WORLD TRADE ORGANIZATION

**WT/DS577/RW/Add.1**

20 February 2024

(24-1542)



Original: English

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN UNION

REPORT OF THE PANEL

*Addendum*

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS577/RW.

---

# LIST OF ANNEXES

## ANNEX A

PANEL DOCUMENTS


| Contents | | Page |
|---|---|---|
| Annex A-1 | Working Procedures of the Panel | 4 |
| Annex A-2 | Additional Working Procedures of the Panel concerning Business Confidential Information | 11 |
| Annex A-3 | Additional Working Procedures for the Panel: Open Meeting | 13 |
| Annex A-4 | Interim Review | 14 |


## ANNEX B

ARGUMENTS OF THE PARTIES


| Contents | | Page |
|---|---|---|
| Annex B-1 | Integrated executive summary of the arguments of the European Union | 21 |
| Annex B-2 | Integrated executive summary of the arguments of the United States | 28 |


## ANNEX C

ARGUMENTS OF THE THIRD PARTIES


| Contents | | Page |
|---|---|---|
| Annex C-1 | Integrated executive summary of the arguments of Brazil | 42 |
| Annex C-2 | Integrated executive summary of the arguments of Canada | 43 |
| Annex C-3 | Integrated executive summary of the arguments of Japan | 47 |
| Annex C-4 | Integrated executive summary of the arguments of the Russian Federation | 52 |

# ANNEX A

## PANEL DOCUMENTS

| Contents | | Page |
|---|---|---|
| Annex A-1 | Working Procedures of the Panel | 4 |
| Annex A-2 | Additional Working Procedures of the Panel concerning Business Confidential Information | 11 |
| Annex A-3 | Additional Working Procedures for the Panel: Open Meeting | 13 |
| Annex A-4 | Interim Review | 14 |

## ANNEX A-1

WORKING PROCEDURES OF THE PANEL

**Adopted on 14 August 2023**

### General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

   (2) The Panel reserves the right to modify these procedures, as well as any additional working procedures, as necessary, after consultation with the parties.

### Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

   (2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

   (3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly provide a non-confidential summary to any Member requesting it, and if possible within 10 days of receiving the request.

   (4) In the event Business Confidential Information ("BCI") is submitted, the parties and third parties shall treat such BCI in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

### Submissions

3. (1) Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

   (2) Each third party that chooses to make a written submission before the substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

   (3) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

### Preliminary rulings

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

   a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the

Panel. The European Union shall submit its response to the request before the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the respondent before the meeting, and any subsequent submissions of the parties in relation thereto before the meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

**Evidence**

5. (1) Each party shall submit all evidence to the Panel no later than during the substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably as soon as it is identified and no later than the next submission or the meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered EU-5, the first exhibit in connection with the next submission thus would be numbered EU-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) Insofar as a party considers that the compliance panel should take into account a document already submitted as an exhibit in the original panel proceeding, it should resubmit that document as an exhibit for the purpose of this proceeding. In its list of exhibits, it should refer to the number of the original exhibit in the original panel proceedings (OP) (example: EU-1 (EU-21-OP)).

(5) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

**Editorial Guide**

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions.

**Questions**

9. (1) The Panel may pose questions to the parties and third parties at any time.

(2) Before the meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

(3) The Panel may put questions to the parties and third parties orally during the meeting, and in writing following the meeting, as provided for in paragraphs 16 and 21 below.

**Substantive meeting**

10. The Panel may open its meetings with the parties to observation by the public, subject to appropriate procedures to protect confidential information to be adopted by the Panel after consulting with the parties.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request by a party for interpretation from one WTO language to another should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. There shall be one substantive meeting with the parties.

16. The substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the timeframe established by the Panel before the end of the meeting.

**Third party session**

17. Each third party may present its views orally during a session of the substantive meeting with the parties set aside for that purpose. The Panel may open the third-party session to the public for those third parties wishing to make their statement public, subject to appropriate procedures to protect confidential information to be adopted by the Panel after consulting the parties.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session three weeks in advance of this session.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

(3) Each third party shall provide, no later than three working days before the third-party session, a list of members of its delegation who will attend the session.

20. To ensure the availability of interpreters, the third parties shall also indicate at least three weeks before the third-party session whether they intend to make their statement in a WTO language other than English, which is the language in which these panel proceedings are being conducted, and whether they would require interpretation from English to any other WTO language.

21. The third-party session shall be conducted as follows:

    a. All parties and third parties may be present during the entirety of this session.

    b. The Panel shall first hear the oral statements of the third parties, who shall speak in reverse alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

    c. Each third party should limit the duration of its statement to 15 minutes. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

    d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

    e. The Panel may subsequently pose questions to any third party.

    f. Following the third-party session:

        i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. on the first working day (Geneva time) following the meeting.

        ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

        iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

        iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

**Descriptive part and executive summaries**

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit one integrated executive summary, which shall summarize the facts and arguments as presented to the Panel in the party's first written submission, second written submission, oral statement, and may also include a summary of its responses to questions and comments thereon following the substantive meeting.

24. Each integrated executive summary shall be limited to 15 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This

integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments unless that third party indicates that it does not wish for the submission and/or oral statement to serve as its executive summary, in which case it shall submit a separate executive summary.

**Interim review**

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. If no meeting is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such written comments shall be limited to the other party's written request for review.

29. If a meeting is requested, the Panel shall consult with the parties on the timing of the meeting and any further written comments.

**Interim and Final Report**

30. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed by the parties.

**Service of documents**

31. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them via the Disputes On-Line Registry Application (DORA) https://dora.wto.org by 5:00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document into DORA shall constitute electronic service on the Panel, the other party, and the third parties.

b. By 5:00 p.m. (Geneva time) the next working day following the electronic submission, each party and third party shall submit one paper copy of all documents it submits to the Panel, including the exhibits, with the DS Registry (office No. 2047). The DS Registrar shall stamp the documents with the date and time of the submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format only. In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.

c. The Panel shall provide the parties with the Descriptive Part of the Report, the Interim Report and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA.

d. If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to contact the DS Registry (DSRegistry@wto.org).

e. If any party or third party is unable to meet the 5:00 p.m. deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned shall inform the DS Registry (DSRegistry@wto.org) without delay and provide an electronic version of all documents to be submitted to the Panel by email including any exhibits. The email shall be addressed to DSRegistry@wto.org, the Panel Secretary, the other party and, if appropriate, the third parties. The documents sent by email shall be submitted no later than 5:30 p.m. on the due date established by the Panel. If the file size of specific exhibits makes transmission by email impossible, or it would require more than five email

messages, owing to the number of exhibits to be filed, to transmit all of them by email, the specific large file size exhibits, or those that cannot be attached to the first five email messages, shall be filed with the DS Registry (office No. 2047) and provided to the other party and, if appropriate, the third parties by no later than 9:30 a.m. the next working day on an electronic medium acceptable to the recipient. In that case, the party or third party concerned shall send a notification to the DS Registrar, copying the Panel Secretary, the other party, and the third parties, as appropriate, via email, identifying the numbers of the exhibits that cannot be transmitted by email.

f. In case any party or third party is unable to access a document filed through DORA because of technical difficulties, it shall promptly, and in any case no later than 5 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar, the Panel Secretary, and the party or third party that filed the document, of the problem by email and shall, if possible, identify the relevant document(s). The DS Registrar will promptly try to identify a solution to the technical problem. In the meantime, the party or third party that filed the document(s) shall, promptly after being informed of the problem, provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry (DSRegistry@wto.org) and the Panel Secretary to allow access to the document(s) while the technical problem is being addressed. The DS Registrar may provide an electronic version of the relevant document(s) by email if the affected party or third party so requests. The DS Registrar shall in that case copy the party or third party that filed the document(s) on the email message.

g. Parties and third parties are responsible, through their DORA account administrators, for creating and updating their DORA accounts. The DS Registry is available to provide assistance with managing the DORA accounts.

**Correction of clerical errors in submissions**

32. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

## ANNEX A-2

### ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

**Adopted on 14 August 2023**

The following procedures apply to any business confidential information (BCI) submitted in the course of the compliance panel proceedings in DS577.

1. For the purposes of these Panel proceedings, BCI includes:

    a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping and countervailing duty investigations at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 4 below.

    b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 4 below.

2. Any information that is available in the public domain may not be designated as BCI. In addition, these procedures cease to apply to any BCI if the person that provided the information makes the information publicly available or agrees in writing to make the information publicly available.

3. If the United States intends to submit BCI from the anti-dumping and countervailing duty investigations at issue to the Panel it shall, at the earliest possible date, obtain an authorizing letter from the entity that submitted the BCI and provide such authorizing letter to the Panel, with a copy to the other party. If the European Union requires BCI from the anti-dumping and countervailing duty investigations at issue for the purpose of preparing its submissions or to submit that BCI to the Panel, the United States shall, at the earliest possible date after being requested by the European Union, obtain an authorizing letter from the entity that submitted the BCI, provide such authorizing letter to the Panel with a copy to the European Union, and provide the BCI to the European Union.

4. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.

5. No person may have access to BCI except a Panelist, member of the Secretariat assisting the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. Where a third party receives written submissions pursuant to the Working Procedures, the third party shall receive a redacted version of any written submission containing BCI and redacted versions of exhibits thereto. The redacted versions of the parties' written submissions received by third parties pursuant to the Working Procedures and redacted versions of exhibits thereto shall be sufficient to convey a reasonable understanding of the nature of the information at issue. A third party may request access to BCI submitted to the Panel. A party requested by a third party to provide that third party with access to BCI must provide such access promptly.

6. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

7. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the anti-dumping and countervailing duty investigations at issue in this dispute, or an officer or employee of an association of such enterprises.

8. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g., Exhibit EU-1 (BCI), Exhibit USA-1 (BCI)).

9. Documents previously submitted to or created by the investigating authority of the party complained against containing information that has been designated as confidential or business proprietary information for purposes of the anti-dumping and countervailing duty investigations at issue in this dispute, and marked as business proprietary information, or words to that effect (including headers and bracketing), that have also been designated as BCI in this dispute, shall be deemed to comply with the requirement set out in paragraph 8. When a party submits a document previously submitted to or created by the investigating authority concerned, that party shall mark on the cover of the document "This document was submitted to or created by the [name of investigating authority] and retains its original confidentiality markings."

