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

Recourse to Article 21.5 of the DSU by the European Union

(DS577)

U.S. RESPONSES TO QUESTIONS FROM THE PANEL FOLLOWING THE SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

November 14, 2023

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US – Stainless Steel (Mexico) (AB)	Appellate Body Report, United States – Final Anti Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, 513
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TABLE OF ABBREVIATIONS

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

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

I. RESPONSES TO PANEL QUESTIONS

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

U.S. Response to Q1:

1. No. It would be legal error for the Panel to conclude that there has been a failure to comply with the Dispute Settlement Body's ("DSB") recommendation with respect to the "as such" findings solely on the grounds the statutory language of Section 771B of the Tariff Act of 1930, as amended ("Section 771B"), has not been changed. As explained in the U.S. first written submission, there is nothing in the text of the Dispute Settlement Understanding ("DSU") that requires a specific type of action to bring a measure into conformity with World Trade Organization ("WTO") rules. 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.[1]

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

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

U.S. Response to Q2(a):

2. 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 proceeding, conducted pursuant to the Uruguay Round Agreements Act ("URAA") Section 129 ("Section 129") are administrative determinations by the United States Department of Commerce ("USDOC"). These determinations demonstrate and give effect to the revised interpretation of Section 771B and the scope of future assessments under the statute. These determinations are of equal validity and accorded the same weight and import as any other determinations made by the USDOC.

[1] *See* U.S. First Written Submission, para. 64.

3. Prior determinations are relevant and instructive on how the USDOC would consider evaluating and applying Section 771B in future proceedings. Further, for purposes of fair administration of the law, consistency is a fundamental principle the USDOC follows when interpreting statutes and regulations. Thus, in future proceedings, the USDOC would consider the legislative interpretation and the analysis contained in the Section 129 determinations in its evaluation of whether, and how, to apply Section 771B in the future. As an administrative agency, the USDOC would not depart from prior interpretations or determinations unless there were a reasonable justification to do so.

4. The United States notes that each application of Section 771B would depend on the particular facts and circumstances in a given case. Further, we emphasize that, as the USDOC indicated in the final Section 129 determination:

> [The USDOC] must abide by the guiding principle that applies in all its proceedings – that [the USDOC] must evaluate all potentially relevant data and information that is available on the record in making its determinations. This principle, together with the flexibility and discretion conferred by Congress, means that [the USDOC] may consider all the information and circumstances unique to a particular product and proceeding before it when conducting its section 771B analysis and attributing the subsidies to the manufacture, production, or exportation of the processed product.[2]

5. The quoted explanation is important to highlight here because, although each application of Section 771B is necessarily case-specific, there is nevertheless a consistent parameter across all USDOC investigations, whereby the USDOC is under a legal obligation to take into consideration all relevant facts and information available on the record.

b. Please also respond to the European Union's argument that the USDOC would be free to apply Section 771B in a WTO-inconsistent manner in any upcoming investigation and the "further developed understanding of Section 771B" applies only "in this case" (see European Union's first written submission, paragraph 20).[3]

U.S. Response to Q2(b):

6. The European Union's ("EU") argument is imprecise and hyperbolic. In its arguments, the EU seems to suggest that there is only a narrow range of acceptable actions that would achieve "as such" compliance (e.g., a legislative amendment or "formal commitment" that would eliminate all future WTO-inconsistent behavior). However, this expectation goes far beyond what is actually required under WTO rules. As we have explained in our written submission and at the substantive meeting of the Parties, Members need only ensure that a measure neither mandates WTO-inconsistent behavior, nor precludes WTO-consistent behavior. Further, in cherry-picking phrases from the U.S. written submissions such as "in this case," the EU misconstrues the arguments of the United States. In using such language, the United States is

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

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

simply calling attention to the case-specific and fact-intensive nature of the attribution of benefits analysis. As we have explained, consistency is a fundamental principle the USDOC follows when interpreting statutes and regulations.[4] Thus, the USDOC would seek consistency in its interpretation and application of Section 771B in the future.

7. 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 *General Agreement on Tariffs and Trade 1994* ("GATT 1994") or Article 10 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and the original panel did not suggest this in its findings. Instead, the original panel found that "under the terms of Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, an investigating authority is required to establish the existence and extent of indirect subsidization … taking into account *facts and circumstances* that are *relevant* to that exercise."[5] The original panel further found that an investigating authority should not "exclude from its determination of pass-through factors that are potentially relevant to its determination and to proceed on the basis of a *presumption* of indirect subsidization."[6] These findings exemplify why it is important that the USDOC consider all potentially relevant factors in future investigations. Such factors are inherently product-specific, and may differ from the facts and scenarios relevant in the present case.

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

U.S. Response to Q2(c):

8. The EU is incorrect. The USDOC's new determination is a valid interpretation of Section 771B under U.S. law, with legal effect, and further permits U.S. law to be understood in a WTO-consistent manner. As a matter of U.S. law, the USDOC has authority and exercised that authority to revise its interpretation of Section 771B. The text of the statute has not changed, but

[4] Prior determinations are relevant and instructive on how the USDOC would consider evaluating and applying Section 771B in future proceedings. For purposes of fair administration of the law, consistency is a fundamental principle the USDOC follows when interpreting statutes and regulations. *See, e.g.*, *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) (holding that agency acts arbitrarily and capriciously when it "consistently followed a contrary practice in similar circumstances and provide[s] no reasonable explanation for the change in practice"). This is also reflected in the applicable standard of review applied by U.S. domestic courts reviewing the USDOC's determinations. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) ("The court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ."). To be in accordance with law, a decision must not be arbitrary and capricious, contrary to regulations, statutes or the Constitution, and must be supported by substantial evidence and reasoned explanations. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 41-43, 103 S.Ct. 2856, 2866-67 (1983); *SKF USA Inc. v. United States*, 630 F.3d 1365, 1373-74 (Fed. Cir. 2011).

[5] *US – Ripe Olives (Spain) (Panel)*, para. 7.169. (emphasis in original).

[6] *US – Ripe Olives (Spain) (Panel)*, para. 7.169. (emphasis in original).

the U.S. understanding has, as evidenced by the analysis in the Section 129 proceeding and the application of that understanding in the Section 129 proceeding. 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. This is because the USDOC is the agency charged with interpreting and applying Section 771B, and so, under the U.S. municipal law system, the USDOC's interpretation has legal effect.[7]

9. The EU's arguments in paragraph 19 of its second written submission are uncompelling for several reasons. First, the EU offers no support for the assertion that the USDOC's re-interpretation of Section 771B in the Section 129 proceeding entails no relevant change to this legal provision. While it is true that the USDOC's re-interpretation does not entail a modification of the legislative authority *behind* Section 771B, as we have explained above, it is certainly a relevant change to the measure itself, because it is a change in the USDOC's *interpretation* of Section 771B, and consequently how Section 771B is applied.

