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**UNITED STATES – COUNTERVAILING MEASURES ON
SUPERCALENDERED PAPER FROM CANADA**

AB-2018-8

Report of the Appellate Body

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AFA	adverse facts available
BCI	business confidential information
Canada's panel request	Request for the Establishment of a Panel by Canada, WT/DS505/2
Catalyst	Catalyst Paper Corporation
CVD	countervailing duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FibreK	FibreK General Partnership
GATT 1994	General Agreement on Tariffs and Trade 1994
Irving	Irving Paper Ltd.
NAFTA	North American Free Trade Agreement
NSPI	Nova Scotia Power Incorporated
OFA	other forms of assistance
Panel Report	Panel Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i>
PHP	Port Hawkesbury Paper LP
PPGTP	Federal Pulp and Paper Green Transformation Programme
PWCC	Pacific West Commercial Corporation
Resolute	Resolute FP Canada Inc.
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USDOC	United States Department of Commerce
Working Procedures	Working Procedures for Appellate Review
WTO	World Trade Organization

PANEL EXHIBITS CITED IN THIS REPORT

Exhibit Number	Short Title (if applicable)	Description
Panel Exhibit CAN-37	Supercalendered Paper from Canada 2015, I&D Memo	USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada (13 October 2015)
Panel Exhibit CAN-47 (BCI)	Supercalendered Paper from Canada 2015, Verification Report (Resolute)	USDOC, Memorandum dated 27 August 2015 for the Verification of the Questionnaire Responses of Resolute FP Canada Inc. in the Countervailing Duty Investigation of Supercalendered Paper from Canada
Panel Exhibit CAN-76	USDOC NAFTA Brief	USDOC, Rule 57(2) Brief (NAFTA) in Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination (5 July 2016)
Panel Exhibit CAN-116		USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China (9 October 2012)
Panel Exhibit CAN-118	Shrimp from China 2013, I&D Memo	USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from the People's Republic of China (12 August 2013)
Panel Exhibit CAN-121	Solar Cells from China 2014, I&D Memo	USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China (15 December 2014)
Panel Exhibit CAN-125	PET Resin from China 2016, I&D Memo	USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from the People's Republic of China (4 March 2016)
Panel Exhibit CAN-148	Stainless Pressure Pipe from India 2016, Final Calculation Memo	USDOC, Countervailing Duty Investigation of Welded Stainless Pressure Pipe from India: Final Calculation Memorandum for Steamline Industries Limited (22 September 2016)
Panel Exhibit CAN-152		USDOC, Issues and Decision Memorandum for the Final Affirmative Determination in the Countervailing Duty Investigation of Welded Stainless Pressure Pipe from India (22 September 2016)
Panel Exhibit CAN-163	Truck and Bus Tires from China 2016, I&D Memo	USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Truck and Bus Tires from the People's Republic of China; and Final Affirmative Determination of Critical Circumstances, in Part (19 January 2016)
Panel Exhibit CAN-210	PET Resin from China 2016, Verification Report (Dragon)	USDOC, Countervailing Duty Investigation of Polyethylene Terephthalate Resin from the People's Republic of China: Verification Report of Dragon Special Resin Co., Ltd., Xiang Lu Petrochemicals Co., Ltd., Xianglu Petrochemicals Co., Ltd., and Xiamen Xianglu Chemical Fiber Company Limited (19 January 2016)
Panel Exhibit CAN-215		USDOC, Verification of Zhanjiang Guolian Aquatic Products Co., Ltd., Zhanjiang Guolian Feed Co., Ltd., Zhanjiang Guolian Aquatic Fry Technology Co., Ltd., and Zhanjiang Guotong Aquatic Co., Ltd. in Countervailing Duty Investigation: Certain Warmwater Shrimp from the People's Republic of China (1 July 2013)
Panel Exhibit USA-8	Solar Cells from China 2015, I&D Memo	USDOC, Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from China (7 July 2015)

Exhibit Number	Short Title (if applicable)	Description
Panel Exhibit USA-19		USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea (18 December 2012)

USDOC CVD PROCEEDINGS CITED IN THIS REPORT

Short Title	Relevant CVD Proceeding
Solar Cells from China 2012	Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China (C-570-980)
Shrimp from China 2013	Certain Frozen Warmwater Shrimp from the People's Republic of China (C-570-989)
Solar Cells from China 2014	Crystalline Silicon Photovoltaic Products from the People's Republic of China (C-570-011)
Solar Cells from China 2015	Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China (C-570-980)
Supercalendered Paper from Canada 2015	Supercalendered Paper from Canada (C-122-854)
PET Resin from China 2016	Certain Polyethylene Terephthalate Resin from the People's Republic of China (C-570-025)
Stainless Pressure Pipe from India 2016	Welded Stainless Pressure Pipe from India (C-533-868)
Truck and Bus Tires from China 2016	Truck and Bus Tires from the People's Republic of China (C-570-041)
Stainless Steel Sheet and Strip from China 2017	Stainless Steel Sheet and Strip from the People's Republic of China (C-570-043)

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Import Measures</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
<i>US – Anti-Dumping Methodologies (China)</i>	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R and Add.1, adopted 22 May 2017, DSR 2017:III, p. 1423
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:I, p. 7

Short Title	Full Case Title and Citation
<i>US – Orange Juice (Brazil)</i>	Panel Report, <i>United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil</i> , WT/DS382/R, adopted 17 June 2011, DSR 2011:VII, p. 3753
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6481
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
<i>US – Supercalendered Paper</i>	Panel Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/R and Add.1, circulated to WTO Members 5 July 2018
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Wool Shirt and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US - Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3

WORLD TRADE ORGANIZATION
APPELLATE BODY

**United States – Countervailing Measures
on Supercalendered Paper from Canada**

United States, *Appellant*
Canada, *Appellee*

Brazil, *Third Participant*
China, *Third Participant*
European Union, *Third Participant*
India, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Mexico, *Third Participant*
Turkey, *Third Participant*

AB-2018-8

Appellate Body Division:

Bhatia, Presiding Member
Graham, Member
Zhao, Member

1 INTRODUCTION

1.1. The United States appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*¹ (Panel Report). The Panel was established on 21 July 2016² to consider a complaint by Canada³ with respect to the consistency of certain United States measures with the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

1.2. In particular, Canada challenged certain countervailing duty (CVD) measures adopted by the United States on supercalendered paper from Canada. Canada made multiple claims of inconsistency in relation to the United States Department of Commerce's (USDOC) CVD determinations regarding Canadian producers Port Hawkesbury Paper LP (PHP), Resolute FP Canada Inc. (Resolute), Irving Paper Ltd (Irving), and Catalyst Paper Corporation (Catalyst). Canada also challenged an alleged unwritten "ongoing conduct" measure attributable to the United States that consisted of the USDOC applying adverse facts available (AFA) to find countervailable subsidies in relation to programmes discovered during CVD investigations that were not reported in response to the USDOC's "other forms of assistance" (OFA) question (the OFA-AFA measure).⁴ Canada requested the Panel to find that the United States acted inconsistently with Articles 1.1(a)(1), 1.1(b), 2, 10, 11.1-11.3, 11.6, 12.1-12.3, 12.7-12.8, 14, 19.1, 19.3-19.4, and 32.1 of the SCM Agreement and Article VI:3 of the General Agreement on Tariffs and Trade 1994 (GATT 1994).⁵ The United States disagreed with Canada's claims in their entirety.⁶ The factual aspects of this dispute are set out in greater detail in the Panel Report.

1.3. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 5 July 2018, the Panel concluded as follows:

- a. for the claims concerning the USDOC's CVD determination with respect to PHP:

¹ WT/DS505/R, 5 July 2018.

² Minutes of the Dispute Settlement Body meeting held on 21 July 2016, WT/DSB/M/383, para. 6.4.

³ Panel Report, para. 1.4; Request for the Establishment of a Panel by Canada, WT/DS505/2 (Canada's panel request).

⁴ The challenged OFA-AFA measure was referred to by the Panel as the "Other Forms of Assistance-AFA measure". (Panel Report, paras. 2.2 and 7.1)

⁵ Panel Report, para. 3.1.

⁶ Annex C-1 of the Panel Report, para. 1.

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- i. the USDOC acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement, by making a finding of entrustment or direction with respect to the provision of electricity by Nova Scotia Power Incorporated (NSPI);
 - ii. the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement, when it determined that the provision of electricity by NSPI to PHP, through the load retention rate, conferred a benefit;
 - iii. the USDOC acted inconsistently with Article 12.8 of the SCM Agreement, by failing to disclose to interested parties an essential fact that, in the view of the USDOC, Section 52 of the Public Utilities Act entrusted or directed NSPI to provide electricity to all customers, including PHP;
 - iv. the USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding that the hot idle funding conferred a benefit on Pacific West Commercial Corporation (PWCC)/PHP;
 - v. the USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding that the second Forestry Infrastructure Fund amount conferred a benefit on PWCC/PHP; and
 - vi. the USDOC acted inconsistently with Article 11.3 of the SCM Agreement, by failing in its obligation to evaluate the accuracy and adequacy of the evidence in the application with respect to the existence of a benefit in the provision of stumpage and biomass by the Government of Nova Scotia to PHP;
- b. for the claims concerning the USDOC's CVD determination with respect to Resolute:
- i. the USDOC acted inconsistently with Article 12.7 of the SCM Agreement, by applying facts available to the discovered programmes;
 - ii. the Panel declined to rule on Canada's claims under Articles 11.2-11.3, 12.1-12.3, and 12.8 of the SCM Agreement, regarding the discovered programmes;
 - iii. the USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding, on the basis of an alleged lack of relevant evidence, that the benefit conferred on Fibrek General Partnership (Fibrek) through the federal Pulp and Paper Green Transformation Programme (PPGTP) was not extinguished when Fibrek was acquired by Resolute;
 - iv. the Panel declined to rule on Canada's claims under Articles 10, 14, 19.1, and 19.3-19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the USDOC's finding that the benefit conferred on Fibrek through the PPGTP was not extinguished when Fibrek was acquired by Resolute;
 - v. the Panel declined to rule on Canada's claims under Articles 1.1(b), 10, 14, 19.1, and 19.3-19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the USDOC's finding that the benefit conferred on Fibrek was not extinguished when Fibrek was acquired by Resolute, with respect to the alleged assistance discovered during the verification of Fibrek;
 - vi. the USDOC acted inconsistently with Articles 10, 19.1, and 19.3-19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, by attributing to the production of supercalendered paper subsidies provided to Resolute and Fibrek under the PPGTP, Ontario Forest Sector Prosperity Fund, and Ontario Northern Industrial Electricity Rate Programmes; and
 - vii. the Panel declined to rule on Canada's claims under Articles 10, 19.1, and 19.3-19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the attribution to the production of supercalendered paper of the alleged assistance discovered during the verification of Fibrek;

- c. for the claims concerning the CVD determinations with respect to Irving and Catalyst:
 - i. the USDOC acted inconsistently with Articles 10, 19.1, 19.3-19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994, by constructing the all-others rate relying on Resolute's rate, which was mainly calculated using AFA;
 - ii. the Panel declined to rule on Canada's claim under Article 12.7 of the SCM Agreement, regarding the construction of the all-others rate relying on Resolute's rate;
 - iii. the Panel rejected Canada's claims under Articles 10, 19.1, 19.3-19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the USDOC's failure to adjust the all-others rate with respect to subsidies that were not available to non-investigated exporters;
 - iv. the USDOC acted inconsistently with Article 19.3 of the SCM Agreement, by including new subsidy allegations in the context of the expedited reviews undertaken for Catalyst and Irving; and
 - v. the Panel declined to rule on Canada's claims under Articles 11.2 and 11.3 of the SCM Agreement, regarding the USDOC's alleged initiation of an investigation into new subsidy allegations during the expedited reviews of Catalyst and Irving; and
- d. for the claims concerning the alleged OFA-AFA measure:
 - i. Canada had adduced sufficient evidence to establish that the challenged OFA-AFA measure constitutes "ongoing conduct" and, therefore, the Panel did not consider it necessary to address Canada's argument that the challenged measure amounts to a "rule or norm of general and prospective application";
 - ii. the unwritten measure challenged by Canada is inconsistent with Article 12.7 of the SCM Agreement; and
 - iii. the Panel declined to rule on Canada's claims under Articles 10, 11.1-11.3, 11.6, 12.1, and 12.8 of the SCM Agreement, with respect to the alleged OFA-AFA measure.

1.4. Having found that the United States acted inconsistently with certain provisions of the SCM Agreement and the GATT 1994, in accordance with Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the Panel recommended that the United States bring its measures into conformity with its obligations under those Agreements.⁷

1.5. On 27 August 2018, the United States notified the Dispute Settlement Body (DSB), pursuant to Article 16 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal⁸ and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review (Working Procedures). On 14 September 2018, Canada filed an appellee's submission pursuant to Rule 22 of the Working Procedures. On 21 September 2018, Brazil, China, the European Union, and Japan each filed a third participant's submission.⁹ On that same day, India and Mexico notified the Appellate Body that they did not intend to submit a third participant's submission, but would appear at the hearing.¹⁰ Subsequently, Korea and Turkey notified the Appellate Body of their intention to appear at the hearing as third participants.¹¹

⁷ Panel Report, paras. 8.5-8.6.

⁸ WT/DS505/6.

⁹ Pursuant to Rule 24(1) of the Working Procedures.

¹⁰ Pursuant to Rule 24(2) of the Working Procedures.

¹¹ On 31 October 2019 and 1 November 2019, respectively, Turkey and Korea each submitted their delegation list for the hearing to the Appellate Body Secretariat. We have interpreted these actions as a notification to attend the hearing pursuant to Rule 24(4) of the Working Procedures.

1.6. On 4 September 2018, the Chair of the Appellate Body received a communication from the European Union requesting that the Division hearing this appeal modify the deadline for the filing of third participants' submissions to allow third participants four full working days following the submission of the appellee's submission. On 5 September 2018, on behalf of the Division hearing this appeal, the Chair of the Appellate Body invited the participants and other third participants in this appeal to comment in writing on the European Union's request. Brazil, Canada, China, India, Japan, Korea, Mexico, and the United States indicated that they had no objections to the European Union's request for an extension. On 13 September 2018, on behalf of the Division hearing this appeal, the Chair of the Appellate Body issued a Procedural Ruling¹² to extend the deadline for filing third participant's submissions, notifications, and executive summaries as requested by the European Union.

1.7. On 24 October 2018, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.¹³ On 9 December 2019, the Chair of the Appellate Body informed the Chair of the DSB that the Report in these proceedings would be circulated no later than 6 February 2020.¹⁴

1.8. On 14 March 2019, the Division received a communication from China, containing the executive summary of China's third participant's submission in the present appeal. China originally filed its third participant's submission on 21 September 2018. China indicated that the executive summary was inadvertently omitted from its third participant's submission. On 19 March 2019, the Presiding Member of the Division hearing this appeal invited, on behalf of the Division, the participants and other third participants in this appeal to comment in writing on China's communication. Canada indicated that it had no objections for China to submit the executive summary of its third participant's submission at this stage of the appeal. Mexico noted that, as China's third participant's submission was filed on time, the participants' and other third participants' due process rights were not affected. On 28 March 2019, the Division hearing this appeal issued a Procedural Ruling¹⁵ to accept the executive summary of China's third participant's submission.