10. Any BCI that is submitted in binary-encoded or other electronic form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded or other electronic files.

11. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 8.

12. Any person authorized to have access to BCI under the terms of these procedures shall store all documents and electronic storage media containing BCI in such a manner as to prevent unauthorized access to such information.

13. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

14. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

# ANNEX A-3

## ADDITIONAL WORKING PROCEDURES FOR THE PANEL: OPEN MEETING

**Adopted on 20 September 2023**

1. The Panel will start its substantive meeting with the parties (on the date of its substantive meeting provided for in its Timetable) with a session open to the public at which no confidential information shall be referred to or disclosed ("non-confidential session").

2. At such a session, each party will be asked to make opening and closing statements which shall not include confidential information. After both parties have made their opening statements, each party will be given the opportunity to pose questions or make comments on the other party's statement, as described in paragraph 16 of the Working Procedures adopted by the Panel. The Panel may pose any questions or make any comments during such session. Such questions shall not include confidential information.

3. To the extent that the Panel or either of the parties considers it necessary, the Panel shall proceed to a closed session ("confidential session"), during which the parties will be allowed to make additional statements or comments and pose questions that involve confidential information. The Panel may also pose questions during the confidential session.

4. The Panel will start the third party session of its substantive meeting with the parties by opening a portion of this session to the public ("non-confidential third party session"). At this portion of the third party session, no confidential information shall be referred to or disclosed. Each third party wishing to make its statement in the non-confidential third party session shall do so, but shall ensure that its statement does not include confidential information. After such third parties have made their statements, the Panel or parties may pose questions or make comments concerning these statements, as foreseen in paragraph 21 of the Working Procedures adopted by the Panel. Such questions or comments shall not include confidential information. To the extent that the Panel or any of the other third parties considers it necessary, the Panel shall then conclude this portion of the third party session and proceed to a third party closed session ("confidential third party session") during which other third parties shall make their statements. The Panel or parties may also pose questions during this confidential session.

5. During the confidential sessions referred to above, the following persons shall be admitted into the meeting room:

- Members of the Panel;
- Members of the delegations of the parties;
- Members of the delegations of the third parties throughout the third party session;
- WTO Secretariat staff assisting the Panel.

6. As set out below in paragraph 7, a live closed-circuit television broadcast of the Panel meeting to a separate viewing room in the WTO shall be used to allow other WTO Members, Observers, staff members, and registered members of the public to observe the non-confidential sessions.

7. The viewings will be open to officials of WTO Members, Observers and staff members of the WTO Secretariat upon presentation of their official badges. Accredited journalists and representatives of relevant non-governmental organizations (NGOs) may indicate to the Secretariat (Information and External Relations Division) their interest in attending the viewing. No later than three weeks before the substantive meeting, the WTO Secretariat will place a notice on the WTO website informing the public of the non-confidential sessions. The notice shall include a link through which members of the public can register directly with the WTO. The date of the deadline for public registration will be informed to the parties as soon as it has been established.

**ANNEX A-4**

INTERIM REVIEW

# 1 INTRODUCTION

1.1. The Panel issued its Interim Report to the parties on 21 December 2023. On 18 January 2024, the United States submitted a written request for review of precise aspects of the Interim Report. The European Union did not make any request to review the Interim Report. The European Union submitted written comments on the United States' written request on 30 January 2024. Neither party requested the Panel to hold an interim review meeting.

1.2. In accordance with Article 15.3 of the DSU, this Annex responds to the issues raised by the parties in the context of the interim review. Apart from the specific changes described in the following section, we have also corrected typographical errors and other non-substantive errors throughout the Report, including those identified by the United States, which are not referred to specifically below. The footnote numbers in the Final Report have changed due to these revisions. The paragraph numbers in the Final Report remain unchanged.

# 2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE UNITED STATES

## 2.1 Paragraph 7.3

2.1. The United States requests the Panel to revise paragraph 7.3, arguing that, as originally drafted, it does not reflect the United States' argument regarding the appropriate standard of review with respect to factual and legal aspects of the dispute. The United States refers to its description of the Panel's standard of review as "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."[1] According to the United States, recent panel reports have expressed the appropriate standard of review as whether an investigating authority reached a conclusion that an objective and unbiased investigating authority could have reached given the same evidence and information.[2]

2.2. The European Union objects to the United States' request, arguing that paragraph 7.3 is not intended to reflect the parties' positions regarding the appropriate standard of review but instead the applicable standard of review as set out in previous WTO reports. The European Union notes that this paragraph does not refer to the European Union's views concerning the standard of review.[3] Furthermore, footnote 31 of the Interim Report refers to prior Appellate Body reports reflecting the applicable standard of review neither of which has been called into question by the panel reports cited to by the United States in its comments. Lastly, the European Union submits that the United States' position does not fundamentally differ from the standard of review applied by the Panel in the present case and, thus, the change requested by the United States is unnecessary.[4]

2.3. We have decided to reject the United States' request. As currently drafted, the text emphasizes that the standard of review this Panel must apply in an Article 21.5 proceeding requires it to evaluate whether the measures found to be inconsistent with the WTO Agreement have been brought into conformity. In addition, as concerns actions taken by an investigating authority to bring a Member into compliance, the Panel explained that it is required to evaluate whether the competent authorities provided a reasoned and adequate explanation as to (a) how the evidence on the record supported its factual findings, and (b) how those factual findings supported the overall determination. This description reflects the Panel's assessment of the relevant standard of review applicable in the

[1] United States' request for interim review, para. 4 (quoting United States' second written submission, para. 3).
[2] United States' request for interim review, para. 4 (referring to Panel Reports, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.78-7.83; *US – Softwood Lumber VII*, appealed 28 September 2020, paras. 7.150 and 7.260).
[3] European Union's comments on the United States' request for interim review, para. 2 (referring to European Union's first written submission, paras. 50-55).
[4] European Union's comments on the United States' request for interim review, para. 2.

original proceeding. In our view the change requested by the United States is not substantially different. We have, however, removed the statement that the Panel "do[es] not understand the parties to take a different view", in the light of the United States' concern that the Panel's description of its standards of review does not reflect the arguments that the United States made in its submissions.

### 2.2 Paragraph 7.6

2.4. The United States requests the Panel to revise the first and second sentences of paragraph 7.6 to more accurately reflect actions taken by the United States to implement the recommendations of the DSB in the original proceeding. In particular, the United States requests that we first specify that the United States Trade Representative requested that the USDOC issue determinations as necessary, after which the USDOC initiated proceedings under Section 129 of the Uruguay Rounds Agreement Act.[5] The European Union did not comment on this request.

2.5. We have made the requested change to enhance clarity.

### 2.3 Paragraph 7.8

2.6. The United States requests the Panel to delete the language "maintains that it carefully reviewed the DSB recommendations and rulings from the original proceeding" from paragraph 7.8 to more accurately restate assertions made by the United States in its first written submission related to the domestic implementation process that was undertaken.[6]

2.7. The European Union partially objects to the deletion suggested by the United States, requesting that the words "maintains that it" are not deleted in order to make clear that this paragraph concerns assertions made by the United States in this proceeding. The European Union does not object to the deletion of the remainder of the text that the United States identified.[7]

2.8. We decline the United States' request as the paragraph directly draws on the language used by the United States in the first paragraph of its first written submission.

### 2.4 Paragraph 7.9

2.9. The United States requests the Panel to revise the second sentence of paragraph 7.9 to more accurately restate arguments by the United States related to the USDOC's discretion to interpret Section 771B.[8] The European Union did not comment on this request.

2.10. We have made the minor changes that were requested by the United States.

### 2.5 Paragraph 7.23

2.11. The United States requests the Panel to revise the second sentence of paragraph 7.23 to more accurately describe the adjustments made to the subsidy attribution where growers grew more than olives.[9] The European Union did not comment on this request.

2.12. To enhance clarity, we have modified the second sentence to indicate that the USDOC attributed the benefit of such subsidies attributable to the olives grown by olive growers.

### 2.6 Paragraph 7.24

2.13. The United States requests the Panel to revise the first sentence of paragraph 7.24 to state that Section 771B applies in certain cases where the requirements of the statute are satisfied and

[5] United States' request for interim review, para. 5.
[6] United States' request for interim review, para. 6.
[7] European Union's comments on the United States' request for interim review, para. 3.
[8] United States' request for interim review, para. 7.
[9] United States' request for interim review, para. 8.

not in all countervailing duty investigations involving an agricultural product processed from a raw agricultural product.[10]

2.14. The European Union argues that the United States' proposed change would give the misleading impression that Section 771B may or may not apply in cases involving agricultural products, whereas Section 771B applies to an agricultural product processed from a raw agricultural product if the conditions in Section 771B are met. Alternatively, the European Union proposes rewording the first sentence of paragraph 7.24 to state that Section 771B applies in the United States' countervailing duty investigations involving an agricultural product processed from a raw agricultural product when the requirements of the statute are satisfied.[11]

2.15. To avoid confusion regarding situations in which Section 771B applies, we have modified the first sentence to state that Section 771B applies in US countervailing duty investigations involving an agricultural product processed from a raw agricultural product when the requirements of Section 771B are satisfied.

## 2.7 Footnote 79

2.16. The United States requests the Panel to revise footnote 79 to reflect that the USDOC's analysis and determinations in the Section 129 proceeding are supplemented by and based upon the information contained in the administrative record of the proceeding conducted by the USDOC.[12]

2.17. The European Union objects to the United States' proposed change, arguing that paragraph 7.34 refers to the USDOC's analysis and determinations, not to the evidence on which the USDOC relied. The European Union further submits that paragraph 7.38 reflects that the USDOC relied on record evidence.[13]

2.18. We do not consider the United States' requested change is necessary as the basis for the USDOC's analysis is reflected in subsequent paragraphs in section 7.2.3.2 of the Report.

