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)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

December 8, 2023

I. EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

1. The original panel report also found that Section 771B of the Tariff Act of 1930, as amended ("Section 771B"), is "as such" inconsistent with Article VI:3 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 10 of *the Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Specifically, the original panel found that Section 771B requires the USDOC to presume the entire benefit of a subsidy provided with respect to a raw agricultural input product passes through to the downstream processed agricultural product, based on a consideration of only two factors. The panel report found that Section 771B did not permit the United States Department of Commerce ("USDOC") to take into account other factors that may be relevant to determining whether there is any pass-through and, if so, its degree.

2. Because of this "as such" inconsistency, the original panel report also found the USDOC's final determination in the investigation was "as applied" necessarily inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. The panel considered that because the USDOC had applied Section 771B in a way that presumed (on the basis of only two factors) that the entire benefit of the subsidy to producers of raw olives was attributable to downstream processed olives, the findings were "as applied" inconsistent. The panel also concluded that this application did not take into account all facts and circumstances relevant to the attribution analysis.

3. To bring the challenged U.S. measures into conformity with WTO rules and address the "as such" findings, the USDOC re-evaluated the meaning of certain ambiguous provisions of Section 771B that had rarely been applied at the time of the original panel proceeding. The USDOC determined that, as a matter of U.S. law, the USDOC is able to exercise its 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, to attribute subsidies granted to an upstream raw agricultural product to the downstream minimally processed agricultural product.

4. The USDOC in fact then exercised this discretion in this case in the proceeding it conducted under Section 129 of the Uruguay Round Agreements Act ("URAA"). The USDOC provided a detailed and reasoned attribution analysis of benefits of the subsidies at issue in this case in its preliminary and final determinations under Section 129 of the URAA. The USDOC in its Section 129 proceeding properly reviewed the evidence on the record before it and considered the facts, evidence, and arguments submitted by interested parties. The USDOC thereby properly addressed the "as applied" findings of the panel.

5. In its first written submission, the European Union ("EU") erroneously argues that the United States has failed to implement the recommendations adopted by the DSB in this dispute because it "did nothing to address the 'as such' inconsistency." The EU also mistakenly argues that there only a few options available for the United States to implement the DSB recommendation to bring Section 771B into conformity with WTO rules – that the text of Section 771B must have been either amended, repealed, not applied, or otherwise changed in some way. However, there is no basis in the DSU for this argument; nothing in the DSU text requires a specific type of action to bring a measure into conformity with WTO rules.

6. The EU also challenges the USDOC's application of Section 771B in the Section 129 proceeding, arguing that any application of the statute must also be inconsistent. However, the EU's "as

applied" arguments fail for the same reasons as the "as such" arguments fail. Further, the EU's arguments disregard the specific findings of the original panel itself.

7. As purported evidence of the non-compliance of the United States, the EU focuses on selective statements from the USDOC in its Final Section 129 Determination, but ignores the greater context: the USDOC commenced the Section 129 proceeding to gather information, analyzed record evidence, reexamined Section 771B and revised its understanding of that provision, and made those determinations as necessary to bring the measures at issue in the original dispute into conformity with WTO rules.

8. Finally, the EU argues that the USDOC took into consideration factors that are not relevant to the underlying proceedings and that it addressed issues that were not addressed by the underlying panel report. In fact, the USDOC evaluated all relevant factual information available as well as the unique circumstances of the ripe olives from Spain investigation in the Section 129 proceeding to determine the appropriate manner to attribute the subsidies. The EU again ignores the fact that the panel in the underlying WTO proceedings did not find the United States was required to take specific types of factors into account when conducting its attribution analysis.

9. The record shows that the United States has implemented the DSB recommendations and brought its measure, Section 771B, into conformity with the GATT 1994 and the SCM Agreement. The Panel, therefore, should reject the EU's claims of non-compliance.