1.9. On 18 April 2019, the Division received a joint communication from Canada and the United States requesting that the public be allowed to observe the participants and third participants that agree to make public their statements and responses at the oral hearing. Canada and the United States made the request on the understanding that any information that had been designated as confidential in the documents filed by any participant in the Panel proceedings would be adequately protected in the course of the Appellate Body's oral hearing. On 13 May 2019, the Division invited third participants to comment on this request. Mexico indicated that, without prejudice to its systemic position on the matter, it did not object to allowing public observation of the oral hearing in these proceedings. No other comments from third participants were received. On 2 July 2019, the Division issued a Procedural Ruling¹⁶ regarding the joint request by Canada and the United States. The Division adopted additional procedures on the conduct of the oral hearing, including procedures pertaining to public observation of the opening statements of the Members' delegations that had agreed to have their statements made public.

1.10. The hearing in this appeal was held on 4-5 November 2019. The participants and four of the third participants (Brazil, China, the European Union, and Japan) made oral statements and responded to questions posed by the Members of the Appellate Body Division hearing the appeal. A simultaneous closed-circuit television broadcast of the hearing was shown in a separate viewing

¹² The Procedural Ruling of 13 September 2018 is contained in Annex D-1 of the Addendum to this Report, WT/DS505/AB/R/Add.1.

¹³ The Chair of the Appellate Body explained that this was due to a number of factors, including the complex issues appealed, the backlog of appeals pending before the Appellate Body, and the overlap in the composition of all Divisions resulting in part from the reduced number of Appellate Body Members. Although this appeal was initiated on 27 August 2018, appeal work could only begin in mid-September 2019. (WT/DS505/7)

¹⁴ WT/DS505/8.

¹⁵ The Procedural Ruling of 28 March 2019 is contained in Annex D-2 of the Addendum to this Report, WT/DS505/AB/R/Add.1.

¹⁶ The Procedural Ruling of 2 July 2019 is contained in Annex D-3 of the Addendum to this Report, WT/DS505/AB/R/Add.1.

room. Oral statements and responses to questions by a third participant that had indicated its wish to maintain the confidentiality of its submissions were not subject to public observation.

1.11. On 3 December 2019, the Chair of the Appellate Body informed the Chair of the DSB that, pursuant to Rule 15 of the Working Procedures, Appellate Body Members Mr Ujal Singh Bhatia and Mr Thomas R. Graham would continue working after their terms expired on 11 December 2019 to finish appeals for which oral hearings had been completed. At the DSB meeting on the same day, the Chair of the DSB reported to WTO Members that this appeal would be concluded by the Appellate Body Division that held the oral hearing. On 9 December 2019, the participants and third participants received a copy of the communication of the Chair of the Appellate Body to the Chair of the DSB referred to above.¹⁷

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The Notice of Appeal and the executive summaries of the participants' claims and arguments are contained in Annexes A and B of the Addendum to this Report, WT/DS505/AB/R/Add.1.¹⁸

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. Brazil, China, the European Union, and Japan filed written submissions. The executive summaries of these written submissions are contained in Annex C of the Addendum to this Report, WT/DS505/AB/R/Add.1.¹⁹

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

- a. whether the Panel erred under Articles 3.3, 4.2, 7.1, and 19.1 of the DSU, by finding that the alleged OFA-AFA measure amounted to a "measure" that could be challenged under the DSU as "ongoing conduct"; and
- b. in relation to the alleged OFA-AFA measure:
 - i. whether the Panel erred under Article 12.7 of the DSU by failing to provide a "basic rationale" for its finding; and
 - ii. whether the Panel erred under Article 12.7 of the SCM Agreement in finding that the alleged OFA-AFA measure is inconsistent with that provision.

5 ANALYSIS OF THE APPELLATE BODY

5.1. In this Report, we first address the United States' claim that the Panel erred under Articles 3.3, 4.2, 7.1, and 19.1 of the DSU, by finding that the alleged OFA-AFA measure amounted to a "measure" that could be challenged under the DSU as "ongoing conduct". Thereafter, we address the United States' claims that the Panel erred by finding that the alleged OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement.

5.2. We recall that the Panel issued its final Panel Report to the parties on 15 December 2017. On 5 July 2018, the Panel Report was circulated to WTO Members. On 5 July 2018, the USDOC revoked the CVD order in Supercalendered Paper from Canada 2015, with retroactive effect to the beginning of the CVD proceeding. Notwithstanding this revocation, the United States filed its appeal on 27 August 2018. This revocation is not addressed by either participant in its written submissions. Moreover, at the oral hearing, both participants confirmed that there is a dispute between them regarding the existence of "ongoing conduct" and the finding of inconsistency with Article 12.7 of the SCM Agreement that remains to be resolved on appeal. Under these circumstances, we consider

¹⁷ WT/DSB/79.

¹⁸ Pursuant to WT/AB/23, 11 March 2015.

¹⁹ Pursuant to WT/AB/23, 11 March 2015.

the United States' claims of error on appeal in light of the Panel's findings as they are in the Panel Report.

5.1 Alleged OFA-AFA measure

5.1.1 Introduction

5.3. The United States appeals the Panel's finding that the alleged OFA-AFA measure is an "ongoing conduct" measure susceptible to challenge under the DSU. According to the United States, the Panel erred in both its understanding and application of the legal standard for "ongoing conduct" measures, in particular with regard to the alleged measure's precise content, repeated application, and likelihood of continued application.²⁰ The United States requests that we reverse the Panel's findings in this respect.²¹ Canada responds that the United States' appeal is outside the scope of appellate review²², and that, in any event, the Panel was correct to find that the alleged OFA-AFA measure was challengeable in WTO dispute settlement as "ongoing conduct".²³ For that reason, Canada requests that we dismiss the United States' claim of error.²⁴

5.4. In the section below, we first summarize the relevant Panel findings concerning the existence of the alleged OFA-AFA measure. We then address Canada's assertion that the United States' claim of error falls outside the scope of appellate review. Finally, we address the United States' claim that the Panel erred in its understanding and application of the legal standard for "ongoing conduct" measures.

5.1.2 The Panel's findings

5.5. The Panel identified the relevant issue before it as whether Canada had demonstrated the existence of the alleged OFA-AFA measure "either as 'ongoing conduct' or as a 'rule or norm of general and prospective application'".²⁵

5.6. The Panel first addressed the legal standard for "measures" challengeable in WTO dispute settlement.²⁶ The Panel recalled that a complainant seeking to prove the existence of a measure, whether written or unwritten, must demonstrate that it is attributable to a Member and its precise content. In addition, depending on the specific measure challenged and how it is described by the complainant, other elements may need to be proven.²⁷ Where dealing with an unwritten "ongoing conduct" measure, the Panel considered that a complainant would need to prove the alleged measure's (i) attribution to a Member, (ii) precise content, (iii) repeated application, and (iv) likelihood of continued application.²⁸

5.7. Next, the Panel addressed whether Canada had demonstrated the precise content of the alleged OFA-AFA measure.²⁹ The Panel observed that the alleged measure challenged by Canada concerns

²⁰ United States' Notice of Appeal, para. 2; appellant's submission, paras. 1, 3, and 6-32.

²¹ United States' appellant's submission, paras. 5, 15, 32, and 80.

²² Canada's appellee's submission, paras. 34-42.

²³ Canada's appellee's submission, paras. 14-33 and 43-60.

²⁴ Canada's appellee's submission, para. 128.

²⁵ Panel Report, para. 7.301. According to the Panel, the alleged OFA-AFA measure challenged by Canada consisted of the USDOC applying AFA to subsidy programmes discovered during verification in a CVD proceeding that were not reported by respondent companies in response to the OFA question. (*Ibid.*, para. 7.295)

²⁶ Panel Report, para. 7.302 (quoting Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 81; *EC and certain member States – Large Civil Aircraft*, para. 794; *US – Zeroing (EC)*, paras. 196-198; referring to Appellate Body Reports, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67; *US – Anti-Dumping Methodologies (China)*, para. 5.122; *Guatemala – Cement I*, fn 47 to para. 69; *Argentina – Import Measures*, paras. 5.106 and 5.109).

²⁷ Panel Report, para. 7.303 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.110).

²⁸ Panel Report, para. 7.304 (referring to Appellate Body Reports, *US – Continued Zeroing*, paras. 181 and 191; *Argentina – Import Measures*, paras. 5.105 and 5.108).

²⁹ Panel Report, paras. 7.307-7.317. The Panel noted that the United States did not contest attribution of the alleged OFA-AFA measure to the United States. (Panel Report, para. 7.305 (referring to Canada's first written submission to the Panel, para. 407; second written submission to the Panel, para. 160))

the USDOC's post-2012 conduct.³⁰ With respect to the OFA question, the Panel produced table 1, which quotes from certain USDOC CVD proceedings from 2012 onwards.³¹ As to the remaining content of the alleged OFA-AFA measure, the Panel produced table 2, which quotes from the same USDOC CVD proceedings.³² The Panel concluded that Canada had provided sufficient evidence to establish the precise content of the alleged OFA-AFA measure.³³ The Panel considered that variations in language in Canada's examples did not detract from the fact that the substance of both the questions and the USDOC's subsequent reactions remained the same in each example.³⁴ To the Panel, the alleged OFA-AFA measure consists in the USDOC asking the OFA question and, where the USDOC discovers information during verification that it deems should have been provided in response to that question, applying AFA to determine that the discovered information amounts to countervailable subsidies.³⁵

5.8. The Panel then addressed the repeated application and likelihood of continued application of the alleged OFA-AFA measure.³⁶ The Panel produced table 3 and table 4, which quote from certain USDOC CVD proceedings relied on by Canada.³⁷ The Panel found that, despite variations in language, those examples showed that, since 2012, the USDOC acted in substantially the same manner in treating information discovered at the verification stage of CVD proceedings that it considered should have been provided in response to the OFA question. On that basis, the Panel considered that Canada had established the repeated application of the alleged OFA-AFA measure.³⁸ The Panel noted that it was unable to identify any instance where the alleged OFA-AFA measure had not been applied³⁹, except as an inadvertent error.⁴⁰

³⁰ Panel Report, paras. 7.309 and 7.312.

³¹ Panel Report, para. 7.309 (referring to Solar Cells from China 2012, Shrimp from China 2013, Solar Cells from China 2014, Solar Cells from China 2015, Supercalendered Paper from Canada 2015, PET Resin from China 2016, and Stainless Pressure Pipe from India 2016).

³² Panel Report, paras. 7.312-7.313.

³³ Panel Report, para. 7.316.

³⁴ Panel Report, para. 7.316. Specifically, the Panel found that the variations in wording appeared mainly to be due to the different circumstances of a given investigation (such as the interested parties and dates), but the object of the OFA question remained the same. The Panel also found that the substance of the USDOC's reactions remained the same: where the USDOC discovered information upon verification that it deemed should have been reported in response to the OFA question, the USDOC applied AFA to find countervailable subsidies. (Ibid.)

³⁵ Panel Report, para. 7.316. The Panel noted that this description of the alleged OFA-AFA measure appears to be in line with the USDOC's description of the alleged measure in a NAFTA Chapter 19 proceeding. (Ibid., para. 7.317 (quoting USDOC, Rule 57(2) Brief (NAFTA) in Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination (5 July 2016) (USDOC NAFTA Brief) (Panel Exhibit CAN-76), pp. 147-149)) See also Panel Report, para. 7.308.

³⁶ Panel Report, paras. 7.318-7.332. As Canada's arguments relied to a great extent on the same evidence for these requirements, the Panel addressed them together. (Ibid., para. 7.318)

³⁷ Panel Report, paras. 7.320-7.321, tables 3 and 4. These tables refer to Shrimp from China 2013, Solar Cells from China 2014, Solar Cells from China 2015, Supercalendered Paper from Canada 2015, PET Resin from China 2016, Stainless Pressure Pipe from India 2016, Truck and Bus Tires from China 2016, and Stainless Steel Sheet and Strip from China 2017.

³⁸ Panel Report, para. 7.324.

³⁹ The Panel noted that in Washers from Korea 2012, which had been issued within two months of Solar Cells from China 2012, the USDOC did not countervail certain grants discovered at verification as they were deemed to not be tied to the subject merchandise. Nonetheless, the Panel considered Canada's claim related to the USDOC's post-2012 practice. The Panel observed that the United States had not provided evidence of any instance subsequent to 2012 where "the USDOC did not apply AFA to a respondent on the basis of the [OFA] question." (Panel Report, para. 7.326 (referring to USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea (18 December 2012) (Panel Exhibit USA-19))) Furthermore, to the Panel, the USDOC's reference to Washers from Korea 2012 in Supercalendered Paper from Canada 2015 pertained to past practice, and thus did not undermine Canada's showing of repeated application of the alleged OFA-AFA measure. (Panel Report, para. 7.326 (referring to USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada (13 October 2015) (Supercalendered Paper from Canada 2015, I&D Memo) (Panel Exhibit CAN-37)))

⁴⁰ Panel Report, para. 7.325 (referring to USDOC, Countervailing Duty Investigation of Welded Stainless Pressure Pipe from India: Final Calculation Memorandum for Steamline Industries Limited (22 September 2016) (Stainless Pressure Pipe from India 2016, Final Calculation Memo) (Panel Exhibit CAN-148), fn 3).

5.9. The Panel also found that Canada had established that the alleged OFA-AFA measure was likely to continue to be applied.⁴¹ The Panel based its finding on: (i) the consistent manner in which the USDOC referred to the alleged OFA-AFA measure or previous applications of the alleged measure⁴²; (ii) the USDOC's own reference to the alleged measure as its "practice"⁴³; and (iii) the USDOC's characterization of a departure from the alleged measure as an "inadvertent error".⁴⁴

5.10. Overall, the Panel concluded that Canada had adduced sufficient evidence to establish the existence of the alleged OFA-AFA measure as ongoing conduct. The Panel did not consider it necessary to address Canada's assertion that the alleged OFA-AFA measure amounted to a rule or norm of general and prospective application.⁴⁵

5.1.3 Scope of appellate review under Article 17.6 of the DSU

5.11. We first address Canada's assertion that the United States' claim on appeal regarding the existence of the alleged OFA-AFA measure falls outside the scope of appellate review under Article 17.6 of the DSU.⁴⁶ According to Canada, the United States' appeal challenges the Panel's factual finding that the alleged OFA-AFA measure exists, and implicates the Panel's appreciation of the facts and evidence.⁴⁷ This is because, according to Canada, the Appellate Body would be required to delve into the record and reweigh the evidence to assess the United States' claim that the Panel erred in finding the existence of the precise content, repeated application, and likelihood of continued application of the alleged OFA-AFA measure.⁴⁸ Canada notes that the United States has not made a claim under Article 11 of the DSU, which, in Canada's view, would have been the appropriate basis for the United States' claim of error.⁴⁹ The United States responds that this appeal concerns legal issues. To the United States, whether a measure exists as "ongoing conduct" that is challengeable under the DSU is a legal question.⁵⁰

5.12. Article 17.6 of the DSU provides that an appeal shall be limited to "issues of law covered in the panel report and legal interpretations developed by the panel". The Appellate Body has stated that findings of fact, as distinct from legal interpretations or legal conclusions by a panel, are in principle not subject to review by the Appellate Body. Whether a certain event occurred in time and

⁴¹ Panel Report, para. 7.328. The Panel considered that Canada was not required to prove certainty of future application; rather, to the Panel, Canada needed to prove likelihood of continued application. (Panel Report, para. 7.329 (quoting Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132))

⁴² Panel Report, para. 7.328.

