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UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

AB-2018-8

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS505/AB/R.

The Notice of Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at 1 in the original may have been renumbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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NOTICE OF APPEAL

ANNEX A-1

UNITED STATES' NOTICE OF APPEAL*

1. Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the Panel in *United States – Countervailing Measures on Supercalendered Paper from Canada* (WT/DS505/R and WT/DS505/R/Add.1) and certain legal interpretations developed by the Panel.

2. The United States seeks review by the Appellate Body of the Panel's findings that the so-called "ongoing conduct" measure is a "measure" that could be challenged under the DSU.[1] This finding is in error and is based on erroneous findings on issues of law and legal interpretations. The Panel erred in finding that "ongoing conduct" is a measure within the DSU, including DSU Articles 7.1, 19.1, 3.3, and 4.2. The Panel improperly relied on the Appellate Body's approach to "ongoing conduct" expressed in *US – Continued Zeroing* when that approach would not support the Panel's finding of an "ongoing conduct" measure. The Panel also failed to properly apply its own legal approach to the facts to determine the existence of the "ongoing conduct". The United States respectfully requests that the Appellate Body reverse the Panel's findings.

3. The United States seeks review by the Appellate Body of the Panel's finding that the so-called "ongoing conduct" measure is inconsistent with Article 12.7 of the SCM Agreement.[2] This finding is in error and is based on erroneous findings on issues of law and legal interpretations. The Panel failed to provide a basic rationale for its findings as required by Article 12.7 of the DSU. The Panel erred in finding a breach of Article 12.7 of SCM Agreement when that provision permits the use of facts available where the respondent significantly impedes the investigation, an alternative basis for using facts available that the Panel failed to analyze. The Panel's legal conclusion is unsubstantiated by its own reasoning, which does not correspond to the "ongoing conduct" actually found by the Panel, nor with the determinations on the record in the proceeding. Finally, the Panel erred in finding that a request for information on "Other Forms of Assistance" can never be a request for "necessary information". The United States respectfully requests that the Appellate Body reverse the Panel's findings.

4. The Panel erred in making a recommendation under DSU Article 19.1 because it erred in finding that the so-called "Other Forms of Assistance" measure exists and is a "measure" within the meaning of the DSU or because it erred in finding this alleged "measure" is inconsistent with SCM Agreement Article 12.7.[3] Having reversed the Panel's legal conclusion on either basis, the Appellate Body should also, as a consequence, reverse the Panel's recommendation under DSU Article 19.1.

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* This notification, dated 27 August 2018, was circulated to Members as document WT/DS505/6.

[1] *US – Supercalendered Paper (Panel)*, paras. 7.301–7.329 and 7.332.
[2] *US – Supercalendered Paper (Panel)*, para. 7.333.
[3] *US – Supercalendered Paper (Panel)*, para. 8.6.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLANT'S SUBMISSION[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 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

[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.

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.

ANNEX B-2

EXECUTIVE SUMMARY OF CANADA'S APPELLEE'S SUBMISSION[1]

1. The Agreement on Subsidies and Countervailing Measures ("SCM Agreement") was intended to strike a balance between the right to impose duties to offset subsidization, and the obligations that discipline the use of countervailing measures to ensure that such measures are not abused by investigating authorities.[2] Before the Panel, Canada demonstrated that the United States' Other Forms of Assistance-AFA measure upset this balance in a manner that was inconsistent with Article 12.7 of the SCM Agreement.

2. The Panel agreed with Canada. It found that, since 2012, the U.S. Department of Commerce ("Commerce") has repeatedly applied the Other Forms of Assistance-AFA measure to countervail information it discovers during verification on the basis that the information could be a *potential* subsidy.[3] During its countervailing duty investigations and reviews, Commerce asks respondents, as a matter of practice, a question that requests the disclosure of any "other forms of assistance" received by the company. If Commerce subsequently discovers information during verification that it deems responsive to this question, it applies Adverse Facts Available ("AFA") to the respondent and determines that this information is a countervailable subsidy, without assessing whether it was "necessary" within the meaning of Article 12.7 of the SCM Agreement, and without permitting the respondent to provide information and supplement the factual record.[4]

