A. Trade Remedies*

1. **WT/DS440: China – Autos (US) – US v. China**

**Status:** Panel Report adopted June 18, 2014 with no appeal; on the same date, China announced revocation of the antidumping and CVD measure.


Findings and conclusions:

- MOFCOM failure to require submission of adequate non-confidential summaries of confidential information in petition violated ADA Article 6.5.1; failure to disclose essential facts under consideration violated ADA Article 6.9; determination of residual AD and CVD rates for unknown US exporters inconsistent with ADA Article 6.8/Annex II para. 1, SCM Article 12.7

- Injury analysis of price effects inconsistent with ADA 3.1/3.2 and SCM 15.1/15.2. Causation determination inconsistent with ADA 3.1/3.5, SCM 15.1/15.5 (use of flawed price effects analysis as basis; refusal to consider third country imports, domestic industry decline in productivity, or lack of overlap between domestic and imported autos in causation analysis; failure to ensure that injury caused by decline in consumption not caused by subject imports)

2. **WT/DS449: US – Countervailing and Anti-Dumping Measures (China) – China v. US**

**Status:** Panel and AB reports adopted July 22, 2014; compliance deadline not yet determined; parties have agreed to leave open possibility of arbitration to set deadline.

Challenge to §1 of PL 112-99, “An act to apply the countervailing duty provisions of the US Tariff Act of 1930 to nonmarket economy countries, and for other purposes” (the “GPX legislation”), which responded to *GPX Int’l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011); claim that GPX legislation inconsistent with GATT Articles X:1, X:2 and X:3(c).

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* Cases circulated since spring 2014, listed in order of date of DSB adoption, with pending cases last.
Challenge to lack of USDOC investigation of whether 25 parallel AD+CVD investigations of Chinese products, initiated from 11/20/2006 to 3/13/2012, gave rise to “double remedies” for subsidization.

**Notable issues:** Double remedies; GPX legislation; application of publication-related provisions of GATT Articles X:1 and X:2


Findings and conclusions:

- Article X:1: GPX legislation was “made effective” and published on same date in 2012, therefore did not violate Article X:1
- Article X:2: GPX legislation was enforced prior to official publication. Panel majority: Article X:2 does not apply because legislation does not effect advance in duty rate or new or more burdensome requirement or restriction on imports. Minority panelist disagreed.
- Article X:3(b) does not prevent WTO Members from enacting legislation that supersedes then-pending decisions of domestic courts or tribunals.


Findings and conclusions:

- Article X:2 turns on whether a measure increased duties or restrictions relative to prior published measure it replaced or modified. Reversed panel interpretation on the benchmark for comparison; proper comparison is between new rate effected by measure at issue (the GPX legislation) and rate previously applicable under an “established and uniform practice” (US CVD law before GPX legislation). AB examined whether GPX legislation changed US CVD law or clarified prior applicable law, but did not rule due to insufficiency of panel record on necessary facts.
- Rejected US appeal that double remedies claims were outside panel terms of reference; US did not appeal substantive findings on double remedies.

3. **WT/DS436: US – Carbon Steel (India) – India v. US**

**Status:** AB Report circulated Dec. 8, 2014; Panel and AB Reports adopted Dec. 19, 2014; parties discussing deadline for compliance.

Challenge to US statutory provisions, CVD regulations, and final CVD determination, final injury determination, five administrative reviews and 2006 sunset review on *Certain Hot-Rolled Carbon Steel Flat Products from India* (2002). Challenge to public body determinations, to evaluation of benefit from provision of iron ore, coal and captive mining rights for less than adequate remuneration (LTAR), and to specificity determination for certain programs. Challenge to treatment of loans from pool of private levies controlled by government committee. Challenge to use of adverse facts available. Challenge to US cross-cumulation statute (19 USC 1677(7)(G)), as such and as applied in original investigation and sunset review. Challenge to examination of new subsidies in administrative reviews. Challenge to adequacy of public notices. **Issues** included:
USDOC determination that respondents received subsidies in the form of iron ore sold for LTAR by National Mining Development Corporation (NMDC); Government of India (GOI) has 98% shareholding in NMDC and appoints its directors. USDOC determined NMDC is a public body, and its provision of high-grade iron ore is de facto specific because only certain industries use iron ore. In measuring LTAR benefit, USDOC disregarded in-country (Tier I) benchmark prices and used out-of-country (Tier II) benchmarks.

USDOC determination that GOI provided subsidies to steel producers through grant of captive mining rights (rights allowing steel producers to mine iron ore and coal for their own internal use). USDOC found that Captive Mining of Iron Ore Program was de facto specific because rights were only provided to certain enterprises, such as steel producers, and Captive Mining of Coal Program was de jure specific because of preferential allocation of coal blocks to certain steel producers with >1 MMT/year production capacity. USDOC measured benefit to steel producers by (i) constructing a notional price for the extracted iron ore and coal and (ii) comparing notional price to a Tier I/II benchmark price. India denied that any captive mining of iron ore program existed, arguing that mining rights for iron ore were granted to all on a first-come-first-served basis.

USDOC determination that loans by Steel Development Fund (SDF) were subsidies; USDOC determined that SDF, whose management committee was composed of government officials, is a public body. India argued that SDF funds had been contributed by steel producers, who were in return entitled to long-term loans from SDF.

Injury determination by USITC utilizing cross-cumulation provisions of 19 USC 1677(7)(G). Original injury investigation by USITC cumulated effects of subsidized imports from India with ten other countries. Imports from Argentina, India, Indonesia, South Africa and Thailand were subject to simultaneous CVD investigations and parallel AD investigations, and imports from China, Kazakhstan, Netherlands, Romania, Taiwan and Ukraine were only subject to parallel AD investigations. India challenged the statutory cross-cumulation provisions as such and as applied both in the original investigation and in the sunset review.