## 2.8 Footnote 85

2.19. The United States requests the Panel to modify the citation in footnote 85 to accurately reflect the relevant range of pages in the cited document.[14] The European Union did not comment on this request.

2.20. We have made the requested change.

## 2.9 Paragraph 7.41

2.21. The United States requests the Panel to revise the second sentence of paragraph 7.41 to reflect that the USDOC applied the described methodology in the Section 129 proceeding to reach its conclusions "based on the facts and evidence presented in the Section 129 proceeding".[15]

2.22. The European Union objects to the requested change, arguing that the proposed additional language could be misunderstood to suggest that relevant facts or evidence beyond the two conditions in Section 771B may be considered by the USDOC for determining pass-through. The European Union maintains that such an understanding is incompatible with the findings in this proceeding that the pass-through methodology in Section 771B is exclusively based on the presumption contained in the two conditions referred to in Section 771B.[16] In addition, the European Union argues that the proposed use of the term "presented" is misleading because it would suggest that the USDOC's analysis depended on the information actively "presented" by interested

[10] United States' request for interim review, para. 9.
[11] European Union's comments on the United States' request for interim review, para. 4.
[12] United States' request for interim review, para. 10.
[13] European Union's comments on the United States' request for interim review, para. 5.
[14] United States' request for interim review, para. 11.
[15] United States' request for interim review, para. 12.
[16] European Union's comments on the United States' request for interim review, para. 6 (referring to Interim Report, paras. 7.51 and 7.54).

parties. The European Union contends that the interested parties were not given the opportunity to present relevant additional evidence in the Section 129 proceeding.[17]

2.23. We do not consider the United States' requested change is necessary as the basis for the USDOC's analysis, including the consideration of evidence, is reflected in subsequent paragraphs in section 7.2.3.2 of the Report.

### 2.10 Paragraph 7.42

2.24. The United States requests the Panel to revise the third sentence of paragraph 7.42 to clarify that "[t]he USDOC considered the interested parties' comments and rejected their arguments that a statutory change was required for the USDOC to be able to consider all relevant information". According to the United States, this additional language would avoid suggesting that the USDOC did not consider the arguments made by interested parties during the Section 129 proceeding.[18]

2.25. The European Union asks the Panel to partially reject the change proposed by the United States, arguing that interested parties made numerous different arguments that were rejected by the USDOC, and thus it would be misleading to focus solely on the argument that "a statutory change was required".[19] Accordingly, the European Union submits that the proposed language "[t]he USDOC considered the interested parties' comments and rejected their arguments" could be retained but the remainder of the text ("that a statutory change was required for the USDOC to be able to consider all relevant information") should not be incorporated.[20]

2.26. In the light of the parties' comments, we have modified the third sentence of paragraph 7.42 to state that "[t]he USDOC considered the interested parties' comments and rejected their arguments, including the comment that a statutory change was required for the USDOC to be able to consider all relevant information, notwithstanding the provisions of Section 771B". In this way, the sentence clarifies that the USDOC considered the interested parties' comments before rejecting their arguments that a statutory change was required for the USDOC to be able to consider all relevant information.

### 2.11 Paragraph 7.44

2.27. The United States requests the Panel to revise paragraph 7.44 to include arguments (a) that it disagrees with assertions by the European Union that the United States made no relevant changes with respect to Section 771B and (b) that the USDOC's revised interpretation constitutes the "measure taken to comply" and is a change in US law, given that the USDOC is the US authority charged with administering US countervailing duty law. The United States submits that paragraph 7.44 omits the United States' arguments regarding the existence of a measure taken to comply. The United States additionally requests that we include a new footnote citing paragraph 5 of the United States' opening statement at the substantive meeting with the Panel and paragraphs 64 and 65 of the United States' response to Panel question No. 25, in connection with the proposed revision.[21]

2.28. The European Union submits that the United States' proposed change is unnecessary, arguing that it is apparent from the existing text that the United States considers that a measure taken to comply exists and that the United States disagrees with the European Union's argument that the United States "made no relevant change with respect to Section 771B". The European Union additionally submits that the proposed language that the USDOC is the authority charged with administering the US countervailing duty law, is not reflected in the references cited by the United States and, therefore, the United States' request should also be rejected for this reason.[22]

2.29. To enhance clarity, the Panel has included language in paragraph 7.44 indicating that the United States disagrees with the European Union's assertion that the United States made no relevant

---

[17] European Union's comments on the United States' request for interim review, para. 6.
[18] United States' request for interim review, para. 13.
[19] European Union's comments on the United States' request for interim review, para. 7 (referring to Final Section 129 determination (Exhibit EU-2), pp. 15-16).
[20] European Union's comments on the United States' request for interim review, paras. 7-8.
[21] United States' request for interim review, para. 14.
[22] European Union's comments on the United States' request for interim review, paras. 9-11.

change with respect to Section 771B and that the USDOC's revised interpretation is the measure taken to comply and constitutes a change in US law. We have also included a new footnote 98 and citation to paragraph 5 of the United States' opening statement. We decline, however, to include additional language proposed by the United States that the USDOC is the US authority charged with administering the US countervailing duty law as we do not consider this language is relevant to our analysis in section 7.2.3.3 of the Report.

## 2.12 Paragraph 7.47

2.30. The United States requests the Panel to revise paragraph 7.47 which addresses the USDOC's reconsideration of the meaning of the terms "raw agricultural product" and "prior stage product". The USDOC's evaluation is contained in the section of the preliminary Section 129 determination entitled "Statutory Interpretation". The United States asks us to reflect that this section must be read together with the supporting memoranda and the explanation provided in the USDOC's final determination, and to also indicate that the USDOC also addressed the meaning of the statutory terms "shall" and "deemed" in the preliminary determination. The United States contends that without these revisions, the paragraph could be misunderstood as suggesting that there was no further discussion of the USDOC's statutory interpretation of Section 771B elsewhere in the preliminary and final determinations.[23]

2.31. The European Union objects to the United States' proposed change, arguing that the United States is attempting to amend the Panel's finding in preceding paragraph 7.46, that the legal interpretation of the terms "raw agricultural product" and "prior stage product" is the extent of the statutory interpretation contained in the section of the preliminary determination entitled "Statutory Interpretation". The European Union further submits that the United States' request to add a reference to supporting memoranda and the explanation provided in the USDOC's final determination is inapposite because these documents do not contain an interpretation as correctly established by the Panel in paragraphs 7.46 and 7.47 of the Interim Report. Lastly, the European Union argues that the United States' request to add a reference to the USDOC's alleged interpretation of the terms "shall" and "deem" is misplaced since paragraph 7.47 is limited to addressing the interpretation of the terms "raw agricultural product" and "prior stage product", while the USDOC's consideration of the terms "shall" or "deemed" is discussed separately in section 7.2.3.3.2.2.[24]

2.32. We reject the United States' request. We disagree with the United States' proposed revision characterizing this section of the preliminary determination as an "introductory section". In addition, we disagree with the United States' proposal to indicate in this paragraph that the preliminary Section 129 determination needs to be read together with supporting memoranda and explanation provided in the Section 129 final determination, and that the USDOC also addressed the meaning of the terms "shall" and "deemed". These aspects of the USDOC's evaluation are addressed by the Panel in section 7.2.3.3.2 of the Report that immediately follows. However, to enhance clarity, we have added language to paragraph 7.47 indicating that this part of the analysis is limited to addressing the USDOC's statutory interpretation in the section of the preliminary Section 129 determination entitled "Statutory Interpretation".

## 2.13 Paragraph 7.55

2.33. The United States requests the Panel to revise the language of the second sentence of paragraph 7.55 to track the language used by the United States in its submissions, namely that the analysis from the ripe olives Section 129 proceeding would "serve as guidance" in future determinations, not that it would be "mandated" in future determinations.[25] The European Union did not comment on this request.

2.34. We decline to make the requested change. The language in the second sentence reflects the Panel's assessment of how the USDOC may undertake an analysis pursuant to Section 771B in future determinations.

[23] United States' request for interim review, para. 15.
[24] European Union's comments on the United States' request for interim review, paras. 12-14.
[25] United States' request for interim review, para. 16.

## 2.14 Paragraph 7.59

2.35. The United States requests the Panel to change the fifth sentence of paragraph 7.59 to the past tense to avoid suggesting that the United States has continued to make arguments from the original proceeding in this compliance proceeding.[26] The European Union did not comment on this request.

2.36. We have made the requested change to enhance clarity.

## 2.15 Paragraph 7.66

2.37. The United States requests the Panel to modify language in the first sentence of paragraph 7.66 to avoid implying that the USDOC only had discretion to interpret Section 771B in the Section 129 proceeding. The United States contends that the USDOC has always had the discretion to interpret relevant statutory provisions, but such discretion had not previously been exercised in the manner it was in the ripe olives Section 129 proceeding with respect to Section 771B.[27] The European Union did not comment on this request.

2.38. We decline to make the requested changes. The language in paragraph 7.66 reflects the Panel's assessment that Section 771B does not allow for such discretion. Nor did the United States provide evidence that the USDOC exercised such discretion in the case at hand.

---

[26] United States' request for interim review, para. 17.
[27] United States' request for interim review, para. 18.

# ANNEX B

## ARGUMENTS OF THE PARTIES


| Contents | | Page |
|---|---|---|
| Annex B-1 | Integrated executive summary of the arguments of the European Union | 21 |
| Annex B-2 | Integrated executive summary of the arguments of the United States | 28 |

# ANNEX B-1

## INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

### I. INTRODUCTION

1. The United States is under a legal obligation to comply with the Panel's finding that Section 771B is "as such" inconsistent with WTO rules because it presumes the existence and degree of pass-through based on only two conditions (substantial dependence and limited added value) and excludes the possibility for the USDOC to take into account other relevant factors. The Panel found that Section 771B in its current form is inconsistent "as such" because it "requires" the USDOC to act inconsistently with Article VI:3 of the GATT and Article 10 of the SCM Agreement each time Section 771B is affirmatively applied. For the same reason, the Panel found that the application of Section 771B in the Spanish ripe olive CVD investigation was inconsistent "as applied."

