table olives be the country of origin of the raw olives that comprise the consumable table olives, providing yet another incentive for Spanish processors to purchase only Spanish raw olive inputs, regardless of costs of production or price.[73] If Spanish processors were to abandon Spain's raw table olive production and rely instead on, for example, Moroccan or Egyptian raw table olives, those goods could not be identified as a "Product of Spain." These rules of origin practices reinforce the interlinkages and mutuality of interest between Spanish raw olive growers and ripe olive processors.

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

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

59. An examination of the economic analysis proposed by the EU to determine the level of nullification or impairment further demonstrates that the EU's requested level of suspension is not equivalent to the level of nullification or impairment. In the discussion that follows, the United States puts aside the fact that the nullification or impairment should be zero for the moment. Instead, the discussion focuses on the errors in the EU's proposed methodology and the results that would be obtained by using a methodology that corrects the errors in the EU's estimation, even assuming a counterfactual CVD rate of zero, which, as discussed above, is not a reasonable or plausible assumption.

60. The key issue in this proceeding is the impact on trade flows of maintaining the WTO-inconsistent U.S. CVD measure following the expiry of the RPT. The United States generally agrees with the EU that an Armington-based partial equilibrium ("PE") model is suitable for estimating trade effects consistent with the market outcomes expected under economic theory, where products are differentiated by source countries, and consumers view products from

[73] *See, e.g.*, U.S. Customs and Border Protection Ruling Letter N308088 (Dec. 23, 2019) (Exhibit USA-11) (ruling that processing of olives does not constitute "substantial transformation" for purposes of determining country of origin and therefore determining that "whole, stuffed, sliced, or broken olives will be considered a product of the country in which the olives are grown").

different countries as imperfect substitutes. Arbitrators have accepted similar models in recent proceedings under Article 22.6 of the DSU.[74]

61. However, the EU model differs from the previously mentioned WTO arbitration methodologies by aiming to capture the global trade reallocation effects of remedy actions across all countries rather than focusing on the specific market directly affected by the actions – that of the United States. To the contrary, the EU model excludes from its assessment the key constituent and intended beneficiary of the disputed measures, U.S. domestic producers of ripe olives.

62. The United States disagrees with the EU's assertion that these modifications render the EU model "more complete and hence more accurate".[75] Instead, these changes not only introduce unnecessary data requirements and analytical complexity but also distort the estimation results for the level of nullification or impairment by overestimating the trade diversion effects.

1. The EU Improperly Isolates the Spanish Market in Its Analysis and Ignores Gains Accruing to Other EU Member States in Calculating Nullification and Impairment

63. As an initial matter, the EU's proposed methodology includes an unexplained and unsupportable, yet critical, scoping decision. In its Methodology Paper, the EU asserts its intention "to suspend benefits at an annual level of 33.5 million USD",[76] assuring the Arbitrator that "[t]he level of suspension of concessions or other obligations will be equivalent to the level of nullification or impairment of benefits accruing to the EU . . . as required by Article 22.4 of the DSU."[77] However, when the EU presents the results of its measurements in Table 2 of its Methodology Paper, those results make clear that 33.5 million USD is the level of alleged nullification and impairment for the Spanish market in isolation, whereas the "Rest of EU" benefitted in the amount of 7.92 million USD.[78] There is no basis in the DSU or the DSB recommendations in this dispute for the EU to isolate the Spanish market when calculating nullification and impairment, rather than calculate nullification and impairment to the EU as a whole. Accordingly, the appropriate level of nullification and impairment to the EU under the EU's proposed methodology would in fact be the combination of measured impacts on Spain

[74] *See, e.g.*, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 11.2; *US — Countervailing Measures (China) (Article 22.6 – US)*, paras. 3.326-30; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 6.81; *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.119, 4.61.

[75] EU Methodology Paper, para. 32.

[76] EU Methodology Paper, para. 13.

[77] EU Methodology Paper, para. 19 (emphasis added).

[78] *See* EU Methodology Paper, Table 2, column (e). *See also* EU Methodology Paper, para. 45 ("The corresponding amount of USD 33.5 million reflects the value by which Spanish imports would have increased in 2023 without the WTO-inconsistent duties (see Table 2, column (e)).") (emphasis added); EU Methodology Paper, Table 1 (showing that other EU Member States gained market share in imports of ripe olives into the United States during the relevant time period).

(allegedly 33.5 million USD) and impacts on the rest of the EU (allegedly -7.92 million USD), resulting in a total value of 25.58 million USD.

64. As the EU correctly observes, "[t]he level of suspension of concessions or other obligations" must be "equivalent to the level of nullification or impairment of benefits accruing to the EU."[79] This requirement is set out by Article 22.4 of the DSU and undergirds the Article 22 process for seeking and challenging suspension of concessions or other obligations. The suspension process begins with Article 22.2 of the DSU, which allows a "party having invoked the dispute settlement procedures [to] request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."[80] Once such a request is made, "the Member concerned" may "object[] to the level of suspension proposed", which objection automatically refers the matter to arbitration.[81] In the ensuing arbitration, "[t]he arbitrator acting pursuant to paragraph 6 . . . shall determine whether the level of such suspension is equivalent to the level of nullification or impairment."[82]

65. Here, the EU is the only "party having invoked the dispute settlement procedures" that has requested "authorization from the DSB to suspend application . . . of concessions or other obligations under the covered agreements."[83] In fact, when it made its Article 22.2 request, the EU was unambiguous that it was requesting to suspend concessions and other obligations in an amount equivalent to the level of nullification and impairment experienced by the EU, not one of its Member States in isolation, stating:

> As required by Article 22.4 of the DSU, the annual level of suspension proposed is equivalent to the level of nullification or impairment of benefits accruing to the European Union from the United States' failure to bring the measure at stake into compliance with the recommendations and rulings of the DSB. On this basis, the European Union intends to suspend benefits at an annual level of approximately 35 million US Dollars.[84]

Pursuant to Article 22.6 of the DSU, the United States objected to the levels of suspension of concessions or other obligations "proposed by the European Union" in its Article 22.2 request,

[79] EU Methodology Paper, para. 19.

[80] DSU, Art. 22.2.

[81] DSU, Art. 22.6.

[82] DSU, Art. 22.7.

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

[84] Recourse to Article 22.2 of the DSU by the European Union, WT/DS577/20 (Nov. 15, 2024) (emphasis added). The EU was equally unambiguous in making its request for suspension of concessions and related obligations for the "as such" recommendations, stating "the European Union requests authorization to suspend concessions and related obligations at an annual level based on a formula commensurate with the trade effects to be caused to the European Union by the United States' non-compliance with the 'as such' recommendations and rulings." Recourse to Article 22.2 of the DSU by the European Union, WT/DS577/20 (Nov. 15, 2024) (emphasis added).

referring the matter to arbitration.[85] Thus, under Article 22.7 of the DSU, the Arbitrator should determine whether the level of suspension requested by the EU is equivalent to the level of nullification or impairment experienced by the EU, not by one Member State only.

66. As the EU's Methodology Paper demonstrates, the level of suspension requested by the EU is not equivalent to the level of nullification and impairment to the EU as a whole. Rather, the EU attempts to isolate its assessment of nullification and impairment to one of its Member State markets while ignoring benefits gained by other Member State markets in the same modeling exercise.[86] In doing so, the EU puts forth a level of suspension that is necessarily in excess of the level of nullification and impairment experienced by the EU, even accepting all other features and assumptions in the EU's proposed methodology, which are flawed in their own right, as discussed further below. Such an approach would generate impermissible punitive sanctions.[87]

67. The EU's proposal to isolate the nullification and impairment to Spain conflicts with its "as such" request. There, the EU makes clear its intent to use its proposed "as such" formula "for every future WTO-inconsistent application by the United States of Section 771B in investigations against EU industries", not just Spanish industries.[88] In other words, the EU would assess nullification and impairment in the case of ripe olives by looking at the impacts to Spain, alone, but would reserve its right to bring an "as such" suspension request for application of Section 771B to exports from any EU Member State.

