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)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

May 1, 2025

EXECUTIVE SUMMARY OF THE U.S. WRITTEN SUBMISSION

I. INTRODUCTION

1. The European Union's ("EU") 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 is not equivalent to the level of nullification or impairment. The correct counterfactual compliance scenario for this arbitration reveals that the level of nullification or impairment is zero. Even using the EU's incorrect counterfactual compliance scenario, the level of nullification or impairment is no more than 6.15 million USD per year.

II. APPROPRIATE CALCULATION FOR NULLIFICATION OR IMPAIRMENT

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

2. Pursuant to Article 22.4 of the DSU, the Dispute Settlement Body ("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. 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 nullification or impairment." Arbitrators in past proceedings have endeavored to rely on the best information or data that is available. In addition, while the purpose of suspension of concessions or other obligations is to induce compliance with WTO obligations, arbitrators have observed that obligations cannot be suspended in a "punitive" manner. Therefore, a determination of the level of nullification or impairment should result in a reasoned estimate.

3. 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 reasonable period of time ("RPT"), known as a counterfactual. The EU proposes the use of a counterfactual in this proceeding. In assessing a counterfactual, an Article 22.6 arbitrator should evaluate whether the Member has offered a plausible or reasonable counterfactual scenario. While the use of a counterfactual is appropriate, the correct counterfactual in this dispute requires that the Arbitrator determine that the appropriate level of nullification or impairment is zero.

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

4. The EU's proposed counterfactual assumes that there is no possible WTO-consistent attribution of benefits arising from the countervailable subsidies at issue. The EU's proposed counterfactual is not supported by the DSU or by the DSB recommendations in this dispute.

5. The DSB recommendations 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. Neither the original

nor the compliance 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 has passed-through to the downstream product. In addition, 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.

6. Accordingly, the EU's assumption 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. Rather, the correct counterfactual 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. Such a compliance scenario does not preclude the USDOC from conducting a WTO-consistent attribution analysis and determining that benefits from upstream subsidies are attributable from Spanish raw olive producers to Spanish ripe olive processors.

7. 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, the Arbitrator's task is to determine whether the counterfactual scenario proposed by the EU is plausible or reasonable. Here, the EU's proposed counterfactual is not plausible or reasonable. Section 771B was enacted because the U.S. Congress was concerned that applying existing legislation to processed agricultural commodities would understate countervailable subsidies and permit circumvention of U.S. countervailing duty laws. These concerns would remain if Section 771B were eliminated without any replacement, as is suggested by the EU's counterfactual. There is no reason to believe that the U.S. government would allow this. 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 indirect subsidization.

8. Contrary to the EU's proposed counterfactual, 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 to downstream processors if the two factual circumstances in Section 771B are present. Amendment or reinterpretation of Section 771B is therefore a reasonable and plausible compliance scenario.

C. Modifying the Countervailing Duty Measures on Ripe Olives from Spain Would Not Result in an Increase in the Level of Trade

9. Article 3.8 of the DSU provides for the possibility that a Member 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. If a Member successfully rebuts the presumption, then there is no nullification or impairment even if the measure at issue continues to exist. Additionally, a Member may make such a rebuttal in the context of an arbitration under Article 22.6 of the DSU.

10. The evidence indicates that the level of trade in Spanish ripe olives exported to the United States would not have changed 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. If the USDOC were to properly determine that 100% of the benefits conferred on Spanish raw olive growers are attributable to Spanish ripe olive processors, the counterfactual countervailing duty ("CVD") rates for Spanish exporters of ripe olives would be the same as the current rates and no reduction in the level of trade in ripe olives could be expected. Therefore, the nullification or impairment to the EU would be zero.

11. The evidence suggests that it is reasonable to assume that, had the USDOC conducted a WTO-consistent attribution analysis, it would have found that 100% of the benefits of subsidies for Spanish raw olive producers are attributable to Spanish ripe olive processors. First, the two criteria contained in Section 771B are indicative of downstream attribution of subsidy benefits, even if the DSB recommendations require that they cannot be exclusively relied upon. Accordingly, the presence of these two factual circumstances in the market for Spanish ripe olives is consistent with attribution of benefits.

