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

Recourse to Article 21.5 of the DSU by the European Union

(DS577)

U.S. COMMENTS ON THE EU'S RESPONSES TO QUESTIONS FROM THE PANEL FOLLOWING THE SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

December 1, 2023

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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, circulated to WTO Members 15 November 2019, appealed 18 December 2019
US – Countervailing and Anti-Dumping Measures (China)	Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R, adopted 22 July 2014
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

TABLE OF ABBREVIATIONS

Abbreviation	Definition
CIT	United States Court of International Trade
CVD	Countervailing Duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USDOC	U.S. Department of Commerce
WTO	World Trade Organization

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USA-7	*Micron Tech. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997)
USA-8	*United States v. Eurodif S.A.,* 555 U.S. 305 (2009)
USA-9	Definition of "consider" from The New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 485.
USA-10	*Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

I. U.S. COMMENTS ON EUROPEAN UNION RESPONSES TO PANEL QUESTIONS

<u>Question 1</u> (*To both parties*): Can the Panel decide that there has been a failure to comply with the recommendation of the DSB that the US "bring its measures into conformity with its obligations under the GATT 1994 [and] the SCM Agreement", with respect to the "as such" conclusion in the DS577 Panel Report regarding the statutory provision known as Section 771B solely on the ground that there is no evidence that the statutory provision has been changed? If so, is there any language in any WTO report which supports the European Union's position?

<u>U.S. Comment on EU Response to Q1</u>:

1. This question from the Panel distills the central issue in these compliance proceedings: whether the measures taken by the United States in the Section 129 proceeding have brought Section 771B of the Tariff Act of 1930, as amended ("Section 771B") into conformity with U.S. World Trade Organization ("WTO") commitments under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Instead of addressing the Panel's question directly, the European Union ("EU") has responded by providing an unsolicited narrative re-arguing the entirety of its case.[1] The EU's lengthy narrative achieves little besides reiterating arguments it has made previously. The narrative also criticizes the manner and particular methodology used by the United States Department of Commerce ("USDOC") in the administrative proceeding conducted pursuant to Section 129 of the Uruguay Round Agreements Act. We will demonstrate below that the EU's reasoning is flawed for several reasons.[2]

2. First, the original panel was clear that Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement do not require a particular pass-through methodology.[3] In fact, the original panel declined to issue findings related to whether a particular pass-through methodology was required.[4] Instead, the original panel focused on whether Section 771B precluded the USDOC from considering additional relevant facts and circumstances when conducting its analysis.[5]

3. The EU's focus on the manner in which the USDOC conducted its investigation reveals the weakness in the primary legal arguments the EU relied on in its earlier submissions. For

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[1] The EU revises the Panel's question into terms that better reflect its arguments. *See* EU Responses to Panel Questions, para. 7 ("Therefore, the European Union will reply to this question in light of the position which the European Union has adopted in these compliance proceedings: **Are there relevant panel reports according to which it would be sufficient for a demonstration of failure to comply with the "as such" finding to demonstrate with positive evidence that Section 771B was not changed?")** (emphasis in original).

[2] As a general note our comments on the EU's responses will focus on refuting the new points in the EU's responses.

[3] *US – Ripe Olives (Spain) (Panel)*, paras. 7.151, 7.154, and 7.162.

[4] *US – Ripe Olives (Spain) (Panel)*, para. 7.155 ("we do not consider that any findings on our part with respect to this matter [of input price comparisons] are necessary to achieve a positive solution to the parties' dispute.").

[5] *US – Ripe Olives (Spain) (Panel)*, para. 7.170.

example, the EU argues that the USDOC took "no investigative measures" when conducting the Section 129 proceeding, and cites the fact that no questionnaires were issued that specifically address pass-through as the only support for these statements.[6] However, there is no requirement for the USDOC to issue certain questionnaires and the USDOC explained in the preliminary and final Section 129 determinations that it considered case-specific facts and circumstances.[7] The USDOC also opened the record of the Section 129 proceeding, adding relevant documents from other segments of the proceeding, provided interested parties an opportunity to submit factual information to rebut, clarify, or correct such information, and offered two opportunities to submit affirmative and rebuttal comments. The record does not reflect any failure to take so-called "investigative measures."

4. The EU further suggests that the United States revised its interpretation of Section 771B in the form of an "advisory opinion." However, the EU's assertion is factually incorrect. The USDOC's statutory interpretation in the Section 129 proceeding is legally operative under U.S. law and therefore not an advisory opinion. This different legal significance means the USDOC statutory interpretation is relevant in future USDOC proceedings, and the USDOC would not deviate from this interpretation without a reasonable justification to do so.[8]

5. The EU discredits the U.S. arguments as "*ex post* fabrication." In doing so, the EU continues to cherry-pick particular references from the U.S. written submissions to misdirect the Panel in support of its arguments, while ignoring the U.S. explanation that the preliminary and final Section 129 determinations should be read holistically. For example, the EU focuses on one sentence from the U.S. second written submission where the United States notes that factors examined by the USDOC, such as insurance premiums, may speak to the way that pricing flows down to the latter stage product.[9] The EU considers this "evidence" that the USDOC did not conduct an attribution of benefits analysis, while ignoring the fact that the cited text explains how the factors may be understood in a more general sense. The United States has appropriately pointed the Panel to relevant portions of the Section 129 proceeding to explain and clarify its position in response to the EU's arguments.

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[6] EU Responses to Panel Questions, para. 3.

[7] *See* USDOC Section 129 Preliminary Determination (Exhibit EU-1), p. 19 ("It is in this manner, that *given the case-specific circumstances present in the ripe olives from Spain investigation, and in this section 129 proceeding*, *we have exercised [the USDOC]'s discretion under section 771B of the Act* in "deeming" countervailable subsidizes 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" (emphasis added); and USDOC Section 129 Final Determination (Exhibit EU-2), p. 21 ("[The USDOC]'s ability to take these steps to attribute less than 100 percent of the Basic Payment Scheme subsidy payments to the respondent companies in some cases further demonstrates that, as discussed above, [the USDOC] *has discretion and flexibility under section 771B of the Act to consider case-specific facts and determine the appropriate manner to attribute subsidies*, including whether less than the full amount of subsidies should be attributed depending on the circumstances.") (emphasis added).

[8] *See* the U.S. Responses to Panel Questions, para. 3.

[9] *See* EU Responses to Panel Questions, paras. 3, 56, and 62-64. We refer the panel to sections III.A and II.A of the U.S. First and Second Written Submissions, respectively, for a more detailed explanation of why the revised interpretation of Section 771B, including the revised interpretations of "prior stage product" and "raw agricultural product" brings Section 771B into conformity with the Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, and implements recommendation of the Dispute Settlement Body ("DSB").