A. The United States has taken appropriate measures to implement the "as such" findings of the panel through the USDOC's revised analysis of the meaning of Section 771B in its Section 129 proceeding

10. Contrary to the EU's argument, the United States has taken very specific measures to address the findings of the panel. The USDOC reexamined the applicability and interpretation of Section 771B in light of the original panel's findings, and came to an understanding that consistent implementation is permissible under the terms of Section 771B. Specifically, the USDOC determined that Section 771B may be reasonably interpreted as allowing the USDOC to "consider all case-specific and relevant record information" and to "determine the appropriate manner to attribute the subsidies to the manufacture, production, or exportation of the processed product." On that basis, the USDOC then carried out an evaluation of the attribution of upstream subsidies to address the core issue of the need to "provide an analytical basis" for its findings, and to address the statute's apparent presumption of a benefit to the downstream processors to consider relevant information beyond that related to the factors specifically enumerated in the two provisions of Section 771B.

11. In the Section 129 Preliminary and Final determinations, the USDOC explains in detail how it reexamined and revised its understanding of Section 771B and then properly applied Section 771B in response to the findings of the panel in the underlying WTO proceeding.

12. As noted in the Section 129 Preliminary and Final Determinations, implementing the DSB recommendations in light of the original panel's findings did not require an amendment to the statute.

13. First, the USDOC reconsidered the meaning of the terms "raw agricultural product" and "prior stage product" as used in Section 771B. In narrowing these definitions, the USDOC considered

significant record information to determine whether, and how, benefits received by the olive growers could be attributed to the olive processors.

14. In addition, the USDOC relied on information from various other sources, including Spain's Ministry of Agriculture, the AICA, Interaceituna, and the International Olive Council. The USDOC also found that it has discretion to determine the appropriate manner to attribute the subsidies to the manufacture, production, or exportation of the processed product. And the USDOC's revised understanding is further demonstrated through its application of the statute in the revised Section 129 determinations, which take into account additional unique aspects of the table olives market.

B. The EU's Arguments That the United States Must Repeal, Amend, Or Otherwise Change the Text Or Applicability of Section 771B to Implement the Recommendations of the DSB Lack Merit

15. The EU erroneously argues that the only way for the United States to implement the recommendations of the DSB would be to amend, repeal, stop applying, or otherwise materially change the text of Section 771B. The EU attaches undue significance to Article 3.7 of the DSU, which expresses a preference for the "withdrawal" of a WTO-inconsistent measure. However, Article 3.7 does not define "withdrawal", which itself reflects that a range of actions may be appropriate. And such a preference does not negate a Member's right to determine what type of compliance measure best addressed the DSB recommendations, nor does it imply that a measure "remains" inconsistent if a Member determines that another approach brings its measures into compliance. Multiple panels have recognized that the DSU text affords Members discretion in determining how to bring a measure that has been found to be inconsistent into conformity with a covered agreement, including the original panel in the underlying WTO proceedings.

16. In its submission, the EU also alleges that, "under no circumstance can a compliance panel revisit 'as such' findings of violation from the original proceedings that have been adopted by the DSB." But whatever the merit generally, that assertion has no relevance to this compliance proceeding, because here, the USDOC's redetermination reflects an interpretation and application of Section 771B that brings that law into compliance with the WTO covered agreements.

17. In these proceedings, the United States is not asking the compliance panel to revisit or disagree with the original panel's "as such" findings, based on the record in the underlying proceedings. Instead, the compliance panel must evaluate whether the USDOC's revised understanding and application of Section 771B, in the context of the Section 129 determinations, adequately addresses the DSB's recommendations.

18. The USDOC's understanding of Section 771B is that it may take "all potentially relevant data and information that is on the record" into account. With that revised understanding and approach, the measure does *not* require WTO-inconsistent action or preclude WTO-consistent action. Where a Member country may apply a measure in a WTO-consistent manner, there is no basis to find that the Member has, through that measure, *already* breached its WTO obligations because of the potential for a *future* WTO-inconsistent application. Instead, it would only be if the Member chooses to act in a WTO-inconsistent manner in a particular circumstance that WTO-inconsistent action would be taken and in which a WTO breach would arise. Any breach in the latter case would stem from the Member's

decision in that specific case on how to apply the underlying measure, not from the underlying measure itself.

