UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

(DS505)

APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

August 27, 2018

SERVICE LIST

Participant

H.E. Mr. Stephen de Boer, Permanent Mission of Canada

Third Parties

H.E. Mr. Evandro Didonet, Permanent Mission of Brazil
H.E. Mr. Zhang Xiangchen, Permanent Mission of the People's Republic of China
H.E. Mr. Marc Vanheukelen, Permanent Mission of the European Union
H.E. Mr. J.S. Deepak, Permanent Mission of India
H.E. Mr. Junichi Ihara, Permanent Mission of Japan
H.E. Ms. Ji-ah Paik, Permanent Mission of Korea
H.E. Mr. Roberto Zapata Barradas, Permanent Mission of Mexico
H.E. Mr. Kemal Madenoğlu, Permanent Mission of Turkey

TABLE OF CONTENTS

TABLE OF REPORTS

Short title	**Full Citation**
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
EC – Selected Customs Matters (AB)	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
Mexico – Corn Syrup (Article 21.5 – US) (AB)	Appellate Body Report, *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*, WT/DS132/AB/RW, adopted 21 November 2001
US – Coated Paper	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R, adopted 12 January 2018
US – Continued Zeroing (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R

I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. The United States presents this appellant submission pursuant to Rule 21 of the Working Procedures for Appellate Review. The United States appeals certain legal findings and erroneous interpretations of the *Agreement on Subsidies and Countervailing Measures (*"SCM Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") in the *United States – Countervailing Measures on Supercalendered Paper from Canada* panel report. Specifically, the United States appeals the Panel's findings that the challenged so-called "other forms of assistance measure" constitutes "ongoing conduct" that is a measure within the meaning of the DSU and is inconsistent with Article 12.7 of the SCM Agreement.

2. The origins of this dispute lie in Canada's decision to provide massive subsidies to rescue a politically important, but financially troubled paper mill from bankruptcy. In response to that situation and after conducting a thorough and rigorous investigation, the U.S. Department of Commerce ("Commerce") appropriately imposed countervailing duties on subsidized imports of supercalendered paper to the U.S. market from Canada. Despite these legitimate countervailing duties, the Panel in its report made extensive legal errors concerning the SCM Agreement and the DSU. This submission describes but a few of those errors.[2]

3. In Section II of this submission, we address the Panel's errors concerning the purported existence of the so-called "ongoing conduct" as a measure. First, we demonstrate that the Panel erred in finding the existence of a measure it refers to as "ongoing conduct." Namely, we explain that what the Panel identified as a measure is not a measure within meaning of the DSU. Second, we demonstrate that what the Panel identified as a measure is not a measure of "ongoing conduct" as understood by prior panel and Appellate Body reports. Third, we show that the Panel misapplied its chosen legal approach for determining the existence of the purported "ongoing conduct." The Panel invented a measure by piecing together parts of countervailing duty proceedings with factually dissimilar determinations and labeling it as one measure capable of being subject to a broad challenge. As described in Section II, we show that the Panel's reliance on excerpted text drawn from non-successive, factually dissimilar countervailing duty determinations does not prove the existence of a measure that is subject to WTO dispute settlement. Rather, the excerpts relied upon by the Panel in context confirm that no "ongoing conduct" measure exists. Accordingly, there is no legal basis for the Panel's findings to the contrary.

4. In Section III of this submission, we demonstrate that the Panel erred in finding that the so-called "ongoing conduct" is inconsistent with Article 12.7 of the SCM Agreement. We show that the Panel's findings suffer from four fundamental problems. First, we show that the Panel

---

[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 755 words (including footnotes), and this U.S. appellant submission (not including the text of the executive summary) contains 8,654 words (including footnotes).

[2] In light of recent developments, the United States has not found it necessary to appeal the many Panel legal findings on the countervailing duties on supercalendered paper with which the United States strenuously disagrees. Reversal of those findings is not necessary to resolve this dispute. Instead, the United States limits its appeal to the Panel's findings relating to the alleged "ongoing conduct" or "Other Forms of Assistance" measure.

failed to provide a basic rationale for its findings as required by Article 12.7 of the DSU. This error vitiates its conclusion and calls for reversal. Second, we demonstrate that the Panel committed legal error by ignoring that Article 12.7 of SCM Agreement provides for the use of facts available where the respondent significantly impedes the investigation. That is, the Panel erred in finding a breach of Article 12.7 where it had *only* analyzed whether "necessary" information had not been provided by an interested party; rather, an alternative basis for using facts available existed. Third, we demonstrate that the Panel's reasoning does not correspond to the "ongoing conduct" actually found by the Panel, nor with the determinations on the record in the proceeding; therefore, the Panel's legal conclusion must be reversed as simply unsubstantiated by its own reasoning. Finally, we show that the Panel's finding that a request for information on "Other Forms of Assistance" can never be a request for "necessary information" is legal error.

5. Accordingly, the Panel's findings have no legal basis under the WTO covered agreements. The United States requests that the Appellate Body reverse the Panel's findings that the challenged so-called "other forms of assistance measure" exists and is a "measure" within the meaning of the DSU and further requests that the Appellate Body reverse the Panel's finding that the alleged "measure" is inconsistent with Article 12.7 of the SCM Agreement.

II. THE PANEL ERRED IN FINDING THE EXISTENCE OF A MEASAURE IT REFERS TO AS "ONGOING CONDUCT"

6. The Panel failed to identify any measure that could be challenged under the DSU. The Panel erred by accepting Canada's argument that by framing certain past actions in the present tense, somehow a measure has been created that may be subject to a finding of WTO inconsistency. In particular, the Panel found that these three statements of what Commerce "does" in a particular situation amounts to a measure: Commerce (1) asks the "any other forms of assistance" question; (2) discovers information that Commerce deems should have been provided in response to that question; and (3) applies facts available to determine that the "discovered" information amounts to a countervailable subsidy.[3] These present tense statements, however, are meaningless in and of themselves. Looking beneath the surface, these present tense statements are only meaningful if they serve as statements of what Commerce *has determined* that it *will do* in the future.