6. Turning to the second part of the Panel's question, the Panel asks for examples of language in previous WTO reports that might support the EU's position. There is no support for the EU's position and the EU is again unable to provide any references beyond the cases it has previously cited.[10] The EU also concedes that prior panel reports have *not* taken the position that *only* a textual amendment of an inconsistent legal provision can lead to compliance for an "as such" finding.[11] The EU's suggestion that previous panel reports have expressed a "preference" for withdrawal of a measure has no bearing on this proceeding.[12]

7. The EU argues that a revised interpretation of Section 771B could not ever constitute compliance in these proceedings, based on flawed interpretations of both *US – Carbon Steel (India) (Article 21.5 - India)* and the original panel report.[13] The panel in *US – Carbon Steel (India) (Article 21.5 - India)* clearly explained that "we do not exclude that there may be ways of remedying [an "as such"] inconsistency which do not involve changing the text of a measure itself."[14] The panel goes on to say that a "measure taken to comply" should be a "new measure, distinct from the one that was the subject of the findings of inconsistency in the original proceedings."[15]

8. The panel reports in *US – Carbon Steel (India) (Article 21.5 - India)* and *US – Gambling (Article 21.5 – Antigua and Barbuda)* also do not distinguish between measures which "require" versus "materially restrict" actions, as the EU argues.[16] Instead the reports engage in a theoretical discussion of when interpretations versus statutory revisions might be appropriate.[17] The EU has also failed to show why the USDOC's revised interpretation does not have an equivalent effect as the withdrawal of Section 771B. A change in the way a measure is interpreted and applied is relevant for compliance proceedings, including this one, irrespective of the form of that change.[18]

9. This belated argument further reveals the EU is straining to overcome the flaws in its legal theory. The original panel found that Section 771B restricted the USDOC's discretion to consider other factors.[19] Thus, a compliance measure that ensures the USDOC can consider all relevant facts and circumstances, beyond those specifically enumerated in Section 771B, would

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[10] *See* EU Responses to Panel Questions, para. 8. ("The reply to the compliance Panel's question would be "yes" if prior panel reports would have established that only a textual amendment of an inconsistent legal provision can lead to compliance for an "as such" finding. *Prior panels have not taken this position* . . . .") (emphasis added).

[11] EU Responses to Panel Questions, para. 8.

[12] We refer the Panel to the U.S. response to Question 29 for an explanation of why the EU's arguments about the reasoning in the *US – Carbon Steel (India) (Article 21.5 – India)* panel report and related cases is flawed.

[13] EU Responses to Panel Questions, para. 12.

[14] *US – Carbon Steel (India) (Article 21.5 - India)*, para. 7.306.

[15] *US – Carbon Steel (India) (Article 21.5 - India)*, para. 7.307.

[16] EU Responses to Panel Questions, paras. 12-17.

[17] *See US – Carbon Steel (India) (Article 21.5 - India)*, paras. 7.304 – 7.308 (citing *US – Gambling (Article 21.5 – Antigua and Barbuda)*, para. 6.22).

[18] U.S. Responses to Panel Questions, para. 9.

[19] *US – Ripe Olives (Spain) (Panel)*, para. 7.170.

appropriately address the recommendation of the DSB and finding of the panel. There is nothing in the original panel report to suggest that the fact that Section 771B "required" a presumption of a finding of pass-through means the USDOC cannot undertake a revised interpretation to allow it to consider other relevant factors. The USDOC's revised interpretation does represent a material change to the measure at issue – and one that is dispositive with respect to the Panel's question.[20]

10. The EU's characterization of the relationship of U.S. administrative agencies, U.S. courts, and Congress is also incorrect.[21] The EU misunderstands the authority delegated to U.S. administrative agencies with respect to the administration and interpretation of laws passed by Congress. Under U.S. law, as set out by the U.S. Supreme Court in *Eurodif*[22] and *Chevron*,[23] 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.[24] A previous panel found as a matter of fact that this is the approach to statutory interpretation and application under U.S. municipal law.[25] The USDOC explained in the final Section 129 determination that "Congress conferred broad discretion upon [the USDOC] in making this determination, and [the USDOC] has flexibility to consider the unique circumstances in each proceeding to determine the appropriate manner to attribute the subsidies."[26]

11. The interpretation contained in the preliminary and final Section 129 determinations has legal effect; this does not mean that the USDOC is modifying the legislative authority of Section 771B. Rather, this interpretation is relevant for future applications of the statute. Agencies tasked with implementing and carrying out the law enacted by Congress have the authority to interpret statutes in the absence of unambiguous statutory language to the contrary while avoiding unreasonable resolution of language that is ambiguous.[27] Section 771B is not applied in a vacuum and must necessarily be applied by the USDOC in the course of administering the law. For the EU to suggest that the USDOC's administrative determinations and interpretations are not "U.S. law" – *i.e.*, are irrelevant in future applications of Section 771B – is factually incorrect.

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[20] *See* U.S. First Written Submission, paras. 63-72.

[21] EU Responses to Panel Questions, para. 18-19.

[22] *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (Exhibit USA-8).

[23] *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (Exhibit USA-10).

[24] *See* U.S. Responses to Panel Questions, paras. 64-66.

[25] *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.163 (internal footnotes omitted) (citing to the U.S. Supreme Court decisions in *United States v. Eurodif S.A.*, 555 U.S. 305 (2009), at 316 (Exhibit USA-8), and *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), at 843) (Exhibit USA-10)).

[26] USDOC Section 129 Final Determination (Exhibit EU-2), p. 20.

[27] U.S. Responses to Panel Questions, para. 8. *See also United States v. Eurodif S.A., 555 U.S. 305 (2009)* (Exhibit USA-8), at 316 (citations omitted), finding that the USDOC's interpretation "governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."

12. Finally, the EU argues that the USDOC's interpretation does not constitute compliance because "third parties also express a preference for 'as such' compliance through textual amendment of Section 771B."[28] It would be inappropriate for the Panel to accept the EU's arguments, setting aside the fact that Japan's arguments do not in fact support the EU's stated position. The WTO agreements do not prescribe a specific manner through which compliance must be achieved.[29]

13. In sum, the EU has failed to show that the USDOC's redetermination in the Section 129 proceeding does not constitute a measure taken to comply.

Question 2 (*To the United States*) In paragraph 18 of its second written submission, the European Union submits that the Section 129 ripe olives determination amounts to a "one -time" interpretation that "may at best be relevant for compliance with an 'as applied' violation but not for compliance with an 'as such' violation".

a. To what extent is the evaluation of Section 771B in the ripe olives Section 129 proceeding binding—if at all—on future assessments by the USDOC under Section 771B?

b. Please also respond to the European Union's argument that the USDOC would be free to apply Section 771B in a WTO-inconsistent manner in any upcoming investigation and the "further developed understanding of Section 771B" applies only "in this case" (see European Union's first written submission, paragraph 20).[30]

c. Please respond to the European Union's argument in paragraph 19 of its second written submission that the "re-interpretation" of Section 771B in the Section 129 proceedings by the USDOC neither modifies the legislative authority of Section 771B nor does it entail a change relevant to this legal provision.

U.S. Comment on Q2:

14. The EU did not respond to this question.

Question 3 (*To the European Union*): If the USDOC has cured the "as applied" non-compliance with respect to its pass-through finding in its administrative action, even if in so doing its administrative action was in breach of Section 771B, would such also cure the "as such" non-compliance of Section 771B?

U.S. Comment on EU Response to Q3:

15. The EU's characterization of what might constitute a "breach" of the statute under U.S. law (an issue which is not before the Panel and irrelevant to these compliance proceedings) is

[28] EU Responses to Panel Questions, para. 28-30.

[29] *See* U.S. Responses to Panel Questions, paras. 12-14.

[30] EU Second Written Submission, para. 20.

erroneous and does nothing to further its arguments. The USDOC can – as it did here – evaluate all relevant facts and circumstances *without* breaching the terms of Section 771B.

