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)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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US – Section 129(c)(1) URAA	Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002

TABLE OF ABBREVIATIONS

Abbreviation	Definition
BPS	Basic Payments Scheme
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
HTSUS	Harmonized Tariff Schedule of the United States
SCM Agreement	Agreement on Subsidies and Countervailing Measures
URAA	Uruguay Round Agreements Act
USDOC	U.S. Department of Commerce
USITC	U.S. International Trade Commission
WTO	World Trade Organization

TABLE OF EXHIBITS

Exhibit No.	Description
U.S. Second Written Submission	
USA-1	Data on U.S. Imports of Olives from Spain

I. INTRODUCTION

1. The issue before the Panel in these Article 21.5 proceedings is a narrow one – whether the United States took appropriate measures to comply with the recommendations of the DSB to address the "as such" and "as applied" findings related to Section 771B of the Tariff Act of 1930, as amended ("Section 771B"). In both its written submissions, the European Union ("EU") has repeatedly tried, and failed, to establish that the measures taken by the United States Department of Commerce ("USDOC") were insufficient to address the recommendations of the Dispute Settlement Body ("DSB").

2. As the United States has explained at length, the record clearly shows the actions the United States took to comply with the DSB's recommendations – namely the revised attribution of benefits analysis in the proceeding the USDOC conducted under Section 129 of the Uruguay Round Agreements Act ("URAA") – and explains why those actions did in fact address the findings of the Panel in the underlying dispute.

3. Despite the EU's arguments to the contrary, the United States is not asking the Panel to re-litigate issues that were already concluded in the original proceedings. The Panel's task here is to examine whether the conclusions reached by the USDOC were ones that any unbiased and objective authority could have made, in the light of the evidence on the record.[1] This analysis should include an examination of the information discussed by the authority in its published report. Thus, the Panel here must evaluate whether the USDOC's revised analysis and reasoned application of Section 771B in the Section 129 determinations constitute "measures taken to comply" that sufficiently address the recommendations of the DSB. This analysis should carefully consider all information available on the record, including the USDOC's reasoning and explanation behind its findings.

4. The EU makes few new arguments in its second written submission, and instead simply expands on the same flawed arguments posited previously.

5. In this second written submission the United States will not repeat the arguments it has made previously, and will instead rebut specific points made by the EU to further demonstrate why these arguments lack merit.

6. The United States' second written submission is structured as follows.

- Section II.A rebuts the EU's repeated claims that the United States has failed to take appropriate measures to implement the Panel's findings. The discussion in this section again demonstrates that (i) the United States addressed the Panel's "as such" findings in a WTO-consistent manner, and (ii) the United States conducted a proceeding that is consistent with WTO rules, thereby implementing the Panel's "as applied" findings.

[1] *See e.g.*, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.82. *See also ibid.* paras. 7.78-7.83.

- Section II.B explains that the USDOC objectively considered additional information and record evidence relevant to the issue of benefit to the processed agricultural product when conducting the Section 129 proceeding.

7. As demonstrated previously and further emphasized below, the United States has implemented the DSB recommendations and brought the inconsistent measure into conformity 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"). Therefore, the United States reiterates its assertion that the Panel should reject the EU's claims of non-compliance.

II. ARGUMENT

A. The EU's claims that the United States has failed to take appropriate measures to implement the DSB's findings are meritless

8. As discussed at length in the United States' first written submission,[2] in conducting the Section 129 proceeding and explaining the reasoning behind the USDOC's revised interpretation of Section 771B and revised benefits calculation methodology, the United States implemented the recommendations and rulings of the DSB.

9. In its second written submission, the EU argues that, in describing how the USDOC revisited its interpretation of the meaning of Section 771B, the United States attempts to "relitigate" issues addressed by the Panel, instead of implementing the findings adopted by the DSB.[3] However, these arguments misconstrue the intent of the USDOC in updating its interpretation of Section 771B in the Section 129 proceeding. It is a matter of U.S. law that agencies have a level of discretion in interpreting ambiguous statutory language. In revisiting the meaning of Section 771B, and providing a revised interpretation of certain undefined statutory terms such as "prior stage product" and "raw agricultural product," the USDOC was able to conduct a more specific substantial dependence analysis, thus enabling it to more accurately calculate whether the demand for the upstream product (raw olives) is substantially dependent on the demand for the downstream processed product (table olives).[4] This, in turn, resulted in a more accurate evaluation of whether the subsidy benefits afforded to raw olives may be attributed to table olives.

