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PERU – ADDITIONAL DUTY ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS

ARB-2015-3/30

Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes

Award of the Arbitrator
Ricardo Ramírez-Hernández

CONTENTS

ABBREVIATIONS USED IN THIS AWARD

Abbreviation	Description
Appellate Body Report	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add. 1, adopted 31 July 2015
CCV	*Comisión de Coordinación Viceministerial* (Vice-Ministerial Coordination Commission)
DGAEICYP	*Dirección General de Asuntos de Economía Internacional, Competencia y Productividad* (Directorate-General of International Economic Affairs, Competition and Productivity)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Economic and Legal Analysis Manual	Manual for the economic and legal analysis of normative output in the Ministry of Economy and Finance of Peru (Exhibit PER-9)
GATT 1994	General Agreement on Tariffs and Trade 1994
Panel Report	Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R and Add. 1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R
PRS	Price Range System
WTO	World Trade Organization

CASES CITED IN THIS AWARD

Short Title	Full Case Title and Citation
Argentina – Hides and Leather (Article 21.3(c))	Award of the Arbitrator, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU*, WT/DS155/10, 31 August 2001, DSR 2001:XII, p. 6013
Australia – Salmon (Article 21.3(c))	Award of the Arbitrator, *Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU*, WT/DS18/9, 23 February 1999, DSR 1999:I, p. 267
Brazil – Retreaded Tyres (Article 21.3(c))	Award of the Arbitrator, *Brazil – Measures Affecting Imports of Retreaded Tyres – Arbitration under Article 21.3(c) of the DSU*, WT/DS332/16, 29 August 2008, DSR 2008
Canada – Patent Term (Article 21.3(c))	Award of the Arbitrator, *Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU*, WT/DS170/10, 28 February 2001, DSR 2001:V, p. 2031
Canada – Pharmaceutical Patents (Article 21.3(c))	Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS114/13, 18 August 2000, DSR 2002:I, p. 3
Chile – Alcoholic Beverages (Article 21.3(c))	Award of the Arbitrator, *Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, p. 2583
Chile – Price Band System (Article 21.3(c))	Award of the Arbitrator, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS207/13, 17 March 2003, DSR 2003:III, p. 1237
China – GOES (Article 21.3(c))	Award of the Arbitrator, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Arbitration under Article 21.3(c) of the DSU*, WT/DS414/12, 3 May 2013, DSR 2013:IV, p. 1495
Colombia – Ports of Entry (Article 21.3(c))	Award of the Arbitrator, *Colombia – Indicative Prices and Restrictions on Ports of Entry – Arbitration under Article 21.3(c) of the DSU*, WT/DS366/13, 2 October 2009, DSR 2009:IX, p. 3819
EC – Chicken Cuts (Article 21.3(c))	Award of the Arbitrator, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU*, WT/DS269/13, WT/DS286/15, 20 February 2006
EC – Export Subsidies on Sugar (Article 21.3(c))	Award of the Arbitrator, *European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU*, WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, DSR 2005:XXIII, p. 11581
EC – Hormones (Article 21.3(c))	Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, p. 1833
EC – Tariff Preferences (Article 21.3(c))	Award of the Arbitrator, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU*, WT/DS246/14, 20 September 2004, DSR 2004:IX, p. 4313
Indonesia – Autos (Article 21.3(c))	Award of the Arbitrator, *Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, p. 4029
Japan – Alcoholic Beverages II (Article 21.3(c))	Award of the Arbitrator, *Japan – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, DSR 1997:I, p. 3
Japan – DRAMs (Korea) (Article 21.3(c))	Award of the Arbitrator, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea – Arbitration under Article 21.3(c) of the DSU*, WT/DS336/16, 5 May 2008, DSR 2008:XX, p. 8553
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015
Peru – Agricultural Products	Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R and Add.1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R

Short Title	Full Case Title and Citation
US – COOL (Article 21.3(c))	Award of the Arbitrator, *United States – Certain Country of Origin Labelling (COOL) Requirements – Arbitration under Article 21.3(c) of the DSU*, WT/DS384/24, WT/DS386/23, 4 December 2012, DSR 2012:XIII, p. 7173
US – Countervailing Measures (China) (Article 21.3(c))	Award of the Arbitrator, *United States – Countervailing Duty Measures on Certain Products from China – Arbitration under Article 21.3(c) of the DSU*, WT/DS437/16, 9 October 2015
US – Hot-Rolled Steel (Article 21.3(c))	Award of the Arbitrator, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU*, WT/DS184/13, 19 February 2002, DSR 2002:IV, p. 1389
US – Offset Act (Byrd Amendment) (Article 21.3(c))	Award of the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU*, WT/DS217/14, WT/DS234/22, 13 June 2003, DSR 2003:III, p. 1163
US – Section 110(5) Copyright Act (Article 21.3(c))	Award of the Arbitrator, *United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU*, WT/DS160/12, 15 January 2001, DSR 2001:II, p. 657
US – Stainless Steel (Mexico) (Article 21.3(c))	Award of the Arbitrator, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Arbitration under Article 21.3(c) of the DSU*, WT/DS344/15, 31 October 2008, DSR 2008:XX, p. 8619

WORLD TRADE ORGANIZATION
AWARD OF THE ARBITRATOR

Peru – Additional Duty on Imports of Certain Agricultural Products	ARB–2015–3/30
Parties:	Arbitrator:
Guatemala Peru	Ricardo Ramírez-Hernández

1 INTRODUCTION

1.1. This arbitration is being conducted pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) in order to determine the "reasonable period of time" for implementation of the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute *Peru – Additional Duty on Imports of Certain Agricultural Products.*[1]

1.2. On 31 July 2015, the DSB adopted the Appellate Body Report[2] and the Panel Report[3], as modified by the Appellate Body Report, in *Peru – Additional Duty on Imports of Certain Agricultural Products*. This dispute relates to the imposition of additional duties by Peru on certain types of rice, sugar, maize and milk. The Panel and the Appellate Body found that the additional duties resulting from the Price Range System (PRS) are inconsistent with Article 4.2 of the Agreement on Agriculture and with the second sentence of Article II:1(b) of the General Agreement on Tariffs and Trade 1994 (GATT 1994).[4]

1.3. At the DSB meeting held on 31 July 2015, Peru informed the DSB of its intention to implement the recommendations and rulings of the DSB in this dispute, and indicated that it would need a reasonable period of time for implementation.[5] By joint letter dated 14 September 2015, Guatemala and Peru agreed that, in the absence of an agreement between the parties on a reasonable period of time, any award issued by an arbitrator under Article 21.3(c) of the DSU, including awards not made within 90 days after the date of adoption of the recommendations and rulings of the DSB, would be deemed to be an award of the arbitrator for the purposes of Article 21.3(c) of the DSU in determining the reasonable period of time for Peru to implement the recommendations and rulings of the DSB.[6]

1.4. On 1 October 2015, Guatemala informed the DSB that it had not reached an agreement with Peru on the reasonable period of time for implementation. Consequently, Guatemala requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU.[7]

1.5. By joint letter dated 9 October 2015, Peru and Guatemala agreed that I should serve as Arbitrator pursuant to Article 21.3(c) of the DSU. In a letter dated 9 October 2015, I informed Peru and Guatemala of my acceptance of the designation as Arbitrator.[8]

1.6. Peru and Guatemala presented their written submissions, together with executive summaries thereof, on 19 and 26 October 2015, respectively. The hearing was held on 3 November 2015. The

[1] WT/DS457.
[2] WT/DS457/AB/R.
[3] WT/DS457/R.
[4] See section 3.2 of this Award.
[5] WT/DS457/12; WT/DSB/M/366, para. 1.8. At the DSB meeting held on 31 August 2015, Peru reiterated that it would require a reasonable period of time for implementation. (WT/DS457/12. See also document WT/DSB/M/367, para. 2.7)
[6] WT/DS457/12.
[7] WT/DS457/13.
[8] WT/DS457/14.

parties have agreed that this Award will be deemed to be an arbitration award under Article 21.3(c) of the DSU.[9]

2 ARGUMENTS OF THE PARTIES

2.1. The arguments of the parties are reflected in the executive summaries of their written submissions, which are contained in Annexes A and B of this Award.