19. The USDOC observed that the legislative history of Section 129 indicates that "any dispute settlement findings that a U.S. statute is inconsistent with an agreement … cannot be implemented except by legislation approved by Congress *unless consistent implementation is permissible under the terms of the statute*." Section 129 thus permits the USDOC to implement DSB recommendations relating to a statute if the USDOC determines that implementation is permissible under the text of the statute.

20. The USDOC's revised understanding of Section 771B is supported by the guiding principle that applies in all USDOC proceedings to consider all relevant data and information on the record of the proceeding. This principle is consistent with the findings of the original panel, which also considered that an investigating authority is required to examine all potentially relevant data when conducting its subsidies benefit calculation.

C. The United States appropriately implemented the "as applied" recommendations of the DSB by considering information related to additional factors when conducting the Section 129 determinations.

21. The USDOC's analysis of attribution of benefit is not based on an interpretation of Section 771B that presumes a benefit. Rather, USDOC correctly considered additional factors or considerations beyond the two specifically enumerated in Section 771B. The original panel provided limited analysis as to why the USDOC's original benefit determination was "as applied" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. The panel noted simply that the determination was inconsistent "for the same reasons that Section 771B is inconsistent 'as such.'" It follows that the inconsistency "as applied" may be remedied by the same types of measures that remedied the inconsistency "as such."

22. In this case, the USDOC interpreted the text of Section 771B in a way that is fully compliant with the requirements of the GATT 1994 and the SCM Agreement. Accordingly, the USDOC then applied the text of Section 771B in a way that is fully compliant with the requirements of the GATT 1994 and the SCM Agreement.

D. The EU's argument that the USDOC's revised analysis focuses only on the definition of "prior stage product" and the exclusion of benefit from crops other than raw olives is erroneous.

23. The EU erroneously argues that the USDOC's revised analysis focuses only on the definition of "prior stage product" and the exclusion of benefit from crops other than raw olives. This argument clearly fails in light of the USDOC's extensive and thorough examination of the evidence, its engagement with the interested parties' arguments and its well-reasoned conclusions. It is clear the USDOC reached a determination that an unbiased and objective investigating authority could have reached in light of the totality of the facts and record information analyzed as part of its revised attribution analysis.

24. The USDOC took into consideration several additional facts and record information in addition to information related to the two prongs of the statute when making its revised determination and

conducting its calculation of benefits analysis. This information was directly relevant to the question of *whether* a subsidy benefit received by the olive growers may be attributed to the olive processors, and to the question of *how much* of the subsidy benefit may be attributed to the olive processors.

25. The United States notes that, in implementing the DSB recommendations based on the findings of the panel under Section 129, the U.S. analysis is not limited by the arguments raised by the EU before the panel. The United States is also not limited to applying factors other than those that may have been specifically described by the panel. However, in the Section 129 proceeding and determinations the USDOC did specifically address the arguments raised by the EU and other interested parties in the Section 129 determinations, since the facts and information it took into account address unique aspects of the Spanish olives market.

26. Ultimately, the USDOC's calculation methodology was guided by the facts and evidence available on the record of the Section 129 proceeding, as well as arguments presented by interested parties. Importantly, 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.

II. EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

27. The issue before the Panel in these Article 21.5 proceedings is a narrow one – whether the United States took appropriate measures to comply with the recommendations of the DSB to address the "as such" and "as applied" findings related to Section 771B. In both its written submissions, the EU has repeatedly tried, and failed, to establish that the measures taken by the USDOC were insufficient to address the recommendations of the DSB.

28. The Panel's task here is to examine whether the conclusions reached by the USDOC were ones that any unbiased and objective authority could have made, in the light of the evidence on the record. This analysis should include an examination of the information discussed by the authority in its published report. Thus, the Panel here must evaluate whether the USDOC's revised analysis and reasoned application of Section 771B in the Section 129 determinations constitute "measures taken to comply" that sufficiently address the recommendations of the DSB. This analysis should carefully consider all information available on the record, including the USDOC's reasoning and explanation behind its findings.