Notable issues:

- Definition of a “public body” (one of the sources of a “financial contribution” under SCM Article 1.1(a)(1)); factual elements and analysis required when administering authority determines that an entity is a public body.
- Analysis of subsidies consisting of provision of goods or services at LTAR under SCM Article 14(d); relationship between government provision of goods/services and the use of the good/service by the beneficiary. Financial contributions through government allocation of funds provided by private industry.
- Standards for analyzing benefit (including from LTAR provision of goods/services) in terms of benefit to recipient. Selection of benchmarks for evaluating benefit under SCM Article 14(d): use of out-of-country benchmarks; use of “as delivered” prices for benchmarks; permissibility of adjustments to benchmark prices.
- Analysis of specificity: for a subsidy to be specific, must it exclude some firms from eligibility? What if only a few firms can use a LTAR input?
• What facts can or cannot be used as “facts available”? Impact on use of “adverse facts available”.
• Administrative reviews: procedural obligations under SCM Agreement, and scope of new subsidy allegations that may be examined.
• Cross-cumulation of injury and 19 USC 1677(7)(G)(iii).


Findings and conclusions:

• **LTAR, benefit and benchmarking (“as such” claims):** Rejected India claims that US CVD regulations inconsistent with SCM Article 14(d); found that Article 14(d) calls for calculation of benefit to recipient relative to prevailing market conditions, that government prices need not be presumed to reflect market principles and that exclusion of government prices from in-country benchmark can be appropriate. Rejected India claim that Article 14(d) excludes any use of out-of-country benchmarks (citing *US – Softwood Lumber IV*) and found that market distortion can exist even when government provider of goods does not play predominant role in market. Rejected India claim that mandatory use of delivered prices in US benchmarking mechanism in CVD regulations is inconsistent as such with Article 14(d), because Article 14(d) benchmarks model prevailing market conditions.

• **Public body:** Rejected India challenge to USDOC determination that NMPC is a public body, because determination was based on factual evidence of GOI control of NMDC, not just shareholding.

• **De facto specificity:** Panel agreed that SCM Article 2.1 provides substantive obligations but subparagraphs need not be applied sequentially. Rejected India’s argument that specificity must be established on the basis of discrimination in favor of “certain enterprises” against a broader category of other, similarly situated entities. Rejected India’s argument that if the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is further limited to a sub-set of this industry. Found that USDOC failed to comply with requirement to take all factors in Article 2.1(c) into account in specificity determination for NMDC provision of goods at LTAR.

• **Benchmarks for LTAR as applied:** Panel found that USDOC’s failure to consider domestic price information for iron ore for potential use as price benchmarks was inconsistent with SCM Article 14(d)/1.1(b); also that failure to explain this issue in CVD determination was inconsistent with SCM Article 22.5. USDOC refusal to use confidential price information submitted by one respondent as Tier I benchmark for other respondents was justified by SCM Article 12.4 obligation to protect confidentiality. Panel rejected three claims regarding world price benchmarks used by USDOC and one more claim regarding USDOC failure to use NMPC export prices in world benchmark price.

• **Existence of de facto subsidy:** Panel found that record evidence (reports and news article) did not constitute sufficient basis to properly determine the existence of a Captive Mining of Iron Ore Programme, therefore determination was inconsistent with SCM Article 12.5. Regarding *Captive Mining of Coal Programme*, panel found that in certain circumstances, grant of extraction rights may constitute provision of goods, but USDOC determination that GOI granted Tata Steel a financial contribution in form of captive coal mining lease lacks sufficient evidentiary basis and is inconsistent with SCM Article 1.1(a)(1)(iii). Panel found that USDOC was entitled to construct a notional
government price for the extracted minerals and rejected other claims regarding Tier I and Tier II price benchmarks against which notional government prices for iron and coal were compared.

- **Steel Development Fund (SDF) loans**: Panel rejected India’s claims regarding USDOC determinations that SDF is a public body and that SDF Managing Committee provided direct transfers of funds. Panel also rejected India’s claims regarding USDOC determination of benefit conferred by SDF loans by comparing SDF lending rate to Reserve Bank of India Prime Lending Rate.

- **Cross-cumulation of injury**: Panel found that SCM Article 15.3 “only allows a cumulative assessment of the effects of imports which are *simultaneously subject to countervailing duty investigations*. ... Imports which are only the subject of a parallel, simultaneous anti-dumping duty investigation plainly do not satisfy this requirement as a matter of fact.” Effect of imports that are not subject to CVD investigation cannot be cumulatively assessed with those of imports which are subject to CVD investigation. 19 USC §1677(7)(G) is therefore inconsistent with SCM Article 15.3 as such and as applied in original investigation; also inconsistent with SCM Articles 15.1, 15.2, 15.4 and 15.5. Panel rejected India claim that US cross-cumulation provisions for sunset reviews are as such inconsistent with Article 15, because SCM Article 21.3 on sunset reviews does not require that injury again be determined in accordance with Article 15.

- **Panel found that India had not established a case that USITC injury determination was inconsistent with SCM Articles 15.1 and 15.4.**

- **Adverse facts available**: Panel rejected India’s claims that 19 USC §1677e(b) and 15 CFR §351.308(a), (b) and (c) are "as such" inconsistent with SCM Article 12.7, finding that SCM Article 12.7 requires that all substantiated facts on the record be taken into account, that "facts available" determinations have a factual foundation, and that "facts available" be generally limited to those facts that may reasonably replace the missing information. Panel reviewed India claims concerning 407 instances of use of facts available or AFA; in a number of instances it found that a “facts available” determination had no factual foundation in the record.

- **New subsidy allegations in administrative reviews**: Panel rejected India’s claims that new subsidy allegations may only be examined in a new investigation, and that USDOC examination of new subsidy allegations in administrative reviews at issue was inconsistent with SCM Agreement. Panel read “subsidization” in SCM Article 21.1 to include newly alleged subsidy programs on the same product.


In response to 67 appeal claims by India and additional appeal claims by US, AB made the following findings and conclusions:

- **Public body**: Found that: a “public body” for purposes of SCM Article 1.1(a)(1) must be an entity that possesses, exercises or is vested with governmental authority. Whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates. Found that panel “failed to evaluate whether the USDOC had properly
considered the relationship between the NMDC and the GOI within the Indian legal order, or the extent to which the GOI in fact ‘exercised’ meaningful control over the NMDC as an entity and over its conduct.” Reversed panel’s rejection of India’s claim regarding USDOC public body determination for NMDC; found that USDOC determination was inconsistent with SCM Article 1.1(a)(1).