16. The EU suggests that the United States conceded that there is no revised interpretation of Section 771B in paragraph 38 of the U.S. first written submission, but the United States has made no such statement. Rather, as we have explained, the Section 129 proceeding is the first time the USDOC addressed all the ambiguities of Section 771B together and explained how its revised interpretation allows for a determination that is consistent with the original panel's findings.[31] The USDOC's discussion of its statutory interpretation of Section 771B is not limited to the paragraphs immediately following the "Statutory Interpretation" header in the Section 129 preliminary determination. Rather, the USDOC's interpretation, and application in this case, of Section 771B is explained throughout section B (titled "Applicability of Section 771B of the Act") of the preliminary determination, as well as Comments 5 and 6 of the final determination.

17. The EU also misreads the findings of the original panel report. The EU suggests that there is "no room whatsoever" for the USDOC to interpret Section 771B in a consistent manner because Section 771B "requires" the USDOC to "presume that the entire benefit of a subsidy . . . passes through to the downstream processed agricultural product."[32] However, the original panel found that Section 771B restricted the USDOC's *discretion* to consider other factors.[33] Thus, a compliance measure that ensures the USDOC can exercise its discretion to consider all relevant facts and circumstances, beyond those specifically enumerated in Section 771B, would appropriately address the recommendation of the DSB and finding of the panel.

18. The belated introduction of these arguments also shows how the EU is straining to overcome the critical flaws of its primary legal theory. The original panel made no specific suggestions as to *how* the United States could bring Section 771B into conformity with the GATT 1994 and the SCM Agreement. Thus, there is no reason to accept that a revised interpretation of Section 771B would not bring the measure at issues – Section 771B – into conformity with the GATT 1994 and the SCM Agreement.

19. The availability of legal review by a U.S. court does not speak to the question of whether the United States has brought Section 771B into compliance.[34] In principle, any agency action, including an interpretation such as the revised interpretation of Section 771B in the ripe olives Section 129 proceeding, may be subject to review in U.S. domestic court proceedings. However, under U.S. law, the USDOC interpretation of the U.S. countervailing duty ("CVD") law is the governing interpretation unless reversed by a final decision of a U.S. court.[35] As a matter of US municipal law, and therefore of fact for this WTO proceeding, the USDOC's interpretation has legal effect under U.S. law. That any given measure might be challenged in municipal courts in

[31] U.S. Responses to Panel Questions, para. 35.

[32] EU Responses to Panel Questions, para. 37. *See also US – Ripe Olives (Spain) (Panel)*, para 7.170.

[33] *US – Ripe Olives (Spain) (Panel)*, para. 7.170 (finding that Section 771B does not "leav[e] 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").

[34] *See* U.S. Responses to Panel Questions, paras. 64-66.

[35] *See* U.S. Responses to Panel Questions, para. 64.

the future is not relevant to and does not alter the content of a Member's municipal law in the present.

20. The EU's arguments that Section 129 cannot be used to modify statutes are also irrelevant for these compliance proceedings and unresponsive to the Panel's question.[36] The EU's understanding does not accurately reflect the purpose of the Section 129 proceeding; nor does it reflect what is permissible under U.S. law. As the USDOC noted in the Section 129 final determination, "any dispute settlement findings that a U.S. statute is inconsistent with an agreement also cannot be implemented except by legislation approved by Congress *unless consistent implementation is permissible under the terms of the statute*."[37] The USDOC demonstrated that consistent implementation is permissible under the current terms of Section 771B by reinterpreting and applying that statute during the compliance proceeding – thus, the Section 129 determinations are an appropriate compliance measure.[38]

Question 4 (*To the United States*) At page 17 of the Preliminary Section 129 Determination, the USDOC's interpretation of Section 771B was that the USDOC is able "to consider factors other than those two factors expressly identified in section 771B of the Act". Was this statement made on the basis of a claimed flexibility in the wording of Section 771B itself or on the basis of Section 129(b)(2) of the Uruguay Round Agreements Act?

U.S. Comment on Q4:

21. The EU did not respond to this question.

Question 5 (*To the United States*) In paragraph 3 of its first written submission, the United States characterises the DS577 Panel Report as finding "that Section 771B did not permit USDOC to take into account other factors that may be relevant to determining whether there is any pass- through and, if so, its degree".

a. Could the United States clarify what it is about the cited paragraph of the DS577 Panel Report that allows the United States to arrive at that characterisation, in particular, the proposition that Section 771B did not permit other factors to be taken into account?

b. Does the United States agree that the Panel's finding was that Section 771B:

i. is "as such" inconsistent with the United States' obligations under the covered agreements because it requires the USDOC to presume that the entire benefit of a subsidy provided in respect of a raw agricultural input product passes through to the downstream processed agricultural

[36] EU Responses to Panel Questions, paras. 40 and 84.

[37] USDOC Section 129 Final Determination (Exhibit EU-2), p. 23 (emphasis in original), citing House Report 103-826(1) at 25 (1994) and Senate Report 103-412.

[38] U.S. Second Written Submission, para. 12.

product, based on a consideration of only the two factual circumstances prescribed in that provision; and

ii. does not leave open the possibility to take into account any other factors that may be relevant to the determination of whether there is any pass-through and, if so, its degree?

U.S. Comment on Q5:

22. The EU did not respond to this question.

Question 6 (*To both parties*) In your opinion, does the *US - Ripe Olives from Spain* Panel Report suggest ways in which the United States could implement the recommendations in the Report, made pursuant to Article 19.1 of the DSU, with respect to the "as such" finding of non-compliance pertaining to Section 771B?

U.S. Comment on EU Response to Q6:

23. The EU suggests in its response that the panel report in the original proceeding expressly *excludes* a revised interpretation of Section 771B as a possible compliance option.[39] This is an incorrect and misguided reading of the original panel's findings and recommendation. There are several ways for a WTO Member to bring a measure that is "as such" inconsistent into conformity with the text of the GATT 1994 and the SCM Agreement,[40] And the EU has expressly agreed with this core fact on several occasions.[41] Despite agreeing that there may be multiple ways to bring an "as such" inconsistent measure at issue into conformity, the EU here claims that the USDOC has no discretion to interpret Section 771B in a consistent manner.

24. The EU again engages in a misreading of the original panel's findings, because the original panel did not exclude interpretation of Section 771B as a possible compliance option.[42] Notably, the EU provides no citations to either the original panel report, or any other panel report, to support its position. This reflects the weakness of the EU's arguments. In fact, the USDOC reached a new understanding of Section 771B that did not require that *only* the two factors specified in text of the statute itself be considered when conducting an analysis of benefits.[43] Instead, the USDOC determined that a reasonable interpretation of the statute allows the USDOC to consider those factors *in addition* to *any other* relevant information and facts available to it during the course of its investigation. The USDOC then gave legal effect to the

[39] EU Responses to Panel Questions, para. 41.

[40] *See* U.S. First Written Submission para. 64, and U.S. Responses to Panel Questions, paras. 12-14.

[41] *See, e.g.*, EU First Written Submission, para. 57 and EU Second Written Submission, para. 19. The EU also acknowledged this during the discussion at the substantive meeting of the parties.

[42] The original panel made no findings regarding a particular manner of compliance.