⁴³ Panel Report, para. 7.328 (quoting USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China (15 December 2014) (Solar Cells from China 2014, I&D Memo) (Panel Exhibit CAN-121), p. 88; USDOC, Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from China (7 July 2015) (Solar Cells from China 2015, I&D Memo) (Panel Exhibit USA-8), p. 58). The Panel also stated that similar language was used in the "other determinations with either specific reference to the word 'practice' or to precedents" where the alleged OFA-AFA measure was applied. (Panel Report, para. 7.328) While the Panel acknowledged the parties' disagreement as to whether the alleged OFA-AFA measure constituted a "practice" under United States law, the Panel considered it was not determinative as to the likelihood of continued application of the alleged OFA-AFA measure. Thus, the Panel did not express a view on the characterization of the alleged measure under United States law. (Panel Report, para. 7.329 and fn 613 thereto)

⁴⁴ Panel Report, para. 7.328 (quoting Stainless Pressure Pipe from India 2016, Final Calculation Memo (Panel Exhibit CAN-148), fn 3). The Panel also found that Canada had not established that the Trade Preferences Extension Act evidenced the likelihood of continued application of the alleged OFA-AFA measure. (Panel Report, paras. 7.330-7.331)

⁴⁵ Panel Report, para. 7.332.

⁴⁶ Canada's appellee's submission, paras. 34-41.

⁴⁷ Canada's appellee's submission, paras. 34 and 39.

⁴⁸ Canada's appellee's submission, paras. 38-40. Canada relies on Appellate Body Report, *US – Zeroing (Japan)* as confirming that the existence of a measure is a factual determination. (Ibid., para. 41 (referring to Appellate Body Report, *US – Zeroing (Japan)*, paras. 82 and 88)) Canada considers that the United States' arguments do not concern legal interpretation, evidenced by the fact that the United States does not cite treaty provisions in its arguments. (Ibid., para. 40)

⁴⁹ Canada's appellee's submission, paras. 38-39.

⁵⁰ United States' appellant's submission, paras. 6-32; opening statement at the oral hearing, para. 16; response to questioning at the oral hearing.

space is typically a question of fact.⁵¹ By contrast, the consistency or inconsistency of a fact or set of facts with the requirements of a given treaty provision, or the application of rules to facts, is a legal characterization, subject to appellate review.⁵²

5.13. The Panel's analysis had three dimensions: (i) identifying the legal standard for "ongoing conduct" measures; (ii) examining relevant evidence and making factual findings; and (iii) applying the legal standard to the facts before the Panel.

5.14. On appeal, the United States argues that the Panel erred in finding that a "measure" existed as one that could be challenged in WTO dispute settlement under the DSU.⁵³ We consider that the correct understanding of the legal standard for establishing the existence of an "ongoing conduct" measure and the application of that standard to the facts on the panel record are legal issues, and thus fall within the scope of appellate review. We note that the United States neither contests the evidence on the Panel record, nor the Panel's factual assessment of that evidence. Specifically, the United States does not identify any factual findings that it challenges on appeal. Rather, we understand the United States' claim and arguments on appeal as directed to the legal standard for an "ongoing conduct" measure, and the application of that standard to the facts of this case.⁵⁴ Therefore, in our view, the United States' claim of error on appeal concerns issues of law covered in the Panel Report and legal interpretations developed by the Panel. On that basis, we consider that the United States' claim of error at issue falls within the scope of appellate review under Article 17.6 of the DSU.⁵⁵

5.1.4 Whether the Panel erred by finding that the alleged OFA-AFA measure amounted to a "measure" that could be challenged under the DSU as "ongoing conduct"

5.15. The United States appeals the Panel's finding that the alleged OFA-AFA measure is a measure that could be challenged under the DSU as "ongoing conduct".⁵⁶ The United States does not challenge the attribution of the alleged measure. Rather, the United States' arguments concern the precise content, repeated application, and likelihood of continued application of that alleged measure.⁵⁷

5.16. Canada responds that the Panel correctly found that "ongoing conduct" measures are subject to WTO dispute settlement, and applied the correct legal standard.⁵⁸ Having framed its challenge as one of ongoing conduct, Canada considers it was required to show attribution, precise content, repeated application, and likelihood of continued application of the alleged measure.⁵⁹ To Canada, the Panel correctly found that Canada had established these elements.⁶⁰

⁵¹ Appellate Body Report, *EC – Hormones*, para. 132. Whether a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is a legal question which, if properly raised on appeal, would fall within the scope of appellate review. (Ibid.)

⁵² Appellate Body Reports, *EC – Hormones*, para. 132.

⁵³ United States' appellant's submission, paras. 6-15.

⁵⁴ Specifically, the United States argues on appeal that the variations in the examples relied on by the Panel as evidence precluded the Panel from identifying the precise content of the alleged OFA-AFA measure, any instance of non-application is sufficient to preclude a finding of repeated application, the Panel erred in characterizing certain examples as repeated applications, and likelihood of continued application requires an adopted decision regarding future conduct. (United States' appellant's submission, paras. 20-31)

⁵⁵ We note that the United States has not made any claim of error under Article 11 of the DSU. Our analysis is limited to the Panel's understanding of the legal standard for "ongoing conduct" measures and the application of that standard to the facts in this appeal as found by the Panel.

⁵⁶ United States' appellant's submission, paras. 1, 3, and 6-32.

⁵⁷ United States' appellant's submission, paras. 20-31.

⁵⁸ Canada's appellee's submission, paras. 17-20 and 26 (referring to Panel Report, paras. 7.302-7.304; Appellate Body Reports, *Argentina – Import Measures*, paras. 5.108 and 5.110; *US – Continued Zeroing*, para. 191).

⁵⁹ Canada's appellee's submission, para. 30. Canada states it was not limited to submitting the same type of evidence as the European Communities in *US – Continued Zeroing*. (Ibid. (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.110))

⁶⁰ Canada's appellee's submission, paras. 33, 44-48, and 50-60.

5.17. We recall that Articles 3.3, 4.4, and 6.2 of the DSU refer to "measures" challengeable in WTO dispute settlement.⁶¹ The Appellate Body has explained that, in principle, any act or omission attributable to a WTO Member can be a measure of that Member for the purposes of dispute settlement proceedings.⁶² Accordingly, a broad range of measures can be challenged in WTO dispute settlement.⁶³ For every measure, a complainant must establish that the measure is attributable to the respondent, as well as the precise content of the challenged measure. A complainant may be required to demonstrate other elements⁶⁴, depending on the particular characteristics or nature of the measure being challenged.⁶⁵ In order to prove the existence of an "ongoing conduct" measure, a complainant must clearly establish that the alleged measure is attributable to the responding Member, its precise content, its repeated application, and that it is likely to continue to be applied in the future.⁶⁶ We examine below each element challenged on appeal by the United States.

5.1.4.1 Precise content of the alleged OFA-AFA measure

5.18. In relation to the precise content of the alleged OFA-AFA measure, the United States points to variations in the language in each of the examples examined by the Panel. To the United States, this reflects different fact patterns and dissimilar results.⁶⁷ The United States also highlights that the determinations concern different segments of CVD proceedings.⁶⁸ The United States argues that including selective excerpts from differing proceedings does not identify with precision the actions that the USDOC may take in future cases. Rather, according to the United States, it reveals only the application of "facts available" based on the particular facts of certain cases.⁶⁹

5.19. Canada responds that the Panel addressed the differences identified by the United States, and correctly concluded that the substance of the questions and the USDOC's conduct was the same in the different examples examined by the Panel.⁷⁰ Further, Canada recalls that the United States'

⁶¹ Article 3.3 of the DSU refers to benefits accruing to a Member that are being "impaired by measures taken by another Member". Further, Article 6.2 of the DSU requires Members to "identify the specific measures at issue" in a panel request. This is one of two requirements under Article 6.2, which together comprise the "matter referred to the DSB". This matter then forms the basis for a panel's terms of reference under Article 7.1 of the DSU. (Appellate Body Report, *US – Carbon Steel*, para. 125 (referring to Appellate Body Report, *Guatemala – Cement I*, paras. 69-76))

⁶² Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.122; *US – Corrosion-Resistant Steel Sunset Review*, para. 81; *Argentina – Import Measures*, para. 5.100.

⁶³ See Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.122; *Guatemala – Cement I*, fn 47 to para. 69; *EC and certain member States – Large Civil Aircraft*, para. 794; *Argentina – Import Measures*, paras. 5.106 and 5.109.

⁶⁴ We recall that the distinction between "as such" and "as applied" challenges neither governs the definition of a measure for purposes of WTO dispute settlement, nor defines exhaustively the types of measures susceptible to challenge. Rather, this distinction serves as an analytical tool to facilitate the understanding of the nature of a measure at issue. Measures need not fit squarely within one of these two categories in order to be susceptible to challenge in WTO dispute settlement. (Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, paras. 5.124-5.125; *US – Continued Zeroing*, para. 179; *Argentina – Import Measures*, para. 5.102) See also European Union's third participant's submission, para. 16 (quoting Appellate Body Reports, *Argentina – Import Measures*, paras. 5.107-5.108; China's third participant's submission, para. 8).

⁶⁵ Appellate Body Reports, *Argentina – Import Measures*, paras. 5.104 and 5.108. The Appellate Body has stated that the "specific measure at issue, whether it is written or unwritten, and how it is described, characterized, and challenged by a complainant, will inform the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged". (Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.123 (referring to Appellate Body Reports, *Argentina – Import Measures*, paras. 5.108-5.110)) See also European Union's third participant's submission, para. 17 (referring to Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, paras. 5.122-5.123); Japan's third participant's submission, para. 4 (referring to Appellate Body Reports, *Argentina – Import Measures*, paras. 5.109-5.110).

⁶⁶ Appellate Body Reports, *Argentina – Import Measures*, paras. 5.104-5.105 and 5.107-5.108.

⁶⁷ United States' appellant's submission, para. 21-22.

⁶⁸ United States' appellant's submission, para. 22.

⁶⁹ United States' appellant's submission, para. 22. The United States specifically refers to the CVD proceedings listed in tables 1 and 2 of the Panel Report. (See Panel Report, paras. 7.309 and 7.313)

⁷⁰ Canada's appellee's submission, para. 45 (referring to Panel Report, para. 7.316). See also Canada's appellee's submission, paras. 32-33.

descriptions of its own practice were found by the Panel to be consistent with the precise content of the alleged OFA-AFA measure.⁷¹

5.20. The Panel compiled tables 1 and 2, which quote from certain USDOC CVD proceedings from 2012 onwards that were submitted by Canada as evidence of the precise content of the alleged OFA-AFA measure.⁷² The Panel concluded that Canada had provided sufficient evidence to establish the precise content of the alleged measure. The Panel considered that variations in language in Canada's examples did not detract from the fact that the substance of the questions and the USDOC's subsequent reactions were the same in each example.⁷³ To the Panel, the alleged OFA-AFA measure consists in the USDOC asking the OFA question and, where the USDOC discovers information during verification that it deems should have been provided in response to that question, applying AFA to determine that the discovered information amounts to countervailable subsidies.⁷⁴

5.21. We note that table 1 of the Panel Report indicates variations in language with respect to respondent countries, calendar dates, and period of review or period of investigation.⁷⁵ We agree with the Panel that these variations do not detract from the fact that the substance of the OFA question remained the same.⁷⁶ Each formulation of the OFA question asks whether a respondent country provided the respondent company with "any other forms of assistance", "directly or indirectly", and to "describe such assistance in detail, including the amounts, date of receipt, purpose and terms". This supports the Panel's conclusion that, despite minor variations in wording, the object and substance of the OFA question remained the same. In addition, we note that, as described in the Panel Report, the USDOC itself refers to asking the OFA question as a matter of "standard procedure".⁷⁷

5.22. In table 2 of the Panel Report, the Panel compiled excerpts describing the USDOC's application of "facts available" when information about unreported assistance was discovered during verification.⁷⁸ The Panel found that the substance of the USDOC's reactions remained the same, and comprised applying AFA to find countervailable subsidies when the USDOC discovers information during verification that it deems should have been reported in response to the OFA question.⁷⁹ The United States challenges the Panel's finding because the excerpts reviewed by the Panel concern

⁷¹ Canada's appellee's submission, para. 50 (referring to Panel Report, para. 7.317, in turn referring to USDOC NAFTA Brief (Panel Exhibit CAN-76), p. 149).

⁷² Panel Report, para. 7.309, table 1; and para. 7.313, table 2.

⁷³ Panel Report, para. 7.316.

⁷⁴ Panel Report, para. 7.316. The Panel noted that this description of the alleged OFA-AFA measure appears to be in line with the USDOC's statements in a NAFTA Chapter 19 proceeding. (*Ibid.*, para. 7.317 (quoting USDOC NAFTA Brief (Panel Exhibit CAN-76), pp. 147-149))

⁷⁵ In table 1 of the Panel Report, the Panel reproduced the OFA question from questionnaires in Solar Cells from China 2012, Shrimp from China 2013, Solar Cells from China 2014, Solar Cells from China 2015, Supercalendered Paper from Canada 2015, PET Resin from China 2016, and Stainless Pressure Pipe from India 2016. (Panel Report, para. 7.309)

⁷⁶ Panel Report, para. 7.316.

⁷⁷ Panel Report, para. 7.311 (quoting Supercalendered Paper from Canada 2015, I&D Memo (Panel Exhibit CAN-37), p. 12).

⁷⁸ In particular, the Panel considered the following information. For Solar Cells from China 2012, the USDOC discovered, during verification, an unreported entry labelled "bonus for employees from government" and determined as AFA that it was a countervailable subsidy. For Solar Cells from China 2014, the USDOC discovered, during verification, unreported grants and a tax deduction for "wages paid for placement of disabled persons", and determined as AFA that they amounted to countervailable subsidies. The USDOC explained that, while it would accept information on names, dates, and amounts for the unreported grants, any additional information on the grants would be rejected as "new factual information". Similarly, for Shrimp from China 2013, Solar Cells from China 2015, and Supercalendered Paper from Canada 2015, the USDOC discovered certain unreported grants or information during verification, and determined as AFA that they were countervailable subsidies. For PET Resin from China 2016, the Panel referred to certain previously unreported grants presented by the respondent companies on the first day of verification as "minor corrections". The USDOC rejected that some of these grants were minor corrections, because whether a programme was used or not by a company is not "minor", and on that basis determined as AFA that those grants were countervailable subsidies. For Stainless Pressure Pipe from India 2016, the USDOC discovered, during verification, an unreported electricity duty rebate, and determined as AFA that it was a countervailable subsidy. While the USDOC considered new information discovered at verification in assessing benefit, the USDOC noted that this was an "inadvertent error", inconsistent with its practice of refusing to consider new information at verification. (Panel Report, para. 7.313, table 2)

⁷⁹ Panel Report, para. 7.316.

different fact patterns, dissimilar results, and different segments of CVD proceedings, and therefore do not identify with precision the actions the USDOC may take in a future determination. Rather, according to the United States, these excerpts merely reveal that, in some determinations, the USDOC applied "facts available" based on the particular facts of those cases.⁸⁰

5.23. In our view, the United States has not identified differences in these determinations that would undermine the Panel's analysis and conclusions in relation to the precise content of the alleged OFA-AFA measure. Although the various determinations concern different facts, we agree with the Panel that such differences, including the variations identified by the United States, do not detract from the fact that the substance of the USDOC's conduct is the same in relation to the elements of the alleged measure challenged by Canada.⁸¹ Specifically, we agree with the Panel that each element of the alleged OFA-AFA measure is replicated in the determinations.⁸² Moreover, we agree with Canada that the fact that these examples concern different segments of CVD proceedings is not material, because the conduct at issue may arise at any segment where the USDOC conducts verification. In this regard, we note that these determinations all concern the identification of information at verification.⁸³

5.24. Overall, we consider that the Panel was correct to focus on the substance of the USDOC's conduct for each element of the alleged OFA-AFA measure, as evidenced by the USDOC questionnaires and determinations before the Panel. Thus, we see no error in the Panel's finding that Canada had established the precise content of the alleged OFA-AFA measure as the USDOC asking the OFA question and, where the USDOC discovers information during verification that it deems should have been provided in response to the OFA question, applying AFA to determine that such information amounts to countervailable subsidies.⁸⁴

5.1.4.2 Repeated application of the alleged OFA-AFA measure

5.25. In relation to the repeated application of the alleged OFA-AFA measure, the United States contends that there are multiple examples on the Panel record showing that the USDOC did not repeatedly apply the alleged measure.⁸⁵ In particular, the United States points to four instances in the CVD proceedings examined by the Panel where the alleged OFA-AFA measure was not applied.⁸⁶ The United States argues that "repeated application" is shown where a measure is applied in a string of determinations made sequentially in successive proceedings over an extended period of time.⁸⁷ To the United States, this was a key part of the Appellate Body's reasoning in *US – Continued Zeroing*.⁸⁸ The United States contends that the Panel never engaged with important differences between this dispute and the situation in *US – Continued Zeroing*.⁸⁹

⁸⁰ United States' appellant's submission, paras. 21-22.

