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PERU – ADDITIONAL DUTY ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS

REPORT OF THE PANEL

TABLE OF CONTENTS

1 INTRODUCTION 14
1.1 Complaint by Guatemala 14
1.2 Panel establishment and composition 14
1.3 Panel proceedings 14
2 FACTUAL ASPECTS 15
2.1 Introduction 15
2.2 Measures at issue 15
3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS 17
4 ARGUMENTS OF THE PARTIES 18
5 ARGUMENTS OF THE THIRD PARTIES 18
6 INTERIM REVIEW 18
7 FINDINGS 22
7.1 Preliminary considerations 22
7.1.1 Introduction 22
7.1.2 The Panel's terms of reference 22
7.1.3 Function of the Panel and standard of review 23
7.1.4 Interpretation of the relevant rules of the agreements 23
7.1.5 Burden of proof 24
7.1.6 Order of analysis 25
7.2 The question of whether the Panel should refrain from examining Guatemala's claims 26
7.2.1 Introduction 26
7.2.2 The content of the FTA and its legal status 27
7.2.2.1 Chronology of events relating to the negotiation and entry into force of the FTA 27
7.2.2.2 Content of the FTA 28
7.2.3 Main arguments of the parties 30
7.2.3.1 Peru 30
7.2.3.2 Guatemala 31
7.2.4 Main arguments of the third parties 33
7.2.4.1 Argentina 33
7.2.4.2 Brazil 33
7.2.4.3 Colombia 33
7.2.4.4 United States 34
7.2.4.5 European Union 34
7.2.5 Assessment by the Panel 35
7.2.5.1 The principle of good faith under Articles 3.7 and 3.10 of the DSU 36

7.2.5.2 Whether Peru has shown that Guatemala did not initiate the present procedure in good faith 39
7.2.5.3 Conclusion 41
7.3 Description of the facts 42
7.3.1 History of the Price Range System 42
7.3.2 The PRS and how it operates 44
7.3.2.1 Introduction 44
7.3.2.2 The PRS 44
7.3.2.3 Objectives of the PRS 45
7.3.2.4 Products subject to the PRS 45
7.3.2.5 The methodology for calculating duties or tariff rebates 48
7.3.2.6 The historical application of the PRS 52
7.3.3 Peru's tariff policy and the recording of tariffs in its schedule of concessions 62
7.4 The question of whether the duties resulting from the PRS are inconsistent with Article 4.2 of the Agreement on Agriculture 63
7.4.1 Introduction 63
7.4.2 Main arguments of the parties 63
7.4.2.1 Guatemala's claim 63
7.4.2.2 Peru's defence 69
7.4.3 Main arguments of the third parties 73
7.4.3.1 Argentina 73
7.4.3.2 Brazil 73
7.4.3.3 Colombia 74
7.4.3.4 Ecuador 74
7.4.3.5 United States 75
7.4.3.6 European Union 76
7.4.4 Assessment by the Panel 76
7.4.4.1 Article 4.2 of the Agreement on Agriculture 76
7.4.4.2 The question of whether the duties resulting from the PRS are variable import levies, minimum import prices or similar border measures 84
7.5 The question of whether the duties resulting from the PRS are inconsistent with the second sentence of Article II:1(b) of the GATT 1994 95
7.5.1 Introduction 95
7.5.2 Main arguments of the parties 96
7.5.2.1 Guatemala's claim 96
7.5.2.2 Peru's defence 98
7.5.3 Main arguments of the third parties 100
7.5.3.1 Colombia 100
7.5.3.2 United States 100
7.5.3.3 European Union 100
7.5.4 Assessment by the Panel 101
7.5.4.1 Introduction 101

7.5.4.2 The obligation under the second sentence of Article II:1(b) of the GATT 1994 101
7.5.4.3 Definition of "other duties or charges" 102
7.5.4.4 Assessment of "other duties or charges" in accordance with the obligations contained in the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 107
7.5.4.5 Conclusion 107
7.6 The question of whether Peru has acted inconsistently with Article X:1 of the GATT 1994 108
7.6.1 Introduction 108
7.6.2 Main arguments of the parties 108
7.6.2.1 Guatemala's claim 108
7.6.2.2 Peru's defence 109
7.6.3 Main arguments of the third parties 110
7.6.3.1 United States 110
7.6.3.2 European Union 110
7.6.4 Assessment by the Panel 110
7.6.4.1 Introduction 110
7.6.4.2 The publication requirement under Article X:1 of the GATT 1994 111
7.6.4.3 Conclusion 114
7.7 The question of whether Peru has acted inconsistently with Article X:3(a) of the GATT 1994 114
7.7.1 Introduction 114
7.7.2 Main arguments of the parties 115
7.7.2.1 Guatemala's claim 115
7.7.2.2 Peru's defence 116
7.7.3 Main arguments of the third parties – European Union 117
7.7.4 Assessment by the Panel 117
7.7.4.1 Article X:3(a) of the GATT 1994 117
7.7.4.2 General considerations 118
7.7.4.3 Measures covered 118
7.7.4.4 Meaning of administration 118
7.7.4.5 The requirement of reasonableness 119
7.7.4.6 Conclusion 120
7.8 Alternative claim under the Customs Valuation Agreement 120
7.9 The question of whether, by means of the FTA, the parties modified their WTO rights between themselves 121
7.9.1 Introduction 121
7.9.2 Main arguments of the parties 121
7.9.2.1 Peru 121
7.9.2.2 Guatemala 122
7.9.3 Main arguments of the third parties 123
7.9.3.1 Brazil 123
7.9.3.2 United States 124

7.9.3.3 European Union 124
7.9.4 Assessment by the Panel 125
7.10 Special and differential treatment 125

8 CONCLUSIONS AND RECOMMENDATION 126

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A	Working Procedures of the Panel	A-1

ANNEX B

ARGUMENTS OF THE PARTIES

GUATEMALA

Contents		Page
Annex B-1	First part of the executive summary of the arguments of Guatemala	B-2
Annex B-2	Second part of the executive summary of the arguments of Guatemala	B-13

PERU

Contents		Page
Annex B-3	First part of the executive summary of the arguments of Peru	B-25
Annex B-4	Second part of the executive summary of the arguments of Peru	B-38

ANNEX C

ARGUMENTS OF THIRD PARTIES

Contents		Page
Annex C-1	Executive summary of the arguments of Argentina	C-2
Annex C-2	Executive summary of the arguments of Brazil	C-5
Annex C-3	Executive summary of the arguments of Colombia	C-6
Annex C-4	Executive summary of the arguments of Ecuador	C-8
Annex C-5	Executive summary of the arguments of the United States	C-10
Annex C-6	Executive summary of the arguments of the European Union	C-15

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Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998
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US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
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US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, adopted 29 July 2002
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US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1
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EEC – Minimum Import Prices	GATT Panel Report, *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, L/4687, adopted 18 October 1978, BISD 25S/68
Japan – Semi-Conductors	GATT Panel Report, *Japan – Trade in Semi-Conductors*, L/6309, adopted 4 May 1988, BISD 35S/116
US – Customs User Fee	GATT Panel Report, *United States – Customs User Fee*, L/6264, adopted 2 February 1998, BISD 35S/245
US – MFN Footwear	GATT Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, DS18/R, adopted 19 June 1992, BISD 39S/128
US – Sugar Quota	GATT Panel Report, *United States – Imports of Sugar from Nicaragua*, L/5607, adopted 13 March 1984, BISD 31S/67

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
c.i.f.	Cost, Insurance and Freight
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Enabling Clause	Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, adopted in 1979 by the CONTRACTING PARTIES to the GATT
f.o.b.	Free on board
FTA	Free Trade Agreement between Peru and Guatemala
GATT 1994	General Agreement on Tariffs and Trade 1994
PRS	Price range system
Understanding on Article II:1(b) of the GATT 1994	Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994
USD	United States dollars
Vienna Convention	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

1 INTRODUCTION

1.1 Complaint by Guatemala

1.1. On 12 April 2013, Guatemala requested consultations with Peru pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 19 of the Agreement on Agriculture, Article 19 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement) and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), with respect to the imposition by Peru of an "additional duty" on imports of certain agricultural products.[1]

1.2. Consultations were held on 14 and 15 May 2013, but failed to resolve the dispute.[2]

1.2 Panel establishment and composition

1.3. On 13 June 2013, Guatemala requested the Dispute Settlement Body (DSB) to establish a panel pursuant to Articles 4.7 and 6 of the DSU, Article 19 of the Agreement on Agriculture, Article 19 of the Customs Valuation Agreement and Article XXIII:2 of the GATT 1994, with the standard terms of reference provided for in Article 7.1 of the DSU.[3] At its meeting on 23 July 2013, the DSB established a panel pursuant to the request of Guatemala in document WT/DS457/2, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Guatemala in document WT/DS457/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 19 September 2013, the parties agreed to the following composition of the Panel:

Chairman: Mr Gary Horlick

Members: Ms Enie Neri de Ross
Mr Miguel Rodríguez Mendoza

1.6. Argentina, Brazil, China, Colombia[6], Ecuador, El Salvador, the European Union, Honduras, India, the Republic of Korea and the United States reserved their right to participate in the panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultations with the parties, the Panel adopted its working procedures on 8 October 2013[7] and its timetable on 4 October 2013. The timetable was modified on 17 February 2014 and 10 April 2014, at the suggestion of the Panel in the first instance, and of the parties in the second.

1.8. Guatemala made its first written submission on 29 October 2013. Peru made its first written submission on 9 December 2013. On 20 December 2013, the Panel received third-party written submissions from Argentina, Brazil, Colombia, the European Union and the United States.

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[1] See request for consultations by Guatemala, document WT/DS457/1 (of 16 April 2013).
[2] See request for the establishment of a panel by Guatemala, document WT/DS457/2 (of 14 June 2013).
[3] Ibid.
[4] See minutes of the DSB meeting held in the Centre William Rappard on 23 July 2013, document WT/DSB/M/334 (of 2 October 2013) and constitution of the panel established at the request of Guatemala, document WT/DS457/3 (of 23 September 2013).
[5] WT/DS457/3.
[6] On 6 August 2013, Colombia notified its interest in participating as a third party.
[7] See the Panel's Working Procedures in Annex A-1.

1.9. The Panel held the first substantive meeting with the parties on 14 and 15 January 2014. A session with the third parties took place on 14 January 2014. The Panel addressed questions to the parties and third parties before the substantive meeting, on 10 January 2014. The Panel also addressed written questions to the parties and third parties after the meeting, which were transmitted to the parties on 21 January 2014 and to the third parties on 22 January 2014. On 29 January 2014, the following third parties furnished written responses to the Panel's questions: Argentina, Brazil, Colombia, Ecuador, the European Union and the United States. The parties furnished their written responses to the Panel's questions on 5 February 2014.

1.10. The parties presented their second written submissions to the Panel on 5 March 2014.

1.11. The Panel held the second substantive meeting with the parties on 2 and 3 April 2014. The Panel sent questions to the parties before the second substantive meeting on 31 March 2014. The Panel also addressed written questions to the parties after the meeting, which were transmitted to the parties on 10 April 2014. On 1 May 2014, the parties furnished written responses to the Panel's questions, and on 12 May each party submitted comments on the responses provided by the other party.

1.12. During the proceedings, the Panel reminded the parties of its readiness, under the terms of the last sentence of Article 11 of the DSU, to consult with them and give them adequate opportunity to develop a mutually satisfactory solution.

1.13. The Panel submitted the descriptive (factual and argument) sections of its final report to the parties on 12 June 2014. On the same date, the Panel informed Argentina, Brazil, China, Colombia, Ecuador, El Salvador, the European Union, Honduras, India, the Republic of Korea and the United States that the descriptive part of the report would contain a summary of the arguments of each of them. On 24 June, Peru submitted its comments on the descriptive part of the report; on the same date, Guatemala notified that it had no comments.

1.14. The Panel issued its interim report to the parties on 12 August 2014. On 26 August, both Guatemala and Peru submitted written requests for the Panel to review specific aspects of the interim report. Neither of the parties requested a further meeting with the Panel to discuss the issues identified in their respective written comments. On 4 September, each of the parties submitted written comments to the Panel on the other party's request for review.

1.15. The Panel submitted its final report to the parties on 2 October 2014.

2 FACTUAL ASPECTS

2.1 Introduction

2.1. In this section of the Report, the Panel will describe the measure at issue. The parties disagree on a number of factual issues. To the extent that it is necessary for the Panel to resolve those disputed factual issues, it will do so in its findings.

2.2 Measures at issue

2.2. In its request for the establishment of a panel, Guatemala identified the measure at issue in this dispute as "the additional duty imposed by Peru on imports of certain agricultural products, such as milk, maize, rice and sugar" (referred to as "affected products"). As described by Guatemala, the measure has the following characteristics: (a) it has been in force since 22 June 2001; (b) it consists of a variable levy that is imposed in addition to the ordinary customs duty; (c) it is determined by using a mechanism known as the "Price Range System" (PRS) which, in its turn, operates on the basis of two components: (i) a range made up of a floor price and a ceiling price which reflect the international price over the last 60 months for the affected products; and (ii) a c.i.f. reference price which is published every two weeks and which reflects the average international market price for the affected products; (d) it may result in the imposition of an import levy on the affected products when the international reference prices of those products are below certain (floor price) levels, or in tariff rebates when these reference prices are above certain (ceiling price) levels; (e) both the price range and the c.i.f. reference prices vary periodically as a result of the application of certain formulas to the circumstances in the markets

for the affected products; the price range varies every six months, while the c.i.f. reference prices vary every 15 days; (f) its amount is specific and is expressed in United States dollars (USD) per metric ton; and (g) it is payable upon importation of the affected products, together with the ordinary customs duties and other import taxes on the affected products.[8] Hereinafter, the Panel will refer to this measure as "the duties resulting from the PRS".

2.3. In its request for the establishment of a Panel, Guatemala identified the following legal instruments in which it believed the measure at issue to be contained[9]:

a. Supreme Decree No. 115-2001-EF, published in the Official Journal "El Peruano" on 22 June 2001;

b. Supreme Decree No. 124-2002-EF, published in the Official Journal "El Peruano" on 17 August 2002;

c. Supreme Decree No. 153-2002-EF, published in the Official Journal "El Peruano" on 27 September 2002.

d. Supreme Decree No. 174-2002-EF, published in the Official Journal "El Peruano" on 15 November 2002.

e. Supreme Decree No. 184-2002-EF, published in the Official Journal "El Peruano" on 27 November 2002;

f. Supreme Decree No. 197-2002-EF, published in the Official Journal "El Peruano" on 30 December 2002;

g. Supreme Decree No. 003-2006-EF, published in the Official Journal "El Peruano" on 13 January 2006;

h. Supreme Decree No. 121-2006-EF, published in the Official Journal "El Peruano" on 20 July 2006;

i. Circular INTA-CR.62-2002 of 26 August 2002 of the National Technical Customs Department;

j. the Supreme Decrees published semi-annually containing the customs tables for determining the floor and ceiling prices of the price range;

k. the Vice-Ministerial Resolutions published every two weeks, containing the c.i.f. reference prices; and

l. any other regulation, instruction, administrative or judicial practice, methodology or guideline, whether currently in force or adopted subsequently, that amends, supplements, complements, develops or is otherwise related to the aforementioned regulatory instruments.

[8] See request for the establishment of a panel by Guatemala, document WT/DS457/2 (of 14 June 2013).

[9] In its request for the establishment of a panel, in addition to the instruments listed, Guatemala identified circular INTA-CR.82-2002 of 5 December 2002 of the National Customs Technical Department, Circular 002-2003-SUNAT/A of 28 February 2003 of the National Tax Administration Supervisory Authority, Circular 010-2004-SUNAT/A of 10 September 2004 of the National Tax Administration Supervisory Authority, Judgement 03041-A-2004 of the Tax Court, dated 14 May 2004, and Judgement 02364-A-2007 of the Tax Court, dated 15 March 2007. During the present proceedings, Guatemala made no reference to those instruments and did not submit them to the Panel for its consideration.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Guatemala requests that the Panel find that:

a. The duties resulting from the PRS are inconsistent with Article 4.2 of the Agreement on Agriculture, as they constitute variable import levies or measures similar to variable import levies;

b. The duties resulting from the PRS are inconsistent with Article 4.2 of the Agreement on Agriculture, as they constitute minimum import prices or measures similar to minimum import prices;

c. The duties resulting from the PRS are duties or charges inconsistent with the second sentence of Article II:1(b) of the GATT 1994;

d. Peru's actions are inconsistent with Article X:1 of the GATT 1994, inasmuch as:

   i. it fails to publish the international prices used as a basis for calculating the floor price and the reference price, despite the fact that these international prices are an essential element of the measure at issue;

   ii. it has failed to publish the content of the "import costs", which is an essential element of the measure at issue; and

   iii. it has failed to publish the methodology for determining the amounts for freight and insurance, which is an essential element of the measure at issue;

e. 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 reasonable given its failure to observe the requirements of its own legislation. Specifically, Peru's failure to comply with its own legislation is shown by the following practices:

   i. extending the validity of the Customs Tables;

   ii. calculating the price ranges for dairy products by reference price intervals and not for each individual value;

   iii. calculating additional duties or customs rebates for two categories of rice (pounded and paddy rice); and

   iv. calculating and updating the reference price for dairy products monthly rather than fortnightly.

3.2. In the event that the Panel considers that the duties resulting from the PRS are ordinary customs duties, Guatemala requests the Panel to find that Peru's actions are inconsistent with Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement, and in particular with Articles 7.2(f) and 7.2(g) of that Agreement, since Peru does not determine the customs value of the goods subject to the PRS in accordance with those provisions, but instead determines the customs value of those goods through the use of minimum, arbitrary or fictitious customs values.

3.3. In accordance with 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, and at the same time eliminate the duties resulting from the PRS and the PRS itself.

3.4. In response to Peru's assertions, Guatemala requests that the Panel reject the allegation that Guatemala has not acted in good faith.

3.5. Peru maintains that, although Members are entitled to engage in procedures in the framework of the WTO dispute settlement system, they must do so in a manner consistent with the requirements established in the DSU, including Articles 3.7 and 3.10 thereof. Peru requests

that the Panel find that Guatemala did not act in good faith in initiating these proceedings, and consequently requests the Panel not to analyse Guatemala's claims.

3.6. Should the Panel decide to examine Guatemala's claims, Peru requests that they be rejected in their entirety by the Panel. In particular, Peru asserts that the duties resulting from the PRS are ordinary customs duties within the meaning of the first sentence of Article II:1(b) of the GATT 1994 and that they therefore stand outside the scope of the second sentence of that Article as well as Article 4.2 of the Agreement on Agriculture. Peru also asserts that the measure at issue is neither the same as nor sufficiently similar to the measures listed in footnote 1 of the Agreement on Agriculture and that Peru has complied with the obligations set forth in Article X:1 and Article X:3(a) of the GATT 1994. Lastly, according to Peru, Guatemala's claims based on the Customs Valuation Agreement must be rejected since that agreement is not applicable to specific duties.

3.7. Finally, in the event that the Panel finds that the measure at issue is inconsistent with provisions of the WTO agreements, Peru considers that an inconsistency would be generated between the Free Trade Agreement signed in December 2011 by Peru and Guatemala (FTA) and the WTO agreements, in regard to which the terms of the FTA should prevail.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in the executive summaries provided to the Panel in accordance with paragraph 20 of the Working Procedures (see Annexes B-1, B-2, B-3 and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Brazil, Colombia, Ecuador, the European Union, and the United States are reflected in the executive summaries provided to the Panel in accordance with paragraph 21 of the Working Procedures (see Annexes C-1, C-2, C-3, C-4, C-5 and C-6). China, El Salvador, Honduras, India and the Republic of Korea did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. In accordance with Article 15.3 of the DSU, this section of the report sets out the Panel's response to the parties' arguments made at the interim review stage, providing explanations where necessary. This section forms an integral part of the Panel's findings in the present case. The Panel thoroughly examined the parties' requests for review and took them into account before issuing this final report. As explained below, the Panel modified aspects of its report in the light of the parties' comments when it considered it appropriate to do so.[10]

6.2. Guatemala requests the Panel to make it clear at the end of paragraph 2.2 that it has used an abbreviated form, throughout the report, to refer to the measure at issue. Guatemala also suggests adjusting the way in which the Panel refers to the measure in two entries in the interim report.[11] Peru opposes Guatemala's request, as it considers that the way in which the report refers to the measure at issue reflects the Panel's analysis.[12] The Panel added a final sentence at the end of paragraph 2.2, based on the text suggested by Guatemala. The Panel also adjusted the language in various paragraphs of the report, in order to use a single identifying term for the measure at issue (the "duties resulting from the PRS"). These adjustments were made in paragraph 7.321, at the request of Guatemala, and in the other following paragraphs of the report: 2.2, 3.1, 3.2, 3.3., 3.6, 7.40, 7.55, 7.99, 7.101, 7.113, 7.114, 7.126, 7.141, 7.149, 7.163, 7.164, 7.174, 7.308, 7.309, 7.312, 7.313, 7.314, 7.315, 7.317, 7.318, 7.319, 7.321, 7.325, 7.326, 7.327, 7.330, 7.333, 7.339, 7.344, 7.348, 7.349, 7.350, 7.351, 7.352, 7.358, 7.359, 7.360, 7.364, 7.366, 7.367, 7.368, 7.371, 7.400, 7.417, 7.418, 7.419, 7.439, 7.443, 7.460, 7.461, 7.494, 7.495, 7.496, 7.497, 7.499, 8.1 and 8.7. For the same reason, the Panel made a similar adjustment to the title of section 7.4.4.2.3, at the request of Guatemala, and to the titles

[10] The numbering of paragraphs and footnotes in the final report has changed in relation to the numbering in the interim report. The text of this section refers to the paragraph numbers of the interim report.

[11] Guatemala's request for review of the interim report, paras. 2.2-2.5.

[12] Peru's comments on Guatemala's request for review of the interim report, para. 5-8.

of the other following sections and subsections of the report: 7.3.2.5, 7.3.2.5.3, 7.3.2.6.3, 7.4.2.1.1, 7.4.2.1.1.1, 7.4.2.1.2, 7.4.4.2, 7.4.4.2.4, 7.4.4.2.4.4, 7.4.4.2.5 and 7.4.4.2.7.

6.3. With regard to the claim concerning the existence of minimum import prices or measures similar to minimum import prices, Guatemala requests that a review be made of the sections summarizing its arguments on an alleged *de facto* threshold.[13] Peru opposes Guatemala's request which it considers would amount to adducing arguments already put forward by the parties, with a view to changing the Panel's analysis.[14] The Panel modified paragraphs 7.209 and 7.223, and introduced a new paragraph supplementing the former paragraph 7.353, in order to give a more precise reflection of the parties' arguments. In the light of Guatemala's request, the Panel also modified the language of paragraph 7.365 and inserted a new paragraph after that paragraph.

6.4. Guatemala requests that, in the description of the basic aspects of the structure and operation of the PRS contained in paragraph 7.317, the Panel should refer to the fact that, on various occasions, both the floor price and the ceiling price had been extended for successive periods, instead of being updated.[15] Peru considers that the addition is unnecessary, since this matter is dealt with in other sections of the report.[16] As a supplement to the summary of the basic aspects of the structure and operation of the PRS, the Panel added a further section at the end of paragraph 7.317, based on the text suggested by Guatemala.

6.5. In the same paragraph 7.317, Guatemala requests that the description of the PRS be supplemented by a reference to the fact that the customs tables announce the resulting duties and rebates.[17] Peru does not consider this addition to be necessary, but does not oppose it.[18] The Panel modified subparagraph (b) of paragraph 7.317, on the basis of the text suggested by Guatemala.

6.6. Peru requests that paragraph 7.319 of the report provide clarification of its position regarding the way in which the customs tables and reference prices are published.[19] Guatemala makes no comments on this point. In the light of Peru's request, the Panel made a clarificatory adjustment to paragraph 7.319 of the report, as well as to paragraph 7.239.

6.7. Peru requests modification of the reference in paragraph 7.321 of the report to the fact that the PRS contains a scheme or formula which causes and ensures automatic and continuous revision of the applicable duties. In Peru's opinion, the formula used by the PRS cannot ensure revisions of the applicable duties.[20] Guatemala opposes Peru's request and considers that the affirmation contained in the report that the PRS ensures the revision of the applicable duties is correct.[21] The Panel rejects Peru's request, considering that the description contained in the paragraph corresponds to the description of the facts as reflected in the evidence and the arguments submitted by the parties.

6.8. Guatemala requests that paragraphs 7.322 and 7.323 include a reference to a similar finding issued by the Panel and the Appellate Body in *Chile - Price Band System (Article 21.5 – Argentina)*, as well as a reference to Guatemala's second written submission.[22] Peru disagrees with the findings contained in these paragraphs of the report. Furthermore, Peru considers that, since the paragraphs in question contain factual findings, it would be unnecessary for the Panel to cite a different case.[23] The Panel considers that, inasmuch as the paragraphs in question contain factual findings, it is inappropriate to add the references to a different case or to Guatemala's second written submission, as requested by Guatemala.

[13] Guatemala's request for review of the interim report, paras. 3.4-3.6.
[14] Peru's comments on Guatemala's request for review of the interim report, para. 18.
[15] Guatemala's request for review of the interim report, para. 2.8.
[16] Peru's comments on Guatemala's request for review of the interim report, para. 23.
[17] Guatemala's request for review of the interim report, paras. 2.9-2.10.
[18] Peru's comments on Guatemala's request for review of the interim report, para. 24.
[19] Peru's request for review of the interim report, p. 2.
[20] Peru's request for review of the interim report, pp. 2-3.
[21] Guatemala's comments on Peru's request for review of the interim report, paras. 2.5-2.11.
[22] Guatemala's request for review of the interim report, paras. 2.11-2.12.
[23] Peru's comments on Guatemala's request for review of the interim report, paras. 9-10.

6.9. Peru requests that, in paragraph 7.323, the Panel should make it clear that the PRS legislation makes no mention of the possibility of extending the customs tables, and that such extensions are acts within the discretion of the Peruvian Executive.[24] Guatemala does not object to the report mentioning that the PRS legislation makes no reference to the possibility of extending the customs tables.[25] However, Guatemala does object to the assertion in the report that the act of extending the customs tables is a discretionary act on the part of the Peruvian Executive, but is not opposed to it being indicated that Peru has made that assertion.[26] Pursuant to Peru's request, the Panel made some clarificatory adjustments to paragraph 7.323. In addition, in paragraph 7.151, the Panel included a reference to the fact that the PRS legislation makes no mention of the possibility of extending the customs tables. The Panel does not consider it appropriate to affirm, as a matter of fact, that such extensions are a discretionary act on the part of the Peruvian Executive, as this point is disputed between the parties, and in the Panel's opinion was not conclusively demonstrated in the course of the proceedings. However, Peru's arguments in this respect are reflected in the report, for example in paragraph 7.480.

6.10. Guatemala requests clarification by the Panel of the findings contained in paragraphs 7.332 to 7.335. In this connection, Guatemala disagrees with the assertion that Peru used futures prices to make price estimates.[27] Guatemala also considers that, in the wording of the interim report, the findings contained in paragraphs 7.332 to 7.335 do not reflect the totality of the arguments, the evidence or the estimates submitted by the parties.[28] In this connection, Peru considers that the description given by the Panel is correct and does not need to be modified. In Peru's opinion, the additions proposed by Guatemala are incorrect and do not include the rebuttals submitted by Peru.[29] Pursuant to Guatemala's request, the Panel modified the language contained in paragraphs 7.332 to 7.335, taking into account Peru's comments, and inserted a new paragraph after the former paragraph 7.332.

6.11. Guatemala requests the Panel to delete the word "average" from the phrase "average reference price" in paragraphs 7.337, 7.344 and 7.345. In Guatemala's opinion, the mere fact that a reference price is applied (instead of the transaction value of a particular consignment), regardless of whether it corresponds to an average, entails a systemic lack of transparency and predictability.[30] Peru opposes this request as it considers that the reference price is an average, and that the elimination of that term would obscure the real facts of the case.[31] The Panel considers that the use of the term "average" in the description of the reference price does not affect the substance of its analysis. In addition, as is explained in the report, the reference price is an average. For these reasons, in the light of Guatemala's request, the Panel adjusted the wording of paragraphs 7.337, 7.344 and 7.345.

6.12. Guatemala requests the Panel to include in paragraph 7.346 a reference to certain paragraphs from its opening statement at the first meeting of the Panel and its responses to the Panel's questions.[32] Peru opposes this request as it considers that the paragraph in question constitutes a factual finding and that the Panel is under no obligation to repeat every argument of the parties on the matter.[33] The Panel included the references mentioned by Guatemala because it considered that they give context to the finding set out in paragraph 7.346.

6.13. Guatemala requests that paragraph 7.352 be modified in order to avoid any confusion between the functions of the Panel and the possibility that the Appellate Body may complete the analysis on a specific point.[34] Peru opposes the wording proposed by Guatemala, considering that a panel is not authorized to leave the analysis of certain aspects to the Appellate Body.[35] The Panel modified paragraph 7.352, on the basis of the text suggested by Guatemala and taking Peru's observations into account.

[24] Peru's request for review of the interim report, p. 2.
[25] Guatemala's comments on Peru's request for review of the interim report, para. 2.2.
[26] Guatemala's comments on Peru's request for review of the interim report, paras. 2.3-2.4.
[27] Guatemala's request for review of the interim report, paras. 2.18-2.20.
[28] Guatemala's request for review of the interim report, paras. 2.21-2.25.
[29] Peru's comments on Guatemala's request for review of the interim report, paras. 11-13.
[30] Guatemala's request for review of the interim report, paras. 2.26-2.27.
[31] Peru's comments on Guatemala's request for review of the interim report, para. 14.
[32] Guatemala's request for review of the interim report, paras. 2.28-2.30.
[33] Peru's comments on Guatemala's request for review of the interim report, para. 22.
[34] Guatemala's request for review of the interim report, paras. 3.1-3.3.
[35] Peru's comments on Guatemala's request for review of the interim report, paras. 15-17.

6.14. Guatemala requests that the report reflect its arguments regarding ten factors which Guatemala identified as grounds for considering that the duties resulting from the PRS are a measure other than an ordinary customs duty. Guatemala also asks the Panel to issue a finding with regard to those factors.[36] Peru opposes Guatemala's requests. In Peru's opinion, Guatemala's request concerning the ten factors that are said to make the duties resulting from the PRS a measure other than ordinary customs duties neither refers to specific aspects of the interim report nor identifies a specific section of the report. Peru points out in addition that Guatemala's request would lead the Panel to make new findings without giving the parties an opportunity to make comments.[37] Regarding Guatemala's request that the report reflect its arguments in respect of the factors purporting to show that the duties resulting from the PRS are a measure other than ordinary customs duties, the Panel adjusted the last part of paragraph 7.376; it inserted a new paragraph after that paragraph; and it also inserted a new paragraph after paragraph 7.387; all with the aim of reflecting the parties' arguments on the matter more extensively. The Panel considers it unnecessary to issue the additional and separate findings requested by Guatemala on this point. In this connection, the Panel made some explanatory adjustments to paragraphs 7.370 and 7.417.

6.15. Guatemala asks that the report provide a better account of its arguments concerning Peru's proposal that consideration be given to whether the challenged measure is an ordinary customs duty on the basis of positive criteria. In this connection, Guatemala suggests that the wording of paragraph 7.377 be modified, and that an adequate description be given of its response to the arguments set forth by Peru, as described in paragraph 7.386.[38] Peru does not oppose the change proposed by Guatemala to paragraph 7.377, to the extent that the Panel may consider that the change in question is a more precise reflection of Guatemala's position on the matter. However, Peru is opposed to revising the description of its arguments in paragraph 7.386.[39] The Panel modified paragraph 7.377 on the basis of the wording suggested by Guatemala. In order to describe Guatemala's arguments, the Panel also inserted an additional section at the end of the same paragraph, as well as an additional paragraph immediately thereafter. The Panel did not modify the description of Peru's arguments, but did include in footnote 469 to paragraph 7.385 an additional reference to a written communication in which Peru explained the basis of some of its arguments.

6.16. Guatemala asks that the report reflect the arguments of the parties as to whether the price range system of Peru has existed since 1991 or since 2001.[40] Concerning this request, Peru is opposed to the Panel including new analyses in the report without giving the parties an opportunity to submit comments on the subject.[41] Pursuant to Guatemala's request, the Panel modified the last part of paragraph 7.382, in order to reflect Guatemala's arguments on this point, and included a new footnote to paragraph 7.388 in order to identify the written submissions in which Peru refers to this topic.

6.17. Guatemala requests the Panel to explain in more detail the reasons why it considers that issuing findings with respect to Guatemala's claims under Articles X:1 and X:3(a) of the GATT 1994 would not help the DSB in making precise recommendations to allow for prompt compliance by Peru.[42] Peru opposes Guatemala's request and states that the interim review would not be the appropriate stage for the Panel to include a new analysis in the report concerning the consistency of the challenged measure with Article X of the GATT 1994.[43] In this connection, the Panel rejects Guatemala's request, as it considers that paragraphs 7.461 and 7.495 provide sufficient explanation as to why, given the finding that the duties resulting from the PRS are inconsistent with Peru's substantive obligations under the WTO agreements, it is unnecessary to take up the additional matter of whether certain elements of the system are in addition consistent with the obligations contained in Articles X:1 and X:3(a) of the GATT 1994.

[36] Guatemala's request for review of the interim report, paras. 4.1-4.5.
[37] Peru's comments on Guatemala's request for review of the interim report, para. 22.
[38] Guatemala's request for review of the interim report, paras. 4.6-4.8.
[39] Peru's comments on Guatemala's request for review of the interim report, para. 19.
[40] Guatemala's request for review of the interim report, para. 4.9.
[41] Peru's comments on Guatemala's request for review of the interim report, para. 22.
[42] Guatemala's request for review of the interim report, paras. 5.1-5.6.
[43] Peru's comments on Guatemala's request for review of the interim report, para. 20.

6.18. Guatemala refers to Peru's argument to the effect that, through the FTA, the parties modified their mutual rights under the WTO agreements. In this connection, Guatemala requests that the findings contained in paragraphs 7.520 to 7.522 of the report should mention the fact that Peru's argument would call for the Panel to interpret the content of the FTA, which would go beyond the Panel's terms of reference.[44] Peru opposes Guatemala's request and asserts that the interim review would not be the appropriate stage for the Panel to modify its analysis.[45] In this connection, the Panel rejects Guatemala's request, considering that paragraphs 7.521 and 7.522 make it sufficiently clear that, since the FTA has not entered into force, it is unnecessary for the Panel to rule on the argument put forward by Peru.

6.19. Guatemala requests that paragraph 8.7 of the report be amended so as not to refer to the measure at issue. In its opinion, it is wrong to state that Guatemala identified the measure at issue as the additional duty imposed by Peru on imports of certain agricultural products and that it did not challenge the PRS as such.[46] Peru considers that Guatemala's request is contrary to the Panel's obligation to issue reasoned conclusions.[47] In this connection, the Panel rejects Guatemala's request, since the measure at issue was identified in the request for the establishment of a panel submitted by Guatemala, in the manner described in paragraph 8.7 of the report.

6.20. In the light of the requests made by the parties during the review stage[48], and in order to reflect the arguments of the parties more precisely, the Panel made adjustments to the following paragraphs: 7.40, 7.169, 7.170, 7.171, 7.203, 7.216, 7.330, 7.381 and 7.439. It also made minor corrections to the following paragraphs: 7.46, 7.92 and 7.321, as well as to the title of section 7.5.

