

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

***Recourse to Article 22.6 of the DSU by the United States***

**(DS577)**

**CLOSING STATEMENT OF THE UNITED STATES OF AMERICA  
AT THE MEETING OF THE PARTIES WITH THE ARBITRATOR**

**March 26, 2025**

Mr. Chairperson, Members of the Arbitrator:

1. Pursuant to Article 22.7 of the DSU, the only task before the Arbitrator in this proceeding is to accurately determine whether the level of suspension of concessions requested by the EU is equivalent to the level of nullification or impairment of benefits accruing to the EU. If the Arbitrator were to recommend that the EU suspend concessions or other obligations in excess of the level of nullification or impairment, the Arbitrator would necessarily be contravening its mandate and the level of suspension of concessions authorized would violate Article 22.4 of the DSU.

2. Thus, the task of the Arbitrator in this proceeding is only to ascertain an accurate measurement of the level of nullification and impairment – all other issues discussed this week flow from that core responsibility. For that reason, an inaccurate, speculative, or even “punitive” level would not be consistent with the DSU.

3. As one pertinent example, we have spent a good deal of time over the last two days discussing the issue of the appropriate counterfactual. But, as we have explained, the counterfactual is only relevant to these proceedings insofar as it is a necessary input into a modeling approach that both the EU and the United States have offered. The EU improperly conflates the requirements for an investigating authority to conduct a WTO-consistent attribution analysis with the task before the Arbitrator, which is to craft a reasonable and plausible counterfactual to serve as an input into a model.

4. Neither the United States nor the Arbitrator is required to replicate a WTO-consistent attribution analysis that would be carried out by an investigating authority. Rather, the only thing that the Arbitrator must determine is whether the counterfactuals presented by the parties are reasonable and plausible based on the best evidence that is available.

5. On that note, the counterfactual offered by the United States, which is supported by ample evidence provided by the United States, is reasonable and plausible. On the other hand, the EU has not provided any evidence to support its counterfactual, which suggests a “proxy” of zero for the counterfactual CVD rate. Instead, the EU relies on repeated assertions that because Section 771B continues to exist, there is no hypothetical compliance scenario where U.S. law could have been made consistent with the relevant DSB recommendations.

6. After two days of this meeting, the EU still has not offered a coherent explanation for why Section 771B could not have been amended or replaced in a hypothetical compliance scenario. To the contrary, the EU’s assumption – that the United States would withdraw CVD orders without enacting any authority to address attribution of benefits for processed agricultural goods – is plainly not reasonable or plausible.

7. The counterfactual is not the only instance where the United States has offered evidence to support its position while the EU declines to present any evidence to support its positions. In fact, a pattern seems to have emerged in which the United States offers evidence to support the arguments that it makes, and the EU tries to poke holes in the reliability or credibility of the U.S. evidence. But the EU seldom, if ever, offers alternative evidence to either establish any holes or to affirmatively support its positions.

8. While the initial burden in this proceeding may be on the United States as the objecting party, it is fundamental to any adjudicatory system for a party to put forth evidence to support the factual assertions it makes.<sup>1</sup> The United States has done so consistently while the EU has not.

9. This pattern is also apparent in the discussions that we have had on various data inputs for both the “as applied” and “as such” models. For example, the United States has presented reliable and publicly available data on domestic production for use in its model. We have shown that, at the very least, this data provides a suitable proxy for domestic production because it aligns with the scope of the relevant CVD order.

10. The EU argues that this is not a reliable data set, but does not provide any evidence to show why. The EU also does not provide any alternative data set that it believes would better approximate domestic production. Instead, its solution is to cut domestic production out of its model entirely – a decision that necessarily overstates the level of nullification or impairment by ignoring a key market participant.

11. The same issue arises in the EU’s approach to export supply elasticity. Here, the EU insists that there is no available data in the literature. This is incorrect. The Arbitrator requested, and the United States provided, export supply elasticities from the economic literature for the seven specific in-scope HTSUS codes. Even before providing that data, the United States suggested using the export supply elasticity for manufactured goods as a proxy.

12. The EU’s alternative to these proposals is to assume an export supply elasticity of infinity with no basis other than that the EU exports ripe olives – and can somehow be assumed to export any other product subject to Section 771B – in “significant” quantities. Here again, the EU neither establishes any error in the U.S. data nor supports any alternative with evidence. Instead the EU insists on an unreasonable modelling decision that will inflate the measurement of nullification or impairment.

13. The mandate of the arbitrator is to accurately measure the level of nullification or impairment. To fulfil that mandate, the Arbitrator must use the best evidence available to it. In multiple instances in this proceeding, including for the counterfactual, domestic supply, and export supply elasticity, the United States has provided evidence while the EU has provided none. Accordingly, the Arbitrator should rely on the information provided by the United States.

14. Finally, many of the issues that we have discussed, including counterfactual CVD rates, inclusion of domestic production, and export supply elasticity, are pertinent to the EU’s request to suspend concessions for the “as such” breach in addition to the “as applied” breach. In fact, the problems presented by the EU approach would be amplified if integrated into a prospective formula or model that would be generally applicable to any of the products that could be subject to Section 771B.

---

<sup>1</sup> See *US — Countervailing Measures (China) (Article 22.6 – US)*, para. 3.3.

15. Given the many unknowns surrounding a future application of Section 771B, we question whether it is possible at all to construct a prospective formula that can calculate the level of nullification or impairment so as not to contravene the DSU. It appears that such an exercise is likely not possible, as the variability in possible future applications of Section 771B would render any such formula overly speculative, such that the level of suspension would exceed the level of nullification and impairment.

16. We have pointed out that the Arbitrator does not need to adopt a prospective “as such” approach. To the contrary, if the Arbitrator lacks confidence that an approach can produce an accurate estimate of the level of nullification or impairment in the case of any future application of Section 771B, it must decline to adopt that approach. In such event, the EU would not be left without a remedy. If Section 771B were applied in the future to an EU product, the EU could seek authorization to suspend concessions at that time. If the United States considered the request to be excessive, the parties could have recourse to limited, and more specific, arbitration to determine the appropriate level with accuracy.

17. Accordingly, the United States requests that the Arbitrator adopt the reasonable and plausible counterfactual proposed by the United States and determine that the level of nullification or impairment with respect to ripe olives is zero.

18. If the Arbitrator decides to adopt a different counterfactual, the United States requests that it adopt the U.S. approach and determine that the level of nullification or impairment is no more than \$6.15 million.

19. Finally, the United States requests that the Arbitrator decline to adopt any prospective formula at this time for potential future applications of Section 771B.

20. This concludes our closing statement. On behalf of the U.S. delegation, I would like to again thank you, and the Secretariat staff assisting you, for meeting with us this week. We appreciate the opportunity to respond to your questions and engage with you in person.

21. Thank you.