10. The USDOC exercised its interpretive authority during the Section 129 proceeding, in such a way that it was able to focus on the factors relevant to determining the attribution of benefits, not just the specific factors enumerated in Section 771B. This ensures that Section 771B is not "as such" WTO-inconsistent. While the original reasoning was appropriate under the statute on its face and as understood by the United States at the time, given the very few prior examples of its use, the USDOC's revised interpretation in the Section 129 proceeding allowed it to expressly consider a wider range of relevant information that addressed the Panel's findings and implemented the recommendation of the DSB.

11. This new interpretation has legal effect and will be considered by the USDOC in future proceedings. This concept is discussed more fully in response to the U.S. response to Question 2.a above.

12. Next, as explained in response to Question 1 above, and throughout these compliance proceedings, there is no requirement in the DSU that requires a Member to implement the recommendations of the DSB in a particular manner. In paragraph 19 of its second written submission, the EU expressly acknowledges that there may ways of remedying the "as such" inconsistency, without changing the text of the measure itself. Yet, the EU has failed to provide any relevant example of what kind of "change" it would be satisfied with, and instead has repeatedly fallen back on unsupported arguments that an amendment to the statute would be the preferred manner of implementation.

13. Finally, it is notable that both the panel reports cited by the EU in support of its assertions also *expressly recognize* that there may be ways of remedying an "as such" inconsistency *without*

[7] *See United States v. Eurodif S.A., 555 U.S. 305 (2009)* (Exhibit USA-8), at 316 (citations omitted), finding that the USDOC's interpretation "governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous." See also the discussion of agency authority in response to Question 25 below.

changing the text of a measure or the legislative authority of that measure.[8] The panel in *US – Gambling (Article 21.5 – Antigua and Barbuda)*, at paragraph 6.22 states:

> Moreover, compliance with a recommendation under Article 19.1 of the DSU could conceivably be achieved through *changes to the factual or legal background to a measure at issue, without a change to the text of the measure itself*. 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*. (emphasis added, footnotes omitted).

14. The quoted text here notes that the focus of compliance is less about the form a particular measure to comply takes, and instead on the quality of "modif[ying] the *effects* of that measure" whether through legal amendment, "changes to the factual or legal background," or "the subsequent occurrence of a relevant circumstance". The panel in *US – Gambling (Article 21.5 – Antigua and Barbuda)* expands on this point by noting that there had been "no change in the application of [the three measures at issue], *or even their interpretation*, since the original proceeding."[9] Thus, for this Panel, a change in an agency's interpretation of a statute could be enough to bring such a measure into compliance.

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

<u>U.S. Response to Q3:</u>

15. This question is directed at the EU.

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

[8] The EU cites to *US – Carbon Steel (India) (Article 21.5 - India)*, para. 7.306 with reference to *US – Gambling (Article 21.5 – Antigua and Barbuda)*, para. 6.22.

[9] *US – Gambling (Article 21.5 – Antigua and Barbuda)*, para. 6.27 (emphasis added).

U.S. Response to Q4:

16. This statement was made regarding the USDOC's authority with respect to interpreting Section 771B, in light of the broad discretion conferred by Congress. Section 129 is the procedural framework for the administrative process following an adverse WTO determination.

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

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

U.S. Response to Q5(a):

17. In paragraph 3 of the U.S. first written submission, the United States cites to paragraphs 7.170-7.171 of the original panel report. The language in paragraph 7.170 supports the limitation noted above. The original panel noted that the USDOC was required to presume the entire benefit of a subsidy passes through to a downstream processed product "based on a consideration of *only the two factual circumstances prescribed* in [Section 771B], *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".[10] Thus, the original panel's express understanding was that, Section 771B apparently would "only" allow consideration of two factual circumstances and would not "leav[e] open the possibility of taking into account any other relevant factors".[11]

18. Paragraph 7.170 also begins with a reference to the preceding analysis ("we conclude, for the reasons stated above…"), which also explains how the text of Section 771B did not allow the USDOC to take into consideration circumstances other than the two specifically referenced in the statute.[12]

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

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

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

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

[12] *See US – Ripe Olives (Spain) (Panel)*, paras. 7.167-7.168.

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

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

U.S. Response to Q5(b):

19. The United States agrees that the above statements reflect the original panel's findings 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". As explained in our written submissions, the United States addressed these findings of the panel through the Section 129 proceeding. The USDOC revisited its interpretation of the applicability and meaning of Section 771B. This revised interpretation allowed the USDOC to consider other relevant facts and circumstances beyond the two factual circumstances prescribed in Section 771B. The USDOC then applied its revised interpretation in a WTO-consistent manner.

20. The United States would also note that, during the substantive meeting of the parties, the EU suggested that the United States was "legally precluded" from re-examining Section 771B to take into consideration new factors. The EU's assertion is meritless, and 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.

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

U.S. Response to Q6:

21. 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. As we have explained, 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. Accordingly, previous panels have agreed that Members have the right to determine which measures would implement the recommendation of the DSB. Nor did the EU request or the original panel make a suggestion under DSU Article 19.1. While the original panel did offer considerations for types of factors that may be relevant to the question of attribution of benefits in the analysis of its report (para 7.167), it did not make specific suggestions regarding such

factors. Further, the original panel declined to issue findings with respect to the question of whether a price comparison was the only meaningful way to assess pass-through.

22. 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. As we have explained at length, there are many different ways in which the United States could choose to resolve the "as such" inconsistency in Section 771B. Ultimately, the United States determined that a re-interpretation of the meaning of Section 771B was appropriate.

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

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

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

U.S. Response to Q7:

23. This question is directed at the EU.

Question 8 (*To the European Union*) In paragraph 28 of its second written submission, the United States submits that "higher pricing for raw olives destined for table olives, insurance premiums charged for different types of olive varietals, higher water requirements for orchards dedicated to growing table and dual-use olive varietals, pruning practices, and applicable standards and industry requirements for table olive production – are all factors related to the nature of the specific market for the input product at issue and all of the conditions of competition in that market, and thus of the kind endorsed by the Panel". The United States further submits that "the insurance premiums charged for different types of olive varietals may speak to the way that pricing flows down to the latter stage product". Does the European Union agree with these statements? If not, why not?

U.S. Response to Q8:

24. This question is directed at the EU.

Question 9 (*To the United States*) In the ripe olives Section 129 determination, did the USDOC consider circumstances/factors that could have led to a different conclusion on the question of whether 100% of the subsidies provided to olive growers passed through to the ripe olive processors than to the conclusion

originally made? Please indicate where this consideration is reflected in the Section 129 determinations.

U.S. Response to Q9:

25. 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 Basic Payments Scheme ("BPS") program to the downstream processed product. The attribution of benefits from the input product to the processed agricultural product in this investigation was appropriate, reasoned, and supported by an analysis of all relevant facts and information on the record.

26. 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. 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, as discussed further below in response to Question 12. Given these circumstances, the USDOC did not engage in hypothetical, alternative analyses that were not grounded in the evidence and arguments before it, or required under U.S. law or the text of the GATT 1994 or SCM Agreement, nor can we speculate now as to what circumstances or factors could have led to a different conclusion.