12. 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. First, average prices for raw olive purchases were below average costs of production for the reference year, especially considering loss and destruction from processing. Thus, in the absence of the relevant subsidies, Spanish processors would have had to pay higher prices to their grower suppliers to ensure that costs of production were covered.

13. In addition, 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, which enable a seamless, mutually reliant line of production. This mutual reliance is 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. Thus, Spanish raw 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. 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 table olives, providing yet another incentive for Spanish processors to purchase only Spanish raw olive inputs.

14. 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. 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 or impairment of zero.

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

15. 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. The United States generally agrees that an Armington-based partial equilibrium ("PE") model is suitable for estimating nullification or impairment in this dispute. However, the EU model differs from methodologies used in previous arbitrations by examining the global trade reallocation effects of the measure across all countries rather than focusing on the specific market directly affected by the measure – that of the United States. To the contrary, the EU model excludes from its assessment U.S. domestic producers of ripe olives. These changes introduce unnecessary complexity and distort the estimation results for the level of nullification or impairment.

1. The EU Improperly Isolates the Spanish Market in Calculating Nullification and Impairment

16. As an initial matter, the EU's proposed methodology includes an unexplained and unsupportable scoping decision. The value of 33.5 million USD identified as the level of nullification or impairment by the EU is the level of alleged nullification and impairment for the Spanish market <u>in isolation</u>, not the EU market. 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 or impairment. Accordingly, the appropriate level of nullification or impairment to the EU under the EU's proposed methodology would be the combination of measured impacts on Spain (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.

17. 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." Article 22.2 of the DSU, 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." 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. 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."

18. 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." 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. 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, referring the matter to arbitration. 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.

19. As the EU's Methodology Paper demonstrates, the level of suspension requested by the EU is not equivalent to the level of nullification or impairment to the EU as a whole. Rather, the EU attempts to isolate its assessment of nullification or impairment to one of its Member State markets while ignoring benefits gained by other Member States. In doing so, the EU puts forth a level of suspension that is necessarily in excess of the level of nullification or impairment experienced by the EU. In addition, the EU's proposal to isolate the nullification or 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. In other words, the EU would assess nullification or 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. Accordingly, the Arbitrator should reject the EU's proposal to isolate the Spanish market and must instead measure nullification or impairment to the EU market as a whole.

2. The EU Introduces Unnecessary Data Requirements and Analytical Complexity

20. The EU's PE model requires data on imports of in-scope ripe olives for each of three relevant entities by source. However, ripe olives subject to the relevant CVD duties fall under a subset of the 6-digit Harmonized Tariff Schedule ("HTS") code 2005.70. 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 in-scope olives is at the 10-digit HTS level, making it challenging to identify subject olives in the national tariff schedules of other countries. 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.

21. 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. In addition, the estimation of eligible imports of ripe olives for each entity 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 which distorts the analysis.

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

22. The EU's 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. The EU acknowledges that 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. Indeed, since the Armington model was first accepted by an arbitrator, no arbitrator has relied on a variant of the model that would exclude domestic production. In addition, the EU's justification for excluding U.S. domestic production is unfounded. 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. 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. Contrary to the EU's assertions, the supply of olive inputs available to the U.S. ripe olive processing industry can adjust quickly if warranted by changes in market conditions.

23. Thus, the U.S. domestic supply of ripe olives can be significantly more elastic than assumed by the EU and the EU's assumption that U.S. domestic supply elasticity is essentially zero is unreasonable. To the contrary, according to estimates from U.S. International Trade Commission ("USITC"), the domestic supply elasticity for ripe olives should be in the range of 4 to 6 or 3 to 6. 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 level of nullification or 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.

