Ukraine had argued that conducting off-site inspections in Ukraine – which was an option explicitly contemplated under Russian law – would be a less trade-restrictive alternative measure. The Panel had rejected this proposed alternative, finding that Ukraine failed to present evidence of compliance with the requirements for conducting such off-site inspections. However, the Appellate Body found that this went beyond what Ukraine was required to show under the TBT Agreement.[7] The Appellate Body found that 'a complainant under Article 5.1.2 cannot be expected to provide detailed information on how a proposed alternative would be implemented by the respondent in practice'. Rather, once Ukraine had established that the proposed alternative was reasonably available, it was for Russia to present evidence to rebut the contention.[8] Again, having reversed the Panel, the Appellate Body was unable to complete the legal analysis because of insufficient factual findings on the record.[9]

Conclusion

The Appellate Body confirmed that there are specific legal disciplines relating to WTO Members' application of conformity assessment procedures, such as non-discrimination obligations depending on the circumstances. It, however, reversed findings of the Panel that Ukraine failed to establish violations under Articles 5.1.1 and 5.1.2 of the TBT Agreement due to a failure to apply these disciplines properly. Thus, the reversals were not based on an assessment of whether or not Russia was justified in preventing imports of railway equipment from Ukraine. In fact, in both instances, after reversal, the Appellate Body was unable to complete the legal analysis leaving unanswered whether Russia's conformity assessment measures were consistent with WTO law.

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United States – Countervailing Measures on Supercalendered Paper from Canada, DS505

Adopted	5 March 2020
Complainant	Canada
Respondent	United States
Third Participants	Brazil, China, European Union, India, Japan, Korea, Mexico, Turkey

Measure at Issue

The dispute concerns a challenge by Canada of certain countervailing duty measures imposed by the United States on supercalendered paper from Canada.[1] Canada brought multiple claims

[7] Ibid. paras. 5.200–5.201.
[8] Ibid. para. 5.195.
[9] Ibid. para. 5.205.

[1] In paper manufacturing, the term 'calendering' refers to the process of smoothing the surface of the paper by pressing it between hard pressure cylinders or rollers – the calendars – at the end of the papermaking process.

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under the WTO Subsidies and Countervailing Measures (SCM) Agreement, including a challenge of an alleged unwritten measure, pursuant to which the US Department of Commerce (USDOC) applies adverse facts available (AFA) to find countervailable subsidies in relation to unreported programs that were discovered during an investigation. In USDOC subsidy investigations, exporters are asked to report information on the use of specifically identified subsidy programs as well as whether they obtained any 'other forms of assistance' (OFA). It is the USDOC's conduct in applying AFA in relation to programs not reported under the OFA question that Canada challenged as an ongoing conduct (the OFA-AFA measure).

On appeal before the Appellate Body, the United States argued that the Panel erred when finding that the alleged OFA-AFA measure was a type of 'ongoing conduct' that could be challenged in WTO disputes. The United States also argued that the Panel erred in finding that the OFA-AFA measure was inconsistent with Article 12.7 of the SCM Agreement. Both points of appeal were rejected by the Appellate Body.

Main Adopted Findings of the Appellate Body

Upholding the Panel's finding that Canada established the existence of the OFA-AFA measure as 'ongoing conduct', and thus possible to challenge in a WTO dispute

The Panel had found that Canada had provided sufficient evidence to establish the constituent elements of the 'ongoing measure', namely the precise content of the alleged OFA-AFA measure, that it was attributable to the United States, that it was repeatedly applied by the USDOC, and that it likely would continue to apply in the future.[2]

In upholding the Panel's finding, first, the Appellate Body did not consider decisive that there were certain variations in the language used by the USDOC when applying AFA to programs not reported under the OFA question. The Appellate Body noted that the substance of the challenged measure was repeated, in the sense that whenever the USDOC discovered information during a verification that it deems should have been provided in response to the OFA question the USDOC applied AFA to determine that the discovered information amounted to countervailable subsidies.[3]

Second, the Appellate Body also agreed that Canada had demonstrated the repeated application of the OFA-AFA measure. The Appellate Body noted that a complainant is not required to show 'repetition in a string of connected and sequential determinations in successive proceedings', but rather that the focus was on the repetition of the substantive elements of the challenged measure. Moreover, the United States had provided no example of a relevant instance after 2012 where the USDOC had not applied the alleged measure, which confirmed that an ongoing conduct existed.[4]

Finally, the Appellate Body rejected the US argument that only an 'adopted' decision could be found likely to apply in the future. The Appellate Body found that complainants are not required to prove 'certainty' of future application of the alleged measure and that the likelihood of continued application may be demonstrated through a number of factors. In this case, the condition was satisfied as Canada had shown that the USDOC applied the OFA-AFA measure in nine determinations since 2012, and that the US provided no counterexamples.[5]

Upholding the Panel's finding that the OFA-AFA measure is inconsistent with Article 12.7 of the SCM Agreement

The Panel had found that the OFA-AFA measure was inconsistent with Article 12.7 of the SCM Agreement, and that an investigating authority may not simply infer that a failure to respond fully

[2] Panel Report, *US–Supercalendered Paper,* paras. 7.305, 7.316, 7.324, 7.328.
[3] Appellate Body Report, *US–Supercalendered Paper*, paras. 5.21–5.24.
[4] Ibid. paras. 5.27–5.34.
[5] Appellate Body Report, *US–Supercalendered Paper*, paras. 5.44, 5.47.

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to the OFA question amounted to a failure to provide information 'necessary' to determine the existence of additional subsidization of the product under investigation.[6]

The Appellate Body agreed that the measure violated Article 12.7. In particular, the USDOC's mechanistic approach to apply AFA whenever it discovered unreported information to the OFA question was found not to be consistent with the requirement that an investigating authority must take appropriate steps to determine whether missing information is 'necessary' to determine the existence of a subsidy.[7] The fact that the USDOC simply *assumed*, through the application of AFA, that any unreported information to an OFA question amounts to countervailable subsidies was also found not to be consistent with Article 12.7. The Appellate Body noted that such assumptions were made without regard to the actual facts on the record, and thus amounted to mere speculation.[8]

Conclusion

The Appellate Body confirmed that the scope of 'measures' that can be challenged in WTO disputes is broad, including both written and unwritten measures such as ongoing conduct. The ruling is noteworthy as it circumscribes one aspect of the USDOC's extensive use of AFA in countervailing duty investigations. Indeed, Article 12.7 of the SCM Agreements allows for the use of facts available to make subsidy determinations when 'necessary' – not just any information can be missing, but rather only such information that is required to complete a determination. The USDOC may apply facts available in future investigations if the unreported information to the OFA question is found to *be required to complete* the subsidy determination. However, the USDOC may not merely assume this; it must clarify the nature of the unreported assistance and whether it is 'necessary'. The same goes for any conclusion on whether the unreported information amounts to countervailable subsidies. The USDOC may make such findings in the future, but it cannot merely assume this *without further analysis of the actual facts on the investigation record.*

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Australia – Anti-Dumping Measures on A4 Copy Paper, DS529

Adopted	27 January 2020
Complainant	Indonesia
Respondent	Australia
Third Parties	Canada; China; European Union; Egypt; India; Israel; Japan; Korea, Republic of; Russian Federation; Singapore; Thailand; Ukraine; United States; Viet Nam

[6] Panel Report, *US – Supercalendered Paper,* para. 7.333.
[7] Appellate Body Report, *US – Supercalendered Paper*, para. 5.81.
[8] Ibid. para. 5.82.

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