[43] USDOC Section 129 Preliminary Determination, p. 17 (Exhibit EU-1).

revised interpretation when it applied that new understanding in the Section 129 proceeding. The USDOC was thus able to interpret the statute to render it not inconsistent with WTO rules.[44]

25. Finally, the EU also suggests that it would be sufficient for the Panel to conclude that the interpretation of Section 771B could not constitute compliance "as such." However, the question of whether the Section 129 determinations and the USDOC's interpretation and application of Section 771B, constitute a valid measure to comply is precisely the issue before the Panel. The reinterpretation is a valid compliance measure because it allows the USDOC to take into consideration all relevant facts and circumstances when conducting its attribution of benefits. The USDOC did in fact take into consideration all relevant facts on the record, in addition to the factors specifically enumerated in Section 771B. Thus, the United States has addressed the recommendation of the DSB and brought Section 771B into conformity with U.S. WTO commitments under the GATT 1994 and the SCM Agreement.[45]

Question 7 (*To the European Union*) Does the European Union agree with the following statements made by the United States in paragraphs 21 and 22 of its second written submission, and if not, why not:

a. "[t]he accuracy and completeness of the analysis of the benefit to the input product is also logically relevant to the question of the attribution of the benefit to the processed product" (emphasis added); and

b. "factors considered by the USDOC that support the analysis of benefits to the input product *also* speak to the attribution of benefits to the *processed product*" (emphasis original)?

U.S. Comment on EU Response to Q7:

26. The accuracy of the analysis of the benefit to the input product is logically relevant to the question of the attribution of benefit to the processed product, as we have explained in our second written submission.[46] The EU disagrees,[47] but fails to provide compelling rebuttal arguments. The original panel agreed that substantial dependence is one factor relevant to the attribution of benefits analysis, and the USDOC's reinterpretation, including the analysis of the benefit to the input product, was more accurate as a result of the reinterpretation.[48]

27. In its response, the EU argues at length that factors considered by the USDOC that are relevant to the attribution of benefits on raw olives (the input product) are irrelevant to the attribution of benefits on processed table olives (the downstream product).[49] However, these

[44] U.S. First Written Submission, paras. 6 and 60. *See also* USDOC Section 129 Preliminary Determination, p. 17 (Exhibit EU-1).

[45] U.S. First Written Submission, para. 61.

[46] U.S. Second Written Submission, para. 21.

[47] EU Responses to Panel Questions, para. 49.

[48] U.S. Second Written Submission, para. 9.

[49] EU Responses to Panel Questions, para. 49.

arguments simply reflect the EU's insistence that only one type of attribution analysis is acceptable. The EU's assertion is not supported by the text of the relevant agreements.[50]

Question 8 (*To the European Union*) In paragraph 28 of its second written submission, the United States submits that "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 – are 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, and thus of the kind endorsed by the Panel". The United States further submits that "the insurance premiums charged for different types of olive varietals may speak to the way that pricing flows down to the latter stage product". Does the European Union agree with these statements? If not, why not?

U.S. Comment on EU Response to Q8:

28. The factors identified by the panel in the original panel report as examples of factors that could be relevant for the analysis of attribution of benefits to the processed product are all qualitative factors. The USDOC examined the same type of qualitative factors in the Section 129 proceedings.[51] The EU argues that the factors identified in this Question 8 are irrelevant for the element of the nature of the market and all conditions of competition in that market, referenced by the original panel.[52] The EU further argues that the United States did not define a "market" in its Section 129 determination.[53] The EU is incorrect for several reasons.

29. First, here the EU suggests that the United States' analysis must take a specific structure and format, including setting out a specific definition of the "market." However, this is not required under the text of Article VI:3 of the GATT nor under Article 10 of the SCM Agreement.[54] The original panel also rejected the idea that there was only one particular format required for a WTO-consistent attribution of benefits analysis, and instead focused on the fact that a consistent analysis should include an examination of all relevant facts and circumstances.[55] The original panel made no findings which would require the USDOC to define a specific market, and the EU's "definition" is irrelevant. Although the original panel gave examples of other factors that *may* be relevant to the attribution of benefits analysis (such as the market power of different producers and processors), it notably declined to say that such factors *must* be examined for a WTO-consistent attribution of benefits analysis.[56]

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[50] *See US – Ripe Olives (Spain) (Panel)*, para. 7.151 and 7.162.

[51] U.S. Second Written Submission, para. 28.

[52] EU Responses to Panel Questions, para. 58.

[53] EU Responses to Panel Questions, para. 59.

[54] U.S. Responses to Panel Questions, para. 48.

[55] *US – Ripe Olives (Spain) (Panel)*, paras. 7.151, 7.154, and 7.162.

[56] *US – Ripe Olives (Spain) (Panel)*, para. 7.155.

30. The key finding of the original panel was that the text of Section 771B precluded the consideration of factors beyond those specifically enumerated in the statute.[57] In conducting the Section 129 proceeding, the USDOC provided a revised interpretation of the statute that explains why the USDOC is able to consider additional factors beyond those specifically enumerated in Section 771B.[58] The USDOC then applied that revised interpretation and conducted a holistic analysis that addressed all relevant information on the record, in addition to the two factors of Section 771B. Thus, the United States has brought its measure into conformity with the relevant provisions of the GATT 1994 and the SCM Agreement.

31. Second, for the EU to say that there is no defined "market" ignores the fact that processed table olives differ very little from the input product – raw olives. Thus, there is logically a great degree of overlap between the market for the downstream product and input product, and factors relevant to the identification of the input product (certain varietals of raw olives) are thus relevant for scoping the market for the downstream processed product (table olives).[59]

32. Third, by arguing that the factors analyzed that are relevant to substantial dependence are irrelevant to the question of attribution of benefits, the EU ignores the fact that the panel specifically agreed that substantial dependence may be one factor that is relevant to pass-through.[60]

Question 9 (*To the United States*) In the ripe olives Section 129 determination, did the USDOC consider circumstances/factors that could have led to a different conclusion on the question of whether 100% of the subsidies provided to olive growers passed through to the ripe olive processors than to the conclusion originally made? Please indicate where this consideration is reflected in the Section 129 determinations.

U.S. Comment on Q9:

33. The EU did not respond to this question.

Question 10 (*To the European Union*) In paragraph 30 of its second written submission, the United States argues that evidence on the record shows that the 100% attribution of benefits from the input product to the processed agricultural product was appropriate, and the record does not support an alternative level of attribution. Does the European Union agree? If not, why not?

U.S. Comment on EU Response to Q10:

34. The EU references one sentence from the Section 129 preliminary determination in support of its argument that there is no evidence to support 100% attribution of benefits.[61]

[57] *US – Ripe Olives (Spain) (Panel)*, paras. 7.168 and 7.170

[58] U.S. First Written Submission, paras. 61 and 69-74; U.S. Second Written Submission, para. 9.

[59] U.S. Opening Statement at the Substantive Meeting with the Parties, para. 10.

[60] *See US – Ripe Olives (Spain) (Panel)*, para. 7.166.

[61] EU Responses to Panel Questions, para. 70.