3 REASONABLE PERIOD OF TIME

3.1. I shall first address the mandate of the Arbitrator in the light of the text of Article 21.3(c) of the DSU, taking into account previous awards issued pursuant to that provision. I shall then examine the measure to be brought into conformity with the recommendations and rulings of the DSB and the arguments of the parties as to the reasonable period of time for implementation in this dispute.

3.1 Mandate of the Arbitrator under Article 21.3(c) of the DSU

3.2. Article 21.3 of the DSU provides, in relevant part:

> If it is impracticable to comply immediately with the recommendations and rulings [of the DSB], the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:
>
> ...
>
> (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.[10]

3.3. According to this provision, my mandate as Arbitrator in the present proceeding is to determine the period of time within which the Member concerned must implement the recommendations and rulings of the DSB in this dispute.

3.4. Certain provisions of the DSU provide guidance regarding my mandate in this proceeding. Article 21.1 of the DSU provides that "[p]rompt compliance with recommendations or rulings of the DSB" is essential for the effective resolution of disputes of the World Trade Organization (WTO). Further on, the introductory clause to Article 21.3 of the DSU stipulates that a reasonable period of time for implementation shall be available only "[i]f it is impracticable to comply immediately with the recommendations and rulings [of the DSB]". According to the last sentence of Article 21.3(c), the "particular circumstances" of a dispute may affect the calculation of the reasonable period of time, making it "shorter or longer".[11] In principle, therefore, the reasonable period of time for implementation should be the shortest period possible within the legal system of the implementing Member[12], in the light of the "particular circumstances" of a dispute.[13] Moreover, previous arbitration awards have held that the Member must utilize all the "flexibilities" available

[9] See document WT/DS457/12.
[10] Footnotes omitted.
[11] See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; *US – COOL (Article 21.3(c))*, para. 69; and *EC – Chicken Cuts (Article 21.3(c))*, para. 49.
[12] See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; *China – GOES (Article 21.3(c))*, para. 3.3; *EC – Hormones (Article 21.3(c))*, para. 26; and *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25.
[13] See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; and *China – GOES (Article 21.3(c))*, para. 3.3.

within its legal system in order to implement the relevant recommendations and rulings of the DSB in the shortest period of time possible.[14]

3.5. With regard to the method of implementation, previous awards have indicated that the Member has a measure of discretion in choosing the means of implementation that it deems most appropriate.[15] However, a Member's right to choose the means of implementation is not unfettered.[16] Accordingly, it is necessary to consider whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB's recommendations and rulings.[17] Thus, "the means of implementation chosen must be apt in form, nature, and content to effect compliance".[18] On the basis of the foregoing, a Member's chosen method of implementation must be capable of bringing the measure into conformity with its WTO obligations within a reasonable period of time, in accordance with the guidelines contained in Article 21.3(c) of the DSU.[19]

3.6. With regard to the content of the measure to be implemented, previous awards have made it clear that it is not for me, as the Arbitrator, to determine the consistency with the covered agreements of the measure taken to comply.[20] Arbitration under Article 21.3(c) of the DSU is limited to determining the period of time within which implementation of the recommendations and rulings of the DSB must occur.[21] In previous arbitrations, the mandate of the Arbitrator was considered to relate to the *time* by which the implementing Member must comply, not to the *manner* in which that Member must comply.[22] However, the *time* by which a Member must comply cannot always be determined without considering the chosen *means* of implementation. In some cases, in order to establish the *time* by which a Member must comply, it will be necessary to take into account the *manner* in which the Member proposes to do so as an element of analysis.[23]

3.7. Moreover, Article 21.2 of the DSU provides that "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement." Previous awards have recognized that, in determining the reasonable period of time under Article 21.3(c), an arbitrator should pay particular attention to matters affecting the interests of both an *implementing* and a *complaining* developing country Member or Members.[24]

3.8. Finally, with regard to the burden of proof, previous arbitrations have established that the Member seeking to implement the recommendations and rulings of the DSB bears the overall burden of proving that the period of time requested for implementation constitutes a "reasonable

[14] See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; *China – GOES (Article 21.3(c))*, para. 3.4; *US – COOL (Article 21.3(c))*, para. 30; and *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 64.

[15] See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.3; *China – GOES (Article 21.3(c))*, para. 3.4; and *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48.

[16] See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.3; *US – COOL (Article 21.3(c))*, para. 69; and *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69.

[17] See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.3; *US – COOL (Article 21.3(c))*, para. 69; and *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27.

[18] Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.3; *China – GOES (Article 21.3(c))*, para. 3.2; *Colombia – Ports of Entry (Article 21.3(c))*, para. 64.

[19] See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.3; *China – GOES (Article 21.3(c))*, para. 3.2; and *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69.

[20] If this question is raised, it can only be addressed in proceedings under Article 21.5 of the DSU. (See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.4; *China – GOES (Article 21.3(c))*, para. 3.2; and *Colombia – Ports of Entry (Article 21.3(c))*, para. 77)

[21] See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.4; and *China – GOES (Article 21.3(c))*, para. 3.2.

[22] See Awards of the Arbitrators, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 41; and *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 47.

[23] See Awards of the Arbitrators, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 41; *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 47; *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 26; and *US – COOL (Article 21.3(c))*, paras. 68-69.

[24] See Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 71.

period of time".[25] In fact, the longer the proposed period of implementation is, the greater this burden will be.[26]

3.9. In response to questioning at the hearing in this arbitration, both Guatemala and Peru agreed that the principles set out above are relevant for the determination of the reasonable period of time for implementation in this dispute.

3.2 Measure to be brought into conformity

3.10. According to the findings of the Panel and the Appellate Body, Peru maintains a PRS that may result in the imposition of additional duties or rebates on certain types of imported rice, sugar, maize and milk.[27] Peru applies the PRS in addition to the tariffs that, pursuant to Article II:1 of the GATT 1994, Peru has bound at 68% *ad valorem* for the products subject to the PRS.[28]

3.11. The PRS operates on the basis of the difference between (i) a floor price and a ceiling price and (ii) a reference price.[29] The PRS imposes an additional duty on the transaction value of imports when the reference price is below the floor price.[30] The amount of the additional duty is based on the difference between the floor price and the reference price.[31] The additional duties resulting from the PRS plus Peru's *ad valorem* duties may not exceed Peru's bound tariff rate.[32] The PRS also provides for tariff rebates when the reference price is higher than the ceiling price.[33] A detailed description of the Panel's understanding of the scope and content of the PRS is set forth in the Panel Report.[34]

3.12. In the dispute underlying this arbitration, the Appellate Body found that "the measure [brought by Guatemala] before the Panel comprised both the additional duties resulting from the PRS and the PRS calculation methodology".[35] In their reports, the Panel and the Appellate Body referred to the measure at issue as, respectively, "the duties resulting from the PRS"[36], and the "additional duties resulting from the PRS" or the "additional duties".[37]

3.13. With regard to the findings and conclusions relevant to this arbitration, the Panel concluded that:

a. the duties resulting from the PRS constitute variable import levies or, at the least, share sufficient characteristics with variable import levies to be considered a border measure similar to a variable import levy, within the meaning of footnote 1 to the Agreement on Agriculture[38];

b. by maintaining measures which constitute a variable import levy or, at the least, are border measures similar to a variable import levy, and are thus measures of the kind which have been required to be converted into ordinary customs duties, Peru is acting

[25] See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.6; *China – GOES (Article 21.3(c))*, para. 3.5; and *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47.