- **Financial contribution:** (i) Affirmed panel rejection of India’s claim regarding grant of mining rights as “provision of goods”, finding that there is a “reasonably proximate relationship” between GOI grant of mining rights and final goods (extracted iron ore and coal). (ii) Affirmed panel rejection of India’s claim on SDF loans, finding that “direct transfer of funds” can include government transfers conducted through an intermediary; “there may be limited situations in which a government is able to exercise control over resources pooled from non-government contributors in such a manner that its decision to transfer those resources could qualify as a financial contribution.”

- **LTAR, benefit and benchmarking (“as such” claims):** AB upheld panel’s rejection of India’s “as such” claims regarding 3-tiered US benchmarking mechanism under 15 CFR §351.511(a)(2)(i)-(iv) for assessing whether a government has provided goods for LTAR.
  - AB observed that SCM Article 14(d) does not require separate analyses of benefit and remuneration and does not require that adequacy of remuneration be assessed from perspective of government provider.
  - Use of out-of-country benchmarks: AB found that SCM Article 14 requires investigating authorities to determine on basis of diligent investigation, record evidence and analysis whether proposed benchmark prices are market-determined such that they can be used to evaluate whether goods provided at LTAR. Whether a price may be relied upon for benchmarking is not a function of its source but whether it is a market-determined price reflective of prevailing market conditions in country of provision. Analysis of in-country prices may not a priori exclude prices from any particular source including government-related prices other than the financial contribution at issue. AB reversed panel finding to extent that it may be read as suggesting no need to consider any in-country government-related prices in determining LTAR benchmarks under SCM Article 14(d), but upheld rejection of India’s “as such” claim, because AB found the benchmarking mechanism requires consideration of all market-determined in-country prices.
  - AB observed that after investigating authority has complied with obligation to investigate whether there are in-country prices that reflect prevailing market conditions in country of provision, it may use alternative benchmark, e.g. proxies based on production costs or world market prices, adjusted appropriately to reflect prevailing market conditions in country of provision. AB found there is no prescribed preference for use of particular alternative benchmarks. AB upheld panel finding that SCM Article 14(d) permits use of out-of-country benchmarks in situations other than where the government is a predominant provider of the good in question; AB observed that use of out-of-country benchmark prices can be justified not just by market distortion in country of provision, but also when information on in-country prices cannot be verified to determine whether they are market-determined. AB upheld panel finding rejecting India’s claim the use of world market prices as Tier II benchmarks provided for in Section 351.511(a)(2)(ii) is inconsistent “as such” with SCM Article 14(d).
AB upheld panel’s rejection of India’s claim that mandatory use of "as delivered" benchmarks provided for in 15 CFR §351.511(a)(2)(iv) is inconsistent "as such" with SCM Article 14(d). AB found that determination of the adequacy of remuneration in relation to prevailing market conditions in the country of provision must capture the full cost to the recipient of receiving the government-provided good in question; prices compared must reflect prevailing market conditions in country of provision including generally applicable delivery charges.

- **Benchmarks for LTAR as applied**: AB reversed panel’s rejection of India’s claim that USDOC should not have rejected use of NMDC export prices to determine a Tier II benchmark in 2006, 2007 and 2008 administrative reviews while using these prices in 2004 review; AB found that USDOC did not provide reasoned and adequate explanation why the benchmarks it used were more appropriate, therefore exclusion of NMDC export prices was inconsistent with SCM Article 14(d) and chapeau of SCM Article 14. AB then reversed panel findings rejecting India’s claim that USDOC use of “as delivered” prices from Australia and Brazil as Tier II benchmarks was inconsistent with SCM Article 14(d); observing that an analysis of prevailing market conditions in the country of provision requires an analysis of the market generally, AB found that USDOC did not provide adequate explanation of this issue and that use of these prices as Tier II benchmarks was inconsistent with SCM Article 14(d).

- **Captive mining rights**: AB upheld panel findings (i) not examining adequacy of remuneration from perspective of government provider, and (ii) that USDOC constructed government prices for iron ore and coal were consistent with SCM Article 14(d); since (in the case of grant of mining rights) the provided good consists of extracted minerals, benefit calculation can be based on price constructed on basis of fees and royalties paid for mining rights plus cost plus profit of extraction process.

- **SDF loans**: AB reversed panel finding rejecting India's claim regarding USDOC determination that SDF loans conferred a benefit under SCM Articles 1.1(b) and 14(b); panel improperly excluded consideration of borrower’s costs in assessing the cost of a loan program to the recipient for purposes of benchmark analysis; rather, Article 14(b) required USDOC to take into account costs incurred by SDF loan recipients in obtaining SDF loans. AB was unable to complete the analysis, however.

- **De facto specificity**: AB upheld panel findings (i) that USDOC not obligated to establish that only a limited number within the set of certain enterprises actually used the subsidy program; (ii) rejecting India’s argument that specificity must be established on basis of discrimination in favor of certain enterprises compared to broader category of other, similarly situated entities; (iii) rejecting India's argument that, if inherent characteristics of subsidized good limit possible use of subsidy to a certain industry, subsidy will not be specific unless access to it is further limited to subset of the industry.

- **Adverse facts available**:
  - AB modified the panel’s finding to the extent that the panel report could be read to exclude, in all instances, a comparative evaluation of all available evidence with a view to selecting the best information from the legal standard for SCM Article 12.7. AB instead found that “Article 12.7 requires an investigating authority to use ‘facts available’ that reasonably replace the missing ‘necessary information’, with a view to arriving at an accurate determination, which calls for a process of evaluation of available evidence, the extent and
nature of which depends on the particular circumstances of a given case." Determinations made on basis of “facts available” must be based on facts in written record of investigating authority, not “non-factual assumptions or speculation”. All substantiated facts must be taken into account.

- **AB reversed panel’s rejection of India’s claim that 19 USC §1677e(b) and 15 CFR §351.308(a)-(c) are inconsistent as such with SCM Article 12.7, then re-analyzed these provisions, US judicial decisions, legislative history and other cases in panel record; AB then again determined India had not sustained its “as such” claim, finding that the law and regulations do not require USDOC to act inconsistently with Article 12.7, and alleged practice of presumptively applying highest prior non-de minimis subsidy rate is not necessarily applied in all cases of non-cooperation. Regarding India’s “as applied” claims under SCM Article 12.7, AB upheld panel finding that for such claims, India was required to explain how each specific application of measure breached Article 12.7.