4. The EU's Methodology Ignores Relevant Anti-Dumping Duties

24. 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 antidumping ("AD") duties impacting the same products during the same time period. Spain's market share in the reference year is distorted by the fact that Spanish firms were dumping ripe olives in the U.S. market, which is not in dispute in this proceeding. However, the EU excludes the AD duties from its calculation.

25. 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.

26. 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 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. 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. This is the only way to represent the actual market conditions faced by all involved entities in 2023.

5. Proper Application of Two-Step Armington PE Methodology to Estimate Nullification or Impairment

27. 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. Moreover, 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, the United States corrects for EU errors in compiling certain data inputs and provides corrected data inputs needed for estimating nullification and impairment.

28. The EU sets the export supply elasticity to be infinite. This assumption 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. 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 and improperly inflating nullification or impairment. 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.

29. The EU adopts the estimates of the Armington elasticity from Fontagné et al (2022) at the HTS 6-digit level and sets the value to be 12. 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 Armington elasticity serve to significantly overstate nullification or impairment. The United States adopts estimates of the Armington elasticity for ripe olives at the HTS 10-digit level from Soderbery (2015), a peer-reviewed econometric study based specifically on U.S. import data. The simple average of the available elasticities for the relevant 10-digit HTS codes is 5.1 and aligns with the range of 4 to 7 estimated by the USITC. Thus, the United States proposes that the Arbitrator adopt the value of 5.1 for use as the elasticity of substitution.

30. 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. The use of the "All Others" rate is consistent with the approach adopted by the arbitrator in *US – Countervailing Measures (China) (Article 22.6 – US)*.

31. Applying the two-step Armington approach with all the necessary corrections, 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 CVD measure on Spanish olives, following the expiration of the RPT, is no more than 6.15 million USD per year. 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").

III. THE EU'S REQUEST TO SUSPEND CONCESSIONS FOR PRODUCTS OTHER THAN RIPE OLIVES IS CONTRARY TO THE DSU

32. The EU requests authorization to apply its methodology to products other than ripe olives from Spain, if and when a CVD order arising from Section 771B is applied to those products. The EU's proposed methodology for assessing nullification or impairment for future applications of Section 771B 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 or impairment for the wide variety of goods potentially subject to Section 771B.

A. The Methodology the EU Proposes to Determine Nullification or Impairment for Products Other than Ripe Olives Is Inadequate

33. Past arbitrators have laid out criteria to assess if a prospective model is suitable to determine the level of nullification or impairment. The methodology proposed by the EU falls short of satisfying any of these criteria. First, the EU provides little detail on how such a model would operate when applied to any of the myriad products that could be subjected to Section 771B, precluding a predictable level of suspension. Second, the aforementioned lack of detail renders the EU's proposed model impractical to implement and would generate future controversies between the parties. Third, the EU provides little guidance on what data should be relied upon to run its model. By failing to propose specific sources or protocols for determining those data inputs, it is not clear that the EU's proposed model would rely upon data that is verifiable and available to both parties. Finally, the EU's proposed formula is not sufficiently generic to capture any variation in the types of products and markets potentially subject to Section 771B because the EU's approach relies on a number of key assumptions that are not reasonable in the context of ripe olives and are equally or more unsupportable when applied in general to potentially any market for processed agricultural goods. These concerns demonstrate that the approach the EU proposes would result in a level of suspension of concessions that is not equivalent to the level of nullification or impairment.

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

34. 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. The same would be true if that methodology were applied for products other than ripe olives from Spain. Additionally, given the data input problems in the EU approach 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. Indeed, the level of suspension under the EU's proposed approach could not be predicted at all. 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.

IV. CONCLUSION

35. 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, 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.

EXEUCTIVE SUMMARY OF THE U.S. RESPONSES TO FIRST SET OF QUESTIONS

U.S. Response to Question 3

36. The context of the ripe olives market makes clear that the existence of the two Section 771B factors is relevant for determining attribution. Raw olives destined for ripe olive production are inedible and have no utility other than as an input into ripe olive processing. Thus, raw olive farmers are completely dependent on a concentrated group of ripe olive processors in order to sell their crop. While processing is essential to convert the raw product into an edible product, the process itself is simple and adds minimal value to the raw olive fruit. Accordingly, the ripe olive market presents a clear example of a situation where downstream processors hold significant market power and can exert pricing pressure on their suppliers.

