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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN UNION

REPORT OF THE PANEL

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China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
US – Carbon Steel (India) (Article 21.5 – India)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Recourse to Article 21.5 of the DSU by India*, WT/DS436/RW and Add.1, 15 November 2019, mutually agreed solution reported
US – Coated Paper (Indonesia)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R and Add.1, adopted 22 January 2018, DSR 2018:I, p. 273
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005, DSR 2005:XVIII, p. 8950
US – Gambling (Article 21.5 – Antigua and Barbuda)	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW, adopted 22 May 2007, DSR 2007:VIII, p. 3105
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Pipes and Tubes (Turkey)	Panel Report, *United States – Countervailing Measures on Certain Pipe and Tube Products from Turkey*, WT/DS523/R and Add.1, circulated to WTO Members 18 December 2018, appealed 25 January 2019
US – Ripe Olives from Spain	Panel Report, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/R and Add.1, adopted 20 December 2021
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Softwood Lumber VII	Panel Report, *United States – Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/R and Add.1, circulated to WTO Members 24 August 2020, appealed 28 September 2020

Short Title	Full Case Title and Citation
US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title (if any)	Description
EU-1	Preliminary Section 129 determination	USDOC, Ripe Olives from Spain: Preliminary Section 129 Determination Regarding the Countervailing Duty Investigation, C-469-818 (23 September 2022)
EU-2	Final Section 129 determination	USDOC, Ripe Olives from Spain: Final Section 129 Determination Regarding the Countervailing Duty Investigation, C-469-818 (20 December 2022)
EU-4	Notice of implementation of Section 129 determination	International Trade Administration, Ripe Olives from Spain: Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act, United States Federal Register Vol. 88 (19 January 2023), pp. 3384-3385
EU-5	Section 771B	Text of Section 771B of the US Tariff Act of 1930 as codified in United States Code (online version accessed 13 August 2023), Title 19, Section 1677-2.
EU-9	Legislative History of Section 771B	United States Senate, "Amendment No. 326 (Purpose: Calculation of subsidies on certain processed agricultural products)", Congressional Record, Vol. 133, Part 13, 100th Congress, 1st session, 26 June 1987, pp. 17764-17766.
EU-10	Asociación de Exportadores e Industriales de Mesa et al. v. United States	United States Court of International Trade, Slip Op. 20-8, Asociación de exportadores e industriales de Aceitunas de Mesa, Aceitunas Guadalquivir, S.L.U., Agro Sevilla Aceitunas S. Coop. And., and Ángel Camacho Alimentación, S.L. v. United States (17 January 2020)
USA-8	United States v. Eurodif S.A., 555 U.S. 305 (2009)	United States Supreme Court, United States v. Eurodif S.A., 555 U.S. 305 (2009)
USA-10	Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	United States Supreme Court, Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
BCI	business confidential information
BPS	basic payment scheme
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Section 771B	Section 771B of the US Tariff Act of 1930
URAA	Uruguay Round Agreements Act
USDOC	United States Department of Commerce
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the European Union

1.1. This dispute concerns the United States' compliance with the adopted recommendations and rulings of the Dispute Settlement Body (DSB) in *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*. The European Union claims that the United States has failed to comply with the adopted findings of the panel report concerning the incompatibility of Section 771B of the US Tariff Act of 1930 (Section 771B) "as such" and "as applied" in the Final Affirmative Countervailing Duty Determination and Countervailing Duty Order of 1 August 2018 on ripe olives from Spain, with Article VI:3 of the General Agreement on Tariffs and Trade (GATT 1994) and Article 10 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

1.2. The DSB adopted the panel report in the original proceeding on 20 December 2021.[1] On 19 January 2022, the United States notified the DSB of its intention to implement the DSB's rulings and recommendations, pursuant to Article 21.3 of the DSU, and that it required a reasonable period of time in which to do so.[2] On 1 July 2022, the European Union and the United States informed the DSB of their mutual agreement that the reasonable period of time for the United States to implement the DSB's recommendations and rulings would be 12 months and 25 days from the date of the adoption of the panel report, expiring on 14 January 2023.[3] On 16 January 2023, the United States informed the DSB that it had "completed its implementation of the DSB's recommendations in this dispute".[4]

1.3. 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.[5]

1.4. The European Union and the United States held consultations on 24 May 2023. These consultations failed to resolve the dispute.

1.2 Panel establishment and composition

1.5. On 14 July 2023, the European Union requested the establishment of a panel pursuant to Article 21.5 of the DSU, with standard terms of reference.[6] At the DSB's meeting on 28 July 2023, the United States accepted the establishment of a compliance panel and the DSB referred this dispute to the original panel in accordance with Article 21.5 of the DSU.[7]

1.6. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in

[1] DSB, Minutes of the meeting held on 20 December 2021, WT/DSB/M/459, para. 7.7.
[2] Communication from the United States, WT/DS577/10.
[3] Agreement under Article 21.3(b) of the DSU, WT/DS577/12.
[4] Status report regarding implementation of the DSB recommendations and rulings by the United States, WT/DS577/13.
[5] Request for consultations by the European Union, WT/DS577/15 (European Union's consultation request). On 13 February 2023, the European Union and the United States informed the DSB that the two parties had concluded agreed procedures under Articles 21 and 22 of the DSU, which provided *inter alia* that "[s]hould the EU consider that the situation described in Article 21.5 of the DSU exists, the EU will request that the United States enter into consultations with the EU." (Understanding between the United States and the European Union regarding procedures under Articles 21 and 22 of the DSU, WT/DS577/14 (Agreed procedures under Articles 21 and 22 of the DSU), para. 1).
[6] Request for the establishment of a panel by the European Union, WT/DS577/16 (European Union's panel request).
[7] DSB, Minutes of the meeting held on 28 July 2023, WT/DSB/M/482. Under the agreed procedures under Articles 21 and 22 of the DSU, the United States agreed to accept the establishment of a panel under Article 21.5 of the DSU at the first DSB meeting at which the European Union's panel request appeared on the agenda for the meeting. (Agreed procedures under Articles 21 and 22 of the DSU, para. 2).

document WT/DS577/16 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[8]

1.7. In accordance with Article 21.5 of the DSU, the Panel was composed on 31 July 2023, comprising the same panel members as in the original proceedings, as follows:

Chairperson: Mr Daniel Moulis

Members: Mr Martin Garcia
Ms Charis Tan

1.8. Brazil, Canada, China, India, Japan, the Russian Federation, Switzerland and Türkiye notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.9. Following the composition of the Panel, on 2 August 2023, the Panel invited the parties to an organizational meeting to discuss proposed working procedures and a timetable for these proceedings.[9] On 3 August 2023, the European Union informed the Panel that it would be unavailable to attend a meeting in person before 22 August 2023 and alternatively proposed that the parties provide written comments on proposed working procedures and a timetable.[10] On 4 August 2023, the United States informed the Panel of its availability to attend an organizational meeting.[11] On 7 August 2023, the Panel invited the parties to comment in writing on proposed working procedures and a timetable.[12] On 10 August 2023, the parties provided their written comments. In its comments the European Union informed the Panel that it would be unable to submit its first written submission until 30 August 2023 and requested that the deadline be set on that date.[13] The United States also requested additional time to file its first written submission.[14] On 11 August 2023, the United States provided further comments on the deadlines for the parties to file their first written submissions.[15]

1.10. On 14 August 2023, the Panel adopted its Working Procedures[16], Additional Working Procedures concerning Business Confidential Information (BCI)[17], and timetable.[18] The Panel revised its timetable during the panel proceedings in light of subsequent developments.[19] On 28 November 2023, the Panel informed the parties of the expected date of the issuance of the Interim Report.

1.11. The European Union and the United States filed their first written submissions on 30 August 2023 and 20 September 2023, respectively. Third parties filed their written submissions on 2 October 2023. The European Union and the United States filed their second written submissions on 4 October 2023 and 18 October 2023, respectively.

1.12. The Panel held one substantive meeting with the parties on 25 and 26 October 2023. A session with the third parties took place on 25 October 2023. At the request of the parties, the Panel's meeting with the parties was opened to the public by means of a live closed-circuit television

[8] Constitution note of the Panel related to the European Union's recourse to Article 21.5 of the DSU, WT/DS577/17.
[9] Panel communication to the parties (2 August 2023).
[10] European Union's communication (3 August 2023).
[11] United States' communication (4 August 2023).
[12] Panel communication to the parties (7 August 2023).
[13] European Union's communication (10 August 2023).
[14] United States' communication (10 August 2023).
[15] United States' communication (11 August 2023).
[16] Working Procedures of the Panel (Annex A-1).
[17] Additional Working Procedures of the Panel concerning BCI (Annex A-2).
[18] Panel communication to the parties (14 August 2023). The Panel further informed the parties that it was available to meet with the parties on 23 August 2023 to further discuss the parties' proposals with respect to organizational aspects of this proceeding. Neither party requested a meeting.
[19] The timetable was updated and revised on 8 November 2023 and 1 December 2023. In addition, the Panel revised its timetable on 21 December 2023 following a request by the United States to extend the deadline for parties to request review of precise aspects of the interim report and to request an interim review meeting.

broadcast to a separate viewing room in the WTO. The third-party session was also opened to the public by means of a live closed-circuit television broadcast.[20]

1.13. On 12 December 2023, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 21 December 2023. The Panel issued its Final Report to the parties on 8 February 2024.

2 FACTUAL ASPECTS

2.1. The European Union challenges the measures taken by the United States to comply with the DSB's recommendations and rulings in the original proceeding. In its panel request, the European Union refers to the following measures:

a. the final determination of the United States Department of Commerce (USDOC) of 20 December 2022 under Section 129 of the Uruguay Round Agreements Act (URAA), regarding the countervailing duty investigation of ripe olives from Spain (final Section 129 determination)[21];

b. the USDOC's notice of implementation of 13 January 2023[22];

c. the preliminary determination memorandum of the USDOC of 23 September 2022 (preliminary Section 129 determination)[23];

d. Section 771B, insofar as the inconsistency with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement has not been removed[24]; and

e. the countervailing duty order issued on 1 August 2018 by the USDOC and applicable as from the same date, insofar as the final Section 129 determination effectively amends and maintains it in force and effect, at least with regard to the parts pertaining to the findings of the panel report concerning the incompatibility as such and as applied with the WTO agreements in relation to Section 771B.[25]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The European Union requests the Panel to find that the USDOC's final Section 129 determination concerning pass-through of benefit and the definitive countervailing duty order that remains in effect are inconsistent with the United States' obligations under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.[26]

3.2. The European Union therefore requests the Panel to find that the United States' measures taken to comply are inconsistent with the rulings and recommendations of the DSB. The European Union further requests the Panel to recommend that the United States bring its measures

[20] After consultations with the parties, the Panel adopted its Additional Working Procedures concerning holding an open meeting on 20 September 2023 (Additional Working Procedures for the Panel: Open Meeting (Annex A-3)). Canada, Japan, and the Russian Federation made statements at the third-party session.