27. 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. There would be no end to such potential hypothetical, alternative analyses. Rather, an investigating authority's analysis will depend on the particular facts and circumstances in a given case. Thus, it was not necessary for the USDOC to propose and address such hypothetical scenarios in the Section 129 determinations.

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

U.S. Response to Q10:

28. This question is directed at the EU.

Question 11 (*To the United States*) In paragraph 71 of its first written submission, the European Union argues that the USDOC's modification of the definition of the

"prior stage product" concerns the determination of benefit to the direct recipients, the olive growers.

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

U.S. Response to Q11(a):

29. The EU misconstrues the USDOC's analysis. The USDOC did not merely modify "the determination of benefit to the direct recipients, the olive growers". As discussed in the U.S. second written submission,[13] the two factors enumerated in Section 771B, in addition to any other relevant factors and evidence before the USDOC, speak to whether, and if so, to what degree, the benefits provided to the raw agricultural product can be considered to benefit the processed product. As noted previously, 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.

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

U.S. Response to Q11(b):

30. No, 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 (i.e., substantial dependence, limited value added, all other factors) 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.

31. Once the USDOC determined that Section 771B applied, the next step under U.S. law was to accurately calculate the benefit attributable to the subject merchandise, given the totality of the information available on the record. That is what the USDOC did in this calculation. 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.

Question 12 (*To the United States*) At page 19 of the Preliminary Section 129 Determination, the USDOC made the following observation: "The sum represents the benefit per kilogram of raw olives. To calculate the benefit to the respondent, we

[13] *See* U.S. Second Written Submission, para. 18.

multiplied this per kilogram benefit by the volume of raw olives purchased for ripe olives by the respondent". Please respond to the European Union's argument in paragraph 31 of its second written submission that this "simple 'multiplication per kilogram'" when determining the benefit passed through to the downstream processor confirms that the USDOC presumed a 100% pass-through.

U.S. Response to Q12:

32. It is incorrect that the USDOC *presumed* a 100 percent attribution of benefits. First, as explained in the preliminary Section 129 determination:

> Where the respondent and/or suppliers grow a combination of crops, it is then necessary to determine a grant amount reasonably attributable to olives. To do so, we calculate the ratio of olive sales to total sales, and apply this ratio to the grant amount by multiplying the grant amount with the percentage of olive sales. Then, to determine the benefit attributable to the respondent, we divided the portion of the grower's benefit that is attributable to olives by its production volume in kilograms of raw olives.[14]

Thus, in certain circumstances, "less than 100 percent of the BPS subsidy payment amount is used when determining the benefit to the respondent."

33. With respect to the calculation of benefits attributable to ripe olives, as explained in the second written submission:

> The evidence on the record shows that the 100 percent attribution of benefits from the input product to the processed agricultural product was appropriate, reasoned, and is supported by an analysis of all relevant facts and information on the record. The record does not support an alternative level of attribution, nor have the parties identified any such information on the record of the proceeding.[15]

34. While the particular facts and record in this case supported full attribution of benefits from the input product to the processed agricultural product, the EU's argument that "the USDOC presumed a 100% pass-through" is incorrect. The USDOC considered myriad factors and conducted a complex analysis to calculate benefits to the respondents as accurately as possible. Notably, neither the EU nor any interested party identified any record information demonstrating that an alternative attribution was appropriate. Dissatisfaction with the results of such a valid attribution analysis is not a sufficient or compelling argument for finding that the analysis in this case is WTO-inconsistent.

Question 13 (*To the United States*) In paragraph 5 of its first written submission, the United States refers to "certain ambiguous provisions of Section 771B that had

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

[15] U.S. Second Written Submission, para. 30.

rarely been applied at the time of the original panel proceeding". Please indicate when the ambiguities were identified and when the USDOC reached its "revised understanding and approach" (see United States first written submission, paragraph 68). Please also indicate whether that was before or after the DSB's adoption of the DS577 Panel Report.

U.S. Response to Q13:

35. Paragraph 5 of the United States' first written submission referred to the fact that the USDOC has rarely applied Section 771B because there have been a limited number of proceedings in which the USDOC investigated an agricultural product processed from a raw agricultural product. 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.

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

U.S. Response to Q14:

36. The additional factors and circumstances considered by the USDOC are discussed on pages 11-19 of the preliminary Section 129 determination, and in the USDOC's response to comments 4 and 5 (pages 11-15 and 19-21) of the final Section 129 determination. The USDOC reconsidered the meaning of the terms "raw agricultural product" and "prior stage product" as used in Section 771B, and considered a variety of information relevant to the ripe olives market. As discussed in the U.S. second written submission, examples include:

- higher pricing for raw olives destined for table olives;
- insurance premiums charged for different types of olive varietals;

- higher water requirements for orchards dedicated to growing table and dual-use olive varietals;

- pruning practices; and

- applicable standards and industry requirements for table olive production.

These factors are relevant to the nature of the ripe olives market as a whole, and thus, are separate from the consideration of the two enumerated prongs of Section 771B (i.e., that the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and the processing operation adds only limited value to the raw commodity).

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

a. provide an analytical basis for its findings of the existence and extent of pass-through that takes into account facts and circumstances that are relevant to that exercise; and

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

U.S. Response to Q15:

37. The United States does not agree with the proposition that Section 771B continues to "materially restrict any USDOC discretion" under points a. and b. above. This proposition is precisely contrary to the facts before this Panel. As the United States has explained, the Section 129 determinations provide the USDOC's explanation for its interpretation of the meaning of Section 771B, and USDOC was clear that it "must evaluate all the available record evidence in making its determinations and thus, considers all potentially relevant data and information that is on the record."[16] Such an evaluation would include providing an explanation and analytical basis for any conclusions made over the course of an investigation, in a similar manner as to what the USDOC has done in the Section 129 proceeding. As described more fully in response to Question 27 below, the 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.

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

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

what circumstances this "gap" could lead to a less - than 100% pass through of the subsidy concerned.

U.S. Response to Q16:

38. In this question's quoted language, the "gap" referred to by the USDOC is the ambiguous language in Section 771B. 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.[17] The USDOC exercised this authority and interpreted Section 771B as allowing it to: (1) consider additional factors and circumstances beyond the two specifically enumerated prongs of Section 771B, and (2) to determine the appropriate manner to attribute the subsidies to the manufacture, production, or exportation of the processed product, including whether less than the full amount of subsidies should be attributed.[18]

39. The USDOC identified the ambiguities of Section 771B, explaining first that Section 771B "does not specify *what* [the USDOC] is to evaluate in conducting its analysis."[19] To this point, the USDOC explained that its analysis "is not an isolated exercise conducted based on a discrete portion of the record, nor does it involve a rote application of a calculation methodology to calculate any benefit conferred by a countervailable subsidy."[20] Rather, the USDOC's analysis occurs within the context of the overall investigation, which enables the USDOC to consider additional factors and circumstances unique to the particular product at issue beyond the two specifically enumerated prongs in Section 771B.