6.21. The Panel also made additional typographical corrections to the following paragraphs: 1.13, 2.2, 3.1, 7.9, 7.10, 7.26, 7.62, 7.67, 7.69, 7.88, 7.125, 7.145, 7.146, 7.174, 7.178, 7.183, 7.198, 7.215, 7.222, 7.223, 7.227, 7.250, 7.272, 7.288, 7.304, 7.369, 7.370, 7.383, 7.423, 7.494, 7.496, 7.512, 7.514, 7.521 and 8.3, as well as to the title of section 7.4.

7 FINDINGS

7.1 Preliminary considerations

7.1.1 Introduction

7.1. The Panel considers that, before proceeding to assess the issues raised in the present dispute, it would be useful to describe the legal framework it will apply with respect to its terms of reference, its task, the standard of review, treaty interpretation, the burden of proof and the order of analysis.

7.1.2 The Panel's terms of reference

7.2. This Panel was established by the DSB on 23 July 2013, with the following standard terms of reference:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Guatemala in document WT/DS457/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[49]

7.3. In accordance with Article 6.2 of the DSU, the request for the establishment of a panel "shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

[44] Guatemala's request for review of the interim report, paras. 6.1-6.2.
[45] Peru's comments on Guatemala's request for review of the interim report, para. 21.
[46] Guatemala's request for review of the interim report, paras. 7.1-7.3.
[47] Peru's comments on Guatemala's request for review of the interim report, para. 8.
[48] See, for example, Guatemala's request for review of the interim report, para. 2.17.
[49] Constitution of the Panel established at the request of Guatemala, document WT/DS457/3 (of 23 September 2013), para. 2.

7.4. Accordingly, the terms of reference of this Panel are delimited by the measures identified and the claims put forward by Guatemala in its panel request submitted on 13 June 2013.[50]

7.1.3 Function of the Panel and standard of review

7.5. Article 11 of the DSU indicates that the function of panels is "to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements". Further, Article 3.4 of the DSU provides that:

> Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

7.6. To this end, and as required by Article 11 of the DSU, a panel should "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". It should also make such "findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

7.7. As regards the legal assessment, that is, the analysis of the consistency or inconsistency of the challenged measures with the applicable provisions, the obligation on a panel to make an objective assessment of the matter means that it may "freely ... use arguments submitted by any of the parties – or ... develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration".[51]

7.1.4 Interpretation of the relevant rules of the agreements

7.8. In its objective assessment of the matter before it, the Panel may be called upon to clarify the scope of certain provisions of the covered agreements cited by the parties. In this connection, Article 3.2 of the DSU states that the WTO dispute settlement system serves to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."

7.9. The "customary rules of interpretation of public international law" referred to by the DSU are the rules of interpretation that have attained the status of general customary international law, as codified in the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention).[52] The Appellate Body explained that these "rules of treaty interpretation … apply to any treaty, in any field of public international law, and not just to the WTO agreements. These rules of treaty interpretation impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned".[53]

7.10. Article 31 of the Vienna Convention contains a general rule of interpretation to the effect that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[54] Under the terms of Article 31.2 of the Vienna Convention, the context for the purpose of the interpretation of a treaty shall comprise the text of the relevant agreement, including its preamble and annexes.

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[50] Request for the establishment of a panel by Guatemala, document WT/DS457/2 (of 14 June 2013).

[51] Appellate Body Report, *EC – Hormones*, para. 156. See also Appellate Body Reports, *Canada - Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.215.

[52] Appellate Body Reports, *US - Gasoline*, p. 17; *Japan – Alcoholic Beverages II*, p. 10. See also *Vienna Convention on the Law of Treaties* (Vienna Convention), done at Vienna on 23 May 1969, United Nations document A/CONF.39/27.

[53] Appellate Body Report, *US – Hot-Rolled Steel*, para. 60.

[54] With respect to good faith, the Appellate Body has indicated that "[t]hat means, *inter alia*, that terms of a treaty are not to be interpreted based on the assumption that one party is seeking to evade its obligations and will exercise its rights so as to cause injury to the other party". Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 326.

7.11. Article 32 of the Vienna Convention provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.[55] The Appellate Body emphasized that Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse, so that an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.[56]

7.12. Article XVI of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) indicates that the legal texts of the WTO are equally authentic in their English, French and Spanish versions.[57] In view of the foregoing, and in accordance with the provisions of Article 33 of the Vienna Convention, the terms of the covered agreements are presumed to have the same meaning in each authentic text, and in the event that a difference of meaning is disclosed, the meaning that best reconciles the three texts, having regard to the object and purpose of the treaty, shall be adopted.[58]

7.1.5 Burden of proof

7.13. Although the DSU does not contain any express provision governing the burden of proof, by application of the general principles of law the WTO dispute settlement system has traditionally recognized that the burden of proof lies with the party asserting a fact, whether that party be the claimant or the defendant.[59]

7.14. Accordingly, in a proceeding the burden of proving that the impugned measure is inconsistent with the relevant provisions of covered agreements initially lies with the complainant. Once the complainant has made a *prima facie* case for such inconsistency, the burden shifts to the defendant, who must in turn rebut the alleged inconsistency.[60] A *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[61] In the words of the Appellate Body:

> [as] a general matter, the burden of proof rests upon the complaining Member. That Member must make out a prima facie case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-consistent, until sufficient evidence is presented to prove the contrary.[62] (emphasis original)

7.15. The Appellate Body added in this respect that precisely how much and precisely what kind of evidence will be required for the complaining party to establish its case will necessarily vary from measure to measure, provision to provision, and case to case.[63] In any event, it should be borne in mind that, in the context of the WTO dispute settlement system:

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[55] Appellate Body Report, *EC – Chicken Cuts*, para. 282.
[56] Ibid. para. 283.
[57] See also the explanatory note to paragraph 2(c)(i) of the GATT 1994.
[58] The Appellate Body explained: "Article 33 of the Vienna Convention reflects the principle that the treaty text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. For the covered agreements, Article XVI of the WTO Agreement provides that the English, French, and Spanish language each are authentic. Consequently, the terms of Article III:8(a) of the GATT 1994 are presumed to have the same meaning in each authentic text. "Appellate Body Report, *Canada - Renewable Energy / Canada - Feed-in Tariff Program*, fn. 512 to para. 5.66. See also, for example, Appellate Body Reports*, Chile - Price Band System*, para. 271; *EC - Bed Linen (Article 21.5 - India)*, fn. 153 to para. 123; *US - Softwood Lumber IV*, fn. 50 to para. 59, *EC - Tariff Preferences*, para. 147; and *US - Upland Cotton,* fn. 510 to para. 424.
[59] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 12-16.
[60] Appellate Body Report, *EC – Hormones*, para. 98.
[61] Ibid. para. 104.
[62] Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66.
[63] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

> A *prima facie* case must be based on "evidence and legal argument" put forward by the complaining party in relation to each of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.[64] (emphasis original; footnotes omitted)

7.16. In the matter before us, and by application of the foregoing criteria, it lies with Guatemala to make out a *prima facie* case for the violations of the provisions of the WTO covered agreements it has invoked. If Guatemala succeeds in making a *prima facie* case for its claims, it will then be for Peru to rebut them.

7.1.6 Order of analysis

7.17. The Appellate Body has stated that, as a general principle, panels are free to structure the order of their analysis as they see fit. Except insofar as there may be a mandatory sequence of analysis, deviation from which would lead to an error of law and/or affect the substance of the analysis itself, panels have discretion to structure the order of their analysis.[65] The Panel also recalls that, although panels may, in structuring their analysis, take account of the manner in which a complainant presents its claims, they may also follow a different sequential order.[66] In the present case, the Panel will determine the order of analysis by focusing on the structure and logic of the provisions at issue in this dispute.[67]

7.18. First of all, the Panel notes that Peru has requested it to find that Guatemala did not act in good faith in engaging in the present procedure and therefore to refrain from examining Guatemala's claims.[68] Peru's request constitutes a preliminary question so that, if it were accepted, the Panel would not proceed to consider Guatemala's substantive claims. Accordingly, the Panel will begin by examining this argument put forward by Peru.

7.19. If, after analysing the above-mentioned preliminary question, the Panel concludes that it should continue with the analysis, it will proceed to consider the main substantive provisions invoked by Guatemala, that is to say, Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. With respect to the order in which these two provisions should be analysed, the Appellate Body has expressed a preference for beginning with Article 4.2 of the Agreement on Agriculture. In this connection, in the original proceedings in *Chile – Price Band System*, the Appellate Body stated:

> 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*. In our Report in *EC – Bananas III*, we interpreted Article 21.1 to mean 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 …
>
> [A]s we see it, the difference between the two provisions is that Article 4.2 of the *Agreement on Agriculture* deals *more specifically* with preventing the circumvention of tariff commitments on *agricultural products* than does the first sentence of Article II:1(b) of the GATT 1994 …

[64] Appellate Body Report, *US – Gambling*, para. 140.
[65] Appellate Body Report, *Canada - Wheat Exports and Grain Imports*, paras. 126-127.
[66] Ibid.; *US - Zeroing (EC) (Article 21.5 - EC)*, para. 277.
[67] Appellate Body Reports, *Canada - Autos*, para. 151; *Canada - Wheat Exports and Grain Imports,* para. 109.
[68] Peru's first written submission, paras. 4.11-4.21.

> [A]ny finding under Article II:1(b) of the GATT 1994 would be subject to further inquiry under the *Agreement on Agriculture*. In contrast, if we were to find first that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*, we would not need to make a separate finding on whether the price band system also results in a violation of Article II:1(b) of the GATT 1994 in order to resolve this dispute.[69] (footnote - citing Appellate Body Report, *EC - Bananas III*, para. 155 - omitted; emphasis original)

7.20. The Panel does not find any justification for departing from the Appellate Body's reasoning in the circumstances of the present dispute. Therefore, in the event that the Panel rejects the preliminary argument regarding the alleged lack of good faith, it will commence its analysis of the main substantive provisions invoked by Guatemala with Article 4.2 of the Agreement on Agriculture. The Panel will then consider, if appropriate, Guatemala's claims under Article II:1(b) of the GATT 1994.

7.21. After analysing, if necessary, the claims concerning the main substantive provisions invoked by Guatemala, the Panel will address, if appropriate, the provisions concerning the application of the measure, that is to say, Articles X:1 and X:3(a) of the GATT 1994.

7.22. Subsequently, if the Panel finds that the measure at issue is an ordinary customs duty, it will consider Guatemala's claims with respect to the Customs Valuation Agreement.

7.23. Peru has raised an additional argument in case the Panel finds the measure at issue to be inconsistent with any of the provisions identified by Guatemala. In that case, Peru asserts that, under the FTA between Peru and Guatemala, the parties modified, as between themselves, their reciprocal obligations under the WTO agreements, and that the provisions of the FTA should prevail. Given the conditional nature of this argument, the Panel will consider this defence only if it decides that the measure at issue is inconsistent with any of the provisions identified by Guatemala.

7.2 The question of whether the Panel should refrain from examining Guatemala's claims

7.2.1 Introduction

7.24. As a preliminary issue, Peru refers to the FTA between Peru and Guatemala signed in December 2011.[70] Peru asserts that, under the FTA, Guatemala agreed that Peru could maintain its PRS.[71] Peru argues that, therefore, in initiating this procedure against the PRS, Guatemala is violating the obligation to engage in WTO dispute settlement procedures in good faith.[72] Thus, according to Peru, the Panel should not consider Guatemala's claims.[73]

7.25. Peru maintains that its PRS is consistent with WTO rules, but even if the Panel were to find that it is not, there would be an inconsistency between the FTA and the WTO agreements. This is because the FTA allows Peru to maintain the PRS, whereas the WTO agreements would prohibit it from doing so. In the presence of such inconsistency, by virtue of the provisions of its Article 1.3.2, the FTA would prevail. This would result in the modification, between the parties, of any provision of the WTO agreements that prohibits the PRS.[74]

7.26. Guatemala rejects Peru's argument that in the present proceedings it has acted contrary to good faith.[75] According to Guatemala, a Member can only be found to have acted in breach of good faith if that Member challenges a measure after having clearly stated that it would not do so.[76]

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[69] Appellate Body Report, *Chile - Price Band System*, paras. 186, 187 and 190.
[70] Free Trade Agreement between the Republic of Peru and the Republic of Guatemala (extracts) (Extracts from the FTA) (Exhibits PER-32 and PER-65). See also Peru's first written submission, para. 3.74.
[71] Peru's first written submission, paras. 3.74 and 3.76; second written submission, para. 2.21.
[72] Peru's first written submission, paras. 4.11 and 4.19-4.20.
[73] Ibid. para. 4.21; Peru's second written submission, para. 2.3.
[74] Peru's second written submission, para. 2.63.
[75] Guatemala's second written submission, para. 9.4.
[76] Ibid. para. 9.7.

Guatemala maintains that no waiver or modification of Guatemala's rights in the WTO with respect to the PRS can be inferred from the FTA.[77]

7.27. Furthermore, Guatemala maintains that Peru's request would require the Panel to rule on the consistency of Guatemala's actions with the provisions of the FTA, and this, in Guatemala's opinion, would lead the Panel to act outside its terms of reference.[78] Guatemala points out that the Panel is not competent to hear disputes unrelated to the WTO covered agreements. Guatemala adds that the FTA is not a legal vehicle for waiving or modifying rights and obligations contained in the WTO Agreement.[79]

7.28. Peru's arguments raise two separate issues. The first is whether Guatemala engaged in the present procedure in a manner inconsistent with the good faith required by the DSU and whether this means that the Panel should therefore refrain from considering Guatemala's claims. The Panel will consider this aspect as a preliminary matter and, in the light of its conclusions, decide whether it should proceed with the consideration of the Guatemalan claims.

7.29. The second is whether – assuming that the Panel finds that the measure at issue is inconsistent with any of Peru's obligations under the provisions of the covered agreements – it can be considered that under the FTA the parties have modified, as between themselves, their reciprocal obligations under the WTO agreements, and if so, whether the provisions of the FTA should take precedence. Given the conditional nature of this Peruvian argument, the Panel will examine this defence only if it decides that the measure at issue is inconsistent with any of the provisions identified by Guatemala.

7.2.2 The content of the FTA and its legal status

7.30. As a preliminary step, consideration will be given to Peru's argument that the Panel should refrain from examining Guatemala's claims on the grounds that Guatemala engaged in the present procedure in a manner contrary to the good faith required by the DSU. The Panel will begin by describing the relevant facts relating to the FTA, together with the provisions of the FTA invoked by the parties to the dispute.

7.2.2.1 Chronology of events relating to the negotiation and entry into force of the FTA

7.31. The negotiations that led to the signing of the FTA arose out of the general negotiating framework agreed between Peru and various Central American countries (Costa Rica, Guatemala, Honduras and Panama) on 16 October 2010 at the VIth Ministerial Meeting of the Latin American Pacific Arc Forum.[80] Guatemala and Peru signed the FTA on 6 December 2011.[81]

7.32. The FTA was approved by the Guatemalan Congress on 4 July 2013, by Decree No. 5-2013 published in the Journal of Central America (Guatemala's official journal) on 23 July 2013.[82] In December 2013, Guatemala initiated the procedures for ratification of the FTA by the President of the Republic.[83] On 5 March 2014, Peru received a communication from Guatemala, dated 21 February 2014, notifying it that Guatemala had fulfilled the legal requirements for the entry into force of the FTA.[84]

7.33. As matters stand at the close of these proceedings, the available evidence indicates that Peru has not ratified the FTA. Peru has stated that, under Article 57 of its Political Constitution, the

[77] Guatemala's second written submission, paras. 9.9-9.14.
[78] Ibid. paras. 9.27 (citing Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 56 and 78), and 9.29-9.31.
[79] Guatemala's second written submission, para. 9.28; response to Panel question No. 21, para. 35.
[80] Peru's first written submission, para. 3.71; General Framework for the negotiation of a Free Trade Agreement between Costa Rica, Honduras, Guatemala, Panama and Peru (Exhibit PER-51).
[81] Peru's first written submission, para. 3.74; Decree No. 5-2013 of the Guatemalan Congress published on 23 July 2013 (Exhibit PER-30); Note from Guatemala to Peru (Exhibit PER-82).
[82] Peru's first written submission, para. 3.78; Peru's response to Panel question No. 23, para. 37; Decree No. 5-2013 of the Guatemalan Congress, published on 23 July 2013 (Exhibit PER-30); Guatemala's response to Panel question No. 23, para. 45.
[83] Guatemala's response to Panel question No. 23, para. 45.
[84] Peru's opening statement at the second meeting of the Panel, para. 6; Note from Guatemala to Peru (Exhibit PER-82); Guatemala's response to Panel question No. 89, para. 7.

President of the Republic can ratify the FTA without having to obtain the prior approval of the Congress.[85] Peru has stated its intention that the FTA should enter into force, and consequently has not ruled out expressing its consent to be bound by the FTA, "provided that the balance agreed between Peru and Guatemala therein is respected".[86] However, Peru has stated that it "is not proceeding with the exchange of notifications at this time since the case brought by Guatemala has created uncertainty with regard to the existence of the balance negotiated".[87]

7.2.2.2 Content of the FTA

7.34. The parties identified the following provisions of the FTA as relevant to the analysis of their arguments with regard to whether the Panel should reject Guatemala's claims.

7.35. The preamble to the FTA states:

> The Government of the Republic of Peru, on the one part, and the Government of the Republic of Guatemala, on the other part, being resolved to:
>
> **STRENGTHEN** the special bonds of friendship and cooperation between them and promote regional economic integration;
>
> **FOSTER** the creation of an expanded and secure market for the goods and services produced in their respective territories;
>
> **PROMOTE** comprehensive economic development in order to reduce poverty;
>
> **ENCOURAGE** the creation of new employment opportunities and improve working conditions and living standards in their respective territories;
>
> **ESTABLISH** clear and mutually advantageous rules governing their trade;
>
> **GUARANTEE** a predictable legal and commercial framework for trade and investment;
>
> **RECOGNIZE** that the promotion and protection of investment by one Party in the territory of the other Party will contribute to enhancing the flow of investment and stimulate mutually advantageous trading activity;
>
> **PREVENT** distortions in their reciprocal trade;
>
> **PROMOTE** the competitiveness of their enterprises in global markets;
>
> **FACILITATE** trade by promoting efficient and transparent customs procedures that ensure predictability for their importers and exporters;
>
> **STIMULATE** creativity and innovation and promote trade in innovative sectors of their economies;
>
> **PROMOTE** transparency in international trade and investment;
>
> **PRESERVE** their capacity for safeguarding public welfare; and
>
> **BUILD ON** their respective rights and obligations under the *Marrakesh Agreement Establishing the World Trade Organization*, and other treaties to which they are parties[88],

[85] Peru's response to Panel question No. 23, para. 39. See the Political Constitution of Peru (Exhibit PER-1), p. 17.

[86] Peru's response to Panel question No. 94, paras. 15-16; comments on Guatemala's response to Panel question No. 89, para. 5. See also Peru's opening statement at the first meeting of the Panel, para. 23.

[87] Peru's response to Panel question No. 23, para. 39.

[88] Extracts from the FTA (Exhibit PER-32).

7.36. Article 1.1 of the FTA provides as follows:

> The Parties to this Treaty, in accordance with the provisions of Article XXIV of the WTO *General Agreement on Tariffs and Trade 1994* and Article V of the WTO *General Agreement on Trade in Services*, hereby establish a free trade area. (emphasis original)

7.37. Article 1.2 identifies as objectives of the FTA:

> (a) encouraging the expansion and diversification of trade between the Parties;
>
> (b) removing unnecessary barriers to trade and facilitating the cross-border movement of goods and services between the Parties;
>
> (c) promoting conditions of free competition within the free trade area;
>
> (d) expanding the opportunities for investment within the territories of the Parties;
>
> (e) appropriately and effectively protecting and enforcing intellectual property rights in the territory of each Party, while taking into consideration the balance between the rights and obligations deriving therefrom; and
>
> (f) creating effective procedures for the application and observance of this Treaty, for its joint administration, and for preventing and settling disputes.

7.38. Article 1.3 of the FTA, on the relationship with other international agreements, stipulates that:

> 1. The Parties confirm their existing mutual rights and obligations under the WTO Agreement and other agreements to which they may be parties.
>
> 2. 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.

7.39. Where tariff elimination is concerned, paragraph 2 of Article 2.3 of the FTA establishes that:

> Except as otherwise provided in this Treaty, each Party shall eliminate its customs tariffs on goods originating in the other Party, in accordance with Annex 2.3.

7.40. The parties have indicated that, during the negotiation of the FTA, they discussed what should be the treatment under the PRS for imports originating in Guatemala. The parties agreed that Peru would grant Guatemala a tariff quota free of "tariffs, including those deriving from the application of the Price Range System" for imports of certain products of Guatemalan origin, namely: cheese, food preparations and preparations of a kind used in animal feeding.[89] Peru has indicated that Guatemala requested that its sugar exports should also be free of tariffs, including the price range system.[90] However, Guatemala and Peru failed to arrive at an agreement on this latter aspect.[91] Finally, with respect to the PRS, paragraph 9 of Annex 2.3 to the FTA states that:

> Peru may maintain its Price Range System, established in Supreme Decree No. 1152001EF and the amendments thereto, with regard to the products subject to

[89] Situation of Products Subject to the Price Range in Peru, as Compared with the Treatment Granted in the Guatemala-Peru Free Trade Agreement (Exhibit GTM-44), pp. 8-9; Peru's response to Panel question No. 31, para. 73.

[90] Guatemala's sugar proposal of 3 May 2011 (Exhibit PER-66). See also Peru's second written submission, para. 2.31.

[91] Peru's first written submission, para. 3.73; Guatemala's response to Panel question No. 24, para. 46.

> the application of the system marked with an asterisk (*) in column 4 of Peru's Schedule as set out in this Annex.[92]

7.41. With respect to disputes that may arise under the FTA and other trade agreements, Article 15.3 of the FTA provides as follows:

> In the event of any dispute that may arise under this Treaty or under another free trade agreement to which the disputing Parties are party or the *WTO Agreement*, the complaining Party may choose the forum for settling the dispute.[93] (emphasis original)

7.42. Finally, Article 19.5 of the FTA stipulates that:

> 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 the date on which the Parties so agree.[94]

7.2.3 Main arguments of the parties

7.2.3.1 Peru

7.43. Peru claims that Guatemala is seeking the "complete dismantlement" of the PRS through these proceedings, after having explicitly recognized, in the FTA, that Peru could maintain it.[95] In Peru's opinion, this conduct is contrary to the obligation on Guatemala, under articles 3.7 and 3.10 of the DSU, to engage in dispute settlement procedures under the DSU in good faith.[96]

7.44. Peru requests the Panel to make an objective assessment of the content of the FTA as a relevant factual matter, in order to verify whether Guatemala engaged in the present procedure in a manner contrary to good faith.[97]

7.45. Peru maintains that, pursuant to articles 3.7 and 3.10 of the DSU, good faith is a requirement as to the admissibility of a Member initiating a procedure under the WTO dispute settlement system.[98] Peru explains that its argument that Guatemala has not acted in good faith does not entail application of the estoppel principle in this case.[99]

7.46. Peru considers that the obligation on Members to exercise their judgement as to whether bringing a case would be fruitful, in accordance with article 3.7 of the DSU, is not a matter of self-regulation.[100] According to Peru, the presumption that a Member has engaged in a procedure in good faith (identified by the Panel in *EC – Export Subsidies on Sugar*) can be refuted.[101] Given the possibility of refuting that presumption, Peru considers that the Panel may determine that action under the present procedure would not be fruitful.[102]

7.47. In Peru's opinion, pursuant to Article 3.10 of the DSU, any action that implies bringing a case contrary to good faith is prohibited. According to Peru, actions contrary to good faith include cases where a Member initiates a dispute with the intention of causing injury to another

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[92] For a list of the tariff lines marked with an asterisk, see Extracts from the FTA (Exhibit PER-32); Table containing the tariff items marked with an asterisk in Peru's Schedule under the Guatemala-Peru FTA, and those subject to the Price Range System (Exhibit GTM-46).

[93] Guatemala's second written submission, para. 9.13.

[94] Extracts from the FTA (Exhibit PER-65).

[95] Peru's first written submission, para. 4.2.

[96] Peru's second written submission, para. 2.3. See also first written submission, paras. 4.11-4.13; response to Panel question No. 26, para. 53.

[97] Peru's first written submission, para. 4.3; second written submission, paras. 2.6 and 2.9; response to Panel question No. 22, para. 34. See also X. Fernández Pons, *La OMC y el Derecho internacional* (The WTO and International Law) (Marcial Pons, 2006) (Exhibit PER-39).

[98] Peru's first written submission, para. 4.13; second written submission, paras. 2.3 and 2.41; response to Panel question No. 90, para. 4.

[99] Peru's response to Panel question No. 39, para. 87; response to Panel question No. 92, para. 7.

[100] Peru's second written submission, paras. 2.38 and 2.41.

[101] Peru's second written submission, para. 2.42 (citing Panel Report, *EC – Export Subsidies on Sugar (Australia) / EC – Export Subsidies on Sugar (Brazil) / EC – Export Subsidies on Sugar (Thailand)*, para. 7.67).

[102] Peru's response to Panel question No. 96, para. 22.

Member or impairing its rights, in order to waste time, as a retaliatory measure, or when the action diametrically contradicts what has been agreed in a free trade agreement.[103]

7.48. Peru maintains that the FTA was adopted and ratified by Guatemala and Peru, but is not yet in force. In addition, neither of the two Parties has expressed the intention of not being party to the FTA. Therefore, in accordance with the provisions of Article 18 of the Vienna Convention[104], Guatemala is obliged not to defeat the object and purpose of the FTA through actions that would render the provisions of the treaty meaningless.[105] Peru states that Article 18 of the Vienna Convention is applicable as an expression of the principle of good faith.[106] In addition, Peru asserts that, in order to find that Guatemala has not acted in good faith, the Panel need only determine that Guatemala violated Article 18 of the Vienna Convention.[107]

7.49. According to Peru, paragraph 9 of Annex 2.3 to the FTA is a clear expression of Guatemala's willingness to agree that Peru could maintain the PRS.[108] Peru also asserts that, given the bilateral nature of the FTA, the object and purpose of the treaty includes all the rules contained therein.[109] Peru adds that bringing a case aimed at the dismantlement of the PRS "would eviscerate" paragraph 9 of Annex 2.3 to the FTA, leaving it inoperative, and would constitute an action tending to defeat the object and purpose of the FTA.[110]

7.50. Consequently, Peru contends that Guatemala did not initiate these proceedings in good faith and requests the Panel to reject Guatemala's claims *in limine*.[111]

7.51. Peru observes that, when one party is not satisfied with what was negotiated in a bilateral treaty establishing that its provisions would take precedence over WTO provisions with which it might conflict, allowing that party to have recourse to the WTO to contest what was agreed in the treaty "undermines both the WTO system and the basic principles of international law, since it constitutes an open abuse of rights which cannot be permitted".[112]

7.2.3.2 Guatemala

7.52. Guatemala asserts that it acted with "the utmost caution and in the most cooperative spirit" in these proceedings, and therefore rejects any allegation of a lack of good faith.[113]

7.53. In Guatemala's view, Peru's request concerning violation of the provisions of the FTA would require the Panel to act outside its terms of reference.[114] Guatemala asserts that panels cannot rule on disputes unrelated to the WTO covered agreements.[115] Guatemala adds that the Panel is not precluded from assessing the FTA as a factual matter and from making factual findings in that respect.[116]

7.54. With regard to Article 3.7 of the DSU, Guatemala maintains that the obligation to exercise judgement as to whether bringing a case would be fruitful entails a decision by each Member,

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[103] Peru's second written submission, para. 2.49; response to Panel question No. 92, para. 8.
[104] See M. Dixon, *Cases & Materials on International Law*, 5th ed. (Oxford University Press, 2011) (Exhibit PER-36); M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009) (Exhibit PER-47).
[105] Peru's first written submission, para. 4.7.
[106] Peru's second written submission, para. 2.51; response to Panel question No. 22, para. 35; response to Panel question No. 93.
[107] Peru's response to Panel question No. 93, para. 13.
[108] Peru's second written submission, paras. 2.19-2.26.
[109] Peru's response to Panel question No. 27.
[110] Peru's response to Panel question No. 28, para. 59. See also response to Panel question No. 93, para. 14.
[111] Peru's first written submission, para. 4.21; second written submission, para. 2.3.
[112] Peru's second written submission, para. 2.68. See also Peru's opening statement at the first meeting of the Panel, para. 10; opening statement at the second meeting of the Panel, para. 12.
[113] Guatemala's second written submission, para. 9.4.
[114] Guatemala's second written submission, paras. 9.29-9.31. See also response to Panel question No. 21, para. 35(a) (citing Appellate Body Report, *Mexico - Taxes on Soft Drinks*, para. 78); response to Panel question No. 91, para. 16.
[115] Guatemala's second written submission, para. 9.27 (citing Appellate Body Report, *Mexico - Taxes on Soft Drinks*, paras. 56 and 78).
[116] Guatemala's response to Panel question No. 91, para. 15.

which a panel must presume to be made in good faith.[117] According to Guatemala, Article 3.7 of the DSU does not limit a Member's discretion with respect to the outcome of exercising its judgement as to whether engagement in a procedure would be fruitful. Consequently, Guatemala maintains that the outcome of that exercise could not be questioned by the respondent Member or by a panel.[118]

7.55. Guatemala indicates that, under Article 3.10 of the DSU, it can only be found that a Member engaged in a procedure in a manner contrary to good faith if, before initiating the dispute, the Member in question clearly expressed its waiver of the right to challenge the measure in question.[119] Guatemala contends that paragraph 9 of Annex 2.3 to the FTA cannot be read as an explicit or implicit waiver of any of Guatemala's WTO rights, including the right to bring a complaint under the DSU with regard to the PRS or the duties resulting from the PRS.[120] Guatemala does not agree with Peru's reading of what was agreed in the FTA. In particular, Guatemala considers that Article 1.3.1 of the FTA, read in conjunction with paragraph 9 of Annex 2.3 to the FTA, grants Peru the *right* to maintain the PRS for a limited number of products, without in any way affecting Peru's *obligation* to comply with the WTO Agreement.[121]

7.56. In addition to the foregoing, Guatemala rejects the possibility for a Member to waive – through a free trade agreement – its right to bring a case in the WTO. According to Guatemala, under the legal framework of the WTO, a waiver of that kind would have to be made through a mutually agreed solution in accordance with Article 3.5 of the DSU or a multilateral agreement.[122]

7.57. Guatemala argues that Peru is requesting the Panel to act outside its terms of reference, since it would be required to verify whether an act by Guatemala defeats the object and purpose of a non-WTO treaty.[123] In any event, Guatemala considers that the initiation of these proceedings does not defeat the object and purpose of the FTA because: (a) under Chapter 15 of the FTA, Guatemala is allowed to bring a case before the WTO; (b) Guatemala has not in any way waived its right to challenge the PRS; (c) there is no conflict whatsoever between the provisions of the FTA and those of the WTO agreements[124]; and (d) under Article 1.3.1 of the FTA, the parties confirm their rights and obligations under the WTO Agreement.[125] Lastly, Guatemala adds that Peru's arguments regarding Article 18 of the Vienna Convention are invalidated by Peru's apparent expression of the wish not to be bound by the FTA.[126]

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[117] Guatemala's response to Panel question No. 29, para. 64 (citing Appellate Body Reports, *EC - Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 211; and Panel Report, *EC – Export Subsidies on Sugar (Australia) / EC – Export Subsidies on Sugar (Brazil) / EC - Export Subsidies on Sugar (Thailand)*, para. 7.67); response to Panel question No. 96, paras. 29-31 (citing Appellate Body Reports, *EC – Bananas III*, para. 135; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74).

[118] Guatemala's response to question No. 96, para. 32; comments on Peru's response to Panel question Nos. 88, 89, 90, 92, 95 and 96, paras. 14-15.

[119] Guatemala's response to Panel question No. 29, paras. 65-66 (citing Appellate Body Reports, *EC - Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 228). See also second written submission, paras. 9.5 and 9.7; comments on Peru's response to Panel question Nos. 88, 89, 90, 92, 95 and 96, paras. 16-18.

[120] Guatemala's second written submission, paras. 9.9-9.14; response to Panel question No. 29, paras. 67-68.

[121] Guatemala's second written submission, paras. 9.11-9.12. See also response to Panel question No. 25, para. 49.

[122] Guatemala's second written submission, para. 9.8 (referring to United States' third-party written submission, para. 50); response to Panel question No. 21, para. 36; response to Panel question No. 91, para. 19; comments on Peru's response to Panel question No. 97, para. 27.

[123] Guatemala's second written submission, paras. 9.34-9.35; response to Panel question No. 27, para. 59 (citing Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 78); response to Panel question No. 88, para. 2.

[124] Guatemala's second written submission, paras. 9.13 and 9.36; response to Panel question No. 27, para. 60; response to Panel question No. 88, para. 4.

[125] Guatemala's response to Panel question No. 28, paras. 62-63.

[126] Guatemala's comments on Peru's response to Panel question Nos. 93 and 94, paras. 21-23 (referring to Guatemala's response to Panel question No. 89, para. 10; and to Public statements by the Minister for Foreign Affairs and the Vice-Minister for Foreign Trade of Peru (Exhibit GTM-38); and to Peru's opening statement at the second meeting of the Panel, para. 23).

7.58. Guatemala adds that, since the FTA has not been accepted by all WTO Members, it cannot be used to interpret the provisions of the covered agreements, or in particular Articles 3.7 and 3.10 of the DSU.[127]

7.59. Guatemala considers that its arguments remain valid regardless of whether or not the FTA is in force. In its view, the fact that the FTA has not entered into force strengthens the argument that this Treaty cannot be used to interpret the WTO agreements.[128]

7.60. Guatemala concludes by expressing concern at the effects that would be produced by acceptance of Peru's arguments. In particular, it considers that, if WTO Members were permitted to waive their right to challenge measures through free trade agreements, even before a dispute might arise in respect of such measures, "the door would be opened dangerously wide for political pressures and negotiating power imbalances to impair the rights of smaller and weaker parties".[129]

7.2.4 Main arguments of the third parties

7.2.4.1 Argentina

7.61. Argentina considers that, although the FTA has not entered into force, Guatemala and Peru, by virtue of having signed it, are subject to the obligation not to defeat its object and purpose.[130] In Argentina's view, a price range system lacks transparency and impairs the predictability of trade. The foregoing is incompatible with collaboration and the promotion of trade sought by an agreement like the FTA. Argentina concludes that the search for ways of further opening up trade should not be hampered by obstacles "such as certain measures which, by their inherent characteristics, tend to impair transparency and predictability, and thus to restrict trade".[131]

7.2.4.2 Brazil

7.62. Brazil considers that a free trade agreement may be relevant to the determination of the parties' rights and obligations in their bilateral relations and that, in accordance with the provisions of Article XXIV of the GATT 1994, it may also serve as a context for assessing the rights and obligations of a WTO Member. However, given that the FTA has not entered into force, it is not relevant to the assessment of the present case.[132] Brazil adds that Article 18 of the Vienna Convention could be relevant within the scope of the FTA, but is not relevant in the context of a dispute concerning the compatibility of the challenged measure with WTO provisions.[133] In addition, the Appellate Body was clear about the fact that panels and the Appellate Body must presume that the decision of any Member to initiate a case is made in good faith.[134] Brazil asserts that nothing in the DSU authorizes a panel to exclude the alleged violation of a WTO rule from its jurisdiction.[135]

7.2.4.3 Colombia

7.63. Colombia considers that Articles 3.7 and 3.10 of the DSU must form part of the objective analysis of a complaint that panels must make in accordance with Article 11 of the DSU.[136] Basing itself on Appellate Body statements, Colombia maintains that Articles 3.10 and 4.3 of the DSU require Members to act in good faith when initiating a dispute, and that Article 3.10 is one

[127] Guatemala's response to Panel question No. 21, para. 35(b) (citing Panel Report, *EC - Approval and Marketing of Biotech Products*, para. 7.68, and referring to Appellate Body Reports, *EC - Chicken Cuts*, paras. 271-273; and *Japan - Alcoholic Beverages II*, p. 15).

