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PERU – ADDITIONAL DUTY ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS457/R.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

Adopted on 8 October 2013

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Following consultations with the parties, the Panel may adopt procedures for the protection of business confidential information in addition to those contained in these Working Procedures. During the interim review stage, either party may request the Panel to remove the business confidential information from the final report.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. Should a party wish to request a preliminary ruling of the Panel, it shall do so at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Guatemala requests such a ruling from the Panel, Peru shall respond to the request in its first written submission. If Peru requests such a ruling, Guatemala shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in the light of the request. The Panel may grant exceptions to this rule upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments on answers provided by the other party. The Panel may grant exceptions to this rule where good cause is shown. Where such exception has been granted, the

Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits submitted to the Panel is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission to which the exhibits are annexed at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation shall be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached in annex, to the extent that it is practical to do so.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Guatemala could be numbered GUA-1, GUA-2, etc. If the last exhibit in connection with the first submission was numbered GUA-5, the first exhibit of the next submission would be numbered GUA-6.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5 p.m. on the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall first invite Guatemala to make an opening statement to present its case. Subsequently, the Panel shall invite Peru to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. Subsequently, the Panel may grant each party time to make a brief oral rebuttal of the statement of the other party. The Panel may, after consultation with the parties, establish time-limits for the opening statements and the oral rebuttals of the parties, and the parties shall be informed of these time-limits prior to the first substantive meeting. In the event that interpretation is needed, each party shall provide additional copies to the interpreters through the Panel secretariat. Each party shall supply the Panel and the other party with a final written version of its statement and its rebuttal, preferably at the end of the meeting, and in any event no later than 5 p.m. on the first working day following the meeting.

b. After the conclusion of the statements and rebuttals, the Panel shall give each party the opportunity to ask the other party questions or to make comments through the Panel. Each party shall then have an opportunity to answer those questions orally. Each party shall send in writing, within a time-frame to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall respond in writing to the questions of the other party within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The panel shall send in writing, within a time-frame to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Guatemala presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Peru if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Peru to present its opening statement, followed by Guatemala. If Peru chooses not to avail itself of that right, the Panel shall invite Guatemala to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. Subsequently, the Panel may grant each party time to make a brief oral rebuttal of the statement of the other party. The Panel may, after consultation with the parties, establish time-limits for the opening statements and the oral rebuttals of the parties, and the parties shall be informed of these time-limits prior to the second substantive meeting. In the event that interpretation is needed, each party shall provide additional copies to the interpreters through the Panel secretariat. Each party shall supply the Panel and the other party with a final written version of its statement and its rebuttal, preferably at the end of the meeting, and in any event no later than 5 p.m. on the first working day following the meeting.

b. After the conclusion of the statements and rebuttals, the Panel shall give each party the opportunity to ask the other party questions or to make comments through the Panel. Each party shall then have an opportunity to answer those questions orally. Each party shall send in writing, within a time-frame to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall respond in writing to the questions of the other party within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a time-frame to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. The Panel may, after consultation with the parties, establish time-limits for the third party statements, and the parties and third parties shall be informed of these time-limits prior to the third party session. In the event that interpretation is needed, each third party shall provide

additional copies for the interpreters through the Panel secretariat. The third party shall make available to the Panel, the parties and other third parties the final written versions of their statements, preferably at the end of the session, and in any event no later than 5 p.m. on the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a time-frame to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have the opportunity to answer these questions orally. The Panel shall send in writing, within a time-frame to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and the third parties, which shall be attached as annexes to the report. These executive summaries shall not serve in any way as a substitute for the submissions of the parties and the third parties in the Panel's examination of the case.

20. Each party shall provide executive summaries of the facts and arguments as presented to the Panel, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of the replies to questions. These summaries shall not exceed 15 pages each. The Panel shall not summarize the parties' replies to the questions in the descriptive part, nor shall it annex them to its report.

21. Each third party shall submit an executive summary of its arguments as presented to the Panel in its written submission and its declaration of conformity with the timetable adopted by the Panel for its work. This summary may also include a summary of the replies to questions, where applicable. The executive summary to be provided by each one of the third parties shall not exceed six pages.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, like the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file six paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, seven CD-ROMS/DVDs

and at least five paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an email attachment. If the electronic copy is provided by email, it should be addressed to *****@wto.org, and cc'd to *****.*****@wto.org, *****.*****@wto.org, and *****.*****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may transmit its documents to the other party or third party in electronic form only, subject to prior written consent of the notified party or third party and provided the Panel secretariat is informed.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX B

ARGUMENTS OF THE PARTIES

GUATEMALA

PERU

ANNEX B-1

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF GUATEMALA

1 THE MEASURE AT ISSUE

1.1. The measure at issue is the variable additional duty imposed by Peru, which is calculated under the rules of the price band system (PBS) established by Supreme Decree No. 115-2001-EF and other amending instruments. This is clear from the way in which Guatemala characterized the measure in its panel request.[1] This implies that the measure at issue is not only the variable additional duty, but also the underlying method of its calculation. A proper examination of the measure concerned necessarily requires an analysis of the functioning of the price band system and its constituent elements. It is not possible to separate the variable additional duty from the PBS: the one does not exist without the other.[2]

1.2. Although Guatemala characterized the measure at issue differently from the way in which the Chilean measure was characterized in *Chile – Price Band System* (which refered to "Chile's PBS"), this does not mean that the legal criteria established by the Appellate Body in that dispute cannot be applied in the present case.[3]

2 FACTUAL DESCRIPTION OF THE MEASURE AT ISSUE

2.1. The variable additional duty is calculated in accordance with the PBS. This system functions on the basis of a "price band", which consists of an area defined by a lower threshold and an upper threshold. The lower threshold is referred to as the "floor price", and the upper threshold as the "ceiling price". Both prices consist of a figure expressed in United States dollars and both are based on international prices for the past 60 days.

2.2. As stated in Supreme Decree No. 115-2001-EF itself, the purpose of the PBS is "to neutralize fluctuations in international prices and limit the negative effects of falls in such prices".[4]

2.3. The PBS operates on the basis of a simple logic[5]:

(i) When recent international prices (reflected in the "reference price") are below the floor price, the system imposes a special charge on imports, known as the "variable additional duty".

(ii) On the other hand, recent international prices are above the ceiling price, the PBS generates a "tariff rebate", which consists of a discount on the amount payable by the importer by way of ordinary customs duties. In most cases, the tariff rebate has no practical effect since most products subject to the PBS attract an ordinary customs duty of 0%.

(iii) If the international prices are at a level between the floor price and the ceiling price, the PBS generates neither an additional duty nor a tariff rebate. In such cases, only the ordinary customs duty is applied.

2.4. Guatemala has detected a series of anomalies characterizing the PBS. Some of these aspects directly contradict the rules or formulas established in Supreme Decree No. 115-2001-EF. Other aspects bear witness to a bias in the administration of the PBS. Guatemala will come back to those anomalies later in this executive summary, when it addresses its claims under Articles X:1 and X:3(a) of the GATT 1994.

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[1] Request for the Establishment of a Panel by Guatemala, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/2, circulates on 14 June 2013.
[2] Response of Guatemala to Panel question 41, para. 87.
[3] Response of Guatemala to question 41 from the Panel, para. 88.
[4] Supreme Decree No. 115-2001-EF, second preambular paragraph.
[5] First written submission of Guatemala, para. 3.9.

3 LEGAL CLAIMS

3.1 Order of analysis

3.1. In accordance with a well-established principle of jurisprudence, legal analysis must begin with the provision that deals with a matter more specifically and in greater detail.[6] With regard to agricultural products, it has been found previously that Article 4.2 of the Agreement on Agriculture is more specific than Article II:1(b) of the GATT 1994. Thus, Guatemala considers that the approach most in harmony with existing case law would be to start the legal analysis with Article 4.2.[7]

3.2. Contrary to Peru's allegation, the fact that both Article 4.2 and Article II:1(b) refer to an ordinary tariff is no justification for initiating the analysis on the basis of Article II:1(b).[8] The two provisions are different in their legal scope and their scope of application. The fact that both provisions share a common concept has no bearing on their nature, specificity and detail, which are precisely the factors that determine the appropriate analytical sequence.

3.3. Regardless of the approach that the Panel decides to adopt, Guatemala respectfully requests the Panel to make findings under both provisions. Guatemala acknowledges that the Panel would be entitled to exercise judicial economy, but respectfully requests the Panel not to adopt that approach. It is common practice for panels to resolve more claims than are technically necessary to "resolve the dispute", with a view to facilitating the Appellate Body's work of completing the analysis in case it rejects one or more panel findings. The Appellate Body has explicitly approved that practice.[9]

3.2 The measure at issue is inconsistent with Article 4.2 of the Agreement on Agriculture

3.2.1 The measure at issue constitutes a variable import levy or similar measure

3.4. In order to constitute a variable levy or similar measure under Article 4.2, a measure must meet three criteria, as previously explained by the Appellate Body.[10]

3.5. The measure is inherently variable: a levy is "variable" when it is "liable to vary" and "inherently variable".[11] The measure itself must impose the variability of the duties. This happens when the measure "incorporates a scheme or formula that causes and ensures that levies change automatically and continuously".[12] In contrast, ordinary duties vary by virtue of discrete changes that occur independently and as a result of specific acts.[13]

3.6. Lack of transparency and lack of predictability: variable import levies are characterized by their lack of transparency and lack of predictability with regard to the level of the resulting duties. If an exporter cannot reasonably predict the amount of the duties to be paid, that exporter is less likely to ship to a market. The Appellate Body made it explicitly clear that lack of transparency and lack of predictability are not independent or absolute characteristics of a variable

[6] See the first written submission of Guatemala, para. 4.2. See also Appellate Body Report, *Chile - Price Band System*, para. 191; Appellate Body Report, *EC – Bananas III*, para. 204; Appellate Body Report, *Canada – Renewable Energy/Canada – Feed-in Tariff Program*, para. 5.6; Panel Report, *Indonesia - Autos*, paras. 14.61–14.63; Panel Reports, *Canada – Autos*, paras. 10.63 and 10.64; and *India - Autos*, paras. 7.157-7.162.

[7] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, para. 5. Response of Guatemala to Panel question 55, paras. 128-129.

[8] First written submission of Guatemala, para. 5.4. Opening statement by Peru at the first substantive meeting of the Panel with the parties, para. 35.

[9] Response of Guatemala to question 55 from the Panel, paras. 130-133.

[10] First written submission of Guatemala, paras. 13.17-13.21.

[11] Appellate Body Report, *Chile – Price Band System*, paras. 232 and 233.

[12] Appellate Body Report, *Chile – Price Band System*, para. 233.

[13] First written submission of Guatemala, para. 4.18. Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, para. 11. See also Guatemala's response to question 64, para. 228.

levy. Rather, they are natural and inherent consequences of the very nature of variable levies and their application.[14]

3.7. Distortion of import prices and impossibility of transmitting international price developments: variable import levies are measures that distort import prices. Thus, they impede the transmission of international price developments to the domestic market (developments as reflected in the prices of imports subject to the measure). This may happen when variable duties are calculated on the basis of the difference between two parameters whose purpose is to disconnect the domestic market from international price developments.[15]

3.8. The measure at issue satisfies these three criteria.

3.9. First, Peru's variable duty is calculated by means of a series of mathematical formulas enshrined in the regulations. Both the variable duty itself and its inputs (reference price, floor price and ceiling price) are based on those formulas. The operation of the formulas is automatic and continuous. The reference price and the variable duty are updated automatically every 15 days, using prescribed legal instruments and on the basis of data gathered in the international markets. The floor and ceiling prices are updated automatically every six months.[16] The Peruvian authorities have no power of discretion in this process. An empirical analysis confirms that the variable duties have almost always varied in relation to the previous two weeks.[17] At no time has Peru sought to refute the fact that the PBS contains mathematical formulas which cause the variable duty to vary automatically and continuously.

3.10. In addition, and contrary to Peru's contention, the variable duty does not cease to be variable by virtue of any attempt by the economic operators to estimate its level. The variability - and the consequent lack of transparency and predictability - are characteristics inherent in the design of the measure and are not dependent on whether or not the economic operators attempt to adjust to the variability. In any event, it is impossible to estimate the variable duty precisely because its level is linked to international prices which are in constant flux. Guatemala has used specific examples to show that, in both the short and the long term, economic operators cannot reasonably predict reference prices and the variable duty.[18] The uncertainty is particularly pronounced in the long term - which is precisely the context in which most world sugar trade is conducted.[19] Guatemala submitted an example of a contract in which an exporter, on the basis of prices on futures markets, estimates a variable duty of zero for a specific month in the future and, 18 months after his initial estimation, the same operator is faced with an estimated variable duty of more than US$200 per metric tonne, for the same month in the future.[20]

3.11. In any event, Guatemala does not deem it necessary to conduct this type of analysis. Actions whereby private entities may seek to mitigate the trade impact of measures that are in violation of a rule do not remedy that violation. Peru owes it to the Government of Guatemala and other WTO Members to comply with Article 4.2. In the context of inter-governmental relations, the actions of private parties are irrelevant.[21] Peru's argument that, in the final analysis, all measures are variable, because they can be changed by sovereign decision of the Government, must also be rejected. The variable duty is characterized by a variability that is distinct from, and additional to, the ordinary variability characteristic of government measures in general.[22]

3.12. Second, inasmuch as they are generated by the above-mentioned mathematical formulas, variable duties are characterized by lack of transparency and predictability.[23] This lack of transparency and predictability is a natural and inherent consequence of the variable nature of the duties. Moreover, Guatemala has demonstrated, using concrete examples, that not only is there a general level of uncertainty, but that this uncertainty also affects specific consignments, taking

[14] First written submission of Guatemala, para. 4.19.
[15] First written submission of Guatemala, para. 4.20.
[16] First written submission of Guatemala, paras. 4.36-4.53.
[17] First written submission of Guatemala, paras. 4.54-4.57.
[18] Response of Guatemala to question 53 from the Panel, paras. 107-122.
[19] Response of Guatemala to question 7 from the Panel, para. 6.
[20] Response of Guatemala to question 53 from the Panel, para. 115.
[21] Response of Guatemala to question 53 from the Panel, paras. 118-120.
[22] Response of Guatemala to question 53 from the Panel, para. 122 and response of Guatemala to questions 46 and 57 from the Panel, footnote 125.
[23] First written submission of Guatemala, paras. 4.58-4.63.

into account the duration of transportation by sea.[24] It was also demonstrated that it is impossible for economic operators to foresee or estimate prices and variable duties in both the short and the long term. As was pointed out, the uncertainty is particularly pronounced in the long term, which is the mode that normally governs transactions on the world sugar market.[25]

3.13. Third, variable additional duties and the PBS distort the prices of imports, thereby impeding the transmission of trends in the prices of such imports to the Peruvian market. This is the express purpose and the practical effect of the Peruvian regulation.[26] The variable duties are precisely calibrated to bridge the gap between two parameters, namely the reference price and the floor price.[27] The measure artificially raises the price of entry for imports, and thus impedes or seeks to impede entry of the goods at a price below the floor price.

3.14. Guatemala rejects the "isolation" analysis proposed by Peru. That analysis contradicts the text of Article 4.2 and the other covered agreements. When the negotiators wished to link the legal characterization of a measure to its economic effects, they said so explicitly.[28] Peru's analysis also contradicts the case law under Article 4.2.[29] The Appellate Body has attached importance to the fact that variable levies neutralize fluctuations *in the prices of imports subject to such levies*. This impedes the transmission of such prices to the national market.[30] Contrary to what is alleged by Peru, the criterion used by the Appellate Body does not concern whether there is a correlation between average price trends in the domestic market and international prices.

3.15. In addition, there is no economic logic in the mere presentation by Peru of the correlation or lack of correlation. Peru takes no account of the wide range of factors that impact and determine the domestic price.[31] Peru also ignores the fact that there are various factors other than imports under the PBS which affect the transmission of international trends to the domestic market. For example, even if the PBS impedes such transmission, the transmission can be effected by imports entering Peru without being subject to the PBS.[32] The measure at issue does not control these factors and is not applicable to them.[33] Guatemala has illustrated these methodological failings in the light of concrete examples in the Peruvian analysis.[34]

3.16. The "isolation" analysis proposed by Peru would also result in a meaningless legal criterion, devoid of any legal certainty. Depending on fluctuations in economic circumstances, the same measure could be an offending measure in one Member but not in another, or its WTO consistency could vary in the same Member according to the period analysed.[35] Moreover, in some Members, the characteristics of the domestic market would not at all permit the application of such an analysis.[36]

3.17. In substance, the "isolation" analysis proposed by Peru is an attempt to introduce through the back door a trade effects test which has been repeatedly rejected – over a period of decades - under the GATT and the WTO, even by the Appellate Body itself, by virtue of a series of provisions of the GATT and the Agreement on Technical Barriers to Trade.[37] The logic underlying that rejection also applies under Article 4.2 of the Agreement on Agriculture: the provisions of the covered agreements provide protection not for trade volumes or price trends but for the

[24] First written submission of Guatemala, paras. 4.64-4.68.
[25] Response of Guatemala to question 53 from the Panel, paras. 107-122.
[26] First written submission of Guatemala, para. 4.74.
[27] First written submission of Guatemala, paras. 4.75 and 4.78. Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, paras. 17-20.
[28] Response of Guatemala to Panel questions 46 and 57. paras. 140-144.
[29] Response of Guatemala to Panel questions 46 and 57, paras. 140-153.
[30] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, paras. 17-20. Response of Guatemala to Panel questions 46 and 57, paras. 146-151.
[31] Response of Guatemala to Panel questions 46 and 57, paras. 159-165.
[32] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, para. 22. Response of Guatemala to Panel questions 46 and 57, paras. 163-169.
[33] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, para. 21. Response of Guatemala to Panel questions 46 and 57, paras. 155-157.
[34] Response of Guatemala to Panel questions 46 and 57, paras. 162 and 167.
[35] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, paras. 173-174.
[36] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, paras. 175-177.
[37] Response of Guatemala to Panel questions 46 and 57, paras. 178-186.

expectations of Members concerning conditions of competition. Under Article 4.2, Members have legitimate expectations that their exports could compete without being subject to customs charges that are not ordinary customs duties. In addition, the purpose of Article 4.2 is to enable governments to negotiate the gradual liberalization of agricultural trade solely on the basis of ordinary customs duties. In this context, the correlation of prices is irrelevant.

3.18. If the Panel were to decide to consider Peru's analysis, Guatemala would claim that that analysis is invalid. Peru does not take into account the many factors that complicate the analysis[38]; it fails to analyse what it claims to analyse[39]; it does not disclose essential elements of the analysis[40]; and it presents ambiguous results at best, results that can also be interpreted as running directly counter to Peru's interpretation, depending on the approach taken.[41] The Panel would also have to analyse the fact that the Peruvian measure has completely eliminated Guatemalan imports and that the origin of imports has been changed to origins not covered by the PBS.[42]

3.2.2 The measure at issue constitutes a minimum import price or similar measure

3.19. The Appellate Body found that the concept of "minimum import price" refers "to the lowest price at which imports of a certain product may enter a Member's domestic market".[43] The characteristics of a minimum import price include: (i) the imposition of a specific additional duty when the reference price falls below the lower band threshold[44]; (ii) the lower the reference price relative to the lower threshold, the higher the specific duty[45]; and (iii) the measure distorts the transmission of declines in world prices to the domestic market.[46]

3.20. Guatemala maintains that, in the light of the criterion enunciated by the Appellate Body, the measure at issue is a minimum import price since the floor price of the PBS operates as a minimum level of imports.[47] When the reference price is below the floor price, the system orders the imposition of a specific duty equal to the difference between those two parameters. The size of the specific duty will augment in line with the difference between the floor price and the reference price. In addition, the measure at issue distorts the transmission of falls in international prices to the domestic market. In the short term, the system completely precludes the transmission of a decline in prices to the Peruvian domestic market. In the long term, although it does not completely preclude the transmission of international prices to the international market, the Peruvian system severely distorts such transmission owing to its cushioning effect.[48]

3.21. Peru's observations concerning the lack of a target price in its measure[49] are inaccurate and, in any event, of no relevance to resolving the issue of whether that measure is a minimum import price.

3.22. Guatemala maintains that the PBS is in fact a target price or an objective price, which consists in the floor price.[50] Moreover, the possibility that some shipments enter Peru with a final cost (i.e. CIF import price plus variable additional duty) lower than the floor price is not a factor conducive to resolving the legality of the Peruvian measure. There are a number of reasons for this: (i) this approach would ignore the design, structure and architecture articulated by the measure itself, that is to say, the neutralization of fluctuations in international prices; (ii) the reference price is calculated in accordance with the *average* of the prices quoted in the reference markets, which implies that, for consignments with a typical or average price, the floor price does operate as a minimum price; (iii) Peru's argument could be turned round to reach a contrary

[38] Response of Guatemala to Panel questions 46 and 57, para. 190.
[39] Response of Guatemala to Panel questions 46 and 57, para. 191.
[40] Response of Guatemala to Panel questions 46 and 57, para. 192.
[41] Response of Guatemala to Panel questions 46 and 57, para. 167.
[42] Response of Guatemala to Panel questions 46 and 57, paras. 194-195.
[43] Appellate Body Report, *Chile – Price Band System*, para. 236.
[44] Appellate Body Report, *Chile – Price Band System (Article 21.5),* para. 202.
[45] Appellate Body Report, *Chile – Price Band System (Article 21.5),* para. 202.
[46] Appellate Body Report, *Chile – Price Band System (Article 21.5)* para. 202.
[47] First written submission of Guatemala, para. 4.88.
[48] First written submission of Guatemala, paras. 4.88–4.93.
[49] First written submission of Peru, paras. 5.61–5.68; Opening oral statement by Peru at the first substantive meeting of the parties with the Panel, para. 41.
[50] Response from Guatemala to question 59, para. 201.

conclusion, that is, that the measure is in fact a minimum price because most consignments enter Peru with a final cost equal to or above the floor price; (iv) even if many consignments entered Peru with a price lower than the reference price, that situation would be temporary since it would be corrected in the following two weeks by the updating of the reference price; and (v) even if the measure at issue did not succeed in some cases in equalizing entry prices with the floor price, the measure has the de facto effect of equalizing entry prices with another parameter: the price resulting from the sum of the lowest international price and the variable additional duty.[51]

3.23. It is evident from all of the above that the factual observations of Peru lead to no valid legal result. An analysis of the design, structure and architecture reveals that the measure in question is a minimum import price in terms of Article 4.2 of the Agreement on Agriculture.

3.3 The measure at issue is inconsistent with Article II:1(b), second sentence, of the GATT 1994

3.24. Article II:1(b), second sentence, establishes disciplines for "other duties or charges".[52] The sentence in question has been clarified by the Understanding, so that the two texts, read in conjunction, provide that the other duty or charge must meet the following requirements: (a) the duty or charge, or the mandatory legislation under which it is to be applied, must have existed at 15 April 1994; (b) it may not exceed the level of the duty or charge applied on 15 April 1994; and (c) it must have been recorded in the schedule of concessions of the importing Member.[53] These three obligations are cumulative.[54]

3.25. Guatemala contends that the variable additional duty is one of the "other duties or charges" and is not recorded in Peru's schedule of concessions; it was not applied at the date of entry into force of the GATT 1994; nor was it stipulated in the binding Peruvian legislation in force on the date of entry into force of the GATT 1994. Contrary to Peru's understanding, Guatemala has not claimed that Peru's other duties and charges exceed those applied at the date of the GATT 1994.[55] An examination of that matter is unnecessary, since the measure in question entered into force in 2001.[56]

3.26. Peru, for its part, alleges that the variable additional duties are consistent with Article II:1(b) of the GATT 1994 because they are "ordinary customs duties".[57] In support of this allegation, Peru erroneously applies the legal standards established in the case law[58] and seeks to define "ordinary customs duties" on the basis of positive criteria.[59] In this way, Peru eliminates the distinction between this concept and that of "other duties or charges".[60]

3.27. On the other hand, contrary to Peru's contention, the fact that Peru's *offer* was accepted by *some* of the negotiating parties during the Uruguay Round does not imply any type of validation of the measure that is challenged. Not all Members even have the possibility of validating measures that run counter to WTO Agreements, except where an exemption is concerned.[61] Nor is it legitimate for Peru to contend that, based on its own "good faith understanding" that it was negotiating in accordance with certain guidelines, the variable additional duties would have had to be considered, automatically and unconditionally, as ordinary customs duties.[62]

3.28. In other words, the fact that the additional variable duty "shares" some characteristics of ordinary customs duties[63]; that there was no objection during the Uruguay Round negotiations[64];

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[51] Response from Guatemala to question 59, para. 203.
[52] First written submission of Guatemala, para. 4.102.
[53] First written submission of Guatemala, para. 4.114.
[54] First written submission of Guatemala, para. 4.114; Response of Guatemala to Panel question 43, para. 94.
[55] First written submission of Peru, para. 5.97.
[56] Opening statement by Guatemala, para. 63.
[57] First written submission of Peru, paras. 5.2 and 5.4.
[58] First written submission of Peru, paras. 5.26–5.41.
[59] First written submission of Peru, para. 5.38.
[60] Opening statement by Guatemala, paras. 48-50.
[61] Opening statement by Guatemala, paras. 52 and 53.
[62] First written submission of Peru, paras. 5.48 to 5.50; opening statement by Guatemala, paras. 54 to 57.
[63] First written submission of Peru, section 5.1.3.

or Peru's own opinions on its own conduct[65] fail to refute the *prima facie* case presented by Guatemala.[66] As was pointed out above[67], the variable additional duties have characteristics that prevent them from being considered as "ordinary customs duties".[68] Guatemala also put forward ten additional factors to confirm that the variable additional duty, in Peru's own legal system, is different from an ordinary customs duty.[69] None of these factors was addressed or refuted by Peru.[70]

3.29. Variable additional duties therefore constitute one of the "other duties or charges". It is an undisputed fact that Peru did not record them as such in its schedule of commitments.[71] For that reason alone, Peru violated Article II:1(b) of the GATT 1994 and its omission is irremediable.[72]

3.30. In addition, Guatemala has demonstrated, contrary to Peru's assertion[73], that the measure challenged did not exist at 15 April 1994.[74] Guatemala not only described the characteristics that distinguish the 1991 system from that of 2001[75], but it also produced two pieces of documentary evidence which confirm that the Peruvian Government itself had concluded that the measure in question abolished the 1991 system; that is to say that they are two distinct measures.[76] In the course of the hearing, Peru did not even attempt to refute the arguments or the exhibits presented by Guatemala. This also confirms a violation of Article II:1(b) of the GATT 1994.

3.31. In the light of the foregoing, the variable additional duty imposed by Peru is inconsistent with the second sentence of Article II:1(b) of the GATT 1994 and with paragraphs 1, 2, 3 and 4 of the Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994.

3.4 Peru's actions are inconsistent with Article X:1 of the GATT 1994 given its failure to publish various aspects of the measure at issue

3.32. The publication requirement under Article X:1 of the GATT 1994 applies not only to administrative rulings of general application, but to any "essential element" forming part thereof.[77]

3.33. Peru is in breach of Article X:1 of the GATT 1994 since it has failed to publish the following three essential elements of the measure in question: (i) the content of the 3% import costs that are used to determine the variable additional duty; (ii) the methodology for determining the amounts of freight and insurance that are used to determine the floor price and the reference price; and (iii) the international prices used as a basis for calculating the floor price and the reference price.[78]

3.34. The foregoing elements come within the scope of Article X:1 inasmuch as, being methodologies or data essential to the operation of the PBS, they are essential elements of the measure in question.

