

appropriate proxy for transaction values of imports entering the Peruvian market. This consideration is also relevant for examining the *de facto* or implicit threshold identified by Guatemala.⁴²⁸ This is because one of the two components of the implicit threshold is the additional duty resulting from the PRS, which is, in turn, dependent on the reference price.⁴²⁹

5.164. Without knowing whether the reference price serves, even if only to a certain degree, as a proxy for transaction values of imports entering Peru's market, it is not possible to determine whether either of the thresholds identified by Guatemala constitutes a "minimum import price" threshold, referring generally to the lowest price at which imports of a certain product may enter the Peruvian market. Being unable to undertake such an examination ourselves, we are also unable to determine whether the measure at issue shares a sufficient number of characteristics with, and has a design, structure, operation and impact similar to, a "minimum import price" to make it "similar" to a "minimum import price".

5.165. In the light of the above, we are unable to complete the legal analysis and reach a conclusion as to whether the measure at issue is inconsistent with Article 4.2 of the Agreement on Agriculture because it is either a "minimum import price" or a border measure "similar" to a minimum import price within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in section 5.2 of this Report, with respect to Articles 3.7 and 3.10 of the DSU, the Appellate Body:

- a. finds that Peru's arguments on appeal are not "new claims" or a "new defence" and are within the scope of this appeal;
- b. finds that Guatemala has not relinquished its right to have recourse to the WTO dispute settlement mechanism in respect of Peru's PRS; and
- c. consequently, upholds the Panel's finding, in paragraph 8.1.a of the Panel Report, that there is "no evidence that Guatemala brought these proceedings in a manner contrary to good faith", and that there was, therefore, "no reason for the Panel to refrain from assessing the claims put forward by Guatemala".

6.2. For the reasons set out in section 5.3.1 of this Report, with respect to "variable import levies" in footnote 1 of Article 4.2 of the Agreement on Agriculture, the Appellate Body:

- a. finds that Peru has not established that the Panel erred in its assessment of the "variability" of the measure at issue;
- b. finds that Peru has not established that the Panel erred in its assessment of the "additional features" of the measure at issue; and
- c. finds that the Panel did not act inconsistently with Article 11 of the DSU in its examination of Guatemala's claim under Article 4.2 of the Agreement on Agriculture.

⁴²⁸ There is also no undisputed facts on the Panel record concerning whether the design, structure, and operation of the PRS incorporates, or at least could reveal, the *de facto* or implicit threshold identified by Guatemala. Moreover, there are no Panel's findings or undisputed facts on the Panel record – and in many respects there is no evidence on the record – concerning the relationship between the lowest relevant international price and the transaction values of imports entering the Peruvian market.

⁴²⁹ We recall that the additional duty resulting from the PRS is calculated on the basis of the difference between the reference price and the floor price of the PRS. In turn, the implicit threshold is the sum of the additional duty resulting from the PRS, and the lowest relevant international price.

6.3. For the reasons set out in section 5.3.2 of this Report, with respect to Article II:1(b) of the GATT 1994, the Appellate Body:

- a. finds that Peru has not established that the Panel erred in finding that the measure at issue is not an "ordinary customs duty" under the first sentence of Article II:1(b) of the GATT 1994; and
- b. finds that the Panel did not act inconsistently with Article 11 of the DSU in its examination of Guatemala's claim under Article II:1(b) of the GATT 1994.

6.4. For the reasons set out in section 5.3.3 of this Report, with respect to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in accordance with Article 31 of the Vienna Convention, the Appellate Body:

- a. finds that Peru's arguments regarding the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in accordance with Article 31(3)(a) and (c) of the Vienna Convention are within the scope of this appeal;
- b. finds that Peru's arguments, that the Panel erred in its interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 because it failed to take into account under Article 31(3) of the Vienna Convention the FTA and ILC Articles 20 and 45, go beyond the interpretation of Article 4.2 and Article II:1(b) in accordance with Article 3.2 of the DSU and Article 31 of the Vienna Convention and amount to arguing that, by means of the FTA, Peru and Guatemala actually modified these WTO provisions between themselves;
- c. finds that the FTA between Peru and Guatemala and ILC Articles 20 and 45 are not "relevant" to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 within the meaning of Article 31(3)(c) of the Vienna Convention and that the FTA is not a subsequent agreement "regarding the interpretation" of these WTO provisions within the meaning of Article 31(3)(a); and, therefore,
- d. finds that the Panel did not commit an error by not interpreting Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 taking into account the provisions of the FTA and ILC Articles 20 and 45 under Article 31(3) of the Vienna Convention.

6.5. For the reasons set out in section 5.3.3 of this Report, the Appellate Body:

- a. finds that the Panel did not err in declining to make findings as to whether the FTA modified the WTO rights and obligations between Peru and Guatemala.

6.6. For the reasons set out in section 5.3 of this Report, the Appellate Body:

- a. upholds 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; and
- b. upholds 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.

6.7. For the reasons set out in section 5.4 of this Report, with respect to the Panel's interpretation and application of "minimum import prices" and "similar border measures" in footnote 1 of Article 4.2 of the Agreement on Agriculture, the Appellate Body:

- a. finds that Guatemala has not established that the Panel erred in its interpretation of the term "minimum import prices" in footnote 1 of Article 4.2 of the Agreement on Agriculture;
- b. reverses the Panel's finding, in paragraph 8.1.c of the Panel Report, that the measure at issue does not constitute a "minimum import price" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture;
- c. finds that Guatemala has not established that the Panel erred in its interpretation of the term "similar border measures" in footnote 1 of Article 4.2 of the Agreement on Agriculture;
- d. reverses the Panel's finding, in paragraph 8.1.c of the Panel Report that the measure at issue does not share sufficient characteristics with "minimum import prices" to be considered a border measure "similar" to a "minimum import price" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture; and
- e. is unable to complete the legal analysis under Article 4.2 and footnote 1 of the Agreement on Agriculture and determine whether the measure at issue constitutes a "minimum import price" or a border measure "similar" to a "minimum import price" within the meaning of footnote 1.

6.8. The Appellate Body recommends that the DSB request Peru to bring its measure found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the Agreement on Agriculture and the GATT 1994 into conformity with those Agreements.

Signed in the original in Geneva this 29th day of June 2015 by:

Ujal Singh Bhatia
Presiding Member

Thomas Graham
Member

Yuejiao Zhang
Member
