



UNITED STATES – ANTI-DUMPING AND COUNTERVAILING DUTIES ON RIPE OLIVES FROM SPAIN

RECOURSE TO ARTICLE 22.6 OF THE DSU BY THE UNITED STATES

DECISION BY THE ARBITRATOR

*BCI redacted, as indicated [[***]]*

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CASES CITED IN THIS DECISION

Short Title	Full Case Title and Citation
<i>Brazil – Aircraft</i> (Article 22.6 – Brazil)	Decision by the Arbitrator, <i>Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS46/ARB , 28 August 2000, DSR 2002:I, p. 19
<i>Canada – Aircraft Credits and Guarantees</i> (Article 22.6 – Canada)	Decision by the Arbitrator, <i>Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS222/ARB , 17 February 2003, DSR 2003:III, p. 1187
<i>EC – Bananas III (Ecuador)</i> (Article 22.6 – EC)	Decision by the Arbitrator, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS27/ARB/ECU , 24 March 2000, DSR 2000:V, p. 2237
<i>EC – Hormones (US)</i> (Article 22.6 – EC)	Decision by the Arbitrator, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS26/ARB , 12 July 1999, DSR 1999:III, p. 1105
<i>EC and certain member States – Large Civil Aircraft</i> (Article 22.6 – EU)	Decision by the Arbitrator, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 22.6 of the DSU by the European Union</i> , WT/DS316/ARB and Add.1, 2 October 2019, DSR 2019:XII, p. 6477
<i>US – 1916 Act (EC)</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Anti-Dumping Act of 1916, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS136/ARB , 24 February 2004, DSR 2004:IX, p. 4269
<i>US – Anti-Dumping Methodologies (China)</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China – Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS471/ARB and Add.1, 1 November 2019, DSR 2019:XII, p. 6775
<i>US – COOL</i> (Article 22.6 – US)	Decisions by the Arbitrator, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS384/ARB and Add.1 / WT/DS386/ARB and Add.1, circulated to WTO Members 7 December 2015, DSR 2015:XI, p. 5877
<i>US – Countervailing Measures (China)</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS437/ARB and Add.1, 26 January 2022, DSR 2022:III, p. 1217
<i>US – FSC (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS108/ARB , 30 August 2002, DSR 2002:VI, p. 2517
<i>US – Gambling</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS285/ARB , 21 December 2007, DSR 2007:X, p. 4163
<i>US – Large Civil Aircraft (2nd complaint)</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS353/ARB and Add.1, 13 October 2020, DSR 2020:V, p. 2085
<i>US – Offset Act (Byrd Amendment) (EC)</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS217/ARB/EEC , 31 August 2004, DSR 2004:IX, p. 4591
<i>US – Ripe Olives from Spain</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain</i> , WT/DS577/R and Add.1, adopted 20 December 2021, DSR 2021:I, p. 7
<i>US – Ripe Olives from Spain (Article 21.5 – EU)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain – Recourse to Article 21.5 of the DSU by the European Union</i> , WT/DS577/RW and Add.1, adopted 19 March 2024
<i>US – Supercalendered Paper</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Countervailing Measures on Supercalendered Paper from Canada – Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS505/ARB and Add.1, 13 July 2022, DSR 2022:III, p. 1427
<i>US – Tuna II (Mexico)</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS381/ARB , 25 April 2017, DSR 2017:VIII, p. 4129

Short Title	Full Case Title and Citation
<i>US – Upland Cotton (Article 22.6 – US I)</i>	Decision by the Arbitrator, <i>United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS267/ARB/1 , 31 August 2009, DSR 2009:IX, p. 3871
<i>US – Upland Cotton (Article 22.6 – US II)</i>	Decision by the Arbitrator, <i>United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement</i> , WT/DS267/ARB/2 and Corr.1, 31 August 2009, DSR 2009:IX, p. 4083
<i>US – Washing Machines (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea – Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS464/ARB and Add.1, 8 February 2019, DSR 2019:XII, p. 6299

MAIN EXHIBITS REFERRED TO IN THIS DECISION

Exhibit	Short title (if applicable)	Description/Long title
Exhibit EU-6	Description of the European Union's economic model	Description of the partial equilibrium model used for the simulations
Exhibit EU-7		GAMS code for the European Union's economic model
Exhibit EU-9	USITC investigation report	USITC, Ripe Olives from Spain, Investigation Nos. 701-TA-582 and 731-TA-1377 (Final), Publication 4805, July 2018
Exhibit EU-11	Kee et al. (2008)	H.L. Kee et al., "Import Demand Elasticities and Trade Distortions" (2008), Vol. 90, No. 4, (2008) <i>The Review of Economics and Statistics</i>
Exhibit EU-12	Fontagné et al. (2022)	L. Fontagné et al., "A new dataset on product-level trade elasticities" (2022), <i>Data in Brief</i>
Exhibit EU-13	Feenstra et al. (2018)	R. Feenstra et al., "In Search of the Armington Elasticity", (2018) Vol. 100, No. 1, <i>The Review of Economics and Statistics</i>
Exhibit EU-14	Calculations for the European Union's economic model	Calculations to assess the level of nullification and impairment in DS577
Exhibit EU-25	USDOC administrative review (December 2022)	USDOC, Ripe Olives From Spain: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2020-2021, 9 December 2022
Exhibit EU-26	USDOC administrative review (March 2024)	USDOC, Ripe Olives From Spain: Final Results of Antidumping Duty Administrative Review; 2021-2022, 11 March 2024
Exhibit EU-27	Fontagné et al. (2022)	L. Fontagné et al., "Tariff-based product-level trade elasticities", <i>Journal of International Economics</i> (2022)
Exhibit USA-13	USITC sunset investigation report	USITC Publications, Ripe Olives from Spain, Inv. Nos. 701-TA-582, 731-TA-1377, 5526 (July 2024) (Review)
Exhibit USA-16	Size of the United States' Ripe Olives Market in 2016 and 2023	Size of the United States' Ripe Olives Market in 2016 and 2023 and market shares of the entities included in the economic model
Exhibit USA-21	Soderbery (2015)	A. Soderbery, "Estimating import supply and demand elasticities: Analysis and implications", <i>Journal of International Economics</i> (2015)
Exhibit USA-38	Broda et al. (2006)	C. Broda et al., "From Groundnuts to Globalization: a Structural Estimate of Trade and Growth", <i>NBER Working Paper Series</i> (2006)
Exhibit USA-39	Yilmazkuday (2015)	H. Yilmazkuday, "Importer-specific elasticities of demand: Evidence from U.S. exports", <i>International Review of Economics and Finance</i> (2015)
Exhibit USA-40	Hillberry and Hummels (2013)	R. Hillberry and D. Hummels, "Trade Elasticity Parameters for a Computable General Equilibrium Model", <i>Handbook of Computable General Equilibrium Modeling</i> , Chapter 18, Volume 1 (2013)
Exhibit USA-42	Ahmad et al. (2021)	S. Ahmad et al., "A Comparison of Sectoral Armington Elasticity Estimates in the Trade Literature", <i>USITC Journal of International Commerce and Economics</i> (2021)

Exhibit	Short title (if applicable)	Description/Long title
Exhibit USA-43	Bajzík et al. (2020)	J. Bajzík et al., "Estimating the Armington Elasticity: The Importance of Study Design and Publication Bias", <i>Journal of International Economics</i> (2020)
Exhibit USA-44	Imbs and Méjean (2015)	J. Imbs and I. Méjean, "Elasticity Optimism" (2015), Vol. 7, No. 3, <i>American Economic Journal: Macroeconomics</i>
Exhibit USA-45	Soderbery (2018)	A. Soderbery, "Trade Elasticities, Heterogeneity, and Optimal Tariffs" (2018), Vol. 114, No. 44, <i>Journal of International Economics</i> pp. 43-48
Exhibit USA-51	United States' own Armington elasticity analysis	Econometric Estimation of the Elasticity of Substitution between the United States' Imports of Ripe Olives from Different Countries
Exhibit USA-57		USDA List of Processed Agricultural Products
Exhibit USA-62 (revised)	Calculation of the respondents' individual shares of the United States' imports of fully in-scope HTS codes (BCI)	Exports of Ripe Olives from Spain by Respondent Companies During the Period of Investigation (BCI)
Exhibit USA-63		Understanding between the European Union and the United States concerning procedures to apply to BCI to the extent necessary to apply the DSB authorization consistent with the Arbitrator's Decision

ABBREVIATIONS USED IN THIS DECISION

Abbreviation	Description
ADD	anti-dumping duty
Anti-dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ASM	Annual Survey of Manufacturers
BEA	Bureau of Economic Analysis
BCI	Business Confidential Information
BCI Procedures	Additional Working Procedures Concerning BCI
BCI Understanding	Understanding between the European Union and the United States concerning procedures to apply to Business Confidential Information to the extent necessary to apply the DSB authorization consistent with the Arbitrator's Decision, agreed on 17 July 2025
BLS	Bureau of Labor Statistics
CAP	EU Common Agricultural Policy
CVD	countervailing duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GAMS	General Algebraic Modeling System
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized System
HTSUS	Harmonized Tariff Schedule of the United States
NASS	National Agricultural Statistical Service
NAICS	North American Industrial Classification System
NI	nullification or impairment
Open Meeting Working Procedures	Additional Working Procedures for an Open Meeting on 19 December 2024
POI	period of investigation
POR	period of review
PPIs	Producer Price Indexes
RPT	reasonable period of time
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Section 129 Proceeding	Section 129 of the Uruguay Round Agreements Act
Section 771B	Section 771B of the Tariff Act of 1930
USDA	United States Department of Agriculture
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
WTO	World Trade Organization

1 INTRODUCTION

1.1 Original proceedings

1.1. The present arbitration arises in the dispute initiated by the European Union concerning the imposition of countervailing duties (CVDs) and anti-dumping duties (ADDs) by the United States on ripe olives from Spain.

1.2. The original proceedings in this dispute commenced on 28 January 2019, when the European Union requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), concerning the imposition of CVDs and ADDs on ripe olives from Spain.¹

1.3. The Panel Report in this dispute was circulated to WTO Members on 19 November 2021. At its meeting on 20 December 2021, the Dispute Settlement Body (DSB) adopted the Panel Report.²

1.4. With respect to the European Union's claims in relation to Section 771B of the Tariff Act of 1930 (Section 771B) and its application in the ripe olives CVD investigation, the panel found that:

- a. 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 United States Department of Commerce (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 two factual circumstances, 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 degree³; and
- b. the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement regarding its application of Section 771B in the Spanish ripe olives CVD investigation because it failed to establish the existence and extent of indirect subsidization taking into account all relevant facts and circumstances.⁴

1.5. On 19 January 2022, the United States notified the DSB of its intention to implement the recommendations and rulings of the DSB, pursuant to Article 21.3 of the DSU, and that it required a reasonable period of time (RPT) in which to do so.⁵ On 1 July 2022, the European Union and the United States informed the DSB that they had agreed pursuant to Article 21.3(b) of the DSU that the RPT for the United States to implement the recommendations and rulings of the DSB would be 12 months and 25 days from the day of adoption of such recommendations and rulings on 20 December 2021.⁶ Accordingly, the RPT was set to expire on 14 January 2023.

1.6. The USDOC initiated proceedings under Section 129 of the Uruguay Round Agreements Act (Section 129 Proceeding) regarding the CVD investigation on ripe olives from Spain on 6 July 2022. On 20 December 2022, the USDOC issued its final determination. At the DSB meeting of 27 January 2023, the United States informed the DSB that it had complied with its recommendations and rulings through the Section 129 Proceeding. The European Union disagreed.⁷

1.2 Compliance proceedings

1.7. On 28 April 2023, the European Union requested consultations with the United States pursuant to Articles 1, 4, and 21.5 of the DSU, Article 30 of the SCM Agreement, and Article XXIII of the GATT 1994, concerning the CVDs and ADDs on ripe olives from Spain imposed by the United States,

¹ Request for consultations by the European Union, 31 January 2019 (WT/DS577/1).

² DSB, Minutes of the meeting held on 20 December 2021 (WT/DSB/M/459), para. 7.7.

³ Panel Report, *US – Ripe Olives from Spain*, para. 8.1(b)(i).

⁴ Panel Report, *US – Ripe Olives from Spain*, para. 8.1(b)(ii).

⁵ Communication from the United States, 24 January 2022 (WT/DS577/10).

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

⁷ DSB, Minutes of the meeting held on 27 January 2023 (WT/DSB/M/475), paras. 1.28-1.32.

and concerning a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with recommendations and rulings in *US – Ripe Olives from Spain*.⁸

1.8. The compliance Panel Report was circulated to WTO Members on 20 February 2024. At its meeting on 19 March 2024, the DSB adopted the compliance Panel Report.⁹

1.9. With respect to the European Union's claims 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, the compliance panel concluded that:

- a. the European Union had demonstrated that the USDOC's revised analysis of Section 771B, as contained in the preliminary and final Section 129 determinations, failed to implement the relevant aspects of the adopted DSB recommendations and rulings that Section 771B is as such inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement; and
- b. the European Union had demonstrated that the application of Section 771B in the ripe olives Section 129 determinations was inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement and consequently, that the United States had failed to bring its measures into conformity with the adopted DSB recommendations and rulings.¹⁰

1.3 Referral to arbitration and arbitration proceedings

1.10. On 14 November 2024, the European Union requested authorization 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.¹¹

1.11. The European Union indicated that it intended to suspend benefits at an annual level of approximately USD 35 million, an amount which may be adjusted for inflation for the year 2024 and on an annual basis thereafter.¹² The European Union stated that the annual level of suspension proposed is equivalent to the level of nullification or impairment (NI) 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.¹³

1.12. In addition, the European Union requested 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.¹⁴ The European Union stated that this additional request was to reflect the possible NI the European Union would suffer if the as such violation continued to exist and Section 771B was applied to other exports from the European Union in the future.¹⁵

1.13. On 22 November 2024, the United States indicated that, pursuant to Article 22.6 of the DSU, it objected to the levels of suspension of concessions or other obligations proposed by the European Union.¹⁶

⁸ Recourse to Article 21.5 of the DSU by the European Union, Request for consultations by the European Union, 2 May 2023 (WT/DS577/15).

⁹ DSB, Minutes of the meeting held on 19 March 2024 (WT/DSB/M/488), para. 3.5.

¹⁰ Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, para. 8.1.

¹¹ Recourse to Article 22.2 of the DSU by the European Union, 15 November 2024 (WT/DS577/20).

¹² In its methodology paper of 20 December 2024, the European Union indicated that it intended to suspend benefits at an annual level of USD 33.5 million, an amount that may be adjusted for inflation for the year 2024 and on an annual basis thereafter. (European Union's methodology paper, para. 13). Subsequently, in its 17 March 2025 responses to the Arbitrator questions, the European Union reduced the amount from USD 33.5 million to USD 30.1 million. (European Union's response to Arbitrator question No. 18.b, para. 59).

¹³ Recourse to Article 22.2 of the DSU by the European Union, 15 November 2024 (WT/DS577/20), p. 2.

¹⁴ Recourse to Article 22.2 of the DSU by the European Union, 15 November 2024 (WT/DS577/20), p. 2.

¹⁵ Recourse to Article 22.2 of the DSU by the European Union, 15 November 2024 (WT/DS577/20), p. 2.

¹⁶ Recourse to Article 22.6 of the DSU by the United States, 22 November 2024 (WT/DS577/21).

1.14. At its meeting on 25 November 2024, the DSB took note that the matter raised by the United States had been referred to arbitration, as required by Article 22.6 of the DSU.¹⁷

1.15. The Arbitrator was constituted on 29 November 2024 and was composed of the original panelists:

Chairperson: Mr Daniel Moulis

Members: Mr Martin Garcia
Ms Charis Tan¹⁸

1.16. An organizational meeting was held on 13 December 2024 to discuss procedural aspects of the arbitration proceedings. On 19 December 2024, the Arbitrator adopted its timetable and its Working Procedures.¹⁹

1.17. In accordance with the timetable and Working Procedures adopted by the Arbitrator, the European Union submitted on 20 December 2024 a communication explaining the methodology that it used to calculate the proposed level of suspension (Methodology Paper). The United States filed its written submission on 28 January 2025. The European Union filed its written submission on 20 February 2025. The Arbitrator sent a first set of questions to the parties on 27 February 2025, to which the parties responded in writing on 17 March 2025.

1.18. The Arbitrator held its meeting with the parties on 25 and 26 March 2025. On 28 March 2025, following its meeting with the parties, the Arbitrator sent a second set of questions to the parties, to which the parties responded in writing on 17 April 2025 and then filed comments on the other party's responses on 1 May 2025. On 27 May 2025, the Arbitrator sent an additional set of questions to the parties, to which the parties responded in writing on 6 June 2025 and then filed comments on the other party's responses on 13 June 2025.

1.19. On 23 June 2025, the Arbitrator requested additional information from the parties and also invited them to develop an agreement on how to obtain and protect Business Confidential Information (BCI). The United States provided the requested information on 9 July 2025, and the European Union commented on the information provided by the United States on 15 July 2025. On 17 July 2025, the parties submitted the Understanding between the European Union and the United States concerning procedures to apply to Business Confidential Information to the extent necessary to apply the DSB authorization consistent with the Arbitrator's Decision (BCI Understanding).²⁰

1.20. On 3 September 2025, the Arbitrator informed the parties that it was considering allowing them to comment on the instructions set out in its Decision relating to the calculations leading to the level of NI concerning the application of Section 771B in the investigation on ripe olives from Spain, as well as those pertaining to the application of the prospective model to calculate NI arising from any future application of Section 771B. The parties were invited to provide comments on this possibility for a limited review. Both parties indicated that they had no comments.

1.21. The Arbitrator sent its Decision to the parties on 17 September 2025 for the limited review. The parties filed comments on 26 September 2025 and comments on the other party's comments on 6 October 2025.

1.22. At the request of the United States, and after consulting with the European Union, the Arbitrator sent its Decision to the parties again on 13 October 2025, to give them one last opportunity to provide comments on the modifications arising from the limited review. The parties filed comments on 17 October 2025 and comments on the other party's comments on 23 October 2025.

¹⁷ DSB, Minutes of the meeting held on 25 November 2024 (WT/DSB/M/495), para. 5.4.

¹⁸ Constitution of the Arbitrator, Note by the Secretariat, 29 November 2024 (WT/DS577/22).

¹⁹ Working Procedures of the Arbitrator, adopted on 19 December 2024 (Annex A-1).

²⁰ See section 8 below.

1.23. The Decision of the Arbitrator was circulated to WTO Members on 29 October 2025.

2 PROCEDURAL MATTERS

2.1 Business Confidential Information (BCI)

2.1. Both the United States and the European Union requested the Arbitrator to adopt working procedures for the protection of BCI. After consulting with the parties, the Arbitrator adopted its Additional Working Procedures Concerning BCI (BCI Working Procedures) on 19 December 2024.²¹

2.2. The BCI Working Procedures define BCI for the purpose of the proceedings; provide that each party shall indicate the presence of BCI in its submissions; and limit access to and use of the BCI submitted during the proceedings.²²

2.3. The BCI Working Procedures provide that the Arbitrator will not disclose BCI in its Decision, or in any other way, to persons not authorized under the procedures to have access to BCI. The Arbitrator may, however, make statements of conclusion drawn from such information.²³ Accordingly, the Arbitrator has redacted statements of BCI from the public version of its Decision circulated to all WTO Members, including certain values that were used in its calculations.

2.4. Pursuant to the BCI Working Procedures, the Arbitrator was required, before circulating its Decision to all WTO Members, to give each party an opportunity to review the Decision to ensure that it did not contain any information that the party had designated as BCI.²⁴ Accordingly, on 13 October 2025, the Arbitrator issued to the parties a confidential version of its Decision to ensure that, in the parties' views, the Decision contained no BCI. The parties expressed no objections concerning the treatment of BCI in the Decision.

2.5. The text of the public version of the Arbitrator's Decision circulated to all WTO Members is identical to the text of the confidential version issued to the parties, with the exception of passages that are redacted to protect BCI. Such passages have been replaced by "[[***]]". In drafting and redacting its Decision, the Arbitrator has done its best to ensure that the public version circulated to all WTO Members is understandable.

2.2 Public viewing of the meeting of the Arbitrator with the parties

2.6. Both the United States and the European Union requested that the meeting of the Arbitrator with the parties be open to public viewing. After consulting with the parties, the Arbitrator adopted its Additional Working Procedures for an Open Meeting on 19 December 2024 (Open Meeting Working Procedures).²⁵

2.7. As provided in the Open Meeting Working Procedures, the meeting of the Arbitrator with the parties was opened to the public by means of a live closed-circuit television broadcast to a separate viewing room in the WTO. Other WTO Members, Observers, staff members of the WTO Secretariat, and registered members of the public were allowed to observe the meeting in the separate viewing room.²⁶

²¹ Additional Working Procedures of the Arbitrator Concerning Business Confidential Information, adopted on 19 December 2024 (Annex A-2).

²² Additional Working Procedures of the Arbitrator Concerning Business Confidential Information, adopted on 19 December 2024 (Annex A-2).

²³ Additional Working Procedures of the Arbitrator Concerning Business Confidential Information, adopted on 19 December 2024 (Annex A-2), para. 13.

²⁴ Additional Working Procedures of the Arbitrator Concerning Business Confidential Information, adopted on 19 December 2024 (Annex A-2), para. 13.

²⁵ Additional Working Procedures for the Arbitrator: Open Meeting, adopted on 19 December 2024 (Annex A-3).

²⁶ Additional Working Procedures for the Arbitrator: Open Meeting, adopted on 19 December 2024 (Annex A-3), para. 5.

3 MANDATE OF THE ARBITRATOR AND BURDEN OF PROOF

3.1 Mandate of the Arbitrator

3.1. This arbitration arises from the United States' objection to the levels of suspension of concessions or other obligations proposed by the European Union in its request for authorization from the DSB to suspend the application to the United States of concessions or other obligations under the covered agreements.

3.2. Pursuant to Article 22.4 of the DSU, "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment".

3.3. In proceedings under Article 22.6 of the DSU, the mandate of the Arbitrator, as set out in Article 22.7 of the DSU, is as follows:

The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment.

3.4. Thus, our task in these proceedings is to determine whether the level of suspension of concessions or other obligations proposed by the European Union is equivalent to the level of NI sustained by the European Union as a result of the United States' failure to implement the DSB recommendations and rulings by the expiry of the RPT.²⁷

3.5. If we find that the European Union's proposed level of suspension is not equivalent to the level of NI caused by the United States' failure to implement the DSB recommendations and rulings by the expiry of the RPT, our mandate requires us to estimate the level of suspension of concessions or other obligations that would be equivalent to the level of NI.²⁸ As per previous arbitrations, this is the essential task and responsibility conferred on Article 22.6 arbitrators, in pursuit of the basic DSU objectives of prompt and positive settlement of disputes, and as implicitly called for in Article 22.7 of the DSU²⁹, which provides in relevant part that "[t]he parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration"; and that the DSB "shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator." Both parties agree that this forms part of the Arbitrator's mandate.³⁰

3.6. As past arbitrators have recognized, any determination of NI, because it is based on assumptions, will necessarily be a reasoned estimate.³¹ Such assumptions, however, must be reasonable, taking into account the circumstances of the dispute³², and be based, as much as

²⁷ See, e.g. Decisions by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 4.5; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.3.

²⁸ Decisions by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 12; *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 12-13; *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.18; *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 4.6-4.9; *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, para. 3.15; *US – Gambling (Article 22.6 – US)*, para. 2.8; *US – Upland Cotton (Article 22.6 – US I)*, para. 5.54; *US – Upland Cotton (Article 22.6 – US II)*, para. 5.54; *US – COOL (Article 22.6 – US)*, para. 4.4; *US – Washing Machines (Article 22.6 – US)*, para. 1.15; *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 3.4; *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 3.5; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12; *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.68; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

²⁹ See, e.g. Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, para. 12; and *US – Gambling (Article 22.6 – US)*, para. 2.8.

³⁰ See, e.g. United States' response to Arbitrator question No. 10, para. 31; European Union's response to Arbitrator question No. 40, paras. 87-91.

³¹ Decisions by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 41; *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54; *US – COOL (Article 22.6 – US)*, para. 4.5; *US – Washing Machines (Article 22.6 – US)*, paras. 1.16; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12; *US – Countervailing Measures (China) (Article 22.6 – US)*, fn 245; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

³² Decisions by the Arbitrators, *US – Gambling (Article 22.6 – US)*, para. 3.30; *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 5.16; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12; *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.173; *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 3.6; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

possible, on credible, factual, and verifiable information³³, not on speculation.³⁴ Both parties rely on this approach taken by past arbitrators.³⁵

3.7. Previous arbitrators have endeavoured to rely on the best information or data that is available in pursuit of formulating such a reasoned estimate³⁶, and have declined to accept claims that are too remote, too speculative, or not meaningfully quantified.³⁷ Both parties rely on this approach taken by previous arbitrators.³⁸

3.8. Moreover, in determining the level of NI, previous arbitrators have developed their own appropriate methodologies, based either on elements of methodologies proposed by the parties, or on an altogether different approach.³⁹

3.9. Finally, we note that, pursuant to Article 22.8 of the DSU, the suspension of concessions or other obligations shall be temporary, pending full implementation of the DSB recommendations and rulings, or a mutually agreed solution. On this basis, previous arbitrators have considered that the purpose of suspension of concessions or other obligations is to induce compliance.⁴⁰ Other arbitrators have also 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.⁴¹ Both parties agree with these statements.⁴²

3.2 Burden of proof

3.10. The burden of proving that the requirements of the DSU have not been met rests on the party challenging the proposed level of suspension.⁴³ This is because WTO Members are presumed to act

³³ Decisions by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54; *US – COOL (Article 22.6 – US)*, para. 4.5; *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 5.16; *US – Washing Machines (Article 22.6 – US)*, paras. 1.16 and 3.127; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12; *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 340 and fn 245; *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.173; *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 3.6; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

³⁴ Decisions by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54; *US – Washing Machines (Article 22.6 – US)*, para. 3.127; and *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12.

³⁵ See, e.g. United States' written submission, para. 18; and response to Arbitrator question No. 40, fn 160; and European Union's response to Arbitrator question No. 78, para. 124.

³⁶ See, e.g. Decisions by the Arbitrators, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, paras. 7.16, 7.19, 7.22, 7.29, 7.34, and fn 272; and *US – Supercalendered Paper (Article 22.6 – US)*, paras. 3.4 and 7.87.

³⁷ Decisions by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.57 (quoting Decisions by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 77; and *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.22); and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

³⁸ See, e.g. United States' response to Arbitrator question Nos. 9, para. 28; 10, para. 30; and 40, para. 93; European Union's response to Arbitrator question No. 40, para. 90.

³⁹ Decisions by the Arbitrators, *US – Washing Machines (Article 22.6 – US)*, para. 1.16 (referring to Decisions by the Arbitrators, *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, paras. 3.69-3.79 and 3.115; *US – Gambling (Article 22.6 – US)*, para. 3.174; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12; *US – Countervailing Measures (China) (Article 22.6 – US)*, fn 245; and *US – Supercalendered Paper (Article 22.6 – US)*, fn 27.

⁴⁰ Decisions by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3; *EC – Hormones (US) (Article 22.6 – EC)*, para. 40; *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.5-5.7; *US – Washing Machines (Article 22.6 – US)*, para. 1.17; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.13; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.5.

⁴¹ Decisions by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3; *EC – Hormones (US) (Article 22.6 – EC)*, para. 40; *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.8; *US – Washing Machines (Article 22.6 – US)*, para. 1.17; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.13; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.5.

⁴² See, e.g. United States' response to Arbitrator question No. 78, para. 89; European Union's response to Arbitrator question No. 78, para. 124.

⁴³ Decisions by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 9; *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 37-38; *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.8; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 2.6; *US – FSC (Article 22.6 – US)*, para. 2.10; *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 3.4; *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, para. 2.25; *US – Gambling (Article 22.6 – US)*, paras. 2.22-2.23; *US – Upland Cotton (Article 22.6 – US I)*, paras. 4.21-4.22; *US – Upland Cotton (Article 22.6 – US II)*, paras. 4.12-4.13; *US – COOL (Article 22.6 – US)*, para. 4.7; *US – Washing Machines (Article 22.6 – US)*, para. 1.14; *EC and*

in conformity with their WTO obligations, and the party claiming that another Member has acted inconsistently with WTO rules bears the burden of proving that inconsistency.⁴⁴ Moreover, Article 3.8 of the DSU states that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment".

3.11. Nevertheless, it is for the party alleging a fact, whether complainant or respondent, to prove its existence, and both parties have a duty to collaborate in presenting evidence to an arbitrator, to assist it in fulfilling its mandate.⁴⁵

3.12. Accordingly, in this proceeding, the United States bears the initial burden of establishing a *prima facie* case that the level of suspension proposed by the European Union is not equivalent to the level of NI and is therefore inconsistent with Article 22.4 of the DSU. Both the United States and the European Union must prove the facts that they allege and have a duty to collaborate in presenting evidence to the Arbitrator. Both parties agree on this allocation of the burden of proof.⁴⁶

4 THE APPROPRIATE COUNTERFACTUAL

4.1 Introduction

4.1. In substantiating its request for suspension in the amount of USD 30.1 million⁴⁷, the European Union estimates the level of NI caused by the United States' failure to implement the DSB recommendations and rulings by relying on a counterfactual. The United States disagrees with the European Union's counterfactual and proposes its own counterfactual.

4.2. Counterfactuals are analytical tools used to determine the level of NI caused by the WTO-inconsistent measures in arbitrations pursuant to Article 22.6 of the DSU.⁴⁸ A counterfactual reflects a hypothetical scenario describing what would have happened in terms of trade flows had the respondent implemented the DSB recommendations and rulings by the end of the RPT.⁴⁹ This hypothetical scenario is constructed for the purpose of comparing it with the actual situation where

certain member States – *Large Civil Aircraft* (Article 22.6 – EU), paras. 4.2-4.3; *US – Large Civil Aircraft* (2nd complaint) (Article 22.6 – US), para. 4.3; *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 1.11; *US – Countervailing Measures (China)* (Article 22.6 – US), paras. 3.2 and 3.34; and *US – Supercalendered Paper* (Article 22.6 – US), para. 4.1.

⁴⁴ Decision by the Arbitrator, *EC – Hormones (US)* (Article 22.6 – EC), para. 9.

⁴⁵ Decisions by the Arbitrators, *EC – Hormones (US)* (Article 22.6 – EC), paras. 10-11; *Brazil – Aircraft* (Article 22.6 – Brazil), para. 2.9; *Canada – Aircraft Credits and Guarantees* (Article 22.6 – Canada), paras. 2.7-2.8; *US – FSC* (Article 22.6 – US), para. 2.11; *US – 1916 Act (EC)* (Article 22.6 – US), paras. 3.5-3.6; *US – Offset Act (Byrd Amendment) (EC)* (Article 22.6 – US), paras. 2.26-2.27; *US – Gambling* (Article 22.6 – US), paras. 2.24-2.25; *US – Upland Cotton* (Article 22.6 – US I), para. 4.23; *US – Upland Cotton* (Article 22.6 – US II), para. 4.14; *US – COOL (Canada and Mexico)* (Article 22.6 – US), paras. 4.8-4.9; *US – Washing Machines* (Article 22.6 – US), para. 1.14; *EC and certain member States – Large Civil Aircraft* (Article 22.6 – EU), para. 4.4; *US – Large Civil Aircraft* (2nd complaint) (Article 22.6 – US), para. 4.4; *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 1.11; *US – Countervailing Measures (China)* (Article 22.6 – US), paras. 3.3 and 3.38; and *US – Supercalendered Paper* (Article 22.6 – US), para. 4.1.

⁴⁶ See, e.g. United States' closing statement at the meeting of the Arbitrator, para. 8; and response to Arbitrator question No. 44, para. 7; and European Union's response to Arbitrator question Nos. 9, para. 38; and 39, para. 85.

⁴⁷ We recall that in its request for authorization from the DSB to suspend concessions or other obligations of 14 November 2024, the European Union indicated that it intended to suspend benefits at an annual level of approximately USD 35 million, an amount which may be adjusted for inflation for the year 2024 and on an annual basis thereafter. In its methodology paper of 20 December 2024, the European Union indicated that it intended to suspend benefits at an annual level of USD 33.5 million, an amount which may be adjusted for inflation for the year 2024 and on an annual basis thereafter. (European Union's methodology paper, para. 13). Subsequently, in its 17 March 2025 responses to the Arbitrator questions, the European Union reduced the amount from USD 33.5 million to USD 30.1 million. (European Union's response to Arbitrator question No. 18.b, para. 59).

⁴⁸ Decisions by the Arbitrators, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.2; and *US – Supercalendered Paper* (Article 22.6 – US), para. 6.50.

⁴⁹ Decisions by the Arbitrators, *US – Tuna II (Mexico)* (Article 22.6 – US), para. 4.4; *US – Washing Machines* (Article 22.6 – US), para. 3.7; *US – Countervailing Measures (China)* (Article 22.6 – US), para. 3.9; and *US – Supercalendered Paper* (Article 22.6 – US), para. 6.50.

the respondent has yet to come into compliance, to quantify the trade effects caused by that Member's failure to comply.⁵⁰

4.3. To construct the counterfactual scenario of what would have happened *in terms of trade flows* had the respondent implemented the DSB recommendations and rulings by the end of the RPT, it is necessary first to have an appropriate hypothetical scenario of implementation of the DSB recommendations and rulings, i.e. an appropriate counterfactual compliance scenario.

4.4. Since a counterfactual compliance scenario is by nature a hypothetical scenario, there may be a degree of uncertainty as to what exact form compliance might have taken, had it occurred.⁵¹

4.5. Past arbitrators have explained that, rather than prejudging how exactly the respondent would have implemented the DSB recommendations and rulings at issue⁵² or speculating on which would be the most likely compliance scenario⁵³, an Article 22.6 arbitrator should instead evaluate whether the counterfactual proposed reflects a reasonable or plausible compliance scenario.⁵⁴ Both parties refer to the approach taken by past arbitrators⁵⁵, and we will rely on this approach for our analysis.

4.6. In this section, we will first address the appropriate counterfactual compliance scenario concerning the application of Section 771B in the Spanish ripe olives CVD investigation, i.e. the "as applied" WTO-inconsistency. We will then address the appropriate counterfactual compliance scenario concerning the future application of Section 771B, which derives from the "as such" WTO-inconsistency. Before addressing the appropriate counterfactuals, however, we will recall the relevant DSB recommendations and rulings, and we will make necessary observations for our assessment of the counterfactuals.

4.2 The relevant DSB recommendations and rulings

4.7. Pursuant to Article 22.1 of the DSU, suspension of concessions or other obligations is available "in the event that *the recommendations and rulings* are not implemented within a reasonable period of time." Also, pursuant to Article 22.2 of the DSU, the party invoking dispute settlement procedures may request authorization from the DSB to suspend concessions or other obligations, "[i]f the Member concerned fails to bring the measure found to be inconsistent with a covered agreement *into compliance therewith or otherwise comply with the recommendations and rulings* within the reasonable period of time."

4.8. Based on the language of Articles 22.1 and 22.2 of the DSU, the right to suspend concessions or other obligations is linked to a Member's failure to implement the DSB recommendations and rulings by the end of the RPT. Such recommendations and rulings explain why the relevant measure was found to be WTO-inconsistent and thus cast light on what could be a reasonable or plausible compliance scenario.

⁵⁰ Decisions by the Arbitrators, *US – Washing Machines (Article 22.6 – US)*, para. 3.7; *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.9; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.50.

⁵¹ Decisions by the Arbitrators, *US – Gambling (Article 22.6 – US)*, para. 3.26; and *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 4.5.

⁵² Decisions by the Arbitrators, *US – Washing Machines (Article 22.6 – US)*, para. 3.9; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.2; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.50.

⁵³ Decisions by the Arbitrators, *US – Gambling (Article 22.6 – US)*, para. 3.26; *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 4.5; *US – Washing Machines (Article 22.6 – US)*, para. 3.9; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.2; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.50.

⁵⁴ Decisions by the Arbitrators, *US – Gambling (Article 22.6 – US)*, para. 3.27; *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 4.5; *US – Washing Machines (Article 22.6 – US)*, para. 3.10; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.2; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.50.

⁵⁵ See, e.g. United States' written submission, paras. 20 and 33; and European Union's written submission, para. 15; opening statement at the meeting of the Arbitrator, para. 8; and response to Arbitrator question No. 1, paras. 2-3.

4.9. We recall that the original panel concluded that Section 771B is as such inconsistent with the United States' obligations under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.

4.10. The original panel explained as follows:

Section 771B is as such inconsistent with the United States' obligations under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement because it *requires* the USDOC to *presume* that the *entire* benefit of a subsidy provided in respect of a raw agricultural input product passes through to the downstream processed agricultural product, based on a consideration of only the two factual circumstances prescribed in that provision, without leaving open the possibility of taking into account any other factors that may be relevant to the determination of whether there is any pass-through and, if so, its degree.⁵⁶

4.11. The original panel also concluded that, through the application of Section 771B in the Spanish ripe olives investigation, the United States had acted inconsistently with its obligations under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement 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.⁵⁷

4.12. The original panel explained as follows:

As reflected in its preliminary and final determinations, the USDOC made its determination of pass-through for three mandatory respondents Agro Sevilla, Ángel Camacho and Aceitunas Guadalquivir based on an evaluation of the two factual circumstances set out in Section 771B, without consideration of any other potentially relevant information relating to the market or the competitive conditions affecting the investigated product. 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.⁵⁸

4.13. Subsequently, the compliance panel rejected the contention that there was a revised interpretation, or that the USDOC could have undertaken a revised interpretation with respect to Section 771B in the ripe olives Section 129 determination. The compliance panel explained as follows:

Contrary to the United States' assertions, the USDOC's analyses of pass through have suggested, on more than one occasion, that it is based solely on consideration of the two factual circumstances in Section 771B. For instance, at the outset of its analysis in the Section 129 proceeding, the USDOC acknowledged that "Section 771B of the Act directs [the USDOC] to deem countervailable subsidies provided to producers of a raw agricultural product as though they have been provided with respect to the manufacture, production, or exportation of the processed agricultural product, 'if two criteria are met'". Furthermore, we have found nothing in other parts of the USDOC's Section 129 determination to substantiate the United States' positions on the meaningfulness of consideration of factors by the USDOC other than the two criteria contained in Section 771B or its flexibility to determine less than full pass through.⁵⁹

⁵⁶ Panel report, *US – Ripe Olives from Spain*, para. 7.170.

⁵⁷ Panel report, *US – Ripe Olives from Spain*, para. 7.176.

⁵⁸ Panel report, *US – Ripe Olives from Spain*, para. 7.175.

⁵⁹ Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, para. 7.71.

4.14. The compliance panel then assessed the WTO-consistency of the USDOC's determination under Section 771B in the ripe olives Section 129 determination, which was the as applied measure that existed by the end of the RPT. The compliance panel found again that the USDOC's determination was inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.⁶⁰

4.15. The compliance panel explained as follows:

[T]he application of Section 771B in the Section 129 proceeding also violates Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. This results from the fact that the USDOC found that subsidies granted to growers of raw olives in Spain could be attributed to three investigated ripe olive producers based solely on its determination that both factual circumstances identified in Section 771B were established, without consideration of any other potentially relevant information relating to the market or the competitive conditions affecting the investigated product.⁶¹

4.16. Based on the relevant DSB recommendations and rulings, we observe that the reason for the as applied WTO-inconsistency in the CVD investigation on ripe olives from Spain was an improper analysis of attribution (pass-through) of subsidy benefits from growers of raw olives to ripe olive producers, which was based solely on the determination that the two factual circumstances identified in Section 771B were established, without consideration of any other potentially relevant information relating to the market or the competitive conditions affecting the investigated product.⁶²

4.17. We also observe that Section 771B was found to be WTO-inconsistent 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. Therefore, the as such WTO-inconsistency of Section 771B led to the as applied WTO-inconsistency in the CVD investigation on ripe olives from Spain.⁶³

4.18. We will consider these two observations in our analysis of whether the counterfactuals proposed reflect a reasonable or plausible compliance scenario.

4.3 Appropriate counterfactual concerning the application of Section 771B in the Spanish ripe olives CVD investigation (the as applied WTO-inconsistency)

4.3.1 Overview

4.19. The European Union argues that no pass-through of benefit, and termination of the CVDs as a result, is the only possible counterfactual compliance scenario in the specific circumstances of the case, in which the USDOC would be unable to carry out a WTO-consistent pass-through analysis because Section 771B requires the USDOC to only consider the two criteria contained therein.⁶⁴

4.20. The European Union maintains that the CVDs on ripe olives from Spain are WTO-inconsistent in their entirety, given that around 95% of the subsidies attributed to the three companies involved were based on a WTO-inconsistent pass-through analysis, and without the presumed pass-through, the subsidy rate would be *de minimis* for such companies. The European Union thus contends that, had the United States complied with the DSB recommendations and rulings by the end of the RPT, the CVDs on ripe olives from Spain should have been removed in full.⁶⁵

⁶⁰ Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, para. 7.79.

⁶¹ Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, para. 7.79.

⁶² Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, para. 7.79.

⁶³ Panel Report, *US – Ripe Olives from Spain*, para. 7.170.

⁶⁴ European Union's written submission, paras. 10, 17 and 29-30; and opening statement at the meeting of the Arbitrator, paras. 11 and 15.

⁶⁵ European Union's methodology paper, para. 22; written submission, para. 10; and opening statement at the meeting of the Arbitrator, para. 9.

4.21. The United States rejects the European Union's counterfactual compliance scenario and argues instead that the proper counterfactual is one in which the USDOC is able to assess attribution of subsidy benefits for products subject to Section 771B, including ripe olives from Spain, in a WTO-consistent manner.⁶⁶

4.22. The United States further submits that the correct counterfactual scenario should assume that a WTO-consistent attribution analysis conducted by the USDOC would determine that 100% of the benefits from the subsidies provided to Spanish raw olive growers are attributable to Spanish ripe olive producers. For the United States, therefore, the CVDs imposed on Spanish ripe olives would not have changed in a WTO-consistent counterfactual scenario and thus the level of NI to the European Union should be 0.⁶⁷

4.23. We recall that our task is to evaluate whether the proposed counterfactual reflects a reasonable or plausible compliance scenario⁶⁸, rather than prejudge how exactly the United States would have implemented the DSB recommendations and rulings at issue⁶⁹ or speculate on which would be the most likely compliance scenario.⁷⁰

4.24. We will first evaluate whether the counterfactual proposed by the European Union reflects a reasonable or plausible compliance scenario. If we find that the European Union's counterfactual compliance scenario is not reasonable or plausible, we will proceed to evaluate the counterfactual proposed by the United States. If we also find that the United States' counterfactual is not reasonable or plausible, in accordance with our mandate, we will necessarily have the task of settling on a counterfactual compliance scenario that is reasonable and plausible in light of the non-compliance concerned.