3.35. Peru is in breach of its obligation to publicize these elements in a way that enables traders and other governments to familiarize themselves with the content of the rules and the charges

[64] First written submission of Peru, para. 5.49.
[65] First written submission of Peru, para. 5.50.
[66] Opening statement by Guatemala, paras. 48 to 57.
[67] See above, paras. 3.4 to 3.24.
[68] First written submission of Guatemala, paras. 4.119 to 4.121.
[69] First written submission of Guatemala, para. 4.125.
[70] First written submission of Peru, para. 5.44; opening statement by Guatemala, para. 47; response of Guatemala to Panel question 64, para. 217.
[71] First written submission of Peru, para. 5.49; opening statement by Guatemala, para. 65.
[72] Response of Guatemala to Panel question 43, para. 94.
[73] First written submission of Peru, para. 5.45.
[74] Opening statement by Guatemala, paras. 58 to 62.
[75] Opening statement by Guatemala, para. 60.
[76] Opening statement by Guatemala at the first substantive meeting of the parties with the Panel, paras. 61-62. Exhibit GTM-36 and Exhibit GTM-37.
[77] First written submission of Guatemala, para. 4.148 (citing the Panel report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.405).
[78] First written submission of Guatemala, paras. 4.150-4.172.

imposed on them.[79] Consequently, Peru's actions are inconsistent with Article X:1 of the GATT 1994 with respect to each of these three elements of the measure.

3.36. Guatemala's claims under Article X:1 also originally included four anomalies of the measure in question.[80] Those claims were submitted by Guatemala in anticipation of the possibility of Peru confirming that those four practices did in fact have a legal basis in Peruvian legislation; in which case, Peru would be in violation of Article X:1 for not having published that provision of its domestic legislation. Guatemala decided to abandon its claims concerning these four practices since it concluded, on the basis of the assertions made by Peru in its first written submission, that those practices had no valid legal basis and, therefore, that there was no provision or instrument to be published in accordance with Article X:1 of the GATT 1994.[81] These four practices, however, continue to be the subject of claims by Guatemala under Article X:3(a) of the GATT 1994, as is explained in the next section.

3.5 Peru's actions are inconsistent with Article X:3 (a) of the GATT 1994 inasmuch as it administers the measure in question in a manner that is not uniform, impartial or reasonable

3.37. Article X:3(a) of the GATT 1994 provides that WTO Members shall administer their trade regulations "in a uniform, impartial and reasonable manner". The requirements of uniformity, impartiality and reasonableness are legally independent, so that failure to comply with any of them would imply an independent breach of Article X:3(a) of the GATT 1994.[82] It has been found that, if a country administers any trade regulation in a manner not provided for in its own internal legislation, this would qualify as an unreasonable administration that would be in breach of Article X:3(a).[83]

3.38. Guatemala has identified four anomalies of the PBS which give cause for claims under Article X:3(a) of the GATT 1994: (i) the decision to extend the validity of the customs tables without applying the formulas required by the Peruvian regulations; (ii) the calculation of the price band for dairy products on the basis of reference price ranges; (iii) the establishment of reference prices for dairy products at the same level for two consecutive two-week periods; and (iv) the calculation of the variable additional duty for two different categories of rice.[84]

3.39. On the basis of the assertions made by Peru in its first written submission, Guatemala concludes that the practices mentioned have no valid legal basis in the Peruvian regulations. Peru mentions no legal authority for the first three practices. With regard to the fourth practice (calculation of the variable additional duty for two different categories of rice), Guatemala observes that the legal instrument cited by Peru does not constitute a proper legal basis, since it is a 1993 instrument which belongs to the previous system of specific duties established in 1991 rather than the current price band system established in 2001.[85]

3.40. Consequently, by resorting to practices not provided for in its internal regulations, Peru administers the measure at issue in a manner that is unreasonable under the terms of Article X:3(a) of the GATT 1994.

3.41. In addition to the four above-mentioned practices, Guatemala identified a fifth anomaly in the PBS, which consists in the rounding method used by Peru to calculate the variable additional duty and the tariff rebate.[86] Guatemala maintains that, owing to the irregularities in that rounding method, Peru administers the measure in question in a manner that is not uniform or impartial. This gives rise to an additional breach of Article X:3(a) of the GATT 1994.

[79] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.406-7.407.
[80] First written submission of Guatemala, paras. 4.173-4.195.
[81] Response of Guatemala to Panel question 79, para. 265.
[82] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.383.
[83] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.385-7.388.
[84] First written submission of Guatemala, para. 3.88.
[85] Opening statement by Guatemala at the first substantive meeting of the parties with the Panel, para. 71.
[86] First written submission of Guatemala, paras. 4.206-4.221.

3.6 Claims under the Agreement on Customs Valuation

3.42. Guatemala is submitting its claims under the Customs Valuation Agreement in the alternative, in case the Panel reaches the conclusion that the measure at issue is an ordinary customs duty.[87]

3.43. Under the Customs Valuation Agreement, WTO Members must base the customs value of goods on the transaction value that is provided by the importer or, failing this, they may determine the value in question on the basis of one of the methods established in Articles 1 to 7 of the Agreement.

3.44. The variable additional duty is not determined on the basis of the weight of the imported goods, but on the basis of a price for the goods. However, this price is not the transaction value provided by the importer but the reference price published by Vice-Ministerial Resolution of Peru's Vice-Minister of the Economy. This means that, by virtue of the price band system, Peru totally ignores the transaction value and, instead, uses minimum, arbitrary or fictitious customs values, in violation of Articles 7.2(f) and 7.2(g) of the Customs Valuation Agreement.

3.45. Peru appears not to understand Guatemala's claims. In its opinion, the Customs Valuation Agreement "only contains principles for situations in which duties are imposed on the basis of a value, and which are not applicable to specific duties levied on the basis of quantity, item or weight.[88] However, the variable additional duty *is not calculated* on the basis of "quantity, item or weight" as alleged by Peru.[89]

3.46. Therefore, by determining the customs value of the goods subject to the measure through the improper use of minimum, arbitrary or fictitious values, Peru is acting inconsistently with Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement.

4 GUATEMALA HAS INSTITUTED PROCEEDINGS BEFORE THIS PANEL IN GOOD FAITH AND IN STRICT CONFORMITY WITH THE RULES OF THE RELEVANT LEGAL INSTRUMENTS

4.1. Peru has requested the Panel not to consider Guatemala's claims since, in its opinion, Guatemala has not acted in good faith in initiating this dispute settlement procedure.[90] In support of its request, Peru ambiguously puts forward four erroneous arguments: (a) that Guatemala, "either explicitly or by necessary implication", waived any rights it might have under the WTO Agreements that were inconsistent with what had been agreed in the FTA[91]; (b) that Guatemala expressly accepted the Peruvian price band in the Guatemala-Peru Free Trade Agreement (FTA) and that the initiation of this dispute settlement procedure defeats its object and purpose[92]; (c) that there has been an abuse of rights, because Guatemala considered the price band system to be consistent with the framework of the WTO Agreements[93]; and (d) that Guatemala agreed to modify its rights and obligations in the WTO framework insofar as they might be inconsistent with the FTA.[94]

4.2. None of these contentions has any basis in the facts, the rules or the jurisprudence. First, Peru is invoking the estoppel principle in support of its request. Although this principle has been invoked in previous WTO disputes, it has never been applied as a valid defence to limit the rights of the complaining country. In fact, the Appellate Body has emphasized that "it is far from clear that the estoppel principle applies in the context of WTO dispute settlement".[95]

4.3. Even assuming that the estoppel principle is applicable in WTO disputes, the assertion that a WTO Member has waived its rights under the DSU "cannot be lightly assumed".[96] If a

[87] First written submission of Guatemala, para. 4.222.
[88] First written submission of Peru, para. 5.142.
[89] First written submission of Peru, para. 5.142.
[90] First written submission of Peru, section 4.1.
[91] First written submission of Peru, para. 4.26.
[92] First written submission of Peru, para. 4.20; opening statement by Peru, para. 32.
[93] First written submission of Peru, para. 4.11.
[94] First written submission of Peru, paras. 4.22 and 4.28; opening statement by Peru, paras. 24 to 28.
[95] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 310.
[96] Appellate Body Report, *EC – Bananas III (Article 21.5 - Ecuador II)*, para. 217.

WTO Member has not clearly stated that it would not take legal action with respect to a certain measure, it cannot be regarded as failing to act in good faith if it challenges that measure.[97]

4.4. Nor does Guatemala accept that such a statement can be made through the FTA. Rather, a waiver of WTO rights would have to be made within the legal framework of the WTO, for example by means of a mutually agreed solution, under Article 3.5 of the DSU, in a dispute that has already been initiated, or through a multilateral agreement.[98] Peru would also have to demonstrate that the FTA clearly establishes that Guatemala waived its right under the DSU to challenge the price band system before the WTO. The FTA simply contains no provision of that nature.[99]

4.5. Second, paragraph 9 of Annex 2.3, which Peru presents as the basis for its claims, should be read in conjunction with Article 1.3.1 of the FTA whereby the Parties confirmed "the rights and obligations existing between them in accordance with the WTO Agreement". The aforementioned provisions indicate that, although Peru has the right to maintain its PBS for a limited number of products, Peru also has the obligation to comply with the provisions of the WTO Agreement. Since neither of the two sets of provisions contains mutually exclusive obligations, there is no conflict or inconsistency between the FTA and the WTO Agreements.[100] Therefore, Peru is not exempted from complying with its WTO obligations, and Guatemala is not impeded from exercising its WTO rights, including the possibility of validly challenging the measure at issue.[101]

4.6. Third, in contrast to Peru's assertions, the FTA contains no provisions indicating that Guatemala recognized the price band system as consistent with WTO rules. This type of interpretation simply does not accord with the ordinary meaning of the terms used in the aforementioned provisions.[102]

4.7. Fourth, contrary to Peru's assumption, the FTA is not a vehicle for modifying rights and obligations under the WTO Agreements. These Agreements can only be modified through the procedures established in Article X of the Marrakesh Agreement.[103]

4.8. Guatemala also explained that Peru's submissions would require the Panel to act outside its terms of reference, since it would have to apply its jurisdiction in order to hear a non-WTO dispute (i.e. to entertain disputes concerning the FTA and the Vienna Convention on the Law of Treaties, which do not form part of the covered agreements).[104] Guatemala also made it clear that Peru's submissions would oblige the Panel to interpret provisions of the covered agreements on the basis of a legal instrument to which not all WTO Members are parties.[105]

4.9. For all of these reasons, Peru lacks any justification for affirming that Guatemala has not acted in good faith in challenging the price band system before the WTO.

5 REQUEST FOR RULINGS AND RECOMMENDATIONS

5.1. On the basis of the foregoing, Guatemala requests the Panel to issue findings and rulings on the following:

- The measure at issue is inconsistent with Article 4.2 of the Agreement on Agriculture as it constitutes a variable import levy or similar measure;

- The measure at issue is inconsistent with Article 4.2 of the Agreement on Agriculture as it constitutes a minimum import price or similar measure;

[97] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 228 (emphasis added).
[98] Opening statement by Guatemala, para. 82; See also third party submission of the United States, para. 50.
[99] Opening statement by Guatemala, para. 83.
[100] Response of Guatemala to Panel question 25, paras. 51 to 56.
[101] Opening statement by Guatemala, paras. 84 and 85.
[102] Opening statement by Guatemala, para. 83.
[103] Response of Guatemala to Panel question 21, para. 35.
[104] Response of Guatemala to Panel question 21, para. 35. Response of Guatemala to Panel question 27, paras. 58 and 59.
[105] Response of Guatemala to Panel question 21, para. 35.

- The measure at issue is inconsistent with Article II:1(b), second sentence, of the GATT 1994, since it is included under the "other duties or charges" of that provision. At the same time, the measure in question is not recorded in Peru's schedule of concessions, was not applied at the date of entry into force of the GATT 1994, and was not stipulated in the binding Peruvian legislation in force on the date of entry into force of the GATT 1994;

- Peru's actions are inconsistent with Article X:1 of the GATT 1994, given its failure to publish: (i) the content of the "import costs"; (ii) the methodology for determining the amounts for freight and insurance; and (iii) the international prices which form the basis for calculating the floor price and the reference price;

- Peru's actions are inconsistent with Article X:3(a) of the GATT 1994, since it administers the measure at issue: (i) in a manner that is not reasonable as it does not observe the requirements of its own legislation; and (ii) in a manner that is not uniform or impartial in the light of the method of rounding used to calculate the additional duty and the tariff rebate;

- If it is found that the measure at issue is an ordinary customs duty, Peru would be acting inconsistently with Article 7.2(f) and 7.2(g) of the Customs Valuation Agreement, since it determines the customs value of the goods subject to the PBS through the use of minimum, arbitrary of fictitious customs values. As a result, Peru would also be acting in violation of Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement.

5.2. In addition to the foregoing, and in accordance with the provisions of the second sentence of Article 19.1 of the DSU, Guatemala requests the Panel to suggest that Peru should completely dismantle the measure at issue.

ANNEX B-2

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF GUATEMALA

1 THE MEASURE AT ISSUE

1.1. The measure at issue is the variable additional duty imposed by Peru, which is calculated under the rules of the price band system (PBS) established by Supreme Decree No. 115-2001-EF and other amending instruments. This is clear from the way in which Guatemala characterized the measure in its panel request.[1] Contrary to Peru's contention[2], the foregoing implies that the measure at issue is not only the variable additional duty, but also the underlying method of its calculation. A further examination of the measure concerned necessarily requires an analysis of the functioning of the price band system and its constituent elements. It is not possible to separate the variable additional duty from the PBS: the one does not exist without the other.[3]

1.2. Although Guatemala characterized the measure at issue differently from the way in which the Chilean measure was characterized in *Chile - Price Band System* (which referred to "Chile's PBS"), this does not mean that the legal criteria established by the Appellate Body in that dispute cannot be applied in the present case.[4]

2 FACTUAL DESCRIPTION OF THE MEASURE AT ISSUE

2.1. The variable additional duty is calculated in accordance with the PBS. This system functions on the basis of a "price band", which consists of an area defined by a lower threshold and an upper threshold. The lower threshold is referred to as the "floor price", and the upper threshold as the "ceiling price". Both prices consist of a figure expressed in United States dollars and both are based on international prices for the past 60 months.

2.2. As stated in Supreme Decree No. 115-2001-EF itself, the purpose of the PBS is "to neutralize fluctuations in international prices and limit the negative effects of falls in such prices".[5]

2.3. The PBS operates on the basis of a simple logic:[6]

i. When recent international prices (reflected in the "reference price) are below the floor price, the system imposes a special charge on imports, known as the "variable additional duty".

ii. On the other hand, if recent international prices are above the ceiling price, the PBS generates a "tariff rebate", which consists of a discount on the amount payable by the importer by way of ordinary customs duties. In most cases, the tariff rebate has no practical effect since most products subject to the PBS attract an ordinary customs duty of zero per cent.

iii. If the international prices are at a level between the floor price and the ceiling price, the PBS generates neither an additional duty nor a tariff rebate. In such cases, only the ordinary customs duty is applied.

2.4. In addition to violations of Article 4.2 of the Agreement on Agriculture, Article II:1(b) of the GATT 1994 and the Understanding on the interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, Guatemala has detected a series of anomalies

[1] Request for the establishment of a Panel by Guatemala, *Peru - Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/2, circulated on 14 June 2013.
[2] Second written submission of Peru, para. 4.1.
[3] Response of Guatemala to Panel question 41, para. 87. Second written submission of Guatemala, paras. 2.1 and 2.2.
[4] Response of Guatemala to Panel question 41, para. 88.
[5] Supreme Decree No. 115-2001-EF, second preambular paragraph.
[6] First written submission of Guatemala, para. 3.9.

characterizing the administration of the PBS. Some of these aspects are in direct contradiction to the rules or formulas established in Supreme Decree No. 115-2001-EF. Other aspects bear witness to a bias in the administration of the PBS. Guatemala will come back to those anomalies later in this executive summary when it addresses its claims under Articles X:1 and X:3(a) of the GATT 1994.

3 LEGAL CLAIMS

3.1 Order of analysis

3.1. According to established precedents, the legal analysis must begin with the provision that deals with a matter more specifically and in greater detail.[7] With regard to agricultural products, it has been found previously that Article 4.2 of the Agreement on Agriculture is more specific than Article II:1(b) (of the GATT 1994). Therefore, Guatemala considers that the approach most in harmony with existing case law would be to start the legal analysis with Article 4.2.[8]

3.2. Contrary to what is alleged by Peru, the fact that both Article 4.2 and Article II:1(b) refer to an ordinary tariff is no justification for initiating the analysis on the basis of Article II:1(b).[9] The two provisions are different in their legal scope and their scope of application. The fact that both provisions share a common concept has no bearing on their nature, specificity and detail, which are precisely the factors that determine the appropriate analytical sequence.

3.3. Peru also alleges that "it is necessary to determine in any case whether a measure is an ordinary customs duty" under the terms of Article II of the GATT 1994.[10] This assertion is also baseless. The argument that Article II of the GATT 1994 plays a more important role than Article 4.2 with regard to the concept of "ordinary customs duties" has already been rejected. More specifically, the Appellate Body found in this connection that "the mere fact that the term 'ordinary customs duties' in Article 4.2 derives from Article II:1(b) of the GATT 1947 does not suggest that Article II:1(b) should be examined before Article 4.2".[11]

3.4. Irrespective of the approach that the Panel decides to adopt, Guatemala requests the Panel to make findings under both provisions. Guatemala acknowledges that the Panel would be entitled to exercise judicial economy. However, it is common practice for panels to resolve more claims than are technically necessary to "resolve the dispute", with a view to facilitating the Appellate Body's work of completing the analysis in case it reverses one or more of the Panel's findings. The Appellate Body has explicitly approved that practice.[12]

3.2 The measure at issue is inconsistent with Article 4.2 of the Agreement on Agriculture

3.2.1 The measure at issue constitutes a variable import levy or similar measure

3.5. In order to constitute a variable levy or similar measure under Article 4.2, a measure must meet three criteria, as previously explained by the Appellate Body.[13]

3.6. The measure is inherently variable: a levy is "variable" when it is "liable to vary" and "inherently variable".[14] The measure itself must impose the variability of the duties. This occurs

[7] See the first written submission of Guatemala, para. 4.2. See Appellate Body Report, *Chile – Price Band System*, para. 191; Appellate Body Report, *EC – Bananas III*, para. 204; Appellate Body Report, *Canada – Renewable Energy/Canada – Feed-in Tariff Program*, para. 5.6; Panel Report, *Indonesia – Autos*, paras. 14.61-14.63; Panel reports, *Canada – Autos*, paras. 10.63 and 10.64; and *India – Autos*, paras. 7.157-7.162.

[8] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, para. 5. Response of Guatemala to Panel question 55, paras. 128-129.

[9] First written submission of Guatemala, para. 5.4. Opening statement by Peru at the first substantive meeting of the Panel with the parties, para. 35.

[10] Second written submission of Peru, para. 3.11. See also the opening statement by Peru at the first substantive meeting of the Panel with the parties, para. 35.

[11] Appellate Body Report, *Chile – Price Band System*, para. 188.

[12] Response of Guatemala to Panel question 55, paras. 130-133. Second written submission of Guatemala, para. 3.17.

[13] First written submission of Guatemala, paras. 13.17-13.21.

when the measure "incorporates a scheme or formula that causes and ensures that levies change automatically and continuously".[15] In contrast, ordinary duties vary through discrete changes that occur independently and as a result of specific acts.[16]

3.7. Lack of transparency and lack of predictability: variable import duties are characterized by their lack of transparency and lack of predictability with regard to the level of the resulting duties. If an exporter cannot reasonably predict the amount of the duties to be paid, that exporter is less likely to ship to a market. The Appellate Body made it explicitly clear that lack of transparency and lack of predictability are not independent or absolute characteristics of a variable levy. Rather, they are natural and inherent consequences of the very nature of variable levies and their application.[17]

3.8. Distortion of import prices and impossibility of transmitting international price developments: variable import levies are measures that distort import prices. Thus, they impede the transmission of international price developments to the domestic market (developments as reflected in the prices of imports subject to the measure). This may happen when variable duties are calculated on the basis of the difference between two parameters whose purpose is to disconnect the domestic market from international price developments.[18]

3.9. The measure at issue satisfies these three criteria. First, Peru's variable duty is calculated by means of a series of mathematical formulas enshrined in the regulations. Both the variable duty itself and its inputs (reference price, floor price and ceiling price) are based on those formulas. The operation of the formulas is automatic and continuous. The reference price and the variable duty are updated automatically every 15 days, using prescribed legal instruments and on the basis of data gathered in the international markets. The floor and ceiling prices are updated automatically every six months[19] and almost always vary.[20]

3.10. Peru does not deny the existence of the formulas, but denies that they are relevant. However, the case law shows that those formulas are the "main [ ]" criterion of the inherent variability.[21] Peru also argues that there is no automatic variability because the authorities have to take specific administrative steps, and that, at each of those steps, there is discretionary power not to take the step in question. However, apart from some general provisions in the Constitution, Peru is not able to identify any legal basis for such discretionary power. Nor is Peru able to indicate a single instance during the 13 years of existence of the PBS, when such discretionary power has been exercised in order to refrain from issuing a new reference price or not to apply the variable duty when the system required its application.

3.11. Peru also argues that, in the final analysis, all the measures are variable because the Government can change them by sovereign decision.[22] However, inherent variability, by virtue of formulas set out in the text of the measure, is a characteristic specific to measures such as the PBS and the variable duty.[23] This inherent variability differs fundamentally from the ordinary variability characteristic of any government measure.[24] Guatemala has presented examples of Peru's practice, where the *ad valorem* duty has varied only 7 times in 22 years, while for the same period, the variable duty – if it had existed long enough – would have changed 537 times.

[14] Appellate Body Report, *Chile – Price Band System*, paras. 232 and 233.
[15] Appellate Body Report, *Chile – Price Band System*, para. 233.
[16] First written submission of Guatemala, para. 4.18. Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, para. 11. See also response of Guatemala to Panel question 64, para. 228.
[17] First written submission of Guatemala, para. 4.19.
[18] First written submission of Guatemala, para. 4.20.
[19] First written submission of Guatemala, paras. 4.36-4.53.
[20] First written submission of Guatemala, paras. 4.54-4.57.
[21] Panel Report, *Chile – Price Band System (Article 21.5 - Argentina)*, para. 6.10 and Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 206.
[22] Response of Guatemala to Panel question 53, para. 122 and Response of Guatemala to Panel questions 46 and 57, footnote 125.
[23] Second written submission of Guatemala, paras. 4.37 to 4.41.
[24] Response of Guatemala to Panel question 53, para. 122 and Response of Guatemala to Panel questions 46 and 57, footnote 125.

Moreover, Peru's argument that all government measures are "variable" nullifies the effectiveness of the term "variable" in Article 4.2.[25]

3.12. Second, because they are generated by such mathematical formulas, variable duties are characterized by a lack of transparency and predictability.[26] This lack of transparency and predictability is a natural and inherent consequence of the variable nature of the duties. Furthermore, Guatemala has used specific examples to show that not only is there a general level of uncertainty, but that this uncertainty also affects specific consignments.[27]

3.13. Contrary to Peru's arguments, neither does the variable duty cease to be lacking in transparency and predictability by virtue of any attempt by the economic operators to estimate its level. Variability – and the consequent lack of transparency and predictability – are characteristics inherent in the design of the measure and are not dependent on whether or not the economic operators attempt to adjust to the variability. In any event, it is impossible to estimate the variable duty precisely because its level is linked to international prices which are in constant flux. Guatemala has provided specific examples, using prospective[28] and retrospective[29] methods, to show that, in both the short and the long term, economic operators cannot reasonably predict reference prices and the variable duty.[30] The uncertainty is particularly pronounced in the long term – which is precisely the context in which most world sugar trade is conducted.[31]

3.14. Even the estimates submitted by Peru itself include substantial margins of error, up to 50% of the price of a consignment.[32] Peru alleges that such margins of error reflect a "reasonable degree of estimation".[33] On the contrary, Peru's examples demonstrate that predictability is a rhetorical illusion invented by Peru.

3.15. In any event, Guatemala does not deem it necessary to conduct this type of analysis. Peru owes it to the Government of Guatemala and other WTO Members to comply with Article 4.2. Actions whereby private entities may seek to mitigate the trade impact of measures that are in violation of a rule do not remedy that violation and are therefore irrelevant. Otherwise, it would be easy for Members to avoid any obligation under the covered agreements.[34]

3.16. Third, the variable additional duties and the PBS distort the prices of imports, thereby impeding the transmission of trends in the prices of such imports to the Peruvian market. This is the express purpose and the practical effect of the Peruvian regulation.[35] The variable duties are precisely calibrated to bridge the gap between two parameters, namely the reference price and the floor price.[36] The measure artificially raises the price of entry for imports, and thus impedes or seeks to impede the entry of goods at a price below the floor price.

3.17. Guatemala rejects the "isolation" analysis proposed by Peru. That analysis contradicts the wording of Article 4.2 of the Agreement on Agriculture and the other covered agreements. When the negotiators wished to link the legal characterization of a measure to its economic effects, they said so explicitly.[37] Peru's analysis also contradicts the case law under Article 4.2.[38] The Appellate Body has attached importance to the fact that variable levies neutralize fluctuations *in the prices of imports subject to such levies*. Thus, the transmission of *these* prices to the domestic market is impeded.[39] Contrary to what is alleged by Peru, the criterion used by the Appellate Body does not

[25] Second written submission of Guatemala, paras. 4.37 to 4.41.
[26] First written submission of Guatemala, paras. 4.58-4.63.
[27] First written submission of Guatemala, paras. 4.64-4.68.
[28] Response of Guatemala to Panel question 53, paras. 4.72 to 4.74.
[29] Second written submission of Guatemala, paras. 4.61 to 4.71.
[30] Response of Guatemala to Panel question 53, paras. 107-122.
[31] Response of Guatemala to Panel question 7, para. 6.
[32] Comment by Guatemala on Peru's response to Panel question 109, paras. 67 to 78.
[33] Response of Peru to Panel question 109, para. 61.
[34] Response of Guatemala to Panel question 53, paras. 118 to 120. Second written submission of Guatemala, paras. 4.54 to 4.56. Comment by Guatemala on Peru's response to Panel question 109, para. 26.
[35] First written submission of Guatemala, para. 4.74.
[36] First written submission of Guatemala, paras. 4.75-4.78. Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, paras. 17-20.
[37] Response of Guatemala to Panel questions 46 and 57, paras. 140-144.
[38] Response of Guatemala to Panel questions 46 and 57, paras. 140-153.
[39] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, paras. 17-20. Response of Guatemala to Panel questions 46 and 57, paras. 146-151.

concern whether there is a correlation between average price trends in the domestic market and international prices.

3.18. In addition, there is no economic logic in the mere presentation by Peru of the correlation or lack of correlation. Peru takes no account of the wide range of factors that impact and determine the domestic price.[40] The measure at issue does not control or apply these factors.[41] What is even more important is that the possible existence of a correlation does not demonstrate a lack of effects produced by the PBS. For example, in the case of sugar, Peru exempts most imports from the PBS, under free trade agreements. As a result, any isolating effect that the PBS may have is undermined by the effects of imports entering outside the PBS.[42] Moreover, the correlation index is not a suitable criterion, because it does not capture the different degrees of price fluctuation.[43] In addition, Peru's analysis requires the Panel to reach an arbitrarily binary conclusion as to the existence or non-existence of correlation during a period of 13 years.[44] Guatemala has also pointed to a number of methodological shortcomings with respect to the way in which Peru compares domestic and international prices.[45]

3.19. The isolation analysis proposed by Peru would also result in a meaningless legal criterion, devoid of any legal certainty. Depending on fluctuations in economic circumstances, the same measure could be an offending measure in one Member, but not in another, or its WTO consistency could vary in the same Member, according to the period analysed.[46] Moreover, in some Members, the characteristics of the domestic market would not at all permit application of the analysis proposed by Peru.[47]

3.20. In substance, the "isolation" analysis is an attempt to introduce through the back door a trade effects test which has been repeatedly rejected - over a period of decades - under the GATT and the WTO, even by the Appellate Body itself.[48]The logic underlying that rejection also applies under Article 4.2 of the Agreement on Agriculture.