[26] See Awards of the Arbitrators, *China – GOES (Article 21.3(c))*, para. 3.5; and *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47.

[27] Appellate Body Report, para. 5.1; Panel Report, para. 7.115.

[28] Appellate Body Report, para. 5.1; Panel Report, para. 7.166. With the exception of three tariff lines for maize, to which an *ad valorem* tariff of 6% is applied, Peru applies no *ad valorem* tariffs to products subject to the PRS. (Panel Report, para. 7.167 and fn 231 to para. 7.145)

[29] The floor and ceiling prices are, respectively, averages of international prices in a specified international market over a recent past period of 60 months. The reference price is an average of international price quotations in the same international market over a recent past period of two weeks. (Appellate Body Report, para. 5.1; Panel Report, paras. 7.130-7.133 and 7.136-7.137)

[30] Appellate Body Report, para. 5.2; Panel Report, para. 7.140.

[31] Appellate Body Report, para. 5.2; Panel Report, paras. 7.140-7.141.

[32] Appellate Body Report, para. 5.2; Panel Report, para. 7.142.

[33] The tariff rebate may not exceed "the sum payable by the importer as the *ad valorem* duty and additional tariff surcharge corresponding to each product". (Appellate Body Report, fn 34 to para. 5.2; Panel Report, paras. 7.143 and 7.145)

[34] See Panel Report, paras. 7.97-7.167.

[35] Appellate Body Report, para. 5.4. (footnote omitted)

[36] Panel Report, para. 2.2.

[37] Appellate Body Report, para. 5.4.

[38] Panel Report, para. 8.1.b.

inconsistently with its obligations under Article 4.2 of the Agreement on Agriculture[39]; and

c. moreover, the additional duties resulting from the PRS constitute "other duties or charges … imposed on or in connection with the importation", within the meaning of the second sentence of Article II:1(b) of the GATT 1994. In applying measures which constitute "other duties or charges", without having recorded them in its Schedule of Concessions, Peru's actions are inconsistent with its obligations under the second sentence of Article II:1(b) of the GATT 1994.[40]

3.14. With regard to the findings and conclusions relevant to this arbitration, the Appellate Body upheld:

a. the Panel's findings, in paragraph 8.1.b of the Panel Report, that the additional duties resulting from the PRS constitute "variable import levies" within the meaning of footnote 1 of the Agreement on Agriculture, and in paragraph 8.1.d of the Panel Report, that, by maintaining a measure that constitutes a "variable import levy", Peru acts inconsistently with its obligations under Article 4.2 of the Agreement on Agriculture[41]; and

b. the Panel's findings, in paragraph 8.1.e of the Panel Report, that the additional duties resulting from the PRS constitute "other duties or charges … imposed on or in connection with the importation", within the meaning of the second sentence of Article II:1(b) of the GATT 1994, and that, by applying such measure without having recorded it in its Schedule of Concessions, Peru acts inconsistently with its obligations under the second sentence of Article II:1(b) of the GATT 1994.[42]

3.15. In the course of the hearing, Peru and Guatemala confirmed that implementation by Peru must focus on complying with the findings and conclusions referred to above.

3.16. The Panel and the Appellate Body recommended that the DSB request Peru to bring its measure into conformity with its obligations under the Agreement on Agriculture and the GATT 1994.[43]

3.3 Factors affecting the determination of the reasonable period of time

3.17. Peru contends that the reasonable period of time for implementing the DSB's recommendations and rulings in this dispute must be at least 19 months. Peru asserts that this is the most appropriate period of time within which it can bring its measure into conformity with the recommendations and rulings of the DSB, taking into account the procedural steps provided for in Peru's domestic regulatory framework, the foreseeable impact of the El Niño phenomenon on the process of implementation, and the complexity of the PRS and its role in Peruvian tariff policy.[44]

3.18. In response, Guatemala argues that the reasonable period of time for implementing the recommendations and rulings of the DSB in this dispute should be five months. Guatemala maintains that this length of time is sufficient and reasonable since it is in conformity with the applicable Peruvian regulatory framework. In addition, Guatemala considers that the El Niño phenomenon is not a valid consideration for extending the reasonable period of time, and that the PRS is not a complex measure or an essential component of Peru's tariff policy. Nevertheless, Guatemala notes that it would not object to a reasonable period of time of six months if I were to decide to consider other factors in determining the reasonable period of time.[45]

3.19. In this section, I will first address the means of implementation in this dispute, before considering the steps in the implementation process specific to this arbitration. Finally, I will

[39] Panel Report, para. 8.1.d.
[40] Panel Report, para. 8.1.e.
[41] Appellate Body Report, para. 6.6.a.
[42] Appellate Body Report, para. 6.6.b.
[43] Panel Report, para. 8.8; Appellate Body Report, para. 6.8.
[44] Peru's submission, paras. 3, 9, and 36.
[45] Guatemala's submission, paras. 1.4, 4.50-4.51, and 4.66-4.67.

examine the arguments of the parties with respect to the factors and particular circumstances affecting the determination of the reasonable period of time.

3.3.1 Means of implementation

3.20. Peru asserts that, according to the Political Constitution of Peru, the President of the Republic regulates customs duties by Supreme Decree. According to Peru, Supreme Decrees "are laws of general application issued by the President of the Republic, which govern rules with the status of law or regulate functional sectoral or multisectoral activity at the national level".[46] Consequently, the means of implementation chosen by Peru is the modification of the WTO-inconsistent measure by Supreme Decree. Guatemala and Peru disagree as to the procedures and periods of time provided for in Peru's legal system. I shall examine those procedures and periods of time below.

3.3.2 Stages in the implementation process

3.21. The relevant implementation procedure for this arbitration, as outlined by Peru, consists of the following six steps: (i) the process of consultations; (ii) the definition of the implementation measure; (iii) the preparation of the draft Supreme Decree; (iv) the approval of the draft by the Vice-Ministerial Coordination Commission (CCV); (v) the approval of the draft by the Council of Ministers; and (vi) the endorsement of the draft by the Minister of Agriculture and Irrigation, the signing of the draft by the Minister of Economy and Finance, and the publication and entry into force of the Supreme Decree. In its written submission and during the hearing, Peru identified the periods of time for completing each step, and stated that the periods necessary for preparing Supreme Decrees may be longer or shorter, depending on the complexity of the subject to be regulated through such Supreme Decrees.[47]

3.22. With respect to the first step, Peru indicates that a consultations process will be conducted between the competent ministries and the sectors of production covered by the PRS in order to discuss the means of implementation and the ways of addressing the impact of implementation.[48] Peru states that the consultations process will take approximately 60 to 70 days.[49]

3.23. As regards the second step, Peru indicates that the definition of the implementation measure requires coordination between the Ministry of Economy and Finance, the Ministry of Agriculture and Irrigation, the Ministry of Foreign Affairs, and the Ministry of Foreign Trade and Tourism.[50] Work on the definition of the measure is carried out at a technical preparatory meeting held by the Directorate-General of International Economic Affairs, Competition and Productivity (DGAEICYP)[51] of the Ministry of Economy and Finance, in order to prepare a summary of the problem that a possible rule is meant to remedy, and to draft a preliminary analysis of the problem to be regulated.[52] According to Peru, and in accordance with the Economic and Legal Analysis Manual, the maximum period of time for this preparatory meeting will be six months.[53] In parallel with the definition of the implementation measure, programmes would be established to enable the sectors of production affected to cope with the impact of implementation and accept the modification of the PRS.[54] According to Peru, the design of these programmes will take six to nine months, on average.[55]

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[46] Peru's submission, para. 22. See ibid., para. 23; and Peru's response to questioning at the hearing.

[47] See Peru's submission, paras. 17, 29, 40, 45, 54, 62, 67, and 69-71; Peru's response to questioning at the hearing.