However, the USDOC undertook a holistic analysis, and the sentence summarizing the calculation of benefits should be read in the broader context of the entire attribution of benefits analysis, generally discussed on pages 17-19 of the preliminary determination, and pages 20-24 of the final determination.[62]

35. Further, in describing its analysis and explanation of findings in the Section 129 determinations, the USDOC placed information onto the record that was relevant for the respondents to reference when submitting rebuttal comments. The USDOC gave parties the opportunity to submit factual information to rebut, correct, or clarify the factual information the USDOC placed on the record. The EU is therefore incorrect in saying that the USDOC failed to take any investigative steps with a view to gathering relevant information regarding pass-through.[63] In fact, the USDOC gave interested parties several opportunities to present new facts, or disagree with the interpretation of Section 771B and attribution of benefits,[64] and, tellingly, none chose to do so.

Question 11 (*To the United States*) In paragraph 71 of its first written submission, the European Union argues that the USDOC's modification of the definition of the "prior stage product" concerns the determination of benefit to the direct recipients, the olive growers.

a. Was this a consideration that on its own could impact on the question of whether the amount of subsidy received by an olive grower that was attributable to olives used in ripe olive processing fully passed through to the olive processors?

b. Did the reconsideration and modification of the scope of the prior stage product also have implications for the calculation of the amount of benefit received by raw olive growers?

U.S. Comment on Q11:

36. The EU did not respond to this question.

Question 12 (*To the United States*) At page 19 of the Preliminary Section 129 Determination, the USDOC made the following observation: "The sum represents the benefit per kilogram of raw olives. To calculate the benefit to the respondent, we multiplied this per kilogram benefit by the volume of raw olives purchased for ripe olives by the respondent". Please respond to the European Union's argument in paragraph 31 of its second written submission that this "simple 'multiplication per kilogram'" when determining the benefit passed through to the downstream processor confirms that the USDOC presumed a 100% pass-through.

[62] U.S. Responses to Panel Questions, para. 61; *see also* U.S. Second Written Submission, para. 28

[63] EU Responses to Panel Questions, para. 68.

[64] *See* U.S. Responses to Panel Questions, paras. 43, 44, 47, 56, and 58, and accompanying citations.

U.S. Comment on Q12:

37. The EU did not respond to this question.

Question 13 (*To the United States*) In paragraph 5 of its first written submission, the United States refers to "certain ambiguous provisions of Section 771B that had rarely been applied at the time of the original panel proceeding". Please indicate when the ambiguities were identified and when the USDOC reached its "revised understanding and approach" (see United States first written submission, paragraph 68). Please also indicate whether that was before or after the DSB's adoption of the DS577 Panel Report.

U.S. Comment on Q13:

38. The EU did not respond to this question.

Question 14 (*To the United States*) At page 18 of the Preliminary Section 129 Determination, the USDOC states the following: "We applied the same benefit calculation methodology for grower subsidies in this section 129 proceeding as we did in the investigation. In the Preliminary Determination, Commerce analyzed the applicability of section 771B of the Act, and found that both prongs were satisfied. Therefore, we found that the benefits provided to olive growers benefit the processors of ripe olives in accordance with section 771B of the Act ..." (emphasis added; footnotes excluded). Please explain whether factors other than those relevant to the two prongs were considered and, if so, which were those other factors. Please explain how any such other factors are distinguished from the two prongs of Section 771B?

U.S. Comment on Q14:

39. The EU did not respond to this question.

Question 15 (*To both parties*) Please explain whether you agree with the proposition that Section 771B continues to materially restrict any USDOC discretion to:

a. 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 that exercise; and

b. determine the extent to which subsidies on input products may have been indirectly bestowed upon the processed investigated products.

U.S. Comment on EU Response to Q15:

40. The EU disagrees that "materially restrict" is the relevant question here because, in the EU's view, the original panel "did not find that Section 771B 'materially restricts' the USDOC's discretion"; rather, according to the EU, it found that "Section 771B 'requires' the USDOC to

violate WTO rules."[65] The EU argues that, as a result, the original panel's finding "excludes any possibility for the United States to comply through 'interpreting' Section 771B."[66] The EU's arguments that the panel findings do not permit a reinterpretation of Section 771B as a possible compliance measure are incorrect and misguided, as discussed above.[67] There are several ways for a WTO Member to bring a measure that is "as such" inconsistent into conformity with U.S. WTO commitments under the GATT 1994 and the SCM Agreement,[68] and the EU has expressly agreed with this core fact on several occasions.[69] Despite agreeing that there may be multiple ways to bring an "as such" inconsistent measure at issue into conformity, the EU here claims that the USDOC has no discretion to interpret Section 771B in a consistent manner.

41. The EU again engages in a misreading of the original panel's findings, because the original panel did not exclude a revised interpretation of Section 771B as a possible compliance option.[70] Notably, the EU provides no citations to either the original panel report, or any other panel report, to support its position that the original panel finding "excludes any possible consistent 'interpretation' of Section 771B."[71] This reflects the weakness of the EU's arguments. In fact, the re-interpretation of Section 771B *does* bring the measure into conformity.[72]

42. The USDOC was also clear that, under the revised interpretation of Section 771B, it "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."[73] In other words, the USDOC is not restricted from providing an analytical basis for its findings that takes into account the relevant facts and circumstances. The USDOC is also not materially restricted from determining the *extent* to which subsidies on input products may be attributed to the downstream investigated products.[74] As the USDOC stated in the final Section 129 determination, "the ambiguity in the term 'deemed' is not necessarily about what the term itself means, but that the statute does not explain in what way [the USDOC] is to conduct the benefit calculation (i.e., what amounts to include or not include, and what adjustments to make)."[75] The statute also

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[65] EU Responses to Panel Questions, paras. 72-73.

[66] EU Responses to Panel Questions, para. 72.

[67] We note that the EU here has gone so far as to re-write the Panel's question to better support its unfounded arguments, stating that the question controlling question is not whether Section 771B "materially restrict[s]" USDOC discretion, but rather "exclude[s]" any USDOC discretion. EU Responses to Panel Questions, para. 73 and n.71 (emphasis original).

[68] *See* U.S. First Written Submission para. 64, and U.S. Responses to Panel Questions, paras. 12-14.

[69] *See e.g.* EU First Written Submission, para. 57 and EU Second Written Submission, para. 19. The EU also acknowledged this during the discussion at the substantive meeting of the parties.

[70] The original panel made no findings regarding a particular manner of compliance.

[71] EU Responses to Panel Questions, para. 72 (emphasis original).

[72] *See* U.S. First Written Submission, paras. 63-72.

[73] USDOC Section 129 Preliminary Determination (Exhibit EU-1), p. 17. *See also* U.S. Responses to Panel Questions, para. 37.

[74] U.S. Responses to Panel Questions, para. 46.

[75] USDOC Section 129 Final Determination (Exhibit EU-2), p. 21.

notably does not specify that the benefits shall be deemed "fully" or "to the full extent."[76] Thus, a finding of less than 100% attribution of benefits is possible.

1. **Question 16: (*To the United States*) At page 19 of the Final Section 129 Determination, the USDOC states that it "disagree[s]" with "the EC's view (which aligns with that of the Panel) that Section 771B of the Act applies when only two factual circumstances (i.e. minimal value and substantial dependence) are met and that the express terms of this provision leave no gap for Commerce to fill with its interpretation". With regard to the USDOC's disagreement, please explain what might be the content of this "gap" and in what circumstances this "gap" could lead to a less - than 100% pass through of the subsidy concerned.**

U.S. Comment on Q16:

43. The EU did not respond to this question.

Question 17 (*To both parties*) In paragraph 92 of its first written submission, the United States argues that the use of a particular calculation method in the ripe olives case does not mean that Section 771B requires the USDOC to utilize one attribution methodology, but the appropriate approach would depend on the particular facts, evidence and arguments presented in each case.

a. Where is this conclusion reflected or otherwise supported in the preliminary and final Section 129 determinations?