[21] European Union's panel request, p. 1. See also Final Section 129 determination (Exhibit EU-2).

[22] European Union's panel request, p. 1 and fn 4 (noting "[t]he notice of the completed implementation was published in the U.S. Federal Register on 19 January, 2023, and can be found at 88 Fed. Reg. 3384 https://www.federalregister.gov/documents/2023/01/19/2023-00930/ripe-olives-from-spain-implementation-of-determination-under-section-129-of-the-uruguay-round"). See also Notice of implementation of Section 129 determination (Exhibit EU-4).

[23] European Union's panel request, p. 2 and fn 5. See also Preliminary Section 129 determination (Exhibit EU-1).

[24] European Union's panel request, p. 2. See also Section 771B (Exhibit EU-5).

[25] European Union's panel request, p. 2 and fn 7 (referring to "Ripe Olives from Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 FR 37469, 1 August 2018"; "Ripe Olives from Spain: Antidumping Duty Order, 83 FR 37467, 1 August 2018"; "Ripe Olives from Spain: Final Affirmative Countervailing Duty Determination, C-469-818, DOC, 11 June 2018, published in 83 FR 28186, 18 June 2018"; "Ripe Olives from Spain: Final Affirmative Determination of Sales at Less Than Fair Value, A-469-817, DOC, 11 June 2018, published in 83 FR 28193, 18 June 2018"; and "Ripe Olives from Spain, Investigation Nos 701-TA-582 and 731-TA-1377 (Final), US ITC, July 2018").

[26] European Union's first written submission, para. 78; second written submission, para. 40.

into conformity with its obligations under the GATT 1994 and the SCM Agreement, including by revoking its determination and ceasing to impose countervailing duties.[27]

3.3. The United States requests that the Panel find that the United States' measures taken to comply are not inconsistent with the SCM Agreement or the GATT 1994, and the United States further requests that the Panel reject the European Union's claims to the contrary.[28]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, Japan and the Russian Federation are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, and C-4). China, India, Switzerland and Türkiye did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 21 December 2023, the Panel issued its Interim Report to the parties. On 18 January 2024, the United States submitted a written request for the Panel to review aspects of the Interim Report. The European Union did not make any request to review the Interim Report. On 30 January 2024, the European Union submitted comments on the United States' request for review.

6.2. The United States' request to review particular aspects of the Interim Report, the European Union's comments made at the interim review stage, as well as the Panel's discussion and disposition of the United States' request, are set out in Annex A-4.

7 FINDINGS

7.1 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered Agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.[29]

7.1.2 Standard of review

7.2. This dispute concerns claims raised by the European Union under the GATT 1994 and the SCM Agreement. Article 11 of the DSU sets out a general standard of review for panels, providing, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered Agreements.

7.3. Article 11 of the DSU thus establishes the standard of review this Panel must apply with respect to both the factual and the legal aspects of the present dispute. A panel in an Article 21.5 proceeding is required to evaluate whether the measures found to be inconsistent with the WTO Agreement have been brought into conformity. The Panel conducts its analysis of the claims in light of the

[27] European Union's first written submission, para. 78; second written submission, para. 40.
[28] United States' first written submission, paras. 94-95; second written submission, paras. 35-36.
[29] Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 104.

findings of the original panel in this dispute.[30] As concerns actions taken by an investigating authority to bring a Member into compliance, the obligation to conduct an "objective assessment" has been found to require panels to evaluate whether the competent authorities provided a "reasoned and adequate explanation" as to (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.[31] Panels and the Appellate Body have understood this standard to mean that a panel may not undertake a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the investigation and must consider all such evidence submitted by the parties to the dispute.[32] At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[33] We agree with these interpretations regarding the standard of review for panels in matters such as this.

7.1.3 Burden of proof

7.4. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[34] Therefore, the European Union bears the burden of demonstrating that the United States' alleged implementation of the DSB's recommendations and rulings has not achieved compliance with the applicable provisions of the GATT 1994 and the SCM Agreement. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, without effective refutation by the defending party, requires a panel as a matter of law to rule in favour of the complaining party.[35] Each party asserting a fact should provide proof thereof.[36]

7.2 The European Union's claims in relation to Section 771B of the Tariff Act of 1930 and its application in the ripe olives from Spain countervailing duty investigation

7.2.1 Introduction

7.5. The European Union challenges the United States' implementation of the DSB's adopted recommendations and rulings in relation to the USDOC's method of determining the existence and extent of indirect subsidization – i.e. "pass-through" of benefit – under Section 771B. In the original proceeding, the panel found that Section 771B was "as such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. The panel further found that the application of Section 771B in the countervailing duty investigation of ripe olives from Spain was also inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.[37]

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[30] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 109 (stating that "a panel acting pursuant to Article 21.5 of the DSU would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceedings under Article 21.5 closely resemble the claims made in the initial proceedings").

[31] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.

[32] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188. See also Panel Reports, *US – Softwood Lumber VII*, para. 7.5; *US – Pipes and Tubes (Turkey)*, para. 7.4; *US – Coated Paper (Indonesia)*, para. 7.7; *US – Washing Machines*, para. 7.5; *China – Autos (US)*, para. 7.5; *China – Broiler Products*, para. 7.5; and *China – GOES*, para. 7.4.

[33] Appellate Body Reports, *US – Softwood Lumber VI (Article 21*.5 – *Canada)*, para. 93; *US – Lamb*, paras. 106-107. See also Panel Reports, *US – Softwood Lumber VII*, para. 7.4; *US – Pipes and Tubes (Turkey)*, para. 7.4; *US – Coated Paper (Indonesia)*, para. 7.7; *US – Washing Machines*, para. 7.5; *China – Autos (US)*, para. 7.5; *China – Broiler Products*, para. 7.5; and *China – GOES*, para. 7.4.

[34] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, p. 337.

[35] Appellate Body Report, *EC – Hormones*, para. 104.

[36] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, p. 335.

[37] The European Union has not presented claims in this compliance proceeding concerning findings in the original proceeding in relation to the USDOC's determination of specificity with respect to the BPS programme or the manner in which the USDOC calculated the final subsidy margin for investigated Spanish ripe olive processor, Aceitunas Guadalquivir, S.L.U. which was subsequently used to calculate the "all-others" rate. See, e.g. Panel Report, *US – Ripe Olives from Spain*, paras. 8.1(a)(v), 8.1(a)(vi), 8.1(d)(i), 8.1(d)(ii), 8.1(d)(iv), and 8.1(d)(v). These aspects were also addressed by the USDOC as part of the administrative proceedings and revised determination undertaken by the USDOC following the adoption of the panel report from the original proceeding.

7.6. On 5 July 2022, following the adoption of the panel report from the original proceeding, the United States Trade Representative requested that the USDOC issue determinations as necessary to "render the determinations in the [ripe olives from Spain countervailing duty] proceeding not inconsistent with the DSB recommendations and rulings".[38] The USDOC accordingly initiated administrative proceedings under Section 129 of the URAA, and on 20 December 2022, the USDOC issued a final determination in those proceedings.[39]

7.7. In this compliance proceeding, the European Union argues that the USDOC did "nothing" in the Section 129 proceeding to address findings of the original panel that Section 771B is inconsistent both "as such" and "as applied" with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. The European Union emphasizes that Section 771B remains in place, unamended.[40] In addition, despite assertions by the United States that it has "re-evaluated the meaning of certain ambiguous provisions of Section 771B"[41], which the United States says was for the purpose of interpreting and applying Section 771B in a WTO-consistent manner, the European Union rejects that any such re-evaluation or re-interpretation can achieve compliance. To the contrary, the European Union maintains that the USDOC through its alleged re-evaluation "explicitly disagrees with" the findings from the original proceeding concerning Section 771B and thereby "openly disregards the DSB findings and recommendations".[42] The European Union contends that the United States must accept those adopted recommendations and rulings as final and is not permitted to re-argue its case as concerns the interpretation of Section 771B. Finally, despite assertions by the USDOC that it is able to exercise its discretion to apply Section 771B in a manner consistent with the panel's findings in the original proceeding, the European Union contends that this is not the case. The European Union argues that the USDOC has done nothing more than apply Section 771B in the Section 129 proceeding in the same manner as it was applied in the original ripe olives investigation. Specifically, the European Union submits that the USDOC again relied solely on the two conditions listed in Section 771B as the basis to determine that subsidies provided to *raw olive growers* in Spain passed through *in full* to investigated *ripe olive processors*. Accordingly, the European Union argues that the United States is wrong in asserting that the USDOC carried out its pass-through analysis in the ripe olives Section 129 proceeding consistently with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.[43]

7.8. The United States maintains that it carefully reviewed the DSB recommendations and rulings from the original proceeding, undertook a domestic implementation process that was fully transparent and consistent with domestic and WTO procedural rules, and took appropriate steps to bring its measures into compliance with the recommendations adopted by the DSB in this dispute.[44]

7.9. To address the "as such" findings from the original proceeding, the United States asserts that the USDOC "re-evaluated the meaning" of certain ambiguous terms in Section 771B[45], finding that those terms could be interpreted in a way that is not inconsistent with the adopted panel findings. More specifically, the United States maintains that the USDOC determined that, as a matter of US law, the USDOC has the discretion to consider all case-specific and relevant information on the record of the proceeding when making its determination of whether, and to what extent, it should attribute subsidies granted to an upstream raw agricultural product to the downstream processed agricultural product. Thus, the United States argues that the USDOC was able to re-interpret the statute to render it not "as such" inconsistent with applicable WTO rules.[46]

7.10. Turning to the original panel's "as applied" findings, the United States asserts that the USDOC employed its new interpretation of Section 771B when applying that provision to the facts of the ripe olives investigation in the Section 129 proceeding. In doing so, the United States contends that the USDOC provided a detailed and reasoned attribution analysis in this Section 129 proceeding that is

[38] Preliminary Section 129 determination (Exhibit EU-1), p. 3.
[39] Final Section 129 Determination (Exhibit EU-2). As explained therein at page 2, the final Section 129 determination adopts and incorporates by reference findings reached in the preliminary Section 129 determination issued on 23 September 2022. (Preliminary Section 129 Determination (Exhibit EU-1)).
[40] European Union's first written submission, para. 3; second written submission, para. 2
[41] United States' first written submission, para. 5.
[42] European Union's first written submission, para. 3; second written submission, para. 6.
[43] European Union's second written submission, para. 2.
[44] United States' first written submission, para. 1.
[45] United States' first written submission, para. 5.
[46] United States' first written submission, paras. 5-6.

not inconsistent with its WTO obligations, thereby properly addressing the "as applied" findings of the panel.[47]

7.2.2 The Panel's task in this compliance proceeding and the nature of the actions taken by the United States to achieve compliance with DSB recommendations and rulings

7.11. The task of a panel in a WTO compliance proceeding is described in Article 21.5 of the DSU which provides, in relevant part:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB] such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it.