7. To be sure, if a complaining party does establish, based on proof and legal argument, that a Member has adopted a decision regarding future conduct (such as a so-called norm of general and prospective application), that measure is subject to dispute settlement.[4] (Indeed, Canada presented such arguments, but the Panel failed to make findings on this Canadian assertion.) However, defining a measure that *implicitly assumes* a Member has decided to pursue a certain type of future conduct, without in fact *establishing* that proposition, is legal error. Furthermore, to the extent the Panel intended to issue a finding covering future conduct[5] – without a finding that such future conduct was in some way decided by the Member at the time of panel establishment – the Panel committed legal error. The DSU precludes a complaining party from

[3] *US – Supercalendered Paper (Panel)*, para. 7.316.
[4] *See US – Oil Country Tubular Goods Sunset Reviews (AB); US – Gasoline (AB).*
[5] *US – Supercalendered Paper (Panel)*, para. 7.316.

challenging future measures that are not in existence at the time of panel establishment nor affect the operation of any covered agreement.

8. Below, we describe in Section II.A the Panel's error in finding that "ongoing conduct" is a measure within the DSU. In Section II.B we explain how the Panel erred in relying on the Appellate Body's approach in *US – Continued Zeroing* to find the existence of "ongoing conduct." Finally, in Section II.C we discuss how the Panel failed to apply its chosen legal approach to determine the existence of the "ongoing conduct" which further vitiates its legal conclusion that a "measure" existed for purposes of the DSU.

A. The Panel Erred in Finding that "Ongoing Conduct" Is a Measure within the DSU Because it Purports to Include Future Measures

9. The WTO dispute settlement system exists so that a complaining party may seek DSB findings on a measure that exists when the matter is referred to a panel for examination,[6] so that the DSB may recommend to the responding party to bring its measure into conformity with its WTO obligations.[7] The DSU is not a mechanism for complaints speculating about whether future actions may lead to a WTO-inconsistency at some future date. Thus, to make findings on a non-existent measure is inconsistent with DSU Articles 7.1 (panel's terms of reference), 19.1 (recommendation on an inconsistent measure), 3.3 (contribution of dispute settlement to balance of WTO rights and obligations), and 4.2 (consultations concerning measures affecting the operation of the covered agreements).

10. The purported "ongoing conduct" identified by the Panel simply describes the conclusions of determinations Commerce has made in a small number of countervailing duty proceedings. This past conduct is then generalized, as noted above, by framing the past actions as present-tense statements of what Commerce "does." This reasoning, however, is slipshod and unconvincing. Unless the complaining Member establishes through evidence and argument that a Member has adopted a decision to follow such conduct in the future, vague statements of what a Member "does" do not establish the existence of a measure. In order for the so-called "ongoing conduct" to give rise to a breach of a WTO obligation, the measure would have to "constitute an instrument with a functional life of its own" and "do something concrete, independently of any other instruments."[8] To be sure, this "instrument" – or more broadly, this

---

[6] In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body both concluded that, under the DSU, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations "*at the time of establishment of the Panel*." *See, e.g., EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel").

[7] Article 19.1 sets out in mandatory terms that, where a panel or the Appellate Body "concludes that a measure is inconsistent with a covered agreement, it *shall recommend* that the Member concerned bring *the measure* into conformity with that agreement." Thus, pursuant to Article 19.1, a panel is *required* to make a recommendation where it has found a measure that exists at the time of its establishment to be inconsistent with the covered agreements.

[8] *US – Export Restraints*, para. 8.85.

measure – may be unwritten. But as the Appellate Body has found, a complaining Member must meet a significant evidentiary burden to prove the existence of an unwritten measure.

11. This understanding is based on the relevant provisions of the DSU. Article 3.3 of the DSU provides that:

> {t}he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements *are being impaired* by *measures taken* by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

12. Article 4.2 of the DSU provides that:

> {e}ach Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning *measures affecting* the operation of any covered agreement *taken within* the territory of the former.

13. Article 3.3 of the DSU reflects that WTO dispute settlement is intended to resolve disputes related to measures that *are* impairing benefits, not measures that *may* impair benefits. Further, it is impossible to consult under DSU Article 4.2 on a measure that does not exist because it is not a measure "taken by another Member." Such a non-existent measure also cannot meet the requirement that the measure be one "affecting the operation" of a covered agreement.

14. As the *Upland Cotton* panel found, the legislation challenged in that dispute could not have been impairing any benefits accruing to the complainant because it was not in existence at the time of the request for the establishment of a panel.[9] Similarly, in this dispute, indeterminate future measures that did not exist at the time of Canada's panel request (and may never exist) could not impair any benefits accruing to Canada.

15. In sum, the purported "ongoing conduct" measure does not address any action or decision by the United States at the time of panel establishment, but rather consists of an indeterminate number of future measures not in existence either at the time of the consultations request or at the time of Canada's panel request. Because any alleged "ongoing conduct" did not exist, this is not a "measure" within the meaning of the DSU including Articles 7.1, 19.1, 3.3, and 4.2. A "measure" that does not exist is not within the Panel's terms of reference and is not susceptible of panel findings or recommendations. Accordingly, the Panel's findings concerning the existence of a measure referred to as "ongoing conduct" must be reversed.

[9] *US – Upland Cotton (Panel)*, paras. 7.158-7.160.

B. The Panel Improperly Relied on the Appellate Body's Approach to "Ongoing Conduct" Expressed in *US – Continued Zeroing*

16. In reaching its erroneous finding on ongoing conduct, the Panel improperly relied on the Appellate Body report in *US – Continued Zeroing*. The Panel ignored critical differences between the facts in *US – Continued Zeroing* and the current dispute, such that, even setting aside the serious concerns of the United States with the notion that "ongoing conduct" can itself be a "measure," there is no support in that report for the conclusions reached by the Panel here.[10]

17. First, the zeroing methodology at issue in *US – Continued Zeroing* was a mechanically applied tool that took place in every antidumping proceeding, and had already been found in prior reports to be an unwritten measure of general and prospective application.[11] The use of zeroing in Commerce's margin calculations hinged only on whether a respondent's sales database included sales with "negative" margins.[12] The rote application of zeroing was evident based on a line of programming code in the dumping margin program.[13]

18. In contrast, the determinations presented as evidence of ongoing conduct in this dispute are fact-specific, qualitative determinations that take into account the totality of the relevant evidence that was available on the record of each proceeding as part of Commerce's analysis. The existence of any WTO-inconsistency cannot be established without consideration of the totality of evidence before Commerce. The available evidence varies in each proceeding, due to, for example, differences in the selected respondents, the information submitted by those respondents, the level of cooperation by the interested parties, and decisions by the investigating authority to accept or reject additional information. Each Commerce determination is different. As a result, unlike the zeroing methodology, the determinations presented as evidence of ongoing conduct in this dispute are fact-specific and reflect differing and nuanced outcomes.