⁸¹ Panel Report, para. 7.316. The Panel noted that "variations in the wording of the questions appear to mainly be due to the circumstances of any given investigation (interested parties, dates etc.)[,]" while the object of the question remains in essence the same", and that, similarly, "the substance of the USDOC's reactions remains the same." (Ibid.)

⁸² Panel Report, para. 7.316. For specific examples, see *supra* fn 78.

⁸³ Canada's appellee's submission, para. 48.

⁸⁴ Panel Report, para. 7.316. The Panel also referred to the USDOC's description of the alleged OFA-AFA measure in the USDOC NAFTA Brief referred to in footnote 35 above: "[The USDOC's] finding that the complainants' failure to report these subsidies earlier in the proceeding warranted the use of adverse inferences was reasonable ... as was [the USDOC's] resulting adverse inference that each discovered subsidy provided a financial contribution, conferred a benefit, and was specific – the elements of a countervailable subsidy[.] ... [The USDOC] determined, in 2012, that the proper course of action when an unreported potential subsidy is discovered at verification is to rely on adverse inferences in making findings on that potential subsidy." (Ibid., para. 7.317 (quoting USDOC NAFTA Brief (Panel Exhibit CAN-76), pp. 147-149)) The Panel noted that this description appears to be in line with Canada's description of the precise content of the alleged OFA-AFA measure. (Ibid.)

⁸⁵ United States' appellant's submission, para. 25.

⁸⁶ United States' appellant's submission, paras. 25-30 (referring to Shrimp from China 2013, Supercalendered Paper from Canada 2015, PET Resin from China 2016, and Stainless Pressure Pipe from India 2016).

⁸⁷ United States' appellant's submission, para. 24.

⁸⁸ United States' appellant's submission, para. 19 and 24 (referring to Appellate Body Report, *US – Continued Zeroing*, paras. 181, 191, and 194).

⁸⁹ United States' appellant's submission, paras. 19, 23-25, and 29-30.

5.26. Canada responds that imposing the requirement suggested by the United States would be to misread the Appellate Body Report in *US – Continued Zeroing*, and conflate the specific measure challenged in that dispute with the constituent elements that have to be shown to establish the existence of an "ongoing conduct" measure.⁹⁰

5.27. In addressing the repeated application of the alleged OFA-AFA measure, the Panel compiled tables 3 and 4 of the Panel Report, which quote from the following USDOC CVD proceedings that were submitted by Canada as evidence of the repeated application of the alleged OFA-AFA measure: Shrimp from China 2013, Solar Cells from China 2014, Solar Cells from China 2015, Supercalendered Paper from Canada 2015, PET Resin from China 2016, Stainless Pressure Pipe from India 2016, Truck and Bus Tires from China 2016, and Stainless Steel Sheet and Strip from China 2017.⁹¹ The Panel found that, despite variations in language, Canada's examples showed that, since 2012, the USDOC acted substantially in the same manner in treating information discovered at verification that it considered should have been provided in response to the OFA question. To the Panel, this was sufficient evidence of the repeated application of the alleged OFA-AFA measure.⁹²

5.28. We recall that, in *US – Continued Zeroing*, the European Communities challenged the "use of the zeroing methodology in a string of connected and sequential determinations" in 18 cases, by which anti-dumping duties were being maintained.⁹³ The Appellate Body understood the "string of connected and sequential determinations" to mean successive proceedings in the 18 anti-dumping duty cases.⁹⁴ Having reversed the relevant panel findings in *US – Continued Zeroing*, the Appellate Body examined whether there were sufficient factual findings and undisputed facts on the record for it to complete the legal analysis, as requested by the European Communities. In this respect, the Appellate Body found that in only 4 of the 18 cases were there sufficient factual findings indicating the repeated use of the zeroing methodology in a string of determinations, made sequentially over an extended period of time.⁹⁵

5.29. In our view, the Appellate Body's analysis concerning the strings of anti-dumping determinations in *US – Continued Zeroing* did not qualify the legal standard of "repeated application" generally. Rather, the Appellate Body's examination related to the European Communities' characterization of the alleged "ongoing conduct" measure in that dispute. Indeed, the panel and the Appellate Body in that dispute examined the evidence submitted by the European Communities in light of the manner in which the European Communities had characterized the challenged measure.⁹⁶ Thus, we do not understand the Appellate Body to have suggested that a complainant must always show repetition in a string of connected and sequential determinations in successive proceedings pertaining to the same order to demonstrate successfully the "repeated application" of an alleged "ongoing conduct" measure.

5.30. Unlike in *US – Continued Zeroing*, Canada does not characterize the alleged OFA-AFA measure as occurring in "a string of connected and sequential determinations" or "successive proceedings". Rather, before the Panel, Canada submitted that the alleged OFA-AFA measure consists in the

⁹⁰ Canada's appellee's submission, paras. 28-30 and 56-57. See also Japan's third participant's submission, paras. 5 and 8.

⁹¹ Panel Report, paras. 7.320-7.321 (tables 3 and 4).

⁹² Panel Report, para. 7.324. The Panel referred to nine determinations, which we understand to include the eight examples in tables 3 and 4 (concerning repeated application), as well as Solar Cells from China 2012, referenced in tables 1 and 2 (concerning precise content).

⁹³ Appellate Body Report, *US – Continued Zeroing*, para. 181.

⁹⁴ Appellate Body Report, *US – Continued Zeroing*, para. 183.

⁹⁵ Appellate Body Report, *US – Continued Zeroing*, paras. 191-197.

⁹⁶ Appellate Body Report, *US – Continued Zeroing*, para. 191. Similarly, in *US – Orange Juice (Brazil)*, the panel looked for evidence of zeroing in "successive proceedings". In that dispute, Brazil had claimed that the USDOC's continued use of zeroing in "successive anti-dumping proceedings under the Orange Juice Order, including the original investigation and any subsequent administrative reviews by which duties are applied and maintained over a period of time" amounted to "ongoing conduct" that was inconsistent with certain provisions of the Anti-Dumping Agreement. (Panel Report, *US – Orange Juice (Brazil)*, paras. 7.163-7.164) That panel understood Brazil to be challenging the continued use of the zeroing methodology under the orange juice anti-dumping duty order, in the limited context of the orange juice proceedings. Having reviewed Brazil's evidence, the panel concluded that the USDOC had used zeroing in the original investigation and three administrative reviews under the orange juice anti-dumping order. In our view, the panel's approach was based on the manner in which Brazil had characterized the challenged measure in that dispute. (Panel Report, *US – Orange Juice (Brazil)*, paras. 7.184 and 7.191)

USDOC asking the OFA question and, where the USDOC discovers information during verification that it deems should have been provided in response to that question, applying AFA to determine that the discovered information amounts to countervailable subsidies.⁹⁷ As before the Panel, Canada contends on appeal that this alleged measure has been repeatedly applied since 2012 whenever the relevant circumstances arose.⁹⁸

5.31. In our view, the Panel's analysis appropriately reflects Canada's characterization of the alleged OFA-AFA measure, focusing at this stage on the repetition of the elements identified by Canada that form part of the alleged OFA-AFA measure. Thus, we consider that the Panel did not err in examining "repeated application" by reference to the elements of the alleged measure in this dispute, and not against the particular elements of the measure in *US – Continued Zeroing*.

5.32. The United States also argues that the evidence in this dispute showed that there was no repeated application of the alleged measure because there were frequent and numerous breaks.⁹⁹ The United States refers to four examples on the Panel record (Supercalendered Paper from Canada 2015, Shrimp from China 2013, PET Resin from China 2016, and Stainless Pressure Pipe from India 2016) where, according to the United States, the USDOC did not apply the alleged OFA-AFA measure.¹⁰⁰

5.33. Canada responds that the Panel correctly evaluated the evidence in finding that the alleged OFA-AFA measure had been repeatedly applied and recalls the Panel's conclusion that it could not identify a single instance where the USDOC had not applied the alleged OFA-AFA measure.¹⁰¹ Canada disagrees with the United States' characterization of certain instances as "deviations" from the alleged OFA-AFA measure. Rather, Canada submits that these determinations also demonstrate the repeated application of the alleged OFA-AFA measure whenever the relevant circumstances arise.¹⁰²

5.34. We note, as observed by Canada, that the Panel found it was unable to identify any instance where the alleged OFA-AFA measure had not been applied by the USDOC, except as an "inadvertent error".¹⁰³ The Panel considered that the United States had not provided evidence of any instance after 2012 where the USDOC did not apply the alleged measure.¹⁰⁴

5.35. In relation to Supercalendered Paper from Canada 2015, the United States argues that the USDOC did not use "facts available" for one of the accounts it had discovered during verification for Resolute.¹⁰⁵ We understand the United States to be referring to the unreported account that the

⁹⁷ Panel Report, paras. 7.308 and 7.316.

⁹⁸ Panel Report, para. 7.319; Canada's appellee's submission, para. 33; second written submission to the Panel, para. 167.

⁹⁹ United States' appellant's submission, para. 30.

¹⁰⁰ United States' appellant's submission, paras. 26-28.

¹⁰¹ Canada's appellee's submission, paras. 52-53.

¹⁰² Canada's appellee's submission, paras. 33 and 53-55 (referring to USDOC, Memorandum dated 27 August 2015 for the Verification of the Questionnaire Responses of Resolute FP Canada Inc. in the Countervailing Duty Investigation of Supercalendered Paper from Canada (Supercalendered Paper from Canada 2015, Verification Report (Resolute) (Panel Exhibit CAN-47 (BCI)), p. 8; USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from the People's Republic of China (12 August 2013) (Shrimp from China 2013, I&D Memo) (Panel Exhibit CAN-118), pp. 15-16 and 76-78; USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from the People's Republic of China (4 March 2016) (PET Resin from China 2016, I&D Memo) (Panel Exhibit CAN-125), pp. 19 and 52-53; USDOC, Verification of Zhanjiang Guolian Aquatic Products Co., Ltd., Zhanjiang Guolian Feed Co., Ltd., Zhanjiang Guolian Aquatic Fry Technology Co., Ltd., and Zhanjiang Guotong Aquatic Co., Ltd. in Countervailing Duty Investigation: Certain Warmwater Shrimp from the People's Republic of China (1 July 2013) (Panel Exhibit CAN-215), pp. 1-2; USDOC, Countervailing Duty Investigation of Polyethylene Terephthalate Resin from the People's Republic of China: Verification Report of Dragon Special Resin Co., Ltd., Xiang Lu Petrochemicals Co., Ltd., Xianglu Petrochemicals Co., Ltd., and Xiamen Xianglu Chemical Fiber Company Limited (19 January 2016) (PET Resin from China 2016, Verification Report (Dragon)) (Panel Exhibit CAN-210), p. 2)).

¹⁰³ Panel Report, para. 7.325 (referring to Stainless Pressure Pipe from India 2016, Final Calculation Memo (Panel Exhibit CAN-148), fn 3); Canada's appellee's submission, paras. 52 and 55.

¹⁰⁴ Panel Report, para. 7.326.

¹⁰⁵ United States' appellant's submission, para. 26.

USDOC discovered during verification for Resolute, which was empty for the relevant periods.¹⁰⁶ As noted by Canada, an account that is empty during the relevant periods would be unlikely to reflect "assistance" that would be reported in response to the OFA question.¹⁰⁷ Thus, we do not consider that this example undermines the Panel's conclusion that Supercalendered Paper from Canada 2015 is an instance of repeated application of the alleged OFA-AFA measure.¹⁰⁸

5.36. With respect to Shrimp from China 2013 and PET Resin from China 2016, the United States contends that the USDOC did not apply "facts available" to all previously unreported information that it had discovered during verification. The United States considers the Panel's reasoning to explain away the non-application of the alleged OFA-AFA measure by referring to the time at which the respondent companies presented information to the USDOC, namely at the outset of verification. To the United States, however, the alleged measure does not include this temporal distinction and refers only to "verification".¹⁰⁹

5.37. We note, however, that the Panel found that in both of these examples, "the USDOC went on to discover information during the verification and applied AFA because the companies did not report the programmes in response to the [OFA] question."¹¹⁰ We understand that the Panel distinguished between situations where a respondent presents information at verification concerning previously *reported* grants or programmes, and situations where a respondent presents information at verification concerning previously *unreported* grants or programmes. Thus, we do not agree with the United States that the distinction made by the Panel merely concerned timing, i.e. whether information was presented at the outset of verification or not.¹¹¹

5.38. Indeed, in Shrimp from China 2013, the respondent companies reported three grants at verification that had not been referred to in their initial or supplemental questionnaire responses.¹¹² The USDOC noted that these grants had not been previously reported, and on that basis applied AFA to determine that they were countervailable subsidies.¹¹³ Similarly, in PET Resin from China 2016, the respondent companies presented certain grants as minor corrections at verification.¹¹⁴ We understand that the USDOC accepted, as minor corrections, information concerning grants that had been previously reported to the USDOC. By contrast, the USDOC rejected, as minor corrections, grants that had not been previously reported. This was because "whether a program was used or not by a company is not 'minor' in the view of the [USDOC]".¹¹⁵ In relation to the previously unreported grants, the USDOC then applied AFA to determine that they were countervailable subsidies.¹¹⁶ Thus, we consider that the Panel correctly concluded that both Shrimp from China 2013 and PET Resin from China 2016 concerned "situations where previously unreported information is discovered by the USDOC".¹¹⁷ As the United States has not demonstrated otherwise, we see no error in the Panel's finding that these proceedings demonstrate repeated application of the alleged OFA-AFA measure.