7.12. As prescribed in this text, Article 21.5 establishes an expedited process for determining whether a Member has properly implemented the recommendations and rulings of the DSB in a given dispute.[48] The mandate of a panel established under Article 21.5 is to examine "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. In this compliance dispute, the United States' "measures taken to comply" are the USDOC's revised analysis and application of Section 771B, as reflected in the preliminary and final Section 129 determinations challenged by the European Union.[49] Our task entails reviewing whether the USDOC's actions, as reflected in the identified Section 129 determinations, have implemented the relevant aspects of the recommendations and rulings of the DSB.

7.13. Before turning to the merits of the European Union's non-compliance claims with respect to the *substance* of the USDOC's revised analysis, we first address the European Union's submission that the USDOC's alleged re-evaluation and consequent "revised understanding of Section 771B"[50] in the ripe olives Section 129 proceeding, "by its very nature", cannot bring the United States into compliance with the adopted recommendations and rulings of the DSB.[51]

7.14. The European Union maintains that the adopted findings of the original panel were that Section 771B *requires* the USDOC to act in a WTO-inconsistent manner. The European Union argues that because these findings are final, the United States' compliance measure must remedy the "as such" and "as applied" inconsistencies identified by the original panel in its adopted report. In this light, the European Union argues that there is no basis for the United States to assert compliance through the USDOC's decision to "revisit" its understanding of the meaning of Section 771B. The European Union argues that this is because, according to the findings of the adopted panel report, there exists no possible interpretation of Section 771B that could allow the USDOC to act consistently with its relevant WTO obligations, and thus any revised interpretation of Section 771B suggesting that it may now be applied in a WTO-consistent manner is inapposite for achieving compliance with the adopted recommendations and rulings.[52]

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[47] United States' first written submission, para. 7.

[48] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 98; and Panel Reports, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.74; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 7.135.

[49] In its panel request, the European Union identifies the measures at issue to be the USDOC's preliminary and final determinations in the Section 129 proceeding initiated by the United States to address the DSB's adopted recommendations and rulings from the original proceeding, as well as the unamended text of Section 771B. (European Union's panel request, pp. 1-2). In its submissions, the United States similarly refers to USDOC's revised analysis and application of Section 771B in the Section 129 determination as constituting the measures taken to comply. See, e.g. United States' first written submission, paras. 5, 10, and 49 ("[t]he USDOC's revised analysis and reasoned application of Section 771B in the Section 129 determinations constitutes measures taken to comply").

[50] United States' first written submission, para. 50.

[51] European Union's second written submission, para. 14.

[52] European Union's first written submission, para. 51; second written submission, paras. 9-10; and response to Panel question No. 1, para. 12. The European Union further argues that the Panel is not itself permitted to revisit "as such" findings of violation from the original proceeding that have been adopted by the DSB. (European Union's first written submission, paras. 52-54; second written submission, paras. 1 and 6-7 (referring to Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.301)).

7.15. The European Union argues that the nature of a finding that a law is "as such" inconsistent with a Member's WTO obligations provides important guidance for how that Member would need to proceed to bring itself into conformity. Thus, the European Union maintains that in cases in which the text of a law is found to require WTO-inconsistent conduct, an amendment to or repeal of the offending legal provision would normally be expected.[53] Nevertheless, irrespective of the precise manner in which compliance is achieved, the European Union submits that a Member must modify the legislative authority of that measure in respect of the inconsistency at issue.[54] In the European Union's view, such a change would need to ensure that the offending legal provision is interpreted in a WTO-consistent manner on a prospective basis. In this respect, the European Union contends that the USDOC's alleged "re-interpretation", "re-evaluation" or "re-examination" of Section 771B may "at best" be considered as a one-time interpretation relevant for complying in respect of the original panel's "*as applied*" findings. Whatever relevance the USDOC's revised understanding of Section 771B may have concerning the original proceeding, the European Union maintains that it cannot be understood to constitute a commitment to apply Section 771B in a WTO-consistent manner.[55]

7.16. We note that the DSU neither defines nor specifies the form that a "measure taken to comply" must take.[56] On its face, the DSU does not explicitly preclude the possibility that a Member may seek to achieve "compliance" for the purpose of Article 21 of the DSU by "re-interpreting", "re-evaluating" and "re-examining", a domestic law found to be "as such" inconsistent with its WTO obligations. In our view, it follows from the focus and subject matter of Article 21 that a "measure taken to comply", regardless of its form, must achieve substantive compliance. Thus, in the case of an alleged compliance action taking the form of a "re-interpretation", "re-evaluation" or "re-examination" of a domestic law previously found to be "as such" inconsistent with a Member's WTO obligations, such action must be shown to render the domestic law no longer "as such" inconsistent with the relevant WTO rules. Accordingly, we are not convinced by the European Union's submission that the USDOC's "revised understanding of Section 771B" could not even potentially constitute a "measure taken to comply" for the purpose of Article 21.5 of the DSU.[57]

7.17. Likewise, we are not persuaded by the European Union's contention that the USDOC's revised analysis and determinations concerning the applicability of Section 771B must be understood to constitute an attempt to "revisit" or re-litigate issues that were fully resolved in the original proceeding. Recalling that Article 21.5 of the DSU does not define what may constitute a "measure taken to comply", we do not see a legal basis to automatically equate a Member's "re-interpretation", "re-evaluation" or "re-examination" of an offending legal provision for the purpose of showing compliance to "revisiting", in the sense of re-litigating, the findings of the original panel. Indeed, such actions may simply reflect a Member's genuine attempt to comply with the findings of the original panel, which will likewise inform a compliance panel's examination of the "measure taken to comply".

7.18. The European Union also argues that the USDOC's "revised understanding" of Section 771B does not address the basis for the "as such" inconsistency identified in the original panel's findings. Moreover, regardless of whether the USDOC's actions addressed the findings from the original proceeding in any relevant way, the European Union argues that the USDOC's determination in the ripe olives Section 129 proceeding cannot achieve compliance because the USDOC's Section 129 determination does not have binding legal effect for the future and may also be subject to judicial review.[58] While the European Union accepts that a formal commitment to act in a WTO-consistent manner going forward could serve to achieve compliance, the European Union maintains that the ripe olives Section 129 determination contains no evidence of such a formal commitment to "address future applications of Section 771B".[59]

7.19. The United States maintains that, as with other determinations made by the USDOC, prior Section 129 determinations are relevant and instructive for how the USDOC will evaluate and apply an applicable law in future proceedings. Furthermore, the United States submits that consistency is

[53] European Union's second written submission, para. 19.
[54] European Union's second written submission, para. 19.
[55] European Union's second written submission, paras. 18-19.
[56] European Union's first written submission, para. 56. See also Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, paras. 6.23-6.24.
[57] European Union's first written submission, para. 63; second written submission, paras. 3, 15, and 20.
[58] European Union's response to Panel question No. 1, paras. 18-20 and 39.
[59] European Union's second written submission, para. 20.

a fundamental principle that the USDOC follows, for purposes of the fair administration of the law, when interpreting statutes and regulations. According to the United States, the USDOC would not depart from prior interpretations or determinations absent a reasonable justification.[60] Thus, the United States maintains that the ripe olives Section 129 determinations "give effect to the revised interpretation of Section 771B and the scope of future assessments under the statute".[61]

7.20. The United States acknowledges that Section 129 determinations may be subject to review in US domestic court proceedings and reversed by a final decision of a US court. However, the United States emphasizes that an agency's interpretation of a statute, such as one undertaken by the USDOC, would be recognized as the governing interpretation unless a final and binding judicial decision finds that interpretation unreasonable or contrary to the plain text of the statute.[62]

7.21. Our task in this compliance proceeding is to assess whether the United States has brought Section 771B and its application in the ripe olives Section 129 proceeding into conformity with its WTO obligations.[63] The United States' compliance actions were the USDOC's "re-interpretation", "re-evaluation" and "re-examination" of Section 771B and its reliance on that "re-interpretation", "re-evaluation" and "re-examination" when applying Section 771B in the ripe olives Section 129 proceeding. In the end result, for reasons explained below, the Panel has concluded that those actions do not achieve the intended result of compliance. This is because the USDOC's actions do not evidence the revised understanding of Section 771B, which interpretation the United States maintains has been adopted. Consequently, they fail to properly respond to the adopted recommendations and rulings of the DSB. We take note of the United States' explanations of the normative value of an agency's interpretation of United States law and of the status of Section 129 determinations under its domestic legal system, but we do not see the normative value claimed by the United States to be demonstrated in that determination.

7.2.3 Analysis of the United States' implementation measures in relation to findings in the original proceeding

7.22. In this section, we evaluate the European Union's claim that the United States' implementation measures fail to address the original panel's findings that Section 771B is "as such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, and its claim that the application of Section 771B in the Section 129 proceeding also violates those same provisions. We first describe the relevant original panel findings. Thereafter, we review the relevant aspects of the USDOC's analysis and determinations concerning the applicability of Section 771B in the ripe olives Section 129 proceeding. Then we evaluate the merits of the European Union's remaining arguments in support of its claims of non-compliance.

7.2.3.1 Findings in the original proceeding in relation to Section 771B of the Tariff Act of 1930 and its application in the ripe olives countervailing duty investigation

7.23. In the original proceeding, the European Union challenged the USDOC's determination in the Spanish ripe olives countervailing duty investigation that the benefit arising from subsidies granted to *raw olive growers* in Spain could be attributed to the three investigated Spanish *ripe olive producers*.[64] The USDOC attributed the benefit of such subsidies over relevant arm's length transactions between upstream raw olive growers and downstream ripe olive producers, in the full

[60] United States' response to Panel question No. 2, paras. 3 and 8.