3.21. If the Panel were to decide to give any credence to Peru's analysis, Guatemala considers that - apart from the many shortcomings mentioned above - the Panel would also have to take into account the fact that the Peruvian measure has completely eliminated Guatemalan imports and that the origin of imports has been changed to origins not covered by the PBS.[49]

3.22. In the light of the foregoing, Guatemala requests the Panel to find that the measure at issue constitutes a variable import levy or similar measure, within the meaning of Article 4.2 of the Agreement on Agriculture.

3.2.2 The measure at issue constitutes a minimum import price or similar measure

3.23. Guatemala maintains that, in the light of the criterion enunciated by the Appellate Body, the measure at issue is a minimum import price or similar measure, since the floor price of the PBS operates as a minimum level of imports.[50] When the reference price is below the floor price, the system orders the imposition of a specific duty equal to the difference between those two parameters. The size of the specific duty will augment in line with the difference between the

[40] Response of Guatemala to Panel questions 46 and 57, paras. 159-165.
[41] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, para. 21. Response of Guatemala to Panel questions 46 and 57, paras. 155-157.
[42] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, para 22. Response of Guatemala to Panel questions 46 and 57, paras. 163-169.
[43] Second written submission of Guatemala, footnote 101.
[44] Second written submission of Guatemala, paras. 4.103-4.107.
[45] Second written submission of Guatemala, paras. 4.94-4.100.
[46] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, paras. 173-174.
[47] Opening statement by Guatemala at the first substantive meeting of the Panel with the parties, paras. 175-177.
[48] Response of Guatemala to Panel questions 46 and 57, paras. 178-186.
[49] Response of Guatemala to Panel questions 46 and 57, paras. 194-195. Response of Guatemala to Panel question 147, para. 209.
[50] First written submission of Guatemala, para. 4.88.

floor price and the reference price. In addition, the measure at issue distorts the transmission of declines in international prices to the national market.[51]

3.24. By way of a defence, Peru has alleged that the PBS has no *target* price[52], which is allegedly made clear by the fact that some imports of sugar – less than 3% –[53] enter Peru with a final cost (i.e. CIF import price plus variable additional duty) that is lower than the floor price. Guatemala considers that this is not a valid criterion for determining the legal nature of the PBS. Peru proposes a legal characterization of the measure at issue based on isolated and exceptional instances where the measure did not produce the results provided for by its design.[54]

3.25. Guatemala maintains that the PBS is in fact a *target* price or objective price, which consists in the floor price.[55] Moreover, the possibility that some shipments enter Peru with a final cost lower than the floor price is not a factor conducive to resolving the legality of the Peruvian measure. Peru has explained that only 3% of total sugar imports entered Peru with final costs below the reference price, and hence below the floor price.[56] This confirms Guatemala's position that those instances are genuinely exceptional. It would be wrong to conclude that the PBS is not a minimum import price (or a measure similar to a minimum import price) because in some isolated and exceptional instances the measure did not produce the expected results.

3.26. Peru's approach can be said to be wrong for a number of other reasons: (i) it would ignore the design, structure and architecture of the measure itself, which seeks to impose an additional duty equal to the price of entry at the level of the floor price[57]; (ii) the reference price is a value which, according to the calculation method selected by Peru, is similar to the price of a real import transaction[58]; (iii) Peru's argument could be turned round to reach a contrary conclusion, that is, that the measure is in fact a minimum price because *most* (97%) sugar consignments enter Peru with a final cost equal to or above the floor price[59]; (iv) even if many consignments entered Peru with a price lower than the reference price in the course of a particular two-week period, that situation would be temporary since it would be corrected in the following two weeks by the updating of the reference price[60]; and (v) even if the measure at issue did not succeed in some cases in equalizing entry prices with the floor price, the measure has the de facto effect of equalizing entry prices with another parameter: the price resulting from the sum of the lowest international price and the variable additional duty.[61]

3.27. It is obvious from all of the above that Peru's factual observations lead to no valid legal result. An analysis of the design, structure and architecture reveals that the measure in question is a minimum import price in terms of Article 4.2 of the Agreement on Agriculture, or a similar measure.

3.3 The measure at issue is inconsistent with Article II:1(b), second sentence, of the GATT 1994

3.28. Article II:1(b), second sentence, establishes disciplines for "other duties or charges".[62] The sentence in question has been clarified by the Understanding, so that the two texts, read in conjunction, provide that the other duty or charge must meet the following requirements: (a) the duty or charge, or the mandatory legislation under which it is to be applied, must have existed at 15 April 1994; (b) it may not exceed the level of the duty or charge applied on 15 April 1994; and

[51] First written submission of Guatemala, paras. 4.88-4.93.
[52] First written submission of Peru, paras. 5.61–5.68; opening oral statement by Peru at the first substantive meeting of the parties with the Panel, para. 41.
[53] Response of Peru to Panel question 123, para. 99.
[54] Second written submission of Guatemala, para. 4.136. Response of Guatemala to Panel question 123, paras. 119–120.
[55] Response of Guatemala to Panel question 59, para. 201.
[56] Response of Peru to Panel question 123, para. 99.
[57] Response of Guatemala to Panel question 123, paras. 119 and 122.
[58] Response of Guatemala to Panel question 125, paras. 133 and 134.
[59] Second written submission of Guatemala, para. 4.139.
[60] Response of Guatemala to Panel question 124, paras. 128 to 132.
[61] Response of Guatemala to question 59, para. 203. Response of Guatemala to question 126, paras. 135 to 152.
[62] First written submission of Guatemala, para. 4.102.

(c) it must have been recorded in the schedule of concessions of the importing Member.[63] These three obligations are cumulative.[64]

3.29. Guatemala contends that the variable additional duty is one of the "other duties or charges" and is not recorded in Peru's schedule of concessions; it was not applied at the date of entry into force of the GATT 1994; nor was it stipulated in the binding Peruvian legislation in force on the date of entry into force of the GATT 1994. Contrary to Peru's understanding, Guatemala has not claimed that Peru's other duties and charges exceed those applied at the date of the GATT 1994.[65] An examination of that matter is unnecessary, since the measure in question entered into force in 2001.[66]

3.30. Peru, for its part, alleges that the variable additional duties are consistent with Article II:1(b) or the GATT 1994 because they are "ordinary customs duties".[67] In support of this allegation, Peru erroneously applies the legal standards established in the case law[68] and seeks to define "ordinary customs duties" on the basis of positive criteria, notwithstanding its recognition that those criteria are not exclusive of ordinary customs duties.[69]

3.31. In this way, Peru eliminates the distinction between this concept and that of "other duties or charges".[70] Guatemala has explained that a positive criterion that applies both the concept of "ordinary customs duties" and "other duties or charges" is of no value for the classification of a charge and, if it is determined that only one characteristic exists which prevents a charge from being considered an "ordinary customs duty", it would have to be concluded that it is an "other duty or charge".[71]

3.32. On the other hand, in its response to Panel question 16, Peru simply asserts that the "GATT contracting parties were aware of the existence of the specific duties introduced in 1991 during the Uruguay Round negotiations".[72] According to Peru, the contracting parties *primarily concerned* were *informed* of the existence of these specific duties, and it was for that reason that they accepted the binding of different tariff ceilings for twenty products. It presents no evidence to support these assertions.[73] Peru adds that all of this was "reviewed and verified" at a meeting of the Group on Review and Verification of Market Access Offers for Industrial and Agricultural Products and that "there was no objection or comment from any of the participating trading partners".[74] Contrary to Peru's contention, the fact that Peru's *offer* was accepted by *some* of the negotiating parties during the Uruguay Round does not imply any type of validation of the measure that is challenged. Not all Members even have the possibility of validating measures that run counter to WTO Agreements, except where an exemption is concerned.[75] Nor can Peru legitimately contend that, on the basis of its own "good faith understanding" that it was negotiating in accordance with certain guidelines, the variable additional duties would have had to be considered, automatically and unconditionally, as ordinary customs duties.[76] Still less valid is Peru's argument that the tariff ceiling of 68% for certain products reflects the PBS "binding".

3.33. In other words, the fact that the additional duty "shares" certain characteristics of ordinary customs duties[77]; that there were no objections during the Uruguay Round negotiations[78]; or

[63] First written submission of Guatemala, para. 4.114.
[64] First written submission of Guatemala, para. 4.114; Response of Guatemala to Panel question 43, para. 94.
[65] First written submission of Peru, para. 5.97.
[66] Opening statement by Guatemala at the first substantive meeting, para. 63.
[67] First written submission of Peru, paras. 5.2 and 5.4.
[68] First written submission of Peru, paras. 5.26–5.41.
[69] First written submission of Peru, para. 5.38; Second written submission of Peru, paras. 3.14 to 3.15.
[70] Opening statement by Guatemala at the first substantive meeting, paras. 48 to 50.
[71] Response of Guatemala to Panel question 128, paras. 157 and 158.
[72] Response of Peru to Panel question 16, para. 24.
[73] Guatemala observes that Exhibits PER-15 and PER-62 reflect the opinions of the Peruvian authorities and are not relevant for the purpose of demonstrating that they notified and/or communicated to the CONTRACTING PARTIES of the GATT the existence of the specific duties and the 1991 system.
[74] Response of Peru to Panel question 16, para. 24.
[75] Opening statement by Guatemala at the first substantive meeting, paras. 52 and 53. Second written submission of Guatemala, paras. 5.48 to 5.51.
[76] First written submission of Peru, paras. 5.48 to 5.50; opening statement by Guatemala at the first substantive meeting, paras. 54 to 57. Second written submission of Guatemala, paras. 5.44 to 5.47.
[77] First written submission of Peru, Section 5.1.3.

Peru's own opinions on its own conduct[79], do not refute the *prima facie* case presented by Guatemala.[80] As was pointed out above[81], the variable additional duties have characteristics that prevent them from being considered as "ordinary customs duties".[82] Guatemala also put forward 10 additional factors to confirm that the variable additional duty, in Peru's own legal system, is different from an ordinary customs duty.[83] None of these factors was addressed or refuted by Peru, except at a late stage of these proceedings. Peru's rebuttals are invalid and do nothing to change the nature of the measure at issue. Guatemala explained that the 10 additional factors identified in Peruvian legislation serve to "confirm" the conclusion that the variable additional duties are not "ordinary customs duties".[84] This is a "confirmation" because the finding that the measure at issue is inconsistent with Article 4.2 of the Agreement on Agriculture would lead to the conclusion that the variable additional duties are not "ordinary customs duties". Guatemala also made it clear that the Peruvian legislation must be considered as part of the facts of the dispute; in concrete terms, as "evidence of characteristics that distinguish variable additional duties from ordinary customs duties".[85] The variable additional duties therefore constitute one of the "other duties or charges".

3.34. It is an undisputed fact that Peru did not record them as such in its schedule of commitments.[86] That fact alone shows that Peru violated Article II:1(b) of the GATT 1994, and its omission is irremediable.[87]

3.35. In addition, Guatemala has demonstrated, contrary to Peru's assertion[88], that the measure challenged did not exist on 15 April 1994.[89] Guatemala not only described the characteristics that distinguish the 1991 system from that of 2001[90], but it also submitted two exhibits which confirm that the Peruvian Government itself had concluded that the measure in question abolished the 1991 system; that is to say that they are two distinct measures.[91] In alleged support of its arguments, Peru also submitted an exhibit showing that even the authorities of the Ministry of Economy and Finance – the authority responsible for publishing the PBS reference prices – have the same understanding.[92] All of this is further confirmation of a violation of Article II:1(b) of the GATT 1994.

3.36. In the light of the foregoing, the variable additional duty imposed by Peru is inconsistent with the second sentence of Article II:1(b) of the GATT 1994 and with paragraphs 1, 2, 3 and 4 of the Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994.

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[78] First written submission of Peru, para. 5.49.
[79] First written submission of Peru, para. 5.50.
[80] Opening statement by Guatemala at the first substantive meeting, paras. 48 to 57.
[81] See above, paras. 3.4 to 3.24.
[82] First written submission of Guatemala, paras. 4.119 to 4.121.
[83] First written submission of Guatemala, para. 4.125.
[84] First written submission of Peru, para. 5.44; opening statement by Guatemala at the first substantive meeting, para. 47; response of Guatemala to Panel question 64, para. 217. Opening statement by Guatemala at the second substantive meeting, para. 30. Second written submission of Peru, para. 3.32. Responseof Guatemala to Panel question 134, paras. 186 to 188.
[85] Response of Guatemala to Panel question 129, paras. 163 to 166.
[86] First written submission of Peru, para. 5.49; opening statement by Guatemala at the first substantive meeting, para. 65.
[87] Response of Guatemala to Panel question 43, para. 94.
[88] First written submission of Peru, para. 5.45; Second written submission of Peru, paras. 3.16 to 3.22.
[89] Opening statement by Guatemala at the First Substantive Meeting, paras. 58 to 62. Second written submission of Guatemala, paras. 5.63 to 5.73. Response of Guatemala to Panel question 133, paras. 175 to 185.
[90] Opening statement by Guatemala at the first substantive meeting, para. 60. Second written submission of Guatemala, paras. 5.63 to 5.73.
[91] Opening statement by Guatemala at the first substantive meeting of the parties with the Panel, paras. 61-62. Exhibit GTM-36 and Exhibit GTM-37.
[92] Exhibit PER-87, page 14, para. 4.11.

3.4 Peru's actions are inconsistent with Article X:1 of the GATT 1994 given its failure to publish various aspects of the measure at issue

3.37. The publication requirement under Article X:1 of the GATT 1994 applies not only to administrative rulings of general application, but to any "essential element" forming part thereof.[93]

3.38. Peru is in breach of Article X:1 of the GATT 1994 since it has failed to publish the following three essential elements of the measure in question: (i) the content of the 3% import costs that are used to determine the variable additional duty; (ii) the methodology for determining the amounts of freight and insurance that are used to determine the floor price and the reference price; and (iii) the international prices used as a basis for calculating the floor price and the reference price.[94]

3.39. The foregoing elements come within the scope of Article X:1 inasmuch as, being methodologies or data essential to the operation of the PBS, they are essential elements of the measure in question. What is more, Peru has recognized that "international prices are an *essential* part of the PBS and a component in the calculation of the price band" (emphasis added).[95]

3.40. Peru is in breach of its obligation to publicize these elements in a way that enables traders and other governments to familiarize itself with the content of the rules and the charges imposed on them.[96] Consequently, Peru's actions are inconsistent with Article X:1 of the GATT 1994 with respect to each of these three elements of the measure.

3.5 Peru's actions are inconsistent with Article X:3(a) of the GATT 1994 because it administers the measure in question in a manner that is not uniform, impartial or reasonable

3.41. Article X:3(a) of the GATT 1994 provides that WTO Members shall administer their trade regulations "in a uniform, impartial and reasonable manner". The requirements of uniformity, impartiality and reasonableness are legally independent, so that failure to comply with any of them would imply an independent breach of Article X:3(a) of the GATT 1994.[97] It has been found that, if a country administers any trade regulation in a manner not provided for in its own internal legislation, this would qualify as an unreasonable administration that would be in breach of Article X:3(a).[98]

3.42. Guatemala has identified four anomalies of the PBS which give cause for claims under Article X:3(a) of the GATT 1994: (i) the decision to extend the validity of the customs tables without applying the formulas required by the Peruvian regulations; (ii) the calculation of the price band for dairy products on the basis of reference price ranges; (iii) the establishment of reference prices for dairy products at the same level for two consecutive two-week periods; and (iv) the calculation of the variable additional duty for two different categories of rice.[99]

3.43. In its defence, Peru has attempted to explain that those practices do have a legal basis in its regulations. However, those attempts have been fruitless. Peru has cited legal instruments that were in force under the previous 1991 system of specific duties, but which are no longer valid[100]; or alternatively it has argued that, inasmuch as those anomalies were noted from the time of the first customs tables, this means that the authorities are now acting with proper legal authority.[101]

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[93] First written submission of Guatemala, para. 4.148 (citing the Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.405).

[94] First written submission of Guatemala, paras. 4.150-4.172.

[95] Response from Peru to question 115, para. 76. The same acknowledgement was made by Peru in para. 3.61 of its Second written submission.

[96] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.406-7.407.

[97] Panel Report, *Dominican Republic – Import and Sale of Cigarettes,* para. 7.383.

[98] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.385-7.388.

[99] First written submission of Guatemala, para. 3.88.

[100] Opening statement by Guatemala at the first substantive meeting of the parties with the Panel, para. 71. Response of Guatemala to Panel question 142, paras. 197-200.

[101] Response of Guatemala to Panel question 143, paras. 201-206.

3.44. Peru has also argued that the legal authority for these practices resides in the general powers of the Executive to establish and modify tariffs at its discretion.[102] Guatemala considers that a reference to the general powers of the Executive to modify tariffs is of no relevance to this analysis. What is important is to note that, under Supreme Decree No. 115-2001-BF there is no discretionary power enabling the Peruvian authorities to refrain from imposing duties resulting from the PBS.[103]

3.45. Consequently, by resorting to practices not provided for in its internal regulations, Peru administers the measure at issue in a manner that is unreasonable under the terms of Article X:3(a) of the GATT 1994.

3.6 Claims under the Agreement on Customs Valuation

3.46. Guatemala is submitting its claims under the Customs Valuation Agreement in the alternative, in case the Panel reaches the conclusion that the measure at issue is an ordinary customs duty.[104]

3.47. Under the Customs Valuation Agreement, WTO Members must base the customs value of goods on the transaction value that is provided by the importer or, failing this, they may determine the value in question on the basis of one of the methods established in Articles 1 to 7 of the Agreement.

3.48. The variable additional duty is not determined on the basis of the weight of the imported goods, but on the basis of a price for the goods. However, this price is not the transaction value provided by the importer, but the reference price published by Vice-Ministerial Resolution of Peru's Vice-Minister of the Economy. This means that, by virtue of the price band system, Peru totally ignores the transaction value and, instead, uses minimum, arbitrary or fictitious customs values, in violation of Articles 7.2(f) and 7.2(g) of the Customs Valuation Agreement.

3.49. Peru appears not to understand Guatemala's claims. In its opinion, the Customs Valuation Agreement "only contains principles for situations in which duties are imposed on the basis of a value, and which are not applicable to specific duties levied on the basis of quantity, item or weight.[105] However, the variable additional duty *is not calculated* on the basis of "quantity, item or weight" as alleged by Peru.[106]

3.50. Therefore, by determining the customs value of the goods subject to the measure through an improper use of minimum, arbitrary or fictitious customs values, Peru is acting inconsistently with Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement.

4 GUATEMALA HAS INSTITUTED PROCEEDINGS BEFORE THIS PANEL IN GOOD FAITH AND IN STRICT CONFORMITY WITH THE RULES OF THE RELEVANT LEGAL INSTRUMENTS

4.1. Peru has requested the Panel not to consider Guatemala's claims since, in its opinion, Guatemala has not acted in good faith in initiating this dispute settlement procedure.[107] In support of its request, Peru ambiguously puts forward four erroneous arguments: (a) that Guatemala, "either explicitly or by necessary implication", waived any rights it might have under the WTO Agreements that were inconsistent with what had been agreed in the FTA[108]; (b) that Guatemala expressly accepted the Peruvian price band in the Guatemala-Peru Free Trade Agreement (FTA) and that the initiation of this dispute settlement procedure defeats its object and purpose[109]; (c) that there has been an abuse of rights, because Guatemala considered the price band system to be consistent with the framework of the WTO Agreements[110]; and (d) that

[102] Second written submission of Peru, para. 4.5. Response from Peru to question 141, para. 138.
[103] Comment by Guatemala on Peru's response to Panel question 103, paras. 11-14. Comment by Guatemala on Peru's response to Panel question 107, para. 19.
[104] First written submission of Guatemala, para. 4.222.
[105] First written submission of Peru, para. 5.142.
[106] First written submission of Peru, para. 5.142.
[107] First written submission of Peru, section 4.1. Second written submission of Peru, section 2.
[108] First written submission of Peru, para. 4.26.
[109] First written submission of Peru, para. 4.20; opening statement by Peru, para. 32.
[110] First written submission of Peru, para. 4.11.

Guatemala agreed to modify its rights and obligations in the WTO framework insofar as they might be inconsistent with the FTA.[111]

4.2. None of these contentions has any basis in the facts, the rules or the jurisprudence. First, despite its express denial[112], Peru is invoking the estoppel principle in support of its request. Although this principle has been invoked in previous WTO disputes, it has never been applied as a valid defence to limit the rights of the complaining country. In fact, the Appellate Body has emphasized that "it is far from clear that the estoppel principle applies in the context of WTO dispute settlement".[113]

4.3. Even assuming that the estoppel principle is applicable in WTO disputes, the assertion that any WTO Member has waived its rights under the DSU "cannot be lightly assumed".[114] If a WTO Member has not clearly stated that it will not submit a claim with respect to a specific measure, it cannot be regarded as having failed to act in good faith if it challenges that measure.[115]

4.4. Nor does Guatemala accept that such a statement can be made through the FTA. Rather, a waiver of WTO rights would have to be made within the WTO legal framework, for example by means of a mutually agreed solution, under Article 3.5 of the DSU, in a dispute that has already been initiated, or through a multilateral agreement.[116] Peru would also have to demonstrate that Guatemala clearly waived its right under the DSU to challenge the price band system before the WTO. The FTA simply does not contain any provision of that nature.[117]

4.5. Second, paragraph 9 of Annex 2.3, which Peru presents as the basis for its claims, should be read in conjunction with Article 1.3.1 of the FTA in which the parties confirmed "the rights and obligations existing between them in accordance with the WTO Agreement". The aforementioned provisions indicate that, although Peru has the right to maintain its PBS for a limited number of products, Peru also has the obligation to comply with the provisions of the WTO Agreement. Since neither of the two sets of provisions contains mutually exclusive obligations, there is no conflict or inconsistency between the FTA and the WTO Agreements.[118] Therefore, Peru is not exempted from complying with its WTO obligations, and Guatemala is not impeded from exercising its WTO rights, including the possibility of validly challenging the measure at issue.[119]

4.6. Third, in contrast to Peru's assertions, the FTA contains no provisions indicating that Guatemala recognized the price band system as consistent with WTO rules. This type of interpretation simply cannot be derived from the ordinary meaning of the terms used in the aforementioned provisions.[120]

4.7. Fourth, contrary to Peru's opinion, the FTA is not a vehicle for modifying rights and obligations under the WTO Agreements. These agreements can only be modified through the procedures established in Article X of the Marrakesh Agreement.[121]

4.8. Guatemala also explained that Peru's submissions would require the Panel to act outside its terms of reference, since it would have to establish its jurisdiction to hear a non-WTO dispute (i.e. to entertain disputes regarding the FTA, which does not form part of the covered agreements).[122] Guatemala also made it clear that Peru's submissions would require the Panel to interpret

[111] First written submission of Peru, para. 4.22 and 4.28; opening statement by Peru, paras. 24-28.
[112] Second written submission of Peru, para. 2.47.
[113] Appellate Body Report, *EC - Export Subsidies on Sugar*, para. 310.
[114] Appellate Body Report, *EC - Bananas III (Article 21.5- Ecuador II),* para 217.
[115] Appellate Body Report, *EC - Bananas III (Article 21.5 - Ecuador II)*, para. 228. (Emphasis added)
[116] Opening statement by Guatemala at the first substantive meeting, para. 82; see also the third party submission by the United States, para. 50. Response of Guatemala to Panel question 91, para. 19.
[117] Opening statement by Guatemala at the first substantive meeting, para. 83. Second written submission of Guatemala, section 9.1
[118] Response of Guatemala to Panel question 25, paras. 51-56. Second written submission of Guatemala, para. 9.36 and paras. 9.41 to 9.51.
[119] Opening statement by Guatemala at the first substantive meeting, paras. 84 and 85.
[120] Opening statement by Guatemala at the first substantive meeting, para. 83.
[121] Response of Guatemala to Panel question 21, para. 35.
[122] Response of Guatemala to Panel question 21, para. 35. Response of Guatemala to Panel question 27, paras. 58 and 59. Second written submission of Guatemala, section 9.2.

provisions of the covered agreements on the basis of a legal instrument to which not all WTO Members are parties.[123]

4.9. Finally, Peru argued that Article 3.7 of the DSU establishes "prerequisites" for instituting a dispute settlement procedure.[124] This is incorrect. The text of Article 3.7 of the DSU shows that the exercise of judgement as to whether action under the WTO dispute settlement procedures would be fruitful is an exercise incumbent solely on the Member initiating a dispute.[125]

4.10. For all of these reasons, Peru lacks any justification for affirming that Guatemala has not acted in good faith in challenging the price band system before the WTO.

5 REQUEST FOR RULINGS AND RECOMMENDATIONS

5.1. On the basis of the foregoing, Guatemala requests the Panel to issue findings and rulings on the following:

- The measure at issue is inconsistent with Article 4.2 of the Agreement on Agriculture, as it constitutes a variable import levy or a measure similar thereto;

- The measure at issue is inconsistent with Article 4.2 of the Agreement on Agriculture as it constitutes a minimum import price or a measure similar thereto;

- The measure at issue is inconsistent with Article II:1(b), second sentence, of the GATT 1994, since it is included under the "other duties or charges" of that provision. At the same time, the measure in question is not recorded in Peru's schedule of concessions, was not applied at the date of entry into force of the GATT 1994, and was not stipulated in the binding Peruvian legislation in force on the date of entry into force of the GATT 1994;

- Peru's actions are inconsistent with Article X:1 of the GATT 1994, given its failure to publish: (i) the content of the "import costs"; (ii) the methodology for determining the amounts for freight and insurance; and (iii) the international prices that form the basis for calculating the floor price and the reference price.

- Peru's actions are inconsistent with Article X:3(a) of the GATT 1994, given its failure to administer the measure at issue in a uniform, impartial and reasonable manner, in relation to: (i) the decision to extend the validity of the customs tables without applying the formulas required by Peruvian regulations; (ii) the calculation of the price band for dairy products on the basis of reference price ranges; (iii) the establishment of reference prices for dairy products at the same level for two consecutive two-week periods; and (iv) the calculation of the variable additional duty for two different categories of rice.

- In the event of a finding that the measure at issue is an ordinary customs duty, Peru would be acting inconsistently with Articles 7.2(f) and 7.2(g) of the Agreement on Customs Valuation, since it determines the customs value of the goods subject to the PBS through the use of minimum, arbitrary or fictitious customs values. As a result, Peru would also be acting in violation of Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement.

5.2. In addition to the foregoing, and in accordance with the provisions of the second sentence of Article 19.1 of the DSU, Guatemala requests the Panel to suggest that Peru should completely dismantle the measure at issue.

[123] Response of Guatemala to Panel question 21, para. 35.
[124] Response of Peru to Panel question 88, para. 1; Response of Peru to Panel question 92, para. 7.
[125] Response of Guatemala to Panel question 96, paras. 29-32.

ANNEX B-3

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF PERU

1 INTRODUCTION

1.1. Peru has demonstrated why Guatemala's request for the "dismantling" of Peru's Price Band System ("PBS") should be rejected, together with each and every one of its allegations and legal claims. In accordance with the working procedures adopted by the Panel, in this document Peru will summarize the facts and arguments presented to the Panel to date.

- The PBS is a mechanism for determining specific duties for certain agricultural products. It is the improved version of a mechanism that has existed since 1991.

- Guatemala signed a free trade agreement with Peru (the "Peru-Guatemala FTA") in which it was expressly agreed that Peru can maintain the PBS and that that agreement would prevail over the WTO Agreements in the event of any inconsistency.

