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)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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TABLE OF ABBREVIATIONS

Abbreviation	Definition
AG	Aceitunas Guadalquivir S.L.U.
AICA	Food Information and Control Agency
BPS	Basic Payments Scheme
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
EU	European Union
SCM Agreement	Agreement on Subsidies and Countervailing Measures
URAA	Uruguay Round Agreements Act
USDOC	U.S. Department of Commerce
USTR	Office of the U.S. Trade Representative
WTO	World Trade Organization

I. INTRODUCTION

1. Proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") are meant to address disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the Dispute Settlement Body ("DSB")]." A panel composed under Article 21.5 of the DSU, therefore, begins with the DSB recommendations to understand what measure the responding party is to bring into conformity with its WTO commitments. That recommendation, in turn, is based on specific findings of the original panel on the matter referred to it by the DSB. In this dispute, the United States has carefully reviewed the DSB recommendations from the underlying proceeding; has proceeded with a domestic implementation process that was fully transparent and consistent with all domestic and WTO procedural rules; and has taken appropriate steps to bring its measures into compliance.

2. The original panel report found that certain aspects of the examination by the United States Department of Commerce (the "USDOC") of the Basic Payment Scheme ("BPS") programs were inconsistent with the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") because they were not based on reasoned and adequate explanations and not clearly substantiated on the basis of positive evidence. During the implementation process, the USDOC re-examined whether the BPS program is specific, and updated the administrative record in the Section 129 proceeding with additional information. The USDOC then found that the record supported a finding that the BPS program is *de facto* specific. In the Section 129 proceeding, the USDOC also collected additional information regarding Aceitunas Guadalquivir S.L.U. ("AG")'s raw olive purchases and revised the total subsidy rate for AG and the all-others rate. The European Union ("EU") has not challenged the USDOC's determinations with respect to any of these issues.

3. The original panel report also found that Section 771B of the Tariff Act of 1930, as amended ("Section 771B"),[1] is "as such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the 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.[2] The panel report found 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.[3]

4. 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.[4] The panel considered

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[1] Section 771B of the Tariff Act of 1930 (Exhibit EU-5).

[2] *US – Ripe Olives (Spain) (Panel)*, paras. 7.176-7.177; 8.1.b.i.

[3] *US – Ripe Olives (Spain) (Panel)*, paras. 7.170-7.171.

[4] *US – Ripe Olives (Spain) (Panel)*, paras. 7.176-7.177.

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.[5] The panel also concluded that this application did not take into account all facts and circumstances relevant to the attribution analysis.[6]

5. 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.[7]

6. In other words, the USDOC determined that Section 771B did not require that *only* the two factors specified in text of the statute itself be considered when conducting an analysis of benefits. Instead, 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 United States was thus able to interpret the statute to render it not inconsistent with WTO rules.

7. 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"). 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.[8] 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.

8. In its first written submission, the 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."[9] The EU then argues that, as a result, the USDOC's revised determination in the proceeding under Section 129 of the URAA must also be considered "as

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[5] *US – Ripe Olives (Spain) (Panel)*, para. 7.175.

[6] *US – Ripe Olives (Spain) (Panel)*, para. 7.176.

[7] Ripe Olives from Spain: Preliminary Section 129 Determination Regarding the Countervailing Duty Investigation, dated September 23, 2022 ("USDOC Section 129 Preliminary Determination") (Exhibit EU-1), p. 18; Ripe Olives from Spain: Final Section 129 Determination Regarding the Countervailing Duty Investigation, dated December 20, 2022 ("USDOC Section 129 Final Determination") (Exhibit EU-2), p. 19.

[8] *See generally*, USDOC Section 129 Preliminary Determination (Exhibit EU-1); USDOC Section 129 Final Determination (Exhibit EU-2).

[9] EU First Written Submission, para. 63.

such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. However, the EU simply ignores the measures the USDOC *did* take to bring Section 771B into conformity with WTO rules. The EU takes no account of the USDOC's interpretation and analysis of the meaning of certain ambiguous language in Section 771B to account for the findings of the original panel.

9. 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. This argument ignores that Members have broad discretion in determining how to bring a measure into conformity with WTO rules. The EU also ignores the fact that the USDOC specifically revisited and further developed its interpretation of the statute in the Section 129 proceeding to account for the findings of the original panel.

10. 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. The EU misunderstands the USDOC's application of its revised methodology in the Section 129 proceeding, erroneously arguing that the USDOC has not considered additional factors in conducting its subsidies analysis, and therefore has not applied Section 771B in a way that is consistent with WTO rules, as applied by the original panel. However, the EU's "as applied" arguments fail for the same reasons as the "as such" arguments fail.

11. Further, the EU's arguments disregard the specific findings of the original panel itself. In evaluating what types of measures *would* be considered consistent with the text of Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, the panel noted that:

> neither Article VI:3 nor Article 10 of the SCM Agreement prescribe that a particular methodology must be followed to perform a pass-through analysis where one is required. To this extent, *investigating authorities have a certain amount of discretion* in evaluating *whether and to what extent* the benefit of a subsidy provided directly to a producer of an upstream product has passed-through to the downstream product produced by an unrelated enterprise (an indirect subsidy).[10]

12. 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,[11] 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

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[10] *US – Ripe Olives (Spain) (Panel)*, para. 7.171 (emphasis added).