10. The EU states in its second written submission that the United States was obligated to "take the necessary steps that would enable the USDOC to carry out a pass-through analysis that is in line with [WTO] rules in the Spanish ripe olives investigation" and "in all future

[2] *See* U.S. First Written Submission, Section III.A.

[3] EU Second Written Submission, paras. 6-10.

[4] *See* 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. 11-16.

proceedings."[5] Again, taking the steps necessary to enable the USDOC to carry out an analysis in line with WTO rules is precisely what the United States has done in this case.

11. As explained at length in the first written submission, the United States addressed the "as such" inconsistency by adjusting its interpretation of the meaning of Section 771B in light of the findings of the Panel in the underlying proceedings.[6] Based on the existing text of the U.S. statute, the USDOC was able to reasonably apply the findings of the Panel to ensure Section 771B was applied in a WTO-consistent manner and could be applied consistently in the future. Further steps for compliance were not necessary in this case.

12. The EU argues that the Section 129 proceeding may not be considered a measure taken to comply because such a proceeding can only modify actions and not statutes.[7] However, this interpretation is an overly narrow view of the purpose of the Section 129 proceeding; nor does it reflect what is permissible under U.S. law. As the USDOC noted in the Section 129 final determination, "any dispute settlement findings that a U.S. statute is inconsistent with an agreement also cannot be implemented except by legislation approved by Congress *unless consistent implementation is permissible under the terms of the statute.*"[8] The USDOC determined that consistent implementation is permissible under the current terms of Section 771B – thus, the Section 129 determinations are an appropriate compliance measure.[9] Legislative changes were ultimately not necessary because the USDOC found there was enough ambiguity in the language of the statute to allow it to effectively implement the findings of the Panel as part of the Section 129 proceeding.[10]

13. As argued in the United States' first written submission, the USDOC's explanation of its interpretation of the meaning of Section 771B specifically addressed the original Panel's concern that Section 771B required a presumption of pass-through "based on a consideration of only two factual circumstances, without leaving open the possibility of taking into account any other factors that may be relevant."[11] The USDOC then applied this revised understanding in the Section 129 proceeding to come to an objective, reasoned, and WTO-consistent conclusion. Below, the United States puts forward additional arguments in support of this basic assertion.

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[5] EU Second Written Submission, para. 6.

[6] *See* U.S. First Written Submission, para. 64-74.

[7] *See* EU Second Written Submission, para. 14; *see also* Third Party Submission of Canada, para. 8.

[8] USDOC Section 129 Final Determination (Exhibit EU-2), p. 23 (emphasis in original), citing House Report 103-826(1) at 25 (1994) and Senate Report 103-412.

[9] The EU and Canada cite to one sentence in para. 2.4 of the panel report in *US – Section 129(c)(1) URAA* to support their arguments. However, the use of the word "change" in this sentence should also be read in line with the relevant legislative history of the URAA. In other words, "change" should be understood to mean amendment of the statute itself.

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

[11] *US – Ripe Olives (Spain) (Panel)*, para. 8.1.b.i.

i. The United States addressed the Panel's "as such" findings in a WTO-consistent manner

14. The United States has explained at length the way it implemented the DSB's "as such" findings. To summarize the arguments of the United States, neither the Panel nor the broader rules of the Dispute Settlement Understanding ("DSU") require a specific methodology to implement the rulings and recommendations of the DSB. Thus, Members are able to exercise their discretion in choosing the appropriate way to implement the recommendations of the DSB as the United States has done here.