[128] Guatemala's response to Panel question No. 22, paras. 40-41.

[129] Guatemala's second written submission, para. 9.19; response to Panel question No. 21, para. 38. In para. 9.20 of its second written submission, Guatemala states that Peru's conduct in the present case, by threatening not to ratify the FTA if the dispute continues, is an example of the type of political pressure to which it refers. See also Guatemala's comments on Peru's response to Panel question No. 97, paras. 28-29.

[130] Argentina's response to Panel question Nos. 1 and 2, pp. 1-2.

[131] Argentina's response to Panel question Nos. 1 and 2, pp. 2-4.

[132] Brazil's response to Panel question No. 1, p. 1.

[133] Brazil's response to Panel question No. 2, p. 1.

[134] Brazil's response to Panel question No. 3, p. 2 (citing Appellate Body Reports, *EC - Sardines*, para. 278; and *Mexico - Corn Syrup (Article 21.5 - US)*, para. 74).

[135] Brazil's response to Panel question No. 3, p. 2.

[136] Colombia's third-party written submission, para. 43.

of the few provisions of the DSU that expressly limits the right of Members to bring a complaint.[137] In the context of Articles 3.7 and 3.10 of the DSU, the doctrine of the abuse of rights may be interpreted as the requirement to refrain from using the dispute settlement mechanism without the motivation to find a solution to the dispute or for the purpose of causing prejudice to one of the Members. Thus, the limits to the exercise of the right to initiate a dispute would lie in the absence of "a genuine intention to resolve the conflict".[138] Finally, Colombia states that the PRS does not *per se* defeat the object and purpose of the FTA or the rules contained in Article 4 of the Agreement on Agriculture.[139]

7.2.4.4 United States

7.64. The United States considers that the FTA is irrelevant to the adjudication of this matter, since the determination as to whether a measure is consistent with a covered agreement does not hinge on the terms of a treaty such as the FTA which does not form part of the covered agreements.[140] Nor does the United States consider Article 18 of the Vienna Convention to be relevant to an assessment as to whether Guatemala is entitled to assert a claim under the DSU.[141] The United States considers that the Panel must reject Peru's requests, inasmuch as they imply that the Panel should make findings regarding obligations other than those contained in the covered agreements and should refrain from making findings on claims relating to violations of those agreements.[142] With regard to Article 3.7 of the DSU, the United States considers that the Appellate Body left it to Members to determine when to bring an action and made it clear that a procedure under the DSU would be presumed to be initiated in good faith.[143] Furthermore, the United States considers that Article 3.10 of the DSU places no obligation on a Member, but is confined to setting out a common understanding of how Members will act under the dispute settlement mechanism.[144]

7.2.4.5 European Union

7.65. The European Union considers that a Member may waive its rights under the WTO agreements. For the purpose of determining whether a Member has undertaken to refrain from challenging a measure, the subsequent agreements between the parties regarding the interpretation of a treaty and any rules of international law applicable between the parties may be relevant for the interpretation of the covered agreements. The European Union suggests in this connection that the Panel is empowered to consider whether the FTA contains a clear commitment on Guatemala's part to refrain from challenging the PRS in the WTO.[145] The European Union argues that Article 18 of the Vienna Convention may be relevant to the extent that the FTA contains a clear commitment by Guatemala to refrain from challenging the PRS in the WTO.[146] The European Union also considers that the doctrine of abuse of rights prohibits a Member from exercising a right for a purpose other than the one for which the right was established. In the case of the dispute settlement mechanism, the purpose is to secure a positive solution to a dispute.[147] The European Union contends that the central issue for determining the existence of any element

[137] Colombia's third-party written submission, paras. 44-45 (citing Appellate Body Reports, *Canada - Continued Suspension*, para. 3.13; *EC - Export Subsidies on Sugar*, para. 312; *EC - Bananas III*, para. 135; and *Mexico - Taxes on Soft Drinks*, fn. 100). See also Colombia's third-party statement, para. 15.

[138] Colombia's response to Panel question No. 3 (citing Appellate Body Reports, *EC - Export Subsidies on Sugar*, para. 312; *EC - Bananas III*, para. 135; *Mexico - Taxes on Soft Drinks*, fn. 100).

[139] Colombia's third-party statement, paras. 12-13.

[140] United States' third-party statement, para. 19; response to Panel question No. 1, para. 4.

[141] United States' third-party written submission, para. 47; third-party statement, para. 21; response to Panel question No. 2.

[142] United States' third-party written submission, para. 36. See also, third-party written submission, paras. 42-43 (citing Appellate Body Report, *Mexico - Taxes on Soft Drinks*, para. 53).

[143] United States' third-party statement, para. 22 (citing Appellate Body Report, *Mexico - Corn Syrup (Article 21.5 - US)*, paras. 73-74); response to Panel question No. 3, para. 9.

[144] United States' third-party written submission, paras. 44-46; third-party statement, para. 24; response to Panel question No. 3, para. 10.

[145] European Union's third-party written submission, paras. 17-18 (citing Appellate Body Report, *EC - Bananas III (Article 21.5 - Ecuador II) / EC - Bananas III (Article 21.5 – US)*, paras. 217 and 218); response to Panel question No. 1, paras. 1-3.

[146] European Union's response to Panel question No. 2, para. 5.

[147] European Union's response to Panel question No. 3, para. 8.

preventing Guatemala from initiating these proceedings is whether, under the FTA, Guatemala made a clear commitment to refrain from bringing a case against the PRS before the WTO.[148]

7.2.5 Assessment by the Panel

7.66. Peru claims that Guatemala did not initiate this procedure in good faith, mainly because Guatemala accepted the maintenance of the PRS in the FTA and subsequently sought its dismantlement in the context of the present proceedings.[149] The Panel has carefully considered the arguments put forward by Peru. As the parties have observed, the assessment of this matter could have important systemic consequences.[150]

7.67. The Panel is aware that trade relations between WTO Members are often not regulated solely and exclusively by the rules contained in the WTO agreements. On the contrary, these relations are frequently governed by a complex framework that includes not only the rules of the WTO but also other international commitments, including those derived from regional and bilateral trade agreements. The WTO agreements recognize this reality, as is clear, for example, from Article XXIV of the GATT 1994, the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation (Enabling Clause), adopted by the GATT CONTRACTING PARTIES in 1979[151], and Article V of the General Agreement on Trade in Services. At the same time, these provisions impose certain conditions in the event that a Member, in the context of a regional or bilateral agreement, requests exemption from any of its obligations under the WTO agreements.[152] As the Appellate Body has observed, in performing its task of clarifying provisions of the covered agreements in the context of a specific dispute, a panel cannot read the texts of the agreements "in clinical isolation from public international law".[153]

7.68. However, this Panel's task is circumscribed by the terms of reference conferred upon it by the DSU. These terms of reference delimit the Panel's authority as follows:

> To examine, *in the light of the relevant provisions of the covered agreements cited by the parties to the dispute*, the matter referred to the DSB by Guatemala in document WT/DS457/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[154] (emphasis added)

7.69. For this reason, the Panel is only authorized to rule on the invocation of any rule of public international law applicable to the relations between the parties to the extent that the invocation of that rule of international law is based on a relevant provision of the covered agreements that has been invoked by one of the parties to the dispute. In this specific case, the Panel's assessment of the argument put forward by Peru is limited to examining whether Peru has succeeded in showing that Guatemala engaged in the present procedure in a manner contrary to good faith and, if so, what consequences might flow from that finding, in the light of Articles 3.7 and 3.10 of the DSU.[155]

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[148] European Union's third-party written submission, paras. 17-18.

[149] Peru's first written submission, para. 4.11; second written submission, para. 2.3.

[150] Peru's second written submission, para. 2.68; Peru's opening statement at the first meeting of the Panel, para. 10; Peru's opening statement at the second meeting of the Panel, para. 12. Guatemala's second written submission, para. 9.19; Guatemala's response to Panel question No. 21, para. 38.

[151] GATT document L/4903, BISD 26S/203-205.

[152] See, for example, Appellate Body Reports, *Turkey - Textiles*, paras. 44-59; *EC - Tariff Preferences*, paras. 89-99.

[153] Appellate Body Report, *US - Gasoline*, p. 17.

[154] Constitution of the Panel established at the request of Guatemala, document WT/DS457/3 (of 23 September 2013), para. 2.

[155] The Panel takes note of the argument put forward by the United States in its response to Panel question No. 3, to the effect that, even if Article 3.10 were to impose binding obligations, Peru would have to submit a claim of violation of that provision to defend its position. Peru has rejected this argument. See Peru's second written submission, para. 2.45. The Panel notes that the argument put forward by the United States was not advanced by Guatemala. The Panel considers that, as was pointed out by the Appellate Body, "panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters" (Appellate Body Report, *Mexico - Corn Syrup (Article 21.5)*, para. 36). Thus, the Panel will proceed to examine Peru's arguments with respect to the Panel's authority to examine the substance of the claims made by Guatemala in this case.

7.70. The Panel will commence its examination by recalling the scope of Members' obligations, under Articles 3.7 and 3.10 of the DSU, that are relevant to the analysis of the present case. The Panel will go on to examine whether Peru has shown that Guatemala engaged in the present procedure in a manner contrary to its obligation to do so in good faith.

7.2.5.1 The principle of good faith under Articles 3.7 and 3.10 of the DSU

7.71. The first sentence of Article 3.7 of the DSU, to which the parties refer, stipulates that:

> Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.

7.72. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body examined a Mexican argument with respect to the alleged failure on the part of the United States to meet the requirement laid down in the first sentence of Article 3.7 of the DSU in initiating the compliance procedure in that case.[156] In its analysis, the Appellate Body considered that the first sentence of Article 3.7 "reflects a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU".[157]

7.73. In the same report, the Appellate Body referred to its finding in *EC – Bananas III* with respect to the broad discretion accorded to every Member in deciding whether the action of bringing a case would be fruitful.[158] In view of this broad discretion, the Appellate Body maintained that panels "must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be 'fruitful'".[159] The Appellate Body also pointed out that the first sentence of Article 3.7 of the DSU "neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgement".[160] Therefore, the Appellate Body considered that the panel in that case was not obliged to consider this issue on its own motion.[161] However, the Appellate Body's ruling does not indicate whether the presumption that a Member is acting in good faith and has duly exercised its judgement as to whether recourse to a panel would be fruitful is a rebuttable presumption.

7.74. Guatemala and Peru disagree about the scope of the findings of the Appellate Body in *Mexico – Corn Syrup (Article 21.5 – US*) with respect to Article 3.7 of the DSU. According to Guatemala, in that case the Appellate Body clearly found that a panel cannot question a Member's exercise of judgement as to whether initiation of a dispute settlement procedure would be fruitful.[162] For its part, Peru maintains that, despite the existence of a presumption, that presumption is rebuttable.[163]

7.75. As pointed out by the Appellate Body, Article 3.7 of the DSU is an expression of the principle that Members should have recourse to the dispute settlement procedure in good faith.[164] In addition, the Appellate Body indicated that every Member should exercise its judgement as to whether the initiation of a procedure would be fruitful and that it was not for a panel to question the outcome of such exercise of judgement. On the contrary, a panel should presume good faith.[165] The Panel does not find any support either in the text of Article 3.7 of the DSU or in panel or Appellate Body reports that would allow it, in the circumstances of the present case, to do anything other than presume that Guatemala duly exercised its judgement as to whether the initiation of this procedure would be fruitful.

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[156] Appellate Body Report, *Mexico - Corn Syrup (Article 21.5 - US)*, paras. 34, 41, 51 and 71.
[157] Ibid. para. 73.
[158] Ibid. para. 73 (citing Appellate Body Report, *EC – Bananas III*, para. 135). See also: Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 211.
[159] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74. See also Panel Reports, *EC – Export Subsidies on Sugar (Australia) / EC – Export Subsidies on Sugar (Brazil) / EC – Export Subsidies on Sugar (Thailand)*, para. 7.67.
[160] Appellate Body Report, *Mexico - Corn Syrup (Article 21.5 - US)*, para. 74.
[161] Ibid.
[162] Guatemala's response to Panel question No. 96.
[163] Peru's second written submission, para. 2.42.
[164] Appellate Body Report, *Mexico - Corn Syrup (Article 21.5 - US)*, para. 73.
[165] Ibid. para. 74.

7.76. Nevertheless, the Panel recalls the Appellate Body's consideration in *EC – Export Subsidies on Sugar* of an argument by the European Communities concerning the application of the principle of estoppel in that dispute. The Appellate Body ruled in the following terms on the limits that the DSU imposes on the right of Members to submit a claim:

> The principle of estoppel has never been applied by the Appellate Body. Moreover, the notion of estoppel, as advanced by the European Communities, would appear to inhibit the ability of WTO Members to initiate a WTO dispute settlement proceeding. We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their "judgement as to whether action under these procedures would be fruitful", by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation. Thus, even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU.[166]

7.77. Within this context, the Panel considers that the assessment of whether an action was brought in good faith can also be guided by the provisions of Article 3.10 of the DSU. Accordingly, the Panel will examine the content and scope of Article 3.10.

7.78. The first sentence of Article 3.10 of the DSU, to which the parties refer, reads as follows:

> It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.

7.79. In the past, the Appellate Body and some panels have assessed the scope of this provision. The question of whether the behaviour of one of the parties over the course of a dispute settlement procedure could be deemed to have been limited by virtue of this provision has been analysed on several occasions.[167] In some of these cases, the Appellate Body pointed out that Article 3.10 obliges Members to participate in dispute settlement proceedings in good faith.[168]

7.80. The Appellate Body[169] has also assessed the possible impact on a panel's terms of reference of failure to comply with the requirements of Article 3.10 of the DSU with regard to initiating a dispute settlement procedure in good faith. In the light of Peru's claim that Guatemala did not engage in the present procedure in good faith, the Panel will proceed to examine the considerations mentioned by the Appellate Body concerning how to determine whether a Member initiated a procedure in a manner contrary to good faith.

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[166] Appellate Body Report, *EC - Export Subsidies on Sugar*, para. 312.

[167] Appellate Body Reports, *US - Gambling*, para. 269 (with reference to the moment at which a responding party should put forward its defence); *Thailand - H-Beams*, para. 97 (in analysing the sufficiency of the identification of the legal basis of the complaint in the request for the establishment of a panel); *US - FSC*, para. 166 (in examining the moment at which responding Members should bring procedural deficiencies to the attention of the panel); *US - Lamb*, para. 115 (in analysing the discretion that Members enjoy to argue claims); *EC - Sardines*, paras. 140-141 (in analysing the imposition of conditions on the withdrawal of an appeal); *Canada - Aircraft*, para. 190 (in assessing the duty of a Member to provide information requested by a panel); *EC - Tariff Preferences*, para. 117 (in assessing whether the complaining party should have analysed a possible defence of the responding party under the Enabling Clause). Panel Reports, *US - Upland Cotton*, para. 7.67 (in assessing the lack of a response from the responding party to questions from the complaining party during consultations); *EC - Fasteners (China)*, para. 7.522 (in examining the moment at which the complaining party developed a claim); *US - 1916 Act (Japan)*, fn. 422; *EC - Asbestos*, fn. 3 of Section VII of the report (where reference is made to the opportunity for a Member to notify the panel during the interim review phase of any factual error contained in the preliminary report).

[168] See Appellate Body Reports, *US - Lamb*, para. 115; *EC - Sardines*, para. 140.

[169] So far, the matter has been discussed in *EC - Export Subsidies on Sugar* and *EC - Bananas III (Article 21.5 - Ecuador II) / EC - Bananas III (Article 21.5 - US)*. In another case, the Appellate Body, in referring to the competence of a panel to examine non-mandatory measures, stated that: "As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their 'judgement as to whether action under these procedures would be fruitful' and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits". Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 89.

7.81. In *EC – Export Subsidies on Sugar*, the Appellate Body stressed that Articles 3.7 and 3.10 are among the few provisions that expressly limit the right of Members to bring an action.[170] The Appellate Body referred to the Panel's finding in that case that it had not been possible to identify any facts or statements made by the complainants where they had admitted that the measure challenged was WTO-consistent or where they had undertaken not to take legal action against the European Communities.[171] The Appellate Body also noted that the Panel had found no evidence of a shared understanding of the Schedule of Concessions, as alleged by the European Communities, that would shelter the measure.[172] The Appellate Body concluded that it had seen nothing in the Panel record to suggest that the complaining Members had acted inconsistently with the principle of good faith.[173]

7.82. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body reviewed the way in which the Panel in that case had assessed a European Communities' argument concerning lack of jurisdiction to examine the substance of the complainants' request. The argument made by the European Communities was that the understandings on bananas signed with the complainants prevented the latter from initiating compliance proceedings under Article 21.5 of the DSU. The legal basis used by the European Communities for alleging this limitation was Article 3.10 of the DSU. In its analysis, the Appellate Body stated that "the complainants could be precluded from initiating Article 21.5 proceedings by means of these Understandings only if the parties to these Understandings had, either explicitly or by necessary implication, agreed to waive their right to have recourse" to those proceedings.[174] The Appellate Body also expressed the view that the relinquishment of rights granted by the DSU could not be lightly assumed and therefore the language in the Understandings must "reveal clearly that the parties intended to relinquish their rights".[175] The Appellate Body added that "irrespective of the type of proceeding, if a 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".[176]

7.83. Guatemala considers that this Appellate Body opinion is unequivocal in circumscribing the legal standard for assessing whether a Member has acted in contravention of its obligation to bring a case in good faith.[177] In other words, in Guatemala's view, an action would be confirmed as being contrary to the obligation to engage in a procedure in good faith, under the terms of Article 3.10 of the DSU, only if the bringing of the case were preceded by an express waiver on the part of the complaining Member of its right to challenge the measure in question. However, Peru does not agree that this is the only case in which there could be an infringement of the obligation to act in good faith. In this connection, Peru maintains that "there could be various ways of engaging in a procedure in bad faith"; an example could be when a Member engages in a procedure with the intention of causing injury to another Member or impairing its rights.[178]

7.84. The Panel does not consider it appropriate to make a general statement intended to cover all the possible situations in which it might be found that a Member engaged in a procedure in the absence of good faith. The Panel's assessment should be made within the strict context of the present dispute and in the light of the evidence which each of the parties has submitted. In any event, pursuant to the observations of the Appellate Body in *EC – Bananas III*

[170] Appellate Body Report, *EC - Export Subsidies on Sugar*, para. 310.
[171] Ibid. para. 315.
[172] Ibid. para. 316.
[173] Ibid. para. 319.
[174] Appellate Body Report, *EC - Bananas III (Article 21.5 - Ecuador II) / EC - Bananas III (Article 21.5 - US)*, para. 217.
[175] Ibid. para. 217 (where reference is made to the consideration by the International Court of Justice of the declaration of acceptance of the Court's jurisdiction by Thailand in: International Court of Justice, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Preliminary Objections, ICJ Reports 1961, p. 32).
[176] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 - US)*, para. 228. The Panel ruled similarly in *Argentina – Poultry Anti-Dumping Duties*, para. 7.38 (in assessing the estoppel argument put forward by Argentina).
[177] Guatemala's second written submission, paras. 9.5 and 9.7.
[178] Peru's second written submission, para. 2.49 and fn. 43. Likewise, Colombia's response to Panel question No. 3, para. 4. Peru also pointed out, in its response to Panel question No. 92, para. 8, that other situations in which it might be possible to engage in a procedure in the absence of good faith include: "engaging in a procedure purely to waste time, as a means of retaliation or when initiating such a procedure diametrically contradicts what has been agreed in a free trade agreement".

(Article 21.5 - Ecuador II) / EC – Bananas III (Article 21.5 – US)[179] and in *EC – Export Subsidies on Sugar*[180], the Panel finds it useful to base its analysis on the question of whether Guatemala, before engaging in this procedure, expressly waived the right to bring a case with respect to the PRS or recognized the consistency of that measure with the WTO agreements.[181] The Panel does not find in the arguments put forward by Peru and in the particular circumstances of the present case any reason for taking additional situations into consideration. In particular, the Panel does not find any evidence to suggest that the complaining party engaged in this procedure with the intention of causing injury to another Member or impairing its rights. In this connection, the Panel recalls that Article 3.10 of the DSU states that "[i]t is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts".

7.85. In addition, Peru asserts that Guatemala failed to comply with the procedural requirement under the DSU to act in good faith, inasmuch as the initiation of the present procedure defeats the object and purpose of the FTA.[182]

7.86. Peru maintains that, even though the FTA is not yet in force, neither of the signatories has expressed the intention of not being party to the treaty.[183] In its opinion, in accordance with Article 18 of the Vienna Convention, both parties are obliged to refrain from acts which would defeat the object and purpose of the FTA by rendering the provisions of the treaty meaningless.[184] Peru points out that both Peru and Guatemala are parties to the Vienna Convention.[185]

7.87. Peru asserts that Article 18 of the Vienna Convention can be instructive in determining whether a State has not acted in good faith in the context of a treaty that has been signed but is not yet in force.[186] According to Peru, this does not mean that the Panel has to assess whether there has been a violation of Article 18; Peru proposes that the Panel take Article 18 of the Vienna Convention into consideration as an expression of the principle of good faith applicable to the present case.[187] For its part, Guatemala considers that the Panel would be acting outside its terms of reference if it were to rule on Peru's arguments relating to Article 18 of the Vienna Convention.[188] Guatemala also maintains that bringing the present case does not defeat the object and purpose of the FTA[189] and that, in any case, Peru's arguments concerning Article 18 of the Vienna Convention are invalidated by Peru's statement that it does not wish to be bound by the FTA.[190]

7.2.5.2 Whether Peru has shown that Guatemala did not initiate the present procedure in good faith

7.88. To begin with, the parties agree that the FTA has not yet entered into force.[191] Peru's argument to the effect that paragraph 9 of Annex 2.3 to the FTA contains an undertaking by Guatemala not to challenge the PRS is limited by this undisputed fact. An international treaty only begins to produce legal effects and bind the parties from the moment it enters into force.

[179] Appellate Body Report, *EC - Bananas III (Article 21.5 - Ecuador II) / EC - Bananas III (Article 21.5 - US)*, para. 228, with regard to the finding that lack of good faith can be determined only if an action is brought after the right to do so has been expressly waived with respect to the measure challenged.

[180] Appellate Body Report, *EC - Export Subsidies on Sugar*, paras. 310-316.

[181] The Panel notes that no ruling is being made with regard to the possibility that there may be other situations in which a Member could act in a manner contrary to its obligation to engage in a dispute settlement procedure in good faith under the terms of Article 3.10 of the DSU, nor with regard to whether a Member may waive its right to engage in a dispute settlement procedure under the DSU.

[182] Peru's response to Panel question No. 88, para. 1. See also Peru's second written submission, para. 2.51.

[183] Peru's first written submission, para. 4.7; second written submission, para. 2.51.

[184] Peru's first written submission, para. 4.7.

[185] Peru's response to Panel question No. 26, para. 45.

[186] Peru's response to Panel question No. 93, para. 10.

[187] Ibid. para. 13.

[188] Guatemala's second written submission, paras. 9.34-9.35; response to Panel question No. 27, para. 59 (citing Appellate Body Report, *Mexico - Taxes on Soft Drinks*, para. 78); response to Panel question No. 88, para. 2.

[189] Guatemala's second written submission, para. 9.36; response to Panel question No. 27, para. 60; response to Panel question No. 88, para. 4.

[190] Guatemala's comments on Peru's response to Panel question Nos. 93 and 94, para. 21.

[191] Ibid. para. 24; Peru's response to Panel question No. 94.

The mere signing of a treaty, before it enters into force, imposes only limited obligations on the parties, fundamentally that of refraining from acting in such a way as to defeat the object and purpose of the treaty. To impose, as an effect of the signing of a treaty, legal consequences that go beyond those indicated in Article 18 of the Vienna Convention would blur the difference between a treaty in force and one that is not yet in force. Thus, the Panel cannot attribute to the FTA a legal value that it does not currently possess.

7.89. The Panel has also taken note of Peru's argument according to which, by having challenged the PRS through the present procedure, Guatemala is defeating the object and purpose of the FTA, within the meaning of Article 18 of the Vienna Convention. In this connection, Peru has pointed out that its argument does not mean that it is asking the Panel to determine whether or not Guatemala is defeating the object and purpose of the FTA.[192]

7.90. The relevant part of Article 18 of the Vienna Convention provides as follows:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty …

7.91. In the opinion of some scholars, the obligation contained in Article 18 of the Vienna Convention is in the nature of a customary rule of public international law.[193] In the circumstances of this dispute, it is not necessary for the Panel to rule on the applicability of this obligation. In any case, as emerges from the text, the provision does not require a signatory to comply with the terms of a treaty which it has not yet ratified, and does not even require the signatory not to act in a manner inconsistent with that treaty. The only obligation is to refrain from acts which would prevent it from being in a position to comply with the treaty once the latter enters into force or which would invalidate the object and purpose of the treaty.[194]

7.92. The Panel is not convinced that the violation by a Member of the obligation contained in Article 18 of the Vienna Convention with respect to a treaty that does not form part of the WTO covered agreements can constitute evidence of lack of the good faith required by Articles 3.7 and 3.10 of the DSU. In any event, and even assuming for the sake of argument that this were so, Peru's argument would require it to be shown that Guatemala's action, in initiating the present procedure, constitutes an act which has the effect of defeating the object and purpose of the FTA. This, in turn, would require the Panel to determine what is the object and purpose of the FTA. The Panel notes that the parties hold significantly divergent opinions on this issue.[195] In any event, to make a determination as to what is the object and purpose of the FTA would be to go beyond the terms of reference entrusted to this Panel by the DSB.[196]

7.93. Finally, Peru has suggested that a Member could also act in a manner contrary to its obligation to engage in a procedure in good faith if it does so: (a) with the intention of causing injury to another Member or impairing its rights; (b) solely to waste time; (c) as a means of retaliation; or (d) in a way diametrically contradicting what has been agreed in a free trade agreement.[197] However, Peru has not claimed or demonstrated that Guatemala's conduct matches

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[192] Peru's response to Panel question No. 88, para. 1.

[193] P. Palchetti, "Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?", in: E Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011), p. 25. Likewise, M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Martinus Nijhoff Publishers, 2009), p. 252. See also, United Nations International Law Commission, Report on the Work of its Eighteenth Session (4 May-19 July 1966), Official Records of the General Assembly, Twenty-first Session, Supplement No. 9, A/6309/Rev.1, p. 202.

[194] A. Aust, *Modern Treaty Law and Practice*, 3rd ed. (2013), pp. 107 and 118-119. See also, United Nations International Law Commission, Report on the Work of its Fifty-ninth Session (7 May-5 June 2007), General Assembly, Official Records, Sixty-second Session, Supplement No. 10, A/62/10, p. 56.

[195] Guatemala's response to Panel question No. 28, paras. 61-62; Peru's response to Panel question No. 28, paras. 59-60.

[196] See Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 56 and 78.

[197] Peru's second written submission, para. 2.49; response to Panel question No. 92, para. 8.

any of these circumstances. Accordingly, it is not necessary to rule on whether, in any of the circumstances listed by Peru, a panel would be precluded from ruling on a claim lodged under the DSU.

7.94. Peru has also proposed that, in its assessment of the obligation to engage in a procedure in good faith, the Panel should take into consideration the doctrine of abuse of rights.[198] Peru affirms that Guatemala has committed an abuse of its rights by "seeking … to invoke 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".[199] In explaining the doctrine of abuse of rights as an expression of the principle of good faith, Peru referred to the observations of the Appellate Body in *US - Shrimp*:

> The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."[200] An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.[201]

7.95. The Appellate Body's approach indicates that a right will be exercised abusively when its assertion unreasonably interferes with the sphere covered by an obligation arising out of a treaty. This would occur when a Member initiates a dispute settlement procedure in a manner contrary to good faith, along the lines described above. Thus, in the Panel's opinion, the elements mentioned by Peru as forming part of the doctrine of abuse of rights coincide with those which the Appellate Body has identified as situations in which a Member acts inconsistently with its obligation to engage in a procedure in good faith. For this reason, the Panel does not find that the doctrine of abuse of rights would add anything to the elements already mentioned as being relevant for the purpose of assessing whether Guatemala engaged in the present procedure in good faith.

7.2.5.3 Conclusion

7.96. On the basis of these considerations, the Panel finds no evidence that Guatemala has engaged in the present procedure in a manner contrary to the good faith obligations contained in Articles 3.7 and 3.10 of the DSU. In the light of this decision on the preliminary issue raised by Peru, the Panel will proceed to examine Guatemala's claims under Article 4.2 of the Agreement on Agriculture.

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[198] Peru's first written submission, paras. 4.11 and 4.20; response to Panel question No. 26, para. 53; response to Panel question No. 29.

[199] Peru's response to Panel question No. 29, para. 66. See also response to Panel question No. 26, para. 53.

[200] (Footnote original) B. Cheng, *General Principles of Law as applied by International Courts and Tribunals (Stevens and Sons, Ltd., 1953),* Chapter 4, in particular, p. 125 elaborates:

> … A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right ("i.e. in furtherance of the interests which the right is intended to protect). *It should at the same time be fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bone fide execution of the treaty obligation, and a breach of the treaty … (emphasis added)

Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed. Vol. I (Longman's, 1992), pp. 407-410, *Border and Transborder Armed Actions Case*, (1988) I.C.J. Rep. 105; *Rights of Nationals of the United States in Morocco Case*, (1952) I.C.J. Rep. 176; *Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 142.

[201] Appellate Body Report, *US - Shrimp*, para. 158.

7.3 Description of the facts

7.97. Before commencing its examination of Guatemala's claims, the Panel will give a description of the facts cited by the parties as forming the basis of the present dispute.

7.98. The Panel notes that the measure at issue identified by Guatemala in its request for the establishment of a panel, submitted on 13 June 2013, is:

> [T]he additional duty imposed by Peru on imports of certain agricultural products, such as milk, maize, rice and sugar (hereinafter affected products).[202]

7.99. Guatemala explains that the characteristics of the measure include the fact that:

> [I]t is determined by using a mechanism known as the "Price [Range] System" which, in its turn, operates on the basis of two components: (i) a [range] made up of a floor price and a ceiling price which, in accordance with the applicable regulations, reflect the international price over the last 60 months for the different products concerned; (ii) a c.i.f. reference price, which is published every two weeks and which, in accordance with the applicable regulations, reflects the average international market price for the different products concerned …[203]

7.100. This section will describe the facts relating to the history of the PRS, the PRS in force and the way it has operated since entering into force, as well as the relevant issues concerning Peru's tariff policy and the way in which Peru bound its tariffs in its Schedule of Concessions.

7.3.1 History of the Price Range System

7.101. Peru maintains that it established a system of specific duties in 1991 and has applied it ever since, and that the PRS is merely the same system, improved and adapted.[204] Guatemala rejects this claim and maintains that Supreme Decree No. 115-EF-2001 tacitly repealed the 1991 system of specific duties and established the PRS, for which reason the latter is a separate measure.[205]

7.102. In support of its argument concerning the continuity between the system of specific duties introduced in 1991 and the PRS, Peru has provided the Panel with the texts of some of the instruments that established and modified the system between 1991 and 2001. These instruments are described below.

7.103. Supreme Decree No. 016-1991-AG of 30 April 1991 regulated the imposition of a specific duty on certain food products comprising 18 tariff lines. The duty was calculated on the basis of an international reference price, fixed weekly, and customs tables, revised semi-annually.[206]

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[202] See request for the establishment of a panel by Guatemala, document WT/DS457/2 (14 June 2013), p. 1. See also Guatemala's response to Panel question No. 41, paras. 84-89.

[203] See request for the establishment of a panel by Guatemala, document WT/DS457/2 (14 June 2013), p. 1.

[204] Peru's first written submission, paras. 3.25 and 3.33; second written submission, para. 3.20; response to Panel question No. 42; response to Panel question No. 129, para. 115; response to Panel question No. 131, para. 124; response to Panel question No. 133; response to Panel question No. 142; comments on Guatemala's response to Panel question No. 133; comments on Guatemala's response to Panel question No. 142.

[205] Guatemala's second written submission, paras. 5.64-5.72; opening statement at the first meeting of the Panel, paras. 59-62; response to Panel question No. 43, para. 95; response to Panel question No. 44, para. 101; response to Panel question No. 133; response to Panel question No. 142; comments on Peru's response to Panel question No. 133. See also Circular INTA-CR.62-2002 of 26 August 2002 of the National Customs Technical Division (Circular INTA-CR.62-2002) (Exhibit GTM-3); Electro-Technical Report No. 7-2009-SUNAT/3D0410 of the Collection Department of the Callao Maritime Customs Division (Exhibit GTM-36); Memorandum No. 73-2009-SUNAT/2B4000 (Exhibit GTM-37).

[206] Supreme Decree No. 016-91-AG (Exhibit PER-22); Supreme Decree No. 016-91-AG with customs tables (Exhibit PER-71). The operation of this system is explained in some detail in Peru's first written submission, paras. 3.26-3.28. See also Peru's second written submission, para. 3.19; response to Panel question No. 42, paras. 100-101; response to Panel question No. 133, para. 132.

7.104. According to Article 1 of Supreme Decree No. 016-1991-AG, "the specific duty, expressed in United States dollars per metric ton, shall be determined in accordance with the respective customs tables … on the basis of the lowest f.o.b. price of the product on the international market on the date of shipment of the goods, as evidenced by the date of the bill of lading or waybill". Article 2 of the same decree provided that a reference price, based on the weekly average of the closing f.o.b. spot prices for the previous week, would be supplied weekly by the Ministry of Agriculture to the Ministry of the Economy and Finance which, in its turn, would communicate it to the National Customs Supervisory Authority. Article 3 of Supreme Decree No. 016-1991-AG also indicated that the specific duty would be applied at the point in time at which the import duties became due. Finally, Article 4 provided that the revenue collected by levying the specific duty would be used to establish a support fund for the agricultural sector.

7.105. Article 2 and Annex No. 1 of Ministerial Resolution No. 258-91-EF-10 of 12 June 1991 identified the reference sources which the Peruvian authorities would use to calculate the specific duties.[207] Article 3 of the Ministerial Resolution made it clear that a product-specific reference price would be reported to customs, and would be used to apply the specific duty, regardless of the source from which the product was purchased or the price indicated in the commercial invoice. Article 5 of Ministerial Resolution No. 258-91-EF-10 also indicated that the Ministry of the Economy and Finance would communicate the reference prices to the Peruvian National Customs Supervisory Authority and would publish them in the Official Journal "El Peruano" on the day after that on which they were received from the Ministry of Agriculture.