19. Second, the Appellate Body in *US – Continued Zeroing* placed considerable emphasis on the fact that the zeroing methodology was applied in "successive proceedings" in "connected stages" of various cases "involving imposition, assessment, and collection of duties under the same anti-dumping order."[14] In this dispute, the seven cases the Panel relied upon to divine the existence of the "other forms of assistance" measure implicated five distinct countervailing duty orders, of which only one – *Solar Cells from China* – was referenced more than once as "connected stages" of the same order.[15] The Panel never engaged with this important aspect of the Appellate Body report in *US – Continued Zeroing*, let alone identified actions on the part of Commerce that would establish "ongoing conduct" over "successive proceedings" involving the same countervailing duty order. Accordingly, the Panel's reliance on *US – Continued Zeroing* is misplaced, and the analysis of that report does not support finding an "ongoing conduct" measure in this dispute.

---

[10] *US – Supercalendered Paper (Panel)*, paras. 7.304-7.306.
[11] *US – Continued Zeroing (AB)*, para. 190.
[12] *US – Continued Zeroing (AB)*, para. 192.
[13] *US – Continued Zeroing (AB)*, para. 351, fn. 749.
[14] *US – Continued Zeroing (AB)*, para. 181.
[15] *US – Supercalendered Paper (Panel)*, paras. 7.309, 7.313; Tables 1 and 2.

C. The Panel Failed to Properly Apply its Chosen Legal Approach to Determine the Existence of the "Ongoing Conduct"

20. Finally, the Panel failed to properly apply its chosen legal approach to determine the existence of the "ongoing conduct." As articulated by the Panel, the complainant must demonstrate that (1) the measure in question is attributable to a Member; (2) its precise content; (3) its repeated application; and (4) the likelihood that such conduct will continue.[16] The Panel erred in finding that Canada established the existence of the second, third, and fourth elements.[17]

1. The Panel erred in finding that Canada demonstrated the precise content of the measure

21. First, the Panel's finding that Canada demonstrated the precise content of the measure fails because varying language is used in each of the seven determinations identified in Tables 1 and 2 of the Panel report reflecting different fact patterns and dissimilar results.[18] According to the Panel, the "ongoing conduct" measure consists of the following three statements describing in the present tense what Commerce does: (1) Commerce asks the "any other forms of assistance" question; (2) Commerce discovers information that it deems should have been provided in response to that question; (3) Commerce applies facts available to determine that the "discovered" information amounts to a countervailable subsidy.[19] As noted, this kind of present tense generalization of past, individual actions is a loose and imprecise way of stating a legal proposition that a Member *has decided* that it *will take* a particular action in the future.

22. Indeed, the very evidence upon which Canada and the Panel relied belies the assertion that Commerce had decided to take particular actions in the future. The Panel reproduced two tables listing a series of questions included in nine questionnaires that it collectively refers to as the "any other forms of assistance" question, and excerpts from seven determinations that it refers to as examples of "application of facts available by the USDOC."[20] However, the wording of the questions the Panel included in Table 1 varies and, similarly, the excerpts listed in Table 2 differ from each other. For instance, the determinations reflect different segments of countervailing duty proceedings; some refer to initial investigations while others refer to administrative reviews. Including selective excerpts from questionnaires and decision memoranda from differing investigations and administrative reviews, does not identify with any precision the actions that Commerce may take in a future determination. The excerpts merely reveal that in some determinations Commerce applied facts available based on the particular facts of that case. Because of these observable differences in the evidence upon which the Panel relied, the Panel erred in finding that Canada had established the precise content of the so-called measure.

---

[16] *US – Supercalendered Paper (Panel)*, para. 7.305.
[17] *US – Supercalendered Paper (Panel)*, paras. 7.316, 7.324, and 7.329.
[18] *US – Supercalendered Paper (Panel)*, para. 7.316.
[19] *US – Supercalendered Paper (Panel)*, para. 7.316.
[20] *US – Supercalendered Paper (Panel)*, Tables 1 and 2.

2. The Panel erred in concluding that Canada demonstrated the repeated application of the measure

23. In addition to insufficiently identifying the precise content of the so-called "ongoing conduct," the Panel erroneously concluded that Canada demonstrated the repeated application of the alleged conduct.[21] The findings relied upon by the Panel to conclude that Canada demonstrated the repeated application of the "measure" present little more than a "string of cases, or repeat action."[22]

24. The Appellate Body in *US – Continued Zeroing* put significant emphasis on the repeated application of the methodology used in "a string of determinations, made sequentially in periodic reviews and sunset reviews over an extended period of time."[23] The Appellate Body determined that "the Panel made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained" because there was "a lack of evidence showing that zeroing was used in one periodic review listed in the panel request" and that "the sunset review determination" was outside of the panel's terms of reference.[24] Consequently, the Appellate Body was "unable to complete the analysis on whether the use of the zeroing methodology exists as an ongoing conduct in successive proceedings."[25]

25. In the present dispute, there are multiple examples on the record before the Panel wherein Commerce did not repeatedly apply the alleged unwritten measure in a string of determinations made sequentially over an extended period of time. In particular, Commerce did not apply facts available to discovered information in successive proceedings. In fact, there are three clear instances in the panel report where the Panel's conclusion that a "measure" had been repeatedly applied cannot follow from the "ongoing conduct" it identified.