3. In the Commerce investigations and reviews cited as evidence of the measure, the Panel found that Commerce only accepted sufficient evidence to find that it had discovered information that it deemed to be potential "assistance", and failed to provide respondents with due process.[5] In fact, upon discovering such additional information, Commerce does not assess whether the information is necessary to complete its determination and refuses to accept any other relevant information onto its record, including evidence that the discovered information is not countervailable.[6] Instead, Commerce systematically applies its Other Forms of Assistance-AFA measure to deem (or, in Commerce's words, *infer*,[7]) that the discovered information provided a financial contribution, that conferred a benefit, and was specific, without providing respondents any opportunity to refute this application of AFA.[8] On the factual record before it, the Panel concluded that the Other Forms of Assistance AFA measure was properly evidenced, including by nine determinations since 2012.[9] The Panel found that the record supported finding, in line with Commerce's own statements, that Commerce has repeatedly applied the measure and is likely to continue to apply it in future investigations and reviews.[10]

4. The United States attempts to distract from these findings by claiming that this dispute relates to "massive" subsidies provided "to rescue […] a financially troubled paper mill from bankruptcy".[11]

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[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), Canada indicates that this executive summary contains a total of 1,146 words (including footnotes), and this appellee submission (not including the text of the executive summary) contains 13,350 words (including footnotes).

[2] Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.542; *US – Anti-Dumping and Countervailing Duties (China)*, para. 301; and *US – Softwood Lumber IV*, para. 64.

[3] Panel Report, *US – Supercalendered Paper*, paras. 7.307-7.327.

[4] Panel Report, *US – Supercalendered Paper*, paras. 7.333 and 7.174-7.176. It is also noteworthy that Commerce does not initiate an investigation into any of the discovered assistance, yet countervails them as new programs.

[5] Panel Report, *US – Supercalendered Paper*, paras. 7.316 and 7.333.

[6] See e.g. Panel Report, *US – Supercalendered Paper*, Table 2: Application of facts available by the USDOC (following para. 7.313) and para. 7.317.

[7] Panel Report, *US – Supercalendered Paper*, Table 2: Application of facts available by the USDOC (following para. 7.313) and para. 7.317.

[8] Panel Report, *US – Supercalendered Paper*, Table 2: Application of facts available by the USDOC (following para. 7.313) and paras. 7.174-7.176 and 7.333.

[9] Panel Report, *US – Supercalendered Paper*, paras. 7.316-7.324.

[10] Panel Report, *US – Supercalendered Paper*, paras. 7.324-7.329.

[11] United States' appellant submission, para. 2.

This is false. None of the issues in this appeal concern the alleged subsidies to Port Hawkesbury Paper LP mill, to which the United States refers.[12]

5. The United States asserts that the Panel made a lengthy list of legal errors in concluding that the Other Forms of Assistance-AFA measure contravenes Article 12.7 of the SCM Agreement. The U.S. arguments fall into two categories.

6. First, it claims that the Panel erred in concluding that the measure existed, or could exist, as "ongoing conduct". In Canada's view, the majority of these arguments relate to the Panel's findings of fact, and are not properly before the Appellate Body.[13] The remainder of the arguments advanced by the United States are inconsistent with the previous decisions of panels and the Appellate Body concerning the broad scope of a "measure" that can be challenged under the Understanding on rules and procedures governing the settlement of disputes ("DSU").[14] In particular, the U.S. argument that the Other Forms of Assistance-AFA measure cannot be challenged as "ongoing conduct" improperly revisits settled interpretations of the DSU, and such an argument has no basis in the DSU.

7. Second, the United States also argues that the Panel erred in finding that the measure is inconsistent with Article 12.7 of the SCM Agreement. The Panel's analysis with respect to Article 12.7 is thorough, and the Panel correctly took its guidance from prior Appellate Body decisions. The Panel also did not improperly ignore the fact that this provision provides for the use of facts available where a respondent significantly impedes an investigation; the Other Forms of Assistance-AFA measure identified by Canada did not concern such a finding. In addition, the Panel correctly concluded that Commerce infers that a failure to respond fully to the broad "other forms of assistance" question results in a failure to provide necessary information in a manner inconsistent with Article 12.7 of the SCM Agreement. Finally, contrary to U.S. argument, the Panel properly relied on previous Appellate Body decisions to interpret the term "necessary information" for the purpose of Article 12.7 of the SCM Agreement, and correctly concluded that Commerce could not determine that the information was necessary without first providing respondents with due process rights.

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[12] In any event, the Panel found that the majority of Commerce's conclusions with respect to the alleged subsidization of the Port Hawkesbury Paper LP mill, which are not at issue in this appeal were WTO-inconsistent.

[13] The United States advances these claims despite its "Statements by the United States at the Meeting of the WTO Dispute Settlement Body", Geneva, August 27, 2018, where the United States argues that authority of the Appellate Body to review panel fact-finding, which is in its view "contrary to the DSU," has added complexity, duplication, and delay to every WTO dispute.

