



2 May 2023

(23-3063)

Page: 1/3

Original: English

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN UNION

REQUEST FOR CONSULTATIONS

The following communication, dated 28 April 2023, from the delegation of the European Union to the delegation of the United States, is circulated to the Dispute Settlement Body in accordance with Article 21.5 of the DSU.

My authorities have instructed me to request consultations with the United States pursuant to Articles 1, 4 and 21.5 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), concerning the anti-dumping and countervailing duties on ripe olives from Spain imposed by the United States, and concerning a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with recommendations and rulings" in DS577 *United States – Anti-dumping and Countervailing Duties on Ripe Olives from Spain*.

In that regard, the European Union also refers to the "Understanding between the United States and the European Union Regarding Procedures under Articles 21 and 22 of the DSU", dated 13 February 2023 ("Sequencing Agreement"), which apply "for the exclusive purposes of this dispute" and in particular point 1 thereof, which governs the procedures for the Parties to consult for purposes of compliance proceedings in this dispute.¹

On 20 December 2021, the Dispute Settlement Body ("DSB") adopted the panel report in case DS577 *United States – Anti-dumping and countervailing duties on ripe olives from Spain* (hereafter the "panel report").²

With respect to the European Union's claims in relation to Section 771B of the Tariff Act of 1930 (Section 771B) and its application in the ripe olives countervailing duty investigation, the panel found, *inter alia*, that (i) Section 771B is as such inconsistent with the United States' obligations under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement because it requires the United States Department of Commerce (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 product, based on a consideration of only two factual circumstances prescribed in that provision, 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; and (ii) through the application of Section 771B of the Tariff Act of 1930 in the Spanish ripe olives investigation the United States acted inconsistently with its obligations under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement to establish the existence and extent of indirect subsidisation (i.e. pass-through) taking into account all relevant facts and circumstances.

¹ WT/DS577/14.

² Dispute Settlement Body, Minutes of 22 February 2022 WT/DSB/M/459, para. 7.

The panel therefore recommended that the United States bring its measures into conformity with its obligations under the GATT 1994, and the SCM Agreement.

On 1 July 2022, the United States and the European Union agreed that the reasonable period of time ("RPT") for the United States to implement the recommendations and rulings of the DSB would expire on 14 January 2023.³ This long RPT of twelve (12) months and twenty-five (25) days was accepted by the European Union on the understanding that such time was needed for the legislative amendment of Section 771B.

On 20 December 2022, the USDOC issued its final determination under section 129 of the Uruguay Round Agreements Act (URAA), intended to implement the recommendations and findings of the DSB in this dispute (Final Determination). On 12 January 2023, the U.S. Trade Representative (USTR) directed USDOC to implement the Final Determination. USDOC issued a notice to that effect on 13 January 2023.

On 16 January 2023, the United States communicated to the DSB the Status Report Regarding Implementation of the DSB Recommendations and Rulings by the United States and stated that it had completed its implementation of the DSB's recommendations in this dispute.⁴

As regards the finding of the panel on the incompatibility with WTO rules of Section 771B, the Final Determination confirmed that Section 771B remains U.S. law, i.e. had not been modified. On the contrary, on the basis of similar arguments that had been rejected in the panel proceedings, the section 129 proceedings concluded that a WTO consistent implementation is permissible under the terms of Section 771B because USDOC would allegedly be permitted to take into account all relevant information in its pass-through analysis under Section 771B.

The European Union (EU) disagrees with the United States as to the existence and consistency with the covered agreements of the measures the United States have taken to comply with the DSB recommendations and rulings in DS577 *United States – Anti-dumping and Countervailing Duties on Ripe Olives from Spain*, as further detailed below.

The measures at issue

The measures at issue include:

- the Final Determination of the USDOC of 20 December 2022 under section 129 of the URAA, regarding the countervailing duty (CVD) investigation of ripe olives from Spain⁵ applicable as of 12 January 2023 as well as USDOC's notice of implementation of 13 January 2023⁶;
- the Preliminary Determination Memorandum of the USDOC of 23 September 2022⁷;
- Section 771B of the Tariff Act of 1930,⁸ insofar as the inconsistency with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement has not been removed.

