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)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE PANEL'S SUBSTANTIVE MEETING WITH THE PARTIES

October 25, 2023

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US – Ripe Olives (Spain) (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/R, adopted 20 December 2021

Mr. Chairperson, Members of the Panel:

1. The United States thanks you for agreeing to serve on the Panel in this proceeding, and extends our gratitude as well to the Secretariat staff assisting you with your work.

2. We begin our statement today by noting that the Panel in this proceeding is tasked with examining a simple and discrete issue – whether the United States has implemented the recommendation of the Dispute Settlement Body ("DSB") with respect to Section 771B of the Tariff Act of 1930 ("Section 771B"). The European Union ("EU") has not challenged the United States' implementation of any other DSB recommendations, and there is now no disagreement that the Basic Payment Scheme is specific or that it is countervailable, and no disagreement on the revised calculation for Aceitunas Guadalquivir S.L.U. and the subsequent recalculation of the all-others rate. The only question left is whether the measures the United States took regarding Section 771B are consistent with Article VI:3 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 10 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

3. The answer to this question is a clear "yes." As we have explained throughout our submissions, the United States Department of Commerce ("USDOC") reexamined the applicability and interpretation of Section 771B in light of the original Panel's findings, and set out an interpretation of that statute that brought the measure into conformity with the covered agreements.

4. In our statement today, we will highlight several important issues addressed in the parties' written submissions. First, we will address the EU's claims regarding the United States' implementation of the original Panel's "as such" findings. Second, we will address the EU's

claims regarding the original Panel's "as applied" findings. In presenting these arguments, we will demonstrate why the Panel should reject the EU's baseless claims.

I. THE EU'S CLAIMS THAT SECTION 771B IS "AS SUCH" INCONSISTENT WITH WTO AGREEMENTS ARE WITHOUT MERIT

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

6. The issue the original Panel highlighted in its findings was that the text of Section 771B apparently *presumed complete* attribution of a benefit to downstream processors based on a consideration of only the two factors described in the statute.[1] To implement the DSB's recommendation to bring the measure into conformity with the GATT 1994 and SCM Agreement, the USDOC examined Section 771B and concluded that consistent implementation was permissible under the terms of the statutory provision. The USDOC explained in the Section 129 proceeding that it may exercise its authority to consider any number of relevant factors, other than the two factors that are specifically enumerated in the statute. Further, the USDOC elaborated that it may take into account "all potentially relevant data and information

[1] *US – Ripe Olives (Spain) (Panel)*, paras. 7.168-7.169.

that is on the record."[2] With that revised U.S. understanding and approach, which is a change from the U.S. interpretation and application by the United States at the time of the original proceeding, the measure does not require the United States to engage in WTO-inconsistent action or preclude the United States from taking WTO-consistent action. Thus, the compliance Panel should consider the measure to be consistent with U.S. WTO commitments.

7. Further, implicit in the EU's arguments is the idea that the United States must necessarily amend, repeal, or refrain from applying Section 771B in order to implement the recommendation of the DSB.[3] However, as we have explained, there is no requirement that a Member implement the recommendations of the DSB in any one particular way, and the EU concedes that compliance need not always include a formal amendment of the legal provision at issue.[4]

8. The EU also claims that, to bring a measure into conformity with the WTO Agreements, a Member must "ensure that this legal provision is interpreted in a WTO-consistent manner also in the future."[5] The EU seems to expect a level of complete certainty and consistency in the USDOC's application of Section 771B that neither aligns with the original Panel's findings nor is supported in the WTO Agreements. Nothing in the DSU, nor the WTO Agreements generally, requires that a measure expressly *prohibit* WTO-*inconsistent* action. Instead, a Member needs to ensure that its measure does not *preclude* WTO-*consistent* action. In that event, it would be a discrete decision or action by a Member that would bring about a future inconsistency – for

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

[3] *See e.g.*, EU First Written Submission, paras. 58-60; EU Second Written Submission, para. 19.

[4] EU Second Written Submission, para. 19.

[5] EU Second Written Submission, para. 18.

example, by deciding to apply the measure in an inconsistent fashion, and it is that decision that could be challenged in the future.

II. THE EU'S CLAIM THAT THE USDOC'S APPLICATION OF SECTION 771B IS WTO-INCONSISTENT IS WITHOUT MERIT

9. After finding that a WTO-consistent interpretation of Section 771B is permissible under U.S. law, the USDOC then applied that statute in a manner consistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. Because the original Panel noted that Section 771B was inconsistent "as applied" for the same reasons as it was found to be inconsistent "as such," it is logical that the "as applied" inconsistences may be remedied by the same type of measure that remedied the inconsistency "as such." Thus, the USDOC's interpretation of Section 771B in a WTO-consistent manner in the Section 129 proceeding resulted in a WTO-consistent application of Section 771B as applied to the facts of the new determination.

10. The original Panel's findings focused on the fact that a consistent analysis would depend on an examination of *all* potentially relevant facts and circumstances, including those that speak to the nature of the specific market for the input product at issue and all the conditions of competition on that market.[6] The EU argues that the USDOC's analysis of such factors with respect to raw olives is irrelevant to the question of whether and to what degree any benefits received by growers may be attributed to the processed olives. But the EU overlooks the relatively straightforward nature of the products in question – raw olives processed and sold as table olives – and the inherently close nature of the relationship between those two products.

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

The USDOC took this into account when it considered the factors expressly indicated in Section 771B – that is, the substantial dependance of demand for one product upon the other and the limited value added by the processing operation.

11. The USDOC also took additional facts into consideration, all of which speak to the nature of the specific market for the input product at issue (raw olives) and the conditions of competition in that market including:

- the 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 are the same types of factors the original Panel identifies as being relevant to a WTO-consistent attribution of benefits analysis.[7] We therefore disagree with the EU that such factors are irrelevant.

12. Further, the USDOC's analysis in the Section 129 determinations demonstrated that there could be circumstances where less than 100 percent of a subsidy might be attributed to a processed product, depending on the facts presented in a given case. The EU seems to take the

[7] *US – Ripe Olives (Spain) (Panel)*, paras. 7.166-7.167.

extreme position that the only permissible attribution of benefits analysis would be one that *necessarily* results in less than 100 percent pass-through of benefits. This is simply not required by the text of the agreements, namely Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, nor suggested by the findings of the original Panel.

13. As demonstrated throughout the United States' written submissions, the USDOC correctly evaluated additional facts and considerations beyond the two factors specifically enumerated in Section 771B to conduct its attribution of benefits analysis. The USDOC reached a determination that an unbiased and objective investigating authority could have reached in light of the totality of the facts and record information.

III. CONCLUSION

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

15. This concludes the U.S. opening statement. We look forward to responding to the Panel's questions. Thank you.