[11] EU First Written Submission, para. 3.

provision, and made those determinations as necessary to bring the measures at issue in the original dispute into conformity with WTO rules.

13. 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.[12] 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.

14. 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.

15. The United States has structured its first written submission as follows:

- In Section II.A, the United States provides a brief overview of the procedural history leading to the Article 21.5 proceedings.
- In Section II.B, the United States summarizes the relevant panel findings in the underlying WTO proceedings.
- In Section II.C, the United States summarizes the measures taken by the USDOC under Section 129 of the URAA, as well as the scope of the USDOC's revised analysis.
- Section II.D outlines the scope of an Article 21.5 proceeding and the Panel's standard of review.
- Sections III.A and III.B rebut the EU's challenge that the United States has not complied with the original panel's "as such" findings because the United States took no measure to implement the findings of the Panel. The discussion in these sections demonstrates that (a) the United States has taken appropriate measures to implement the panel's findings through the USDOC's revised analysis of Section 771B in its Section 129 proceeding; and (b) there is no merit to the EU's argument that the United States must repeal or amend the text of Section 771B.
- Section III.C rebuts the EU's challenge that no "as applied" attribution analysis based on Section 771B can be considered consistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, based on the Panel's "as such" findings.

[12] EU First Written Submission, para. 10.

- Finally, Section III.D rebuts the EU's extraneous 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. We demonstrate in Section III.D that the USDOC evaluated all appropriate information and facts relevant to the Section 129 proceeding.

II. FACTUAL BACKGROUND

A. Procedural History

16. The DSB adopted the report of the panel in the underlying WTO proceedings on December 20, 2021.[13]

17. Subsequently, on January 19, 2022, the United States notified the DSB of its intention to implement the DSB's rulings and recommendations, pursuant to Article 21.3 of the DSU.

18. On July 1, 2022, the United States and the EU together informed the DSB that the "reasonable period of time" for implementing the panel's findings would be 12 months and 25 days, giving the United States until January 14, 2023 to implement the findings of the panel.

19. On July 5, 2022, the Office of the U.S. Trade Representative ("USTR") requested that the USDOC issue determinations as necessary to render the determinations in the olives proceedings not inconsistent with the DSB recommendations.[14]

20. On July 11, 2022, the USDOC informed interested parties that it was initiating administrative action under Section 129 of the URAA to comply with the recommendations of the DSB, and issued its Preliminary Section 129 Determination on September 23, 2022. On December 20, 2022, the USDOC issued its Final Section 129 Determination.[15] On January 12, 2023, USTR directed the USDOC to implement the determination in accordance with the URAA. The USDOC accordingly issued a notice announcing implementation of the Final Section 129 Determination on January 12, 2023, which published in the Federal Register on January 19, 2023.[16]

21. On January 17, 2023, the United States provided the DSB with its "Status Report Regarding Implementation of the DSB Recommendations and Rulings" (the "Status Report") which summarized the actions taken by USTR and the USDOC under Section 129 of the

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[13] DSB, Minutes of Meeting (20 December, 2021), WT/DSB/M/459, 22 February 2022, para. 7.7.

[14] USDOC Section 129 Preliminary Determination (Exhibit EU-1), p. 3.

[15] *See generally*, USDOC Section 129 Final Determination (Exhibit EU-2).

[16] *Ripe Olives From Spain: Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act*, 88 Fed. Reg. 3384, 19 January 2023 (Exhibit EU-4).

Uruguay Round Agreements Act.[17] The Status Report also confirmed that that United States had completed its implementation of the DSB's recommendations in the dispute. The United States provided additional details regarding the measures it took to implement the findings of the panel during the January 27, 2023, DSB meeting.

22. The EU did not agree that the United States had brought its measures into compliance with the recommendations of the DSB, and on April 28, 2023, requested consultations with the United States. The consultations took place on May 24, 2023, and failed to resolve the dispute.

23. The European Union subsequently requested the establishment of an Article 21.5 compliance panel, and the Panel was composed on July 31, 2023.

24. The United States also notes that the Parties entered into a sequencing agreement which provides that the EU may request authorization to suspend concessions or other obligations pursuant to Article 22.2 in the event that the DSB rules that, as a result of Article 21.5 proceedings, a measure taken to comply does not exist or is inconsistent with a covered agreement.[18] The sequencing agreement also notes that this is without prejudice to the United States right to have the matter referred to arbitration in accordance with Article 22.6.