7.106. Ministerial Resolution No. 0768-91-AG of 31 October 1991 provided that the minimum f.o.b. reference price used to establish specific duties higher than zero would be calculated from the simple arithmetic mean of the f.o.b. prices for the past 60 months. These prices would be updated every six months, by eliminating the prices corresponding to the earlier six months and incorporating those corresponding to the latest six months at the time of updating.[208]

7.107. Supreme Decree No. 114-93-EF of 27 July 1993 modified the tariff lines subject to specific duties.[209] Article 2 of this decree established that the specific duty would be expressed in "US dollars per metric ton" and would be determined on the basis of the customs table on the date of shipment of the goods, in accordance with the date indicated on the bill of lading or the waybill. Article 3 entrusted the Central Reserve Bank of Peru with the task of semi-annually reviewing and updating the customs tables for approval by Supreme Decree endorsed by the Ministers of the Economy and Finance and of Agriculture. Article 5 entrusted the Central Reserve Bank of Peru with the task of informing the Ministries of the Economy and Finance and of Agriculture, on a weekly basis, of the average f.o.b. reference prices; these f.o.b. reference prices would be published by the Ministry of the Economy and Finance in a ministerial resolution. Annex IV of the Supreme Decree added an adjustment for a proportion of the standard price deviation and established the following "inter-product proportionality factors": "in the case of flour and pasta, the specific duty is 30% above the specific duty for wheat, and in the case of paddy rice, the specific duty is equal to 70% of the duty on pounded rice. In the case of dairy products, the specific duty applied to skimmed milk powder and anhydrous milk fat is the same as the duty applied to whole milk powder".[210]

7.108. Supreme Decree No. 133-94-EF of 6 October 1994 introduced some adjustments to the sources of information on reference prices and a methodology for calculating a floor price.[211] Under the Supreme Decree, information on average f.o.b. reference prices would be provided weekly to the Ministries of the Economy and Finance and of Agriculture by the Central Reserve Bank of Peru in respect of products subject to the specific duty, except in the case of dairy products, for which information would be provided fortnightly. According to Annex IV of the Supreme Decree in question, the floor price is calculated as "the average of the past 60 monthly observations of the international f.o.b. prices inflated by the United States Consumer Price Index. This average is adjusted by the proportion of the standard deviation with respect to the average floor price [indicated in Annex II]".The same annex provides that the final calculation of the

[207] Ministerial Resolution No. 258-91-EF-10 (Exhibit PER-21).
[208] Ministerial Resolution No. 0768-91-AG (Exhibit PER-23).
[209] Supreme Decree No. 114-93-EF (Exhibit PER-24).
[210] Supreme Decree No. 114-93-EF (Exhibit PER-24). See also Peru's response to Panel question No. 133.
[211] Supreme Decree No. 133-94-EF (Exhibit PER-74).

"surcharge" (also referred to in the Supreme Decree as "specific duty") is based on the difference between the floor price and the f.o.b. reference price, multiplied by an adjustment factor associated with import expenses.

7.109. Supreme Decree No. 083-98-EF of 5 August 1998 excluded certain tariff lines from the scope of the specific duty and updated the sources of information for the calculation of reference prices.[212] Supreme Decree No. 133-99-EF of 11 August 1999 modified the reference sources for calculating the floor price of some of the products subject to the specific duty.[213]

7.110. Supreme Decree No. 015-2001-EF of 29 January 2001 updated the information on the reference sources for calculating the customs tables and the reference price for rice, maize and sugar; further, for the purposes of the methodology used to calculate the customs tables, it eliminated the standard deviation from the floor price calculation.[214]

7.111. Supreme Decree No. 021-2001-EF of 5 February 2001 repealed Supreme Decree No. 015-2001-EF and made some adjustments to the calculation of the specific duties. Supreme Decree No. 021-2001-EF introduced a timetable for updating the customs tables; confirmed the reference sources for the calculation of the customs tables, and the reference price for rice, maize and sugar; and reintroduced the standard deviation from the floor price calculation and the compilation of the customs tables.[215]

7.112. Supreme Decree No. 15-2001-EF, of 21 June 2001, established the PRS applicable to imports of various agricultural products. The preamble to the Supreme Decree included the following two paragraphs:

> Whereas Supreme Decree No. 016-91-AG established a Specific Duty System imposing a levy on imports of certain agricultural products and that system was modified by Supreme Decree No. 021-2001-EF, which established the need to formulate a proposal for improving the variable specific duty methodology;
>
> Whereas, following review and evaluation of the above-mentioned System, it was deemed necessary to refine it and to 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 …[216]

7.3.2 The PRS and how it operates

7.3.2.1 Introduction

7.113. As previously mentioned[217], 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" and explained that this duty was calculated by means of the PRS.

7.114. In this section, the Panel will describe the PRS and the duty or the tariff rebates that it can generate, together with the way in which the system has operated since it was first established.

7.3.2.2 The PRS

7.115. Supreme Decree No. 115-2001-EF[218], published on 22 June 2001, established the PRS applicable to imports of various tariff lines for rice, maize, milk and sugar.

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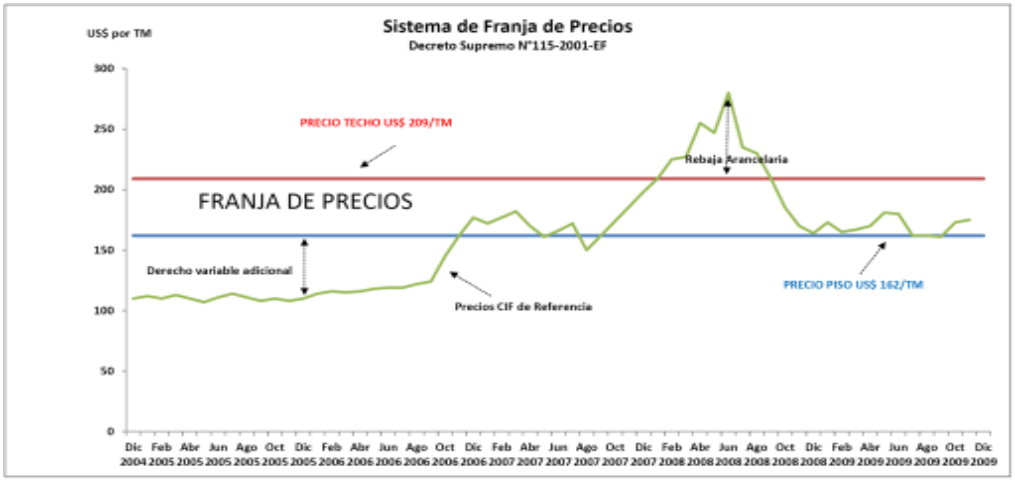
[212] Supreme Decree No. 083-98-EF (Exhibit PER-25).
[213] Supreme Decree No. 133-99-EF (Exhibit PER-26).
[214] Annex IV to Supreme Decree No. 015-2001-EF (Exhibits PER-92 and GTM-59). See also Peru's response to Panel question No. 133.
[215] Supreme Decree No. 021-2001-EF (Exhibit PER-49). See also Peru's response to Panel question No. 133.
[216] Supreme Decree No. 115-2001-EF (Exhibit GTM-4, p. 204887).
[217] See above, para. 7.98.
[218] Supreme Decree No. 115-2001-EF (Exhibit GTM-4).

7.116. According to Article 1 of Supreme Decree No. 115-2001-EF, the PRS was established "for the purpose of applying variable duties additional to the tariff", when the international reference prices for the products subject to the PRS are lower than certain floor price levels, and tariff rebates, when those reference prices are higher than certain ceiling price levels.[219]

7.117. On the website of Peru's Ministry of the Economy and Finance the PRS is illustrated as follows[220]:



7.3.2.3 Objectives of the PRS

7.118. In the preamble to Supreme Decree No. 115-2001-EF the objectives of the PRS are described as follows[221]:

> Whereas national agricultural production is being adversely affected by distortions reflected in uncertainty and instability of domestic prices and national production and due, in particular, to the agricultural policies implemented by the main food producing and exporting countries;
>
> Whereas the Price Range System is a stabilization and protection mechanism that makes it possible to neutralize the fluctuations of international prices and limit the negative effects of the fall in those prices;
>
> Whereas the System in question constitutes an appropriate means of improving the levels of competitiveness of domestic producers, by giving the market clear signals with regard to trends in prices, thereby allowing economic agents to operate efficiently and productively …

7.119. On the website of the Ministry of the Economy and Finance, it is stated that the PRS "is intended to stabilize the costs of importing the products included in the System by ensuring effective prices both for the producer, by means of a floor price, and for the consumer, through a ceiling price, and applying Variable Additional Duties or Tariff Rebates on the c.i.f. value".[222]

7.3.2.4 Products subject to the PRS

7.120. The PRS is applicable to various tariff lines for four agricultural products, namely, rice, sugar, yellow maize and milk.

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[219] Supreme Decree No. 115-2001-EF (Exhibit GTM-4), Article 1.
[220] Copy of the Peruvian Ministry of the Economy and Finance's web page explaining the Price Range System (Exhibit GTM-2).
[221] Supreme Decree No. 115-2001-EF (Exhibit GTM-4, p. 204887).
[222] Copy of the Peruvian Ministry of the Economy and Finance's web page explaining the Price Range System (Exhibit GTM-2).

7.121. Annex I to Supreme Decree No. 115-2001-EF, as amended[223], identifies the following tariff lines subject to the PRS, and indicates whether the products concerned are "marker" products or "associated" products.

Tariff line	Description	Classification under the PRS
	Rice	
1006.30.00.00	Semi-milled or wholly milled rice, whether or not polished or glazed	**Marker product**
1006.10.90.00	Rice in the husk (paddy or rough), other than for sowing	Associated product
1006.20.00.00	Husked (brown) rice	Associated product
1006.40.00.00	Broken rice	Associated product
	Yellow maize	
1005.90.11.00	Yellow flint maize	**Marker product**
1005.90.12.00	White flint maize	Associated product
1005.90.90.90	Other maize	Associated product
1007.00.90.00	Grain sorghum, other than for sowing	Associated product
1103.13.00.00	Groats and meal of maize	Associated product
1108.12.00.00	Maize starch	Associated product
1108.13.00.00	Potato starch	Associated product
1702.30.20.00	Glucose syrup	Associated product
2309.90.90.00	Balanced food for animals	Associated product
3505.10.00.00	Dextrins and other modified starches	Associated product
	Milk	
0402.21.19.00	Other milk in powder, granules or other solid forms, of a fat content, by weight, of 26% or more, on the dry product, in containers holding more than 2.5 kg	**Marker product**
0401.10.00.00	Milk and cream, not concentrated nor containing added sugar or other sweetening matter, of a fat content, by weight, not exceeding 1%	Associated product
0401.20.00.00	Milk and cream, not concentrated nor containing added sugar or other sweetening matter, of a fat content, by weight, exceeding 1% but not exceeding 6%	
0402.10.10.00	Milk in powder of a fat content not exceeding 1.5%, in containers holding more than 2.5 kg	Associated product
0402.10.90.00	Other	Associated product
0402.21.11.00	Milk in powder of a fat content of 26% or more, in containers holding not more than 2.5 kg, not containing added sugar or other sweetening matter	Associated product
0402.21.91.00	Milk in powder of a fat content exceeding 1.5% but not exceeding 26%, in containers holding not more than 2.5 kg, not containing added sugar or other sweetening matter	Associated product
0402.21.99.00	Other	Associated product
0402.29.11.00	Milk in powder of a fat content of 26% or more, in containers holding not more than 2.5 kg, containing added sugar or other sweetening matter	Associated product

[223] Annex I to Supreme Decree No. 15-2001-EF has been amended on the following occasions:
(a) Supreme Decree No. 153-2002-EF, in Compilation of all Customs Tables published under the Price Range System (Exhibit GTM-5, pp. 145-147), expanded the number of tariff lines associated with milk and sugar;
(b) Supreme Decree No. 174-2002-EF (Exhibit GTM-6), added a tariff line associated with milk; and
(c) Supreme Decree No. 197-2002-EF (Exhibit GTM-7) modified some tariff lines associated with milk. See also List of all tariff subheadings covered by the PRS (Exhibit GTM-8).

Tariff line	Description	Classification under the PRS
0402.29.19.00	Other	Associated product
0402.29.91.00	Milk in powder of a fat content exceeding 1.5% but not exceeding 26%, in containers holding not more than 2.5 kg, containing added sugar or other sweetening matter	Associated product
0402.29.99.00	Other	Associated product
0402.99.10.00	Condensed milk	Associated product
0404.10.90.00	Whey, whether or not concentrated or containing added sugar or other sweetening matter, other than whey partially or completely demineralized	Associated product
0405.10.00.00	Butter	Associated product
0405.90.20.00	Butter oil	Associated product
0405.90.90.00	Other	Associated product
0406.30.00.00	Processed cheese, not grated or powdered	Associated product
0406.90.10.00	Other cheese, of a moisture content of less than 36% by weight	Associated product
0406.90.20.00	Other cheese, of a moisture content of 36% or more but less than 46% by weight	Associated product
0406.90.30.00	Other cheese, of a moisture content of 46% or more but less than 55% by weight	Associated product
0406.90.90.00	Other	Associated product
1901.90.90.00	Only: preparations containing 50% or more by weight of milk product	Associated product
2106.90.99.00	Only: soya-based preparations that substitute milk products	Associated product
Sugar		
1701.99.00.90	Other refined cane or beet sugar, in solid form, not containing added flavouring or colouring matter	**Marker product**
1701.11.90.00	Cane sugar, raw, not containing added flavouring or colouring matter, excluding brown sugar	Associated product
1701.12.00.00	Beet sugar, raw, not containing added flavouring or colouring matter	Associated product
1702.60.00.00	Other fructose and fructose syrup, containing in the dry state more than 50% by weight of fructose, excluding invert sugar	Associated product
1702.90.20.00	Caramel	Associated product
1702.90.30.00	Sugars containing added flavouring or colouring matter	Associated product
1702.90.40.00	Other syrups	Associated product

7.122. Annex II to Supreme Decree No. 115-2001-EF defines marker products as products whose international prices are used for calculating the ranges, and associated products as products obtained by processing or mixing of marker products or capable of replacing a marker product for industrial use or consumption.

7.123. As can be seen from Annex I to Supreme Decree No. 115-2001-EF, each of the four agricultural products subject to the PRS includes a tariff line that functions as a marker product and various lines that function as associated products.

7.124. The current marker products, identified in Annex IV to Supreme Decree No. 115-2001-EF, are: (a) No. 2 yellow maize (tariff line 1005.90.11.00); (b) white rice (tariff line 1006.30.00.00); (c) refined white sugar (tariff line 1701.99.00.90); and (d) whole milk, in powder, not containing added sugar (tariff line 0402.21.19.00).

7.125. According to Article 8 of Supreme Decree No. 115-2001-EF, the variable additional duties or tariff rebates for associated products will be equal to the variable additional duty or tariff rebate for their marker product. Therefore, for the purposes of the PRS, only the values for the customs tables and reference prices corresponding to the four marker products will be calculated and these values will be used for the associated products.

7.3.2.5 The methodology for calculating duties or tariff rebates

7.126. The methodology for calculating duties or tariff rebates resulting from the PRS includes various steps and mathematical formulas and consists of two essential components: (a) a price range with a ceiling price and a floor price; and (b) a reference price. Each of these components, steps and mathematical formulas is described below.

7.3.2.5.1 The floor and ceiling prices

7.3.2.5.1.1 The reference markets

7.127. Point 2 of Annex II to Supreme Decree No. 115-2001-EF stipulates that the range corresponding to each marker product is to be based on international prices expressed in United States dollars (USD) per metric ton, with the markets indicated in Annex IV to the Decree being used for reference purposes.

7.128. The current international reference markets are as follows[224]:

Marker product	Reference market
No. 2 yellow maize (tariff line 1005.90.11.00)	f.o.b. Gulf, based on the Chicago Exchange. Daily closing prices, first position. Source: REUTERS.
White rice (tariff line 1006.30.00.00)	White rice 100% grade B, f.o.b. Bangkok, weekly prices. Source: Creed Rice.
Refined white sugar (tariff line 1701.99.00.90)	No. 5 contract, London Exchange. Daily closing prices, first position. Source: REUTERS.
Whole milk, in powder, not containing added sugar (tariff line 0402.21.19.00)	Whole milk, in powder, not containing added sugar, f.o.b. price New Zealand. Source: Statistics, New Zealand, official figures for monthly exports by volume and value.

7.3.2.5.1.2 Calculation of the confidence interval

7.129. To determine the floor price and the ceiling price it is first necessary to establish a confidence interval, using the following methodology, described in point 3.1 of Annex II to Supreme Decree No. 115-2001-EF:

a. The monthly average f.o.b. prices for the past 60 months[225] corresponding to the marker product on the international reference market are taken and converted into constant US dollars using as an inflator the United States Consumer Price Index with base equal to 100 in May or November of the last year, as appropriate.

b. The average of the series is calculated from the following formula:

$$Pm = \{sum\ (PNt / IPC) / 60\}$$

[224] The reference market for sugar was modified by Supreme Decree No. 121-2006-EF of 20 July 2006 (Exhibit GTM-5, p. 121).

[225] Annex II to Supreme Decree No. 115-2001-EF explains that, in the case of rice, maize and sugar, the monthly values are taken up to May or November of the latest year, as appropriate. In the case of milk, the values are taken up to March or September of the latest year, as appropriate, due to the fact that the information for April and May is received after the first week of July. See Supreme Decree No. 115-2001-EF (Exhibit GTM-4).

Where:

Pm = Simple average

PNt = Monthly nominal international price

IPC = United States Consumer Price Index.

c. The confidence interval is determined by adding a standard deviation to the f.o.b. average of the series to establish the upper bound and subtracting a standard deviation to establish the lower bound, using the following formulas:

Upper bound = Pm + DS

Lower bound = Pm - DS

Where:

DS = Standard deviation

d. Extreme values located above and below the confidence interval are discarded.

7.3.2.5.1.3 Calculation of the floor price

7.130. Point 3.2 of Annex II to Supreme Decree No. 115-2001-EF stipulates that the floor price is determined by calculating a new average with the values recorded within the confidence interval, using the following formula:

Pfloor = {sum (PNt/ IPC) / N }

Where:

N = Number of observations within the confidence interval

7.131. In the case of the sugar range, the floor price calculation includes an adjustment factor that increases the floor price by 10.7% by means of the following formula:

Pfloor = {sum (PNt/ IPC) / N } * 1.107[226]

7.3.2.5.1.4 Calculation of the ceiling price

7.132. Point 3.3 of Annex II to Supreme Decree No. 115-2001-EF indicates that the ceiling price is obtained by adding to the floor price a standard deviation of the original series, using the following formula:

Pceiling = Pfloor + DS

7.3.2.5.1.5 Conversion of the ceiling and floor prices to c.i.f. prices

7.133. Point 4 of Annex II to Supreme Decree No. 115-2001-EF states that the floor and ceiling prices expressed in f.o.b. terms are to be converted into c.i.f. terms by adding the following freight and insurance costs, as indicated in Annex V to that Supreme Decree.

[226] This adjustment factor was not originally envisaged in Supreme Decree No. 115-2001-EF. Supreme Decree No. 153-2002-EF introduced an adjustment factor of 1.441, which was reduced to 1.107 by Supreme Decree No. 003-2006-EF. See Supreme Decree No. 153-2002-EF (Exhibit GTM-5, p. 145); Supreme Decree No. 003-2006-EF (Exhibit GTM-5, p. 131).

Product	Freight (USD per tonne)	Insurance (% of cost and freight)
Yellow maize	20	0.5
White rice	35	0.5
Refined white sugar	25	0.5
Whole milk, not containing added sugar	130	0.5

7.134. Annex V to Supreme Decree No. 115-2001-EF indicates the General Secretariat of the Andean Community as the source of the freight and insurance costs. These values coincide with the costs indicated in Annex 3 to Decision 371 of the Andean Price Band System.[227] Decision 371 contains no explanation as to how these values were determined.

7.3.2.5.1.6 The semi-annual updating of the ceiling and floor prices and their publication in the customs tables

7.135. Article 7 of Supreme Decree No. 115-2001-EF indicates that the Central Reserve Bank of Peru will semi-annually review and update the customs tables used to determine the floor and ceiling prices, for approval by supreme decree issued by the Constitutional President of the Republic of Peru with the endorsement of the Ministers of the Economy and Finance and of Agriculture. In accordance with Article 6 and point 3.3 of Annex II to Supreme Decree No. 115-2001-EF, the floor and ceiling prices are to be adjusted semi-annually by updating the respective price series, the inflator index and the amounts of freight and insurance. The customs tables are valid for six months (from 1 January to 30 June and from 1 July to 31 December of each year) and are to be published before 30 June and 31 December of each year.

7.3.2.5.2 Reference prices

7.3.2.5.2.1 Calculation of reference prices

7.136. Article 4 of Supreme Decree No. 115-2001-EF stipulates that reference prices are to be published every two weeks and must reflect the average price obtained from the price quotations observed on the international reference markets of Annex IV, as described above.[228]

7.137. Moreover, according to Article 5 of Supreme Decree No. 115-2001-EF, the reference prices are to be converted into c.i.f. terms by applying the freight and insurance costs of Annex V.

7.3.2.5.2.2 Fortnightly updating of the reference prices and their publication by means of vice-ministerial resolutions

7.138. Article 7 of Supreme Decree No. 115-2001-EF stipulates that, on the first working day of each fortnight, the Central Reserve Bank of Peru will provide the Ministries of the Economy and Finance and of Agriculture with the average of the c.i.f. reference prices for the immediately preceding fortnight.

7.139. According to the same article, the Ministry of the Economy and Finance is to publish these reference prices by means of a vice-ministerial resolution issued by the Vice-Minister of the Economy.[229]

7.3.2.5.3 Determination of the duties or tariff rebates

7.140. Point 1 of Annex III to Supreme Decree No. 115-2001-EF stipulates that a "variable additional duty" is to be applied if the reference price is lower than the c.i.f. floor price.

[227] Commission of the Cartagena Agreement, Decision 371: Andean Price Band System, 1994 (Exhibit PER-27), Annex 3.

[228] See above, para. 7.128.

[229] Supreme Decree No. 115-2001-EF required the reference prices to be published by means of ministerial resolutions. Supreme Decree No. 184-2002-EF (Exhibit GTM-30), published on 27 November 2002, amended Supreme Decree No. 115-2001-EF by providing for the reference prices to be published by means of vice-ministerial resolutions.

The "variable additional duty" is equal to the difference between the floor price and the reference price multiplied by one plus the factor associated with the marker product import costs.

7.141. The amount of the "variable additional duty" is calculated by means of the following formula:

> DA = (1 + b) (Pfloor – Pr)
>
> Where:
>
> DA = Additional duty
>
> Pr = c.i.f. reference price
>
> b = Costs associated with import expenses:
>
> 12% or 20% of the *ad valorem* tariff plus the "corresponding additional tariff surcharge (according to the product)", with an additional 3% for import expenses.

7.142. Article 4 of Supreme Decree No. 153-2002-EF of 26 September 2002 stipulates that:

> The variable additional duties resulting from the application of the provisions of the Price Range System …, plus the *ad valorem* c.i.f. duties, may not exceed the basic standard tariff bound by Peru with the World Trade Organization for the subheadings included in the [PRS], each import transaction being considered individually and the c.i.f. value of the goods included in the transaction concerned being taken as the basis for calculation.[230]

7.143. Where tariff rebates are concerned, according to point 2 of Annex III to Supreme Decree No. 115-2001-EF they are to be applied to marker products whenever the c.i.f. reference price is higher than the c.i.f. ceiling price. The tariff rebate is equal to the difference between the reference price and the ceiling price, multiplied by one plus the factor associated with the marker product import costs.

7.144. The tariff rebates are calculated by means of the following formula:

> RA = (1 + b) (Pr – Pceiling)
>
> RA = Tariff rebate

7.145. Article 8 of Supreme Decree No. 115-2001-EF explains that "[i]n no circumstances shall the tariff rebate exceed the sum payable by the importer as the *ad valorem* duty and additional tariff surcharge corresponding to each product". It should be noted that all the products subject to the PRS have an *ad valorem* tariff of 0%, except for three tariff lines for maize, which are subject to a 6% tariff (1108.12.00.00, 1108.13.00.00 and 3505.10.00.00).[231] Accordingly, at least at present, only these three products could obtain tariff rebates, where applicable.

7.146. Finally, point 2 of Annex III to Supreme Decree No. 115-2001-EF states that, where the reference price is equal to the floor price or the ceiling price, or lies between these two limits, only the corresponding tariff is to be paid and neither variable additional duties nor tariff rebates shall be applied.

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[230] Supreme Decree No. 153-2002-EF, of 26 September 2002 (Exhibit GTM-5, p. 147).

[231] Exhibit amending the Extract from Peru's Customs Tariff 2012, including the pages corresponding to tariff lines 1108.12.00.00, 1108.13.00,00 and 3505.10.00.00 (Exhibit GTM-1 *corr*, pp. 455.440 and 455.506). See also Supreme Decree No. 038-2008-EF (Exhibit PER-28); Supreme Decree No. 279-2010-EF (Exhibit PER-29). As regards the tariff lines for rice, sugar and dairy products, Peru has maintained a 0% *ad valorem* tariff since 6 March 2008, and as regards the tariff lines for maize, Peru has maintained a 0% *ad valorem* tariff since 31 December 2010, except for three lines (1108.12.00.00, 1108.13.00.00 and 3505.10.00.00) which currently have an *ad valorem* tariff of 6%. Peru's first written submission, para. 3.59; Supreme Decree No. 038-2008-EF (Exhibit PER-28); Supreme Decree No. 279-2010-EF (Exhibit PER-29).

7.147. Article 8 of Supreme Decree No. 115-2001-EF explains that the "variable additional duties" and "tariff rebates" are to be expressed in US dollars per tonne. These additional duties or rebates shall be determined on the basis of the customs tables in force on the date of registration of the import declaration by applying the reference prices for the previous fortnight. In this connection, previous fortnight shall mean the period between the first and the fifteenth or between the sixteenth and the last day of each month, as appropriate.[232]

7.148. Point 3(f) of Circular INTA-CR.62-2002 of 26 August 2002 explains that, if on the date of registration of the single customs declaration the supreme decree or ministerial resolution updating the customs tables or determining the c.i.f. reference prices has not been published, the calculation shall be made on the basis of the table and price indicated in the immediately previous publication. In such cases, the authorities shall record the circumstances so that, once the corresponding values have been published, unpaid taxes can, where appropriate, be assessed for collection or so that, in the event of an overpayment, a refund can be requested.[233]

7.149. Finally, point 3(c) of the same circular states that "the variable additional duties" should be paid by the importer in the customs office, together with the import duties and other import taxes.

7.3.2.6 The historical application of the PRS

7.3.2.6.1 Floor and ceiling prices

7.150. As already explained, under the Peruvian legislation, the floor prices and ceiling prices that form the price range are reproduced in customs tables which are valid for six months and are to be published before 30 June and 31 December each year. The legislation also states that the Central Reserve Bank of Peru shall review and update the customs tables semi-annually, for approval by supreme decree.

7.151. From 2001 to 2014 customs tables have been in force for every period. However, these customs tables have not always been updated semi-annually in accordance with Supreme Decree No. 115-2001-EF. On several occasions, the customs tables have been extended instead of being updated, despite this possibility not being provided for in the PRS regulations, and on other occasions the customs tables have been replaced for only one product.[234]

7.152. The following table reflects the instances in which the Peruvian authorities have updated, extended or replaced customs tables over the years of existence of the PRS:

Supreme Decree	Date of Publication	Period of Validity	Update	Extension
318-2013-EF[235]	19.12.13	01.01.14 – 30.06.14	For the four products	-
164-2013-EF[236]	30.06.13	01.07.13 – 31.12.13	For the four products	-
293-2012-EF[237]	23.12.12	01.01.13 – 30.06.13	For the four products	-
113-2012-EF[238]	29.06.12	01.07.12 – 31.12.12	For the four products	-

[232] Supreme Decree No. 115-2001-EF stipulated that the variable additional duties and tariff rebates would be determined on the basis of the customs tables in force on the date of shipment of the goods, as evidenced by the date of the bill of lading or waybill. Supreme Decree No. 124-2002-EF, published on 18 August 2002, provided that the variable additional duties and tariff rebates would be determined on the basis of the customs tables in force on the date of registration of the import declaration. Supreme Decree No. 197-2002-EF, published on 30 December 2002, additionally provided that the reference prices for the fortnight prior to the date of registration of the import declaration would apply. See Article 1, Supreme Decree No. 124-2002-EF (Exhibit PER-50); Article 2, Supreme Decree No. 197-2002-EF (Exhibit GTM-7).

[233] Point 3(f), Circular INTA-CR.62-2002 (Exhibit GTM-3).

[234] Chart summarizing the multiple extensions of the Customs Tables (Exhibit GTM-16).

[235] Supreme Decree No. 318-2013-EF of 18 December 2013, updating the Customs Tables (Exhibit GTM-35).

[236] Supreme Decree No. 164-2013-EF (Exhibit GTM-5, p. 1); Supreme Decree No. 164-2013-EF (containing the Customs Tables for the second six months of 2013) (Exhibit GTM-11).

[237] Supreme Decree No. 293-2012-EF (Exhibit GTM-5, p. 11).

[238] Supreme Decree No. 113-2012-EF (Exhibit GTM-5, p. 21).

Supreme Decree	Date of Publication	Period of Validity	Update	Extension
244-2011-EF[239]	28.12.11	01.01.12 – 30.06.12	For the four products	-
117-2011-EF[240]	28.06.11	01.07.11 – 31.12.11	-	For the four products
278-2010-EF[241]	31.12.10	01.07.11 – 30.06.11	For the four products	-
138-2010-EF[242]	30.06.10	01.07.10 – 31.12.10	-	For the four products
318-2009-EF[243]	31.12.09	01.01.10 – 30.06.10	For the four products	-
183-2008-EF[244]	01.01.08	01.01.09 – 31.12.09	-	For the four products
084-2008-EF[245]	29.06.08	01.07.08 – 31.12.08	For the four products	-
001-2008-EF[246]	15.01.08	to 30.06.08	The customs table for maize was replaced in order to expand the reference prices	-
133-2007-EF[247]	31.08.07	to 30.06.08	The customs table for dairy products was replaced in order to expand the reference prices	-
086-2007-EF[248]	29.06.07	01.01.08 – 30.06.08	-	For the four products
183-2006-EF[249]	23.11.06	to 30.06.07	The customs table for maize was replaced in order to expand the reference prices	-
121-2006-EF[250]	20.07.06	to 30.06.07	The customs table for sugar was replaced owing to the change of reference market	-
094-2006-EF[251]	22.06.06	01.06.06 – 30.06.07	-	For the four products
074-2006-EF[252]	01.06.06	to 30.06.06	The customs table for sugar was replaced in order to expand the reference prices	-
003-2006-EF[253]	13.01.06	to 30.06.06	The customs table for sugar was replaced owing to the change in the methodology for calculating the floor price	-
074-2005-EF[254]	29.06.05	01.07.05 – 30.06.06	-	For the four products
075-2004-EF[255]	08.06.04	01.07.04 – 30.06.05	-	For the four products

[239] Supreme Decree No. 244-2011-EF (Exhibit GTM-5, p. 35).
[240] Supreme Decree No. 117-2011-EF (Exhibit GTM-5, p. 53).
[241] Supreme Decree No. 278-2010-EF (Exhibit GTM-5, p. 55).
[242] Supreme Decree No. 138-2010-EF (Exhibit GTM-5, p. 71).
[243] Supreme Decree No. 318-2009-EF (Exhibit GTM-5, p. 73).
[244] Supreme Decree No. 183-2008-EF (Exhibit GTM-5, p. 87).
[245] Supreme Decree No. 084-2008-EF (Exhibit GTM-5, p. 89).
[246] Supreme Decree No. 001-2008-EF (Exhibit GTM-5, p. 105).
[247] Supreme Decree No. 133-2007-EF (Exhibit GTM-5, p. 109).
[248] Supreme Decree No. 086-2007-EF (Exhibit GTM-5, p. 113).
[249] Supreme Decree No. 183-2006-EF (Exhibit GTM-5, p. 115).
[250] Supreme Decree No. 121-2006-EF (Exhibit GTM-5, p. 121).
[251] Supreme Decree No. 094-2006-EF (Exhibit GTM-5, p. 125).
[252] Supreme Decree No. 074-2006-EF (Exhibit GTM-5, p. 127).
[253] Supreme Decree No. 003-2006-EF (Exhibit GTM-5, p. 131).
[254] Supreme Decree No. 074-2005-EF (Exhibit GTM-5, p. 135).
[255] Supreme Decree No. 075-2004-EF (Exhibit GTM-5, pp. 137-139).

Supreme Decree	Date of Publication	Period of Validity	Update	Extension
090-2003-EF[256]	25.06.03	01.07.03 – 30.06.04	-	For the four products
153-2002-EF[257]	27.09.02	01.01.03 – 30.06.03	The customs table for sugar was replaced owing to the change in the methodology for calculating the floor price	For three products
001-2002-EF[258]	04.01.02	01.01.02 – 30.06.02	For the four products	-
115-2001-EF[259]	22.06.01	01.07.01 – 31.12.01	First customs tables	-

7.153. The following reasons for extending customs tables were given in the relevant supreme decrees:

> Given the economic difficulties currently besetting domestic agricultural production under the Price Range System, it is necessary to extend the validity of the Customs Tables …[260]

> Given the current trend in the prices of agricultural products, it is considered advisable to maintain the Customs Tables for Maize, Rice, Sugar and Dairy Products …[261]

7.154. Peru has submitted an example of a technical report and a legal report, issued by the competent departments of the Ministry of the Economy and Finance, both dated 24 June 2011, whereby the Vice-Minister of the Economy was recommended to extend the customs tables for the second half of 2011. Peru has also submitted an example of a technical report and a legal report issued by the competent departments of the Ministry of the Economy and Finance, dated 17 December and 18 December 2013, respectively, whereby the Vice-Minister of the Economy was recommended to update the customs tables for the first half of 2014.[262]

7.155. Moreover, since the first PRS customs tables, issued under Supreme Decree No. 115-2001-EF[263], two different values of the specific duties or tariff rebates have been used for rice: for paddy rice and pounded rice, respectively. Supreme Decree No. 115-2001-EF does not offer any explanation with regard to the use of these two values for rice. However, the distinction between the two kinds of rice has been applied since the pre-2001 customs tables of the specific duty system. Specifically, Supreme Decree No. 114-93-EF[264], of 27 July 1993, introduced into the definition of inter-product proportionality factors the words "in the case of paddy rice, its specific duty is equal to 70% of the duty for pounded rice". This distinction is also to be found in Supreme Decree No. 133-94-EF and in Supreme Decree No. 021-2001-EF[265] and in the updates to the customs tables during the period of application of the previous system.[266]

[256] Supreme Decree No. 090-2003-EF (Exhibit GTM-5, pp. 141-143).
[257] Supreme Decree No. 153-2002-EF (Exhibit GTM-5, p. 145).
[258] Supreme Decree No. 001-2002-EF (Exhibit GTM-5, p. 153).
[259] Supreme Decree No. 115-2001-EF (Exhibit GTM-5, p. 163); (Exhibit GTM-4).
[260] Supreme Decree No. 153-2002-EF (Exhibit GTM-5, p. 145); Supreme Decree No. 090-2003-EF (Exhibit GTM-5, p. 143); Supreme Decree No. 075-2004-EF (Exhibit GTM-5, p. 139); Supreme Decree No. 074-2005-EF (Exhibit GTM-5, p. 135); Supreme Decree No. 094-2006-EF (Exhibit GTM-5, p. 125); Supreme Decree No. 086-2007-EF (Exhibit GTM-5, p. 113).
[261] Supreme Decree No. 183-2008-EF (Exhibit GTM-5, p. 87); Supreme Decree No. 138-2010-EF (Exhibit GTM-5, p. 71); Supreme Decree No. 117-2011-EF (Exhibit GTM-5, p. 53).
[262] Compendium of technical and legal reports (Exhibit PER-87).
[263] Annex VI to Supreme Decree No. 115-2001-EF (Exhibit GTM-4).
[264] Annex IV to Supreme Decree No. 114-93-EF (Exhibit PER-24).
[265] Annex IV to Supreme Decree No. 133-94-EF (Exhibit PER-74); Annex IV to Supreme Decree No. 021-2001-EF (Exhibit PER-49).
[266] See, for example, Annex I, Supreme Decree No. 114-93-EF (Exhibit PER-24); Annex I, Supreme Decree No. 083-98-EF (Exhibit PER-25); Annex I, Supreme Decree No. 133-99-EF (Exhibit PER-26).