4.3.2 Counterfactual proposed by the European Union

4.25. The European Union's counterfactual is based on the termination of the measure, i.e. full removal of the CVDs on ripe olives from Spain. We consider that termination of a WTO-inconsistent measure is generally a simple, straightforward choice for a counterfactual. Past arbitrators have relied on such an approach even when compliance could have taken different forms.

4.26. For example, in *EC – Hormones*⁷¹, *US – COOL*⁷² and *US – Tuna II*⁷³, the arbitrators selected the withdrawal of the WTO-inconsistent measure as the appropriate counterfactual. In those cases, the parties ultimately agreed on the use of this counterfactual. In this case, however, the parties do not agree on using termination as the counterfactual.

4.27. The European Union argues that no pass-through of benefit, and termination of the CVDs as a result, is not only reasonable and plausible, but it is the only possible counterfactual compliance scenario. The European Union maintains that the United States cannot remedy the as applied violation through the application of a WTO-consistent pass-through analysis that could result in the attribution of benefit. For the European Union, this is caused by the as such violation, which requires the USDOC to act WTO-inconsistently when applying Section 771B. The European Union maintains

⁶⁶ United States' written submission, para. 2.

⁶⁷ United States' written submission, para. 42.

⁶⁸ Decisions by the Arbitrators, *US – Gambling* (Article 22.6 – US), para. 3.27; *US – Tuna II (Mexico)* (Article 22.6 – US), para. 4.5; *US – Washing Machines* (Article 22.6 – US), para. 3.10; *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.2; and *US – Supercalendered Paper* (Article 22.6 – US), para. 6.50.

⁶⁹ Decision by the Arbitrators, *US – Washing Machines* (Article 22.6 – US), para. 3.9; *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.2; and *US – Supercalendered Paper* (Article 22.6 – US), para. 6.50.

⁷⁰ Decisions by the Arbitrators, *US – Gambling* (Article 22.6 – US), para. 3.26; *US – Tuna II (Mexico)* (Article 22.6 – US), para. 4.5; *US – Washing Machines* (Article 22.6 – US), para. 3.9; *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.2; and *US – Supercalendered Paper* (Article 22.6 – US), para. 6.50.

⁷¹ Decision by the Arbitrator, *EC – Hormones (US)* (Article 22.6 – EC), para. 38.

⁷² Decision by the Arbitrator, *US – COOL* (Article 22.6 – US), para. 3.12.

⁷³ Decision by the Arbitrator, *US – Tuna II (Mexico)* (Article 22.6 – US), para. 4.10.

that Section 771B remained unchanged at the end of the RPT, preventing a WTO-consistent pass-through analysis and excluding another counterfactual.⁷⁴

4.28. The European Union contends that, in constructing a counterfactual for the as applied violation, the only relevant question is how the United States would have complied under the legal framework as it existed at the end of the RPT, which includes Section 771B. The European Union submits that there is no reason or justification to consider what the situation would be if the United States had complied with the as such violation. To do so, the European Union submits, would mean that the Arbitrator would be applying two separate counterfactuals for one single as applied violation, or a double counterfactual for a single inconsistency.⁷⁵

4.29. The United States argues that the European Union's counterfactual is not supported by the DSU or by the DSB recommendations because it assumes that there is no possible WTO-consistent attribution of benefits to downstream Spanish ripe olive producers.⁷⁶ The United States maintains that the DSU limits the role of the arbitrator to the assessment of the effects of the WTO-inconsistent measures in accordance with the DSB recommendations, and that neither the original nor the compliance panel found that the application of any attribution analysis to the relevant products was WTO-inconsistent.⁷⁷

4.30. The United States contends that neither panel made any finding that subsidies granted to Spanish raw olive growers could not be appropriately attributed to Spanish ripe olive producers at all, allowing for the possibility that the USDOC could conduct a WTO-consistent attribution analysis should appropriate changes be made to the law, or should the USDOC reinterpret, re-evaluate, or re-examine Section 771B in a WTO-consistent manner.⁷⁸ According to the United States, 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.⁷⁹

4.31. The United States submits that the only support that the European Union provides for its unreasonable and implausible counterfactual is its assertion that it was impossible for the United States to have ever complied with the DSB recommendations by the end of the RPT. For the United States, the DSU neither supports nor requires such an assumption. Rather, the United States argues that the procedures in the DSU assume that parties can bring their measures into compliance prior to the imposition of countermeasures.⁸⁰

4.32. The United States adds that it is not reasonable or plausible to assume that it would willingly cede its ability to analyse attribution of subsidy benefits for a large variety of products that the US Congress has specifically identified as at a heightened risk of benefiting from indirect subsidization.⁸¹

4.33. We note that the European Union's counterfactual assumes that full removal of the CVDs on ripe olives from Spain is the only possible compliance scenario. This is because, as submitted by the European Union, the USDOC would not be able to carry out a WTO-consistent pass-through analysis since Section 771B requires the USDOC to conduct a WTO-inconsistent pass-through analysis, and it remained in force by the end of the RPT. The European Union's assumption that a WTO-consistent pass-through analysis is not possible is based on the premise that the counterfactual compliance scenario must be constrained by the legal framework that existed by the end of the RPT and thus cannot entail remedying the WTO-inconsistency of Section 771B. In other words, under the

⁷⁴ European Union's written submission, paras. 10, 17 and 29-30; and opening statement at the meeting of the Arbitrator, paras. 11 and 15.

⁷⁵ European Union's closing statement at the meeting of the Arbitrator, paras. 4-5 and 9; and response to Arbitrator question No. 41, para. 3.

⁷⁶ United States' written submission, para. 23.

⁷⁷ United States' written submission, paras. 25 and 30.

⁷⁸ United States' written submission, para. 37; opening statement at the meeting of the Arbitrator, para. 11; and response to Arbitrator question No. 8, para. 24.

⁷⁹ United States' written submission, para. 30 (referring to Panel Report, *US – Ripe Olives from Spain (EU) (Article 21.5 – EU)*, para. 7.28); and opening statement at the meeting of the Arbitrator, para. 8.

⁸⁰ United States' opening statement at the meeting of the Arbitrator, para. 10.

⁸¹ United States' written submission, para. 35; and opening statement at the meeting of the Arbitrator, para. 8.

European Union's premise, the hypothetical compliance scenario for the as applied WTO-inconsistency cannot entail remedying the as such WTO-inconsistency first, to then remedy the as applied WTO-inconsistency.

4.34. The European Union justifies its argument by stating that there is no reason or justification to consider what the situation would be if the United States had complied with the as such violation, and that this would mean applying a double counterfactual for a single inconsistency. However, as we have explained earlier⁸², a counterfactual is by nature a hypothetical scenario of compliance by the end of the RPT. It is precisely because compliance did not happen by the end of the RPT that we have to assess what would be a reasonable or plausible compliance scenario *in a hypothetical manner*. This means that we are considering how the United States could remedy the as applied WTO-inconsistency by the end of the RPT *in a hypothetical manner*; we are not considering why the United States could not have remedied or did not remedy the as applied inconsistency by the end of the RPT *in the real world*.

4.35. Therefore, we are not convinced that, in cases where the as such and the as applied WTO-inconsistencies remained by the end of the RPT, a counterfactual compliance scenario for the as applied WTO-inconsistency could not entail addressing the as such WTO-inconsistency. More precisely, we are not convinced that a hypothetical compliance scenario concerning the application of Section 771B in the ripe olives CVD investigation must assume that no action could be taken with respect to Section 771B, because it remained unchanged by the end of the RPT.

4.36. In response to the European Union's argument, the United States contends that the European Union's position is predicated on viewing the as applied and as such breaches as independent and unrelated, when the as applied breach emanates from, and is dependent on, the finding that Section 771B is as such WTO-inconsistent.⁸³ For the United States, while removal of the CVD order would eliminate any NI arising from the breach, it would leave the as such WTO-inconsistency in place and the United States would continue to be non-compliant.⁸⁴

4.37. The European Union contends that the as such violation merely constitutes the underlying reason for the application of Section 771B causing NI, but it in itself does not cause NI⁸⁵, and that it is not possible to consider Section 771B for the as applied counterfactual.⁸⁶

4.38. We recall that the as such WTO-inconsistency of Section 771B led to the as applied WTO-inconsistency in the CVD investigation on ripe olives from Spain.⁸⁷ Thus, it is reasonable to assume that an appropriate counterfactual could entail remedying the as such WTO-inconsistency of Section 771B, to enable the USDOC to remedy the as applied WTO-inconsistency.

4.39. With respect to how the as such WTO-inconsistency of Section 771B could be remedied, the European Union maintains that, based on the two panel reports in *US – Ripe Olives from Spain*, the only possible compliance scenario would be a formal amendment or repeal of Section 771B, but that it is not possible to consider it for the as applied counterfactual.⁸⁸ The European Union argues that reinterpretation of Section 771B as a possible compliance measure must be discarded because the compliance panel rejected the alleged reinterpretation of Article 771B by the USDOC in the Section 129 proceedings as a compliance measure, and found that the fundamental concern remains that the USDOC will still be required to determine the existence of pass-through if the two factual circumstances in Section 771B are fulfilled.⁸⁹

4.40. The United States argues that the correct compliance scenario requires only that United States' 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.⁹⁰ The

⁸² See Section 4.1 above.

⁸³ United States' response to Arbitrator question No. 44, para. 9.

⁸⁴ United States' response to Arbitrator question No. 44, para. 10.

⁸⁵ European Union's closing statement at the meeting of the Arbitrator, para. 4; response to Arbitrator question No. 41, para. 3.

⁸⁶ European Union's written submission, para. 19.

⁸⁷ See para. 4.17 above.

⁸⁸ European Union's written submission, para. 19.

⁸⁹ European Union's written submission, para. 18.

⁹⁰ United States' written submission, para. 32.

United States contends that there are myriad forms that a change to United States' law could take which would allow the USDOC to conduct a WTO-consistent attribution analysis for the products at issue. For the United States, therefore, 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.⁹¹

4.41. We note that the parties debate how the United States could achieve compliance with the DSB recommendations and rulings concerning the as such WTO-inconsistency of Section 771B, in particular whether it should be through a formal amendment or repeal of Section 771B or through its reinterpretation. However, as explained above⁹², it is not our task to prejudge how the United States could bring Section 771B into compliance. Without speculating on how the United States could remedy the as such WTO-inconsistency, for the purpose of our assessment it suffices to say that an appropriate counterfactual could entail remedying the as such WTO-inconsistency of Section 771B to enable the USDOC to remedy the as applied WTO-inconsistency.

4.42. The European Union also argues that the United States already failed twice to carry out a WTO-consistent pass-through analysis for ripe olives, which confirms that the reasonable and plausible counterfactual is that no pass-through of benefit can be established in a WTO-consistent manner.⁹³

4.43. The European Union adds that the United States has indicated that Section 771B will not be repealed or amended in the future because the concerns regarding agricultural commodity markets that prompted it to enact it in the first place remain, and that there is no reason to believe that the US Government would allow for what it viewed as circumvention of CVD laws to continue unchecked.⁹⁴ For the European Union, a counterfactual based on a hypothetical amendment of Section 771B is entirely implausible, in view of (i) the alleged perceived need by the US legislator to give special treatment to agricultural commodities as regards pass-through of benefit, and (ii) the fact that the United States has failed to change Section 771B even after three adverse panel reports, two in *US – Ripe Olives from Spain* and the GATT Panel Report in *US – Canadian Pork*.⁹⁵

4.44. The United States contends that 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 States cannot comply with a DSB recommendation. For the United States, the European Union fails to appreciate that the purpose of a counterfactual is to construct a hypothetical compliance scenario.⁹⁶

4.45. We understand the European Union's concerns regarding the reasons expressed by the United States for giving special treatment to agricultural commodities as regards pass-through of subsidy benefits. We also understand the European Union's concerns with respect to the United States' failure to bring Section 771B into compliance with the covered agreements following adverse panel reports, and to carry out a WTO-consistent pass-through analysis in the CVD investigation on ripe olives from Spain. However, it is not our task in these proceedings to speculate on the likeliness that the United States will bring Section 771B into compliance with the DSB recommendations and rulings or the likeliness that the USDOC will be able to carry out a WTO-consistent pass-through analysis.

4.46. In sum, we do not agree with the European Union's argument that full removal of the CVDs on ripe olives from Spain is the only possible counterfactual compliance scenario on the basis that the USDOC would be unable to carry out a WTO-consistent pass-through analysis. We are not convinced that the counterfactual scenario to remedy the WTO-inconsistent application of Section 771B in the ripe olives from Spain investigation cannot entail remedying the as such WTO-inconsistency of Section 771B. To the contrary, we consider it reasonable to assume that an appropriate counterfactual compliance scenario could entail remedying the as such WTO-inconsistency of Section 771B, to enable the USDOC to remedy the as applied WTO-inconsistency.

⁹¹ United States' written submission, para. 37; and response to Arbitrator question No. 44, para. 10.

⁹² See para. 4.23 above.

⁹³ European Union's response to Arbitrator question Nos. 7, para. 31; and 8, para. 33.

⁹⁴ European Union's written submission, para. 19.

⁹⁵ European Union's response to Arbitrator question No. 8, paras. 34-35.

⁹⁶ United States' opening statement at the meeting of the Arbitrator, para. 12.

4.47. We conclude therefore that the European Union's proposed counterfactual, in which the United States would have to remove in full the CVDs on ripe olives from Spain on the basis that the USDOC would be unable to carry out a WTO-consistent pass-through analysis, is not a reasonable or plausible compliance scenario.

4.48. We will now evaluate whether the counterfactual proposed by the United States reflects a reasonable or plausible compliance scenario.

4.3.3 Counterfactual proposed by the United States

4.49. The United States argues that the proper counterfactual should assume that the USDOC would conduct an attribution analysis and that it would have discretion on how to conduct such an analysis. The United States maintains that any reduction in the level of trade in ripe olives that the European Union 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 producers that the USDOC would determine through a WTO-consistent attribution analysis.⁹⁷

4.50. We recall that, in simple terms, the reason for the as applied WTO-inconsistency in the CVD investigation on ripe olives from Spain is an improper analysis of pass-through of subsidy benefits from growers of raw olives to ripe olive producers. Based on the reason for the as applied WTO-inconsistency, we agree in principle with the United States that an appropriate counterfactual compliance scenario would be one in which the USDOC conducts a WTO-consistent analysis of pass-through of subsidy benefits from growers of raw olives to ripe olive producers.

4.51. We will now evaluate whether what the United States assumes would be the result of a WTO-consistent pass-through analysis is reasonable or plausible.

4.52. According to the United States, the evidence suggests that if the USDOC had conducted a WTO-consistent attribution analysis it is reasonable to assume that it would have found that 100% of the benefits of direct subsidies conferred on Spanish raw olive growers were indirectly attributable to Spanish ripe olive producers.⁹⁸ For the United States, if the USDOC was to conduct a WTO-consistent attribution analysis and find such 100% attribution, the counterfactual CVD rates for Spanish exporters would be the same as the current rates developed through the application of Section 771B. In such a scenario, the United States argues, no reduction in the level of trade in ripe olives could be expected and, therefore, the level of NI to the European Union would be zero.⁹⁹

4.53. The European Union contends that it is neither appropriate nor possible in the present case to estimate the likely existence and extent of pass-through of subsidy benefits when assessing a counterfactual scenario for the purpose of calculating NI under Article 22.4 of the DSU. For the European Union, estimating pass-through in such a situation would, first, exceed the mandate of the Arbitrator under Article 22.6 DSU and, second, be incompatible with the requirement for a WTO-consistent counterfactual.¹⁰⁰ According to the European Union, to find that the level of NI is zero would not only be based on an incorrect counterfactual but would also not serve to induce the United States to comply with the panel's findings of inconsistency as adopted by the DSB.¹⁰¹

4.54. The European Union also argues that there would be no relevant information in the case file that would allow the USDOC to carry out a WTO-consistent analysis, because the USDOC relied on the two criteria in Section 771B during the investigation and failed to collect any information that would be required for a WTO-consistent pass-through analysis.¹⁰²

4.55. We observe that the United States' counterfactual assumes that a WTO-consistent attribution analysis would have determined that 100% of the benefits of the subsidies granted to raw olive growers passed-through to ripe olive producers, leading to a level of NI of zero. The United States'

⁹⁷ United States' written submission, para. 51.

⁹⁸ United States' written submission, paras. 49 and 52.

⁹⁹ United States' written submission, para. 51.

¹⁰⁰ European Union's response to Arbitrator question No. 1, para. 1.

¹⁰¹ European Union's written submission, paras. 9 and 20.

¹⁰² European Union's written submission, paras. 17 and 25; response to Arbitrator question No. 1, para. 15.

contention is based on the USDOC's analysis on the record of the investigation concerning the two criteria contained in Section 771B, supplemented by additional arguments and evidence presented during these proceedings.

4.56. The counterfactual proposed by the United States thus raises the question of whether, in order to evaluate if such counterfactual reflects a reasonable or plausible compliance scenario, we could explore what results a hypothetical pass-through analysis would yield, based on the analysis conducted by the USDOC of the two criteria of Section 771B, supplemented by additional evidence presented during these proceedings.

4.57. On this question, the European Union argues that estimating the likely existence and extent of pass-through of subsidy benefits when assessing a counterfactual scenario for the purpose of calculating NI would exceed the Arbitrator's mandate.¹⁰³ For the European Union, it is not the Arbitrator's task to carry out a *de novo* investigation based on entirely new and non-pertinent facts presented by the United States for the first time in these proceedings.¹⁰⁴

4.58. The United States argues instead that the DSU is silent as to the types of information the Arbitrator may rely on to accurately calculate the level of NI, and that 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 NI. According to the United States, to measure the level of NI as accurately as possible, the DSU directs the Arbitrator to use the best information available to it; and, if the Arbitrator were to be called upon to construct its own counterfactual, it would be free to use the best evidence available to it and would not be bound to consider only the existing record of the CVD measure.¹⁰⁵

4.59. We note that the DSU is silent as to what type of information the Arbitrator could look at to determine whether the level of suspension of concessions or other obligations proposed by the European Union is equivalent to the level of NI sustained as a result of the United States' failure to implement the DSB recommendations and rulings by the expiry of the RPT.

4.60. We recall that any determination of NI, because it is based on assumptions, will necessarily be a reasoned estimate.¹⁰⁶ Such assumptions, however, must be reasonable, taking into account the circumstances of the dispute¹⁰⁷, and be based, as much as possible, on credible, factual, and verifiable information¹⁰⁸, not on speculation.¹⁰⁹ As explained, previous arbitrators have endeavoured to rely on the best information or data that is available in pursuit of formulating such a reasoned

¹⁰³ European Union's response to Arbitrator question No. 1, para. 1.

¹⁰⁴ European Union's written submission, para. 39; opening statement at the meeting of the Arbitrator, para. 17; response to Arbitrator question No. 9, para. 39.

¹⁰⁵ United States' opening statement at the meeting of the Arbitrator, para. 17; and response to Arbitrator question No. 10, paras. 30-31.

¹⁰⁶ Decisions by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 41; *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54; *US – COOL (Article 22.6 – US)*, para. 4.5; *US – Washing Machines (Article 22.6 – US)*, paras. 1.16; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12; *US – Countervailing Measures (China) (Article 22.6 – US)*, fn 245; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

¹⁰⁷ Decisions by the Arbitrators, *US – Gambling (Article 22.6 – US)*, para. 3.30; *US – Tuna (Article 22.6 – US)*, para. 5.16; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12; *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.173; *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 3.6; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

¹⁰⁸ Decisions by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54; *US – COOL (Article 22.6 – US)*, para. 4.5; *US – Tuna (Article 22.6 – US)*, para. 5.16; *US – Washing Machines (Article 22.6 – US)*, paras. 1.16 and 3.127; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12; *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 340 and fn 245; *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.173; *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 3.6; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

¹⁰⁹ Decisions by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54; *US – Washing Machines (Article 22.6 – US)*, para. 3.127; and *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12.

estimate¹¹⁰, and have declined to accept claims that are too remote, too speculative, or not meaningfully quantified.¹¹¹

4.61. We observe that past Article 22.6 arbitrators in disputes concerning trade remedies, when evaluating whether a proposed counterfactual was reasonable or plausible, have faced a situation similar to that we are facing: that is, a situation in which they had to consider what would be the counterfactual results of a WTO-consistent calculation or analysis in an AD or CVD determination. We consider it particularly instructive to look at the approach taken by two of those past arbitrators.

4.62. In *US – Washing Machines* and *US – Anti-Dumping Methodologies*, the arbitrators rejected counterfactuals based on the termination or withdrawal of the WTO-inconsistent ADDs or CVDs and selected instead a counterfactual based on remedying the WTO-inconsistent aspects of the analysis or calculations that led to the WTO-inconsistent application of ADDs and CVDs. The approach in those two cases is similar to the approach that we have taken in this case, in which we have accepted in principle that an appropriate counterfactual could be one in which the USDOC conducts a WTO-consistent analysis of pass-through of subsidy benefits from growers of raw olives to ripe olive producers.

4.63. On the one hand, we note that for some of the WTO-inconsistencies at issue in those two disputes, the arbitrators had available a WTO-consistent counterfactual calculation and were able to assign an alternative ADD rate as the reasonable and plausible WTO-consistent counterfactual rate. We will explain, in paragraphs 4.64- 4.71 below, the circumstances that allowed the arbitrators to select such a counterfactual ADD rate.

4.64. The dispute in *US – Washing Machines* concerned both CVD and AD measures. With respect to the AD measures, the United States was found to have acted in a WTO-inconsistent manner because it had used a weighted average to transaction (W-T) comparison methodology with zeroing for calculating dumping margins. The arbitrator rejected the counterfactual of termination or withdrawal of the ADD order proposed by Korea¹¹² and considered instead that the application of a WTO-consistent comparison methodology was a reasonable and plausible counterfactual.¹¹³ In that case, the dumping margin assigned to one of the three companies involved was not subject to any DSB recommendations, so withdrawal of the order would have led to withdrawal of ADDs not subject to DSB recommendations.¹¹⁴

4.65. Notably, during the investigation, the USDOC had calculated dumping margins with a weighted average to weighted average (W-W) comparison methodology *without zeroing*, as part of its consideration of whether to use the W-T methodology with zeroing. The dumping margins calculated with the W-W methodology *without zeroing* were part of the record of the investigation, were disclosed to the two companies involved, and had not been contested by Korea during the panel or arbitration proceedings.¹¹⁵

4.66. For the purpose of the counterfactual, the arbitrator in *US – Washing Machines* considered that the dumping margins and consequently the ADD rates resulting from such W-W comparison methodology *without zeroing* represented a suitable proxy for the duties that would exist if a normal methodology had been applied.¹¹⁶

4.67. The dispute in *US – Anti-Dumping Methodologies* involved numerous AD investigations. The United States was found to have acted in a WTO-inconsistent manner in some of those investigations

¹¹⁰ See, e.g. Decisions by the Arbitrators, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, paras. 7.16, 7.19, 7.22, 7.29, 7.34, and fn 272; and *US – Supercalendered Paper (Article 22.6 – US)*, paras. 3.4 and 7.87.

¹¹¹ Decisions by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.57 (quoting Decisions by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 77; and *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.22); and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

¹¹² Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, paras. 3.13-3.24.

¹¹³ Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, paras. 3.25-3.33.

¹¹⁴ Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 3.22.

¹¹⁵ Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, paras. 3.27 and 3.31.

¹¹⁶ Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 3.27.

because it had used the W-T comparison methodology with zeroing for calculating dumping margins, as in *US – Washing Machines*.

4.68. The arbitrator rejected the counterfactual of withdrawal of the ADDs proposed by China and selected instead a counterfactual reflecting what would have happened if, by the expiry of the RPT, the USDOC had ceased using the W-T methodology with zeroing. The arbitrator considered that it would not be reasonable to assume that, had the USDOC ceased using the W-T methodology with zeroing, it would have withdrawn the entirety of the ADD orders, including the ADDs imposed on exporters whose dumping margins were not calculated using this WTO-inconsistent methodology.¹¹⁷

4.69. Notably, as in *US – Washing Machines*, in two of the AD investigations that led to *US – Anti-Dumping Methodologies* (coated paper and OCTG), the USDOC had calculated during the investigation dumping margins with the W-W methodology *without zeroing* but had ended up using the W-T methodology with zeroing. The dumping margins calculated with the W-W methodology *without zeroing* were part of the record of the investigation and were not contested by China during the panel or arbitration proceedings.¹¹⁸

4.70. For the purpose of the counterfactual, the arbitrator considered that the dumping margins and consequently the ADD rates resulting from the W-W comparison methodology reflected a reasonable and plausible compliance scenario for the relevant companies' individual duty rate and for the separate duty rate.¹¹⁹

4.71. Thus, we note that in the two cases described above, with respect to the use of the same WTO-inconsistent methodology, the arbitrators had available a WTO-consistent counterfactual calculation and were able to assign an alternative ADD rate as the reasonable and plausible WTO-consistent counterfactual rate. This was possible because the USDOC had calculated alternative ADD rates with a different methodology during the investigation, and the calculations were part of the record of the investigation and were not contested by the parties.

4.72. On the other hand, however, we note that for the other WTO-inconsistencies at issue in those two disputes, the arbitrators were unable to find a WTO-consistent counterfactual analysis or calculation and select an alternative rate. They considered instead that a proxy rate of 0% was a reasonable and plausible WTO-consistent counterfactual rate. We will explain, in paragraphs 4.73-4.82 below, the circumstances that led those arbitrators to select that proxy.

4.73. In *US – Washing Machines*, with respect to the CVD measures the United States was found to have acted in a WTO-inconsistent manner because of certain deficiencies in the determination of the *de facto* specificity and in the calculation of the amount of the subsidy. The arbitrator rejected Korea's counterfactual of termination of the CVD measures¹²⁰ and selected instead a counterfactual that assumed a WTO-compliant determination of the subsidization amount. In that case, the determinations that resulted in the imposition of CVDs for two of the three companies involved were not subject to any DSB recommendations and rulings.¹²¹

4.74. For the purpose of the counterfactual, which assumed a WTO-compliant determination of the subsidization amount, the arbitrator considered the value of zero to be a reasonable proxy in the calculation of the level of NI. Notably, both parties had agreed that a 0% rate assigned to the company involved would be an appropriate counterfactual rate.¹²²

4.75. Also in *US – Anti-Dumping Methodologies*, with respect to its AD investigation on steel cylinders, the USDOC had revoked the ADD rate for one exporter but had continued to assign the rate calculated with the W-T *with zeroing* comparison methodology as the separate duty rate.¹²³ The arbitrator considered it reasonable to assume that, had the USDOC ceased using the W-T

¹¹⁷ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.7.

¹¹⁸ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), paras. 5.18 and 5.21.

¹¹⁹ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), paras. 5.20 and 5.24.

¹²⁰ Decision by the Arbitrator, *US – Washing Machines* (Article 22.6 – US), paras. 3.34-3.35.

¹²¹ Decision by the Arbitrator, *US – Washing Machines* (Article 22.6 – US), paras. 3.36-3.41.

¹²² Decision by the Arbitrator, *US – Washing Machines* (Article 22.6 – US), paras. 3.40-3.41.

¹²³ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.27.

methodology *with zeroing* in calculating the individual duty rate for that exporter, it would also not have assigned that duty rate as the separate duty rate.¹²⁴

4.76. Notably, the arbitrator explained that neither party had pointed to alternative figures from the record of the steel cylinders AD investigation that could be used as the counterfactual for the separate duty rate. The arbitrator thus considered that it could not speculate on how the USDOC would have calculated the separate duty rate, had the USDOC not used the rate calculated using the W-T methodology *with zeroing* as the separate duty rate.¹²⁵

4.77. For the purpose of the counterfactual, the arbitrator therefore considered that the use of a 0% duty rate for the separate duty rate reflected a reasonable and plausible compliance scenario.¹²⁶

4.78. In *US – Anti-Dumping Methodologies*, the United States was found to have acted in a WTO-inconsistent manner in 25 AD investigations, because the USDOC had used a "single rate presumption" for a group of companies. That is, the USDOC had presumed that all Chinese exporters comprised a single China-wide entity (PRC-wide entity) and had assigned these exporters a single PRC-wide duty rate unless they had passed a separate rate test. The main problem with the "single rate presumption" was that the USDOC had made no affirmative determination that these exporters were in such a relationship that they could be treated as a single entity.¹²⁷

4.79. The arbitrator rejected the counterfactual of withdrawal of the ADDs proposed by China and instead selected a counterfactual reflecting what would have happened if the USDOC had ceased using the "single rate presumption" in the relevant investigations by the expiry of the RPT. The arbitrator considered that in that scenario it would not be reasonable to assume that the USDOC would have withdrawn the entirety of the ADD orders, including the ADD imposed on exporters whose dumping margins were not calculated using the WTO-inconsistent methodology.¹²⁸

4.80. Notably, the arbitrator explained that in determining the appropriate counterfactual for the USDOC's use of the W-T methodology *with zeroing*, it had used alternative duty rates from the record that were specifically calculated by the USDOC for the exporters at issue in the relevant AD investigation. The arbitrator explained, however, that the USDOC had not calculated such alternative duty rates for the exporters to which the PRC-wide duty rate was assigned. In light of this, the arbitrator considered that it could not speculate on how the USDOC would have calculated the duty rates for the exporters within the PRC-wide entity, had they not been included in the PRC-wide entity and assigned the PRC-wide duty rate pursuant to the "single rate presumption".¹²⁹

¹²⁴ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.29.

¹²⁵ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.30.

¹²⁶ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.31.

¹²⁷ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.36.

¹²⁸ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.7.

¹²⁹ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.51.

We also note that, for the counterfactual, the United States considered that the Chinese exporters within the PRC-wide entity should be divided into two groups: (i) exporters for which there was evidence that they had failed to cooperate and (ii) exporters for which there was no evidence that they had failed to cooperate. For the first group, the United States considered it reasonable to continue assigning them the PRC-wide duty rate, which is calculated on the basis of adverse facts available. For the second group of exporters, the United States proposed to use the separate duty rates on record as the counterfactual. On the proposal to divide the exporters into two groups, the arbitrator explained that the USDOC had not determined that any of the individual exporters within the PRC-wide entity had failed to cooperate, and that the USDOC had not made such distinction in the actual investigations and administrative reviews. The Arbitrator also noted that no evidence had been submitted indicating that the USDOC subsequently had made an affirmative determination that the exporters were in such a relationship that they could be treated as a single entity. According to the arbitrator, considering that the USDOC had not determined that any of the individual exporters within the PRC-wide entity failed to cooperate, it would be too speculative to assume that the USDOC could continue assigning individual exporters within the PRC-wide entity the PRC-wide duty rate. On the proposal to use the separate duty rates on record as the counterfactual for the exporters within the PRC-wide entity, the arbitrator considered the proposed counterfactual too speculative because it assumed that the exporters within the PRC-wide entity would necessarily be subject to the separate duty rate on record, had the USDOC ceased treating them as a single PRC-wide entity under the Single Rate Presumption. Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), paras. 5.36-5.50.

4.81. For the purpose of the counterfactual, the arbitrator therefore considered that the use of a 0% duty rate reflected a reasonable and plausible compliance scenario.¹³⁰

4.82. Thus, in the two cases described above, with respect to three different WTO-inconsistencies, the arbitrators were unable to find a WTO-consistent alternative analysis allowing them to assign alternative rates, and considered instead that a proxy rate of 0% was a reasonable and plausible WTO-compliant counterfactual rate.

4.83. The selection of such a counterfactual in *US – Washing Machines* was based on the fact that both parties had agreed to such a 0% rate. The selection of such a counterfactual in two different instances in *US – Anti-Dumping Methodologies*, however, was based on the fact that the USDOC had not made the necessary determinations for the individual exporters and had not calculated alternative duty rates for such exporters, so the arbitrator could not speculate on how the USDOC would have calculated such rates. In other words, the arbitrator refused to speculate on how the USDOC would have calculated WTO-consistent duty rates when it was not able to find an alternative analysis or calculation on the record of the investigation.

4.84. Turning now to the case at issue, we note that the situation in this arbitration is similar to the situation that we just described from *US – Anti-Dumping Methodologies*. We have no alternative figures calculated by the USDOC, or even an alternative analysis carried out by the USDOC, available from the record of the investigation, that can provide us with a reasonable and plausible WTO-consistent counterfactual pass-through rate of subsidy benefits from raw olive growers to ripe olive producers. As in *US – Anti-Dumping Methodologies*, based on the information on the record of the investigation, we cannot speculate on how the USDOC would have calculated such a pass-through rate.

4.85. The situation in this arbitration contains an additional element. The United States' proposed counterfactual raises the question of whether in this case we could venture into exploring what results a hypothetical pass-through analysis would yield, based on the analysis conducted by the USDOC of the two criteria of Section 771B (which is on the record of the ripe olives investigation) *supplemented by additional evidence presented during these proceedings*.

4.86. In this respect, the United States maintains that a WTO-consistent attribution analysis would have determined that 100% of the benefits of the countervailable subsidies were attributable to downstream Spanish ripe olive producers. This is based on the USDOC's analysis on the record of the investigation concerning the two criteria contained in Section 771B supplemented by (i) additional evidence and arguments concerning relevant economic data; (ii) additional arguments and evidence concerning the structure of the Spanish olive industry; and (iii) a proposed benchmark attribution analysis concerning EU Common Agricultural Policy (CAP) subsidies for processed dairy products.

4.87. In particular, the United States argues that the evidence it presented shows the following: (i) with respect to the relevant economic data, Spanish olive processors purchase olives at prices below their cost of production, especially considering the losses due to processing and pitting; (ii) with respect to the structure of the Spanish olive industry, Spanish olive growers and Spanish olive processors are mutually reliant on one another due to pervasive cooperative structures, and Spanish processors make yearly purchases that cover virtually all of Spanish annual olive crop and are incentivized by rules of origin to purchase raw olives grown in Spain; and (iii) with respect to the proposed benchmark attribution analysis, economic analysis of the analogous market for processed dairy products demonstrates attribution of EU CAP subsidies to downstream processors estimated at 65%. For the United States, under these circumstances, it is both reasonable and plausible that the Arbitrator assume that 100% of the benefits of the subsidies provided to Spanish raw olive growers are attributable to Spanish ripe olive producers, resulting in a level of NI of zero.¹³¹

4.88. The United States adds that it does not need to prove that 100% of subsidy benefits are in fact attributed to Spanish ripe olive producers. For the United States, the question before the Arbitrator is whether it is "reasonable and plausible to assume, for the purpose of constructing a hypothetical counterfactual compliance scenario, that the USDOC would have determined that 100%

¹³⁰ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.52.

¹³¹ United States' written submission, para. 58; opening statement at the meeting of the Arbitrator, para. 16.

of subsidy benefits are attributable to downstream ripe olive producers through a WTO-consistent attribution analysis".¹³²

4.89. The European Union contends that the fulfilment of the two criteria in Section 771B "in combination with some generic and non-company-specific market information from the internet by which the United States 'infers' the existence and 100% of pass-through benefit would result in the same WTO-inconsistency that was found in the two panel reports in *US – Ripe Olives from Spain*".¹³³ The European Union maintains that the United States' counterfactual would have to overcome the basic principle under WTO rules that pass-through of benefit cannot be presumed, and that the investigating authority must establish pass-through based on positive evidence. For the European Union, the general presumption is that there is no pass-through.¹³⁴

4.90. According to the European Union, to assess whether a pass-through benefit is conferred, the investigating authority needs to assess elements such as market shares of the relevant producers, their degree of market power, the competitive conditions on the national and international markets, pricing data, etc, which is information that cannot be found publicly on the internet. The European Union adds that the assessment would require an in-depth analysis based on specific information requested from the relevant producers. The European Union asserts that the United States does not possess any relevant information for such an analysis, and that "the information hastily pieced together from the internet and relied on by the United States is entirely inapt to provide any indication about the existence or the degree of pass-through".¹³⁵

4.91. In our view, to accept the assumption of a 100% pass-through rate proposed by the United States, or of any other positive percentage, we would have to speculate as to how the USDOC would have conducted a WTO-consistent analysis based on the evidence on the record of the investigation, supplemented by the evidence presented in these proceedings, and how this analysis would have led to such rate. For this purpose, we would have to speculate on how the participants in the CVD investigation would have responded to the new information in terms of evidence, the interpretation of the evidence, and the argumentation about that evidence. Thus, to accept the United States' assumption, we would have to engage in a degree of speculation that would go beyond the kind of speculation that other arbitrators have previously rejected. We decline to do so.

4.92. Based on all the above, we conclude that the United States' proposed counterfactual, in which the USDOC would find that 100% of the benefits of subsidies granted to Spanish raw olive growers are attributable to ripe olive producers, is not a reasonable or plausible compliance scenario.

4.93. Given that we have rejected the counterfactuals proposed by both parties, in accordance with our mandate, we will proceed to select an appropriate counterfactual, based on elements of the counterfactuals they have proposed.

4.3.4 Arbitrator's counterfactual

4.94. As we have previously explained¹³⁶, we agree in principle that an appropriate counterfactual compliance scenario would be one in which the USDOC conducts a WTO-consistent analysis of pass-through of subsidy benefits from growers of raw olives to ripe olive producers.

4.95. However, as we have explained earlier¹³⁷, there are no alternative figures calculated by the USDOC, or even an alternative analysis carried out by the USDOC, on the record of the investigation, that can provide us with a reasonable and plausible WTO-consistent counterfactual pass-through rate of subsidy benefits from raw olive growers to ripe olive producers. Thus, based on the record of the investigation, we are not able to reasonably construct what the USDOC might have calculated

¹³² United States' opening statement at the meeting of the Arbitrator, para. 15; closing statement at the meeting of the Arbitrator, paras. 3-4.

¹³³ European Union's response to Arbitrator question No. 46, para. 31.

¹³⁴ European Union's written submission, paras. 22-24; opening statement at the meeting of the Arbitrator, para. 16; and response to Arbitrator question Nos. 1, para. 9 and 46, para. 30.

¹³⁵ European Union's written submission, para. 36; opening statement at the meeting of the Arbitrator, para. 18; response to Arbitrator question No. 1, para. 14.

¹³⁶ See para. 4.50 above.

¹³⁷ See para. 4.84 above.

as being the pass-through rate. We have also explained¹³⁸ why we decline to speculate as to how the USDOC would have conducted a WTO-consistent analysis based on the evidence on the record of the investigation, supplemented by the evidence presented in these proceedings.

4.96. In this sense, we recall that when past arbitrators have not been able to select alternative ADD or CVD rates, they have considered that a proxy rate of 0% was a reasonable and plausible WTO-consistent counterfactual rate, even where the parties (as in this case) did not agree on this rate. We consider this approach to be appropriate in the circumstances of this case for the rate of pass-through of subsidy benefits from raw olive growers to ripe olive producers. That is, in the absence of any alternative WTO-consistent pass-through rate, we consider that the use of a proxy rate of 0% reflects a reasonable and plausible WTO-consistent counterfactual pass-through rate.

4.97. A proxy pass-through rate of 0% means, in effect, that the portion of the subsidy rates and the portion of the resulting CVD rates attributable to the WTO-inconsistent pass-through analysis will become 0% for the purpose of the counterfactual. We note, however, that there is a portion of the subsidy rates calculated for the three investigated exporters in the CVD investigation on ripe olives from Spain that was not attributable to the WTO-inconsistent pass-through analysis.

4.98. In this respect, the European Union argues 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. The European Union maintains that, without the presumed pass-through, the subsidy rate would have been around [***]% for Agro Sevilla Aceitunas S. Coop. Andalusia, [***]% for Ángel Camacho Alimentación, S.L.U. and [***]% for Aceitunas Guadalquivir S.L.U., each of which is at a *de minimis* level.¹³⁹

4.99. The European Union explains that it obtained these values by subtracting from the CVD rates imposed on the relevant exporters the *ad valorem* subsidy rate attributed to various programmes benefiting olives growers that were passed through to the exporters in their full amounts due to the application of Section 771B. The programmes are the EU CAP Pillar I – Basic Payment Scheme (BPS), EU CAP – Greening, EU CAP Pillar II – Agricultural Fund for Rural Development (Rural Development) Spanish Agricultural Insurance System, and the EU Programme for Environment and Climate Action (LIFE).¹⁴⁰

4.100. The European Union indicates that extracts from the calculations prepared by the USDOC in the original investigation are provided in Exhibits EU-2 (BCI), EU-3 (BCI) and EU-4 (BCI). The European Union notes that the calculations in EU-4 (BCI) refer to the Guadalquivir original investigation, and that the recalculation resulting from the Section 129 proceeding only affected the subsidy duty rate related to the suppliers and did not change the result with respect to the percentage of the subsidy duty rate attributable to the exporter excluding the application of the pass-through.¹⁴¹

4.101. The approach taken by the European Union is similar to that taken by the arbitrator in *US – Countervailing Measures*. In that case, the reason for the WTO-inconsistency of the CVD measures included deficiencies in the determination of benefit and specificity for some alleged input subsidy programmes, but the orders covered other subsidy programmes that were not subject to DSB recommendations. The arbitrator selected a counterfactual that implied modifying the relevant CVD rates by deducting the portion attributable to some alleged input subsidy programmes. The parties in their submissions presented the calculations of such CVD rates. There were some disagreements at an earlier stage, but those were ultimately resolved.¹⁴²

4.102. We consider this approach to be appropriate for the circumstances of this dispute. That is, because the portion of the subsidy rates attributable to the WTO-inconsistent pass-through analysis has become 0% for the purpose of the counterfactual, we will calculate the counterfactual subsidy

¹³⁸ See para. 4.91 above.

¹³⁹ European Union's methodology paper, para. 22; written submission, para. 10; and opening statement at the meeting of the Arbitrator, para. 9.