[61] United States' response to Panel question No. 2, para. 3.

[62] In support of its position, the United States refers to prior decisions by the United States Supreme Court, setting out that an agency interpretation of a statute is the governing interpretation unless a final and binding judicial decision finds that interpretation unreasonable or contrary to the plain text of the statute. (United States' response to Panel question No. 25, fns 37-38 (referring to *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (Exhibit USA-8) and *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (Exhibit USA-10))).

[63] This ties with the objective to achieve a satisfactory settlement of the matter in accordance with the rights and obligations under the DSU and the covered agreements, as provided in Article 3.4 of the DSU.

[64] The USDOC published its final determination in the investigation of ripe olives from Spain on 18 June 2018, and published an amended final determination and countervailing duty order on 1 August 2018, following the correction of certain ministerial errors. (Panel Report, *US – Ripe Olives from Spain*, para. 2.1). For further explanation, see also Panel Report, *US – Ripe Olives from Spain*, para. 7.174; Preliminary Section 129 Determination (Exhibit EU-1), p. 2.

amount of the subsidy attributable to the olives grown by the growers, based on the USDOC's application of Section 771B.

7.24. Section 771B applies in the United States' countervailing duty investigations involving an agricultural product processed from a raw agricultural product when the requirements of the statute are satisfied. It provides as follows:

> In the case of an agricultural product processed from a raw agricultural product in which –
>
> > (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and
> >
> > (2) the processing operation adds only limited value to the raw commodity,
>
> countervailable subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.[65]

7.25. The original panel report found 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 because:

> Section 771B … *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.[66]

7.26. The original panel additionally found the USDOC's application of Section 771B 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", explaining that the inconsistency "follows from the operation of the law itself".[67] The original panel based its finding on the fact that the USDOC made its determination of pass-through for the investigated ripe olive producers based on the two factual circumstances set out in Section 771B without considering any other potentially relevant information related to the market or the competitive conditions affecting the investigated product.[68]

7.27. The original panel based its findings on the understanding that both Article VI:3 of the GATT 1994 and Article 10 (and footnote 36) of the SCM Agreement entitle Members to offset indirect subsidization by imposing duties on imported products that benefit from subsidies conferred on upstream companies and products. The original panel agreed with past panels and the Appellate Body that Members are not entitled to simply presume that a subsidy bestowed on an input product passes through from an input product to the downstream product. Instead, the original panel explained that an investigating authority must strive to work out, as accurately as possible, how much of the subsidy has flowed indirectly from an input product to the downstream product. This is to ensure that findings of the existence and extent of pass-through take into account all relevant facts and circumstances for the purpose of ensuring that a countervailing duty is not imposed in excess of the estimated subsidy.[69]

7.28. The original panel also recognized that neither Article VI:3 of the GATT 1994 nor Article 10 of the SCM Agreement prescribe that a particular methodology must be followed to perform a pass-through analysis where one is required. Members have discretion in determining whether and to what extent the benefit of a subsidy provided directly to a producer of an upstream product has

[65] Section 771B (Exhibit EU-5).
[66] Panel Report, *US – Ripe Olives from Spain*, para. 7.170 (emphasis original). See also ibid. para. 8.1.b.i.
[67] Panel Report, *US – Ripe Olives from Spain*, paras. 7.170 and 7.175-7.176.
[68] Panel Report, *US – Ripe Olives from Spain*, paras. 7.175-7.176.
[69] Panel Report, *US – Ripe Olives from Spain*, para. 7.150.

passed-through to the downstream product.[70] The original panel emphasized that the discretion afforded to an investigating authority is not unfettered, recalling the need for an investigating authority to analyse to what extent direct subsidies on inputs may have indirectly flowed to the investigated processed product. In light of this, the original panel explained that:

> [A]n investigating authority must provide an *analytical basis* for its findings of the existence and extent of pass-through that takes into account *facts and circumstances* that are *relevant* to the exercise and that are directed to ensuring that any countervailing duty imposed on the downstream product is not in excess of the total amount of subsidies bestowed on the investigated product.[71]

7.29. Thus, the original panel did not understand an investigating authority's discretion in arriving at a determination of pass-through of subsidies under Article VI:3 to be so wide as to permit it to exclude any consideration of facts and circumstances that may be relevant to the very analysis that it must perform.[72]

7.30. For the purpose of a determination of pass-through, the original panel found that Section 771B does not leave open the possibility for the USDOC to consider factors that may be affecting the market for the investigated product beyond those factual circumstances listed in Section 771B. The original panel held the view that other factors could be relevant to an analysis of pass-through including, potentially, the degree to which raw input sellers face pricing pressure, the market power of different producers and processors, and the extent to which national or international competition could affect the reliability of input product pricing.[73]

7.31. In the original panel proceedings, the United States argued that markets for raw agricultural commodities are systematically characterized by "perfect competition". The United States had asserted that producers of these products are unable to charge a price higher than that of all other producers (whether subsidized or not). In these circumstances, the United States contended that market prices could not be used to assess whether the benefit of a subsidy granted to the upstream raw product has passed-through. Therefore, the United States argued that, because a raw agricultural commodity is often devoted completely to the production of a processed product and a product processed from a raw agricultural commodity is often produced substantially from the raw product, a subsidy that affects the production of the raw product necessarily affects trade in the product *whenever these two circumstances exist*.[74] The original panel did not agree with the view that markets for raw agricultural products falling within the scope of Section 771B will "systematically" be perfectly competitive.[75]

7.32. The original panel also found that the language in Section 771B requires the USDOC to determine that the countervailable subsidies provided to a raw agricultural input pass through to the downstream processed product if the two factual circumstances are determined to exist:

> We furthermore note that Section 771B directs the USDOC to simply "deem" countervailable subsidies found to have been provided to upstream producers of the raw agricultural product to have passed-through to the downstream processed product. We understand this to mean that there is no possibility for the USDOC to attribute to the downstream processed product anything less than the full amount of the subsidies provided to upstream producers of the raw agricultural product. We do not see how an evaluation of the two factual circumstances in Section 771B *alone* would provide a basis to calculate with any precision the degree or the extent of pass-through. Thus, not only does Section 771B require the USDOC to *presume* the existence of pass-through when the two designated factual circumstances are present, it also effectively requires the USDOC to treat the *full* amount of any countervailable subsidy provided to a raw agricultural input as if it had passed-through to the investigated processed product.[76]

[70] Panel Report, *US – Ripe Olives from Spain*, para. 7.151.
[71] Panel Report, *US – Ripe Olives from Spain*, para. 7.154. (emphasis original; fn omitted)
[72] Panel Report, *US – Ripe Olives from Spain*, para. 7.154.
[73] Panel Report, *US – Ripe Olives from Spain*, para. 7.167.
[74] Panel Report, *US – Ripe Olives from Spain*, para. 7.163.
[75] Panel Report, *US – Ripe Olives from Spain*, para. 7.166.
[76] Panel Report, *US – Ripe Olives from Spain*, para. 7.168. (emphasis original; fns omitted)

7.33. In the original proceeding, the United States did not argue that Section 771B leaves the USDOC with any discretion to attribute less than the full amount of subsidies found to have been provided to upstream producers.[77]

7.2.3.2 The USDOC's revised analysis and application of Section 771B in the ripe olives Section 129 proceeding

7.34. On 5 July 2022, the United States Trade Representative requested that the USDOC initiate Section 129 proceedings to revise aspects of the countervailing duty determination in the ripe olives from Spain investigation that were found to be WTO-inconsistent in the original proceeding.[78] With respect to the European Union's claims, the USDOC revised its analysis and determination pertaining to the calculation of subsidies provided to investigated ripe olive processors under Section 771B. The revised aspects of the USDOC's analysis and determinations concerning the applicability of Section 771B are contained in the USDOC's preliminary and final determinations in the Section 129 proceeding.[79]

7.35. At the outset of its analysis in the preliminary Section 129 determination, the USDOC acknowledged that Section 771B "remains U.S. law".[80] The USDOC explained that it "must continue to evaluate its applicability in the ripe olives from Spain proceeding, and continue to apply it, if the circumstances in this case so warrant".[81] The USDOC concluded that Section 771B continues to apply in the circumstances.[82]

7.36. In its consideration of Section 771B, the USDOC undertook a "statutory interpretation" of the terms "raw agricultural product", "prior stage product", and "latter stage product". It did so for the purposes of its analysis of whether the demand for the prior stage product in the ripe olives investigation is substantially dependent on the demand for the latter stage product.[83] The USDOC explained that, as the Tariff Act of 1930 does not define the terms "raw agricultural product", "prior stage product" and "latter stage product" as those terms are used in Section 771B, it could interpret the terms "raw agricultural product" and "prior stage product" so as to define them in the ripe olives investigation as "table and dual-use raw olive varietals that are biologically distinct from other raw olive varietals"; and could consider the "latter stage product" to be " table olives… the next-stage olive product inclusive of ripe olives".[84]

7.37. The USDOC then reviewed a series of record facts to evaluate the extent to which different raw olive varietals should be included in its analysis as the "prior stage product", determining that 55.28% of the identified varietals were processed into the latter stage product, table olives. This formed the basis for it to uphold its finding of substantial dependence, made pursuant to Section 771B(1).[85] The USDOC also reaffirmed its finding that olive processing adds only 3% in value to the raw product, thus upholding its finding made pursuant to Section 771B(2) that olive processing adds only limited value.[86]

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[77] Panel Report, *US – Ripe Olives from Spain*, fn 327.

[78] Status report regarding implementation of the DSB recommendations and rulings by the United States, WT/DS577/13.

[79] Preliminary Section 129 determination (Exhibit EU-1) pp. 10-19; Final Section 129 determination (Exhibit EU-2), pp. 9-29.

[80] Preliminary Section 129 determination (Exhibit EU-1), p. 11.

[81] Preliminary Section 129 determination (Exhibit EU-1), p. 11.

[82] Preliminary Section 129 determination (Exhibit EU-1), p. 11.

[83] The USDOC found that the demand for distinct biological varietals of raw olives (the prior stage product) is substantially dependent on the demand for table olives (the latter stage product). (Preliminary Section 129 determination (Exhibit EU-1), p. 11).

[84] Preliminary Section 129 determination (Exhibit EU-1), p. 12. The USDOC noted that the Tariff Act of 1930 defines "raw agricultural product" as "any farm or fishery product" for purposes of identifying the relevant industry for the domestic like product and that the USDOC through practice adopted a similar definition of the term. The USDOC noted that there is no statutory definition for "latter stage product". (Preliminary Section 129 determination (Exhibit EU-1), pp. 11-12 (referring to Section 771(4)(E)(iv) of the Tariff Act of 1930 (emphasis omitted))).