26. First, in *Supercalendered Paper from Canada 2017*, Commerce did not use facts available for one of the subsidies it discovered during verification.[26] During the verification of Resolute, one of the respondents in the supercalendered paper investigation, Commerce discovered four potential previously unreported subsidy accounts but determined that it was not necessary to apply facts available to all four subsidy accounts discovered.[27]

27. Second, other cases on the record also demonstrate that Commerce did not use facts available for all of the subsidies it discovered during verification. In *Shrimp from China 2013* and *PET Resin from China 2016*, as acknowledged by the Panel, Commerce discovered previously unreported information and chose not to apply facts available to that missing information.[28] While the Panel recognized that Commerce did not apply facts available to subsidies it discovered during verification in both the *Shrimp from China 2013* and *PET Resin from China 2016* investigations, it reasoned that the situation in *Shrimp from China 2013* and

---

[21] *US – Supercalendered Paper (Panel)*, para. 7.324.
[22] *US – Supercalendered Paper (Panel)*, paras. 7.318-7.325.
[23] *US – Continued Zeroing (AB)*, para. 191.
[24] *US – Continued Zeroing (AB)*, para. 194.
[25] *US – Continued Zeroing (AB)*, para. 194.
[26] *US – Supercalendered Paper (Panel)*, Table 2.
[27] *US – Supercalendered Paper (Panel)*, Table 2 and para. 7.162.
[28] *US – Supercalendered Paper (Panel)*, para. 7.327.

PET Resin from China 2016 was distinct from the challenged conduct because the respondents in those cases presented information to Commerce at the outset of the verification.[29] The Panel's reasoning ignored the very measure it has identified. In *PET Resin from China 2016* and *Shrimp from China 2013*, the respondents failed to provide all of the information requested by the any other forms of assistance question, and when Commerce discovered that the respondents did not fully answer the question, Commerce chose not to apply facts available.[30] The Panel's conclusion concerning *Shrimp from China 2013* and *PET Resin from China 2016* does not align with the measure as defined by Canada and the Panel.

28. Third, the countervailing duty investigation of *Welded Stainless Pressure Pipe from India 2016* is another example cited by Canada and the Panel of repeated application of the alleged measure where Commerce did not apply the purported "ongoing conduct."[31] The Panel, in fact, acknowledged that *Welded Stainless Pressure Pipe from India 2016* is an example where the purported ongoing conduct was not applied.[32] Nevertheless, the Panel reasoned that Commerce characterized the decision to not apply facts available as an "inadvertent error."[33] However, the reason for not applying the purported measure is irrelevant for determining whether Commerce has repeatedly applied the alleged "ongoing conduct." In fact, Commerce's decision not to apply the purported measure demonstrates that the Panel's legal conclusion was in error.

29. Given the Panel's objective to demonstrate a string of determinations made sequentially in successive proceedings, any determination where the purported ongoing conduct was not present should result in no finding of "ongoing conduct." The fact that the any other forms of assistance question was asked in prior determinations does not demonstrate repeated application of an alleged unwritten measure that – as alleged – contains three separate elements.

30. Therefore, the Panel's finding of repeated application was in error. In at least four of the proceedings cited by the Panel, Commerce did not apply the purported "ongoing conduct." Thus, the cases cited by the Panel demonstrate that there is no repeated application of the challenged measure because there were frequent and numerous breaks in the string of cases where this alleged conduct occurred.

3. The Panel erred in finding that Canada demonstrated that there is a likelihood that the measure would continue

31. Finally, the Panel erred in finding that Canada met its burden of showing that the alleged "conduct" is likely to continue in the future.[34] As established in Section II.C.2 above, Commerce did not always apply facts available to information discovered during verification in the nine determinations relied on by the Panel; therefore, there is no discernible basis in the Panel's finding to support the conclusion that the alleged "ongoing conduct" is likely to continue. The Panel's reference to a "practice" in some of Commerce's determinations does not indicate that

[29] *US – Supercalendered Paper (Panel)*, para. 7.327.
[30] *US – Supercalendered Paper (Panel)*, Table 2.
[31] *US – Supercalendered Paper (Panel)*, Table 2 and para. 7.328.
[32] *US – Supercalendered Paper (Panel)*, Table 2 and para. 7.328.
[33] *US – Supercalendered Paper (Panel)*, para. 7.328.
[34] *US – Supercalendered Paper (Panel)*, para. 7.328.

there is a likelihood of continuation and, importantly, the Panel's findings were not premised upon any such conclusion.[35] Rather, the determinations reveal that Commerce has not applied the so-called "ongoing conduct" in four out of the nine determinations referenced in this dispute.

32. For the reasons given above, the United States respectfully requests that the Appellate Body reverse the Panel's findings of the existence of a so-called "ongoing conduct" measure.

III. THE PANEL ERRRED IN FINDING THAT THE SO-CALLED "ONGOING CONDUCT" IS INCONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT

33. The Panel's finding that the so-called "ongoing conduct" is inconsistent with Article 12.7 of the SCM Agreement suffers from four major problems.

34. First, the Panel failed to provide a basic rationale for its findings as required by Article 12.7 of the DSU. The lack of any basic rationale makes it nearly impossible to understand the basis for the Panel's legal conclusion, and vitiates that conclusion.

35. Second, the panel committed legal error by ignoring that Article 12.7 of SCM Agreement provides for the use of facts available where the respondent significantly impedes the investigation. That is, the Panel erred in finding a breach of Article 12.7 where it had *only* analyzed whether "necessary" information had not been provided by an interested party; rather, an alternative basis for using facts available existed.

36. Third, we demonstrate that the Panel's reasoning does not correspond to the "ongoing conduct" actually found by the Panel, nor with the determinations on the record in the proceeding. Therefore, the Panel's legal conclusion must be reversed as simply unsubstantiated by its own reasoning.

37. Finally, we show that the Panel's finding that a request for information on "other forms of assistance" can never be a request for "necessary information" is legal error.

38. Consequently, the Panel erred in finding that the so-called "ongoing conduct" is inconsistent with Article 12.7 of the SCM Agreement. The Panel's legal conclusion that the "other forms of assistance measure" is inconsistent with SCM Agreement Article 12.7 therefore must be reversed.