- Guatemala now repudiates what was agreed in the Peru-Guatemala FTA because of pressure from its sugar producing sector, following a fall in the price of sugar. Guatemala is prohibited from submitting claims in the WTO if it is not acting in good faith.

- There is no inconsistency whatsoever between Peru's specific duties and Article II:1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, as they are ordinary customs duties which were bound during the Uruguay Round. Peru has never exceeded that binding.

- In any event, the specific duties are not variable import levies or minimum import prices, or similar measures within the meaning of the footnote to Article 4.2 of the Agreement of Agriculture.

- Peru has published all the essential elements of the specific duties that may arise from the administration of the PBS, consistent with Article X:1 of the GATT 1994.

- Peru has administered the PBS in a uniform, impartial and reasonable manner, in accordance with Article X:3 of the GATT 1994.

- The provisions of the Customs Valuation Agreement invoked by Guatemala are not applicable, as they only apply to *ad valorem* duties.

2 FACTUAL BACKGROUND

2.1 The Price Band System

2.1. The PBS is a mechanism developed by Peru to calculate the specific duties that have formed part of Peru's tariff policy for more than two decades. The system of specific duties calculated on the basis of international prices was introduced in 1991 and formed part of the tariff offer made by Peru to its negotiating partners in the Uruguay Round.

2.1.1 Development within the tariff framework

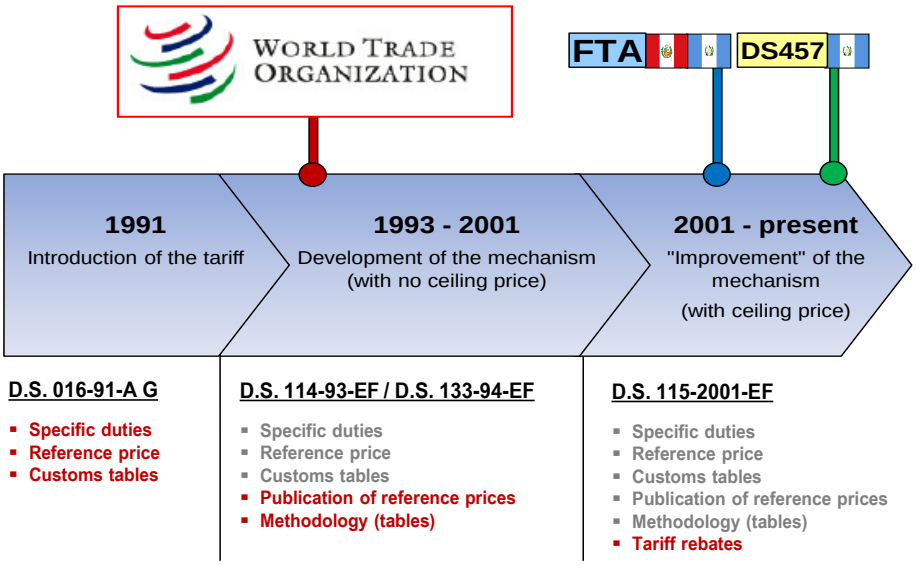
2.2. Peru applies two types of tariff duties, *ad valorem* and specific duties, which when combined generate the so-called "mixed" or "compound" tariff.[1] Peruvian legislation expressly recognizes that both *ad valorem* and specific duties are tariff duties. Not only has Peru prohibited all non-tariff

[1] Ministry of the Economy and Finance, *Definiciones*, Exhibit PER-6.

measures during a process of reform and trade liberalization[2], but Decree Law No. 26140 made explicitly clear the fact that the specific duties are tariff measures.[3] In accordance with the legal regime of the Constitution and organic laws, both types of duty have been ordered by the executive power and by Supreme Decree, endorsed by the Minister of the Economy and Finance.[4]

2.3. Peru introduced specific duties for certain agricultural products in 1991, by means of Supreme Decree No. 016-91-AG.[5] At the outset, the specific duties were applied to 18 tariff headings for rice, sugar, dairy, maize and wheat products, and they were determined in accordance with (i) an international reference price and (ii) the respective customs tables.[6]

2.4. Peru has developed the system since 1991. As the following timeline shows, the main changes to the mechanism since 1991 have not altered the essential features or the legal nature of the measure.[7]



2.5. It is obvious that the PBS is not a new measure but a refinement of the mechanism that has existed since 1991. Supreme Decree No. 021-2001-EF had already mentioned the need to make proposals for improving the system.[8] Supreme Decree No. 115-2001-EF establishing the PBS explicitly states that it is a refined and updated version of the pre-existing system.[9]

2.1.2 Tariff binding during the Uruguay Round

2.6. During the Uruguay Round, Peru negotiated tariff bindings with its main trading partners, which accepted Peru's offer.

2.7. As indicated in Section I-A of Part I of Peru's Schedule XXXV at the end of the Uruguay Round, all agricultural products in Annex I of the Agreement on Agriculture were bound at 30%, with the exception of rice, sugar, dairy, maize and wheat – that is, the products subject to specific

[2] See Supreme Decree No. 60-91-EF, Exhibit PER-10; Legislative Decree No. 668, Exhibit PER-11; Decree Law No. 25988, Exhibit PER-12.
[3] Decree Law No. 26140, Exhibit PER-53, Article 1.
[4] See Political Constitution of Peru, Exhibit PER-1, Article 74; Law No. 29158, Exhibit PER-2, Article 11; Organic Law, Legislative Decree No. 183, PER-4, Article 5.
[5] Supreme Decree No. 016-91-AG, PER-22.
[6] Ibíd, Article 1.
[7] See slide 1 of 15 January 2014, Peruvian Exhibit PER-57.
[8] Supreme Decree No. 021-2001-EF, Exhibit PER-49.
[9] Supreme Decree No. 115-2001-EF, Exhibit GTM-4, preambular part ("following review and evaluation of the above-mentioned [1991] system, it was deemed necessary to refine it and bring it into line with the needs of national agriculture, so as to enable domestic producers to plan their investments under conditions of reduced uncertainty").

duties in existence since 1991 – which were bound at 68%, over a period of application of ten years, on the basis of different base rates.[10]

2.8. The binding of specific duties was carried out in accordance with paragraph 14 of the "modalities" document issued by the Chairman of the Market Access Group to provide guidance to countries on how to establish firm commitments in their final offers. The paragraph provides that "[i]n the case of products subject to unbound *ordinary customs duties*, developing countries shall have the flexibility to offer ceiling bindings on these products".

2.9. Accordingly, in the light of the prior elimination of any kind of non-tariff measure in the country, Peru prepared and submitted its final schedule without going through the so-called process of "tariffication". There was no reason to go through that process, since following the elimination of all types of non-tariff measure, Peru's only tariffs were in the form of *ad valorem* duties and mixed or compound duties composed of *ad valorem* and specific duties.

2.10. On 14 December 1993, Peru notified its final offer to the Chairman of the Negotiating Group on Market Access. Subsequently, in a communication of 27 May 1994, Peru notified that the new schedule of commitments had been formally accepted by the contracting parties concerned.

2.2 Operation of the PBS

2.11. In May 1991, through Supreme Decree No. 016-91-AG, Peru established the system of specific duties. From the outset, specific duties were calculated on the basis of the same essential elements: (i) an international reference price and (ii) customs tables calculated on the basis of international prices over the previous 60 months.

2.12. Through Supreme Decree No. 115-2001-EF, published on 22 June 2001, the PBS was established for 47 tariff subheadings corresponding to rice, sugar, dairy and maize. With regard to the international reference price, this is the fortnightly average of prices for each product in the designated reference market, converted to a CIF basis by applying certain freight and insurance costs.

2.13. The main methodological innovation with respect to the customs tables was the introduction of a "ceiling price", whereby the "band" was set between the floor and ceiling prices. The methodology for calculating the customs table is similar to the existing methodology under the previous system, with the sole addition of a ceiling price calculation. Under this methodology and its amendments, Peru has established specific duties and customs rebates through the publication of customs tables on 14 occasions.

2.14. Although the analysis in the present case must focus on the specific duties themselves and not on the methodology of calculation, a summary of the operation of the main elements of the PBS is provided below:

- *Calculation of reference price*: The reference price for each product is the fortnightly average of the price quotations observed on the international reference market for marker products (with the exception of dairy products, for which the reference quotation is a monthly one). The reference prices are published by Vice-Ministerial Resolution and on the web page of the Ministry of the Economy and Finance (MEF).

- *Calculation of the price band*: Price bands for each product are calculated on the basis of monthly average FOB prices for the past 60 months on the corresponding international reference markets, deflated by the United States Consumer Price Index. All prices that do not fall within a standard deviation of the average price are eliminated. The floor price of the band is the average of the remaining prices.[11] The ceiling price of the band is a standard deviation of the original series above the floor price. The floor and ceiling prices expressed in FOB terms are converted to CIF terms, adding the costs of freight and insurance.

[10] PER-18.

[11] Since sugar is a sensitive product, an adjustment factor is applied to the floor price of the sugar band, which increases that price by 10.7%.

- *Calculation of the specific duty*: The MEF and the Ministry of Agriculture and Irrigation (MINAGRI) publish the bands and the corresponding specific duties in customs tables approved by Supreme Decree. A specific duty has to be applied when the reference price is lower than the floor price, i.e. when it falls below the band. In no case may the actual tariff, i.e. the sum of the specific duty and the *ad valorem* duty, exceed Peru's bound tariff. On the other hand, when the reference price goes above the ceiling price, i.e. when it rises above the band, the importer is granted a tariff rebate. In no circumstances may the tariff rebate exceed the sum to be paid by the importer by way of an *ad valorem* duty.[12] When the international reference price lies between the floor price and the ceiling price, i.e. when it is within the band, no specific duty is applied.

2.3 The Peru-Guatemala FTA

2.15. Peru and Guatemala signed the Peru-Guatemala FTA on 16 December 2011. This Agreement was the result of a negotiating process in which "the entire tariff universe will be subject to negotiation".[13]

2.16. During the negotiating process, Guatemala recognized that the PBS is a tariff-based system. Specifically, Annex 2.3 of the Peru-Guatemala FTA provides:

> *Peru may maintain its Price Band System* established in Supreme Decree No. 1152001EF and the amendments thereto, with regard to the products subject to the application of the system, as marked with an asterisk (*) in column 4 of Peru's Schedule set out in this Annex.

2.17. Accordingly, the 47 tariff subheadings for which Peru may maintain the PBS are indicated with an asterisk in Peru's tariff schedule.

2.18. In addition, Peru and Guatemala agreed to negotiate tariff reductions for the *ad valorem* and specific components. In particular, Guatemala proposed negotiating the non-application of *ad valorem* and specific tariffs for a limited quantity of sugar, under heading 17.01 of the Harmonized System. Nevertheless, on account of the interests expressed by both countries during the negotiating process, no agreement was reached on a reduction for that heading. Finally, as a result of the negotiations, the Parties agreed that Peru could maintain the PBS.

2.19. Moreover, Article 1.3 ("Relationship with other international agreements") contains the following key provisions:

> The Parties confirm their existing mutual rights and obligations under the WTO Agreement and other Agreements to which they may be Parties.
>
> In the event of any inconsistency between this Treaty and the Agreements referred to in paragraph 1, this Treaty shall prevail to the extent of the inconsistency, unless otherwise provided in this Treaty.

2.20. It is clear that Guatemala (i) negotiated the application of the PBS in the context of tariff elimination under a free trade agreement; (ii) recognized that the duties to which the PBS may give rise are in the nature of tariffs; and (iii) explicitly agreed that Peru could maintain the PBS. The text of the Peru-Guatemala FTA, having being adopted and authenticated by both States, constitutes a clear expression of their intention to be bound by the content of the Treaty in its entirety.

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[12] With regard to the tariff headings covered by the PBS, Peru has systematically reduced the *ad valorem* tariff, from an average of roughly 21% in 2001 to practically 0% at the present time. Indeed, for the rice, sugar and dairy subheadings (i.e. the products subject to the PBS other than maize), Peru maintained the *ad valorem* tariff at 0% from 6 March 2008. With regard to the tariff headings for maize, as from 31 December 2010, Peru has maintained the *ad valorem* tariff at 0% - with the exception of 3 headings (1108120000, 1108130000 and 3505100000). This means in practice that a tariff rebate is possible only in respect of three tariff headings for maize.

[13] See the General Framework for the negotiation of a free trade agreement between Costa Rica, Honduras, Guatemala, Panama and Peru, Exhibit PER-51, Article II(2).

2.21. As an essential precondition for the entry into force of the Peru-Guatemala FTA, the Parties must exchange written notifications confirming that they have completed their respective legal procedures.[14]

2.22. On 4 July 2013, after initiating the current process, the Guatemalan Congress approved the Peru-Guatemala FTA as a matter of "national urgency" and declared that the Agreement is "consistent…with its multilateral obligations in the framework of the World Trade Organization". Paradoxically, the Panel was established on that same day at the request of Guatemala.

2.23. Peru was unable to continue with its domestic legal procedures since the case brought by Guatemala has created uncertainty, in the first instance, with regard to that country's conduct, and in the second instance with regard to the disruption of the balance achieved in the negotiation of the above-mentioned FTA.

3 SIGNIFICANCE OF THE PERU-GUATEMALA FTA

3.1. The PBS is fully consistent with Peru's WTO obligations. Never before in the history of the WTO has a Member sought to challenge, in the multilateral framework, a measure to which it has explicitly agreed in a bilateral trade agreement. Specifically, Guatemala is seeking "the complete dismantling" of the PBS in the context of the WTO dispute settlement process, which is totally at odds with its explicit agreement, in the Peru-Guatemala FTA, that "Peru may maintain its Price Band System", since it agreed with Peru on the specific products that would be covered by the PBS.

3.2. Pursuant to Article 18(a) of the Vienna Convention, to which Peru and Guatemala are parties, when a treaty has been signed and is subject to ratification for the purpose of its entry into force, a State that has signed that treaty cannot frustrate its object and purpose, unless it expresses its desire not be a party to the treaty. Guatemala has not expressed a desire not to be a party to the Peru-Guatemala FTA; rather, it has undertaken the "national urgency" procedure for approval of the treaty.

3.1 Guatemala cannot institute proceedings contrary to good faith

3.3. It is clear that Guatemala has not acted in good faith by expressly accepting the PBS of Peru in the bilateral FTA and then resorting to the WTO dispute settlement system. Furthermore, it has committed an abuse of right by invoking the rules of the DSU in relation to situations which, having regard to its own circumstances, it has considered consistent with the framework of the WTO Agreement.

3.4. According to the Real Academia Española definition, good faith is the "criterion of conduct to which the honest behaviour of subjects of law must conform" or "in bilateral relations, behaviour in keeping with the expectations of the other Party". This is precisely what Guatemala has failed to do by contradicting the Peru-Guatemala FTA, and this is not permissible in international law. According to the well-known author Bin Cheng:

> It is a principle of good faith that a man shall not be allowed to blow hot and cold – to affirm at one time and deny at another. … Such a principle has its basis in common sense and common justice. … it is one which courts have in modern times most usefully adopted. In the international sphere, this principle has been applied in a number of cases.

3.5. Good faith is a requirement for initiating proceedings under the DSU, in accordance with the provisions of Articles 3.7 and 3.10 of the DSU, for which reason, in the instant case, Guatemala does not appear to be in compliance with the essential requirement for instituting proceedings before the DSB.

[14] Peru-Guatemala FTA, Article 19.5, Exhibit PER-65 ("This Treaty shall enter into force sixty (60) days after the date on which the Parties exchange written notifications confirming that they have completed their respective legal procedures or on such date as the Parties may so agree").

3.6. As was explained in the *Mexico – Corn Syrup* case: Members should not "*frivolously set in motion* the procedures contemplated in the DSU". The reference to the principle of good faith in the context of Article 3.10 of the DSU is addressed in *US - FSC*, in the following terms: "*This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law*".

3.7. In this connection, it is relevant to refer to the provisions of the above-mentioned Article 18 of the Vienna Convention, inasmuch as, although the Peru-Guatemala FTA has not entered into force, the signatory States could not act contrary to its object and purpose. Indeed, in the report of the Panel that presided over *US - Shrimp*, it is expressly stated that "[t]he concept of good faith is explained in Article 18 of the Vienna Convention which states that 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty'". Consequently, it emerges from the above-mentioned provision and from Articles 3.7 and 3.10 of the DSU that a claim that is inconsistent with good faith cannot proceed.

3.8. The Appellate Body in *EC – Export Subsidies on Sugar* indicated that Articles 3.7 and 3.10 of the DSU are among the very few provisions "in the DSU that explicitly [limit] the rights of WTO Members to bring an action", considering that, if the principle of estoppel were applicable, it would fall within the parameters of those Articles. Unlike the situation in *EC – Export Subsidies on Sugar*, for example, where the then European Communities relied on the silence of the complainants in order to demonstrate their consent to the offences claimed, the facts of this case clearly and categorically show Guatemala's express acceptance of the PBS.

3.9. In conclusion, it is clear that Guatemala is not acting in good faith by having recourse to the WTO dispute settlement procedure. In this context, an abuse of right is created by that State when it invokes the rules and initiates the procedures established in the DSU with regard to the PBS which it expressly accepted in the bilateral FTA, and it is barred from frustrating the object and purpose of the FTA by Article 18 of the Vienna Convention, which gives expression to the principle of good faith. For all the above reasons, the conditions laid down by the DSU for initiating a dispute settlement proceeding are not met in this case. Consequently, Peru requests the Panel not to continue with the analysis of Guatemala's claims.

3.2 Guatemala has modified its rights with respect to the dismantling of the PBS

3.10. In line with the foregoing, Guatemala has no right to seek the dismantling of the PBS, because Guatemala agreed to modify its rights and obligations in the WTO framework to the extent that they might be inconsistent with the treaty it has signed with Peru.

3.11. The Appellate Body recognized that Members may waive their rights under the WTO in *EC-Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, where it held that it was in fact possible for the parties to waive their WTO rights, "if the parties to [the understandings reached between the parties concerned] had, either explicitly or by necessary implication, agreed to waive their right …".

3.12. Unlike *EC – Bananas III*, the present case is one where Guatemala has in fact waived "either explicitly or by necessary implication" any rights it might have had under the WTO Agreements that were inconsistent with what was agreed in the Peru–Guatemala FTA. The fact that it now says that the PBS is incompatible with Peru's WTO obligations presupposes an incompatibility between the Peru-Guatemala FTA and the WTO Agreements, in which the bilateral treaty must take precedence. Consequently, it is neither useful nor correct for the Panel to continue its analysis of Guatemala's claims as if the Peru-Guatemala FTA did not exist. It is important to emphasize that the Panel need only consider what the parties' rights are under the WTO Agreements, not under the Peru-Guatemala FTA, which demonstrates the fact of the waiver.

3.13. It should be noted in this context that there is nothing unusual about Members modifying their WTO rights by means of trade agreements. Free trade agreements are permitted under Article XXIV, provided that they meet the requirements of that Article. Likewise, Article 41 of the Vienna Convention provides that two State parties to a multilateral treaty may modify their mutual obligations.

3.14. Guatemala must not be allowed to use the multilateral system in this way. The Panel must prohibit such abuse by concluding (i) that Guatemala may not engage in a procedure against Peru in the instant case; or (ii) that Guatemala modified its rights through the Peru-Guatemala FTA.

4 THE SPECIFIC DUTIES THAT MAY RESULT FROM THE PBS ARE FULLY CONSISTENT WITH THE WTO AGREEMENTS

4.1 Peru's specific duties are ordinary customs duties

4.1.1 If a measure is an "ordinary customs duty" it is not inconsistent with Article II:1(b), second sentence, of the GATT 1994 or with Article 4.2 of the Agreement on Agriculture

4.1. The first sentence of Article II:1(b) of the GATT 1994 refers to "ordinary customs duties", and the second to measures that are "other duties or charges". This shows that the second sentence refers only to the category of measures that are not "ordinary customs duties". Therefore, if it is established that a measure is an "ordinary customs duty", the second sentence – the only part of Article II concerning which Guatemala alleges a violation – is not applicable.

4.2. Article 4.2 of the Agreement on Agriculture refers to "any measures of the kind which have been required to be converted into ordinary customs duties", i.e. not "ordinary customs duties" themselves. It is clear from the text of Article 4.2 that "ordinary customs duties" cannot be included among the measures prohibited by that Article, since a measure that is already an "ordinary customs duty" cannot be converted to one. Furthermore, Article 4.2 of the Agreement on Agriculture includes an illustrative list of the "measures of the kind which have been required to be converted into ordinary customs duties" that are prohibited. This shows that Article 4.2 does not prohibit "ordinary customs duties" and that, on the contrary, the Article prohibits only a group of measures which are at least similar to those identified in the illustrative list.

4.3. For these reasons, if the Panel determines that Peru's specific duties are "ordinary customs duties", it must reject Guatemala's claims regarding the second sentence of Article II:1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

4.1.2 Characteristics of "ordinary customs duties"

4.4. Considering the text of the Agreements, together with the supplementary means of interpretation and the relevant case law, we may conclude that: "ordinary customs duties" have certain clear characteristics, including the following:

- *They are MFN duties, forming part of the tariff regime*: "Ordinary customs duties" are general customs duties, which means, in the context of Article I of the GATT 1994, that they are tariffs subject to most-favoured-nation treatment.

- *They are applied to imports, and the obligation to pay arises at the time of importation*: In accordance with their ordinary meaning, the words "customs duties" mean the amount paid for the importation of a good. The Appellate Body has recognized that "the *obligation* to pay it must accrue at the moment and by virtue of … importation".

- *They may be designed to collect revenue and protect the domestic industry*: As was indicated in *India - Additional Import Duties*, "[o]rdinary customs duties … by their nature … discriminate against imports of the products subject to the duty [and] inherently disadvantage imports of the subject products *vis-à-vis* domestic products", and "may be applied for a variety of reasons unrelated to domestic production, including, as the United States observes, the raising of revenue".

- *They may be ad valorem, specific or compound duties*: According to the Appellate Body, the form of the duty is not a determining factor. Like other Members, Guatemala recognizes that an ordinary customs duty "may be *ad valorem*, specific or compound". Moreover, as Guatemala appears to acknowledge, two duties forming part of "a single entity or a coherent unit - as, for example, a compound tariff" may constitute "ordinary customs duties".

- *They may vary but are subject to limits*: If it is a "duty" (amount that is paid), it is a positive value (more than zero), and its upper limit is fixed at the bound level. As the Appellate Body indicated in *Chile - Price Band System*, "[a] levy is "variable" when it is "liable to vary" … An "ordinary customs duty" could also fit this description. A Member may, fully in accordance with Article II of the GATT 1994, exact a duty upon importation and periodically change the rate at which it applies that duty (provided the changed rates remain *below* the tariff rates bound in the Member's Schedule)."

- *They are transparent and predictable*: Without precisely defining the exact degree of transparency they must exhibit, the Appellate Body made it clear that an "ordinary customs duty" must be transparent. Such transparency is necessary so that the trading partners can understand the costs and to facilitate future multilateral trade negotiations.

4.5. Peru does not claim that these characteristics constitute an exhaustive list of all the characteristics of "ordinary customs duties". Rather, Peru considers that the aforementioned characteristics are derived from the ordinary meaning of the text of the Agreements, taking into account their context, object and purpose, as well as the supplementary means of interpretation and WTO jurisprudence.

4.1.3 Peru's specific duties have the same characteristics as "ordinary customs duties"

4.6. The specific duties that may result from the PBS are "ordinary customs duties" since they meet each of the characteristics identified above. In particular, Peru emphasizes the following:

- *They are MFN duties, forming part of the tariff regime*: Decree Law No. 26140 expressly provides that: "specific import duties, whether fixed or variable, on food products and inputs […] are tariff duties". Therefore, the specific duties are non-discriminatory general tariffs that are applied to all imports of the products covered, without distinction as to country of origin. In line with what was indicated previously, and in accordance with Article XXIV of the GATT 1994, they were negotiated under the formula of bilateral preferences in the overall context of tariff reduction.

- *They apply to imports, and the obligation to pay arises at the time of importation*: in accordance with Article 1 of Supreme Decree No. 124-2002-EF, the specific duty is determined at the date of the import declaration.

- *Designed, inter alia, to collect revenue and protect the domestic* industry: Supreme Decree No. 115-2001-EF states that "the price band system is a stabilization and protection mechanism".

- *A compound or "mixed" tariff is applied to the lines included in the PBS*: The specific duty that is calculated by means of the PBS is added to the *ad valorem* duty to obtain a compound tariff. As Peru has explained, "there are two types of tariff: *ad valorem* and specific tariffs. The mixed tariff is created on the basis of a combination of the two".

- *They vary without ever exceeding the bound rate*: Although the effective tariff may vary every two weeks, under no circumstances may it exceed the rate bound by Peru in its Schedule XXXV, as is expressly stipulated in Supreme Decree No. 153-2002-EF. Guatemala has branded the tariff rebate that may result from the PBS as "symbolic", "since it may not exceed the amount of the ordinary customs duties to be paid which, for most products, is zero per cent."[15] Nevertheless, this is precisely one of the characteristics of ordinary customs duties, as there would be nothing ordinary in a "customs duty" resulting in a payment to the importer of the goods.

- *They are transparent and predictable*: the duties are published in print and on the web pages of the MEF and SUNAT, and all information concerning the calculation is available to the public.

[15] Guatemala, First written submission, paras. 4.122-4.125.

4.7. In other words, the design, purpose and method of application of the specific duties that may result from the PBS show that they are "ordinary customs duties". They came into being as part of the restructuring of Peru's tariff system in 1991; they are included in Peru's tariff offer in the Uruguay Round; they form part of the tariff reduction under free trade agreements; and, by design, the combination of specific duties and *ad valorem* duties may not exceed the bound level, nor may it be negative.

4.8. The ceilings of the mixed/compound duties in force since 1991 were part of Peru's offer during the Uruguay Round negotiations, as reflected in the bound rate of 68% for products subject to such duties in column 4 of Peru's Schedule XXXV.

4.9. The schedules (Appendix I to Schedule XXXV – Peru) which accompanied the letter sent to the Chairman of the Negotiating Group on Market Access on 14 December 1993, transmitting Peru's final tariff offer, began with the statement "[t]he customs tariffs of Peru are bound at the uniform rate of 30% *ad valorem*, with the exception of 20 products listed in point 4, below". Point 4 listed the products already subject to a specific duty as part of the tariff. The final schedule submitted by Peru indicated "30%" under the column "Bound duty rate" for all products except those mentioned in point 4, for which the corresponding tariff was bound at "68%". Column 8, "Other duties and charges", remained blank. Peru assumed its commitments at the end of the Uruguay Round with a good faith understanding that it was following the rules established by the Chairman of the Negotiating Group. These rules, and the nature of the measure itself, demonstrate that the Peruvian tariffs are "ordinary customs duties".

4.1.4 Peru's specific duties are nothing more than "ordinary customs duties"

4.10. Since the specific duties are "ordinary customs duties", they are not, by definition, included among "other duties or charges" nor are they sufficiently similar to the measures listed in the footnote to Article 4.2 of the Agreement on Agriculture. These categories are mutually exclusive. If the Panel decides that Peru's specific duties are "ordinary customs duties" on the basis of direct analysis, it is not necessary to consider whether they are similar to the measures listed in the footnote to Article 4.2 of the Agreement on Agriculture.

4.11. The specific duties are not variable import levies or minimum import prices. The interpretation and significance of the terms "variable import levy" and "minimum import price", as established by the Appellate Body and other uses in the multilateral system and in legal writings, are related to the use of target prices or minimum prices.[16] As the Appellate Body explained in *Chile – Price Band System*:

> The main difference between minimum import prices and variable import levies is, according to the Panel, that "variable import levies are generally based on the difference between the *governmentally determined threshold* and the lowest world market offer price for the product concerned, while minimum import price schemes generally operate in relation to the *actual transaction value* of the imports."[17]

4.12. This shows that the difference between variable levies and minimum prices is the operating mechanism whereby it is sought to impose a target price.