[85] Preliminary Section 129 determination (Exhibit EU-1), pp. 10-16. In the original countervailing duty determination, the "substantial dependence" finding had been based on the fact that the olives identified by the USDOC as being processed into the latter stage product constituted 8% of the prior stage product.

[86] Preliminary Section 129 determination (Exhibit EU-1), p. 16.

7.38. In addition to the revision of its analysis of substantial dependence under Section 771B(1), the USDOC also included a section in its Section 771B analysis entitled "Additional Considerations". In this section, it explained that it "wishe[d] to further clarify the evaluation it conducts pursuant [*sic*] Section 771B" as part of its analysis in the Section 129 determination.[87] In this regard, the USDOC disagreed with the original panel's findings, which it characterized to be that the term "shall" in Section 771B precludes the USDOC from "consider[ing]" factors other than those expressly identified in Section 771B. The USDOC explained:

> Although the Panel concluded that the word "shall" in [Section 771B] ("shall be deemed to be provided …") does not leave open the possibility for [the USDOC] to consider factors other than [the two factors in Section 771B, the USDOC]'s analysis is not so limited. [The USDOC] must evaluate all the available record evidence in making its determinations and, thus, considers all potentially relevant data and information that is on the record. Thus, if the record of a proceeding indicates that [the USDOC] should consider additional, relevant, [*sic*] considerations as part of its [S]ection 771B analysis, then consistent with our duty to evaluate all of the record information, [the USDOC] will do so.[88]

7.39. The USDOC then explained that it "considered many other factors in its analysis" in the Section 129 proceeding, "including determining the extent to which different olive varietals should be included in its [Section] 771B analysis". For the USDOC, this analysis demonstrated that "[the USDOC] did, in fact, take into account other considerations in addition to the two factors specifically enumerated in Section 771B".[89]

7.40. The USDOC went on to address the original panel's findings in relation to the requirement that countervailable subsidies provided to producers or processors of the raw agricultural product "shall be deemed" to be provided with respect to the manufacture, production, or exportation of the processed production. Contrary to the original panel's findings, the USDOC found that Section 771B leaves the USDOC with flexibility to attribute less than the full amount of subsidies. The USDOC explained its considerations on this issue as follows:

> Although the Panel found that the word "deemed" in [S]ection 771B leaves no possibility for [the USDOC] to attribute anything less than the full amount of subsidies provided to upstream producers of the raw agricultural product, the statute does not define "deemed" as it is used in this context, nor does it expressly prescribe the manner in which [the USDOC] is to effectuate this determination. Therefore, Congress conferred broad discretion upon [the USDOC] in making this determination. Given this broad discretion, [the USDOC] may consider case-specific facts and determine the appropriate manner to attribute the subsidies to the manufacture, production, or exportation of the processed product, including whether less than the full amount of subsidies should be attributed (i.e., found to provide a benefit) to the manufacture, production, or exportation of the processed product.[90]

7.41. The USDOC concluded this part of its preliminary determination by explaining that "[t]he flexibility and discretion conferred by Congress is exemplified in [the USDOC's] benefit calculation methodology for grower subsidies in this very proceeding".[91] That methodology led the USDOC to attribute: (a) the entire amount of the basic payment scheme (BPS) subsidies to upstream raw olive growers, in cases where the subsidy recipient grows only olives; and (b) less than 100% of BPS subsidy payments to upstream raw olive growers, in cases where an investigated grower received subsidies for "a combination of crops", not just olives.[92] According to the USDOC, this methodology

[87] Preliminary Section 129 determination (Exhibit EU-1), p. 17.

[88] Preliminary Section 129 determination (Exhibit EU-1), p. 17. See also Final Section 129 determination (Exhibit EU-2), pp. 19-20 and 22-23.

[89] Preliminary Section 129 determination (Exhibit EU-1), p. 17; Final Section 129 determination (Exhibit EU-2), p. 20.

[90] Preliminary Section 129 determination (Exhibit EU-1), pp. 17-18 (fn omitted). See also Final Section 129 determination (Exhibit EU-2), pp. 20-21.

[91] Preliminary Section 129 determination (Exhibit EU-1), p. 18.

[92] To do this, the USDOC calculated the ratio of raw olive sales to total sales (of raw olives and other products) and applied this to the BPS grant amount by multiplying the grant amount with the percentage of olive sales. This *direct* benefit determined for raw olives was then expressed as a weighted average benefit per kilogram, and attributed to ripe olive processors. (Preliminary Section 129 determination (Exhibit EU-1), p. 19. See also Final Section 129 determination (Exhibit EU-2), p. 21).

reveals that "*less than 100 percent of the BPS subsidy payment amount is used* when determining the benefit to the respondent"[93], and thus demonstrates that the USDOC "exercised [its] discretion under [Section 771B] in 'deeming' countervailable subsidizes [*sic*] provided to producers or processors of the raw agricultural product to be provided with respect to the manufacture, production, or exportation of the processed product".[94]

7.42. Following the issuance of the preliminary determination, interested parties in the investigation commented that legislative changes to Section 771B would be required to implement the original panel's findings. In response, the USDOC commented that there is no prescribed methodology in Section 129 for how the USDOC may reach a determination that is not inconsistent with the adopted recommendations and rulings of the DSB. The USDOC considered the interested parties' comments and rejected their arguments, including the comment that a statutory change was required for the USDOC to be able to consider all relevant information, notwithstanding the provisions of Section 771B. The USDOC reiterated in its final determination "that consistent implementation is permissible under the terms of [S]ection 771B"[95], because Section 771B may reasonably be interpreted as allowing the USDOC to consider all case-specific and relevant record information in its analysis and to determine whether less than the full amount of subsidies should be attributed.[96]

7.2.3.3 Whether the United States' implementation measures address the "as such" inconsistency of Section 771B

7.43. The European Union argues that the United States made no relevant change with respect to Section 771B in the ripe olives Section 129 determination to achieve compliance with the DSB's adopted recommendations and rulings. According to the European Union, the United States' stated actions were limited to re-evaluating the meaning of the term "prior stage product" and making a revised factual determination in relation to the first factor in Section 771B in the context of the ripe olives proceedings, and otherwise excluding crops other than raw olives from the assessment of benefit received by upstream olive growers. The European Union argues that these steps are irrelevant for demonstrating compliance with the "as such" findings from the original proceeding.[97]

7.44. The United States disagrees with the European Union's assertion that the United States made no relevant change with respect to Section 771B and argues that the USDOC's revised interpretation is the measure taken to comply and constitutes a change in US law.[98] The United States argues that the key finding of the original panel was that the text of Section 771B precluded the consideration of factors that may be relevant to the assessment of pass-through, other than the two factors specifically enumerated in Section 771B. In undertaking the Section 129 determination in the ripe olives proceeding, the United States contends that the USDOC adopted a revised interpretation of Section 771B explaining why the USDOC is able to consider additional factors beyond those specifically enumerated in Section 771B. Furthermore, the United States maintains that the application of Section 771B in the ripe olives Section 129 proceeding objectively demonstrates that the USDOC applied its revised interpretation of Section 771B and that it conducted a holistic analysis of the question of pass-through that addressed all relevant information on record, in addition to the two factors of Section 771B. Accordingly, the United States argues that the ripe olives Section 129 proceeding demonstrates that the United States brought its measure into conformity with its WTO obligations.[99]

7.45. In the sections that follow, we examine whether the different aspects of the USDOC's alleged "revised analysis and reasoned application of Section 771B"[100] in the ripe olives Section 129 determination bring the United States into conformity with the recommendations and rulings of the

[93] Preliminary Section 129 determination (Exhibit EU-1), p. 19. (emphasis original)
[94] Preliminary Section 129 determination (Exhibit EU-1), p. 19.
[95] Final Section 129 determination (Exhibit EU-2), p. 19. (fn omitted)
[96] Final Section 129 determination (Exhibit EU-2), pp. 19-20.
[97] European Union's first written submission, paras. 11-12, 25, 43-47, 60-63, and 67-71; second written submission, paras. 12-13, 23, 34-35 and 37; and opening statement at the meeting of the Panel, para. 21.
[98] United States' opening statement at the meeting of the Panel, para. 5.
[99] United States' first written submission, paras. 5-6, 48-50, 52, 60-61, and 67-72; comments on the European Union's response to Panel question No. 8, para. 30.
[100] United States' first written submission, para. 49

DSB in relation to the original panel's conclusion that Section 771B is "as such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 (footnote 36) of the SCM Agreement.

7.2.3.3.1 The USDOC's reconsideration of the meaning of "raw agricultural product" and "prior stage product" in Section 771B

7.46. As we explained in section 7.2.3.2 above, the Section 129 preliminary determination contains a section entitled "Statutory Interpretation". In this section, the USDOC reconsidered the meaning of the terms "raw agricultural product" and "prior stage product", which it indicated was being done "for purposes of the analysis under Section 771B(1)".[101] After noting that the Tariff Act of 1930 does not define "raw agricultural product", "prior stage product" and "latter stage product", the USDOC stated that "the statutory language does not require the latter stage product to be the subject merchandise or the foreign like product" and also that it would "apply the same fundamental rule of statutory construction to the term 'prior stage product'".[102] Following its interpretation, the USDOC explained that it would "conduct[] the analysis under Section 771(B)(1) of the Act using a 'raw agricultural product' and 'prior stage product' that is defined as table and dual-use raw olive varietals that are biologically distinct from other raw olive varietals and a 'latter stage product' that is defined as table olives".[103]

7.47. This is the extent of the USDOC's statutory interpretation in the section of the Section 129 preliminary determination entitled "Statutory Interpretation". The USDOC then turned to review data previously submitted by the respondents and the petitioner in the underlying investigation, which the USDOC concluded "demonstrate[s] that there are only five biological varietals of raw olives that the [Government of Spain] considers suitable for table olive production".[104] This section also sets out the USDOC's reconsideration of whether the demand for the prior stage product (certain biological varietals of raw olives) is substantially dependent on demand for the latter stage product (table olives), and recalls the determination from the original investigation that olive processing added only limited value to the raw commodity.[105]