7.156. In addition, since the first PRS customs tables, intervals of 50 have been used for the dairy product price ranges. The use of these intervals for dairy products can also be traced back to the customs tables of the 1991 specific duty system.[267]

7.3.2.6.2 Reference prices

7.157. As already explained, under the Peruvian legislation reference prices are updated fortnightly, for which purpose the Central Reserve Bank of Peru provides the Ministries of the Economy and Finance and of Agriculture, on the first working day of each fortnight, with the average of the c.i.f. reference prices for the immediately preceding fortnight. The Ministry of the Economy and Finance subsequently publishes these reference prices by means of a vice-ministerial resolution of the Vice-Minister of the Economy.

7.158. During the period of existence of the PRS, the competent Peruvian authorities have published reference prices for every fortnight.[268] The only exception was for the period 1 to 15 November 2006, with respect to the reference price for maize.[269] The reference prices are not published at the beginning of each fortnight to which they apply but a few days after that fortnight has begun.[270]

7.159. Moreover, although reference prices are published every fortnight, on some occasions the values coincide from one fortnight to the next, that is to say, on some occasions the reference prices are rolled over.[271]

7.160. Although this has happened with all the products at one time or another, in the case of dairy products, the reference prices are updated monthly and not fortnightly. In this connection, the Panel notes that the international reference market values for the marker product for dairy products are obtained monthly and not fortnightly.[272]

7.161. The following table reflects all the publications of vice-ministerial resolutions announcing reference prices between June 2001 and December 2013[273]:

Period	Vice-ministerial Resolution	Date of publication	Period	Vice-ministerial Resolution	Date of publication
2013					
16-31/12	001-2014-EF/15.01	08.01.2014	01-15/12	025-2013-EF/15.01	20.12.2013
16-30/11	024-2013-EF/15.01	06.12.2013	01-15/11	023-2013-EF/15.01	22.11.2013
16-31/10	022-2013-EF/15.01	12.11.2013	01-15/10	021-2013-EF/15.01	24.10.2013
16-30/09	020-2013-EF/15.01	08.10.2013	01-15/09	019-2013-EF/15.01	25.09.2013

[267] See, for example, Annex I, Supreme Decree No. 114-93-EF (Exhibit PER-24); Annex I, Supreme Decree No. 083-98-EF (Exhibit PER-25); Annex I, Supreme Decree No. 133-99-EF (Exhibit PER-26).

[268] See Compilation of Ministerial and Vice-Ministerial Resolutions containing Reference Prices (Reference Price Resolutions) (Exhibit GTM-13); Vice-Ministerial Resolutions announcing Reference Prices (21 October 2013 to 7 January 2014) (Exhibit GTM-34); Vice-Ministerial Resolution No. 003-2014-EF/15.01 (Exhibit GTM-54); Vice-Ministerial Resolution No. 004-2014-EF/15.01 (Exhibit GTM-55).

[269] See Vice-Ministerial Resolution No. 023-2006-EF/15.01 (Exhibit GTM-13, p. 207).

[270] See List of publication dates of Ministerial and Vice-Ministerial Resolutions publishing Reference Prices and delay in the publication of those documents (Exhibit GTM-14).

[271] See History of Application of the Price Range System (Exhibit GTM-15); Update of Exhibit GTM-15 (Exhibit GTM-15*bis*); History of Application of the Price Range System (GTM-15), indicating the instances in which a reference price has remained the same in consecutive periods (Exhibit GTM-17); Repeat Reference Prices (Exhibit PER-78).

[272] Whole milk, in powder, without added sugar, f.o.b. price New Zealand. Source: Statistics, New Zealand, official figures for monthly exports by volume and value. See Annex IV, Supreme Decree No. 115-2001-EF (Exhibit GTM-4).

[273] Vice-Ministerial Resolution No. 019-2013-EF/15.01 (containing the Reference Price for the first two weeks of September 2013) (Exhibit GTM-12); Reference Price Resolutions (Exhibit GTM-13); Vice-Ministerial Resolutions, announcing Reference Prices (21 October 2013 to 7 January 2014) (Exhibit GTM-34). See also Vice-Ministerial Resolution No. 003-2014-EF/15.01 (Exhibit GTM--54); Vice-Ministerial Resolution No. 004-2014-EF/15.01 (Exhibit GTM-55).

Period	Vice-ministerial Resolution	Date of publication	Period	Vice-ministerial Resolution	Date of publication
16-31/08	018-2013-EF/15.01	06.09.2013	01-15/08	017-2013-EF/15.01	24.08.2013
16-31/07	016-2013-EF/15.01	07.08.2013	01-15/07	015-2013-EF/15.01	27.07.2013
16–30/06	014-2013-EF/15.01	08.07.2013	01-15/06	013-2013-EF/15.01	21.06.2013
16–31/05	012-2013-EF/15.01	15.06.2013	01-15/05	011-2013-EF/15.01	24.05.2013
16–30/04	010-2013-EF/15.01	08.05.2013	01-15/04	009-2013-EF/15.01	02.05.2013
16–31/03	008-2013-EF/15.01	05.04.2013	01-15/03	007-2013-EF/15.01	27.03.2013
16–28/02	006-2013-EF/15.01	14.03.2013	01-15/02	005-2013-EF/15.01	27.02.2013
16–31/01	003-2013-EF/15.01	09.02.2013	01-15/01	002-2013-EF/15.01	22.01.2013
2012					
16-31/12	001-2013-EF/15.01	16.01.2013	01-15/12	031-2012-EF/15.01	22.12.2012
16–30/11	030-2012-EF/15.01	11.12.2012	01-15/11	029-2012-EF/15.01	27.11.2012
16–31/10	028-2012-EF/15.01	10.11.2012	01-15/10	027-2012-EF/15.01	24.10.2012
16-30/09	026-2012-EF/15.01	12.10.2012	01-15/09	025-2012-EF/15.01	22.09.2012
16–31/08	024-2012-EF/15.01	07.09.2012	01-15/08	023-2012-EF/15.01	25.08.2012
16-31/07	022-2012-EF/15.01	14.08.2012	01-15/07	021-2012-EF/15.01	25.07.2012
16-30/06	020-2012-EF/15.01	12.06.2012	01-15/06	019-2012-EF/15.01	23.06.2012
16-31/05	016-2012-EF/15.01	08.06.2012	01-15/05	015-2012-EF/15.01	26.05.2012
16-30/04	012-2012-EF/15.01	11.05.2012	01-15/04	011-2012-EF/15.01	26.04.2012
16-31/03	010-2012-EF/15.01	12.04.2012	01-15/03	009-2012-EF/15.01	25.03.2012
16-29/02	008-2012-EF/15.01	09.03.2012	01-15/02	006-2012-EF/15.01	25.02.2012
16-31/01	005-2012-EF/15.01	10.02.2012	01-15/01	002-2012-EF/15.01	22.01.2012
2011					
16-31/12	001-2012-EF/15.01	16.01.2012	01-15/12	025-2011-EF/15.01	23.12.2011
16–30/11	024-2011-EF/15.01	12.12.2011	01-15/11	023-2011-EF/15.01	25.11.2011
16–31/10	022-2011-EF/15.01	10.11.2011	01-15/10	021-2011-EF/15.01	23.10.2011
16-30/09	020-2011-EF/15.01	13.10.2011	01-15/09	019-2011-EF/15.01	24.09.2011
16-31/08	018-2011-EF/15.01	06.09.2011	01-15/08	017-2011-EF/15.01	23.08.2011
16-31/07	016-2011-EF/15.01	05.08.2011	01-15/07	015-2011-EF/15.01	23.07.2011
16-30/06	014-2011-EF/15.01	08.07.2011	01-15/06	013-2011-EF/15.01	22.06.2011
16-31/05	012-2011-EF/15.01	04.06.2011	01-15/05	011-2011-EF/15.01	20.05.2011
16-30/04	010-2011-EF/15.01	10.05.2011	01-15/04	009-2011-EF/15.01	21.04.2011
16-31/03	008-2011-EF/15.01	06.04.2011	01-15/03	006-2011-EF/15.01	23.03.2011
16-28/02	005-2011-EF/15.01	10.03.2011	01-15/02	004-2011-EF/15.01	19.02.2011
16-31/01	003-2011-EF/15.01	09.02.2011	01-15/01	002-2011-EF/15.01	22.01.2011
2010					
16-31/12	001-2011-EF/15.01	07.01.2011	01-15/12	025-2010-EF/15.01	23.12.2010
16–30/11	024-2010-EF/15.01	10.12.2010	01-15/11	023-2010-EF/15.01	24.11.2010
16–31/10	022-2010-EF/15.01	06.11.2010	01-15/10	021-2010-EF/15.01	23.10.2010
16-30/09	020-2010-EF/15.01	06.10.2010	01-15/09	019-2010-EF/15.01	18.09.2010
16–31/08	018-2010-EF/15.01	04.09.2010	01-15/08	017-2010-EF/15.01	21.08.2010
16-31/07	016-2010-EF/15.01	06.08.2010	01-15/07	015-2010-EF/15.01	24.07.2010
16-30/06	014-2010-EF/15.01	03.07.2010	01-15/06	013-2010-EF/15.01	19.06.2010

Period	Vice-ministerial Resolution	Date of publication	Period	Vice-ministerial Resolution	Date of publication
16-31/05	012-2010-EF/15.01	05.06.2010	01-15/05	010-2010-EF/15.01	20.05.2010
16-30/04	009-2010-EF/15.01	07.05.2010	01-15/04	008-2010-EF/15.01	23.04.2010
16-31/03	007-2010-EF/15.01	10.04.2010	01-15/03	006-2010-EF/15.01	20.03.2010
16-28/02	005-2010-EF/15.01	06.03.2010	01-15/02	004-2010-EF/15.01	23.02.2010
16-31/01	003-2010-EF/15.01	06.02.2010	01-15/01	002-2010-EF/15.01	23.01.2010
2009[274]					
16-31/12	001-2010-EF/15.01	08.01.2010	01-15/12	025-2009-EF/15.01	22.12.2009
16–30/11	024-2009-EF/15.01	16.11.2009	01-15/11	023-2009-EF/15.01	19.11.2009
16–31/10	022-2009-EF/15.01	04.11.2009	01-15/10	021-2009-EF/15.01	22.10.2009
16-30/09	020-2009-EF/15.01	05.10.2009	01-15/09	019-2009-EF/15.01	21.09.2009
16–31/08	018-2009-EF/15.01	03.09.2009	01-15/08	016-2009-EF/15.01	19.08.2009
16-31/07	015-2009-EF/15.01	10.08.2009	01-15/07	014-2009-EF/15.01	30.07.2009
16-30/06	013-2009-EF/15.01	07.07.2009	01-15/06	012-2009-EF/15.01	24.06.2009
16-31/05	011-2009-EF/15.01	05.06.2009	01-15/05	010-2009-EF/15.01	22.05.2009
16-30/04	009-2009-EF/15.01	08.05.2009	01-15/04	008-2009-EF/15.01	21.04.2009
16-31/03	007-2009-EF/15.01	06.04.2009	01-15/03	006-2009-EF/15.01	20.03.2009
16-28/02	005-2009-EF/15.01	05.03.2009	01-15/02	004-2009-EF/15.01	19.02.2009
16-31/01	003-2009-EF/15.01	06.02.2009	01-15/01	002-2009-EF/15.01	23.01.2009
2008					
16-31/12	001-2009-EF/15.01	09.01.2009	01-15/12	031-2008-EF/15.01	24.12.2008
16–30/11	030-2008-EF/15.01	05.12.2008	01-15/11	029-2008-EF/15.01	20.11.2008
16–31/10	024-2008-EF/15.01	08.11.2008	01-15/10	022-2008-EF/15.01	21.10.2008
16-30/09	021-2008-EF/15.01	07.10.2008	01-15/09	020-2008-EF/15.01	23.09.2008
16–31/08	019-2008-EF/15.01	06.09.2008	01-15/08	017-2008-EF/15.01	23.08.2008
16-31/07	015-2008-EF/15.01	08.08.2008	01-15/07	014-2008-EF/15.01	22.07.2008
16-30/06	013-2008-EF/15.01	08.07.2008	01-15/06	012-2008-EF/15.01	21.06.2008
16-31/05	011-2008-EF/15.01	06.06.2008	01-15/05	010-2008-EF/15.01	24.05.2008
16-30/04	009-2008-EF/15.01	13.05.2008	01-15/04	008-2008-EF/15.01	25.04.2008
16-31/03	007-2008-EF/15.01	09.04.2008	01-15/03	006-2008-EF/15.01	20.03.2008
16-29/02	005-2008-EF/15.01	08.03.2008	01-15/02	004-2008-EF/15.01	22.02.2008
16-31/01	003-2008-EF/15.01	08.02.2008	01-15/01	002-2008-EF/15.01	19.01.2008
2007					
16-31/12	001-2008-EF/15.01	10.01.2008	01-15/12	025-2007-EF/15.01	21.12.2007
16–30/11	024-2007-EF/15.01	07.12.2007	01-15/11	023-2007-EF/15.01	22.11.2007
16–31/10	022-2007-EF/15.01	09.11.2007	01-15/10	020-2007-EF/15.01	20.10.2007
16-30/09	019-2007-EF/15.01	05.10.2007	01-15/09	018-2007-EF/15.01	20.09.2007
16–31/08	017-2007-EF/15.01	07.09.2007	01-15/08	016-2007-EF/15.01	22.08.2007
16-31/07	015-2007-EF/15.01	04.08.2007	01-15/07	014-2007-EF/15.01	19.07.2007
16-30/06	013-2007-EF/15.01	06.07.2007	01-15/06	012-2007-EF/15.01	21.06.2007
16-31/05	011-2007-EF/15.01	06.06.2007	01-15/05	010-2007-EF/15.01	24.05.2007

[274] In the case of vice-ministerial resolutions issued in 2009, the table presents the dates of issue, not the dates of publication.

Period	Vice-ministerial Resolution	Date of publication	Period	Vice-ministerial Resolution	Date of publication
16-30/04	009-2007-EF/15.01	09.05.2007	01-15/04	008-2007-EF/15.01	20.04.2007
16-31/03	007-2007-EF/15.01	05.04.2007	01-15/03	006-2007-EF/15.01	21.03.2007
16-28/02	005-2007-EF/15.01	07.03.2007	01-15/02	004-2007-EF/15.01	21.02.2007
16-31/01	003-2007-EF/15.01	07.02.2007	01-15/01	002-2007-EF/15.01	19.01.2007
2006					
16-31/12	001-2007-EF/15.01	06.01.2007	01-15/12	026-2006-EF/15.01	21.12.2006
16-30/11	025-2006-EF/15.01	07.12.2006	01-15/11	023-2006-EF/15.01	22.11.2006
16-31/10	022-2006-EF/15.01	07.11.2006	01-15/10	021-2006-EF/15	18.10.2006
16-30/09	020-2006-EF/15	05.10.2006	01-15/09	019-2006-EF/15	22.09.2006
16-31/08	018-2006-EF/15	05.09.2006	01-15/08	017-2006-EF/15	19.08.2006
16-31/07	016-2006-EF/15	08.08.2006	01-15/07	015-2006-EF/15	08.08.2006
		08.08.2006	01-15/07	014-2006-EF/15	21.07.2006
16–30/06	013-2006-EF/15	06.07.2006	01-15/06	012-2006-EF/15	21.06.2006
16–31/05	011-2006-EF/15	07.06.2006	01-15/05	010-2006-EF/15	20.05.2006
16–30/04	009-2006-EF/15	05.05.2006	01-15/04	008-2006-EF/15	19.04.2006
16–31/03	007-2006-EF/15	06.04.2006	01-15/03	006-2006-EF/15	21.03.2006
16–28/02	005-2006-EF/15	04.03.2006	01-15/02	004-2006-EF/15	18.02.2006
16–31/01	003-2006-EF/15	04.02.2006	01-15/01	002-2006-EF/15	19.01.2006
2005					
16-31/12	001-2006-EF/15	07.01.2006	01-15/12	024-2005-EF/15	21.12.2005
16–30/11	023-2005-EF/15	03.12.2005	01-15/11	022-2005-EF/15	18.11.2005
16–31/10	021-2005-EF/15	05.11.2005	01-15/10	020-2005-EF/15	20.10.2005
16-30/09	019-2005-EF/15	05.10.2005	01-15/09	018-2005-EF/15	20.09.2005
16–31/08	017-2005-EF/15	03.09.2005	01-15/08	016-2005-EF/15	23.08.2005
16-31/07	015-2005-EF/15	06.08.2005	01-15/07	014-2005-EF/15	19.07.2005
16-30/06	013-2005-EF/15	07.07.2005	01-15/06	012-2005-EF/15	18.06.2005
16-31/05	011-2005-EF/15	03.06.2005	01-15/05	010-2005-EF/15	18.05.2005
16-30/04	009-2005-EF/15	04.05.2005	01-15/04	008-2005-EF/15	19.04.2005
16-31/03	007-2005-EF/15	06.04.2005	01-15/03	006-2005-EF/15	18.03.2005
16-28/02	005-2005-EF/15	04.03.2005	01-15/02	004-2005-EF/15	18.02.2005
16-31/01	003-2005-EF/15	05.02.2005	01-15/01	002-2005-EF/15	20.01.2005
2004					
16-31/12	001-2005-EF/15	06.01.2005	01-15/12	024-2004-EF/15	21.12.2004
16–30/11	023-2004-EF/15	03.12.2004	01-15/11	022-2004-EF/15	19.11.2004
16–31/10	021-2004-EF/15	05.11.2004	01-15/10	020-2004-EF/15	20.10.2004
16-30/09	019-2004-EF/15	05.10.2004	01-15/09	018-2004-EF/15	18.09.2004
16–31/08	017-2004-EF/15	04.09.2004	01-15/08	016-2004-EF/15	19.08.2004
16-31/07	015-2004-EF/15	05.08.2004	01-15/07	014-2004-EF/15	20.07.2004
16-30/06	013-2004-EF/15	03.07.2004	01-15/06	012-2004-EF/15	18.06.2004
16-31/05	011-2004-EF/15	05.06.2004	01-15/05	010-2004-EF/15	20.05.2004
16-30/04	009-2004-EF/15	05.05.2004	01-15/04	008-2004-EF/15	20.04.2004
16-31/03	007-2004-EF/15	07.04.2004	01-15/03	006-2004-EF/15	20.03.2004

Period	Vice-ministerial Resolution	Date of publication	Period	Vice-ministerial Resolution	Date of publication
16-29/02	005-2004-EF/15	10.03.2004	01-15/02	004-2004-EF/15	21.02.2004
16-31/01	003-2004-EF/15	07.02.2004	01-15/01	002-2004-EF/15	23.01.2004
2003					
16-31/12	001-2004-EF/15	09.01.2004	01-15/12	024-2003-EF/15	24.12.2003
16–30/11	023-2003-EF/15	06.12.2003	01-15/11	022-2003-EF/15	21.11.2003
16–31/10	021-2003-EF/15	08.11.2003	01-15/10	020-2003-EF/15	29.10.2003
16-30/09	019-2003-EF/15	08.10.2003	01-15/09	018-2003-EF/15	25.09.2003
16–31/08	017-2003-EF/15	06.09.2003	01-15/08	016-2003-EF/15	28.08.2003
16-31/07	015-2003-EF/15	08.08.2003	01-15/07	014-2003-EF/15	25.07.2003
16-30/06	013-2003-EF/15	10.07.2003	01-15/06	012-2003-EF/15	26.06.2003
16-31/05	011-2003-EF/15	06.06.2003	01-15/05	010-2003-EF/15	24.05.2003
16-30/04	009-2003-EF/15	10.05.2003	01-15/04	008-2003-EF/15	24.04.2003
16-31/03	007-2003-EF/15	05.04.2003	01-15/03	006-2003-EF/15	22.03.2003
16-28/02	005-2003-EF/15	07.03.2003	01-15/02	004-2003-EF/15	21.02.2003
16-31/01	003-2003-EF/15	11.02.2003	01-15/01	002-2003-EF/15	23.01.2003
2002					
16-31/12	001-2003-EF/15	09.01.2003	01-15/12	004-2002-EF/15	20.12.2002
16–30/11	003-2002-EF/15	07.12.2002	01-15/11	002-2002-EF/15	30.11.2002
16–31/10	450-2002-EF/15	09.11.2002	01-15/10	449-2002-EF/15	09.11.2002
16-30/09	165-2002-EF/15	31.10.2002	01-15/09	165-2002-EF/15	31.10.2002
16–31/08	165-2002-EF/15	31.10.2002	01-15/08	165-2002-EF/15	31.10.2002
16-31/07	165-2002-EF/15	31.10.2002	01-15/07	165-2002-EF/15	31.10.2002
16-30/06	279-2002-EF/15	13.07.2002	01-15/06	270-2002-EF/15	29.06.2002
16-31/05	269-2002-EF/15	29.06.2002	01-15/05	220-2002-EF/15	31.05.2002
16-30/04	196-2002-EF/15	14.05.2002	01-15/04	173-2002-EF/15	26.04.2002
16-31/03	148-2002-EF/15	13.04.2002	01-15/03	134-2002-EF/15	04.04.2002
16-28/02	106-2002-EF/15	08.03.2002	01-15/02	106-2002-EF/15	08.03.2002
16-31/01	106-2002-EF/15	08.03.2002	01-15/01	106-2002-EF/15	08.03.2002
2001					
16-31/12	005-2002-EF/15	11.01.2002	01-15/12	381-2002-EF/15	28.12.2001
16–30/11	377-2001-EF/15	22.12.2001	01-15/11	355-2001-EF/15	29.11.2001
16–31/10	333-2001-EF/15	17.11.2001	01-15/10	332-2001-EF/15	17.11.2001
16-30/09	312-2001-EF/15	17.10.2001	01-15/09	300-2001-EF/15	22.09.2001
16–31/08	278-2001-EF/15	08.09.2001	01-15/08	276-2001-EF/15	23.08.2001
16-31/07	270-2001-EF/15	15.08.2001	01-15/07	242-2001-EF/15	20.07.2001
23-30/06	225-2001-EF/15	11.07.2001			

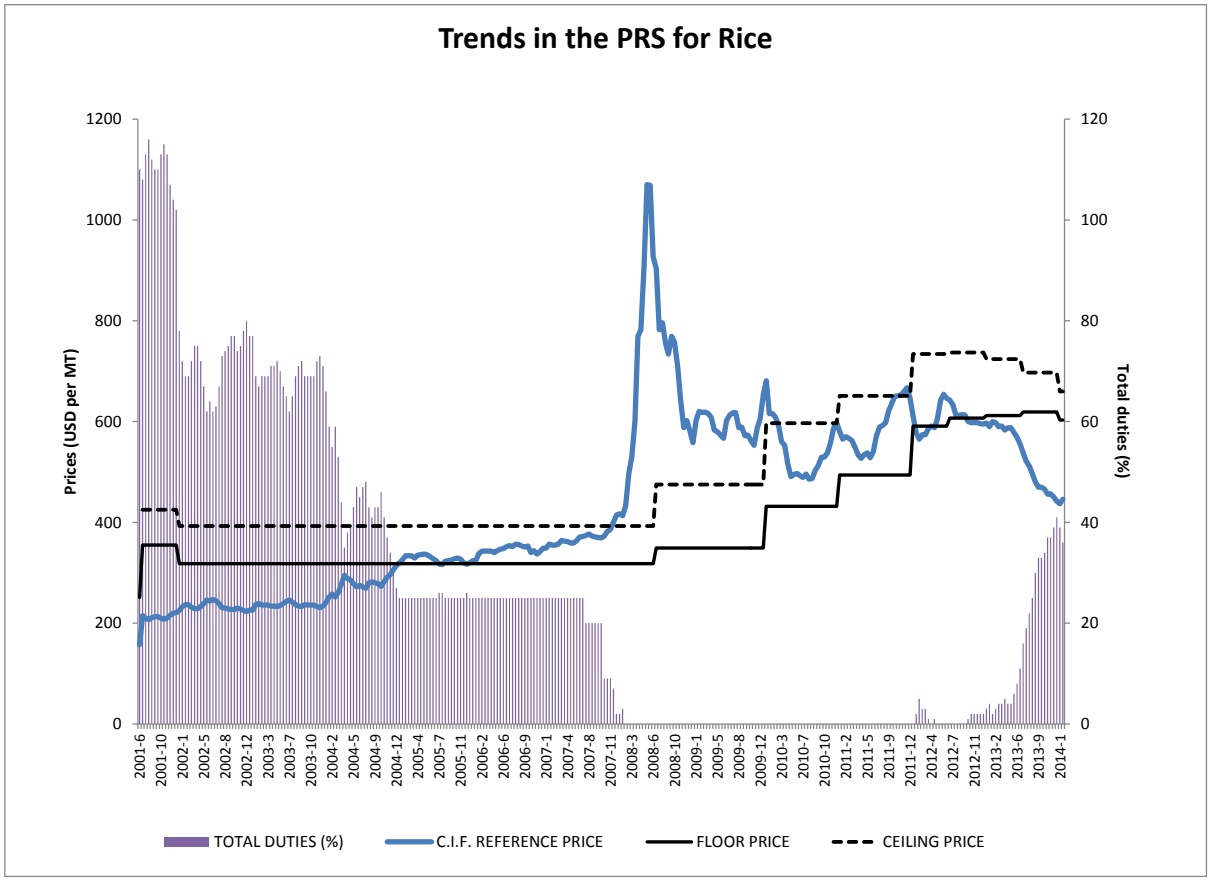
7.162. Peru has submitted an example of a technical report and a legal report issued by the competent departments of the Ministry of the Economy and Finance, dated 21 April and 22 April 2014, respectively, whereby the Vice-Minister of the Economy was recommended to publish the reference prices for the first two weeks of April 2014.[275]

[275] Compendium of technical and legal reports (Exhibit PER-87).

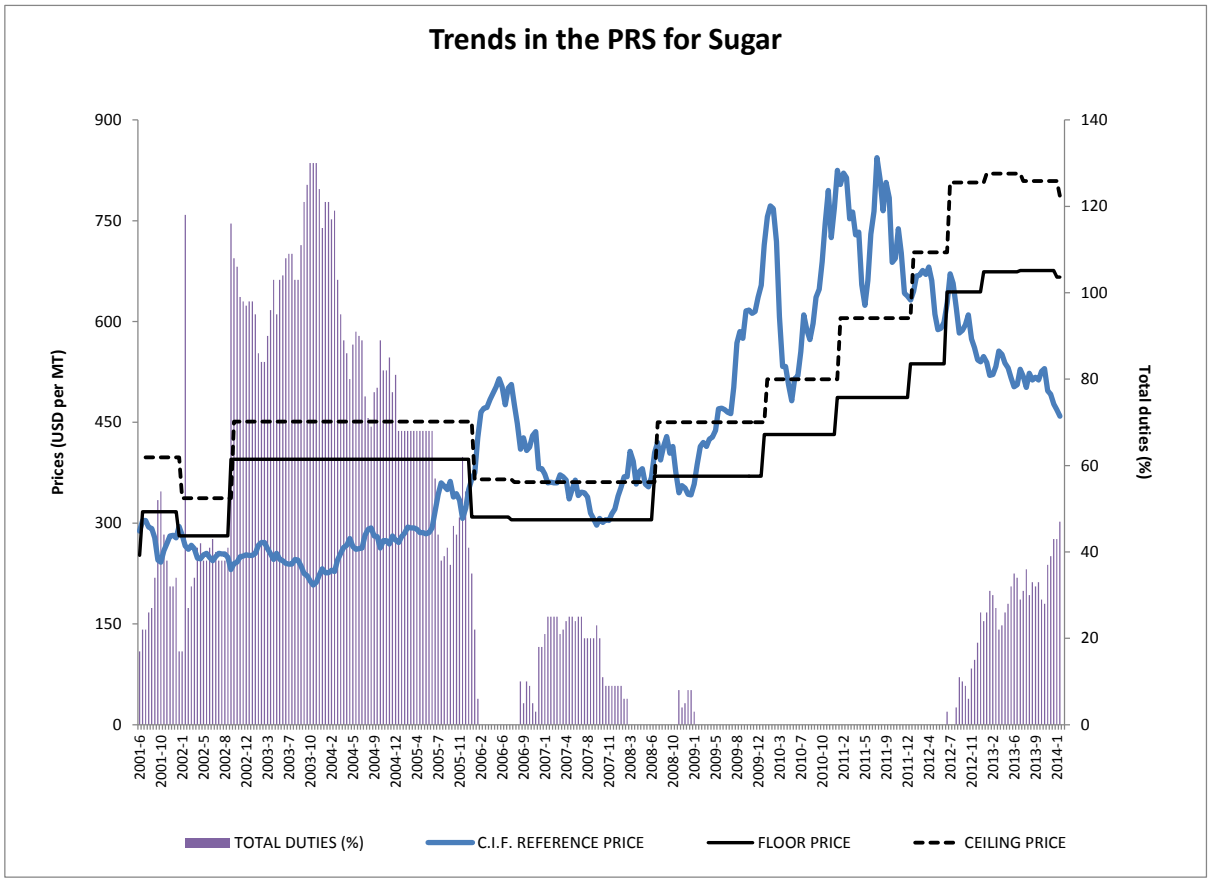
7.3.2.6.3 The duties and tariff rebates resulting from the PRS

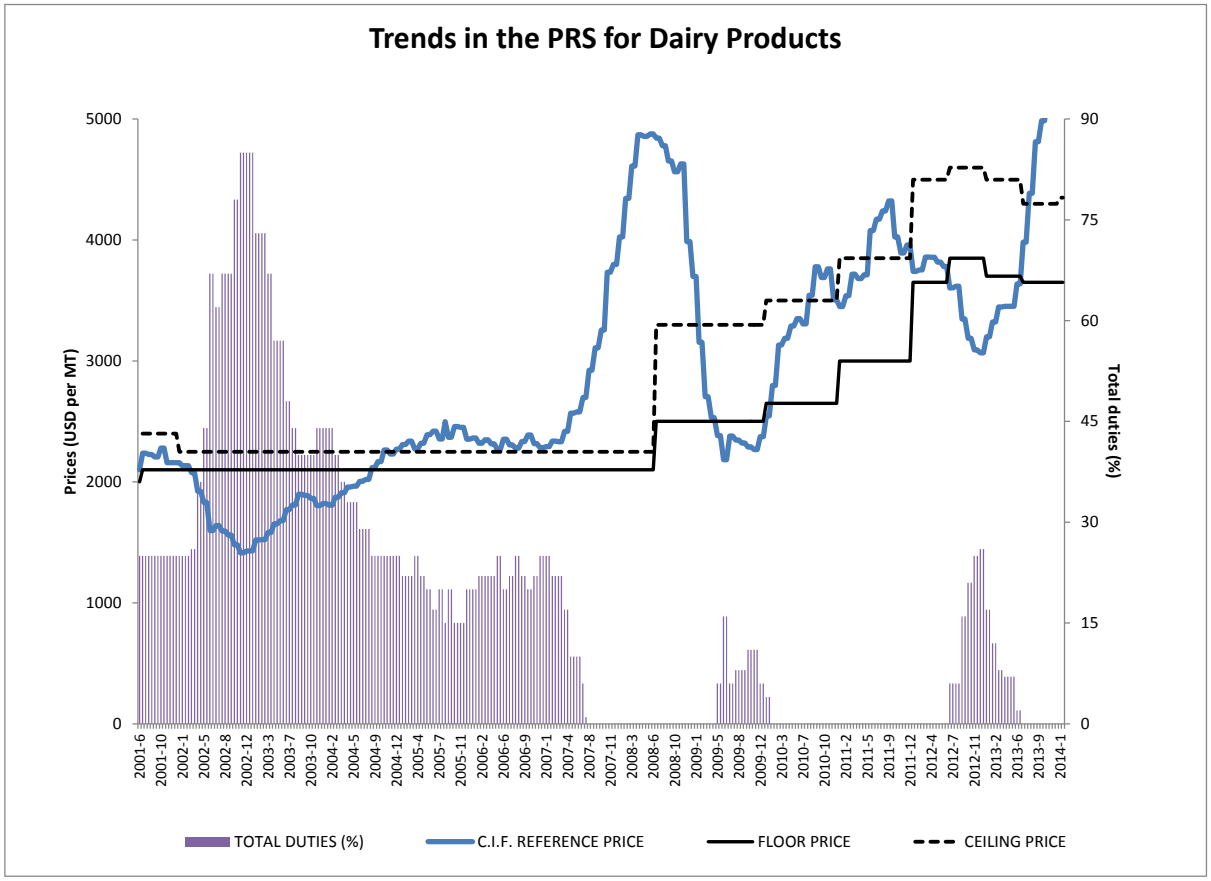
7.163. From the establishment of the PRS in June 2001 to the present time, the system has sometimes generated specific duties, at other times tariff rebates, for the four products subject to the PRS, and on other occasions has generated neither specific duties nor tariff rebates.

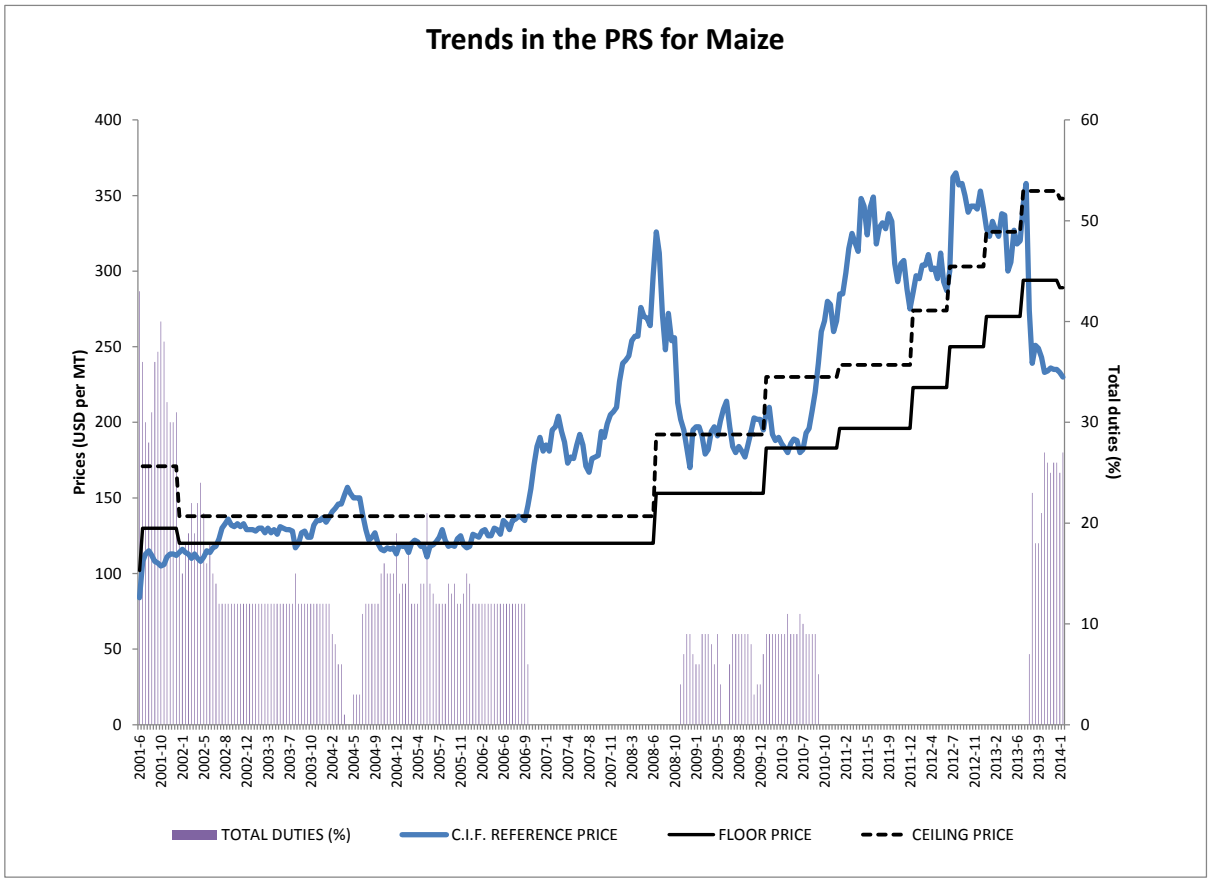
7.164. The following charts illustrate the evolution of the PRS for each of the four products subject to the system, including the ceiling and floor prices, the reference price and the total duties (*ad valorem* duties plus specific duties) applicable from July 2001 to January 2014[276]:



[276] These charts were drawn up by the Panel on the basis of the Fortnightly Information (SPFP - Reference 1991-2013)(Exhibit PER-75); checked against the information contained in the Historical Charts of the Price Range System (Exhibit GTM-20) and the Exhibit updating the information contained in GTM-20, including data from 1 October 2013 to 31 December 2013 (Exhibit GTM-20*bis*). See also Statistics on the application on the Price Range System (Exhibit GTM-19). In the case of the tariff lines for rice, sugar and dairy products, Peru has maintained a 0% *ad valorem* tariff since 6 March 2008, and in the case of the tariff lines for maize, Peru has maintained a 0% *ad valorem* tariff since 31 December 2010, with the exception of the three lines (1108120000, 1108130000 and 3505100000) which currently have an *ad valorem* tariff of 6%. Peru's first written submission, para. 3.59; Supreme Decree No. 038-2008-EF (Exhibit PER-28); Supreme Decree No. 279-2010-EF (Exhibit PER-29).