B. Findings by the Original Panel in the Underlying Proceedings

25. The original panel report found that Section 771B is "as such" inconsistent with U.S. obligations under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement because it:

> requires the USDOC to presume that the entire benefit of a subsidy provided in respect of a raw agricultural input product passes through to the downstream processed agricultural product, based on a consideration of only two factual circumstances, without leaving open the possibility of taking into account any other factors that may be relevant to the determination of whether there is any pass-through and, if so, its degree.[19]

The original panel found the USDOC's final determination in the investigation to be inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement because the USDOC had applied Section 771B to presume on the basis of only two factors that the entire benefit of

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[17] *United States – Anti-Dumping and Countervailing Duties on Ripe Olives From Spain, Status Report Regarding Implementation of the, DSB Recommendations and Rulings by the United States*, WT/DS577/13, 17 January 2023.

[18] *United States – Anti-Dumping And Countervailing Duties On Ripe Olives from Spain, Understanding Between the United States and the European Union Regarding Procedures Under Articles 21 And 22 of the DSU*, WT/DS577/14, 15 February 2023.

[19] *US – Ripe Olives (Spain) (Panel)*, para. 8.1.b.i.

the subsidy to producers of raw olives was attributable to downstream processed olives.[20] The panel also concluded that this application did not take into account all facts and circumstances relevant to the attribution analysis.[21]

26. To recall, the text of Section 771B addresses the calculation of countervailable subsidies on certain processed agricultural products. Specifically, Section 771B states:

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

27. In analyzing the statute, the original panel primarily took issue with the fact that the statutory text seems to demand that the USDOC presume the attribution of the full amount of the benefit of the subsidies provided to raw olive producers to downstream ripe olives processors, without undertaking a more detailed, case specific analysis.[22]

28. More specifically, the panel reasoned that:

> an importing Member is not entitled to simply presume that a subsidy bestowed on an input product passes through, in total or in part, to the processed imported product. Rather, an investigating authority *must work out, as accurately as possible, how much of the subsidy has flowed indirectly from an input product to the downstream product*, to ensure that any countervailing duty imposed on the downstream product is not in excess of the total amount of subsidies bestowed on the investigated product. *To this end, an investigating authority must take into account all relevant*

[20] *US – Ripe Olives (Spain) (Panel)*, para. 7.175.

[21] *US – Ripe Olives (Spain) (Panel)*, para. 7.176.

[22] *US – Ripe Olives (Spain) (Panel)*, para. 7.172.

> *facts and circumstances to ensure that a countervailing duty is not imposed in excess of the estimated subsidy*.[23]

29. Although the original panel noted that a thorough analysis is required to achieve WTO consistency, the panel nevertheless agreed with the United States' arguments that there is no one particular methodology that must be applied to perform such an analysis where one is required, and that "investigating authorities have a certain amount of discretion in evaluating whether and to what extent the benefit of a subsidy" should be attributed to a processed product.[24]

30. Further, the panel specifically rejected the EU's claims in the underlying WTO proceedings that a particular methodology was required for compliance – and more specifically disagreed that only a price comparison could allow an investigating authority to meaningfully assess whether any benefit should be attributed to the downstream ripe olives processors.[25] Instead, the panel emphasized that:

> the 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.[26]

31. In sum, and as noted above, in the panel's view, the primary inconsistency of Section 771B was the fact that it did not leave open the possibility for the USDOC to consider other factors that may be affecting the market for the investigated product, beyond those specifically enumerated in the statute.[27] Whether there is a possibility for an investigating authority to take into account additional facts and circumstances that may be relevant to the attribution analysis is therefore highly relevant to the question of how the "as such" inconsistency may be remedied.

32. With regard to the EU's challenge to the USDOC's application of Section 771B in the countervailing duty investigation, the panel provided only a limited analysis for why the USDOC's original determination of benefit was "as applied" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.[28] The panel simply noted that:

> Because [Section 771B] directs the USDOC to presume the existence of pass-through between raw and processed agricultural

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[23] *US – Ripe Olives (Spain) (Panel)*, para. 7.150 (emphasis added).

[24] *US – Ripe Olives (Spain) (Panel)*, para. 7.151.

[25] *US – Ripe Olives (Spain) (Panel)*, para. 7.152 (internal citations omitted).

[26] *US – Ripe Olives (Spain) (Panel)*, para. 7.154 (emphasis in original).

[27] *US – Ripe Olives (Spain) (Panel)*, para. 7.167.

[28] *US – Ripe Olives (Spain) (Panel)*, para. 7.175.

> products, whenever the two factual circumstances it prescribes are established, and to avoid consideration of additional factors that may potentially be relevant. We found this inconsistent with the obligations in Article VI:3 and Article 10 to establish the existence and extent of indirect subsidization (i.e. pass-through) taking into account facts and circumstances that are relevant to that exercise.[29]

33. Thus, the core provisions of the panel's findings highlight the importance of an investigating authority conducting a reasoned analysis, which takes into account all relevant facts and circumstances relevant to the case at issue. However, no one methodology is necessarily required to be considered a "reasoned analysis." As shown below, the USDOC took exactly these considerations into account when interpreting the meaning of Section 771B and when applying the statute in its Section 129 proceeding.

C. Overview of the USDOC's Analysis Under Section 129 of the Uruguay Round Agreements Act

34. Section 129 of the URAA governs the administrative actions the United States takes following the issuance of a WTO panel report containing findings that certain actions were not in conformity with WTO obligations.