5.39. Turning to Stainless Pressure Pipe from India 2016, the United States contends that the USDOC did not apply the alleged measure. The United States notes that the Panel emphasized that the USDOC characterized its conduct in that proceeding as an "inadvertent error". To the United States, however, the reason why the USDOC did not apply the alleged measure is "irrelevant".¹¹⁸

¹⁰⁶ Supercalendered Paper from Canada 2015, Verification Report (Resolute) (Panel Exhibit CAN-47 (BCI)), p. 8.

¹⁰⁷ Canada's appellee's submission, para. 53.

¹⁰⁸ Panel Report, para. 7.320, table 3.

¹⁰⁹ United States' appellant's submission, para. 27.

¹¹⁰ Panel Report, para. 7.327.

¹¹¹ United States' appellant's submission, para. 27.

¹¹² At the outset of verification, the respondent companies also presented five corrections that did not concern the unreported grants. (Shrimp from China 2013, I&D Memo (Panel Exhibit CAN-118), p. 76)

¹¹³ Shrimp from China 2013, I&D Memo (Panel Exhibit CAN-118), pp. 76-77.

¹¹⁴ PET Resin from China 2016, I&D Memo (Panel Exhibit CAN-125), p. 19.

¹¹⁵ PET Resin from China 2016, I&D Memo (Panel Exhibit CAN-125), p. 19; PET Resin from China 2016, Verification Report (Dragon) (Panel Exhibit CAN-210).

¹¹⁶ Panel Report, para. 7.320, table 3 (referring to PET Resin from China 2016, I&D Memo (Panel Exhibit CAN-125), p. 53).

¹¹⁷ Panel Report, para. 7.327.

¹¹⁸ United States' appellant's submission, para. 28.

5.40. We note, however, that the Panel Report refers to excerpts indicating that the alleged OFA-AFA measure was eventually applied in Stainless Pressure Pipe from India 2016 in relation to information discovered at verification.¹¹⁹ In addition, contrary to the United States' argument, we consider that the reason for an apparent break in the application of the alleged OFA-AFA measure is relevant to the analysis at issue. We agree with the Panel that the USDOC's characterization of the non-application as an "inadvertent error" suggests that, had the USDOC not erred, it would have applied the alleged OFA-AFA measure, as it ultimately did in this example.¹²⁰ Thus, we consider that the Panel was correct to conclude that Stainless Pressure Pipe from India 2016 does not represent a break in the application of the alleged OFA-AFA measure; rather, it provides evidentiary support for the repeated application of the alleged measure.

5.41. We therefore consider that the Panel was correct to find that the alleged OFA-AFA measure was applied in each of the examples relied on by Canada, and that no instances of non-application were identified by the United States. We agree with the Panel that these examples establish that the alleged OFA-AFA measure has been repeatedly applied.

5.1.4.3 Likelihood of continued application of the alleged OFA-AFA measure

5.42. The United States also claims that the Panel erred in finding that Canada had established that the alleged OFA-AFA measure was likely to continue to be applied in the future.¹²¹ The United States contends that, unless the complainant establishes that "a Member has adopted a decision to follow [particular] conduct in the future, vague statements of what a Member 'does' do not establish the existence of a measure".¹²² The United States refers to its arguments on repeated application and submits that there is "no discernible basis" in the Panel's findings to support the conclusion that the alleged ongoing conduct is likely to continue.¹²³ Finally, the United States considers that the Panel's reference to "practice" does not demonstrate likelihood of continued application and that the Panel's findings were not premised on any such conclusion.¹²⁴

5.43. Canada responds that the legal standard for likelihood of continued application is not one of "certainty".¹²⁵ Canada recalls that the USDOC applied the alleged OFA-AFA measure whenever it was confronted with relevant factual circumstances. Canada considers that the Panel correctly concluded that the alleged OFA-AFA measure is likely to continue to be applied, given its repeated application, the consistent manner in which the USDOC refers to the alleged measure as a "practice", the frequent reference to previous applications of the alleged measure in USDOC determinations, and the USDOC's description of a departure from the alleged measure as an "error".¹²⁶

5.44. We disagree with the United States' suggestion that a complainant is required to establish that a Member has "adopted" a decision to follow particular conduct in the future.¹²⁷ While such an adopted decision may suffice, in certain cases, to show that particular conduct is likely to continue in the future, a complaining Member need not rely on a formal decision by the responding Member to demonstrate the existence of "ongoing conduct". Rather, we consider that likelihood of continued application may be demonstrated through a number of factors. In this respect, we agree with the Panel that Canada was not required to prove "certainty" of future application of the alleged OFA-AFA measure.¹²⁸

¹¹⁹ Panel Report, para. 7.313, table 2 (referring to USDOC, Issues and Decision Memorandum for the Final Affirmative Determination in the Countervailing Duty Investigation of Welded Stainless Pressure Pipe from India (22 September 2016) (Panel Exhibit CAN-152), pp. 6, 8, and 28-29 (fns omitted)).

¹²⁰ Panel Report, para. 7.328.

¹²¹ United States' appellant's submission, paras. 31-32.

¹²² United States' appellant's submission, para. 10.

¹²³ United States' appellant's submission, para. 31.

¹²⁴ United States' appellant's submission, para. 31 (referring to Panel Report, para. 7.329).

¹²⁵ Canada's appellee's submission, paras. 11 and 58 (referring to Panel Report, para. 7.329; Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132; Panel Report, *US – Orange Juice (Brazil)*, para. 7.192).

¹²⁶ Canada's appellee's submission, para. 60 (referring to Panel Report, para. 7.328).

¹²⁷ United States' appellant's submission, para. 10.

¹²⁸ Panel Report, para. 7.329. We note that the Appellate Body has taken a similar view in relation to the prospective nature of rules or norms of general and prospective application. To the Appellate Body, a complainant would not be able to show "certainty" of future application, because any measure may be modified

5.45. We recall that the Panel found that the alleged OFA-AFA measure amounted to conduct that was likely to continue on the basis of the following factors present in the USDOC's post-2012 determinations: (i) the consistent manner in which the USDOC referred to the alleged OFA-AFA measure or previous applications of the alleged measure¹²⁹; (ii) the USDOC's own reference to the alleged measure as its "practice"¹³⁰; and (iii) the USDOC's characterization of a departure from the alleged measure as an "inadvertent error".¹³¹

5.46. In examining these factors, the Panel relied on evidence summarized in tables 3 and 4 of the Panel Report concerning the USDOC's post-2012 determinations. In relation to Shrimp from China 2013, the excerpt relied on by the Panel notes that, while the USDOC's practice concerning programmes discovered at verification has varied in past cases, the facts of that case merited the application of AFA.¹³² The excerpts relied on by the Panel in Solar Cells from China 2014, Solar Cells from China 2015, and Supercalendered Paper from Canada 2015 repeat the same statement.¹³³ Moreover, Solar Cells from China 2014, Supercalendered Paper from Canada 2015, and PET Resin from China 2016 each refer to Shrimp from China 2013 when applying AFA to unreported information discovered during verification.¹³⁴ Further, the excerpts for Solar Cells from China 2014, Solar Cells from China 2015, and Supercalendered Paper from Canada 2015 preface the application of AFA to unreported information discovered at verification with the statement: "consistent with [the USDOC's] practice".¹³⁵ In relation to Stainless Pressure Pipe from India 2016, the Panel referred to the USDOC's "practice of not collecting new information at verification" and the view that it was an "inadvertent error" to do otherwise.¹³⁶ In relation to Truck and Bus Tires from China 2016, the excerpt relied on by the Panel also prefaces the application of AFA to unreported information discovered during verification with the statement: "consistent with prior determinations", referring to PET Resin from China 2016 and Supercalendered Paper from Canada 2015.¹³⁷ We also note that, in that proceeding, the USDOC stated that, "[w]hile the [USDOC] acknowledges that its practice has evolved over time, since 2012, it has determined that the proper course of action when an unreported potential subsidy is discovered or 'presented' at verification is to rely on adverse inferences in making a finding on that potential subsidy."¹³⁸

5.47. Overall, the Panel found that Canada had shown that the USDOC applied the alleged OFA-AFA measure in nine determinations since 2012, and that the United States had not provided any evidence of non-application of the alleged measure subsequent to 2012.¹³⁹ We see no error in

or withdrawn in the future. The mere possibility that "a rule or norm may be modified or withdrawn, however, does not remove the prospective nature of that measure". (Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132) See also European Union's third participant's submission, para. 20; Japan's third participant's submission, para. 6; China's third participant's submission, paras. 7 and 10.

¹²⁹ Panel Report, para. 7.328.

¹³⁰ The Panel also acknowledged the parties' disagreement as to whether the alleged OFA-AFA measure constituted a "practice" under United States law, but considered it was not determinative as to the likelihood of the continuation of the alleged OFA-AFA measure, and did not express a view. (Panel Report, para. 7.329 and fn 613 thereto)

¹³¹ Panel Report, para. 7.328 (quoting Stainless Pressure Pipe from India 2016, Final Calculation Memo (Panel Exhibit CAN-148), fn 3).

¹³² Panel Report, para. 7.320, table 3 (quoting Shrimp from China 2013, I&D Memo (Panel Exhibit CAN-118), p. 78).

¹³³ Panel Report, para. 7.320, table 3 (quoting Solar Cells from China 2014, I&D Memo (Panel Exhibit CAN-121), p. 88; Solar Cells from China 2015, I&D Memo (Panel Exhibit USA-8), p. 58; Supercalendered Paper from Canada 2015, I&D Memo (Panel Exhibit CAN-37), p. 155).

¹³⁴ Panel Report, para. 7.320, table 3 (quoting Solar Cells from China 2014, I&D Memo (Panel Exhibit CAN-121), p. 88; Supercalendered Paper from Canada 2015, I&D Memo (Panel Exhibit CAN-37), p. 155; PET Resin from China 2016, I&D Memo (Panel Exhibit CAN-125), p. 53).

¹³⁵ Panel Report, para. 7.320, table 3; Solar Cells from China 2014, I&D Memo (Panel Exhibit CAN-121), p. 88; Supercalendered Paper from Canada 2015, I&D Memo (Panel Exhibit CAN-37), p. 155; Solar Cells from China 2015, I&D Memo (Panel Exhibit USA-8), p. 59.

¹³⁶ Panel Report, para. 7.320, table 3; Stainless Pressure Pipe from India 2016, Final Calculation Memo (Panel Exhibit CAN-148).

¹³⁷ Panel Report, para. 7.321, table 4; USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Truck and Bus Tires from the People's Republic of China; and Final Affirmative Determination of Critical Circumstances, in Part (19 January 2016) (Truck and Bus Tires from China 2016, I&D Memo) (Panel Exhibit CAN-163), pp. 15-16.

¹³⁸ Truck and Bus Tires from China 2016, I&D Memo (Panel Exhibit CAN-163), p. 67 (referring to Solar Cells from China 2012, Shrimp from China 2013).

¹³⁹ Panel Report, paras. 7.324-7.326.

the Panel's conclusion that the evidence adduced by Canada sufficiently establishes that the challenged conduct is likely to continue. In particular, we agree with the Panel that the consistent manner in which the USDOC refers to the alleged OFA-AFA measure, the frequent reference to previous applications of the alleged measure in USDOC determinations, the fact that the USDOC refers to the alleged measure as its "practice"¹⁴⁰, and the USDOC's characterization of a departure from the alleged measure as an "inadvertent error" all support the conclusion that the alleged measure is likely to continue to apply.¹⁴¹

5.1.5 Conclusion

5.48. For the reasons stated above, we dismiss Canada's assertion that the United States' claim on appeal falls outside the scope of appellate review. Further, we find that the Panel did not err in concluding that Canada had established the precise content, repeated application, and likelihood of continued application of the alleged OFA-AFA measure.

5.49. Consequently, we uphold the Panel's finding, in paragraphs 7.332 and 8.4.a of the Panel Report, that Canada established the existence of the OFA-AFA measure as "ongoing conduct".¹⁴²

5.2 Article 12.7 of the SCM Agreement

5.2.1 Introduction

5.50. The United States appeals the Panel's finding that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement. In particular, the United States claims that the Panel erred under Article 12.7 of the DSU by failing to provide a "basic rationale" for its finding that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement.¹⁴³ The United States also claims that the Panel erred under Article 12.7 of the SCM Agreement by finding that the OFA-AFA measure is inconsistent with that provision.¹⁴⁴ The United States requests that we reverse the Panel's finding that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement.¹⁴⁵ Canada responds that the Panel did not err in finding that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement.¹⁴⁶ Canada requests that we dismiss the United States' claims of error.¹⁴⁷

5.51. We begin by summarizing the Panel's findings under Article 12.7 of the SCM Agreement. We then address the United States' claims of error on appeal.

5.2.2 The Panel's findings

5.52. Before the Panel, Canada claimed that the United States acted inconsistently with Article 12.7 of the SCM Agreement by improperly applying AFA against the Canadian company Resolute in relation to assistance discovered at verification that had not been disclosed in response to the OFA question.¹⁴⁸ Separately, Canada also claimed that the OFA-AFA measure, as an "ongoing conduct" measure, is inconsistent with Article 12.7 of the SCM Agreement because it eliminates the

¹⁴⁰ We understand the Panel's reference to "practice" to be a general reference to the usual or routine procedure applied by the USDOC when certain circumstances arise. The Panel did not make any findings in relation to a "practice" within the meaning of United States law. We agree with the Panel's statement that whether the alleged OFA-AFA measure "constitutes a legally-binding practice or policy under [United States] law is not determinative as to the likelihood of the continuation of the [alleged] measure" in examining whether an "ongoing conduct" measure exists for purposes of WTO dispute settlement. (Panel Report, para. 7.329)

¹⁴¹ Panel Report, para. 7.328.

¹⁴² We note that, in making this finding, the Panel did not find it necessary to address Canada's assertion that the measure amounted to a rule or norm of general and prospective application. (Panel Report, para. 7.332 (referring to Canada's opening statement at the first Panel meeting, para. 210))

¹⁴³ United States' appellant's submission, paras. 4 and 39-48.

¹⁴⁴ United States' appellant's submission, paras. 4 and 49-79.

¹⁴⁵ United States' appellant's submission, para. 80.

¹⁴⁶ Canada's appellee's submission, paras. 61-127.

¹⁴⁷ Canada's appellee's submission, para. 128.

¹⁴⁸ Panel Report, para. 7.155.

requirement for evidence and effectively replaces it with the assumptions of the USDOC during verification.¹⁴⁹

5.53. The Panel first examined the USDOC's use of "facts available" against Resolute in section 7.4.1.4 of the Panel Report. The Panel began by noting that the purpose of Article 12.7 of the SCM Agreement is to ensure that a lack of information does not hinder the ability of an investigating authority to conduct its investigation. This provision allows authorities to fill in the gaps by using "facts available" they deem relevant in order to make a determination.¹⁵⁰ The Panel later explained that this allowance is not boundless. An authority must use those "facts available" that reasonably replace the information that an interested party failed to provide, with a view to arriving at an accurate determination.¹⁵¹ The "facts available" must be facts that are in the possession of the investigating authority and on its written record. To the Panel, an investigating authority cannot resort to non-factual assumptions or speculations and must take into account all substantiated facts on the record.¹⁵²

5.54. The Panel considered that the disagreement between the parties concerned "refus[ing] access to, or otherwise ... not provid[ing], necessary information within a reasonable period", rather than "significantly impeded[ing] the investigation".¹⁵³ To the Panel, the term "necessary" in Article 12.7 of the SCM Agreement is "concerned with overcoming the absence of information required to complete a determination".¹⁵⁴ The Panel distinguished between "necessary" information and information that is merely "requested" or "required".¹⁵⁵ To the Panel, only a request for "necessary" information may justify use of "facts available".¹⁵⁶

5.55. In relation to Resolute, the Panel noted that Resolute and Canada had not indicated any other assistance in response to the OFA question.¹⁵⁷ The Panel also noted that, at the verification stage of the underlying investigation, the USDOC had discovered certain forms of assistance that had not been disclosed in response to the OFA question.¹⁵⁸ The USDOC consequently determined that the use of "facts available" was warranted with respect to Resolute and concluded that the discovered forms of assistance provided a financial contribution and were specific, and that a benefit had been conferred.¹⁵⁹

5.56. The Panel stated that it is logical to postulate that information pertaining to the existence of as-of-yet unidentified subsidy programmes benefiting the product under investigation is necessary information under Article 12.7 of the SCM Agreement.¹⁶⁰ In order to justify recourse to "facts available" on the grounds that such necessary information was refused access to or was otherwise not provided, however, the USDOC first needed to establish that the information about the discovered assistance was information necessary to complete a determination on subsidization of

¹⁴⁹ Panel Report, paras. 7.294 and 7.296; Canada's first written submission to the Panel, para. 426.