4.13. In its zeal to demonstrate that the PBS is included among the prohibited measures, Guatemala has put forward a distorted account of the way in which the PBS operates. In Exhibit GTM-31, Guatemala mistakenly states that the reference price is equivalent to the price before application of the specific duty.[18] In fact, however, the reference price is independent of the transaction price, which is at the discretion of the trader. The PBS has no target prices or minimum prices. Peru applies the same tariff regardless of the price that the importer chooses to declare, the measure itself is neither fitted nor intended to arrive at a target price, and in practice the goods may enter below the floor price.[19] For this reason, it cannot be said that the specific duties that may result from the application of the PBS are variable levies or minimum import prices or an instrument similar to those measures.

[16] Peru, First written submission, paras. 5.54-5.60.
[17] Appellate Body Report, *Chile - Price Band System*, para. 237.
[18] Exhibit GTM-31.
[19] Peru, First written submission, paras. 5.61-5.68.

4.14. This can be seen clearly from the information available to the public on the SUNAT website, and from illustrative examples which involve real transactions. For example, in the case of sugar, during the first two weeks of August 2012 the reference price published by the Peruvian authorities was US$657/MT; as a result, no specific duties were established, as the floor price in the applicable customs table was US$644/MT for that six-month period.

4.15. Against the background of the data provided in the previous paragraph, it was observed that imports could enter Peru at prices below the price calculated by the PBS. The operating procedure for the single customs declaration (DUA) No.354310 of 9 August 2012, for sugar from Guatemala (Peurto Quetzal) imported through the maritime customs office of Callao (port of Callao), involved the following information:

a. CIF amount:	US$ 339,359.40
b. Net weight:	530,000.00 KG (530.0 MT)
c. Specific duty payment:	US$ 0.00

4.16. The above data make it possible to calculate the CIF price per imported metric tonne, which was US$640.3/MT. The CIF price for that import is lower than the above-mentioned floor price of US644/MT[20] established in the customs table in effect for the six-month period concerned. If Guatemala were correct, the Peruvian authorities ought to have collected a specific duty of at least US$4/MT, in order to equalize the import "entry price" with the floor price for the six-month period (US$644/MT). However, the Peruvian authorities maintained the specific duty of US$0.00/MT in force for that two-week period. In other words, contrary to Guatemala's contention, imports were admitted at a price below the minimum established by the PBS.

4.17. This is only one example among many which shows that the PBS and the system of specific duties do not in any sense create a "minimum import price", and do not share the characteristics of "variable import duties" which are directed to the achievement of some target price.

4.1.5 The specific duties are not sufficiently similar to variable import levies or minimum import prices

4.18. In order for measures to be "similar" for the purposes of the Agreement on Agriculture, there must be "sufficient" similarity between two measures. In other words, not all similarity is relevant, which is obvious since all border measures share certain similarities. As was explained by the Appellate Body in *Chile – Price Band System,* "the task of determining whether something is similar to something else must be approached on an empirical basis", and the Appellate Body made it clear that an analysis of similarity for the purpose for Article 4.2 requires an assessment of various characteristics of the different measures, plus an understanding of their operation and effect in the market. It should be pointed out that it is wrong to focus on whether the Peruvian measure is similar to the one considered in *Chile – Price Band System*, but at the same time it must be stressed that, in that case, for the purposes of analysing the degree of "sufficiency" of similarity, particular emphasis was placed on the transparency and predictability of the measure in question, and on the effect of isolating the domestic market from the international market.

4.19. Isolation from the international market does not occur in the case of Peru's PBS. The specific duties that are applied do not depend on a domestic or regulated price, but are a function of prices on the international market. When applied in conjunction with the corresponding *ad valorem* duty, they can in no case result in a duty higher than Peru's consolidated tariff. Consequently, far from being isolated from the international market, domestic prices consistently and progressively reflect its movements.

4.1.5.1 The specific duties are transparent and predictable

4.20. Another distinctive characteristic of the PBS which differentiates it from variable levies and minimum import prices is its high degree of transparency and predictability. Importers, exporters and other persons involved in international trade gain access to information on specific duties in exactly the same way as they access information relating to the *ad valorem* component of

[20] In Peru's first Written Submission, the value of the reference price had been considered as the value of the floor price (paragraph 5.64). That error is corrected here. The error does not affect the argument or the calculations referred to in the paragraph of the first submission.

compound duties. On the SUNAT website, interested persons are able to ascertain the amounts of the tariff duties applicable to the importation of a product by merely entering the number of the tariff heading for the product. The duties applicable for subsequent periods depend on trends in international reference prices; consequently, economic operators can reasonably predict the amounts of specific duties, in accordance with price forecasts for the sector which are published in publicly accessible media, or alternatively the interested parties may make their own estimates on the basis of the observable data.

4.21. Although variation is possible, it is important for the Panel to take account of two points: (1) the Appellate Body itself has said that variability in itself is not a decisive factor since each Member "may … exact a duty upon importation and periodically change the rate at which it applies that duty (provided the changed rates remain below the tariff rates bound in the Member's Schedule)"; (2) it is important to distinguish *what* it is that varies in the Peruvian system. It is the specific duties, not the calculation thereof, that constitute the measure at issue. Specific duties and rebates are published in the customs tables, and what changes is the international reference price which determines which of the values in the table is applicable. Each calculation is not a change in the tariff; rather, for much of the period of application of the PBS, the specific duty has *remained at zero*.

4.1.6 Article II:1(b) of the GATT 1994, second sentence, does not apply to "ordinary customs duties"

4.22. Guatemala has submitted claims under the second sentence of Article II:1(b) of the GATT 1994, which is not applicable to "ordinary customs duties". Accordingly, as it has been found that Peru's specific measures are "ordinary customs duties", the only possible conclusion is that they are not inconsistent with Article II:1(b), second sentence.

4.1.7 In any event, the duties applied by Peru do not exceed those imposed on the date of the GATT 1994

4.23. The second sentence of Article II:1(b) only prohibits the application of duties or charges "in excess of those imposed [in 1994]". The specific duties calculated on the basis of fluctuations in international market prices were introduced into Peruvian tariff policy in 1991, were in existence at the time of the GATT and were notified to the GATT within the framework of the Uruguay Round negotiations. If the Panel considers the specific duties to be "other duties or charges" within the meaning of Article II:1(b), second sentence, the only question it should consider is whether Peru has exceeded the levels obtaining on 15 April 1994. There is no inconsistency with Article 4.2 of the Agreement on Agriculture.

4.1.8 Article 4.2 of the Agreement on Agriculture does not apply to "ordinary customs duties"

4.24. Article 4.2 of the Agreement on Agriculture does not apply to "ordinary customs duties", but to "measures of the kind which have been required to be converted into ordinary customs duties". Therefore, as it has been found that Peru's specific duties are "ordinary customs duties", the only possible conclusion is that they are not inconsistent with Article 4.2 of the Agreement on Agriculture.

4.1.9 In any event, the duties applied are not sufficiently similar to the measures listed in the footnote

4.25. Even assuming that the Peruvian duties could be considered not to be "ordinary customs duties", this does not mean that they are necessarily "measures of the kind which have been required to be converted into ordinary customs duties", inconsistent with Article 4.2 of the Agreement on Agriculture. In addition, it is necessary to determine whether the specific duties are one of the measures to which the footnote refers or whether they are sufficiently similar thereto. Unlike variable import levies or minimum prices or similar measures, the Peruvian duty does not establish a minimum or floor price for imported products; on the contrary, the same duty is applicable regardless of the price quoted by the importer. Moreover, unlike such measures, the specific Peruvian duties do not isolate the domestic market and are transparent. For these reasons, Guatemala's claim must be rejected.

4.2 Peru has published the essential elements of the PBS, in accordance with Article X:1 of the GATT 1994

4.26. Peru has published the essential elements of the PBS, which is remarkable for its transparency and accessibility. Indeed, Peru has published every one of the elements to which Guatemala refers, but has no obligation whatsoever to publish the thinking behind the PBS calculation or the components thereof. For these reasons, the Panel must reject Guatemala's claims.

4.2.1 Legal standard of Article X:1 of the GATT 1994

4.27. The foregoing shows that Members agreed on a rapid publication requirement of limited scope. As was emphasized by the Appellate Body in *EC – Poultry*, "Article X relates to the *publication and administration* of "laws, regulations, judicial decisions and administrative rulings of general application", rather than to the *substantive content* of such measures". Such being the interpretation made in this context, it was concluded that paragraph 1 "reflects the 'due process' concerns", by requiring of Members "publication that is prompt and that ensures those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them". Furthermore, the Panel in *Thailand – Cigarettes (Philippines)* held that the "data used for determining the MRSPs are not an administrative ruling of general application within the meaning of Article X".

4.2.2 Guatemala has not identified any "essential element" which should have been published and which Peru failed to publish

4.28. Peru agrees with Guatemala that the PBS as a whole is subject to the publication obligation established in Article X:1; however, Peru considers that it has fully complied with its publication obligations under Article X:1 by publishing the existence of the PBS, its methodology and every one of the components that form part of the process of calculation of that methodology. As was explained earlier, the specific duties were established in 1991, and since then Peru has published, in its official journal "El Peruano", each of the amendments related to the duties, the elements and calculation thereof, as well as the international reference prices and applicable customs tables.[21]

4.29. The 3% for "import costs" is a component of the calculation of the specific duty which has nothing to do with the substantive content of the PBS. Peru has published the fact that an additional charge of 3% is included in the calculation of the PBS and has revealed how the charge is processed as part of the general methodology of the PBS.

4.30. The amounts for "freight" and "insurance" serve to convert FOB prices into CIF prices. Peru has published each of these amounts, indicating that their source is the "General Secretariat of the Andean Community".[22] Freight and insurance are not subject to changes. However, governments and traders do not need to know how these components are calculated individually in order to have a "more or less complete" understanding of the PBS.

4.31. Peru has already published details of the reference markets for each product. Peru calculates the reference prices and the customs tables on the basis of price quotations in the reference markets during the previous 15 days or 60 months, respectively. Any importer may have direct access to the sources in the reference markets, if it so wishes. However, Peru publishes the reference prices and customs tables, and the applicable specific duty can only be calculated with these data.

4.32. Guatemala identifies four instances in which it alleges that "the Peruvian authorities have no legal basis in their national regulations". In each case, Guatemala commits two errors: (i) it suggests that Peru's actions have no basis in law and (ii) it omits to mention that, in each case, Peru has published sufficient facts to enable governments and traders to have "more or less complete" information.

[21] See Exhibits GTM-4, GTM-5.
[22] See Supreme Decree No. 115-2001-EF, Exhibit GTM-4, Annex V.

4.3 Peru has administered the PBS in a uniform, impartial and reasonable manner, in accordance with Article X:3 of the GATT 1994

4.33. The Appellate Body has explained that Article X:3(a) of the GATT establishes certain minimum standards for transparency and procedural fairness in relation to the administration of the laws, regulations and other measures referred to in Article X:1. In order to establish a violation under Article X:3(a), the complaining party must demonstrate by means of "solid evidence" that the measure comes within the scope of the measures referred to in Article X:1, and that it is "administered" in a non-uniform, partial and/or unreasonable manner.

4.34. Peru rejects Guatemala's allegation that the PBS is administered in a non-uniform and partial manner with regard to the way in which decimal figures are "rounded". Peru recalls that the "uniformity" requirement means that operators, under similar conditions, must be treated equally, and this is precisely the situation with respect to rounding. For the calculation of specific duties or tariff reductions, Peru uses floor and ceiling prices with all the decimal figures derived from the particular way in which they are calculated, together with rounded reference prices as published by the authorities. When calculating the mathematical difference between an unrounded value, i.e. a value with decimal places, and an integer value, the result will always be an unrounded figure, i.e. one with decimal places. In this particular case, the specific duties or tariff reductions derived from the difference between the reference price and the floor or ceiling price, respectively, are rounded in the normal, accepted way. The Peruvian system does not require any commercial operator to effect any calculation. Peru publishes the exact amount of the duty or rebate in printed form and on various web pages.

4.35. The criterion of reasonableness requires a measure not to be "irrational or absurd", and that it should be "proportionate". In any event, Peru's practice is reasonable, as was explained earlier; there are no anomalies in the administration of the regulations.

4.4 The PBS does not breach any rule of the Customs Valuation Agreement

4.36. Guatemala errs in alleging in the alternative that Peru violated all the substantive provisions of the Customs Valuation Agreement. That agreement is applicable only to situations where duties are imposed on the basis of a value; it is not applicable to situations where specific duties are levied on the basis of quantity, item or weight.

5 CONCLUSION

5.1. For all of the foregoing reasons, the Republic of Peru respectfully requests that the Panel reject Guatemala's claims in their entirety.

ANNEX B-4

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF PERU

1 INTRODUCTION

1.1. This case is unique. Never before has the DSB had before it a case in which a complaining Member approves, as a matter of national urgency, a bilateral free trade agreement in which the respondent party is permitted to maintain a measure, on the very day that it challenges the same measure before the DSB. Particular facts of this nature have implications for the multilateral trading system, since the determinations in this case will extend beyond the parties to the dispute. The decision adopted by this Panel will be determinative for preventing the institutionalization of the abuse of rights that would exist if any Member, like Guatemala in this case, were to turn to the DSB whenever it is dissatisfied with the results achieved through bilateral negotiations conducted in accordance with the requirements of the multilateral system itself.

1.2. The bringing of this case is motivated simply by failure at the bilateral negotiating table. After the signing of the FTA, which provides that "Peru may maintain its Price Band System", the changes in international sugar prices resulted in the CIF reference price for sugar falling below the floor price of the price band. It was this market trend, and not any change in tariff policy as such or in the manner in which specific duties are calculated, which led to the imposition of a specific duty on consignments of sugar to Peru, including consignments from Guatemala. Bowing to pressure from its sugar sector, Guatemala initiated this procedure with the aim of "dismantling" the same PBS that it had expressly and unreservedly accepted in the Peru-Guatemala FTA. This underlying motive is clear not only from the fact that the sugar sector's dissatisfaction with the Peru-Guatemala FTA negotiation is public knowledge, but also from the distortion of the relevant facts by Guatemala and the weakness of its legal arguments.

1.3. In any event, Guatemala's claims must be rejected in their entirety because: (i) Guatemala initiated these proceedings in a manner contrary to good faith, which is a binding and enforceable requirement of the DSU, (ii) the measure at issue is an ordinary customs duty bound in the Uruguay Round, and (iii) in any case, the measure is not similar to the measures specified in the footnote to Article 4.2 of the Agreement on Agriculture.

1.4. Guatemala has not initiated these proceedings in good faith, as required by Articles 3.7 and 3.10 of the DSU, and in this connection the following points need to be taken into account:

- In seeking to dismantle the PBS after having explicitly agreed and accepted in the FTA that "***Peru may maintain its [PBS]***" and that ***the FTA*** "***shall prevail to the extent of any inconsistency*** *[with the WTO Agreement]*", Guatemala clearly demonstrates its lack of good faith.

- The Panel is obliged by its terms of reference to reject claims not made in good faith and thus to maintain the integrity of the DSB.

- Articles 3.7 and 3.10 of the DSU and Article 18 of the Vienna Convention on the Law of Treaties make it clear that it is not necessary for the FTA to have entered into force since Guatemala has signed and ratified the FTA, which expressly provides that Peru may maintain the PBS.

- Nor does good faith require that Guatemala should have expressly undertaken not to engage in a procedure related to the PBS. This is an element of estoppel and not of good faith.

1.5. The specific duties resulting from the administration of the PBS are ordinary customs duties that have been in existence since 1991 and are fully consistent with Peru's international trade commitments. Consequently, they are not in breach of Article II of the GATT 1994 or Article 4.2 of the Agreement on Agriculture:

- The specific duties are ordinary customs duties because they have all of the characteristics peculiar to such duties. As such, they were bound by Peru during the Uruguay Round.

- The specific duties have existed since 1991, beginning with Supreme Decree No. 016-91-AG.

- They are customs tariffs under Peruvian legislation, having been introduced in 1991 by Decree Law No. 26140.

- Given that Peru correctly recorded these duties in its schedule of commitments as ordinary customs duties within the meaning of Article II of the GATT 1994, the provisions of the Agreement on Agriculture invoked by Guatemala are not even applicable under the terms of the Agreement.

1.6. Notwithstanding the foregoing, if Article 4.2 of the Agreement on Agriculture is deemed to be applicable, the specific duties are not similar to the measures listed in the footnote to that article. Nor have the specific duties been applied in excess of the "other duties or charges" applied in 1994 in accordance with Article II(b) of the GATT 1994:

- Even on the contested assumption that the specific duties that may result from Peru's PBS are not ordinary customs duties, it is wrong to assume that there is any violation of Article 4.2 of the Agreement on Agriculture.

- The specific duties that may result from the PBS are not minimum import prices or variable import levies, nor measures sufficiently similar thereto.

- The specific duties resulting from the PBS are predictable and transparent, do not constitute a minimum or *target* price and do not isolate the local market from the international market.

- Although the duties vary, they do so in a reasonable and non-automatic manner. Moreover, variability is not a characteristic sufficient to establish the specific duties as one of the measures listed in the footnote to Article 4.2 of the Agreement on Agriculture.

- Furthermore, and even if it were determined that the specific duties are not ordinary customs duties, the specific duties are not in excess of the "other duties or charges" imposed on the date of the GATT 1994, in accordance with Article II(b).

1.7. The specific duties are applied reasonably, they have a legal basis and all their essential elements are published in accordance with Articles X:1 and X:3(a) of the GATT 1994:

- Far from identifying essential elements that have not been published, Guatemala has referred to justifications concerning specific aspects of the calculation which it would have preferred to be made aware of, but which Peru has no obligation whatsoever to provide.

- Likewise, far from identifying any lack of reasonableness in the administration of the measure, Guatemala has referred to alleged anomalies which are in fact totally reasonable measures that fall within Peru's discretionary powers.

1.8. Consequently, and as is explained in more detail below, all of Guatemala's claims must be rejected since, in the first place, Guatemala has not complied with the DSU's requirement of good faith, which carries the procedural implication that its claims are inadmissible; and secondly because the specific duties at issue, as well as the PBS used to calculate them, are fully compatible with Peru's WTO obligations.

2 THE PERU-GUATEMALA FTA IS RELEVANT FOR THE CORRECT DETERMINATION OF THE DISPUTE

2.1. Guatemala continues arguing, erroneously, that the Peru-Guatemala FTA is irrelevant. Guatemala's position is untenable. The Peru-Guatemala FTA is an agreement between two sovereign States, which was negotiated under Article XXIV of the GATT 1994, that is, in the framework of the World Trade Organization; moreover, it is the result of months of negotiation, specifically including negotiation on the measure at issue in this dispute; and it expressly recognizes that the specific duties resulting from the application of the PBS are in the nature of tariffs. Furthermore, the FTA explicitly indicates Guatemala's commitment with regard to Peru being allowed to maintain the PBS, and it also provides that the FTA shall prevail to the extent of any inconsistency between it and the WTO Agreements. It is therefore illogical to claim that the agreement is not relevant for the proper determination of this dispute. Guatemala itself asserts, in response to question No. 91, that it "does not consider that the Panel is precluded from assessing the content of the FTA as a factual matter and from issuing factual findings in that respect".[1]

2.2. The Peru-Guatemala FTA has factual, procedural and substantive implications. The factual circumstances of its negotiation, and the acceptance of the PBS by Guatemala, show that the latter considered and recognized the specific duties resulting from application of the PBS as being essentially tariff-based. Inasmuch as Guatemala has agreed and explicitly accepted in the FTA that Peru may maintain its PBS, and is now seeking to override and dismantle that provision, its actions are procedurally inconsistent with the requirement of engaging in a DSU procedure in good faith, for which reason its claims must be rejected *in limine* given the absence of that admissibility requirement.

2.3. In substantive terms, Peru does not believe that there is any inconsistency whatsoever between the WTO Agreements and the specific duties that may result from the PBS. However, on the assumption that Guatemala is correct, which Peru denies, this would signify an inconsistency between the provisions of the FTA and those of the WTO Agreements in relation to the measure at issue, insofar as both parties agreed in the FTA that the latter would prevail. Accordingly, in the event of a finding of inconsistency and a recommendation that the PBS be eliminated, Peru and Guatemala would have modified their mutual WTO rights and obligations by establishing in the FTA that the PBS can be maintained.

2.1 The Panel's terms of reference require consideration to be given to the Peru-Guatemala FTA

2.4. Article 11 of the DSU provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case". Contrary to what is claimed by Guatemala[2], Peru is not proposing that the Panel "analyse whether Guatemala has breached the provisions of the Free Trade Agreement or whether an inconsistency exists between that Agreement and the WTO Agreements". Peru's position is that the Panel must analyse the case in the light of the covered agreements listed in the DSU and the DSU itself, in order to determine whether there is any inconsistency between the duties that may result from the PBS and the WTO Agreements. In this context, Peru considers that the negotiation, adoption and signing of the Peru-Guatemala FTA, and in the case of Guatemala, the expression of consent, are objective facts which have legal implications for this analysis. Even now, Guatemala agrees that the Panel may assess the content of the FTA as a factual matter.[3] We do not ask and we do not consider it necessary that the Panel determine whether Guatemala has failed to comply with the Peru-Guatemala FTA.

2.5. In this regard, it is irrelevant whether the Peru-Guatemala FTA is an agreement covered by Appendix 1 of the DSU, as Guatemala argues.[4] Peru is not asking that the Panel rule on a dispute outside the scope of the WTO, but that it determine that the present case has not been properly instituted.

[1] Guatemala's response to Panel question No. 91, para. 15.
[2] Guatemala's response to Panel question No. 21, para. 34.
[3] Guatemala's response to Panel question No. 91, para. 15.
[4] Guatemala's response to Panel question No. 21, para. 34.

2.6. Peru considers that Articles 3.7 and 3.10 of the DSU in themselves establish a good faith requirement for initiating proceedings. The objective facts of what was agreed by Guatemala in the FTA with Peru are relevant for demonstrating its lack of good faith which, as has been indicated, is a requirement for initiating proceedings in the DSU framework. Guatemala's argument[5] that the Peru-Guatemala FTA has not been accepted by all Members is therefore irrelevant. What is at issue in this case is how the parties have behaved between themselves.

2.2 Guatemala is mistaken in denying the objective facts

2.7. The text of paragraph 9 of Annex 2.3 of the Peru-Guatemala FTA is clear: "**Peru may maintain its [PBS]**", with no qualifications, conditions or reservations. Guatemala, on the other hand, seeks to identify non-existent reservations through confused and erroneous arguments.[6][7]

2.8. In fact, Guatemala vainly seeks a tacit reservation in Article 1.3.1 and ignores Article 1.3.2 which stipulates that "[i]n the event of any inconsistency between this Treaty and [the WTO Agreement], this Treaty shall prevail to the extent of the inconsistency". Peru and Guatemala confirmed their WTO rights and obligations, and recognized that there could be inconsistencies and that, if there were, the Peru-Guatemala FTA would prevail.

2.9. However, Guatemala seeks to use Article 1.3.1 in order to identify an alleged reservation implicit in paragraph 9 of Annex 2.3 which would invalidate the content of what was negotiated and agreed by the two countries. Given that, in fact, the WTO Agreements do not prohibit Peru from maintaining the PBS, as Peru has demonstrated, such an alleged reservation would be of no added value. On the other hand, if the WTO Agreements prohibited the PBS, according to the argument made by Guatemala, Peru could **not** maintain the PBS, making paragraph 9 of Annex 2.3 meaningless.

2.10. It must also be borne in mind that the Peru-Guatemala FTA is a bilateral treaty which, by its very nature, cannot be subject to reservations. However, in addition to the above and at the request of Guatemala itself, Article 19.4 was included in the FTA, which reads: "This Treaty shall not be subject to reservations or unilateral interpretative declarations".

2.11. Guatemala is wrong in alleging in this case that "the FTA contains no provisions indicating that Guatemala recognized the Price Band System as consistent with WTO rules".[8] Guatemala did recognize the consistency of the PBS with WTO rules. While it is true that the text of the Peru-Guatemala FTA does not refer expressly to the WTO consistency of the PBS, it is also true that it is not necessary for it to do so on account of the aforementioned provisions of Article 19.4 of the FTA, and because such recognition would be highly unorthodox. For example, the Peru-Guatemala FTA also contains no express recognition that *ad valorem* duties are WTO-consistent.

2.12. Guatemala's actions and its signing of the FTA do imply a tacit recognition of the WTO consistency of the PBS. Not only did Guatemala agree that "Peru may maintain" the PBS, but its actions demonstrate an implicit acknowledgement that the specific duties that might result from the PBS were ordinary customs duties when considered as a common and current tariff.[9]

2.13. Guatemala was under an obligation to understand what it signed, and the evidence shows that Guatemala did consider the implications of the PBS for its sugar sector, seeking a tariff quota that would enable it to export a limited quantity of sugar "duty free, including the Price Band

[5] Guatemala's response to Panel question No. 21, para. 35.
[6] Guatemala's response to Panel question No. 25, para. 49.
[7] Ibid. para. 51. See also Guatemala's first executive summary, para. 4.5.
[8] Guatemala's first executive summary, para. 4.6; Guatemala's opening statement at the first meeting of the Panel, para. 83.
[9] In this connection, it should be emphasized that the Parties considered the PBS in the context of Annex 2.3 ("Tariff Elimination Programme"): according to Article 2.3.2 of the "Tariff Elimination" section, "unless otherwise provided in this Treaty, each Party shall eliminate its customs tariffs on goods originating from the other party, in accordance with Annex 2.3". The PBS was negotiated in the context of the General Negotiating Framework which provided that "the entire tariff universe shall be subject to negotiation" [Guatemala's first executive summary, para. 4.6; Guatemala's opening statement at the first meeting of the Panel, para. 83]. Guatemala's proposal of 3 May 2011 referred to a limited tariff quota "duty free, **including** price band" [Guatemala's proposal on sugar, dated 3 May 2011, Exhibit PER-66].

System".[10] Moreover, Guatemala's actions are made more contradictory by the fact that it has continued with its internal procedures to bring the FTA into force, including the decree issued as a matter of national urgency by the Guatemalan Congress, which approved ratification of the treaty.

2.14. Guatemala could not expect the PBS to disappear. Guatemala has argued that the Peruvian authorities stated during the negotiation of the Peru-Guatemala FTA and in the context of bilateral consultations that the PBS would possibly be eliminated.[11] Although Peru has already denied Guatemala's assertion[12], it is important to emphasize that Guatemala admits that it has no evidence at all to substantiate its allegation.[13]

2.3 Guatemala cannot institute proceedings contrary to good faith

2.15. Good faith is a principle of cardinal importance in relations between sovereign States. It is a governing principle of public international law, including in the WTO multilateral framework. Contrary to what is argued by Guatemala, (i) good faith is a requirement enshrined in Articles 3.7 and 3.10 of the DSU, (ii) no express waiver is required to act contrary to good faith, and (iii) it is irrelevant that the Peru–Guatemala FTA has not entered into force.

2.16. Articles 3.7 and 3.10 of the DSU establish a binding and enforceable obligation. Guatemala does not deny, because it cannot deny, that Articles 3.7 and 3.10 of the DSU require proceedings to be instituted in good faith. Nevertheless, Guatemala argues incorrectly that this requirement is one of "self-regulation"[14], which is inconsistent with the text of the DSU, the case law and common sense.