40. The USDOC then identified the term "deemed" as ambiguous, stating that "[t]he statute does not define 'deemed' in the context in which it appears in Section 771B of the Act," and that the statute "also does not expressly prescribe the manner in which countervailable subsidies provided to producers or processors of the raw agricultural product are deemed to be provided with respect to the manufacture, production, or exportation of the processed product."[21] The USDOC further emphasized this point by stating: "[p]ut another way, 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)."[22]

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[17] *See* USDOC Section 129 Final Determination (Exhibit EU-2), p. 23 (noting that "[t]he U.S. Court of Appeals for the Federal Circuit has explained that [the USDOC's] 'interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous ... .'"; *see also* USDOC Section 129 Preliminary Determination (Exhibit EU-1), p. 18 and fn.102.

[18] *See* USDOC Section 129 Final Determination (Exhibit EU-2), p. 19 and 22-23.

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

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

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

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

41. The additional factors and circumstances that the USDOC would consider, and the manner in which it determined the amount of benefit to attribute, if any, to the processed product will vary depending on the particular case and product subject to investigation. 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. Nor is such speculation or further certainty in this regard required for the United States to satisfy its WTO commitments.

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

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

U.S. Response to Q17(a):

42. This statement is supported throughout both the preliminary and final Section 129 determinations in the context of the USDOC's explanation of its interpretation of the statute, and the overall procedures of the Section 129 proceeding as a whole. The below excerpt, taken from the preliminary Section 129 determination, highlights the USDOC's analysis with respect to the method of calculation of benefits:

> [T]he statute does not define "deemed" as it is used in this context, nor does it expressly prescribe the manner in which [USDOC] is to effectuate this determination. Therefore, Congress conferred broad discretion upon [USDOC] in making this determination. Given this broad discretion, [USDOC] may consider case-specific facts and determine the appropriate manner to attribute the subsidies to the manufacture, production, or exportation of the processed product, including whether less than the full amount of subsidies should be attributed (*i.e.*, found to provide a benefit) to the manufacture, production, or exportation of the processed product.[23]

In the quoted statement, the USDOC is explaining that the word "deemed" in Section 771B is ambiguous, which gives the USDOC flexibility in determining *how* and *to what extent* to attribute subsidies. In specifying that the USDOC "may consider case-specific facts," the USDOC is also acknowledging the inherently case-specific aspect of the attribution of benefits analysis. The USDOC went on to explain how it attributed the BPS subsidies to the ripe olives based on the particular facts and evidence in this case, taking into account the way the Basic Payments Scheme ("BPS") program operates. This explanation provides an example of how the

[23] Preliminary Section 129 Determination, pp. 17-18.

USDOC's interpretation works in practice, and serves as a pertinent reference for how the analysis could be conducted in future cases.

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

U.S. Response to Q17(b):

43. Yes. Interested parties had several opportunities to comment on the Section 129 determination and place additional information on the record. First, in the preliminary Section 129 determination itself, the USDOC provided interested parties an opportunity to submit affirmative and rebuttal comments on the issues and analysis discussed therein.[24] The USDOC also gave interested parties the opportunity to submit information to rebut, clarify, or correct information the USDOC placed on the record at the time the preliminary Section 129 determination was issued.[25] The USDOC then allowed for a second opportunity to submit affirmative and rebuttal comments.[26]

44. Following this invitation, the Government of Spain, and together, ASEMESA, Agro Sevilla, and Camacho (the "Spanish Respondents") submitted rebuttal information.[27] The Spanish Respondents re-submitted their comments and Musco, the petitioner, re-submitted its rebuttal comments.[28] 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.

45. Other than general statements expressing dissatisfaction with the attribution methodology, none were provided. Thus, in the final Section 129 determination, the USDOC continued to use an attribution methodology based on the particular facts, evidence and arguments presented in the Section 129 proceeding. This reflects the statement in the U.S. first written submission that the appropriate attribution approach depends on the particular facts, evidence, and arguments presented in each case.

46. In the final Section 129 determination, the USDOC took into account the facts, evidence and arguments presented after the preliminary Section 129 determination was issued. The USDOC provided additional explanation for why it determined that the term "deemed" is ambiguous. For example, the USDOC stated:

[24] USDOC Section 129 Preliminary Determination (Exhibit EU-1), p. 22-23.

[25] Section 129 Memo to All Interested Parties, dated October 12, 2022 (Exhibit USA-2).

[26] Section 129 Memo to All Interested Parties, dated October 12, 2022 (Exhibit USA-2).

[27] *See* USDOC Section 129 Final Section 129 Determination (Exhibit EU-2), p. 3.

[28] USDOC Section 129 Final Section 129 Determination (Exhibit EU-2), p. 3.

> ASEMESA, Agro Sevilla, and Camacho argue that the term "deemed," as used in section 771B of the Act, reflects Congress's instruction to presume the existence of pass through of a subsidy. ASEMESA, Agro Sevilla, and Camacho offer two definitions of the terms "deem" and "deemed" as "to consider that someone or something has a particular quality," or "to consider or judge something in a particular way." However, this is simply an exercise in using different words to explain the meaning of "deemed," and ultimately, it does not demonstrate that the term is unambiguous, such that [the USDOC] lacks flexibility in making its determination. Even under these definitions there is no indication as to *how* [the USDOC] is to conduct its analysis or *to what extent* subsidies should be attributed (*i.e.*, how or to what extent countervailable subsidies provided to producers or processors of the raw agricultural product **are deemed (or considered) to be provided to the manufacture, production, or exportation of the processed product**). Put another way, 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). This is further exemplified by the fact that **the statute states that countervailable subsidies "shall be deemed" to be provided with respect to the manufacture, production, or exportation of the processed product, but does not state that they shall be deemed "fully" or "to the full extent."** Thus, [the USDOC] has discretion on this matter.[29]

47. These opportunities were provided after the USDOC presented its Section 771B analysis in the preliminary Section 129 determination, and were openings for interested parties, including the EU, to provide facts, evidence, arguments, or alternative calculation methodologies if they believed that the methodology used by the USDOC was inappropriate or inadequate. No such information was provided and no rebuttal brief was submitted by any interested party other than the petitioner. In clearly laying out its reasoning and methodology, and providing respondents multiple opportunities to comment on the investigation, the USDOC satisfied the requirements for an investigating authority to conduct a thorough and objective investigation. Given the EU's contention that the USDOC incorrectly applied 771B, and the implication throughout its submissions and the substantive hearing that the USDOC failed to conduct a proper "pass-through" analysis, it is notable that neither the EU nor any other interested party has, at any point, presented an alternative approach or methodology.

48. The standard of review is whether the USDOC has reached a conclusion an objective and unbiased investigating authority could have reached given the same evidence and information. The absence of any alternative evidence or information presented by interested parties to the Section 129 proceeding, beyond conjecture, speaks to this. Because no particular attribution methodology is required by Section 771B[30] or by Article VI:3 of the GATT 1994 or Article 10 of the SCM Agreement, and the USDOC's attribution methodology used a holistic approach that was based on the record information and the data reported by the respondents, the USDOC's

[29] USDOC Section 129 Final Section 129 Determination (Exhibit EU-2), p. 20-21.