37. In addition, economists who have examined the attribution of EU agricultural subsidies in similar markets have measured the substantial attribution of subsidies. For example, a study of the impact of EU Common Agricultural Policy subsidies on French dairy supply chains found attribution of 65 percent. The French dairy market shares striking similarities to the Spanish ripe olives market. In fact, ripe olive processors have even more market power than dairy processors because of the more limited marketable end uses for raw olives compared to raw milk. Thus, the 65 percent attribution rate found for dairy processing should be a floor when compared to the ripe olives industry.

U.S. Response to Question 4

38. A prospective formula for calculating the level of nullification or impairment arising from a future use of Section 771B would require a procedure for calculating a WTO-consistent attribution rate. For a more precise, but more labor intensive, process, the Arbitrator could adopt a procedure for examining the relevant indicia for attribution of subsidy benefits, using the best evidence available, and determining a suitable value for a WTO-consistent attribution rate. In addition, some past arbitrations have sought to overcome the inherently speculative nature of estimating nullification or impairment from future applications of a WTO-inconsistent measure through the use of a proxy value. Under a proxy approach, the Arbitrator could select a proxy value for attribution of subsidy benefits for processed agricultural goods subject to Section 771B between the values of 65 and 100 percent. The EU's presumed zero-percent attribution is unreasonable and could not be used to develop a proxy attribution value.

U.S. Response to Question 5

39. The majority of the information presented by the United States regarding the Spanish olive industry is either on the record or, in certain cases, directly supported and corroborated by information in the record of the underlying CVD investigation.

U.S. Response to Question 10

40. The Arbitrator's mandate under Article 22 of the DSU is to "determine whether the level of [] suspension is equivalent to the level of nullification or impairment." The DSU is silent as to the types of information the Arbitrator may rely on to accurately calculate the level of nullification or impairment. Furthermore, past arbitrators have found that fulfillment of their mandate requires them to "rely on the best information or data that is available in pursuit of formulating [] a reasoned estimate" of the level of nullification and impairment. Thus, nothing in the DSU suggests that an Arbitrator is restricted to the administrative record of the relevant measure in formulating an appropriate, hypothetical WTO-consistent counterfactual for the purpose of measuring the level of nullification or impairment.

41. While the EU is correct that the United States bears the "overall burden" of showing that the EU's requested level of suspension is not equivalent to the level of nullification or impairment, the United States has met this burden by demonstrating that the EU's proposed counterfactual is neither reasonable nor plausible. Having met its burden, the United States also offered an alternative counterfactual, which the United States demonstrated is reasonable and plausible. Nonetheless, if the Arbitrator were to determine that the United States has not adequately substantiated its alternative counterfactual, the Arbitrator would be called upon to construct its own counterfactual that it considers would best approximate the level of nullification and impairment. In doing so, the Arbitrator would be free to use the best evidence available to it and is not bound to the existing record of the CVD measure.

U.S. Response to Question 20

42. The fact that the breach of WTO obligations at issue stems from duties imposed on imports from a specific EU Member State is not relevant to the process for measuring

nullification or impairment laid out in the DSU. If the EU had imposed WTO-inconsistent duties on U.S. exports originating from a specific U.S. state, the United States could not credibly assert that nullification or impairment arising from that measure should only be calculated with respect to the impacted state, ignoring the rest of the U.S. market. The fact that the EU's sub-jurisdictions are themselves sovereign states makes no difference.

