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## 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set out in this report, the Panel concludes as follows:

- a. The Panel finds no evidence that Guatemala brought these proceedings in a manner contrary to good faith; there is therefore no reason for the Panel to refrain from assessing the claims put forward by Guatemala;
- b. the duties resulting from the PRS constitute variable import levies or, at the least, share sufficient characteristics with variable import levies to be considered a border measure similar to a variable import levy, within the meaning of footnote 1 to the Agreement on Agriculture;
- c. the duties resulting from the PRS do not constitute minimum import prices and do not share sufficient characteristics with minimum import prices to be considered a border measure similar to a minimum import price, within the meaning of footnote 1 to the Agreement on Agriculture;
- d. by maintaining measures which constitute a variable import levy or, at the least, are border measures similar to a variable import levy, and are thus measures of the kind which have been required to be converted into ordinary customs duties, Peru is acting inconsistently with its obligations under Article 4.2 of the Agreement on Agriculture;
- e. moreover, the additional duties resulting from the PRS constitute "other duties or charges ... imposed on or in connection with the importation", within the meaning of the second sentence of Article II:1(b) of the GATT 1994. In applying measures which constitute "other duties or charges", without having recorded them in its Schedule of Concessions, Peru's actions are inconsistent with its obligations under the second sentence of Article II:1(b) of the GATT 1994; and
- f. inasmuch as the Free Trade Agreement signed by Peru and Guatemala in December 2011 has not entered into force, it is not necessary for this Panel to rule on whether the parties may, by means of the FTA, modify as between themselves their rights and obligations under the covered agreements.

8.2. In the light of the foregoing conclusions, the Panel does not consider it necessary to rule on Guatemala's claims that:

- a. Peru's actions are inconsistent with its obligations under Article X:1 of the GATT 1994 because it failed to publish certain elements of the measure which Guatemala considers essential; and
- b. Peru's actions are inconsistent with its obligations under Article X:3(a) of the GATT 1994 because it administers the measure in question in a manner that is not reasonable, given that it fails to observe the requirements of its own legislation.

8.3. The Panel does not consider it relevant to address Guatemala's claim that Peru acted inconsistently with its obligations under Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement inasmuch as this claim was made by Guatemala as an alternative, and only in case the Panel were to find that the duties resulting from the PRS are ordinary customs duties.

8.4. Pursuant to Article 3.8 of the DSU, in cases where there is an infringement of obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits accruing under the Agreement. The Panel therefore concludes that, to the extent that Peru has acted inconsistently with the provisions of the Agreement on Agriculture and the GATT 1994, it has nullified or impaired benefits accruing to Guatemala under those agreements.

8.5. Guatemala has requested the Panel, in exercise of its discretionary powers afforded by the second sentence of Article 19.1 of the DSU, to suggest that Peru "completely dismantle the measure in question". In Guatemala's opinion, this would imply the elimination of the additional

variable duty and the underlying calculation mechanism, i.e. the PRS.<sup>741</sup> According to Guatemala, this would be the only way of enabling "Peru properly to bring its measure into conformity with WTO rules in view of the gravity, nature and manifest character of the legal violations in the measure in question".<sup>742</sup>

8.6. The Appellate Body has indicated that the power vested in panels and the Appellate Body, under Article 19.1 of the DSU, to suggest to Members ways in which they could implement recommendations and rulings is of a discretionary nature.<sup>743</sup> According to the provisions of Article 21.3 of the DSU, it is normally the Member to which the recommendations are addressed which has to decide on how to implement them.<sup>744</sup> Exceptionally, panels have accepted a request by the complaining party to suggest to the respondent Member the way in which it could comply with panel recommendations.<sup>745</sup>

8.7. The Panel recalls that, in its request for the establishment of a panel, Guatemala identified the measure at issue as "the additional duty imposed by Peru on imports of certain agricultural products". Guatemala added that the additional duty is determined using the PRS.<sup>746</sup> Bearing in mind that Guatemala challenged the duties resulting from the PRS and not the system as such, the Panel does not consider it appropriate to suggest that the proper way of implementing its recommendation is through the elimination of the underlying mechanism for calculating the additional duties. As part of the measures adopted with a view to complying with the Panel's rulings and recommendations, Peru may decide to dismantle the PRS completely. It is not, however, appropriate for the Panel to make a suggestion to that effect, which would go beyond the measure as defined by Guatemala. The Panel therefore rejects Guatemala's request to suggest to Peru that the way in which its recommendation should be implemented is through the elimination of the PRS.

8.8. Pursuant to Article 19.1 of the DSU, and having found that Peru has acted inconsistently with provisions of the Agreement on Agriculture and the GATT 1994, the Panel recommends that Peru bring the challenged measure – namely, the duties resulting from the PRS – into conformity with its obligations under those agreements.

<sup>741</sup> Guatemala's first written submission, para. 5.2. See also second written submission, para. 10.2.

<sup>742</sup> Ibid.

<sup>743</sup> Appellate Body Reports, *US - Zeroing (EC) (Article 21.5 - EC)*, para. 466; *US - Oil Country Tubular Goods Sunset Review (Article 21.5 - Argentina)*, para. 182.

<sup>744</sup> Appellate Body Report, *US - Oil Country Tubular Goods Sunset Review (Article 21.5 - Argentina)*, paras. 173 and 184; Panel Report, *EC - Fasteners (China)*, para. 8.8 (citing Panel Report, *US - Hot-Rolled Steel*, para. 8.13); Panel Report, *US - Steel Plate*, para. 8.8; Panel Report, *EC and certain member States - Large Civil Aircraft*, para. 8.8; Panel Report, *EU - Footwear (China)*, para. 8.12.

<sup>745</sup> In the following cases, the panels accepted the complaining party's request to suggest a way of implementing its recommendations: *US - Underwear*, para. 8.3 (with regard to a specific transitional safeguard measure under Article 6 of the Agreement on Textiles and Clothing); *EC - Bananas III (Article 21.5 - Ecuador)*, paras. 6.155-6.159 (with regard to the European Communities' banana import regime); *Guatemala - Cement I*, para. 8.6 (with regard to an anti-dumping measure); *Guatemala - Cement II*, paras. 9.6-9.7 (with regard to an anti-dumping measure); *US - Cotton Yarn*, para. 8.5 (with regard to a specific transitional safeguard measure under the Agreement on Textiles and Clothing); *US - Offset Act (Byrd Amendment)*, para. 8.6 (with regard to a law on anti-dumping and countervailing duties); *Argentina - Poultry Anti-Dumping Duties*, para. 8.7 (with regard to an anti-dumping measure); and *Mexico - Steel Pipes and Tubes*, paras. 8.12-8.13 (with regard to an anti-dumping measure). In the following reports, the panels made suggestions for taking into consideration the interests of developing country Members involved in the dispute: *India - Quantitative Restrictions*, paras. 7.5-7.6; *EC - Export Subsidies on Sugar (Australia) / EC - Export Subsidies on Sugar (Brazil) / EC - Export Subsidies on Sugar (Thailand)*, para. 8.7. Lastly, in the Reports on *EC - Trademarks and Geographical Indications (US) / EC - Trademarks and Geographical Indications (Australia)*, para. 8.5, the Panel made a suggestion on the way in which the European Communities might implement its recommendations. In many other disputes, however, the panels refrained from making suggestions on how to implement their recommendations.

<sup>746</sup> See Request for the establishment of a Panel by Guatemala, document WT/DS457/2 (14 June 2013).