29. The United States has implemented the DSB recommendations and brought the inconsistent measure into conformity with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. Therefore, the United States reiterates its assertion that the Panel should reject the EU's claims of non-compliance.

A. The EU's claims that the United States has failed to take appropriate measures to implement the DSB's findings are meritless

30. In conducting the Section 129 proceeding and explaining the reasoning behind the USDOC's revised interpretation of Section 771B and revised benefits calculation methodology, the United States implemented the recommendations and rulings of the DSB. It is a matter of U.S. law that agencies have a level of discretion in interpreting ambiguous statutory language. In revisiting the meaning of Section

771B, and providing a revised interpretation of certain undefined statutory terms such as "prior stage product" and "raw agricultural product," the USDOC was able to conduct a more specific substantial dependence analysis, thus enabling it to more accurately calculate whether the demand for the upstream product (raw olives) is substantially dependent on the demand for the downstream processed product (table olives). This, in turn, resulted in a more accurate evaluation of whether the subsidy benefits afforded to raw olives may be attributed to table olives.

31. 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.*" The USDOC determined that consistent implementation is permissible under the current terms of Section 771B – thus, the Section 129 determinations are an appropriate compliance measure.

i. The United States addressed the Panel's "as such" findings in a WTO-consistent manner

32. Neither the Panel nor the broader rules of the DSU require a specific methodology to implement the rulings and recommendations of the DSB. Thus, Members are able to exercise their discretion in choosing the appropriate way to implement the recommendations of the DSB as the United States has done here. A statute need not preclude WTO-inconsistent action to be considered consistent with a Member's WTO obligations. Consistent with the original Panel's findings, a measure must necessarily lead to WTO-inconsistent action to breach a Member's WTO obligations. Here, the USDOC interpreted and applied the U.S. statute in a manner consistent with U.S. WTO obligations. In this way, the USDOC rendered the U.S. statute consistent with the recommendations of the DSB, and no further action is needed.

ii. The United States conducted a proceeding that is consistent with WTO rules, thereby implementing the Panel's "as applied" findings

33. The USDOC's analysis in the Section 129 proceeding was consistent "as applied" because the determination was made based on an interpretation of the meaning of Section 771B that is consistent with the WTO obligations of the United States. The facts the USDOC considered related to the definition of the prior stage product are relevant to the question of *whether* and *how much* of the BPS subsidy payment may be allocated to olives specifically, but these facts are *also* relevant to the question of benefits to the processed product because they speak to the overall nature of the table olives market. An objective and reasoned analysis under Section 771B would include an analysis of the facts and circumstances that are relevant to the nature of the input product.

34. Additionally, it is important to re-emphasize that, although the Panel provided examples of possible factors that would be relevant to the question before us, the Panel was also clear that there is no specific or prescribed methodology that must be followed to perform a pass-through analysis where one is required. Previous WTO panels have likewise not prescribed a particular calculation methodology, focusing instead on the importance of *analyzing the extent* that a subsidy bestowed on the producer of an input product flows down to processed products. The USDOC used a holistic approach when conducting its analysis. The 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*. Thus, the Panel should reject the EU's arguments.

B. The USDOC objectively considered additional information and record evidence relevant to the issue of benefit to the processed product in conducting the Section 129 proceeding

35. The USDOC's reasoning in the Section 129 proceeding clearly explains how the information on the record speaks to the attribution of benefit to the processed product. In providing examples of factors that *could* be considered when conducting a WTO-consistent analysis, the Panel focused on factors that speak to the *whole nature* of the olives market. The factors considered by the USDOC 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.