Trends in the PRS for Sugar
Prices (USD per MT)
Total duties (%)
900
750
600
450
300
150
0
140
120
100
80
60
40
20
0
2001-6
2001-10
2002-1
2002-5
2002-8
2002-12
2003-3
2003-7
2003-10
2004-2
2004-5
2004-9
2004-12
2005-4
2005-7
2005-11
2006-2
2006-6
2006-9
2007-1
2007-4
2007-8
2007-11
2008-3
2008-6
2008-10
2009-1
2009-5
2009-8
2009-12
2010-3
2010-7
2010-10
2011-2
2011-5
2011-9
2011-12
2012-4
2012-7
2012-11
2013-2
2013-6
2013-9
2014-1
TOTAL DUTIES (%)
C.I.F. REFERENCE PRICE
FLOOR PRICE
CEILING PRICE


Trends in the PRS for Dairy Products
Prices (USD per MT)
Total duties (%)
5000
4000
3000
2000
1000
0
90
75
60
45
30
15
0
2001-6
2001-10
2002-1
2002-5
2002-8
2002-12
2003-3
2003-7
2003-10
2004-2
2004-5
2004-9
2004-12
2005-4
2005-7
2005-11
2006-2
2006-6
2006-9
2007-1
2007-4
2007-8
2007-11
2008-3
2008-6
2008-10
2009-1
2009-5
2009-8
2009-12
2010-3
2010-7
2010-10
2011-2
2011-5
2011-9
2011-12
2012-4
2012-7
2012-11
2013-2
2013-6
2013-9
2014-1
TOTAL DUTIES (%)
C.I.F. REFERENCE PRICE
FLOOR PRICE
CEILING PRICE



7.3.3 Peru's tariff policy and the recording of tariffs in its schedule of concessions

7.165. Peru states that, under its tariff system, *ad valorem* and compound tariffs are applied.[277] Peru points out that, in the context of the development of its tariff policy in 1991, all the non-tariff barriers that it was applying to agricultural products were removed.[278] Supreme Decree No. 060-91-EF of 22 March 1991 declared inoperative from that date "all non-tariff restrictions".[279] Legislative Decree No. 668 of 11 September 1991 prohibited, in relation to imports, "the application of surcharges, fees or any other levy with the sole exception of tariff duties and taxes which are also levied on the domestic sale of goods".[280]

7.166. With this context in mind, Peru explained that, during the Uruguay Round, it bound its tariffs at two levels. Most products were bound at the level of 30% *ad valorem*. Agricultural products were also for the most part bound at the level of 30% *ad valorem*, the exceptions being rice, sugar, dairy products, maize and wheat, which were bound at a level of 68%.[281]

[277] Peru's first written submission, paras. 3.9 and 3.15. Peru explained that it used the expression "mixed duties" to refer to the situation in which the duty consists of an *ad valorem* tariff and another specific tariff, for which reason it uses the expressions "compound duties" and "mixed duties" as synonyms. Peru's response to Panel question No. 11, paras. 12-13.

[278] Peru's first written submission, para. 3.10. See also Pre-1990 Legislation Relating to Non-Tariff Barriers for Agricultural Products (Exhibit PER-7); Negotiating Group on Market Access, List of Liberalization Measures, MTN.GNG/MA/W/10, 13 November 1991 (Exhibit PER-9), pp. 15-16.

[279] Supreme Decree No. 060-91-EF (Exhibit PER-10).

[280] Legislative Decree No. 668 (Exhibit PER-11).

[281] Peru's first written submission, para. 3.18. See Schedule XXXV - Peru, Uruguay Round, 15 April 1994 (Exhibit PER-18).

7.167. As was indicated above, in the case of the tariff lines for rice, sugar and dairy products, Peru maintained an *ad valorem* tariff at 0% from 6 March 2008, and for the maize tariff lines, Peru maintained an *ad valorem* tariff at 0% from 31 December 2010, with the exception of three lines (1108120000, 1108130000 and 3505100000) which currently attract an *ad valorem* tariff of 6%.[282]

7.4 The question of whether the duties resulting from the PRS are inconsistent with Article 4.2 of the Agreement on Agriculture

7.4.1 Introduction

7.168. As explained earlier, the Panel's consideration of Guatemala's claims will begin with Article 4.2 of the Agreement on Agriculture.

7.4.2 Main arguments of the parties

7.4.2.1 Guatemala's claim

7.169. Guatemala asserts that the duties resulting from the PRS constitute variable import levies and minimum import prices, or alternatively, that they constitute measures similar to variable import levies and minimum import prices. Guatemala maintains that, consequently, the measure at issue is inconsistent with Article 4.2 of the Agreement on Agriculture.[283]

7.4.2.1.1 The duties resulting from the PRS are variable import levies or measures similar to variable import levies

7.170. Guatemala argues that the duties resulting from the PRS meet the three criteria established by the Appellate Body for constituting variable import levies or similar measures: (a) they exhibit inherent variability; (b) they lack transparency and predictability with regard to the level of the resulting levies; and (c) they impede or obstruct transmission of international price developments to the domestic market.[284]

7.4.2.1.1.1 The duties resulting from the PRS are border measures

7.171. Guatemala argues that the duties resulting from the PRS are a measure applied to the importation of goods subject to the PRS by the Peruvian customs authorities, which therefore meet the requirement of being border measures.[285]

7.4.2.1.1.2 The duties resulting from the PRS are inherently variable

7.172. Guatemala maintains that the duties resulting from the PRS are inherently variable. Guatemala asserts that Peru calculates the duties and tariff rebates resulting from the PRS through the PRS, which is made up of various mathematical schemes and formulas that operate in a coordinated manner to calculate duties and rebates automatically and continuously.[286] Guatemala adds that that the measure at issue possesses inherent variability because the measure itself, as a mechanism, imposes the variability of the duties.[287]

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[282] Peru's first written submission, para. 3.59; Supreme Decree No. 038-2008-EF (Exhibit PER-28); Supreme Decree No. 279-2010-EF (Exhibit PER-29).

[283] Guatemala's first written submission, paras. 4.3 and 4.96-4.98.

[284] Guatemala's first written submission, paras. 4.32 and 4.81-4.83; second written submission, paras. 4.8-4.9.

[285] Guatemala's first written submission, paras. 4.29-4.31; response to Panel question No. 100, para. 33.

[286] Guatemala's first written submission, paras. 4.34-4.35 and 4.44; second written submission, paras. 4.18-4.21; opening statement at the first meeting of the Panel, para. 11.

[287] Guatemala's first written submission, para. 4.39.

7.173. Guatemala asserts that the duties resulting from the PRS are calculated in such a way that the authorities have no discretion to interfere in their application, since both the formulas and the manner of carrying out the calculations that produce the amounts of the resulting duties are contained in the applicable legislation. Guatemala adds that the mechanism guarantees that the resulting duties will vary every 15 days.[288]

7.174. Guatemala points out that the PRS contains mathematical formulas not only for calculating the duty or tariff rebate, but also for establishing the floor price and ceiling price, every six months, and the reference prices every fortnight.[289]

7.175. Guatemala asserts that the changes in the amounts of the duties resulting from the PRS are not produced independently or as a result of separate administrative or legislative action, because the authorities are obliged to act under the applicable rules, and administrative action is limited to announcing the level of the elements of the PRS and the resulting duties or rebates.[290]

7.176. Guatemala maintains that an empirical analysis shows the inherent variability of the duties or rebates under the PRS. Guatemala affirms that, throughout the more than 12 years of application of the PRS: (a) the resulting duties or rebates have almost always varied with each new fortnight; (b) the floor and ceiling prices have varied with practically every publication of updated customs tables; and (c) the reference price has changed every fortnight in roughly 92 to 96% of instances.[291]

7.177. Guatemala asserts that any government measure can be changed by an autonomous and independent government decision, but explains that the measure at issue possesses a degree of additional variability, as the text thereof includes an inherent methodology requiring and necessarily implying periodic modifications.[292]

7.178. Guatemala maintains that, unlike the variability that may occur in respect of ordinary customs duties, in the case of duties or rebates resulting from the PRS, there is no lack of a specific legislative act. The duties and rebates owe their existence to the legislative act issued in 2001 which set out the formulas by which they are established. The acts publishing the customs tables and reference prices are merely an announcement of the outcome of application of the formulas.[293]

7.179. In contrast, according to Guatemala, the Peruvian authorities modify ordinary *ad valorem* duty rates whenever they deem it appropriate to do so in the light of their trade policy. By way of example, Guatemala points out that the *ad valorem* duties on bovine meat have changed once every three years, in contrast to the fortnightly variability of the measure at issue, which has resulted in 72 updates during the same period of three years.[294]

7.180. Guatemala also contends that Peru's argument to the effect that, in substance, all governmental measures are variable, would render redundant the term "variable" (in the expression "variable import levies").[295]

[288] Guatemala's first written submission, paras. 4.36-4.38; second written submission, paras. 4.8-4.11.
[289] Guatemala's first written submission, paras. 4.45-4.53.
[290] Guatemala's first written submission, para. 4.48.
[291] Guatemala's first written submission, paras. 4.54-4.57; History of Application of the Price Range System (Exhibit GTM-15); History of Application of the Price Range System (GTM-15), indicating the instances in which a reference price has remained the same in consecutive periods (Exhibit GTM-17).
[292] Guatemala's second written submission, paras. 4.22-4.27.
[293] Guatemala's first written submission, paras. 4.40-4.42.
[294] Guatemala's second written submission, paras. 4.28-4.36; comments on Peru's responses to the Panel's questions, para. 40; Extracts from Peru's Tariff of 2002, 2007 and 2012 relating to tariff line 0202.30.00.00 (Exhibit GTM-52).
[295] Guatemala's second written submission, paras. 4.37-4.40.

7.4.2.1.1.3 The duties resulting from the PRS lack transparency and predictability

7.181. Guatemala maintains that, given their very variability, the duties generated by the PRS lack both transparency and predictability, as a natural and inherent consequence of the variable nature of those duties, since 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.[296]

7.182. Guatemala asserts that the lack of transparency and predictability is clear from an empirical analysis. Guatemala explains that, as the key elements of the PRS vary, the resulting values are not predictable, and a commercial operator will have no certainty as to what will be the reference price, or as to whether an additional duty will be applied in the coming months, and what will be its amount. Guatemala points out that the system in fact guarantees that the importer faces uncertainty.[297]

7.183. Guatemala claims that not only is there a general level of uncertainty, but that this uncertainty also affects specific consignments, because operators are unaware at the date of shipment of the goods what will be the amount of the duties required by the Peruvian authorities at the time of arrival in Peru.[298]

7.184. With regard to sugar, Guatemala indicates that the normal practice is to agree long-term contracts (usually with a duration of one to three years, and sometimes four or five years), with prices to be fixed at a date close to the date of shipment. In such cases, Guatemala asserts that, owing to the way in which commercial operators work, the imposition of additional duties is a total deterrent to imports from Guatemala, as importers would prefer to purchase sugar from a source not subject to the PRS.[299]

7.185. Guatemala also contends that the following aspects of the PRS are characterized by lack of transparency: (a) the way in which Peru determines import-related costs; (b) the source used for determining the freight and insurance costs needed to convert f.o.b. values into c.i.f. values; and (c) the reason for the adjustment factor of 1.107 for the floor price of sugar and how it is determined.[300]

7.186. Guatemala also indicates that the determinant of the lack of transparency and predictability is not whether the levy is published or whether it conforms to the WTO bound tariff levels, but that the variability automatically entails a lack of transparency and predictability.[301]

7.187. Guatemala argues that, under the PRS, an economic operator knows that the duty will vary on the first and the fifteenth day of each month, but does not know the level of those duties. Guatemala adds that, even though economic operators may speculate about the future level of prices, this would never provide a degree of predictability sufficient to ensure the conditions of market access that were sought by the negotiators of the Agreement on Agriculture.[302]

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[296] Guatemala's first written submission, paras. 4.58-4.61; opening statement at the first meeting of the Panel, para. 26 (citing Appellate Body Report, *Chile - Price Band System*, para. 234); second written submission, paras. 4.12, 4.19 and 4.50; response to Panel question No. 56, paras. 134-138.

[297] Guatemala's first written submission, paras. 4.61-4.63.

[298] Guatemala's first written submission, paras. 4.64-4.71; List of dates of publication of Ministerial and Vice-Ministerial Resolutions publishing reference prices and delay in the publication of those documents (Exhibit GTM-14); Searates: *Tiempo de transporte marítimo - Distancia Tailandia – Perú* (Exhibit GTM-21); and Searates: *Tiempo de transporte marítimo - Distancia Guatemala - Perú* (Exhibit GTM-22).

[299] Guatemala's response to Panel question No. 7, paras. 7-11; response to Panel question No. 58, paras. 196-198; Eight-month Forward Sales Contract (Exhibit GTM-41); Two-year Forward Sales Contract (Exhibit GTM-42); The White Paper on Sugar: A History of Protectionism (Exhibit GTM-48).

[300] Guatemala's first written submission, para. 4.70.

[301] Guatemala's opening statement at the first meeting of the Panel, para. 26.

[302] Guatemala's second written submission, paras. 4.50-4.53.

7.188. Guatemala also asserts that the task of price estimation requires a high degree of sophistication on the part of economic operators and generates costs imposed by a decision of the Peruvian Government. Guatemala adds that, although economic operators could estimate the reference prices and duties or rebates resulting from the PRS, this would not remedy the lack of predictability.[303]

7.189. Guatemala also expresses concern at Peru's attempt to condition its rights and obligations on the actions and capacities of private operators.[304]

7.190. Guatemala also states that economic operators cannot predict the future level of the reference price, because estimates fluctuate constantly and are based on data from the highly volatile futures markets, and there are no fortnightly estimates.[305]

7.191. Guatemala rejects the estimates submitted by Peru because: (a) most commercial transactions have a long time horizon; (b) Peru used historical data, not future prices; (c) past trends are no guide to the future; and (d) estimates prove to be imprecise in the short term and become so imprecise in the long term that they hamper any serious commercial planning.[306]

7.192. Guatemala concludes that neither economic operators nor governments can estimate the duties or rebates resulting from the PRS, either in the short term or the long term. In Guatemala's view, all margins of inaccuracy are commercially relevant in terms of generating uncertainty and persuading buyers to resort to other suppliers, particularly supplier countries that are not subject to the PRS.[307]

7.4.2.1.1.4 Inhibition of the transmission of international price developments to the domestic market

7.193. Guatemala claims that, because of its design, architecture and effect, the measure at issue insulates domestic prices in Peru from international price trends and impedes transmission of those trends to the domestic Peruvian market. Guatemala claims that the explicit objective of the PRS is to neutralize fluctuations in international prices and limit the negative effects of falls in such prices; and it has the effect of completely inhibiting or severely distorting the transmission of any decline in international prices to the Peruvian market.[308]

7.194. Guatemala points out that the preamble to Supreme Decree No. 155-2001-EF confirms that the measure at issue constitutes a stabilization and protection mechanism that makes it possible to neutralize the fluctuations of international prices and limit the negative effects of falls in those prices. In Guatemala's opinion "neutralizing" and "stabilizing" international price fluctuations is equivalent to impeding their transmission.[309]

7.195. Guatemala asserts that, in the short term, the system is designed to totally preclude the transmission of a decline in prices to the domestic Peruvian market. This is because any change in international prices produced during the period of validity of the floor price will not at all be reflected in the price at which imports may enter the Peruvian market. Guatemala adds that, if there is a fall in international prices, reflected in a fall in the reference price, the PRS increases the resulting duties by the same amount as the fall in the reference price, thereby covering the

[303] Guatemala's response to Panel question No. 53, paras. 117-122; opening statement at the second meeting of the Panel, paras. 13-17; comments on Peru's responses to the Panel's questions, para. 66.
[304] Guatemala's second written submission, paras. 4.54-4.56.
[305] Guatemala's second written submission, paras. 4.57-4.58; response to Panel question No. 53, para. 109; Future price trends for Contract No. 5 (Exhibit GTM-47).
[306] Guatemala's second written submission, paras. 4.59-4.73; opening statement at the second meeting of the Panel, paras. 18-20; Estimate of future sugar prices during the first two weeks of February 2014, based on Peru's methodology (Exhibit GTM-57).
[307] Guatemala's second written submission, para. 4.74.
[308] Guatemala's first written submission, paras. 4.72-4.75; second written submission, para. 4.13.
[309] Guatemala's second written submission, paras. 4.86-4.87; copy of the web page of the Peruvian Ministry of the Economy and Finance, explaining the Price Range System (Exhibit GTM-2); and Supreme Decree No. 115-2001-EF (Exhibit GTM-4).

difference between the reference price and the floor price. As a result, the duties generated by the PRS totally neutralize any change in international prices.[310]

7.196. Guatemala adds that, in the long term, even if the PRS does not completely preclude the transmission of international prices to the domestic market, it severely distorts such transmission owing to its cushioning effect. Guatemala asserts that the incorporation of changes in international prices into the floor price is highly diluted, because when there is a fall in those prices, the floor price would decrease at a much slower rate than the decline in the reference price, with a time lag of up to six months. Furthermore, if monthly prices outside the confidence interval are eliminated, it is possible that none of the prices will be incorporated into the floor price, whereas no value is omitted from the reference price.[311]

7.197. Guatemala submits Exhibits GTM-31 and GTM-56 in order to support its arguments concerning the neutralizing and insulating effect of the duties resulting from the PRS with respect to the prices of imports subject to that mechanism, in contrast to ordinary customs duties.[312]

7.198. Guatemala also asserts that the PRS not only covers the difference between the reference price and the floor price, since with the addition of 3% for import costs, the PRS has the effect of overcompensating for falls in international prices.[313]

7.199. With regard to the correlation that Peru claims to exist between domestic prices and international prices, Guatemala contends that the variable nature of a levy has no bearing on the behaviour of prices.[314] Guatemala points out that a variable levy impedes or distorts the transmission of international price developments to the domestic market through the prices of imported products, and this remains the case regardless of whether domestic prices are connected or not connected to international prices by virtue of any other factor.[315]

7.200. Guatemala argues that the type of analysis proposed by Peru has no legal basis because: (a) Article 4.2 of the Agreement on Agriculture refers to variability as an inherent characteristic of a variable levy, and not to the economic effects of the measure; (b) it ignores the economic reality and would result in an arbitrary legal criterion, since the average domestic price reflects the prices of all products present on the market and is the result of a wide range of factors; and (c) it is equivalent to the trade effects test which has already been rejected in other cases, since the WTO provisions provide protection not for trade volumes but for expectations concerning conditions of competition.[316]

7.201. Moreover, Guatemala identifies the following alleged methodological flaws in Peru's proposed analysis of the correlation between domestic prices and international prices: (a) the existence of anomalies in the application of the measure, such as the extension of customs tables; (b) Peru is presenting data for periods when the measure was not applied and has failed to present data for 2013; and (c) Peru has not checked that the price data it uses are comparable.[317]

7.202. Guatemala also argues that, regardless of the methodological flaws, the data submitted by Peru show periods of correlation and periods of non-correlation, so that it is impossible to reach a conclusion on the existence or non-existence of correlation.[318]

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[310] Guatemala's first written submission, para. 4.76.

[311] Guatemala's first written submission, para. 4.77.

[312] Guatemala's second written submission, paras. 4.86-4.91; opening statement at the first meeting of the Panel, para. 20; response to Panel question Nos. 116, 117 and 120, paras. 91-103 and 113-118; Chart demonstrating the neutralizing effect of the PRS (sugar imports July 2012-December 2013) (Exhibit GTM-31); Chart on the fluctuation of import prices (Exhibit GTM-56).

[313] Guatemala's first written submission, paras. 4.79-4.80; second written submission, paras. 4.12-4.24.

[314] Guatemala's second written submission, paras. 4.75-4.77.

[315] Guatemala's opening statement at the first meeting of the Panel, paras. 17 and 18 (citing Appellate Body Report, *Chile - Price Band System*, para. 246).

[316] Guatemala's second written submission, paras. 4.78-4.85; 4.108-4.111; opening statement at the first meeting of the Panel, paras. 21-22; response to Panel question No. 57, paras. 139-186.

[317] Guatemala's second written submission, paras. 4.94-4.100; response to Panel question No. 57, paras. 187-193.

[318] Guatemala's second written submission, paras. 4.101-4.107.

7.4.2.1.2 The duties resulting from the PRS constitute minimum import prices or measures similar to minimum import prices

7.203. Guatemala claims that the duties resulting from the PRS also constitute minimum import prices or measures similar to minimum import prices, as they are the minimum price at which imports of certain products can enter the Peruvian domestic market.[319]

7.204. Guatemala asserts that the PRS seeks to prevent goods entering Peru at a price below the floor price, so that the floor price operates as a minimum price level which is applied to imports of the products subject to the PRS.[320]

7.205. Guatemala claims that the floor price fulfils the function of an indicative (or target) price, despite not being expressed in specific numerical terms[321], since when the reference price falls below the floor price, an additional duty is imposed corresponding to the difference between the international reference price and the limit of the range. The floor price is the level which the PRS seeks to achieve with regard to the cost of importing the products.[322]

7.206. Guatemala asserts that the Peruvian measure is characterized by the following: (a) it guarantees that goods will not enter the Peruvian market at a price below a certain threshold; (b) it imposes an additional duty based on the difference between the floor price and the reference price; (c) the amount of the additional duty varies in line with that difference; and (d) it impedes or distorts the transmission of a fall in world prices to the domestic market.[323]

7.207. According to Guatemala, it is also logical that the sum of the price of an individual consignment and the specific duty may not always reach the same level as the floor price, but this does not alter the fact that the measure was designed and conceived to prevent imports from entering Peru at a price below a certain threshold.[324]

7.208. Guatemala also contends that the reference price, by definition, represents the typical average consignment which does not enter below the floor price, so that in the case of the typical average consignment, the floor price operates as a minimum price. Guatemala also explains that, if the prices of many consignments in a two-week period are below the floor price, this situation would be corrected in the following two-week period by an adjustment of the reference price.[325]

7.209. Guatemala also maintains that the floor price is not the only threshold serving as a minimum price, since the PRS guarantees that no consignment will enter at a price lower than the sum of the lowest international price and the additional duty. This sum constitutes a lower *de facto* threshold than the floor price, and therefore covers the two examples presented by Peru of transactions which entered at a level lower than the floor price, it being highly unlikely that there are any transactions for which the final price is situated below that threshold. Guatemala adds that the difference between a specific tariff and the duty resulting from the PRS, with respect to a minimum price based on a *de facto* threshold, consists in the way in which the additional duty is determined, fortnightly by means of mathematical formulas, and in the fact that the lowest transaction price serves as an input for calculating the additional duty, which does not occur with a specific duty.[326]

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[319] Guatemala's first written submission, paras. 4.84-4.85 and 4.97; second written submission, para. 4.126.

[320] Guatemala's first written submission, para. 4.88; second written submission, paras. 4.127-4.130.

[321] Guatemala's response to Panel question No. 59, para. 201.

[322] Guatemala's second written submission, para. 4.134.

[323] Guatemala's first written submission, para. 4.94.

[324] Guatemala's second written submission, paras. 4.135-4.136; opening statement at the first meeting of the Panel, paras. 31 and 34-35; response to Panel question No. 59, para. 201; response to Panel question No. 123, paras. 119-127.

[325] Guatemala's second written submission, paras. 4.137-4.140; opening statement at the first meeting of the Panel, paras. 31-36; response to Panel question No. 59, para. 203; response to Panel question No. 124, paras. 128-132; response to Panel question No. 125, paras. 133-134.

[326] Guatemala's second written submission, para. 4.141; opening statement at the first meeting of the Panel, paras. 37-39; response to Panel question No. 59, para. 203; response to Panel question No. 126, paras. 135-152.

7.210. Guatemala also asserts that the PRS reflects the characteristic of minimum import prices in that it distorts the transmission of falls in international prices to the domestic market.[327]

7.4.2.2 Peru's defence

7.211. Peru argues that the measure at issue is an ordinary customs duty, and that Article 4.2 of the Agreement on Agriculture is therefore not applicable.[328] Peru also argues that the measure at issue does not exhibit characteristics such as to be considered a variable import levy, a minimum import price or a measure similar to these.[329]

7.4.2.2.1 The duties resulting from the PRS are ordinary customs duties

7.212. Peru identifies a series of characteristics of ordinary customs duties, which, it argues, are derived from the ordinary meaning of the text of the relevant agreements, taking into account their context, object and purpose, the supplementary means of interpretation and the previous decisions of panels and the Appellate Body.[330]

7.213. Peru asserts that ordinary customs duties: (a) are duties subject to most-favoured-nation (MFN) treatment, forming part of the tariff regime; (b) apply to imports and the obligation to pay them arises at the time of importation; (c) may be designed to collect revenue or to protect the domestic industry; (d) may be *ad valorem*, specific or compound duties; (e) may vary, but are subject to an upper limit, which is the level bound in the schedule of the respective Member; and (f) are transparent and predictable.[331] Peru argues that the duties resulting from the PRS meet these characteristics, and are therefore ordinary customs duties.[332]

7.214. Peru explains that the duties resulting from the PRS: (a) came into being as part of the restructuring of its tariff system in 1991 and have formed part of its tariff policy since that date; (b) were included in Peru's tariff offer in the Uruguay Round; (c) form part of the tariff reductions negotiated under free trade agreements; (d) the combination of specific duties and *ad valorem* duties may not exceed the bound level; and (e) they are customs duties, in accordance with its legislation.[333]

7.215. Regarding its assertion that its mixed duties formed part of its offer during the Uruguay Round negotiations, Peru indicates that its schedule of concessions reflects the fact that the customs tariffs were bound at a uniform rate of 30% *ad valorem*, with the exception of 20 agricultural products which were already subject to a specific duty as part of its tariff, and for which the tariff was bound at a rate of 68%. Peru argues that it assumed its commitments at the end of the Uruguay Round with a good faith understanding that it was following the established rules.[334]

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[327] Guatemala's first written submission, paras. 4.89-4.92; second written submission, paras. 4.128-4.132.

[328] Peru's first written submission, para. 5.41; second written submission, para. 3.13.

[329] Peru's first written submission, para. 5.54; second written submission, para. 3.35.

[330] Peru's first written submission, paras. 5.11-5.37.

[331] Peru's first written submission, paras. 5.38-5.39.

[332] Peru's first written submission, paras. 5.40-5.41; opening statement at the first meeting of the Panel, para. 37.

[333] Peru's first written submission, paras. 5.40-5.50; second written submission, paras. 3.14-3.33; opening statement at the first meeting of the Panel, para. 38; Communication from Peru to the Chairman of the Negotiating Group on Market Access, 14 December 1993 (Exhibit PER-15); Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, MTN.GNG/MA/W/24, 20 December 1993 (Exhibit PER-19); Decree Law No. 26140 (Exhibit PER-53); Circular INTA-CR.62-2002 (Exhibit GTM-3). See also Decree Laws Nos. 25528 and 25784 (Exhibit PER-91).

[334] Peru's first written submission, paras. 5.46-5.50; second written submission, paras. 3.23-3.27; Communication from Peru to the Chairman of the Negotiating Group on Market Access, 14 December 1993 (Exhibit PER-15); Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, MTN.GNG/MA/W/24, 20 December 1993 (Exhibit PER-19).

7.4.2.2.2 The duties resulting from the PRS are not variable import levies or minimum import prices

7.216. Peru maintains that the duties resulting from the PRS do not share the features of variable import levies and do not constitute minimum import prices.[335]

7.4.2.2.2.1 The measure is neither fitted nor intended to arrive at an indicative price

7.217. Peru asserts that the main feature of minimum import prices and of variable import levies is that the import charge is based on a minimum import price, preventing products from entering a domestic market at a lower price.[336]

7.218. Peru maintains that the measure at issue is neither a variable import levy nor a minimum import price, since the PRS does not impose a minimum import price, either by impeding the entry of goods at a price lower than the minimum or by varying the levy to equalize the import price with the established minimum.[337]

7.219. Peru asserts that the measure has neither the objective nor the capacity to arrive at an indicative (target) price and points out that it is meaningless to talk of either a variable import levy or a minimum import price in the absence of an indicative price.[338]

7.220. To demonstrate the foregoing, Peru presents an example of an import transaction for sugar where the c.i.f. entry price for the merchandise was lower than the floor price, and another where the c.i.f. entry price was lower than the international reference price and the floor price.[339]

7.221. Peru also presents trade statistics for the four products subject to the PRS for the period between 2001 and 2013, in which it identifies the number of trade transactions that entered Peru at a price lower than the reference price and the floor price.[340]

7.222. Regarding Guatemala's argument that, in a typical transaction, the floor price operates as a minimum price, Peru maintains that the measure is applicable to all consignments and the decision on price is at the discretion of the seller and the buyer. Peru also claims that Guatemala assumes without justification that the prices of products upon entry will affect price quotations in the reference market, pointing out that, if the prices of many consignments are below the reference price for one fortnight, that situation would be corrected in the following fortnight.[341]

7.223. Peru indicates that, to accept Guatemala's argument to the effect that, if the PRS does not succeed in equalizing entry prices with the floor prices, it does produce a *de facto* equalization of entry prices with the price resulting from the sum of the lowest international price and the resulting specific duty, would imply that any imposition of a specific duty is *de facto* a minimum import price, regardless of how it is calculated.[342]

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[335] Peru's first written submission, para. 5.54; second written submission, para. 3.35.

[336] Peru's second written submission, para. 3.36. See also Peru's first written submission, paras. 5.59-5-60; second written submission, paras. 3.42 and 3.65-3.66; Discussion paper on tariffication submitted by the United States, MTN.GNG/NG5/W/97, 10 July 1989 (Exhibit PER-20); Negotiating Group on Non-Tariff Measures, *Communication from Australia*, MTN.GNG/NG2/W/24, 2 December 1988 (Exhibit PER-48); Compendium of Definitions from the WTO Glossary (Exhibit PER-41) and J. Jackson, *World Trade and the Law of the GATT* (Bobbs-Merrill, 1969) (Exhibit PER-38).

[337] Peru's first written submission, para. 5.61; second written submission, paras. 3.36; opening statement at the first meeting of the Panel, para. 41, response to Panel question No. 59, paras. 147-149.

[338] Peru's first written submission, para. 5.61; second written submission, paras. 3.36-3-41 and 3.67; opening statement at the first meeting of the Panel, para. 41; opening statement at the second meeting of the Panel, para. 37.

[339] Peru's first written submission, paras. 5.62-5.68.

[340] Peru's response to Panel question No. 123, paras. 98-99; Statistical data on product entries below the minimum price (Exhibit PER-90).

[341] Peru's second written submission, para. 3.40, subpara. (iv).

[342] Peru's second written submission, para. 3.40, subpara. (v); opening statement at the second meeting of the Panel, para. 37.

7.4.2.2.2.2 The duties resulting from the PRS are not sufficiently similar to variable import levies or minimum import prices

7.224. Peru claims that the duties resulting from the PRS are not similar to variable import duties or minimum import prices.[343]

7.4.2.2.2.3 The duties resulting from the PRS do not insulate the Peruvian market

7.225. Peru states that a key characteristic of variable import levies and minimum import prices is that they insulate the domestic market from the international market.[344]

7.226. Peru argues that insulation from the international market does not occur in the case of its PRS because the resulting duties do not seek to impede the entry of goods below an indicative or minimum price, but are a function of prices on the international market; moreover, they cannot exceed the bound tariff level. Peru asserts that domestic prices consistently and progressively reflect trends in the international market.[345]

7.227. Peru presents three charts relating to maize and one relating to sugar, which compare domestic prices over the five previous years with international reference prices and import prices from the United States and the European Union. Peru maintains that domestic prices closely follow import price patterns.[346]

7.228. Peru indicates that the PRS is established by law as a stabilization and protection mechanism that serves to neutralize fluctuations in international prices and limit the negative effects of falls in such prices. In Peru's opinion, the PRS has been effective in seeking to achieve those objectives. Peru nevertheless points out that there is no reason to affirm that "neutralize" means "distort" or "isolate".[347]

7.229. Peru notes that every customs duty neutralizes international effects in relation to the local market, and that the distorting effect of variable import levies must be of a different or greater degree. Peru adds that the objective of its PRS is to cushion the impact of sharp price fluctuations in the short term.[348]

7.4.2.2.2.4 The duties resulting from the PRS are transparent and predictable

7.230. Peru claims that lack of transparency and predictability is an additional characteristic independent of variability, and asserts that the high degree of transparency and predictability of the PRS distinguishes it from variable levies and minimum import prices.[349]

7.231. Peru argues that its measure is transparent and enables commercial operators to acquaint themselves with the amounts corresponding to the applicable tariff duties. Peru indicates that

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[343] Peru's first written submission, paras. 5.69-5.73.

[344] Peru's first written submission, paras. 5.74-5.77; response to Panel question No. 46, para. 110; C. Coughlin and G. Wood, "An Introduction to Non-Tariff Barriers to Trade", Federal Reserve Bank of St. Louis Review (1989) (Exhibit PER-42); G. Sampson and R. Snape, "Effects of Variable Import Levies and Options for Retaliation", Stockholm, Sweden, Institute for International Economic Studies, Seminar Paper No. 120 (Exhibit PER-43).

[345] Peru's first written submission, para. 5.78; second written submission, paras. 3.62-3.64; opening statement at the first meeting of the Panel, para. 43; opening statement at the second meeting of the Panel, para. 41.

[346] Peru's first written submission, paras. 5.79-5.87; response to Panel question No. 121, paras. 85-89; Statistical Compendium (Exhibit PER-46); Database of sugar and maize prices (Exhibit PER-69); Updated version of charts 1-7 (Exhibit PER-70); Explanation of alleged flaws in price charts (Exhibit PER-93).

[347] Peru's response to Panel question No. 49, paras. 116-119; second written submission, paras. 3.59-3.60; opening statement at the second meeting of the Panel, para. 41; response to Panel question No. 115, paras. 75-77.