2.17. The lack of good faith has consequences in the WTO context. It is clear from the peremptory language used by the Appellate Body and panels that the good faith requirement is binding and enforceable.[15]

2.18. The Panel cannot accept the good faith requirement as being one of self-regulation, since this would mean that, if there is found to be a lack of good faith, the Panel cannot do anything about it. The Panel is under an obligation to prevent claims from proceeding that do not meet the requirement of being lodged in good faith. Fortunately for the integrity of the dispute settlement system, Guatemala's argument is baseless.

2.19. The only support found by Guatemala are citations taken out of context with regard to Article 3.7 of the DSU, none of which limits the power of the Panel in regard to Peru's objections. This is made clear by the *Mexico – Corn Syrup* case, where the Appellate Body indicated that, pursuant to Article 3.7 of the DSU, "Members **should** have recourse to WTO dispute settlement in good faith".[16] In that case, the responding party had not "explicitly" formulated its objections, for which reason the Appellate Body indicated that "the Panel was not obliged to consider this issue on its own motion".[17] Since in the present case Peru has in fact explicitly formulated objections to the admissibility of Guatemala's claims, the Panel is obliged to examine them.

2.20. Articles 3.7 and 3.10 of the DSU do not require an explicit waiver. According to Guatemala "Peru is invoking the estoppel principle in support of its request".[18] This is incorrect. Although the principle of estoppel is also related to the principle of good faith in international law, Peru considers that, in the WTO framework, it is only necessary to refer to the obligations contained in Articles 3.7 and 3.10 of the DSU.

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[10] Guatemala's proposal on sugar, dated 3 May 2011, Exhibit PER-66.
[11] Guatemala's response to Panel question No. 33, paras. 71-75.
[12] Peru's response to Panel question No. 34, paras. 77-78.
[13] Guatemala's response to Panel question No. 33, para. 72.
[14] Guatemala's oral statement at the first meeting; see also Guatemala's response to Panel question No. 96.
[15] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 312: Appellate Body Report, *US - FSC*, para. 166: Appellate Body Report, *Canada – Continued Suspension*, para. 313; Panel Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 89; Panel Report, *US – Upland Cotton*, para. 7.67.
[16] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 73.
[17] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74.
[18] Guatemala's first executive summary, paras. 4.2-4.4.

2.21. Guatemala has argued that "the applicable legal standard for a finding of lack of good faith under Article 3.10 of the DSU consists in examining whether the complaining party has clearly stated that it would not take legal action with respect to a certain measure".[19] Therefore, Guatemala concludes that the FTA is irrelevant since "there is no clear statement in the Free Trade Agreement that Guatemala would not take legal action with respect to the measure at issue".[20]

2.22. Contrary to what is claimed by Guatemala[21], no such limit to the scope of Article 3.10 of the DSU is revealed by the *EC – Bananas III* case. Guatemala omits to mention that, in that case, the Appellate Body ruled specifically on an estoppel argument made by the European Communities, which indicated that the Understanding on Bananas contained an express waiver of the right to initiate Article 21.5 proceedings.[22] Although the requirement of an express waiver is part of the legal standard applicable to the estoppel principle, nothing in the *EC – Bananas III* case suggests that the normative content of Article 3.10 of the DSU is identical to the requirements of the estoppel principle, a principle whose application in the WTO context has been marked by controversy. In fact, there could be various ways of engaging in a procedure in bad faith[23]; what matters is that they are all prohibited.

2.23. It is irrelevant that the Peru-Guatemala FTA has not entered into force. According to Guatemala, "the fact that the Free Trade Agreement has not entered into force strengthens even further the argument that this Agreement cannot be used, for instance, to interpret the Marrakesh Agreement".[24]

2.24. As a matter of fact, a Member may act in bad faith by engaging in a procedure under the DSU without having to have signed a treaty. This is obvious, since good faith is a condition of inter-State relations, with or without the entry into force of a treaty. As has been explained by Peru[25], although the Peru-Guatemala FTA has not entered into force, this does not detract from the fact that Guatemala is obliged not to act contrary to its object and purpose. As long as the Peru-Guatemala FTA has been adopted and ratified by both States and as long as there has been no expression by either of them of the wish not to be party to the FTA, Article 18 of the Vienna Convention remains applicable as an expression of the principle of good faith.

2.4 Guatemala and Peru are alleged to have modified their mutual WTO rights and obligations

2.25. Peru and Guatemala agreed as follows in Article 1.3.2 of the Peru-Guatemala FTA: "[i]n the event of any inconsistency between this Treaty and [the WTO Agreement], this Treaty shall prevail to the extent of the inconsistency, unless otherwise provided in this Treaty".

2.26. Peru does not consider that there is any inconsistency between the Peru-Guatemala FTA and any provision of the WTO Agreements. Contrary to what is claimed by Guatemala, (i) the Peru-Guatemala FTA can in fact be a vehicle for Peru and Guatemala to modify their mutual rights and obligations, and (ii) such modification could take place if it were determined that the PBS is not permitted by the WTO Agreements, as Guatemala argues.

2.27. Free trade agreements may be vehicles for the modification of substantive rights and obligations between the parties thereto. As regards the Peru-Guatemala FTA, Guatemala maintains that the covered agreements can only be modified through the procedures established in Article X of the Marrakesh Agreement.[26] This is not the case. Having recognized the desirability of enhancing freedom of trade through free trade agreements[27], Members agreed, under Article XXIV of the GATT 1994, to permit free trade areas, on the condition, *inter alia*, that the customs duties

[19] Guatemala's response to Panel question No. 29, para. 66.
[20] Guatemala's response to Panel question No. 21, paras. 36-39.
[21] Guatemala's response to Panel question No. 29, para. 66.
[22] Appellate Body Reports, *EC – Bananas III* (*Article 21.5 – Ecuador II*)/*EC – Bananas III* (*Article 21.5 - US*), para. 228.
[23] For example, it is conceivable that a Member would act in bad faith if it instituted proceedings with the intention of causing injury to another Member or affecting its rights.
[24] Guatemala's response to Panel question No. 22, para. 41.
[25] Peru's response to Panel question No. 22, paras. 34-35.
[26] Guatemala's response to Panel question No. 21, para. 35: see also Guatemala's first executive summary, para. 4.7.
[27] See the GATT 1994, Article XXIV, para. 4.

should not be higher than those applicable, prior to the date of the agreement, to the contracting parties not parties to that agreement.[28]

2.28. Furthermore, Article XXIV of the GATT 1994 refers explicitly to certain rights and obligations in the multilateral context that would **not** be affected by an agreement under the Article in question.[29]

2.29. By clarifying that there are certain rights and obligations that will not be affected by the terms of an agreement under Article XXIV, the same text makes clear what is obvious to Peru: a bilateral agreement under Article XXIV *can* affect the way in which WTO rights and obligations apply among Members that have taken the decision to enter into a special relationship. This is fully consistent with Article 41 of the Vienna Convention, which recognizes that two parties to a multilateral treaty may modify the treaty only between themselves.

2.30. Moreover, in *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 - EU)*, the Appellate Body acknowledged that the parties may modify rights and obligations under the WTO Agreements by means of express or tacit waivers, either explicitly or by necessary implication. Although in that case consideration was given to the waiver of a procedural right contained in the DSU, there are no grounds for maintaining that Members may not waive substantive rights.

2.31. Guatemala considers that the PBS is inconsistent with the WTO Agreements, and wants to have it dismantled. If Guatemala's position is accepted, there would be an inconsistency between the Peru–Guatemala FTC and the WTO Agreements, since the former allows Peru to maintain the PBS, while the latter prohibit the PBS. In the face of such inconsistency, the Peru-Guatemala FTA takes precedence, in accordance with the terms agreed by the parties in Article 1.3.2 thereof, and this results in the modification of any of the provisions of the WTO Agreements which *would have* prohibited the PBS, according to Guatemala's argument, either through Article II:1(b) of the GATT 1994 or Article 4.2 of the Agreement on Agriculture.

2.32. The Panel in *Indonesia – Autos* explained that "[t]echnically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously".[30] That is precisely the situation that would obtain if it were considered that the WTO Agreements prohibit the PBS, since it would not be possible for Peru to "maintain" the PBS in accordance with the terms of paragraph 9 of Annex 2.3 of the FTA.

2.33. The way in which the Panel decides this case could have implications for all of Peru's trade agreements, as well as for hundreds of other agreements between other WTO Members. Multilateral and bilateral agreements play a complementary role in achieving the same objective of opening up and liberalizing international trade. This obviously means that, in the case of a bilateral agreement, the parties will negotiate terms that may modify their mutual rights and obligations with respect to rights and obligations in the international framework. This is normal for an agreement under Article XXIV of the GATT 1994, as it would make no sense for the terms to be identical, even though consistent.

2.34. The novelty in this case is that the parties agreed that the terms of the bilateral agreement would prevail over any inconsistency with the multilateral agreement. The parties were not bound to include that provision, but they clearly did so. In the circumstances, to allow one party that is not satisfied with what it achieved through bilateral negotiations to have recourse to the WTO in order to request something that runs counter to what was agreed bilaterally, undermines both the WTO system and the basic principles of international law, since it constitutes an open abuse of right which cannot be permitted.

[28] See the GATT 1994, Article XXIV, para. 5(b).
[29] Ibid. para. 9.
[30] Panel Report, *Indonesia – Autos*, footnote 649.

3 THE SPECIFIC DUTIES ARE CONSISTENT WITH ARTICLE II:1(B) OF THE GATT 1994 AND ARE NOT PROHIBITED BY ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

3.1. The specific duties are ordinary customs duties within the meaning of the first sentence of Article II:1(b) of the GATT 1994. Consequently, they are not in breach of Article II:1(b) of the GATT 1994, nor are they prohibited by Article 4.2 of the Agreement on Agriculture. The main facts of relevance to this determination that should be found by the Panel are the following:

- The specific duties are ordinary customs duties.
- The specific duties have existed since 1991.
- The specific duties formed part of Peru's commitments during the Uruguay Round.
- The specific duties are tariffs under the Peruvian regulations.

3.2. Even if it were determined that the specific duties are not ordinary customs duties, which Peru denies, they are not in breach of Article II:1(b), second sentence, of the GATT 1994, nor are they measures prohibited by Article 4.2 of the Agreement on Agriculture.

3.3. Peru considers that the order of analysis suggested by Guatemala is incorrect. It is a matter of general agreement that, if Peru has properly bound the measure in accordance with the first sentence of Article II:1(b), Article 4.2 of the Agreement on Agriculture is not applicable. For this reason, Peru considers that the natural order of analysis is that the Panel should begin with an analysis of whether or not the specific duties are ordinary customs duties within the meaning of the first sentence of Article II:1(b). Peru has demonstrated that the specific duties existed at the time when it bound its commitments under Article II, and that it duly recorded those duties as ordinary customs duties.

3.1 The specific duties are ordinary customs duties within the meaning of the first sentence of Article II of the GATT 1994

3.4. Peru has demonstrated that the specific duties are ordinary customs duties as they have the characteristics peculiar to the latter. Peru never asserted that these characteristics, individually, were exclusive characteristics of ordinary customs duties. However, it is significant that a customs duty should have all these characteristics and that the Member concerned recorded them as ordinary customs duties at the time of assuming obligations in the context of the Uruguay Round. The question that the Panel should ask itself is: why is this measure not an ordinary customs duty, despite possessing all these characteristics and despite the form in which it was bound by Peru during the Uruguay Round?

3.5. As Peru has demonstrated, and as Guatemala itself admits[31], the measures in question are specific duties applicable to imports of certain agricultural products. These duties date from 1991, having been introduced by Supreme Decree No. 016-91-AG.[32] Apart from differences in terminology that are irrelevant to the design, architecture and scope of the measure, the only characteristics indicated by Guatemala as having been introduced by Supreme Decree No. 115-2001-EF are the change from FOB prices to CIF prices and the introduction of the ceiling price. In fact, Supreme Decree No. 115-2001-EF made no significant changes such as to alter the essential features of the measure. Although the PBS, as such, dates from 2001, it is no more than a refinement of the pre-existing system, as is clear from Supreme Decree No. 115-2001-EF itself.[33]

[31] Guatemala's response to Panel question No. 41, para. 86.
[32] Supreme Decree No. 016-91-AG, Exhibit PER-22.
[33] Supreme Decree No. 115-2001-EF, Exhibit GTM-4, preambular part ("following review and evaluation of the above-mentioned [1991] system, it was deemed necessary to refine it and bring it into line with the needs of national agriculture, so as to enable domestic producers to plan their investments under conditions of reduced uncertainty").

3.6. Guatemala considers that the specific duties could not form part of Peru's commitments.[34] It is clear that the (*ad valorem* and specific) duties applicable to agricultural products were bound by Peru in the Uruguay Round, since a higher tariff ceiling was established solely for these products, as was notified by Peru to the Chairman of the Negotiating Group on Market Access.[35] In fact, Peru's final Schedule XXXV establishes the maximum rate of 30% for the entire tariff universe, with the sole exception of products subject to specific duties, which were bound as ordinary customs duties with a tariff ceiling of 68%.[36] This was accepted by Peru's main trading partners.[37]

3.7. As Peru has demonstrated, both the specific duties and the *ad valorem* duties are ordinary customs duties in accordance with the Peruvian regulations.[38] Moreover, the fact that both types of duty are tariff measures was made explicitly clear by Decree Law No. 26140[39], which is consistent with the fact that, prior to the Uruguay Round, Peru had already prohibited and eliminated all non-tariff measures.[40] Guatemala failed to meet the very high burden of proof needed to establish that a sovereign State is interpreting its own legislation incorrectly. In its first written submission, Guatemala identifies 10 allegedly relevant factors in order to affirm that the specific duty is different from an ordinary customs duty.[41] Guatemala is mistaken about all of these 10 factors.[42]

3.2 Even if the Panel were to determine that the specific duties are not ordinary customs duties, they would not be in breach of Article II of the GATT 1994

3.8. Even on the contested assumption that the specific duties that may result from Peru's PBS are not ordinary customs duties, it is not correct to assume that there is an automatic breach of the second sentence of Article II:1(b) of the GATT 1994. In this connection, Guatemala identifies three requirements for finding that a duty is consistent with the second sentence of Article II:1(b): "(a) the duty or charge, or the mandatory legislation under which it is to be applied, must have existed at 15 April 1994; (b) it may not exceed the level of the duty or charge applied on 15 April 1994; and (c) it must have been recorded in the Schedule of Concessions of the importing Member".[43] Guatemala was unable to demonstrate that even one of these requirements has not been met in the instant case.

3.3 Even if the Panel were to determine that the specific duties are not ordinary customs duties, they would not be the same as or sufficiently similar to the measures referred to in the footnote to Article 4.2 of the Agreement on Agriculture

3.9. The measure at issue does not constitute a minimum import price or variable import levy, or a measure similar to either of these:

- Minimum import prices and variable import levies, or measures similar thereto, are characterized by determining the charge on the base of a minimum import price, or target price, thereby preventing products from entering the domestic market of a Member at a lower price.[44]

[34] Guatemala's first executive summary, para. 3.25; Guatemala's opening statement at the first meeting of the Panel, para. 63.
[35] Communication from Peru to the Chairman of the Negotiating Group on Market Access, dated 14 December 1993, Exhibit PER-15.
[36] Schedule XXXV - Peru, Uruguay Round, 15 April 1994, Exhibit PER-18.
[37] Peru - Establishment of a New Schedule XXXV, L/7471, 7 June 1994, Exhibit PER-17.
[38] Ministry of the Economy and Finance, *Definiciones*, Exhibit PER-6.
[39] Decree Law No. 26140, Exhibit PER-53, Article 1.
[40] See Supreme Decree No. 60-91-EF, Exhibit PER-10; Legislative Decree No. 668, Exhibit PER-11; Decree Law No. 25988, Exhibit PER-12.
[41] Guatemala's first written submission, para. 4.125.
[42] See Peru's second written submission, para. 3.32.
[43] Guatemala's first executive summary, para. 3.24.
[44] Peru's first written submission, para. 5.59.

- As Peru has demonstrated, the specific duties that may result from the PBS do not share this characteristic: the measure is neither fitted nor intended to arrive at a target price, a concept that does not even exist in the PBS.[45]

- In the PBS, the reference price is independent of actual transaction prices, and any convergence is purely coincidental.

- In practice, Peru has shown actual cases where products enter at transaction prices lower than the floor price and the reference price.[46] This is precisely the demonstration that Chile was unable to make in *Chile – Price Band System*.[47]

3.10. The measure at issue does not constitute a variable import levy or similar measure. Guatemala identified three criteria that a measure must meet in order to be a variable import levy: "variability", "lack of transparency and lack of predictability" and "distortion of import prices".[48] Guatemala focused its arguments on variability, assuming that this element is sufficient for the measure to be considered similar to those listed in the footnote to Article 4.2. In fact, variability is not *per se* a characteristic sufficient for a measure to be prohibited and, in any case, none of the aforementioned criteria is manifest in the specific duties.

3.11. The specific duties do not exhibit automatic and/or inherent variability:

- First, as agreed by the Parties, the specific measure challenged by Guatemala and which the Panel has to consider is the specific duty itself, not the PBS or other calculation mechanisms. It is an undeniable fact that, for much of its existence, the specific duty applied to each product has not varied, having been maintained at zero.[49]

- Second, even if consideration is given to the constituent elements of the PBS, the latter do not operate automatically, but different organs of the Peruvian State have to take certain administrative steps in order for the reference prices and updated customs tables to be published, and this is followed by administrative measures such as supreme decrees and vice-ministerial resolutions. Without such steps and administrative measures, the duties could not be established.

3.12. The specific duties are sufficiently transparent and predictable.

- Lack of transparency and predictability is an additional characteristic independent of variability, although Guatemala seeks to lump the two together.[50] It cannot be assumed that, because a measure is variable, it is also associated with a lack of transparency or predictability, as is asserted by Guatemala.

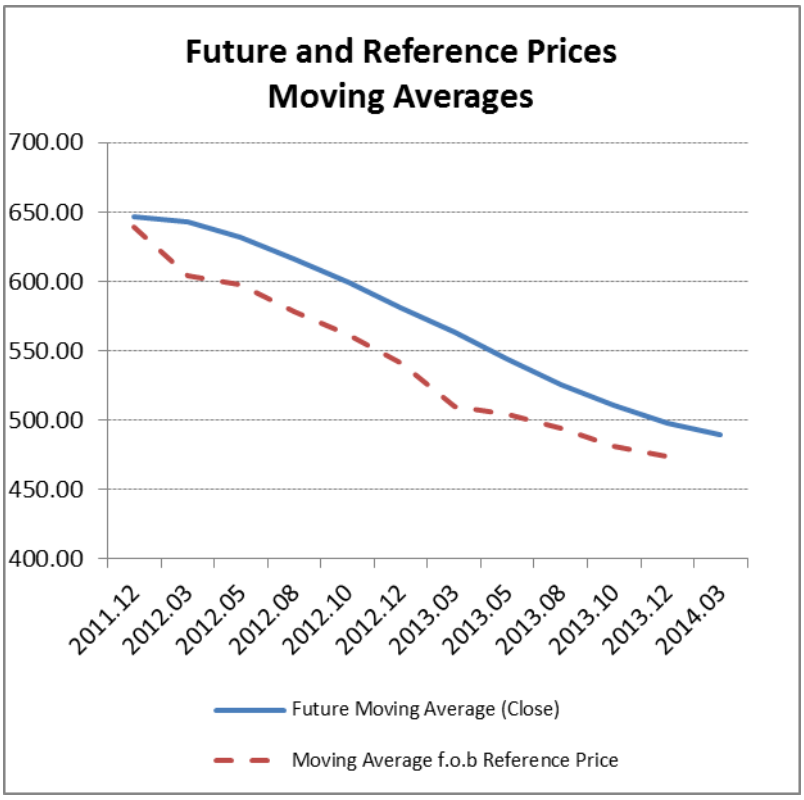
- Peru has easily demonstrated that its measure is transparent and predictable, on the basis of real facts. Operators not only know that the compound duty will never exceed the bound rate, but the specific duties themselves are published in the customs tables, the reference prices are published periodically and all the essential elements for their calculation are available in hard copy publications of normative instruments and on the web pages of Peru.[51]

- Moreover, since the calculation methodology and information sources are accessible to the public, traders can reasonably predict specific duties with a high degree of certainty.

[45] Ibid. para. 5.61; Peru's opening statement at the first meeting of the Panel, para. 41.
[46] Peru's first written submission, paras. 5.61-5.68; Peru's response to Panel question No. 123.
[47] See Panel Report, *Chile – Price Band System*, para. 6.20 (where it was recalled "that Chile did not respond to part (b) of question 46 of the Panel, which specifically requested: 'in this connection, have goods entered the Chilean market at prices below the lower level end of price band? If so, please identify as many instances as possible, and provide supporting documentation'").
[48] Guatemala's first written submission, paras. 4.17-4.21; Guatemala's first executive summary, paras. 3.4-3.7.
[49] See Peru's first written submission, Charts 2-5.
[50] Appellate Body Report, *Chile – Price Band System*, para. 234.
[51] See Examples of information available on the SUNAT website, Exhibit PER-44.

In addition, future prices are an element of estimation that can be used in conjunction with available historical data.

- The variation in "future" prices is a normal risk of trade, as is clearly shown by eight-month and two-year futures contracts introduced by Guatemala.



3.13. The specific duties do not isolate the Peruvian market.

- The duties that may result from the PBS do not have the "explicit purpose"[52] of insulating the Peruvian market from international trends.[53]

- It should be noted that every ordinary customs duty is a form of protection and thus in some way neutralizes international effects in relation to the local market. In other words, the distorting or insulating effect of variable import levies must be of a different or greater degree.

- Peru's objective is solely to cushion the impact of sharp fluctuations in prices (volatility) in the short term.

- The specific duties that are applied do not depend on a domestic or regulated price, as in the case of variable import duties. On the contrary, international prices are a key part of the calculation of the price band and reference prices.[54]

- Guatemala has sought to disparage Peru's demonstration of actual effects, calling it a trade effects test and criticizing different specific elements. In each place, Guatemala is mistaken.[55]

[52] See Examples of information available on the SUNAT website, Exhibit PER-44.
[53] Supreme Decree No. 155-2001-EF, Exhibit GTM-4, recitals.
[54] Guatemala's first executive summary, para. 3.13.
[55] Guatemala's response to Panel question No. 57. See also Peru's second written submission, para. 3.63.

3.14. The specific duties do not impose a target price.

- The target price is an important element of variable levies.
- This is apparent from the definitions of the term "variable levy", which refer to the "administered domestic price"[56] or "threshold price".[57]
- It was also apparent in *Chile – Price Band System*, where the Panel explained that "[v]ariable levies generally operate so as to prevent the entry of imports priced below the threshold or minimum entry price".[58]
- The Appellate Body also distinguished between variable import levies and minimum import prices, in terms of the way in which the target price is calculated.[59]
- Peru has shown that there is no target price, using specific examples where sugar from Guatemalan exporters has entered Peru at a price lower than the floor price of the PBS.

ACTUAL EXAMPLES

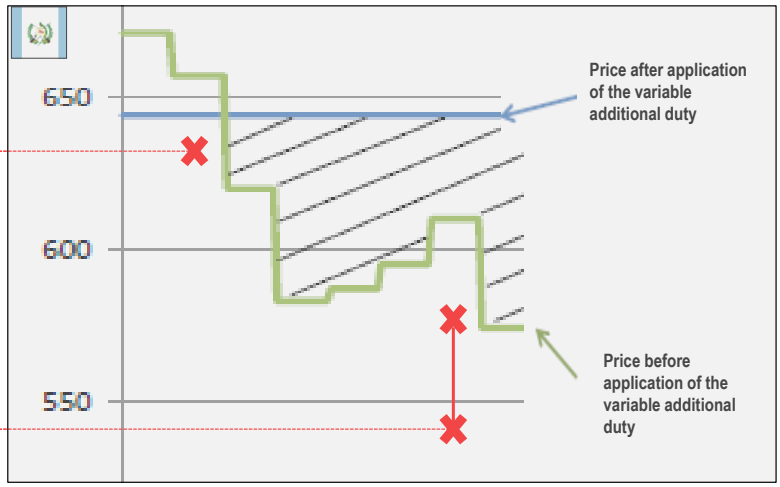
DUA (Single Customs Declaration) No. 354310 from Guatemala

- Price at Border: $640
- Duty: Ø
- TOTAL: $640

DUA (Single Customs Declaration) No.48732 from Guatemala

- Price at Border: $534
- Duty: $35
- TOTAL: $569

GUATEMALA'S CONCEPTUAL ERROR (GTM-31)



3.15. It is clear that the specific duties do not have the same characteristics as the measures referred to in the footnote to Article 4.2 of the Agreement on Agriculture.

4 GUATEMALA'S CLAIMS CONCERNING ARTICLE X OF THE GATT 1994 ARE BASED ON MISTAKEN NOTIONS ABOUT THE MEASURE AND THE ARTICLE ITSELF

4.1. The measure in question is the specific duty, not the Price Band System. The PBS is only a methodology developed for the calculation of the ordinary customs duties, and nothing more, and could even be dispensed with without altering the nature of the duty itself.

[56] Negotiating Group on Non-Tariff Measures, communication from Australia, MTN.GNG/NG2/W/24, Exhibit PER-48.
[57] Discussion paper on tariffication submitted by the United States, MTN.GNG/NG5/W/97, Exhibit PER-20.
[58] Panel Report, *Chile – Price Band System*, para. 7.36 (c).
[59] Appellate Body Report, *Chile – Price Band System*, paras. 236-237 (internal footnotes omitted).

4.1 The legal standard and the relationship between Articles X:1 and X:3 of the GATT 1994

4.2. Guatemala fails to take into account the fact that there is no publication requirement in respect of non-essential elements, and that the measure can perfectly well be applied in a uniform, impartial and reasonable manner without non-essential elements being published.

4.3. Guatemala's argument relating to Article X:1 repeatedly confuses the measure with the essential elements "leading to the … determination"[60] of the measure, and confuses the essential elements with the discretionary reasoning and the specific provisions in the text of the measure. Similarly, its argument concerning Article X:3(a) also confuses the manner in which the measure is applied with the discretionary reasoning and the specific provisions in the text of the measure.

4.4. In any event, the Executive possesses inherent constitutional and legal powers to exercise its functions with a degree of discretion in the administration of a tariff measure[61], provided that international commitments are met. There is no presumption that the exercise of such authority prevents the administration of the measure in a uniform, impartial and reasonable manner, and Guatemala presents no convincing evidence to the contrary.

4.2 Peru publishes every essential element of the measure in accordance with Article X:1 of the GATT 1994

4.5. Peru has published every "essential element" in accordance with Article X:1. Guatemala has not demonstrated the contrary. In its oral statement at the first substantive meeting, Guatemala said that the allegedly unpublished aspects could be essential elements "since they have a direct impact on the amount of the additional duty".[62] However, the aspects referred to by Guatemala have **no** impact on the magnitude of the duty and it is not necessary to justify the reasoning behind those aspects. Everything that has a direct impact on the measure is published, including:

- import costs of 3%, the content or basis of which is not an essential element of the specific duty, but the substantive background to the essential element;

- the amounts for freight and insurance, the calculation or basis of which is not an essential element of the specific duty, but a background detail concerning a component of the measure;

- international prices which form the basis for calculating the floor price and the reference price, which are not essential elements of the specific duty, but are background data on a component of the measure.

4.3 Peru administers the specific duty in a uniform, impartial, and reasonable manner, in accordance with Article X:3 of the GATT 1994.

4.6. With regard to the alleged anomalies which have no valid legal basis, Guatemala is wrong in assuming that, in exercising its inherent authority[63], a Member cannot act in a uniform, impartial and reasonable manner. Contrary to Guatemala's assumption, the requirements of Article X:3 do not affect the inherent authority of each Member to exercise its power of discretion within

[60] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.828.