15. The EU argues that resolving an "as such" inconsistency requires the defending Member to ensure the legal provision is interpreted in a WTO-consistent manner in the future, as well as in the individual subject investigation.[12] The EU's argument is misplaced. A statute need not preclude WTO-inconsistent action to be considered consistent with a Member's WTO obligations. As we have explained[13] and consistent with the original Panel's findings, a measure must necessarily lead to WTO-inconsistent action to breach a Member's WTO obligations.[14] That is, a measure must preclude WTO-consistent action to be in breach; it need not preclude WTO-inconsistent action to be permissible. That a Member *could* apply its law in a WTO-inconsistent manner in the future could be true for any statutory provision – it would depend on whether a Member chose to apply its law in such a way. Here, the USDOC interpreted and applied the U.S. statute in a manner consistent with U.S. WTO obligations. In this way, the USDOC rendered the U.S. statute consistent with the recommendations of the DSB, and no further action is needed.

ii. The United States conducted a proceeding that is consistent with WTO rules, thereby implementing the Panel's "as applied" findings

16. As explained in the first written submission, the USDOC's analysis in the Section 129 proceeding was consistent "as applied" because the determination was made based on an interpretation of the meaning of Section 771B that is consistent with the WTO obligations of the United States.[15]

17. The EU claims that the facts the USDOC took into consideration during the Section 129 proceeding are only relevant to the question of whether a benefit was provided to the raw agricultural product, and not relevant to whether that benefit was passed through to the downstream product. The EU's arguments are unconvincing for several reasons.

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

[13] U.S. First Written Submission, para. 68.

[14] *US – Ripe Olives (Spain) (Panel)*, para. 7.146 (agreeing with past panel and Appellate Body reports "that in order for an "as such" challenge against a provision of domestic legislation to succeed, the complaining Member must establish that the relevant provision of domestic law requires the responding Member to violate its obligations under the relevant covered agreement or otherwise restricts, in a material way, the responding Member's discretion to act in a manner that is consistent with those obligations.").

[15] U.S. First Written Submission, paras. 75-76.

18. First, as explained in detail in our first written submission, the facts the USDOC considered related to the definition of the prior stage product are relevant to the question of *whether* and *how much* of the general Basic Payments Scheme ("BPS") subsidy payment may be allocated to olives specifically, but these facts are *also* relevant to the question of benefits to the processed product because they speak to the overall nature of the table olives market.[16]

19. Again, this is a question the original Panel expressly addressed in its findings, noting that "the probative value of [Section 771B's 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.[17] Here, the Panel's mention of the nature of the specific market for the *input* product (not just the downstream product) when discussing the probative value of the factors identified in Section 771B means that the nature of the input product is in fact relevant to the question of benefit to the processed product. It follows that an objective and reasoned analysis under Section 771B would include an analysis of the facts and circumstances that are relevant to the nature of the input product.

20. Additionally, it is important to re-emphasize that, although the Panel provided examples of possible factors that would be relevant to the question before us, the Panel was also clear that there is no specific or prescribed methodology that must be followed to perform a pass-through analysis where one is required.[18] It is more important for the investigating authority to ensure that the analysis is reasoned and considers factors that may be relevant to the particular case at issue.[19]

21. Previous WTO panels have likewise not prescribed a particular calculation methodology, focusing instead on the importance of *analyzing the extent* that a subsidy bestowed on the producer of an input product flows down to processed products.[20] The 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. In accordance with Article VI:3 of the GATT 1994, the countervailing duty bestowed on the downstream product must not be in excess of the total amount of subsidies bestowed on the investigated product.[21] As explained by the USDOC, payments under the BPS program may be provided to growers of multiple types of crops, not just raw olives.[22] Thus, it was necessary to take reasonable steps to identify the grant amount that could be attributed to olives specifically, to ensure that the benefit calculated for processed table olives would not be in excess of the amount of benefits awarded to raw olives.

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[16] U.S. First Written Submission, paras. 55, 57, and 89.

[17] *US – Ripe Olives (Spain) (Panel)*, para. 7.166 (emphasis added).

[18] *US – Ripe Olives (Spain) (Panel)*, para. 7.151 and 7.162.

[19] *US – Ripe Olives (Spain) (Panel)*, para. 7.162.

[20] *See US – Softwood Lumber IV*, para. 140; *US – Large Civil Aircraft (2nd Complaint)*, paras. 7.266-7.267.

[21] *US – Ripe Olives (Spain) (Panel)*, para 7.150.

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

22. As explained in further detail below, the USDOC used a holistic approach when conducting its analysis. The factors considered by the USDOC that support the analysis of benefits to the input product *also* speak to the attribution of benefits to the *processed product*. Thus, the Panel should reject the EU's arguments.