[14] For example, the Panel appropriately relied on Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 81; *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67; *US – Anti-Dumping Methodologies (China)*, paras. 5.122 and 5.132; *US – Continued Zeroing*, para. 191; and *Argentina – Import Measures*, paras. 5.108-5.110.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

I. "FACTS AVAILABLE" INTENDS TO OVERCOME ABSENCE OF INFORMATION NEEDED TO COMPLETE A DETERMINATION

1. A request for information on "other forms of assistance" can be a request for "necessary information". However, as the question may be overly broad, it could be difficult to discern what the "necessary" information is.

2. Having discovered new information, investigating authorities can rely on best information available, without having to open a new line of investigation. However, they should first determine which information is necessary[1].

3. Authorities are furthermore expected to explain whether and how the newly discovered information led or contributed to a determination.

4. Finally, "facts available" should be complementary to other evidence presented, which should be taken into account, even if the information provided is not complete[2].

II. INCOMPLETE ANSWERS SHOULD NOT NECESSARILY BE INTERPRETED AS IMPEDANCE OF INVESTIGATION

5. While Article 12.7 provides that investigating authorities can rely on facts available, Article 12.1 entails a due process obligation to ask specifically for the information deemed necessary before assuming the investigated party is denying to disclose it.[3]

6. Article 6.8 of the Anti-Dumping Agreement and its Annex II provide interpretive guidance on the specific requirements that must be satisfied in order for an authority to resort to facts available under Article 12.7 of the SCM Agreement.

[1] *Mexico – Anti-Dumping Measures on Rice*, Appellate Body Report, para. 295.
[2] *Mexico – Anti-Dumping Measures on Rice*, Appellate Body Report, para. 294.
[3] *Mexico – Anti-Dumping Measures on Rice*, Appellate Body Report, paras. 290-295.

ANNEX C-2

EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION

1. China focuses its submission on the issue of systemic importance: whether the "ongoing conduct" challenged by Canada in this dispute can be subject to WTO dispute settlement.

2. China considers that the proper adjudication of the "ongoing conduct" related issues has far-reaching implications for the appropriate functioning of the SCM Agreement and the DSU, and for the maintaining of the delicate balance built in the said agreements.

3. In China's view, it is now well settled Appellate Body jurisprudence that the scope of measures susceptible to challenge in WTO dispute settlement is broad. "Ongoing conduct" does involve elements in relation to future application, but that does not mean that ongoing conduct is a certain type of future measure. In addition, the fact that a measure is "ongoing" does not mean that the measure does not "exist". Furthermore, the legal standard for proving the future application of a measure is not "certainty".

4. Against this legal background, China submits that the Panel in this dispute correctly relied on the broad meaning of a "measure" under the DSU and the Appellate Body's jurisprudence and concluded that "ongoing conduct" can be a measure subject to WTO dispute settlement.

ANNEX C-3

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION[1]

A. "MEASURE AT ISSUE"

1. The European Union considers that the range of measures subject to dispute settlement is broad. There is no exhaustive catalogue of challengeable measures. The evidentiary standard to be met by the complainant is set by its own characterisation, as the Appellate Body has pointed out in *Argentina – Import measures* and confirmed in *US – Anti-Dumping Methodologies (China)*. The types of unwritten measures that have been found to exist in previous case law are examples; measures need not fit squarely into one of these boxes.

2. "Ongoing conduct" is one type of unwritten measure that has been found by the Appellate Body to be challengeable, and there are no cogent reasons to depart from these findings. The standard for future application is "likelihood", and not certainty, as stressed (for "norms of general and prospective application") by the Appellate Body in *US – Anti-Dumping Methodologies (China).*

B. FACTS AVAILABLE

3. As regards the United States' claim under Article 12.7 of the DSU, the European Union points to previous case law which has stated that panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for their findings and recommendation. A panel's 'basic rationale' might also be found in reasoning set out in other documents, such as referenced panel or Appellate Body reports – or referenced reasoning on other measures at stake in the same dispute, if the factual situation and legal issues are comparable.

4. As regards Article 12.7 of the SCM Agreement, the European Union agrees with the Panel that requests for information must be sufficiently precise as to what information is needed. However, the notion of "necessity" must be assessed from an *ex ante* perspective. Even if it becomes clear afterwards that the information requested was not objectively decisive for the determination, the investigating authority must have the right to request it in the first place, in order to evaluate whether or not it is relevant – provided it is not clear from the beginning that the request relates to irrelevant information.