7.48. We do not see any basis to accept that this aspect of the USDOC's "statutory interpretation" of the terms "raw agricultural product" and "prior stage product" is relevant to addressing the "as such" inconsistency of Section 771B and to achieving compliance with the DSB recommendations and rulings. The original panel found that the problem with Section 771B was that it directs the USDOC to find that the entire benefit of a subsidy provided to a raw agricultural input product passes through to the downstream processed agricultural product, without any necessary consideration of facts and circumstances for this purpose other than those specifically referred to in its two enumerated conditions. In our view, the USDOC's "statutory interpretation" does not address this problem. This is because it is entirely focused on elements pertaining to the operation of the first of Section 771B's two enumerated conditions.[106] Thus, we do not agree with the United States when it argues that the USDOC's "revised interpretation of the statute"[107] demonstrates that Section 771B leaves open the possibility for the USDOC to take all relevant facts and circumstances into account for the purpose of conducting a pass-through analysis that is consistent with Article VI:3 GATT and Article 10 of the SCM Agreement.[108]

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[101] Preliminary Section 129 determination (Exhibit EU-1), p. 11.
[102] Preliminary Section 129 determination (Exhibit EU-1), p. 12.
[103] Preliminary Section 129 determination (Exhibit EU-1), p. 12.
[104] Preliminary Section 129 determination (Exhibit EU-1), p. 12.
[105] Preliminary Section 129 determination (Exhibit EU-1), pp. 14-16.
[106] The European Union asserts that the reason for the USDOC's change of the terms "raw agricultural product" and "prior stage product" was not done to comply with the DSB's adopted recommendations and rulings but was done to comply with a judgment of the United States Court of International Trade that had reversed the USDOC's substantial dependence analysis. The European Union submits that the Court had taken issue with the USDOC's substantial dependence finding in that only 8% of Spanish raw olives were used for ripe olives, while over 90% were used for olive oil. (European Union's comments on United States' response to Panel question No. 18, para. 96 (referring to Asociación de Exportadores e Industriales de Mesa et al. v. United States (Original Exhibit EU-50) (Exhibit EU-10), p. 28)).
[107] United States' comments on European Union's response to Panel question No. 8, para. 30
[108] We address separately below the United States' argument that the USDOC's consideration of certain factual information related to its reconsideration of the "raw agricultural product" and "prior stage product" in the ripe olives investigation, is relevant to addressing the "as such" inconsistency of Section 771B.

7.2.3.3.2 The USDOC's "additional considerations"

7.49. We recall that the USDOC's preliminary Section 129 determination also includes a section entitled "Additional Considerations" in which the USDOC sought to "further clarify the evaluation it conducts pursuant [*sic*] Section 771B".[109] In this part of its preliminary determination, the USDOC first addresses the original panel's assessment of the term "shall" in Section 771B in connection with the original panel's finding that Section 771B does not leave open the possibility for the USDOC to consider factors other than the two factual circumstances that Section 771B lists explicitly. The USDOC states that its "analysis is not so limited".[110] The USDOC also addresses the panel's finding that the term "deemed" in Section 771B leaves no possibility for the USDOC to attribute to the downstream processed product anything less than the full amount of the subsidies provided to upstream producers of the raw agricultural product.[111] However, the USDOC explains that the lack of any statutory definition of the term "deemed" means that "Congress conferred broad discretion" on the USDOC in determining whether anything less than the full amount of subsidies provided to upstream producers of a raw agricultural product should be attributed to the producers of the downstream processed product. We consider each of these aspects of the USDOC's "additional considerations" below.

7.2.3.3.2.1 The USDOC's assessment that it has discretion to take into account considerations in addition to the specifically enumerated factors in Section 771B

7.50. In the preliminary Section 129 determination, the USDOC refers to a "duty" for the USDOC to evaluate all relevant record information and evidence in undertaking its Section 771B analysis and making its determination.[112] Likewise, in the final Section 129 determination, the USDOC refers to a "guiding principle" which it asserts is applicable in all USDOC investigations, namely to evaluate all potentially relevant data and information that is on the record of an investigation.[113] The United States argues that this ability to consider all potentially relevant data and information on the record "speaks to"[114] the original panel's finding. Specifically, the United States refers to the original panel's finding that Section 771B 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 two factual circumstances, without leaving open the possibility of taking into account any other factors that may be relevant.[115] According to the United States, therefore, the USDOC's ability to take into account additional relevant considerations as part of its Section 771B analysis is responsive to the panel's "as such" finding of inconsistency.

7.51. We disagree with the United States that a "duty" for the USDOC to evaluate all relevant record information addresses the problem with Section 771B that the panel identified. Section 771B *requires* the USDOC to determine the existence of pass-through whenever the two enumerated factual circumstances under the statute are satisfied, in the absence of any consideration of other facts and circumstances that may be relevant to a WTO-consistent showing of pass-through.[116] The original panel found that there is an inflexible requirement in Section 771B to determine the existence of pass-through in situations where the two factual circumstances are satisfied. This requirement persists irrespective of other information that the USDOC might consider. In our assessment, this would be the case even in situations where consideration and analysis of those other factors might suggest that pass-through is not likely. This follows from the operation of the law itself, which we recall, once again, requires that countervailable subsidies provided to the producers of the upstream raw agricultural input product "shall be deemed" to be provided with respect to the downstream processed product in cases where the two factual circumstances are found to exist. Thus, *regardless* of whether other factors may be "considered", the USDOC would in all cases be required to determine the *existence* of pass-through if the two factual conditions in

[109] Preliminary Section 129 determination (Exhibit EU-1), p. 17.
[110] Preliminary Section 129 determination (Exhibit EU-1), p. 17.
[111] Preliminary Section 129 determination (Exhibit EU-1), pp. 17-18.
[112] Preliminary Section 129 determination (Exhibit EU-1), p. 17.
[113] Final Section 129 determination (Exhibit EU-2), p. 19. The United States' arguments in the original proceeding did not refer to a "guiding principle" being applicable in all USDOC investigations to evaluate all potentially relevant data and information that is on the record of an investigation. We understand this "guiding principle" to be a general principle that existed before the compliance proceeding.
[114] United States' first written submission, para. 58.
[115] United States' first written submission, paras. 58-61.
[116] Panel Report, *US – Ripe Olives from Spain*, paras. 7.167-7.168, 7.170, and 8.1.b.i.

Section 771B are fulfilled, even in situations where consideration and analysis of those other factors might suggest that pass-through is not likely. In this light, we are not convinced by the United States' contention that the duty to consider all relevant information on the record "speaks to"[117] the original panel's finding. The United States' submission overlooks the original panel's conclusion that the inflexible nature of Section 771B renders any consideration of factors beyond those in the enumerated conditions *inutile* for the purpose of establishing pass-through in accordance with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.[118]

7.52. The United States submits that the fact that the USDOC may take into account factors beyond those specified in the enumerated conditions of Section 771B is further demonstrated by the USDOC's application of Section 771B in the ripe olives Section 129 determination. According to the United States, the USDOC's pass-through determination takes into account additional unique aspects of the table olives market.[119] The United States refers to the USDOC's consideration of factual information that the USDOC "received in other segments of the ripe olives from Spain proceeding"[120] in determining the biological varietals of raw olives that were relevant to its assessment of substantial dependence. This included information from different sources[121] on: higher pricing for raw olives destined for table olives; insurance premiums charged for different types of olive varietals; higher water requirements for orchards dedicated to growing table and dual-use olive varietals; pruning practices; and applicable standards and industry requirements for table olive production.[122]

7.53. The United States maintains that the USDOC's evaluation of this information is particularly relevant as the additional record information the USDOC considered in the ripe olives proceeding "speaks to the particular nature of the market and products at issue"[123], including "all factors related to the nature of the specific market for the input product at issue and all of the conditions of competition in that market".[124] According to the United States, this demonstrates that the USDOC may consider factors that may be affecting the market for the investigated product other than those Section 771B lists explicitly.[125]

7.54. As is evident from the Section 129 preliminary and final determinations, the USDOC considered this information when defining the prior stage product, which it used in assessing whether the demand for the prior stage product (certain biological varietals of raw olives) is substantially dependent on demand for the latter stage product (table olives), for purposes of the analysis under the first Section 771B factor.[126] Although the United States contends that the USDOC did not "*only* re-evaluate the prior-stage product", and "these same facts are relevant to other aspects of the investigation"[127], we find no indication in the determinations that any of this information was meaningfully assessed in any other context. We thus see no factual basis to conclude that the USDOC considered the information for purposes of evaluating the likelihood of the existence and extent of pass-through, beyond what is called for under the two factual circumstances in Section 771B.

7.55. Accordingly, we are not persuaded by the United States' submission that any duty the USDOC may have to take into account considerations beyond the two factors specifically enumerated in Section 771B would ensure that other information will be meaningfully taken into account or form part of the analytical basis for a WTO-consistent determination of pass-through. We also do not

[117] United States' first written submission, para. 58.

[118] We also share the European Union's concern that the USDOC's collection and placement of relevant information on the record will be limited in circumstances where the USDOC continues to be obliged to determine that there has been 100% pass through of countervailable subsidies when the two enumerated factors are established. (European Union's comments on United States' response to Panel question No. 17, paras. 86-87).

[119] United States' first written submission, para. 61.

[120] Preliminary Section 129 determination (Exhibit EU-1), p. 17.

[121] The USDOC considered information from the Government of Spain's Ministry of Agriculture Food Information and Control Agency, International Olive Council, and Interaceituna.

[122] Preliminary Section 129 determination (Exhibit EU-1), pp. 12-17.

[123] United States' first written submission, para. 57.

[124] The United States maintains that the information that USDOC considered speaks to the nature of the specific market for the input product at issue and all of the conditions of competition in that market and are thus factors similar to those discussed by the panel in the original proceeding as relevant for an assessment of pass-through. (United States' second written submission, para. 28).

[125] United States' first written submission, para. 57.

[126] Preliminary Section 129 determination (Exhibit EU-1), pp. 12-16.

[127] United States' first written submission, para. 83.

agree with the United States when it argues that the application of Section 771B in the ripe olive Section 129 determinations demonstrates that the USDOC undertook such an analysis or that this would be mandated in future determinations.[128]

7.2.3.3.2.2 The USDOC's evaluation of "deemed" and its assessment that it has discretion to attribute less than the full amount of subsidies under Section 771B

7.56. As part of its consideration of the applicability of Section 771B in the Section 129 proceeding, the USDOC also responded to the original panel's finding that Section 771B directs the USDOC to "deem" that countervailable subsidies found in an investigation have passed-through to the downstream processed product, thereby leaving no possibility for the USDOC to attribute anything less than the full amount of subsidies provided to upstream producers of the raw agricultural product.