A. The Panel Failed to Provide a Basic Rationale for its Finding that the So-Called "Ongoing Conduct" Is Inconsistent with Article 12.7 of the SCM Agreement, as Required by DSU Article 12.7

39. Article 12.7 of the DSU provides 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." Here, the Panel failed to explain how the so-called "ongoing conduct" is inconsistent with Article 12.7 of the SCM Agreement. Specifically, the Panel did

[35] *US – Supercalendered Paper (Panel)*, para. 7.329.

not identify the legal obligations of Article 12.7 of the SCM Agreement with respect to "ongoing conduct," nor did it apply the elements of the "ongoing conduct" to any legal requirements. Consequently, the Panel breached its obligations under DSU Article 12.7 and as a result, the Appellate Body should reverse the Panel's findings.

40. The Appellate Body has found that Article 12.7 of the DSU "establishes a *minimum* standard for the reasoning that panels must provide in support of their findings and recommendations," and "the reasoning of the panel must reveal how and why the law applies to the facts."[36] It has explained that Article 12.7 of the DSU promotes procedural fairness, particularly "in cases where a Member has been found to have acted inconsistently with its obligations under the covered agreements, that Member is entitled to know the reasons for such finding as a matter of due process."[37] And, that "the requirement to set out a 'basic rationale' in the panel report assists such Member to understand the nature of its obligations and to make informed decisions about: (i) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (ii) whether and what to appeal."[38]

41. In this Panel report, the only relevant reference to Article 12.7 of the SCM Agreement in relation to the purported "ongoing conduct" is found in the penultimate paragraph of the conclusion section.[39] The Panel made the following statement:

> 7.333 In line with our findings in Section 7.4.1.4 above, we find that the unwritten measure challenged by Canada is inconsistent with Article 12.7 of the SCM Agreement. While a broad question such as 'other forms of assistance' might pertain to necessary information regarding additional subsidization of the product under investigation, it may also pertain to a much broader range of 'assistance'. As we have said, in these circumstances, an investigating authority may not simply infer that a respondent's failure to respond fully to the 'other forms of assistance' question resulted in a failure to provide information necessary to establish the existence of additional subsidization of the product under investigation. In light of the due process rights enjoyed by interested parties throughout an investigation, it is the right of respondents that the investigating authority may only resort to the facts available mechanism after properly determining that information necessary to complete a determination on additional subsidization of the product under investigation had been withheld. 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 its notice of initiation.

---

[36] *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, paras. 106 and 108.
[37] *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 107.
[38] *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 107.
[39] *US – Supercalendered Paper (Panel)*, para. 7.333.

42. Here, there is neither an explanation as to how Article 12.7 of the SCM Agreement should be interpreted nor a discussion as to how the identified measure is inconsistent with Article 12.7 of the SCM Agreement. Instead, the Panel simply concludes that "an investigating authority may not simply infer that a respondent's failure to respond fully to the 'other forms of assistance' question resulted in a failure to provide information necessary to establish the existence of additional subsidization of the product under investigation."[40]

43. The paragraph lacks any analysis revealing how the Panel reached its conclusions, and does not identify how the United States breached its specific obligations under the covered agreement. The best guess for the Panel's reasoning is that the Panel improperly generalized its findings on the *specific* application of facts available in the supercalendered paper investigation to the separate measure it has called "ongoing conduct." But even this is uncertain. The only reference to its "as applied" analysis in the "ongoing conduct" section is found in the opening clause of paragraph 7.333 that reads: "in line with the findings in Section 7.4.1.4 above."

44. This passing reference is hardly enough to serve as a replacement for a proper legal analysis or basic rationale of its "ongoing conduct" findings. The phrase "in line with" does not definitively show that the Panel is attempting to incorporate its "as applied" analysis into its "ongoing conduct" discussion. Rather, the reference to its "as applied" findings may simply be a recognition that it has reached the same conclusion of inconsistency with respect to the purported "ongoing conduct" measure as it did with the application of facts available in the supercalendered paper investigation. It is not an explicit finding that the legal analysis found in Section 7.4.1.4 should also serve as the legal analysis for the "ongoing" conduct findings.

45. To the extent the panel report is read as relying on a generalization from the as applied finding, this form of reasoning is plainly erroneous. The fact that an unwritten measure, when applied in a particular circumstance based on a particular set of facts, may be inconsistent with an obligation, certainly does not mean that the measure is necessarily inconsistent in all cases. Indeed, as the Panel itself acknowledged, "ongoing conduct" is a distinct measure with dissimilar legal review standards from "as applied" measures.[41] Yet the Panel failed to conduct a legal analysis of the unwritten, "ongoing conduct" measure.

46. Moreover, the Panel's "as applied" analysis involved considerations that were not relevant to the measure the Panel identified as "ongoing conduct." For instance, in determining that the application of facts available in the supercalendered paper investigation was inconsistent with Article 12.7 of the SCM Agreement, the Panel explained that the investigating authority was not justified in disregarding the subsidy amounts discovered during a verification and should have made a comparative evaluation of all available information before deciding which information was the best information available.[42] Discounting specific subsidy amounts discovered during a verification was not part of the "ongoing conduct" measure identified by the Panel. Yet, as noted, the Panel appeared to have applied its "as applied" findings to the ongoing conduct measure, without any consideration of the different circumstances.

---

[40] *US – Supercalendered Paper (Panel)*, para. 7.333.
[41] *US – Supercalendered Paper (Panel)*, para. 7.304.
[42] *US – Supercalendered Paper (Panel)*, para. 7.185.

47. Finally, while it might be the case that the basic rationale might be quoted or, at a minimum, incorporated by reference,[43] the Panel did not even do that here. The only report that was referenced by the Panel in its discussion of Article 12.7 of the SCM Agreement and "ongoing conduct" was *EC – Tube or Pipe Fittings*, and there the Panel did not quote or reference any reasoning related to an inconsistency with Article 12.7 of the SCM Agreement.[44] Rather the Panel simply cited to *EC – Tube or Pipe Fittings* to support its statement that interested parties have due process rights in an investigation.[45]

48. As explained above, the Panel has not provided any basic rationale for its finding that the purported "ongoing conduct" is inconsistent with Article 12.7 of the SCM Agreement. Accordingly, the United States requests that the Appellate Body reverse the Panel's findings.