2. It is undisputed that the United States did not amend Section 771B following the adoption of the Panel Report. The text of Section 771B today is the same as the text prior to the adoption of the Panel Report. The only U.S. measure taken to comply both with the "as such" and with the "as applied" findings in the Panel Report is the alleged "revised interpretation" by the USDOC in the Section 129 determination of the terms "prior stage product" and "raw agricultural product" applied in the context of the USDOC's substantial dependence analysis in Section 771B. According to the United States, this alleged "re-interpretation" would have allowed the USDOC to consider additional factors for the pass-through analysis.

3. As a general matter, because the "as applied" finding of inconsistency in the Panel Report is based on "the same reasons" as the "as such" finding of inconsistency and because the Panel expressly found that every affirmative application of Section 771B "requires" the USDOC to act inconsistently, the European Union takes the position that the United States can only achieve "as applied" compliance after having achieved "as such" compliance.

4. The USDOC's alleged "revised interpretation" of the terms "prior stage product" and "raw agricultural product" in Section 771B did not result in "as such" compliance and hence could not result in "as applied" compliance either.

### II. THE ALLEGED "REVISED INTERPRETATION" OF THE "PRIOR STAGE PRODUCT" DOES NOT EXIST

5. The alleged "revised interpretation" of the "prior stage product" and the "raw agricultural product" is nowhere reflected, let alone explained, in the Section 129 determination and does not exist. What the United States refers to, in a misleading manner, as a legal interpretation of Section 771B, is nothing but a run-of-the-mill factual *application* of those terms by the USDOC, taking into account the specific facts of the ripe olive case. The USDOC simply *determined* the "prior stage product" to be five certain raw olive varietals in view of the factual information it considered. It did not undertake any relevant change to Section 771B.

6. This is evidenced, for example, by the USDOC's conclusion on page 14 of the preliminary determination concerning the "prior stage product": "Thus, we are narrowing our definition of the "prior stage product" and "raw agricultural product" to table and dual-use raw olive varietals that are biologically distinct from other raw olive varietals." This modified definition follows a lengthy factual analysis of the substitutability of certain raw olive varietals. It is not the result of a legal interpretation of "prior stage product". Similarly, on page 18 of the preliminary determination the USDOC writes that "[w]e examined the totality of the information on the record, and subsequently determined to adjust our definition of the "prior stage product" to be the five [relevant] varietals." The United States, for example in paragraph 38 of its first written submission, also refers to a determination, not to a legal interpretation.

7. The absence of a legal interpretation is also evidenced by the fact that the United States throughout the proceedings has avoided (or has been unable) to identify the exact location of the alleged "interpretation", or to explain how the interpretation changed compared to the situation

prior to the adoption of the Panel Report. In response to the Panel's question as to where the alleged "interpretation" could be found, the United States alleged that the "interpretation" would be set forth over a total of 13 pages in the Section 129 determination. In short, the United States cannot find the "interpretation" because it does not exist.

8. The non-existence of any "interpretation" of the terms "prior stage product" and "raw agricultural product" that would be relevant for the consideration of additional factors (and hence for compliance) is further confirmed by the fact that the USDOC simply re-applied the same inconsistent presumption in the Section 129 determination as it had done in the original determination, despite the alleged "interpretation" of Section 771B. In particular, the USDOC made clear on page 18 in the preliminary determination that "[t]he two prongs of Section 771B are fulfilled", "[t]herefore" we apply a 100% pass-through. Similarly, the USDOC stated that it is "directed" by Section 771B to presume 100% pass-through. Therefore, the Section 129 determination also confirms that no legal interpretation of "prior stage product" relevant for pass-through exists.

9. The non-existence of any legal interpretation of "prior stage product" relevant for pass-through compliance is further supported by the fact that the USDOC even failed to gather any information that could be relevant for the consideration of additional factors relevant for pass-through. The USDOC merely placed "certain documents" onto the record from the original CVD investigation which could not contain relevant information since the USDOC applied the WTO-inconsistent presumption for that investigation. If the USDOC did not even collect information relevant for additional pass-through factors, why would the USDOC "revise its interpretation" in order to be able to consider additional factors in the first place?

10. The non-existence of any legal interpretation of "prior stage product" relevant for pass-through compliance is also demonstrated by the express U.S. acknowledgment in its Responses to the Panel's Questions that the "prior stage product" is irrelevant for the determination of direct benefit in the present case. Since indirect benefit is a corollary, full or partial, of direct benefit, this means that the "prior stage product" is also irrelevant for pass-through compliance in the present case. Why would the USDOC re-interpret the terms "prior stage product" if, as acknowledged by the United States, these terms are irrelevant for direct benefit and hence for indirect benefit?

11. The United States never specifically contested, let alone rebutted, the EU's arguments concerning the non-existence of a legal interpretation of "prior stage product". The United States limited its defence to merely *asserting* that the USDOC's alleged "revised interpretation" would have led to compliance without ever even identifying, let alone explaining, the alleged "interpretation".

12. The non-existence of the alleged "interpretation" suffices to establish U.S. non-compliance.

## III. THE ALLEGED "REVISED INTERPRETATION" OF "PRIOR STAGE PRODUCT" IS IRRELEVANT FOR PASS-THROUGH BEYOND SUBSTANTIAL DEPENDENCE

13. The terms "prior stage product" are located within the substantial dependence prong of Section 771B. These terms are therefore relevant for the USDOC's analysis as to whether the demand for the "prior stage product" is *substantially dependent* on the demand for the latter stage product. The substantial dependence analysis under Section 771B was not the subject of the WTO proceedings. Compliance does not concern the USDOC's substantial dependence analysis but, on the contrary, concerns the USDOC's legal obligation to consider relevant factors *other than* substantial dependence.

14. The United States throughout these proceedings has mostly been asserting the relevance of "prior stage product" for pass-through compliance without providing any explanation. At times, the United States asserted that the "prior stage product" would be relevant for "a more accurate substantial dependence analysis which would result in a more accurate pass-through", or has asserted that the factors relevant for "prior stage product" would be relevant for the "ripe olives market" or would be relevant for the "overall market of ripe olives and raw olives" or would be relevant for "attribution" or "pass-through". In none of its assertions did the United States explain how the factors that are relevant for the USDOC's factual substitutability analysis concerning the "prior stage product" could be relevant for the USDOC's consideration of additional factors for determining the existence and degree of pass-through which is an entirely different analysis.

Nowhere did the United States rebut the detailed EU arguments as to the irrelevance of the "prior stage product" for pass-through. This suffices on its own to establish U.S. non-compliance.

15. Importantly, the United States in none of its submissions referred to any analysis by the USDOC in the Section 129 determination as to why and how the factors relevant for the "prior stage product" would also be relevant as additional considerations for pass-through. The United States repeatedly provided *ex post* assertions to the effect that the factors relevant for the "prior stage product" "may speak to" pass-through or would be "relevant" for pass-through. However, compliance in the present case requires the consideration of additional relevant factors specifically for pass-through by the USDOC. This U.S. acknowledgment that the USDOC failed to consider the relevant factors *specifically* in the context of pass-through in combination with the glaring absence of any USDOC analysis of such factors regarding pass-through demonstrates that the USDOC did not consider additional factors for pass-through. This suffices to confirm, on its own, U.S. non-compliance.

16. The U.S. *ex post* rationalization that the modification of the "prior stage product" would result in a more accurate substantial dependence analysis which in turn would result in a more accurate pass-through analysis is factually incorrect. The substantial dependence analysis is a mere "yes or no" analysis. Either the condition is met (together with the condition of limited added value) and then there is 100% pass-through, or the condition is not met, in which case there is no pass-through. The substantial dependence analysis, by its very nature, is therefore irrelevant for the degree of pass-through.

17. The U.S. *ex post* rationalization that the factors considered by the USDOC for the determination of the "prior stage product" also "may speak to" pass-through or attribution are not backed up by any substantiation or evidence, let alone by references to the Section 129 determination. The factors considered for the "prior stage product" are in fact entirely irrelevant for pass-through. The USDOC carried out a highly fact-intensive substitutability analysis in the Section 129 determination and determined to limit the "prior stage product" to certain raw olive varietals (whereas the "prior stage product" in the original determination had included all ripe olives). The USDOC's analysis was based on factors which speak to the product characteristics of specific raw olive varietals such as e.g. different pruning practices, different watering requirements, or different insurance premiums. However, a pass-through analysis is not based on product characteristics. A pass-through analysis is a rather complex economic assessment that relates, *inter alia*, to elements such as conditions of competition and pricing conditions as also established by the Panel in the Panel Report. It does not relate to factors such as a particular pruning practice for olive varietal X. And it is certainly not sufficient to merely assert such relevance as the United States did.

18. The United States *ex post* also asserted, without substantiation, that the factors considered for the "prior stage product" would speak to the element "nature of the market and all the conditions of competition in that market" which was one of the elements identified by the Panel in the Panel Report as relevant for a pass-through analysis. However, the USDOC did not determine any "market" in the Section 129 determination, it merely determined the "prior stage product" which is a narrower concept than "market". In addition, the USDOC only defined the "prior stage product", it did not further analyse it. Lastly and in any event, the USDOC completely failed to consider the conditions of competition in a market which is an integral part of the element that the Panel considered as relevant. In other words, out of the four elements that the Panel identified as relevant examples for a pass-through analysis, the USDOC did not consider a single one in its Section 129 determination.

19. The fact that the modification of the "prior stage product" is irrelevant for pass-through is also evidenced by the fact that the USDOC re-applied the same presumption under Section 771B that had been found to be inconsistent by the Panel in the original proceedings as evidenced in particular on pages 11 (Section 771B "<u>directs</u>" the USDOC to deem) and on 18 ("the two prongs of Section 771B are met, <u>therefore</u> there is pass-through"). Evidently therefore, the modification of "prior stage product" had no bearing on the pass-through analysis in the Section 129 determination.

20. Importantly, the United States in its Responses to the Questions of the Panel <u>explicitly acknowledged that the "prior stage product" is irrelevant for the determination of direct benefit and hence also for indirect benefit</u>.