- **New subsidy allegations in administrative reviews**: AB partially upheld panel; found that examination of new subsidy allegations in administrative reviews is not inconsistent with SCM Articles 11.1, 13.1, 21.1 and 21.2, but is inconsistent with SCM Articles 22.1 and 22.2. AB observed that administrative review may consider original level of subsidization, changes in original subsidy programs and new subsidy programs introduced after the CVD order, but new subsidies considered must have “a sufficiently close link” to the original subsidy programs, and reviews are subject to notice requirements in SCM Articles 22.1 and 22.2. AB reversed panel rejection of India claims that when USDOC examined new subsidy allegations in certain reviews, USDOC did not provide notice required by Articles 22.1/22.2; however AB did not complete the analysis in respect of this claim.

- **Cross-cumulation of injury**: AB upheld panel finding that SCM Articles 15.3, 15.1, 15.2, 15.4, and 15.5 do authorize investigating authorities to assess cumulatively the effects of imports subject to simultaneous CVD investigations, but do not authorize cumulation of those imports with imports that are not subject to CVD investigations. AB found that Panel failed to articulate clearly the scope of its finding of inconsistency, and reversed Panel finding that 19 USC §1677(7)(G) inconsistent as such with SCM Articles 15.3, 15.1, 15.2, 15.4 and 15.5. AB then analyzed the US statute and found that 19 USC §1677(7)(G)(iii) is inconsistent as such with these provisions, but that because it is unclear whether 19 USC §1677(7)(G)(i) and (ii) require USITC to cumulate effects of subsidized imports with effects of dumped, non-subsidized imports, it could not complete the legal analysis with respect to 19 USC §1677(7)(G)(i) and (ii).

- **AB also rejected various claims by India under DSU Articles 11 and 12.7.**


Challenge to USDOC initiation, preliminary and final determinations in 17 CVD investigations of Chinese products 2007-2012 (solar panels; wind towers; thermal paper; coated paper; tow-behind lawn groomers; kitchen shelving; steel sinks; citric acid; magnesia carbon bricks; pressure pipe; line pipe; seamless pipe; steel cylinders; drill pipe; oil country tubular goods; wire strand; aluminum extrusions).
Notable issues:

- **Financial contribution/public body:** use of rebuttable presumption that majority government-owned enterprises are public bodies; application or presumption in 12 investigations. Export restraints as a financial contribution.

- **LTAR/benefit:** calculation of benefit from provision of inputs at “less than adequate remuneration” (LTAR) – circumstances when investigating authority can reject in-country prices as benchmarks under SCM Article 14(d), and market analysis required for investigating authority’s evaluation of whether benchmark prices can be used.

- **Specificity:** Requirements for analysis of specificity of *de facto* specific subsidies; if a SOE supplier repeatedly provides inputs at LTAR, when is this a *de facto* specific subsidy?

- **Regional specificity:** Application of regional subsidy rules in SCM Article 2.2; must *de facto* specificity determination identify which jurisdiction is granting the subsidy? How does regional specificity apply to access rights to land?

- **Standards for initiation:** is mere government ownership of a SOE enough to initiate regarding a LTAR subsidy?

- What facts can or cannot be used as “facts available”? Impact on use of “adverse facts available”.

- Application of SCM Agreement to unwritten subsidy programs.


Findings and conclusions:

- **Financial contribution/Public body:** In 12 CVD cases (Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, Solar Panels) USDOC determination that SOEs concerned were public bodies was inconsistent with SCM Article 1.1(a)(1) definition of public body.

- USDOC’s policy (stated in Kitchen Shelving decision memorandum) to presume that majority government-owned entity is a public body is inconsistent as such with SCM Art. 1.1(a)(1). Because key issue in identifying a public body is its authority to perform governmental functions, investigating authority must evaluate entity’s core features and relationship to government, to determine whether entity has authority to perform governmental functions. Ownership and control as such are not enough.

- China did not establish that 4 CVD investigations (steel cylinders, solar panels, wind towers, steel sinks) were wrongfully initiated, because petitions contained evidence of government ownership of SOE supplier, and “such evidence can serve as evidence that an entity is a public body”.

- **LTAR:** China argued that USDOC found LTAR benefits in 12 investigations by wrongfully rejecting in-country benchmarks merely based on determination that SOEs were public bodies, but benefit analysis in USDOC determinations at issue did not treat SOEs as public bodies. Under SCM Article 14(d), use of out-of-country benchmarks can be justified if government role as provider of financial contribution is so predominant that it distorts market prices, or when other government action distorts prices.
• **De facto specificity of subsidies:** China did not establish that 14 CVD investigations wrongfully initiated without sufficient evidence of specificity; however USDOC determinations of *de facto* specificity of subsidies in 12 investigations were inconsistent with SCM Article 2.1(c) as all factors in final sentence of Article 2.1(c) must be taken into account in any analysis of *de facto* specificity. USDOC determinations in 6 investigations that land-use rights were regionally specific were inconsistent with SCM Article 2.2; location of land in an industrial park or zone is relevant but only if conditions for provision of land in the zone differ from conditions outside the zone.

• **Adverse facts available:** panel found that when authorities make determinations based on “facts available”, they need not state each fact actually used; also that China did not establish that 42 AFA determinations lacked factual foundation.

• **Initiation of investigations/export restraints as subsidies:** USDOC acted inconsistently with SCM Article 11.3 by initiating CVD investigations on magnesia bricks and seamless pipe in respect of Chinese export quotas on magnesia/magnesite and export taxes, export quotas and export licensing of coke. Petitions did not provide evidence that PRC gives responsibility to, or exercises its authority over, Chinese producers of magnesium or coke to carry out function of providing these products to producers in China; fact that government compels suppliers to restrict their exports does not establish that government compels suppliers to provide inputs to producers in China.


**Findings and conclusions:**

• **Use of in-country benchmark prices for LTAR:** investigating authority cannot automatically assume there is price distortion, and reject in-country benchmark prices, because government is the predominant supplier; price distortion must be established on case-by-case basis. Breach of SCM Article 14(d) in selection of LTAR benefit benchmark depends on whether or not the investigating authority did the “necessary market analysis” to evaluate “whether the proposed benchmark prices are market determined such that they can be used to assess whether the remuneration is less than adequate”. Analysis may need to include market structure and conditions of competition, and must have reasoned and adequate explanation. Panel conclusions under Article 14(d) reversed with respect to 4 CVD determinations (OCTG, solar panels, pressure pipe, line pipe), due to insufficient reasoning. Appellate Body re-evaluated these 4 determinations and found that USDOC analysis and explanation for rejecting in-country benchmark prices was inconsistent with SCM Article 14(d) and 1.1(b); because USDOC benefit determinations in these cases were inconsistent with these provisions, AB also found they were inconsistent with SCM Articles 10 and 32.1.