68. The EU is the WTO Member that brought this dispute, litigated it through the original and compliance panels, and is now seeking authorization to suspend concessions or other obligations in the amount of the nullification or impairment that it has experienced.[89]

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[85] Recourse to Article 22.6 of the DSU by the United States, WT/DS577/21 (Nov. 22, 2024).

[86] *See* EU Methodology Paper, Table 2, column (e). *See also* EU Methodology Paper, para. 45 ("The corresponding amount of USD 33.5 million reflects the value by which Spanish imports would have increased in 2023 without the WTO-inconsistent duties (see Table 2, column (e)).") (emphasis added); EU Methodology Paper, Table 1 (showing that other EU Member States gained market share in imports of ripe olives into the United States during the relevant time period).

[87] As previously discussed, the DSU does not allow for punitive sanctions on Members for non-compliance with WTO obligations and therefore suspension of concessions or other obligations in excess of the appropriate level of nullification and impairment risks violating that prohibition. *See, e.g.*, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.22 ("any suspension of obligations in excess of the level of nullification or impairment would be punitive. We recall that both parties to this dispute accept the proposition, with which we fully agree, that punitive sanctions are prohibited by Article 22.4.").

[88] EU Methodology Paper, para. 49.

[89] The EU's own regulations for implementing a properly granted authorization to suspend concessions or other obligations make clear that the EU views itself as a single unit in this regard. The relevant EU regulations define "level of nullification or impairment" as "the degree to which the benefits accruing to the Union under an international trade agreement are affected." *See* Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council 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

Accordingly, the Arbitrator should reject the EU's proposal to isolate the Spanish market in measuring nullification and impairment and must instead measure nullification and impairment to the EU market as a whole, taking into account gains made by other olive exporting EU Member States.

2. The EU's PE Model Introduces Unnecessary Data Requirements and Analytical Complexity that Could Distort Estimated Results

69. The EU's PE model technically includes four entities (countries or regions): the United States, Spain, other EU countries, and the rest of the world ("ROW"). However, the EU model only analyzes the trade reallocation effects due to the trade remedy actions across three of the four entities, excluding the United States from its analysis.[90] As a result, the EU estimation requires data on imports of in-scope ripe olives for each of the three relevant entities by source. However, the ripe olives subject to the relevant U.S. CVD duties fall under a subset of the 6-digit Harmonized Tariff Schedule ("HTS") code 2005.70 pertaining to prepared or preserved olives. Because the description for olives subject to the CVD order does not tie directly to the HTS classification system, the best available level of detail for identifying subject olives is at the 10-digit HTS level within the U.S. tariff schedule, making it challenging to identify subject olives in the national tariff schedules of other countries.[91] As a result, the EU calculates the proportion of eligible olives in U.S. imports under HTS 2005.70 from each of the three entities involved and then applies these percentages to determine the imports of eligible ripe olives by source for each of the three entities.[92]

70. The global dimension of the EU model is unnecessary, overly complex, and extraneous because the dispute concerns CVD rates on U.S. imports from Spain. Moreover, the EU's estimation results further demonstrate that the trade reallocation effects resulting from the U.S. CVD duties would predominantly impact Spanish exports, with minimal consequences for the other two entities included in the analysis.[93]

71. In addition, the calculation to estimate the imports of eligible ripe olives for each entity subject to the relevant CVD duties is equivalent to assuming that all three entities in the model have the same percentage of imported eligible ripe olives by source. This assumption is a substantial oversimplification and the EU has not presented any basis for it. Furthermore, such

international trade rules, in particular those established under the auspices of the World Trade Organization, 2014 O.J. (L 189), Art. 2(c) (Exhibit USA-12).

[90] *See* Exhibit EU-14, p.2.

[91] *See* EU Methodology Paper, para. 34 ("However only a subset of all the headings of the HS2005.70 code – which covers all olives – are fully covered by United States measures and these specific headings can only be identified in the US tariff schedule (HTSUS) and not in the national tariff schedules of other countries."). The U.S. and EU national tariff schedules are synchronized only at the 6-digit level of the HTS.

[92] *See* EU Methodology Paper, para. 34; Exhibit EU-14, p.2-6.

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

an assumption distorts the analysis and leads to serious inaccuracies in estimating nullification and impairment.

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

72. The EU's proposed methodology for calculating nullification and impairment excludes completely any consideration of U.S. domestic ripe olive producers based on the argument that domestic production "does not contribute much to the determination of the impact of tariffs on imports because of the very low United States domestic supply elasticity of raw olives which are used to produce ripe olives."[94] More specifically, the EU states that "United States domestic supply of raw olives will not be able to react swiftly in case of additional needs of the (ripe) olive industry."[95] The EU's complete exclusion of domestic ripe olive production in its proposed methodology is unsupported by prior arbitrations, factually suspect, and incompatible with the rationale behind imposing anti-dumping and countervailing duties on ripe olives from Spain in the first place.

73. As the EU acknowledges, its proposal to use a two-step Armington model that ignores domestic production of the subject good is not an approach that previous arbitrators have relied upon.[96] Indeed, since the Armington model was first accepted by an arbitrator in *US – Washing Machines (Korea) (Article 22.6 – US)*, no arbitrator has relied on a variant of the model that would exclude domestic production.[97] This is because it would be unreasonable to assume that domestic production of the product at issue has no capacity to capture market share from the affected imports, especially in a case involving anti-dumping and countervailing duties, like here, where the entire purpose of the measures at issue is to reverse the capture of market share by illegally dumped and subsidized imports.

74. The EU claims that its proposed model is "more complete and hence more accurate" because it "considers the reallocation of trade among third countries (trade diversion), whereas the models used by arbitrators in DS464 and DS471 only consider the reallocation among United States imports and United States domestic production/supply."[98] However, the EU never explains why a model that considers reallocation of trade among third countries to the exclusion of reallocation of trade between affected imports and domestic supply is more accurate for assessing nullification and impairment arising from the loss of market share in the domestic market of the country imposing the measures, especially when those measures are designed to

[94] EU Methodology Paper, para. 32.

[95] EU Methodology Paper, para. 32.

[96] EU Methodology Paper, para. 32 (stating that the Armington models "applied in DS464 and DS471 also take into account domestic production whereas the EU model does not.").

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

[98] EU Methodology Paper, para. 32.

provide relief to that industry. In any case, the EU presents a false choice between the two options. Armington models adopted by Article 22.6 arbitrators have routinely included varieties or entities for (1) domestic production, (2) subject imports from the complaining Member, and (3) imports from the rest of the world, thus accounting for both trade diversion to third countries and market share captured by domestic producers.[99] The EU has not provided any rationale for why the appropriate methodology in this case cannot similarly account for domestic production of ripe olives.

75. In addition, the EU's justification for excluding U.S. domestic production from its methodology is unfounded. As a factual matter, the EU is simply incorrect in assuming that domestic ripe olive producers are unable to scale production to meet new demand. The EU argues that its model does not take into account U.S. domestic production of ripe olives because of the arguably low supply elasticity of raw olives in the United States. Specifically, the EU argues that the U.S. production of raw olives is rigid as it takes from five to seven years for olive trees to become commercially bearing, and the United States olive crop acreage has decreased in recent years.[100] This characterization fails to accurately reflect the input supply conditions for the U.S. ripe olive processing industry, which includes both domestic raw olives and imported raw and provisionally preserved olives. As the U.S. International Trade Commission ("USITC") concluded in its 2024 review report, U.S. table olive producers "were able to supply the U.S. market at historical levels using domestically grown raw olives, imports of raw olives, and inventories, and most responding purchasers had reported no supply constraints from any source."[101]

76. Beginning with the import side, imported olive inputs can and do serve as substitutes for domestic raw olives in U.S. domestic ripe olive production. In the 2024 review by the USITC, the U.S. ripe olive industry reported that "they are able to maintain a stable supply [of raw olives] by supplementing domestic raw olives with imported raw or provisionally preserved olives from other countries, including Argentina, Mexico and Spain".[102] In addition, Musco, one of the two largest ripe olive producers in the United States, reported that "the share of domestic olive inputs (raw and provisionally preserved olives) used in domestic production of ripe olives declined during the [period of review] . . . . Going forward, Musco expects to reduce its reliance on imported raw materials because, in its view, the domestic crop outlook for the next few years appears strong."[103]

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[99] *See, e.g.*, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 7.91; *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.327-28; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.5.