¹⁴⁰ European Union's methodology paper, fn 22 to para. 22.

¹⁴¹ European Union's methodology paper, fn 22 to para. 22.

¹⁴² Decision by the Arbitrator, *US – Countervailing Measures (China) (Article 22.6 – US)*, paras. 3.9-3.12.

rates, and the resulting CVD rates, by deducting from the overall USDOC-calculated subsidy rates the portion attributable to the WTO-inconsistent pass-through analysis.

4.103. The United States argues that it cannot speculate on the accuracy of the calculations provided by the European Union and whether those figures represent the CVD rates the USDOC would have calculated without the application of Section 771B. The United States submits that, even assuming *arguendo* that such calculations are accurate, a large amount of attribution would not be needed for CVD rates to be above the *de minimis* rate of 1.00%. Using the example of Ángel Camacho, which received a 13.76% rate in the CVD order, the United States contends that the USDOC would only need to find [[***]]% attribution to reach an above *de minimis* level.¹⁴³

4.104. While the United States argues that it cannot speculate on the accuracy of the numbers presented by the European Union, it does not explain why those numbers are not accurate and does not present any alternative figures. The numbers provided by the European Union were taken from the calculations prepared by the USDOC during the original investigation and were not changed as a result of the Section 129 proceeding. In that light, we consider it reasonable to accept them for the purpose of constructing the counterfactual.

4.105. Accepting the numbers provided by the European Union, and using the value of 0% for the subsidy rates attributable to the WTO-inconsistent pass-through analysis, the counterfactual subsidy rates become [[***]]% for Agro Sevilla Aceitunas S. Coop. Andalusia, [[***]]% for Ángel Camacho Alimentación, S.L.U. and [[***]]% for Aceitunas Guadalquivir S.L.U., all of which are *de minimis*.¹⁴⁴

4.106. Because all the individually investigated companies' counterfactual CVD rates are *de minimis* and would amount to individual CVD rates of 0%¹⁴⁵, we consider it appropriate to use a proxy of 0% for the counterfactual all-others rate.¹⁴⁶ Therefore, the single counterfactual CVD rate to be used as the input for the model is 0%.¹⁴⁷

4.4 Appropriate counterfactual for future application of Section 771B

4.4.1 Counterfactual proposed by the European Union

4.107. For future application of Section 771B, the European Union proposes to use the same counterfactual as that used for the as applied violation. The European Union maintains that the situation in a future application of Section 771B would be the same as in ripe olives from Spain. That is, Section 771B would still exist without any legal modification, would be as such inconsistent, would require WTO-inconsistent behaviour, and its application to any agricultural processed product from the European Union would therefore be inconsistent as applied. For the European Union, the only WTO-consistent counterfactual would be the removal of the pass-through of benefit, because no pass-through of benefit can be attributed in compliance with WTO rules.¹⁴⁸

4.108. The United States contends that the benefits that the European Union could have expected, in good faith and taking into account all relevant circumstances, including the recommendations adopted by the DSB, are not that the United States would abandon its ability to determine attribution of subsidy benefits for any product that falls within the scope of Section 771B. Rather, submits the United States, the expectation should be that the USDOC would determine the attribution of subsidy

¹⁴³ United States comments on the European Union's response to Panel question No. 41, para. 11.

¹⁴⁴ Under Article 11.9 of the SCM Agreement and 19 U.S.C. § 1671b(b)(4)(A) (Exhibit USA-5), the amount of the subsidy is *de minimis* if it is less than 1% *ad valorem*.

¹⁴⁵ Under 19 U.S.C. § 1671d(a)(3) (Exhibit USA-48), the USDOC would disregard any countervailable subsidy that is *de minimis*.

¹⁴⁶ This approach will be explained in detail below when we give instructions on how to calculate the counterfactual all-others rate for future application of Section 771B. This approach is also consistent with that taken by the Arbitrator in *US – Supercalendered Paper*. (Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – US), paras. 6.82-6.95)

¹⁴⁷ To be clear, a value of 0% for the subsidy rates derived from the WTO-inconsistent pass-through analysis is a proxy figure for what would have been a subsidy rate calculated in a WTO-consistent manner. Thus, setting the counterfactual CVD rate as 0% for the purpose of the calculation, based on the fact that the counterfactual subsidy rates for the individually investigated companies are *de minimis*, does not transform the counterfactual scenario into one of termination of the CVD order.

¹⁴⁸ European Union's opening statement at the meeting of the Arbitrator, paras. 20-25; closing statement at the meeting of the Arbitrator, para. 8; and response to Arbitrator question No. 41, paras. 6-7.

benefits for processed agricultural products using a WTO-consistent method. The United States adds that it would not achieve that aim by adopting an attribution rate of zero for all processed agricultural goods. For the United States, the counterfactual proposed by the European Union would result in a level of NI that does not accurately reflect the benefits accruing to the European Union and would not be consistent with the DSU.¹⁴⁹

4.109. We note that the European Union's proposed counterfactual compliance scenario for future application of Section 771B assumes the removal of the pass-through of benefit. For this counterfactual, the European Union relies on the assumption that a WTO-consistent pass-through analysis is not possible, based on the premise that the counterfactual compliance scenario must be constrained by the legal framework that existed by the end of the RPT, and thus cannot entail remedying the WTO-inconsistency of Section 771B.

4.110. We have already explained in section 4.3.2 above why we are not convinced that the counterfactual compliance scenario to remedy the WTO-inconsistent application of Section 771B in the ripe olives from Spain investigation cannot entail remedying the as such WTO-inconsistency of Section 771B. The same reasoning applies to the counterfactual compliance scenario concerning the application of Section 771B in future CVD investigations. We are not convinced that a hypothetical compliance scenario concerning the application of Section 771B in future CVD investigations cannot entail remedying the as such WTO-inconsistency of Section 771B. As explained, and to the contrary, we consider it reasonable to assume that an appropriate counterfactual compliance scenario could entail remedying the as such WTO-inconsistency of Section 771B, in order to enable the USDOC to remedy the as applied WTO-inconsistency.

4.111. We conclude therefore that the European Union's proposed counterfactual, in which the United States would have to remove the pass-through of benefit on the basis that the USDOC would be unable to carry out a WTO-consistent pass-through analysis, is not a reasonable or plausible compliance scenario.

4.4.2 Counterfactual proposed by the United States

4.112. The United States maintains that a prospective formula for calculating the level of NI arising from any future use of Section 771B would require a procedure for calculating a WTO-consistent attribution rate. For the United States, excluding any counterfactual WTO-consistent CVD rate or assuming it to be zero in all cases without justification or examination would necessarily yield a level of suspension of concessions that is not equivalent to the level of NI. The United States suggests that, for a more precise but more labour-intensive process, the Arbitrator could adopt a procedure for examining the relevant indicia for attribution of subsidy benefits, using the best evidence conceivably available for processed agricultural products subject to Section 771B, and determining to the best of the parties' ability a suitable value for a WTO-consistent attribution rate.¹⁵⁰

4.113. The United States argues that such a process should take into consideration that the two criteria enumerated in Section 771B will by definition have been established by the USDOC following an in-depth investigation. For the United States, this is the only information that is known with certainty about a future application of Section 771B. The United States adds that the absence of information about a future application of Section 771B calls into question whether a prospective formula or model would be capable of generating an estimate of NI that is not overly speculative.¹⁵¹

4.114. We note that the United States suggests that we adopt a "more precise" procedure to determine a WTO-consistent attribution rate for future application of Section 771B. However, we do not have any insight into what such a procedure would look like or what kind of information parties could rely on to implement it.

4.115. The United States also notes that some past arbitrations have sought to overcome the inherently speculative nature of estimating NI from future application of a WTO-inconsistent measure by using a proxy value. Similarly, the United States submits that if the Arbitrator was to find that precise information to justify a specific rate of attribution is not available, it could adopt some type of proxy value to use as an attribution rate for all processed agricultural products subject to

¹⁴⁹ United States' comments on responses, para. 4.

¹⁵⁰ United States' response to Arbitrator question No. 4, para. 14.

¹⁵¹ United States' response to Arbitrator question No. 4, para. 14.

Section 771B, or for categories of such products.¹⁵² The United States puts forward the Decision by the Arbitrator in *US – Offset Act (Byrd Amendment)* as being instructive on the use of a proxy value for an attribution rate.¹⁵³

4.116. The United States points out that the study of the impact of EU CAP subsidies on French dairy supply chains found that on average 65% of the marginal euro of subsidy given to farmers between 2005 and 2018 was diverted from farmers due to processor buyer power. The United States interprets this as indicating that the market power of dairy processors allows them to mark down the price of raw milk and, in doing so, to benefit from the CAP subsidies provided to upstream farmers.¹⁵⁴ The United States refers to this study as a value indicative of attribution for processed agricultural products potentially subject to Section 771B. The United States submits that using the study in that way yielded an attribution rate of 65%.¹⁵⁵

4.117. The United States submits that 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%.¹⁵⁶

4.118. The European Union contends that the counterfactual proposed by the United States would be based on a mere presumption of the existence and degree of pass-through and would not be based on evidence regarding the specific product concerned. For the European Union, the proposed counterfactual is WTO-inconsistent and speculative, and therefore not reasonable and plausible.¹⁵⁷

4.119. According to the European Union, if the Arbitrator were to assume a pass-through rate of 65% for any future investigation applying Section 771B, it would mean that the 65% pass-through rate would be based on the fulfilment of the two criteria of Section 771B and on a study concerning the French dairy market. The European Union is of the view that this would mean in practice that the Arbitrator would be doing the USDOC's work by applying an inconsistent presumption. The European Union maintains that, despite the obligation under WTO rules that the existence and degree of pass-through must be determined by the investigating authority, the outcome of six years of litigation would be that the United States would be able to presume the existence and degree of pass-through on the basis of the two criteria of Section 771B and a dairy study in every future investigation. According to the European Union, the outcome of the arbitration then would be to allow "the WTO-inconsistent application of Section 771B through a back door, directly contradicting the two adopted panel reports".¹⁵⁸

4.120. The European Union also disagrees on the relevance of the French dairy market study, pointing out that: (i) the study focuses on one single member State (France), which is geographically the largest EU member State, whereas any proxy value would need to apply to 27 member States of very different sizes; (ii) the study concerns dairy products, which involves livestock, whereas agricultural products in the main relate to farming; and (iii) "the French dairy market is characterised by very specific features, notably an 'extreme asymmetry' where atomistic raw milk supplier face demand from very concentrated actors, favouring the emergence of buyer power".¹⁵⁹

4.121. We note that the United States' proposed counterfactual assumes that, if the USDOC were to conduct a WTO-consistent attribution analysis, it would find that between 65% and 100% of the benefits of subsidies granted to growers of raw agricultural products would be attributable to the processors of such agricultural products. To accept such an assumption of between 65% and 100% pass-through rate, we would have to accept that an attribution analysis based on the two criteria

¹⁵² United States' response to Arbitrator question No. 4, para. 15.

¹⁵³ United States' response to Arbitrator question No. 4, para. 15 (referring to Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, paras. 3.139-3.143).

¹⁵⁴ United States' response to Arbitrator question No. 3, para. 8 (referring to: Rémi Avignon and Etienne Guigue, *Markups and Markdowns in the French Dairy Market, 2022* (Exhibit USA-29), p. 64).

¹⁵⁵ United States' response to Arbitrator question No. 4, para. 16.

¹⁵⁶ United States' response to Arbitrator question No. 4, para. 16.

¹⁵⁷ European Union's opening statement at the meeting of Arbitrator, paras. 26-27.

¹⁵⁸ European Union's closing statement at the meeting of the Arbitrator, para. 12; response to Arbitrator question No. 43, paras. 25-27.

¹⁵⁹ European Union's response to Arbitrator question No. 43, para. 29 (referring to Rémi Avignon and Etienne Guigue, *Markups and Markdowns in the French Dairy Market, 2022*, p. 11 (Exhibit USA-29)).

contained in Section 771B, supplemented by a study on French dairy producers, would be a WTO-consistent compliance scenario.

4.122. As explained by the arbitrator in *US – Anti-Dumping Methodologies*, there is a difference between, on the one hand, assessing the WTO-consistency of a measure or a measure taken to comply with the DSB recommendations and rulings and, on the other hand, assessing whether a proposed counterfactual represents a reasonable or plausible compliance scenario. However, as that arbitrator stressed, it would be incongruous to assess whether a counterfactual reflects a reasonable or plausible compliance scenario without considering that counterfactual's WTO-consistency.¹⁶⁰ Therefore, we cannot accept as an appropriate counterfactual a hypothetical scenario that does not achieve compliance with the DSB recommendations and rulings or is otherwise WTO-inconsistent.

4.123. In this sense, we recall that Section 771B was found to be WTO-inconsistent 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.¹⁶¹

4.124. In the CVD investigation of ripe olives from Spain, for example, the compliance panel found that the United States had acted in a manner inconsistent with such provisions, because the USDOC had found that subsidies granted to growers of raw olives in Spain could be attributed to three investigated ripe olive producers based solely on its determination that both factual circumstances identified in Section 771B were established, without consideration of any other potentially relevant information relating to the market or the competitive conditions affecting the investigated product.¹⁶²

4.125. If we were to accept a hypothetical scenario whereby a proxy value of between 65% and 100% is established for pass-through of subsidy benefits from growers of raw agricultural products to processors of such agricultural products in future CVD investigations, it would mean accepting that the USDOC could, in a WTO-consistent manner, presume pass-through based on the factors in Section 771B, with only the addition of the study of a market – the French dairy market – which would likely not be relevant for the investigated product. This would not remedy, in a hypothetical scenario, the WTO-inconsistent situation in which the USDOC presumes pass-through with no consideration of additional factors that may potentially be relevant.

4.126. Therefore, we conclude that the United States' proposed counterfactual, in which a proxy value of between 65% and 100% would be established for the pass-through of subsidy benefits from growers of raw agricultural products to processors of such agricultural products in future CVD investigations subject to Section 771B, is not a reasonable or plausible compliance scenario.

4.127. Given that we have rejected the counterfactuals proposed by both parties, in accordance with our mandate, we will select an appropriate counterfactual, based on elements of the counterfactuals proposed by the parties. An appropriate counterfactual will be a necessary input in a prospective model for future applications of Section 771B. This input will contribute to reaching a reasoned estimate¹⁶³ of the level of NI, using assumptions that are reasonable taking into account

¹⁶⁰ Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 5.40.

¹⁶¹ See para. 4.17 above (referring to Panel Report, *US – Ripe Olives from Spain*, para. 7.170).

¹⁶² Panel Report, *US – Ripe Olives from Spain* (Article 21.5 – EU), para. 7.79.

¹⁶³ Decisions by the Arbitrators, *EC – Hormones (US)* (Article 22.6 – EC), para. 41; *US – 1916 Act (EC)* (Article 22.6 – US), para. 5.54; *US – COOL* (Article 22.6 – US), para. 4.5; *US – Washing Machines* (Article 22.6 – US), paras. 1.16; *US – Anti-Dumping Methodologies (China)* (Article 22.6 – US), para. 1.12; *US – Countervailing Measures (China)* (Article 22.6 – US), fn 245; and *US – Supercalendered Paper* (Article 22.6 – US), para. 3.4.

the circumstances of the dispute¹⁶⁴, based on credible, factual, and verifiable information¹⁶⁵, and that are not merely speculative.¹⁶⁶

4.4.3 Arbitrator's counterfactual

4.128. The original panel found that Section 771B is inconsistent as such 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.¹⁶⁷

4.129. As expressed by the original panel, and reiterated by the compliance panel, Section 771B is as such WTO-inconsistent because it requires a WTO-inconsistent analysis of pass-through of subsidy benefits from growers of raw agricultural products to processors of such agricultural products. Therefore, we consider that an appropriate counterfactual compliance scenario for future application of Section 771B would be one in which the USDOC conducts a WTO-consistent pass-through analysis of subsidy benefits from growers of raw agricultural products to the processors of such products.

4.130. We have already explained¹⁶⁸ why we cannot accept a proxy value of between 65% and 100% for the pass-through rate based on the information provided by the United States, and we do not have any information that can provide us with a reasonable and plausible WTO-consistent counterfactual pass-through rate of subsidy benefits from growers of raw agricultural products to the processors of such products that may be subject to the application of Section 771B in the future.¹⁶⁹

4.131. The United States puts forward the view that the Arbitrator should be cautious not to develop a proxy attribution rate that is too low and instead err on the side of a higher rate, on the basis that a rate that is too low would necessarily lead to suspension of concessions that is beyond the level of NI.¹⁷⁰ However, if we were to assign any other positive percentage of pass-through rate, we would be speculating on how the USDOC would be conducting a WTO-consistent pass-through analysis for any agricultural product that may be subject to a CVD investigation in the future, and on what the results of such an analysis would be. We decline to do so.

4.132. We recall that when past arbitrators have not been able to select alternative ADD or CVD rates, they have considered that a proxy rate of 0% was a reasonable and plausible WTO-consistent counterfactual rate, even where the parties (as in this case) did not agree on this rate. We consider this approach to be appropriate in the circumstances of this case for the rate of pass-through of subsidy benefits from growers of raw agricultural products to the processors of such products. That is, in the absence of any alternative WTO-consistent pass-through rate, we consider that the use of a proxy rate of 0% reflects a reasonable and plausible WTO-consistent counterfactual pass-through rate for the future application of Section 771B.

¹⁶⁴ Decisions by the Arbitrators, *US – Gambling (Article 22.6 – US)*, para. 3.30; *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 5.16; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12; *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.173; *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 3.6; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

¹⁶⁵ Decisions by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54; *US – COOL (Article 22.6 – US)*, para. 4.5; *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 5.16; *US – Washing Machines (Article 22.6 – US)*, paras. 1.16 and 3.127; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12; *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 340 and fn 245; *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.173; *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 3.6; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4.

¹⁶⁶ Decisions by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54; *US – Washing Machines (Article 22.6 – US)*, para. 3.127; and *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.12.

¹⁶⁷ Panel Report, *US – Ripe Olives from Spain*, paras. 7.170 and 8.1(b); and Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, para. 7.25.

¹⁶⁸ See para. 4.125 above.

¹⁶⁹ United States' response to Arbitrator question No. 48, para. 19; and European Union's response to Arbitrator question No. 43, paras. 34-35.

¹⁷⁰ United States' response to Arbitrator question No. 4, para. 16.

4.133. We consider that a proxy pass-through rate of 0% is a reasonable and plausible WTO-consistent counterfactual considering the absence of any alternative WTO-consistent pass-through rate and considering that assigning any positive pass-through rate would be too speculative. Mindful that concessions or other obligations are not to be suspended in a punitive manner¹⁷¹, in selecting this counterfactual we are guided by the consideration that the purpose of suspension of concessions or other obligations is to induce compliance.¹⁷²

4.134. The proxy pass-through rate of 0% will have to be implemented both for the calculation of the counterfactual CVD rates of individually investigated companies and for the calculation of the counterfactual all-others rate. We describe below how this proxy pass-through rate of 0% will be implemented by the European Union for both calculations. We also describe the process for obtaining the BCI information required for those calculations.

4.4.3.1 Counterfactual for individually investigated companies

4.135. A proxy pass-through rate of 0% means, in effect, that the portion of the subsidy rates and the portion of the resulting CVD rates attributable to the WTO-inconsistent pass-through analysis will become 0% for the purpose of the counterfactual. Therefore, the counterfactual subsidy rates and the resulting CVD rates for individually investigated companies in case of future application of Section 771B shall be calculated by deducting from the overall USDOC-calculated subsidy rates the portion attributable to the WTO-inconsistent pass-through analysis. This aligns with the European Union's calculation of the counterfactual CVD rates for individually investigated companies in the CVD investigation on ripe olives from Spain.

4.136. In this respect, the United States maintains that it is not possible to devise a universal methodology to accurately calculate a net CVD rate that does not include rates determined by using Section 771B. The United States submits that the USDOC's CVD proceedings require certain decisions with regard to the methodologies used in determining programme-specific subsidy rates and thus net subsidy rates. The United States maintains that it is possible that the European Union may disagree with certain of those decisions, and it is likewise possible that the United States may disagree with the subsidy rates the European Union may calculate in its attempts to separate from the total CVD rates the subsidy rates derived from an attribution analysis under Section 771B. For the United States, leaving this calculation to the exclusive discretion of the European Union is likely to give rise to future controversies between the parties.¹⁷³

4.137. The United States also argues that the USDOC, as the investigating authority, and not the European Union, should determine how to calculate programme-specific, and net CVD rates, without using Section 771B. For the United States, as the investigating authority responsible for calculating CVD rates and for applying Section 771B, the USDOC is best positioned to determine the appropriate subsidy rate without the application of Section 771B.¹⁷⁴

4.138. The European Union agrees that the USDOC should perform the calculation to determine what portion of the CVD rates are due to the application of Section 771B and share the results of such calculations with the European Union.¹⁷⁵ However, the European Union maintains that if the European Union disagrees with the USDOC, the European Union should be entitled to set the counterfactual CVD rate at 0%.¹⁷⁶

4.139. We note that the United States has confirmed that the USDOC publishes the subsidy rates calculated for each programme it countervails separately, explaining the methodology it applies in calculating the programme-specific subsidy rate, and then determines an overall net subsidy rate

¹⁷¹ Decisions by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3; *EC – Hormones (US) (Article 22.6 – EC)*, para. 40; *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.8; *US – Washing Machines (Article 22.6 – US)*, para. 1.17; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.13; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.5.

¹⁷² Decisions by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3; *EC – Hormones (US) (Article 22.6 – EC)*, para. 40; *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.5-5.7; *US – Washing Machines (Article 22.6 – US)*, para. 1.17; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.13; and *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.5.

¹⁷³ United States' response to Arbitrator question No. 80, para. 4.

¹⁷⁴ United States' response to Arbitrator question No. 80, para. 7.

¹⁷⁵ European Union's comment on the United States response to Arbitrator question No. 80, para. 7.

¹⁷⁶ European Union's comment on the United States response to Arbitrator question No. 80, para. 9.

for each of the companies under investigation.¹⁷⁷ Therefore, the necessary data to obtain the counterfactual CVD rates will have been produced by the USDOC and will be on the record of the investigation.

4.140. The calculation of the counterfactual subsidy rate would require the European Union to deduct from the overall subsidy rate the portion of the subsidy rate attributable to the pass-through analysis under Section 771B. The European Union would have to use the subsidy rates calculated by the USDOC for each subsidy programme, and contained on the record of the investigation, to perform the subtraction and obtain the counterfactual CVD rates. In our view, the European Union could directly perform this subtraction, based on the USDOC's calculations as reported on the record of the investigation. To perform the subtraction, the European Union would need to obtain the business confidential subsidy rates for each programme for each individually investigated company in accordance with the instructions set out in section 4.4.3.3 below.

4.141. The European Union submits that the attribution of zero pass-through may result in two relevant counterfactual scenarios. For the European Union, the first scenario would be that the CVDs imposed on the relevant EU company or companies must be terminated because the subsidy rate becomes *de minimis* due to removing the benefit amount attributed to pass-through. The European Union maintains that such a counterfactual of CVD termination would be perfectly reasonable and would not call into question the equivalence of the level of NI.

4.142. We agree with the European Union that the proxy pass-through rate of 0% can lead to the first scenario described by the European Union, i.e. when the portion of the subsidy rate attributable to the WTO-inconsistent pass-through analysis is deducted from the overall subsidy rates, all of the individual overall subsidy rates become *de minimis*. However, we do not agree that the counterfactual consequence of all of the individual subsidy rates becoming *de minimis* is termination of the CVD order.

4.143. As we explained in footnote 147 to paragraph 4.106 above, a value of 0% for the subsidy rates attributable to the WTO-inconsistent pass-through analysis is a proxy figure for what would have been a subsidy rate calculated in a WTO-consistent manner. Thus, setting the counterfactual CVD rate as 0% for the purpose of the calculation, based on the fact that the counterfactual subsidy rates for the individually investigated companies are *de minimis*, does not transform the counterfactual scenario into one of termination of the CVD order. In this first scenario, as we did with the counterfactual of the as applied WTO-inconsistency, the overall CVD rates used will be 0%.¹⁷⁸

4.144. According to the European Union, the second scenario would be one where the removal of the pass-through benefit results in the reduction of the duty (e.g. from 15% to 5%) and the level of NI will be calculated on the basis of the difference between the actual CVD rate (e.g. 15%) and the reduced CVD rate without pass-through benefit (e.g. 5%).¹⁷⁹

4.145. We agree that the proxy pass-through rate of 0% can lead to the second scenario described by the European Union, i.e. when the portion of the subsidy rate attributable to the WTO-inconsistent pass-through analysis is deducted from the overall subsidy rates calculated by the USDOC, the subsidy rates will give rise to a positive number above *de minimis*. In such a case, the counterfactual subsidy rates for individually investigated companies will have a positive value.

4.146. Finally, the European Union proposes that, if it were unable to obtain the relevant data, the applicable default counterfactual scenario should be CVD termination. The European Union argues that, in the field of agriculture, support is generally granted to farmers and not to processing companies, as evidenced by the two cases in which the application of Section 771B came before WTO panels to date. The European Union maintains that: (i) in *US – Canadian Pork*, 99% of the

¹⁷⁷ United States' response to Arbitrator question No. 80, para. 8.

¹⁷⁸ In an arbitration under Article 22.6 of the DSU, it is not for the arbitrator to recommend that the defending Member bring its measure into conformity with the relevant covered agreement. The authorized suspension of concessions or other obligations may ultimately have that effect, and that is its aim. In the meantime, the WTO Member that maintains the challenged measure may be subject to the suspension of concessions or other obligations that the complaining Member is permitted to impose.

¹⁷⁹ European Union's opening statement at the meeting of the Arbitrator, para. 21; response to Arbitrator question No. 41, paras. 14-15.

subsidies considered for pork producers were attributable to the producers of the raw agricultural product, namely swine farmers; and (ii) in the present case, 95% of the subsidies taken into consideration for ripe olive processors were based on subsidies granted to the olive farmers. For the European Union, it is therefore reasonable and plausible to assume that the elimination of pass-through benefit in investigations where Section 771B is applied will result in the termination of the CVD order due to the subsidy rate becoming *de minimis*.¹⁸⁰

4.147. The United States submits that if the European Union continues to disagree with the calculations performed by the USDOC or if the European Union is unable to obtain authorization from EU exporters to share the relevant BCI, the European Union should not be permitted to apply the prospective model and should instead approach the DSB for a new authorization to suspend concessions or other obligations pursuant to the DSU. For the United States, simply assuming that the counterfactual CVD rate is 0% where the parties cannot obtain the relevant BCI, is not reasonable as there would be no basis for such an assumption, particularly considering that the case-specific facts and market in a future CVD proceeding are unknown. The United States adds that if a 0% counterfactual CVD rate were the default, EU exporters would have no incentive to share the BCI that is necessary for calculating the correct counterfactual CVD rate.¹⁸¹

4.148. We consider that it is possible that European Union will be unable to obtain the data required to perform the calculations to obtain the counterfactual. In accordance with the instructions set out in section 4.4.3.3 below, the European Union will have to make all the necessary efforts to obtain the data required. Only if after making such efforts, and not being able to obtain the data, will the European Union then be allowed to use a proxy of 0% for the overall CVD rate for the individually investigated exporter from which the European Union was unable to obtain the information.

4.4.3.2 Counterfactual all-others rate

4.149. To apply the prospective model, the European Union will need to calculate a counterfactual all-others CVD rate. We have based the instructions to be used by the European Union to construct the counterfactual all-others CVD rate on the instructions set out by the Arbitrator in *US – Supercalendered Paper*¹⁸², which are based on the USDOC's legislation and practice. Our instructions are as follows:

- a. If all the individually investigated companies' *counterfactual CVD rates* are zero, *de minimis*, or calculated entirely with facts available, the European Union will use a proxy of 0% for the counterfactual all-others rate.
- b. If only one individually investigated company has a *counterfactual CVD rate* that is not zero, *de minimis*, or calculated entirely with facts available, the European Union will determine the counterfactual all-others rate based on that company's counterfactual CVD rate.
- c. If (i) the USDOC calculated the actual all-others rate using either a simple average of two individually investigated companies' CVD rates or a weighted average of two individually investigated companies' CVD rates using as weights "publicly ranged" US sales data¹⁸³ contained in the public record of the USDOC investigation, and (ii) these two individually investigated companies have *counterfactual CVD rates* that are not zero, *de minimis*, or calculated entirely with facts available, the European Union will determine the counterfactual all-others rate using the same averaging methodology that the USDOC used to determine the actual all-others rate.

¹⁸⁰ European Union's response to Arbitrator question No. 41, paras. 16-17.

¹⁸¹ United States' response to Arbitrator question No. 91 para. 31.

¹⁸² Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, paras. 6.82-6.95.

¹⁸³ As explained in *US – Supercalendered Paper*, "publicly ranged" data refers to numerical data submitted by a company which are confidential but have been altered by the submitting party to nonetheless be accurate to within 10% of the confidential numbers, thus allowing the altered data to appear on the public record of the USDOC investigation. Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, fn 184. Also, as indicated by the United States in its comments of 6 October 2025, if provided by the individually investigated companies, the publicly ranged data would be publicly available in the public record of the investigation in USDOC's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), as described in 19 C.F.R. 351.304(c)(1), available to registered users at <https://access.trade.gov>.

- d. If (i) the USDOC calculated the actual all-others rate using a weighted average of three or more individually investigated companies' CVD rates using as weights confidential US sales data, but (ii) only two of those three or more individually investigated companies have *counterfactual CVD rates* that are not zero, *de minimis*, or calculated entirely with facts available (the two relevant companies)¹⁸⁴, the European Union will use either a simple average of the two relevant companies' CVD rates or a weighted average of the two relevant companies' CVD rates using as weights publicly ranged US sales data contained in the public record of the USDOC investigation, whichever is closest to the weighted average of the two relevant companies' CVD rates using as weights the two relevant companies' confidential US sales data. To follow these instructions, the European Union would need to obtain the confidential US sales data in accordance with the instructions set out in section 4.4.3.3 below.
- i. If the European Union obtains the two relevant companies' confidential sales data by the applicable deadline, the European Union would then: (a) calculate a weighted average of the two relevant companies' CVD rates using the confidential sales data as weights; (b) calculate a simple average of the two relevant companies' CVD rates and a weighted average of their CVD rates using as weights publicly ranged US sales data contained in the public record of the USDOC investigation; and, finally, (c) select whichever rate calculated under item (b) most closely approximates the rate calculated under item (a).
- ii. If the European Union does not receive the authorizations from the two relevant companies by the applicable deadline, or if the United States does not relay the two relevant companies' confidential sales data by the relevant deadline, the European Union will calculate a weighted average using as weights the two relevant companies' publicly ranged US sales data contained in the public record of the USDOC investigation. If, for any reason, this option is unavailable, the European Union will use the simple average of the two relevant companies' CVD rates as the counterfactual all-others rate.
- e. If (i) the USDOC calculated the actual all-others rate using a weighted average of three or more individually investigated companies' CVD rates using as weights confidential US sales data, and (ii) three or more individually investigated companies have *counterfactual CVD rates* that are not zero, *de minimis*, or calculated entirely with facts available, the European Union will use a weighted average of the latter companies' CVD rates, using the companies' actual and normally confidential US sales data as weights. To follow these instructions, the European Union would need to obtain the confidential US sales data in accordance with the instructions set out in section 4.4.3.3 below.
- i. If the European Union obtains all relevant companies' confidential sales data by the applicable deadline, the European Union will then calculate a weighted average of the companies' CVD rates using the confidential sales data as weights.
- ii. If the European Union does not receive all authorizations from the relevant companies by the applicable deadline, or if the United States does not relay the companies' confidential sales data by the relevant deadline, the European Union will calculate a weighted average using as weights the relevant companies' publicly ranged US sales data contained in the public record of the USDOC investigation. If, for any reason, this option is unavailable, the European Union

¹⁸⁴ To clarify, this "two relevant company" scenario arises when the USDOC used three or more companies' CVD rates to calculate the actual all-others rate, but when the European Union calculates the counterfactual CVD rates of these three or more companies, only two of them have counterfactual CVD rates that are not zero, *de minimis* or calculated entirely with facts available. In this situation, the European Union will be left with only two of these three or more companies' CVD rates to calculate the counterfactual all-others rate. As explained by the United States in its comments on 6 October 2025, USDOC's practice is to use the companies' publicly ranged US sales data, where provided by the companies, in situations when it averages two rates using the US sales data from two companies. As indicated by the United States, the use of publicly ranged US sales data protects the two relevant companies' BCI sales data in those situations, because it is not possible for either company to derive the sales amount of the other company using their resulting average and their own sales information.

will use the simple average of the relevant companies' CVD rates as the counterfactual all-others rate.

- f. Finally, in accordance with section 6.4 below, if the level of NI needs to be recalculated because duty rates have been modified, the European Union will need to calculate the counterfactual non-selected rate following the same instructions as for the all-others rate.

4.4.3.3 Instructions for obtaining the BCI required for the calculations

4.150. As noted earlier, to calculate the counterfactual CVD rates for the individually investigated companies and the counterfactual all-others rate, the European Union will need to obtain the following BCI contained on the record of the USDOC's investigation: (i) the individually investigated companies' subsidy rates corresponding to each subsidy programme; and (ii) the US sales data of each individually investigated company.

4.151. The parties provided their views on how the European Union could obtain the necessary information for the purpose of calculating the individually investigated companies' counterfactual CVD rates.¹⁸⁵ We have constructed the instructions for obtaining the required BCI based on the parties' views, as well as on the Understanding between the European Union and the United States concerning procedures to apply to Business Confidential Information to the extent necessary to apply the DSB authorization consistent with the Arbitrator's Decision (BCI Understanding), agreed on 17 July 2025. They are as follows:

- a. Following a triggering event, the European Union will notify the United States that it intends to invoke the prospective model to suspend concessions with respect to a given application of Section 771B.
- b. Upon notification to the United States, the European Union will send written requests to the individually investigated companies for written statements authorizing the USDOC to release the relevant BCI to the European Union for the purpose of using it to calculate the counterfactual CVD rates. The European Union will copy the United States on such communications to the companies.
- c. In the notification mentioned in paragraph a. above, the European Union may also request the United States to provide the publicly ranged US sales data of all the individually investigated companies contained in the public record of the relevant USDOC investigation, or the European Union may obtain the information itself from the public record of the investigation. If the European Union requests the information from the United States, and that information is indeed available in the public record of the relevant USDOC investigation, the United States must provide the information to the European Union within two calendar weeks (14 days). If the USDOC does not provide the information within the deadline, the European Union will obtain the information from the public record of the USDOC investigation, if that information is indeed available in the public record of the investigation.
- d. From the date the European Union sends the written request, the companies will have two calendar weeks (14 days) to provide their written authorizations to the European Union.
- e. If the European Union receives all such authorizations within the two calendar weeks (14 days), it will provide the companies' authorizations to the United States.
- f. The United States will then, at the time of such provision, have one of the two following time-periods to provide the companies' relevant BCI to the European Union, whichever is longer: (a) two calendar weeks (14 days); or (b) the remainder of a 30-calendar-day

¹⁸⁵ United States' response to Arbitrator question Nos. 80, paras. 5-6 and 91 para. 31; European Union's comments on the United States' responses to additional Arbitrator questions, paras. 29-30.

period that started to run at the time the European Union sent the written requests to the relevant companies.

- g. If the European Union does not receive all such authorizations within the two calendar weeks (14 days), once this period of time is over it will notify the United States that it was unable to obtain the authorizations and will be required to send again written requests for written statements authorizing the USDOC to release the relevant BCI to the European Union to the individually investigated companies that did not provide the requested authorizations upon the first request. The deadlines in steps c to e will apply again to this new request for written statements.
- h. If the European Union is unable to obtain the authorizations from one or more of the individually investigated companies within the two calendar weeks (14 days) after the second request, once this period of time is over it will notify the United States that it was unable to obtain the authorizations and that it intends to use the alternative options provided in paragraph 4.148 above (in the case of BCI concerning the individually investigated companies' subsidy rates corresponding to each subsidy programme), and paragraphs 4.149.d.ii and 4.149.e.ii above (in the case of BCI concerning the US sales data of each individually investigated company). The European Union will be authorized to use the alternative options provided in paragraphs 4.148, 4.149.d.ii and 4.149.e.ii above once the entire 30-calendar-day period that started to run at the time the European Union sent the second written requests to the relevant exporters is over. All such deadlines can be extended by the parties through mutual agreement.

4.5 Conclusion with respect to the appropriate counterfactual

4.152. For the WTO-inconsistent application of Section 771B in the CVD investigation on ripe olives from Spain, we select as the appropriate counterfactual compliance scenario one in which the USDOC conducts a WTO-consistent analysis of pass-through of subsidy benefits from growers of raw olives to ripe olive producers. We consider that a proxy pass-through rate of 0% reflects a reasonable and plausible WTO-consistent counterfactual rate. Based on the subsidy rates on the record of the investigation for the three investigated exporters, the counterfactual single CVD rate is 0%.

4.153. For the future application of Section 771B, we select as the appropriate counterfactual compliance scenario one in which the USDOC conducts a WTO-consistent analysis of pass-through of subsidy benefits from growers of raw agricultural products to the processors of such products. We consider that a proxy pass-through rate of 0% reflects a reasonable and plausible WTO-consistent counterfactual rate. We have provided specific instructions on how to implement this counterfactual rate in case of future application of Section 771B.¹⁸⁶

5 RELEVANT MARKET

5.1. The United States argues that the level of suspension requested by the European Union is in excess of the level of NI, because the European Union is not measuring the level of NI accruing to it, but rather is measuring the level of NI accruing to Spain.¹⁸⁷ For the United States, the level of NI should be the combination of impacts on Spain and impacts on the rest of the European Union (positive and negative).¹⁸⁸

5.2. The European Union contends that the NI should be assessed based on the hypothetical trade lost by Spanish importers as a result of the United States' failure to remove the WTO-inconsistent CVDs by the end of the RPT.¹⁸⁹ The European Union maintains that any alleged gains by ripe olive producers in other EU member States not affected by the inconsistent CVDs cannot offset the NI resulting from the United States' failure to comply, as this would lead to an artificial reduction of the European Union's NI and would run counter to the objective of inducing compliance.¹⁹⁰

¹⁸⁶ See sections 4.4.3.1 and 4.4.3.2 above.

¹⁸⁷ United States' written submission, para. 66; opening statement at the meeting of the Arbitrator, para. 22; and response to Arbitrator question No. 57, para. 35.

¹⁸⁸ United States' written submission, para. 63.

¹⁸⁹ European Union's written submission, para. 49.

¹⁹⁰ European Union's opening statement at the meeting of the Arbitrator, paras. 54-55.

5.3. We note that the issue before us is whether the level of NI should be calculated with respect to Spain only, as the European Union maintains, or whether it should be calculated with respect to the European Union as a whole, as the United States contends. As a starting point, we observe that both parties refer to provisions of the DSU to justify their positions, which we now address.

5.4. The United States submits that the text of Article 22.2 of the DSU is clear that any party having invoked the DS procedures may request authorization from the DSB to suspend concessions, and that the European Union is that party. The United States maintains that in making its request for authorization from the DSB to suspend concessions under Article 22.2 the European Union unambiguously requested to suspend concessions in an amount equivalent to the level of NI experienced by the European Union, and not by one of its member States in isolation. The United States adds that the European Union asks the Arbitrator in its written submission to determine that the level of suspension proposed is equivalent to the level of NI accruing to the European Union, not to Spain.¹⁹¹

5.5. The European Union maintains that the presumption of NI in Article 3.8 of the DSU underlines that NI is linked to a breach of the rules, and that the breach in this case stems from the WTO-inconsistent duties imposed on imports from Spain. For the European Union, the purpose of the Article 22.6 arbitration proceedings is to determine the level of NI resulting from the United States' failure to remedy this breach by the end of the RPT.¹⁹²

5.6. On the one hand, we observe that Article 3.8 of the DSU indicates that "[i]n 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." Thus, we agree with the European Union that Article 3.8 links the presumption of NI to an infringement of obligations assumed under a covered agreement.

5.7. On the other hand, we also agree with the United States that Article 22.2 of the DSU refers to the right of "any party having invoked the dispute settlement procedures" to request authorization from the DSB to suspend concessions or other obligations under the covered agreements. The party that invoked dispute settlement procedures was the European Union. Indeed, the European Union accepts that it brought the dispute, acting as a WTO Member in its own right.¹⁹³

5.8. Two legal circumstances in the case are also relevant to a consideration of this issue. The first is that both the European Union and Spain are individual WTO Members in their own right. The second is that the United States investigated and imposed the WTO-inconsistent CVDs only on ripe olives from Spain.

5.9. With respect to the first circumstance, which is that both the European Union and Spain are individual WTO Members in their own right, the United States contends that the political structure of the European Union does not alter its treatment under the DSU, and that the fact that the European Union's subjurisdictions are themselves sovereign States makes no difference. The United States maintains that Spain, as a Member of the WTO in its own right, could have brought this dispute in its capacity as a WTO Member, but did not do so. Had it done so, according to the United States, the Arbitrator's mandate would be to ensure that the suspension of concessions requested by Spain does not exceed the NI of benefits accruing to Spain. The United States submits that having made the decision to bring the dispute as the European Union, the European Union is now bound to accept that NI must be measured for the European Union as a whole.¹⁹⁴

5.10. The United States adds that this situation could only come about with respect to the European Union because both the European Union and its member States are WTO Members. According to the United States, the European Union uses its unique political structure to act as the European Union in requesting relief for any EU member State for a future as such breach, but to

¹⁹¹ United States' written submission, para. 65; and response to Arbitrator question Nos. 20, para. 45, and 57, para. 33.

¹⁹² European Union's written submission, para. 45.

¹⁹³ European Union's response to Arbitrator question No. 13, para. 48.