21. Since the alleged "revised interpretation" of "prior stage product" is the only U.S. measure taken to comply, its demonstrated irrelevance for a consistent pass-through analysis suffices, on its own, to establish U.S. non-compliance.

## IV. THE USDOC'S ALLEGED "REVISED INTERPRETATION" CANNOT CONSTITUTE COMPLIANCE IN THE PRESENT CASE

### 1. The Panel's "as such" finding excludes "interpretation" of Section 771B as means of U.S. compliance

22. Previous panel reports that addressed compliance options other than formal amendments of inconsistent legal provisions emphasized that "compliance must entail <u>a change relevant to the measure that was found to be inconsistent in the original proceedings</u>." In the present case, the Panel in the Panel Report explicitly found that Section 771B "<u>requires</u>" the USDOC to act inconsistently. It found that the "as such" inconsistency follows "from the operation of the law itself". The Panel therefore did not only find that the discretion of the USDOC under Section 771B was "materially restricted." The Panel found that its discretion was "excluded" and no consistent interpretation was possible. In such a scenario, the relevant measure to be changed cannot be the *interpretation* of Section 771B. This is because, according to the very findings of the adopted Panel Report in this case, <u>there exists no possible interpretation</u> of Section 771B that could allow the USDOC to act consistently under its terms. That is, in fact, the very essence of an "as such" finding that "requires" inconsistent administrative action like in the present case. The "as such" finding by the Panel concerning Section 771B therefore, by its very nature, is not a finding that can be remedied through a mere "interpretation" of Section 771B by the USDOC since the "relevant measure" to be changed in this case is not the "interpretation" or "application" of Section 771B by the USDOC. The relevant measure is <u>the very text of Section 771B</u>.

23. Therefore, even if there is no formal textual amendment of Section 771B, any measure taken to comply by the United States must ensure that the relevant measure, i.e. the law (the text of Section 771B), no longer stands in the way of the USDOC acting in a consistent manner. The United States must "modify the legislative authority" of Section 771B in some form. How the United States could achieve such a "change" of legislative authority of Section 771B without modifying the actual text of Section 771B is very difficult to imagine in the circumstances of an "as such" finding that "requires" inconsistent action.

24. It is undisputed that the alleged "revised interpretation" of Section 771B constitutes the only measure taken to comply by the United States for the "as such" and "as applied" findings of inconsistency. Since the mere "interpretation" of Section 771B by the USDOC cannot constitute compliance for the adopted "as such" finding according to which Section 771B "requires" the USDOC to act inconsistently, the United States failed to comply with the "as such" finding (and, consequently, with the "as applied" finding).

### 2. The compliance Panel and the United States are bound by the adopted DSB finding that Section 771B cannot be interpreted in a consistent manner

25. The Panel found in the Panel Report that Section 771B "requires" the USDOC to act inconsistently. In other words, the Panel found that there is no room for the USDOC whatsoever to interpret Section 771B in a consistent manner. Both the compliance Panel and the United States are bound by this adopted DSB finding and hence, necessarily, the United States cannot based its compliance claims on an alleged "interpretation" of Section 771B.

26. With respect to the required acceptance of adopted findings by the compliance Panel, the panel in *US – Carbon Steel (India) (Article 21.5 – India) stated*: "Under no circumstance can a compliance panel revisit "as such" findings of violation from the original proceedings that have been adopted by the DSB." This means that the compliance Panel cannot revisit the Panel's finding that the USDOC cannot "interpret" Section 771B in a consistent manner.

27. With respect to the required acceptance of adopted findings by the parties, the Appellate Body clarified, for example, in *EC – Bed Linen* that "an adopted DSB finding must be accepted by the parties." Similarly, the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* found that "allowing a party in an Article 21.5 proceeding to re-argue a claim that has been decided in adopted reports would provide an unfair 'second chance'." In the original proceedings the

United States had accepted that the USDOC has no discretion under Section 771B. The United States should have made its argument in the original proceedings, it cannot argue in the compliance proceedings that the USDOC may "interpret" Section 771B in a consistent manner.

28. In the circumstances of the present case, the adopted DSB findings therefore exclude "interpretation" as a means of U.S. compliance.

### 3. Previous reports establish that the mere "interpretation" of Section 771B cannot constitute "as such" compliance and hence cannot constitute "as applied" compliance either in the present case

29. The panel report in *US – Carbon Steel (India) (Article 21.5 – India)* confirms that the mere "revised interpretation" of Section 771B by the USDOC cannot constitute compliance for the "as such" finding in this case. The panel recalled that Article 3.7 of the DSU expresses a clear preference for the "withdrawal" of the measure and made clear that any other measure taken to comply would need to have an "equivalent effect". Withdrawal in the present case would be a repeal or a formal amendment of Section 771B which would have binding effect also for the future. This is important because the Appellate Body clarified that the nature of "as such" compliance requires that the root of the inconsistent behaviour is eliminated in order to prevent future trade disputes, avoid multiple litigation and to ensure the predictability and security of future trade in line with Article 3.2 of the DSU. The "re-interpretation" of Section 771B would not be a measure with "equivalent effect" because the USDOC's "interpretation" of Section 771B would not be binding for the future. Hence it would not ensure the predictability and security of future trade in a manner equivalent to a formal amendment of Section 771B. The non-binding nature of the USDOC's "interpretation" follows from the USDOC's nature as administrative body: The USDOC can neither enact laws (only U.S. Congress can), nor can it decide what the law says (only U.S. Courts can). The non-binding nature of the USDOC's alleged "interpretation" was also expressly confirmed by the United States in these proceedings.

30. The United States expressly acknowledged that the USDOC's alleged "interpretation" would not be binding for the future. The "interpretation" would merely constitute "useful guidance" for future investigations that would be "considered" by the USDOC.

31. The United States further acknowledged that under U.S. law an "interpretation" by the USDOC does not govern, i.e. does not have any legal relevance, if such interpretation contradicts the unambiguous language of the relevant legal provision. This would be the case if the USDOC would interpret Section 771B to the effect that the USDOC may consider other relevant factors for pass-through (*quod non*) since the unambiguous wording of Section 771B does not allow for the consideration of factors other than substantial dependence and limited added value ("shall be deemed") – as also established by the Panel. In other words, compliance through consistent interpretation would be legally impossible under U.S. law in the present case even according to the United States.

32. The United States also acknowledged that the USDOC would be "allowed" or would have "discretion" to consider additional factors but it would not be obliged to do so. This confirms that the USDOC is not bound by its alleged "interpretation".

33. The non-binding nature of a USDOC interpretation is further confirmed by the alleged "re-interpretation" of the terms "prior stage product" in the Section 129 determination (assuming it were an interpretation). If the USDOC could "re-interpret" Section 771B in the Section 129 determination, nothing would stop it from doing so in a future determination.

34. The non-binding nature of the USDOC's "interpretation" means that it is not a measure with an effect that is "equivalent" to a formal amendment or repeal.

35. For the same reason, the mere "interpretation" by the USDOC would not "modify the legislative authority of Section 771B" as required by the panel in *US – Carbon Steel (India) (Article 21.5 – India)* for "as such" compliance. The USDOC as an administrative authority is unable to modify the legislative authority of Section 771B. Only U.S. Congress or U.S Courts can do so. The USDOC's non-binding "re-interpretation" does not modify the legislative authority of Section 771B.

36. The panel in *US – Carbon Steel (India) (Article 21.5 – India)* also made clear that the mere change in application of a legal provision cannot constitute "as such" compliance. However, the USDOC's "re-interpretation" of Section 771B would only constitute a mere change in application.

37. If the mere "interpretation" of Section 771B would be sufficient in the present case for "as such" compliance, it would mean that the measure for "as applied" compliance would also achieve "as such" compliance. This in turn would mean that the Panel's "as such" finding of inconsistency would not have any legal relevance and would be deprived of any meaning. Also the European Union would be deprived of the legal relevance and practical effects of the Panel's "as such" finding.

38. A previous panel found in *US – Section 129(c)(1) URAA* that a Section 129 determination cannot constitute compliance for an "as such" finding as a matter of principle because it cannot modify statutes such as Section 771B. The Section 129 determination in the present case therefore cannot constitute "as such" compliance.

39. The third parties in this dispute supported the EU's position that the USDOC's "interpretation" of Section 771B cannot constitute "as such" compliance.

## V. THE UNITED STATES' ARGUMENTS ARE WITHOUT MERIT

40. During the proceedings the United States invoked on several occasions the alleged failure by interested parties to provide facts or arguments concerning alternative attribution methods. As a result, the United States contends that the USDOC's pass-through analysis was "appropriate" based on the "facts on the record". This argument is circular, self-serving and without any merit for a number of reasons.

41. First, the USDOC had made sure that the Section 129 record would not contain any information that could be relevant for pass-through beyond the two conditions in Section 771B on which interested parties could comment. Contrary to the WTO-inconsistencies regarding specificity and calculation error for which the USDOC sent out questionnaires, the USDOC did not carry out any investigative measures concerning pass-through. It merely "placed certain relevant documents" from the CVD investigation onto the Section 129 record. Since the USDOC had applied the inconsistent presumption in the CVD investigation, there could not be any relevant information on the record of the CVD investigation concerning pass-through compliance.

42. Second, the USDOC only permitted comments by interested parties in a very narrowly defined manner, namely on the "analysis and issues discussed in the preliminary determination". Since the USDOC applied the inconsistent pass-through presumption under Section 771B in the preliminary determination and did not discuss or analyse any other attribution method, the interested parties had no opportunity to comment on alternative methodologies.

43. Third, the interested parties strongly opposed the re-application of the presumption under Section 771B in their comments. The USDOC simply disregarded those objections.

44. At the very last stage of the proceedings (in its Responses to the Questions of the Panel), the United States for the very first time argued that the USDOC was able to consider additional factors for pass-through because it interpreted the term "deemed" in the Section 129 determination. In none of its previous submissions the United States had relied on the "interpretation" of "deemed", it had only invoked the alleged "interpretation" of the "prior stage product". This novel U.S. argument (and related evidence) was presented too late in these compliance proceedings under the Panel's Working Procedures and under due process considerations.