U.S. Comment on EU Response to Q17(a):

44. In its response, the EU again attempts to mischaracterize the U.S. explanations as *ex post* rationalization.[77] However, the United States explained in its responses to the Panel's questions where the above conclusion is reflected in the preliminary and final Section 129 determinations.[78] The EU focuses on just one sentence from the preliminary Section 129 determination in support of its arguments, which is misleading and does not reflect the nature of the overall statutory interpretation and analysis conducted by the USDOC in the Section 129 proceeding.

45. Although the two factors in Section 771B remain relevant to the question of attribution of benefits to the downstream product, they are not the only factors considered by the USDOC, and Section 771B is silent as to *how* to calculate benefits in any one instance.[79] This question is inherently fact specific, and requires a case-by-case analysis depending on the product and

[76] USDOC Section 129 Final Determination (Exhibit EU-2), p. 21.

[77] EU Responses to Panel Questions, para. 77.

[78] *See* U.S. Responses to Panel Questions, para. 42 and accompanying citations.

[79] U.S. Responses to Panel Questions, para. 70 (quoting the final Section 129 determination at pages 20-24 that "Congress has left it to [the USDOC]'s discretion to determine the parameters of the analysis, i.e., what is considered "substantially dependent" in a given case, how to evaluate the value of the processing operation, and how to attribute the subsidies provided to the upstream producers.").

market at issue. Therefore, it is reasonable to expect that there will be some variations in the methodology used to calculate the grower benefits attributable to the respondents and in the factors used by the USDOC in any particular proceeding in which Section 771B is applied.

b. Is it relevant that no interested party that participated in the Section 129 proceeding presented an alternative calculation methodology, nor facts, evidence, or arguments to support that a different amount should be attributed under the facts of this case?

U.S. Comment on EU Response to Q17(b):

46. In its response, the EU focuses on the fact that the USDOC did not issue a specific questionnaire related to attribution of benefits to the respondents. However, the USDOC provided ample opportunities for the interested parties of the Section 129 proceedings to comment and place additional factual information on the record.[80] We emphasize that the original panel did not issue findings related to the *manner* that an investigating authority should analyze all relevant facts and circumstances related to the question of attribution of benefits.[81] The original panel instead focused on the fact that an investigating authority should not be *precluded from* analyzing such facts and circumstances.[82]

47. The EU's arguments in response to this question simply reflect the weakness of its legal theory, and a belated effort to broaden the scope of the issue before the Panel. That the USDOC did not issue questionnaires to interested parties specifically related to attribution of benefits does not mean that the analysis excluded relevant facts and circumstances. Interested parties did have opportunities to comment on the method of attribution of benefits, and as explained, offered no alternatives to the USDOC's methodology.[83] The EU's suggestion that the way the USDOC presented its methodology in the Section 129 proceeding precluded interested parties from submitting additional comments is factually incorrect. There was no such limitation placed on commenters. That the EU now takes issue with the manner in which the USDOC conducted its analysis does not mean the analysis was flawed – just that the EU disagrees with the result.

Question 18: (*To the United States*) With respect to the "narrowing [of the] definition of the 'prior stage product' and 'raw agricultural product' to table and dual-use raw olive varietals that are biologically distinct from other raw olive varietals":

a. Please explain how the finding by the USDOC that it "modified [its] definition of the 'prior stage product' from all raw olives to the four principal varietals produced for table and found that 55.28 percent of these varietals were

[80] *See* U.S. Responses to Panel Questions, paras. 43, 44, 47, 56, and 58, and accompanying citations.

[81] *US – Ripe Olives (Spain) (Panel)*, para. 7.155.

[82] *See e.g. US – Ripe Olives (Spain) (Panel)*, para. 7.169 ("An investigating authority is not entitled to exclude from its determination of pass-through factors that are potentially relevant to its determination and to proceed on the basis of a *presumption* of indirect subsidization." (emphasis in original)). *See also US – Ripe Olives (Spain) (Panel),* paras. 7.154 and 7.162.

[83] *See* U.S. Responses to Panel Questions, paras. 43, 44, 47, 56, and 58, and accompanying citations.

processed into table olives", differs from the original finding by the USDOC. This question is asked in the context of paragraph 47 of the European Union's first written submission, where the European Union states that "[t]he USDOC had undertaken the same 'exclusion' in the original proceedings".

b. Given the change to the class of products receiving the direct subsidy, was there not therefore a change in the volume of the raw olives assumed to have been dedicated to ripe olive processing? In circumstances where there was a change in the volume of the raw olives assumed to have been dedicated to ripe olive processing, but the volume of ripe olives processed by the subject exporters did not change, why did the countervailing subsidy amounts not change?

c. Does the lack of any change indicate that the redetermination of the prior stage product was not relevant to the question of pass-through in the sense required under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, but instead was only relevant to satisfy the first of the two conditions that are prescribed under Section 771B to deem 100% pass through?

U.S. Comment on Q18:

48. The EU did not respond to this question.

Question 19: (*To the United States*) In paragraph 71 of its first written submission, the European Union argues that the modification of the definition of the "prior stage product" concerns the determination of benefit to the *direct* recipients, the olive growers, and similarly, the exclusion of benefit conferred to crops other than raw olives concerns the determination of benefit to the *direct* recipients, i.e. the olive growers.

a. Please respond to the argument that direct benefit is a matter that falls under Articles 1 and 19 of the SCM Agreement.

b. Please respond to the argument that the United States was under an obligation to implement the DSB rulings and recommendations with respect to *indirect* benefit conferred to ripe olive producers (i.e., the pass-through of direct subsidies to raw olive producers to ripe olive processors) under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.

U.S. Comment on Q19:

49. The EU did not respond to this question.

Question 20: (*To the United States*) At page 19 of the Final Section 129 Determination, the USDOC states "because the section 771B analysis occurs within the context of the overall CVD investigation (or administrative review, as the case may be), Commerce must abide by the guiding principle that applies in all its proceedings – that Commerce must evaluate all potentially relevant data and information that is available on the record in making its determinations." Please

explain where this guiding principle is contained in the U.S. administrative law framework or guidelines and explain how it applies. Please support your answer with documentary evidence.

U.S. Comment on Q20:

50. The EU did not respond to this question.

Question 21: (*To the United States*) At page 3 of the Preliminary Section 129 Determination, the USDOC refers to issuing questionnaires in the Section 129 proceeding. Did any of these questionnaires refer to or request information about any factors other than the two factors under Section 771B that may be relevant to the determination of the existence and extent of any pass-through of a benefit to the imported downstream product? If so, what were those factors?