5. The European Union also agrees with the distinction by the Panel between the right to ask questions, and the consequences of incomplete answers. Not any broad question that is legitimate from an *ex ante* perspective will justify automatic negative inferences in case of incomplete answers. Negative inferences have to be justified on a case-by-case basis, taking all relevant procedural circumstances into account. This position is warranted in light of previous case-law on the relevance of procedural circumstances in which necessary information is missing, context from Annex II to the Anti-Dumping Agreement, and the necessary balance between efficient investigations and due process rights.

[1] Total number of words (including footnotes but excluding executive summary) = 4751; total number of words of the executive summary = 441.

ANNEX C-4

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. On the existence of a measure characterized as "ongoing conduct", the United States argued that the complainant needs to demonstrate that a Member has adopted a decision to follow the past actions in the future.[1] While such action would certainly constitute strong evidence of the likelihood of continuance, it would not constitute an additional requirement.

2. The United States stated that the zeroing methodology in *US – Continued Zeroing* case had a clearer indication of "general and prospective application" and "rote application" than the measure at issue. However, the requirements to establish "ongoing conduct" are repeated application and of the likelihood of continuance, rather than "general and prospective application" and "rote application".[2]

3. On "significant impedance" under Article 12.7 of the SCM Agreement, the due process rights of interested parties who significantly impede the investigation may still need to be taken into account since facts available shall not be used as punishment,[3] and thus, no deviation from the unbiased and objective fact-finding is permitted.

4. The Panel's finding under Article 12.7 highlighted the absence of a linkage between newly discovered subsidies and the subject merchandise before resorting to facts available.[4] The due process requires respondent to know (and to be given appropriate opportunity to rebut) at least the basic nature of the discovered subsidies, including whether or not such subsidies are relevant to the subject merchandise. Japan agrees with the Panel that practical difficulties to confirm the basic nature of the discovered information cannot outweigh the due process rights.[5]

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[1] United States' appellant's submission, paras. 10 and 15.
[2] Appellate Body Report, *Argentina – Import Measures*, para. 5.108.
[3] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.419 and 4.422.
[4] Panel Report, para. 7.176.
[5] Panel Report, paras. 7.177 and 7.333.

ANNEX D

PROCEDURAL RULINGS

ANNEX D-1

PROCEDURAL RULING OF 13 SEPTEMBER 2018

1. On Tuesday, 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 and executive summaries in this appeal. In its letter, the European Union noted that the Working Schedule set the date for the submission of appellees' submissions as Friday, 14 September 2018, and the date for the filing of the third participants' submissions as Monday, 17 September 2018. The European Union highlighted that this allowed third participants less than one working day to consider and react to the appellees' submissions in their third participants' submissions. The European Union requested that the Division extend the deadline for the filing of the third participants' submissions to Friday, 21 September 2018, thus allowing third participants four full working days following the submission of the appellees' submissions. The European Union noted that the date of the hearing had not yet been determined and asserted that therefore the requested change would not cause any inconvenience to the Appellate Body and other participants in this appeal.

2. On 5 September 2018, on behalf of the Division hearing this appeal, the Chair of the Appellate Body invited Canada and the United States, as well as the other third participants in this appeal to comment in writing on the communication from the European Union by 5 p.m. on Monday, 10 September 2018.

3. On 4, 5, 7 and 10 September 2018, communications were received from Canada, China, Brazil, Mexico, Korea, Japan, India, and the United States indicating that they had no objections to the European Union's request for an extension.

4. We recall that Rule 24 of the Working Procedures for Appellate Review ("Working Procedures") foresees the filing of third participants' submissions within 21 days as of the filing of the Notice of Appeal regardless of whether the period between the due date for filing of appellee submissions and the date for filing third participants' submissions runs over a weekend. At the same time, we take into consideration the exceptional circumstances of persistent vacancies on the Appellate Body coupled with the large number of pending appeals, which leads to a significantly longer period of time between the filing of submissions and the oral hearing in this appeal. We further note that the participants and other third participants have not raised any objection to the European Union's request. Accordingly, we consider that granting an extension to the deadline for the filing of the third participants' submissions would not prejudice their due process rights. In the light of the above considerations, I would like to inform you that the Division hearing this appeal has decided, pursuant to Rule 16(2) of the Working Procedures, to extend the deadline for filing third participant's submissions, notifications and executive summaries under Rule 24(1) and (2) of the Working Procedures to Friday, 21 September 2018. The revised Working Schedule is attached to this Ruling.