• **Specificity of subsidies:** USDOC did not err by analyzing *de facto* specificity only under SCM Article 2.1(c). Evidence of a “systematic activity or series of activities” may establish existence of unwritten subsidy program for purposes of *de facto* specificity; analysis must consider past, present and potential recipients of subsidy, and whether provided pursuant to plan or scheme. Mere fact that financial contributions have been provided to certain enterprises is not enough -- to demonstrate that provision of financial contributions constitutes a plan or scheme, must have adequate evidence of *systematic* series of actions pursuant to which benefits provided to limited number of certain enterprises. AB affirmed panel finding to this effect but reversed panel finding regarding 15 USDOC determinations in 12 investigations, because panel analysis of determinations was insufficient; however because panel had found these determinations inconsistent with SCM Article 2.1(c) due to
failure to take certain factors into account, and US did not appeal that finding, AB did not complete the legal analysis regarding existence of plan or scheme.

- AB found specificity analysis must properly identify the jurisdiction of the granting authority (central, regional or local government). AB reversed panel finding on this issue as lacking “case-specific discussion” on this issue or references to USDOC determinations, but did not complete the legal analysis.

- “Facts available” and AFA: Following US – Carbon Steel (India), AB found that SCM Article 12.7 required USDOC to provide explanation sufficient to establish it had engaged in process of reasoning and evaluation of the facts before it to determine which of facts available could reasonably replace the missing "necessary" information. Explanation and analysis must be sufficient to establish that "facts available" used are "reasonable" replacements for missing “necessary information", but nature and extent of explanation and analysis required will necessarily vary from determination to determination. AB reversed panel findings which had rejected China claims on 42 USDOC determinations; however it declined to complete the legal analysis.

5. **DS429 - US - Shrimp II (Viet Nam)** - Vietnam v. US

**Status:** Vietnam appealed Jan. 6, 2015, limited to panel findings and analysis regarding Section 129(c); no cross-appeal by US.

Claims concerning final determinations in three administrative reviews, and sunset review, in Certain Frozen Warmwater Shrimp from Vietnam; also US statutes and practices.

**Notable issues:**

- Threshold requirements for complainant to establish an “as such” claim.
- Country-wide NME rates (presumption that all companies in NME country belong to single, NME-wide entity, assigning a single country-wide rate to these companies). Use of facts available to calculate country-wide rate.
- Claim that Uruguay Round Agreements Act Section 129(c) precludes US from implementing DSB recommendations with respect to prior unliquidated entries.
- Requirement to use WTO-consistent dumping margins as inputs for sunset review determination.
- Right for any exporter to seek revocation of antidumping order even if it is not a mandatory respondent.

**Panel Report:** [http://www.wto.org/english/tratop_e/dispu_e/429r_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/429r_e.pdf)

**Findings and conclusions:**

(1) **Zeroing:** Panel found that in light of changes since 2012, Vietnam did not establish an “as such” claim on zeroing in administrative reviews – however application of simple zeroing in these administrative reviews found inconsistent with ADA Article 9.3 and GATT Article VI:2
(2) **Country-wide rates**: Panel found USDOC practice or policy in NME cases of presuming all companies in NME country belong to single, NME-wide, entity and assigning a single rate to these companies, is "as such" inconsistent with ADA Articles 6.10 and 9.2. Vietnam did not establish "as such" claim regarding use of facts available to calculate the country-wide rate; country-wide rate applied in these reviews found inconsistent with ADA Article 9.4 but not 6.8 or Annex II

(3) **URAA Section 129(c)**: Panel found Vietnam did not establish claim that §129(c)(1) precludes USG from implementing DSB recommendations with respect to prior unliquidated entries – Vietnam appealed panel finding, as well as panel analysis

(4) **Sunset review determination**: If investigating authority relies on dumping margins in making likelihood-of-dumping determination, calculation of margins must be consistent with ADA. Use of WTO-inconsistent margins in Vietnam sunset review made USDOC’s likelihood-of-dumping determination inconsistent with ADA Article 11.3.

Under ADA Art. 11.2, authority must review continued need for imposition of duty whenever it receives request that meets criteria in 11.2 – even if the requester is not a mandatory respondent. USDOC refusal to revoke duties with respect to individual exporters that requested but were not mandatory respondents violated Article 11.2. Margins used in revocation decisions must be WTO-consistent.

6. **DS454/460 – China- HP-SSST (Japan and EU)** - Japan and EU v. China


Claims concerning China’s imposition of antidumping duties on certain high-performance stainless steel seamless tubes (HP-SSST) from Japan and the EU. Challenges to the dumping calculations, injury determination, transparency issues in the antidumping investigation, use of facts available, application of provisional measures, and adequacy of final determination notice.

**Panel report**: [http://www.wto.org/english/tratop_e/dispu_e/454_460r_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/454_460r_e.pdf)

**Findings and conclusions**:

- Antidumping determination inconsistent with ADA Articles 2.2.2, 2.4
- Injury determination inconsistent with ADA Articles 3.1, 3.2, 3.4, 3.5 due to failure to account for differences in quantities in price comparisons, failure to properly evaluate dumping margin in considering impact of imports, and flaws in analysis of causal link and non-attribution analysis
- Keeping petitioner information confidential without good cause inconsistent with ADA Article 6.5; failure to require petitioner non-confidential summaries inconsistent with ADA Article 6.5.1; failure to disclose essential facts for calculation of margins and injury determination inconsistent with ADA Article 6.9
- Refusal of respondent’s request for rectification inconsistent with ADA Article 6.7 and Annex I para. 7
- Application of provisional measures for more than four months inconsistent with ADA Article 7.4
- Final determination’s failure to set out reasons why MOFCOM applied highest margin for cooperating exporters as all others rate was inconsistent with ADA Article 12.2, 12.2.2
B. Market Access/Trade in Goods

1. **WT – DS 400/401: EC – Seal Products** (Canada + Norway v. EU)

**Status:** Panel and AB reports adopted on June 18, 2014. EU, Canada and Norway have agreed on compliance deadline of Oct. 18, 2015 (WT/DS400/15, WT/DS401/16). On Feb. 6, 2015, EC Commission adopted proposal to amend the EU Regulation on trade in seal products to bring it into compliance. 