36. Implicit in the EU's arguments seems to be the idea that a valid analysis will necessarily result in less than 100% of attribution of benefits from the input product to the processed agricultural product – and therefore that 100% of attribution of benefits is necessarily WTO-inconsistent. However, this would not be an accurate interpretation of the provisions of the text of Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. The record does not support an alternative level of attribution, nor have the parties identified any such information on the record of the proceeding. Dissatisfaction with the *results* of such a valid attribution analysis is not a sufficient or compelling enough argument for finding that the analysis in this case is WTO-inconsistent, or for withdrawing the resulting countervailing duty order.

III. EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT THE SUBSTANTIVE MEETING OF THE PARTIES

37. The EU's principal argument is that the United States has done nothing to bring Section 771B into compliance with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. This is clearly not the case. The USDOC revisited its interpretation of Section 771B, keeping in mind the original Panel's findings, and reached a new determination on the basis of its revised interpretation. The USDOC's new determination is a permissible interpretation of Section 771B under U.S. law and further permits U.S. law to be understood in a WTO-consistent manner. Thus, the compliance Panel should consider the measure to be consistent with U.S. WTO commitments.

38. Further, implicit in the EU's arguments is the idea that the United States must necessarily amend, repeal, or refrain from applying Section 771B in order to implement the recommendation of the DSB. However, there is no requirement that a Member implement the recommendations of the DSB in any one particular way, and the EU concedes that compliance need not always include a formal amendment of the legal provision at issue.

39. The EU also claims that, to bring a measure into conformity with the WTO Agreements, a Member must "ensure that this legal provision is interpreted in a WTO-consistent manner also in the future." The EU seems to expect a level of complete certainty and consistency in the USDOC's application of Section 771B that neither aligns with the original Panel's findings nor is supported in the WTO Agreements. Nothing in the DSU, nor the WTO Agreements generally, requires that a measure expressly *prohibit* WTO-*inconsistent* action. Instead, a Member needs to ensure that its measure does not *preclude* WTO-*consistent* action.

40. Because the original Panel noted that Section 771B was inconsistent "as applied" for the same reasons as it was found to be inconsistent "as such," it is logical that the "as applied" inconsistences may be remedied by the same type of measure that remedied the inconsistency "as such." Thus, the USDOC's interpretation of Section 771B in a WTO-consistent manner in the Section 129 proceeding resulted in a WTO-consistent application of Section 771B as applied to the facts of the new determination.

41. The original Panel's findings focused on the fact that a consistent analysis would depend on an examination of *all* potentially relevant facts and circumstances, including those that speak to the nature of the specific market for the input product at issue and all the conditions of competition on that market. As demonstrated throughout the United States' written submissions, the USDOC correctly evaluated additional facts and considerations beyond the two factors specifically enumerated in Section 771B to conduct its attribution of benefits analysis. The USDOC reached a determination that an unbiased and objective investigating authority could have reached in light of the totality of the facts and record information.

42. As we have demonstrated, the EU's claims that Section 771B, the Section 129 determinations, and the countervailing duty order remain inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement are without merit. The United States respectfully requests that the Panel reject them.

IV. EXECUTIVE SUMMARY OF THE U.S. NOVEMBER 14 RESPONSES TO THE PANEL'S QUESTIONS

Summary of U.S. Responses to Panel Questions 1-2

43. It would be legal error for the Panel to conclude that there has been a failure to comply with the DSB's recommendation with respect to the "as such" findings solely on the grounds the statutory language of Section 771B has not been changed. A legislative measure can be brought into conformity through various methods, and multiple panels have recognized that the DSU text affords Members discretion in determining how to bring a measure into conformity with a covered agreement.

44. In arguing that the U.S. approach in the Section 129 proceedings was a "one time interpretation" and a "further developed understanding of Section 771B" that applies only "in this case," the EU concedes the core of the U.S. argument: that the United States was capable, as a matter of domestic law, of revising its understanding of Section 771B and giving effect to that statutory interpretation. The preliminary and final determinations of the Section 129 proceeding are administrative determinations by the USDOC. Prior determinations are relevant and instructive on how the USDOC would consider evaluating and applying Section 771B in future proceedings. The USDOC would not depart from prior interpretations or determinations unless there were a reasonable justification to do so.