35. In the Section 129 proceeding, in this case, the USDOC supplemented its administrative record with information compiled by the USDOC as well as information that the USDOC solicited from interested parties.[30] The USDOC also received and took into account arguments submitted by interested parties. On the basis of the new evidence and arguments on the records of the Section 129 proceeding, as well as information from the original investigation, the USDOC made and published revised determinations at the conclusion of the Section 129 proceeding.[31]

36. In conducting the Section 129 proceeding, the USDOC determined that Section 771B can be interpreted as allowing the USDOC to consider all case-specific and relevant record information in its analysis, and to determine the appropriate manner in which to attribute subsidies to the manufacture, production, or exportation of the processed product, including whether less than the full amount of benefits should be attributed to the downstream product.[32]

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[29] *US – Ripe Olives (Spain) (Panel)*, para. 7.175.

[30] USDOC Section 129 Preliminary Determination, p. 11-19 (Exhibit EU-1).

[31] 88 Fed. Reg. 3384 (Exhibit EU-4).

[32] USDOC Section 129 Preliminary Determination, p. 18 (Exhibit EU-1); USDOC Section 129 Final Determination, p. 21 (Exhibit EU-2).

37. Following its reexamination of Section 771B, the USDOC analyzed additional relevant information beyond that related to the factors specifically enumerated in the text of Section 771B, and more generally took into consideration all facts relevant to the case at issue.

38. First, the USDOC reconsidered the meaning of the terms "raw agricultural product" and "prior stage product" as used in Section 771B.[33] Based on the particular facts in this case and the information submitted by the parties to the Section 129 proceeding, the USDOC narrowed the definition of the relevant "raw agricultural product" and "prior stage product" to include certain distinct biological varietals of raw olives, *i.e.*, the raw olive varietals that the Government of Spain and the Spanish olive industry recognize as table or dual-use olive varietals.[34]

39. Specifically, the USDOC evaluated data relevant to the ripe olives market that was previously submitted by the company respondents, the Government of Spain, and the petitioner in the underlying investigation and other segments of the ripe olives proceeding. These data demonstrate that there are only five biological varietals of raw olives that the Government of Spain and the Spanish olive industry consider to be suitable for table olive production.[35] For instance, information from the Government of Spain indicates that it tracks table olive production statistics by variety because the production process and marketing differ by varietals for table olive production, whereas no differentiation is made for mill olive varietals (the varietals used to make olive oil as opposed to table olives, the latter stage product in this case).[36] This supported the USDOC's determination to narrow the definitions of "raw agricultural product" and "prior stage product."

40. In addition, the USDOC relied on information from various other sources, including Spain's Ministry of Agriculture; the Food Information and Control Agency ("AICA"), an agency within the Ministry of Agriculture; Interaceituna, a Spanish interprofessional organization for the table olive industry; and the International Olive Council, an organization that establishes the standards and industry requirements specific to table olive production. Information from each of these sources also indicates that only certain biological varietals of raw olives are fit for the production of table olives.[37]

41. Further, the USDOC analyzed the Government of Spain's agricultural insurance regulations on olive crops, which it found demonstrated that the Spanish olive industry

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[33] With respect to the "latter stage product" as used in Section 771B, the USDOC continued to define this term as table olives, which includes ripe olives.

[34] USDOC Section 129 Preliminary Determination, p. 11-19 (Exhibit EU-1).

[35] USDOC Section 129 Preliminary Determination, p. 11-19 (Exhibit EU-1).

[36] USDOC Section 129 Preliminary Determination, p. 11-19 (Exhibit EU-1).

[37] USDOC Section 129 Preliminary Determination, p. 11-19 (Exhibit EU-1). Based on the information on the record, the USDOC determined that the five biological varietals of raw olives suitable for production of table olives include manzanilla, gordal, hojiblanca, cacerena, and carrasquena. Two of these varietals, hojiblanca and cacerena, are dual-use olive varietals that can be used to produce table olives or olive oil.

acknowledges a distinction between the various types of raw olive varietals and that only certain biological varietals are considered suitable for use in the production of table olives.[38] Finally, the USDOC examined additional price data from AICA, which is derived from information obtained from the Junta de Andalusia, the regional government responsible for administering the Andalusia province's agricultural sector. These data demonstrate that the prices farmers receive for raw olives destined for the production of table olives are consistently higher than the prices farmers receive for olives destined for the production of olive oil—data that supports the fact that there are key differences between such olives.[39]

42. By revising its analysis to include the above facts and factors unique to the Spanish table olives market and all other relevant data available to it during its investigation, the USDOC properly addressed the totality of information on the record, and appropriately implement the DSB recommendations.

D. Standard of Review

43. Under Article 21.5 of the DSU, a panel is to evaluate "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. The DSB recommendations, which stem from the adjudicator's findings, are important to an identification of whether a measure taken to comply exists or is consistent with the covered agreements.