45. In any event, the U.S. argument is plainly without merit. The United States expressly decided not to challenge the lack of the USDOC's discretion embodied in the terms "shall be deemed" in the original proceedings. It is therefore *precluded* from doing so in the compliance proceedings. In addition, it is not the term "deemed" in isolation that prevents the USDOC from considering relevant factors for pass-through, it is the terms "shall be deemed" in combination which "direct" the USDOC to base its 100% presumption on the two conditions in Section 771B. Lastly, there is no "interpretation" of "deemed" in the Section 129 determination. In the very next paragraph following the alleged "interpretation" of the term "deemed" by the USDOC (to the effect that the

USDOC may consider additional factors), the USDOC quotes Section 771B and states that "because the two prongs are fulfilled, therefore there is 100% pass-through." The USDOC thereby acknowledges that it has no discretion and that no "re-interpretation" of Section 771B exists.

# ANNEX B-2

## INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

### 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.

---

# ANNEX C

## ARGUMENTS OF THE THIRD PARTIES


| Contents | | Page |
|---|---|---|
| Annex C-1 | Integrated executive summary of the arguments of Brazil | 42 |
| Annex C-2 | Integrated executive summary of the arguments of Canada | 43 |
| Annex C-3 | Integrated executive summary of the arguments of Japan | 47 |
| Annex C-4 | Integrated executive summary of the arguments of the Russian Federation | 52 |

## ANNEX C-1

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil appreciates the opportunity to provide responses to the Panel's questions to the third parties. Brazil does not take a position regarding the facts of this dispute, but will present its views on the first question posed by the Panel regarding the consideration of unadopted panel reports.

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

2. In Brazil's view, any legal dispute in the WTO relates to specific matters and takes place between two or more particular Members. Therefore, adopted (or unadopted) panel reports are not binding precedentes for other disputes, even if these disputes relate to the same questions of WTO law. In other words, the panel is not obliged to follow previous reports even if they have elaborated interpretation of exactly the provisions which are now before the panel.

3. Nevertheless, if the analysis and reasoning developed in previous reports to interpret certain WTO rules are considered relevant and persuasive from the panel's point of view, even though those reports were not adopted by the DSB, and therefore lack a formal legal status in the WTO, the panel may accept them as useful guidance[1].

**2. Also with respect to *US – Carbon Steel (India) (Article 21.5 - India)*, the proposition is expressed that, to comply with an "as such" finding of non-compliance, a Member is expected to change its domestic laws and cannot comply otherwise. Do you agree with this or are there other ways?**

[1] Panel Report, *Guatemala – Cement II*, para. 8.15, and Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 32.

## ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

### I. INTRODUCTION

1. Canada participates in this compliance proceeding because it has a substantial systemic interest in the proper interpretation of the provisions of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") that deal with the existence and extent of pass-through of benefits of indirect subsidies, and in compliance with related DSB rulings and recommendations.

2. The original WTO proceeding concerns a U.S. Department of Commerce ("USDOC") investigation on imports of ripe olives that presumed that 100% of the subsidies granted to Spanish olive growers, as allocated over their raw olives passed through to three Spanish ripe olive producers when the raw olives were sold to them. The USDOC had reached this conclusion on the basis of Section 771B of the *Tariff Act of 1930*, a statute outlining the method by which the benefit of a subsidy passes through from agricultural commodities to processed products.

3. The Panel concluded that Section 771B violated Article VI:3 of the GATT and Article 10 of the SCM Agreement "as such". The Panel further found that the affirmative application of Section 771B in the Spanish ripe olive investigation infringed the same provisions because the USDOC had illegally presumed both the existence and a 100% degree of pass-through benefit and did not take into account all relevant factors.[1]

4. As a result of the Panel's findings, the United States carried out administrative proceedings under Section 129(b)(2) of the U.S. *Uruguay Round Agreements Act* ("URAA") and issued its Section 129 Determination on 20 December 2022.[2]

5. As indicated by the European Union, the United States did nothing in the Section 129 proceedings to address the "as such" and "as applied" violations concerning the flawed pass-through methodology in Section 771B.[3] Below, Canada provides comments on how the United States' measure to comply fails to address the "as such" and "as applied" violations.

### II. THE UNITED STATES TAKES NO MEASURE TO PROPERLY ADDRESS THE "AS SUCH" VIOLATION AND THEREFORE DOES NOT COMPLY WITH THE RECOMMENDATIONS AND RULINGS OF THE DSB

6. The focus of a compliance proceeding is to verify whether a Member, after the DSB recommendation has been adopted, has taken steps to bring a measure that was previously found to be WTO-inconsistent into conformity with the covered agreements. Canada agrees with the United States and the European Union who both correctly point out that "there are no rigid requirements in the DSU that specify what form 'the measure taken to comply' must take".[4] However, the critical element is actual compliance with the DSB's rulings and recommendations.

7. The only measure taken by the United States in response to the DSB recommendations and rulings was a USDOC determination under Section 129(b)(2) of the URAA. The Panel in this compliance proceeding must determine whether the U.S. measure, in this case the U.S. Section 129 Determination, "complies" with the original Panel's findings of an "as such" violation. When the Panel in the original proceedings analyzed the pass-through of indirect subsidies, it found an "as such" violation of Article 10 of the SCM Agreement. The Panel held that Section 771B is as such inconsistent:

---

[1] Panel Report, *US – Ripe Olives from Spain*, paras. 7.176, 8.1.b.i, and 8.1.b.ii.

[2] Ripe Olives from Spain: Final Section 129 Determination Regarding the Countervailing Duty Investigation, C-469-818, **Exhibit EU-2**.

[3] European Union's first written submission, para. 3.

[4] United States' first written submission, para. 9; European Union's first written submission, para. 57 and European Union's second written submission, para. 16.

> […] 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.[5]

As the U.S. itself acknowledges, "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".[6] Yet the USDOC proceeded to do exactly that in the Section 129 Determination which it claims as its measure taken to comply.

8. The United States argues that the USDOC Section 129 Determination remedies the "as such" inconsistency by interpreting Section 771B to allow for the consideration of additional factors. According to the U.S., "in the Section 129 Preliminary and Final determinations, the USDOC explains in detail how it re-examined and revised <u>its understanding</u> of Section 771B and then properly applied Section 771B in response to the findings of the panel in the underlying WTO proceeding".[7] The United States actions through its Section 129 Determination and its arguments in this compliance proceeding, which suggest that it can now interpret or re-examine Section 771B as allowing for a consideration of additional factors, run directly counter to the Panel's decision in the original proceeding.

9. To accept this U.S. position, this compliance Panel would effectively revisit the original Panel's "as such" findings. As the panel held in *US – Carbon Steel (India) (Article 21.5 - India)*, <u>under no circumstance can a compliance panel revisit "as such" findings of violation from the original proceedings that have been adopted by the DSB</u>.[8] Canada considers that *US – Carbon Steel (India) (Article 21.5 - India)* is relevant to the present case. In that case, as in this case, the statute itself was found to be "as such" inconsistent and the United States had done nothing to effect compliance. Instead, the United States had simply taken the position that the statute was not "as such" inconsistent, claiming that the investigating authority maintained some discretion—a position which was directly contrary to the original panel's finding. Because of this position, the United States argued that there was compliance by virtue of its "re-interpretation" of the provision that was found to be an "as such" violation of WTO law. The panel in *US – Carbon Steel (India) (Article 21.5 - India)* reasoned that "[i]n the case of a finding of WTO inconsistency in respect of a legislative act 'as such', we would normally expect the alleged 'measure taken to comply' to modify the legislative authority of that measure in respect of the WTO inconsistency at issue".[9] It further held that "even where a Member seeks to cure an 'as such' inconsistency 'without a change to the text of the measure itself', compliance must nonetheless entail a change relevant to the measure that was found to be inconsistent in the original proceedings".[10]

10. The United States is making essentially the same argument in the present case as in *US – Carbon Steel (India) (Article 21.5 – India)* when it claims that its investigating authority has reinterpreted a statutory provision as providing for discretion, even though a panel had already found the statute to be "as such" inconsistent with WTO law. The Panel has concluded that Section 771B violated Article VI:3 of the GATT and Article 10 of the SCM Agreement "as such".

---

[5] Panel Report, *US – Ripe Olives from Spain*, para. 8.1.b.i. (Emphasis added)

[6] United States' first written submission, paras. 31 and 33. Panel Report, *US – Ripe Olives from Spain*, para. 7.167.

[7] United States' first written submission, para. 50. (Emphasis added)

[8] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.301 (Emphasis added). Canada notes that this panel report has not been adopted by the DSB. However, while a panel's task is to make an objective assessment of the specific matter put before it by the disputing parties, pursuant to Article 11 of the DSU, Canada submits that, when discharging its duty, a panel should take into account previous adopted panel or Appellate Body reports that are relevant to its analysis. In Canada's opinion, the fact that a relevant panel report mentioned by a party has not come before the DSB for adoption does not prevent a panel from taking such report into account. The reasoning contained in an unadopted panel report may be useful to the panel's analysis. Ultimately though, a panel's assessment must be rooted in the facts of the case before it and the applicability of and conformity with the covered agreements.

[9] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India),* para. 7.308.

[10] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India),* para. 7.306.

11. Canada agrees with the European Union that the "re-interpretation" of Section 771B in the Section 129 proceedings by the USDOC in the present case "neither modifies the legislative authority of Section 771B nor does it entail a change relevant to this legal provision" and therefore cannot be considered compliance. As the European Union argues in its second written submission, "irrespective of the precise manner in which compliance may be achieved for 'as such' violations, […] [a] 'change' or 'modification' of Section 771B with legally binding effect for the future is essential in order to prevent future WTO inconsistencies through the application of this inconsistent legal provision".[11]

12. In line with the Panel's reasoning, Canada submits that compliance requires "a change of some kind to the offending provision, whether by legislative amendment, repeal, or changing Section 771B in any other relevant way such that its application no longer automatically results in actions on the part of the USDOC that are WTO-inconsistent".[12] In this case, the USDOC simply re-applied the same statute, which had already been found to be an "as such" violation, and its application was in violation of the WTO rules. Such a measure cannot constitute compliance with a finding of an "as such" violation.