U.S. Comment on Q21:

51. The EU did not respond to this question.

Question 22: (*To the United States*) In paragraph 30 of its second written submission, the United States says:

> **Further, the evidence on the record shows that the 100 percent attribution of benefits from the input product to the processed agricultural product was appropriate, reasoned, and is supported by an analysis of all relevant facts and information on the record. The record does not support an alternative level of attribution, nor have the parties identified any such information on the record of the proceeding. (emphasis added)**

What is the significance of the references to the "facts and information on the record" in the context of the investigation that was carried out in arriving at the ripe olives Section 129 determination? To what extent did that limit the consideration of relevant factors in the determination of the existence and extent of any pass-through of a benefit to the imported downstream product?

U.S. Comment on Q22:

52. The EU did not respond to this question.

Question 23: (*To the European Union*) In paragraph 19 of its second written submission, the European Union states as follows:

> **While the European Union would agree with a previous arbitrator that "a repealing or amendatory statute is commonly needed" in case of "as such" inconsistent legal provisions to come into compliance, the European Union also acknowledges that there may be other forms of compliance that may not require the formal amendment of the text of the legal provision. The European Union in its first written submission expressly referred to the potential example of a**

formal commitment by the defending Member to apply a legal provision in a certain manner in the future.

In view of the discussion that took place at the parties' substantive meeting with the Panel, does the European Union wish to clarify its position with respect to the availability of a formal commitment as a means of complying with the as such ruling with respect to Section 771B, and what the legal character of such a commitment would be? Please consider in your answer where the dividing line would be drawn between a commitment that could satisfy a Panel as being a suitable basis for a ruling in its report, and a commitment that would only be suitable as a mutually agreeable solution.

U.S. Comment on EU Response to Q23:

53. The United States notes that the EU has not directly responded to the panel's question.[84] Instead of providing an example of what sort of "formal commitment" would satisfy the EU, it only states that a commitment based on the revised interpretation of Section 771B is "irrelevant" for an attribution of benefits analysis.[85] The EU conveniently ignores that the USDOC has provided an explanation of the statutory interpretation of Section 771B *as a whole* in the Section 129 proceeding, not just a reinterpretation of the terms "prior stage product" and "raw agricultural product." The EU also ignores the explanation provided by the United States for why the meaning of these terms *is*, in fact, relevant to the attribution of benefits to the downstream product.

54. Despite accepting there are multiple ways to bring a WTO-inconsistent measure into conformity, including, potentially, a formal commitment,[86] the EU now backtracks and says that such a commitment would be unacceptable because it would disagree with the *content*, not the form, of any commitment based on the USDOC's reinterpretation. Evidently, the EU is *now* concerned that the reinterpretation and application of Section 771B in the Section 129 determinations *has* legal effectiveness within the U.S. municipal law system – specifically, a legal effect with which the EU disagrees – and one which has effect beyond this proceeding.[87] For these reasons, and as explained above in our comments on the EU's response to Question 1, the Panel should reject the EU's reasoning.

Question 24: (*To the United States*) At the substantive meeting, the Panel asked about the legal character of the USDOC's re-interpretation of Section 771B, from

[84] EU Responses to Panel Questions, para. 83.

[85] EU Responses to Panel Questions, para. 83. The EU's statement is notably unsupported, except for one reference to *US – Carbon Steel (India) (Article 21.5 – India)*.

[86] *See* EU Second Written Submission, para. 19.

[87] As noted, 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. *See United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (Exhibit USA-8); *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (Exhibit USA-10); *see also* U.S. Responses to Panel Questions, paras. 64-66.

the perspective of the formal legal status of the ripe olives Section 129 determination and its future binding effect.

a. Could the US provide the Panel with more information regarding those matters, including where the USDOC's re-interpretation can be found in the U.S. administrative law framework?

b. What evidentiary standard should the Panel apply in being satisfied as to the legal status, future binding effect and meaning of the ripe olives Section 129 determination?

c. If the Panel were to conclude that the ripe olives Section 129 determination did not bring the measure into conformity with the covered agreement on an "as applied" basis, because the USDOC did not consider matters that were relevant to the evaluation of pass-through, would that degrade the utility of the ripe olives Section 129 determination as evidence of "as such" compliance? Please explain.

U.S. Comment on Q24:

55. The EU did not respond to this question.

Question 25: (*To the United States*) Could the USDOC's re-interpretation in the ripe olives Section 129 proceeding be further reviewed and/or revised by a U.S. domestic court? If so, does that affect whether the USDOC's re-interpretation of Section 771B in the ripe olives Section 129 determination suffices to achieve compliance regarding the "as such" violation?

U.S. Comment on Q25:

56. The EU did not respond to this question.

Question 26: (*To the United States*) Was the USDOC's re-interpretation in the ripe olives Section 129 proceeding also a re-interpretation of the question of whether, if the two prongs of Section 771B are met, a countervailable subsidy found to be provided to either a producer or a processor of an agricultural product processed from a raw agricultural product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product? Please explain.

U.S. Comment on Q26:

57. The EU did not respond to this question.

Question 27: (*To the United States*) The Panel found that Section 771B provided no flexibility to arrive at a finding of other than 100% pass through when the two factors stated therein are established. Is it correct to interpret the ripe olives Section 129 determination as providing flexibility *to consider other factors* going to the question of pass through as equally providing flexibility *not to consider other factors*

going to the question of pass through? In this regard, could the United States point to any reference in its submissions that indicates that the effect of the ripe olives Section 129 determination is that the USDOC must consider other factors going to the question of pass through?

U.S. Comment on Q27:

58. The EU did not respond to this question.

Question 28: (*To both parties)* In paragraph 10 of its oral statement, Japan stated that "the question of whether the United States' revised interpretation of Section 771B constitutes a relevant 'change' to comply with the DSB's finding of an 'as such' violation still needs an objective assessment by this compliance Panel, and a mere assertion of such a change by the United States should not suffice." Do you agree that this Panel is to carry out an "objective assessment" of the revised interpretation? Please explain why or why not.

U.S. Comment on EU Response to Q28:

59. Japan's arguments support the U.S. position – that reinterpretation is one way to comply with the recommendation of the DSB – and that, therefore, a panel must examine whether the claimed compliance measure – including a reinterpretation of a measure at issue – exists.[88] The United States agrees that this calls for an objective assessment. In this case, such an assessment would be whether the USDOC has reinterpreted and applied Section 771B according to that revised understanding. Because this is a matter of the content of U.S. municipal law, it is an issue of fact in this compliance proceeding,[89] and the United States has demonstrated those facts. The EU in effect concedes this point by arguing that the U.S. reinterpretation *might* be challenged in court and that the U.S. had no discretion to change its interpretation.

60. The EU's response simply repackages the unpersuasive arguments it has made previously. As the United States has explained, although the USDOC cannot change the legislative authority of Section 771B, this does not mean that the revised statutory interpretation is somehow unable to bring the measure into conformity with the GATT 1994 and the SCM Agreement.[90] Further, the United States has not "merely asserted" that there was a relevant change to the interpretation of the statute. The United States has explained why the revised interpretation and application of Section 771B in the Section 129 proceeding constitutes a relevant change.[91] The United States has also supported its explanations with references to the

[88] Japan Oral Statement at the Substantive Meeting with the Parties, para. 7 ("In Japan's view, WTO inconsistent measures, including those that constitute "as such" violations, may be brought into compliance through various methods, including without a change in the text of the measure itself. . . . In this regard, the panel in *US – Gambling (Article 21.5 – Antigua and Barbuda)* has implied that a revised interpretation of domestic law could constitute a "measure taken to comply" for "as such" violations.") (internal citations omitted).