44. In reviewing a trade remedy determination, a panel or compliance panel should not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action" and not as "*initial trier of fact*."[40] The Panel should examine whether the conclusions reached by the investigating authority are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations.[41]

45. Thus, here, the panel should focus its evaluation on the merits of the new measures taken to implement the DSB recommendations in light of the findings of the original panel, and specifically the consistency of the USDOC's redetermination under Section 129, and Section 771B in light of USDOC's reevaluation, with the GATT 1994 and the SCM Agreement.

46. Further, with respect to a trade remedy determination, "a panel should examine whether the *conclusions reached by the investigating authority are reasoned and adequate* in the light of

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[38] USDOC Section 129 Preliminary Determination, p. 11-19 (Exhibit EU-1); USDOC Section 129 Final Determination, p. 11-15 (Exhibit EU-2).

[39] USDOC Section 129 Preliminary Determination, p. 11-19 (Exhibit EU-1); USDOC Section 129 Final Determination, p. 19-24 (Exhibit EU-2).

[40] *See, e.g.*, *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis in original).

[41] *United States – Tyres (AB)*, para. 123.

the evidence on the record and other plausible alternative explanations."[42] Thus, the panel here should take careful consideration of the USDOC's revised interpretation of Section 771B as well as the revised benefits calculation methodology.

III. ARGUMENT

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.

47. The EU asserts that the United States has failed to implement the DSB's recommendations and rulings with respect to the panel's "as such" finding in relation to Section 771B.[43] The EU erroneously argues that the United States needed to either repeal, amend, refrain from applying, or otherwise change the statute in some way to come into compliance.[44] However, the EU's argument simply invents a requirement that does not exist in the DSU. There is no DSU requirement that a measure subject to an "as such" finding must be remedied by repealing, not applying, or changing the text of the statute in question.

48. 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.[45] 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."[46] 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"[47] for its findings, and to address the statute's apparent presumption of a benefit to the downstream processors[48] to consider relevant information beyond that related to the factors specifically enumerated in the two provisions of Section 771B.

49. The USDOC's revised analysis and reasoned application of Section 771B in the Section 129 determinations constitutes measures taken to comply," and the panel in this compliance proceeding should analyze whether the USDOC's application of the statute in the Section 129

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[42] *US – Tyres (China) (AB)*, para. 123 (emphasis added).

[43] EU First Written Submission, paras. 3 and 68.

[44] EU First Written Submission, para 59.

[45] USDOC Section 129 Final Determination, p. 19 (Exhibit EU-2).

[46] USDOC Section 129 Final Determination, p. 19 (Exhibit EU-2).

[47] *US – Ripe Olives (Spain) (Panel)*, para. 7.154.

[48] *US – Ripe Olives (Spain) (Panel)*, para. 7.150.

determinations is consistent with GATT 1994 Article VI:3 and Article 10 of the SCM Agreement.

50. 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.[49] The USDOC determined that the circumstances warranted exercising its discretion in applying Section 771B in a WTO-consistent manner by considering all case-specific and relevant record information in its analysis beyond the information related to the two factors enumerated in Section 771B, and determining the appropriate manner to attribute subsidies to the manufacture, production, or exportation of the processed product.[50]

51. As noted in the Section 129 Preliminary and Final Determinations, and explained below, implementing the DSB recommendations in light of the original panel's findings did not require an amendment to the statute. To reach that conclusion, the USDOC considered the text of the statute and the record evidence and arguments before it in the Section 129 determinations.

52. In light of the panel's findings in the original panel proceeding, and as explained in Section II.C above, in reexamining the application of Section 771B, the USDOC considered other relevant record information as part of its analysis, beyond that related to the factors specifically enumerated in the statute.

53. First, the USDOC reconsidered the meaning of the terms "raw agricultural product" and "prior stage product" as used in Section 771B. The narrowed definitions include certain distinct biological varietals of raw olives, i.e., the raw olive varietals that the Government of Spain and the Spanish olive industry recognize as table or dual-use olive varietals, and 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.

54. Specifically, the USDOC evaluated data relevant to the ripe olives market that was previously submitted by the company respondents, the Government of Spain, and the petitioner in the underlying investigation and other segments of the ripe olives proceeding. These data demonstrate that there are only five biological varietals of raw olives that the Government of Spain and the Spanish olive industry consider to be suitable for table olive production. For instance, information from the Government of Spain indicates that it tracks table olive production statistics by variety because the production process and marketing differ by varietals for table olive production, whereas no differentiation is made for mill olive varietals (the varietals used to make olive oil as opposed to table olives, the latter stage product in this case).

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[49] USDOC Section 129 Preliminary Determination, p. 11-19 (Exhibit EU-1); USDOC Section 129 Final Determination, p. 19-24 (Exhibit EU-2).

[50] USDOC Section 129 Preliminary Determination, p. 11-19 (Exhibit EU-1); USDOC Section 129 Final Determination, p. 19-24 (Exhibit EU-2).

This supported the USDOC's determination to narrow the definitions of "raw agricultural product" and "prior stage product."

55. 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. Information from each of these sources also indicates that only certain biological varietals of raw olives are fit for the production of table olives and speak to the nature of the market for both the raw and processed agricultural goods.