45. Although the EU appears to want a list of specific factors that will always be considered in every case, and continues to look for a specific formula in how the USDOC explains its analysis and consideration of those factors, such a rigid approach is not required by or contemplated under the text of Article VI:3 of the GATT 1994 or Article 10 of the SCM Agreement, and the original panel did not suggest this in its findings.

46. The text of the statute has not changed, but the U.S. understanding has. The Panel should, as a matter of fact, understand the statute as now interpreted by the USDOC because that interpretation has legal effect – and is the measure taken to comply.

Summary of U.S. Responses to Panel Questions 4-6

47. The U.S. agrees that the original panel's findings are that Section 771B creates a presumption based "only" on consideration of two factual circumstances and does "not "leav[e] open the possibility of taking into account any other factors". It is incorrect that the United States is "legally precluded" from re-interpreting its own law in domestic proceedings relating to this dispute. The EU is improperly characterizing this as a situation where the United States is presenting new arguments in a WTO compliance dispute without having taken any action under U.S. municipal law to implement the recommendations of the DSB. That is not the case here, where the United States did take actions under U.S. law to bring its measures into conformity with the GATT 1994 and the SCM Agreement.

48. The original panel's report does not suggest particular ways in which the United States could implement the recommendation in the report with respect to the "as such" findings. The DSU mandates a panel to make a specific recommendation in case of a finding of breach — to bring the measure into conformity with the covered agreements. Previous panels have agreed that Members have the right to determine which measures would implement the recommendation of the DSB. The factors highlighted by the original panel are also not directly relevant to the question of the manner of implementation of the "as such" findings, and speak more to the possible ways to address the "as applied" findings.

Summary of U.S. Responses to Panel Question 9

49. As explained in the Section 129 determination, the USDOC considered the totality of the information on the record and additional information beyond the two factors in section 771B. Based on these facts, the USDOC determined the attribution of benefit provided by the BPS program to the downstream processed product. The factors the USDOC examined are inherently neutral and the USDOC does not work backward from a particular conclusion when conducting its analysis, as the EU seems to suggest. Instead, the USDOC conducts an objective analysis based on the factors and all relevant information on the record.

50. The information on the record, including the additional circumstances and factors the USDOC considered, did not support an alternative level of attribution of benefits from the olive growers to the ripe olive processors. Importantly, *neither did the interested parties identify any such information* on the record of the proceeding. To the extent the Panel is asking about whether there conceivably could have been different conclusions, the answer would be yes, but it would depend on whether there were different facts presented. However, the GATT 1994 and the SCM Agreement do not require that an investigating authority engage in alternative attribution analyses or hypotheticals with different attribution level results for comparison.

Summary of U.S. Responses to Panel Questions 11-22

51. The USDOC did not merely modify "the determination of benefit to the direct recipients, the olive growers". The application of Section 771B depends on the facts and circumstances in each case,

and the USDOC used a holistic approach when conducting its analysis. Thus, the factors it considered that support the analysis of benefits speak to the analysis as a whole.

52. Reconsideration of the prior stage product was relevant to attribution, but did not have implications on the calculation of benefit received by raw olive growers. The Section 771B analysis is distinct from the benefit calculation. The Section 771B analysis informs whether the USDOC can attribute the subsidy to the grower to the processed product. Section 771B does not provide how to calculate the benefit. The EU's arguments related to the calculation of benefits imply that an investigating authority must necessarily take a qualitative factor and convert it into a quantitative coefficient in the calculation. That is not a requirement of Section 771B, nor is it required by the GATT 1994 or the SCM Agreement.

53. The USDOC acknowledged that its substantial dependence analysis in the Section 129 proceeding is substantially similar as the one used in its second remand redetermination before the United States Court of International Trade ("CIT") (November 2021), and that the CIT sustained that analysis as supported by substantial evidence (September 2022). Some of the statutory ambiguities were identified before the DSB's adoption of the DS577 Panel Report. The Section 129 determination is the first time that the USDOC addressed all the ambiguities of Section 771B together and explained how its revised interpretation allows for a Section 129 determination that is not inconsistent with the original panel's adverse findings.