## III. THE UNITED STATES' MEASURE TO ADDRESS THE "AS APPLIED" VIOLATION DOES NOT COMPLY WITH THE RECOMMENDATIONS AND RULINGS OF THE DSB

13. Regarding the "as such" violation, the Panel in the original proceedings explained that it "follows from the operation of the law itself" when it held that the USDOC's determination "is inconsistent with Article VI:3 and Article 10 for the same reasons that Section 771B is inconsistent "as such" with those same provisions".[13] Thus, the "as applied" violation follows from the "as such" violation, with the Panel concluding "that through the application of Section 771B of the Tariff Act of 1930 in the Spanish ripe olives investigation the United States acted inconsistently with its obligations under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement to establish the existence and extent of indirect subsidization (i.e. pass-through) taking into account all relevant facts and circumstances".[14]

14. The European Union argues that "since every affirmative application of Section 771B 'requires' (as the Panel specifically determined) the USDOC to violate WTO rules, the failure by the United States to address the "as such" inconsistency has as a necessary legal consequence that the affirmative application of Section 771B in the Section 129 proceedings also violates Article VI:3 of the GATT and Article 10 of the SCM Agreement".[15]

15. Canada agrees that if a statute found to be an "as such" violation continues to be applied, it follows that this application must also violate the WTO rules. Moreover, when one examines the USDOC's application of Section 771B in its Section 129 Determination it becomes clear that the U.S. claim that it has taken a measure to comply with respect to pass-through of <u>indirect</u> subsidies must necessarily fail because it only considered additional factors relevant to <u>direct</u> subsidies.

16. Before the original Panel, both parties agreed that the dispute was about "<u>how to determine the existence and extent of the pass-through of indirect subsidies</u>", i.e. the benefit conferred to ripe olive producers as indirect recipients. The USDOC claims in the Section 129 Determination that it considered "additional factors and information beyond the two factors in Section 771B". The USDOC then contends that it did so by modifying the definition of the "prior stage product" and by eliminating crops other than raw olives when calculating the benefit received by olive growers.[16] However, both these aspects concern the determination of benefit conferred to direct recipients (olive growers).[17] Thus the USDOC did not address the "as applied" violations as they related to pass-through for indirect subsidies.

[11] European Union's first written submission, para. 19.
[12] Canada's Third Party Oral Statement, para. 11.
[13] Panel Report, *US – Ripe Olives from Spain*, paras. 7.175 and 8.1.b.ii.
[14] Panel Report, *US – Ripe Olives from Spain*, paras. 7.176 and 8.1.b.ii.
[15] European Union's first written submission, para. 4.
[16] European Union's first written submission, para. 11. Ripe Olives from Spain: Final Section 129 Determination Regarding the Countervailing Duty Investigation, C-469-818, **Exhibit EU-2**, p. 20; Ripe Olives from Spain: Preliminary Section 129 Determination Regarding the Countervailing Duty Investigation, C-469-818, **Exhibit EU-1**, p. 17.
[17] European Union's first written submission, para. 4.

17. As the European Union noted in its first written submission, it is important in these compliance proceedings to make a distinction between the benefit conferred to raw olives growers as *direct* recipients and the benefit conferred to ripe olive producers as *indirect* recipients. The Appellate Body explained this distinction in *US – Softwood Lumber IV*:

> Where a subsidy is conferred on input products, and the countervailing duty is imposed on processed products, the initial recipient of the subsidy and the producer of the eventually countervailed product, may not be the same. In such a case, there is a direct recipient of the benefit—the producer of the input product. When the input is subsequently processed, the producer of the processed product is an indirect recipient of the benefit—provided it can be established that the benefit flowing from the input subsidy is passed through, at least in part, to the processed product.[18]

18. The United States did not implement the DSB's recommendations and rulings with respect to indirect benefit conferred to ripe olive producers. Thus, the U.S. claim that it has taken a measure to comply with the "as applied" violation as it relates to pass-through of indirect subsidies must necessarily fail.

## IV. CONCLUSION

19. For the reasons outlined above, Canada considers that the United States failed to take an appropriate measure to address the "as such" violation in Section 771B and, consequently, to address the "as applied" violations concerning the flawed pass-through methodology in the Section 129 Determination.

[18] Appellate Body Report, *US – Softwood Lumber IV*, para. 143.

## ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

### I. How a panel should treat the reasoning contained in a panel report unadopted by the DSB

1. Regarding whether a panel must accept the reasoning contained in an unadopted panel report as "useful guidance", Japan recalls that the Appellate Body in *Japan – Alcoholic Beverages II* found

> Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.
>
> …
>
> {U}nadopted panel reports "have no legal status in the GATT or WTO system …. {A} panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant".[1]

2. Thus, a panel is not *obliged* to accept as "useful guidance" the reasoning contained in previous panel reports, whether they are adopted or unadopted, and this conclusion follows for two reasons. First, the WTO agreements, including the DSU, do not impose any such obligation. Second, a panel report does not have binding effects beyond the context of a particular dispute in which it was issued, even if it has been adopted by the DSB.

3. However, as to how a panel should treat the reasoning that it is not legally obliged to accept as "useful guidance", a panel *may* still refer to the reasoning in its own findings, even when the previous panel report was unadopted. As the panel said in *EU – Footwear (China)*: "While we recognize that the unadopted report of a panel does not bind the parties, we nonetheless consider that we may take it into account in our own deliberations, and, to the extent we find the analysis, reasoning, and conclusions of that report persuasive on the issues before us, may follow it".[2]

4. In Japan's view, a panel may refer to the reasoning from a previous unadopted panel report, to the extent that the panel finds the reasoning to be sound and persuasive, and relevant to the case at hand, because such reference would contribute to and support the panel's objective assessment of the matter (including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements) under Article 11 of the DSU.

### II. How to determine whether measures taken to comply with the DSB's recommendations and rulings that a measure is "as such" inconsistent with the covered agreements exist

5. As to the issue of whether the United States has taken measures to comply with the DSB's recommendations and rulings on "as such" inconsistency, the parties disagree on whether the USDOC's revised interpretation of Section 771B of the Tariff Act of 1930 ("Section 771B"), in the context of USDOC's Section 129 determination on Ripe Olives from Spain, may be a "measure taken to comply" with the DSB's finding under Article 21.5 of the DSU, without changing any of the text of Section 771B itself.

[1] Appellate Body Report, *Japan – Alcoholic Beverages II*, pages 14-15 (emphasis and footnotes in the original omitted) (*quoting* Panel Report, *Japan – Alcoholic Beverages II*, para. 6.10).

[2] Panel Report, *EU – Footwear (China)*, para. 7.83.

6. Before presenting its view, Japan would like to reiterate that "[a] compliance panel proceeding is not an opportunity to 're-litigate' issues that were addressed, or that could have been addressed, in the original proceedings"[3], as a previous panel correctly explained. Prohibition of re-litigation in the compliance stage has been repeatedly confirmed because re-litigation would, in principle, provide an unfair second chance to the party and compromise the finality of the DSB's recommendations and rulings.[4]

7. In the current case, the United States argues that, while Section 771B itself has not been amended, the USDOC's revised interpretation of Section 771B constitutes a "measure taken to comply" for "as such" inconsistency, because it now allows the consideration of all case-specific and relevant record information to determine whether upstream subsidies pass through to a downstream processor, consistent with the requirements of the GATT 1994 and SCM Agreement.[5]

8. This compliance Panel must carefully consider the United States' argument so as to avoid re-litigation. In Japan's view, WTO inconsistent measures, including those that constitute "as such" violations, may be brought into compliance through various methods[6], including without a change in the text of the measure itself.[7] Both the European Union and the United States agree on this general point.[8] In this regard, the panel in *US – Gambling (Article 21.5 – Antigua and Barbuda)* has implied that *a revised interpretation of domestic law* could constitute a "measure taken to comply" for "as such" violations.[9]

9. However, as a previous panel stated, "even where a Member seeks to cure an 'as such' inconsistency 'without a change to the measure itself', compliance must nonetheless entail a *change relevant to the measure that was found inconsistent in the original proceedings*".[10] An assessment of whether there is such a change logically depends on what the panel found to be inconsistent and recommended in the original proceeding.

10. Therefore, Japan disagrees with the proposition expressed in *US – Carbon Steel (India) (Article 21.5 – India)* that, to comply with an "as such" finding of non-compliance, a Member is expected to change its domestic laws and cannot comply otherwise, to the extent that it

---

[3] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.10.

[4] See, e.g., Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 210-211; Panel Report, *US – Large Civil Aircraft (2nd Complaint) (Article 21.5 – EU)*, para. 7.25.

[5] See United States' first written submission, para. 50. See also United States' first written submission, paras. 5 ("re-evaluate"), 9 ("revisit"), and 37 ("reexamination"); United States' second written submission, para. 9 ("revisiting" and "revised").

[6] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.305 ("There are *no rigid requirements in the DSU* that specify what form the 'measure taken to comply' must take."). (emphasis added)

[7] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.306 ("*[W]e do not exclude that there may be ways of remedying [an 'as such'] inconsistency which do not involve changing the text* of a measure itself ….") (citing Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda),* para. 6.22). (emphasis added)

[8] See European Union's first written submission, para. 57; United States' first written submission, para. 64.

[9] Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, para. 6.27 ("There has been no change to any of these three measures since the original proceeding. There has been no change in the application of these three measures, *or even their interpretation*, since the original proceeding. There is no evidence of any changes in the factual or legal background bearing on these measures or their effects since the original proceeding that might have brought them into compliance. This indicates that they remain inconsistent with the United States' obligations under the GATS."). (emphasis added)

[10] Panel Report, *US – Carbon Steel (India) (Article 21.5)*, para. 7.306. (emphasis added) See also Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, paras. 6.15 and 6.22 ("Therefore, the recommendation requires a *change* that eliminates the inconsistency of those measures with the covered agreements"; "For example, a measure may lapse, or satisfy a requirement in a covered agreement, due to the subsequent occurrence of a relevant circumstance. If changes to the measure's factual or legal background modified the *effects* of that measure sufficiently to bring about a situation in which it complied with the relevant covered agreement, there seems to be no reason why this should not fulfil the aim of the recommendation of the DSB, which is to achieve a satisfactory settlement of the matter in accordance with the rights and obligations under the DSU and the covered agreements, as provided in Article 3.4 of the DSU. *The essential point is that there needs to be compliance*. However, even in these cases, compliance would *entail a change relevant to the measure* since the original proceeding".). (emphasis added; footnote omitted)

means that a Member cannot comply with an "as such" finding of non-compliance unless the Member changes the text of the domestic law(s) found to be non-compliant.