U.S. Response to Question 21

43. Parallel AD duties are different in-kind from general macroeconomic shocks such as COVID-19 and strong inflation, which are properly excluded from the model. The AD investigation is wholly parallel to the CVD investigation: they were initiated on the same date; include largely the same Spanish exporters and producers; share an identical product scope; rely on the same injury determination by the USITC; have the same final determination and order dates; and require importers to post cash deposits for each duty when entering the U.S. market. Accordingly, in terms of how they impact the U.S. market, these duties function as a single combined duty on in-scope olive imports from Spain. Thus, AD duties cannot be isolated from the CVD duties in a way that would accurately yield a measurement of nullification or impairment attributable only to the CVD duties. The proposed models cannot be accurately allocate trade damage between two functionally identical contemporaneous measures.

U.S. Response to Question 24

44. The NASS data used in the U.S. model is consistent with the scope of the CVD order and is among the best available proxies for U.S. ripe olive production. There is no evidence to support that this data includes any significant quantity of olives which should be excluded from the U.S. domestic production data.

U.S. Response to Question 25

45. A decline in domestic production could result from reduced demand, insufficient supply, or a combination of both. Therefore, it is not appropriate to infer inelastic domestic supply based solely on the decline in domestic production seen in the data.

U.S. Response to Question 27

46. The economic literature provides foreign export elasticity estimates. The simple average of the five available elasticities for the relevant products is 23.5, and the weighted average, using imports at the 10-digit HTS level in 2016 as weights, is 12.3.

U.S. Response to Question 36

47. The triggering event for the use of a prospective model to calculate nullification or impairment would be the imposition of duties pursuant to a CVD order on exports of goods from the EU that attributes 100 percent of an upstream subsidy to downstream processors of the subject agricultural products through the application of Section 771B. The suspension of concessions should not exceed the length of time during which a WTO-inconsistent CVD rate imposed pursuant to Section 771B remains in place.

U.S. Response to Question 40

48. If the Arbitrator were to determine that conjecture renders a determination of equivalence under the DSU too remote or too speculative, the Arbitrator may decline to measure nullification or impairment as it relates to the overly speculative claim. Due to the lack of information on hypothetical future CVD investigations applying Section 771B, the Arbitrator could conclude that any prospective model for calculating future nullification or impairment is overly speculative. The Arbitrator should then decline to accept any such formula or model and instead require the EU to seek authorization for countermeasures from the DSB in the future if and when Section 771B is applied to another EU product exported to the United States.

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT AT MEETING OF THE PARTIES WITH THE ARBITRATOR

49. The EU argues that Section 771B could not have been reinterpreted, amended, or replaced by the end of the RPT. On reinterpretation, the compliance panel rejected the EU's argument that reinterpretation could never constitute a compliance measure, finding only that the specific reinterpretation offered by the USDOC in the Section 129 proceeding was not sufficient to achieve compliance. On amendment or replacement, the EU offers the circular argument that because the United States has not amended or replaced Section 771B by the end of the RPT, it could not have amended or replaced Section 771B by the end of the RPT. But the fact that the United States has not complied with a DSB recommendation – a fact that is by definition present in every Article 22.6 arbitration – is not evidence that the United State cannot comply with a DSB recommendation.

50. The United States does not need to prove that 100 percent of subsidy benefits are in fact attributed to Spanish ripe olive processors to justify the use of its counterfactual. Rather, the question before the Arbitrator is as follows: is it reasonable and plausible to assume for the purpose of constructing a hypothetical counterfactual compliance scenario that the U.S. Department of Commerce ("USDOC") would have determined that 100 percent of subsidy benefits are attributable to downstream ripe olive processors through a WTO-consistent attribution analysis? The evidence presented by the United States reveals that the answer to that question is yes.

51. The EU suggests that while the supply elasticity of U.S. olive production is zero, the supply elasticity of Spanish exports of the exact same product is infinity. These elasticity parameters are not supported by any sources, including in the economic literature. They are in obvious tension with one another, even accepting the basic premise that Spanish export supply is more elastic than U.S. domestic supply. It is not credible to suggest that the process for producing a ripe olive is so rigid that domestic supply cannot react at all to meet new demand, but at the same time suggest that Spanish export supply of the same product can immediately satisfy any new demand at any scale at a fixed price.