B. The Panel Committed Legal Error by Ignoring that Article 12.7 of the SCM Agreement Provides for the Use of Facts Available Where the Respondent Significantly Impedes the Investigation

49. As explained above, the panel report fails to explain the rationale for its finding that the "ongoing conduct" measure is inconsistent with Article 12.7 of the SCM Agreement. This fundamental failure makes the identification of the specific errors in the Panel's reasoning difficult. Nonetheless, the United States will show that the few shreds of reasoning in the report do not support a finding of a WTO breach, and are legally erroneous.

50. The Panel's single paragraph of vague reasoning on the merits of Canada's ongoing conduct claim contains the following language:

> While a broad question such as 'other forms of assistance' might pertain to necessary information regarding additional subsidization of the product under investigation, it may also pertain to a much broader range of 'assistance'. As we have said, in these circumstances, an investigating authority may not simply infer that a respondent's failure to respond fully to the 'other forms of assistance' question resulted in a failure to provide information necessary to establish the existence of additional subsidization of the product under investigation. In light of the due process rights enjoyed by interested parties throughout an investigation, it is the right of respondents that the investigating authority may only resort to the facts available mechanism after properly determining that information necessary to complete a determination on additional subsidization of the product under investigation had been withheld.

51. This language, to the extent it is comprehensible at all, departs from Article 12.7 of the SCM Agreement in a fundamental way. In short, the fact that an authority may apply facts

---

[43] *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 109.
[44] *US – Supercalendered Paper (Panel)*, para. 7.333, fn. 623.
[45] *US – Supercalendered Paper (Panel)*, para. 7.333, fn. 623.

available when a respondent refuses to answer a question **does not mean** that the authority necessarily determined that the missing information was "necessary" within the meaning of Article 12.7. To the contrary, Article 12.7 provides that three separate types of determinations – any one of which supports the use of facts available – may be reached in cases where a respondent fails to answer a question. Therefore, to establish a breach of Article 12.7, a complaining party must establish that *none* of the three conditions in Article 12.7 was present. But the Panel reached no such conclusion in this dispute.

52. In particular, Article 12.7 provides that "{i}n cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available." Thus, a Member may make a determination on the basis of facts available under Article 12.7 of the SCM Agreement if *any* of the following conditions are present: (1) an interested party refuses access to necessary information within a reasonable period; (2) an interested party otherwise fails to provide necessary information within a reasonable period; and (3) an interested party significantly impedes an investigation.[46]

53. The Panel's failure to recognize that a finding of "significantly impedes" supports the use of facts available completely undercuts the Panel's reasoning, to the extent that reasoning is comprehensible at all. The Panel's reasoning seems premised on the idea that Commerce under the ongoing conduct measure assumes that "assistance" writ large is necessarily a subsidy, and that Commerce's use of facts available somehow presumes that any and all assistance necessarily amounted to a "subsidy" under the SCM Agreement. This reasoning is completely wrong. Rather, a failure to answer the "assistance" question could well amount to significant impedance of the investigation, because without basic knowledge of the assistance received by a producer of the investigated product, it is impossible to conduct the further analysis of whether the assistance amounted to subsidization of that product.

54. Oddly, in the context of the as applied claim, the Panel recognized the "significantly impedes" language in Article 12.7. In addressing Canada's "as applied" claims concerning the supercalendered paper investigation, the Panel stated "{w}e note at the outset that while the United States at times alludes in its submissions to Resolute impeding the USDOC's investigation, we consider 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."[47] The Panel cited U.S. submissions[48] and Canada's rebuttal submission[49] in which both parties recognized that an investigating authority is permitted to use facts available when the respondent significantly impedes the investigation.

---

[46] *China – GOES (Panel)*, paras. 3.384 and 7.387.
[47] *US – Supercalendered Paper (Panel)*, para. 7.173 (footnote omitted).
[48] *US – Supercalendered Paper (Panel)*, fn. 294 (quoting U.S. argument that Commerce was permitted to use facts available because the respondent had significantly impeded the investigation).
[49] *US – Supercalendered Paper (Panel)*, fn. 294 (Canada argued that "recourse to Article 12.7 would not normally be available, except when an exporter refused access to or did not provide necessary information or significantly impedes the investigation. The latter must be objectively assessed and cannot refer to the failure to respond adequately to an overly broad and ambiguous question.").

So, in its "as applied" analysis, the Panel recognized the importance of this provision but then assumed the issue away ("we consider that the disagreement between the parties concerns…").[50] However, even this was better than its cursory analysis of the "ongoing conduct" claim, in which the Panel completely failed to mention the "significantly impedes" condition and failed to find that this condition was not present.

55. In sum, the Panel did *not* find that Canada demonstrated that Commerce, when engaging in the alleged "ongoing conduct," does not and could not find that a respondent significantly impeded the investigation. Yet, resort to facts available is permissible under SCM Agreement Article 12.7 if *any* of the conditions in that provision are present. Therefore, in order to find that the "ongoing conduct" is inconsistent with Article 12.7 of the SCM Agreement, the Panel would have had to find that *none* of the conditions in that provision could be present. The Panel did not conduct that analysis or make that finding. Accordingly, the Appellate Body should reverse the Panel's finding that the alleged "ongoing conduct" measure is inconsistent with Article 12.7 of the SCM Agreement.

C. The Panel Reasoning Does Not Correspond to the "Ongoing Conduct" Actually Found By the Panel, Nor with the Determinations on the Record in the Proceeding

56. The Panel's single paragraph of vague reasoning on the merits of Canada's ongoing conduct claim is also fundamentally wrong for a different reason. To recall, the key language is as follows:

> While a broad question such as 'other forms of assistance' might pertain to necessary information regarding additional subsidization of the product under investigation, it may also pertain to a much broader range of 'assistance'. As we have said, in these circumstances, an investigating authority may not simply infer that a respondent's failure to respond fully to the 'other forms of assistance' question resulted in a failure to provide information necessary to establish the existence of additional subsidization of the product under investigation. In light of the due process rights enjoyed by interested parties throughout an investigation, it is the right of respondents that the investigating authority may only resort to the facts available mechanism after properly determining that information necessary to complete a determination on additional subsidization of the product under investigation had been withheld.