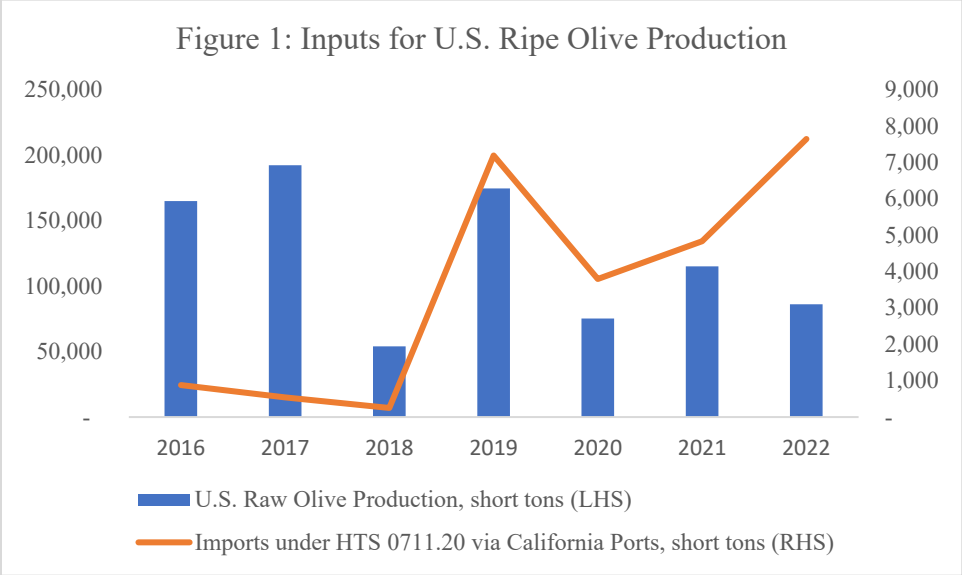
[100] *See* EU Methodology Paper, para. 32.

[101] Ripe Olives from Spain, Inv. Nos. 701-TA-582, 731-TA-1377, USITC Pub. 5526 (July 2024) (Review), p. 29 (Exhibit USA-13).

[102] Ripe Olives from Spain, Inv. Nos. 701-TA-582, 731-TA-1377, USITC Pub. 5526 (July 2024) (Review), p. 17 (Exhibit USA-13).

[103] Ripe Olives from Spain, Inv. Nos. 701-TA-582, 731-TA-1377, USITC Pub. 5526 (July 2024) (Review), p. 18 (Exhibit USA-13).

77. To illustrate this argument clearly, Figure 1 below shows that U.S. imports of provisionally preserved olives (olives that have undergone some processing for preservation but remain unsuitable for immediate consumption) under HTS 0711.20 via California ports, which represented the vast majority of total U.S. imports, rose steadily in recent years when U.S. domestic raw olive production was relatively low.[104] Figure 1 demonstrates that the supply of olive inputs available to the U.S. ripe olive processing industry can adjust quickly if warranted by changes in market conditions, and the U.S. domestic supply of ripe olives should be more elastic than assumed by the EU, which is essentially zero.



[105]

78. Likewise, on the production side, the EU fails to take into account the various potential uses of domestically produced raw olives. U.S. domestically produced raw olives can rapidly switch from the ripe olive processing sector to the olive oil crushing sector based on relative market conditions. Thus, changes in relative market conditions that benefit the ripe processing sector relative to the oil processing sector would be expected to increase the supply of domestic raw olives available to the ripe processing sector through switching, even if the overall supply of raw olives remains static.

79. Thus, the U.S. domestic supply of ripe olives can be significantly more elastic than assumed by the EU in its Methodology Paper. In fact, the market features discussed above show that the EU's assumption that U.S. domestic supply elasticity is essentially zero is unreasonable and based on the incorrect premise that the U.S. domestic industry is entirely reliant on the constraints of U.S. raw olive crop yields. To the contrary, according to estimates from USITC,

[104] California ports were focused on because ripe olive production in the United States is based in California.

[105] Data for Figure 1 can be found in Exhibit USA-14.

the domestic supply elasticity for ripe olives should be in the range of 4 to 6 as noted in its 2018 investigation report, or in the range of 3 to 6 as noted in its 2024 review report, not zero.[106]

80. The improper exclusion of U.S. domestic production in the EU's model serves to inflate the market shares for Spain and other foreign countries at the expense of U.S. producers and leads to an overestimation of the trade diversion effects and thus the level of nullification and impairment, as it suggests that any reduction in imports from countries subject to trade remedy actions would only be replaced by imports from non-subject countries. In contrast, under the more reasonable assumption of a positive domestic supply elasticity for the United States, consumers would have the option to purchase domestic goods rather than depending only on imports from non-subject countries, which would mitigate the trade diversion effect.

4. The EU's Methodology Ignores the Anti-Dumping Duties on Spanish Olives During the Relevant Time Period

81. As previously mentioned, the United States generally agrees with the EU that the two-step Armington approach adopted by arbitrators in prior proceedings under Article 22.6 of the DSU should adequately estimate the level of nullification or impairment for the current proceeding. However, the two-step approach adopted by the EU contains another significant flaw which results in a trade impact estimate not equivalent to the level of nullification or impairment. Specifically, the counterfactual market shares from the first step of the EU's two-step approach fail to adequately represent actual competitiveness, as the EU's simulation only considers the relevant CVD duties and ignores accompanying anti-dumping ("AD") duties impacting the same products during the same time period. Accordingly, the United States proposes an adjustment to the EU's model to address this shortcoming and to correct the EU's consequent overestimation of the level of nullification or impairment, as outlined below.

82. Applied to the present case, the two-step approach followed by the EU begins by calculating the market shares of the three entities (Spain, other EU countries, and ROW) within total U.S. imports in 2016, the year prior to the imposition of provisional duties pursuant to the CVD measure (the "reference year"). In the first step, the EU applies the Armington-based PE model for the first time to simulate how the reference year market shares would have changed due to the United States imposing WTO-inconsistent CVD duties on imports of ripe olives from Spain. Under the EU model, these counterfactual market shares are assumed to reflect the actual relative competitiveness position of each entity in 2023, the year the RPT expired.