56. Further, the USDOC analyzed the Government of Spain's agricultural insurance regulations on olive crops, which it found demonstrated that the Spanish olive industry acknowledges a distinction between the various types of raw olive varietals and that only certain biological varietals are considered suitable for use in the production of table olives. Finally, the USDOC examined additional price data from AICA, which is derived from information obtained from the Junta de Andalusia, the regional government responsible for administering the Andalusia province's agricultural sector. These data demonstrate that the prices farmers receive for raw olives destined for the production of table olives are consistently higher than the prices farmers receive for olives destined for the production of olive oil, which speak to the significant differences between them.

57. This additional record information speaks to the particular nature of the market and products at issue in the Section 129 determinations, and thus allows the USDOC to, in the panel's words, "consider factors that may be affecting the market for the investigated product other than those Section 771B lists explicitly."[51]

58. The USDOC's revised interpretation of Section 771B in the Section 129 determinations also speaks to the panel's findings, on the basis of the record before it in the original proceeding, that Section 771B:

> requires the USDOC to presume that the entire benefit of a subsidy provided in respect of a raw agricultural input product passes through to the downstream processed agricultural product, based on a consideration of only two factual circumstances, without leaving open the possibility of taking into account any other factors that may be relevant to the determination of whether there is any pass-through and, if so, its degree.[52]

59. To recall, in the initial determination conducted before the underlying WTO proceedings, the USDOC had focused its analysis on the two factors enumerated in the statute; specifically that:

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[51] *US – Ripe Olives (Spain) (Panel)*, para. 7.167.

[52] *US – Ripe Olives (Spain) (Panel)*, para. 8.1.b.i.

> "(1) the demand for raw olives, the prior stage product, was substantially dependent on demand for processed table olives (including ripe olives), the latter stage product; and (2) the processing operations for table olives adds only limited value to raw olives.[53]

60. In the Section 129 determinations, as described above, the USDOC revisited and further developed its understanding of the meaning of the statute. USDOC found that it is reasonable to conclude that the USDOC is meant to consider "all potentially relevant data and information that is on the record."[54] 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.[55] In light of this further developed understanding of Section 771B, in this case, the USDOC then specifically examined and factored in certain unique aspects of the table olives market, such as the suitability of certain varietals for table olives, and the prices that farmers receive for raw olives destined for table olives.[56]

61. Thus, the USDOC reexamined its understanding of the meaning of Section 771B in the Section 129 proceeding. In so doing, the USDOC addressed the original panel's concern that Section 771B required a presumption "based on a consideration of only two factual circumstances, without leaving open the possibility of taking into account any other factors that may be relevant." 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

62. 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 considers that, because those specific steps were not taken, Section 771B necessarily remains "as such" inconsistent with these same provisions and that the United States has failed to implement the recommendations and rulings of the DSB.[57]

63. However, the EU's argument is in error. The EU simply invents a requirement that does not exist in the DSU; there is nothing in the DSU text requires a specific type of action to bring a measure into conformity with WTO rules. The EU attaches undue significance to Article 3.7 of

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[53] USDOC Section 129 Preliminary Determination, p. 10 (Exhibit EU-1).

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

[55] USDOC Section 129 Final Determination, p. 19 (Exhibit EU-2).

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

[57] See EU First Written Submission, paras. 35 and 59.

the DSU, which expresses a preference for the "withdrawal" of a WTO-inconsistent measure.[58] 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.

64. Indeed, 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.[59] For example, in *US - Hot-Rolled Steel (India) (Article 21.5)*, which the EU relies on heavily in its submission, the panel reasoned that there may be ways of remedying measures found to be inconsistent with a covered agreement which do not involve changing the text of the measure itself.[60] The panel stated, "[W]e do not exclude the possibility that the United States could have achieved compliance *through means other than changing the text of the inconsistent measure by amending its legislation*."[61] Thus, a legislative measure can be brought into compliance through various methods, and there is no requirement that the only way to implement DSB recommendations is by amending or repealing the legislative instrument (or otherwise through any other specific method).

65. 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."[62] 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.

66. 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.

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[58] Article 3.7 states "[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."

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

[60] *US - Hot-Rolled Steel (India) (Article 21.5)*, para.7.306 *(citing US Gambling (Article 21.5 – Antigua and Barbuda)* (stating that "compliance with a recommendation under Article 19.1 of the DSU could conceivably be achieved through changes to the factual or legal background to a measure at issue, without a change to the text of the measure itself").

[61] *US – Hot-Rolled Steel (India) (Article 21.5)*, para. 7.137 (emphasis added).

[62] EU First Written Submission, para 54.

67. As noted above, the underlying findings of the panel focus on the fact that the text of Section 771B apparently *presumed* complete attribution of a benefit to downstream processors based on a consideration of only the two factors described in the statute. However, the statute could be brought into conformity if the USDOC was able to undertake a reasoned analysis to understand that the statute in a manner that brought it into compliance with U.S. obligations.

68. 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.[63] 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.