¹⁹⁴ United States' response to Arbitrator question No. 63, para. 54.

come forward as an individual member State to the exclusion of the rest when that is to its advantage.¹⁹⁵

5.11. The United States further argues, to illustrate its point, that if the European Union had imposed WTO-inconsistent duties on US exports originating from one US state, the United States could not assert that NI arising from that measure should only be calculated with respect to the impacted state, ignoring the rest of the United States' market. For the United States, it would not be appropriate to argue that, because a WTO-inconsistent measure was directed at a specific region or set of companies within the Member, NI should be measured only with respect to that region or those companies.¹⁹⁶

5.12. The European Union contends that the fact that Spain is a WTO Member is relevant because the United States imposed CVDs on ripe olive exports from Spain and the relevant trade flows are therefore only those from Spain to the United States. For the European Union, if gains by ripe olive producers in other EU member States were to be considered, EU member States would be at a serious disadvantage *vis-à-vis* other WTO Members because, as regards investigations covering only one or several EU member States, an EU member State would have to offset gains and losses not only within its own borders but also with up to 26 other EU member States.¹⁹⁷

5.13. The European Union further contends that the situation illustrated by the United States is not comparable because (i) US states are not WTO Members, whereas Spain is a WTO Member, and the trade flows relevant to calculating NI must be assessed with respect to the WTO Member(s) concerned by the investigation; and (ii) it is not possible to limit a CVD investigation to imports originating in a territorial subdivision of a WTO Member, e.g. a US state.¹⁹⁸ For the European Union, the appropriate example is not one of offsetting gains and losses between two US states as suggested, but between two WTO Members.¹⁹⁹

5.14. We note that regardless of how the European Union formally chose to bring this case based on its internal political structure and competencies, it is legally correct that both the European Union and Spain are WTO Members in their own right, with the rights and obligations pertaining to such membership²⁰⁰, including the right to invoke dispute settlement procedures or to request authorization from the DSB to suspend concessions or other obligations. The situation put forward by the United States regarding the position of US states should a European Union measure only apply to exports from one US state, is not comparable to the situation at issue because, as the European Union noted, Spain is a WTO Member in its own right whereas US states are not.

5.15. The second circumstance is that the United States imposed the WTO-inconsistent CVDs on ripe olives from Spain only. The United States maintains that the scope of the USDOC's investigation and the fact that the breach of WTO obligations at issue stems from duties imposed on imports from a specific EU member State does not change the requirement in the DSU that NI must be measured with respect to the party having invoked the dispute settlement procedures and that has requested authorization from the DSB to suspend concessions.²⁰¹ For the United States, the fact that a WTO-inconsistent measure covers a specific set of producers or a specific geographic location within a WTO Member does not allow an arbitrator to isolate its estimate of NI to only those producers or that region to the exclusion of the rest of the requesting WTO Member.²⁰²

5.16. The European Union contends that the United States' investigation and the scope of the ensuing CVDs concerned ripe olives from Spain. Therefore, only the impact on the trade flows from the relevant Spanish ripe olive producers to the United States is relevant to calculating the level of NI of benefits accruing to the European Union resulting from those CVDs.²⁰³

¹⁹⁵ United States' response to Arbitrator question No. 63, para. 53.

¹⁹⁶ United States' opening statement at the meeting of the Arbitrator, para. 23; response to Arbitrator question Nos. 20, para. 45 and 57, para. 34.

¹⁹⁷ European Union's response to Arbitrator question No. 63, para. 71.

¹⁹⁸ European Union's response to Arbitrator question No. 63, para. 70.

¹⁹⁹ European Union's response to Arbitrator question No. 63, para. 72.

²⁰⁰ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.174.

²⁰¹ United States' opening statement at the meeting of the Arbitrator, para. 23.

²⁰² United States response to Arbitrator question No. 57, para. 34.

²⁰³ European Union's response to Arbitrator question No. 13, para. 48.

5.17. The European Union further argues that the Arbitrator needs to calculate the level of NI based on the imports of Spanish ripe olives to the United States, because this is dictated by the scope of the USDOC's investigation on ripe olives, which only concerned Spain.²⁰⁴ The European Union maintains that the United States decided to narrow its case to Spanish ripe olives, and that such choice determines the scope of the measures at issue. For the European Union, the level of NI should be consistent with the scope of the measures at issue and be assessed at the same level, so any alleged gains by other exporting EU member States are immaterial.²⁰⁵

5.18. We note that the United States chose to initiate and conduct the CVD investigation on ripe olives with respect to Spain only and, consequently, to impose CVDs on ripe olives from Spain only. In other words, the United States did not consider the European Union as an indivisible whole for the purpose of the CVD investigation, and instead, conducted the CVD investigation with respect to one of its member States and imposed the WTO-inconsistent CVDs on one of its member States.

5.19. We also recall that Article 3.8 links the presumption of NI to an infringement of obligations assumed under a covered agreement. Moreover, we note that Article 22.2 of the DSU links the authorization to suspend concessions to the responding Member's failure "to bring *the measure found to be inconsistent* with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the [RPT]". Similarly, Article 22.8 provides that the suspension of concession or other obligations shall only be applied "until such time as *the measure found to be inconsistent* with a covered agreement has been removed...". Therefore, there is in our view a clear link between the right to suspend concessions and the measures that were found to be WTO-inconsistent, including the scope of such WTO-inconsistent measures.

5.20. In the dispute at issue, because the scope of the CVD investigation was limited to ripe olives from Spain, the relevant WTO-inconsistency in the original panel concerned the application of Section 771B of the Tariff Act of 1930 in the *Spanish ripe olives CVD investigation*²⁰⁶; and the relevant WTO-inconsistency in the compliance panel concerned the application of Section 771B in the ripe olives Section 129 determinations regarding the *CVD investigation of ripe olives from Spain*.²⁰⁷

5.21. Considering the fact that the WTO-inconsistent measure was imposed on one of the EU member States, Spain, which is a WTO Member in its own right, and considering also the link that exists in the DSU between the right to suspend concessions and the scope of the measures found to be WTO-inconsistent, we deem it appropriate to calculate the level of NI with respect to Spain only.

5.22. The United States notes that if the European Union imposes countermeasures as a result of these proceedings, those countermeasures will not apply to US exports coming into Spain only, but to exports coming into any EU member State.²⁰⁸

5.23. The United States puts this forward as an additional reason to support its argument that the level of NI should be the combination of impacts on Spain and impacts on the rest of the European Union, an argument which we have already addressed. In any event, we caution that the level of suspension of concessions must remain the same regardless of whether the European Union chooses to apply the suspension of concessions to US exports coming into Spain or to US exports coming into all EU member States. Thus, there would be no difference in the level of NI.

5.24. Based on the above, we do not believe the United States' proposal to calculate the level of NI with respect to the European Union as a whole can be supported. Instead, we believe that the level of NI should be calculated with respect to Spain.

5.25. Finally, with respect to the suspension of concessions for future applications of Section 771B, the European Union argues that the NI that results from the fact that Section 771B violates the SCM Agreement and the GATT 1994 as such, and may be applied in the future in other investigations

²⁰⁴ European Union's response to Arbitrator question No. 63, para. 69.

²⁰⁵ European Union's written submission, paras. 46-48; response to Arbitrator question No. 63, para. 73.

²⁰⁶ Panel Report, *US – Ripe Olives from Spain*, para. 8.1(b)(ii).

²⁰⁷ Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, paras. 2.1(a) and 8.1(b).

²⁰⁸ United States' written submission, para. 67; response to Arbitrator question No. 63, paras. 53 and 55.

concerning one, several or all EU member States, would equally concern benefits accruing to the European Union, so it is appropriate to bring an as such suspension request for the future application of Section 771B to exports from any EU member State.²⁰⁹

5.26. We note that the future application of Section 771B in a CVD investigation might concern one, several or all EU member States. For the prospective model, addressed in section 7 below, we consider it appropriate to follow the same logic spelled out above regarding the as applied WTO-inconsistency concerning the CVD investigation on ripe olives from Spain. Thus, the European Union should calculate the level of NI with respect to the scope of the relevant WTO-inconsistent CVD investigation, i.e. with respect to the Member or Members to which the WTO-inconsistent CVDs apply.

6 THE EUROPEAN UNION'S REQUEST CONCERNING THE APPLICATION OF SECTION 771B IN THE SPANISH RIPE OLIVES CVD INVESTIGATION

6.1 Introduction

6.1. In this section, we will examine whether the level of suspension of concessions or other obligations proposed by the European Union is equivalent to the level of NI sustained by the European Union as a result of the United States' failure to implement the DSB recommendations and rulings concerning the application of Section 771B of the Tariff Act of 1930 in the Spanish ripe olives CVD investigation by the expiry of the RPT (the as applied WTO-inconsistency).

6.2. We will first determine the appropriate time-periods. Then, we will determine the appropriate methodology, by addressing the models proposed by the parties, the parameter values, and data inputs. Finally, we will implement the methodology to arrive at a reasoned estimate of the level of NI.

6.2 Appropriate time-periods

6.3. The European Union uses two time-periods in its calculations, each consisting of a full calendar year:

- a. A "baseline year", which is used to obtain data on market shares of each supplying entity in the United States' market for ripe olives prior to the imposition of the CVDs. The European Union maintains that the baseline year has to be the last year during which trade was not affected by WTO-inconsistent duties. The European Union uses calendar year 2016 as the baseline year, given that the provisional CVDs on ripe olives from Spain were imposed in 2017.²¹⁰
- b. A "reference year", which is the time-period after the expiry of the RPT used to determine the level of NI. This time-period is used to obtain data on the value of the United States' market for ripe olives and the relevant duty rates. The European Union uses calendar year 2023 as the reference year, given that the RPT for the United States to implement the DSB recommendations and rulings expired on 14 January 2023.²¹¹

6.4. The United States does not contest the time-periods used by the European Union in its calculations and adopts these time-periods for its alternative calculations.

6.5. The baseline year proposed is the closest full calendar year prior to the imposition of provisional CVDs on ripe olives from Spain, and the reference year is the calendar year in which the RPT expired because the RPT occurred very early in that year. Thus, we consider that the time-periods used by both parties are appropriate for determining the level of NI caused by the United States' failure to implement the DSB recommendations and rulings by the expiry of the RPT.

²⁰⁹ European Union's response to Arbitrator question No. 13, paras. 49-50.

²¹⁰ European Union's methodology paper, para. 41.

²¹¹ European Union's methodology paper, para. 43.

6.3 Methodology

6.3.1 The European Union's proposed economic model

6.6. The economic model proposed by the European Union is a two-step Armington partial equilibrium model adapted from a study by Balistreri and Rutherford (2013). The model consists of a set of equations describing how trade flows react to a change in consumer prices caused by changes in *ad valorem* trade costs, such as the imposition of CVDs. The change in trade flows is determined by the reaction of import demand and export supply to the price change.²¹²

6.7. Import demand is characterized by the Armington concept of product differentiation based on origin. The key idea is that consumers view goods from different countries as imperfect substitutes for each other, even goods of the same type. For example, ripe olives from Spain are not seen as identical to ripe olives from Morocco, even though both are the same type of ripe olives. The degree to which consumers are willing to substitute a product from one origin with the same product from a different origin is represented in the model by the "Armington" elasticity of substitution. This parameter determines the degree to which import demand reacts to an increase in price of ripe olives from Spain by shifting towards other sources.²¹³ On top of the reallocation of demand across different sources, the increase in the price of ripe olives from Spain in the United States also causes a decrease in the overall import demand for ripe olives in the United States' market. This is because the average import price of ripe olives in the market increases. The degree to which this average price increase reduces the overall import demand for ripe olives in the United States is captured by the price elasticity of import demand.²¹⁴

6.8. On the supply side, producers react to a higher price in the export market by increasing their production or by shifting existing sales from their domestic market to the export market. Both dimensions are captured by a single model parameter: the price elasticity of export supply.²¹⁵ Together, (i) the Armington elasticity of substitution, (ii) the price elasticity of demand, and (iii) the price elasticity of supply determine the responsiveness of the United States' imports from Spain to a change in the *ad valorem* trade costs following the removal of the WTO-inconsistent CVDs.²¹⁶

6.9. The model proposed by the European Union focuses on the market for one product: ripe olives. The model represents a partial equilibrium, meaning that only the direct effect of price changes on import demand and export supply of ripe olives are considered. Possible second order effects through adjustments in aggregate demand, labour markets, investment or other product markets are not part of the model.²¹⁷ However, the European Union's model does consider adjustment in the *global* market for ripe olives by incorporating all trade flows among the four regional entities it includes: United States; Spain; other EU economies (Croatia, France, Germany, Greece, Italy, Latvia and Portugal); and the rest of the world.²¹⁸ In other words, the model covers not only imports to the United States but also imports to Spain, other EU economies and the rest of the world. The inclusion of these "third markets" adds another margin of adjustment in the economic model to account for the likely response of Spanish exporters to the change in duties in the United States' market in shifting their exports to other export markets.²¹⁹

6.10. The European Union recognizes that including third markets represents a departure from the economic modelling approach adopted by past arbitrators. The European Union considers this necessary to obtain a full picture of the options available to Spanish exporters facing duties. The European Union asserts that when the WTO-inconsistent CVDs are removed, Spain would be able to increase exports to the United States either by increasing production or by redirecting existing

²¹² European Union's methodology paper, para. 29; and Description of the European Union's economic model (Exhibit EU-6).

²¹³ European Union's methodology paper, paras. 30-31; and Description of the European Union's economic model (Exhibit EU-6).

²¹⁴ European Union's methodology paper, paras. 30-31; and Description of the European Union's economic model (Exhibit EU-6).

²¹⁵ European Union's methodology paper, para. 30; and European Union's response to Arbitrator question No. 15, para. 54.

²¹⁶ European Union's methodology paper, para. 29; and Description of the European Union's economic model (Exhibit EU-6).

²¹⁷ Description of the European Union's economic model (Exhibit EU-6).

²¹⁸ European Union's methodology paper, Table 1.

²¹⁹ Description of the European Union's economic model (Exhibit EU-6).

exports from other markets towards the United States. The European Union argues that an economic model without third markets ignores this latter possibility and would therefore "artificially reduce Spain's possibility to increase exports only to the option of increasing production and, thus, put an artificial cap on the level of nullification or impairment".²²⁰

6.11. The European Union's model also departs from the economic modelling approach adopted by past arbitrators in that it considers only the international segment of the ripe olives market, and not the United States' domestic sales by domestic producers. The European Union argues that the price elasticity of supply of ripe olives in the United States is low enough to assume that the economic model does not need to include domestic supply to accurately estimate the impact of the WTO-inconsistent duty on imports.²²¹

6.12. The European Union applies the model to a group of ripe olive products classified under seven Harmonized Tariff Schedule of the United States (HTSUS) 10-digit codes that it considers are fully in the scope of the WTO-inconsistent CVDs (in-scope products).²²² All these seven codes fall under the Harmonized System (HS) 6-digit code 2005.70. The European Union notes that data on global trade flows, which are necessary for the inclusion of third markets in the economic model, are only available up to the HS 6-digit level of disaggregation. To address this information gap, the European Union uses data on the United States' imports at HTSUS 10-digit level to calculate the share of in-scope imports in total imports under the HS 2005.70 heading.

- a. First, the European Union calculates this share based on the United States' imports from all origins in each year and applies it to imports of each of the other three regional entities (Spain, other EU economies, and the rest of the world) to calculate their in-scope imports from all origins.²²³ The assumption underlying this calculation is that the share of total in-scope imports to the United States in imports under the broader HS 6-digit heading is representative of total imports of other countries.
- b. Second, the European Union uses the same share to calculate the United States' global exports under in-scope codes.²²⁴
- c. Third, the European Union calculates the share specifically for exports to the United States from Spain and from the rest of EU in each year and then applies these shares to calculate the exports under in-scope codes of these two entities to the rest of the world in each year.²²⁵ The assumption underlying these calculations is that the share of in-scope exports to the United States in exports under the broader HS 6-digit heading from the two entities is representative of their exports to the remainder of their trade partners.²²⁶
- d. Finally, the European Union calculates exports under in-scope codes of the rest of the world to countries other than the United States as the difference between the total in-scope imports of each entity, calculated in the first step, and the sum of in-scope exports to each entity from Spain, other EU economies and the United States.²²⁷

6.13. The European Union applies the economic model in two steps. In the first step, the European Union applies the model to predict the impact of the WTO-inconsistent CVD imposition on trade flows in the baseline year and calculates the predicted import market shares of each regional entity in each market. The European Union then multiplies these predicted import market shares with the actual value of total imports in each market in the reference year. These calculations yield hypothetical trade flows in the WTO-inconsistent scenario in the reference year. These hypothetical trade flows serve as input into the second step, in which the model is applied to predict the impact of the CVD removal on trade flows in the reference year. The second step yields hypothetical trade flows in the WTO-consistent scenario in the reference year. The difference between the

²²⁰ European Union's methodology paper, para. 32.

²²¹ European Union's methodology paper, para. 32.

²²² European Union's methodology paper, Table 1.

²²³ Calculations for the European Union's economic model (Exhibit EU-14), pp. 5-6.

²²⁴ Calculations for the European Union's economic model (Exhibit EU-14), pp. 5-6.

²²⁵ European Union's methodology paper, para. 34.

²²⁶ European Union's written submission, para. 51.

²²⁷ Calculations for the European Union's economic model (Exhibit EU-14), pp. 5-6.

United States' hypothetical imports from Spain in the WTO-consistent scenario and those in the WTO-inconsistent scenario under this methodology is said by the European Union to represent the level of NI.²²⁸

6.3.2 The United States' proposed adjustments to the economic model

6.14. The United States agrees with the European Union that a two-step Armington partial equilibrium model can be employed to determine the level of NI in this arbitration.²²⁹ The United States, however, objects to three features of the European Union's model:

- a. the exclusion of United States' domestic sales by domestic producers;
- b. the inclusion of markets other than the United States' market (third markets); and
- c. not taking into account parallel ADDs.²³⁰

6.15. Below, we will address the United States' objections to these three features of the European Union's model.

6.3.2.1 The United States' domestic sales

6.16. The United States argues that the European Union's model leads to an inappropriately high trade impact estimate of the WTO-inconsistent CVDs that is not equivalent to the level of NI because it excludes domestic ripe olive production sold in the domestic market, i.e. domestic sales. In particular, the United States argues that the consequence of this modelling decision is an inflated market share for Spain and other exporters that leads to an overestimation of the trade diversion effect and thus the level of NI.²³¹

6.17. Moreover, the United States maintains that excluding domestic sales 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".²³² The United States asserts that since the first use of an Armington economic model in Article 22.6 proceedings, no arbitrator has chosen to use a version of the model that excludes domestic sales. The United States claims that this is because the very purpose of CVDs is to protect domestic producers, such that imposition of CVDs would serve no purpose if there was no domestic production to capture the market share of the affected imports. For this reason, the United States argues that domestic sales should be an essential feature of the economic model in this case.²³³

6.18. Finally, the United States contends that the European Union presents contradictory arguments when it simultaneously claims that the United States' domestic production is inelastic and therefore need not be included in the modelling framework, while also suggesting that there is an implicit channel through which domestic production can adjust.²³⁴

6.19. The European Union submits that its proposed economic model does not overestimate the level of NI because it implicitly accounts for domestic sales by discounting demand satisfied by local production from total demand.²³⁵ In other words, the larger market shares of Spain and other exporters (resulting from the non-inclusion of domestic production) are balanced out as they are applied to a smaller market only including imports.

6.20. Moreover, the European Union argues that the supply of domestic producers in the United States is completely inelastic because those producers do not have the capacity to react to changes in market conditions such as the imposition of CVDs. For the European Union, therefore, the variation in the United States' domestic sales does not contribute much to the determination of

²²⁸ European Union's methodology paper, paras. 41-45.

²²⁹ United States' written submission, para. 4.

²³⁰ United States' written submission, paras. 61-62 and 81.

²³¹ United States' written submission, para. 80.

²³² United States' written submission, para. 72.

²³³ United States' written submission, para. 73.

²³⁴ United States' comments on European Union's response to Arbitrator question No. 64, para. 65.

²³⁵ European Union's written submission, para. 56.

the impact of the WTO-inconsistent CVDs on imports. The European Union maintains that, for these reasons, an economic model that excludes domestic sales and focuses on the reallocation among imports from different sources is appropriate in the present case.²³⁶ The European Union adds that the inclusion of the United States' domestic sales in the model would lead to a distortion of the modelling results because it would "artificially inflate" the domestic producers' market share predicted in the first-step application of the economic model. The European Union submits that, when simulating the CVD imposition, the model would "inevitably show an increase in the production and sales of domestically produced olives to the detriment of imports", which would be unrealistic if the United States' production were inelastic.²³⁷

6.21. Finally, the European Union supports the choice to exclude domestic sales from the model by asserting that the domestic production data proposed by the United States is unreliable because it includes products that are outside the scope of the seven HTSUS codes to which the model is applied, such as green olives, and the product classification of domestic production data does not correspond to that of the trade data used in the economic model.²³⁸

6.22. We agree with the European Union that an appropriately specified economic model without domestic sales does not necessarily overestimate the level of NI. However, we are not convinced by the European Union's arguments for such model specification in this case. We agree with the United States that, for the purpose of estimating the impact of a measure that has been introduced to protect domestic producers, an economic model that explicitly considers domestic sales would be conceptually more accurate. We note the European Union's argument that if data on domestic sales is unreliable, its inclusion in the model may introduce even greater inaccuracy. Yet, in this case we find that there is data accurate enough to proxy the United States' domestic sales. For these reasons, we consider it more appropriate to include the United States' domestic sales in the economic model.

6.23. We elaborate on the discussion of the appropriate value of domestic supply elasticity in section 6.3.4.3.1 below where we conclude that the United States provides convincing arguments for rejecting the assumption of inelastic domestic supply. Moreover, we discuss the available domestic sales data sources in section 6.3.4.5 below where we conclude that appropriate data exists for ripe olives.

6.3.2.2 Third markets

6.24. The United States objects to the inclusion of third markets in the economic model, and in particular to the European Union's assumption that the share of in-scope ripe olives among all ripe olive imports in the United States can be used as a proxy for this share in other importing countries.²³⁹ The United States maintains that such an assumption is unreliable because: (i) production and consumption patterns differ across countries, such that certain countries are net exporters while others are net importers; (ii) Spanish producers reported in the United States International Trade Commission (USITC)'s investigation that they did not face import competition in their home market; and (iii) evidence from the USITC shows that the value of the share of in-scope Spanish exports to the rest of the European Union differs from the share calculated with the European Union's assumption with a discrepancy that varies from negative 6.7 percentage points to positive 5.4 percentage points depending on the year.²⁴⁰ The United States further argues that the global dimension of the European Union's model is "unnecessary, overly complex, and extraneous" because the dispute concerns CVD rates on United States' imports from Spain.²⁴¹

6.25. The European Union submits that the United States' argument about production and consumption patterns "seems entirely irrelevant", because the fact that Spain is a net exporter while the United States is a net importer does not prevent the share of in-scope imports from being the same in both countries. The European Union maintains that the fact that Spanish producers reported facing no import competition does not mean that no in-scope products were imported. The European Union argues that the evidence on the share of in-scope Spanish exports to the rest of the European Union provided by the United States, proves that the European Union's assumption is

²³⁶ European Union's methodology paper, para. 32.

²³⁷ European Union's written submission, para. 57.

²³⁸ European Union's written submission, para. 58.

²³⁹ United States' written submission, para. 71, and section 6.3.1 above.

²⁴⁰ United States' response to Arbitrator question No. 59, paras. 39-41 and Figure 1.

²⁴¹ United States' written submission, para. 70.

reliable. In particular, the European Union submits that this is because "[i]t shows that on average, the approximation done by the EU is very close to the survey data. The average of the shares calculated by the EU over the period 2018-2022 is 15.3% while the average of the shares based on USITC survey data is 15.1%."²⁴²

6.26. We agree with the United States that some of the assumptions that underpin the European Union's calculations are unreliable. The assumption used by the European Union to calculate the global in-scope exports of Spain and other EU economies (in paragraph 6.12.c above) is at least plausible. However, we agree with the United States' point (i) in paragraph 6.24 that production and consumption patterns differ across countries, such that certain countries are net exporters while others are net importers. We therefore find it unreliable to assume that the composition of the United States' imports is representative of the import composition of the rest of the world. We also find it unreliable to assume that the United States' export composition is the same as the composition of imports into the United States. Moreover, we note that the European Union's response to the third point, showing that its approximation is reliable *on average*, is incongruent with its approach of using year-specific shares.²⁴³

6.27. We further recall that the European Union argues that the inclusion of third markets is necessary to account for trade diversion, which is potentially an important margin of adjustment for estimating the level of NI.²⁴⁴ We are not convinced by this argument because the flexibility of adjustment through trade diversion to and from other export markets can be readily captured by an appropriate value of the export supply elasticity. Thus, this flexibility can be implicitly part of the economic model, through the export supply elasticity, even if the model focuses only on the United States' market.²⁴⁵ Including third markets would either require excluding United States' domestic sales or necessitate a more complex model. Specifically, including United States' domestic sales²⁴⁶ in the European Union's model with third markets would change the interpretation of the supply and demand elasticities for the United States. This would require distinguishing these parameters from those of the other three regional entities, making the model parametrization much more complex.

6.28. The European Union acknowledges that including domestic sales in the European Union's model would add additional complexity and including only the United States' domestic production but not that of other entities would result in an incomplete model.²⁴⁷ Moreover, the European Union agrees that an appropriately chosen export supply elasticity in a one-market model could, in some circumstances, indeed capture the adjustment through trade diversion to and from third markets. However, the European Union argues that such simpler model is a reasonable approximation of the more complex model only for small changes in duty rates. According to the European Union, when the change in duty rates exceeds a certain level, the results calculated with a one-market model would deviate significantly from those of a multi-market model.²⁴⁸

6.29. We note that available estimates of export supply elasticities from the academic literature capture all possible adjustment channels and thus correspond to the elasticity in the one-market model. Therefore, we have some empirical guidance on the value of the export supply elasticity in the one-market model, but we lack such guidance for the corresponding elasticity in the multi-market model. We only know that in theory the latter is smaller than the former.²⁴⁹

6.30. After careful consideration, we are not convinced by the European Union's argument that a departure from a single-market economic model is necessary. Since we find no clear justification for such a departure and noting that it would rely on additional data assumptions and more complex model parameterization, we consider it more appropriate that the economic model focus exclusively on the United States' market.

²⁴² European Union's comments on United States' response to Arbitrator question No. 49, paras. 47 and 49.

²⁴³ See paragraph 6.12 above.

²⁴⁴ See section 6.3.1 above.

²⁴⁵ See section 6.3.4.3.2 below.

²⁴⁶ See section 6.3.2.1 above.

²⁴⁷ European Union's response to Arbitrator question No. 82, paras. 11-12.

²⁴⁸ European Union's response to Arbitrator question No. 87, para. 21.

²⁴⁹ See section 6.3.4.3.2 below for the discussion of the appropriate value of export supply elasticity.

6.3.2.3 Parallel ADDs

6.31. The United States argues that the European Union's model leads to an inappropriately high trade impact estimate of the WTO-inconsistent CVDs that is not equivalent to the level of NI because it fails to account for the parallel ADDs that were imposed on the same products during the same time-period.²⁵⁰

6.32. The United States therefore proposes to include the ADDs and CVDs as a single combined duty when the economic model is applied in the first step²⁵¹, so that the presence of both is reflected in the simulated market shares in the reference year. In the second-step application of the model²⁵², the United States proposes that only the CVD component of the combined duty is modified, while the ADD component remains the same as in the first step.²⁵³

6.33. We note that the adjustment proposed by the United States reduces the estimated NI in two ways: (i) by simulating the impact of the combined duty in the first step, it delivers lower predicted imports from Spain in the reference year, and therefore a smaller increase in imports from Spain in the second step; and (ii) by including the ADDs in the counterfactual WTO-consistent scenario, it dampens the impact of eliminating the CVDs and therefore further reduces the increase in imports from Spain in the second step. This second change occurs because in the Armington model, the marginal impact of a duty depends on the total level of duties (or other *ad valorem* trade barriers) already in place. This implies non-linear effects of tariffs: the higher the baseline tariff, the less impactful an additional tariff becomes on imports.

6.34. The United States relies on two arguments for the inclusion of the parallel ADDs:

- a. Spanish exporters were dumping ripe olives in the United States' market in the baseline year and the inclusion of the ADDs in the economic model corrects this distortion, which would otherwise result in an inflated predicted market share in the reference year and thus an overstated NI; and
- b. the parallel CVDs and ADDs operate as a single duty on ripe olives from Spain in terms of their impact on trade flows; therefore, the impact of the ADDs cannot be isolated from the impact of the CVDs in a way that would accurately yield a measurement of NI attributable only to the CVDs.²⁵⁴

6.35. In our assessment below, we examine these two arguments and the European Union's counter arguments.

6.3.2.3.1 Inclusion of ADDs to correct the distortion to the reference year predicted market shares

6.36. The United States questions the appropriateness of the market shares in the baseline year used as input into the first step of the economic model, arguing that they reflect unfair practices by Spanish exporters. The United States argues that Spain's market share in the baseline year (2016) is distorted by the fact that "Spanish firms were selling ripe olives in the United States' market at prices that were less than fair value, i.e. dumping, the existence of which is not in dispute in this proceeding".²⁵⁵ The United States argues that including the ADDs in the first-step simulation would address these distortions. If, on the other hand, the ADDs are omitted from the first-step simulation, the United States argues that Spain's market share at the end of the RPT would be inflated and thus the level of NI would be overstated.²⁵⁶

6.37. The European Union argues that the market share of Spanish producers in 2016 is "a simple value that needs to be fed" into the economic model and that the underlying reasons for the market

²⁵⁰ United States' written submission, para. 85.

²⁵¹ See para. 6.13 for the description of the first-step application of the economic model.

²⁵² See para. 6.13 for the description of the second-step application of the economic model.

²⁵³ United States' written submission, para. 87.

²⁵⁴ United States' written submission, para. 81 and United States's response to Arbitrator question

No. 21, para. 50.

²⁵⁵ United States' written submission, para. 84.

²⁵⁶ United States' written submission, paras. 85 and 87.

share of Spanish producers in 2016 are irrelevant.²⁵⁷ The European Union further argues that if ADDs were incorporated, other potentially relevant elements that were present at the same time as the application of the CVDs and that "might (or might not)" have influenced the market share of ripe olive exports from Spain in the United States may have to be considered as well. The European Union suggests that one could consider taking into account, for example, the particularly good or bad quality of olives or harvest in a certain year. Such factors, the European Union argues, cannot be accounted for in a standard economic model of the type used in previous arbitrations. For the European Union, taking into account such adjustments would add "extraordinary and unnecessary complexity to the model with the risk that a part of the NI to be attributed to the CVDs would be attributed to those other elements", and would require complex decisions by arbitrators on which of these additional elements to include and which not.²⁵⁸

6.38. We note that the question at hand concerns what should be reflected in the predicted reference year market shares (i.e. the input into the second-step simulation). The European Union argues that, compared to the actual market shares in the baseline year, they should only reflect the imposition of the CVDs while the United States asserts that they should reflect the actual relative competitiveness of each entity in the reference year.²⁵⁹

6.39. To understand what the predicted reference year market shares should reflect, we recall the purpose of the two-step approach introduced in the *US – Washing Machines* Article 22.6 arbitration. The purpose, as explained by that arbitrator, was to redress the issue that the longer a WTO-inconsistent measure is maintained, the more severely market shares of the affected exporters are likely to fall, and the lower the resulting calculated level of NI would be if the economic model was applied to the actual reference year market shares.²⁶⁰ The two-step approach avoids this issue by assuming that the WTO-inconsistent duty was the only major factor that changed the relative competitiveness of the affected exporters between the baseline and the reference year, and simulating the relevant market shares in the reference year under this assumption.

6.40. We note that when Spain's market share in the reference year is assumed to differ from the baseline year only by the imposition of the CVDs, as in the European Union's application of the model, the removal of the CVDs in the second step effectively yields the market shares as they were before the imposition of the CVDs, i.e. in the baseline year. Thus, this approach leads to a result whereby when the WTO-inconsistent duty is lifted, Spain's market share returns to the level where it was in the baseline year. We find this unlikely given that Spanish exporters also started to face parallel ADDs in the meantime: there is no reason to believe that these additional duties did not reduce the relative competitiveness of Spanish exporters. In light of the above, we consider that the United States' argument that ignoring the impact of the ADDs on market shares in the reference year inflates the NI has merit.

6.41. The United States has provided evidence that the imposition of the parallel ADDs is, in the present case, a significant and quantifiable factor that affected Spain's competitiveness in the relevant market at the same time as the WTO-inconsistent CVDs and it would thus not be appropriate to ignore its effect on the reference period market shares. Therefore, we consider it more appropriate

²⁵⁷ European Union's written submission, para. 69.

²⁵⁸ European Union's response to Arbitrator question No. 14, para. 52.

²⁵⁹ European Union's written submission, para. 68; and United States' written submission, para. 82.

²⁶⁰ As the arbitrator in *US – Washing Machines* explained:

The imposition of higher duties or more trade-restrictive measures, or the maintenance of these measures for a prolonged period of time, is likely to cause trade to fall more severely. Using this diminished level of trade in the calculation may lead to a severely reduced estimate of the level of nullification or impairment. [...] Further, in the circumstances of this proceeding, relying exclusively on data at the end of the RPT could lead to the perverse effect that the longer an inconsistent measure affects the trade of a Member, the lower the resulting calculated level of suspension of concessions would be.

(Decision by the Arbitrator, *US – Washing Machines* (Article 22.6 – US), paras. 3.114-3.119) And the arbitrator in *US – Anti-dumping Methodologies* stated more succinctly:

[...] we have determined that it is necessary to adjust the United States' proposed Armington model in order to address the small market shares resulting from the depressing effect of the WTO-inconsistent anti-dumping duties. To address this issue, we proposed to the parties using the Armington model in two steps.

(Decision by the Arbitrator, *US – Anti-dumping Methodologies* (China) (Article 22.6 – US), para. 6.69)

to select a modelling approach that takes this effect into account, i.e. the approach that considers both duties in predicting the reference period market shares in the first step, as proposed by the United States.

6.3.2.3.2 Operation of the parallel CVDs and ADDs as a single duty and the isolation of the impact of the WTO-inconsistent measure

6.42. The United States argues that the parallel ADDs also need to be included in the second-step application of the economic model, which simulates the removal of the WTO-inconsistent CVD. Even though the two duties arose from distinct legal authorities and investigations, the United States argues that they operate as a single duty on ripe olives from Spain in terms of their economic impact and effects on trade flows. Accordingly, the United States argues that it is more accurate from an economic modelling perspective to use a counterfactual where the combined duty is reduced by the amount of its WTO-inconsistent component, rather than a counterfactual where the WTO-inconsistent CVDs are eliminated "while ignoring completely" the parallel ADD.²⁶¹

6.43. The United States generally agrees with the premise proposed by the European Union that the purpose of an economic model is to isolate the trade impacts of WTO-inconsistent measures while excluding the impact of other macroeconomic factors on the market at issue. However, the United States maintains, parallel ADDs are different in kind from general macroeconomic shocks such as COVID-19 and strong inflation because they are functionally identical to the WTO-inconsistent CVDs and therefore cannot be isolated from the CVDs in a way that would accurately yield a measurement of NI attributable only to the CVD.²⁶² In other words, the United States argues that "an economic model simply cannot be expected to achieve an accurate allocation of trade damage between two functionally identical contemporaneous measures".²⁶³

6.44. The European Union contends that the arbitrator in *US – Countervailing Measures* expressly rejected the identical argument raised by the United States that ADDs should be incorporated into the model.²⁶⁴ As in *US – Countervailing Measures*, the European Union argues, the United States in the present case "does not demonstrate with evidence whether and, if so, to what extent the trade effects of the anti-dumping duties would alter the level of nullification or impairment resulting from the CVDs at issue".²⁶⁵ The European Union points out that the arbitrator in *US – Countervailing Measures* found that "the United States needs to show more than the mere existence of the AD duties or that these may have an impact on Chinese imports" and that the mere submission of modelling outcomes is insufficient.²⁶⁶

6.45. The United States disagrees with the conclusion of the arbitrator in *US – Countervailing Measures* that modelling outcomes for measuring NI cannot be relied upon to demonstrate the impacts of including or failing to include parallel ADDs on the overall estimation of NI. Rather, the United States argues, such modelling discrepancies are the most reliable evidence to demonstrate that treatment of functionally identical ADDs and CVDs as a single duty creates a significant difference in the overall estimation of NI when compared to isolation of the CVDs using the same modelling methodology.²⁶⁷

6.46. The United States further maintains that many of the ADDs discussed in *US – Countervailing Measures* were themselves the subject of WTO dispute settlement and found to be WTO-inconsistent, while the WTO-consistency of the ADDs on ripe olives from Spain is not contested in the present case.²⁶⁸

6.47. Finally, the United States contends that "the arbitrator in *US – Countervailing Measures* declined to make 'any principled statement as to the appropriateness of an Article 22.6 arbitration taking into account trade measures, such as ADDs, different from those at issue in a specific dispute' and further declined to 'address whether, as a matter of principle, it may or may not be appropriate

²⁶¹ United States' response to Arbitrator question No. 21, para. 50.

²⁶² United States' response to Arbitrator question No. 21, para. 47.

²⁶³ United States' response to Arbitrator question No. 21, para. 50.

²⁶⁴ European Union's written submission, para. 72.

²⁶⁵ European Union's written submission, para. 74.

²⁶⁶ European Union's written submission, paras. 73 and 75.

²⁶⁷ United States' response to Arbitrator question No. 28, para. 70.

²⁶⁸ United States' response to Arbitrator question No. 28, para. 70.

to consider, in the specific context of applying the two-step Armington model, measures other than those at issue in a specific dispute."²⁶⁹

6.48. We agree with the United States that the economic model at hand cannot achieve an accurate allocation of trade damage between two functionally identical *contemporaneous* measures. However, in the modelling approach that we adopt, the data inputs in the second-step economic model already reflect the impact of the parallel ADDs on the relative competitiveness of Spanish exporters. Thus, the only factor that changes in the counterfactual compliance scenario in the reference period is the WTO-inconsistent CVD. It would be incorrect to include, in the scenario in the second step, the level of other *ad valorem* trade barriers that do not change and that are already reflected in the data inputs, such as the ADDs or other import duties. Therefore, we select the counterfactual compliance scenario proposed by the European Union which considers only the removal of the WTO-inconsistent CVDs.

6.3.3 The economic model selected by the Arbitrator

6.49. Based on the conclusions reached in the previous section, the selected partial equilibrium Armington model focuses on the United States' market and includes domestic sales (D) along with imports from three regions: Spain (S), other European Union economies (OEU), and the rest of the world (ROW). The model is characterized by the following equations:

The aggregate price index:

$$P = \left(\sum_i m_i p_i^{1-\sigma} \right)^{\frac{1}{1-\sigma}}, \quad \text{where } i \in \{D, S, OEU, ROW\} \quad (1);$$

Total demand:

$$E = Y P^\varepsilon \quad (2);$$

Demand for a product variety from supplier i :

$$d_i = E m_i \left(\frac{P}{p_i} \right)^\sigma, \quad \text{where } i \in \{D, S, OEU, ROW\} \quad (3);$$

Supply of the domestic variety and imported varieties:

$$s_D = a_D (p_D)^{\eta_D} \quad (4a);$$

$$s_i = a_i \left(\frac{p_i}{1+t_i} \right)^{\eta_i}, \quad \text{where } i \in \{S, OEU, ROW\} \quad (4b);$$

The market clearing condition:

$$d_i = s_i, \quad \text{where } i \in \{D, S, OEU, ROW\} \quad (5).$$

6.50. Equation (1) defines the aggregate price index (P) as the sum of prices (inclusive of duties) from each supplier (p_i), weighted by the supplier's initial market share m_i , and depending on the Armington elasticity of substitution (σ).

6.51. Equation (2) represents the total quantity demanded (E), which depends on the initial total market value (Y) and the aggregate price index. The price elasticity of demand (ε) determines how much the total quantity demanded reacts to a change in the aggregate price index.

6.52. Equation (3) represents the demand for the product variety from each supplier, according to which the quantity demanded (d_i) is decreasing in the price of this product variety relative to the

²⁶⁹ United States' response to Arbitrator question No. 28, para. 70.

aggregate price index. The strength of this relationship is determined by the Armington elasticity of substitution.

6.53. Equations (4a) and (4b) are the supply functions for domestic (s_D) and imported (s_i) varieties, respectively, according to which the quantity supplied increases as the price of the product variety net of duties (t_i) increases. The strength of this relationship is determined by the domestic supply elasticity (η_D) and the export supply elasticity (η_i), respectively. The supply shifters a_D and a_i are defined as $a_D = Y m_D$ and $a_i = Y m_i (1 + t_i)^{\eta_i}$, respectively.

6.54. Equation (5) represents the market clearing condition, according to which the quantity demanded from each supplier must be equal to the quantity supplied by that supplier.

6.55. The application of the model requires specific values for several parameters. These are the price elasticity of demand ε , the Armington elasticity of substitution σ , the price elasticity of domestic supply η_D , and the price elasticity of export supply η_i .

6.56. The model is applied in two steps (see section 6.3.1 above). The first-step application of the model requires data on United States' imports by source and domestic sales for the baseline year (2016) to calculate the initial total market value Y and the initial market share m_i of each supplier i . The second-step application requires the same data for the reference year (2023) to calculate the initial total market value while the initial market shares are obtained from the first-step simulation.

6.57. Finally, the model requires the initial and counterfactual duty rates t_i for each step. The initial duty rate on imports from Spain in the first step is zero, and the counterfactual duty rate is the sum of the actual CVD rate and the parallel ADD rate. In the second step, the initial duty rate is the actual CVD rate, and the counterfactual duty rate is zero. The duty rates are always zero for all suppliers other than Spain.

6.3.4 Parameter values and data inputs

6.58. The parties agree that the parameter values and import data for the economic model should refer to the sum of seven product categories that are characterized by the following HTSUS product codes: 2005.70.5030; 2005.70.5060; 2005.70.6020; 2005.70.6030; 2005.70.6050; 2005.70.6060; and 2005.70.6070.²⁷⁰ The following sections explain the selected values and sources for the elasticities and data inputs.

6.3.4.1 Price elasticity of demand

6.59. The price elasticity of demand (ε) measures how sensitive consumers are to price changes. For ordinary goods, its values are negative. This means that demand for these goods decreases when their price increases. For example, a demand elasticity of -1 can be interpreted as follows: a 1% price increase leads to a 1% decrease in demand. If the price elasticity of demand indeed takes a negative value, the level of NI decreases as the value of the demand elasticity approaches zero. This reflects the fact that when demand is less sensitive to price changes, a change in import duties leads to a smaller change in quantities traded.