**Summary** of proposed amendment explains that it will repeal the MRM exception and modify the IC exception.

Challenge to Regulation (EC) Nº 1007/2009 and its implementing rules, which generally prohibit importation and marketing of seal products, but have exceptions for seal products derived from hunts conducted by Inuit or indigenous communities (IC exception) and hunts conducted for marine resource management purposes (MRM exception). Panel and AB treated this as one regime (the “EU Seal Regime”). Claim that the Seal Regime and/or the IC and MRM exceptions are inconsistent with TBT Article 2.1 and GATT Articles III:4 and I:1 because they discriminate against imported seal products compared to like domestic (Greenland) and other foreign products. Claim that these measures violate TBT Article 2.2 because they creates an unnecessary obstacle to international trade (are more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create). Claims regarding conformity assessment under TBT Articles 5.1.2 and 5.2.1.

**Notable issues:**

- Extent to which “non-product related processes and production methods” (npr-PPMs) are or are not “technical regulations” to which TBT Articles 2 and 5 apply.
- Implications for other possible measures of Appellate Body determination that EU Seal Regime is not a “technical regulation”.
- Scope of exception in GATT Article XX(a) for measures “necessary to protect public morals”. Implications of the Appellate Body’s analysis in this case for animal welfare laws or other measures affecting trade that are presented as morals-based.
- Significance of AB ruling that legal standard for nondiscrimination in TBT 2.1 is different from legal standard under GATT Articles I:1 and III:4.
- What prognosis for future claims under TBT Article 2.2?

**Panel reports:** [http://www.wto.org/english/tratop_e/dispu_e/400_401r_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/400_401r_e.pdf)

**Findings and conclusions:**

- Seal Regime is a “technical regulation” as defined by TBT Agreement Annex 1.1.
- IC exception and MRM exception are inconsistent with nondiscrimination provisions of TBT Article 2.1 because their detrimental impact does not stem exclusively from legitimate regulatory distinctions, therefore they accord imported seal products treatment less favourable than that accorded to like domestic and other foreign seal products.
Seal Regime does not violate TBT Article 2.2 because it fulfils objective of addressing EU public moral concerns on seal welfare to a certain extent, and no alternative measure has been demonstrated to make an equivalent or greater contribution to the fulfilment of the objective.

EU has breached TBT Article 5.1.2 and 5.2.1 because Seal Regime’s conformity assessment procedures were incapable of enabling trade in qualifying products to take place as from Seal Regime’s date of entry into force.

IC exception violates GATT Article I:1 and MRM exception violates Article III:4.

Seal Regime qualifies as measure “necessary to protect public morals” under GATT Article XX(a) but not as measure “necessary to protect . . . animal life or health” under GATT Article XX(b); Seal Regime including exceptions involves arbitrary or unjustifiable discrimination between countries where the same conditions prevail, thus does not meet requirements in Article XX chapeau.

AB Reports:  http://www.wto.org/english/tratop_e/dispu_e/400_401abr_e.pdf

Findings and conclusions:

- AB reversed panel finding that Seal Regime is a technical regulation, because the Seal Regime because it does not “lay down product characteristics” under TBT Annex 1.1; AB did not rule on whether EU Seal Regime lays down “related processes and production methods”. AB declared panel findings on TBT Articles 2 and 5 “moot and of no effect”.
- AB upheld the panel finding that the legal standard for TBT Article 2.1 non-discrimination obligations does not apply equally to claims under GATT Article I:1 and III:4.
- AB upheld panel finding that Seal Regime violates GATT Article I:1 because it does not "immediately and unconditionally" extend the same advantage accorded to seal products of Greenlandic origin to like seal products of Norwegian origin.
- AB upheld panel finding that analysis under Article XX(a) should examine prohibitive and permissive aspects of Seal Regime; upheld panel finding that objective of Seal Regime falls within the scope of GATT Article XX(a) and that Seal Regime is “necessary to protect public morals” within meaning of Article XX(a);
- AB reversed the panel’s interpretation of the Article XX chapeau and found that the EU has not demonstrated that the Seal Regime is designed and applied in manner that meets requirements of chapeau.

2. WT/DS431-432-433: China - Rare Earths  (US, EU and Japan v. China)


Challenge by US, EU and Japan concerning Chinese (a) export duties on rare earths, tungsten and molybdenum; (b) export quotas on same products; (c) restrictions on right of enterprises to export rare
earths and molybdenum. Para. 11.3 in China’s WTO Accession Protocol obligated China to eliminate all export duties except for products listed in Annex 6; products at issue in this case were not listed in Annex 6. In Accession Working Party Report, China also agreed to eliminate non-automatic restrictions on exports and restrictions on right to trade. Follow-on case to WT/DS394-395-398, China – Raw Materials (2011-2012); key legal findings followed Appellate Body report in that case.

Notable issues:

- Precedential value of past Appellate Body findings
- Relationship between China accession protocol and other WTO rules
- Whether GATT Article XX exceptions apply to all China accession protocol provisions (or to other non-GATT WTO agreements on trade in goods).
- Application of Article XX(b) exception to restrictions not applied to domestic producers.
- Application of Article XX(g) conservation exception where domestic production or consumption not restricted, or not as restricted as external trade.
- Application of trading rights commitments in China accession protocol.
- Implications for climate or environmental measures


Findings and conclusions:

- In response to China efforts to reopen findings on GATT Article XX in China – Raw Materials, panel decided to thoroughly examine issues in light of China’s specific arguments in this dispute, but not conduct a de novo determination of issue; key legal question is whether these arguments present “cogent reasons” for departing from prior adopted AB finding on same question of law.

- Regarding relationship between China Accession Protocol and WTO Agreement, panel majority found that Accession Protocol is integral part of WTO Agreement, but individual Protocol provisions are not integral parts of Multilateral Trade Agreements annexed to WTO Agreement. Consequently China Accession Protocol commitment on export duties is not integral part of GATT and not subject to Article XX. Even without Article XX, China still has access to all WTO-consistent means to protect environment and human health. (One panelist found that all WTO exceptions (Article XX, XVIII(c) etc.) apply to any WTO obligations on trade in goods except if expressly stated otherwise, and China accession protocol does not do so.)