69. Here, as explained previously, the USDOC revisited its understanding of Section 771B and interpreted it as affording discretion to consider additional facts and factors beyond the two specifically enumerated provisions in Section 771B. Under the USDOC's revised understanding, the statute reasonably allows the USDOC to determine the appropriate manner in which to attribute subsidies to the manufacture, production, or exportation of the processed product based on the facts, evidence, and arguments presented in the Section 129 proceeding.

70. Because Section 771B remains U.S. law, the USDOC examined its applicability in the ripe olives from Spain proceeding and determined that it was able to implement the panel's findings through exercising its discretion in applying Section 771B in a WTO-consistent manner. As part of its analysis, the USDOC noted that Section 129 provides USDOC with flexibility and discretion in determining *how* to address the recommendations of the DSB, including the possibility of reexamining its understanding of applicable domestic statutes.[64]

71. 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*

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[63] This is consistent with the panel's finding in the underlying dispute that "in order for an 'as such' challenge against a provision of domestic legislation to succeed, the complaining Member must establish that the relevant provision of domestic law *requires* the responding Member *to violate* its obligations under the relevant covered agreement or *otherwise restricts*, in a material way, the responding Member's *discretion to act in a manner that is consistent* with these obligations." *US – Ripe Olives (Spain) (Panel)*, para. 7.146 (italics added) (*citing US – Oil Country Tubular Goods Sunset Reviews*, para. 172; *EU Biodiesel (Argentina)*, para 6.229; *US – Carbon Steel,* para. 162).

[64] USDOC Section 129 Preliminary Determination, p. 3 (Exhibit EU-1).

permissible under the terms of the statute."[65] 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.

72. The USDOC determined that consistent implementation was permissible by exercising its discretion in the Section 129 determinations to interpret Section 771B as allowing the USDOC to consider all case-specific and relevant record information in its analysis, and evaluating the appropriate manner to attribute subsidies to the manufacture, production, or exportation of the processed product, including whether less than the full amount of subsidies should be attributed.[66]

73. 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.[67] 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. Thus, the USDOC found that implementation was permissible under the current terms of Section 771B because the statute Section 129 determinations allowed the USDOC to consider other relevant facts and record information as part of its analysis, in addition to the two specifically enumerated factors in the statute.

74. The USDOC then exercised this discretion appropriately in the Section 129 determinations to avoid engaging in that WTO-inconsistent action. Thus, the USDOC has implemented the DSB's recommendations in a manner that is consistent with the GATT 1994 and Article 10 of the SCM Agreement.

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.

75. The EU argues that no analysis based on Section 771B can be considered consistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement if that analysis relies on an unamended or otherwise materially unchanged Section 771B, which the original panel found to be "as such" inconsistent.[68] However, the EU's argument is erroneous. The USDOC's analysis of attribution of benefit is not based on an interpretation of Section 771B that presumes

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[65] USDOC Section 129 Final Determination, p. 23 (Exhibit EU-2) (internal citations omitted).

[66] USDOC Section 129 Preliminary Determination, p. 11-19 (Exhibit EU-1); USDOC Section 129 Final Determination, p. 19-24 (Exhibit EU-2).

[67] USDOC Section 129 Preliminary Determination, p. 11-19 (Exhibit EU-1); USDOC Section 129 Final Determination, p. 19 (Exhibit EU-2).

[68] EU First Written Submission, paras. 67-68.

a benefit. Rather, USDOC correctly considered additional factors or considerations beyond the two specifically enumerated in Section 771B.

76. As explained above, 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.'"[69] It follows that the inconsistency "as applied" may be remedied by the same types of measures that remedied the inconsistency "as such."

77. The United States implemented the DSB's recommendations through actions taken by the USDOC, in which the USDOC exercised its discretion to interpret, and subsequently apply, Section 771B in a WTO-consistent manner. Specifically, the USDOC considered additional information in its Section 771B analysis, and determined the appropriate manner to attribute subsidies to the manufacture, production, or exportation of the processed product based upon the particular facts, evidence, and argument raised in the Section 129 determinations, in addition to the two factors specifically enumerated in Section 771B.

78. 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.

79. In addition to the EU's meritless arguments which we have addressed above, the EU makes an additional argument that is likewise without merit and should be rejected. 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. However, 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. In light of the USDOC's explanation, 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.

80. As noted in Sections II.C and III.A above, 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

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[69] *US – Ripe Olives (Spain) (Panel)*, para. 7.175.

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.

81. When conducting the benefit calculation, the USDOC likewise took into consideration other information (such as program characteristics) to ensure only the amount of BPS subsidies proportional to raw olives were attributed to the respondent in the Section 129 proceeding, so that effectively, "less than 100 percent of the BPS subsidy payment amount is used when determining the benefit to the respondent."[70] While the calculation methodology may have been the same as in the underlying proceedings, the additional factors the USDOC considered provide a more reasoned and supported analytical basis for the benefit calculation.