[61] Panels and the Appellate Body have made it clear that, pursuant to Article X:3(a), Members have a degree of discretion to apply their laws and regulations as they deem fit and most appropriate to the circumstances of the case. Consequently, not all cases of "discretionary" application of a measure amount to administration in a manner that is not uniform, impartial and reasonable; provided that "certain minimum standards for transparency and procedural fairness" are complied with, there will be no violation of Article X:3(a). (See Panel Report *US – COOL*, para. 7.861; Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.874 and 7.925, Panel Report, *EC – Selected Customs Matters*, paras. 7.141 and 7.434; Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 202).

[62] Guatemala's opening statement at the first meeting of the Panel, para. 67. In the same paragraph, Guatemala states: "the case law has confirmed that the methodology for establishing any constituent element of a fiscal burden is an element that must be published", citing *Dominican Republic – Import and Sale of Cigarettes*. That case is different and hardly applicable to this case, since the unpublished element was a survey used to determine *the basis* for an *ad valorem* duty.

[63] See section 4.2 above.

international, and also national, limits. In the case of Peru, this inherent authority rests with the Executive through the Ministry of the Economy and Finance, which exercises the constitutional and legal authority to regulate tariffs.[64]

- The extension of the customs tables has a valid legal basis. The Executive (and the President of the Republic in particular) has the inherent authority to issue other supreme decrees modifying Supreme Decree No. 115-2001-EF, which in any case does not prohibit an extension. Moreover, extensions ensure the continuation of reasonable administration, in accordance with Article X:3(a) since they do not change the constituent elements of the PBS.

- The calculation of the price band for dairy products on the basis of reference price ranges has a valid legal basis in the same Supreme Decree No. 155-2001-EF, Annex VI of which clearly indicates the ranges[65], and in any case the fact that Annex III does not mention the range corresponding to the calculation for dairy products has no bearing on the application of the specific measure.

- The establishment of reference prices for dairy products at the same level for two consecutive two-week periods has a valid legal basis, since the marker products are published monthly, as established in the same Supreme Decree No. 115-2001-EF.[66] Therefore, it is entirely reasonable that Peru should only modify the level of the reference prices for dairy products at such intervals.

- The calculation of the specific duty for two different categories of rice has a valid legal basis, since the two categories of rice are included in the measure introduced in 1991[67], by means of Supreme Decree No. 144-93-EF, which was never repealed or replaced – a fact out borne out by the continued existence of the measure in question.

- The rounding method used to calculate the variable additional duty and the additional rebate is applied reasonably, impartially and uniformly among operators in similar situations. Peru has explained the facts and the method in detail, making it clear that there is no problem of rounding. The specific duties or tariff reductions derived from the difference between the reference price and the floor or ceiling price, respectively, are rounded in the normal, accepted way.

5 ERRORS IN THE ALTERNATIVE CLAIM UNDER THE CUSTOMS VALUATION AGREEMENT

5.1. Guatemala continues to argue erroneously that the measure in question is subject to the Customs Valuation Agreement, although it is a specific duty because, according to Guatemala, the duty in question "is *not* calculated on the basis of quantity, item or weight".[68] However, Peru's specific duty on products subject to the measure is based on metric tonnes – a quantity.[69] The Customs Valuation Agreement only applies where the basis is a value[70], which is not the situation in this case, and it is therefore impossible for the measure to be subject to the Customs Valuation Agreement.

6 CONCLUSION

6.1. For all of the forgoing reasons, the Republic of Peru respectfully requests that the Panel reject Guatemala's claims in their entirety.

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[64] See Peru's first written submission, section 3.1.
[65] Supreme Decree No. 155-2001-EF, Exhibit GTM-4 and Annex VI.
[66] Ibid. Annex IV.
[67] Supreme Decree No. 016-91-AG, Exhibit PER-22.
[68] Guatemala's first executive summary, para. 3.45.
[69] Supreme Decree No. 155-2001-EF, Exhibit GTM-4.
[70] See Peru's first written submission, para. 5.142 (citing Articles 1-3 and 5-7 of the Customs Valuation Agreement, each of which refers to a value).

ANNEX C

ARGUMENTS OF THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA

1. In this submission, Argentina will be referring to what it believes should be the interpretation of Article 4.2 of the Agreement on Agriculture, and not to the other complaints that form part of this dispute.

2. It is Argentina's understanding that, as stated by the Panel in *Chile – Price Band System* (case cited by Guatemala), "*Article 4.2 is of crucial importance in the context of the Agreement on Agriculture*" and is *"central to the establishment and protection of a fair and market-orientated agricultural trading system in the area of market access*"[1], as also reflected in the preamble to the Agreement on Agriculture.[2]

3. Argentina also concurs with the view that was expressed by the Appellate Body that " *… Article 4 of the Agreement on Agriculture is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products*."[3]

4. At the same time Argentina would like to point out that, as stated by Guatemala[4], in the cited case, *Chile – Price Band System*, the Appellate Body upheld the Panel's statement that Article 4.2 of the Agreement on Agriculture should be examined first, since it "*deals more specifically and in detail with measures affecting market access of agricultural products …*".[5] The Panel had stated the following: "*We note that Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 both use the phrase 'ordinary customs duties'. Provided this phrase has the same meaning in both provisions, neither provision can therefore be interpreted independently from the other. However, having regard to the above, we believe that Article 4.2 of the Agreement on Agriculture deals more specifically and in detail with measures affecting market access of agricultural products …*".[6]

5. In this same vein, the Appellate Body in the above case stated the following: "*It is clear, as a preliminary matter, that Article 4.2 of the Agreement on Agriculture applies specifically to agricultural products, whereas Article II:1(b) of the GATT applies generally to trade in all goods. Moreover, Article 21.1 of the Agreement on Agriculture provides, in relevant part, that the provisions of the GATT 1994 apply 'subject to the provisions' of the Agreement on Agriculture.*"[7]

6. On the basis of the above considerations, Argentina is of the view that given the importance of Article 4.2 of the Agreement on Agriculture, Members must be particularly careful to ensure compliance and enforcement and to avoid taking any measures that could restrict market access for agricultural products.

7. With respect to Article 4.2 of the Agreement on Agriculture, the Appellate Body stated the following: "*[W]e turn now to Article 4, which is the main provision of Part III of the Agreement on Agriculture. As its title indicates, Article 4 deals with 'Market Access'"… "During the course of the Uruguay Round, negotiators identified certain border measures which have in common that they restrict the volume or distort the price of imports of agricultural products. The negotiators decided that these border measures should be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. Thus, they envisioned that ordinary customs duties would, in principle, become the only form of border protection. As ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers, they are also more easily compared between trading partners, and thus the maximum amount of such duties can be*

[1] Panel Report, *Chile – Price Band System*, para. 7.15.
[2] Agreement on Agriculture, preamble, paragraph 2.
[3] Appellate Body Report, *Chile – Price Band System*, para. 201.
[4] First written submission of Guatemala, para. 4.2. See also original footnote 78.
[5] Appellate Body Report, *Chile – Price Band System*, para. 191.
[6] Panel Report, *Chile – Price Band System*, para. 7.16.
[7] Appellate Body Report, *Chile – Price Band System*, para. 186.

more easily reduced in future multilateral trade negotiations. The Uruguay Round negotiators agreed that market access would be improved-both in the short term and in the long term-through bindings and reductions of tariffs and minimum access requirements, which were to be recorded in Members' Schedules."[8]

8. Regarding the measure at issue in this dispute, Argentina agrees with the complainant that the variable additional duty is a measure that is "*clearly inconsistent with Article 4.2 of the Agreement on Agriculture, since it qualifies as a variable import levy, a minimum import price, or as a measure similar to a variable import levy and a measure similar to a minimum import price …*", all measures that are prohibited under Article 4.2 of the Agreement on Agriculture.[9]

9. As stated by the Appellate Body, "*the obligation in Article 4.2 not to 'maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties' applies from the date of the entry into force of the WTO Agreement - regardless of whether or not a Member converted any such measures into ordinary customs duties before the conclusion of the Uruguay Round. The mere fact that no trading partner of a Member singled out a specific 'measure of the kind' by the end of the Uruguay Round by requesting that it be converted into ordinary customs duties, does not mean that such a measure enjoys immunity from challenge in WTO dispute settlement. The obligation 'not [to] maintain' such measures underscores that Members must not continue to apply measures covered by Article 4.2 from the date of entry into force of the WTO Agreement.*"[10]

10. In the light of the above, the argument used by Peru in support of the WTO consistency of the PBS, namely that the PBS "*was part of Peru's tariff offer to its trading partners during the Uruguay Round*",[11] would appear to be invalid.

11. Regarding the similar system examined earlier on, the Appellate Body held that "*... the presence of a formula causing automatic and continuous variability of duties is a necessary, but by no means a sufficient, condition for a particular measure to be a 'variable import levy' within the meaning of footnote 1. 'Variable import levies' have additional features that undermine the object and purpose of Article 4, which is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. This lack of transparency and this lack of predictability are liable to restrict the volume of imports.*"[12] In this connection, we note that the Appellate Body referred to what Argentina had pointed out earlier, namely that "*an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be. This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.*"[13]

12. It is particularly important that in trade relations, transparency and predictability should prevail. In general terms, a price band system will lessen the transparency and predictability of trade.[14] Argentina therefore considers that price band systems like the one at issue in this dispute are contrary to the spirit of Article 4.2 of the Agreement on Agriculture and footnote 1 of that article.

13. Finally, Argentina will turn briefly to the Panel's question relating to the relevance of the Peru-Guatemala Free Trade Agreement (FTA) and Article 18 of the Vienna Convention on the Law of Treaties to this case. Although the signature of an FTA that has not yet entered into force would suggest that the agreement in question is not yet binding on the parties, under Article 18 of the Vienna Convention on the Law of Treaties, the parties are under obligation not to defeat the object and purpose of the treaty prior to its entry into force. In other words, under this provision,

[8] Appellate Body Report, *Chile – Price Band System*, para. 200.
[9] First written submission of Guatemala, paragraph 4.3.
[10] Appellate Body Report, *Chile – Price Band System*, para. 212.
[11] First written submission of Peru, para. 3.23, already cited earlier.
[12] *Chile – Price Band System*, Appellate Body Report, para. 234.
[13] *Chile – Price Band System*, Appellate Body Report, para. 234.
[14] We recall, in this connection, the Appellate Body's statement that " … the lack of transparency and the lack of predictability are inherent in how Chile's price bands are established …". Appellate Body Report, *Chile – Price Band System*, para. 247.

upon signing a treaty the signatory parties take on a "*good faith obligation to refrain from any acts directed against the object of the treaty*".[15]

14. It is Argentina's understanding that the purpose of an agreement of the FTA kind, including the one signed by the parties to this dispute, is to "improve market access conditions, while at the same time establishing clear rules and disciplines to promote trade in goods and services, and investment".[16] The FTA between Peru and Guatemala actually states in Article 1.2 that the objectives of the Agreement are essentially to stimulate expansion and diversification of trade between the Parties; to eliminate unnecessary obstacles to trade and facilitate cross-border trade in goods and services between the Parties; to promote conditions of free competition within the free trade area; to increase investment opportunities in the territories of the Parties; to provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory, taking account of the balance of rights and obligations arising therefrom; and to create effective procedures for the implementation and application of, and compliance with the Agreement, for its joint administration, and for the prevention and resolution of disputes.[17]

15. As Argentina has already pointed out in these proceedings, it considers that mechanisms of the PBS type, like the one at issue in this dispute, lessen the transparency and predictability of trade.[18] This lack of transparency would appear to be inconsistent with the spirit of cooperation and trade stimulation sought by agreements of the FTA type. We recall what Argentina said in connection with the *Chile – Price Band System* case:

> "*… What is certain is that the bands will have to go, and it is a good thing that the country should get used to the idea that it will not be able to continue living with price bands if it wants to join the major leagues of world free trade … The international free trade agreements are unequivocal about wanting to see bands abolished because they undoubtedly cause distortion*".[19]

16. In Argentina's view, the above considerations point to the conclusion that the quest for more open and fluid trade, free among other things from unnecessary obstacles, through the conclusion of a free trade agreement, should not encounter the kind of barriers produced by certain measures whose intrinsic characteristics tend to reduce transparency and predictability, and hence restrict trade.

[15] "El Derecho de los Tratados y la Convención de Viena de 1969" (La Ley, 1970), Ernesto De La Guardia and Marcelo Delpech, page 238.

[16] http://www.acuerdoscomerciales.gob.pe/index.php?option=com_content&view=category&layout=blog&id=125&Itemid=148.

[17] http://www.sice.oas.org/ctyindex/PER/PERagreements_e.asp. Organization of American States, Foreign Trade Information System.

[18] Third –Party Written Submission of Argentina, 20 December 2013, para. 17.

[19] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (WT/DS207), First written submission of Argentina, Section C - Arguments, page A-16.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL*

1. Brazil hereby presents its integrated executive summary, where it provides a brief description of the main points presented in its Third Participant Submission and Oral Statement.

(a) A charge limited to the bound tariff in a Member's Schedule of Commitments does not, in and of itself, make it consistent with WTO obligations

2. In Brazil's view, tarification is one of the foundations of the Agreement on Agriculture (AA). However, the concept of tarification is not restricted to the level of the tariffs. This means that the fact that a measure establishes a duty limited to the bound tariff in a Member's Schedule of Commitments is a necessary, but not a sufficient condition to establish consistency with WTO obligations.

3. In this sense, Brazil recalls what the Appellate Body (AB) stated in the Chile-Price Band System Dispute: the fact that the Chilean Price Band System (PBS) had a cap at the country's bound rate did not make it, for that reason, consistent with Article 4.2 of the AA; rather, the cap merely reduced the extension of trade distortions, but did not eliminate the lack of transparency and predictability in the fluctuation of the duties resulting from the Chilean measure.[1]

4. Brazil therefore suggests that in assessing the characteristics of the challenged measure, the Panel first scrutinize its overall features based upon the relevant facts, law and jurisprudence vis-à-vis the kind of measures proscribed under Art 4.2 of the AA, footnote 1. If inconsistency is found, then the panel does not need to assess consistency under GATT, Art. II.1(b), as the measure would have to be modified or withdrawn anyway – it can then exercise judicial economy.

5. Once again, Brazil recalls that as the measure at issue is covered by the AA, which establishes on its Art. 21.1 its prevalence over other agreements under Annex 1A of the Marrakesh Agreement, the appropriate order of analysis of the claims in the present proceedings is, firstly, the one related Art. 4.2 of the AA, and then the other related to Art. II.1(b) of GATT 1994. Accordingly, in the present case, the AA is *lex specialis*.

(b) One of the main purposes of the AA is to improve market access for agricultural products by enhancing transparency and predictability in agricultural trade and by strengthening of the link between domestic and international markets.

6. As expressed in its Oral Statement, Brazil understands that one of the core issues under this dispute is the importance of transparency and predictability to the establishment of a fair and market-oriented agricultural trading system, as prescribed by the AA. Accordingly, Article 4.2 of the Agreement of Agriculture provides, in its footnote 1, a list of measures that should have been converted into ordinary customs duties.

7. In Brazil's view, if a measure establishes a formula for periodical duty calculation, even if all elements related to that formula are published and explained in detail, it can still have a negative effect on market access, related to the uncertainty in the long term of the customs duties that will have to be paid. As a consequence, the celebration of long term supplying contracts would be discouraged, and market access would be diminished.

8. In addition, Brazil emphasizes that such a negative effect on trade is even more pronounced and distortive when some Members are not subject to the measure. In this scenario, importers would be led to celebrate long term contracts with exporters from exempted Members, as costs with importation duties would be more predictable.

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* This text was originally submitted in English by Brazil.

[1] *Chile – Price Band System* (Appellate Body Report, para. 259).

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA*

1. I am grateful for this opportunity to participate as a third party in this dispute. Our principal aim is to provide the Panel with information to settle this dispute without sticking exclusively to the precedents provided by the *Chile – Price Band System* case.

2. In that case, it was argued that "[i]n general terms, the purpose of this exercise was to enhance transparency and predictability in agricultural trade, establish or strengthen the link between domestic and world markets, and allow for a progressive negotiated reduction of protection in agricultural trade."

3. Although in general terms this opinion would appear to be in keeping with the doctrine of "tariffication" of the Agreement on Agriculture, Colombia considers that while specific elements thereof may be of illustrative value and could provide useful guidance to this Panel, they are not binding, nor are they necessarily applicable to this case under the provisions of the DSU.

4. Traditionally, multilateral trade policy has sought to make market access predictable and more liberal. This is done, *inter alia*, through the binding of maximum permissible tariffs in Members' Schedules of Commitments and applying reductions to arrive at new, lower, bound tariffs.

5. As a result of the Uruguay Round, all Members, including Peru, converted their various forms of non-tariff measures that they used in agricultural trade into bound tariffs that provided substantially the same level of protection.

6. By prohibiting Members from maintaining, resorting to or reverting to any measures of the kind which have been required to be converted into ordinary customs duties, Article 4.2 of the Agreement on Agriculture provides the legal underpinning for what, in ordinary parlance, is referred to as a "tariff only" regime for trade in agricultural goods.

7. It should be recalled that there is no rule in the multilateral trading system that prevents a Member from applying tariffs or altering them. In the case of the products covered by the Agreement on Agriculture, if a Member applies ordinary customs duties and subjects them to calculation methodologies that cause them to vary without exceeding the maximum WTO bound tariff or infringing any of the other rules of the system, it cannot be accused of acting inconsistently with its WTO obligations.

8. The concept of "ordinary customs duties" does not correspond to a single value. The concept covers everything that is a customs duty. The intention of the multilateral trading system was to ensure that there were no hidden costs affecting the importation of agricultural goods in the same way that tariffs would affect them, but that would not be taken into consideration in determining whether a Member had exceeded the maximum WTO bound tariff.

9. Once the legal status of the measure has been determined, i.e. whether it is an ordinary customs duty or not, it is possible to determine whether or not there is any inconsistency with Article II.1(b) of the GATT.

10. The complainant argues that the measure seeks to insulate the Peruvian market from international price fluctuations. In the Request for the Establishment of a Panel, the complainant sets out the legal basis for its complaint. It is not clear to Colombia how Peru's obligations under provisions cited by the complaint would be affected *per se* by the above situation. As I mentioned, if the bound tariff is not exceeded, if the measures do not involve a restriction to trade in agricultural goods through measures other than the imposition of ordinary customs duties, and if

* Colombia requested that its oral statement serve as the executive summary.

there are no quantitative restrictions on the imports in question, other economic effects of the measure should not be fundamental.

11. It goes without saying that the methodology used to calculate variations in the tariff and to report the applicable tariff must be transparent and predictable for the economic operators. In Colombia's view, the methodology adopted by Members to calculate their tariffs may be transparent and predictable, and at the same time variable. If the variables on the basis of which the calculation is made are known in advance by those involved in the trade transactions, there is no reason why they should be considered unpredictable or lacking in transparency.

12. At the same time, the Peru-Guatemala Free Trade Agreement signed in Guatemala City on 6 December 2011 has not yet entered into force – although it is true that in accordance with Article 18 of the Vienna Convention on the Law of Treaties "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty" when it has signed the treaty.

13. Article 1.2 lists the objectives of the Agreement. In Colombia's view, the measure under consideration does not *per se* undermine any of those objectives. Section F in Chapter 2 of the Agreement contains the provisions relating specifically to agriculture. Sections B and D of the same chapter contain provisions on tariff elimination and non-tariff measures. Once again, it does not appear to this delegation that those provisions contain special rules in relation to the provisions of Article 4 of the Agreement on Agriculture that could be undermined by the measure under consideration.

14. Now, although Peru has agreed with some of its trading partners not to apply "**any** price band system to imported agricultural goods", (see, for example, the Trade Promotion Agreement between Peru and the United States, Appendix I to the General Notes to the Tariff Schedule of Peru), at the same time, the Free Trade Agreement with Guatemala states that "Peru **may maintain** its price band system … for goods subject to the System [as provided for in Peru's schedule]". Colombia would like to call the attention of the Panel to Article 1.3 of the Agreement between Peru and Guatemala in relation to the provisions of Article 30 of the Vienna Convention. Under the former, the Peru-Guatemala FTA would prevail in case of incompatibility with the WTO Agreement. Article 30 of the Vienna Convention, for its part, contains provisions on the "[a]pplication of successive treaties relating to the same subject-matter". We call upon the Panel to examine whether in this case there is, or could be, any incompatibility between the FTA and the WTO Agreement, and whether there are grounds for applying Article 59 of the Vienna Convention.

15. Finally, Colombia notes that Articles 3.7 and 3.10 of the DSU are essential to compliance with panel and Appellate Body procedures, and must therefore form part of the objective analysis that panels must make of the matter before them under Article 11 of the DSU. Assessing each complaint properly and conducting the panel procedure in good faith and not on a contentious basis is as important as determining compliance with the principle whereby a Member must exercise due judgement as to whether it would be fruitful to have recourse to the mechanism provided for in the DSU and to reach a settlement that would not only be positive for that Member and the opposing party, but also for WTO Members in general.

16. Colombia has now clarified its views on certain systemic aspects of this dispute. We will gladly answer any questions that the panel or the parties may wish to ask us.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF ECUADOR

1. FIRST: ORDER OF ANALYSIS. The Appellate Body has not only made it clear that a panel may depart from the sequential order suggested by a complaining party[1], but it has established, as a general rule, that panels are free to structure the order of their analysis as they see fit.[2] According to this general approximation, it is the "structure and logic" of the provisions under consideration in each dispute that determine the proper sequence of steps in the process of analysis incumbent on the Panel, when that analysis comprises one or more WTO provisions or agreements.[3]

2. Peru has highlighted two issues it considers fundamental, warranting a decision at the outset. Here, we would note in particular the following: "Although Article II:1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture establish the legal consequences of measures being 'ordinary customs duties', they do not define the term"[4]; Peru goes on to say: "In accordance with Article 31 of the Vienna Convention, it is necessary to examine the ordinary meaning of 'ordinary customs duties' in their context and in the light of their object and purpose … ".[5]

3. This order would also provide for the possibility of applying the principle of judicial economy with regard to the complainant's other claims.

4. In our view, therefore, the order of analysis proposed by Peru seems to be the most logical and economical one in the circumstances obtaining in this dispute.

5. SECOND: HARMONIOUS INTERPRETATION AND APPLICATION. The Appellate Body recalled: "that in *Argentina – Footwear (EC)* and *US – Upland Cotton*, [the Appellate Body] affirmed that the Multilateral Agreements on Trade in Goods, contained in Annex 1A of the WTO Agreement, are "integral parts" of the same treaty, the WTO Agreement, and that their provisions, which are binding on all Members, are all provisions of one treaty, the WTO Agreement. The Appellate Body thus considered that a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously".[6]

6. This, in our view, implies among other things that, barring the presence in one of the agreements of an expressly binding provision whereby a different meaning and scope is explicitly established for an obligation that is also contained in other agreements that are integral parts of the WTO Agreement, such obligation shall have a similar meaning and scope in all the agreements concerned. This line of reasoning was applied by the Appellate Body in *EC - Bananas III*, where it affirmed that "the provisions of the GATT 1994 … apply to market access commitments concerning agricultural products, except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter".[7]

7. In short, it is "important to understand that the WTO Agreement is one treaty".[8] And this must be so, *inter alia*, in view of the object and purpose of the WTO Agreement, which is: "the security and predictability of 'the … arrangements directed to the substantial reduction of tariffs

[1] Appellate Body Report, *United States – Zeroing (EC)* (Article 21.5 - EC), paras. 277-279.
[2] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 126-129.
[3] Appellate Body Reports, *Canada – Autos*, para. 151; and *Canada – Wheat Exports and Grain Imports*, para. 109.
[4] First written submission of Peru, para. 5.12.
[5] First written submission of Peru, para. 5.13.
[6] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, footnote 548.
[7] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, para. 155.
[8] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, para. 75, after citing Article II.1 of the Marrakesh Agreement.

and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994".[9]

8. Peru has pointed out that it has published the most important elements of its price band system, in accordance with Article X:1 of the GATT 1994.[10] It has also pointed out that it has administered that system in a uniform, impartial and reasonable manner, in accordance with Article X:3 of the GATT 1994.[11][12]

9. In our view, in the event that the Panel finds in favour of these assertions, the Peruvian price band system would also have to be declared "transparent and predictable" in the analysis under Article 4.2 of the Agreement on Agriculture.

10. THIRD: AUTHORITY OF EVERY MEMBER TO VARY DUTIES. First, to the extent that ordinary customs duties are not applied in excess of those provided for in the Schedule of the Member concerned, that Member may apply a type of duty different from the type provided for in its Schedule.[13]

11. Secondly, with regard to the level, it cannot be said that the WTO agreements prohibit a Member from varying those duties. Nor do the WTO agreements impose temporal restrictions on how such adjustments are made. A Member may publish an adjustment annually, or make the adjustment the following week, as the case may be. As long as the duty is not in excess of that provided for in the Schedule, variability is perfectly valid and lies within the authority of each Member.

12. Finally, we agree with Peru that the measure in the present case must be analysed objectively and independently: the circumstances surrounding the measure analysed in the *Chile - Price Band System* case were different from the Peruvian measure, and it is not established by that case that any price band-type measure is inconsistent with the WTO agreements.

[9] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, para. 6.108.

[10] First written submission of Peru, para. 5.2.

[11] First written submission of Peru, para. 5.3.

[12] The Appellate Body referred to the fundamental importance of the transparency standards contained in Article X of the GATT 1994. Panel report, *EC – Selected Customs Matters*, para. 7.107, footnote 372.

[13] Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, para. 55.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES[*]

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION (DECEMBER 20, 2013)

I. INTRODUCTION

1. As reflected in Article 4.2 of the *Agreement on Agriculture*, in the Uruguay Round Members agreed that they would convert measures such as variable import levies into ordinary customs duties, and that they would no longer adopt or maintain such measures. The measure at issue in this dispute appears to be a measure "of the kind" that falls within the scope of Article 4.2. Indeed, it appears indistinguishable from Chile's price band system, which was the focus of the previous *Chile – Price Band* dispute. Accordingly, to the extent that the measure at issue operates as a variable import levy or other similar measure, such a measure would appear to be inconsistent with Peru's obligations under the *Agreement on Agriculture*.

II. ORDER OF ANALYSIS

2. The United States suggests that the analysis should begin with Guatemala's Article 4.2 claim. In this regard, the panel and Appellate Body reports in *Chile – Price Band* are instructive. In that dispute, the Appellate Body upheld the panel's decision to consider the Article 4.2 claims first. The Appellate Body recognized that this provision applies specifically to agricultural products, whereas Article II:1(b) of the GATT applies generally to trade in all goods. The Appellate Body also observed that, if a panel found an inconsistency with Article 4.2 of the *Agreement on Agriculture*, a further finding under Article II:1(b) of the GATT would not be necessary to resolve the dispute. But if the panel first found an inconsistency with Article II:1(b), it would still have to examine whether the measure was inconsistent with Article 4.2.

3. In contrast, Peru appears to be suggesting that the Panel evaluate, first, whether its price band duties are "ordinary customs duties" as that term is used in both Article II:1(b) of the GATT 1994 and footnote 1 of Article 4.2 of the *Agreement on Agriculture*. Peru's suggested approach risks confusion over the differences between the distinct legal obligations contained in Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994.

III. PERU'S PRICE BAND SYSTEM APPEARS TO BE THE TYPE OF MEASURE PROHIBITED UNDER ARTICLE 4.2 OF THE *AGREEMENT ON AGRICULTURE*

4. Peru's price band system appears to fall within the category of trade-distorting measures prohibited under Article 4.2 of the *Agreement on Agriculture*.