6.60. Both parties propose the value of -1 for the elasticity of demand for ripe olives.²⁷¹ The European Union cites empirical estimates from a study by Kee, Nicita, and Olarreaga (2008) that finds a value for the United States' imports of ripe olives to be between -1.08 and -1.2 .²⁷² The United States cites the USITC sunset investigation report, where -1 is the midpoint of the range of published values.²⁷³

6.61. The European Union notes that its proposed estimate based on Kee, Nicita, and Olarreaga (2008) is appropriate for an economic model without domestic production as it represents the elasticity of import demand, not the elasticity of overall demand in the United States. The

²⁷⁰ European Union's methodology paper, Table 1; United States' written submission, Table 1; and United States response to Arbitrator question No. 60, para. 45.

²⁷¹ European Union's methodology paper, para. 36; and United States written submission, para. 98. The European Union refers to the absolute value of the elasticity of import demand in its methodology paper.

²⁷² Kee, Nicita, and Olarreaga (2008) (Exhibit EU-11).

²⁷³ USITC sunset investigation report (Exhibit USA-13), pp. II-25.

European Union argues that because of the home bias in consumption, domestic shipments tend to be preferred over imports and therefore the demand for them should be less elastic. When adding domestic production to the economic model, the European Union argues that the value of the price elasticity of demand should reflect a weighted average of the import demand elasticity and the domestic demand elasticity, resulting in a value closer to zero.²⁷⁴

6.62. We note that the source proposed by the United States considers the overall quantity demanded in the United States' market, i.e. including demand for domestically produced ripe olives, and therefore we do not consider an adjustment of the elasticity of demand away from -1 to be necessary.²⁷⁵ Hence, we consider that the value of -1 initially proposed by both parties is appropriate for the price elasticity of demand for ripe olives in the United States' market.

6.3.4.2 Armington elasticity of substitution

6.63. The economic model is based on the Armington assumption that consumers consider the same products from different origins as different varieties and therefore imperfect substitutes. The Armington elasticity of substitution (σ) is the parameter governing the degree of substitutability across these varieties. The value of the elasticity is assumed to be at least one and the higher the elasticity, the more the consumers consider different varieties of a product to be substitutes. The level of NI increases as the elasticity of substitution increases because, when the price of ripe olives from Spain declines due to the duties being removed, more consumers switch from other varieties to the Spanish variety.

6.64. The European Union proposes the value of 13.3 for the Armington elasticity of substitution, which is the estimate for ripe olives from a study by Fontagné et al. (2022).²⁷⁶ The United States objects to the value, and more generally to the use of Fontagné et al. (2022) as a source of estimates of this parameter. Instead, the United States proposes to source the value from a study by Soderbery (2015).²⁷⁷ The latter provides estimates at the HTSUS 10-digit level. The United States proposes to take the simple average of the available estimates from Soderbery (2015) for in-scope products, which amounts to 5.1. The United States also notes that the weighted average of the values from Soderbery (2015), using imports at the 10-digit HTSUS level in 2016 as weights, is 8.0.²⁷⁸

6.65. The European Union contends that its proposed value of 13.3 is supported by a USITC investigation report, which finds that the elasticity of substitution between *domestic and imported* ripe olives has the value at between 4 and 7.²⁷⁹ The European Union points out that the elasticity in its economic model represents the degree of substitution between ripe olives *imported from different sources*. According to the European Union, a study by Feenstra et al. (2018) suggests that the degree of substitutability between goods imported from different sources is around twice as large as the degree of substitutability between domestic and imported goods, a relationship referred to as the "rule of two", and that hence the value of the Armington elasticity of substitution in its model should be between 8 and 14.²⁸⁰ The United States counters that the USITC estimates "should be interpreted as being equal to the elasticity of substitution between ripe olives from various foreign sources", and so the European Union's value of 13.3 is inappropriate because it exceeds the range of 4 to 7 found by the USITC.²⁸¹

6.66. We note that Feenstra et al. (2018) finds only limited evidence for the relationship identified by the European Union. The study covers all manufactured products and does not report its results by individual product groups. Summary results are available for six food product groups, which we consider more representative of processed agricultural products such as ripe olives than the full

²⁷⁴ European Union's response to Arbitrator question No. 17, para. 56.

²⁷⁵ USITC sunset investigation report (Exhibit USA-13), pp. II-25.

²⁷⁶ In its methodology paper, the European Union uses the value of 12. However, in response to Arbitrator question No. 16, the European Union admits that it misinterpreted the estimates in Fontagné et al. (2022), and that the relevant value is 13.3 (European Union's methodology paper, para. 37; European Union's response to Arbitrator question No. 16, para. 55; and Fontagné et al. (2022) (Exhibit EU-12)).

²⁷⁷ Soderbery (2015) (Exhibit USA-21).

²⁷⁸ United States' written submission, para. 111; and United States' response to Arbitrator question No. 95, para. 46.

²⁷⁹ USITC investigation report (Exhibit EU-9), pp. II-23.

²⁸⁰ European Union's methodology paper, para. 37.

²⁸¹ United States' written submission, para. 110.

sample. These results suggest that the rule of two is less likely to hold for food products compared to the full sample. Specifically, the rule of two can be rejected for up to four of the six food product groups.²⁸² In our view, these results thus do not support the assumption that the rule of two holds for ripe olives. Moreover, the study does not provide reliable evidence even for the more general argument that the elasticity of substitution between imports from different sources is greater than the elasticity of substitution between domestic and imported goods. In fact, the study reports no significant difference between the two elasticities for between two thirds and all the six food product groups.²⁸³ Accordingly, we agree with the United States that we can assume that the two elasticities are equal in this case.²⁸⁴

6.67. Each party further provides numerous arguments in favour of the study that it prefers as the source of the elasticity estimates, referring to data characteristics (importing countries included in the sample, the level of product aggregation, and the time-period) as well as the method of estimation. These arguments and our assessments are summarized in the following paragraphs.

6.3.4.2.1 Differences between sources: Data characteristics

6.68. First, the United States considers the use of Fontagné et al. (2022) unreliable in this case because it is based on global trade flows and therefore represents a global average across all markets, which may not be representative of the United States' market specifically. The United States argues that there is ample empirical evidence demonstrating that Armington elasticities could vary significantly across importing countries, although it also states that it is not aware of any such evidence specifically pertaining to processed agricultural products. To support its argument, the United States cites a study by Broda et al. (2006), which finds that "the average Armington elasticity in the United States is 4.2, smaller than the average Armington elasticity of 6.8 in the typical country in the sample". The United States also cites a study by Yilmazkuday (2015) that finds that the price elasticity of demand for United States' exports "decreases significantly in GDP per capita".²⁸⁵

6.69. The United States further mentions a study by Hillberry and Hummels (2013) who "caution against the blanket application of a single elasticity across all countries and recommend practitioners to allow the elasticity parameters to be specific to individual countries".²⁸⁶

6.70. The European Union objects to this argument on the grounds that Hillberry and Hummels (2013) base the warning on the fact that "many elasticity estimates in the literature are drawn from US imports and the US market may be in some sense the least typical market one might employ", and that they also do not ultimately "pronounce upon the question of which estimates provide the 'right' elasticities". The European Union further contends that the studies supporting "different substitution elasticities for different importers" are either outdated or biased.²⁸⁷

6.71. We consider that the evidence submitted by the United States provides only weak support for the argument that the Armington elasticity of substitution for ripe olives is lower in the United States than the global average. We note that the findings of Broda et al. (2006) are supported by the meta study by Bajzík et al. (2020) that finds lower elasticities in larger markets (measured by gross domestic product), despite theoretical studies predicting the opposite.²⁸⁸ This finding provides support for the United States' argument, given the fact that the United States is the largest market in the world. However, we note that both studies refer to averages across all product categories, which may not be representative of ripe olives in particular or even processed agricultural products in general.

6.72. Overall, we agree that the evidence provided by the United States, and more broadly the academic literature, suggests that Armington elasticities vary across importing countries and may

²⁸² Feenstra et al. (2018) (Exhibit EU-13), Table 4.

²⁸³ Feenstra et al. (2018) (Exhibit EU-13), Table 4.

²⁸⁴ This is consistent with approaches adopted in previous arbitrations. See, e.g. Decisions by the Arbitrators, *US – Washing Machines (Article 22.6 – US)*; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*; and *US – Supercalendered Paper (Article 22.6 – US)*.

²⁸⁵ United States' response to Arbitrator question No. 58, paras. 36-37.

²⁸⁶ United States' response to Arbitrator question No. 58, para. 37.

²⁸⁷ European Union's comment on United States' response to Arbitrator question No. 58, paras. 43-44.

²⁸⁸ Bajzík et al. (2020) (Exhibit USA-43), pp. 20 and 28.

be relatively low in the United States. Yet, we do not have clear evidence that the Armington elasticity of ripe olives specifically, or even of processed agricultural products in general, is lower in the United States compared to the global average.

6.73. To further support its argument, the United States submits its own Armington elasticity analysis based on a trade cost approach "similar to that used in Fontagné et al. (2022)" but relying solely on United States' import data for the in-scope products at the HTSUS 10-digit level during the 2017-2023 period. The United States finds a statistically significant estimate of the Armington elasticity of 4.5, with a 95% confidence interval ranging from 2.6 to 6.4, which aligns more closely with the estimates in Soderbery (2015) than those in Fontagné et al. (2022). According to the United States, Soderbery (2015) is thus a more reliable source in this case because it is based specifically on imports to the United States.²⁸⁹

6.74. We note that while the United States' own Armington elasticity analysis employs a trade costs approach similar to that used in Fontagné et al. (2022), its estimation relies on the difference between the customs value of goods and their "landed, duty-paid value".²⁹⁰ Besides duties paid, this difference also includes the costs of freight, insurance, and other charges incurred in bringing the merchandise to the United States.²⁹¹ Hence, this method differs from the method of Fontagné et al. (2022), which exploits only the variation in tariffs. Therefore, while we agree that the United States' analysis provides support for the elasticity value reported by Soderbery (2015), we cannot conclude that it provides evidence on the values of the Armington elasticity for the United States that would be obtained if the methodology of Fontagné et al. (2022) was applied exclusively to the United States' imports.

6.75. Second, the United States considers Fontagné et al. (2022) unreliable in this case because the study is conducted at the HS 6-digit product level, covering also out-of-scope products, and therefore the estimate may not "reflect the characteristics of in-scope ripe olives". The United States thus considers Soderbery (2015) a more reliable source because it provides estimates at the HTSUS 10-digit level, which allows the construction of an average that corresponds precisely to the in-scope products.²⁹²

6.76. The European Union contends that substitution elasticities estimated on more disaggregated data tend to be higher because products within a more narrowly defined category are more similar and therefore more substitutable, which is supported by empirical evidence from Bajzik et al. (2020). The European Union thus concludes that Fontagné et al. (2022) is a conservative source for the substitution elasticity estimates in this case.²⁹³

6.77. We agree in principle with the United States that Soderbery (2015) provides estimates at a more appropriate level of aggregation. We also note that there is empirical evidence supporting the European Union's argument, and thus we agree with the European Union that the higher level of aggregation makes the estimates in Fontagné et al. (2022) conservative. Moreover, we observe that the additional level of product detail in Soderbery (2015) comes at the cost of missing estimates, although missing product categories account for only 2.5% of in-scope imports of ripe olives.²⁹⁴

6.78. Third, the European Union contends that Fontagné et al. (2022) is based on more recent data and is thus more representative of the time-period considered in this case.²⁹⁵

6.79. We agree with the European Union that the time-period covered by the data in Fontagné et al. (2022) is more appropriate, but we are not aware of empirical evidence to suggest that this is an important factor.

²⁸⁹ United States' comment on European Union's response to Arbitrator question No. 61, para. 52.

²⁹⁰ United States' own Armington elasticity analysis (Exhibit USA-51).

²⁹¹ USITC, https://www.usitc.gov/faq_subsection/definitions_and_classifications_and_https://dataweb.usitc.gov/trade/search/Export/HTS (accessed 16 May 2025).

²⁹² United States' written submission, paras. 106 and 107.

²⁹³ European Union's written submission, para. 86; European Union's comments on United States' response to Arbitrator question No. 61, para. 57; and Bajzik et al. (2020) (Exhibit USA-43), p. 27.

²⁹⁴ United States' response to Arbitrator question No. 26, para. 66 and Table 2.

²⁹⁵ European Union's written submission, para. 87.

6.80. In summary, we consider that the level of product aggregation and the import market coverage are more appropriate in Soderbery (2015), but we also note that there is no clear empirical evidence that these features in Fontagné et al. (2022) result in an inappropriately high elasticity estimate that would lead to an overstated level of NI in this case. Also, we agree with the European Union that the time-period covered by the data in Fontagné et al. (2022) is more appropriate, but we are not aware of empirical evidence to suggest that this is an important factor.

6.3.4.2.2 Differences between sources: Estimation methods

6.81. Apart from differences in data characteristics, Fontagné et al. (2022) and Soderbery (2015) also employ different methods to estimate Armington substitution elasticities. Several academic studies emphasize that differences in estimation methods are a major factor behind the differences in estimates in different studies. For instance, the trade costs approach employed by Fontagné et al. (2022) tends to produce higher estimates than the system-of-equations approach employed by Soderbery (2015).²⁹⁶

6.82. Each party highlights general drawbacks and advantages of each method in delivering unbiased estimates.²⁹⁷ The United States notes that while different methodologies for estimating elasticities exist in the academic trade literature, there is no consensus on which one is optimal.²⁹⁸ The European Union emphasizes that Fontagné et al. (2022) represents "the most recent literature available".²⁹⁹

6.83. We note that both studies are published in the same high-quality peer-reviewed academic journal, and thus, in general, both provide reliable estimates of Armington substitution elasticities. Regarding the European Union's point that Fontagné et al. (2022) is a more recent publication, we observe that studies relying on estimation methods like that of Soderbery (2015) continue to be published in high-quality peer-reviewed journals.³⁰⁰ We therefore consider that both studies are in general appropriate and reliable in terms of their estimation method.

6.84. We also observe that neither party has submitted arguments on why one of the estimation methods would deliver elasticities that would be more appropriate or reliable *in this case*. We note that major differences in the Armington elasticity estimates in the literature are related to whether the estimates capture short-run or long-run reaction. Short-run estimates are expected to be lower than long-run estimates because it may take time for markets to fully adjust to the change in prices. As noted by Hillberry and Hummels (2013), estimates based on time-series variation tend to be lower than estimates based on cross-sectional and panel variation that "implicitly contemplate much longer adjustment periods".³⁰¹ Estimates from Soderbery (2015), being based on annual changes in prices, capture the adjustment over a relatively short time horizon. The estimates published by Fontagné et al. (2022), on the other hand, capture a long-run reaction because they are based on panel data and are mostly identified from variation in tariff *levels* across markets.³⁰² In this case, we seek to quantify the annual change in imports in the reference year if the WTO-inconsistent CVDs had been removed in the reference year. In our view, this calls for an elasticity estimate that

²⁹⁶ See, e.g. United States' response to Arbitrator question No. 61, para. 47; Hillberry and Hummels (2013) (Exhibit USA-40), p. 1241; and Ahmad et al. (2021) (Exhibit USA-42), p. 9.

²⁹⁷ European Union's response to Arbitrator question No. 61, paras. 56-59; United States' comment on European Union's response to Arbitrator question No. 61, paras. 49-50.

²⁹⁸ United States' response to Arbitrator question No. 61, para. 47.

²⁹⁹ European Union's written submission, para. 87.

³⁰⁰ See, e.g. F. Farrokhi and A. Soderbery (2024), "Trade Elasticities in General Equilibrium: Demand, Supply, and Aggregation", *The Review of Economics and Statistics*, pp. 1-45.

³⁰¹ Hillberry and Hummels (2013) (Exhibit USA-40), p. 1241.

³⁰² As Fontagné et al. (2022) point out, "[p]roduct-level tariffs can vary both within each country pair over time (within variation) and/or across trade partners within a given year (between variation). [...] Most of the variance for each product occurs between country pairs; we will therefore exploit the between pairs variation in bilateral tariffs to estimate tariff elasticities [...]" (Fontagné et al. (2022) (Exhibit EU-27), p. 5). As the United States points out, when Fontagné et al. (2022) employ an alternative regression specification that focuses only on the variation over time, i.e. includes country-pair fixed effects, the elasticity estimates become lower and often statistically indistinguishable from zero. The authors explain that the country-pair fixed effects "absorb specific systematic patterns of tariff schedules, such as preferential tariffs applied to most of the goods in a given country-pair, and hence much of the variation in bilateral applied tariffs" (United States' comments on European Union's response to Arbitrator question No. 61, para. 50; and Fontagné et al. (2022) (Exhibit EU-27), p. 22).

represents adjustment over a one-year horizon, making Soderbery (2015) the more appropriate source according to this criterion.

6.85. In summary, we consider both studies an appropriate and reliable source in general. However, we find the time horizon of adjustment captured in the estimates by Soderbery (2015) more appropriate in this case.

6.86. Finally, we note that Fontagné et al. (2022) reports standard errors for their elasticity estimates while Soderbery (2015) does not. Both studies produce thousands of product-specific elasticity values, and some of these estimates may be highly imprecise. Standard errors quantify the statistical precision of each estimate and indicate the degree of uncertainty surrounding the reported values. This information helps determine which elasticity estimates are sufficiently precise to be retained and which may be too unreliable to use. In the case of ripe olives, we consider that the additional evidence submitted by the United States, i.e. the USITC estimates and its own Armington elasticity analysis, is sufficient to consider the elasticity value for ripe olives based on estimates in Soderbery (2015) reliable.

6.3.4.2.3 Conclusion on the value of the Armington elasticity of substitution

6.87. In conclusion, Soderbery (2015) provides elasticities based on the appropriate import market, at the appropriate level of product aggregation and estimated at the appropriate time horizon. While the study does not report standard errors and thus does not allow for an assessment of the statistical precision of estimates, we find that the United States has provided enough evidence supporting the value derived from this study. Therefore, we conclude that the appropriate value of the Armington elasticity of substitution is 8.0, which is the trade-weighted average of the estimates for in-scope product categories in Soderbery (2015).³⁰³

6.3.4.3 Price elasticity of supply

6.88. The price elasticity of supply (η) measures how sensitive producers are to price changes. It typically takes a positive value, indicating that producers will increase supply when prices rise. For example, a supply elasticity of 10 can be interpreted as follows: a 1% price increase leads to a 10% increase in supply. The level of NI increases with the price elasticity of supply in the selected model. This reflects the fact that when supply is more sensitive to price changes, a change in import duties leads to a larger change in quantities traded.

6.89. The price elasticity of supply in a single-market partial equilibrium model depends on several factors. Some of these are specific to the product and the supplier, such as the supplier's ability to alter production capacity or switch between producing other products. Other factors relate to both the supplier and the market in question, such as the supplier's ability to redirect sales to or from that particular market.³⁰⁴ This ability, in turn, depends on the size of the market relative to the size of the supplier's overall production. The economic literature consistently finds that supply is more elastic when serving relatively small markets.³⁰⁵

6.90. The economic model allows for a distinction between the supply elasticity of United States' domestic producers and the elasticity of export supply. The parties agree that the elasticity of domestic supply is lower than the elasticity of export supply.³⁰⁶ However, the parties disagree on the values that these two parameters should take.

³⁰³ See Imbs and Méjean (2015) (Exhibit USA-44) for the argument that using an import-weighted average is the appropriate way to aggregate the HTSUS 10-digit level elasticities.

³⁰⁴ See e.g. USITC investigation report (Exhibit EU-9), pp. II-21-22; and F. Farrokhi and A. Soderbery (2024), "Trade Elasticities in General Equilibrium: Demand, Supply, and Aggregation", *The Review of Economics and Statistics*, pp. 1-45, <https://web.ics.purdue.edu/~asoderbe/research/farrokhisoderbery2024/paper.pdf> (accessed 29 August 2025).

³⁰⁵ See, e.g. Soderbery (2018) (Exhibit USA-45), p.55.

³⁰⁶ European Union's methodology paper, paras. 32 and 38; and United States' written submission, paras. 95 and 105.

6.3.4.3.1 Price elasticity of domestic supply

6.91. The European Union proposes to assume that domestic production of ripe olives in the United States is completely inelastic. The United States rejects this assumption and proposes to use the value of 4.5, which is the midpoint of the estimates in the USITC's sunset review report.³⁰⁷

6.92. The European Union argues that the value for domestic supply elasticity of ripe olives proposed by the United States appears unrealistic and "in stark contrast to figures accepted for other agricultural products (e.g. cereals) for which the relevant literature sets the domestic supply elasticity well below 1".³⁰⁸ The European Union maintains that domestic producers in the United States face constraints that make their supply elasticity very low. The major constraint, according to the European Union, is that it takes from 5 to 7 years for olive trees to grow, which means that the production of raw olives, which are used to produce ripe olives, is "rather rigid".³⁰⁹ The European Union argues that domestic producers do not alleviate this constraint by importing provisionally preserved olives, citing data provided by the United States that, according to the European Union, show that imports of provisionally preserved olives were minimal even when the United States' raw olive production significantly decreased.³¹⁰

6.93. The United States asserts that the European Union's basis for the assumption of inelastic domestic supply fails to account for the possibility that ripe olive producers in the United States can complement domestically grown raw olives with imports of raw or provisionally preserved olives. The United States adds that the share of olive inputs, as represented by imports of provisionally preserved olives, rose when domestic production in the United States was low, which "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".³¹¹ The United States further argues that domestically produced raw olives destined for olive oil crushing could be repurposed for ripe olive production in the event of a rise in ripe olive demand. Given these two points, the United States argues that the production of ripe olives in the United States is not constrained by domestic raw olive production, and a positive value should be used for the elasticity of domestic supply.³¹²

6.94. We note the European Union's argument that if the flexibility of domestic supply of ripe olives depended only on the availability of domestic raw olives, it would be inelastic over the time horizon shorter than a few years. However, we consider that the United States has provided sufficient rationale to conclude that there is a scope for quantity adjustment.

6.95. The European Union submits that its assumption of inelastic domestic supply is corroborated by the fact that domestic production of ripe olives in the United States declined by 60% and lost market share to imports between 2016 and 2023, indicating that domestic producers were not able to capture the market share lost by Spain.³¹³

6.96. The United States argues that the fact that domestic production may have decreased over the relevant time-period is not an appropriate basis to assume a domestic supply elasticity of zero because "real domestic production can be, and likely was, impacted by both changes in demand and supply constraints that are not tied to a low domestic supply elasticity".³¹⁴

6.97. We agree with the United States that the evolution of market shares over the relevant period does not provide sufficient information to infer the elasticity of domestic supply. We also note that the European Union's observation about the decline in the United States' domestic production and its loss of market share is based on data supplied by the United States that represents the value of the United States' production of *raw* olives utilized for canning.³¹⁵ Therefore, this observation does

³⁰⁷ European Union's methodology paper, para. 32; and United States' written submission, para. 79.

³⁰⁸ European Union's written submission, para. 62.

³⁰⁹ European Union's methodology paper, para. 32.

³¹⁰ European Union's written submission, para. 61.

³¹¹ United States' written submission, para. 77.

³¹² United States' written submission, paras. 75-78.

³¹³ European Union's written submission, para. 57.

³¹⁴ United States' comments on European Union's response to Arbitrator question No. 64, para. 65.

³¹⁵ United States' response to Arbitrator question No. 24, para. 62.

not permit conclusions about the flexibility of the United States' production of *ripe* olives given the flexibility derived from imports of raw or provisionally preserved olives and from inventory levels.

6.98. In light of the above arguments, we have to consider the assumption that the United States' domestic supply is completely inelastic to be unreliable. We also note that USITC reports, despite their drawbacks³¹⁶, have been relied on by previous arbitrators in the absence of more rigorous empirical evidence. Therefore, we conclude that an appropriate value for the elasticity of domestic supply of ripe olives is 4.5.

6.3.4.3.2 Price elasticity of export supply

6.99. The European Union proposes to assume that the elasticity of export supply is infinite, which is implemented in the European Union's computer code with a value of 99.³¹⁷ The United States proposes to use the value of 10, based on the fact that this value was used in previous arbitrations.³¹⁸

6.100. The European Union asserts that there are no reliable estimates of this parameter in the literature and that in their absence it is appropriate to assume an infinite export supply elasticity. The European Union maintains that this is because, compared to the United States, Spain and the other two regional entities have a higher ability to increase production and reallocate sales to the United States. The European Union submits information purporting to show that the European Union and the rest of the world produce more than they consume and that their export supply is larger than the entire United States' consumption. According to the European Union, this implies that any level of demand in the United States can be met by Spain or other foreign suppliers and justifies the assumption of infinitely elastic export supply.³¹⁹

6.101. The United States notes that the assumption of infinite elasticity of export supply is equivalent to a perfectly horizontal export supply curve, whereby foreign producers of ripe olives have an unlimited supply at a constant price and thus can instantly adjust their output to meet market demand without changing the price. This, in the view of the United States, contradicts the argument that scaling up ripe olive production is severely constrained by the production cycle of raw olives. The United States further argues that the infinite elasticity assumption is typically only applied to small importing economies within single-country models, and that there is limited theoretical foundation to extend this assumption to the current proceeding.³²⁰ According to the United States, "the mere fact that total excess ripe olive production from the EU as a whole covers total consumption in the United States by a modest margin in no way justifies applying an infinite export supply elasticity to ripe olives from Spain".³²¹

6.102. We agree with the European Union that export supply elasticity is determined not only by how easily foreign producers can adjust their output but also how easily they can redirect their sales from one market to another. Therefore, the fact that production of ripe olives is constrained by the availability of raw olives does not necessarily imply a low export supply elasticity. The European Union's argument that export supply elasticity is high when the importer is small relative to the exporter has support in the economic literature, as discussed at the beginning of this section. However, we agree with the United States that an assumption applicable to a small importing economy is questionable in this case. We observe that the United States accounted for 24% of global imports of ripe olives in 2016, and, more specifically, it was the destination for 31% of Spain's exports.³²² Therefore, we disagree that the United States could be considered a small market for Spain's exports of ripe olives, in the sense that Spanish exporters could instantly adjust to meet any level of United States' import demand without changes in prices.

³¹⁶ The Arbitrator in *US – Supercalendered Paper* pointed out that USITC reports rely on methods that are "untransparent and non-replicable" (Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – *US*), para. 8.285).

³¹⁷ European Union's methodology paper, para. 38; and the GAMS code for the European Union's economic model (Exhibit EU-7).

³¹⁸ United States' written submission, paras. 103-105.

³¹⁹ European Union's response to Arbitrator question No. 15, para. 54.

³²⁰ United States written submission, para. 101; and United States' response to Arbitrator question No. 62, para. 50.

³²¹ United States' comment on European Union's response to Arbitrator question No. 87, para. 24.

³²² Calculations for the European Union's economic model (Exhibit EU-14).

6.103. The European Union further contends that the value of 10 proposed by the United States is not appropriate because it has been used in arbitrations concerning manufactured goods while this case relates to agricultural goods. The European Union argues that compared to the United States, Mediterranean countries "have an infinite supply of olives (including ripe olives), a long history of production and the right climate".³²³ According to the European Union, this difference in production capacity explains the difference in supply flexibility between the United States and Mediterranean countries.³²⁴

6.104. The United States recognizes that the past arbitrations, which used the value of 10, relate to manufacturing goods, and that the elasticity of export supply of agricultural goods such as ripe olives might be different. However, the United States argues that producers of agricultural goods face greater constraints than producers of manufacturing goods due to factors such as natural growth cycles, climate conditions, and seasonal variations, which reduces their elasticity of supply, making the value of 10 a conservative estimate in the view of the United States.³²⁵

6.105. The United States further supports its choice with the empirical evidence provided in Soderbery (2015). Soderbery (2015) provides estimates of export supply elasticities for five of the seven in-scope HTSUS 10-digit codes, and the import-weighted average of these elasticities is 12.8.³²⁶ The United States recognizes that export supply elasticities are challenging to estimate and that the estimates from this study may suffer from a modelling bias. Yet, the United States maintains that either its proxy of 10 or the values from Soderbery (2015) should be used rather than relying on the European Union's "unsupported" assumption of infinity.³²⁷

6.106. We note that the elasticity estimates from Soderbery (2015) are in principle appropriate for the selected economic model. Estimated specifically on data for United States' imports by source, they represent export supply elasticities of the average exporting economy that capture all margins of adjustment relevant for the single-economy partial equilibrium model selected in this case, including the ability to redirect sales between the United States' and other export markets.³²⁸ We agree with both parties that, in practice, the literature on export supply elasticities has limitations and that Soderbery (2015) acknowledges that his estimates may suffer from a bias if certain assumptions are not met.

6.107. Considering all the above, we are not satisfied that the assumption of infinite export supply elasticity is well-reasoned. Although the estimates from Soderbery (2015) have been criticized, we find that they represent the best available evidence from the economic literature for this case. Hence, we use the value of 12.8 for the export supply elasticity of each exporting entity in the economic model, which is a weighted average of the relevant estimates from Soderbery (2015) using imports at the 10-digit HTSUS level in 2016 as weights.

6.3.4.4 Import values

6.108. The European Union proposes to source the import values of ripe olives fully covered by the CVD order from the Global Trade Atlas, which reports data from the U.S. Census Bureau. The United States argues that the import data should be sourced directly from the U.S. Census Bureau.³²⁹

³²³ European Union's written submission, para. 83.

³²⁴ European Union's written submission, para. 83.

³²⁵ United States' written submission, paras. 103-105.

³²⁶ In the United States' response to Arbitrator question No. 27, para. 67, the United States reported a value of 12.3. We note that this is the average when missing values are considered as zeros. Using a correct approach that takes into account only non-missing values, the weighted average is 12.8. This is the approach that the United States applied to calculate the weighted average of the Armington elasticity of substitution in the United States' response to Arbitrator question No. 95, para. 46.

³²⁷ United States' response to Arbitrator question No. 62, para. 50; and European Union's response to Arbitrator question No. 62, paras. 61-64.

³²⁸ According to available empirical evidence, the average export supply elasticity of processed agricultural products is not statistically significantly different from the average export supply elasticity of other manufactured products. This is based on the HS codes list of processed agricultural products in Annex C-3 and statistically significant estimates of export supply elasticities in Soderbery (2018) for the United States as the importer and France, Germany, Italy, and other Southern/Eastern Europe as exporters (Soderbery, "Trade elasticities, heterogeneity, and optimal tariffs" (2018), *Journal of International Economics*) (Exhibit USA-45).

³²⁹ European Union's methodology paper, para. 34; and United States' written submission, para. 97.

6.109. The European Union considers the data presented by the United States the same as that it suggests using.³³⁰ Based on that consensus and the likely accuracy of the United States source data, we have decided to use the U.S. Census Bureau as the appropriate source for the United States' import data. The relevant import values are summarized in Table 1 below.

Table 1: Import values, in USD

Country or region	2016	2023
Spain	70,891,065	26,485,184
Other EU economies*	7,555,660	16,208,776
Rest of the world	15,780,090	45,605,750
Total	94,226,815	88,299,710

* Croatia, France, Germany, Greece, Italy, Latvia and Portugal.

6.3.4.5 Value of the United States' domestic sales

6.110. The United States proposes data on domestic olive production from the United States Department of Agriculture (USDA).³³¹ Specifically, the United States refers to the USDA National Agricultural Service (NASS) data on the production in tons and price in dollars per ton of olives processed for canning and limited use.³³²

6.111. The European Union objects to the NASS data because it also covers products that are not included in the relevant trade data, such as green olives, and is presented in a classification system for which there is no official concordance with the HS. In the European Union's view, this means that the import data cannot be reconciled with the production data of the United States' national statistics at the high degree of detail needed for this case. The European Union argues that the data for imports and domestic sales must be based on the same set of products.³³³

6.112. The United States counters that its proposed domestic production data, which covers both non-green and green ripe olive production, is consistent with the scope of the CVD order and is "among the best available proxies for United States' ripe olive production".³³⁴ The United States also argues that it is not reasonable to expect a one-to-one match between the NASS production data and the identified in-scope HTSUS tariff lines, and that both data inputs are approximations of the coverage of the CVD order, meaning that "the Arbitrator's goal should be only that each proxy used is as accurate as possible in that regard."³³⁵ The United States asserts that this is the case of the NASS data, because no other publicly available data exists for the value of canned ripe olive production in the United States.³³⁶

6.113. We recognize the United States' point that the NASS data is the best available data on the production of ripe olives in the United States and that this data broadly falls in the scope of the CVD order. At the same time, we agree with the European Union that within the economic model, data for domestic production and imports should refer to the same set of products, lest the results become distorted. Given the parties' agreement that the model should only include import data for the seven HTSUS codes listed in the USITC investigation report³³⁷, an adjustment to the value of domestic production reported by NASS may be required for it to be congruent with the import data.

³³⁰ European Union's written submission, para. 79.

³³¹ United States' written submission, para. 97.

³³² United States' response to Arbitrator question No. 24, para. 57.

³³³ European Union's written submission, para. 79.; and European Union's response to Arbitrator question No. 60, para. 55.

³³⁴ United States' response to Arbitrator question No. 24, para. 61.

³³⁵ United States' response to Arbitrator question No. 72, para. 69.

³³⁶ United States' response to Arbitrator question No. 24, para. 62.

³³⁷ European Union's methodology paper, Table 1; United States' written submission, Table 1; and United States response to Arbitrator question No. 60, para. 45.

6.114. Additionally, we note that the NASS data covers the value of total domestic production, including goods that are exported. Including the United States' exports in the value of its domestic sales would also lead to distorted results.

6.115. The United States asserts that it is not possible to suitably adjust the NASS data for the United States' exports because the NASS data lacks details on the United States' domestic sales.³³⁸ The United States notes that the possibility that the NASS data includes exports is not concerning because no evidence has been presented to suggest that the United States exports olives in any significant amount, and rather that to the contrary, the United States' domestic production of ripe olives only satisfies a fraction of the country's consumption.³³⁹ The United States further points out that its proposed data relate to *raw* olives produced in the United States that are utilized for canning and therefore does not reflect the value added through processing and packaging, the value of ripe olives produced from imported raw or provisionally preserved olives nor sales from inventories. Hence, according to the United States, its proposed data understates the value of the United States' domestic production of ripe olives.³⁴⁰

6.116. We observe that the information on olives processed for canning and limited use, as reported by NASS, forms the basis of the information on the product group "olives, canned" contained in Yearbook Tables from the USDA Economic Research Service.³⁴¹ We consider the information in the Yearbook Tables may help address the European Union's concerns about the NASS data coverage of products that are not included in the relevant trade data. Compared to the NASS database, these tables include additional information, particularly regarding import and export quantities under the same product definition as the domestic production data. The Yearbook Tables thus also report domestic availability, which is the sum of imports and domestic production sold in the United States. Therefore, it is possible to calculate the share of the United States' market for canned olives that is served by domestic production.

6.117. This market share of domestic producers can be used as a proxy for the domestic share of the market for the seven in-scope products covered by the economic model. This approach rests on the assumptions that (i) the domestic share of products covered by the NASS definition of ripe olives is a relevant proxy for the domestic share of the products covered by the imports data, and (ii) the domestic *volume* share is a relevant proxy for the domestic *value* share. The use of data based on volumes may cause some inaccuracy if the price of domestically produced ripe olives is systematically different from the price of imported ripe olives. Moreover, data based on domestically produced raw olives disregards the production of ripe olives from imported raw olives or sales from inventories and therefore may underestimate domestic sales of ripe olives. However, using this proxy share, rather than the reported absolute values of domestic production, alleviates the European Union's concern of having an incongruence between the products contained in the import data and the domestic sales data. The information on domestic availability in the Yearbook Tables also has the benefit that it is adjusted for exports of domestic production. Therefore, we consider that this approach addresses the main issues with the NASS data, while still being based on the same underlying information on domestic production, which we agree is the best available for this case.

6.118. The economic model described in section 6.3.3 above requires the market share of each supplying entity (m_i) in 2016 and the total value of the United States market for ripe olives (Y) in 2016 and 2023. We will use the data described above to obtain a proxy for the domestic market share (m_D). This domestic market share will then be combined with the value of total imports, as listed in section 6.3.4.4 above, to obtain the total market value. Finally, we will calculate the market shares of the three foreign entities by dividing the data on their imports with the total market value.

³³⁸ United States' response to Arbitrator question No. 24, para. 62.

³³⁹ United States' response to Arbitrator question No. 72, para. 68.

³⁴⁰ United States' response to Arbitrator question No. 24, para. 62.

³⁴¹ The production quantity data in the Yearbook Tables correspond exactly to the NASS quantity data submitted by the United States on production of canned olives, including "limited" size olives for canning (Exhibit USA-16). Specifically, the NASS data estimates were converted to product weight (product weight = fresh weight x 1.06) and from tons to pounds (1 ton = 2000 pounds) ("Fruit and tree nut U.S. supply and availability: fresh, canned, juice, dried; per capita availability, U.S. population", Table G-24, fn 2, available at <https://www.ers.usda.gov/data-products/fruit-and-tree-nuts-data/fruit-and-tree-nuts-yearbook-tables> (accessed 29 August 2025)).

6.119. First, the value of domestically available and imported canned olives is sourced from the relevant USDA Economic Research Service Yearbook Table. This information is used to calculate the domestic market share as:

$$m_D = 1 - \frac{\text{imports}_{USDA}}{\text{domestic availability}_{USDA}},$$

which is combined with the total value of the United States' imports under the seven relevant product codes (imports_{USHTS}) to obtain a proxy for the total market value of the United States' market for products classified under these same codes using the formula:

$$Y = \frac{\text{imports}_{HTSUS}}{1 - m_D}.$$

6.120. This procedure yields a domestic market share of 37% in 2016 and the total value of the United States' market for ripe olives of USD 149,311 thousand in 2016 and USD 108,026 thousand in 2023. The corresponding market shares of the three foreign entities in 2016 are 47% for Spain, 5% for other EU economies and 11% for the rest of the world.

6.3.4.6 Duty rates

6.121. The economic model requires a single value for the actual CVD rate applied to imports of ripe olives from Spain in the reference year. This value should represent the overall level of protection provided by the CVDs against those imports during that year. In addition, the first step of the model also requires a single representative value for the actual ADD rate applied to the same imports in the reference year.

6.3.4.6.1 The actual CVD rate

6.122. Although the parties agree on sourcing CVD rates from the Section 129 Proceedings notice, they disagree on how to calculate the single representative duty rate. The notice includes four CVD rates: the individual rates of 11.63%, 7.52%, and 13.76% imposed on three investigated exporters, as well as the rate of 11.08% that is applied to all other exporters. The European Union uses the value of 10.99% for the representative CVD rate, calculated as a simple average of the four values included in the notice. The United States, on the other hand, proposes to use exclusively the all-others rate of 11.08%, which is a trade-weighted average of the individual rates.³⁴²

6.123. The United States argues that a trade-weighted average is "a more accurate estimated average than a simple average and is intended to be representative for all exporters". The United States adds that its approach is consistent with the approach adopted by the arbitrator in *US – Countervailing Measures (China)*.³⁴³

6.124. The United States points out that the all-others rate has been applied during the customs clearance process for importers that did not identify a specific producer or exporter in Spain with an individual rate, and it continues to be so applied. According to the United States, "whether the all-others rate is calculated using trade weights representative of the market during the investigation period or during 2023 is therefore not relevant because the goal of the nullification and impairment analysis is to estimate the change in Spain's exports to the United States as a result of removing the applied WTO-inconsistent CVD rates during the investigation period".³⁴⁴

6.125. The European Union argues that the all-others rate is a weighted average of the three individual CVD rates applied in the original CVD order and is weighted using trade data from 2016, the period of investigation (POI) and the baseline year in the economic model. The European Union also submits that the level of duties has varied since their imposition and did not correspond for the whole period to the levels identified in the Section 129 Proceeding.³⁴⁵ Therefore, according to the European Union, using only the all-others rate "fails to consider all trade flows from all exports in the relevant years" and is "not relevant for the second application of the model which refers to year

³⁴² European Union's methodology paper, fn 21; and United States' written submission, para. 114.

³⁴³ United States' comments on European Union's response to question No. 49, para. 29; and United States' written submission, para. 114.

³⁴⁴ United States' comment on European Union's response to Arbitrator question No. 81, para. 3.

³⁴⁵ European Union's methodology paper, para. 27.

2023".³⁴⁶ The European Union thus considers that the rate of 10.99% is appropriate because "it takes into account *all* the different rates applied by the USDOC and it is not related specifically to the trade flows of the different companies in the original investigation period".³⁴⁷ The European Union also maintains that even if more recent trade weights were available, they would not be reliable because they were influenced by the application of WTO-inconsistent CVDs.³⁴⁸

6.126. The European Union also rejects the United States' argument that using the all-others rate is consistent with the approach adopted by the arbitrator in *US – Countervailing Measures (China)*. The European Union argues that in the aforementioned approach, there is no discussion on the distinction between using the all-others rate, or the average of the all-others rate and the rates attributed to investigated importers, and that the only guidance it can draw from the decision in *US – Countervailing Measures (China)* is that the correct approach in determining the CVD rate has to be done on a case-by-case basis.³⁴⁹

6.127. We note that there are two issues to consider: (i) whether the all-others rate takes into account all duty rates applied in the reference year; and (ii) whether the single representative rate should be a simple or a weighted average.

6.128. Regarding the first issue, we note that, contrary to the European Union's assertion, the all-others CVD rate published in the Section 129 Proceeding notice is the average of the revised individual rates.³⁵⁰ Therefore, the all-others CVD rate proposed by the United States is representative of the duty rates applied in the reference year.

6.129. On the second issue, the European Union suggests that equal weights, i.e. a simple average, are preferable to trade weights from the baseline year (2016), as the latter are not representative of the market in the reference year (2023). We are not convinced by this argument. Since the economic model assumes that the only factors that impacted the relative competitiveness of ripe olive exporters on the United States' market between the baseline and the reference year were the WTO-inconsistent CVDs and the parallel ADDs (see section 6.3.2.3 above), it is also reasonable to assume that the trade weights from the baseline year reflect the relative competitiveness among the individual exporters from Spain in the reference year, were it not for the duties. Hence, the baseline-year trade weights carry information about the relative potential of the individual exporters to benefit from the removal of the WTO-inconsistent duty in the second-step application of the model and thus are in principle appropriate.³⁵¹

6.130. In conclusion, the all-others rate from the Section 129 Proceedings notice is representative of the CVD rates applied in the reference year as well as calculated using weights that are appropriate for the economic modelling approach applied in this case. Therefore, the value of the single representative CVD rate in the economic model is 11.08%.