¹⁵⁰ Panel Report, para. 7.172.

¹⁵¹ Panel Report, para. 7.184 (referring to Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.416; *Mexico – Anti-Dumping Measures on Rice*, para. 294; *US – Countervailing Measures (China)*, para. 4.178).

¹⁵² Panel Report, para. 7.184 (referring to Appellate Body Reports, *US – Carbon Steel (India)*, paras. 4.417 and 4.419; *Mexico – Anti-Dumping Measures on Rice*, para. 294; *US – Countervailing Measures (China)*, para. 4.178; *US – Anti-Dumping Methodologies (China)*, para. 5.172).

¹⁵³ Panel Report, para. 7.173.

¹⁵⁴ Panel Report, para. 7.174 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 (emphasis added by the Panel omitted)). The Panel noted a dictionary definition of the term "necessary" as something "[t]hat cannot be dispensed with or done without; requisite, essential, needful". (Panel Report, para. 7.174) The Panel also stated that Article 12.7 "permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination". (Panel Report, fn 297 to para. 7.174 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293))

¹⁵⁵ Panel Report, para. 7.174 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.155).

¹⁵⁶ Panel Report, para. 7.174.

¹⁵⁷ Panel Report, paras. 7.157-7.160.

¹⁵⁸ Panel Report, paras. 7.162-7.163. While the USDOC examined the accounts relating to the discovered assistance, it refused to accept onto the record any of the information contained in the accounts concerning the nature or value of the assistance. (Panel Report, para. 7.163)

¹⁵⁹ Panel Report, para. 7.165.

¹⁶⁰ Panel Report, para. 7.175. Given that "[t]he parties to these proceedings are in agreement that new programmes may be added to an investigation when they are discovered during that investigation", the Panel stated that this question is not addressed in the Panel Report. (Ibid.)

the product under consideration.¹⁶¹ The Panel considered that the USDOC failed to do so. Instead, having found certain entries during verification, the USDOC inferred that these entries pertained to countervailable subsidization of supercalendered paper, "without taking any further steps to confirm that this was in fact the case and providing a reasoned and adequate explanation to that effect".¹⁶²

5.57. The Panel acknowledged arguments by the United States in relation to the practical difficulties arising from the timing of verifications and the closing of the record of the USDOC's investigation. Nonetheless, the Panel held that it is the right of respondents that an investigating authority may only resort to "facts available" after properly determining that information necessary to complete a determination on additional subsidization of the product under investigation had been withheld.¹⁶³ The fact that it would have been inconvenient or impractical for the USDOC to take further steps to confirm the basic nature of the discovered assistance cannot outweigh the due process rights enshrined in the WTO Agreements.¹⁶⁴ The Panel explained that this is all the more applicable where an investigating authority elects to add subsidy programmes to an ongoing investigation.¹⁶⁵

5.58. While recognizing that Canada does not contest the USDOC's right to ask the OFA question¹⁶⁶, the Panel noted that the OFA question is very broad. To the Panel, while the OFA question might pertain to necessary information regarding additional subsidization of the product under investigation, it may also pertain to a much broader range of "assistance".¹⁶⁷ The Panel considered that, in these circumstances, the investigating authority may not infer that a respondent's failure to respond fully to such a question resulted in a failure to provide information necessary to establish the existence of additional subsidization of the product under investigation. To the Panel, more is required of the investigating authority.¹⁶⁸

5.59. The Panel then examined the USDOC's decision to disregard the actual amounts discovered during verification when determining benefit. Instead of using the actual amounts from Resolute's company ledger, the USDOC relied on the rates calculated in an unrelated investigation.¹⁶⁹ The Panel explained that reliance on such rates "over information found by the verification team in a respondent's own company ledger, without analysing that information, was not justified".¹⁷⁰ To the Panel, this was especially the case since the USDOC had already relied on information in that ledger to infer the existence of a countervailable subsidy. The Panel concluded that the USDOC's use of facts other than actual amounts present in the company ledger discovered at verification, without reasoned and adequate explanation, was inconsistent with Article 12.7 of the SCM Agreement.¹⁷¹

5.60. The Panel next considered Canada's claim that the OFA-AFA measure, as an "ongoing conduct" measure, is inconsistent with Article 12.7 of the SCM Agreement. Addressing this claim of inconsistency in paragraph 7.333, the Panel noted that, while a broad question such as the OFA question might pertain to necessary information regarding additional subsidization of the product under investigation, it may also pertain to a much broader range of "assistance".¹⁷² As the Panel stated, in these circumstances, an investigating authority may not simply infer that a respondent's failure to respond fully to the OFA question resulted in a failure to provide information

¹⁶¹ Panel Report, para. 7.175.

¹⁶² Panel Report, para. 7.176 (referring to Supercalendered Paper from Canada 2015, I&D Memo (Panel Exhibit CAN-37) p. 30 ("For the subsidies discovered at Resolute's verification, we have identified the remaining two programs that we find, as AFA, to provide a financial contribution, to be specific, and to confer a benefit[.]") and p. 153 ("[W]e find that Resolute failed to provide information regarding this assistance discovered at verification, and thus, [S]ection 776(a)(2)(B) of the Act applies. We further find that ... Resolute failed to cooperate[.] ... Thus, pursuant to Section 776(b) of the Act, we are determining, as AFA, that the unreported assistance in question is countervailable.")).

¹⁶³ Panel Report, para. 7.177.

¹⁶⁴ Panel Report, para. 7.177.

¹⁶⁵ Panel Report, para. 7.177.

¹⁶⁶ The Panel noted that Canada itself conceded that "[t]he formulation of a question cannot, in and of itself, violate the requirements of the SCM Agreement." (Panel Report, para. 7.181, quoting Canada's response to Panel question No. 75, para. 164)

¹⁶⁷ Panel Report, para. 7.181.

¹⁶⁸ Panel Report, para. 7.181.

¹⁶⁹ Panel Report, paras. 7.182 and 7.185.

¹⁷⁰ Panel Report, para. 7.185.

¹⁷¹ Panel Report, para. 7.185.

¹⁷² Panel Report, para. 7.333.

necessary to establish the existence of additional subsidization of the product under investigation.¹⁷³ The Panel noted that, in light of the due process rights enjoyed by interested parties throughout an investigation, an investigating authority may only resort to "facts available" after properly determining that information necessary to complete a determination on additional subsidization of the product under investigation had been withheld.¹⁷⁴ To the Panel, this is all the more applicable where an investigating authority elects to add subsidy programmes to an ongoing investigation, rather than investigating only the subsidies identified in the notice of initiation.¹⁷⁵ The Panel concluded that the challenged measure is inconsistent with Article 12.7 of the SCM Agreement. The Panel noted that this conclusion was in line with its findings in section 7.4.1.4 of the Panel Report relating to Resolute.¹⁷⁶

5.2.3 Whether the Panel erred under Article 12.7 of the DSU by failing to provide a "basic rationale"

5.61. The United States claims that the Panel erred under Article 12.7 of the DSU by failing to provide a "basic rationale" for its finding that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement.¹⁷⁷ Canada responds that the Panel met the minimum standard of providing a "basic rationale" in accordance with Article 12.7 of the DSU.¹⁷⁸

5.62. Article 12.7 of the DSU provides, in relevant part, that the report of a panel shall set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it makes. The requirement to set out a "basic rationale" establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations.¹⁷⁹ To meet this minimum standard, panels must provide explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations.¹⁸⁰ Whether a panel has articulated a "basic rationale" for its findings is determined on a case-by-case basis.¹⁸¹ In order to determine whether a "basic rationale" has been provided, it is appropriate to read the Panel Report as a whole. In this respect, we recall that panels are free to structure the order of their analysis as they see fit.¹⁸²

5.63. The United States alleges that the Panel did not incorporate the reasoning from section 7.4.1.4 of the Panel Report, which concerns Resolute, into the Panel's findings in relation to the OFA-AFA measure in paragraph 7.333 of the Panel Report. To the United States, the only indication that the Panel may have intended to incorporate section 7.4.1.4 is the phrase "in line with the findings in Section 7.4.1.4 above" at the beginning of paragraph 7.333.¹⁸³ In response, Canada observes that the similarity in wording between paragraph 7.333 and section 7.4.1.4 supports a view that the Panel intended to incorporate section 7.4.1.4 into the "basic rationale" of paragraph 7.333.¹⁸⁴

¹⁷³ Panel Report, para. 7.333.

¹⁷⁴ Panel Report, para. 7.333.

¹⁷⁵ Panel Report, para. 7.333.

¹⁷⁶ Panel Report, para. 7.333. The Panel noted that Canada had brought additional challenges to the OFA-AFA measure under Articles 10, 11.1-11.3, 11.6, 12.1, and 12.8 of the SCM Agreement. To the Panel, Canada's main concern in bringing these additional claims was to ensure that respondents enjoy certain "procedural safeguards" with respect to subsidy programmes discovered during the course of an investigation. The Panel considered that its finding under Article 12.7 of the SCM Agreement already reflected the type of "procedural safeguards" envisaged by Canada. Thus, the Panel saw no need to separately consider Canada's additional claims. (Panel Report, para. 7.334)

¹⁷⁷ United States' appellant's submission, paras. 39-48.

¹⁷⁸ Canada's appellee's submission, paras. 63-85.

¹⁷⁹ Appellate Body Reports, *US – Carbon Steel*, para. 4.194; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 106.

¹⁸⁰ Appellate Body Reports, *US – Carbon Steel*, para. 4.194; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 106.

¹⁸¹ Appellate Body Reports, *US – Carbon Steel*, para. 4.194; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 108.

¹⁸² Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 126; *US – Shrimp (Article 21.5 – Malaysia)*, paras. 99-106.

¹⁸³ United States' appellant's submission, para. 43.

¹⁸⁴ Canada's appellee's submission, paras. 68-80.

5.64. At the outset, we note that paragraph 7.333 of the Panel Report contains an explanation of the Panel's findings in relation to the OFA-AFA measure that follows the extensive preceding analysis of the nature of the OFA-AFA measure as an "ongoing conduct" measure.¹⁸⁵ In addition, we note that the first sentence of paragraph 7.333 explicitly refers to the Panel's earlier analysis by beginning with: "[i]n line with our findings in Section 7.4.1.4 above". In addition, a comparison of the second, third, fourth, and final sentences of paragraph 7.333 with paragraphs 7.177 and 7.181 of section 7.4.1.4 shows that the language in paragraph 7.333 is substantially identical to the language of the earlier paragraphs. Moreover, the third sentence of paragraph 7.333 also directly refers to the Panel's earlier analysis. The third sentence states "[a]s we have said" and then repeats language substantially identical to the final sentence of paragraph 7.181 (from section 7.4.1.4).¹⁸⁶ Furthermore, we note that the Appellate Body Report in *EC – Tube or Pipe Fittings*¹⁸⁷ is quoted in paragraph 7.177 and then cited for the same proposition in the fourth sentence of paragraph 7.333 of the Panel Report. On the basis of these textual connections, we consider that the Panel incorporated section 7.4.1.4 into its analysis of the OFA-AFA measure in paragraph 7.333.¹⁸⁸

5.65. The United States also asserts that section 7.4.1.4 cannot be incorporated into the "basic rationale" of paragraph 7.333 because the Panel's earlier analysis in section 7.4.1.4 involved issues unrelated to the OFA-AFA measure.¹⁸⁹ Canada argues that this is unproblematic because a plain reading shows that the Panel intended to incorporate only the relevant paragraphs.¹⁹⁰

5.66. We agree with the United States that the OFA-AFA measure does not extend to the manner in which the USDOC selected facts available to determine the *amount of benefit* attributable to the discovered assistance evaluated by the Panel in paragraphs 7.182-7.183 and 7.185 (in the context of Supercalendered Paper from Canada 2015).¹⁹¹ This does not, however, prevent the Panel from incorporating the relevant parts of section 7.4.1.4 into paragraph 7.333. These are paragraphs 7.171-7.181 and 7.184, where the Panel interprets Article 12.7 of the SCM Agreement and evaluates the USDOC's determination that the unreported assistance discovered during the verification of Resolute *amounts to a countervailable subsidy*. There is no indication that the Panel changed its understanding of Article 12.7 between section 7.4.1.4 and paragraph 7.333. That the Panel sought to draw only on the relevant paragraphs is also confirmed by the fact that, as discussed above, the language of paragraph 7.333 of the Panel Report mirrors specific parts of the Panel's earlier analysis. In our view, the Panel made it clear that paragraph 7.333 must be read in the context of the earlier analysis.

5.67. Finally, the United States argues that the reasoning in section 7.4.1.4 cannot be incorporated into the Panel's reasoning regarding the OFA-AFA measure because it would be erroneous to generalize from an "as applied" finding (concerning Resolute) to the OFA-AFA measure.¹⁹² We agree with Canada that it was reasonable for the Panel to incorporate certain parts of its earlier analysis because the Panel had already considered the interpretation of Article 12.7 with respect to a specific application of the OFA-AFA measure.¹⁹³ Indeed, the conduct of the USDOC under consideration earlier by the Panel was a specific instance of the conduct described by the OFA-AFA measure.¹⁹⁴ The Panel considered the USDOC CVD proceeding Supercalendered Paper from Canada 2015 to be an example of the "ongoing conduct" measure challenged by Canada. In this respect, we recall that the Panel found that the relevant conduct of the USDOC remained the same in the examples examined by the Panel.¹⁹⁵

5.68. In summary, we consider the Panel to have appropriately incorporated into paragraph 7.333 the relevant portions of its earlier analysis in section 7.4.1.4. Through these paragraphs, the Panel

¹⁸⁵ Panel Report, paras. 7.301-331.

¹⁸⁶ Canada's appellee's submission, para. 74.

¹⁸⁷ Panel Report, fn 623 to para. 7.333, referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 138 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 136).

¹⁸⁸ European Union's third participant's submission, paras. 29-30.

¹⁸⁹ United States' appellant's submission, para. 46.

¹⁹⁰ Canada's appellee's submission, para. 83.

¹⁹¹ United States' appellant's submission, para. 46.

¹⁹² United States' appellant's submission, para. 45.

¹⁹³ Canada's appellee's submission, para. 79.

¹⁹⁴ We recall that Supercalendered Paper from Canada 2015 was one of nine determinations used as evidence of the existence of the OFA-AFA measure.