83. In the second step, the generated counterfactual market shares are applied to determine the distribution of total imports among involved entities in 2023, creating an alternative market scenario under the assumption that, during the seven years that the CVD measure had been in place, no factors other than the CVD duties have altered the relative competitiveness among the entities. This new alternative market for 2023 is applied to the PE model for the second time to simulate the effects of modifying the CVD rates to be WTO-consistent on the market share of

[106] Ripe Olives from Spain, Inv. Nos. 701-TA-582, 731-TA-1377, USITC Pub. 4805 (July 2018) (Final), p. II-22 (Exhibit EU-9); Ripe Olives from Spain, Inv. Nos. 701-TA-582, 731-TA-1377, USITC Pub. 5526 (July 2024) (Review), p. II-25 (Exhibit USA-13).

each entity. The difference between Spain's counterfactual market share as applied to the actual 2023 market and its predicted market share after modifying the CVD rates to be WTO-consistent in the second step represents the trade impact estimate under the EU's approach.[107]

84. Therefore, the two-step approach adopted by the EU relies on trade data in the year-prior to calculate the counterfactual market shares for the involved three entities in the first step, which are intended to reflect the actual relative competitiveness position of each entity in 2023. However, Spain's market share in the reference year is distorted by the fact that Spanish firms were selling ripe olives in the U.S. market at prices that were less than fair value, i.e., dumping, the existence of which is not in dispute in this proceeding. However, the EU excludes the AD duties from its calculation.[108]

85. Failing to account for the AD duties and only including the CVD duties in the first step of the EU's approach generates counterfactual market shares that inflate Spain's market share and overstate its real underlying competitiveness in 2023, leading to an inappropriately high trade impact estimate that is not equivalent to the level of nullification or impairment. Because the appropriate counterfactual is the withdrawal of the WTO-inconsistent measures at the end of the RPT (and not the withdrawal or denial of other measures), the EU model's failure to account for the relevant AD duties that applied to Spanish ripe olives during the RPT creates an inaccurate picture of the relative competitiveness of Spanish ripe olive producers. The effect of this omission is that the constructed 2023 market is fundamentally distorted and significantly overstates the level of nullification or impairment. It is necessary to correct for these distortions because, as the arbitrators observed in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, "we need to guard against claims of lost opportunities where the causal link with the inconsistent [measure] is less than apparent, i.e., where exports are allegedly foregone not because of the [inconsistent measure] but due to other circumstances."[109]

86. Here, the impact of the parallel AD duties placed on ripe olives from Spain is readily apparent. The Armington model proposed by the United States reveals that the counterfactual market share for Spain in the reference year (2016) declines from 35% to 26%, nearly 10 percentage points, when the relevant AD duties are added to the existing CVD duties. This results in a substantial reduction in total nullification and impairment of roughly 4.6 million USD annually.[110] This result is consistent with the conclusions of the USITC in its recent 2024 review of the AD and CVD orders on ripe olives from Spain, where it found "that the likely volume of

[107] As discussed in Section III.D.1, the EU's focus on measuring trade impacts to Spain, rather than to the EU as a whole, is not supported by the DSU. Accordingly, the approach utilized by the United States also must make an adjustment for this issue by using the combination of impacts on both Spain and the rest of the EU to represent the EU-wide trade impact estimate equivalent to the level of nullification or impairment experienced by the EU.

[108] *See* EU Methodology Paper, para. 22.

[109] *EC – Hormones (US) (Article 22.6 – EC)*, para. 41; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 40. *See also EC – Hormones (US) (Article 22.6 – EC)*, para. 77 (refusing to consider, as "too speculative," lost exports that would have resulted from foregone marketing campaigns).

[110] *See* Exhibit USA-15.

subject imports would be significant, both in absolute terms and relative to consumption in the United States, if the orders were revoked."[111]

87. Accordingly, it is necessary to adjust the EU's proposed methodology in order to account for the effect of both the AD and CVD duties on the counterfactual market shares of involved entities in the U.S. market in step one of the two-step Armington approach. This is the only way to represent the actual market conditions faced by all involved entities in 2023. In step two, only the CVD duties are modified to simulate an alternative new market in 2023 (the AD margins remain the same as in step one).

5. Calculation That Would Be Involved in Properly Applying a Two-Step Armington-Based PE Methodology to Estimate the Nullification or Impairment

88. Having established that the EU's proposed methodology fails to accurately estimate the level of nullification and impairment as required by the DSU, in this section, the United States presents the correct Armington-based PE methodology similar to those used in multiple WTO arbitrations to estimate the trade impacts equivalent to the level of nullification or impairment. In contrast to the PE model adopted by the EU that attempts to estimate hypothetical global trade flows, the U.S. model concentrates specifically on analyzing the U.S. market where the CVD duties were applied. This targeted approach enables a comprehensive analysis of the complex market interactions between domestic and imported varieties in the U.S. market, as is required for an accurate estimation of trade impacts. Accordingly, it provides a precise estimate of the level of nullification or impairment, similar to the approach used in past WTO arbitrations.

89. Moreover, in contrast to the two-step approach advocated by the EU, the United States applies both AD and CVD duties to generate the counterfactual market shares for Spain in 2023 in the first step. It further combines the impacts of removing the WTO-inconsistent CVD duties on Spain with the impacts on the rest of the EU to estimate the appropriate level of nullification and impairment for the EU as a whole. Furthermore, although the United States generally agrees with the EU on the types of data required for applying the Armington-based two-step approach, the EU has erred in compiling certain data inputs. The United States explains the EU's errors and provides corrected data inputs needed for estimating the trade impacts, and hence the nullification and impairment.

a. Technical Discussion of the Armington-Based PE Model Adopted by the United States

90. Unlike the EU model, which incorrectly focuses only on U.S. imports from the three entities examined, the U.S. model considers all four relevant entities: the United States (*D*), Spain (*S*), the rest of the EU (*REU*), and the rest of the world (*ROW*). Total U.S. demand for a given product takes the form below, where *E* represents a Constant Elasticity of Substitution (CES) composite of domestic and imported varieties of the product, *P* is the Armington CES

[111] Ripe Olives from Spain, Inv. Nos. 701-TA-582, 731-TA-1377, USITC Pub. 5526 (July 2024) (Review), p. II-25 (Exhibit USA-13)

price index, Y_0 is the total U.S. expenditure on the product if *P*=1, and ϵ is the price elasticity of demand:

$$E = Y_0 P^{\epsilon}$$

91. The price index *P* represents is defined as follows:

$$P = (\sum_i b_i p_i^{1-\sigma})^{\frac{1}{1-\sigma}}, \textit{ i=D, S, REU, and ROW}$$

where b_i is the initial market share of entity *i*, p_i is the price of variety *i,* that may be sourced from one of the four entities, and σ is the constant elasticity of substitution between product varieties from all four entities. As explained in detail in Section III.D.5.b.v below, the United States follows the EU's methodology and assumes consumer demand following a *non-nested* CES approach, suggesting consumers substitute at a constant rate between all sources of ripe olives.

92. Conditional demand functions for domestic and imported varieties of the product are defined as follows:

$$d_i = b_i \left(\frac{P}{p_i}\right)^{\sigma} E, i = D, S, REU, and\ ROW$$

where d_i represents the quantity demanded of variety *i*.

93. Similarly, supply functions for domestic and imported varieties of the product are defined as follows:

$$s_D = a_D (p_D)^{\eta_D}$$

$$s_j = a_j \left(\frac{p_j}{1 + t_j}\right)^{\eta_j}, j = S, REU, and\ ROW$$

where s_D represents the quantity supplied from domestic entity *D*, s_j represents the quantity supplied from foreign entity *j*, η_D is the elasticity of supply of domestic entity *D*, η_j is the elasticity of supply of foreign entity *j* that may vary across foreign suppliers, and t_S is the *ad valorem* duty rate applied only to Spanish imports.

94. In the current proceeding, the United States follows the EU's methodology and assumes that the foreign supply elasticity η_j is the same across foreign entities. As discussed in Section III.D.5.b below, in contrast to the EU methodology, the United States assumes that the domestic supply elasticity η_D is positive but smaller than the foreign supply elasticity η_j.