- China export duties on various rare earths, molybdenum, and tungsten found inconsistent with China WTO accession protocol commitment to eliminate these duties. See above concerning applicability of GATT Article XX; panel also found that even if Article XX could apply to these commitments, (i) China had shown that mining these products causes grave harm to environment and health in China, but (ii) evidence showed no link between export duties and environmental or health objective, and that export duties designed to promote increased domestic production of high value-added products using these raw materials as inputs; (iii) China did not show duties make material contribution to environmental objective; (iv) alternative measures existed for objective; (v) export duties not applied in manner consistent with Article XX chapeau.
• China conceded that it imposes export quotas on various rare earths, molybdenum, tungsten that are inconsistent with GATT Article XI:1 and China accession commitments to eliminate export quotas. Panel examined regulations on domestic production, consumption and exports of rare earths in detail. Panel found that China’s export quotas were not measures qualifying under GATT Article XX(g) as they did not relate to conservation of rare earths but were industrial policy measures to encourage domestic extraction and processing, and secure preferential access to these materials by domestic manufacturers; these export quotas were also administered inconsistently with Article XX chapeau. Panel reached same conclusions for export quotas on tungsten and molybdenum.

• Restrictions on trading rights of enterprises exporting rare earths and molybdenum (prior experience requirement, export performance requirement, minimum registered capital requirement) found to be inconsistent with para. 5.1 of China accession protocol on trading rights; GATT Article XX can apply to para. 5.1, but China did not sustain prima facie case that violation of trading rights commitments justified under Article XX(g).


Findings and conclusions: Appeal by China was limited to a few systemic issues. AB rejected challenges to panel assessment of facts, and ruled:

• WTO Agreement, attached multilateral trade agreements and Accession Protocol all form single package of obligations to be read together, but questions of (a) whether a particular Accession Protocol provision is linked to a particular WTO provision, or (b) whether breach of Accession Protocol provision can be justified by an exception in a multilateral trade agreement, must be resolved by careful analysis of specific provisions concerned.

• In response to China appeal of panel findings on Article GATT XX(g), AB upheld panel’s analysis, clarifying that panel did not err in focusing on design and structure of measures at issue; panel need not consider market effects of a measure but can do so; effects inherent to design and structure of a measure can be relevant.

• AB found that panel erred to extent that it held that “even-handedness” is a requirement that must be fulfilled in addition to condition that a measure must be “made effective in conjunction with” restrictions on domestic production and consumption; also that panel erred to extent that it found that Article XX(g) requires burden of conservation to be evenly distributed between domestic and foreign interests. However errors did not taint panel findings on Article XX(g).

• AB observed that “even-handedness” of measure is relevant to whether it is made effective in conjunction with restrictions on domestic consumption, and found it hard to conceive of measure that would impose a significantly more onerous burden on foreign consumers or producers and could still meet all requirements of Article XX(g). "Made effective in conjunction with restrictions on domestic production or consumption" requires that, when GATT-inconsistent measures are in place, real, effective restrictions must also be imposed on domestic production or consumption.


Challenge by US, EU and Japan to managed trade measures of the Argentine government:

- Argentine government prevents companies from importing unless they achieve a trade balance or an export surplus, and pressures individual companies to make commitments of five types (which government monitors): (A) “1 to 1” commitments to at least balance imports and exports by value – including exports of unrelated products (2) Commitments to reduce import volume or price (3) Import substitution plans and/or local content targets (4) Commitments to invest or manufacture in Argentina (5) Commitments not to repatriate profits and reinvest them in Argentina.

- Starting in 2012, Argentina required importers to submit Advance Sworn Import Declaration (DJAI) through online portal; DJAI could be accessed by various government ministries, which could (and did) object to a DJAI and block imports indefinitely. DJAI process provided leverage for ministries to obtain company commitments referred to above.

Notable issues:

- Proof of facts in difficult situations where private parties will not provide identifiable facts for fear of government retaliation.

- Treatment of repeated government actions applying single underlying policy; application of jurisprudence on “as such” claims to this situation.

- GATT Article XI:1: application where government uses ability to block imports as leverage to coerce commitments by business. Non-automatic import licensing as a violation of GATT Article XI:1. Relationship between GATT Article XI:1 and GATT Article VIII.


- Agreed with complainants that first set of requirements combined together make up a single unwritten measure, used systematically and repeatedly to implement the government’s announced policy of managed trade – not a collection of one-off events. Used flexible approach to proof of facts where companies would not provide identifiable facts due to fear of retaliation. Found that this measure will continue to be applied until the underlying policy is modified or withdrawn. Making importation conditional on entering into one/more of these requirements is inconsistent with GATT Article XI; local content requirements violate GATT Article III:4.

- “DJAI procedure” -- requirement to submit a DJAI and processing of DJAIs including objections – also violates GATT Article XI:1 because it restricts imports. DJAI is also an import “formality” in sense of GATT Article VIII, but that does not excuse Argentina from complying with Article XI:1.


Affirmed panel findings and interpretations, including fact-finding. Thoroughly discussed why the first measure could be subject of a complaint without applying WTO jurisprudence regarding “as such” challenges.


Status: Original Panel and Appellate Body Reports adopted July 23, 2012; compliance period expired May 23, 2013. USDA Agricultural Marketing Service (AMS) issued a final rule, effective May 23, 2013,
modifying the labeling provisions for muscle cuts, and making other modifications to the labeling program (the “2013 Final Rule”): see 74 FR 31367 (May 24, 2013). US then notified compliance to the WTO; Canada and Mexico requested compliance panel under DSU Article 21.5, and dispute was referred to original panel on Sept. 25, 2013. Compliance panel report circulated Oct. 20, 2014; appeal by US Nov. 28, 2014; other appeals by Canada and by Mexico Dec. 12, 2014.

The Appellate Body has extended its timetable for this case. The oral hearing was held on February 16-17, 2015. The Appellate Body has announced that the circulation date of the Appellate Body reports in this appeal will be communicated to the participants and third participants shortly after the oral hearing.