6.3.4.6.2 The parallel ADD rate

6.131. Regarding the parallel ADD rate, the parties disagree not only on the calculation but also on the source of the single representative duty rate. The United States proposes to use the all-others rate from the original ADD order issued in 2018.³⁵² The European Union contends that ADD rates varied widely throughout the period of the duty imposition (2018 to present) and that the all-others rate was not revised to incorporate modifications of individual ADD rates or changes in trade flows.

³⁴⁶ European Union's response to Arbitrator question No. 49, para. 36.

³⁴⁷ European Union's response to Arbitrator question No. 49, paras. 36-37.

³⁴⁸ European Union's response to Arbitrator question No. 81, para. 2.

³⁴⁹ European Union's response to Arbitrator question No. 50, paras. 42-46.

³⁵⁰ United States' response to Arbitrator question No. 84, para. 19.

³⁵¹ Compared to the baseline year, the relative competitiveness of individual exporters in the reference year is affected by the parallel ADDs that are assumed to remain in place. However, the differences in the duty rates applied to the individual exporters were relatively small – the duties ranged between 1.84% and 4.56% (see section 6.3.4.7.2 below) – and thus were unlikely to significantly alter the relative competitiveness of each individual exporter.

³⁵² More specifically, the duty rates are sourced from the Correction to Antidumping Duty Order notice (United States' written submission, fn 130).

For this reason, the European Union argues that the single representative ADD rate should be calculated as a simple average of all rates applied throughout the period of the ADD imposition.³⁵³

6.132. We agree with the European Union that the all-others ADD rate is not a representative duty rate in the reference year because there were several administrative reviews between 2018 and 2023 that modified the individual rates while the all-others rate was not recalculated to reflect those adjustments. However, we find the European Union's suggestion to consider rates from all administrative reviews throughout the period of imposition inaccurate. Recalling the discussion from section 6.3.2.3 above, the parallel duties are included in the first-step simulation to more accurately reflect the relative competitiveness of exporters from Spain in the reference year. Therefore, in our view, the duty rates that should be considered are those that were in place in the reference year.³⁵⁴ Those are the results of the USDOC administrative review published in December 2022 as the subsequent review was published (and became effective) only in March 2024.³⁵⁵ The ADD rates imposed pursuant to the December 2022 administrative review are as follows: (i) 1.84% Agro Sevilla Aceitunas, S. Coop., (ii) 4.56% Ángel Camacho Alimentación, S.L., (iii) 2.87% Aceitunas Guadalquivir, S.L.U., (iv) 2.87% Aceitunas Torrent, S.L., and (v) 19.98% on all other exporters.³⁵⁶

6.133. To calculate the single representative ADD rate, we find it appropriate to use the same weights as those used to calculate the single representative CVD rate, i.e. the trade values from the POI. We also note that the European Union considers that these weights "might be relevant" to the first-step application of the economic model.³⁵⁷ However, we note that the weights from the POI lack the information for one individual exporter (Aceitunas Torrent, S.L.) who was assigned a company-specific rate in the December 2022 administrative review but not in the original investigation. We discuss this issue in detail in section 7.3.4.6 below, where we set out instructions on how to calculate the single duty rate after duty rate(s) modifications. In line with the instructions, we assume that this individual exporter belongs to exporters subject to the all-others rate.

6.134. The single representative duty rate is then calculated as the weighted average of the all-others rate and the three rates assigned to exporters that were examined in the original investigation. The weight for the all-others rate is based on the difference between total United States' imports of the in-scope products from Spain in the POI and the total trade value of the three individually examined exporters.³⁵⁸ This calculation yields the single representative ADD rate of 6.86%.

6.3.5 Implementation of the Arbitrator's economic model

6.135. The selected economic model uses the values of -1 for the price elasticity of demand, 8.0 for the Armington elasticity of substitution, 4.5 for the price elasticity of domestic supply, and 12.8 for

³⁵³ European Union's response to Arbitrator question No. 49, paras. 39-40.

³⁵⁴ To determine which duty rates were in place in a given year, the Arbitrator in *US – Supercalendered Paper* explained that:

[...] under the United States' retrospective CVD duty system, it is true that CVDs first imposed under a CVD order arising out of an original investigation are estimated duties that are then collected going forward in the form of cash deposits. The ultimate amount of duties definitively assessed for that time period, however, is decided upon the performance of a subsequent administrative review or at the time that such an administrative review could have occurred but did not. As Canada observes, however, it appears wholly reasonable to assume that the imposition of CVDs on a particular good that initiates the collection of estimated duties (as a result of, *inter alia*, original investigations) for subsequent assessment would cause changes in pricing decisions by relevant economic actors regarding that good, such that its competitiveness in the US market would be affected in a manner that, in particular, the parties' proposed models would capture as a measurable level of NI.

(Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – US), para. 6.44). In other words, it is the duties published as final results in the most recent duty order or its administrative review that determine the duty rates in place in a given year, despite these duties being potentially partially or fully refunded upon the performance of a subsequent administrative review.

³⁵⁵ USDOC administrative review (December 2022) (Exhibit EU-25); and USDOC administrative review (March 2024) (Exhibit EU-26).

³⁵⁶ USDOC administrative review (December 2022) (Exhibit EU-25).

³⁵⁷ European Union's response to Arbitrator question No. 49, para. 36.

³⁵⁸ Information provided by the United States in Calculation of the respondents' individual shares of the United States' imports of fully in-scope HTS codes (Exhibit USA-62) (BCI).

the price elasticity of export supply. The total market value is computed as the sum of imports and a proxy for domestic sales of seven HTSUS 10-digit products. Imports by source are based on data from U.S. Census Bureau and the proxy for domestic sales is based on data from USDA Research Service Yearbook Tables. CVD rates are sourced from the Section 129 Proceeding notice and ADD rates are sourced from the December 2022 USITC administrative review.

6.136. The model is applied in two steps. In the first step, the model is used to predict market shares when the WTO-inconsistent CVDs and the parallel ADDs are imposed in the baseline year. These predicted market shares are multiplied by the value of the market in the reference year to obtain predicted sales that serve as data input into the second step. In the second step, the model is used to predict sales in the counterfactual compliance scenario where the CVD rates are 0%. The difference between the United States' imports from Spain predicted in the second step and those predicted in the first step represents the level of NI. The computer code to run this model is based on the code proposed by the United States.³⁵⁹

6.4 Modifications of the level of NI

6.137. The Arbitrator inquired with the parties whether the level of NI estimated in this Decision for ripe olives should be adjusted, in the future, if the CVD rate (or rates) relating to the ripe olive CVD order is (or are) modified by the United States after this Decision has been issued.³⁶⁰

6.138. The European Union submits that this should not be the case.³⁶¹ The European Union supports its position by arguing that the relevant CVD rates remain those which were subject to the compliance proceedings and which were found to be WTO-inconsistent as applied. The European Union also submits that in line with previous cases, the level of the WTO-inconsistent duties is the average of the CVD rates resulting from the Section 129 proceedings carried out by the USDOC in 2022.³⁶² For the European Union, and in the circumstances of the present arbitration, countermeasures can be applied until the measure found to be inconsistent with a covered agreement has been removed, as provided by Article 22.8 of the DSU.³⁶³

6.139. The United States disagrees with the European Union. It argues that if CVD rates on ripe olives from Spain were to change in the future, and the CVD order continued to be inconsistent with the DSB recommendations in this dispute, then any level of suspension approved by the Arbitrator would need to be adjusted to maintain equivalence with the revised level of NI. The United States submits this is so because the requirement of Article 22.4 of the DSU that the level of suspension authorized by the DSB "shall be equivalent to the level of nullification or impairment" applies equally to both as applied and as such inconsistent measures.³⁶⁴

6.140. The United States also points to the potential inconsistency in the European Union's position regarding the ripe olives model as compared to the prospective model. The United States argues that there is no reason under the DSU that a prospective level of suspension should be adjusted to remain consistent with Article 22.4 of the DSU while the level of suspension authorized for the past application of a WTO-inconsistent measure should not.³⁶⁵

6.141. Article 22.4 of the DSU requires that the authorized level of suspension of concessions is equivalent to the level of NI. We note that the level of NI, as calculated by the model, is directly linked to the CVD rates imposed on ripe olives so that any changes to the CVD rates imply a consequent change to the calculated level of NI. Therefore, if these CVD rates were to be modified in the future by the United States, the level of NI, and consequently of the authorized suspension of concessions, would need to be revised by the European Union to conform with the requirement of equivalence.

³⁵⁹ See Annex C-1.

³⁶⁰ Arbitrator question No. 92.

³⁶¹ European Union's response to Arbitrator question No. 92.b, para. 34.

³⁶² European Union's response to Arbitrator question No. 92.b, para. 34 (referring to *US – Countervailing Measures (China) (Article 22.6 – US)*, paras. 3.9-3.25).

³⁶³ European Union's response to Arbitrator question No. 92.b, para. 35.

³⁶⁴ United States' comments on the European Union's response to Arbitrator question No. 92.b.

³⁶⁵ United States' comments on the European Union's response to Arbitrator question No. 92.b.

6.142. We are mindful of the European Union's arguments that, for the purpose of the initial calculation of the NI for ripe olives, the Arbitrator should use the rates set out in the Section 129 proceedings carried out by the USDOC in 2022.³⁶⁶ In our view, however, this does not mean that the level of NI is fixed and will not be able to be revised to take into account possible modifications of the CVD rates occurring after the issuance of this Decision. We also note that the European Union has agreed to conduct such modifications in the context of the prospective model³⁶⁷, which is intended to calculate the NI stemming from future applications of Section 771B, and is functionally similar to the model used for ripe olives. For these reasons, we consider it appropriate to adjust the level of NI and the authorized suspension of concessions, as set out in this Decision, in response to future modifications of the CVD rates affecting ripe olives from Spain after the issuance of this Decision. We thus instruct the European Union to revise the level of NI for ripe olives to take into account modifications³⁶⁸ of the related CVD rates occurring after the issuance of this Decision.

6.143. To calculate the modified level of NI, the European Union shall use the same economic model for ripe olives, as set out in the previous sections³⁶⁹, with the same data inputs and parameter values, except for the CVD rates. The counterfactual WTO-consistent CVD rate resulting from a future modification may not be zero. Therefore, the European Union may need to calculate not only the modified actual CVD rate but also the modified counterfactual WTO-consistent CVD rate. In this connection, we have developed detailed instructions for modifications of the level of NI in the context of the prospective model that address analogous issues. The European Union shall thus use the instructions on how to calculate the single representative actual CVD rate and the single representative counterfactual WTO-consistent CVD rate in case of modifications, as set out in sections 7.3.4.6.2 and 7.3.4.6.3 of the methodology for the prospective model.

6.144. We also note that we have addressed concerns raised by the parties relating to the practical implementation of modifying a level of NI in the context of the prospective model, as well as set out instructions in this respect. In particular, we have addressed the issues of whether the European Union is allowed to continue to suspend concessions while it recalculates a level of NI (section 7.2.3 below), and the practical steps and deadlines the parties should follow when revising a level of NI given that the European Union might require BCI in possession of the United States in order to run the prospective model (section 7.2.6 below). We consider these instructions to be also relevant for revisions to the level of NI relating to ripe olives.

6.145. For the same reasons presented in the context of the prospective model, we consider that the European Union may continue to suspend concessions while it recalculates the level of NI relating to ripe olives. Such recalculation, however, should be done in a timely manner. Therefore, in case of modifications to the CVD rate(s) relating to the measures on ripe olives occurring after the issuance of this Decision, the European Union shall have 15 calendar days after any such modification occurs to send the initial notification mentioned in section 7.2.4 below. The European Union shall then follow the steps set out in Table 2 in section 7.2.6 below, beginning with step 1.b, to obtain a revised value of the NI.

6.5 Annual price-level adjustment of the level of NI

6.146. The European Union argues that the level of suspension of concessions should be adjusted for price-level changes, based on a price index for a product that either corresponds or is the closest approximation to the product covered by the CVD order. The European Union argues that price changes should be calculated on an annual basis and that the selected price index should be applied to the calculated level of NI according to the following formula³⁷⁰:

$$NI_{t+j} = NI_t * \left(\frac{P_{t+j}}{P_t} \right) \text{ with } j = 1, \dots, T,$$

³⁶⁶ See section 6.3.4.6.1 above.

³⁶⁷ See section 7.2.3 below.

³⁶⁸ These modifications would normally stem from revisions of duty rates of individually examined companies following administrative reviews occurring after the issuance of this Decision.

³⁶⁹ Section 6.3 above.

³⁷⁰ European Union's response to Arbitrator question Nos. 31 and 65.

where t is the reference period, and P_t the price index referring to the reference year (2023), in each year $j = 1, \dots, T$.³⁷¹

6.147. The United States proposes using the "Producer Prices for Olives for Processing, Canned" as a price index, published by the NASS. According to the United States, this data series would be the closest approximation to the subject goods covered in the current proceeding.³⁷²

6.148. The European Union objects to the United States proposal to use a price index for canned olives, as it claims it does not correspond to the in-scope olive products in the current proceedings, is based on data only from California and not from the whole United States, and does not correspond to the United States' definition of in-scope domestic production that includes also limited olives. The European Union recognizes that even in the face of these alleged deficiencies of the United States' proposal, it is not in a position to identify among the other price indexes for olives compiled by the USDA one that could be more appropriate. The European Union considers that the price adjustment should be calculated on the basis of a broader category such as the price index for all olives and proposes to use figures that it considers relate to the whole olives sector in the United States. The European Union submits that, should the United States disagree with its approach, it would then suggest using a price index for the whole agricultural sector or even for the whole US economy.³⁷³

6.149. Responding to the European Union's concerns of using this price index, the United States sustains that the majority of US ripe olives are produced in California, thus making this price index a reasonable proxy for nationwide prices.³⁷⁴ The United States also submits that the canned price index excludes limited olives, for which there is a separate price index, and that even if canned olives may not exactly correspond to the in-scope products, they represent the closest available information.³⁷⁵

6.150. At the outset, we note that the two proposed price indexes are relatively correlated, although the canned olives index appears to be more volatile than the general olives index. For instance, over the period from 2016 to 2023, the price index for canned olives decreased by around 11% while that for all olives decreased by around 9%. Both indexes constitute reasonable options for performing the price adjustment, but as the European Union notes, the index should be as close as possible to the product scope.³⁷⁶

6.151. In this case, we consider the canned olive index to be closer to the product scope, even though, as discussed in section 6.3.4.5, the definition of canned olives includes a broader set of products than the HTSUS codes constituting the proxy for the product scope. As pointed out by the United States, the European Union's proposal of using an even broader index only appears to worsen the issue of the canned olives index by including even more out-of-scope products.³⁷⁷

6.152. We therefore consider that the price-level adjustment shall be performed based on the "Producer Prices for Olives for Processing, Canned" price index published by the NASS. The European Union shall apply the following formula to adjust the level of NI on an annual basis:

$$NI_{t+j} = NI_t * \left(\frac{P_{t+j}}{P_t} \right) \text{ with } j = 1, \dots, T,$$

where NI_t refers to the level of NI in the reference year (2023), P_t is the price index referring to the reference year, and NI_{t+j} refers to the level of NI in year $t+j$ (e.g. NI_{t+1} refers to the level of NI in 2024).

6.153. The European Union shall adjust the price index to compensate for the fact that it is reported on a marketing year basis (August 1 to July 30) by using the weighted average of the price level for the two marketing years matching the desired calendar year. For instance, to obtain the price index

³⁷¹ European Union's response to Arbitrator question No. 31.

³⁷² United States' written submission, para. 124.

³⁷³ European Union's response to Arbitrator question No. 38.

³⁷⁴ United States' written submission, para. 124; comments to the European Union's response to Arbitrator question No. 65.

³⁷⁵ United States' comments to the European Union's response to Arbitrator question No. 65.

³⁷⁶ European Union's response to Arbitrator question No. 38.

³⁷⁷ United States' comments to the European Union's response to Arbitrator question No. 65.

for the calendar year 2025, the European Union shall take the weighted average of the reported price index for marketing year 2024/2025 and that for marketing year 2025/2026, using as weights 7/12 and 5/12 respectively to account for the number of months of calendar year 2025 included in each marketing year.

6.154. If, for any reason, the "Producer Prices for Olives for Processing, Canned" is not available in a future year, the European Union shall use the NASS' price index for all olives instead. If, for any reason, the European Union is also unable to access the price index for all olives, the European Union shall use the BLS' Producer Price Index (PPI) for NAICS code 311421, corresponding to fruit and vegetable canning, instead.³⁷⁸ The price changes should be calculated based on twelve-month year-on-year (i.e. December-to-December) changes of the respective PPI.

6.155. The price-level adjustment shall be applied to any change in the relevant price level, whether it is inflationary (price-level increases) or deflationary (price-level decreases).

6.6 Conclusion with respect to the NI arising from the application of Section 771B in the Spanish Ripe Olives CVD investigation

6.156. Using the methodology set out above, we determine that the level of NI of benefits accruing to the European Union as a result of the application of Section 771B in the CVD investigation on ripe olives from Spain is USD 13.64 million. Therefore, in accordance with Article 22.4 of the DSU, the European Union may request authorization from the DSB to suspend concessions or other obligations at a level not exceeding USD 13.64 million per annum. In accordance with section 6.4 above, the level of NI, and consequently the authorized level of suspension of concessions or other obligations, would need to be revised following modifications of the CVD rates on ripe olives from Spain taking place after this Decision has been issued. The level of suspension of concessions may also be adjusted for inflation in 2024 and on an annual basis thereafter, as discussed in section 6.5 above.

7 THE EUROPEAN UNION'S REQUEST CONCERNING THE FUTURE APPLICATION OF SECTION 771B

7.1 Introduction

7.1. In its recourse to Article 22.2 of the DSU, the European Union requests authorization to suspend concessions and related obligations at an annual level based on a formula³⁷⁹ commensurate with the trade effects that would be caused to the European Union by the United States' non-compliance with the recommendations and rulings adopted by the DSB in relation to the as such inconsistency of Section 771B with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. The European Union asserts that this request reflects the possible NI the European Union would suffer if the as such violation continued to exist and Section 771B was applied to other exports from the European Union in the future.³⁸⁰

7.2. The United States requests that the Arbitrator decline to adopt, at this time, any model to calculate NI arising from potential future applications of Section 771B.³⁸¹ The United States also argues that the European Union's prospective model suffers from several deficiencies, similar to

³⁷⁸ We consider this last contingency to be suitable in light of the fact that the parties agree to using BLS data in the context of the prospective model (see section 7.3.5). An online data selection tool for industry-specific PPIs from the BLS is currently available at: <https://data.bls.gov/PDQWeb/pc>.

³⁷⁹ In response to the Arbitrator's question on whether the European Union suggests relying on an approximation approach based on a formula, or on a computer-run model, the European Union clarified that, given the potential differences between the two approaches, it prefers a computer-run model relying on an exact solution approach (European Union's response to Arbitrator question No. 29).

³⁸⁰ Recourse to Article 22.2 of the DSU by the European Union, 15 November 2024 (WT/DS577/20), p. 2. The European Union clarifies it is not requesting the Arbitrator to set out a prospective model to calculate the level of NI arising from the as such inconsistency of Section 771B, in the future, but rather that one arising from the future application of this measure to other products. For the European Union, "[i]f the US would apply Section 771B in any future CVD investigation concerning agricultural products, the nullification or impairment accruing to the EU would result from the 'as applied' violation, not from the 'as such' violation" (European Union's response to Arbitrator question No. 77; closing statement at the meeting of the Arbitrator, para. 7).

³⁸¹ United States' closing statement at the meeting of the Arbitrator, para. 19.

those it submitted in the context of the as applied model, and sets forth what in its view could be the model that could be used to calculate NI arising from future applications of Section 771B.³⁸²

7.2 General issues on the application of the prospective model

7.2.1 The United States' request to decline to set out any model

7.3. The United States requests that the Arbitrator decline to adopt, at this time, any model to calculate NI arising from potential future applications of Section 771B³⁸³, as the European Union's proposed model cannot produce a reasoned estimate that can credibly be deemed equivalent with the NI of benefits accruing to the European Union.³⁸⁴ For the United States, the European Union would not be left without a remedy if the Arbitrator were to accept its request. According to the United States, the European Union could seek authorization to suspend concessions, at a later time, if Section 771B were to be applied in the future.³⁸⁵ If, in the future, the parties were to disagree on the level of suspension, the United States suggests that the parties could have recourse to a limited and more specific arbitration to determine the appropriate level with accuracy.³⁸⁶

7.4. The United States submits that the Arbitrator should be cautious in identifying any model of general applicability in this case as any future application of Section 771B could cover virtually any processed agricultural product, potentially resulting in a significant degree of variability. The United States expressed doubts that a model could be constructed that would (i) be practical without giving rise to further controversies between the parties, and (ii) produce an estimate of NI in line with the requirements of the DSU. The United States submits that to the extent the Arbitrator lacks confidence that such a model could be constructed, "with the requisite detail for ensuring that the level of nullification or impairment is accurately estimated for any future application of Section 771B"³⁸⁷, it should decline to do so as it would be contrary to the DSU.³⁸⁸

7.5. The United States also submits that even if the Arbitrator were to adopt the model proposed by the United States, the risk of excess WTO-inconsistent suspension would be reduced but not entirely eliminated.³⁸⁹ The United States recognizes that neither the DSU nor subsequent arbitrator decisions preclude the possibility that the Arbitrator might base the level of suspension of concessions on a model similar to that proposed by the European Union.³⁹⁰ The United States, however, submits that a Member's right to request and be authorized to suspend concessions on the basis of a prospective model is not without any limitation.³⁹¹

7.6. The European Union disagrees and submits that the United States' position is contrary to past practice by Article 22.6 arbitrators on this matter.³⁹² The European Union argues that out of the recent arbitrations featuring prospective models, this current arbitration is the least problematic.³⁹³ For the European Union, the prospective model for future applications of Section 771B "is as simple as can be" because (i) it is "certain" that any future application of Section 771B is WTO-inconsistent; (ii) it is "certain" that the entire pass-through analysis by the USDOC will be WTO-inconsistent and

³⁸² United States' written submission, section IV; opening statement at the meeting of the Arbitrator, section IV.

³⁸³ United States' closing statement at the meeting of the Arbitrator, para. 19.

³⁸⁴ United States' opening statement at the meeting of the Arbitrator, para. 38.

³⁸⁵ United States' closing statement at the meeting of the Arbitrator, para. 16.

³⁸⁶ United States' closing statement at the meeting of the Arbitrator, para. 16; response to Arbitrator question No. 75.

³⁸⁷ United States' response to Arbitrator question No. 75.

³⁸⁸ United States' opening statement at the meeting of the Arbitrator, para. 34.

³⁸⁹ United States' opening statement at the meeting of the Arbitrator, para. 38.

³⁹⁰ United States' written submission, para. 135.

³⁹¹ United States' written submission, para. 136. The United States also refers to the arbitrator's decision in *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)* and argues that it 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 levels may not be adjusted from time to time, provided such adjustments are justified and unpredictability is not increased as a result." (United States' written submission, para. 136 (referring to Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*, para. 4.20) (emphasis added by the United States)).

³⁹² European Union's comments on the United States' response to Arbitrator question No. 77.

³⁹³ European Union's comments on the United States' response to Arbitrator question No. 77 (referring to Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*; Decision by the Arbitrator, *US – Washing Machines (Article 22.66 – US)*).

that any proxy value for pass-through benefit will therefore have to be zero; and (iii) the only remaining question is whether that zero value will translate into the termination of the CVD order(s) or into a reduction of the CVD order(s) – a "purely mathematical question" that can be easily solved.³⁹⁴

7.7. We understand the United States' request to be premised on the argument that the European Union's model is flawed, and thus it will not be able to provide a reasoned estimate of the NI arising from possible future applications of Section 771B. Also, because of the uncertainties as to which products would be covered by a future application of Section 771B, it would not be possible to construct a model to calculate NI in line with the DSU requirements.³⁹⁵

7.8. We recall that under Article 22.7 of the DSU, we are called upon to determine whether the level of the requested suspension is equivalent to the level of NI.³⁹⁶ The Arbitrator's task would not end should we find the European Union's model to be flawed. On the contrary, in our view, in such a case we should go on to set out a model that would properly calculate the level of NI arising from a future application of Section 771B.³⁹⁷ This would not only be required by our mandate under Article 22.7 of the DSU, but has in fact been the approach taken by previous arbitrators, including those dealing with requests to set out prospective models. Under those circumstances, such arbitrators have gone on to develop their own models, based either on elements of models proposed by the parties, or on an altogether different economic approach.³⁹⁸

7.9. We recognize the conceptual differences between discharging our mandate in the face of a measure that has already been applied, and that would thus result in a numerical level of NI, and a measure that has not yet been applied but has been found to be as such inconsistent. In this latter case, and consistent with the European Union's request and past practice, the Arbitrator would be required to set out a prospective model to calculate NI to be used when such a measure is applied in the future. A similar issue was addressed by the arbitrator in *US – Washing Machines*. In that arbitration, the United States argued that if the arbitrator were to conclude that Korea's requested amount of suspension was not equivalent to the level of NI "without knowing precisely what the numerical level of nullification or impairment may be", then the arbitrator "would need to go well beyond what is required under Article 22.6 of the DSU" if it were to determine the level of NI on its own.³⁹⁹ The arbitrator rejected this line of reasoning arguing that determining its own approach for assessing the level of NI with respect to the as such inconsistencies would not amount to "mak[ing] Korea's case for it": it is, in fact, our 'essential task and responsibility'.⁴⁰⁰

7.10. A WTO arbitrator's mandate is rooted in the text of the DSU, and not on a notion of inherent power. Certainly, and in the circumstances of the present arbitration, a threshold requirement in the context of the prospective model is whether the complaining party has proposed a model that opens the way for us to consider whether, in the future, the calculated level of suspension of concessions is equivalent to the level of NI.⁴⁰¹

7.11. We therefore find no basis to reject the European Union's request to set out a prospective model if we find the European Union's model not to be appropriate to calculate future NI levels, as

³⁹⁴ European Union's comments on the United States' response to Arbitrator question No. 77.

³⁹⁵ United States' opening statement at the meeting of the Arbitrator, para. 38.

³⁹⁶ See section 3.1 above.

³⁹⁷ See Decision by the Arbitrators, *US – Supercalendered Paper (Article 22.6 – US)*, para. 3.4 (referring to Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, para. 12).

³⁹⁸ See Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 1.16 (referring to Decisions by the Arbitrators, *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, paras. 3.115 and 3.69-3.79; *US – Gambling (Article 22.6 – US)*, para. 3.174); see also Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, fn 27.

³⁹⁹ Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 4.42 (referring to United States' comments on Korea's response to Arbitrator question No. 52, para. 13).

⁴⁰⁰ Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 4.43 (referring to Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, para. 12). (fns omitted)

⁴⁰¹ We note that the European Union has proposed a model to determine the NI arising from future applications of Section 771B relating to other agricultural products, for which facts do not presently exist for uptake into the model. We are not called upon to decide what would be the case if a complaining party came forward requesting a level of suspension *without even presenting a model* by which the NI was or would be determined, whether the facts for the calculation of that level were known or not.

argued by the United States. In that case, we would be required to adjust the European Union's model or set up an alternative appropriate model.

7.12. In parallel with its general request to decline to set out a model, the United States argues that in any event the Arbitrator should be cautious in identifying any model of general applicability in this arbitration and that a Member's right to request and be authorized to suspend concessions on the basis of a prospective model is not without any limitation.⁴⁰² We agree with these arguments. Any future suspension of concessions should be equivalent to the level of NI caused by the future WTO-inconsistent measure, and thus the model used for this purpose should follow certain rules and be underpinned by correct principles to ensure that such calculations provide a reasoned estimate.

7.13. In this connection, we note that this is not the first time a request to suspend concessions or related obligations arising from the future application of a WTO-inconsistent measure has been granted. The two most recent arbitrations dealing with these types of requests in the context of trade remedies, *US – Washing Machines* and *US – Supercalendered Paper*, provide useful insights in this regard. These arbitrations had to ensure that the prospective model provided a reasoned estimate of future levels of NI. These arbitrators decided to follow four guiding principles that would contribute to the quality and reliability of the prospective model, so that the NI could be reasonably estimated in the future.⁴⁰³ These principles are:

- a. that the calculation of the level of NI should result in a predictable level of suspension;
- b. that the decision should be practical to implement and limit the risk of potential controversies between the parties;
- c. that the data used to calculate the level of NI should rely, as much as possible, on factual and verifiable information that is available to both parties; and
- d. that given that a future WTO-inconsistent trade remedy measure may be applied against any product, the economic model should be sufficiently generic to capture any variation in the types of products and any variation in the types of markets on which a given product is traded.⁴⁰⁴

7.14. We find these guiding principles to be of assistance in considering our current task and note that the parties have similarly relied on these principles when presenting their arguments on the appropriate model.⁴⁰⁵ We have adopted these principles in our assessment of the parties' proposed methodologies and our final decision on which model should be used.

7.2.2 Triggering event

7.15. At the outset we clarify that, for the purpose of this Decision, a triggering event generally describes the circumstances that will give the European Union the right to calculate a level of NI using the prospective model, and thus suspend concessions, in the future.⁴⁰⁶

7.16. The European Union argues that a triggering event should be defined, in this particular case, as "any application of Section 771B against an 'agricultural product processed from a raw agricultural product' imported from the [European Union], i.e. from one, several or all of its member States depending on the scope of the measure concerned".⁴⁰⁷ The European Union clarifies that its position is not that the triggering event should "only [occur] when duties are collected from the exporters concerned".⁴⁰⁸ For the European Union, the relevant triggering event, as set out in

⁴⁰² United States' written submission, para. 136.

⁴⁰³ Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.24.

⁴⁰⁴ Decisions by the Arbitrators, *US – Washing Machines (Article 22.6 – US)*, paras. 4.49-4.53; and *US – Supercalendered Paper (Article 22.6 – US)*, paras. 6.23-6.24.

⁴⁰⁵ European Union's written submission, section IV; United States' written submission, section IV.A.

⁴⁰⁶ For a similar approach, see Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.36.

⁴⁰⁷ European Union's response to Arbitrator question No. 36.a.

⁴⁰⁸ European Union's comments on the United States' response to Arbitrator question No. 73.

US – Supercalendered Paper, is not the actual application of CVDs, but the moment of issuing the CVD order imposing duties.⁴⁰⁹

7.17. The United States argues that the triggering event should be defined as "the imposition of duties pursuant to a U.S. CVD order on exports of goods from the [European Union] that attributes 100 percent of an upstream subsidy to downstream processors of the subject agricultural products through the application of Section 771B".⁴¹⁰ The United States submits that the prospective model "should only be used once duties are actually applied to exports, pursuant to final affirmative USDOC and USITC determinations, from the EU under Section 771B in a WTO-inconsistent manner".⁴¹¹ For the United States, using the actual imposition of duties as the triggering event provides clarity on the scope of the covered products, as the CVD order would define such scope and would minimize the risk of controversies between the parties. The United States also submits that any CVD order issued pursuant to Section 771B applying to exports from countries other than European Union member States should not trigger the application of the prospective model.⁴¹²

7.18. We note that the parties largely agree on the definition of the triggering event except in two respects: (i) whether it should be the actual imposition of duties following a CVD order or when such CVD order is issued⁴¹³, and (ii) whether the triggering event should cover CVD orders featuring a pass-through analysis under Section 771B that attributes less than 100% of an upstream subsidy to downstream processors.

7.19. On the first issue, the United States argues that the triggering event should be the application of duties pursuant to a WTO-inconsistent CVD order, not just the mere issuance of such order.⁴¹⁴ The European Union disagrees as it understands that under this approach the triggering event would only occur once duties are collected from the exporters concerned, thus introducing an unnecessary gap between the issuance of the CVD order and the collection of duties. The European Union also argues that such an approach is not consistent with the arbitrator's decision in *US – Supercalendered Paper*.⁴¹⁵

7.20. We note that both parties rely on the approach taken in *US – Supercalendered Paper* but appear to extract different conclusions from how the triggering event was defined in that arbitration. The arbitrator in that case defined that a triggering event would occur when "the United States applies the OFA-AFA Measure (as defined by its precise content) in any US CVD proceeding and then imposes a CVD rate to Canadian goods that is affected by that application".⁴¹⁶ In supporting its decision, the arbitrator explained that it was reasonable to assume that the imposition of CVDs on a particular product, which initiates the process of collection of estimated duties, would cause changes in pricing decisions by relevant economic actors regarding that product, and such changes would be captured by the parties' proposed models as a measurable level of NI.⁴¹⁷ We agree with this reasoning and add that it can reasonably be assumed that forward orders and logistics requirements will likely bring forward supply and pricing decisions by importers within the United States' market to at least the time of imposition of a CVD rate, which is when the certainty of that cost becomes known.

7.21. In our view, these considerations justify the proposition that the issuance of the CVD order is the appropriate triggering event, and not the later actual first collection under such an order. We also note that the concerns mentioned by the United States about the necessity to limit the risk of controversies between the parties because of uncertainty as to the product scope⁴¹⁸, would be adequately addressed by using the issuance of the CVD order as the triggering event. For these reasons, we are of the view that the triggering event should be the issuance of the relevant CVD order, and not when duties arising from such order are actually first collected.

⁴⁰⁹ European Union's comments on the United States' response to Arbitrator question No. 73.

⁴¹⁰ United States' response to Arbitrator question No. 36.a.

⁴¹¹ United States' response to Arbitrator question No. 36.a.

⁴¹² United States' response to Arbitrator question No. 36.a.

⁴¹³ United States' response to Arbitrator question No. 73.ii; European Union's comments on the United States' response to Arbitrator question No. 73.

⁴¹⁴ United States' response to Arbitrator question No. 73.ii.

⁴¹⁵ European Union's comments on the United States' response to Arbitrator question No. 73.

⁴¹⁶ Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – US), para. 6.49.

⁴¹⁷ Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – US), para. 6.44.

⁴¹⁸ United States' response to Arbitrator question No. 36.a.

7.22. On the second point of disagreement between the parties, we note that the United States supports its position by referring to the findings of the original and compliance panels in this dispute. For the United States, the "core 'as such' finding" in the original proceedings was that Section 771B is WTO-inconsistent because it requires the USDOC to automatically attribute the entirety of the benefit of a subsidy to a downstream processed agricultural product based only on the two criteria listed in Section 771B.⁴¹⁹ The United States adds that the findings of the compliance panel confirm that a fundamental issue is the requirement by Section 771B to automatically attribute the entirety of upstream subsidy benefits based only on the two factual circumstances in the statute.⁴²⁰ From these findings, the United States infers that any CVD order issued where the entirety of the upstream subsidy benefit is not automatically attributed based on the two factual circumstances would not fall under the scope of the DSB recommendations and rulings in this dispute. The United States recognizes that such an order would not, in all circumstances, be WTO consistent, but nonetheless argues that there would be a "genuine question as to whether such an order contravenes the covered agreements that would need to be settled before the EU could suspend concessions or other obligations with respect to that order under the DSU".⁴²¹ The United States further submits that it would be improper for an as such model to automatically authorize a level of countermeasures before any disagreement regarding the compliance of the order with the WTO agreements is settled.⁴²²

7.23. The European Union disagrees with the United States. For the European Union, a hypothetical CVD order finding a pass-through rate below 100% is not possible under Section 771B. The European Union submits that the compliance panel confirmed that Section 771B directs the USDOC to find a 100% pass-through whenever the two enumerated criteria are fulfilled and thus the USDOC is unable to determine a degree of pass-through different to 100%.⁴²³

7.24. The European Union also submits that the findings in the original and compliance panels indicate that the inconsistency of a pass-through determination under Section 771B does not depend on the level of the pass-through rate, but that it is the method following the "operation of the law itself", that is flawed.⁴²⁴ The European Union argues that the USDOC's inability to consider all relevant circumstances and the presumption of pass-through applies irrespective of the rate of pass-through, so that even if it were possible for the USDOC to establish a pass-through rate below 100% under Section 771B, such CVD order would still be WTO-inconsistent.⁴²⁵ The European Union additionally argues that accepting the United States' position would allow it to circumvent the findings of the original and compliance panels. As an example, the European Union submits that the United States would be able to issue a CVD order with a pass-through rate of 99% that would not give the European Union the right to suspend concessions under the prospective model. According to the European Union, the United States would evade retaliation even though the USDOC would have relied on the presumption set out in Section 771B to determine the existence of the 99% pass-through.⁴²⁶

7.25. The issue presented by the parties is whether a CVD order imposed on the basis of Section 771B, with a pass-through analysis resulting in less than 100% attribution rate, should also be considered to fall within the scope of a triggering event.

7.26. The United States' position is premised on the fact that the fundamental WTO-inconsistency found by the original panel, and allegedly later confirmed by the compliance panel, was the extent or degree of pass-through, particularly the fact that the pass-through rate is 100%. In this sense, the United States suggests that any pass-through analysis under Section 771B that determines a pass-through rate below 100% would not be WTO-inconsistent and thus would not give the right to the European Union to suspend concessions.

7.27. A close inspection of the findings by the original and compliance panels does not appear to support the United States' view. The original panel based its as such finding of inconsistency of

⁴¹⁹ United States' response to Arbitrator question No. 73.iii.

⁴²⁰ United States' response to Arbitrator question No. 73.iii.

⁴²¹ United States' response to Arbitrator question No. 73.iii; see also comments to the European Union's response to Arbitrator question No. 73.

⁴²² United States' response to Arbitrator question No. 73.iii.

⁴²³ European Union's response to Arbitrator's question No. 2 (referring to Panel Report, *US – Ripe Olives from Spain* (Article 21.5 – EU), para. 7.70))

⁴²⁴ European Union's response to Arbitrator question No. 73.iii.

⁴²⁵ European Union's response to Arbitrator question No. 73.iii.

⁴²⁶ European Union's response to Arbitrator question No. 73.iii.

Section 771B on multiple aspects of this measure, including (i) the requirement to presume, (ii) that the entire benefit passes through, (iii) based only on the two factual circumstances prescribed in the provision:

Section 771B is as such inconsistent ... 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.⁴²⁷

7.28. In coming to this conclusion, the original panel noted that the language in Section 771B requires the USDOC to determine that the full amount of the countervailable subsidies provided to a raw agricultural input passes through to the downstream processed product if the two factual circumstances are determined to exist.⁴²⁸ These findings confirm that a pass-through rate of 100% is not the only reason why Section 771B was found to be as such inconsistent by the original panel. The presumption based on the two factual circumstances contained in Section 771B, and the fact that this measure does not allow for the possibility of taking other relevant factors into account to determine the existence and, if so, degree of pass-through, are equally central to the findings and recommendations of the original panel.

7.29. The findings of the compliance panel confirm the above conclusion. The compliance panel rejected the United States' arguments that the USDOC has discretion in evaluating relevant record data and information. According to the compliance panel, this alleged discretion did not address its fundamental concern that the USDOC will still be required to determine the *existence* of pass-through if the two factual circumstances in Section 771B are fulfilled.⁴²⁹ For the compliance panel, any alleged duty and discretion to take into account record information, beyond the two criteria set out in Section 771B, was unable to ensure that other information would be meaningfully taken into account or form part of a WTO-consistent pass-through determination.⁴³⁰ The compliance panel also found that the USDOC's re-interpretation of the meaning of "raw agricultural product" and "prior stage product" in Section 771B did not have a bearing on achieving compliance. In doing so, it emphasized the United States' failure to demonstrate that Section 771B allows the USDOC to take all relevant facts and circumstances into account for the purpose of conducting a pass-through analysis. These findings supported the compliance panel's conclusion that the European Union had succeeded in demonstrating that the United States had failed to implement the relevant aspects of the adopted DSB recommendations and rulings that Section 771B is as such inconsistent.⁴³¹

7.30. The findings of the original and compliance panels thus indicate that the as such WTO-inconsistency of Section 771B is based partly on, but is not limited to, a 100% pass-through rate. It also includes the operation of the presumption of existence of pass-through if the two factual circumstances are present, and the USDOC's inability to take into account all relevant facts and circumstances in a pass-through analysis under this measure.

7.31. The above findings indicate that a CVD order applying Section 771B, *in its current form*, finding an attribution rate different from 100%, is not possible. As stated by the original panel, the language in Section 771B requires the USDOC to determine that the full amount of the countervailable subsidies passes through if the two factual circumstances are determined to exist⁴³² – a conclusion shared by the compliance panel.⁴³³ The application of Section 771B *in its current form* would thus always result in a determination of 100% pass-through if the two factual circumstances are found to exist. Thus, a CVD order based on an attribution rate different from 100% would still fall under the purview of the DSB recommendations and rulings in this dispute. In such a case, key

⁴²⁷ Panel Report, *US – Ripe Olives from Spain*, para. 7.170. (emphasis original) See also *ibid.* para. 8.1.b.i.

⁴²⁸ Panel Report, *US – Ripe Olives from Spain*, para. 7.168.

⁴²⁹ Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, para. 7.69.

⁴³⁰ Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, para. 7.69.

⁴³¹ Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, para. 7.68.

⁴³² Panel Report, *US – Ripe Olives from Spain*, para. 7.168.

⁴³³ Panel Report, *US – Ripe Olives from Spain (Article 21.5 – EU)*, para. 7.69.

aspects of this measure that were found to be inconsistent would still form part of the analytical basis used by the USDOC to establish the *existence* and *extent* of pass-through of subsidies.

7.32. In reaching the above conclusion, we note that our mandate does not involve determining the WTO-consistency of a future CVD order adopted by the United States using Section 771B, but does involve defining the triggering event that would entitle the European Union to use a prospective model to calculate NI (and thus suspend an equivalent level of concessions, on the basis of already existing DSB recommendations and rulings on this matter).⁴³⁴ We note the United States' concern about the possibility that a genuine question as to the existence of compliance might arise in the future. If the parties were to disagree on whether a measure taken by the United States is in accordance with the existing DSB recommendations and rulings, the DSU provides appropriate avenues to address the situation. Particularly, those under Article 21.5 of the DSU, which would allow the European Union and the United States to bring any disagreement on the possible WTO-consistency of a future CVD order involving the use of Section 771B to a compliance panel.