¹⁹⁵ Panel Report, para. 7.316.

provided an interpretation of Article 12.7 of the SCM Agreement, addressed pertinent factual aspects of the OFA-AFA measure, and provided explanation sufficient to disclose the Panel's essential justification for its finding. Thus, we consider that the Panel did not err under Article 12.7 of the DSU by failing to provide a "basic rationale" for its finding that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement.

5.2.4 Whether the Panel erred under Article 12.7 of the SCM Agreement by finding that the OFA-AFA measure is inconsistent with that provision

5.69. The United States claims that the Panel erred under Article 12.7 of the SCM Agreement by finding that the OFA-AFA measure is inconsistent with that provision. This is because, in the United States' view: (i) it was inappropriate for the Panel to have ignored the "significantly impedes" ground for using "facts available" under Article 12.7 of the SCM Agreement;¹⁹⁶ (ii) the Panel identified conduct that is not contained in the OFA-AFA measure as WTO-inconsistent;¹⁹⁷ and (iii) the Panel incorrectly found that the OFA question can never be a request for "necessary information" under Article 12.7 of the SCM Agreement.¹⁹⁸ We examine each of the United States' arguments below.¹⁹⁹

5.70. First, the United States argues that it was inappropriate for the Panel to have ignored the "significantly impedes" ground for using "facts available" under Article 12.7 of the SCM Agreement.²⁰⁰ Canada responds that the "significantly impedes" ground is not relevant because the OFA-AFA measure concerns only a situation where a party fails to provide information and the USDOC either fails to assess whether such information is necessary or makes an unjustified assessment that such information is necessary.²⁰¹

5.71. We note that, under Article 12.7 of the SCM Agreement, use of "facts available" may be based on three alternative grounds. These are when an interested party or interested Member: (i) "refuses access to ... necessary information within a reasonable period"; (ii) "otherwise does not provide ... necessary information within a reasonable period"; or (iii) "significantly impedes the investigation". We refer below to the first two grounds collectively as a situation where a party fails to provide necessary information.²⁰²

5.72. The United States contends that, to find the OFA-AFA measure inconsistent with Article 12.7 of the SCM Agreement, the Panel would have had to conclude that none of the conditions triggering the use of "facts available" could be present.²⁰³ To the United States, a failure to answer the OFA question could well amount to significant impedance of the investigation.²⁰⁴

5.73. We recall that the sequence of actions identified in the OFA-AFA measure is entirely concerned with a failure by an interested party to provide necessary information. Specifically, the conduct described by the measure involves the USDOC discovering during verification assistance that the USDOC deems should have been reported in response to the OFA question, and then using AFA to

¹⁹⁶ United States' appellant's submission, paras. 4 and 49-55.

¹⁹⁷ United States' appellant's submission, paras. 4 and 56-65.

¹⁹⁸ United States' appellant's submission, paras. 4 and 66-79.

¹⁹⁹ Canada does not contest the USDOC's right to ask the OFA question, either on appeal or before the Panel. (Panel Report, para. 7.181; Canada's appellee's submission, fn 149 to para. 117; response to Panel question No. 75, para. 164) Consequently, we neither examine this issue nor make any findings in relation to it. As noted by the European Union, the right to ask questions and the conclusions that may be drawn from answers are distinct issues. (European Union's third participant's submission, para. 34)

²⁰⁰ United States' appellant's submission, paras. 49-55.

²⁰¹ Canada's appellee's submission, paras. 86-96.

²⁰² We note that, regardless of the particular grounds that justify recourse to Article 12.7, "facts available" may be used "solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination". (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293) An investigating authority may use only those "facts available" that "reasonably replace the information that an interested party failed to provide", with a view to arriving at an accurate determination". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294) (emphasis omitted)) See also Japan's third participant's submission, para. 11 (referring to Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.419 and 4.422); Brazil's third participant's submission, para. 6.

²⁰³ United States' appellant's submission, para. 55.

²⁰⁴ United States' appellant's submission, para. 53.

determine that the discovered assistance is a countervailable subsidy.²⁰⁵ The actions identified in the OFA-AFA measure do not involve the USDOC concluding that conduct by a party "significantly impede[d]" the investigation.²⁰⁶ This is consistent with Canada's characterization of the measure as limited to the use of "facts available" by the USDOC on the basis of a failure by a party to provide "necessary information".²⁰⁷ Because Canada so characterized the measure, it was for the United States to show that the USDOC had relied instead on the "significantly impedes" ground in the determinations used as evidence of the OFA-AFA measure. The United States, however, failed to contend this in relation to the OFA-AFA measure before the Panel and on appeal.²⁰⁸

5.74. Consequently, we consider that the OFA-AFA measure, as established by the Panel, is limited to circumstances where the USDOC uses "facts available" on the basis of a party's failure to provide "necessary information". As a result, the findings concerning the OFA-AFA measure are also limited to these circumstances. These findings do not concern the USDOC's use of "facts available" where an interested party significantly impedes the investigation.²⁰⁹ For these reasons, we do not consider that the Panel erred by not addressing the "significantly impedes" ground for the use of "facts available" under Article 12.7 of the SCM Agreement. This conclusion renders it unnecessary for us to interpret the "significantly impedes" ground under Article 12.7.

5.75. The United States also claims that the Panel erred because the conduct it found to be inconsistent with Article 12.7 of the SCM Agreement is not contained in the OFA-AFA measure.²¹⁰ In particular, in the United States' view, neither the OFA-AFA measure nor the underlying determinations on the Panel record support a finding that the USDOC made an inference that respondents failed to provide necessary information.²¹¹ Rather, the United States alleges that in each determination the USDOC made a positive determination that the respondent failed to provide the necessary information. Having made that determination, the USDOC used an inference to fill in the gaps resulting from the missing necessary information.²¹²

²⁰⁵ Panel Report, para. 7.316.

²⁰⁶ In analysing the specific instance of the OFA-AFA measure in Supercalendered Paper from Canada 2015, the Panel considered that "the disagreement between the parties concerns 'refus[ing] access to, or otherwise ... not provid[ing], necessary information within a reasonable period', rather than 'significantly imped[ing] the investigation'". (Panel Report, para. 7.173) In relation to the other determinations used to evidence the OFA-AFA measure, see Panel Report, para. 7.313, table 2.

²⁰⁷ Canada articulated the precise content of the OFA-AFA measure in its first written submission to the Panel as follows:

Since 2012, [the USDOC] has applied its Other Forms of Assistance-AFA measure to countervail dozens of alleged subsidy programs in six different investigations or reviews. In these investigations and reviews, [the USDOC] asked the "other forms of assistance" question, then "discovered" information at verification that it deemed responsive to the "other forms of assistance" question, but that was undisclosed, and then applied AFA without making any factual determination of whether the elements of a countervailable subsidy had been met or assessing whether the information was "necessary information" related to the allegations it was investigating.

(Canada's first written submission to the Panel, para. 409)

²⁰⁸ See the United States' first written submission to the Panel, paras. 176, 203-209, and 364; second written submission to the Panel, para. 82. We note that, only in relation to Supercalendered Paper from Canada 2015, the United States argued that "Canada's arguments do not address the fundamental fact that Resolute impeded the investigation by failing to fully answer [the USDOC's] question concerning 'any other forms of assistance.'" (United States' first written submission to the Panel, para. 203) As articulated by the United States, however, the issue of Resolute impeding the investigation was evidence that the undisclosed information was necessary, not that the use of "facts available" had been triggered by Resolute "significantly impede[ing]" the investigation. As the United States concluded:

By not divulging the receipt of the unreported assistance prior to the commencement of verification, Resolute precluded this unreported assistance from being "verifiable" and *impeded* the investigation by refusing to provide complete and verifiable answers. As a result of Resolute's failure to respond to [the USDOC's] question, *necessary information was missing from the record* of the investigation which prevented [the USDOC] from analyzing the relevant facts concerning the element of benefit.

(United States' first written submission to the Panel, para. 209) (fn omitted; emphasis added)

²⁰⁹ On this basis, we do not consider it necessary to address the United States' argument that a failure to answer the OFA question could constitute significant impedance of an investigation under Article 12.7 of the SCM Agreement. (United States' appellant's submission, para. 53)

²¹⁰ United States' appellant's submission, paras. 56-65.

²¹¹ United States' appellant's submission, paras. 60-65.

²¹² United States' appellant's submission, para. 65.

5.76. Canada responds that the OFA-AFA measure corresponds to the conduct discussed in paragraph 7.333 of the Panel Report. To Canada, the Panel correctly concluded that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement because, when discovering information during verification, the USDOC uses inferences to assume that the discovered information constitutes a countervailable subsidy.²¹³ Canada also observes that the Panel's use of the term "infer" derived from the USDOC's own descriptions of its practice.²¹⁴

5.77. We turn to the conduct considered by the Panel to be inconsistent with Article 12.7 of the SCM Agreement and examine whether it is part of the OFA-AFA measure. In this respect, the Panel's explanation of the Article 12.7 inconsistency must be read in light of the relevant measure at issue before the Panel. We recall that the OFA-AFA measure provides for the following steps: (i) the USDOC asks the OFA question; (ii) the USDOC discovers, during verification, information that it deems should have been reported in response to the OFA question; and (iii) the USDOC applies AFA to determine that the discovered information amounts to countervailable subsidies.²¹⁵ In the final stage of the OFA-AFA measure, the USDOC refuses to accept additional information from the respondents and instead relies on AFA to determine that each discovered assistance provided a financial contribution, conferred a benefit, and was specific, all of which are necessary elements of a countervailable subsidy.²¹⁶ Against this background, the Panel found the following conduct to be inconsistent with Article 12.7:

[A]n investigating authority may not simply *infer* that a respondent's failure to respond fully to the [OFA] question resulted in a failure to provide information necessary to establish the existence of additional subsidization of the product under investigation.²¹⁷

5.78. We understand the Panel to have faulted the USDOC for mechanically concluding, without any further steps, that necessary information had not been provided and that the discovered assistance amounted to a countervailable subsidy, when the USDOC discovers unreported assistance during verifications. The USDOC's conclusion extends beyond an assessment as to whether a respondent "refuses access to, or otherwise does not provide, necessary information" under Article 12.7 of the SCM Agreement.²¹⁸ The inference²¹⁹ that the information is necessary to "establish the existence of additional subsidization" refers to the conclusion by the USDOC in the final stage of the OFA-AFA measure that the discovered assistance amounts to a countervailable subsidy.²²⁰ This is

²¹³ Canada's appellee's submission, paras. 97-107. Canada submits that the USDOC considers that the failure to report information "warrants the application of inferences, and through inferences [the USDOC] determines that the unreported other assistance is countervailable". (Canada's appellee's submission, para. 102 (emphasis omitted))

²¹⁴ Canada's appellee's submission, para. 101. Canada refers to a number of examples where the USDOC described its conduct as an "inference". (Canada's appellee's submission, paras. 101-104 (quoting USDOC NAFTA Brief (Panel Exhibit CAN-76), pp. 147-149; referring to excerpts of Solar Cells from China 2015, Solar Cells from China 2014, Stainless Pressure Pipe from India 2016, and Supercalendered Paper from Canada 2015 contained in para. 7.313, table 2 of the Panel Report))

²¹⁵ Panel Report, para. 7.316.

²¹⁶ Panel Report, paras. 7.314 and 7.316-7.317.

²¹⁷ Panel Report, para. 7.333. (emphasis original)

²¹⁸ Although the Panel refers to "information necessary", we do not consider that this reference limits the Panel's conclusion to the USDOC's determining that "necessary information" had been withheld. Were that the intention of the Panel, the Panel would have simply stated that the USDOC may not infer that the failure to respond fully to the OFA question was a failure to disclose "necessary information". Instead, the Panel stated that the USDOC may not "simply infer" that the respondent failed to provide information necessary to "establish the existence of additional subsidization of the product under investigation". (Panel Report, para. 7.333)

²¹⁹ The United States takes issue with the Panel's use of the verb "infer". As noted above, the United States contends that the USDOC made positive determinations that the respondents failed to provide necessary information and then used inferences to fill in the gaps resulting from the missing necessary information. (United States' appellant's submission, paras. 57-60 and 65) Canada considers that the Panel used the verb "infer" because that is the verb used by the USDOC to refer to its own conduct. (Canada's appellee's submission, para. 101) In our view, it is not determinative in this case whether the decisions made by the USDOC in the OFA-AFA measure are described as "inferences" or "determinations". The key aspect is that the USDOC mechanically concludes that unreported assistance is a countervailable subsidy, after it discovers during verification assistance that it deems should have been reported in response to the OFA question.

²²⁰ In relation to the analysis of Resolute, the Panel was even clearer when it stated: "the USDOC *inferred* that these entries pertained to countervailable subsidization of [supercalendered] paper, without

confirmed by the next sentence of paragraph 7.333, where the Panel refers to due process rights in relation to information necessary "to complete a determination on additional subsidization of the product under investigation". Furthermore, the Panel continued in the final sentence of paragraph 7.333 that this is "all the more applicable where an investigating authority elects to add subsidy programmes to an ongoing investigation". These two subsequent sentences in paragraph 7.333 concern the USDOC's conclusion that the discovered assistance is a countervailable subsidy to be included in the investigation.²²¹

5.79. Thus, in paragraph 7.333, the Panel ties the discovery of the unreported assistance to the USDOC's application of AFA to conclude that the discovered assistance amounts to a countervailable subsidy. This is because the USDOC treats the failure to respond fully to the OFA question as a sufficient basis to mechanically conclude that a party failed to provide "necessary information" and that, as AFA, the discovered assistance is a countervailable subsidy. As this process reflects the precise content of the OFA-AFA measure, we consider the conduct examined by the Panel in paragraph 7.333 to be part of the OFA-AFA measure.

5.80. In addition, we do not consider that the Panel erred in finding that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement. We agree with the Panel that the USDOC's mechanical response to the discovery of unreported assistance during verification is inconsistent with Article 12.7 for two reasons.²²²

5.81. First, the USDOC uses "facts available", on the basis of a failure to provide "necessary information", without taking any additional steps to clarify the nature of the unreported assistance and whether the missing information is "necessary" under Article 12.7 of the SCM Agreement.²²³ The United States contends that the investigating authority is in the best position to assess what information is "necessary" and that the OFA question relates to "necessary information" because it serves to identify possible assistance for which the application of countervailing duties may be appropriate.²²⁴ The United States refers to the panel's view in *EC – Countervailing Measures on DRAM Chips* that information is "necessary" if an investigating authority "reasonably consider[s]" it so.²²⁵ We consider, however, that the use of "reasonably" by the panel itself indicates that an investigating authority is not entirely unconstrained in its identification of "necessary information". Indeed, in our view, the investigating authority must make a reasonable assessment based on evidence and cannot simply infer, without further clarification²²⁶, that the missing information is "necessary" within the meaning of Article 12.7. We agree with the Panel that the fact that it would have been inconvenient or impractical for the USDOC to take further steps to confirm the basic

taking any further steps to confirm that this was in fact the case and providing a reasoned and adequate explanation to that effect." (Panel Report, para. 7.176 (fns omitted; italics original; underlining added))

²²¹ According to the Panel, the "parties to these proceedings are in agreement that new programmes may be added to an investigation when they are discovered during that investigation", "notwithstanding the parties' disagreement on the procedural steps required to add such programmes to an investigation".