[48] See Peru's submission, paras. 37 and 38; Peru's response to questioning at the hearing.

[49] Peru's submission, para. 40; Peru's response to questioning at the hearing.

[50] Peru's submission, paras. 41-42.

[51] With regard to measures within the purview of the Ministry of Economy and Finance, Peru clarified that two entities shall participate at this stage: the DGAEICYP and the administrative body possessing the substantive expertise (the *Área Sustantiva*) that would be responsible for preparing the draft regulatory instrument and its regulatory impact report. However, according to Peru, in this case, the *Área Sustantiva* is the DGAEICYP itself. (Peru's submission, para. 45)

[52] Peru's submission, paras. 43-46; Manual for economic and legal analysis of normative output in the Ministry of Economy and Finance of Peru (Economic and Legal Analysis Manual) (Exhibit PER-9), p. 10.

[53] Peru's submission, para. 45; Economic and Legal Analysis Manual (Exhibit PER-9), p. 10.

[54] Peru's submission, paras. 47 and 49.

[55] Peru's submission, para. 48.

3.24. With regard to the third step, Peru points out that the competent ministries prepare the draft Supreme Decree which will contain the description of the measure and the justification of the need for its implementation.[56] In this case, the draft Supreme Decree will be referred for approval to the Ministry of Agriculture and Irrigation.[57] According to the Economic and Legal Analysis Manual, the DGAEICYP must conduct a prior assessment of the economic impact of the regulatory draft.[58] Peru maintains that the process of preparing the draft may take 30 to 45 days.[59]

3.25. With respect to the fourth step, Peru indicates that, inasmuch as it involves more than one sector, the draft Supreme Decree must be approved by the CCV.[60] Within the CCV, the Vice-Ministries of the Executive Branch have the option of determining the viability of the draft, and of making observations or comments thereon.[61] Peru states that the period of time for this step may be 14 to 30 days under normal conditions, depending on the observations submitted and the time it takes to respond to them.[62]

3.26. Regarding the fifth step, Peru indicates that the draft is placed on the agenda of the Council of Ministers, which must approve the draft or return it for any further amendment. According to Peru, such approval, in normal circumstances, may take between 7 and 14 days on average.[63]

3.27. With respect to the sixth step, Peru states that the draft is endorsed by the Minister of Agriculture and Irrigation and signed by the Minister of Economy and Finance, for subsequent publication in the Official Journal *El Peruano* and entry into force the following day.[64] According to Peru, endorsement may, in normal circumstances, take about 7 days.[65]

3.3.3 Legal analysis

3.28. Article 21.1 of the DSU provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". In addition, the second clause of Article 21.3 stipulates that a reasonable period of time shall be available for implementation only "[i]f it is impracticable to comply immediately with the recommendations and rulings [of the DSB]". The provisions of Article 21 are clear: the primary obligation of the Member is to comply *immediately*, and only if such immediate compliance is impracticable will a "reasonable period of time" be granted.[66] Therefore, I must consider the determination of the reasonable period of time in the light of the primary obligation to comply immediately with the recommendations and rulings of the DSB.

3.29. The obligation to implement the recommendations and rulings of the DSB arises with the adoption of the relevant panel or Appellate Body reports.[67] Once the DSB adopts the relevant reports, any inaction or dilatory conduct by a Member would exacerbate the nullification or impairment of the rights of other Members caused by the inconsistent measure.[68] Therefore, I consider that the Member must act immediately and as expeditiously as possible to fulfil its obligation to bring the offending measure into conformity.

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[56] Peru's submission, para. 55.
[57] Peru's submission, para. 57.
[58] Peru's submission, paras. 59-60.
[59] Peru's submission, para. 62.
[60] Peru's submission, para. 63.
[61] Peru's submission, para. 67.
[62] Peru's submission, para. 67.
[63] Peru's submission, paras. 68-69.
[64] Peru's submission, para. 70.
[65] Peru's submission, para. 70.
[66] See Awards of the Arbitrators, *Chile – Price Band System (Article 21.3(c))*, para. 33; *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 45; *Australia – Salmon (Article 21.3(c))*, para. 30; and *US – Hot-Rolled Steel (Article 21.3(c))*, para. 25.
[67] Awards of the Arbitrators, *China – GOES (Article 21.3(c))*, para. 3.30; *Chile – Price Band System (Article 21.3(c))*, para. 43. I also observe that Article 21.3(c) of the DSU clearly indicates that the "reasonable period of time" for implementation is calculated from "the date of adoption of a panel or Appellate Body report" by the DSB.
[68] Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 43. Similarly, in previous arbitrations it has been stated that the implementing Member "must use the time after adoption of a panel and/or Appellate Body report to begin to implement the recommendations and rulings of the DSB". (Awards of the Arbitrators, *US – COOL (Article 21.3(c))*, para. 84; *US – Section 110 (5) Copyright Act (Article 21.3(c))*, para 46)

3.30. In an arbitration under Article 21.3(c) of the DSU, an arbitrator cannot accept the continued exposure of the complaining party to the negative consequences of the maintenance of a measure declared inconsistent in the reports adopted by the DSB for any further period of time that is not strictly necessary within the legal system of the defending party, in order for the latter to bring its measure into conformity with WTO rules. Consequently, as stated previously, I agree that the reasonable period of time for implementation, in cases where it is impracticable to comply "immediately", must be the *shortest period possible* as provided in the legal system of the Member that is to implement the recommendations and rulings of the DSB[69], taking into account the "particular circumstances" of a dispute.[70]

3.31. I now turn to examine the points of disagreement between Peru and Guatemala concerning the six steps identified by Peru for the drafting and enactment of supreme decrees in normal circumstances.[71] The aim of this analysis is to identify the necessary steps for implementation by Peru, and to identify the customary periods of time under Peruvian legislation. I will then examine the particular circumstances affecting the determination of the reasonable period of time.

3.32. With respect to the first step – that is, the process of consultations between the competent ministries and sectors of production covered by the PRS – Peru confirms that, although there is no legal provision establishing the obligation to conduct such consultations, they have become a practice for maintaining a dialogue with the sectors of production affected by regulatory changes.[72] Guatemala, for its part, maintains that consultations do not constitute a mandatory step under Peru's internal regulations, for which reason they should not be taken into account in order to determine the reasonable period of time.[73] However, the absence of an explicit obligation under Peru's legal system to undertake consultations between the competent ministries and the relevant sectors of production is not necessarily sufficient, in itself, to rule out the relevance of such consultations in determining the reasonable period of time for implementation. In the course of the hearing, Peru added that consultations between competent ministries and the relevant sectors of production constitute a current practice within Peru's legal system.[74] I consider that the standard practices that form part of the process of drafting laws and regulations within Peru's legal system, although they are not strictly mandatory, may, in certain cases, be relevant for the determination of the reasonable period of time.[75] Therefore, I shall now turn to consider the relevance of consultations in determining the reasonable period of time for implementation in this arbitration.

3.33. Peru maintains that the consultations process, in the first step, serves three objectives: (i) to inform the sectors of production that implementation derives from the mandate of an international organization; (ii) to discuss the means of implementation with the sectors of production; and (iii) to establish support programmes in order to improve competitiveness and productivity in those sectors and to address the impact of implementation.[76] Guatemala, for its part, contends that the consultations do not constitute a necessary step for implementation.[77] As has been observed in previous arbitrations, when a measure has been found inconsistent with a Member's obligations, some degree of adjustment will frequently be necessary in the domestic industry of the Member in question. However, structural adjustments to take account of the withdrawal or modification of an inconsistent measure, including support programmes for the affected sectors of production, can under no circumstances be relevant to the determination of the reasonable period of time for implementation.[78] I agree with previous awards, where it has been

[69] Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; *China – GOES (Article 21.3(c))*, para. 3.3; *EC – Hormones (Article 21.3(c))*, para. 26.