7.57. As indicated above[129], the USDOC stated that Congress "conferred broad discretion" upon the USDOC in determining the appropriate manner to attribute subsidies to the processed product, including attributing less than the full amount of the subsidies.[130] The USDOC asserts that this discretion arises due to the fact that the term "deemed" as it is used in Section 771B is not defined and that Section 771B does not otherwise prescribe the manner in which countervailable subsidies provided to producers or processors of the raw agricultural product are to be attributed to the downstream product.[131] The USDOC further stated that the flexibility and discretion conferred by Congress is "exemplified" in the benefit calculation methodology for olive grower subsidies that the USDOC used in the ripe olives Section 129 proceeding.[132] The USDOC reiterated these views in the final determination. The USDOC noted, for instance, that Section 771B does not explicitly require that countervailable subsidies must be deemed to have passed through "fully" or "to the full extent".[133] The USDOC also did not agree with the view that definitions of the term "deemed" submitted by the investigated ripe olive processors[134] establish that the term is unambiguous, such that the USDOC lacks flexibility in making its determination.[135]

7.58. In our view, the USDOC's interpretation of the term "deemed" fails to respond to the original panel's finding, which more broadly addressed the operation of Section 771B and the fact that it stipulates that countervailable subsidies found to be provided to the producers of the upstream product "*shall be deemed*" to be provided with respect to the downstream processed product, in cases where the two factual circumstances are found to exist.

7.59. We find it useful to recall that in the original proceeding the United States argued that Section 771B provides an "appropriate method" to determine the existence of pass-through in light of the special commercial and economic circumstances present in the markets for raw agricultural commodities. The United States maintained that raw agricultural markets are systematically characterized by "perfect competition" which prevents producers from charging a price higher than the price a processor could obtain from another producer (which may have been subsidized or not). In these circumstances, the United States argued that market prices could not be relied upon as a way to analyse whether the benefit of a subsidy granted to the upstream raw input producer has

[128] Our concern about the prospect of meaningful consideration in future determinations rests on the failure of the Section 129 determination to evidence the statutory re-interpretation professed by the United States. If that had been evidenced, a second question to be asked would be whether the character and effect of a re-interpretation such as this would cure an "as such" inconsistency. In answers to the Panel's questions in this regard, the United States referred to the ability of the USDOC to "reference[] [the determination] in future proceedings"; stated that the re-interpretation would serve "as useful guidance for future USDOC investigations under Section 771B"; and advised that USDOC "would not depart from prior interpretations or determinations unless there were a reasonable justification to do so". (United States' responses to Panel question No. 2, para. 3; and question No. 24(a), para. 61).

[129] See paras. 7.40-7.41 above.

[130] Final Section 129 determination (Exhibit EU-2), p. 21.

[131] Preliminary Section 129 determination (Exhibit EU-1), p. 18.

[132] Preliminary Section 129 determination (Exhibit EU-1), p. 18.

[133] Final Section 129 determination (Exhibit EU-2), p. 21.

[134] In the ripe olives Section 129 proceeding, investigated ripe olive processors submitted definitions of the terms "deem" and "deemed" as "to consider that someone or something has a particular quality" or "to consider or judge something in a particular way". (Final Section 129 determination (Exhibit EU-2), p. 20 (referring to Macmillan Dictionary Online and Cambridge Dictionary Online)).

[135] Final Section 129 determination (Exhibit EU-2), p. 20.

passed through to a downstream processer.[136] The United States argued that a raw agricultural commodity is often devoted completely to the production of a processed product and a product processed from a raw agricultural commodity is often produced substantially from the raw product. The United States maintained that whenever these two circumstances exist, a subsidy that affects the production of the raw product necessarily affects trade in the product.[137] The original panel found that the United States' explanation is reflected in the legislative history of the enactment of Section 771B[138], which was submitted to the original panel and has been resubmitted by the European Union in this proceeding.

7.60. Section 771B was enacted to provide a specific method to assess pass-through in the context of countervailing duty investigations of processed agricultural products when the raw agricultural product is being subsidized. Based on our reading, Section 771B is structured and designed to direct that subsidies provided to the producer of an upstream raw agricultural product "shall be deemed" to be provided to the downstream processed product in cases in which the two factual circumstances are determined to exist. Other factors that might touch upon the question of *the extent* of any pass-through are not required to be considered and are irrelevant to the question of whether the countervailable subsidies provided to the producers have passed through to the processors where the two factual circumstances are found. In this regard, we recall that the original panel did not find it necessary to express any views on whether input price comparisons would offer the only meaningful way to assess the existence or extent of pass-through.[139] The point made by the original panel was that an evaluation limited to the two factual circumstances in Section 771B *alone* would not provide a sufficient basis to calculate with any precision *the degree or the extent of* pass-through.[140] Thus, we do not find compelling the United States' arguments that Section 771B bestows a broad discretion to determine not only the existence of, but also the *extent to which* pass-through occurs (including an amount *less than* the full amount of subsidies provided to upstream producers of the raw agricultural product).[141]

7.61. We are also not convinced by the United States' assertion that any relevant "broad discretion" conferred on the USDOC through the operation of the term "deemed" is "exemplified"[142] in the benefit calculation methodology for grower subsidies that was used in the ripe olives Section 129 proceeding. A consideration for the purpose of finding that the countervailable subsidies did not pass through to their full extent, or at all, is not to be found in the USDOC's Section 129 determination.

7.62. We note that the USDOC confirmed that it applied the same benefit calculation methodology in the Section 129 proceeding that it did in the underlying ripe olives investigation. As a first step in its calculation, the USDOC determined the benefit provided under the investigated programmes to the *upstream* raw olive growers as the direct subsidy recipients. In cases where the investigated grower was determined to grow only olives, the USDOC utilized the entire grant amount to calculate the benefit provided to the upstream grower. However, in cases where it was determined that a particular grower produces a combination of crops and not just olives, the USDOC allocated a portion of the grant amount that was received by the grower to olive production. In the latter situations, the allocated portion was then used to calculate the benefit amount that passed through to the respondent.[143] According to the USDOC, the circumstances in which it did not allocate the entire

[136] Panel Report, *US – Ripe Olives from Spain*, para. 7.164. See also Legislative History of Section 771B (Exhibit EU-9).

[137] Panel Report, *US – Ripe Olives from Spain*, para. 7.163.

[138] In particular, members of the US Congress expressed concerns that legislation in place like the "upstream subsidies" test applicable for conducting a pass-through assessment for components used to produce finished manufactured products, as contained in Section 1677-1(b) (Section 771A of the Tariff Act of 1930), was incompatible with the nature of agricultural commodity markets. Because the "upstream subsidies" test required the USDOC to assess the extent to which the price for the input product is lower than would otherwise be paid in an arm's length transaction as the basis to detect pass-through, members of the US Congress expressed concern that this test applied to agricultural commodities would "understate the magnitude of the subsidy and permit wholesale circumvention" of US countervailing duty laws. (Legislative History of Section 771B (Exhibit EU-9), p. 17766. See also Panel Report, *US – Ripe Olives from Spain*, para. 7.164).

[139] Panel Report, *US – Ripe Olives from Spain*, para. 7.155.

[140] Panel Report, *US – Ripe Olives from Spain*, para. 7.168.

[141] We note that interested parties in the Section 129 proceeding presented arguments that the use of the term "deemed" in Section 771B reflected Congress's instruction to presume the existence of pass-through of a subsidy. (Final Section 129 determination (Exhibit EU-2), p. 20).

[142] Preliminary Section 129 determination (Exhibit EU-1), p. 18.

[143] Preliminary Section 129 determination (Exhibit EU-1), p. 19.

grant amount to upstream raw olive growers, show that "*less than 100 percent of the BPS subsidy payment amount is used* when determining the benefit to the respondent".[144]

7.63. In its assessment of Article VI:3 of the GATT 1994 and Article 10 (and footnote 36) of the SCM Agreement, the original panel explained that both of these provisions make clear that Members are entitled to offset indirect subsidization by imposing duties on imported products that benefit from subsidies conferred on upstream companies and products. However, Members are not entitled to presume that a subsidy bestowed on an upstream input product passes through to the downstream product as such a presumption would not ensure that any countervailing duty imposed on the downstream product is not in excess of the total amount of subsidies bestowed on the investigated product, as is required under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. Thus, the original panel explained that an investigating authority must undertake an analysis to determine, as accurately as possible, how much of the subsidy has flowed indirectly from an input product to the downstream product.[145]

7.64. The USDOC's explanation of its approach speaks to adjustments made to the determination of *direct* benefit to upstream growers. We accept that these adjustments may serve to ensure that the countervailing duties imposed on ripe olives do not reflect subsidy amounts provided for products other than raw olives. However, the original panel found that investigating authorities are required to provide an analytical basis to establish the existence and extent of pass-through of subsidies from the upstream input product to the downstream processed product, i.e. *indirect* subsidization. The original panel found that Section 771B does not allow or provide for this possibility because, by its operation, 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 two factual circumstances. In this way, Section 771B prevents the USDOC from undertaking a meaningful consideration of *facts and circumstances* that may be *relevant* to a WTO-consistent determination of *pass-through*. This means that, in terms of Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, Section 771B fails to ensure that the duties imposed on the investigated product are not in excess of the total amount of subsidies bestowed indirectly on that product.

7.65. As discussed above[146], we see no indication in the ripe olives Section 129 determination that an assessment was undertaken to evaluate whether and to what extent the subsidies allocated to the upstream production of raw olives were determined to *pass-through* to the ripe olive producers. The USDOC applied the same benefit calculation methodology for grower subsidies in the Section 129 proceeding as it did in the original proceeding.[147] However, as we have explained, this approach does not provide the requisite analytical basis to establish the existence and extent of pass-through of subsidies provided to raw olive production to the investigated downstream ripe olive processors, i.e. *indirect* subsidization.[148]

7.66. We therefore disagree with the United States when it argues that the USDOC, in the light of its various statements and actions in the Section 129 determination, now has broad discretion under Section 771B to determine not only the existence of but also the *extent to which* pass-through occurs, including discretion to determine that less than the full amount of subsidies provided to upstream producers of the raw agricultural product passes through to the downstream processed product. We also disagree that the benefit calculation in the ripe olives Section 129 proceeding supports these assertions.