54. The United States does not agree with the proposition that Section 771B continues to "materially restrict any USDOC discretion". USDOC is also not materially restricted from determining the *extent* to which subsidies on input products may have been indirectly bestowed upon the processed investigated products.

55. When a statute does not define a term or prescribe the manner in which the USDOC must effectuate its determination, *i.e.*, is ambiguous, this may be referred to informally as a "gap" in the statute. When a statute is ambiguous, general principles of U.S. domestic law permit the USDOC to exercise its authority to interpret the statute.

56. Given the numerous kinds of agricultural products that could be the subject of a proceeding, and the unforeseen facts that may be before the USDOC, we cannot speculate on what circumstances could lead to less than 100% of a subsidy provided to a raw agricultural product being attributed to a processed product in a countervailing duty investigation; this analysis would depend on the facts and information available on the record and would be determined on a case-by-case basis.

57. Interested parties had several opportunities to comment on the Section 129 determination and place additional information on the record. These were opportunities for interested parties to submit evidence or argument about the particular attribution methodology and benefit calculation the USDOC used in the preliminary Section 129 determination, including to provide alternative methodologies and data in support of such alternatives.

58. In the original investigation, the USDOC determined that eight percent of raw olives (the prior stage product as defined in the investigation) were processed into table olives (the latter stage product). The USDOC determined in the original investigation that the demand for the prior stage product was substantially dependent on the demand for the latter stage product for purposes of Section 771B(1). In

the Section 129 proceeding, the USDOC revised the definition of the prior stage product to be certain distinct biological varietals of raw olives that the Government of Spain and the Spanish olive industry consider to be suitable for table olive production (the revised prior stage product). It then determined that 55.28 percent of these varietals were processed into table olives (the latter stage product), and thus, that the demand for these varietals was substantially dependent on processed table olives.

59. The prior and latter stage products within the substantial dependence calculation do not necessarily define the benefit attribution calculation. The USDOC did not modify the benefit calculation after redefining the prior stage product in the substantial dependence calculation because the information reported by growers allowed for a calculation of the benefit attributable to the production of *subject merchandise* and the benefit calculation already used this data. Therefore, the countervailing subsidy amount did not change.

60. The United States does not agree that the modification of the definition of the "prior stage product" speaks *only* to the question of benefits to the raw agricultural product. The definition is also relevant for the analysis of attribution of benefit to the processed product, in that it relates to the question of substantial dependence, and is one part of the holistic analysis the USDOC used in the Section 129 proceeding.

61. The relevant issue is the measure taken to bring Section 771B into conformity with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. The fact that the actions the United States took may also touch on issues of benefit to the raw agricultural product do not negate the fact that these actions are also relevant to the question of benefit to the processed product. Instead, this simply highlights the holistic nature of the analysis conducted by the USDOC.

62. The Section 129 proceeding is conducted like other antidumping and countervailing duty proceedings, in which the USDOC may request information from interested parties, issues a preliminary determination, allows for parties to comment and submit written arguments, and issues a final determination responding to party comments and arguments. Together, the information and facts gathered and evaluated at each of these stages comprises the "record" of the proceeding. In all its administrative proceedings, including under Section 129, the USDOC bases its determinations on the facts and information on the record.

Summary of U.S. Responses to Panel Questions 24-32

63. A negative conclusion regarding the application of the law would not implicate the ripe olives Section 129 determination as evidence of "as such" compliance. While it is logical that the same actions that bring Section 771B into conformity with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement "as such" would also bring the measure into conformity "as applied," the two questions should nevertheless be examined separately.

64. 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. This supports the conclusion that the USDOC's interpretation has legal effect under U.S. law and does not pose any obstacle to complying with U.S. WTO commitments.