[70] See Awards of the Arbitrators, *US – Countervailing Measures (China) (Article 21.3(c))*, para. 3.5; and *China – GOES (Article 21.3(c))*, para. 3.3.

[71] See paras. 3.21-3.27 of this Award.

[72] Peru's response to questioning at the hearing.

[73] In particular, Guatemala refers to the Economic and Legal Analysis Manual, which, according to Guatemala, does not envisage that consultations would be held either to achieve the objectives mentioned by Peru or as a separate and distinct step prior to the definition of the measure. (Guatemala's submission, para. 4.23; Guatemala's response to questioning at the hearing)

[74] Peru's response to questioning at the hearing.

[75] See Awards of the Arbitrators, *Chile – Price Band System (Article 21.3(c))*, para. 42; and *EC – Chicken Cuts (Article 21.3(c))*, para. 79.

[76] Peru's submission, para. 37; Peru's response to questioning at the hearing.

[77] See Guatemala's submission, paras. 4.14 and 4.16.

[78] See Awards of the Arbitrators, *Indonesia – Autos (Article 21.3(c))*, para. 23; *Argentina – Hides and Leather (Article 21.3(c))*, para. 41; and *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 52. See also

indicated that the domestic "contentiousness" of an implementation measure also does not serve as a basis for granting longer implementation periods.[79] In fact, in my opinion, any consideration of the domestic effect or "contentiousness" that might be generated by the implementation of a measure would also necessarily lead to the consideration of the domestic effect produced by the failure to implement a WTO-inconsistent measure in the complaining Member.

3.34. In addition, at the hearing, Peru explained that the support programmes in question, addressed during the first step, are the same support programmes that are included in the second step. As I indicated above, the second step includes two activities that are developed in parallel: (i) the definition of the implementation measure, and (ii) the establishment of programmes enabling the affected sectors of production to cope with the impact of implementation and to accept modification of the PRS.[80] Thus, in relation to the second step, Peru expressly accepted that the establishment of support programmes may take place in parallel to the definition of the implementation measure.[81]

3.35. For the foregoing reasons, I do not consider the framing and establishment of support programmes to be relevant for the establishment of a reasonable period of time. These are actions unrelated to the implementation of an inconsistent measure. In any event, I observe that such consultations and actions could take place parallel to the implementation process.[82]

3.36. In the light of the foregoing, I consider that the first step and the part of the second step related to the support programmes in question are not relevant to the determination of the reasonable period of time for implementation.

3.37. With regard to the period of time for the part of the second step that relates to the definition of the implementation measure, Peru points out that, according to the Economic and Legal Analysis Manual, the maximum period of time for this step will be six months.[83] Guatemala argues that this step can be carried out within a maximum period of three months in view of the clarity of Peru's obligations to implement the recommendations and rulings of the DSB – that is, that Peru should stop collecting the additional duty resulting from the PRS.[84] As was noted above, although Peru has the overall burden of proving that the period of time requested for implementation constitutes a "reasonable period of time", Guatemala may submit evidence in support of its assertion that the period of time requested by Peru is not "reasonable" and that a shorter period of time is justified for implementation.[85] However, Guatemala did not duly substantiate how it arrived at the maximum period of three months that it proposed for this step. Therefore, I consider only the period of six months, as provided for in Peru's legal system, as the maximum period of time for the part of the second step that relates to the definition of the implementation measure.

3.38. With regard to the third, fourth, fifth, and sixth steps, Peru indicates that the total period of time for these steps may be 58 to 96 days "under normal conditions".[86] Guatemala does not question the relevance of these steps for the implementation of the measure or the minimum or maximum time-frames for the periods described by Peru. Its argument is that, in determining the reasonable period of time, the defending party must take full advantage of the flexibility offered by

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Awards of the Arbitrators, *Japan – Alcoholic Beverages II (Article 21.3(c))*, paras. 19 and 27; and *EC – Tariff Preferences (Article 21.3(c))*, para. 31.

[79] See Awards of the Arbitrators, *Chile – Price Band System (Article 21.3(c))*, para. 47; *Canada – Protection Term (Article 21.3(c))*, para. 58; *US – Section 110(5) Copyright Act (Article 21.3(c))*, para. 42; and *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 60.

[80] See para. 3.23 of this Award.

[81] Peru's submission, para. 47; Peru's response to questioning at the hearing.

[82] See Guatemala's submission, paras. 4.20 and 4.31-4.33; Guatemala's response to questioning at the hearing.

[83] Peru's submission, para. 45; Economic and Legal Analysis Manual (Exhibit PER-9), page 10.

[84] Guatemala's submission, paras. 4.35-4.36. Guatemala also contends that, as the substantive department is the DGAEICYP itself in this case, and the DGAEICYP does not need to coordinate with another department within its Ministry, the preparation of the draft Supreme Decree should be "more agile than normal". (Ibid., para. 4.29) Guatemala also indicates that the Government of Peru has the capacity to issue a Supreme Decree more promptly than is suggested by Peru in its written submission. According to Guatemala, Peru enacted Supreme Decree No. 121-2006-EF on 20 July 2006, less than 30 days after the previous Supreme Decree issued in relation to the PRS. In Supreme Decree No. 121-2006-EF, Peru modified the "marker product" for sugar and created a new Customs Table for the same product. (Ibid., paras. 4.39-4.41)

[85] See para. 3.8 of this Award.

[86] See paras. 3.24-3.27 of this Award.

its legal system to reduce that period to the greatest extent possible. Accordingly, Guatemala considers that, with respect to these steps, I must consider the minimum periods of time indicated by Peru.[87]

3.39. In this connection, I agree with Guatemala's reasoning. In my opinion, a Member must undertake all available efforts, within the flexibility offered by its legal system, to implement, as expeditiously as possible, the recommendations and rulings of the DSB and to bring into conformity a measure that has been declared inconsistent with WTO rules. Expeditious compliance with the recommendations and rulings of the DSB is essential to the proper functioning of the WTO dispute settlement mechanism. Consequently, for the purpose of calculating the "reasonable period of time" within the meaning of Article 21.3(c), I will take the shortest possible period of time as the baseline, that is, the *minimum* periods indicated by Peru in relation to the third, fourth and fifth steps, in addition to the single period indicated by Peru in relation to the sixth step.

3.40. During the hearing, Peru argued that the periods of time may also vary in accordance with the nature of the implementation measure. In my opinion, it is clear that, to the extent that I have more information regarding the way in which the inconsistent measure is to be implemented, this could facilitate my consideration of other elements that might justify a longer period of time. However, Peru did not provide detailed or specific information concerning the *implementation measure.* As I do not have that information, it is impossible for me to assess precisely the impact, within the Peruvian legal system, on the periods of time established for each step of the implementation measure.

3.41. In the light of the foregoing, I consider that, in accordance with the regular periods of time provided for in the Peruvian legal system, and taking into account Peru's obligation to bring its measure into conformity as quickly as possible, Peru is able to draft and enact a supreme decree in a shorter period of time than the period it proposes.

3.42. I shall examine below the particular circumstances, as identified by Peru, which may affect the determination of the reasonable period of time. First, I shall review the legal provisions of Article 21 of the DSU concerning the status of developing country Members. I shall go on to address the relevance of the El Niño phenomenon to the determination of the reasonable period of time. Lastly, I shall address the role of the PRS within Peru's tariff policy.