B. The USDOC objectively considered additional information and record evidence relevant to the issue of benefit to the processed product in conducting the Section 129 proceeding

23. Throughout its second written submission, the EU puts forward arguments related to the calculation of "direct" versus "indirect" benefits.[23] For simplicity, we will address all such arguments together here.

24. The EU claims that the United States has offered no rebuttal to the EU's arguments that the additional factors considered by the USDOC concern only the question of "direct" benefits and are not relevant to the analysis of attribution of "indirect" benefits.[24] However, the USDOC's reasoning in the Section 129 proceeding clearly explains how the information on the record speaks to the attribution of benefit to the processed product.[25]

25. The EU argues that the USDOC "expressly acknowledges that because – and whenever – the two conditions of Section 771B are fulfilled, the USDOC presumes 100 percent of pass-through, including in the Section 129 proceedings."[26] However, as the United States explained in its first written submission,[27] the USDOC was clear in its preliminary determination that it exercised its "discretion under section 771B … in 'deeming' countervailable subsidizes [*sic*] 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."[28]

26. Specifically, the USDOC noted that, for certain subsidy programs (the BPS-Direct Payment program, the BPS-Greening Program, and the Spanish Agricultural Insurance program), "*less than 100 percent of the BPS subsidy payment amount is used when determining the benefit to the respondent.*[29] As explained above, narrowing the definition of the prior-stage product provides further support for a more accurate calculation of benefits that flow down to the processed table olives. Thus, it is possible to objectively calculate the attribution of benefits and, when warranted, attribute less than 100 percent.

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[23] EU Second Written Submission, paras. 12, 13, 23-25, 30, 34, and 35.

[24] EU Second Written Submission, 13.

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

[26] EU Second Written Submission, para. 29.

[27] U.S. First Written Submission, para. 70 and 77.

[28] USDOC Section 129 Preliminary Determination (Exhibit EU-1), p. 19.

[29] USDOC Section 129 Preliminary Determination (Exhibit EU-1), p. 19; *see also* USDOC Section 129 Final Determination (Exhibit EU-2), p. 20-21.

27. Again, the Panel was clear that "neither Article VI:3 nor Article 10 of the SCM Agreement prescribe that a particular methodology must be followed to perform a pass-through analysis where one is required."[30] The Panel also specifically declined to find that a particular methodology would be required to satisfy the minimum requirements of the GATT 1994 and the SCM Agreement.[31] Instead, the Panel emphasized that "whatever methodology is chosen, an investigating authority must analyze to what extent subsidies on inputs may be included in the determination of the total amount of subsidies bestowed upon processed products."[32] It is important that the Panel here focused on the nature and quality of the analysis overall, and not the merits of one methodology or probative factor over another.

28. The EU dismisses the additional factors considered by the USDOC in the Section 129 determination and seeks to contrast the factors analyzed by the USDOC with those identified by the Panel, emphasizing that the Panel's factors are examples of what may be relevant for a "proper" pass-through analysis.[33] However, the EU ignores that the example factors discussed by the Panel are similar in nature to the additional factors examined by the USDOC. In providing examples of factors that *could* be considered when conducting a WTO-consistent analysis, the Panel focused on factors that speak to the *whole nature* of the olives market – e.g., the nature of the specific market for the input product at issue and all of the conditions of competition in that market, the degree to which raw input sellers face pricing pressure, the market power of the different producers and processors, or the extent to which national or international competition could potentially affect the reliability of input product pricing.[34] These factors speak to the overall nature of the ripe olives market, as do the factors that the USDOC considered in the Section 129 determination. The factors considered by the USDOC – e.g., 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[35] – 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. Further, any of these factors, such as the insurance premiums charged for different types of olive varietals may speak to the way that pricing flows down to the latter stage product.

29. So long as a Member undertakes an objective analysis, which accounts for the facts and circumstances relevant to the investigation, such an analysis should be considered consistent with the obligations of Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.

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[30] *US – Ripe Olives (Spain) (Panel)*, para. 7.151.

[31] *US – Ripe Olives (Spain) (Panel)*, para. 7.155.

[32] *US – Ripe Olives (Spain) (Panel)*, para. 7.162.

[33] EU Second Written Submission, para. 24.

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

[35] USDOC Section 129 Preliminary Determination (Exhibit EU-1), p. 13-14; USDOC Section 129 Final Determination (Exhibit EU-2), p. 20.