[30] *US – Ripe Olives (Spain) (Panel)*, para. 7.151 and 7.162; *US – Softwood Lumber IV*, para. 140; *US – Large Civil Aircraft (2nd Complaint)*, paras. 7.266-7.267.

conclusion is one that an unbiased and objective authority could have reached and thus is WTO-consistent.

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

a. Please explain how the finding by the USDOC that it "modified [its] definition of the 'prior stage product' from all raw olives to the four principal varietals produced for table and found that 55.28 percent of these varietals were processed into table olives", differs from the original finding by the USDOC. This question is asked in the context of paragraph 47 of the European Union's first written submission, where the European Union states that "[t]he USDOC had undertaken the same 'exclusion' in the original proceedings".

U.S. Response to Q18(a):

49. 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).[31] 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.

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

U.S. Response to Q18(b):

50. The prior and latter stage products within the substantial dependence calculation do not necessarily define the benefit attribution calculation. The recipients of the subsidies are farmers, *i.e.*, occasionally growers of multiple products, including olives. This has not changed at any

[31] *See* Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain, dated November 20, 2017 (Exhibit USA-3), p. 16. *See also US – Ripe Olives (Spain) (Panel)*, para. 7.174, fn. 335.

point. The definition of the prior stage product and latter stage products speaks, in part, to whether the nature of the product at issue warrants the application of Section 771B and ultimately, where appropriate, the attribution of subsidy benefits to the processed product (here, ripe olives). For example, the latter stage product is defined as "table olives," which is a larger category that includes as a subset, ripe olives (subject merchandise). This also has not changed at any point. However, the benefit calculation never attributed the benefits received by raw olive growers to the volume of processed *table* olives. The benefit calculation involved multiple steps, and the result of the calculation attributed benefits received to the volume of each respondent's purchases of raw olives for ripe olives, the subject merchandise, another fact that has not changed at any point. 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. The USDOC included this explanation in the Section 129 preliminary determination because it was important for the USDOC to explain its full methodology of attributing BPS subsidy payments for precision and transparency. This explanation provides a more detailed analytical basis for the attribution of benefits calculation, thereby addressing a specific concern of the original panel.

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

U.S. Response to Q18(c):

51. Redefining the prior stage product was relevant to the substantial dependence prong in Section 771B and was also separately relevant to the additional facts and circumstances the USDOC considered, including the unique nature of the market for raw and processed olives. Olive processors operate in the same market as olive growers, and thus, the prior stage product definition is relevant to the overall attribution analysis. Moreover, we recall that the original panel report expressed agreement that the two prongs of Section 771B, including the substantial dependence prong, may be relevant to attribution. In its report, the original panel found that:

> While the two factual circumstances identified in Section 771B may be relevant to an examination of whether a subsidy to a raw agricultural product has passed-through to a processed agricultural product, the probative value of those factors will, in our view, depend upon the specific facts of the situation in question, including the nature of the specific market for the input product at issue and all of the conditions of competition in that market.[32]

52. As the United States has explained, the USDOC took into account additional factors related to the specific market for raw and processed olives, which informed its attribution

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

analysis based on the information available on the record of the Section 129 proceeding. Merely because the resulting attribution calculation did not change once these factors were taken into account does not mean that the USDOC's determination is inconsistent, given the revised interpretation of 771B and the additional information the USDOC considered.

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

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

U.S. Response to Q19(a):

53. 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. As the United States explained in its written submissions, 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. As discussed in our response to Question 18 above, the Panel agreed that the question of substantial dependence may be relevant to the issue of attribution of benefits. Further, the analysis behind the definition of "prior stage product" also speaks to the nature of the olives market as a whole and, in particular, the fact that raw olives and processed table olives have an inherently close nature.

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

U.S. Response to Q19(b):

54. 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 United States took the relevant actions to comply over the course of the Section 129 proceeding. 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. For additional explanation, we direct the Panel to paras. 86 – 90 of the U.S. first written submission.

Question 20: (*To the United States*) At page 19 of the Final Section 129 Determination, the USDOC states "because the section 771B analysis occurs within the context of the overall CVD investigation (or administrative review, as the case may be), Commerce must abide by the guiding principle that applies in all its proceedings – that Commerce must evaluate all potentially relevant data and information that is available on the record in making its determinations." Please explain where this guiding principle is contained in the U.S. administrative law framework or guidelines and explain how it applies. Please support your answer with documentary evidence.

U.S. Response to Q20:

55. The guiding principle the USDOC refers to is enshrined across several relevant statutes and judicial decisions. Pursuant to section 703(b)(1) of the Tariff Act of 1930, as amended ("Tariff Act"), for the purpose of preliminary determinations, the administering authority "shall make a determination, *based upon the information available to it at the time of the determination*, of whether there is a reasonable basis to believe or suspect that a countervailable subsidy is being provided with respect to the subject merchandise" (emphasis added).[33] While section 705(a) of the Tariff Act, regarding final determinations, does not speak to the information considered on the record, under U.S. legal precedent, the USDOC considers the entirety of the evidence on the record in relation to comments received, including evidence that otherwise detracts from the USDOC's preliminary determination. The USDOC has previously explained that this requirement arises from section 516A(b)(1)(B)(i) of the Tariff Act (the provision identifying the standard of review applied by U.S. courts), which requires that the USDOC's decisions must be supported by substantial evidence.[34] U.S. courts have in turn explained that to determine if substantial evidence exists, they review the record as a whole, including all evidence that fairly detracts from the substantiality of the evidence.[35] Accordingly, the USDOC evaluates the record as a whole to come to its determinations.

Question 21: (*To the United States*) At page 3 of the Preliminary Section 129 Determination, the USDOC refers to issuing questionnaires in the Section 129 proceeding. Did any of these questionnaires refer to or request information about any factors other than the two factors under Section 771B that may be relevant to

[33] *See* Section 703(b)(1) of the Tariff Act of 1930 (Exhibit USA-4).

[34] *See Issues and Decision Memorandum, Coated Free Sheet Paper from China: Final Affirmative Countervailing Duty Determination* (October 17, 2007) (Exhibit USA-5) ("we agree that section 516A(b)(1)(B)(i) of the Act requires that the Department's decisions must be supported by substantial evidence. It is precisely this provision that requires the Department to fully evaluate all record evidence, including contradictory evidence. The U.S. Court of Appeals for the Federal Circuit has explained that in order to "determine if substantial evidence exists, we review the record as a whole, including all evidence that 'fairly detracts from the substantiality of the evidence.'") (internal citations omitted).

[35] *See Wind Tower Trade Coal v. United States*, 633 F. Supp. 3d 1286, 1290 (CIT 2023) (Exhibit USA-6), and *Micron Tech. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (Exhibit USA-7).

the determination of the existence and extent of any pass-through of a benefit to the imported downstream product? If so, what were those factors?