Challenges to the COOL labeling measure as amended by the 2013 Final Rule. Claims that (a) the amended COOL measure is inconsistent with TBT Article 2.1 and GATT Article III:4 because it discriminates against cattle and hogs imported from Canada and cattle imported from Mexico, compared to US cattle and hogs; (b) the amended COOL measure is inconsistent with TBT Article 2.2 because it creates an unnecessary obstacle to international trade, as it is more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create; (c) non-violation nullification or impairment of benefits under GATT Article XXIII:1(b).

Notable issues: Application of differing standards under GATT Article III:4 and TBT Article 2.1 for discrimination claims regarding the same measure; application of TBT Article 2.2. Application of non-violation nullification or impairment remedy where trade takes place under preferential tariff rates, not under the bound GATT tariff rate.

Article 21.5 Compliance Panel Reports:

Findings and conclusions:

- The amended COOL measure is a “technical regulation” within meaning of TBT Annex 1.1
- The amended COOL measure violates TBT Article 2.1 because it accords imported Canadian and Mexican livestock treatment less favorable than that accorded to like domestic livestock, in particular because amended COOL measure increases the original COOL measure’s detrimental impact on competitive opportunities of imported livestock, and this detrimental impact does not stem exclusively from legitimate regulatory distinctions
- Canada and Mexico did not make prima facie case that amended COOL measure is more trade restrictive than necessary under TBT Article 2.2. Panel applied AB interpretation from US – Tuna II (Mexico), and found that:
  - The amended COOL measure pursues a legitimate objective, to provide consumer information on origin and contributes to fulfillment of this objective in a significant but necessarily partial degree (considering the products exempted from its coverage that would otherwise be labeled).
  - The amended COOL measure has increased the “considerable degree of trade-restrictiveness” found by the AB in the original dispute.
There is some risk associated with non-fulfilment of the legitimate objective (that consumers would be misinformed, confused or uninformed about origin), but based on the evidence presented, the panel could not determine the gravity of this risk; even USDA found it difficult to quantify the benefits of the amended COOL measure.

Canada and Mexico suggested four alternative measures. The panel found that for the first two, the complainants did not make a prima facie case that the measure would make an at least equivalent contribution to the objective of providing origin information to consumer, compared to the amended COOL measure; for the third and fourth, the panel found the complainants had not sufficiently explained how they would be implemented in the US (e.g. through trace-back or livestock segregation), that they were reasonably available, or that they would be less trade restrictive. Consequently the complainants did not make a prima facie case that any of these alternatives demonstrate that the amended COOL measure is more trade restrictive than necessary within the meaning of TBT Article 2.2.

- The amended COOL measure violates GATT Article III:4, as it has a detrimental impact on competitive opportunities of imported Canadian livestock, and thus accords less favorable treatment within meaning of GATT Article III:4.

- Panel exercised judicial economy regarding non-violation nullification or impairment claims.

5. **WT/DS430: India - Agricultural Products** (US v. India)


SPS Agreement challenge to India prohibition on imports of poultry, birds, eggs, pigs and certain other livestock products, from countries reporting Notifiable Avian Influenza (NAI) to the World Organization for Animal Health (OIE). Panel consulted with OIE on its Terrestrial Code and with three individual experts on avian influenza (AI) surveillance, India domestic surveillance and India avian influenza situation.

**Panel Report:** [http://www.wto.org/english/tratop_e/dispu_e/430r_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/430r_e.pdf)

**Findings and conclusions:** (substantive issues)

- Panel found India’s AI measures inconsistent with SPS Article 3.1 because not based on relevant international standard; inconsistent with SPS Articles 5.1, 5.2, 2.2 because not based on a risk assessment; inconsistent with Article 2.3 because they arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail and are applied in a manner which constitutes a disguised restriction on international trade; inconsistent with SPS Articles 5.6 and 2.2 because significantly more trade-restrictive than required to achieve India's appropriate level of protection (ALOP), and are applied beyond extent necessary to protect human and animal life or health; inconsistent with SPS Articles 6.2 and 6.1 because do not recognize and are not adapted to SPS characteristics of disease-free areas and areas of low disease prevalence. No ruling on alternative claim under SPS Article 5.5 or on US claim under GATT Article XI.

- Panel found India’s failure to comply with notification and publication requirements violated SPS Article 7, Annex B(2), and Annex B(5)(a), (b) and (d)
6. **WT/DS457, Peru – Agricultural Products** (Guatemala v. Peru)

**Status:** Panel report circulated Nov. 27, 2014; WTO Dispute Settlement Body decided 12/17 to postpone deadline for appeal/adoption to March 27, 2015, to accommodate AB workload

Challenge by Guatemala to Peru’s Price Range System (PRS) duties on rice, sugar, corn, milk, some dairy products. Price Range System resembles duties at issue in WT/DS207, **Chile – Price Band System**, where panel and AB found PRS duties are a type of variable import levy and inconsistent with both Article 4.2 of Agreement on Agriculture (AoA) and GATT Art. II:1(b).

As described by panel report, in December 2011, Peru and Guatemala signed the **Guatemala-Peru FTA**; Para. 9 in **Annex 2.3** of FTA provides explicitly that Peru may retain its PRS duties for specific products. Guatemala then brought WTO challenge to PRS duties in April 2013. Guatemala completed domestic approval procedures for FTA by March 2014, but Peru has not ratified, arguing that WTO challenge to PRS upsets negotiated balance of FTA. FTA has not entered into force.

**Main notable issue:** Inconsistency between FTA and WTO obligations of the parties to the dispute; how to treat claims that dispute is brought in bad faith; can or should WTO panel refuse to consider complaint brought in these circumstances?

**Panel Report:** [http://www.wto.org/english/tratop_e/dispu_e/457r_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/457r_e.pdf)

**Findings and conclusions:**

On the PRS: PRS duties are variable levies (or close enough to variable levies), and therefore are measures within scope of prohibition in AoA Article 4.2. PRS duties are also “other duties or charges” within GATT Article II:1(b). By maintaining PRS duties Peru violates AoA Article 4.2; by maintaining PRS duties without having recorded them in its GATT Schedule, Peru violates GATT Article II:1(b).

**FTA issues:**

- Panel refused to refrain from assessing Guatemala’s claims because it found no evidence that Guatemala brought WTO case contrary to good faith
- Because Peru-Guatemala FTA signed in December 2011 has not entered into force, Panel did not rule on whether FTA parties may modify their WTO obligations *inter se* via the FTA.