Pursuant to Rule 26 of the Working Procedures, the revised Working Schedule for this appeal is as follows:

Modified Dates for the Submission of Documents

Process	Rule	Date
Notice of Appeal	Rule 20	Monday, 27 August 2018
Appellant's submission and executive summary	Rule 21(1)	Monday, 27 August 2018
Notice of Other Appeal	Rule 23(1)	Monday, 3 September 2018

Other appellant's submission and executive summary	Rule 23(3)	Monday, 3 September 2018
Appellee's submission(s) and executive summary(ies)	Rules 22 and 23(4)	Friday, 14 September 2018
Third participants' submissions and executive summaries	Rule 24(1)	~~Monday, 17 September 2018~~ **Friday, 21 September 2018**
Third participants' notifications	Rule 24(2)	~~Monday, 17 September 2018~~ **Friday, 21 September 2018**

ANNEX D-2

PROCEDURAL RULING OF 28 MARCH 2019

1. On Thursday, 14 March 2019, the Appellate Body received a communication from the Permanent Mission of 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. The covering letter, sent on the same day, stated that both the submission and the executive summary were enclosed. The communication received on 14 March 2019 indicates that the executive summary was inadvertently omitted from the third participant's submission. The communication also indicated that on 14 March 2019 copies of the executive summary were provided to the participants and the other third participants.

2. On 19 March 2019, the Presiding Member of the Division hearing this appeal invited, on behalf of the Division hearing this appeal, Canada and the United States, as well as the other third participants in this appeal to provide comments in writing on China's request by 5 p.m. on Thursday, 21 March 2019.

3. On 21 March 2019, communications were received from Canada and Mexico. 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. Mexico also noted that document WT/AB/23 of 11 March 2015 regarding "executive summaries of written submission in appellate proceedings" is a guideline that, while useful, "should not be strictly applied given the circumstances of the present case".

4. Having considered the communications received and the circumstances of this appeal, the Division hearing this appeal accepts the executive summary of China's third participant's submission and decides that it will be annexed, as other executive summaries of the submissions in this appeal, as an addendum to the Appellate Body report in this dispute.

ANNEX D-3

PROCEDURAL RULING OF 2 JULY 2019

1. On 18 April 2019, we received a joint communication from the participants in the present appeal. Canada and the United States request that all WTO Members and the public be allowed to observe the oral statements and oral responses to questions of the participants and third participants that agree to make their statements and responses at the oral hearing public. In this respect, Canada and the United States make the request "on the understanding that any information that has been designated as confidential in the documents filed by any participant in the [P]anel proceedings would be adequately protected in the course of the Appellate Body's oral hearing". They propose that public observation of the oral hearing be permitted via simultaneous closed-circuit television broadcasting, with the option for the transmission to be turned off when issues involving confidential information are discussed, or if a third participant indicates that it wishes to keep its oral presentation confidential.

2. On 13 May 2019, we invited third participants to comment on this request by 16 May 2019. Only Mexico responded. 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. Mexico requested that the necessary precautions be taken so that, if Mexico decided to participate in the oral hearing, its oral statement and responses to questions asked at the hearing would not be subject to public observation.

3. In the past, the Appellate Body has allowed public observation of certain oral hearings. In this appeal, the participants jointly request the Appellate Body to allow observation by all WTO Members and the general public of the oral hearing by means of simultaneous closed-circuit television broadcasting, with the option for the transmission to be turned off when issues involving confidential information are discussed, or if a third participant indicates that it wishes to keep its oral statement and responses to questions confidential. In our view, these modalities would operate to protect confidential information in the context of a hearing that is open to public observation.[1]

4. We therefore authorize public observation of the oral hearing in this appeal on the terms set out below. Accordingly, pursuant to Rule 16(1) of the Working Procedures for Appellate Review, we adopt the following additional procedures for the purpose of these appellate proceedings:

a. The oral hearing will be open to public observation by means of simultaneous closed-circuit television broadcasting, shown in a separate room to which duly registered delegates of WTO Members and members of the general public will have access.

b. Oral statements and responses to questions by the third participants that have indicated their wish to maintain the confidentiality of their submissions, as well as – at the request of any participant – any discussion of information that the participants designated as confidential in documents submitted to the Panel, will not be subject to public observation.

c. Any request by a third participant wishing to maintain the confidentiality of its oral statements and responses to questions at the oral hearing should be received by the Appellate Body Secretariat at least 10 days before the first day of the oral hearing.

d. An appropriate number of seats will be reserved in the separate room where the closed-circuit television broadcast will be shown for delegates of WTO Members that are not participants or third participants in these proceedings. WTO delegates wishing to observe the oral hearing will be requested to register in advance with the Appellate Body Secretariat.

e. Notice of the oral hearing will be provided to the general public on the WTO website. Members of the general public wishing to observe the oral hearing will be required to

[1] See procedural ruling in Annex 6 to the Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725.

register in advance with the Appellate Body Secretariat, in accordance with the instructions set out in the WTO website notice.