U.S. Response to Q21:

56. The USDOC issued questionnaires seeking usage data necessary for analyzing the specificity of the BPS program and the volume of AG's purchases of raw olives. The USDOC also sought any other relevant information from interested parties and gave interested parties two opportunities to submit affirmative and rebuttal comments. These opportunities were provided after the USDOC presented its Section 771B interpretation and analysis in the preliminary Section 129 determination, and permitted interested parties, including the European Union, to provide facts, evidence, arguments, or alternative calculation methodologies if they believed that the methodology used by the USDOC was inappropriate or inadequate. No parties commented on the USDOC's benefit calculation other than providing general statements expressing dissatisfaction with the USDOC's attribution methodology. Similarly, no parties provided additional facts, evidence, or alternative calculation methodologies to amend the USDOC's benefit calculation.

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

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

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

U.S. Response to Q22:

57. As explained in the U.S. first written submission, the Section 129 proceeding is an administrative proceeding conducted pursuant to Section 129 of the URAA.[36] The 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

[36] *See* U.S. First Written Submission, para. 34.

proceedings, including under Section 129, the USDOC bases its determinations on the facts and information on the record.

58. This basic process does not mean the USDOC's ability to consider additional relevant factors is limited. Rather, this process defines the general scope of the investigation. Here, the interpretation and application of the statutory provisions was set out as the central issue in the proceeding for interested parties to comment on the full range of relevant considerations. In fact, the USDOC opened the record of the Section 129 proceeding, and in doing so, the USDOC invited input from the interested parties and added relevant documents from the administrative record of the countervailing duty ("CVD") investigation, and the record of subsequent remand segments conducted pursuant to domestic litigation. As described in response to Question 17.a, the USDOC then provided interested parties an opportunity to submit factual information to rebut, clarify, or correct, the factual information the USDOC added to the Section 129 proceeding, and two opportunities to submit affirmative and rebuttal comments on the issues and analysis discussed in the preliminary Section 129 determination. Thus, interested parties had an opportunity to submit factual information and comments regarding the USDOC's consideration of relevant factors and the attribution of benefits analysis the USDOC conducted pursuant to Section 771B.

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

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

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

U.S. Response to Q23:

59. This question is directed at the EU.

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

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

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

U.S. Response to Q24(a):

60. As explained above in response to Question 2.c, as matter of U.S. law, the USDOC has authority and exercised that authority to revise its interpretation of Section 771B. The text of the statute has not changed, but the U.S. understanding has, as evidenced by the analysis in the Section 129 proceeding and the application of that understanding in the Section 129 proceeding. 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. This is because the USDOC is the agency charged with interpreting and applying Section 771B, and so, under the U.S. municipal law system, the USDOC's interpretation has legal effect.

61. The USDOC's re-interpretation is explained throughout the Section 129 preliminary and final determinations and, in particular, from pages 11-14 and 17-19 of the Section 129 preliminary determination, and again in its in responses in Comments 5 and 6 in the Section 129 final determination, at pages 19-24. The USDOC's overall explanation of its statutory interpretation and analysis in the Section 129 determination, along with the information provided by respondents and the petitioner, make up the administrative record of the proceeding, which can be referenced in future proceedings and serves as useful guidance for future USDOC investigations under Section 771B. For an additional explanation of the effect of USDOC's interpretation on future proceedings, we direct the Panel to our response to Question 2.a.

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

U.S. Response to Q24(b):

62. The applicable standard is no different from consideration of any other U.S. domestic measure as municipal law.

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

U.S. Response to Q24(c):

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. The original panel's findings with respect to the "as applied" inconsistencies of Section 771B are limited, and simply refer to the same reasoning the original panel provided in its "as such" findings. 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. Thus, it is conceivable (though the United States would disagree) that the Section 129 determination might not bring the measure into compliance "as applied" if the compliance Panel were to find that yet other factors should have been taken into account and therefore that the conclusions were ones an unbiased and objective investigating authority could not reach. This would not mean that Section 771B would necessarily be inconsistent "as such" given that the USDOC's revised interpretation no longer excludes consideration of other relevant factors.

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

U.S. Response to Q25:

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. 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. Under U.S. law, as set out by the U.S. Supreme Court in *Eurodif*[37] and *Chevron*,[38] an agency interpretation of a statute is the governing interpretation unless a final and binding judicial decision finds that interpretation unreasonable or contrary to the plain text of the statute. Accordingly, the panel report in *US – Countervailing and Anti-Dumping Measures (China)* correctly observed that the USDOC's interpretation of U.S. CVD law is the governing interpretation unless a final U.S. court decision reverses the USDOC's interpretation.[39] The panel in that dispute considered that:

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

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

[39] *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.171, fn. 270 ("under recognized principles of U.S. law, [USDOC]'s interpretation of the U.S. CVD law is presumed to be the governing interpretation of the U.S. Tariff Act until and unless a court finds that Commerce's interpretation is unreasonable or contrary to the plain text of the statute in a final and binding decision") (internal citations omitted). *See also United States v. Eurodif S.A., 555 U.S. 305 (2009)* (Exhibit USA-8), at 316 (citations omitted), finding that the USDOC's interpretation "governs

> As the United States explained, under United States law, even when a court reviews the interpretation of a law that underlies action taken by an agency administering that law, the agency's interpretation of the law 'governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.' This means that, within these limits, a reviewing United States court must defer to the agency's interpretation rather than impose its own interpretation.[40]

As the quoted text above demonstrates it would be appropriate to rely on the USDOC's interpretation of Section 771B given the ambiguity in the statutory language and the USDOC's authority to interpret and apply that statutory language.

66. 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. This does not impact "as such" compliance because, as noted above, the USDOC interpretation of the U.S. CVD law is the governing interpretation unless reversed by a final decision of a U.S. court.

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

<u>U.S. Response to Q26</u>:

67. Yes. The USDOC provided its reinterpretation of the term "deemed" at pages 17-19 of the preliminary Section 129 determination, and at pages 20-21, and 22-24 of the final Section 129 determination. Simply put, the USDOC determined that the word "deemed" is ambiguous because it is not defined as used in the context of Section 771B, and it does not prescribe the manner in which the USDOC should conduct its attribution analysis (*i.e., how* to conduct the analysis), nor the amount of subsidies that should be attributed (*i.e., to what extent* to attribute subsidies). While the statute contains the terms "shall be deemed", the USDOC explained that the statute does not say "shall be deemed *fully*" or "shall be deemed *to the full extent*", indicating there is discretion to attribute less than 100 percent of subsidies. The USDOC treated the term "deemed" as meaning "considered" in the sense that the USDOC considers or evaluates how and to what extent subsidies provided to the raw agricultural product should be found to provide a

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in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."

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

benefit to the manufacture, production, or exportation of the processed product, based on the particular facts and circumstances in a case.

68. It is important to consider the detailed explanation described in the cited pages and the United States encourages the Panel to examine the USDOC's reinterpretation in its entirety. For ease of reference, excerpts are provided below, with emphasis added in bold.