95. Finally, the market clearing condition is that demand equals supply for all entities:

$$d_i = s_i$$

b. Correct Data Inputs that Should Be Used in Applying the Two-Step Approach

96. The United States generally agrees with the EU on the four types of data required for applying the Armington-based two-step approach: (i) data on the U.S. market for the subject products for the reference year (2016), including the sales of U.S. domestic producers, and U.S. imports of the subject products from Spain, the rest of the EU, and the rest of the world; (ii) data on the U.S. market for the subject products for the year the RPT expires (2023); (iii) the required elasticity parameters; and (iv) the AD rates and the WTO-inconsistent CVD rates. However, the EU has erred in compiling certain data inputs within those data sets. In the sections below, the United States explains the EU's errors and provides corrected data inputs. Where possible, the United States relies on information sources and data inputs already provided to the Arbitrator by the EU.

i. U.S. Market in 2016 and 2023

97. As explained above, the U.S. model focuses on a single national market (the United States) with products from the four entities (*D*, *S*, *REU*, and *ROW*). Similar to the EU, the United States treats 2016 as the reference year, and 2023 as the year the RPT expires. The United States has provided domestic shipment and import data for both years in Exhibit USA-16, sourced from the United States Department of Agriculture and the United States Census Bureau.[112] The market shares in 2016 are used to simulate the counterfactual market shares for all four entities after the imposition of the AD rates and WTO-inconsistent CVD rates in the first step of the two-step approach.

ii. Price Elasticity of Total Demand

98. The USITC published a range of the price elasticity of domestic demand in its 2024 sunset investigation report, which considered comments from all parties in that proceeding.[113] The United States uses the midpoint of that range to estimate the trade impacts.

$$\epsilon = -1$$

iii. Domestic Supply Elasticity

99. As discussed in Section III.D.3 above, the EU model improperly excludes products from U.S. domestic producers as a source of supply based on the assumption that U.S. domestic producers cannot increase supply to capture additional demand. As explained above, this assumption is not reasonable based on the circumstances of U.S. domestic ripe olive production. Such an assumption has the practical effect of reducing domestic supply elasticity to zero for modeling purposes. Instead, the USITC published a range of 3 to 6 for domestic supply

[112] *See* Exhibit USA-16.

[113] Ripe Olives from Spain, Inv. Nos. 701-TA-582, 731-TA-1377, USITC Pub. 5526 (July 2024) (Review), p. II-25 (Exhibit USA-13).

elasticities in its 2024 sunset investigation report, which considered comments from all parties in that proceeding.[114] The United States uses the midpoint of that range to estimate the trade impacts.

$$\eta_D = 4.5$$

iv. Export Supply Elasticity

100. In its Methodology Paper, the EU sets the elasticity of export supply from Spain and other foreign countries to be infinite, arguing that "there are no estimates from the literature" and Spain "has an unlimited supply of ripe olives" relative to the United States.[115]

101. This assumption is equivalent to a perfectly horizontal foreign export supply curve, and suggests that foreign producers of ripe olives have an unlimited supply at a constant price, are extremely flexible in production, and thus can instantly adjust their output to meet market demand without changing the price. Such an assumption cannot be reconciled with the inflexibility of growing raw olives in the United States that the EU also assumes in its Methodology Paper, which states that "it takes from 5 to 7 years for olives trees to grow" and become commercially bearing.[116] The EU does not explain why the practical limitations and timeframes for cultivating olive trees constrains U.S. producers to such an extent that they should be eliminated completely from the EU's model, but poses absolutely no limitation on raw olive production from Spain.

102. Under the EU's assumption of an infinite supply elasticity for Spanish olives, countervailing duties will be borne in their entirety by Spanish ripe olive processors, resulting in larger estimated trade impacts from the WTO-inconsistent CVD order compared to a more appropriate upward sloping foreign export supply curve, all else being equal. Therefore, the EU's assumption of an infinite export supply elasticity serves to improperly inflate nullification and impairment.

103. In practice, an upward sloping export supply curve is the standard reasonable assumption because it indicates foreign suppliers are willing to supply more olives as the price of olives increases. A value of 10 for the foreign export supply elasticity was used in *US – Countervailing Measures (China) (Article 22.6 – US)* and *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, both related to manufacturing goods.[117] A set value of 10 was also used for the

[114] Ripe Olives from Spain, Inv. Nos. 701-TA-582, 731-TA-1377, USITC Pub. 5526 (July 2024) (Review), p. II-25 (Exhibit USA-13).

[115] EU Methodology Paper, para. 38.

[116] EU Methodology Paper, para. 32.

[117] *See US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.37; *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.324, n. 642. *See also US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.100 (using a supply elasticity of 6 for the large residential washers market).

prospective formula adopted by the arbitrator in *US – Supercalendered Paper (Canada) (Article 22.6 – US)*.[118]

104. Although the value of 10 for the export supply elasticity is appropriate for manufacturing goods, such as those at issue in *Countervailing Measures* and *Anti-Dumping Methodologies*, as companies have sufficient flexibility to adjust production levels in response to market changes, the export supply elasticity should be smaller for agricultural goods because farmers are often constrained by factors such as natural growth cycles, climate conditions, and seasonal variations, making it difficult to rapidly change crop production in response to demand fluctuations. The EU recognizes such limitations in (1) arguing for a domestic supply elasticity of zero due to constraints on growing new olive trees[119] and (2) acknowledging that imports of Spanish olives into the United States were in fact hampered by factors such as the COVID-19 pandemic.[120]

105. In the current proceeding, the United States proposes to use the approach followed in recent arbitrations and assumes the export supply elasticity to be 10. As discussed above, such an assumption is in fact conservative when applied to an agricultural good such as ripe olives.

$$\eta_j = 10$$

v. Elasticity of Substitution

106. The EU adopts the estimates of the elasticity of substitution (between imports from different sources) from Fontagné et al (2022) at the HTS 6-digit level and sets the value to be 12, which is intended for the 6-digit HTS code 2005.70.[121] As discussed below, this value is unreasonable as it is derived from global trade flows at a highly aggregated level rather than being specifically tied to the products covered in the current proceeding and is arrived at using sources and methodologies that have been rejected in prior arbitrations. Such unreasonably high proposed estimates for the elasticity of substitution serve to significantly overstate nullification and impairment in the EU's proposed methodology.

107. As shown in Exhibit USA-17, there are 16 HTS codes at the 8-digit level and 31 HTS codes at the 10-digit level under the 6-digit HTS code 2005.70 in 2016. However, the in-scope ripe olives in the current proceeding fall within only two of these 16 HTS-8 codes (2005.7050 and 2005.7060) and seven of the 31 HTS-10 codes.[122] Therefore, the elasticities of substitution proposed by the EU improperly encompass out-of-scope products and it is more appropriate to use narrowly defined estimates of the elasticity of substitution from reputable sources for

[118] *See US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 8.326.

[119] *See* EU Methodology Paper, para. 32.

[120] *See* EU Methodology Paper, para. 27.

[121] *See* EU Methodology Paper, para. 37; Exhibit EU-12.

[122] The 10-digit HTS codes that cover the ripe olives in this case include: 2005.70.5030, 2005.70.5060, 2005.70.6020, 2005.70.6030, 2005.70.6050, 2005.70.6060, and 2005.70.6070. *See* EU Methodology Paper, Table 1, notes.

products tied explicitly to the current proceeding to estimate the trade impacts equivalent to the level of nullification or impairment.

108. In addition, the EU misinterprets the elasticity of substitution between domestic and imported ripe olives, as suggested in the USITC's 2018 investigation report on ripe olives from Spain, which ranges from 4 to 7.[123] The EU incorrectly references the so-called the "rule of two" to scale that range to 8 to 14 as further justification to use the value of 12 as the elasticity of substitution between imports of ripe olives from different foreign sources.[124] Specifically, by invoking the argument of the "rule of two", the EU implicitly assumes that consumers treat the substitution of domestic and foreign ripe olives differently than the substitution between ripe olives from different foreign sources. This approach is known as consumer demand following a nested constant elasticity of substitution (CES) approach.