57. This reasoning, to the extent it is comprehensible at all, is premised on the notion that the ongoing conduct measure includes the following conduct: "an investigating authority may not simply infer that a respondent's failure to respond fully to the 'other forms of assistance' question resulted in a failure to provide information necessary to establish the existence of additional

[50] *US – Supercalendered Paper (Panel)*, para. 7.173 (footnote omitted).

subsidization of the product under investigation." But, this is plainly wrong. The "ongoing conduct," as defined by the Panel, does not include this element. In particular, the Panel defined the measure as follows:

> We thus consider that Canada has established the precise content of the "Other Forms of Assistance-AFA measure", which consists in the USDOC asking the "other forms of assistance" question, and where the USDOC "discovers" information that it deems should have been provided in response to that question, applying AFA to determine that the "discovered" information amounts to countervailable subsidies.[51]

58. Nowhere is this supposed inference upon which the panel relied part of the ongoing conduct found by the Panel. Accordingly, for this reason alone, the Panel's finding must be reversed.

59. Nonetheless, although certainly not the U.S. burden in this appeal, the United States will show below that this element could **not** have been included in the ongoing conduct measure because it was not supported by the record in the proceeding.

60. The Panel report sets out the relevant aspect of the determinations upon which Canada relied to establish so-called ongoing conduct. A review of the report demonstrates that Commerce did not make an *inference* that the respondent failed to provide necessary information. Rather, Commerce made a positive *determination* that the respondents failed to provide necessary information. Having made that determination Commerce used an inference to fill in the gaps from the missing information.

61. For instance, in *Solar Cells from China 2012*, which was relied upon by the Panel, "during verification, the **USDOC examined the respondent company, Trina's, 'special payables' account**. The USDOC applied AFA to countervail one of the entries in the account, **labelled 'bonus for employees from government,'** as it held **Trina was unable to tie this entry to a grant reported in its questionnaire response**, or to demonstrate that it was not a countervailable subsidy."[52]

62. Based on the bolded statements above, an inference was not made nor needed to determine that the respondent failed to provide information necessary to establish the existence of additional subsidization of the product under investigation. Based on the fact that Commerce found an account within the records of the respondent – a producer of the product under investigation – labeled "bonus for employees from government," the information discovered constituted information that should have been provided so that Commerce could have properly investigated the existence of any additional subsidization of the product.

63. Likewise, in *Solar Cells from China 2014*, during verification, the USDOC discovered "(a) **twenty-eight unreported 'grant programs**;**'** and (b) an **unreported tax deduction for**

---

[51] *US – Supercalendered Paper (Panel)*, para. 7.316.
[52] *US – Supercalendered Paper (Panel)*, Table 2.

'wages paid for placement of disabled persons."[53] This information was found in the records of a respondent, a producer of the product under investigation. Again, based on the bolded statements, the receipt of funds under 28 grant programs and a tax deduction for employees' wages was information that should have been provided so that Commerce could have properly investigated the existence of any additional subsidization of the product.

64. Additionally, in *Supercalendered Paper from Canada 2017*, during verification Commerce discovered unreported forms of assistance, which were identified in Resolute's accounting system as a BCI label strongly indicating the existence of a subsidy.[54] This information was found in the records of a respondent, a producer of the product under investigation. Again, based on an accounting entry labeled in a manner that strongly indicated the existence of a subsidy, the receipt of assistance was information that should have been provided so that Commerce could have properly investigated the existence of any additional subsidization of the product.

65. Given the absence of reasoning in the report, it has hard to know just how the Panel came up with this concept of "inference." Perhaps the Panel confused the inferences used in filling the gaps for the missing information with the positive determination that the respondent failed to provide information necessary to establish subsidization. In any event, the record does not support a finding that Commerce made an inference as to whether the respondents failed to provide necessary information. Rather, the discovery of accounts in the records of producers of the product under investigation explicitly labeled grants, tax deduction, and a BCI label strongly indicating the existence of a subsidy, indicates that the respondents failed to provide information that would have permitted a proper investigation of subsidization of the product. Accordingly, the Panel's legal conclusion must be reversed as simply unsubstantiated by its own reasoning. The Panel's reasoning does not correspond to the "ongoing conduct" actually found by the Panel, nor with the determinations on the record in the proceeding.

D. The Panel's Finding that a Request for Information on "Other Forms of Assistance" Can Never Be a Request For "Necessary Information" Is Legal Error

66. The United States has demonstrated that the Panel's legal conclusion that the alleged "ongoing conduct" claim breached SCM Agreement Article 12.7 can be reversed on any of the bases explained above. Accordingly, it would not be necessary for the Appellate Body to consider any further claim of legal error. As noted, given the paucity of legal reasoning in the panel report related to the "ongoing conduct" claim, identifying the Panel's specific legal errors is difficult. In this section, the United States will show that to the extent the Panel's reasoning means or implies that Commerce does not solicit "necessary information" in requesting interested parties to provide information regarding "any other forms of assistance," the panel report is legally flawed for this additional reason.

---

[53] *US – Supercalendered Paper (Panel)*, Table 2.
[54] *US – Supercalendered Paper (Panel)*, Table 2 and paras. 7.162, 7.176.

1. The meaning of necessary information within the context of Article 12.7 of the SCM Agreement

67. In its discussion of the "as applied" claims, the Panel appropriately looked to the ordinary meaning of the term "necessary": "{t}hat cannot be dispensed with or done without; requisite, essential, needful."[55] Despite taking this initial step in an interpretive analysis, the Panel failed to proceed further with an interpretive analysis. Not in the "as applied" section, and certainly not in the cursory "ongoing conduct" section.

68. The next step is to look at the context – namely, the information sought is being used to determine the level of subsidization. Accordingly, what is "necessary" is information that is requisite, essential, or needful for finding the level of subsidization.

69. For this reason, the WTO dispute settlement panel in *EC – Countervailing Measures on DRAM Chips* adopted a reasonableness standard to assess whether certain information is "necessary" under Article 12.7 of the SCM Agreement. In that panel's view, information is "necessary" if an investigating authority "reasonably consider{s}" it so.[56] The panel in *US – Coated Paper* stated that "{i}t is, in the first instance, for the investigating authority to determine what information it considers 'necessary' to make its determination, in light of the specific circumstances of the investigation at issue."[57] Such statements reflect an understanding that an investigating authority is in the best position to assess what information is "necessary" to conduct its investigations.