Insofar as the Final Determination effectively amends and maintains in force and effect the CVD duty order issued on 1 August 2018 by the USDOC and applicable as from the same date, it should also be considered as measure at issue, at least with regard to the parts pertaining to the findings of the

³ WT/DS577/12.

⁴ WT/DS577/13.

⁵ <https://www.federalregister.gov/documents/2023/01/19/2023-00930/ripe-olives-from-spain-implementation-of-determination-under-section-129-of-the-uruguay-round> and <https://www.govinfo.gov/content/pkg/FR-2023-01-19/pdf/2023-00930.pdf>.

⁶ On January 12, 2023, the U.S. Trade Representative (USTR) directed Commerce to implement the section 129 final determination. Commerce issued a notice to that effect on January 13, 2023. The notice of the completed implementation was published in the U.S. Federal Register on 19 January, 2023, and can be found at 88 Fed. Reg. 3384. <https://www.federalregister.gov/documents/2023/01/19/2023-00930/ripe-olives-from-spain-implementation-of-determination-under-section-129-of-the-uruguay-round>

⁷ Memorandum, "Ripe Olives from Spain: Preliminary Section 129 Determination Regarding the Countervailing Duty Investigation," dated September 23, 2022 (Preliminary Determination).

⁸ 19 U.S.C. § 1677-2.

panel report concerning the incompatibility as such and as applied with the WTO agreements in relation to Section 771B.⁹

The legal basis for the complaint and the reasons for the request

Each of the measures at issue, considered individually in isolation or in any combination, appears to be inconsistent with the United States' obligations under Article 10 of the SCM Agreement and Article VI:3 of the GATT 1994.

This is, first, because the United States did not take any measures to remove the "as such" inconsistency of Section 771B with Article VI:3 of the GATT 1994 and Article 10 of the Agreement on Subsidies and Countervailing Measures. In particular, the United States has not repealed or amended Section 771B. Therefore, Section 771B remains "as such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the Agreement on Subsidies and Countervailing Measures and the United States has failed to implement the DSB's recommendations and rulings.

Second, no "as applied" pass-through analysis based on Section 771B that the panel report found "as such" incompatible with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement can be considered consistent with the same provisions. As a result, and as also evidenced in the Final Determination, the United States did not implement the "as applied" findings in the panel report regarding Section 771B either and the United States has failed to implement the DSB's recommendations and rulings.

* * *

In light of the foregoing, it appears that, through its actions and omissions, the United States has failed to comply with the recommendations and rulings adopted by the DSB in relation to the inconsistency as such and as applied with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement of Section 771B in the panel proceedings.

The measures taken by the United States adversely affect exports to the United States of ripe olives from Spain, and also nullify or impact the benefits accruing to the EU and its Member States directly or indirectly under the cited agreements.

This consultation request relates to the measures at issue and to any amendments, supplements, extensions, replacement measures, renewal measures and implementing measures, including but not limited to any such measures referred to by either party during the consultations.

The EU reserves the right to address additional measures and claims under other provisions of the covered agreements regarding the above matters during the course of the consultations.

The EU looks forward to receiving the United States' reply to this request and to finding a mutually convenient date and place for the consultations in line with the principles included in the Sequencing Agreement.

⁹ Ripe Olives from Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 FR 37469, 1 August 2018; and Ripe Olives from Spain: Antidumping Duty Order, 83 FR 37467, 1 August 2018. Ripe Olives from Spain: Final Affirmative Countervailing Duty Determination, C-469-818, DOC, 11 June 2018, published in 83 FR 28186, 18 June 2018; and Ripe Olives from Spain: Final Affirmative Determination of Sales at Less Than Fair Value, A-469-817, DOC, 11 June 2018, published in 83 FR 28193, 18 June 2018. Ripe Olives from Spain, Investigation Nos 701-TA-582 and 731-TA-1377 (Final), US ITC, July 2018.