

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 Finally, as noted above, the CVD order in Supercalendered Paper from Canada 2015 has been revoked retroactively to its beginning.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 Singh Bhatia
Presiding Member

Hong Zhao
Member

Thomas R. Graham
Member