A. The Price Band Mechanism Appears To Be A Measure Prohibited By Footnote 1

5. Peru's price band system appears to be a "variable import levy," or at a minimum, is "similar" to both variable import levies and "minimum import prices," within the meaning of footnote 1.

6. The principal contours of the price band system appear to be undisputed. These characteristics appear to meet the description of a variable import levy, within the meaning of footnote 1. Peru's price band mechanism employs a formula that generates additional duties, which automatically change every two weeks in response to movements in either or both of the two key parameters – *i.e.*, the lower band and the reference price. By design, the structure of the price band mechanism also tends to impede the transmission of international prices to the domestic market.

[*] This text was originally submitted in English by the United States.

7. The price band measure also appears to be "similar" to a "minimum import price," within the meaning of footnote 1. Peru emphasizes the fact that its price band system does not incorporate a target price. But a definitive target price is not required to establish that a system is "similar" to minimum import prices. Here, the overall nature of the measure – including its tendency to distort the transmission of declines in world prices to the domestic market – suggests that it is "similar" to a minimum import price.

B. The Price Band Duties Are Not "Ordinary Customs Duties"

8. If the Panel were to find that Peru's price band system is within the scope of the measures covered by Article 4.2 and footnote 1 of the *Agreement on Agriculture*, then these measures would not be ordinary customs duties. Accordingly, this dispute does not – as Peru suggests – present the Panel with the general question of what may or may not be an "ordinary customs duty." It is sufficient to note that an "ordinary customs duty" can be defined by exclusion – *i.e.*, by ascertaining whether a measure is of a type that does not constitute "ordinary customs duties." Because Peru's price band system appears to be similar to the measures specifically enumerated in footnote 1, the price band duties would, by definition, not be "ordinary customs duties."

9. In its submission, Peru offers a list of characteristics that it claims are "clear features" of "ordinary customs duties," and attempts to map those features onto its price band scheme. Peru's efforts are unavailing. A list that may include certain common attributes is not instructive as to whether a particular border charge is an ordinary customs duty, or instead is a variable import levy or other type of measure that is prohibited under Article 4.2.

10. Further, Peru's assertion that ordinary customs duties "may vary" misses the mark. Although a Member may decide to change the applied rates of ordinary customs duties, variation is not an inherent or necessary characteristic of such duties.

11. Peru's reliance on domestic legislative materials is equally unavailing. A Member's own characterization of a measure is not dispositive of how the measure is considered with respect to specific WTO obligations. And if one does consider Peru's legislative framework, it does not, in fact, appear to support Peru's argument that its measures are ordinary customs duties. Peru's price band system and its ordinary customs regime are set out in different legislative and administrative instruments, enacted by different government bodies. In addition, the price band duties vary regularly, according to a mathematical formula that does not apply to the normal *ad valorem* customs duties.

12. Contrary to Peru's assertion, the final offer tabled by Peru during the Uruguay Round negotiations cannot transform its price band duties into "ordinary customs duties." Even if Peru had incorporated a price band system into its Schedule, this would not immunize that measure against a challenge under Article 4.2.

13. Peru emphasizes that it had in place a predecessor version of its current price band system prior to the entry into force of the *WTO Agreement*. But if that price band mechanism fell within the scope of footnote 1, and Peru failed to convert it into "ordinary customs duties," Article 4.2 would bar Peru from "maintain[ing]" this scheme as of the date of the entry into force of the *WTO Agreement* – *i.e.*, January 1, 1995. Likewise, under Article 4.2, Peru would not be permitted to "resort to" new measures of the kind listed in footnote 1, such as the price band system challenged by Guatemala in this dispute.

IV. ARTICLE II:1(B) OF THE GATT 1994

14. If the Panel finds that Peru's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*, resolution of the dispute would not require the Panel to make findings on Guatemala's claim under Article II:1(b), second sentence, of the GATT 1994. If the Panel makes findings on this claim, the United States observes that the price band duties would, by definition, appear not to constitute "ordinary customs duties."

15. It appears to be undisputed that Peru did not record its price band system in its Schedule, as called for by the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*. Accordingly, the price band duties would be imposed in

excess of the amounts permitted under Peru's Schedule, and would thus be inconsistent with Article II:1(b) of the GATT 1994, second sentence.

V. THE FTA BETWEEN GUATEMALA AND PERU DOES NOT BAR CLAIMS UNDER THE DSU

16. The United States sees no basis for Peru's reliance on the FTA that it signed with Guatemala.

17. There is no basis in the DSU for Peru's request that the Panel make findings with respect to the parties' respective rights and obligations under a non-covered agreement – *i.e.*, the Peru-Guatemala FTA – for which it does not invoke a defense under Article XXIV of the GATT 1994. Consistent with the Appellate Body's findings *in Mexico – Taxes on Soft Drinks*, the Panel should reject Peru's apparent suggestion that the Panel decline to make the findings called for under its terms of reference.

18. The United States does not see a basis for the Panel to make findings on whether Guatemala has acted in bad faith. Peru mainly relies on Article 3.10 of the DSU. But Article 3.10 is not presented as an obligation regarding a Member's conduct. The United States also does not believe that Article 18 of the *Vienna Convention on the Law of Treaties* is relevant here.

19. Peru also errs in its assertion that the FTA resulted in a modification or waiver of Guatemala's rights under the *WTO Agreement*. A bilateral FTA – and the parties' FTA is not even in force – cannot amend the *WTO Agreement*.

20. The United States also does not agree with Peru's assertion that the text of an FTA may result in a waiver of Members' right to invoke WTO dispute settlement. Mutually agreed solutions are given a particular legal status under the DSU. It is a far different matter to argue that Members can waive their WTO dispute settlement rights through an FTA.

EXECUTIVE SUMMARY OF U.S. ORAL STATEMENT (JANUARY 14, 2014)

21. In our statement today, the United States will address four issues. The United States has addressed certain aspects of these issues in our written submission. Where we address them again today, we will focus on the points raised by other third parties and the list of topics recently circulated by the Panel.

22. First, like Argentina and Brazil, the United States believes that the Panel's analysis should begin with Article 4.2 of the *Agreement on Agriculture*. For purposes of assisting the parties in finding a positive solution to the dispute, it is useful to begin the analysis of Peru's measures with the more specific provision of the covered agreements before addressing more general obligations. This is consistent with the approach of past panel and Appellate Body reports and would facilitate the exercise of judicial economy. On the other hand, the interests of judicial economy would not be served if the Panel began with the second sentence of GATT 1994 Article II:1(b).

23. Second, turning to Guatemala's claim under Article 4.2 of the *Agreement on Agriculture*, the relevant inquiry is the extent to which Peru's price band falls within the category of measures listed in footnote 1. The United States observes that Peru's price band system appears to be a "variable import levy," or at least a measure that is "similar" to a variable import levy, within the meaning of footnote 1. It is also similar to a "minimum import price."

24. The table presented by Guatemala is instructive. This table compares Peru's price band system with the mechanisms from the original and Article 21.5 proceedings in *Chile – Price Band*. Guatemala's table is, in certain respects, a simplification. But it sets out the principal contours of the three price band systems and confirms the striking similarities between them.

25. The EU suggests that, to qualify as a variable import levy, a measure must be constructed in a way that renders it impossible for a trader to effectively anticipate the duties that it will pay. This position lacks support in the text of the agreement, or from any panel or Appellate Body findings.

26. "Lack of transparency" and "lack of predictability" are not independent, absolute tests that a measure must pass in order to qualify as a variable import levy. Instead, it is the presence of the underlying formula or scheme that renders a measure inherently variable, because it causes and ensures that levies change automatically and continuously. It is this feature that renders the

resulting duties less transparent and less predictable than ordinary customs duties. A measure need not render prediction of duties "impossible," as the EU suggests. Nor can mere publication of the elements of a measure that otherwise would be inconsistent with Article 4.2 render that measure consistent with that obligation.

27. Likewise, the Appellate Body has recognized that lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market. But this, too, should not be seen as an independent, absolute test. There is no need to conduct statistical or econometric analyses to assess whether, in fact, the measure has impeded the transmission of world prices to the domestic market.

28. Third, with respect to Guatemala's claims under GATT Article X, in the particular circumstances of this dispute, the exercise of judicial economy may be appropriate.

29. To the extent that the Panel does address Article X, the United States would note that it has difficulty understanding the basis for Guatemala's claim. Article X:1 requires prompt publication of measures of general applicability pertaining to, among other things, rates of duty. Here, it appears that Peru has published its price band system. Guatemala does not argue otherwise.

30. Rather, Guatemala relies on the "essential element" test articulated by the panel in *Dominican Republic – Cigarettes*, and using this idea, argues that Peru should have published certain methodologies. In our view, the "essential element" test articulated by the panel in *Dominican Republic – Cigarettes* should be viewed with caution. The United States has difficulty understanding a textual basis for using this type of test in the application of Article X:1. The text does not refer to "methodologies" or "data," much less "essential elements."

31. Article X:1 does not require the publication of every input or data point that underlies a measure of the kind subject to Article X:1 – that is, a law, regulation, judicial decision, or administrative ruling of general application. The interpretation argued for in this dispute, while purportedly limited to "essential" elements (an inherently imprecise concept), could impermissibly expand the obligations agreed in Article X:1 and impose unreasonable burdens on Members.

32. Finally, the FTA that Peru signed with Guatemala is irrelevant to the adjudication of claims in this dispute. A determination of whether a measure is consistent with a covered agreement does not hinge on the terms of an agreement not covered, such as an FTA. Accordingly, the Panel should reject Peru's apparent suggestion that the Panel decline to make findings called for under its terms of reference, and that it adjudicate rights and obligations under the FTA. Such a step would be contrary to the text of the DSU and reports in previous disputes.

33. Peru has not adequately supported its assertion that the text of an FTA – in this case, which is not even in force – can serve to bar a Member from invoking its rights under the DSU. FTAs are not referenced in the DSU, and the DSU does not accord an (alleged) FTA provision an effect like that of a mutually agreed solution or other waiver of WTO dispute settlement rights. We also note that Article 18 of the *Vienna Convention on the Law of Treaties* – which Peru invokes – has no bearing on this dispute.

34. Articles 3.7 and 3.10 of the DSU should not affect the Panel's analysis of the substantive provisions at issue in this dispute. The first sentence of Article 3.7 provides that, "[b]efore bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful." As the Appellate Body observed, a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful." The Appellate Body has confirmed that a Member should be presumed to have asserted a claim in good faith, and Article 3.7 neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgment.

35. The United States cannot envision a basis for a panel to opine on whether or not a Member has exercised its judgment "before bringing a case." Once a dispute has been brought, the Member has exercised its judgment and the provision imposes no ongoing obligation.

36. Likewise, the United States does not view the first sentence of Article 3.10 as imposing binding or enforceable obligations on Members. The first sentence of Article 3.10 provides: "[i]t is understood that … if a dispute arises, all Members will engage in these procedures in good faith in

an effort to resolve the dispute." The text of this provision makes clear that Article 3.10 sets out a common understanding among Members as to how they "will" engage in dispute settlement, but does not contain a binding or enforceable obligation. Members knew how to draft language that would impose binding and enforceable obligations, and took evident care to avoid doing so here, perhaps to avoid arguments of the sort advanced here – as opposed to arguments relating to whether a Member has observed its substantive WTO obligations.

37. In response to the Panel's query, the United States does not view the doctrine of "*abus de droit*" as playing a role in connection with the scope of Articles 3.7 and 3.10 of the DSU. Neither provision refers to "*abus de droit*," and there is no basis for importing this doctrine into the negotiated text of these provisions.

ANNEX C-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION*

I. THE PERU-GUATEMALA FREE TRADE AGREEMENT

1. The Peru-Guatemala Free Trade Agreement (PGFTA) may be relevant to this case to the extent it contains a clear commitment on behalf of Guatemala in respect of non-challenging the Peruvian price band system (PBS) in the WTO. The PGFTA contains several provisions which may be helpful in this respect.[1] There is an apparent contradiction between Article 1.3(1) and Article 1.3(2) of the PGFTA, to the extent to which the first paragraph states that the parties consider their rights and obligations in conformity with their WTO obligations, but in the second paragraph the parties nevertheless stipulate that in case of non-conformity the FTA provisions would prevail. Article 15.3 of the PGFTA reflects the principle *electa una via, non datur recursus ad alteram* without further relevant indications.

2. The European Union notes that, according to the Appellate Body, it is possible for Members to waive their WTO rights.[2] The European Union further recalls that the Appellate Body has made it clear from the very beginning that the WTO Agreements should "not be read in clinical isolation from public international law".[3] Subsequent agreements between the parties (either contained in a mutually agreed solution under DSU rules or in any other document having a binding nature under international rules) as well as rules of international public law are relevant for the interpretation of the covered agreements.[4] Thus, an FTA may be relevant to interpret the scope of the obligations of the Parties at issue. This should not be confused with the application of an FTA instead of, or with primacy over, a WTO agreement.

3. Article 18 of the Vienna Convention on the law of Treaties (VCLT) is an expression of the good faith principle. According to this principle the parties should refrain from a conduct which would defeat the object and purpose of a Treaty before its entry into force. Article 3.10 of the DSU refers to Members engaging in WTO dispute settlement proceedings in good faith. The concept of good faith in Article 3.10 is informed by good faith as a general principle of law and a principle of customary international law. The principle of good faith can be invoked by itself in WTO proceedings and not only as an "add-on" to the violation of another WTO rule.[5]

II. ORDER OF ANALYSIS

4. The European Union considers that the Panel should start its analysis with the concept of "ordinary customs duties" and consequently under Article II:1(b) of the GATT 1994. This approach is different from the one advocated by other participants[6] because it presents the advantages of a position that has as a starting point a presumption that measures are in principle WTO compatible unless otherwise proven.

5. The Appellate Body stated in *Chile – Price Band System* that both Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 refer to ordinary customs duties and that "the term 'ordinary customs duties' should be interpreted in the same way in both of these provisions".[7] While Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 contain "distinct legal obligations",[8] the two are related through the use of the same concept, i.e. "ordinary customs duties". Article II:1(b), first sentence, of the GATT 1994 obliges

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* This text was originally submitted in English by the European Union.

[1] Article 2.3(2), read in conjunction with Annex 2.3 (9) to the PGFTA, and Article 1.3 of the PGFTA.

[2] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 217.

[3] Appellate Body Report, *US – Gasoline*, p. 17.

[4] Articles 31(3)(b) and 31(3)(c) of the Vienna Convention on the law of Treaties. See also the Panel Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 7.58.

[5] Appellate Body Report, *EC – Bananas III,* paras. 223-28.

[6] Argentina's third party written submission, paras. 8-9, and United States' third party written submission, paras. 3-7.

[7] Appellate Body Report, *Chile – Price Band System*, para. 188.

[8] Ibid.

WTO Members not to exceed a particular threshold of tariff binding when imposing ordinary customs duties. In turn, Article 4.2 of the Agreement on Agriculture mandates the conversion of certain non-tariff protectionist measures into ordinary customs duties.

6. Footnote 1 to the Agreement on Agriculture is drafted by reference to an *inclusive category* of measures that Members cannot maintain ("quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures…"). Footnote 1 also incorporates an *exclusive category* of measures which do not fall under Article 4.2 of the Agreement on Agriculture ("… other than ordinary customs duties" as well as "measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement").

7. The Appellate Body has confirmed that in "scope" situations[9] the analysis should start under the provision which, if applicable, will make unnecessary recourse to other provisions.[10] If the PBS were to fall under the *exclusive* category of ordinary customs duties, the Panel would not need to consider whether the PBS falls under any of the measures listed in the inclusive category.[11] In any event, the European Union draws the attention that whichever order of analysis the Panel may chose, given the absence of remand authority under the DSU, judicial economy may not be appropriate if not allowing the Appellate Body to complete the analysis in the case of an appeal.[12]

III. ARTICLE II:1(B) OF THE GATT 1994

1. Ordinary customs duties

8. The Appellate Body has determined that GATT 1994 does not regulate the type of duties which can be imposed. It held that Argentina could apply a specific duty provided that the *ad valorem* equivalent of that specific duty did not exceed the bound rate.[13] Members are thus in a position to apply different types of duties.[14] They can calculate such duties in a number of different manners without acting inconsistently with GATT 1994.[15] Further, as the Appellate Body recognised, varying a duty is a common occurrence and a perfectly legal one at that.[16]

9. In *India - Additional Import Duties*, the panel noted that "the term 'ordinary' in the phrase 'ordinary customs duties' (…) is defined as meaning 'occurring in regular custom or practice; normal, customary, usual' or 'of the usual kind, not singular or exceptional'".[17] Ordinary customs duties are duties collected at the border which constitute customs duties *stricto sensu*; they do not include possible extraordinary or exceptional duties collected in customs.[18]

10. One may distil from the case-law what features may or may not be seen as guiding criteria on this matter. It is neither the form, nor "the fact that the duty is calculated on the basis of exogenous factors, such as the interests of consumers or of domestic producers".[19] Indeed,

[9] Appellate Body Reports, *Canada – Renewable Energy* and *Canada – Feed-in Tariff Program*, para. 5.27.

[10] Appellate Body Reports, *Canada – Renewable Energy* and *Canada – Feed-in Tariff Program*, paras. 5.39-45, and Appellate Body Report, *China – Raw Materials*, para. 321.

[11] Yet, the Panel may need to analyse if the customs valuation respects the principles and methodology provided for in the Customs Valuation Agreement, provided that this Agreement is applicable.

[12] Appellate Body Report, *US – Tuna II (Mexico)*, para. 405.

[13] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 55.

[14] Id, paras. 46 and 54.

[15] Some Members may express duties in a currency other than their own (e.g. commodities are typically traded in US dollars) and thus the duty applied will depend on exchange rate fluctuations. Tariffs may also be expressed as "technical tariffs" (i.e. based on contents of a certain ingredient such as alcohol or sugar). For certain products (often agricultural products) duties may be seasonal. Duty exemptions can also be granted for shortages in the importing country.

[16] To provide a concrete example, it is perfectly legal for a WTO Member to review, from time-to-time, an applied duty, and to adjust it in the light of market developments, if the Member stays within its bound levels.

[17] Panel Report, *India - Additional Import Duties*, para. 7.155.

[18] Panel Report, *Dominican Republic - Safeguard Measures*, para. 7.85.

[19] Panel Report, *Dominican Republic - Safeguard Measures*, para. 7.84. Appellate Body Report, *Chile - Price Band System*, paras. 271-278.

ordinary customs duties may take different forms. The Appellate Body clarified that it cannot be conceived as a normative matter that scheduled duties are always *ad valorem* or specific.[20] Conversely, "not each and every duty that is calculated on the basis of the value and/or volume of imports is necessarily an 'ordinary customs duty'".[21] In addition, it is worth recalling that ordinary customs duties may also vary.[22]

11. A necessary but not sufficient criterion is the fact of associating the duty to the crossing of a border.[23] However, "importation is not the *only* element to the determination as to whether a charge falls within the scope of the first sentence of Article II:1(b) of the GATT 1994".[24]

12. One of the most important features of an ordinary customs duty is its transparency and predictability. This will easily differentiate it from the other duties contemplated in footnote 1 to the Agreement on Agriculture.[25] Thus, "the maximum amount of such duties can be *more* easily reduced in future multilateral trade negotiations".[26] Therefore, a Member may not be entitled to alter its customs duties in any manner whatsoever as long as it is within its tariff bindings.

13. Finally, the European Union notes that the negotiating history of Article II.1(b) shows that the term "ordinary" was used to distinguish those tariffs which were maintained as part of a Member's tariff legislation from "other duties or charges".[27] Thus, the tariff Schedule of the Member concerned is relevant in this respect.

2. Other duties and charges

14. Article II:1(b), second sentence, of the GATT 1994 provides also for the possibility of scheduling "other duties and charges" which are not ordinary customs duties. This is a residual category, under which will fall charges which are neither ordinary customs duties nor one of the three categories of duties specified in Article II:2 of the GATT 1994.[28]

15. The other duties or charges shall be recorded in the Schedules at the levels applying on 15 April 1994.[29] The Panel would have thus to check if either the additional variable duty resulting from the PBS was recorded for the specific products in the Schedule as to 15 April 1994 or if at that date there was legislation in force in Peru mandatorily requiring it.

IV. CLAIMS RELATED TO THE AGREEMENT ON AGRICULTURE

16. Article 4.2 of the Agreement on Agriculture reflects the tariffication process undertaken during the Uruguay Round. As a result, variable import levies disappeared. The tariffication process essentially allowed the conversion of non-tariff barrier protection into the equivalent tariff protection.

17. The key features of a variable import levy are the continuous and automatic variation, and the lack of transparency and predictability.[30] For the first condition to be met it is necessary that the levies change automatically and continuously, without further legislative or administrative intervention.[31] Ordinary customs duties may also vary, but according to the Appellate Body it is the build-in formula which will distinguish between the two categories.[32]

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[20] Appellate Body Report, *Chile – Price Band System*, para. 271.
[21] Appellate Body Report, *Chile – Price Band System*, para. 274.
[22] Appellate Body Report, *Chile – Price Band System*, para. 232.
[23] Appellate Body Reports, *China- Auto Parts,* para. 153.
[24] Panel Report, *China- Auto Parts*, footnote 316.
[25] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 156.
[26] Appellate Body Report, *Chile – Price Band System*, para. 200.
[27] Verbatim Report, Twenty Third Meeting of the Tariff Agreement Committee, 18 September 1947, p. 24 (E/PC/T/TAC/PV/23).
[28] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.79; Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.113.
[29] Para. 2 of the Article II:1(b) Understanding.
[30] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 158, Panel Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 7.28.
[31] Appellate Body Report, *Chile - Price Band System*, para. 233.
[32] Appellate Body Report, *Chile - Price Band System*, para. 233.

18. The second feature of a variable import levy is the lack of transparency and predictability.[33] In practice this translates into the impossibility for a trader to effectively anticipate the amount of duties it would have to pay in order to have access to a certain market.[34] The European Union considers that a particular attention should be attached to this second condition. It is indeed the precise lack of transparency and predictability which affects traders and governments.[35]

19. In addition, the result which may be achieved by a variable import levy system is that the measure distorts the transmission of declines in world prices to the domestic market in a different way than ordinary customs duties would do.[36] Ordinary customs duties, depending on the level of binding, permit, at least potentially, price competition between imports and domestic products. However, it is a feature of any tariff, whether specific or *ad valorem,* to soften the impact of, or disconnect international prices from domestic markets. The extent of the softening or disconnect varies from case to case. Decisive weight cannot be given to the distortion in the transmission of declines in world prices to the domestic market.

20. A key characteristic of variable import levies is the fact that they generally prevent price competition among all imports. The measures listed in footnote 1 to the Agreement on Agriculture indeed all prevent price competition among either part or all imports.[37] They can thus be distinguished from ordinary bound customs duties, which depending on the level of binding, permit, at least potentially, price competition among all imports.

V. TRANSPARENCY AND GOOD ADMINISTRATION CLAIMS

1. Article X:1 of the GATT 1994

21. Transparency is a cornerstone principle of the WTO system. The transparency obligation in Article X:1 of the GATT aims at properly informing traders and governments about the conditions upon which the interested parties may have access to a Member's market.

22. The obligation of publication refers to the acts of general application. These acts are "laws, regulations, judicial decisions and administrative rulings that apply to a range of situations or cases"[38], affecting "an unidentified number of economic operators, including domestic and foreign producers".[39] In order to comply with Article X:1 a certain level of detail is required, so as to enable the interested parties to become "acquainted" with the measures.[4041] However, this level of detail refers rather to the "essential elements" of the measure.[42]

23. Finally, prompt publication means that the measures "must be generally available through an appropriate medium rather than simply making them publicly available".[43] Thus, the requirement of publication should be seen as more demanding that "making publicly available".[44]

2. Article X:3(a) of the GATT 1994

24. Article X:3(a) of the GATT 1994 concerns the method of application of the measures identified in Article X:1.[45] The complainant has to bring "solid evidence" in order to prove the

[33] Appellate Body Report, *Chile - Price Band System*, para. 234.
[34] Appellate Body Report, *Chile - Price Band System*, para. 234.
[35] Let us imagine that a Member changes its duties by legislative intervention every day, following international reference prices. As long as these changes occur not as a result of the application of a formula, the first condition may not be met. However, the second condition seems to be fulfilled.
[36] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 202, Appellate Body Report, *Chile - Price Band System*, para. 227.
[37] For instance, quantitative import restrictions and discretionary import licensing only allow price competition among those products which can actually enter the domestic market. Minimum import prices prevent imports at entering below a specific price, and thus prevent any price competition.
[38] Panel Report, *EC – IT Products*, para. 7.1032.
[39] Panel Report, *US – Underwear,* para. 7.65.
[40] Panel Report, *Dominican Republic – Import and Sale of Cigarettes,* para. 7.414.
[41] Panel Report, *Thailand – Cigarettes (Philippines),* para. 7.789.
[42] Panel Report, *Dominican Republic – Import and Sale of Cigarettes,* para. 7.405.
[43] Panel Report, *EC – IT Products*, para. 7.1084
[44] Panel Report, *Chile – Price Band System*, para. 7.127.
[45] Panel Report, *Argentina – Hides and Leather,* para. 11.73.

breach of this provision.[46] The uniform, impartial and reasonable manner requirements are distinct from each other and the violation of one of these criteria results in the breach of Article X:3(a) of the GATT 1994.[47]

25. In assessing compliance with the "uniformity" requirement a panel may take into account elements of the administrative process, on a case by case basis.[48] Members shall ensure that their laws are applied consistently and predictably.[49] An "impartial" administration amounts to the "application or implementation of the relevant laws and regulations in a fair, unbiased and unprejudiced manner".[50] There may be instances where a certain measure is so clearly flawed that it would not require illustration with concrete examples in order to qualify it as unfair.[51]

26. The term "reasonable" is defined as '"in accordance with reason", "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate"'.[52] The examination of reasonableness requires the examination of "the features of the administrative act at issue in the light of its objective, cause or the rationale behind it".[53] A previous panel has found that the fact of non-relying on the rules in force at the time of the decision, disregarding them and in exchange using other methods amounted to an unreasonable administration of the relevant legal provisions.[54]

VI. CLAIMS RELATED TO THE CUSTOMS VALUATION AGREEMENT

27. Article 15 of the Customs Valuation Agreement provides that the "customs value of imported goods" means the value of goods for the purposes of levying *ad valorem* duties of customs on imported goods. The European Union recalls that there are instances when the variable duty levied in accordance with the PBS is only an *ad valorem* duty, namely in the hypothesis the international reference price falls within the price band delimitated by the floor and ceiling prices. In the case the international reference price drops below the floor price an additional duty is collected on top of the *ad valorem* duty.

28. Indeed, the Customs Valuation Agreement does not apply in the case of specific customs duties. It applies to the *ad valorem* duties (alone or in combination with specific duties) because in that case the customs value is essential to determine the duty to be paid on an imported good. In the present case the Panel will have first to decide to which extent the actual customs value contributes to the determination of the amount of duties to be paid under the PBS. In this respect, the European Union considers it relevant to examine the tariff Schedule of the Member concerned.

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[46] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217.
[47] Panel Report, *Dominican Republic – Import and Sale of Cigarettes,* para. 7.383.
[48] Panel Report, *Thailand - Cigarettes (Philippines)*, para. 7.871; Appellate Body Report, *EC – Selected Customs Matters*, paras. 224-225.
[49] Panel Report, *Argentina – Hides and Leather,* para. 11.83.
[50] Panel Report, *Thailand - Cigarettes (Philippines)*, para. 7.899.
[51] Panel Report, *Thailand - Cigarettes (Philippines)*, para. 7.909.
[52] Panel Report, *Thailand - Cigarettes (Philippines)*, para. 7.919; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385.
[53] Panel Report, *Thailand - Cigarettes (Philippines)*, para. 7.951.
[54] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.388.