[348] Peru's second written submission, para. 3.61; response to Panel question No. 115, paras. 75-77.

[349] Peru's first written submission, paras. 5.88 and 5.92; second written submission, para. 3.47; opening statement at the first meeting of the Panel, para. 44.

operators know that the duty will never exceed the bound rate and that all the essential elements for its calculation are published.[350]

7.232. In particular, Peru asserts that: (a) any interested party may log on to the official website in order to check the applicable duties; (b) the methodology is publicly accessible and open sources are required for its application; (c) the international reference markets are known[351]; (d) the reference prices are characterized by temporal proximity; (e) forward financial instruments exist for the determination of agricultural product prices; (f) the products subject to the PRS are commodities for which a wealth of forecasts exist in easily accessible time series; and (g) there is predictability with regard to the administrative practice of the Peruvian State. Peru claims that all of the foregoing ensures that duties under the PRS are reasonably predictable.[352]

7.233. Peru also maintains that the transparent and predictable characteristics of the PRS enable economic operators to predict, prior to the customs declaration for the goods, what duties will apply.[353]

7.234. To demonstrate the foregoing, Peru explains that it attempted to make an advance calculation of reference prices for the first two weeks of February 2014 and that: (a) for maize it projected a reference price of between USD 231 and USD 232, and the actual price was USD 232; (b) for sugar it projected a reference price of between USD 433 and USD 434, and the actual price was USD 437; and (c) for dairy products it projected a reference price of between USD 5,048 and USD 5,555, and the actual price was USD 5,252.[354] Peru rejects Guatemala's allegation that it is impossible to make estimates.[355]

7.4.2.2.2.5 The duties resulting from the PRS have no automatic or inherent variability

7.235. Peru acknowledges that the duties resulting from the PRS are in general variable, but claims that variability *per se* is not a decisive factor or element, since it is a necessary but by no means sufficient condition.[356]

7.236. Peru affirms that ordinary customs duties may vary and in fact do so, since every Member may exact a duty upon importation and periodically change the rate at which it applies that duty.[357]

7.237. Peru also claims that what varies in the Peruvian system is not the duties or rebates, but the reference price used to determine the applicable values, and each new calculation does not involve a change in the tariff, which for much of the period of application of the PRS has remained at zero.[358]

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[350] Peru's first written submission, paras. 5.89-5.91; second written submission, para. 3.48; opening statement at the first meeting of the Panel, para. 44; Examples of Information Available on the SUNAT Website (Exhibit PER-44).

[351] Peru adds that the Central Reserve Bank of Peru publishes data on the international prices of sugar, maize and rice, as well as the PRS reference prices. Peru's response to Panel question No. 114, para. 74; Statistical Tables from the Weekly Report of the Central Reserve Bank of Peru (BCRP) (Exhibit PER-88).

[352] Peru's second written submission, paras. 3.56-3.58; response to Panel question No. 52, paras. 126-127; opening statement at the second meeting of the Panel, para. 40.

[353] Peru's response to Panel question No. 52, para. 126.

[354] Peru's second written submission, paras. 3.49-3.50; response to Panel question No. 53, para. 129; response to Panel question No. 109, paras. 54-62; Reference Prices (Exhibit PER-72); Slides presented by Peru (Exhibit PER-83).

[355] Peru's second written submission, paras. 3.51-3.55.

[356] Peru's first written submission, para. 5.92; second written submission, para. 3.43; opening statement at the first meeting of the Panel, para. 40; opening statement at the second meeting of the Panel, para. 38; response to Panel question No. 101, paras. 32-34.

[357] Peru's second written submission, para. 3.43; opening statement at the first meeting of the Panel, para. 40; response to Panel question No. 101, para. 32; Compendium of Tariff Changes for Boneless Bovine Meat (Exhibit PER-85).

[358] Peru's first written submission, para. 5.92; second written submission, para. 3.44; opening statement at the first meeting of the Panel, para. 40; opening statement at the second meeting of the Panel, para. 38.

7.238. Peru also points out that the measure challenged by Guatemala is a duty under the PRS and not the PRS itself or other calculation mechanisms.[359]

7.239. Peru also asserts that the constituent elements of the PRS do not operate automatically, since different State organs have to complete certain administrative steps in order for the reference prices and updated customs tables to be published. Peru adds that every customs table is published with the same legal status as Supreme Decree No. 115-2001-EF and that on various occasions Peru has chosen not to publish a new table and instead to extend the table for one or more products by supreme decree.[360]

7.4.3 Main arguments of the third parties

7.4.3.1 Argentina

7.240. Argentina considers that Members must be particularly careful to ensure compliance with and enforcement of Article 4.2 of the Agreement on Agriculture, and avoid taking measures that could restrict market access for agricultural products.[361]

7.241. In Argentina's opinion, the duties resulting from the PRS are a measure inconsistent with Article 4.2 of the Agreement on Agriculture, since they qualify as a variable import levy, a minimum import price, or as a measure similar to these.[362]

7.242. Argentina asserts that the obligation under Article 4.2 of the Agreement on Agriculture applies from the date of the entry into force of the WTO Agreement, which would not appear to match Peru's defence to the effect that the PRS was part of Peru's tariff offer during the Uruguay Round.[363]

7.243. Finally, Argentina states that it is particularly important that transparency and predictability should prevail in trade relations, and observes that, in general terms, a price band system will lessen the transparency and predictability of trade.[364]

7.4.3.2 Brazil

7.244. In Brazil's view, in order to assess whether a border measure on agricultural products is consistent with market access commitments, it is not enough to establish whether the measure is consistent with the schedule of concessions of the particular Member, but it is also necessary to confirm that the measure is not one of those referred to in Article 4.2 of the Agreement on Agriculture.[365]

7.245. Brazil argues that, in assessing whether a measure is inconsistent with Article 4.2 of the Agreement on Agriculture, it must be considered whether the challenged measure is similar to one of the measures identified in footnote 1 to the Agreement on Agriculture, without having to check that the measure is identical. Brazil points out that the fact that a measure shares characteristics with the duties set out in a Member's schedule of concessions does not, *ipso facto*, turn it into an ordinary customs duty.[366] Brazil also asserts that not all the duties calculated on the basis of the value and/or volume of imports constitute ordinary customs duties.[367]

7.246. Brazil considers that some characteristics of the measure at issue appear to be similar to those of the measures mentioned in footnote 1 to the Agreement on Agriculture.[368]

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[359] Peru's second written submission, para. 3.44.
[360] Peru's second written submission, para. 3.45; opening statement at the second meeting of the Panel, para. 38; response to Panel question No. 104, paras. 42-44.
[361] Argentina's third-party written submission, para. 10.
[362] Argentina's third-party written submission, para. 11; third-party statement, para. 8.
[363] Argentina's third-party written submission, paras. 13 and 14; third-party statement, paras. 4-6.
[364] Argentina's third-party written submission, para. 17.
[365] Brazil's third-party written submission, para. 10.
[366] Brazil's third-party written submission, paras. 11-12.
[367] Brazil's third-party written submission, para. 10.
[368] Brazil's third-party written submission, paras. 14-18.

7.247. In Brazil's view, the inherent variability of the measure appears to be undisputed. Regarding the lack of transparency and predictability, Brazil considers that a measure with these characteristics generates costs and discourages the conclusion of long-term contracts.[369] Brazil indicates that the discouraging effect is even clearer when the measure does not apply to all Members.[370]

7.248. Brazil adds that the fact that a measure refers to the objective of disconnecting domestic prices from international market signals, beyond the normal effect of tariffs, and protecting local producers from the agricultural policies of other Members, appears to run counter to Article 4.2 of the Agreement on Agriculture.[371]

7.4.3.3 Colombia

7.249. Colombia is of the view that the Agreement on Agriculture contains no provision suggesting that one of the fundamental characteristics of a variable levy is its inherent variability.[372]

7.250. Colombia considers that the interpretation of variable import levies by the Appellate Body does not meet the customary rules of interpretation, insofar as it takes no account of the context of the entire sentence. Colombia explains that the use of the phrase "these measures include" in the footnote to the Agreement on Agriculture is not meant to indicate that the measures must "themselves contain" variable formulas or minimum prices, but serves to list measures of the kind that should be converted into tariffs.[373]

7.251. In Colombia's opinion, a system like the Peruvian one may be transparent and predictable, even though it exhibits a factor of variation modulated by a methodology. Colombia adds that the Panel should not confine itself to the definition of predictability and transparency proposed in *Chile – Price Band System*, since that definition relates to a specific case and not a definition authorized by Members. In Colombia's opinion, the fact that a measure includes a formula with fixed terms and coefficients would make it possible to predict the final result, while the existence of clear and public rules and a stable and equally public methodology for defining the tariff make it possible to characterize the mechanism as transparent.[374]

7.252. Colombia considers that the interpretation of Article 4.2 of the Agreement on Agriculture in *Chile – Price Band System* does not show that measures that isolate domestic markets are WTO-inconsistent. Colombia maintains that, in order for a measure to be WTO-inconsistent, it is necessary that the Member alleging the violation demonstrate that measures isolating domestic markets have similar or identical effects to measures that are prohibited under the provisions of the agreements. Colombia concludes that, in such cases, it is not necessary to examine whether the measure has the effect of isolating the Peruvian market from the international market.[375]

7.4.3.4 Ecuador

7.253. Ecuador considers that, to the extent that ordinary customs duties are not applied in excess of those set forth in a Member's schedule of concessions, it is possible for that Member to apply a type of duty different from the type provided for in its schedule. In Ecuador's opinion, the WTO agreements do not prohibit a Member from adjusting its customs duties; nor do they impose temporal restrictions on how such adjustments are made, as long as the duties are not in excess of the commitments undertaken in the Member's schedule.[376]

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[369] Brazil's third-party oral statement, para. 4.
[370] Brazil's third-party oral statement, para. 5.
[371] Brazil's response to Panel question No. 5.
[372] Colombia's third-party written submission, para. 12 (citing Appellate Body Report, *Chile - Price Band System*, para. 233).
[373] Colombia's third-party written submission, paras. 13-14.
[374] Colombia's third-party written submission, paras. 17-23; Colombia's third-party statement, para. 11.
[375] Colombia's response to Panel question No. 5, paras. 5-9.
[376] Ecuador's third-party statement, paras. 10-11; response to Panel question No. 6.

7.4.3.5 United States

7.254. The United States considers that Peru's PRS appears to be a variable import levy, a minimum import price, or at least a measure similar to both of these.[377]

7.255. The United States notes that the following features of Peru's measure appear to be undisputed: (a) it is based on a mathematical formula such that when the reference price falls below the lower threshold, an additional duty is applied based on the difference; (b) it employs a reference price that is updated every two weeks, based on international prices, and the lower threshold is obtained from average prices over the preceding five years; (c) it yields duties whose amounts change every two weeks; and (d) the further the reference price is below the lower threshold, the higher the resulting duty.[378]

7.256. The United States argues that, in the light of those features, the PRS appears to be inherently variable and less transparent and predictable than ordinary customs duties, apart from which its design and structure impede the transmission of international prices to the domestic market.[379]

7.257. In the United States' opinion, the lack of transparency and predictability are not independent characteristics that a measure must possess in order to be considered a variable import levy, since it is the presence of a formula that makes a measure inherently variable, and this feature renders the levy less transparent and predictable than ordinary customs duties.[380]

7.258. The United States also points out that the PRS appears to be similar to a minimum import price. The United States considers that the existence of a target price is not required to establish that a measure is similar to minimum import prices. The nature of the measure, including its tendency to distort the transmission of declines in world prices, suggests that Peru's measure is similar to minimum import prices.[381]

7.259. In the United States' opinion, Article 4.2 of the Agreement on Agriculture does not require a finding as to whether the measure isolates the domestic market from international prices. According to the United States, even if the measure never causes effects, it may be prohibited, for which reason the evidence concerning the effects will be of a secondary nature.[382]

7.260. The United States affirms that it is not necessary to define ordinary customs duties inasmuch as, if the measure is one of those included in footnote 1 of the Agreement on Agriculture, ordinary customs duties are defined by exclusion.[383]

7.261. The United States considers that the characteristics of ordinary customs duties proposed by Peru do not constitute an effective argument, since ordinary customs duties and variable import levies share certain attributes.[384] The United States also points out that a Member's characterization of its own measure is not conclusive, apart from which the evidence presented by Peru does not demonstrate that the measure constitutes ordinary customs duties.[385]

7.262. Finally, the United States points out that Peru's schedule of concessions does not incorporate the duties resulting from the PRS and does not include the system established in 2001; even if it did, this would not remedy the violation of Article 4.2 of the Agreement on

[377] United States' third-party written submission, para. 11.
[378] United States' third-party written submission, para. 12.
[379] United States' third-party written submission, paras. 13-16; response to Panel question No. 6, paras. 21-23.
[380] United States' third-party written submission, paras. 10-12.
[381] United States' third-party written submission, paras. 17-19.
[382] United States' response to Panel question No. 5, paras. 17-20.
[383] United States' third-party written submission, paras. 20-22.
[384] United States' third-party written submission, paras. 24-26.
[385] United States' third-party written submission, paras. 27-28.

Agriculture, since the obligations contained in that provision would prevail over the content of the schedule of concessions.[386]

7.4.3.6 European Union

7.263. The European Union states that the Panel's task is to characterize the measure at issue within the framework of the categories contained in footnote 1 of the Agreement on Agriculture, particularly with regard to variable import levies.[387]

7.264. The European Union refers to the two features of variable import levies identified by the Appellate Body in *Chile – Price Band System*: (a) their continuous and automatic variation; and (b) their lack of transparency and predictability.[388]

7.265. The European Union considers that particular attention should be paid to the lack of transparency and predictability, because this is what affects traders and governments. In the European Union's view, provided that all the elements of the system are published and all the values used are publicly available, the system will be transparent and predictable, because the economic operator will be in a position to predict the nature of a change in the amount of the duties.[389]

7.266. The European Union asserts that, if a Member were to change its duties every day by legislative intervention, following international prices, and not through the use of a formula, the measure would continue to lack transparency and predictability.[390]

7.267. The European Union notes that no decisive weight can be given to the distortion in the transmission of declines in world prices, since this is a relative analysis.[391]

7.268. The European Union considers that a key characteristic of variable import levies, and of all the measures included in footnote 1 of the Agreement on Agriculture, is the fact that they prevent price competition for all imports or a part thereof, thus distinguishing them from ordinary customs duties which permit price competition on all imports.[392]

7.4.4 Assessment by the Panel

7.4.4.1 Article 4.2 of the Agreement on Agriculture

7.4.4.1.1 Content of Article 4.2 of the Agreement on Agriculture

7.269. Article 4.2 of the Agreement on Agriculture, together with the footnote thereto, reads as follows:

> 2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5.[1]
>
> _____
>
> (Footnote original)[1] These measures include 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 other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not 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.

[386] United States' third-party written submission, paras. 29-31 (citing Appellate Body Report, *EC - Export Subsidies of Sugar*, paras. 221-222).
[387] European Union's third-party written submission, para. 42.
[388] European Union's third-party written submission, paras. 43-47.
[389] European Union's third-party written submission, para. 47.
[390] European Union's third-party written submission, para. 48.
[391] European Union's third-party written submission, para. 49.
[392] European Union's third-party written submission, para. 50.

7.4.4.1.2 Article 4.2 of the Agreement on Agriculture in previous disputes

7.270. Article 4.2 of the Agreement on Agriculture has been examined by WTO panels and by the Appellate Body in only two disputes: *Chile – Price Band System* and *Turkey – Rice*. In *Chile – Price Band System*, both in the original and in the compliance proceedings, the Panels and the Appellate Body clarified the scope of the text of Article 4.2 of the Agreement on Agriculture and interpreted the terms "variable import levies", "minimum import prices" and "similar border measures". In *Turkey – Rice*, the Panel examined as the principal claim the consistency of the challenged measure, which was in the nature of a quantitative restriction, with Article 4.2.[393]

7.271. In two other disputes, *India – Quantitative Restrictions* and *Korea – Various Measures on Beef*, the Panels found that the challenged measure was inconsistent with Article 4.2 of the Agreement on Agriculture, after having found an inconsistency with Article XI:1 of the GATT 1994. In these disputes, the Panels did not interpret the content of Article 4.2, considering that a quantitative restriction on agricultural products that was inconsistent with Article XI:1 of the GATT 1994 was necessarily also inconsistent with Article 4.2 of the Agreement on Agriculture.[394] Along the same lines, in *EC – Seal Products*, the Panel rejected a claim in respect of Article 4.2, having already rejected a claim relating to Article XI:1 of the GATT 1994.[395]

7.272. The interpretation of the scope of the obligation in Article 4.2 of the Agreement on Agriculture and the meaning of the terms "variable import levies", "minimum import prices" and "similar border measures", contained in the analyses carried out by the Panels and the Appellate Body in *Chile – Price Band System* are more relevant to this dispute than those contained in the analyses of other disputes relating to Article 4.2. For this reason, the Panel will take those reports into account in conducting its own analysis.

7.4.4.1.3 Objective of Article 4.2 of the Agreement on Agriculture

7.273. In the original *Chile – Price Band System* proceedings, the Appellate Body referred to the overall objectives set out in the preamble to the Agreement on Agriculture:

> [T]he preamble to the *Agreement on Agriculture* states that an objective of that Agreement is "to establish a fair and market-oriented agricultural trading system", and to initiate a reform process "through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines".[396] The preamble further states that, to achieve this objective, it is necessary to provide for reductions in protection, "resulting in correcting and preventing restrictions and distortions in world agricultural markets"[397], through achieving "specific binding commitments," *inter alia*, in the area of market access.[398, 399]

7.274. The Appellate Body went on to explain the specific objective of Article 4 of the Agreement on Agriculture:

> 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,

[393] See Panel Report, *Turkey - Rice,* paras. 7.12-7.138.
[394] Panel Reports, *India - Quantitative Restrictions*, paras. 5.241-5.242; *Korea - Various Measures on Beef*, para. 762. (These panel findings were not appealed.)
[395] Panel Report, *EC - Seal Products*, para. 7.665. (This panel finding was not appealed.)
[396] (Footnote original) Preamble to the *Agreement on Agriculture*, second recital.
[397] (Footnote original) Ibid. third recital.
[398] (Footnote original) Ibid. fourth recital.
[399] Appellate Body Report, *Chile - Price Band System,* para. 196.

> and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations.[400]

7.275. The Appellate Body thus concluded that Article 4 of the Agreement on Agriculture "is … the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products."[401]

7.4.4.1.4 Scope of Article 4.2 of the Agreement on Agriculture

7.276. With regard to the scope of Article 4.2 of the Agreement on Agriculture, in *Chile – Price Band System*, the Appellate Body explained that the obligation 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 before the conclusion of the Uruguay Round. The Appellate Body added that the fact that no Member singled out any measure of any other Member does not mean that such a measure subsequently enjoys immunity.[402]

7.277. The Appellate Body also stated that footnote 1 to the Agreement on Agriculture "lists six categories of border measures and a residual category of such measures that are *included* in 'measures of the kind which have been required to be converted into ordinary customs duties' within the meaning of Article 4.2."[403] The Appellate Body clarified that the list in the footnote is illustrative, and includes *inter alia* variable import levies, minimum import prices and similar border measures other than ordinary customs duties.[404]

7.278. In the original proceedings, the Appellate Body identified the features shared by all the border measures listed in footnote 1:

> Before looking at these categories of measures, we note that *all* of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do. Moreover, *all* of these measures have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market.[405] (emphasis original)

7.279. The Appellate Body clarified that, if the measure at issue in that dispute fell within any *one* of the categories of measures listed in footnote 1, it would be among the "measures of the kind which have been required to be converted into ordinary customs duties", and thus could not be maintained, resorted to, or reverted to, as of the date of entry into force of the WTO Agreement.[406]

7.280. The Appellate Body also explained that the fact that any variable import levies or minimum import prices result in the payment of duties does not mean that they should not have been converted into ordinary customs duties.[407]

7.281. In addition, the Appellate Body referred to Article 5 of the Agreement on Agriculture, which provides for a market access exemption in the form of a special safeguard. It pointed out that Article 4.2 should not be interpreted in a way that permits Members to maintain measures that operate in a way similar to a special safeguard inasmuch as no proper meaning and effect could be given to the conditions for establishing the special safeguard.[408]

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[400] Appellate Body Report, *Chile - Price Band System,* para. 200.
[401] Ibid. para. 201.
[402] Ibid. para. 212.
[403] Ibid. para. 219.
[404] Ibid. para. 219.
[405] Ibid. para. 227.
[406] Ibid. para. 221.
[407] Ibid. para. 216.
[408] Ibid. para. 217.

7.4.4.1.5 Relevant terms in Article 4.2 of the Agreement on Agriculture

7.4.4.1.5.1 Variable import levies

7.282. In the present case, the Panel will begin by considering what should be understood by "variable import levies" within the meaning of footnote 1 to the Agreement on Agriculture.

7.283. According to the ordinary meaning of the terms, a "*gravamen*" (levy) is a "*carga*" or "*obligación*"[409] (charge or obligation); or an "*[o]bligación de cualquier clase que pesa sobre alguien o algo*" (an obligation of any kind imposed on someone or something), a "*[c]anon*", "*carga*", "*censo*", "*gabela*", "*graveza*", "*hipoteca*", "*obligación*", "*pecha*", "*pecho*", "*servidumbre*" or "*tributo*"[410] (various types of tax, charge, rent, mortgage, obligation, servitude or tribute). An "import levy" would thus be a charge or obligation applied for the purpose of importation. "*Variable*" is something "*[q]ue varía o puede variar*" (which varies or may vary), is "*[i]nestable*, *inconstante y mudable*"[411] (unstable, inconstant and movable); or something "*[s]usceptible de variar*" (liable to vary), "*[m]uy o excesivamente inclinado o propenso a variar*"[412] (highly or excessively inclined or likely to vary). Furthermore, "*variar*" (vary) means "*hacer que una cosa sea diferente en algo de lo que antes era*" (to make something different in some way from what it was before), "*cambiar de forma*, *propiedad o estado*" (to change form, condition, or state), "*ser diferente de otra*"[413] (to be different from something else); or else "*[a]lterarse o cambiar*" (to alter or change), "*dejar una cosa o persona de ser de una manera y ser de otra*" (to change something or someone from one condition to another), "*[h]acer una cosa diferente de como era*" (to make something different from what it was), "*alterar*" (to alter), "*cambiar*" (to change), "*modificar*" (to modify), "*mudar*" (to move) or "*transformar*" (to transform).[414] Consequently, an "import levy" would be variable when it varies or may vary and, above all, is highly inclined or likely to vary.

7.284. The foregoing is consistent with the way in which the Appellate Body interpreted the words "variable import levies" in the original *Chile – Price Band System* proceedings:

> In examining the ordinary meaning of the term "*variable import levies*" as it appears in footnote 1, we note that a "levy" is a duty, tax, charge, or other exaction usually imposed or raised by legal execution or process.[415] An "import" levy is, of course, a duty assessed upon importation. A levy is "variable" when it is "liable to vary".[416, 417] (emphasis original)

7.285. In this case, however, the Appellate Body also noted that variability alone is not determinative when defining a measure as a "variable import levy" within the meaning of footnote 1 to the Agreement on Agriculture:

> 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 … This change in the *applied* rate of duty could be made, for example, through an act of a Member's legislature or executive at any time ... Thus, the mere fact that an import duty can be varied cannot, alone, bring that duty within the category of "variable import levies" for purposes of footnote 1.[418] (footnote omitted, emphasis original)

7.286. In order to determine what type of variability makes an import levy a "variable import levy", the Appellate Body considered the immediate context of the other terms in footnote 1 to the Agreement on Agriculture:

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[409] *Diccionario de la Lengua Española*, 22nd ed. (Real Academia Española, 2001), p. 783.
[410] María Moliner, *Diccionario de Uso del Español*, 2. ed. (Gredos, 1998), Vol. 1, p. 1,419.
[411] *Diccionario de la Lengua Española*, 22nd ed. (Real Academia Española, 2001), p. 1,542.
[412] María Moliner, *Diccionario de Uso del Español*, 2nd ed. (Gredos, 1998), Vol. 2, p. 1,357.
[413] *Diccionario de la Lengua Española*, 22nd ed. (Real Academia Española, 2001), p. 1,542.
[414] María Moliner, *Diccionario de Uso del Español*, 2nd ed. (Gredos, 1998), Vol. 2, pp. 1,357-1,358.
[415] (Footnote original) *The New Shorter Oxford English Dictionary*, *supra*, fn. 190, p. 1,574.
[416] (Footnote original) Ibid. p. 3,547.
[417] Appellate Body Report, *Chile - Price Band System*, para. 232.
[418] Ibid.

> The term "variable import levies" appears after the introductory phrase "[t]hese *measures* include". Article 4.2 - to which the footnote is attached - also speaks of "*measures*". This suggests that at least one feature of "variable import levies" is the fact that the *measure* itself - as a mechanism - must impose the *variability* of the duties. Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Ordinary customs duties, by contrast, are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula. The level at which ordinary customs duties are applied can be *varied* by a legislature, but such duties will not be automatically and continuously *variable.* To vary the applied rate of duty in the case of ordinary customs duties will always require *separate* legislative or administrative action, whereas the ordinary meaning of the term "variable" implies that *no* such action is required.[419] (emphasis original)

7.287. Variability within the meaning of footnote 1 to the Agreement on Agriculture, therefore, requires that the measure itself, as a mechanism, imposes the variability of the duties, that is to say, that variability is inherent in the measure. Variability will be inherent in a measure if it incorporates a scheme or formula that causes and ensures that levies change automatically and continuously.[420]

7.288. An import levy that shows the inherent variability resulting from a scheme or formula that causes and ensures that the measure changes automatically and continuously is "variable", not only in the sense that it varies or may vary, but even more so because it is a measure "highly inclined or likely to vary".

7.289. Lastly, the Appellate Body added that, in addition to the existence of a formula that makes variability of the duties automatic and continuous, there are other features which make a measure a variable import levy under the terms of footnote 1 to the Agreement on Agriculture. As the Appellate Body stated:

> [T]he 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.[421] "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 … [A]n 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.[422] (footnote omitted, emphasis original)

7.290. As the Appellate Body pointed out, the foregoing does not mean that the "lack of transparency" and the "lack of predictability" are independent or absolute characteristics that a measure must display in order to be considered a variable import levy.[423] Rather, what the Appellate Body sought to explain was that:

> [T]he level of duties generated by variable import levies is less transparent and less predictable than is the case with ordinary customs duties.[424] Thus [in the original

[419] Appellate Body Report, *Chile - Price Band System*, para. 233.

[420] Ibid. paras. 232-234; Panel Report *Chile - Price Band System (Article 21.5 - Argentina)*, para. 7.28; Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina)*, paras. 155-158.

[421] (Footnote original) The participants agreed with this in their responses to questioning at the oral hearing.

[422] Appellate Body Report, *Chile - Price Band System*, para. 234.

[423] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina),* para. 156.

[424] (Footnote original) The Appellate Body explained that the Uruguay Round negotiators had identified "certain border measures which have in common that they restrict the volume or distort the price of imports

> case], the Appellate Body considered transparency and predictability in tandem and in relation to the level of resulting duties, observing 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".[425] This is why variable import levies are "liable to restrict the volume of imports".[426] In addition, they "contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market".[427, 428]

7.291. In other words, in addition to the inherent variability resulting from the existence of a scheme or formula that causes and ensures that the measure is automatically and continuously modified, what defines a measure as a "variable import levy" within the meaning of footnote 1 to the Agreement on Agriculture is the presence of features which make it distinct from an ordinary customs duty. These features may include the measure's lack of transparency and predictability as compared to an ordinary customs duty.[429]

7.292. In any event, all the measures contained in the illustrative list in footnote 1 to the Agreement on Agriculture are prohibited under Article 4.2, regardless of whether in practice they restrict volumes, distort import prices or insulate the domestic market from international price trends. In other words, the presence of these effects may help to determine the type of measure in question when compared to an ordinary customs duty, but does not constitute a necessary condition for qualifying the measure as a "variable import levy" within the meaning of footnote 1 to the Agreement on Agriculture.

7.4.4.1.5.2 Minimum import prices

7.293. According to the ordinary meaning of the term, "minimum" is something "*[t]an pequeño en su especie, que no lo hay menor ni igual*" (so small of its type that there is nothing the same or smaller).[430] The term "*mínimo*" (minimum) "*[s]e aplica a las cosas que son en cantidad o grado … lo más pequeñas posible o las más pequeñas entre las de su clase*"[431] (applies to things which in quantity or grade are the smallest possible or the smallest of their type). The term "minimum" may be used to indicate the"*[l]ímite inferior, o extremo a que se puede reducir algo*"[432] (the lowest or extreme limit to which something may be reduced). In the English text of the Agreement on Agriculture, the expression "minimum import prices" is used in footnote 1 as the equivalent of "*precios minimos de importacion*". The ordinary meaning of the term "minimum" is "[t]he smallest amount or quantity possible, usual, attainable, etc."[433]

7.294. The term "minimum" may be used to qualify a requirement. For example, a "*salario mínimo*" (minimum wage) is "*[e]l que establece la ley como retribución mínima para cualquier trabajador*"[434] (that which is established by law as the minimum remuneration for any worker). In *EEC – Minimum Import Prices*, for example, the Panel established under the GATT examined a minimum import price system in force at that time in the European Community under which certain imports were allowed "but not below the minimum price level".[435] In *China - Raw Materials*, the Panel considered the existence of a minimum export price requirement under which export below such prices was not allowed and compliance with minimum prices was enforced through

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of agricultural products" and "decided that these border measures should be converted into ordinary customs duties" which "would, in principle, become the only form of border protection." Ordinary customs duties were viewed as the preferred border measure because they "are *more* transparent and *more* easily quantifiable", "*more* easily compared between trading partners" and, therefore, "the maximum amount of such duties can be *more* easily reduced in future multilateral trade negotiations." (Appellate Body Report, *Chile - Price Band System*, para. 200 (emphasis added))

[425] (Footnote original) Appellate Body Report, *Chile - Price Band System*, para. 234 (referring to Argentina's responses to questioning at the oral hearing in the original proceedings).

[426] (Footnote original) Ibid.

[427] (Footnote original) Ibid.

[428] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina),* para. 156.

[429] Appellate Body Report, *Chile - Price Band* System, para. 234.

[430] *Diccionario de la Lengua Española*, 22nd ed. (Real Academia Española, 2001), p. 1,023.

[431] María Moliner, *Diccionario de Uso del Español*, 2nd ed. (Gredos, 1998), Vol. 2, p. 352.

[432] *Diccionario de la Lengua Española*, 22nd ed. (Real Academia Española, 2001), p. 1,023.

[433] *Shorter Oxford English Dictionary*, 6nd ed. (Oxford University Press, 2007), Vol. 1, p. 1,789.

[434] *Diccionario de la Lengua Española*, 22nd ed. (Real Academia Española, 2001), p. 1,365.

[435] GATT Panel Report, *EEC – Minimum Import Prices*, para. 4.9.

the imposition of penalties.[436] In *China – Rare Earths*, the Panel examined the minimum registered capital requirements imposed on trading enterprises as a condition for being able to obtain quota rights.[437]

7.295. In the original *Chile – Price Band System* proceedings, the Appellate Body defined minimum import prices as follows:

> The term "minimum import price" refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market. Here, too, no definition has been provided by the drafters of the Agreement on Agriculture. However, the Panel described "minimum import prices" as follows:
>
> > … [these] schemes generally operate in relation to the actual transaction value of the imports. If the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference.[438]
>
> The Panel also said that minimum import prices "are generally not dissimilar from variable import levies in many respects, including in terms of their protective and stabilization effects, but that their mode of operation is generally less complicated."[439] 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."[440, 441, (emphasis original)

7.296. In the compliance proceedings, the Panel summarized the features of minimum import prices as follows:

> In essence, a minimum import price is a measure which ensures that certain imported products will not enter a domestic market at a price lower than a certain threshold, normally by imposing an import duty assessed on the basis of the difference between such threshold and the transaction value of the imported goods.[442]

7.4.4.1.5.3 Similar border measures

7.297. When examining the term "similar border measures" in the original *Chile – Price Band System* proceedings, the Appellate Body agreed with the Panel's definition of the word "similar" as "having a resemblance or likeness", "of the same nature or kind", and "having characteristics in common".[443]

7.298. The Appellate Body explained that "The better and appropriate approach is to determine similarity by asking the question whether two or more things have likeness or resemblance sufficient to be similar to each other."[444] The Appellate Body added that, in its view, the task of determining whether something is similar to something else must be approached on an empirical basis.[445]

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[436] Panel Report, *China – Raw Materials,* para. 7.1066. (The Appellate Body declared part of the Panel's analysis moot and of no legal effect on procedural grounds.)
[437] Panel Report, *China - Rare Earths,* paras. 7.218 and 7.233.
[438] (Footnote original) Panel Report, para. 7.36(e).
[439] (Footnote original) Panel Report, para. 7.36(e).
[440] Ibid.
[441] Appellate Body Report, *Chile - Price Band System*, paras. 236-237.
[442] Panel Report, *Chile - Price Band System (Article 21.5 - Argentina),* para. 7.30.
[443] Appellate Body Report, *Chile - Price Band System*, para. 226.
[444] Ibid.
[445] Ibid.

7.299. In the compliance proceedings in that particular case, the Appellate Body clarified what it had referred to in the original proceedings as the approach to determining whether something is similar *on an empirical basis*.

> [I]n advocating that the issue of similarity be approached "on an empirical basis", the Appellate Body was contrasting this to, and counselling against, an approach that focused on the *fundamental nature* of the shared characteristics. The proper approach should, instead, entail both an analysis of the extent of such shared characteristics and a determination of whether these are sufficient to render the two things similar. Such characteristics can be identified from an analysis of *both* the structure and design of a measure as well as the effects of that measure. Thus, we do not consider that the Panel would have needed, as Chile's argument seems to imply, to focus its examination *primarily* on numerical or statistical data regarding the effects of that measure in practice. Where it exists, evidence on the observable effects of the measure should, obviously, be taken into consideration, along with information on the structure and design of the measure. The weight and significance to be accorded to such evidence will, as is the case with any evidence, depend on the circumstances of the case.[446] (emphasis original)

7.300. As already mentioned, in the original proceedings the Appellate Body explained that all of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products *in ways different from the ways that ordinary customs duties do*, in addition to disconnecting domestic prices from international price developments, and thus impeding the transmission of world market prices to the domestic market.[447]

7.301. The Appellate Body added that, even if a measure were to share these common characteristics with all of these border measures, it would not be sufficient to make that system a "similar border measure"; there must be something more:

> To be "similar", Chile's price band system - in its specific factual configuration - must have, to recall the dictionary definitions we mentioned, sufficient "resemblance or likeness to", or be "of the same nature or kind" as, *at least one* of the specific categories of measures listed in footnote 1.[448] (emphasis original)

7.302. The Appellate Body thus explained that any examination of similarity presupposes a comparative analysis; therefore, in order to determine whether a measure is "similar" within the meaning of footnote 1, it is necessary to identify the categories with which it has to be compared.[449]

7.303. In *Chile – Price Band System*, the Panel examined the similarity of the measure at issue with the two categories identified by the complainant, variable import levies and minimum import prices. In examining whether the measure at issue in *Chile – Price Band System* was a border measure *similar* to variable import levies or minimum import prices, the Appellate Body explained that what had to be determined was whether the measure, in its particular features, shared sufficient features with either of these two categories of prohibited measures to resemble, or be of the same nature or kind and thus be prohibited by Article 4.2.[450] The Appellate Body concluded that, although there were some dissimilarities between the measure at issue and the features of minimum import prices and variable import levies, the way in which the measure was designed and the way it operated in its overall nature were sufficiently "similar" to the features of the two categories of prohibited measures to make the challenged measure a "similar border measure" within the meaning of footnote 1 to Article 4.2.[451]

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[446] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina),* para. 189.
[447] Appellate Body Report, *Chile - Price Band System,* para. 227.
[448] Ibid.
[449] Ibid. para. 228.
[450] Ibid. para. 239.
[451] Ibid. para. 252.

