

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

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

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

7.79. These findings reflected our view that the USDOC's analysis and determinations concerning the applicability of Section 771B in the Section 129 determinations fail to implement the relevant aspects of the adopted DSB rulings and recommendations that Section 771B is "as such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. They further demonstrate that the application of Section 771B in the Section 129 proceeding also violates Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. This results from the fact that the USDOC found that subsidies granted to growers of raw olives in Spain could be attributed to three investigated ripe olive producers based solely on its determination that both factual circumstances identified in Section 771B were established, without consideration of any other potentially relevant information relating to the market or the competitive conditions affecting the investigated product. In view of this latter finding, we additionally find that the USDOC's determination under Section 771B in the ripe olives Section 129 determination is inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATIONS

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

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

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

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

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

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

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

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

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