[89] *See* paras. 10, 19 and 54, *supra.*

[90] *See* U.S. Responses to Panel Questions, paras. 8-9.

[91] U.S. Responses to Panel Questions, paras. 9-11; U.S. Second Written Submission, para. 12; U.S. First Written Submission, para. 67-73.

preliminary and final Section 129 determinations, and other relevant source material where appropriate.[92]

61. The EU asserts that the USDOC's reinterpretation cannot constitute compliance because it may be changed by the USDOC in the future or may be overturned by U.S. courts. However, the USDOC would not depart from prior interpretations or determinations unless there was a reasonable justification to do so.[93] Moreover, under the EU's inflexible approach, and based on the EU's concern with judicial review, even a change to the *statutory text* would be insufficient for compliance under the U.S. legal system because U.S. courts may *also* examine and invalidate statutes. Taken to its logical conclusion, the EU's approach would result in the inappropriate finding that any action taken by the United States to bring the measure to compliance would fail to do so merely because the legal system allows for judicial review. The Panel should therefore decline to adopt the EU's erroneous approach.

Question 29: (*To both parties)* The European Union, in its written submissions, cites *US – Carbon Steel (India) (Article 21.5 - India)* on a number of occasions. That panel report was not adopted by the DSB. In your opinion, must a panel accept the reasoning contained in an unadopted panel report as "useful guidance", even though it has not come before the DSB for adoption?

U.S. Comment on EU Response to Q29:

62. The EU argues in its response that the Panel should provide thorough and convincing reasoning if it were to deviate from the basic compliance findings of the panel report in *US – Carbon Steel (India) (Article 21.5 – India)*.[94] However, the Panel is not required to "accept the reasoning" of any prior panel report, and thus need not provide a reasoned explanation for any deviation from the findings of that panel.[95]

63. Even if the Panel were to accept the reasoning in *US – Carbon Steel (India) (Article 21.5 – India)*, the facts in this case differ from the facts in *US – Carbon Steel (India) (Article 21.5 – India)*. The USDOC has explained its revised interpretation of Section 771B in the context of the Section 129 proceeding, and provided an explanation for how it was able to consider all relevant facts and circumstances in conducting its attribution of benefits analysis.[96] In contrast, in *US – Carbon Steel (India) (Article 21.5 – India)*, the compliance measures did not include any statutory interpretation within a Section 129 proceeding, and instead included expressions of a commitment to exercise discretion not to apply the statute at issue in that case.[97] The measure taken to comply in this case represents a direct change relevant to the measure that was found to be inconsistent in the original proceedings.

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[92] *See, e.g.*, U.S. Responses to Panel Questions, paras. 55 and 68-70.

[93] U.S. Responses to Panel Questions, para. 3.

[94] EU Responses to Panel Questions, para. 88.

[95] *See* U.S. Responses to Panel Questions, para. 73.

[96] U.S. First Written Submission, para. 48; *see also* U.S. Responses to Panel Questions, paras. 8-10.

[97] *See US – Carbon Steel (India) (Article 21.5 – India)* at paras. 7.310 – 7.317.

<u>Question 30</u>: (*To both parties*) At the substantive meeting with the Panel, there was discussion around the question of whether there is a prescribed standard or prescribed methodology for a pass-through analysis. Paragraph 7.154 of the *US - Ripe Olives from Spain* Panel Report states the following:

> **…an 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.**

Do you agree, therefore, that the standard would be achieved if an investigating authority was able to provide an adequate and reasoned explanation of the analytical basis for its determination of whether there is any pass-through and, if so, its degree?

<u>U.S. Comment on EU Response to Q30</u>:

64. The United States reiterates that providing an "adequate and reasoned" explanation is not the standard that is applicable in these proceedings.[98] The Panel should instead evaluate whether the Section 129 determinations reflect conclusions that an objective and unbiased investigating authority could have reached under the circumstances and in light of the evidence on the record.[99]

65. In its third party submission, Japan also agreed with this approach, explaining that a revised interpretation of the offending domestic law may constitute a relevant change, and noting that it would be desirable if the revised interpretation were supported by objective evidence, such as a written administrative instrument or "*instances of actual application*."[100] The United States application of Section 771B in the Section 129 proceeding is such objective evidence of the revised US interpretation of Section 771B.

66. The EU argues that only a reasoned and adequate explanation that is based on a WTO-*consistent* analytical basis could be accepted by the Panel.[101] The EU's argument is tautological. It implies that an analysis based on Section 771B could not be accepted because it remains WTO-inconsistent, but fails to prove *why* that is the case.[102] Throughout these proceedings, the EU has taken issue with the manner of the USDOC's attribution of benefits analysis in the Section 129 proceeding, arguing that the factors enumerated in Section 771B could not possibly

[98] U.S. Responses to Panel Questions, para. 74.

[99] U.S. Second Written Submission, para. 29.

[100] Japan Responses to Panel Questions, para. 7 (emphasis added).

[101] EU Responses to Panel Questions, para. 90.

[102] EU Responses to Panel Questions, paras. 90 – 91.

be relevant. As we have explained, the Panel agreed that the factors already enumerated in the statute may also be relevant to the question of pass-through.[103]

67. In the Section 129 proceeding, the USDOC revisited its interpretation of Section 771B to ensure it is able to consider all relevant facts and information on the record, not just the factors specifically enumerated in the statute.[104] The preliminary and final Section 129 determinations demonstrate that the revised interpretation was applied, and the conclusion on attribution of benefits was one that could have been reached by an objective and unbiased investigating authority.[105] Thus, the Panel should reject the EU's arguments.

Question 31: (*To the United States*) In paragraph 6 of its first written submission, the United States submits that "a reasonable interpretation of the statute allows the USDOC to consider those factors *in addition* to *any other* relevant information and facts available to it during the course of its investigation." Please respond to the following:

a. Is it correct for the Panel to understand that the reference to "allow[ing] the USDOC to consider those factors" means that it is not mandatory to consider those factors?

b. What does "consider" mean in the context of a pass-through analysis, in the United States' perspective?

U.S. Comment on Q31:

68. The EU did not respond to this question.

Question 32: (*To the United States*) If the ripe olives Section 129 determination is a new measure that brings Section 771B into conformity with the United States' obligations, can the Panel be satisfied of the general and prospective effect of that measure when:

a. the USDOC has expressed the view that Section 771B has always allowed the USDOC to consider factors that are relevant to a pass-through analysis consistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement (see, for instance, page 17 of the ripe olives Preliminary Section 129 Determination and page 19 of the ripe olives Final Section 129 Determination); *but*

b. the United States argued in the original DS577 proceeding that "the two factual circumstances contained in Section 771B are *on their own* appropriate for establishing pass-through in the context of the special commercial and

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

[104] U.S. First Written Submission, para. 36 (citing USDOC Section 129 Preliminary Determination, p. 18 (Exhibit EU-1); USDOC Section 129 Final Determination, p. 21 (Exhibit EU-2)).

[105] U.S. Second Written Submission, Section II.B.

economic circumstances facing agricultural input products used to process downstream products"? (see Panel Report, *US - Ripe Olives from Spain*, para. 7.161)

U.S. Comment on Q32:

The EU did not respond to this question.