3.43. It should be pointed out that, in previous arbitrations, arbitrators have been mindful of Article 21.2 of the DSU, which provides that "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement." Regarding this provision, I fully agree with the arbitrators who have maintained that, in determining the reasonable period of time, particular attention should be paid to "'matters affecting the interests' of both an *implementing* and a *complaining* developing country Member or Members".[88] For this reason, I consider that "in a situation where both the implementing and the complaining Member are developing countries, the requirement provided in Article 21.2 is of little relevance, except if one party succeeds in demonstrating that it is more severely affected by problems related to its developing country status than the other party."[89] Throughout the proceedings in this arbitration, I have been mindful of the interests of both Peru, which is participating as a developing country Member required to bring an inconsistent measure into conformity, and Guatemala, which is participating as a complaining developing country Member. However, I do not consider that either Peru or Guatemala has demonstrated that its developing country status should be a factor to be considered in the final determination of the reasonable period of time in this arbitration.[90] Consequently, I consider that the developing country status of the two parties does not, in this arbitration, constitute an element of analysis relevant for determining the "reasonable period of time".

[87] Guatemala's submission, para. 4.43.

[88] Awards of the Arbitrators, *US – COOL (Article 21.3(c))*, para. 71; *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 99. (emphasis original)

[89] Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 106.

[90] See Award of the Arbitrator, *Chile – Alcoholic Beverages (Article 21.3(c))*, para. 44. In that arbitration award, it was noted that Chile, the respondent developing country Member, was "not … very specific or concrete about its particular interests as a developing country Member nor about how those interests would actually bear upon the length of the 'reasonable period of time' to enact necessary amendatory legislation". (Ibid.)

3.44. With regard to the 2015-2016 El Niño phenomenon, Peru contends that the implications of this natural phenomenon have an impact on the different steps of the regulatory process in Peru.[91] Peru foresees a severe future impact on the main agricultural crops of the country from the El Niño phenomenon, generating losses and harm to life, health and means of subsistence of the population, in addition to public and private infrastructure.[92] Guatemala, for its part, argues that the El Niño phenomenon is not a circumstance justifying extension of the reasonable period of time beyond the minimum period permitted under the Peruvian legal system.[93] Guatemala claims that the likelihood of natural disasters occurring is an extra-legal factor which cannot be taken into consideration in determining the reasonable period of time.[94] According to Guatemala, the prioritization of a particular matter of State over others is not a legal criterion to be examined by an arbitrator in connection with a measure for the implementation of the recommendations and rulings of the DSB.[95]

3.45. I do not, in principle, rule out the possibility that a natural disaster may constitute a "particular circumstance" and, hence, an element to be considered in the determination of the reasonable period of time. The prevention of natural disasters, such as those which could result from the El Niño phenomenon, and the mitigation of their effects may clearly affect the regulatory or legislative capacity of a Member to implement the recommendations and rulings of the DSB. In my opinion, the relevant issue in this arbitration is how and to what extent Peru's activities to address and mitigate the effects of the El Niño phenomenon affect the period of time for implementing the DSB's recommendations and rulings.

3.46. Peru has declared a State of Emergency in 14 of the country's 24 departments.[96] Under the State of Emergency and the Emergency Decree that was issued, priority has been given to the human and financial resources of the Peruvian Ministries to cope with the impact of the El Niño phenomenon.[97] In this connection, Peru argues that it is reasonable to expect that it will take a longer period of time to fulfil the regulatory functions of the Ministries concerned. According to Peru, although the Emergency Decree contains no provision modifying the procedure for the drafting and enactment of supreme decrees or the specific periods of time for that procedure[98], the Emergency Decree and the State of Emergency take precedence over the administrative process required by law for the implementation of the recommendations and rulings of the DSB.[99] For this reason, Peru requests that I grant an additional period of seven and a half months in my determination of the reasonable period of time.[100] Guatemala, for its part, maintains that Peru's administrative and regulatory activities follow their normal course and that, since the date of the Emergency Decree, the Ministry of Economy and Finance, the Ministry of Agriculture and Irrigation, the Ministry of Foreign Affairs and the Ministry of Foreign Trade and Tourism have continued issuing and modifying rules of all kinds, including rules of general application.[101]

3.47. I consider that Peru has not sufficiently demonstrated that actions for the prevention of the negative consequences or the mitigation of the effects of the El Niño phenomenon have specific implications for its regulatory capacity to implement the DSB's recommendations and rulings.[102] As

[91] Peru's submission, para. 54.
[92] Peru's submission, para. 18.
[93] Guatemala's submission, para. 4.30.
[94] See Guatemala's submission, para. 4.74.
[95] Guatemala's submission, para. 4.91.
[96] See Peru's submission, para. 18; Supreme Decree No. 045-2015-PCM (Exhibit PER-3); and Emergency Decree No. 004-2015 (Exhibit PER-6).
[97] Peru's submission, paras. 19 and 52.
[98] See section 3.3.2 of this Award.
[99] Peru's submission, paras. 18-19; Peru's response to questioning at the hearing.
[100] I understand that Peru requested an additional four and a half months because it is concentrating its financial and human capital on implementation measures to mitigate the impact of the El Niño phenomenon, in order to undertake the subsequent process of reconstruction, and on account of the seriousness of the El Niño phenomenon and the state of emergency. In addition, Peru requested three additional months over and above the maximum period of six months prescribed for step 2 – that is, definition of the measure – in the light of the El Niño phenomenon. As a result, I understand that Peru has requested seven and a half additional months in relation to the El Niño phenomenon. (Peru's submission, paras. 54 and 71)
[101] See Guatemala's submission, paras. 4.79-4.81, 4.83, 4.84, and 4.86-4.89; and rules issued by: the Ministry of Economy and Finance (Exhibit GTM-61); the Ministry of Agriculture and Irrigation (Exhibit GTM-62); the Ministry of Foreign Affairs (Exhibit GTM-63); and the Ministry of Foreign Trade and Tourism (Exhibit GTM-64).
[102] Guatemala's submission, para. 4.75.

noted above, Peru bears the overall burden of proving that the period of time requested for implementation constitutes a "reasonable period of time".[103] In the course of the hearing, Peru did not demonstrate or, at least, explain how it arrived at the calculation of the additional period of time said to derive from the actions of prevention or mitigation in relation to the El Niño phenomenon. Nor did Peru indicate, in relation to each of the steps in the procedure for drafting and enacting a supreme decree, how and for what reasons the period of time for each step of this procedure would be lengthened in the light of the El Niño phenomenon. Given that Peru has not sufficiently demonstrated the impact that the El Niño phenomenon will have on its regulatory capacity to implement the recommendations and rulings of the DSB, I find it impossible to examine how and to what extent Peru's activities relating to the El Niño phenomenon affect the period of time for implementation.

3.48. With regard to the function of the PRS, Peru argues that the PRS is an essential element in Peru's tariff and economic policy. Peru argues that the PRS has formed part of its national programme of liberalization, including trade liberalization, and macroeconomic reforms for more than a decade.[104] Peru also points out that the specific duties resulting from implementation of the PRS have been an important part of its tariff policy and an essential part of the measures necessary to transform its economy.[105] Peru suggests that the PRS has a regulatory position for the determination of domestic prices, which must be considered to be part of the particular circumstances in this arbitration.[106]

3.49. On the other hand, Guatemala argues that the PRS currently performs a limited role in Peru's tariff and economic policy.[107] Guatemala maintains that Peru has negotiated free trade agreements with its trading partners, under which Peru has been prepared to stop applying the PRS, provided that it obtains adequate trade benefits.[108] Guatemala also claims that the PRS is not a complex measure and that the compliance action to be taken by Peru – i.e. cessation of the collection of variable additional duties – is not "particularly complicated".[109] Guatemala refers to certain statistics which, in its opinion, indicate that, for some of the four products covered by the PRS, only a small proportion of imports and an even smaller percentage of domestic consumption are covered by the PRS.[110] Finally, Guatemala emphasizes that, during the proceedings before the Panel and the Appellate Body, Peru endeavoured to demonstrate that the PRS had no impact on import prices and did not insulate the price on the national market from international price fluctuations.[111]

3.50. In the proceedings that are the subject of this arbitration, the Appellate Body pointed out that, as the Panel had found, the PRS has an impact on prices in the Peruvian market for the four products covered. In particular, the Appellate Body observed that, as the Panel had found, the use of a floor price updated every six months and the use of a reference price updated every two weeks are key elements of a system that is designed to, and indeed does to certain extent, "neutralize" or dilute fluctuations in international prices.[112] In addition, referring to the findings of the Panel, the Appellate Body pointed out that, in the short term, the PRS is designed to prevent any fall in prices from being transmitted to Peru's domestic market, and that, in the medium term, the PRS may also distort the transmission of international prices to the domestic market.[113] Despite the fact that the PRS has played a role in regulating prices in the Peruvian market, there is no doubt, in my opinion, that Peru has gradually reduced the relevance of the PRS in relation to

[103] See para. 3.8 of this Award.