109. However, such an assumption is incompatible with the PE model used in the EU's Methodology Paper, which is based on Balistreri and Rutherford (2013).[125] Balistreri and Rutherford (2013) assume that consumers substitute at a constant rate between all sources of ripe olives—an approach known in the literature as demand following a non-nested CES approach. With non-nested CES demand, it is inappropriate to scale the elasticity of substitution by an additional value. The non-nested CES demand approach is a standard approach for an Armington-based PE model, and has been used widely in the economic literature on trade, including in Krugman (1980), Melitz (2003), and USITC's economic models for the USITC *Large Residential Washers* investigation.[126] In other words, the EU's reference to the "rule of two," which only arguably applies to nested CES models, is plainly incompatible with the non-nested approach the EU proposes in their Methodology Paper and is therefore not relevant to determination of the proper elasticity of substitution.[127]

110. Consistent with the framework of non-nested CES demand, the elasticity of substitution between U.S.-produced and imported ripe olives, as suggested in the USITC's 2018 investigation report, should be interpreted as being equal to the elasticity of substitution between ripe olives from various foreign sources. Therefore, the value of 12 put forth by the EU significantly exceeds the range of 4 to 7 as suggested by the USITC's report.

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[123] Ripe Olives from Spain, Inv. Nos. 701-TA-582, 731-TA-1377, USITC Pub. 4805 (July 2018) (Final), p. II-23 (Exhibit EU-9).

[124] *See* EU Methodology Paper, para. 37.

[125] *See* Exhibit EU-5.

[126] Paul Krugman, *Scale Economies, Product Differentiation, and the Pattern of Trade*, 70 Am. Econ. Rev. 950 (1980) (Exhibit USA-18); Marc J. Melitz, *The Impact of Trade on Intra-Industry Reallocations and Aggregate Industry Productivity*, 71 Econometrica 1695 (2003) (Exhibit USA-19); Large Residential Washers, Inv. No. TA-201-076, USITC Pub. 4745 (December 2017), pp. 81-84 (Exhibit USA-20).

[127] The only prior arbitrator to apply any scaling factor to the elasticity of substitution in an Armington model did so in the context of a nested approach. *See US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.63. However, the arbitrator in that case nevertheless declined to apply the "rule of two," instead scaling elasticity of substitution by a factor equal to the square root of 2 (approximately 1.41). *See US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.69.

111. As discussed above, the U.S. model follows a non-nested CES demand approach, which assumes the elasticity of substitution is constant across products from all entities. The United States adopts estimates of the elasticity of substitution for ripe olives at the HTS 10-digit level from Soderbery (2015), a peer-reviewed econometric study based specifically on U.S. import data.[128] Table 1 below includes estimates of the elasticity of substitution from this source for all seven in-scope products. The simple average of the available elasticities is 5.1 and aligns with the suggested range of 4 to 7 in the USITC's 2018 report. Thus, the United States proposes that the Arbitrator adopt the value of 5.1 for use as the elasticity of substitution in the application of an Armington-based PE model.

$$\sigma = 5.1$$

Table 1: In-scope Elasticity of Substitution Estimates at the HTS-10 level

HTSUS 10-digit Code	Soderbery (2015) Estimate
2005.70.50.30	4.3
2005.70.50.60	Not Reported
2005.70.60.20	2.2
2005.70.60.30	1.8
2005.70.60.50	9.5
2005.70.60.60	7.5
2005.70.60.70	Not Reported
Simple average	5.1

vi. AD and CVD rates

112. The EU uses the simple average of the CVD rates from the Section 129 proceedings implemented by the USDOC in 2022 to represent the WTO-inconsistent CVD rates. It asserts that the CVD rates must be fully removed to be WTO-consistent.[129]

[128] Anson Soderbery, *Estimating Import Supply and Demand Elasticities: Analysis and Implications*, 96 J. Int'l Econ. 1 (2015) (Exhibit USA-21). Soderbery (2015) also estimates the elasticities of substitution at the 8-digit HTS level. For the two in-scope HTS codes (2005.70.50 and 2005.70.60), it reports an estimate of 13 for the product code 2005.70.50, and does not report an estimate for the product code 2005.70.60, which accounted for the vast majority of U.S. imports of in-scope ripe olives in 2016 (98%). Considering that the U.S. imports of ripe olives under 2005.70.50 represented only 2 percent of the total in-scope imports, the value of 13 is not representative of the elasticity of substitution for all in-scope products at the HTS-8 level. Soderberry (2015) has been relied upon by past arbitrators, as well, specifically as a data source for "as such" formulas. *See US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.75.

[129] EU Methodology Paper, para. 22; Exhibit EU-15. As discussed above in Sections III.B and III.C, the EU's proposed counterfactual scenario in which the CVD duties at issue are removed in their entirety is neither plausible nor reasonable. Instead, the evidence suggests that a WTO-consistent attribution analysis would reveal that 100% of benefits are attributable to downstream ripe olive processors, meaning that the counterfactual WTO-consistent rates would equal the WTO-inconsistent rates and nullification and impairment would be zero. Nonetheless, for purposes of illustrating the other flaws in the EU's proposed methodology, the United States has run its model based on the EU's unreasonable counterfactual that would remove the relevant CVD duties in their entirety.

113. As discussed in Section III.D.4 above, corresponding AD duties that apply to the products in the current proceeding must be factored into the overall duty calculation in order to obtain an accurate estimation of nullification and impairment. This is because both the AD and CVD duties would impact the counterfactual market shares simulated in the first step of the two-step approach, which are intended to reflect the actual relative competitiveness of all entities in the market in 2023.

114. Like the EU, the United States uses the CVD rates from the Section 129 proceedings for its WTO-inconsistent CVD duties. However, unlike the EU, the United States adopts the AD and CVD rates for "All Others" in the two-step approach, rather than using a simple average of the Section 129 rates.[130] 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.[131]

vii. Summary Comments Concerning Data Errors and False Assumptions in EU's Estimation of the Level of Nullification or Impairment for Ripe Olives from Spain

115. As discussed in the preceding sections, numerous data input errors in the EU's estimation of the trade impacts caused by the WTO-inconsistent measures serve to overestimate the level of nullification or impairment. The EU's incorrect inputs and corresponding correct inputs used by the United States in its model are summarized in Table 2 below.

Table 2: Comparison of Data Inputs in the Two Methodologies

DO NOT USE (EU's Data Inputs)	USE INSTEAD (U.S. Data Inputs)
Spain's share in the U.S. imports in 2016: 75%	Spain's share in the U.S. market (including U.S. domestic production): 41**%**
U.S. Total Imports in 2023: $88.5 million	U.S. Market in 2023 (including domestic production): $117.9 million
Domestic Supply Elasticity: Not included	Domestic Supply Elasticity: 4.5
Foreign Supply Elasticity: 99	Foreign Export Supply Elasticity: 10
Elasticity of Substitution within the industry: 12	Elasticity of Substitution within the industry: 5.1

[130] For the "All Others" CVD rate, s*ee* Exhibit EU-15 at p. 29. For the "All Others" AD rate, *see* Ripe Olives From Spain: Notice of Correction to Antidumping Duty Order, 83 Fed. Reg. 39,961 (Aug. 7, 2018) (Exhibit USA-22).

[131] *See US – Countervailing Measures (China) (Article 22.6 – US)*, Annex C-10 (describing data inputs used to implement the Armington model in that arbitration and relying on the "All Others" CVD rates included in Annex C-3 for use as the WTO-inconsistent CVD rates).

DO NOT USE (EU's Data Inputs)	USE INSTEAD (U.S. Data Inputs)
AD rate: 0%; CVD rate: 10.99% Total rate in step 1: 10.99% Total rate in step 2: 0.00%	AD rate: 20.04%; CVD rate: 11.08% Total rate in step 1: 31.12% Total rate in step 2: 20.04%

c. The Correct Estimate of the Level of Nullification or Impairment, Even Accepting the EU's Unreasonable Counterfactual WTO-Consistent CVD Rate of Zero, Is No More Than 6.15 Million USD Per Year

116. Having identified the correct data inputs, the U.S. implements the two-step Armington approach to calculate the level of nullification and impairment as follows. First, the U.S. identified 2016 as the reference year and calculated the market shares of all involved entities in the U.S. market. This differs from the EU's market share calculation because the United States includes supplies from U.S. domestic production.