30. Implicit in the EU's arguments seems to be the idea that a valid analysis will necessarily result in less than 100 percent of attribution of benefits from the input product to the processed agricultural product – and therefore that 100 percent of attribution of benefits is necessarily WTO-inconsistent. However, this would not be an accurate interpretation of the provisions of the text of Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. 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. Dissatisfaction with the *results* of such a valid attribution analysis is not a sufficient or compelling enough argument for finding that the analysis in this case is WTO-inconsistent, or for withdrawing the resulting countervailing duty order.

31. The EU's dissatisfaction here seems to stem in part from the alleged significant harms suffered by Spanish ripe olive producers since the countervailing duty order has been in place. In its first written submission, the EU argues that "Spanish exports to the United States have plummeted by 68% since the U.S. tariffs were imposed in 2018. The void left in the U.S. market is filled by ripe olives from North African and other European producers – and not by ripe olives from U.S. producers."[36]

32. Notably, the U.S. International Trade Commission ("USITC") determined that an industry in the United States was materially injured by reason of imports of ripe olives from Spain. The Panel has already addressed the EU's arguments with respect to the USITC's injury determination at length, and concluded that the USITC's injury finding did not violate the Anti-Dumping Agreement or SCM Agreement. Upon determination of material injury, the USDOC imposed definitive anti-dumping and countervailing duties on subject olives from Spain. Thus, it is not surprising that some impact on volume of imports from Spain would result, and in fact the very purpose of the trade remedy laws is to ensure that an injured domestic industry is afforded relief from unfairly dumped and/or subsidized imports.

33. However, total U.S. imports of olives from Spain have not decreased as dramatically as the EU argues. In the most recent 12-month period ending in July 2023,[37] imports of all olives from Spain were at 91 percent of the level of the three years prior to the order (i.e., the 2015-2017 average), by volume, and were in fact above the volume for 2013-2014.[38] Moreover, imports of provisionally preserved olives, which are explicitly excluded from the orders, from Spain have substantially increased, to more than double their pre-order level.[39]

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[36] EU First Written Submission, para. 5.

[37] Where possible, we used the most recent 12-month period ending in July 2023, in order to examine the most recent data available.

[38] *See Data on U.S. Imports of Olives from Spain*, Table 1 (Exhibit USA-1).

[39] Provisionally preserved olives are under 0711.20 and may be used as inputs to ripe olives. Provisionally prepared olives unsuitable for immediate consumption were explicitly excluded from the scope.

34. The scope of olives subject to the order consists of five primary Harmonized Tariff Schedule of the United States ("HTSUS") codes[40] which accounted for more than 97 percent of U.S. imports of subject olives from Spain in 2015-2017. For these five HTSUS codes, total U.S. imports have decreased by 25 percent (a 10,000 metric ton per year decrease) over the years prior to the orders.[41] This 25 percent decrease primarily impacts Spain, and so while it is true that Spain did lose market share in this category of olives, it does not appear there was a direct replacement with imports from other countries.[42] While, on average, the United States has produced more ripe olives than it imported in any given year,[43] in recent years, both imports and production of these types of olives are down.[44]

35. The EU's arguments that the USDOC's analysis focused only on attribution of "direct" benefits should be rejected. As explained above, and more generally in both submissions in the Article 21.5 proceedings, the U.S. implementation of the recommendations of the DSB is consistent with its WTO obligations, as is the USDOC's revised interpretation and application of Section 771B. The USDOC's application of Section 771B addressed all available facts and circumstances relevant to the question of attribution of benefits to processed table olives.

III. CONCLUSION

36. For the foregoing reasons, the United States respectfully reiterates its request that the Panel reject the EU's claims.

[40] 2005.70.6020, 2005.70.6030, 2005.70.6050, 2005.70.6060, and 2005.70.6070.

[41] *Data on U.S. Imports of Olives from Spain*, Table 2 and Chart 1 (Exhibit USA-1).

[42] *Data on U.S. Imports of Olives from Spain*, Table 2 and Chart 1 (Exhibit USA-1).

[43] U.S. data from the National Agricultural Statistics Service (NASS) is for "Olives, processing, canned, production measured in tons," which equate to the ripe olives covered by the scope of the order.

[44] *Data on U.S. Imports of Olives from Spain*, Chart 2 (Exhibit USA-1).