[104] See Peru's submission, para. 9. Both in the current proceedings and in the proceedings before the Panel and the Appellate Body, the parties have disagreed about the year in which the PRS was established. Peru maintains that it established a system of specific duties in 1991 and has applied it ever since, and that the PRS is only a revised system. Guatemala rejects this argument and claims that Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), in 2001, tacitly repealed the 1991 system of specific duties and established the PRS. (Appellate Body Report, fn 26 to para. 5.1 (referring to Panel Report, para. 7.101)) See Peru's submission, para. 10; and Guatemala's submission, para. 4.63.

[105] Peru's submission, para. 12.

[106] See Peru's submission, paras. 12-17.

[107] Guatemala's submission, para. 4.57.

[108] Guatemala's submission, para. 4.52.

[109] Guatemala's submission, para. 4.64.

[110] Guatemala's submission, para. 4.57.

[111] Guatemala's submission, para. 4.61.

[112] Appellate Body Report, para. 5.59 (referring to Panel Report, paras. 7.344-7.349).

[113] Appellate Body Report, fn 127 to para. 5.35 (referring to Panel Report, paras. 7.345-7.346).

the products covered.[114] I consider that Peru has not demonstrated that the PRS currently constitutes an essential element of its tariff and economic policy and, furthermore, how this element would affect or influence Peru's regulatory capacity in a way that would justify a longer period of time for implementing the measure at issue. In the light of all of the above, I do not consider that, as Peru claims, the function and role of the PRS should be taken into account as a "particular circumstance" that would affect my determination of the reasonable period of time.

3.51. In conclusion, examining the matter reasonably and fairly, after having reviewed the shortest period possible, under Peru's legal system, within which Peru would be expected to implement the recommendations and rulings of the DSB, and evaluating the particular circumstances claimed by the parties in this dispute, I do not consider the period of 19 months proposed by Peru to be necessary. I also do not consider that the period of 5 or 6 months proposed by Guatemala is a sufficient "reasonable" period of time within which Peru would be able to complete implementation as expeditiously as possible.

4 AWARD

4.1. In the light of the foregoing considerations, the "reasonable period of time" for Peru to implement the recommendations and rulings of the DSB in this dispute is 7 months and 29 days from 31 July 2015, that is, from the date on which the DSB adopted the Panel and Appellate Body Reports in this dispute. Thus, the reasonable period of time will expire on 29 March 2016.

Signed in the original at Geneva this 11th day of December 2015 by:

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Ricardo Ramírez-Hernández
Arbitrator

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[114] See Peru's response to Panel question No. 8; Guatemala's submission, paras. 4.52, 4.55, and 4.57-4.60.

ANNEX A

EXECUTIVE SUMMARY OF PERU'S SUBMISSION

1 INTRODUCTION

1. On 31 August 2015, Peru informed the DSB that it intended to implement the DSB's recommendations and rulings in this dispute. Peru explained that it would not be possible to comply immediately and that it would need a reasonable period of time to bring its measures into conformity with the WTO Agreements.

2. Given that the Appellate Body's recommendation concerning the additional duties implies a significant change in Peruvian tariff policy, and that "particular circumstances" exist, an implementation period of at least 19 months constitutes a reasonable period of time for the implementation of the DSB's recommendations and rulings.

2 GENERAL CONSIDERATIONS REGARDING THE IMPLEMENTATION OF THE RECOMMENDATIONS OF THE PANEL AND THE APPELLATE BODY

2.1 The PRS is an essential element of Peru's economic policy

3. It is important to emphasize the level of integration of the PRS in Peru's agricultural and tariff policies since the creation of this system in 1991. In May 1991, Peru established specific duties under Supreme Decree No. 016-91-AG. During the Uruguay Round, Peru bound its tariffs for all products at 30%, with the exception of rice, sugar, dairy, maize and wheat – that is, the products subject to specific duties in existence since 1991 – which were bound at 68%.

4. It is not by chance that the measure encompassed the four categories of agricultural products that are still included today. These four product categories are very important to Peru, as they provide work for a large part of Peruvian society. The integral role of the PRS and the specific duties in the Peruvian system is currently very relevant for determining a reasonable period of time in the context of proceedings under Article 21.3(c) of the DSU.[1]

2.2 State of emergency in Peru requiring the concentration and prioritization of resources to address the El Niño phenomenon

5. Pursuant to a decision taken at the highest political level, the ministries involved in the implementation of the recommendations of the Panel and the Appellate Body are currently in the process of taking measures to prevent and mitigate the El Niño phenomenon. As a consequence, which constitutes unforeseeable circumstances not attributable to the country, the state of emergency will also have a considerable impact on the process of modifying the measure and implementing the recommendations of the Panel and the Appellate Body.

2.3 Legal nature of a Supreme Decree

6. Pursuant to Article 11 of Chapter II of the Executive Organic Law – Law No. 29158[2], Supreme Decrees are general enactments issued by the President of the Republic, which govern rules with the status of law or regulate functional sectoral or multisectoral activity at national level. Furthermore, pursuant to the Political Constitution of Peru, customs duties are regulated by the President of the Republic by Supreme Decree.

[1] Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 48.
[2] Executive Organic Law No. 29158, PER-7.

3 ANALYTICAL FRAMEWORK FOR DETERMINING THE REASONABLE PERIOD OF TIME FOR IMPLEMENTATION OF THE APPELLATE BODY'S RECOMMENDATIONS

7. Taking into consideration the particular circumstances of the present case, which include the nature of the measure as an integral part of the country's economic policy and the current state of emergency requiring the prioritization of Government resources, set out below are details of the administrative procedure required to implement the recommendations of the Appellate Body and the Panel.

3.1 Consultation process with the production sectors concerned

8. Given that the implementation of the DSB's recommendations will have a negative impact on the staple goods-producing sectors concerned, it is essential to conduct a consultation process. The ministries responsible for formulating relevant programmes assess comments and hold coordination meetings to design the programmes concerned. On average, this process can take between 15 and 20 days, following which a further meeting is held with the production sectors. The total duration of these consultations is around 60 to 70 days.

3.2 Definition of the measure

9. The measure to implement the DSB's recommendations must be defined by the ministries responsible for issuing the Supreme Decree. Coordinated efforts are therefore required, involving not only the Ministries of the Economy and Finance (MEF), and of Agriculture and Irrigation, but other State sectors.

10. By Ministerial Resolution No. 639-2006-EF/67, the MEF approved the "Economic Analysis Manual", according to which the determination of a measure requires a preparatory meeting with all the units involved in the draft legislation.

11. To date, despite the efforts made, the competent ministries have been unable to agree on any proposed modification of the measure in order to match the DSB's recommendations to the PRS. A period of between six and nine months is therefore envisaged for the completion of this stage.

3.3 Preparation of the draft Supreme Decree

12. Once the measure has been determined and the consultation process with the sectors concerned has been concluded, the competent ministries formulate the draft Supreme Decree that will contain the description of the measure and the justification for its implementation. Under normal circumstances, the process of preparing and approving the draft measure can take 30 to 45 calendar days.