117. Second, the U.S. applied the PE model for the first time to simulate the impact of imposing both AD and CVD duties (31.12%) on market shares in 2016. This differs from the EU methodology that fails to take into account the relevant AD duties. This simulation yields a counterfactual market share for Spanish imports of 26% for 2016.

118. Third, the counterfactual market shares simulated in the previous step were multiplied by the value of the total, actual, U.S. market in 2023. This indicates the counterfactual value of imports from Spain resulting from the WTO-inconsistent duties in 2023. According to this calculation, subject U.S. imports from Spain in 2023 would have amounted to 23.23 million USD in 2023.[132]

119. Fourth, the PE model was applied for the second time to simulate a WTO-consistent scenario, i.e., to quantify the hypothetical additional trade associated with removing the WTO-inconsistent duties. In this step, the model quantifies the value of subject U.S. imports from Spain with complete elimination of the WTO-inconsistent CVD order and associated duties in 2023, while keeping the uncontested AD duties in place. According to this calculation, U.S. imports from Spain would have amounted to 29.87 million USD in 2023.

120. Fifth, the counterfactual value of imports from Spain (23.23 million USD) was subtracted from the amount estimated by removing the WTO-inconsistent CVD order (29.87 million USD) to estimate how the removal of the WTO-inconsistent order would have affected the values of the hypothetical 2023 trade flows. The resulting amount of 6.65 million USD estimates the

[132] The value is quantified in terms of producer, as opposed to consumer, prices. In other words, the value presented nets out duties when valuing the imports.

value by which subject U.S. imports from Spain would have increased in 2023 if the WTO-inconsistent duties were removed.

121. In the sixth and final step, the United States accounts for the change in subject U.S. imports from the rest of the EU due to removing the WTO-inconsistent CVD order. Based on this calculation, U.S. imports of olives from the rest of the EU would have decreased by 0.50 million USD. Subtracting this figure from the estimated change in U.S. imports of olives from Spain due to removing the CVD order (6.65 million USD) provides the net change in the value of U.S. imports of olives from the EU. The resulting estimate, 6.15 million USD, represents the value of subject U.S. imports from the EU that would have increased in 2023 without the WTO-inconsistent CVD order and is therefore the correct estimate of nullification or impairment experienced by the EU, assuming a counterfactual CVD duty rate of zero.

122. Thus, by applying the two-step Armington approach with all the necessary corrections outlined above, and accepting the EU's unreasonable counterfactual scenario of complete elimination of the CVD order at issue, the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent U.S. CVD measure on Spanish olives, following the expiration of the RPT, is no more than 6.15 million USD per year.[133]

123. The EU intends to suspend benefits at an annual level equivalent to the nullification or impairment and states that the amount "may be adjusted for inflation for the year 2024 and on an annual basis thereafter."[134] However, the EU does not specify any methodology, including a price index, for calculating the inflation adjustment.

124. To the extent that the arbitrator believes that it is necessary or appropriate to adjust the annual level of nullification or impairment for inflation, the United States proposes using the "Producer Prices for Olives for Processing, Canned" as a price index, published by the National Agricultural Statistical Services ("NASS"), a statistical agency under the U.S. Department of Agriculture. This data series would be the closest approximation to the subject goods covered in the current proceeding.[135] Data are provided on a marketing year (MY) basis (August 1 to July 31). Since MY 2017, NASS has only reported data for California, given that the vast majority of canned olives in the United States are produced there. Exhibit USA-24 presents the data series from 2000 to 2023, the latest year available.

[133] Exhibit USA-15 summarizes the estimation results from the United States' proposed methodology. It also includes the estimation results for the scenario only considering the CVD duties, for comparison purpose.

[134] EU Methodology Paper, para. 13.

[135] For noncitrus fruits, including olives, NASS administers grower surveys. These surveys, along with federal administrative data, are used to estimate bearing acres, yield, total production, price, and value. These estimates are reviewed for errors, reasonableness, and consistency with historical estimates. For more information about the survey, *see* NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., PRICE PROGRAM: HISTORY, CONCEPTS, METHODOLOGY, ANALYSIS, ESTIMATES, AND DISSEMINATION (2011) (Exhibit USA-23).

IV. THE EU'S REQUEST TO SUSPEND CONCESSIONS FOR PRODUCTS OTHER THAN RIPE OLIVES ON THE BASIS OF ITS PROPOSED METHODOLOGY IS CONCEPTUALLY FLAWED AND CONTRARY TO THE DSU

125. In addition to its request to suspend concessions and other obligations with respect to the United States in the amount of $33.5 million per year for the application of Section 771B to ripe olives from Spain after the expiration of the RPT, the EU also requests to suspend concessions with respect to future applications of Section 771B by the United States to other products from the EU. Rather than proposing a particular level of suspension, however, the EU requests authorization to apply its "as applied" methodology to products other than ripe olives from Spain, if and when countervailing duty orders arising from Section 771B are applied to those products.

126. The EU explains "that a methodology similar to the one explained [in its Methodology Paper for ripe olives] could be used for every future WTO-inconsistent application by the United States of Section 771B in investigations against EU industries leading to the application of countervailing duties."[136] Specifically, the EU proposes to "rely on simulations based on the same partial equilibrium model, albeit without resorting to its double application as done when calculating the nullification or impairment relating to the application of Section 771B in the ripe olives investigation."[137] The EU further proposes to source "the values of the demand and substitution (Armington) elasticities . . . also for the future, from the same literature that has been used to source the values of the elasticities employed in the simulations" for ripe olives.[138] The EU does not propose any other alterations or provide any other data sources for its "as such" approach.

127. Because the EU's proposed methodology for assessing nullification and impairment for future applications of Section 771B mirrors its proposed methodology for assessing nullification and impairment for application of Section 771B to ripe olives from Spain, it suffers from the same flaws, unreasonable assumptions, and data sourcing issues as demonstrated above. In addition, the EU's proposed methodology lacks sufficient detail and flexibility to accurately and predictably measure nullification and impairment for the wide variety of goods potentially subject to Section 771B. For this reason, the EU's methodology fails to satisfy the minimum requirements laid out by past arbitrators for a prospective model for calculating nullification and impairment that would be permissible under the DSU.

[136] EU Methodology Paper, para. 49.

[137] EU Methodology Paper, para. 50.

[138] EU Methodology Paper, para. 52.

A. The Methodology the EU Proposes To Use To Determine the Level of Nullification or Impairment for Products Other than Ripe Olives is Inadequate and Suffers from the Same Conceptual Flaws and Data Input Problems as the Methodology the EU Proposes for Ripe Olives

128. The arbitrator in *US – Supercalendered Paper (Canada) (Article 22.6 – US)* laid out four criteria for assessing whether a prospective model is suitable for determining the level of nullification and impairment:

> (a) [T]he calculation should result in a predictable level of suspension; (b) the method should be practical to implement and limit the risk of potential controversies between the parties; (c) the data relied on should be, as much as possible, verifiable and available to both parties; and (d) given that a future WTO-inconsistent trade remedy measure may be applied against any good, the method used to determine nullification or impairment should be 'sufficiently generic to capture any variation' in the types of product and markets.[139]

The arbitrator went on to observe:

> [P]rinciples (a), (b), and (d) go to the selection of a model that will reliably work in the future under varying circumstances, which, of course, is essential if a model is to yield a reasoned estimate of a level of [nullification and impairment]. Principle (c), in our view, helps ensure that quality data is used in the calculation of the level of [nullification and impairment].[140]

129. The methodology proposed by the EU falls short of satisfying any of these criteria. First, the EU provides virtually no detail on how such a model would operate when applied to any of the myriad products that could be subjected to Section 771B, which, as discussed in Sections III.B and III.C above, was designed by the U.S. Congress to apply generally to subsidies granted to raw agricultural commodities that undergo minimal processing. The lack of specifics on how the EU intends to apply such a methodology to such a diverse group of products precludes a predictable level of suspension, and thus fails the first criterion.