65. Additionally, a review by a U.S. domestic court does not affect whether the USDOC's re-interpretation of Section 771B in the Section 129 determinations suffices to achieve compliance regarding the "as such" violation. As a basic principle of U.S. law, U.S. courts generally have the ability to review acts and omissions of both the legislative and executive branches of our government.

66. The United States agrees that this compliance Panel should carry out an objective assessment pursuant to DSU Article 11 of whether the United States has revised its interpretation of Section 771B and the content of that re-interpretation. Because these are matters of U.S. domestic (municipal) law, they are issues of fact for purposes of this WTO proceeding.

67. A panel is not *required* to "accept the reasoning" of any prior panel as providing any guidance or to carry any weight. It should be understood that precedent is not created under the DSU and is not part of the WTO dispute settlement system. Only authoritative interpretations adopted by the WTO Ministerial Conference must be accepted by Members and adjudicators.

68. The revised U.S. interpretation of Section 771B evidenced by the Section 129 determination demonstrates the U.S. understanding of its CVD law and its capacity in future proceedings to take other factors, and all relevant information on the record, into account in conducting an attribution analysis for downstream processed agricultural products. The United States argued that the factors expressly listed in Section 771B would be enough to conduct a WTO-consistent attribution of benefits analysis. The original panel disagreed with this reasoning and, given this finding and the recommendation of the DSB, the USDOC has reinterpreted the statute and found that it has discretion to take into account additional factors, *and that it is appropriate to do so*.

V. EXECUTIVE SUMMARY OF THE U.S. COMMENTS ON EUROPEAN UNION RESPONSES TO THE PANEL'S QUESTIONS

Summary of U.S. Comments on EU Responses to Panel Question 1

1. The EU's reasoning is flawed for several reasons. 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. In fact, the original panel declined to issue findings related to whether a particular pass-through methodology was required. Instead, the original panel focused on whether Section 771B precluded the USDOC from considering additional relevant facts and circumstances when conducting its analysis.

2. 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. The EU further suggests that the United States revised its interpretation of Section 771B in the form of an "advisory opinion." However, the USDOC's statutory interpretation in the Section 129 proceeding is legally operative under U.S. law and therefore not an advisory opinion.

3. 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. 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. 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. 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.

4. The EU misunderstands the authority delegated to U.S. administrative agencies with respect to the administration and interpretation of laws passed by Congress. 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.

5. 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." 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.

Summary of U.S. Comments on EU Responses to Panel Question 3

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

Summary of U.S. Comments on EU Responses to Panel Question 3

7. 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. This is an incorrect and misguided reading of the original panel's findings and recommendation. 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 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.

Summary of U.S. Comments on EU Responses to Panel Questions 7-8

8. 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. The EU disagrees, 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.

9. 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. The EU argues that the factors identified in this Question 8 are irrelevant for the element referenced by the original panel. The EU further argues that the United States did not define a "market" in its Section 129 determination. The EU is incorrect for several reasons.

10. 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. 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. 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.

Summary of U.S. Comments on EU Responses to Panel Question 10

11. 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. 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. 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.

Summary of U.S. Comments on EU Responses to Panel Question 15

12. 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. 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)."

Summary of U.S. Comments on EU Responses to Panel Question 17

13. In its response, the EU again attempts to mischaracterize the U.S. explanations as *ex post* rationalization. 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. 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.

14. 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.

Summary of U.S. Comments on EU Responses to Panel Question 23

15. 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. 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.

Summary of U.S. Comments on EU Responses to Panel Questions 28-30

16. 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. 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, 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.

17. 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. 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.

18. 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)*. 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. Even if the Panel were to accept the reasoning in *US – Carbon Steel (India) (Article 21.5 – India)*, the facts in this case differ.

19. The United States reiterates that providing an "adequate and reasoned" explanation is not the standard that is applicable in these proceedings. 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. 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*." The United States application of Section 771B in the Section 129 proceeding is such objective evidence of the revised US interpretation of Section 771B.