3.4 Vice-Ministerial Coordination Commission

13. Any draft Supreme Decree involving more than one sector must first be approved by the Vice-Ministerial Coordination Commission (CCV). Under normal circumstances, this approval process can take between 14 and 30 days, depending on the comments submitted and the time it takes to respond to them.

3.5 Council of Ministers

14. Once approved by the CCV, the draft legislation is placed on the agenda of the Council of Ministers, which must either approve the draft or return it for further amendment. Council of Ministers sessions are convened by the Secretariat of the Council of Ministers and are held on a weekly basis. The presence of the head of the proposing sector is necessary for the Council to give its approval. Under normal circumstances, this approval process can take, on average, between 7 and 14 days.

3.6 Ministerial endorsement, publication and entry into force

15. Once the draft text has been agreed and approved by the Council of Ministers, it is endorsed by the Minister of Agriculture and Irrigation and signed by the Minister of the Economy and Finance, for subsequent publication in the Official Journal, *El Peruano*. Under normal circumstances, this endorsement can take around seven days. The Supreme Decree will enter into force on the day following its publication, unless otherwise provided.

4 CONCLUSION

16. Peru requests the Arbitrator to determine that the reasonable period of time for the implementation of the Appellate Body's ruling be 19 months, starting from the date of approval of the report by the DSB and thus ending on 31 October 2016.

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ANNEX B

EXECUTIVE SUMMARY OF GUATEMALA'S SUBMISSION

1 INTRODUCTION

1. The purpose of this arbitration is to determine the reasonable period of time that will be granted to Peru to comply with the recommendations and rulings adopted by the Dispute Settlement Body (DSB).

2. Peru requests 19 months as a reasonable period of time. The main reasons for this excessive length of time are the likely occurrence of the El Niño phenomenon and Peru's decision to design production sector support programmes to offset the allegedly negative effects of modifying the PRS.

3. Guatemala considers five months to be an amply sufficient and perfectly reasonable period of time for Peru to implement the DSB's recommendations and rulings, in accordance with its domestic legislation. Nevertheless, Guatemala would not object to a time-period of six months, if the Arbitrator were to decide to consider other factors in the determination of the reasonable period of time.

4. In the present case, Peru needs to implement the recommendations and rulings of the DSB through an administrative act (i.e. a Supreme Decree of the President of the Republic, endorsed by the Minister of the Economy and Finance and the Minister of Agriculture and Irrigation). While Peru has the discretion to decide how to implement these recommendations and rulings, its sole obligation is to stop collecting the additional duties resulting from the PRS. The modification of the PRS and the adoption of production sector support measures do not, therefore, form part of Peru's implementation obligations that would justify extending the reasonable period of time.

5. Furthermore, while Guatemala regrets Peru's vulnerability to natural phenomena, Peru has not, in this case, demonstrated that the El Niño phenomenon is a consideration that the Arbitrator should take into account for extending the reasonable period of time. On the contrary, the evidence shows that the Government of Peru continues to carry out its functions as normal and that the uncertain likelihood of the impact of the El Niño phenomenon has not at all impaired its regulatory capacity.

2 LEGAL STANDARD UNDER ARTICLE 21.3(C) OF THE DSU

6. In the present case, the Arbitrator should consider certain key principles of the case law under Article 21.3(c) of the DSU, such as the following: immediate compliance is the rule and the reasonable period of time only applies where immediate compliance is "impracticable"; the responding Member bears the burden of demonstrating that the reasonable period of time is the shortest period possible; the reasonable period of time is the shortest period possible within the domestic legal system; one of the "particular circumstances" that should be considered is that compliance via administrative means requires less time than compliance via legislative means; the reasonable period of time should only cover the time required to implement the DSB's recommendations and rulings (not to make other changes to legislation); the "contentiousness" or "political sensitivity" of the measure to be implemented is not a "particular circumstance[ ]" that is relevant for determining the reasonable period of time; and the fact that the responding Member has not yet commenced implementation of the DSB's recommendations and rulings is a factor that the arbitrator should take into account in determining the reasonable period of time.

3 FIVE MONTHS IS THE SHORTEST PERIOD OF TIME UNDER THE PERUVIAN LEGAL FRAMEWORK

7. The reasonable period of time proposed by Peru is excessively long, as Peru considers it to include the time required for designing, approving and implementing production sector support measures; Peru also claims that it does not have the human and financial resources necessary to

design the implementation measures, since such resources are channelled entirely towards addressing the state of emergency related to the El Niño phenomenon.

8. A time-period of five months is, however, perfectly reasonable for the following reasons:

a. The time required for establishing production sector support measures does not form part of the reasonable period of time. Peru's obligation is in fact to stop collecting the additional duties resulting from the PRS, and the support measures are not necessary for the implementation of the DSB's rulings and recommendations.

b. Furthermore, consultations with the production sectors concerned are not required under Peruvian legislation. In any event, such consultations may take place in parallel to or as part of the process of designing the measure, and Guatemala therefore considers three months to be amply sufficient. In some cases, the entire process of preparing, approving and publishing Supreme Decrees takes no more than 30 days.

c. Regarding the definition of the measure, the time required for interinstitutional coordination may be less than that indicated by Peru; in particular, because instead of requiring the coordination of two separate Government units, only one unit is responsible for preparing the draft legal instrument.

d. Guatemala does not dispute the minimum and maximum time-frames for the periods described by Peru for the preparation of the draft Supreme Decree, its analysis by the Vice-Ministerial Coordination Commission and the Council of Ministers, and ministerial approval, or for the publication and entry into force of the measure. The combined total of the minimum and single time-periods described by Peru does not exceed two months.

4 THE PRS IS NOT A MEASURE FUNDAMENTALLY INTEGRATED INTO TARIFF POLICY

9. Peru has been willing to abandon the PRS in free trade agreement negotiations and the system currently plays a limited role in Peru's agricultural policy. Statistics show that for some of the products covered, the PRS accounts for only a small proportion of imports and an even smaller percentage of domestic consumption. Furthermore, as explained by Peru, the PRS is not a tool for regulating prices in the Peruvian market.

5 THE EL NIÑO PHENOMENON IS NOT A VALID CONSIDERATION FOR EXTENDING THE REASONABLE PERIOD OF TIME

10. Peru's reasoning behind this argument is that the El Niño phenomenon will prevent it from focusing on the implementation of the DSB's recommendations and rulings, as its human and financial resources are channelled towards addressing an emergency situation.

11. However, while Peru may be able to predict the likely occurrence of the El Niño phenomenon, it cannot determine *a priori* the potential effects of the phenomenon in the future. A natural event that has not occurred cannot constitute "unforeseeable circumstances", and determining a reasonable period of time on this basis would be speculative.

12. Moreover, the facts show that Peru continues to carry out its normal regulatory activities, despite the existence of an Emergency Decree issued by the President of the Republic.

13. In addition, the Action Plan devised to address El Niño situations does not require urgent response actions from the officials responsible for the implementation of the DSB's rulings and recommendations.

14. In any case, the Arbitrator should not consider speculation concerning events that have not occurred to be relevant for granting additional time for the implementation of the DSB's recommendations and rulings. A reasonable period of time determined in this way, where such events do not occur, would not be the "shortest period" possible.

6 CONCLUSION

15. Five months is an amply sufficient and perfectly reasonable period of time for Peru to implement the DSB's recommendations and rulings. The determination of the reasonable period of time should not be influenced by the design of production sector support measures; speculation concerning potential effects of the El Niño phenomenon; or considerations such as how long the PRS has been in place or its level of integration in tariff policy.

16. If the El Niño phenomenon were to have devastating consequences in Peru, thereby affecting the country's regulatory capacity to the point of preventing it from complying with the DSB's recommendations and rulings within the reasonable period of time determined by the Arbitrator, Peru could inform the DSB of this situation in the context of its status reports on compliance pursuant to Article 21.6 of the DSU. Guatemala would give sympathetic consideration to this situation.

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