69. The preliminary Section 129 determination, at pages 17-19, states the following:

> Although the Panel found that the word "deemed" in Section 771B leaves no possibility for [the USDOC] to attribute anything less than the full amount of subsidies provided to upstream producers of the raw agricultural product, **the statute does not define "deemed" as it is used in this context, nor does it expressly prescribe the manner in which [the USDOC] is to effectuate this determination**. Therefore, Congress conferred broad discretion upon [the USDOC] in making this determination. Given this broad discretion, [the USDOC] may consider case-specific facts and determine the appropriate manner to attribute the subsidies to the manufacture, production, or exportation of the processed product, **including whether less than the full amount of subsidies should be attributed (*i.e.*, found to provide a benefit) to the manufacture, production, or exportation of the processed product.** The flexibility and discretion conferred by Congress is exemplified in [the USDOC]'s benefit calculation methodology for grower subsidies in this very proceeding.
> …
> Thus, in such circumstances, *less than 100 percent of the BPS subsidy payment amount* is used when determining the benefit to the respondent. This first step in the calculation was necessary in calculating the benefit provided by the BPS-Direct Payment program, BPS-Greening Program, Spanish Agricultural Insurance program for all three respondents. For the rural development program, for Agro Sevilla, we used a similar methodology using adverse facts available for its first-tier suppliers because Agro Sevilla reported numerous grants received by its first-tier suppliers under this program well after the established deadline under 19 CFR 351.301(c)(1)(v). However, we divided each supplier/grower's benefit by its sales volume of raw olives. **It is in this manner, that given the case-specific circumstances present in the ripe olives from Spain investigation, and in this section 129 proceeding, we have exercised [the USDOC]'s discretion under section 771B of the Act in "deeming" countervailable subsidizes provided to producers or processors of the raw agricultural product to be provided with respect to the manufacture, production, or exportation of the processed product**.

The excerpted text shows how the USDOC carefully considered the meaning of key terms in the statute, and found that it was reasonable to conclude that the USDOC has broad authority in interpreting the manner of attribution of benefits. This interpretation addresses the original panel's findings that Section 771B required a *presumption* of pass-through. With this additional flexibility expressly clarified, Section 771B may be applied in a WTO-consistent manner.

70. The final Section 129 determination states the following at pages 20-24, again with emphasis added in bold:

ASEMESA, Agro Sevilla, and Camacho argue that [the USDOC] incorrectly finds discretion in the statute to interpret the word "deemed" and that the plain meaning of the term means there is no room to attribute less than 100 percent when the two factors in section 771B of the Act are satisfied. We disagree that the statutory language is unambiguous, and that [the USDOC] cannot consider case-specific facts when evaluating attribution of subsidies to the manufacture, production, or exportation of the processed product. As we stated in the *Preliminary Determination*, the statute does not define "deemed" in the context in which it appears in section 771B of the Act. The statute also does not expressly prescribe the manner in which countervailable subsidies provided to producers or processors of the raw agricultural product are deemed to be provided with respect to the manufacture, production, or exportation of the processed product. Thus, Congress conferred broad discretion upon [the USDOC] in making this determination, and [the USDOC] has flexibility to consider the unique circumstances in each proceeding to determine the appropriate manner to attribute the subsidies.

ASEMESA, Agro Sevilla, and Camacho argue that the term "deemed," as used in section 771B of the Act, reflects Congress's instruction to presume the existence of pass through of a subsidy. ASEMESA, Agro Sevilla, and Camacho offer two definitions of the terms "deem" and "deemed" as "to consider that someone or something has a particular quality," or "to consider or judge something in a particular way." However, this is simply an exercise in using different words to explain the meaning of "deemed," and ultimately, it does not demonstrate that the term is unambiguous, such that [the USDOC] lacks flexibility in making its determination. **Even under these definitions there is no indication as to *how* [the USDOC] is to conduct its analysis or *to what extent* subsidies should be attributed (*i.e.*, how or to what extent countervailable subsidies provided to producers or processors of the raw agricultural product are deemed (or considered) to be provided to the manufacture, production, or exportation of the processed product).** Put another way, 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).** This is further exemplified by the fact that the statute states that countervailable subsidies "shall be deemed" to be provided with respect to the manufacture, production, or exportation of the processed product, **but does not state that they shall be deemed "fully" or "to the full extent." Thus, [the USDOC] has discretion on this matter.**

…

ASEMESA, Agro Sevilla, and Camacho incorrectly presume that [the USDOC]'s analysis under section 771B of the Act must consider only the two factors contained therein; that these factors have specific, narrowly construed meanings; and that the word "deemed" requires [the USDOC] to attribute the full amount of the subsidies provided to upstream producers of the raw agricultural product in every scenario. [the USDOC]'s *Preliminary Determination* noted that, crucially, although section 771B of the Act identifies two factors that [the USDOC] must consider in its analysis, the statute does not specify how [the USDOC] is to evaluate whether the demand for the prior stage product

> is substantially dependent on the demand for the latter stage product, or how it is to evaluate the value of the processing operation. **The statute also does not define "deemed" as it is used in this context, nor does it expressly prescribe the manner in which [the USDOC] is to effectuate this determination. Because the statute does not direct [the USDOC] to conduct its section 771B analysis or calculate benefit in any particular way, Congress has left it to [the USDOC]'s discretion to determine the parameters of the analysis,** *i.e.,* what is considered "substantially dependent" in a given case, how to evaluate the value of the processing operation, and how to attribute the subsidies provided to the upstream producers.

Consistent with the other examples and explanations provided, the excerpted text above speaks to the authority afforded to the USDOC in determining the *manner* of calculation of benefits.

Question 27: (*To the United States*) The Panel found that Section 771B provided no flexibility to arrive at a finding of other than 100% pass through when the two factors stated therein are established. Is it correct to interpret the ripe olives Section 129 determination as providing flexibility *to consider other factors* going to the question of pass through as equally providing flexibility *not to consider other factors* going to the question of pass through? In this regard, could the United States point to any reference in its submissions that indicates that the effect of the ripe olives Section 129 determination is that the USDOC must consider other factors going to the question of pass through?

U.S. Response to Q27:

71. As explained above and in the Section 129 determinations, the USDOC has discretion to consider other factors in addition to the two specifically enumerated prongs of Section 771B. In addition, the USDOC must abide by the guiding principle that applies in all its proceedings that it must evaluate all potentially relevant data and information that is available on the record in making its determinations.[41] In this way, the USDOC does not simply disregard other factors or

[41] The guiding principle the USDOC refers to is enshrined across several relevant statutes and judicial decisions. Pursuant to section 703(b)(1) of the Tariff Act of 1930 ("Tariff Act"), for the purpose of preliminary determinations, the administering authority "shall make a determination, *based upon the information available to it at the time of the determination*, of whether there is a reasonable basis to believe or suspect that a countervailable subsidy is being provided with respect to the subject merchandise" (emphasis added). *See* Section 703(b)(1) of the Tariff Act of 1930 (Exhibit USA-4). While section 705(a) of the Tariff Act, regarding final determinations, does not speak to the information considered on the record, under U.S. legal precedent, the USDOC considers the entirety of the evidence on the record in relation to comments received, including evidence that otherwise detracts from the USDOC's preliminary determination. The USDOC has previously explained that this requirement arises from section 516A(b)(1)(B)(i) of the Tariff Act (the provision identifying the standard of review applied by U.S. courts), which requires that the USDOC's decisions must be supported by substantial evidence. *See Issues and Decision Memorandum, Coated Free Sheet Paper from China: Final Affirmative Countervailing Duty Determination* (October 17, 2007) (Exhibit USA-5) ("we agree that section 516A(b)(1)(B)(i) of the Act requires that the Department's decisions must be supported by substantial evidence. It is precisely this provision that requires the Department to fully evaluate all record evidence, including contradictory evidence. The U.S. Court of Appeals for the Federal Circuit has explained that in order to "determine if substantial evidence exists, we review the record as a

information on the record related to attribution, but engages in an evaluation of whether the factors under consideration are indeed relevant or probative for its analysis, and weighs the totality of evidence on the record in making its findings. Regarding the second part of this question, we refer the Panel to our answer to Question 2.a.