7.2.3.3.3 Overall assessment

7.67. The United States has argued that the USDOC undertook a revised interpretation of Section 771B that explains why, contrary to the original panel's finding, the USDOC is able to consider additional factors when applying Section 771B beyond those specifically enumerated therein. The United States has also argued that the USDOC has discretion to determine the appropriate manner to attribute the subsidies to the manufacture, production, or exportation of the

[144] Preliminary Section 129 determination (Exhibit EU-1), p. 19. (emphasis original)
[145] Panel Report, *US – Ripe Olives from Spain*, paras. 7.150 and 7.154.
[146] See para. 7.54 above.
[147] Preliminary Section 129 determination (Exhibit EU-1), pp. 18-19.
[148] In this respect, see the arguments of the European Union and Canada. (European Union's first written submission, paras. 11, 25, 43-48, 62, and 67-71; Canada's third party submission, paras. 16-20).

processed product. The United States maintains that the USDOC's revised interpretation demonstrates that it has taken appropriate measures to implement the "as such" findings of the panel in the original proceeding. The United States has additionally argued that the ripe olives Section 129 proceeding provides ample demonstration that its revised interpretation achieves compliance.

7.68. We have concluded that the USDOC's re-interpretation of the meaning of "raw agricultural product" and "prior stage product" in Section 771B does not have a bearing on achieving compliance. We have found that the revised interpretations of these terms are entirely focused on elements pertaining to the operation of one of Section 771B's two enumerated conditions and do not demonstrate that Section 771B leaves open the possibility for the USDOC to take all relevant facts and circumstances into account for the purpose of conducting a pass-through analysis that is consistent with Article VI:3 GATT and Article 10 of the SCM Agreement.

7.69. We have similarly found unavailing the United States' assertions that the USDOC's duty to evaluate all potentially relevant data and information that is on the record of an investigation has any bearing on achieving compliance. Section 771B requires the USDOC to determine the existence of pass-through whenever the two factual circumstances are satisfied, irrespective of additional information that the USDOC may have before it and may consider. The USDOC's claims of discretion in evaluating relevant record data and information do not address our fundamental concern that the USDOC will still be required to determine the *existence* of pass-through if the two factual conditions in Section 771B are fulfilled. We therefore disagree with the United States that any alleged duty and discretion to take into account record information, beyond the two factors specifically enumerated in Section 771B, ensures that other information will be meaningfully taken into account or form part of the analytical basis for a WTO-consistent determination of pass-through.

7.70. Finally, we have rejected the United States' assertions that the USDOC retains broad discretion to assess the extent to which pass-through occurs and may determine less than 100% pass-through in cases where pass-through is determined to occur. Such assertions are at odds with the statutory approach embodied in Section 771B, which directs that subsidies to producers of the upstream raw agricultural product "shall be deemed" to be provided to the downstream processed product solely based upon consideration of the two factual circumstances in Section 771B, without a requirement to assess other factors that might touch upon the question of *the extent* of any pass-through. In our view, such an approach does not allow the USDOC to discharge its responsibilities in a manner that accords with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, and does not provide a basis to calculate with any precision the *degree or the extent* of pass-through. We are also not convinced that the flexibility and discretion the United States maintains was conferred to the USDOC is evidenced in the benefit calculation methodology for grower subsidies that was used in the ripe olives proceedings. To the contrary, we have found that the USDOC did not provide the requisite analytical basis to establish the existence and extent of pass-through of subsidies provided to raw olive production to the investigated downstream ripe olive processors.

7.71. We therefore disagree with the United States' submission that it has presented evidence that the USDOC has flexibility under Section 771B to consider the unique circumstances in each proceeding to evaluate the appropriate manner to determine whether there is any pass-through and, if so, its degree.[149] 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*'".[150] 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.

7.72. For the foregoing reasons, we therefore find that the European Union has established that the revised aspects of the USDOC's analysis and determinations concerning the applicability of

[149] Final Section 129 determination (Exhibit EU-2), pp. 20-21.
[150] Preliminary Section 129 determination (Exhibit EU-1), p. 11. (emphasis added)

Section 771B, as reflected in the preliminary and final Section 129 determinations, fail to implement the relevant aspects of the adopted DSB rulings and recommendations that Section 771B is "as such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.

7.2.3.4 Whether the 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

7.73. The European Union claims that the 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, demonstrating that the United States has failed to comply with findings from the original proceeding. The European Union argues that since the United States made no relevant change to Section 771B to bring it into conformity with the DSB recommendations and rulings concerning the inconsistency of Section 771B "as such", the *application* of Section 771B in the ripe olives Section 129 proceeding is necessarily also WTO-inconsistent.[151] This argument results from the findings in the original proceeding that the inconsistency of Section 771B "follows from the operation of the law itself".[152] Accordingly, the European Union argues that there is no need to address the revised aspects of the Section 771B analysis to establish that the application of Section 771B in the Section 129 proceeding is also WTO-inconsistent.[153]

7.74. The United States argues that the USDOC's revised application of Section 771B in the Section 129 determination exemplifies the consistency of Section 771B and additionally shows that the USDOC properly addressed the "as applied" findings of the original panel.[154] The United States submits that the USDOC's consideration of information that only certain biological varietals of raw olives are fit for the production of table olives shows that the USDOC considered information that also speaks to the nature of the market for both the raw and processed agricultural goods and thus allowed the USDOC to "consider factors that may be affecting the market for the investigated product other than those Section 771B lists explicitly".[155] The United States argues that the European Union errs by wrongly assuming that this detailed analysis of specific olive varietals that should be considered when identifying the "prior stage product" means that the USDOC *only* re-evaluated the prior stage product, and that the European Union ignores the fact that these same facts are relevant to other aspects of the investigation.[156] The United States also argues that when conducting the benefit calculation, the USDOC likewise took into consideration other information related to the granting of subsidies to the upstream input producer (such as BPS subsidy programme characteristics), and that it did this to ensure only the amount of investigated subsidies proportional to raw olives were attributed to the investigated ripe olive producers in the Section 129 proceeding. The United States claims that by ensuring that "less than 100 percent of the BPS subsidy payment amount is used when determining the benefit to the respondent", the USDOC thereby provided a more reasoned and supported analytical basis for the benefit calculation.[157]

7.75. In the preceding section, we found that the USDOC's analysis and determinations concerning the applicability of Section 771B in the Section 129 determinations fail to implement the relevant aspects of the adopted DSB rulings and recommendations that Section 771B is "as such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.

7.76. As part of our review, we noted that the USDOC had reconsidered the meaning of the terms "raw agricultural product" and "prior stage product" for purposes of the analysis of whether demand for the prior stage product is substantially dependent on the demand for the latter stage product under the first enumerated factor in Section 771B. Based on its consideration of the data and

[151] European Union's first written submission paras. 64-65 and 67-68; second written submission, para. 21; and opening statement at the meeting of the Panel, paras. 10 and 29.

[152] Panel Report, *US – Ripe Olives from Spain*, paras. 7.170 and 7.175.

[153] The European Union, in any event, recalls its arguments that the USDOC's steps, first, to modify the definition of the "prior stage product" for purposes of its substantial dependence analysis, and second, to attribute subsidy payments to upstream raw olive production where a respondent and/or suppliers grow a combination of crops and not just olives, are both irrelevant to the analysis of pass-through.
European Union's first written submission paras. 69-77; second written submission, paras. 23-25 and 34-35.

[154] United States' first written submission, para. 53.

[155] United States' first written submission, para. 57 (referring to Panel Report, *US – Ripe Olives from Spain*, para. 7.167).

[156] United States' first written submission, para. 83 (referring to European Union's first written submission, paras. 66-77).

[157] United States' first written submission, para. 81.

information on record, the USDOC evaluated the extent to which different raw olive varietals should be included in its analysis as the "prior stage product", determining that 55.28% of the identified varietals were processed into the latter stage product, table olives. This formed the basis to uphold its finding of substantial dependence and its ultimate determination that subsidies granted to growers of raw olives in Spain could be attributed to three investigated ripe olive producers.[158]

7.77. We did not agree with the United States' proposition that the USDOC's consideration of information and related analysis in this context reflects relevant considerations outside of its analysis of substantial dependence in relation to the first factor of Section 771B. Such considerations failed to show that the USDOC took into account additional factors relevant to its analysis of pass-through.

7.78. We also rejected the United States' arguments that the USDOC retains broad discretion to assess the extent to which pass-through occurs, or that it may determine that less than 100% pass-through occurs where the two enumerated factors under Section 771B are found to exist. To the contrary, we found that the USDOC applied the same benefit calculation and determined that the entire amount of subsidies allocated to raw olives production passed through to ripe olive processors without any assessment of factors other than the two specifically enumerated factors in Section 771B. We therefore disagreed that the United States has presented evidence demonstrating that it had undertaken an appropriate determination of whether there is any pass-through and, if so, its degree.

7.79. These findings reflected our view that the USDOC's analysis and determinations concerning the applicability of Section 771B in the Section 129 determinations fail to implement the relevant aspects of the adopted DSB rulings and recommendations that Section 771B is "as such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. They further demonstrate that the 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. In view of this latter finding, we additionally find that the USDOC's determination under Section 771B in the ripe olives Section 129 determination is inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, the Panel concludes, with respect to the European Union's claims that the United States has failed to bring its measures into conformity with the adopted recommendations and rulings of the DSB in relation to Section 771B of the Tariff Act of 1930, as follows:

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

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the GATT 1994 and the SCM Agreement, they have nullified or impaired benefits accruing to the European Union under these agreements.

[158] Preliminary Section 129 determination (Exhibit EU-1), pp. 11-16.

8.3. We also conclude that the United States has failed to implement the adopted recommendations and rulings of the DSB to bring Section 771B of the Tariff Act of 1930 into conformity with its obligations under the GATT 1994 and the SCM Agreement. To the extent that the United States has failed to comply with the adopted recommendations and rulings of the DSB in the original dispute, those adopted recommendations and rulings remain operative.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under the GATT 1994 and the SCM Agreement.

8.5. The European Union has requested that we recommend that the United States revoke its determination and cease to impose countervailing duties.[159] The Panel does not have the ability to make specific recommendations in this way.[160] The DSU recognizes that a panel may suggest ways in which the Member concerned could implement the Panel's recommendation. Having carefully considered the European Union's request, we decline to make such suggestion or any specific suggestion. The aim of dispute settlement is to achieve a satisfactory settlement of matters brought before the DSB in accordance with the rights and obligations of the parties under the DSU and the covered agreements. The Panel considers that its report supports that aim by clarifying the existing provisions of the relevant agreements and without dictating to the parties how they could settle their dispute should they choose to do so.

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[159] European Union's first written submission, para. 78; second written submission, para. 40.

[160] Pursuant to Article 19.1 of the DSU, where a panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. A panel may, in addition, suggest ways in which the Member concerned could implement the recommendation.