52. A future application of Section 771B could cover virtually any processed agricultural good, and therefore presents a significant degree of variability. It is not clear how the Arbitrator could construct a formula or model that would (1) be practically useable without giving rise to

further controversies between the parties, and (2) produce an estimate of nullification or impairment that satisfies the requirements of the DSU. To the extent that the Arbitrator lacks confidence that a prospective model or formula can produce a level of countermeasures that is equivalent with the level of nullification or impairment, it would not be permissible under the DSU to adopt one.

53. The EU accepts that domestic production data could be taken into account in its prospective model "if relevant and reliable data is publicly available or is made available by the US" but the EU never explains how such data could actually be incorporated into its model when the entire architecture of the model is designed to exclude U.S. domestic production. The EU also claims that its assumption of an infinite export supply elasticity for ripe olives should be applied to any product potentially subject to Section 771B, without providing any basis to assume that any processed agricultural product that could be subject to Section 771B should have an infinite export supply elasticity. Thus, the EU carries over two of its most extreme assumptions for ripe olives – an implied domestic supply elasticity of zero and an assumed export supply elasticity of infinity – and assumes without providing any evidence that these baseless values can be applied in the future to any processed agricultural good.

EXECUTIVE SUMMARY OF U.S. CLOSING STATEMENT AT MEETING OF THE PARTIES WITH THE ARBITRATOR

54. The counterfactual is only relevant to these proceedings insofar as it is a necessary input into a modeling approach that both the EU and the United States have offered. The EU improperly conflates the requirements for an investigating authority to conduct a WTO-consistent attribution analysis with the task before the Arbitrator, which is to craft a reasonable and plausible counterfactual to serve as an input into a model. Accordingly, neither the United States nor the Arbitrator is required to replicate a WTO-consistent attribution analysis that would be carried out by an investigating authority. Rather, the only thing that the Arbitrator must determine is whether the counterfactuals presented by the parties are reasonable and plausible based on the best evidence that is available.

55. While the initial burden in this proceeding may be on the United States as the objecting party, it is fundamental to any adjudicatory system for a party to put forth evidence to support the factual assertions it makes. To fulfil its mandate, the Arbitrator must use the best evidence available to it. In multiple instances in this proceeding, including for the counterfactual, domestic supply, and export supply elasticity, the United States has provided evidence while the EU has provided none. Accordingly, the Arbitrator should rely on the information provided by the United States.

56. If the Arbitrator lacks confidence that a prospective approach can produce an accurate estimate of the level of nullification or impairment in the case of any future application of Section 771B, it must decline to adopt that approach. In such event, the EU would not be left without a remedy. If Section 771B were applied in the future to an EU product, the EU could seek authorization to suspend concessions at that time. If the United States considered the request to be excessive, the parties could have recourse to limited arbitration to determine the appropriate level with accuracy.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO SECOND SET OF QUESTIONS

U.S. Response to Question 43

57. The EU's position is that if a law is "as such" WTO-inconsistent, then a hypothetical compliance counterfactual can only consist of a situation in which the Member involved remedies the application of the law, but not a situation in which the Member brings the law into compliance with the relevant DSB recommendations. This argument is not supported by the DSU or the specific DSB recommendations in this dispute. First, both the original panel and the compliance panel were clear that the "as applied" breach in this dispute emanates from, and is dependent on, the finding that Section 771B is "as such" inconsistent with the relevant WTO agreements. Second, past arbitrators have found, it is not appropriate for an Article 22.6 arbitrator to prejudge how a Member would choose to come into compliance when constructing an appropriate counterfactual. Rather, the task of the Arbitrator is to determine whether the counterfactual before it is reasonable and plausible. Accordingly, a counterfactual in which the United States reinterprets, amends, or replaces Section 771B, thereby addressing the root "as such" inconsistency as well as any consequential "as applied" inconsistencies, is both reasonable and plausible. While removal of WTO-inconsistent CVD orders would eliminate any nullification or impairment arising from the breach, it would nonetheless leave the "as such" WTO-inconsistency found by the panel in place and the United States would continue to be non-compliant with the DSB recommendations in that regard. Thus, the EU's proposed hypothetical compliance counterfactual prevents the United States from taking the very compliance actions that the EU seeks.