(Panel Report, para. 7.175 and fn 300 thereto) Similarly to the Panel, we do not address this question in our Report. (Panel Report, para. 7.175)

²²² Panel Report, para. 7.333.

²²³ The scope of the OFA question clearly extends to forms of assistance that may not be countervailable subsidies. For example, the USDOC took no additional steps to clarify whether there was any indication that the unreported tax deduction for "wages paid for placement of disabled persons" discovered at verification in Solar Cells from China 2014 was specific to the respondent in that case. (Panel Report, para. 7.313, table 2 (quoting Solar Cells from China 2014, I&D Memo (Panel Exhibit CAN-121), pp. 16-17)) Similarly, the USDOC took no additional steps to clarify whether the "bonus for employees from government" identified in the respondent's accounts in Solar Cells from China 2012 was connected to the production of crystalline photovoltaic cells subject to investigation. (Panel Report, para. 7.313, table 2 (quoting USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China (9 October 2012) (Panel Exhibit CAN-116, pp. 9-10)))

²²⁴ United States' appellant's submission, paras. 69-72.

²²⁵ United States' appellant's submission, para. 69 (referring to Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.265).

²²⁶ At the hearing, the United States explained that the USDOC reviews the investigation record to confirm that the discovered information had not been previously reported by the respondent companies. We understand, however, that this review merely confirms that information about the discovered assistance is not present in the record and does not constitute a step towards ascertaining whether "necessary information" has been withheld.

nature of the discovered information cannot outweigh the due process rights in the WTO Agreements.²²⁷

5.82. Second, the USDOC concludes, as AFA, that the unreported assistance amounts to a countervailable subsidy. As described by the USDOC itself, the USDOC simply asserts "as AFA" that the discovered assistance provides a financial contribution, confers a benefit, and is specific. Such a finding is made without regard to any facts on the record.²²⁸ We consider, however, that procedural circumstances and any resulting inferences may not alone form the basis of a determination. This is because, pursuant to Article 12.7 of the SCM Agreement, determinations must be made on the basis of "facts" available²²⁹, and not "on the basis of non-factual assumptions or speculation".²³⁰ For these reasons, we agree with the Panel that the USDOC cannot simply reach conclusions without further analysis and regard to the facts available on the record and the due process rights of interested parties.²³¹ To be clear, in arriving at this conclusion, we make no finding about the manner in which the USDOC should have selected facts available in the circumstances of this case. We simply note that determinations must be made on the basis of "facts" available, and in the circumstances of the OFA-AFA measure the USDOC instead relies on non-factual assumptions or speculation.

5.83. Finally, the United States claims that the Panel erred because it implied that the OFA question used by the USDOC can never be a request for "necessary information" under Article 12.7 of the SCM Agreement.²³² We note, however, that the Panel explicitly observed that the OFA question "might pertain to necessary information regarding additional subsidization of the product under investigation".²³³ For this reason, we are unable to agree with the United States that the Panel found that the OFA question can never be a request for "necessary information".²³⁴ Thus, we do not consider that the Panel erred in this regard.

5.2.5 Conclusion

5.84. For the reasons stated above, we find that the Panel did not err under Article 12.7 of the DSU by failing to provide a "basic rationale" for its finding that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement. Furthermore, we find that the United States has not demonstrated that the Panel erred in making its finding under Article 12.7 of the SCM Agreement.

5.85. Consequently, we uphold the Panel's finding, in paragraph 7.333 of the Panel Report, that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement.²³⁵

²²⁷ Panel Report, paras. 7.177 and 7.333. See also Japan's third participant's submission, para. 13 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292).

²²⁸ As identified by the Panel, this view is also evidenced by the USDOC's description of this measure at the NAFTA Chapter 19 proceeding, namely that "[the USDOC's] finding that the complainants' failure to report these subsidies earlier in the proceeding warranted the use of adverse inferences was reasonable ... as was [the USDOC's] resulting adverse inference that each discovered subsidy provided a financial contribution, conferred a benefit, and was specific – the elements of a countervailable subsidy." (Panel Report, para. 7.317 (quoting USDOC NAFTA Brief (Panel Exhibit CAN-76), pp. 147-148)) Moreover, this view is confirmed by the underlying determinations examined by the Panel, where the USDOC simply determined, as AFA, that unreported assistances are countervailable subsidies. See *supra* fn 78 for relevant excerpts.

²²⁹ The Appellate Body has stated that an investigating authority may only use those "facts available" that "'reasonably replace the information that an interested party failed to provide', with a view to arriving at an accurate determination". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294) (emphasis omitted)) See also Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 293; Japan's third participant's submission, para. 11 (referring to Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.419 and 4.422); Brazil's third participant's submission, para. 4.

²³⁰ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.417. See also *ibid.*, para. 4.422.

²³¹ Panel Report, paras. 7.176-7.177, 7.181, and 7.333.

²³² United States' appellant's submission, paras. 4 and 66-79.

²³³ Panel Report, para. 7.333.

²³⁴ Brazil's third participant's submission, para. 4.

²³⁵ The United States requests that we reverse the Panel's recommendation under Article 19.1 of the DSU as a consequence of the errors alleged by the United States on appeal. (United States' appellant's submission, paras. 79 and 81) Having upheld the Panel's findings at issue, we are unable to accede to the United States' request.

5.3 Separate opinion of one Appellate Body Division Member

5.3.1 Introduction

5.86. "Ongoing conduct" is not a treaty term found in WTO Agreements; it is a descriptive term first used in the Appellate Body Report in *US – Continued Zeroing* with respect to the particular circumstances, arguments, and evidence in that case. In this case, the Panel and the majority have gone beyond *US – Continued Zeroing* to enhance and broaden the concept of "ongoing conduct" into something akin to a "rule or norm of general and prospective application", only vaguer and less disciplined in its requirements.

5.87. I also consider relevant the fact that Supercalendered Paper from Canada 2015, the underlying CVD proceeding at issue in this case, has been revoked retroactively to its beginning. To me, this means that no real dispute remains to be resolved regarding any "ongoing conduct" that may or may not continue with respect to the proceeding at issue here. It follows that further addressing this matter could be characterized as an advisory opinion based on, and pertaining mainly to, cases involving other countries that are not complainants and in which key facts and circumstances may differ from those present in this case. Consequently, I think the Division could and should have mooted the relevant findings of the Panel. In lieu of that, I suggest that this decision and its interpretations should be confined to the particulars of this case.

5.3.2 Ongoing conduct

5.88. The Panel started with the criteria that had been used previously for finding an "ongoing conduct" measure: attribution to a WTO Member, precise content, repeated application, and likelihood of continued application. The Panel found that these criteria were met in this case by the USDOC asking the OFA question, discovering during verification information it deems should have been provided in response to that question, and applying AFA to determine that the discovered information amounts to countervailable subsidies.

5.89. The majority has upheld the Panel's finding. I disagree and believe the Panel committed legal errors, both by characterizing the USDOC's alleged "ongoing" conduct in an unacceptably vague manner, and, having done that, by employing inadequate and improper evidentiary standards for identifying precise content, repeated application, and likelihood of continued application. In other words, the Panel defined the alleged conduct vaguely and used inapt evidence to fit its vague definitions.

5.90. This is illustrated by the differences between this case and *US – Continued Zeroing*, the case principally relied on by the Panel. That case involved a particular calculation methodology, used automatically "in a string of connected and sequential determinations, in each of the 18 cases ... by which duties are maintained over a period of time".²³⁶ By contrast, the "ongoing conduct" in this case is not a particular calculation methodology, but instead involves a series of administrative decisions about such things as the nature of the discovered information, the timing and circumstances of its discovery, the relevance of the discovered information, and the use that is made of it.

5.91. In the present case, the Panel found the alleged ongoing conduct to exist as a result of several USDOC CVD proceedings involving China and one CVD proceeding involving India, in addition to Supercalendered Paper from Canada 2015. In some of those cited proceedings, the USDOC's conduct differed from the challenged conduct in the current case. And for others, the Panel did not have, or examine, important evidence regarding the comparability of those cited proceedings with the challenged case – such as the circumstances of the information's non-provision and discovery (e.g. hidden, resisted, or volunteered), the timing of the discovery in the case schedule, the use made by the USDOC of all or parts of the relevant evidence, or the nature of the respondent entity and its relationship with the government.

5.92. These known and unknown differences undermine the "precise content" element of the Panel's alleged "ongoing conduct" measure, and illustrate how vague and imprecise that version of the alleged measure is. They also bring into question the "repeated application" and "likelihood of

²³⁶ Appellate Body Report, *US – Continued Zeroing*, paras. 180-181.

continued application" of the alleged measure as formulated by the Panel, by begging the question: repetition and likely continuation of what, exactly?

5.93. Finally, as noted above, the CVD order in Supercalendered Paper from Canada 2015 has been revoked retroactively to its beginning. As a result, there is no real dispute remaining to be resolved between Canada and the United States as to any "ongoing conduct" that may or may not continue with respect to the proceeding at issue here. For this decision not to be at risk of being considered *obiter dicta*, or, applied in the future so as to blur the lines between "ongoing conduct" and rules or norms of general and prospective application, or both, it is hoped that its effects will be limited to the particulars of this case.²³⁷

5.3.3 Conclusion

5.94. I do not address the Panel's and majority's findings regarding Article 12.7 of the SCM Agreement because, in my view, those findings should have been rendered moot either by the Division's considering the Panel's findings as a whole as mooted by the revocation of the underlying CVD investigation, or by the findings regarding the alleged "ongoing conduct" that I suggest above.

5.95. I offer these views with the hope that any future consideration of these issues will take this separate opinion into account, as well as that of the majority.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body reaches the following findings and conclusions:

6.1 OFA-AFA measure

6.2. The consistency or inconsistency of a fact or set of facts with the requirements of a given treaty provision or the application of rules to facts is a legal characterization that is subject to appellate review under Article 17.6 of the DSU. The United States' claim of error on appeal concerns the Panel's understanding and application of the legal standard for "ongoing conduct" as a measure that can be challenged in WTO dispute settlement under the DSU. In our view, the United States' claim concerns issues of law covered in the Panel Report and legal interpretations developed by the Panel, and thus falls within the scope of appellate review. For these reasons, we dismiss Canada's assertion that the United States' claim on appeal falls outside the scope of appellate review.

6.3. In order to prove the existence of an "ongoing conduct" measure, a complainant must clearly establish: (i) that the alleged measure is attributable to the responding Member; (ii) its precise content; (iii) its repeated application; and (iv) its likelihood of continued application. We note that, as before the Panel, the United States does not challenge the attribution of the alleged measure on appeal. We consider that the Panel was correct to focus on the substance of the USDOC's conduct for each element of the OFA-AFA measure, as evidenced by the examples before the Panel. We agree with the Panel that the variations referred to by the United States in these examples do not detract from the fact that the substance of the USDOC's conduct remained the same in relation to the elements of the measure challenged by Canada.

- a. For these reasons, we find that the Panel did not err in finding that Canada had established the precise content of the OFA-AFA measure as the USDOC asking the OFA question and, where the USDOC discovers information during verification that it deems should have been provided in response to the OFA question, applying AFA to determine that such information amounts to countervailable subsidies.

6.4. Concerning repeated application, we consider that the Panel's analysis appropriately reflects Canada's characterization of the OFA-AFA measure, focusing on the repetition of the elements identified by Canada that form part of the OFA-AFA measure. Thus, we consider that the Panel did

²³⁷ "Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute." (Appellate Body Report, *US – Upland Cotton*, para. 509, quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 340)

not err in examining "repeated application" by reference to the elements of the measure in this dispute. We are also not convinced by the United States' assertion that certain examples on the Panel record show that the USDOC did not apply the OFA-AFA measure.

- a. For these reasons, we find that the Panel did not err in finding that Canada had established the repeated application of the OFA-AFA measure.

6.5. In relation to likelihood of continued application, a complaining Member need not rely on a formal decision by the responding Member to demonstrate the existence of "ongoing conduct". Rather, we consider that likelihood of continued application may be demonstrated through a number of factors. We agree with the Panel that the consistent manner in which the USDOC refers to the OFA-AFA measure, the frequent reference to previous applications of the measure in USDOC determinations, the fact that the USDOC refers to the measure as its "practice", and the USDOC's characterization of a departure from the measure as an "inadvertent error" all support the conclusion that the measure is likely to continue to be applied.

- a. For these reasons, we find that the Panel did not err in finding that Canada had established that the OFA-AFA measure is likely to continue to be applied in the future.
- b. Consequently, we uphold the Panel's finding, in paragraphs 7.332 and 8.4.a of the Panel Report, that Canada established the existence of the OFA-AFA measure as "ongoing conduct".

6.2 Article 12.7 of the SCM Agreement

6.6. Pursuant to the requirement to set out a "basic rationale" for findings and recommendations in Article 12.7 of the DSU, panels must provide explanations and reasons sufficient to disclose the essential justification for those findings and recommendations. In our view, the Panel appropriately incorporated into its examination of the OFA-AFA measure (in paragraph 7.333 of the Panel Report) the relevant portions of its earlier analysis concerning Article 12.7 of the SCM Agreement (in section 7.4.1.4 of the Panel Report). Through these paragraphs, the Panel provided an interpretation of Article 12.7 of the SCM Agreement, addressed pertinent factual aspects of the OFA-AFA measure, and provided explanation sufficient to disclose the Panel's essential justification for its finding.

- a. For these reasons, we find that the Panel did not err under Article 12.7 of the DSU by failing to provide a "basic rationale" for its finding that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement.

6.7. In relation to the Panel's analysis of the OFA-AFA measure under Article 12.7 of the SCM Agreement, we consider that the OFA-AFA measure, as established by the Panel, is limited to circumstances where the USDOC uses "facts available" on the basis of a party's failure to provide "necessary information".

6.8. In addition, we understand the Panel to have faulted the USDOC for mechanically concluding, without any further steps, that necessary information had not been provided and that the discovered assistance amounted to a countervailable subsidy, when the USDOC discovers unreported assistance during verifications. As this process reflects the precise content of the OFA-AFA measure, we consider that the conduct examined by the Panel in paragraph 7.333 is part of the OFA-AFA measure. We also agree with the Panel that the USDOC cannot simply reach conclusions without further analysis and regard to the facts available on the record and the due process rights of interested parties.

6.9. Finally, we disagree with the United States' view that the Panel found that the OFA question can never be a request for "necessary information" under Article 12.7 of the SCM Agreement. Rather, the Panel explicitly observed that the OFA question might pertain to necessary information regarding additional subsidization of the product under investigation.

- a. For these reasons, we find that the United States has not demonstrated that the Panel erred in making its finding under Article 12.7 of the SCM Agreement.

- b. Consequently, we uphold the Panel's finding, in paragraph 7.333 of the Panel Report, that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement.

6.3 Recommendation

6.10. The Appellate Body recommends that the DSB request the United States to bring its measures, as found in this Report, and in the Panel Report as upheld by this Report, to be inconsistent with the SCM Agreement and the GATT 1994, into conformity with its obligations under those Agreements.

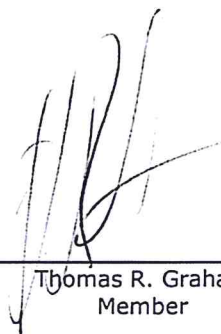
Signed in the original in Geneva this 10th day of December 2019 by:



Ujal S. Bhatia
Presiding Member



Hong Zhao
Member



Thomas R. Graham
Member