82. However, the EU makes the argument that the USDOC has, even with its revised interpretation of the meaning of Section 771B in the Section 129 determinations, nevertheless conducted an analysis that does not appropriately address the "as applied" inconsistency in the underlying WTO proceedings.[71]

83. The EU focuses its arguments on the fact that the USDOC provided a detailed justification for how it re-evaluated the specific olive varietals that should be considered when identifying the "prior stage product" relevant to the benefit analysis.[72] However, the EU wrongly assumes that this detailed analysis means that the USDOC *only* re-evaluated the prior-stage product, and ignores the fact that these same facts are relevant to other aspects of the investigation.

84. The compliance panel in this case should evaluate the WTO consistency of the revised findings of the Section 129 determinations, in light of the USDOC's explanation of its interpretation of the meaning of Section 771B, and whether an unbiased and objective investigating authority could have reached the USDOC's conclusions given its explanation of the totality of the facts and record information analyzed as part of its revised attribution analysis.

85. The EU goes on to argue that the USDOC used the same methodology as it did in the original investigation.[73] However, the EU's claims lack merit, given that the panel findings in this case did not examine the nature of the benefit analysis itself, and instead focused on the fact that it was the operation of Section 771B that necessarily gave rise to the "as applied" inconsistency.

86. The EU contends that the USDOC's focus on the benefit conferred to olive growers and the definition of "prior stage product" "were not the subject of the original WTO proceedings and were not part of the European Union's claims" and are therefore "irrelevant for compliance

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[70] USDOC Section 129 Preliminary Determination, p. 19 (Exhibit EU-1).

[71] EU First Written Submission, para. 68.

[72] EU First Written Submission, paras. 66-77.

[73] EU First Written Submission, para 74.

purposes in the present dispute which concerns the proper method of determining the benefit that passes-through from olive growers to the indirect recipients, i.e. ripe olive producers."[74]

87. 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.

88. As explained above, the original panel focused on the need to examine "additional factors that may potentially be relevant" when applying a benefit analysis that could be considered consistent with the GATT 1994 and SCM Agreement, but makes no findings as to what those factors may be, nor even *how* such additional factors may be incorporated into the USDOC's benefit analysis.

89. Notably, there is nothing in either the panel's findings or the text of Section 771B that would prevent the USDOC from considering the same facts during one aspect of the analysis (in this case, the two prongs of Section 771B), as it does during other aspects of its analysis (e.g., the unique nature of the market and products at issue). There is also nothing in the panel's findings to suggest that the two factors in Section 771B should *not* continue to be considered in a revised analysis. In fact, the panel noted the opposite in its report, stating that:

> While the two factual circumstances identified in Section 771B may be relevant to an examination of whether a subsidy to a raw agricultural product has passed-through to a processed agricultural product, the probative value of those factors will, in our view, depend upon the specific facts of the situation in question, including the nature of the specific market for the input product at issue and all of the conditions of competition in that market.[75]

90. The USDOC conducted exactly such an analysis in this case, and while the factors in Section 771B remained relevant to the USDOC's conclusions in this case, the USDOC *also* considered several additional facts and record information when conducting its revised analysis.

91. Further, in the Section 129 determination and the underlying investigation, the Government of Spain indicated that it is not possible to know the total amount of aid under the BPS program approved for the olive sector because the aid that a farmer receives under the BPS program is not linked to a specific product or applied to a specific sector. The USDOC examined and considered the BPS program structure and the manner in which the Government of

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[74] EU First Written Submission, para 11.

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

Spain described that BPS payments are made to farmers. BPS payments can be provided for multiple types of crops. Therefore, in its calculation, it was necessary for the USDOC to consider whether a respondent or grower grows only olives or if they also grow other crops, in order to determine the benefit attributable to the respondent.

92. 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. Interested parties, which included the European Commission and the Government of Spain, could have identified other considerations or information to support the contention that a different amount should be attributed to the downstream processors, but they did not. The USDOC thus determined, based on the particular facts and evidence available on the record of the Section 129 proceeding, that the attribution methodology described above was reasonable in this circumstance. To be clear, this does not mean that Section 771B requires the USDOC to utilize one attribution methodology. The appropriate approach would depend on the particular facts, evidence, and argument presented in each case. Here, the information presented in the Section 129 proceeding did not support an alternative attribution calculation.

93. The EU also requests the compliance panel to "recommend" that the United States revoke the new determination and cease to impose the countervailing duties.[76] The EU appears to conflate a panel "recommendation" under DSU Article 19.1, first sentence, with a panel "suggestion" under DSU Article 19.1, second sentence. The EU appears to be seeking a recommendation from the compliance panel on how the United States could implement the DSB's recommendations.

94. However, the record clearly shows that the USDOC conducted a complete, reasoned, and thorough benefit analysis, which addressed not only the two factors specified in the text of 771B, but also facts and record information relevant to the unique nature of the products at issue – ripe olives. The USDOC reached a determination that an unbiased and objective investigating authority could have reached in light of the totality of the facts. Thus, the U.S. compliance measures are not WTO-inconsistent, and there is no basis for a recommendation or suggestion.

IV. CONCLUSION

95. For the foregoing reasons, the United States respectfully requests that the Panel reject the EU's claims.

[76] EU First Written Submission, para 78.