70. Although certain alleged subsidies might be identified in the petition, the domestic industry filing the petition may not be aware based upon information reasonably available to it of all assistance to foreign producers that might constitute a countervailable subsidy. As observed by the Panel in its "as applied" discussion, "{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."[58] Furthermore, "{t}he parties to this dispute do not contest Commerce's right to pose the question on 'other forms of assistance."[59]

71. Accordingly, information about an interested party's level of government assistance constitutes "necessary information" in the context of a proceeding to determine the extent of injurious subsidization of a product. Although assistance alone does not necessarily entail a subsidy within the meaning of the SCM Agreement, the fact of assistance is a crucial starting point in any analysis of the total level of subsidization.

72. Information related to "assistance" is essential in multiple respects. First, the question serves to identify possible assistance for which the application of countervailing duties may be appropriate. As noted, the parties to this dispute are in agreement that "new programmes may be

---

[55] *US – Supercalendered Paper (Panel)*, para. 7.174 (citing Shorter Oxford English Dictionary, 6th ed, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1901).
[56] *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.265.
[57] *US – Coated Paper*, para. 7.112.
[58] *US – Supercalendered Paper (Panel)*, para. 7.175.
[59] *US – Supercalendered Paper (Panel)*, para. 7.181.

added to an investigation when they are discovered during that investigation."[60] Particularly in this light, a question concerning "any other forms of assistance" to respondent governments and companies represents a direct way to learn about other potential subsidies that were not alleged in the petition, but should be subject to the investigating authority's examination.

2. The Panel's reasoning is internally inconsistent

73. The Panel's reasoning is internally inconsistent. In its analysis of the "as applied claim," the Panel wrote that, "{a}ssuming new programmes may be added to an investigation, 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."[61] Yet, in its vague reasoning on the "ongoing conduct" claim, the Panel questioned whether a request for information on "other forms of assistance" solicits "necessary" information.

74. The United States has struggled to find a coherent thought behind these contradictory statements. Perhaps one could read the report as meaning that information on "other assistance" is necessary, but when the respondent fails to provide the information, the *specific missing information* might not be necessary.

75. This strained reading, however, would not save the Panel's reasoning from being fundamentally flawed and erroneous. This type of reasoning is completely circular: to apply facts available, an investigating authority must establish that the missing information is "necessary;" however, to establish that the missing information is "necessary," the authority must take steps to confirm what the missing information would be if it had been provided. Obviously, an investigating authority cannot establish that specific requested information is "necessary" when that specific information has not been provided.

76. Aside from its circularity, such logic, if adopted, would create a perverse incentive for exporters not to be forthcoming with an investigating authority seeking to determine the extent of a particular product's subsidization. Exporters that choose not to answer initial questions about other forms of assistance or possible subsidization – or choose to answer those questions untruthfully or incompletely – would benefit from the non-disclosure and possibly avoid a full investigation into the alleged subsidization should an investigating authority make such a discovery at verification or at a similarly late stage of an investigation. In that scenario, the distortive effects of injurious subsidization for which the SCM Agreement provides a remedy would go unaddressed. The Panel's approach would privilege lack of transparency and undermine the subsidy disciplines of the WTO Agreements.

77. Finally, the Panel's cursory analysis contains the mysterious critique that the ongoing conduct measure involves too "broad" a question on assistance.[62] The Panel presents no legal basis for this critique, nor is it clear that this amounts to some sort of legal finding. Further, it is completely inconsistent with the Panel's assertion that "it is logical to postulate that information pertaining to the existence of as-of-yet unidentified subsidy programmes benefiting the product

---

[60] *US – Supercalendered Paper (Panel)*, para. 7.175.
[61] *US – Supercalendered Paper (Panel)*, para. 7.175.
[62] *US – Supercalendered Paper (Panel)*, para. 7.333.

under investigation is necessary information." In any event, a question on assistance is as specific as it can be without knowledge of whether additional subsidies, in fact, exist.

78. To phrase the question in terms of additional "subsidies" (as opposed to "assistance"), as the Panel perhaps suggests, would require the respondent to make a legal conclusion as to whether a particular form of assistance amounts to subsidization. That determination, however, must be made by the investigating authority, not the respondent. Phrasing the question in terms of subsidies would be unfair to respondents, who would be faced with the untenable choice of (a) reporting that assistance was a subsidy even though they thought otherwise, or (b) not reporting the assistance as a subsidy, with the risk that the authority would disagree and – upon finding information about the subsidy through some other means – would end up resorting to facts available. Nothing in the SCM Agreement could be read to require this type of question that calls upon a respondent to make legal determinations of this sort.

79. Because the Panel's finding on a non-existent measure is inconsistent with the DSU, and because the Panel's legal conclusions relating to the alleged measure were based on an erroneous interpretation and application of SCM Agreement Article 12.7, the Appellate Body should reverse the Panel's finding that the "other forms of assistance" measure is inconsistent with SCM Agreement Article 12.7. Having reversed the Panel's legal conclusion, the Appellate Body should, as a consequence, also reverse the Panel's recommendation to bring this non-existent measure into conformity with the SCM Agreement.

IV. CONCLUSION

80. For the foregoing reasons, the United States respectfully requests that the Appellate Body reverse the Panel's findings that the challenged so-called "other forms of assistance measure" exists and is a "measure" within the meaning of the DSU and further requests that the Appellate Body reverse the Panel's finding that such a supposed "measure" is inconsistent with Article 12.7 of the SCM Agreement.[63]

81. Article 19.1 sets out in mandatory terms that, where a panel or the Appellate Body "concludes that a measure is inconsistent with a covered agreement, it *shall recommend* that the Member concerned bring *the measure* into conformity with that agreement." Neither a panel nor the Appellate Body has the authority under Article 19.1, however, to make a recommendation where a challenged "measure" does not exist at the time of the panel's establishment or has not been found to be inconsistent with the covered agreements. Having reversed the Panel's legal conclusion on either basis set out above, the Appellate Body should also, as a consequence, reverse the Panel's recommendation.[64]

[63] *US – Supercalendered Paper (Panel)*, paras. 8.4(a) and 8.4(b).
[64] *US – Supercalendered Paper (Panel)*, para. 8.6.