130. Second, because the EU provides so little detail on how such a methodology would operate in practice when applied to a diverse set of agricultural products, the EU's proposed model is not practical to implement. As just one example, as is the case for ripe olives, CVD orders often do not tie directly to specific HTS codes, thus requiring the user of a prospective model to decide how to properly scope the product coverage for the model using data sources based on HTS codes. The EU does not provide any protocol or specifics on how it would select

[139] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.23. *See also US – Washing Machines (Korea) (Article 22.6 – US)*, paras. 4.49-4.53.

[140] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.24.

the proper scope of products for running its model in the event that a Section 771B CVD order were applied to an as-yet unknown group of EU products. Such lack of clarity on a threshold question of such magnitude is certain to produce "controversies between the parties."[141]

131. Third, the EU does not provide any guidance on what data should be relied upon to run its model, aside from specifying sources for "the values of the demand and substitution (Armington) elasticities."[142] As discussed above in Section III.D.5.b, the United States disagrees with the EU's proposed sources for these values for its "as applied" methodology, and has the same concerns for their use in a prospective "as such" model. However, even putting these concerns aside, the United States notes that the EU's proposed formula requires at least seven data inputs, not two.[143] By failing to propose specific sources or protocols for determining those data inputs, the EU's proposed model cannot be said to rely upon data that is "verifiable and available to both parties."[144] We simply do not know if the EU is proposing to rely on verifiable data that is available to both parties.

132. Finally, and most importantly, the EU's proposed formula is plainly not "sufficiently generic to capture any variation in the types of products and markets." As previously discussed, the EU's approach relies on a number of key assumptions that are not reasonable, even for the ripe olives market in isolation, including: an assumption of zero indirect attribution of countervailable subsidies in the WTO-consistent counterfactual scenario, complete elimination of domestic production from the model, and lack of accounting for the impact of concurrent anti-dumping duties. These assumptions are wrong in the context of the ripe olives market and are equally unsupportable when applied in general to potentially any market for processed agricultural goods.

133. Take, for example, the issue of eliminating domestic producers from the EU's proposed methodology, one of the key "features" touted by the EU as a benefit of its model. The EU justifies this deviation from all preceding Armington models adopted by arbitrators by arguing that it is appropriate for "the case of ripe olives . . . because of the very low United States domestic supply elasticity of raw olives which are used to produce ripe olives", further elaborating that "[t]he production of olives is rather rigid in that it takes from 5 to 7 years for olives trees to grow."[145] This type of bespoke rationale for making a fundamental structural decision to exclude domestic production from consideration in the EU's approach is not

[141] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.23

[142] EU Methodology Paper, para. 52.

[143] These inputs include import data for each entity in the EU model (Spain, rest of EU, and ROW), values for the three types of elasticities, and the WTO-inconsistent CVD rate. The United States' proposed model would also require U.S. market share data for domestic producers and any parallel AD rates.

[144] *See US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.38 ("Hence, Korea would be expected to provide a clearly defined procedure to identify the data sources and to compile those inputs. However, the data sources proposed by Korea to implement its formula are not described in a sufficiently detailed manner making it difficult to assess them.").

[145] EU Methodology Paper, para. 32.

"'sufficiently generic to capture any variation' in the types of products and markets."[146] Even accepting *arguendo* that there is something unique about the cultivation of olives in the United States that justifies excluding domestic production from the EU's "as applied" model, it would be completely unreasonable to assume that any raw agricultural product subject to Section 771B would also be characterized by market dynamics that make it impossible for domestic producers to capture market share from foreign producers subject to the duties at issue. Accordingly, the EU all but admits that its proposed methodology is narrowly tailored to the circumstances of the ripe olives market and it therefore cannot be considered "'sufficiently generic to capture any variation' in the types of product and markets."[147]

134. Thus, the EU's proposed "as such" methodology fails all of the criteria identified by the arbitrator in *Supercalendered Paper* for determining if a prospective model is suitable for calculating nullification and impairment. Accordingly, these concerns demonstrate that the approach the EU proposes would result in a level of suspension of concessions and related obligations that is not equivalent to the level of nullification or impairment. That renders the EU's request for suspension contrary to the DSU, and requires its rejection.

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

135. As a general matter, neither the DSU nor subsequent arbitrator decisions preclude the possibility that the Arbitrator might base the level of suspension of concessions on a methodology similar to the one proposed by the EU. To the contrary, "multiple prior arbitrators have determined methods of varying complexities (including formulae) through which the level of suspension would be determined in the future based on the future application of the measure at issue."[148] As the arbitrator in *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)* found, there is "no limitation in the DSU to the possibility of providing for a variable level of suspension if the level of nullification or impairment also varies."[149] Similarly, the arbitrator in *US – Anti-Dumping Act of 1916 (EC) (Article 22.6 – US)*, in determining a level of suspension of concessions according to a formula that would vary over time, disagreed with the proposition that the complaining party's "right to suspend obligations must be frozen in time as of the date it made the request under DSU Article 22.2."[150]

136. That being said, however, a Member's right to request and be authorized to suspend obligations on the basis of a prospective model is not without any limitation. The arbitrator in *US – Offset Act (Brazil) (Article 22.6 – US)* observed that, as long as the approved level of suspension is equivalent to the level of nullification or impairment, there is no "reason why these

[146] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.23.

[147] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.23.

[148] *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.22. *See also US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.45 ("we consider that a formula – as opposed to the determination of a fixed level – is an appropriate approach to estimate the level of suspension in a situation involving 'as such' measures.")

[149] *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*, para. 4.20.

[150] *US – 1916 Act (EC) (Article 22.6 – US*), para. 6.14.

levels may not be adjusted from time to time, provided such adjustments are justified and unpredictability is not increased as a result."[151] Under Article 22.4 of the DSU, the level of suspension of concessions "is" to be equivalent to the level of nullification or impairment. The use of the present tense "is" indicates that the level of suspension of concessions may need to be determined in a manner that allows it to continue to be equivalent to the level of nullification or impairment, but, at the same time, the level of suspension of concessions must never be permitted to exceed the level of nullification or impairment.

137. As explained above in Section III, the methodology the EU proposes to apply overstates the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the CVD measure on ripe olives from Spain after the expiration of the RPT. The same would be true if that methodology were applied for products other than ripe olives from Spain. Because they would greatly exceed the actual level of nullification or impairment, the adjustments to the EU's level of suspension of concessions that the EU proposes to make using its "as such" methodology would not be "equivalent"[152] and thus would not be "justified."[153]

138. Additionally, given the data input problems discussed in the preceding paragraphs, as well as the wide and diverse range of products and markets that are potentially covered by Section 771B, the adjustments to the EU's level of suspension of concessions made using the EU's proposed methodology would increase "unpredictability" substantially.[154] Indeed, the level of suspension under the EU's proposed approach simply could not be predicted at all.

139. For these reasons, the EU's request for authorization to suspend concessions on the basis of a formula in this dispute is contrary to the DSU.

V. CONCLUSION

140. For the reasons set forth above, the United States respectfully requests that the Arbitrator find that the level of suspension of concessions requested by the EU is in excess of the appropriate level of nullification or impairment, and that the level of nullification or impairment is **zero**. If the Arbitrator does not agree that the level of nullification or impairment is zero and proceeds to apply a model to estimate the trade effects attributable to the WTO-inconsistent CVD measure on ripe olives, the United States requests that the Arbitrator find that the level of nullification or impairment is no more than **6.15 million USD** annually. Finally, the United States respectfully requests that the Arbitrator reject the EU's proposal to suspend concessions or other obligations on the basis of a formula for future applications of Section 771B to products from the EU, because the methodology proposed by the EU will not result in a reasoned estimate of nullification or impairment consistent with Article 22.4 of the DSU.

[151] *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*, para. 4.20 (emphasis added).

[152] DSU, Art. 22.4.

[153] *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*, para. 4.20.

[154] *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*, para. 4.20.