7.33. For the reasons discussed in this section, we conclude that a triggering event is defined as the imposition of duties by the United States pursuant to a CVD order against a processed agricultural product imported from the European Union, i.e. from one, several or all of its member States, relying on an attribution (pass-through) analysis of subsidy benefits granted to raw agricultural products under Section 771B.⁴³⁵

7.2.3 Duration, timing, and modification of the suspension

7.34. We observe that both parties generally followed the process set out by the arbitrator in *US – Supercalendered Paper* when presenting their views on the duration, timing, and possible modification of a suspension of concessions calculated under the prospective model.

7.35. For the European Union, the duration of the suspension of concessions should be equal to the length of time during which a given CVD rate (or CVD rates) imposed under Section 771B, and which was (or were) used for the calculation of the level of NI, is (or are) in place.⁴³⁶ The European Union also suggests following the approach by the arbitrator in *US – Supercalendered Paper* to extend the duration of the suspension of concessions by an amount of time equal to that required for the European Union to calculate the level of NI following a triggering event.⁴³⁷ The European Union argues that the arbitrator in *US – Supercalendered Paper* simply introduced a temporal shift of the duration of the suspension of concessions. For the European Union, this was to take into account the possible delay between the imposition of the WTO-inconsistent CVDs and the time it took Canada to calculate the level of NI.⁴³⁸ The European Union submits that the approach taken by that arbitrator is consistent with Article 22.8 of the DSU as that provision refers to a situation where substantive compliance is achieved. For the European Union, in this case, this is the removal of Section 771B, and not the termination of a particular instance of application.⁴³⁹

7.36. The European Union recognizes it would have to revise the level of suspension of concessions if a CVD rate (or rates), used in the calculation of an original level of NI is (or are) subsequently modified.⁴⁴⁰ In practical terms, the European Union submits that it would recalculate the level of NI during the time extension of the original suspension of concessions.⁴⁴¹ The European Union submits that following the expiry of this extension, it would go on to apply the revised level of suspension of concessions.⁴⁴² The European Union maintains that the revised calculation should be done not only on the basis of the modified CVD rate (or rates), but also on the basis of the revised values of the other variables of the model, including market value and market shares. The European Union

⁴³⁴ See Section 7.2.1, where we elaborate on our mandate in relation to the prospective model.

⁴³⁵ For the sake of clarity, a triggering event does not include modifications to the measures on ripe olives subject to this dispute. See section 6.4 on modifications to the NI for ripe olives.

⁴³⁶ European Union's response to Arbitrator question No. 36.b.

⁴³⁷ European Union's response to Arbitrator question No. 89, para. 26.

⁴³⁸ European Union's response to Arbitrator question No. 89, para. 27.

⁴³⁹ European Union's response to Arbitrator question No. 89, para. 28.

⁴⁴⁰ The European Union argues this would be consistent with the decision of the arbitrator in *US – Supercalendered Paper*. (European Union's response to Arbitrator question No. 92, paras. 31-32 (referring to Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – *US*), para. 6.49)).

⁴⁴¹ European Union's response to Arbitrator question No. 92, para. 32.

⁴⁴² European Union's response to Arbitrator question No. 92, para. 32.

suggests using the same approach taken by the arbitrator in *US – Supercalendered Paper* regarding the appropriate time-period.⁴⁴³

7.37. The United States submits that 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.⁴⁴⁴ For the United States, the suspension should not be extended by an amount of time equal to that necessary to calculate and impose the suspension of concessions following a triggering event.⁴⁴⁵ Consequently, the United States disagrees with the approach taken by the arbitrator in *US – Supercalendered Paper*, and argues that following it reduces incentives for the parties to cooperate in calculating NI and impose a suspension as quickly and efficiently as possible. The United States also argues that allowing for a suspension of concessions to extend beyond the "recission of the WTO-inconsistent CVD order" would be in furtherance of the objectives of recuperating economic losses or punishing the non-compliant member, neither of which are a legitimate basis to suspend concessions under the DSU.⁴⁴⁶

7.38. For the United States, if a WTO-inconsistent CVD rate is removed or reduced to reflect an attribution rate of less than 100%, then the suspension of concessions must be terminated.⁴⁴⁷ Alternatively, if the WTO-inconsistent CVD rates are modified for other reasons, the United States submits that the European Union should terminate the original suspension, recalculate the level of NI, and implement the modified suspension. For the United States, the revised duty rates should be the only updated inputs in the recalculation, with all other data inputs, such as the market shares and the market value, remaining unchanged from the original calculation.⁴⁴⁸ The United States also submits that if duty rates are revised in a manner that calls into question whether Section 771B is continuing to be applied in a WTO-inconsistent fashion, the European Union should not be permitted to continue to use the prospective model to suspend concessions.⁴⁴⁹

7.39. We note that both parties agree on the main aspects of the duration, timing, and modification of a suspension of concessions calculated using the prospective model. The divergences generally relate to: (i) whether the duration of the suspension should be extended by a length of time equal to that taken by the European Union to calculate NI after the occurrence of a triggering event; (ii) whether the suspension should be terminated if a given CVD rate (or CVD rates), and which was (or were) used for the calculation of the level of NI, is (or are) reduced to reflect a pass-through rate of less than 100%; and (iii) how the level of a suspension of concessions should be revised if the CVD rate (or rates) are subsequently modified after an original suspension has taken place. We address each of these issues below.

7.40. On the first point, we understand the approach taken by the arbitrator in *US – Supercalendered Paper* to be a way to address the possible delay that could exist between the occurrence of a triggering event and the actual suspension of concessions, because of the time it might take the suspending Member to source the data necessary to run the prospective model.⁴⁵⁰

7.41. We are not convinced of this approach. If a given CVD rate (or rates), used in the calculation of the level of NI, is (or are) removed, no NI would exist as of the time that such CVD rate (or rates) is (or are) effectively withdrawn. Allowing the European Union to continue to suspend concessions after such point in time could result in a situation where the equivalence between the proposed level of suspension of concessions and the level of NI is no longer present. Therefore, even if the European Union has the right to suspend concessions immediately after the occurrence of a triggering event, we do not find support in our mandate nor in the text of the DSU to conclude that delays in the calculation of the NI should be compensated by adding time after the measure causing the NI has been removed.

7.42. We also note that the circumstances in this arbitration are different from those featured in *US – Supercalendered Paper*, particularly in relation to the European Union's arguments on the

⁴⁴³ European Union's response to Arbitrator question No. 92, para. 32 (referring to Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – US), para. 6.124).

⁴⁴⁴ United States' response to Arbitrator question No. 36.b.

⁴⁴⁵ United States' response to Arbitrator question No. 36.b.

⁴⁴⁶ United States' response to Arbitrator question No. 36.b.

⁴⁴⁷ United States' response to Arbitrator question No. 36.b.

⁴⁴⁸ United States' response to Arbitrator question No. 92, para. 36.

⁴⁴⁹ United States' response to Arbitrator question No. 92, para. 35.

⁴⁵⁰ Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – US), paras. 6.46-6.47.

source of the NI as quantified by its proposed prospective model, the requirement of equivalence under Article 22.4 of the DSU, and the potential relevance of Article 22.8 of the DSU.

7.43. We recall that according to the European Union, as in *US – Supercalendered Paper*, Article 22.8 of the DSU is not applicable in the present arbitration as that provision refers to situations where substantive compliance is achieved. According to the European Union, substantive compliance would occur in this case with the removal of Section 771B and not just the termination of a particular instance of its application.⁴⁵¹ However, we note that during these proceedings the European Union has been explicit in stating that there is no NI arising from Section 771B as such; NI only arises from actual instances of application of this measure.⁴⁵² The European Union has thus tied the existence of NI to the actual application of Section 771B. This is, in fact, reflected in the operation of its proposed prospective model that works based on the CVD rates stemming from applications of Section 771B, and which would provide a level of NI equal to zero if there are no CVD rates imposed pursuant to Section 771B. Therefore, regardless of whether Article 22.8 of the DSU is applicable in the present circumstances, equivalence would be potentially missing if a suspension of concessions is allowed to continue after the CVD rate (or rates) that were used as a basis in the prospective model are no longer in place. This meaningful differentiation causes us to take a different approach to that taken by the arbitrator in *US – Supercalendered Paper*.

7.44. On the second point, we have already addressed this issue when defining the triggering event. As discussed in section 7.2.2 above, a CVD order imposing CVDs under Section 771B, *in its current form*, with a hypothetical pass-through rate of less than 100%, falls under the scope of the definition of a triggering event. The European Union would not be required to terminate a future suspension of concessions because of a hypothetical modification of the pass-through rate to reflect a less than 100% attribution rate, relying on Section 771B *in its current form*. In relation to the United States' arguments on the possibility that duty rates are revised in a manner that calls into question whether Section 771B has been applied in a WTO-consistent manner⁴⁵³, we refer to our statements in paragraph 7.32 above.

7.45. Finally, regarding the revisions to the level of suspension of concessions, we note that if a given CVD rate (or rates) is (or are) modified, the NI stemming from such a measure would change, requiring a revision of the level of suspension of concessions.⁴⁵⁴ Therefore, and in the context of an already existing suspension of concessions due to a future application of Section 771B, the European Union would be required to recalculate the level of NI if the CVD rate (or rates) is (or are) modified by the United States after the original suspension takes place.

7.46. The parties submit alternative approaches as to how this should be implemented practically. The European Union suggests it would recalculate the level of the suspension of concessions, on the basis of revised inputs for all the parameters of the model (and not just the revised CVD rate (or rates)), during the time extension of the original suspension of concessions.⁴⁵⁵ Following the expiry of this extension, the European Union says it would go on to apply the revised level of suspension of concessions.⁴⁵⁶ The United States suggests that if a CVD rate (or rates) is (or are) subsequently modified, the European Union should terminate the original suspension, recalculate the level of NI, and implement the modified suspension. For the United States, the revised duty rates should be the only updated inputs in the recalculation, with all other data inputs, such as the market shares and the market value, remaining unchanged from the original calculation.⁴⁵⁷

7.47. As discussed previously in this section, we have ruled differently from the approach set out in *US – Supercalendered Paper* regarding the time extension of the suspension of concessions, following the removal of the CVD rate (or rates) used in the prospective model to calculate a level

⁴⁵¹ European Union's response to Arbitrator question No. 89, para. 28. See also Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – US), para. 6.47.

⁴⁵² European Union's response to Arbitrator question No. 77, para. 117; closing statement at the meeting of the Arbitrator, paras. 4 and 7. See also footnote 380 above and United States' comments on the European Union's response to Arbitrator question No. 89.

⁴⁵³ United States' response to Arbitrator question No. 92, para. 35.

⁴⁵⁴ The parties agree that the level of suspension of concessions should be revised if the CVD rate (or rates) used as a basis for the calculation of the level of NI is (or are) modified. (European Union's response to Arbitrator question No. 92; United States' response to Arbitrator question No. 92).

⁴⁵⁵ European Union's response to Arbitrator question No. 92, para. 32.

⁴⁵⁶ European Union's response to Arbitrator question No. 92, para. 32.

⁴⁵⁷ United States' response to Arbitrator question No. 92, para. 36.

of NI. This does not mean, however, that the European Union would need to terminate a suspension of concessions whenever there is a revision to the CVD rate (or rates), as suggested by the United States. In contrast to a situation of full removal of CVD rate (or rates), where the level of NI would be zero, a revision to the mentioned rates implies that NI stemming from a CVD order issued by the United States would continue to exist – it is only the actual level that is uncertain. To us, this indicates that the issue regarding the requirement of equivalence discussed in the context of the time extension in paragraph 7.41 above is not of the same nature in circumstances involving a revision of the CVD rate (or rates). Whether the level of suspension of concessions is equivalent to the level of NI is a question that will only be definitively answered once the prospective model has been run with the revised numbers. We are therefore of the view that the European Union is not required to terminate the original suspension while revising the level of NI. This revision should be done in a timely manner, in accordance with the deadlines set out in section 7.2.6 below.

7.48. Regarding the issue of which data inputs the European Union should revise to recalculate the level of NI following a modification of duty rates, we note that if all data inputs were updated, the revised calculation would be based on market shares affected by the WTO-inconsistent CVD, which both parties agree is not the appropriate approach to calculating the level of NI.⁴⁵⁸ Therefore, we agree with the United States that the European Union should only revise the CVD rate (or rates) when recalculating the level of NI after a CVD rate (or rates) modification.

7.49. We therefore consider that with respect to a given level of NI calculated using the prospective model the European Union may suspend concessions for the length of time during which a given CVD rate (or rates) imposed pursuant to Section 771B and used as an input for the prospective model, is (or are) in place. Following a suspension of concessions on the basis of the prospective model, the European Union would be required to recalculate the level of NI if a given CVD rate (or rates) is (or are) modified by the United States after the original suspension takes place.⁴⁵⁹ The European Union may continue to suspend concessions while it revises the level of NI to reflect the modified CVD rate (or rates).

7.2.4 Initial notification on the application of the prospective model

7.50. The European Union submits that the Arbitrator could decide on a procedure, inspired by the solution reached in *US – Supercalendered Paper*⁴⁶⁰, whereby the European Union would send a written notification to the United States following the occurrence of a triggering event.⁴⁶¹

7.51. We agree that, for the purpose of transparency, the European Union should provide a notification to the United States whenever it intends to apply a suspension of concessions based on the prospective model. We therefore consider that the European Union should do so after the occurrence of a triggering event, including the following information:

- a. a notification that the European Union intends to suspend concessions with respect to a given application of Section 771B in a CVD order;
- b. the names of all the European Union's exporters that are subject to relevant CVD rates;
- c. a confirmation that the European Union will send the letters to the relevant exporters requesting authorization so that the USDOC may disclose and share with the European Union any confidential information necessary to run the prospective model, in accordance with the instructions set out in this Decision;
- d. a request for the United States to share with the European Union the calculation sheets, in Excel format, of the companies subject to the relevant CVD rates; these calculation

⁴⁵⁸ See section 7.2.8 below.

⁴⁵⁹ For greater clarity, the modifications to the CVD rate (or rates) that give rise to the obligation for the European Union to revise the level of NI are those occurring after a triggering event, i.e. after the issuance of a CVD order imposing definitive duties. These modifications normally occur in the context of an administrative review.

⁴⁶⁰ European Union's response to Arbitrator question No. 74 (referring to Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 8.77).

⁴⁶¹ European Union's response to Arbitrator question No. 74.

sheets should identify the relevant part of the final CVD rate that is due as a result of the pass-through attribution pursuant to Section 771B;

- e. if applicable, a request for the United States to provide the publicly ranged US sales data of all the individually investigated companies contained in the public record of the relevant USDOC investigation; and
- f. a request for the United States to share any other information necessary to run the prospective model, according to the instructions set out in this Decision.

7.52. In case of any modification mentioned in section 7.2.3 above, the European Union shall also send a notification, similar to that described above, informing the United States that it intends to modify the level of NI and requesting the data necessary to run the revisions to the prospective model in accordance with the instructions set out in this Decision.

7.2.5 Notifications to the DSB

7.53. The European Union suggests that the Arbitrator follow the approach adopted in *US – Supercalendered Paper*, whereby the European Union should notify the DSB whenever it suspends concessions or other obligations following the application of the prospective model.⁴⁶²

7.54. We agree with the European Union about notifying the DSB, as it will provide transparency to the United States and keep the membership informed of the application of the prospective model and a consequent suspension of concessions. We therefore suggest that the European Union notifies the DSB whenever it suspends concessions or other obligations using the prospective model, and of any adjustments to the level of suspension in response to the modifications discussed in section 7.2.3 above. Such notification of the level(s) of suspension should occur in the first quarter following the calendar year of the beginning of such suspension and should include all relevant information regarding the suspension of concessions, including the date on which it began, the product coverage, and the annual amount.

7.2.6 Deadlines for the application of the prospective model

7.55. The following table sets out the deadlines for the different steps needed to run the prospective model that require coordination between the European Union and the United States. Details on the events set out in the table can be found in sections 4.4.3.3 and 7.2.4 above. We instruct the parties to abide by these deadlines, noting that they can be modified by mutual consent.

Table 2: Steps and deadlines for the application of the prospective model

Event	Description	Timing and maximum allotted time
1.a	Initial notification from the European Union to the United States including the information discussed in section 7.2.4 above.	No deadline for the European Union to send this initial notification following a triggering event.
1.b	The European Union sends authorization request letters to the individually investigated companies.	Sent at the same time as the initial notification referenced in the preceding row.
2.a	Responses from the individually investigated companies indicating whether they authorize the USDOC to share BCI with the European Union.	Two calendar weeks (14 days) from the date the European Union sends the written request to the individually investigated companies. <i>(Note: In accordance with the instructions set out in section 4.4.3.3 above, if the European Union does not receive all such authorizations within the two calendar weeks (14 days), once this period of time is over it will notify the United States that it was unable to obtain the authorizations and will be required to send again written requests to the</i>

⁴⁶² European Union's response to Arbitrator question No. 74 (referring to *US – Supercalendered Paper* (Article 22.6 – US), para. 10.2).

		<i>individually investigated companies that did not provide the requested authorizations upon the first request, repeating the process beginning with event 1.b.)</i>
2.b	Response from the United States to the European Union providing the publicly ranged sales data of the individually investigated companies. <i>(If requested by the European Union in its initial notification)</i>	Two calendar weeks (14 days) from the date the European Union sent the initial notification mentioned in event 1.a.
3	The European Union transmits the authorization letters from the individually investigated companies to the United States.	Immediately after receiving the authorization letters from the individually investigated companies. <i>(Note: In accordance with the instructions set out in section 4.4.3.3 above, if the European Union is unable to obtain the authorizations from one or more of the individually investigated companies within the two calendar weeks (14 days) after the second request, once this period of time is over it will notify the United States that it was unable to obtain the authorizations and that it intends to use the alternative options provided in that section).</i>
4	The United States transmits to the European Union the BCI required for the calculations. ⁴⁶³	After receiving the authorization letters from the European Union, the United States has one of the two following time-periods to provide the companies' relevant confidential information to the European Union, whichever is longer: (a) two calendar weeks (14 days); or (b) the remainder of a 30-calendar-day period that started to run at the time the European Union sent the written requests to the relevant companies..

7.56. Regarding modifications to the CVD rate (or rates) in the original CVD order, discussed in section 7.2.3 above, we recall our decision to allow the European Union to continue to suspend concessions while it recalculates the level of NI – and not to terminate it as suggested by the United States. Such recalculation should nonetheless be done in a timely manner.⁴⁶⁴ The European Union thus shall have 15 calendar days after the CVD rate (or rates) have been modified to begin the process of revising the level of NI. This process shall begin by sending the initial notification mentioned in the event 1.a above. Thereafter, the European Union is instructed to follow the remaining events set out in the table above.

7.2.7 Scope of products covered by the model

7.57. The European Union suggests relying on the USHTS codes listed in future CVD orders applying Section 771B to identify the relevant trade flows, and argues this approach was also followed by the arbitrator in *US – Supercalendered Paper*.⁴⁶⁵ The European Union submits that only the fully covered codes should be used in the economic model.⁴⁶⁶

7.58. The United States submits that under United States' law, it is the written description of the subject merchandise in the CVD order that is dispositive in determining the scope of products to which duties apply, and not the HTSUS codes.⁴⁶⁷ The United States argues that in the context of future applications of the prospective model, there is no reason to believe that HS codes will be able to provide a suitable proxy for in-scope imports, and thus submits that the Arbitrator should decline to set out a prospective model.⁴⁶⁸ The United States nonetheless argues that if the Arbitrator decides

⁴⁶³ Only if the European Union is able to obtain all the authorization letters from the individually investigated companies.

⁴⁶⁴ See paragraph 7.47 above.

⁴⁶⁵ European Union's response to Arbitrator question No. 30 (referring to Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 8.72).

⁴⁶⁶ European Union's response to Arbitrator question No. 94.

⁴⁶⁷ United States' response to Arbitrator question No. 35. See also response to Arbitrator question No. 24.

⁴⁶⁸ United States' comments to the European Union's response to Arbitrator question No. 94.

to do so, it would agree with the European Union in following the same approach as for the as applied model for ripe olives, i.e. "consider[ing] only HS codes that are fully covered by the relevant CVD order to define in-scope imports".⁴⁶⁹

7.59. As clarified by the United States, under the US legal system the scope of a CVD order is not defined by HTSUS codes, but by the narrative description of the products in the CVD order. This implies that the boundaries of the scope of the relevant products may partially, but not completely, overlap with the scope of certain HTSUS codes. In this context, we take note of the United States' assertion that HTSUS codes do not legally define which products are in-scope, but rather only constitute a proxy for this purpose.⁴⁷⁰

7.60. The arbitrator in *US – Supercalendered Paper* addressed a similar issue and noted it could be solved in two ways: either using all HTSUS codes in the CVD order, which may lead to overinclusive results, or ignoring the codes with partial coverage, which may lead to underinclusive results. The arbitrator ended up choosing the former option.⁴⁷¹

7.61. As in *US – Supercalendered Paper*, we are also faced with choosing between two proxies: all HTSUS codes contained in the CVD order or only the "primary" codes, i.e. those with full coverage.⁴⁷² Given the issues raised by the United States, we consider the primary codes approach to be appropriate in the circumstances of the present arbitration for the prospective model we will be setting out. In this connection, we note that both parties agree on the Arbitrator taking this approach⁴⁷³ and that they also agree to this same approach in the context of the as applied model for ripe olives.

7.62. Therefore, and to the extent that a set of in-scope HTSUS codes needs to be determined to use as inputs in the prospective model, the European Union shall source the codes from the relevant future CVD order applying Section 771B, falling under the scope of a triggering event. Only the primary codes (i.e. the fully covered codes) within the set of codes listed in the CVD order shall be used to define in-scope products for the purpose of the application of the prospective model.

7.2.8 Appropriate time-period

7.63. In this section we address the parties' arguments on the appropriate time-period that should be used to source data relating to market shares, which is necessary to run the prospective model. We will refer to this time-period as the "baseline year", as we did in our discussion concerning the as applied model for ripe olives.

7.64. The European Union argues that the baseline year to source the data necessary to run the prospective model should be the year before the imposition of the duties.⁴⁷⁴ The United States does not directly address the matter of the baseline year that should be used in the context of the prospective model, other than with its general proposition that the model should be "akin to that proposed by the United States and used in past Article 22.6 arbitrations".⁴⁷⁵

7.65. We begin our assessment noting that, in the context of a prospective model, the arbitrator in *US – Supercalendered Paper* reasoned that an appropriate time-period should represent: (i) "a period of time during which relevant imports are unaffected by the [WTO-inconsistent] measure"⁴⁷⁶, and (ii) "a period as close in time as reasonably possible to the triggering event".⁴⁷⁷ The arbitrator in that case thus concluded, in part, that the baseline year to be used by the parties was the most

⁴⁶⁹ United States' comments to the European Union's response to Arbitrator question No. 94.

⁴⁷⁰ United States' response to Arbitrator question No. 94.

⁴⁷¹ Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 8.72.

⁴⁷² Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 8.72.

⁴⁷³ European Union's response to Arbitrator question No. 94; United States' comments to the European Union's response to Arbitrator question No. 94.

⁴⁷⁴ European Union's methodology paper, para. 50.

⁴⁷⁵ United States' response to Arbitrator question No. 35.

⁴⁷⁶ Decision by the Arbitrator, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.104.

⁴⁷⁷ Decision by the Arbitrator, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.104.

recent calendar year preceding the triggering event in which no Canadian exporter was subject to an affected CVD rate.⁴⁷⁸

7.66. The European Union suggests following a similar approach, while the United States does not seem to oppose it as it generally (i) agrees with relying on the practice of past Article 22.6 arbitrators and (ii) agrees that the baseline year should be one year before provisional duties were first imposed in its proposed as applied model for ripe olives.⁴⁷⁹

7.67. We find the reasoning presented by the arbitrator in *US – Supercalendered Paper* regarding the characteristics an appropriate time-period should reflect as being useful for our present task. At the same time, we note that the parties in this arbitration have presented arguments not necessarily addressed by the arbitrator in *US – Supercalendered Paper*, in particular relating to the issue of the imposition of preliminary duties in the context of the as applied model for ripe olives.

7.68. Given the above considerations, we believe that the baseline year should be the most recent calendar year preceding a relevant triggering event in which no companies were subject to CVD rates imposed under Section 771B, unless provisional duties were imposed in the relevant CVD investigation. If such provisional duties were imposed, the baseline year would be the most recent calendar year preceding the imposition of the provisional duties. This is to guarantee that the baseline year represents a point in time when the relevant imports remain unaffected by actions taken in relation to a CVD investigation resulting in a CVD order falling under the scope of a triggering event.

7.3 Methodology for the prospective model

7.3.1 The European Union's model

7.69. The European Union argues that its proposed approach relies on simulations based on the same partial equilibrium model used in the context of the as applied model for ripe olives, but only running the simulation once.⁴⁸⁰ The European Union maintains that a single application of the model is possible because the RPT relating to the implementation of the findings on Section 771B expired in January 2023. The European Union submits that the calculation of the NI could therefore be performed using the same model as in step two of its as applied methodology, taking as a baseline the imports and market shares in the year before the imposition of the future WTO-inconsistent duties.⁴⁸¹

7.70. In response to the Arbitrator's question on whether the European Union suggests relying on an approximation approach based on a formula, or on an exact solution based on a computer-run model, the European Union clarifies that it prefers a computer-run model relying on an exact solution approach.⁴⁸²

7.71. According to the European Union, the level of NI should be quantified by subtracting the hypothetical value of exports simulated under the model for the year after the imposition of the WTO-inconsistent duties from the actual value of the European Union's exports to the United States of the concerned product in the year before the imposition of such duties.⁴⁸³

7.3.2 The United States' model

7.72. The United States submits that the same model it proposes in the context of the as applied inconsistency could be used as the basis to calculate the level of NI arising from the future application of Section 771B. The United States argues this is possible as it designed its model, which followed that used in previous arbitrations, to be equally applicable in both scenarios. The United States submits that regardless of the model ultimately chosen by the Arbitrator, it should be sufficiently generic to capture other products that could be subject to future CVD orders pursuant to

⁴⁷⁸ Decision by the Arbitrator, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.124.

⁴⁷⁹ United States' written submission, paras. 82 and 97.

⁴⁸⁰ European Union's methodology paper, para. 50; written submission, para. 97.

⁴⁸¹ European Union's methodology paper, para. 50.

⁴⁸² European Union's response to Arbitrator question No. 29.

⁴⁸³ European Union's methodology paper, para. 51.

Section 771B, and thus it needs to account for domestic production.⁴⁸⁴ The United States also argues that the methodology should include the other aspects it raised in the context of the as applied inconsistency, i.e. (i) measuring NI to the European Union as a whole, rather than just the market or markets from which the subject goods are being exported, (ii) the incorporation of appropriate counterfactual CVD rates, and (iii) incorporating any parallel ADDs imposed on the same goods.⁴⁸⁵

7.73. The United States has also submitted that the European Union's prospective model does not satisfy the guiding principles set out by previous arbitrators (discussed in section 7.2.1 above).⁴⁸⁶ In particular, the United States argues that the European Union's model (i) lacks specifics on how to apply it to a diverse group of products and that this runs contrary to a predictable level of suspension⁴⁸⁷; (ii) is not practical to implement, as the European Union has not provided enough details on how such a methodology would operate in practice when applied to a diverse set of agricultural products⁴⁸⁸; (iii) lacks specific guidance on what data should be relied upon to run it⁴⁸⁹; and (iv) is not sufficiently generic to capture any variation in the types of products and markets.^{490, 491}

7.3.3 Model chosen by the Arbitrator

7.74. We note that the parties propose using the same models as those they submitted in the context of the as applied inconsistency relating to ripe olives. We have already assessed these models in section 6.3 above, and addressed the concerns raised by the parties. We also asked the parties whether we should follow the same modelling approach used in the context of ripe olives for the prospective model. The European Union agreed that the Arbitrator should do so.⁴⁹² For its part, the United States submits that it would have no problem with using the same model "as long as the model is capable of capturing the variety of products and scenarios that could arise in a future application of Section 771B"⁴⁹³, which the United States submits can be achieved by using its model.⁴⁹⁴

7.75. As discussed in section 7.2.1 above, we find the principles set out by previous arbitrators when adopting a prospective model to be instructive for our current task. We will thus choose a model that (i) will result in predictable levels of suspension and (ii) is generic enough to accommodate the different products falling under the scope of Section 771B. In this connection, given that future NI caused by Section 771B would stem from future applications of the measure,

⁴⁸⁴ United States' response to Arbitrator question No. 35. See also United States' written submission, paras. 132-133.

⁴⁸⁵ United States' response to Arbitrator question No. 35.

⁴⁸⁶ United States' written submission, paras. 128-129 (referring to Decisions by the Arbitrators, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.23; *US – Washing Machines (Korea) (Article 22.6 – US)*, paras. 4.49-4.53). The United States recalls that the arbitrator in *US – Supercalendered Paper (Canada) (Article 22.6 – US)* stated that:

(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.

(Decision by the Arbitrator, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 6.23)

⁴⁸⁷ United States' written submission, para. 129.

⁴⁸⁸ United States' written submission, para. 130.

⁴⁸⁹ United States' written submission, para. 131 (referring to European Union's methodology paper, para. 52).

⁴⁹⁰ United States' written submission, para. 132.

⁴⁹¹ The United States also submitted other arguments on how the European Union's prospective model is flawed, citing the same deficiencies it pointed out in the context of the as applied model for ripe olives. In particular, (i) that for the same reasons the European Union's proposed methodology overstates the level of NI in the as applied model, it does so in the prospective model; and (ii) that given the data input problems it has pointed to in the context of the as applied model, the European Union's proposed model would increase unpredictability substantially, and thus, its request to suspend concessions on the basis of a model is contrary to the DSU. (United States's written submission, section IV). We note these arguments have already been addressed in the context of the as applied model.

⁴⁹² European Union's response to Arbitrator question No. 35.

⁴⁹³ United States' response to Arbitrator question No. 35.

⁴⁹⁴ United States' response to Arbitrator question No. 35.

and not from the existence of the measure itself⁴⁹⁵, we find it appropriate to rely generally on the model we have chosen for the as applied inconsistency relating to ripe olives.

7.76. The partial equilibrium Armington model we have chosen in the context of the as applied inconsistency accommodates various forms of demand and supply and thus is sufficiently generic to be applied to any product potentially covered by Section 771B. The model is also practical to implement because its structure is pre-determined and it can rely on pre-determined and publicly available sources of the model parameter values and data inputs (see section 7.3.4 below). Therefore, we are of the view that the European Union should use the same partial equilibrium Armington model as described in section 6.3.3 above.

7.77. Upon a triggering event, the European Union can apply the model discussed below (the prospective model) to quantify the value of foregone imports due to the application of the WTO-inconsistent CVDs underlying the triggering event. The prospective model is meant to be applied in one step only. The two-step approach adopted in the case of ripe olives, whereby the second-step application of the model uses as data input the sales predicted in the first-step application of the model⁴⁹⁶, is only relevant when the RPT expired after the imposition of the WTO-inconsistent measure (i.e. in the circumstances of the present arbitration, the situation arising with the as applied inconsistency relating to ripe olives). Under the prospective model, the calculation of the level of NI involves comparing results of two simulations that both use the actual sales data in the baseline year as an input, and differ only in the scenarios being modelled:

- a. simulation A: WTO-inconsistent scenario of imposing a WTO-inconsistent CVD; and
- b. simulation B: WTO-consistent scenario of imposing a WTO-consistent CVD.

7.78. Note that when the WTO-consistent scenario involves using a CVD equal to zero, the approach effectively requires only one application of the model (simulation A) because the scenario in simulation B describes a situation that corresponds to the actual market before the imposition of the WTO-inconsistent CVDs. In such case, the level of NI is the reduction in imports predicted by simulation A, as suggested by the European Union. The computer code to run this model is appended in Annex C-2.

7.79. As discussed in section 6.3.2 above, the economic model chosen in the context of the as applied inconsistency relating to ripe olives incorporates the adjustments proposed by the United States regarding the inclusion of domestic sales and the exclusion of third markets. The rationale behind those two features remains the same in the context of the prospective model. However, the third adjustment to the European Union's model, i.e. the inclusion of parallel duties in the first-step simulation is specific to the two-step approach adopted in the context of the as applied inconsistency relating to ripe olives. As explained above, the application of the prospective model requires only one step and thus the considerations of how to account for parallel duties are different in this context. We discuss these considerations in section 7.3.4.6 below.

7.80. The application of the prospective model requires specific values for several parameters. These are the price elasticity of demand ε , the Armington elasticity of substitution σ , the price elasticity of domestic supply η_D , and the price elasticity of export supply η_i .

7.81. The application of the prospective model also requires data on United States' imports by source and domestic sales for the baseline year to calculate the initial total market value Y and the initial market share m_i of each supplier i . The model described in section 6.3.3 above includes four supplying entities: domestic, Spain, other European Union economies, and the rest of the world. Since it is presently unknown which European Union member State(s) would be affected by a future WTO-inconsistent CVD order, the notation for the prospective model needs to be more general. Therefore, the supplying entities in the prospective model are domestic, European Union member

⁴⁹⁵ We recall that the European Union clarifies it is not requesting the Arbitrator to set out a prospective model to calculate the level of NI arising from the as such inconsistency of Section 771B, in the future, but rather the NI arising from the future application of this measure to other products. See footnote 380 above.

⁴⁹⁶ See section 6.3.5 above.

State(s) affected by the WTO-inconsistent CVD order, and the rest of the world.⁴⁹⁷ The European Union shall consider each affected member State as a separate supplying entity.

7.82. Finally, the model requires values for the initial and counterfactual duty rates t_i . The initial duty rate in both simulations is zero for all suppliers. For the affected European Union member State(s), the counterfactual duty rate in simulation A is the actual duty rate while in simulation B, it is the hypothetical WTO-consistent duty rate discussed in section 4.3.4 above. For all other suppliers, the counterfactual duty rate is always zero.

7.3.4 Parameter values and data inputs

7.83. In the following sections, we set out instructions on how to obtain the parameter values and data inputs to implement the prospective model. In doing so, we are guided by the considerations that the instructions need to ensure a practical implementation of the model and limit the risk of potential controversies between the parties. Hence, we rely on pre-determined and, to the greatest extent possible, publicly available sources of the model parameter values and data inputs that allow for the selection of values that are factual and verifiable.

7.84. For the European Union, the prospective model can rely on the same sources of data inputs and values of elasticities as the model for the as applied inconsistency relating to ripe olives.⁴⁹⁸ For parameters that are not sourced from the literature, the European Union proposes to use the same values as those used in the model for ripe olives.⁴⁹⁹

7.85. The United States requests that the Arbitrator adopt specific data sources or data sourcing protocols for the application of the model. These include a protocol for defining the scope of relevant trade flows to be used as an input into the model and ensuring that such trade flows align with the scope of the relevant CVD order, and protocols to designate appropriate data sources for other key inputs such as the various elasticity parameters.⁵⁰⁰ The United States also submits that the Arbitrator should adopt instructions similar to those set out in *US – Supercalendered Paper* so as to avoid future controversies between the parties.⁵⁰¹ The United States notes that the elasticities should be sourced from economic literature that is reliable, verifiable, tied as directly as possible to the in-scope products, and aligned as closely as possible with the underlying modelling approach.⁵⁰²

7.86. In general, we consider the data sources used in the model for the as applied inconsistency relating to ripe olives to be appropriate also for any future application of the prospective model. If, in the following sections, we deviate from the sources used in the ripe olives model it is because the potential instructions required for using those sources would not be practical to implement.

7.87. To clarify the set of products for which we are to set out the instructions, we have asked the parties to propose the product codes that could fall within the scope of any potential future application of Section 771B.⁵⁰³ This set of product codes will guide us in considering the scope of data sources required and in setting out the instructions on how to use the data sources. The European Union suggests that the relevant set of products includes HS chapters 1 to 24 plus a few select 4-digit codes in other chapters.⁵⁰⁴ The United States considers this definition too broad

⁴⁹⁷ Unlike the model for the as applied inconsistency, the prospective model does not include a separate entity for a group of other European Union economies. As neither model features any parameters that vary across foreign entities, the calculated level of NI remains consistent, regardless of whether this group is considered a separate entity or if all foreign economies unaffected by the WTO-inconsistent duty are grouped together as the "rest of the world" entity.

⁴⁹⁸ European Union's methodology paper, para. 52 (referring to sourcing the price elasticity of demand and the Armington elasticity of substitution from Kee, Nicita and Olarreaga (2008) and Fontagné et al. (2022), respectively; European Union's written submission, para. 73 (referring to the use of Global Trade Atlas data).

⁴⁹⁹ European Union's written submission, para. 72 (referring to the supply elasticity being set to 99).

⁵⁰⁰ United States' response to Arbitrator question No. 35.

⁵⁰¹ United States' response to Arbitrator question No. 74; comments on the European Union's response to Arbitrator question No. 75.

⁵⁰² United States' response to Arbitrator question No. 75.

⁵⁰³ Section 7.2.7 above sets out how the European Union will define the scope of products for a particular future application of the prospective model.

⁵⁰⁴ European Union's response to Arbitrator question No. 95, para. 45. The select 4-digit codes in HS chapters other than 1 to 24 are 2905, 3301, 3302, 3501-3505, 3809, 3823, 3824, 4101, 4102, 4103, 4301, 5001-5003, 5101-5103, 5201-5203, 5301.

because it includes raw agricultural products. Instead, the United States suggests a list of HTSUS codes compiled by the USDA that defines processed agricultural products as agricultural products subject to certain forms of transformation process which can range from minimal handling (such as drying, freezing, packaging, etc.) to extensive processing (such as fermenting, cooking, blending, etc.). The United States adds that this list has remained "relatively stable since at least 2010".⁵⁰⁵

7.88. We agree with the United States that the list should in principle exclude raw agricultural products. We also consider it preferable that the list is too broad than too restrictive. Guided by these considerations, we are of the view that it is best to rely on a combination of the parties' proposals. We thus base our instructions on the set of product codes proposed by the United States complemented with the list of products suggested by the European Union in HS categories above HS 24 (see Annex C-3).⁵⁰⁶

7.3.4.1 Price elasticity of demand and price elasticity of domestic supply

7.89. For the values of the price elasticity of demand and the price elasticity of domestic supply, the as applied model relies on a USITC sunset investigation report. We note that the arbitrator in *US – Supercalendered Paper* rejected the possibility of obtaining elasticity values from future USITC determinations because such estimates cannot be evaluated *a priori* by the arbitrator. Instead, the arbitrator in *US – Supercalendered Paper* relied on estimates from the literature at a highly aggregated level.⁵⁰⁷

7.90. The approach followed by the arbitrator in *US – Supercalendered Paper* guarantees predictability but comes at the cost of accuracy because the values would not be specific to the product scopes of the prospective model applications. In this case, such an approach would mean setting two possible pre-determined values of the demand elasticity and one pre-determined value of the domestic supply elasticity for all products that could be subject to Section 771B.⁵⁰⁸ In contrast, the USITC estimates would be tied specifically to the product scope of the WTO-inconsistent duties to which the prospective model would be applied. We also note that the European Union did not raise any concerns related to the methodology through which the USITC arrives at its estimated range of elasticity values. It could be argued that the process through which the USITC arrives at the estimated values to some extent guarantees that the resulting values are reasonable because it reflects comments from stakeholders with opposing interests. Therefore, we do not consider the fact that we cannot at present evaluate the values selected in the future USITC reports to be a major issue that would make it preferable to set pre-determined values of the two elasticities based on aggregate sectors.

7.91. Therefore, for any application of the prospective model, the European Union shall source the price elasticity of demand and the price elasticity of domestic supply from the future USITC investigation report associated with the relevant CVD order. If the report includes a range of values, the appropriate value will be the midpoint of the range. Should the report not include the required elasticity estimate, the European Union shall use the same value as in the model for the as applied inconsistency relating to ripe olives. That is -1 for the price elasticity of demand and 4.5 for the price elasticity of domestic supply.

⁵⁰⁵ United States's response to Arbitrator question No. 95, para. 45; and USDA List of Processed Agricultural Products (Exhibit USA-579).

⁵⁰⁶ Where only HS 4-digit codes are listed in Annex C-3, the list covers all HS 6-digit codes belonging to those HS 4-digit categories.

⁵⁰⁷ Decision by the Arbitrator, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, paras. 8.314-8.315 and 8.325.

⁵⁰⁸ For the price elasticity of domestic supply, the arbitrator in *US – Supercalendered Paper* set the value at 6 (Decision by the Arbitrator, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 8.325). For the price elasticity of demand, the arbitrator relied on estimates from the Global Trade Analysis Project (GTAP) 11 Data Base (Decision by the Arbitrator, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, para. 8.316). For the purpose of estimating the demand elasticities, GTAP groups all agricultural products (raw and processed) into just three aggregate sectors: Grains and Other Crops; Meat, Dairy, and Fish; and Processed Food, Beverages, and Tobacco. The estimated elasticity values in the United States are 0.0 for Grains and Other Crops and -0.8 for the other two sectors (T.W. Hertel and D. van der Mensbrugghe (2024), "Chapter 16: Behavioral Parameters", *GTAP 11 Documentation*, Table 16.6).

7.3.4.2 Armington elasticity of substitution

7.92. In section 6.3.4.2 above we have selected the value of the Armington elasticity of substitution for ripe olives based on the estimates from Soderbery (2015). We have relied on this source despite not being able to assess which elasticity values are statistically reliable and which should be disregarded because they were not estimated with enough precision.⁵⁰⁹ This is because, as discussed in section 6.3.4.2 above, in the case of ripe olives, the United States provided evidence from other sources that supported the specific value of elasticity based on Soderbery (2015).

7.93. However, since such additional evidence may not be available in future applications of the prospective model and any procedure on how to reflect any additional evidence in the selection of the appropriate value would likely create excessive complications and potential for controversy, the lack of information on standard errors makes Soderbery (2015) an unreliable source for the prospective model. Therefore, we select the study proposed by the European Union, Fontagné et al. (2022), which allows for the selection of only those values that are sufficiently precisely estimated, as the source of the Armington elasticity of substitution for the prospective model. We acknowledge that this study is relatively less appropriate in terms of product level aggregation and import market coverage, but we also recall that empirical evidence does not suggest that these features lead to an upward bias in the elasticity estimates and thus in the level of NI.