U.S. Response to Question 53

58. The AD duties in this dispute are contemporaneous with the CVD duties and the "all others" AD rate is significantly higher than the "all others" CVD rate. Thus, if the CVD duties are found to create a trade impact, then the contemporaneous and higher AD duties necessarily would also impact trade in the same good.

U.S. Response to Question 58

59. There is ample empirical evidence in the relevant economic literature demonstrating that Armington elasticities could vary significantly across importing countries. The U.S. model uses Armington elasticity estimates derived using U.S. imports and tied directly to the in-scope products while the estimates relied upon by the EU are based on global trade flows at a higher HTS aggregation level, and vary across products but not across countries.

U.S. Response to Question 59

60. The EU assumes that the share of in-scope imports in total ripe olive imports in the United States is representative of this share in other import markets. Empirical evidence demonstrates that the EU's assumption is not reasonable. Production and consumption patterns for ripe olives in the United States versus the EU and ROW are not the same.

U.S. Response to Question 60

61. The HTS codes used in the U.S. model (which are also used by the EU) are the best available proxy for in-scope products subject to the CVD order. Likewise, the domestic production data supplied by the United States is the best available proxy for U.S. domestic production that would be subject to the CVD order. There is no reason to expect two proxies, even two extremely reliable proxies, to be completely aligned with one another in a modeling exercise. Nor is it necessary for two proxy values used as inputs to be aligned with one another for a model to produce a reasoned result.

U.S. Response to Question 73

62. Because Section 771B's requirement to automatically attribute the entirety of upstream subsidy benefits is core to the DSB recommendations in this dispute, any CVD order issued where the USDOC did not apply Section 771B in this manner might not be subject to the DSB recommendations. Rather, there would be a genuine question as to whether such an order contravenes the covered agreements that would need to be settled before the EU could suspend concessions under the DSU. The DSU does not allow an Article 22.6 arbitrator to adopt an "as such" model that could automatically authorize suspension of concessions for a measure that may not be subject to DSB recommendations. Accordingly, the Arbitrator must decline to adopt an "as such" model that could encompass measures that are not subject to the DSB recommendations in this dispute, including orders that do not automatically attribute the entirety of the subsidy benefit to downstream processors of agricultural products.

U.S. Response to Question 75

63. The DSU does not discuss prospective formulae or "as such" models. The DSU contains its own system for arriving at the appropriate level of countermeasures for a specific WTO-inconsistent measure: limited and expedited arbitration. In this way, any future WTO-inconsistent CVD order issued under Section 771B could be individually analyzed and the level of suspension could, consistent with the requirements of the DSU, be definitively and accurately determined.

U.S. Response to Question 78

64. The DSU provides express limitations on the suspension of concessions or other obligations. Thus, the DSU contemplates that suspension of concessions or other obligations within the bounds of the limitations laid out in the DSU are sufficient and appropriate to achieve the goal of inducing compliance. Any additional action by Members above and beyond such suspension might be described as "punitive." Under the DSU, the role of an Article 22.6 arbitrator is limited to determining "whether the level of [] suspension is equivalent to the level of nullification or impairment." In this way, the arbitrator is tasked with ensuring the requirement of Article 22.4 of the DSU that the level of suspension "shall be equivalent to the level of nullification or impairment." Any action or consideration by an Article 22.6 arbitrator that amplifies the level of suspension beyond what is equivalent to the level of nullification or impairment, whether to apply pressure to induce compliance by the Member involved or to achieve some other goal, would be inconsistent with the express requirements of the DSU.