11. In the current case, the original panel, agreeing with previous panel and Appellate Body reports, found an "as such" violation occurs when a 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 those obligations".[11] The original panel then found that Section 771B satisfies this standard and is accordingly "as such" inconsistent.[12]

12. Thus, to determine whether the United States took a measure to comply with this "as such" violation, this compliance Panel must determine: (i) whether the USDOC's revised interpretation of Section 771B, without any change to the text, may nonetheless constitute a relevant *change* to Section 771B; and (ii) whether such change eliminated the WTO inconsistency of the measure. In this case, this compliance Panel must determine whether Section 771B, with USDOC's revised interpretation, *does NOT require* the United States to violate its WTO obligations, or *does NOT restrict, in a material way,* the United States' discretion to act in a manner that is consistent with its WTO obligations. If the measure entails such a change, an argument based on such change should not be regarded as re-litigating the original panel's findings, and a measure taken to comply should be found to exist.

13. That said, while the prerogative of WTO Members to interpret their own domestic laws should be fully respected, the question of whether the United States' revised interpretation of Section 771B constitutes a relevant "change" to comply with the DSB's finding of an "as such" violation still needs an objective assessment by this compliance Panel, and a mere assertion of such a change by the United States should not suffice.

14. In this regard, the compliance Panel should ensure that the United States had not and could not have asserted its current interpretation in the original proceeding, because to recall, the compliance Panel may not review the original panel's findings.

15. In addition, the compliance Panel should take into account whether the USDOC has provided a sufficient and reasoned explanation on how its revised interpretation of Section 771B has made the measure consistent with the WTO Agreements, without making any change to the statutory text. For this purpose, it would be desirable if the USDOC's revised interpretation were supported by certain objective evidence, such as a written administrative instrument or actual applications.

**III. Whether the USDOC's Section 129 determination cures the "as applied" inconsistency**

16. The second issue in this case is whether the USDOC's Section 129 determination addressed the original panel's finding of an "as applied" inconsistency with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement in the Ripe Olives from Spain CVD investigation when the USDOC presumed pass-through of benefit from an upstream input supplier to a downstream processor based on consideration of only the two factual circumstances specified in Section 771B, without consideration of other relevant factors.

17. The United States argues the USDOC's Section 129 determination addressed this concern, and accounted for additional factors making the table olives market unique, by specifically narrowing the definition of the "raw agricultural product" and "prior stage product" under Section 771B to include only those few varietals of raw olives that are suitable for table olive production.[13]

18. In turn, the European Union argues that this modification concerns only the determination of the direct benefit to the upstream raw olive growers, and does not address the analysis of

[11] Panel Report, para. 7.146. (emphasis added)
[12] Panel Report, para. 7.170.
[13] See United States' first written submission, paras. 38-41, 53-54, and 61; United States' second written submission, para. 26.

the indirect benefit passed through to the downstream ripe olive producers that the original panel found to be WTO-inconsistent.[14]

19. An assessment of whether the USDOC addressed the "as applied" inconsistency again logically depends on what the original panel found to be WTO-inconsistent, including the analysis it found to be required for a WTO-consistent pass-through determination.

20. Here, the original panel found that, for a WTO-consistent determination of pass-through, "an investigating authority must analyse to what extent subsidies on inputs may be included in the determination of the total amount of subsidies bestowed upon processed products".[15] For that purpose, "an investigating authority must take into account facts and circumstances that may be relevant to that determination and is *not entitled to exclude from its determination factors that are potentially relevant*".[16]

21. The question then is: what factors are potentially relevant for the pass-through analysis? Section 771B prescribes only two factors, which the original panel found to characterize "perfect competition" in the subject market, in the sense that products are undifferentiated and market-entry is unrestricted, and the producers of the raw products have no choice but to accept the prevailing market price.[17] However, the original panel found that "it is reasonable to believe that *variations may exist in the competitive conditions* of different product markets, including in those for raw agricultural commodities, such that any given market may or may not be perfectly competitive."[18] The factors that are potentially relevant for the pass-through analysis include, therefore, "the nature of the specific market for the input product at issue and *all of the conditions of competition in that market*," especially those factors that may affect the input product pricing.[19]

22. The original panel gave some examples of such other factors that may be relevant, namely, "the degree to which raw input sellers face pricing pressure", and "the market power of the different producers and processors, or the extent to which national or international competition could potentially affect the reliability of input product pricing".[20]

23. Japan agrees with the original panel's findings regarding the need to analyse factors relevant to the conditions of competition in the market, especially those that may affect input product pricing. This is because the essence of the pass-through analysis in a CVD case is to determine whether and to what extent the subsidies granted to the input (raw) product led to a decrease in the level of prices for the input product paid by the processors below the level they would have to pay for the input product from other commercial sources of supply. Considering that the benefit of upstream subsidies would be conferred to downstream producers only through the lowered price of the input, an estimated quantification of how much the input price is lowered by the upstream subsidy is logically required to assess the benefit conferred to the downstream producers, so the downstream producers can lower the price of their products by using such benefit. Accordingly, factors regarding the conditions of competition in the market that may affect input product pricing are highly relevant to the pass-through determination, and should not be neglected.

24. For example, even when the subsidized inputs are commodities, depending on how the price of such commodities are formed in the market, pass-through of the benefit may not be lightly inferred. If downstream producers have access to low-priced imports that are substitutable for the domestic input produced by subsidized upstream producers, then an upstream subsidy may not change the input price to be paid by the subject downstream producers. In that case, the benefit of the upstream subsidy would not pass through to the downstream producers.

[14] See European Union's first written submission, para. 71; European Union's second written submission, para. 23.
[15] Panel Report, para. 7.162.
[16] Panel Report, para. 7.162. (emphasis added)
[17] Panel Report, paras. 7.163 and 7.167.
[18] Panel Report, para. 7.166. (emphasis added)
[19] Panel Report, para. 7.166. (emphasis added)
[20] Panel Report, para. 7.167.

25. In light of the original panel's findings just described, this compliance Panel should assess whether the USDOC's Section 129 determination at issue actually addressed all relevant factors regarding the competitive conditions in the input product market, especially those affecting input product pricing.

26. Narrowing the upstream products for the pass-through analysis to those that have a direct link to the downstream products makes demand for the upstream products more dependent on demand for the downstream products, and thus further supports the existence of the first factor under Section 771B, which may be relevant to the pass-through determination. However, the compliance Panel needs to carefully consider whether the USDOC's Section 129 determination addressed relevant factors affecting input product pricing *other than* the two circumstances under Section 771B, such as "the extent to which national or international competition could potentially affect the reliability of input product pricing".[21]

[21] Panel Report, para. 7.167.

## ANNEX C-4

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

Mr. Chairman, distinguished Members of the Panel:

1. The Russian Federation would like to thank the Panel for the opportunity to present this Oral Statement as a Third Party in the current proceedings.

2. The Russian Federation takes note on the positions of the parties with respect to bringing the measure into compliance, in case when the specific legislative provision is recognized "as such" as WTO-inconsistent. Proper interpretation of Article 21.5 as well as other provisions of the DSU in this regard is determinative for the proper functioning of the WTO dispute resolution system. Accordingly, the issues that are before this Panel have enormous systemic importance.

3. To begin with, the Russian Federation recalls Article 21.1 of the DSU which establishes that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." To this end, having said that the *prompt compliance* is essential for the effective resolution of the dispute, the "compliance" in itself is the indispensable part for it.

4. The first sentence of Article 21.5 of the DSU prescribes that: "where there is disagreement as to the <u>existence</u> or <u>consistency</u> with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel".[1]Thus, the analysis of the panel shall focus on whether the measure taken to comply exists and if such measure exists, whether it is in conformity with the covered agreements. This approach is confirmed by the WTO jurisprudence.[2]

5. Further, the first sentence of Article 19.1 of the DSU states:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.

6. Hence, it is necessary to bring into conformity specifically the measure, with regard to which a recommendation was issued under Article 19.1 of the DSU, *i.e.* it necessary to do something with respect to such measure. As a result the measure shall become consistent with the corresponding WTO agreement.

7. In this regard, it is hard to imagine the situation where a measure recognized as WTO-inconsistent in itself would be considered as not WTO-inconsistent if it remains in its original form and original status.

8. Russia acknowledges the existence of the diverged legal systems of different WTO members. Russia also acknowledges that the DSU does not prescribe for the specific mode of bringing the measure into compliance, leaving the adjudicators the possibility only to make recommendations in this regard.[3] Nevertheless, the thesis that a measure is brought into conformity by a measure taken to comply without corresponding legal consequences for the original measure is very difficult to pursue.

9. Finally, Article 3.2 of the DSU proclaims that "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". Russia believes that the rules on compliance with recommendations and rulings of panels and the Appellate Body are the core features of this dispute settlement. In this regard, when the

[1] Emphasis added.
[2] See, for instance, Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79.
[3] Article 19.1 of the DSU, second sentence.

complainant brings "as such" claim with respect to the "laws …. of the Member that have general and prospective application", it asserts that that other "Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations".[4] Thus, "the complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct".[5]

10. Yet, the sense of challenging the measure of "as such" character additionally to the measure of "as applied" character and recognizing them as WTO-inconsistent separately becomes meaningless, if at the compliance stage the changes made exclusively to the "as applied" measure would be deemed also the compliance with respect to "as such" measure while leaving the original form and status of the last unchanged.

11. This concludes our statement. Thank you again for this opportunity to express the views of the Russian Federation.

---

[4] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172
[5] *Ibid.*