7.94. The parties both recognize that data sourced from an empirical study such as Fontagné et al. (2022) may require certain adjustments due to some of the estimated elasticities being too large, i.e. outliers, and others being missing. The parties both indicated their willingness to follow a procedure similar to that laid out in *US – Supercalendered Paper* to handle these two issues.⁵¹⁰ The procedure in *US – Supercalendered Paper* defines and caps statistical outliers at the median elasticity value plus two standard deviations across all observations in the Fontagné et al. (2022) dataset. Missing estimates at the HS 6-digit level are replaced by averages at a more aggregate level.

7.95. The only point on which the United States disagrees with the approach in *US – Supercalendered Paper* for dealing with statistical outliers and missing values in Fontagné et al. (2022) concerns computing the median and average elasticities over the *entire* Fontagné et al. (2022) dataset. The United States indicates that the median and average elasticity should only be taken over the products relevant to Section 771B.⁵¹¹ The European Union does not oppose this deviation from *US – Supercalendered Paper*⁵¹² and therefore we rely on the list of processed agricultural products in Annex C-3 for the purpose of defining the set of products over which the median and average elasticities shall be computed.

7.96. We now provide detailed instructions for the calculation of the substitution elasticity value to be used in the prospective model based on the HS 6-digit elasticity estimates in Fontagné et al. (2022). To calculate this value, the European Union shall use the most recent version of the Fontagné et al. (2022) trade elasticities at the HS 6-digit level. We note that the current version of Fontagné et al. (2022) follows the HS 2007 classification, and that due to periodic revisions to the HS, it will be necessary to match the data to the more recent HS classifications. When such revisions make it necessary to concord the reference HTSUS 10-digit codes to the 6-digit elasticities in Fontagné et al. (2022), the European Union shall use official concordance tables from the United Nations.⁵¹³ The European Union shall calculate the substitution elasticity using the following linear transformation, where ε is the point estimate of the trade elasticity in Fontagné et al. (2022):

$$\sigma = 1 - \varepsilon$$

7.97. The European Union shall then replace statistical outliers, defined as values of σ exceeding the median estimate in the Fontagné et al. (2022) dataset for all processed agricultural products, as

⁵⁰⁹ This is problematic because there are many low values (close to 1) in Soderbery et al. (2015), so that the median elasticity is 2.14. It is likely that some of these very low values are not statistically significant and their consideration in the future economic model would bias the level of NI downwards.

⁵¹⁰ European Union's response to Arbitrator question Nos. 75 and 95; United States' response to Arbitrator question No. 95.

⁵¹¹ United States' response to Arbitrator question No. 95.

⁵¹² European Union's response to Arbitrator question No. 95.

⁵¹³ Concordance tables from the United Nations are currently available at: <https://unstats.un.org/unsd/classifications/Econ>.

defined in Annex C-3, with the value corresponding to the median plus two standard deviations across the same processed agricultural products.

7.98. Next, if the substitution elasticity σ is missing from the dataset entirely or is statistically insignificant as defined by Fontagné et al. (2022)⁵¹⁴, the European Union shall compute it as the trade-weighted average within the HS 4-digit heading to which the HS 6-digit sub-heading belongs. If this value is also missing or cannot be computed, the trade-weighted average within the HS 2-digit chapter to which the HS 6-digit sub-heading belongs shall be used. If this value is also missing or cannot be computed, the European Union shall use the median across all processed agricultural products in the Fontagné et al. (2022) dataset. Trade weights used for the trade-weighted averages should be the United States' total imports at the HS 6-digit level in the baseline year, sourced from the United States' Census Bureau. The European Union shall then assign the same substitution elasticity σ to all relevant HTSUS 10-digit codes where the first six digits are identical.

7.99. Once each in-scope HTSUS 10-digit code is assigned a substitution elasticity, and where all relevant HTSUS 10-digit codes have the same substitution elasticity, then this common substitution elasticity will be used as the input in the prospective model. In case two or more HTSUS 10-digit codes are assigned different substitution elasticities, the elasticity to be input into the model shall be computed as a weighted average of each HTSUS 10-digit level substitution elasticity, using as weights the United States' HTSUS 10-digit imports in the baseline year sourced from the United States' Census Bureau as described in section 7.3.4.4 below, according to the following formula:

$$\sigma = \sum_j \sigma_j \frac{M_j}{\sum_j M_j}$$

where σ_j is the elasticity of substitution for HTSUS 10-digit code j (common to all 10-digit codes within each HS 6-digit sub-heading), M_j is the corresponding import value, and $\sum_j M_j$ is the total of all the United States' imports of the in-scope HTSUS 10-digit codes for which the elasticity of substitution is available.

7.3.4.3 Price elasticity of export supply

7.100. In section 6.3.4.3 above, we have rejected the European Union's assumption of perfectly elastic export supply of ripe olives on the basis that the United States cannot be considered a small importing economy of ripe olives in the sense that Spanish exporters could instantly adjust to meet any level of United States' import demand without changes in prices.⁵¹⁵ Since the United States accounts for the largest share of global imports generally, we consider that the assumption of infinite export supply elasticity is unlikely to be appropriate for any product that could be subject to Section 771B. We have also determined that despite their drawbacks, the estimates from Soderbery (2015) represent the best available evidence from the economic literature and, in the case of ripe olives, are in line with the elasticity values used by previous arbitrators in *US – Supercalendered Paper* and *US – Anti-Dumping Methodologies*.

7.101. As discussed in section 7.3.4.2 above, Soderbery (2015) is not a reliable source for the prospective model. Therefore, in the absence of reliable product-specific estimates, we follow the

⁵¹⁴ The current Fontagné et al. (2022) dataset includes a variable labelled "zero" which is equal to one if a point estimate is statistically insignificant.

⁵¹⁵ The European Union argues that it is reasonable to assume that future United States' CVD investigations applying Section 771B would target processed products that are exported in significant numbers to the United States and hence to assume an infinite export supply elasticity. (European Union's response to Arbitrator question No. 32; and European Union's response to Arbitrator question No. 75). The United States rejects the assumption of infinite export supply elasticity, stating that (i) it is unreasonable to apply such assumption to all products that could be subject to Section 771B, (ii) such assumption is "unsupported by both economic theory and empirical evidence, and (iii) there is no way to predict that such products would be exported in significant numbers to the United States, or what sort of threshold would be significant enough to warrant assigning an infinite export supply elasticity (United States' response to Arbitrator question No. 71; United States' comments to the European Union's response to Arbitrator question Nos. 66 and 75). In section 6.3.4.3 above, we have determined that the relevant metric to consider in this context is not the absolute size of exports to the United States but their size *relative* to the overall size of the exporter.

arbitrator in *US – Supercalendered Paper* and adopt the value of 10 as a proxy for the value of export supply elasticity of any processed agricultural product that could be subject to Section 771B.

7.3.4.4 Import values

7.102. The prospective model requires data on the value of the United States' imports under the in-scope 10-digit HTSUS codes, as defined in section 7.2.7 above, from the European Union member State(s) affected by the relevant WTO-inconsistent CVDs in the baseline year. It also requires the same data on import values from the rest of the world.

7.103. As discussed in section 6.3.4.4 above, the most appropriate source of import data in this case is the United States' Census Bureau, and specifically its USA Trade Online data tool.⁵¹⁶ This database is based on official data from the United States' Customs⁵¹⁷, is publicly available and organized at the HTSUS 10-digit level. The selection criteria to extract the relevant data are listed in Table 3 below. If the USA Trade Online tool is unavailable, the European Union shall retrieve the import values from the USITC DataWeb⁵¹⁸ according to search parameters specified in Table 4 below. The USITC database is also publicly available and relies on data from the United States' Census Bureau.⁵¹⁹

Table 3: USA Trade Online search parameters

Field	Search parameter
Measures	"Customs Value (Cons) (\$US)"
Commodity	European Union would select the in-scope HTSUS 10-digit codes
Country	"World Total" (select all individual economies by ticking "Select All level 2 members")
Country Subcode	"All Country Subcodes"
District	"All Districts"
Rate Provision	"All Rate Provisions"
Time	European Union would select the year that corresponds to the baseline year

Table 4: USITC DataWeb search parameters

Field	Search parameter
Trade Flow	"Imports for Consumption"
Classification System	"HTS Items"
Data to Report: Summable Measure	"Customs Value"
Data to Report: Value Multiple	"Actual"
Timeframe Option	"Full years"
Timeframe Aggregation	"Annual"
Full Years	European Union would select the year that corresponds to the baseline year
Countries	"Use All Countries"
Country Aggregation	"Display Countries Separately"
Commodities	European Union would select the in-scope HTSUS 10-digit codes (under "Select Individual Commodities")
Commodity Aggregation	"Display Commodities Separately"
Commodity Aggregation Level	"HTS-10"
Programs	"Use All Programs"
Rate Provision Code	"Use All Provision Codes"
Districts	"Use All Districts"

7.104. The European Union submits that in the case of CVDs adopted early in the calendar year, the data required to run the prospective model may not be available for the prior year. Therefore, the European Union suggests that it would "use the most complete annual figures available, which

⁵¹⁶ Available at <https://usatrade.census.gov/>.

⁵¹⁷ The source of the import data is primarily the United States Customs' Automated Commercial System (United States' Census Bureau, "Guide to the U.S. International Trade Statistical Program" https://www.census.gov/foreign-trade/guide/sec2.html#source_imp (accessed 2 July 2025)).

⁵¹⁸ Available at <https://dataweb.usitc.gov/>.

⁵¹⁹ USITC, "Open Data: Tariff and Trade Datasets" <https://www.usitc.gov/data/index.htm#tariff-and-trade-datasets> (accessed 2 July 2025).

will be, for CVD orders adopted in the second half of the year, those of the previous year and, for CVD orders adopted during the first half of the year, those of two years before".⁵²⁰

7.105. The United States objects to the European Union's suggestion that it may be necessary to use data from two years prior to the imposition of the CVD order in the first half of a calendar year, claiming that this "is likely to introduce significant distortion" into the level of NI estimated by the prospective model because "market shares can change significantly in a year for reasons unrelated to the measures at issue".⁵²¹

7.106. We note that the United States' Census Bureau publishes the trade statistics monthly and the lag between any given date and the latest statistical month available is just over one month at most. This would be relevant for CVD orders published at the beginning of January because data for the full preceding calendar year would not be available at that point. Specifically, according to the most recent release schedule, data for December 2024, and thus the full calendar year 2024, was published on 5 February 2025.⁵²² Assuming the Census Bureau's release schedule remains the same, we note that at the beginning of January in any future year, there will be 11 months of data available from the preceding year. In our view, rather than discarding these data and using the latest available full calendar year, the more accurate approach is to annualize the monthly data for the 11 available months from the year that corresponds to the baseline year. Specifically, if data for the full calendar year that corresponds to the baseline year is not available, the European Union shall use monthly data for the year that corresponds to the baseline year. The European Union shall compute the annualized value of imports by summing over all available months and dividing this sum by the fraction of the number of available months.⁵²³ Should more than three months of data be unavailable, the European Union shall use data from the preceding calendar year.

7.107. To obtain the value of the United States' imports under the in-scope HTSUS codes, the European Union shall sum the extracted import data for each exporter over all product codes. To obtain the final values of imports to be used in the prospective model, the European Union shall split exporters into groups corresponding to the supplying entities in the model: European Union member State(s) affected by the WTO-inconsistent CVD order; and the rest of the world. The European Union shall then compute the sum of the in-scope imports for each group.

7.3.4.5 Value of the United States' domestic sales

7.108. In section 6.3.4.5 above we have determined that the USDA's Yearbook Tables provide the best available data to calculate the value of the United States' domestic sales of ripe olives. We have noted that the Yearbook Tables contain the same information on the volume of domestic production as the USDA's NASS data proposed by the United States.⁵²⁴ What makes the Yearbook Tables a preferable source is that, in addition to domestic production, they also include information on imports and exports of the same product. This information can be used to calculate the domestic producers' share of the United States' market, which can then be applied to the import data to calculate the congruent value of domestic sales, alleviating the issue raised by the European Union that the set of products covered by the NASS data may not fully match the set covered by the import data.

7.109. In our view, the Yearbook Tables are the most detailed public source of data based on official statistics. However, as the European Union points out, these statistics are collected in a product

⁵²⁰ European Union's response to Arbitrator question No. 70.

⁵²¹ United States' comments to the European Union's response to Arbitrator question No. 70.

⁵²² United States' Census Bureau, "Press Release Schedule" <https://www.census.gov/foreign-trade/schedule.html> (accessed 2 July 2025).

⁵²³ The fraction of the number of available months is equal to $\frac{T}{12}$ where T is the number of available months. The annualization approach is similar to that adopted by the arbitrator in *US – Supercalendered Paper* in the case of incomplete data for new shippers. (Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – US), para. 8.230).

⁵²⁴ In the context of the prospective model, the United States proposes to use the cash receipt data from the USDA's Economic Research Service (ERS) if the NASS data are not available (United States' response to Arbitrator question No. 31, para. 90).

classification that cannot be predictably matched to the HTSUS classification.⁵²⁵ This poses an issue for their use as a source of data for the prospective model.

7.110. We note that the arbitrator in *US – Supercalendered Paper* set out instructions for calculating the value of domestic sales that rely on data from the Annual Survey of Manufacturers (ASM) published by the United States' Census Bureau.⁵²⁶ The instructions involve matching in-scope HTSUS 10-digit codes with the North American Industrial Classification System (NAICS) 6-digit codes using official concordance tables from the United States' Census Bureau. Importantly, the procedure outlined in *US – Supercalendered Paper* maintains congruence between domestic sales data and the in-scope import data because it constructs a share that is applied to the in-scope import data rather than using directly the value of domestic sales from the ASM.

7.111. We note that the parties raised objections to relying on instructions similar to those in *US – Supercalendered Paper* to construct the domestic market share. The main issue raised by the parties is that the data reported by the ASM is too aggregated, therefore requiring the possibly strong assumption that the domestic share is the same within the in-scope HTSUS 10-digit codes and the NAICS 6-digit aggregates to which these codes are matched. The European Union submits that "such approximation would be much worse than excluding domestic production from the simulations".⁵²⁷ The United States maintains that sourcing the value of domestic sales from NASS is preferable because it would allow more closely aligning the selected set of products with the in-scope products, even though it may not match the 10-digit HTSUS import data used in the model.⁵²⁸

7.112. We recognize that the approach in *US – Supercalendered Paper* is less precise than using the USDA's Yearbook Tables.⁵²⁹ However, the European Union has not substantiated its argument that constructing the domestic sales data as in *US – Supercalendered Paper* would lead to a worse approximation than excluding domestic sales entirely. Moreover, while the use of ASM data may lead to some inaccuracies in calculating the domestic market share, we are not concerned that these inaccuracies would be systematically biased in one direction. Therefore, we consider the ASM data the appropriate source to calculate the domestic share of United States' market for any future product(s) covered by a CVD order issued under Section 771B.

7.3.4.5.1 Sourcing data from the ASM

7.113. The European Union shall first match all in-scope HTSUS 10-digit codes, as defined in section 7.2.7 above, with 6-digit NAICS codes using an official concordance table provided by the United States Census Bureau.⁵³⁰ Once each HTSUS 10-digit code is assigned a 6-digit NAICS code and where all relevant HTSUS 10-digit codes match the same 6-digit NAICS code, the share of the United States' domestic sales shall be calculated based on ASM data referring to this NAICS code.

7.114. The European Union shall then access ASM data produced by the United States Census Bureau under the table titled "Summary Statistics for Industry Groups and Industries in the United States" and under the column "Sales, value of shipments or revenue (\$1000)".⁵³¹ The European Union shall use the data for the calendar year that corresponds to the baseline year, or the most recent preceding calendar year that is available. The ASM data do not include imports, and thus the European Union shall access the 6-digit NAICS code-specific exports and imports from the

⁵²⁵ European Union's response to Arbitrator question No. 37, para. 79. The same argument would apply to the NASS data and to the cash receipt data from the USDA's Economic Research Service proposed by the United States.

⁵²⁶ Decision by the Arbitrator, *US – Supercalendered Paper (Canada) (Article 22.6 – US)*, paras. 8.37-8.45.

⁵²⁷ European Union's response to Arbitrator question No. 75.

⁵²⁸ United States' comments to the European Union's response to Arbitrator question Nos. 51 and 75.

⁵²⁹ We note that there are at least 50 different 6-digit NAICS codes that correspond to the definition of processed agricultural products in Annex C-3.

⁵³⁰ Concordance tables can be accessed currently via <https://www.census.gov/foreign-trade/reference/codes/index.html#concordance>. The European Union shall use the Concordance Files for Imports and for the calendar year that corresponds to the baseline year, or the most recent preceding calendar year for which the ASM data is available.

⁵³¹ The data can be accessed currently via <https://data.census.gov/table>, in a table labelled "AM1831BASIC01". For data starting in March 2024, the data reported in the ASM transitioned to the Annual Integrated Economic Survey and will be available through the same website.

United States Census Bureau's USA Trade Online for the same year.⁵³² The European Union shall then calculate the domestic share of the United States' market, m_D , as follows:

$$m_D = \frac{\text{Sales} - \text{Exports}}{\text{Sales} - \text{Exports} + \text{Imports}}.$$

7.115. Where two or more relevant HTSUS 10-digit codes are assigned different 6-digit NAICS codes, the domestic share of the United States' market shall be computed as a weighted average of HTSUS 10-digit specific shares, using, as weights, the United States' HTSUS 10-digit imports, according to the following formula:

$$m_D = \sum_j m_{Dj} \frac{M_j}{\sum_j M_j},$$

where m_{Dj} is the domestic share of the United States' market for HTSUS 10-digit code j (common to all 10-digit codes corresponding to the same 6-digit NAICS code), M_j is the corresponding import value, and $\sum_j M_j$ is the total of all the United States' imports that fall under the matched HTSUS 10-digit codes. The European Union shall use the relevant United States' import data obtained according to the instructions set out in section 7.3.4.4 above, where M_j are imports of product j summed over all exporters.

7.116. Where only a subset of HTSUS 10-digit codes can be assigned one or more 6-digit NAICS codes with coverage in the ASM, the European Union shall calculate the domestic share of the United States' market based only on this subset of codes.

7.117. If none of the in-scope HTSUS 10-digit codes can be matched to a NAICS 6-digit code for which the ASM contains the relevant data, the European Union shall use the average domestic share over all processed agricultural products, as defined in Annex C-3, that can be matched to the NAICS codes in ASM.

7.118. If the European Union finds that ASM data, for any reason, are unusable or are significantly outdated, the European Union shall inform the United States and consult with the United States on whether the Bureau of Economic Analysis (BEA)'s input-output data could be used instead of the ASM data. If the United States fails to provide a viable way to overcome potential data shortcomings, the European Union shall instead use the BEA data.

7.3.4.5.2 Sourcing data from the BEA

7.119. The following paragraphs outline instructions for constructing the domestic share of the United States' market using such data. The European Union shall only rely on the BEA data if the ASM data cannot be used, i.e. following the failure of the United States to address shortcomings in the ASM data as discussed in the preceding section.

7.120. The European Union shall first match the in-scope HTSUS 10-digit codes with 6-digit NAICS codes using an official concordance table provided by the United States Census Bureau.⁵³³ The European Union shall assign to each HTSUS 10-digit code the first three digits of the corresponding 6-digit NAICS code. Once each HTSUS 10-digit code is assigned a 3-digit NAICS code, and where all in-scope USHTS codes are assigned the same 3-digit NAICS code, the United States' domestic sales share shall be calculated based on the BEA data referring to this 3-digit NAICS code.

7.121. The European Union shall access the summary "supply and use" tables provided by the BEA at the 3-digit NAICS level for the calendar year that corresponds to the baseline year, or the most

⁵³² Specifically, the European Union shall use imports for consumption (labelled "Customs Import Value (Cons) (\$US)" in the USA Trade Online data tool) and domestic exports (labelled "Domestic Exports Value (\$US)" in the USA Trade Online data tool). If the USA Trade Online tool is unavailable, the European Union shall retrieve the import and export values from the USITC DataWeb.

⁵³³ Concordance tables can be accessed currently via <https://www.census.gov/foreign-trade/reference/codes/index.html#concordance>. The European Union shall use the Concordance Files for Imports and for the calendar year that corresponds to the baseline year, or the most recent preceding calendar year for which the BEA data is available.

recent preceding calendar year that is available.⁵³⁴ Total commodity output and imports would be sourced from the "supply" table, and exports of goods and services would be sourced from the "use" table. The domestic share of the United States' market shall be calculated as:

$$m_{US} = \frac{\text{Total Commodity Output} - \text{Exports of goods and services}}{\text{Total Commodity Output} - \text{Exports of goods and services} + \text{Imports}}.$$

7.122. Where two or more HTSUS 10-digit codes are assigned different 3-digit NAICS codes, the domestic share of the United States' market shall be computed as a weighted average of HTSUS 10-digit specific shares, using as weights, the United States' HTSUS 10-digit imports, according to the following formula:

$$m_D = \sum_j m_{Dj} \frac{M_j}{\sum_j M_j},$$

where m_{Dj} is the domestic share of the United States' market for HTSUS code j (common to all 10-digit codes corresponding to the same 3-digit NAICS code), M_j is the corresponding import value, and $\sum_j M_j$ is the total of all the United States' imports that fall under the matched HTSUS 10-digit codes.

7.123. If a given HTSUS 10-digit cannot be assigned a 3-digit NAICS code, the European Union shall calculate the domestic share of the United States' market based on the HTSUS codes that can be assigned a NAICS code.

7.124. If no HTSUS 10-digit code can be assigned a 3-digit NAICS code, the European Union shall calculate m_D as an average domestic share over all processed agricultural products, as defined in Annex C-3, that can be matched to the NAICS codes in the BEA, applying the following alternative approach where S denotes 3-digit NAICS codes:

$$m_D = \frac{\sum_S (\text{Total Commodity Output} - \text{Exports of goods and services})}{\sum_S (\text{Total Commodity Output} + \text{Imports} - \text{Exports of goods and services})}.$$

7.3.4.6 Duty rates

7.125. The economic model in simulation A requires a single value for the actual CVD rate applied by the United States on the in-scope products from each affected EU member State. In addition, the economic model in simulation B requires a single value for the counterfactual (hypothetical) WTO-consistent CVD rate for each affected EU member State. Before discussing the instructions on how to calculate these CVD rates, we first address the United States' request to include parallel ADDs in the economic model (see section 7.3.2 above).

7.3.4.6.1 Parallel ADDs

7.126. The United States argues that if parallel ADDs are imposed at the same time on the same products as the WTO-inconsistent CVD, it should be added to both the WTO-consistent and the WTO-inconsistent scenarios, so that the NI estimate takes into account the fact that the simultaneous imposition of this parallel duty would dampen the trade impact of the CVD. We have summarized the parties' arguments regarding this issue in section 6.3.2.3 above. We note that while the parties agree that the economic model at hand cannot achieve an accurate allocation of trade damage between two simultaneously imposed duties, they disagree on the implication of this observation. The United States argues that it is more accurate to simulate the effect of the ADDs and CVDs as a combined duty in simulation A and assume that the WTO-consistent counterfactual in simulation B includes the ADD rate. The European Union argues that it is more accurate to disregard the ADD rate in both scenarios.⁵³⁵

⁵³⁴ The BEA's 71-sector (summary) supply and use tables are updated annually and are presently available in the BEA's Input-Output Interactive Data Application at <https://www.bea.gov/itable/input-output>.

⁵³⁵ United States' response to Arbitrator question No. 21, para. 50; United States' response to Arbitrator question No. 35, para. 83; and the European Union's response to Arbitrator question No. 93, paras. 37 and 40.

7.127. We recall that we have decided to include the parallel ADDs in the first-step simulation of the as applied methodology for ripe olives, which quantifies the impact of the hypothetical removal of the WTO-inconsistent CVDs and it does so in two steps. The first-step simulation is used to predict the market shares in the reference year. These market shares should reflect as closely as possible the relative competitiveness of each supplier in the reference year and therefore the first-step model includes both CVDs and the parallel ADDs. We also recall that these simulated market shares are used as input into the second-step simulation that serves to quantify the level of NI, i.e. the hypothetical increase in imports from Spain to the United States if the CVDs were removed in the reference year. In the second step, the impact of the ADDs on the market is already reflected in the initial market shares and therefore the second-step hypothetical scenario involves only the change in the CVDs from their WTO-inconsistent to their WTO-consistent rate. In contrast, the prospective model is applied in only one step to quantify the hypothetical decline in imports from the affected exporter(s) to the United States when the WTO-inconsistent CVDs are imposed in the baseline year.

7.128. In our view, there are conceptual differences between the as applied and the prospective methodologies in how the parallel ADDs would affect the level of NI. The purpose of the first step of the as applied methodology is to quantify the total effect of the two simultaneously imposed duties on market shares, without a need to disentangle the effect of the CVDs from the effect of the parallel ADDs. In contrast, the purpose of including the parallel ADDs in the prospective model, as a combined ADD and CVD rate, would be to account for the fact that simultaneously imposed ADDs may alter the trade impact of the CVDs. In this latter case, however, the impact of the combined duty would need to be allocated between the CVDs and the ADDs because it is only the impact associated with the CVDs that determines the level of NI.

7.129. We note that the United States recognizes that the partial equilibrium Armington model cannot achieve an accurate allocation of trade impact between two functionally identical duties. Yet the United States proposes to use this model to do so, in a manner that allocates a lower impact to the CVDs than the European Union's methodology⁵³⁶, without providing any empirical evidence that would support this particular allocation. In light of this, we conclude that the United States has not demonstrated that the European Union's methodology is incorrect, and thus the European Union is not required to include parallel ADDs in the scenarios for the prospective model.

7.3.4.6.2 Actual duty rate

7.130. In the model for the as applied inconsistency relating to ripe olives, we have determined that the single representative actual CVD rate should be calculated as the weighted average of duty rates that were in place in the year for which the level of NI is to be calculated, with the weights corresponding to the value of trade that would have been subject to each rate in the baseline year. Accordingly, the appropriate way to aggregate the different CVD rates in place after a triggering event is to use the weighted average where the weights correspond to the value of trade that would have been subject to each rate in the baseline year.⁵³⁷

7.131. We recall that there are two types of rates in an original CVD order – individual rates assigned to individually examined companies and a rate that applies to all other companies. The latter is typically calculated as the weighted average of the individual rates that are not zero, *de minimis*, or

⁵³⁶ Assuming that the ADDs and CVDs act as a combined duty for the purpose of modelling their impact within the Armington partial equilibrium model (an assumption that the United States has not substantiated with empirical evidence but that may be a reasonable approximation in the context of accounting for both duties in an economic model like that used in this arbitration), the effect of the combined duty in simulation A can be decomposed into an effect of first imposing the ADDs and then imposing the CVDs, which is equal to the effect of first imposing the CVDs and then imposing the ADDs. In other words, the sequence in which the duties are imposed does not matter. However, the sequencing matters for the individual effects of each duty. This is because the Armington model features diminishing marginal effects of *ad valorem* trade costs (see also European Union's comments on United States' response to question No. 54, paras. 23-26). In other words, the duty that is assumed to be imposed first is allocated a higher marginal trade impact. We note that while the United States assumes that the duties are imposed at the same time, the United States' approach of including the ADDs in the counterfactual duty rate of simulation B is mathematically equivalent to assuming that the CVDs were imposed on top of the ADDs. This is because the counterfactual simulation B captures the impact of increasing the combined duty from zero to the level of the ADDs so that the level of NI is effectively calculated as the impact of the CVDs when going from a market with the ADDs to a market with the combined duty. Therefore, this approach attributes the lowest marginal effect of the combined duty to the CVDs.

⁵³⁷ If more than one European Union member State is affected by the CVDs, the European Union shall calculate the weighted average for each member State separately.

calculated entirely with facts available, using as weights company-specific trade values from the POI. We note that data from the POI will not be affected by the WTO-inconsistent measure and will be close in time to the baseline year. Therefore, if the relevant CVD order does not include an individual rate that is zero, *de minimis*, or calculated entirely with facts available, the all-others rate represents the appropriate weighted average to be used as the single representative duty rate in the prospective model. The all-others rate will be published in the relevant future CVD order applying Section 771B, falling under the scope of a triggering event, and available from public USDOC records.

7.132. If the relevant CVD order includes at least one individual rate that is zero, *de minimis*, or calculated entirely with facts available, the European Union shall calculate the single representative duty rate as the weighted average of all duty rates listed in the CVD order. The instructions on how to calculate the weighted average need to address two issues: (i) what weights to use for individual rates, and (ii) what weight to use for the all-others rate.

7.133. Regarding individual rates, the European Union shall use as weights company-specific trade values from the POI that will be available from USDOC records. Since these data are confidential, the European Union shall follow the instructions set out in section 4.4.3.3 above to obtain the information. If the European Union cannot obtain the confidential information, it shall use publicly ranged data from the POI that will be available from public USDOC records.⁵³⁸

7.134. Regarding the all-others rate, the European Union shall calculate the weight as the difference between the total affected in-scope value of the United States' imports in the POI and the total of the company-specific trade values used as weights for the individual rates. The European Union shall obtain the value of the total affected in-scope imports from the public data source described in the instructions in section 7.3.4.4 above.

7.135. If, for any reason, trade values for one or more individually examined companies are not available from USDOC records, the European Union shall use the all-others rate as the single representative duty rate in the prospective model.

7.136. In section 7.2.3 above, we have established that the European Union would be required to recalculate the level of NI if the CVD rate(s) is modified by the United States after the original suspension takes place. In this context, the European Union shall calculate the modified single representative duty rate as the weighted average of the duty rates in place after the modification, including all individual rates, the non-selected rate⁵³⁹ and the all-others rate. If a company that was previously assigned a company-specific rate (i.e. an individual rate or the non-selected rate) is not listed in the document that is the source of the modified duty rates, the European Union shall assume that the company's most recent rate is in place.

⁵³⁸ As noted by the arbitrator in *US – Supercalendered Paper*:

[t]he parties have explained that 'publicly ranged' data, in this context, refers to numerical data submitted by a company which are confidential, but have been altered by the submitting party to nonetheless be accurate to within 10% of the confidential numbers, thus allowing the altered data to appear on the public record of the USDOC proceeding. Canada has explained that publicly ranged sales data should always be available for individually investigated companies from at least one USDOC record source.

(Decision by the Arbitrator, *US – Supercalendered Paper* (Canada) (Article 22.6 – US), fn 184.)

⁵³⁹ As explained by the arbitrator in *US – Supercalendered Paper*:

[t]he non-selected rate arises due to the fact that the USDOC will not necessarily individually investigate all companies participating in an administrative review. The participating companies that are not individually investigated are assigned a 'non-selected rate' which is calculated in the same manner as the all-others rate. The non-selected rates do not replace the all-others rate, which remains active and unchanged throughout USDOC CVD proceedings with respect to a given CVD order.

(Decision by the Arbitrator, *US – Supercalendered Paper* (Canada) (Article 22.6 – US), fn 144.)

7.137. The instructions on how to calculate the modified weighted average need to address two issues: (i) what weights to use for company-specific rates, and (ii) what weight to use for the all-others rate.⁵⁴⁰

7.138. Regarding company-specific rates, the European Union shall use as weights company-specific trade values from the POI that will be available from the USDOC record. Since these data are confidential, the European Union shall follow the instructions set out in section 4.4.3.3 above to obtain the information. If the European Union cannot obtain the confidential information, it shall use publicly ranged data from the POI that will be available from public USDOC records.

7.139. Using trade values from the POI rather than values from a later period has two desirable properties. First, as noted above, trade values from the POI will not be affected by the original WTO-inconsistent duties or their revised rates. Second, using weights that do not change over time ensures that the sign of the change in the level of NI will be the same as the sign of the rate(s) modification. That is, if all rates are reduced, the modified level of NI will be lower and if all rates increase, the modified NI will be higher. Such correspondence is not guaranteed if the weights vary over time.

7.140. Regarding the all-others rate, the European Union shall calculate the weight as the difference between the total affected in-scope value of the United States' imports in the POI and the total of the company-specific trade values used as weights for the company-specific rates. The European Union shall obtain the value of the total affected in-scope imports from the public data source described in the instructions in section 7.3.4.4 above.

7.141. Finally, we need to address situations in which calculating the appropriate weights will pose an issue. These situations arise if trade data from the POI for a company with a company-specific rate is not available from USDOC records.⁵⁴¹ In such cases, the European Union shall use the company's confidential trade values, available from the USDOC record, from the period of review (POR) that are the closest in time to the POI. The European Union shall also retrieve the total value of affected in-scope imports for the same period, using the public data source described in section 7.3.4.4 above, and calculate the company's share of these imports in the POR. The European Union shall then multiply the company's share by the total value of affected in-scope imports from the POI to obtain a proxy for the company's trade value in the POI and use this value as the weight for the company's rate. If the European Union cannot obtain the confidential information, it shall use the publicly ranged data from the relevant POR. If a company's trade data is not available from USDOC record, the European Union may disregard the company's rate and thus assume that the company has been assigned the all-others rate.⁵⁴²

7.3.4.6.3 Counterfactual WTO-consistent duty rate

7.142. In section 4.4.3 above, we have set out instructions on how to calculate the counterfactual WTO-consistent duty rates, including the individual duty rates, the all-others rate, and the non-selected rates. To aggregate these rates to the single representative counterfactual WTO-consistent rate, the European Union shall follow the instructions described in the previous section so that the single actual duty rate and the single counterfactual WTO-consistent duty rate are calculated in the same manner.

7.3.5 Annual price-level adjustment

7.143. We refer to section 6.5 above where we addressed the possible price-level adjustment in the context of the as applied model and consider that a similar methodology can be used for the prospective model. However, as the prospective model is designed to cover all processed agricultural products, and not just ripe olives, we consider that this methodology must be adjusted to reflect

⁵⁴⁰ The all-others rate, once created in the original investigation, stays in place for the duration of the CVD order (see fn 539 above). Therefore, it will not represent the weighted average of individual rates after a modification and needs to be taken into account as a separate rate.

⁵⁴¹ This will be the case, for instance, when companies that were not part of the original investigation request a company-specific rate in an administrative review or in a new-shipper review.

⁵⁴² The set of instructions in this paragraph is consistent with the instructions set out by the arbitrator in *US – Supercalendered Paper*. (Decision by the Arbitrator, *US – Supercalendered Paper (Canada)* (Article 22.6 – *US*), paras. 8.171, 8.180, 8.186, and 8.234).

this potentially broad scope of products. We note that both the European Union and the United States agree that the Arbitrator can rely on the instructions set out in *US – Supercalendered Paper*, regarding the price-level adjustments to the level of NI resulting from the prospective model.⁵⁴³

7.144. The main decision informing the issue of the price-level adjustment is which price-level index to use. As discussed in the context of the as applied model, this index should be as close as possible to the in-scope HTSUS codes used in the model. For the purpose of the prospective model, it is not possible to be sure that a relevant price index will exist that relates exactly to the relevant products. For this reason, the arbitrator in *US – Supercalendered Paper* proposed using the price index for the 6-digit NAICS industry to which those products belong. Such data is available from the Bureau of Labor Statistics (BLS) in its industry PPIs.⁵⁴⁴ Additionally, as noted by the arbitrator in *US – Supercalendered Paper*, these indexes are reliable and organized by NAICS codes which can be readily matched to HTSUS codes.⁵⁴⁵

7.145. In what follows, we set out the instructions the European Union shall follow when applying a price-level adjustment, based on the process described in section 9 of the Decision by the Arbitrator in *US – Supercalendered Paper*. This price-level adjustment shall be applied to any change in the relevant price level, whether it is inflationary (price-level increases) or deflationary (price-level decreases).⁵⁴⁶ The price changes should be calculated based on twelve-month year-on-year (i.e. December-to-December) changes of the respective PPI.⁵⁴⁷

7.146. The European Union shall first access PPIs from the United States' BLS at the level of 6-digit NAICS codes.⁵⁴⁸ Second, the European Union shall match all the in-scope HTSUS 10-digit codes with the PPIs using an official correspondence table provided by the United States' Census Bureau.⁵⁴⁹ In case all the relevant HTSUS 10-digit codes correspond to only one 6-digit NAICS code, the price-level adjustment shall be based on that respective price-level change. Where only a subset of HTSUS 10-digit codes can be matched to 6-digit NAICS codes, the price-level adjustment shall be based on the PPI price-level change(s) corresponding to those NAICS code(s) that can be matched. Where the HTSUS 10-digit codes can be matched to two or more 6-digit NAICS codes, the price-level adjustment shall be based on the weighted average of PPIs corresponding to those NAICS codes, using, as weights, HTSUS 10-digit United States' imports obtained according to the instructions set out in section 7.3.4.4 above, according to the following formula:

$$PPI = \sum_j PPI_j \frac{M_j}{\sum_j M_j},$$

where *PPI* is the weighted average PPI, *PPI_j* is the NAICS 6-digit industry-specific PPI, and *M_j* are United States' imports belonging to industry *j*.

7.147. If no HTSUS 10-digit code can be matched to a 6-digit NAICS code or if the respective 6-digit PPIs are unavailable, the European Union shall apply the same procedure as described in the paragraph immediately above using 3-digit NAICS codes. Where no HTSUS 10-digit code can be matched to a 3-digit NAICS code or if the respective 3-digit PPIs are unavailable, the European Union shall use the PPI for final demand in the United States.⁵⁵⁰

7.148. Third, the European Union shall use the PPIs calculated as in the two steps above to adjust the level of NI for price-level changes. The Arbitrator notes that the European Union calculates a level of NI in year *t* (regardless of the month in year *t* in which suspension begins), while the baseline

⁵⁴³ European Union's response to Arbitrator question No. 96; United States' response to Arbitrator question No. 96.

⁵⁴⁴ An online data selection tool for industry-specific PPIs is currently available at: <https://data.bls.gov/PDQWeb/pc>.

⁵⁴⁵ Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – US), para. 9.11.

⁵⁴⁶ Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – US), para. 9.21.

⁵⁴⁷ Decision by the Arbitrator, *US – Supercalendered Paper* (Article 22.6 – US), para. 9.16.

⁵⁴⁸ An online data selection tool for industry-specific PPIs is currently available at: <https://data.bls.gov/PDQWeb/pc>.

⁵⁴⁹ Correspondence tables can be accessed currently via <https://www.census.gov/foreign-trade/reference/codes/index.html#concordance>.

⁵⁵⁰ Specifically, the European Union shall use the PPI for final demand, seasonally adjusted, which can be accessed currently via: <https://data.bls.gov/PDQWeb/wp>

year could be $t - 1$ (i.e. the calendar year immediately preceding the year in which the level of NI is initially calculated) or a year prior to that. Price-level changes that occurred between the baseline year and the year immediately before the European Union's calculation of the level of NI – if the two years are not the same – should be taken into account in the initial calculation of the level of NI. To this end, the European Union shall first apply the price-level adjustment to the calculated level of NI, denoted NI_t , determining the initial price-level adjusted NI, denoted $\tilde{NI}_t$, as follows:

$$\tilde{NI}_t = NI_t \times \left(\frac{PPI_{t-1}^{DEC}}{PPI_{baseline}^{DEC}} \right),$$

and then, provided that the measure is still in place so that the European Union is still entitled to suspend concessions, in each year $t + 1, t + 2, \dots$, the European Union shall use the following price-level adjustment to $\tilde{NI}_t$:

$$NI_{t+j} = \tilde{NI}_t \times \left(\frac{PPI_{t+j-1}^{DEC}}{PPI_{t-1}^{DEC}} \right), j = 1, \dots, T.$$

7.149. To provide an example, assume that t , the year in which the European Union calculates NI_t (in any month), is 2027. The European Union applies the Arbitrator's selected methodology and calculates NI_{2027} . If the baseline year is not 2026, but a year preceding 2026, the European Union will first calculate $\tilde{NI}_{2027}$ using the first formula in the previous paragraph: $\tilde{NI}_{2027} = NI_{2027} \times \left(\frac{PPI_{2026}^{DEC}}{PPI_{baseline}^{DEC}} \right)$. In 2028, when PPI_{2027}^{DEC} becomes available, provided that the measure is still in place, the European Union applies the second formula in the previous paragraph and calculates $NI_{2028} = \tilde{NI}_{2027} \times \left(\frac{PPI_{2027}^{DEC}}{PPI_{2026}^{DEC}} \right)$.

7.4 Conclusion with respect to the NI arising from the future application of Section 771B

7.150. For the reasons set out above, we determine that the European Union may request authorization from the DSB to suspend concessions or other obligations at a level not to exceed an annual amount to be determined by applying the methodology described in section 7 above.

8 BCI UNDERSTANDING

8.1. In response to questions from the Arbitrator on how the parties intended to protect the BCI needed to run the models set out in this Decision, the parties submitted an agreement regulating this matter (BCI Understanding) on 17 July 2025.⁵⁵¹ The BCI Understanding sets out procedures to apply to BCI for the purpose of and to the extent necessary for applying the DSB authorization consistent with the Arbitrator's Decision. The BCI Understanding is an integral part of this Decision and is appended in Annex D-1.

8.2. The parties are encouraged to apply the BCI Understanding when obtaining BCI necessary to run the models set out in this Decision to calculate a level of NI, according to the instructions set out in this Decision.

9 OVERALL AWARD OF THE ARBITRATOR

9.1. We determine that the level of NI of benefits accruing to the European Union as a result of the application of Section 771B in the CVD investigation on ripe olives from Spain is USD 13.64 million. Therefore, in accordance with Article 22.4 of the DSU, the European Union may request authorization from the DSB to suspend concessions or other obligations at a level not exceeding USD 13.64 million per annum. In accordance with section 6.4 above, the level of NI, and consequently the authorized level of suspension of concessions or other obligations, would need to be revised following modifications of the CVD rates on ripe olives from Spain taking place after this Decision has been issued. The level of suspension of concessions may also be adjusted for inflation in 2024 and on an annual basis thereafter, as discussed in section 6.5 above.

⁵⁵¹ Understanding between the European Union and the United States concerning procedures to apply to BCI to the extent necessary to apply the DSB authorization consistent with the Arbitrator's Decision (Exhibit USA-63). The text of this agreement is reproduced in Annex D-1.

9.2. We also determine that, in relation to any future application of Section 771B, the European Union may request authorization from the DSB to suspend concessions or other obligations at a level not to exceed an annual amount to be determined by applying the methodology described in section 7 of this Decision.