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

U.S. Response to Q28:

72. 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.[42] As the panel in *US – Countervailing and Anti-Dumping Measures (China)* correctly observed, the

whole, including all evidence that 'fairly detracts from the substantiality of the evidence.' *Micron Tech. v. United States*, 117 F.3d at 1392 (citing *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984))"). U.S. courts have in turn explained that to determine if substantial evidence exists, they review the record as a whole, including all evidence that fairly detracts from the substantiality of the evidence. *See Wind Tower Trade Coal v. United States*, 633 F. Supp. 3d 1286, 1290 (CIT 2023) (Exhibit USA-6), and *Micron Tech. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (Exhibit USA-7). Accordingly, the USDOC evaluates the record as a whole to come to its determinations. *See* the discussion in response to Question 20 and accompanying footnotes.

[42] In the WTO system, as in any international law dispute settlement system, the meaning of municipal law is an issue of fact. In a WTO dispute, the interpretation of the WTO Agreement or relevant covered agreements is the issue of law for the WTO dispute settlement system. The relevant provisions of the DSU reflect this straightforward division between issues of fact and law. DSU Article 6.2 requires a complaining party to set out "the matter" in its panel request comprised of "the specific measures at issue" – that is, the core issue of fact – and to "provide a brief summary of the legal basis of the complaint" – that is, the issue of law. DSU Article 11 similarly distinguishes between the panel's "objective assessment of the facts of the case" and its assessment of "the applicability of and conformity with the covered agreements" – that is, the issue of law. DSU Article 12.7 makes the same distinction in relation to the findings of fact and law in a panel's report. *See* Statement by the United States Concerning Article 17.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Appellate Review of Panel Findings of Fact, Including Domestic Law, Meeting of the Dispute Settlement Body on August 27, 2018, pp. 15-22, available at https://geneva.usmission.gov/wpcontent/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_rev_.public.pdf (citing extensive examples of prior panels and WTO Members recognizing that matters of domestic (municipal) law are issues of fact for purposes of a WTO proceeding); *see also* United States Trade Representative Report on the Appellate Body of the World Trade Organization (February 2020), pp. 40-44 ("Although whether a given domestic law is consistent with WTO obligations is a question of law, in the WTO system the meaning of that municipal law is an issue of fact. The DSU reflects this straightforward division between issues of fact and law. The determination that the meaning of municipal law is an issue of fact is not unique to the WTO dispute settlement system. This determination is well-recognized in international law generally. For example, a standard treatise on international law states that '*municipal laws are merely facts* which express the will and constitute the activities of States.'").

USDOC's interpretation of U.S. CVD law is the governing interpretation unless a final U.S. court decision finds that the USDOC's interpretation is unreasonable or contrary to the plain text of the statute in a final and binding judicial decision.[43] The United States has thoroughly explained its measure and the implications of the USDOC's reinterpretation of Section 771B in the Section 129 proceeding throughout these compliance proceedings. Based on the evidence available, the Panel should conclude, as a matter of fact, that the United States has revised its interpretation of Section 771B, and that revised interpretation no longer excludes consideration of other relevant factors. Based on the Panel's objective assessment of this factual matter, the United States respectfully requests the Panel to then conclude, as a matter of WTO law, the U.S. revised interpretation brings Section 771B into conformity with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.

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

U.S. Response to Q29:

73. The United States respectfully does not accept the premise of the question that there is any type of report a panel "must … accept". The relevant obligations are contained in the covered agreements, which must be interpreted by an adjudicator according to customary rules of interpretation (DSU Article 3.2), and it would be legal error for the Panel to treat a prior report as having any legal authority. 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.

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

> **…an investigating authority must provide an *analytical basis* for its findings of the existence and extent of pass-through that takes into account *facts and circumstances* that are *relevant* to the exercise and that are directed to ensuring that any countervailing duty imposed on the downstream product is not in excess of the total amount of subsidies bestowed on the investigated product.**

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

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

U.S. Response to Q30:

74. When evaluating what constitutes an "analytical basis" for the findings of the existence and extent of attribution of benefits on a down-stream processors, the Panel should use the same standard as it does when evaluating the actions of an investigating authority under any other circumstances. In other words, the Panel should examine the record and explanation provided by the USDOC, and determine whether the Section 129 determinations reflect the conclusions that an objective and unbiased investigating authority could have reached under the circumstances and in light of the evidence on the record. As explained during the substantive meeting of the parties, there is no particular requirement for *how* an investigating authority should *present* its findings and explanation of the attribution of benefits analysis. So long as the explanation provided by the USDOC represents an analysis that an objective and unbiased authority could have reached, taking into account the facts and circumstances relevant to the question of indirect attribution of benefits to the down-stream processors, such explanation should be acceptable.

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

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

U.S. Response to Q31(a):

75. As explained previously, the USDOC must abide by the guiding principle that applies in all its proceedings that it must evaluate all potentially relevant data and information that is available on the record in making its determinations. For further elaboration, we refer the Panel to our response to Question 27.

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

U.S. Response to Q31(b):

76. The term "consider" in this context means to evaluate, examine, or take into account.[44]

[44] Definition of "consider" form *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 485 (Exhibit USA-9).

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

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

b. the United States argued in the original DS577 proceeding that "the two factual circumstances contained in Section 771B are *on their own* appropriate for establishing pass-through in the context of the special commercial and economic circumstances facing agricultural input products used to process downstream products"? (see Panel Report, *US - Ripe Olives from Spain*, para. 7.161)

U.S. Response to Q32:

77. 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 phrase highlighted by the Panel in Question 32.b speaks to the U.S. understanding of the statute at the time of the original WTO proceedings. At the time, the United States argued that the factors expressly listed in Section 771B would be enough to conduct a WTO-consistent attribution of benefits analysis. In other words, under that interpretation, consideration of additional factors would not be needed, even if permissible. 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*. With that understanding, the USDOC then conducted its investigation under Section 129 and did take additional factors into consideration. As explained above and during the Panel meeting, this understanding becomes part of the USDOC's overall administrative record, and serves as a reference point in future investigations conducted under Section 771B.