7.304. The Appellate Body explained that it had reached its conclusion

> [o]n the basis of the particular configuration and interaction of all these specific features of [the measure at issue]. In assessing this measure, no *one* feature is determinative of whether a specific measure creates intransparent and unpredictable market access conditions. Nor does any particular feature of Chile's price band system, on its own, have the effect of disconnecting Chile's market from international price developments in a way that insulates Chile's market from the transmission of international prices, and prevents enhanced market access for imports of certain agricultural products.[452] (emphasis original)

7.305. Lastly, in examining whether a measure that is neither a "variable import levy" nor a "minimum import price" should nevertheless be considered a "similar border measure", the context of footnote 1 to the Agreement on Agriculture has to be borne in mind. As already mentioned, Article 4 of the Agreement prohibits border measures that do not constitute ordinary customs duties. Thus, in considering whether a measure is similar to a "variable import levy" or a "minimum import price", this Panel finds it necessary also to examine whether the particular features of the measure, taking into account its structure and design as well as its effects, make it similar to the categories of measures prohibited by footnote 1 (in the present case, to a "variable import levy" or "minimum import price") or to an ordinary customs duty.

7.4.4.1.5.4 Other than ordinary customs duties

7.306. In the *Chile – Price Band System* compliance proceedings, the Appellate Body explained that:

> [T]he structure and logic of footnote 1 make clear that variable import levies and minimum import prices cannot be ordinary customs duties.
>
> [I]nconsistency with Article 4.2 can be established when it is shown that a measure is a border measure similar to one of the measures explicitly identified in footnote 1. A separate analysis of whether […] the measure is "other than ordinary customs duties" may also be undertaken to confirm such a finding. However, these are not indispensable for reaching a conclusion on the categories listed in footnote 1.[453]

7.307. If a measure is a variable import levy, a minimum import price or a measure similar to one of these, which have been required to be converted into ordinary customs duties, it cannot be an ordinary customs duty. For this reason, if a panel finds that a measure is one of those listed in the footnote, it may conclude that such a measure is not an ordinary customs duty.

7.4.4.2 The question of whether the duties resulting from the PRS are variable import levies, minimum import prices or similar border measures

7.4.4.2.1 General considerations

7.308. The question to be resolved by this Panel with regard to this claim is whether the measure at issue, the duties resulting from the PRS, constitute variable import levies or measures similar to variable import levies, or whether they constitute minimum import prices or measures similar to minimum import prices.

7.309. If the Panel finds that the duties resulting from the PRS constitute variable import levies or measures similar to variable import levies, or that they constitute minimum import prices or measures similar to minimum import prices, the measure would be one of those covered by footnote 1 to Article 4.2 of the Agreement on Agriculture. It would therefore be one of the measures required to be converted into ordinary customs duties. If this is the case, by maintaining the measure, Peru would be acting inconsistently with Article 4.2 of the Agreement on Agriculture.

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[452] Appellate Body Report, *Chile - Price Band System,* para. 261.
[453] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina),* paras. 167 and 171.

7.4.4.2.2 Structure of the analysis

7.310. Guatemala has requested the Panel to find that the challenged measure is a variable import levy, a minimum import price, or a similar measure.[454] Peru has requested the Panel to begin its analysis by examining whether the measure is an ordinary customs duty.[455] Peru deems it important that the Panel should not avoid tackling the issue of whether the duties resulting from the PRS are ordinary customs duties.[456]

7.311. The Panel notes that, both in the original and in the compliance proceedings in *Chile - Price Band System*, the Panels and the Appellate Body first examined whether the measure was one of those covered by the footnote to Article 4.2. In both proceedings, after finding that the measure at issue was one of those identified in the footnote, the Appellate Body did not proceed with the additional analysis on whether the measure was an ordinary customs duty.

7.312. In the circumstances of the present case, it appears more appropriate to commence the analysis by considering whether the duties resulting from the PRS are the kind of measure covered by Article 4.2 instead of considering whether the measure is the kind of measure not covered by that Article.

7.313. Accordingly, the Panel will commence its analysis by considering whether the duties resulting from the PRS constitute variable import levies or measures similar to variable import levies, or whether they constitute minimum import prices or measures similar to minimum import prices. More specifically, the Panel will first consider whether the measure is a variable import levy or a measure similar to a variable import levy. Subsequently, and depending on its previous findings, the Panel will address the question of whether the measure is a minimum import price or a measure similar to a minimum import price.

7.314. The Panel will therefore examine whether the duties resulting from the PRS, by their structure, design and operation, and in their particular features, share sufficient features with variable import levies or minimum import prices as to constitute variable import levies or minimum import prices, or to bear a resemblance or be of the same nature or kind and thus to be prohibited by Article 4.2 of the Agreement on Agriculture. The Panel will arrive at its conclusion on the basis of the particular configuration and interaction of all the specific features of the duties resulting from the PRS.

7.4.4.2.3 Whether the duties resulting from the PRS are border measures

7.315. Before undertaking this analysis, the Panel notes that the duties resulting from the PRS are applied only to imported products and that the Peruvian authorities require that they be enforced at the border. Both parties agree that this is the case, so it is an undisputed fact that the duties resulting from the PRS are border measures.[457]

7.4.4.2.4 The question of whether the duties resulting from the PRS are variable import levies or measures similar to variable import levies

7.4.4.2.4.1 Description of the measure

7.316. As already mentioned, in essence, a variable import levy is a duty applied upon importation and is liable to vary; moreover, it is highly inclined or likely to vary automatically and continuously on the basis of a scheme or formula that does not require any separate administrative or legislative measure.[458]

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[454] Guatemala's first written submission, para. 5.1; second written submission, para. 4.1.

[455] Peru's first written submission, paras. 5.51-5.53; opening statement at the first meeting of the Panel, paras. 3-6; response to Panel question No. 55, paras. 131-134.

[456] Peru's response to Panel question No. 55, para. 133.

[457] Guatemala's response to Panel question No. 100, para. 33; Peru's response to Panel question No. 100, para. 31.

[458] See paras. 7.283 to 7.292 of the present report.

7.317. The Panel recalls the fundamental aspects of the structure and operation of the PRS, from which the duties that are the subject of this dispute arise:

a. The declared objective of the PRS is to be "a stabilization and protection mechanism that serves to neutralize fluctuations in international prices and limit the negative effects of falls in such prices."[459]

b. The main components of the system are a price range composed of a floor price and a ceiling price, together with a reference price.

c. The floor price is obtained by calculating the average price in the confidence interval derived from the deflated average price[460] over the last 60 months for the corresponding marker product in the relevant reference market, and converting it to c.i.f. level by adding the freight and insurance costs indicated in the legislation. For sugar products, an adjustment factor of 10.7% is also added.

d. The ceiling price is obtained by adding to the floor price the standard deviation by which the confidence interval was calculated and converting it to c.i.f. level by adding the freight and insurance costs indicated in the legislation.

e. The floor price and ceiling price, and the additional duties and tariff rebates that are applicable in accordance with the reference price for each fortnight, are published twice yearly, prior to the start of the half-year in which they are to be applied, by means of customs tables published in Supreme Decrees issued by the President of Peru, endorsed by the Ministers of Agriculture and of the Economy and Finance, and on the basis of the data furnished by Peru's Central Reserve Bank.

f. The reference price is obtained by calculating the fortnightly average price for the corresponding marker product in the same relevant reference market, for the fortnight prior to that in which the said price is to be applied, and converting it to c.i.f. level using the values indicated in the legislation.

g. Reference prices are published fortnightly, during the fortnight in which they are to be applied, by means of vice-ministerial resolutions of the Ministry of the Economy and Finance, based on the data furnished by Peru's Central Reserve Bank.

h. When the reference price is lower than the floor price, a specific duty is imposed (corresponding to the measure at issue), which is expressed in United States dollars per metric ton, and is equivalent to the difference between the floor price and the reference price. This specific duty, together with the *ad valorem* tariff, may not exceed the tariff levels bound by Peru in the WTO.

i. When the reference price is within the price range, i.e. between the floor and ceiling prices, only the relevant *ad valorem* tariff is applied.

j. When the reference price rises above the ceiling price, a tariff rebate is applied that may not exceed the equivalent of the applicable *ad valorem* tariff.

k. The additional duties and the tariff rebates, as applicable, are determined on the basis of the customs tables in force on the date of registration of the import declaration and must be paid by the importer at the customs, together with the duties and other import taxes.

l. From 2001 to 2014 customs tables have been in force for every period, but on several occasions, despite the provisions of Supreme Decree No. 115-EF-2001, these tables have been extended instead of being updated.

[459] Second preambular paragraph of Supreme Decree No. 115-2001-EF (Exhibit GTM-4).
[460] Using the United States Consumer Price Index.

m. During the period of existence of the PRS, the competent Peruvian authorities have published reference prices for every fortnight, except on one occasion in respect of maize. Publication usually takes place a few days after the fortnight has begun.

7.4.4.2.4.2 Variability

7.318. As regards the variability of the measure, Guatemala contends that the measure at issue is inherently variable inasmuch as it is based on mathematical schemes or formulas which operate in a coordinated manner to calculate the specific duty automatically and continuously, and the measure itself, as a mechanism, imposes the variability of the duty.[461]

7.319. Peru claims that variability is not a decisive element. It also states that, under WTO rules, Members may vary their ordinary customs duties. In its view, what varies under the PRS is the reference price and not the resulting specific duty. Peru contends that the PRS does not operate automatically because the various organs of the Peruvian State have to complete certain administrative steps in order for the customs tables and the reference prices to be updated.[462]

7.320. As already mentioned, variability within the meaning of footnote 1 to Article 4.2 requires that the measure itself, as a mechanism, imposes the variability of the duty; in other words, the variability is inherent in the measure. Variability can be said to be inherent in a measure if the measure incorporates a scheme or formula which causes and ensures that levies change automatically and continuously.[463]

7.321. The measure at issue in this dispute, the duties resulting from the PRS, is one of the possible outcomes of applying the system. The PRS includes a series of steps and mathematical formulas for calculating the ceiling and floor prices every six months, and the reference prices every fortnight. In application of these rules and on the basis of the formulas contained therein, the Peruvian authorities update and publish the corresponding results. They use the rules of the PRS and the formulas contained therein to determine fortnightly a result which, depending on the calculations, may consist of imposing an additional duty, granting a tariff rebate, maintaining the duties or rebates already in effect, or deciding not to apply any rebate or duty. The PRS therefore contains a scheme or formula which causes and ensures automatic and continuous revision of the applicable duties or rebates, from one fortnight to the next. It is thus clear that the PRS, as a mechanism, imposes the variability of the additional duties.

7.322. Moreover, the half-yearly updating and publication of the supreme decrees containing the customs tables showing the floor and ceiling prices, and the fortnightly publication of the vice-ministerial resolutions showing the reference prices, are not discretionary administrative acts separate from the PRS. On the contrary, they are regulated acts which the corresponding authorities issue in compliance with the rules governing the operation of the PRS. In essence, according to the rules in effect, action by the administrative authorities in this context is limited to applying the rules and formulas included in the PRS and to publishing the results of such calculations.

7.323. The fact that, on some occasions, the Peruvian authorities had been able to extend the values in the customs tables, or even the values of the reference prices, without relying on the formulas laid down in the applicable regulations[464], does not alter the nature of the action for which these authorities are responsible. It does not mean either that the administrative acts remain discretionary or separate from the PRS inasmuch as such acts are carried out in compliance with the legislation on the PRS, which obliges the authorities to announce the values resulting from the application of predetermined formulas. The facts show that every six months since the current PRS was first applied, the Peruvian authorities have issued a supreme decree[465], either updating or extending the corresponding customs tables, and every fortnight they have issued a vice-ministerial resolution, updating the reference prices in most cases. In any event, the rules governing the operation of the PRS have been the legal basis cited by the Peruvian authorities for

[461] Guatemala's first written submission, paras. 4.34-4.57; second written submission, paras. 4.14-4.43.
[462] Peru's first written submission, para. 5.92; second written submission, paras. 3.43-3.45.
[463] See above, paras. 7.287 and 7.288.
[464] See above, paras. 7.151-7.154 and 7.159-7.162.
[465] See above, para. 7.152.

exercising their responsibilities, within the framework of the powers vested in the Peruvian Executive.

7.324. As the reference price is calculated anew every two weeks, the result of applying the PRS (whether it consists of imposing an additional duty, granting a tariff rebate, extending existing duties or rebates, or deciding not to apply any rebate or duty) is subject to fortnightly changes. The fact that the result may be the same for some or several fortnightly periods as a result of applying the formulas, owing for example to price stability in the reference markets, or even the fact that in some cases the formulas have not been applied correctly, does not mean that the PRS, as a mechanism, does not impose fortnightly variability of duties. The fortnightly variability imposed by the PRS, as a mechanism, which is the result of rules and formulas that form part of the system and are applied automatically and continuously, cannot be compared to the normal variability of ordinary customs duties, whose level may change at certain times as a result of specific trade policy decisions or separate decisions.

7.325. For the foregoing reasons, the Panel finds that the duties resulting from the PRS are an inherently variable measure.

7.4.4.2.4.3 Additional characteristics

Transparency and predictability

7.326. Guatemala states that, because of this variability, the duties resulting from the PRS lack both transparency and predictability. It also points out that the system guarantees that importers face uncertainty because the resulting values cannot be predicted and a commercial operator will have no certainty as to the reference price, whether or not a variable additional duty will be imposed, and what will be the amount. Guatemala also identifies a lack of transparency in the way in which Peru determines import-related costs, the source used to determine freight and insurance costs in order to convert the amounts to c.i.f. level, and the reason for the adjustment factor of 1.107 for sugar and how it is determined.[466]

7.327. Peru, on the other hand, claims that its measure is highly transparent and predictable because the specific duties applicable and all the essential elements for calculating them can be found in the printed texts of the legal instruments and on Peru's web pages. Peru also states that these characteristics enable economic operators to predict, prior to the customs declaration for the goods, what specific duties will apply, so traders may reasonably and with a high degree of certainty predict the specific duties.[467]

7.328. As already mentioned, lack of transparency and predictability are not separate characteristics which a measure must have in order to be considered a variable import levy. In *Chile – Price Band System*, the Panels and the Appellate Body took into account lack of transparency and predictability as additional characteristics of the measure in question which undermined the object and purpose of Article 4 of the Agreement on Agriculture: achieving better market access conditions for imports of agricultural products, only allowing the application of ordinary customs duties. What is essential therefore when examining any of the measures listed in footnote 1 to the Agreement on Agriculture is whether the measure in question has features which undermine the object and purpose of Article 4 of the Agreement. Depending on the case, these may be the measure's lack of transparency and predictability. However, a quantitative restriction on imports, a variable import levy or a minimum import price, for example, may be transparent and predictable but for this reason alone not cease to be one of the measures required to be converted into ordinary customs duties. In other words, the Panel's task with regard to this particular aspect is not to determine whether the measure is transparent or predictable, but rather whether the measure offers a level of transparency and predictability that is similar, but not necessary identical, to that of an ordinary customs duty.[468]

7.329. In the present case, the arguments regarding the lack of transparency and predictability of the challenged measure will be considered as a whole and in relation to the variability of the

[466] Guatemala's first written submission, paras. 4.58-4.71; second written submission, paras. 4.44-4.74.
[467] Peru's first written submission, paras. 5.88-5.91; second written submission, paras. 3.46-3.58.
[468] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina),* paras. 156, 214-215, and 221-222.

level of the resulting duties. The Panel will therefore consider the various elements of the measure at issue, their interaction and configuration. It will also take into account the object and purpose of Article 4 of the Agreement on Agriculture, to achieve better market access for agricultural products.

7.330. Firstly, the Panel does not consider that a finding to the effect that the duties resulting from the PRS are inherently variable is sufficient for finding that the measure at issue has the additional characteristic of lack of transparency and predictability. Lack of transparency and predictability are elements distinct from variability and only constitute some of the additional characteristics a panel may consider when assessing a measure in the light of the provision in footnote 1 to the Agreement on Agriculture. At least in theory, a variable import levy may be inherently variable and be based on application of a formula that makes the variability of the duties automatic and continuous, and yet at the same time be transparent and predictable. In the latter case, the transparency and predictability of the measure would not imply *per se* that the measure is consistent with Article 4 of the Agreement on Agriculture, or make it an ordinary customs duty.

7.331. Peru's legislation sets out the formulas used to calculate the floor and ceiling prices, the reference markets used, the import costs, the freight and insurance costs used to convert f.o.b. values into c.i.f. values and the adjustment value for sugar. In the supreme decrees containing the customs tables, the legislation also announces the floor and ceiling prices applicable for each six-month period and, in the vice-ministerial resolutions, the reference prices applicable for each fortnight. It should be noted, however, that the reference prices applicable during a fortnight are published a few days after the start of the two-week period[469]; therefore, the customs authorities sometimes do not know what the final duty applicable at the date of entry of the goods will be and use the figures for the previous fortnight, making the necessary adjustments subsequently. It should also be noted that, although Peru publishes some international prices for sugar, maize and rice[470], it does not publish the reference market values used to calculate the reference prices and these values are not always available free of charge to commercial operators.

7.332. In response to the Panel's question No. 53 regarding the possibility of predicting the result of applying the PRS formulas for each marker product in the first fortnight of February 2014, Peru presented estimates for maize, sugar, and dairy products that were close to the actual results, albeit with a certain margin of error, and explained that, in order to arrive at the estimates for maize and sugar, it had used twenty historical data sets already available to it and had filled the gaps in the data on the basis of the trends indicated by the available data. Peru also claims that commercial operators can predict the applicable additional duties with a reasonable degree of precision, by using methods of estimation and historical data available in conjunction with futures prices.[471]

7.333. Guatemala, for its part, expresses concern at what it calls Peru's attempt to condition its obligations on the actions and predictive capacity of private operators. Guatemala also rejects the claim that predictions can be made with a reasonable degree of precision on the basis of futures prices, and indicates that the latter are highly volatile. Moreover, Guatemala asserts that, in the case of sugar, contracts have a long time horizon. Guatemala adds that, although the historical data had already been available to Peru on the date of submission of its responses to the Panel, Peru's estimates are imprecise and any long-term estimate would be even more so. Finally, Guatemala presents examples of fictitious sales contracts for sugar, with dates on which futures prices differed substantially from the actual historical values, in order to demonstrate the impossibility of making reasonable estimates.[472]

7.334. The Panel considers that, although the form in which the duties resulting from the PRS are calculated is to a certain degree transparent and predictable and it is thus possible for private operators to use the available information in order to attempt to predict, with a certain margin

[469] See above, para. 7.158

[470] Statistical Tables from the Weekly Report of the BCRP (Exhibit PER-88).

[471] Peru's second written submission, paras. 3.46-3.56; opening statement at the second meeting of the Panel, paras. 39-40; response to Panel question No. 53, para. 129; response to Panel question No. 109, paras. 54-61.

[472] Guatemala's second written submission, paras. 4.44-4.74; response to Panel question No. 53, paras. 107-122; opening statement at the second meeting of the Panel, paras. 13-17; comments on Peru's response to Panel question No. 109, paras. 64-85.

of error, what will be the additional duties applicable in a particular fortnight, this result, irrespective of the degree of precision achieved, will never be as transparent and predictable as ordinary customs duties.

7.335. In order to try to predict the result, a commercial operator would have to obtain all the information needed, including that published by Peru (i.e. the customs tables and historical reference prices), as well as information on prices in the reference market and futures prices. Subsequently, from one fortnight to the next, the commercial operator would have to forecast the way in which reference market prices will act and apply the appropriate formulas in order to arrive at the reference price and, where applicable, the additional duty. Commercial operators would not be faced with this situation in the case of ordinary customs duties.

7.336. Furthermore, at least in the case of sugar, the evidence provided by the parties indicates that private operators enter into long-term contracts without any certainty as to the way in which prices in the global reference markets will behave, and thus without knowing the floor and ceiling prices and reference prices, and consequently the level of duties resulting from the PRS. This is the case even when prices are set at dates close to the date of shipment of the goods. Although operators may attempt to estimate price trends using the available historical data and futures prices, this does not give a level of transparency and predictability comparable to that afforded by an ordinary customs duty. Likewise, given the link between the total amount of applicable duties and fluctuations in world market prices, such fluctuations may, in themselves, become an additional factor in lack of transparency and predictability.

7.337. In the short term, as the examples given by Guatemala with regard to the time required for transport indicate[473], it is possible for commercial operators to undertake specific shipments without knowing with certainty what will be the final result of application of the PRS when the goods arrive in Peru. This is further complicated by the fact that Peru publishes reference prices some days after the commencement of the fortnight to which they apply. This does not occur with ordinary customs duties, concerning which any change is normally announced in advance.

7.338. Transparency and predictability are also affected by the mere existence of a reference price. The fact that specific additional duties are applied on the basis of an average reference price which changes every fortnight, rather than on the value or the volume of the imported goods, entails a systemic lack of transparency and predictability.[474]

7.339. Lastly, with regard to the additional specific aspects of the PRS which Guatemala claims lack transparency and predictability (i.e. the way in which Peru determines the import-related costs, the source used to determine freight and insurance costs, and the reason for the existence of the 1.107 adjustment factor for sugar and the way it is determined), even though Peru's legislation does not specify how these values were originally determined, it does publish and announce the values utilized. Consequently, these specific aspects add no relevant information to the analysis of the transparency and predictability of the measure.

7.340. For the foregoing reasons, even though the system exhibits a degree of transparency and predictability in the way in which the resulting additional duties are calculated, it lacks transparency and predictability regarding the level of duties resulting from those calculations when compared to the transparency and predictability afforded by ordinary customs duties.

[473] Searates: *Tiempo de transporte marítimo - Distancia Tailandia – Perú* (Exhibit GTM-21); Searates: *Tiempo de transporte marítimo - Distancia Guatemala – Perú* (Exhibit GTM-22).

[474] See Panel Report, *Chile - Price Band System (Article 21.5 - Argentina),* para. 7.72.

Distortion of import prices and inhibition of the transmission of international prices

7.341. Guatemala claims that, because of its design, structure and effect, the challenged measure insulates domestic prices in Peru from international price developments and impedes the transmission of those developments to Peru's domestic market, inasmuch as its explicit objective is to neutralize fluctuations in international prices and limit the negative effects of falls in such prices. Guatemala asserts that the measure has the effect of completely or severely distorting the transmission of any fall in international prices to the Peruvian market.[475]

7.342. Peru maintains that its PRS does not insulate its domestic market from the international market because the specific duties applied do not depend on a domestic or controlled price but are a function of international market prices and may not exceed Peru's bound tariff. Peru states that domestic prices consistently and progressively reflect trends in the international market and presents evidence to show the correlation between Peru's domestic market and the international market.[476]

7.343. The Panel recalls that a common feature of all the measures in footnote 1 to the Agreement on Agriculture is that they act differently from ordinary customs duties. One of the additional features that may be examined in this context is whether the challenged measure insulates domestic prices from international price developments and thus impedes the transmission of world market prices to the domestic market.[477]

7.344. First of all, the Panel notes that the declared objective of the PRS is to act as "a stabilization and protection mechanism that makes it possible to neutralize fluctuations in international prices and limit the negative effects of falls in such prices".[478] This objective is particularly revealing in the sense that the purpose of the measure is to neutralize, at least to a certain degree, the transmission of declines in international prices for certain products to Peru's domestic market.

7.345. With regard to the structure and design of the PRS, in the short term, the system is designed to prevent any fall in prices from being transmitted to Peru's domestic market, as any change in international prices occurring during the six months in which the floor price is in effect will not be reflected in the price at which imports may enter Peru's market. If there is a fall in international prices, reflected to a certain extent in the fall in the reference price, the PRS generates an increase in the resulting additional duties in the same amount as the fall in the average reference price, thereby covering the difference between the reference price and the floor price.

7.346. In the medium term, the PRS may also distort the transmission of international prices to the domestic market because the incorporation into the floor price of changes in international prices for each six-monthly period is diluted. If prices fall, the decrease in the floor price will be much slower than that in the reference price and will be delayed by up to six months. Furthermore, if monthly prices outside the confidence interval are eliminated, it is possible that none of the prices will be incorporated into the floor price, whereas no value is omitted from the average reference price.

7.347. With regard to Peru's argument on the existence of a correlation between international market prices and Peru's domestic prices and the evidence it submitted on sugar and maize[479], the Panel notes that, as is claimed by Guatemala[480], other factors may affect the transmission of international prices to Peru's domestic market. For example, in the case of sugar, a large

[475] Guatemala's first written submission, paras. 4.72-4.80; second written submission, paras. 4.75-4.124.
[476] Peru's first written submission, paras. 5.74-5.87; second written submission, paras. 3.59-3.64.
[477] See above, para. 7.292
[478] Second preambular paragraph, Supreme Decree No. 115-2001-EF (Exhibit GTM-4).
[479] Statistical Compendium (Exhibit PER-46); Database of sugar and maize prices (Exhibit PER-69); Updated version of charts 1-7 (Exhibit PER-70); Explanation of alleged omissions in price charts (Exhibit PER-93).
[480] Guatemala's opening statement at the second meeting of the Panel, para. 22; response to Panel question No. 57, paras. 155-156 and 164.

proportion of imports entering Peru are not subject to application of the PRS, so the system has a limited impact on the transmission of international prices to the domestic market.[481]

7.348. Of noteworthy relevance in this connection is the objective of the Agreement on Agriculture to establish a fair and market-oriented agricultural trading system, and the specific objective of Article 4 to convert the border measures listed in footnote 1 into ordinary customs duties.

7.349. In conclusion, the structure, design and operation of the PRS show that the resulting additional duty acts in such a way that it may distort the prices of imports subject to the PRS and limit the transmission of the prices of imports subject to the PRS to Peru's domestic market. In this respect, the system operates differently to ordinary customs duties.

7.4.4.2.4.4 Conclusion regarding whether the duties resulting from the PRS are variable import levies or measures similar to variable import levies

7.350. In conclusion, the duties resulting from the PRS, by their structure, design and operation, are an inherently variable measure. This inherent variability is the result of rules imposed by the PRS, as a mechanism, and derives from rules and formulas that form part of the PRS itself and are applied automatically and continuously. In this regard, the duties resulting from the PRS are measures other than ordinary customs duties. As a further characteristic, the PRS lacks transparency and predictability regarding the level of the additional duties resulting from application of the rules and formulas, when compared to ordinary customs duties. Furthermore, such additional duties may distort import prices subject to the PRS and limit the transmission of import prices subject to the PRS to Peru's domestic market in a different way to ordinary customs duties.

7.351. The Panel has found that the duties resulting from the PRS, by their structure, design and operation and in their particular features, share sufficient features as to be or to resemble or to be of the same nature or kind as variable import levies and to be considered as a border measure similar to a variable import levy.

7.352. For the foregoing reasons, the Panel considers that the duties resulting from the PRS constitute variable import levies and, therefore, a measure other than ordinary customs duties. In any event, such duties share sufficient characteristics with variable import levies as to constitute at the least a border measure similar to a variable import levy.

7.4.4.2.5 The question of whether the duties resulting from the PRS are minimum import prices or measures similar to minimum import prices

7.353. The Panel has found that the duties resulting from the PRS constitute variable import levies or, at least, a border measure similar to a variable import levy. In the light of this finding, it is not necessary for the Panel to carry out an additional review as to whether the measure also constitutes a minimum import price or a border measure similar to a minimum import price. Nevertheless, in order to ensure that its analysis is exhaustive, the Panel will undertake such a review.

7.354. Guatemala asserts that the PRS seeks to prevent goods from entering Peru at a price lower than the floor price, and so the floor price operates as a minimum price level that is applied to imports of products subject to the PRS.[482] Guatemala claims that Peru's measure is a minimum import price or similar measure because: (a) it ensures that goods will not enter Peru's market at a price below a predetermined threshold (i.e. the floor price); (b) it imposes an additional specific duty based on the difference between the floor price and the reference price; (c) the amount of the additional duty varies according to the difference between the floor price and the reference

[481] See Peru's response to Panel question No. 8, para. 9; response to Panel questions Nos. 1 and 3, paras. 1 and 2; Spreadsheet for questions 1 and 3 (SPFP-XM 1993-2013) (Exhibit PER-59); Statistics of the International Sugar Organization (Exhibit GTM-51); Compendium of Peru's Trade Agreements (extracts) (Exhibit PER-33).

[482] Guatemala's first written submission, para. 4.88; second written submission, paras. 4.127-4.130.

price; and (d) the measure impedes or distorts the transmission of a fall in world prices to the domestic market.[483]

7.355. Guatemala also contends that the floor price is not the only threshold that serves as a minimum price, since the PRS ensures that no consignment will enter at a price below the sum of the lowest international price and the additional duty, which constitutes a *de facto* threshold lower than the floor price, and transactions with a final price lower than that threshold are highly unlikely to occur.[484]

7.356. Peru claims that its PRS does not impose a minimum import price, either by impeding the entry of goods at a price lower than the minimum and/or by varying the levy to equalize the import price with the established minimum. Peru contends that the measure has neither the objective nor the capacity to arrive at an indicative (*target*) price, and adds that it applies the same tariff no matter what price the importer decides to declare.[485]

7.357. Peru cited an example of an import transaction for sugar during a period in which no specific duties were imposed, where the c.i.f. price upon import of the goods was lower than the floor price, and another example in which a specific duty was charged but the c.i.f. entry price for the goods was less than both the international price and the floor price. Peru also submitted trade statistics for the period between 2001 and 2013 and pointed out that, in approximately 57% of the fortnightly periods since Supreme Decree No. 115-2001-EF came into force, various trade transactions entered Peru at a price lower than the reference price and the floor price in the range, accounting for more than one third of trade transactions recorded over these periods. Peru added that, in the case of sugar, 224 transactions had been identified which had entered at c.i.f. prices lower than the reference price and the floor price in the range, amounting to approximately 3% of sugar imports since the introduction of the PRS. It pointed out that this situation also occurred for other imports related to the tariff lines for marker products.[486]

7.358. In the *Chile – Price Band System* compliance proceedings, the Panel pointed out that:

> In essence, a minimum import price is a measure which ensures that certain imported products will not enter a domestic market at a price lower than a certain threshold, normally by imposing an import duty assessed on the basis of the difference between such threshold and the transaction value of the imported goods.[487]

7.359. In this connection, the Appellate Body added that:

> A measure is "similar" to a minimum import price when it shares a sufficient number of characteristics with, and has a design, structure, and effects similar to, a minimum import price, even if it is not "identical" to such a scheme in all respects.[488]

7.360. Taking into account the structure and design of the measure at issue, as well as the details concerning its operation, there is no evidence at all that the additional duties resulting from application of the PRS directly ensure that imported products subject to the PRS will not enter the Peruvian market at a price lower than a certain threshold.

7.361. This is clear, particularly when the way in which the duties resulting from the PRS operate is compared to the way in which ordinary customs duties operate. There is no evidence at all that the duties resulting from the PRS directly impede the entry of products at prices below a limit or threshold. Nor is there any evidence that such duties have the direct effect of preventing imported products from entering Peru's market at a price lower than a certain threshold in a way different from what would occur with ordinary customs duties and, for example, from what might occur with

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[483] Guatemala's first written submission, paras. 4.84-4.95; second written submission, paras. 4.125-4.141.

[484] Guatemala's second written submission, para. 4.141; opening statement at the first meeting of the Panel, paras. 37-39; response to Panel question No. 126, paras. 135-152.

[485] Peru's first written submission, paras. 5.58-5.68; second written submission, paras. 3.36 and 3.41.

[486] Peru's first written submission, paras. 5.62-5.68; response to Panel question No. 123, paras. 98-99; Statistical data on product entries below the minimum price (Exhibit PER-90).

[487] Panel Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 7.30.

[488] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 193.

a specific import tariff. In this respect, a specific tariff (for example a tariff of USD 100 per metric ton on a product) could indirectly ensure that imports of that product do not enter at a price lower than a certain threshold (in the case of the example, it would be ensured that the specific tariff would operate as the lower threshold). Nevertheless, it would not convert the specific tariff into a minimum import price or a measure other than ordinary customs duties.

7.362. Having found that there is no evidence that the duties resulting from the PRS constitute minimum import prices, the Panel also has to consider whether such duties nonetheless constitute, at the least, a border measure similar to a minimum import price. In this connection, in *Chile - Price Band System,* the measure at issue (the Chilean price band system) was considered by the Panels and by the Appellate Body to be a measure similar to a minimum import price inasmuch as it operated in practice as a "proxy" or "substitute" for a minimum import price. This conclusion was based on the fact that the measure operated in such a way as to impede the entry of imports subject to the measure at prices below the lower threshold in the band. In this case, the price with which the substitute for the minimum price was compared was not the transaction value of the product, as is the case for minimum prices, but the reference price.[489]

7.363. In this connection, in the compliance proceedings in *Chile – Price Band System,* the Appellate Body stated:

> The overall approach taken by the Panel seems to us to accord with the proper interpretation of a border measure that is similar to a minimum import price, as discussed above. The Panel examined the structure and design of the measure at issue, as well as evidence relating to its operation. The Panel found that, like the original price band system, this measure imposed a threshold that operates to ensure that, in all but the most unlikely circumstances, wheat and wheat flour will not enter the Chilean market at a price lower than that threshold, and that does not ensure that entry prices fall in tandem with world market prices. The measure did so by imposing a specific duty assessed on the basis of the difference between such a threshold and another value, namely, a reference price.[490, 491]

7.364. In the case before us, the measure operates in this regard in a way similar to the measure examined in *Chile – Price Band System*. In that case, the determination that the measure operated as a "proxy" or "substitute" for a minimum import price was based on consideration of the way in which duties calculated on the basis of the difference between the lower threshold in the band and the reference price were imposed. In the present case, the duties are calculated on the basis of the difference between the floor price and the reference price.

7.365. Under Peru's PRS, when the reference price applicable during a particular fortnight is below the floor price, which is the lower threshold in the range, an additional specific duty is applied in the next fortnight based on the difference between these two parameters. The lower the reference price in comparison with the floor price, the higher the specific duty and the greater its protective impact.

7.366. In the present case, however, Peru has furnished evidence that the duties resulting from the PRS do not impede the entry of imports of the affected products into the Peruvian market at prices below the lower threshold of the range. As shown in Exhibit PER-90, in fortnights during which additional duties were applied, imports of products subject to the PRS at transaction prices below the floor price did not cease. In the Panel's opinion, this shows that the measure at issue does not impede the entry of products subject to the PRS into the Peruvian market at a transaction value below the floor price.

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[489] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 194-195.

[490] (Footnote original) We recall that, under the measure at issue, the reference price is set every two months and calculated as the simple average of daily f.o.b. prices in certain foreign markets over a 15-day period. We also note that in a typical minimum import price scheme the value to which the minimum import price or target price is compared is the *transaction value* of a particular shipment, rather than a calculated reference price.

[491] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 195 (one footnote omitted).

7.367. In any event, because of its design and structure, the PRS does not operate in relation to the true transaction value of imports but on the basis of international prices. The fact that prices may change every fortnight does not alter the fact that the imported products may enter the Peruvian market, and in fact do so, at a price below the floor price.

7.368. Nor is the Panel convinced that the duties resulting from the PRS lead to the establishment of a minimum import price with a *de facto* threshold consisting of the sum of the lowest transaction price and the duty resulting from the PRS. The Panel does not consider that this situation is different from the one that could arise, for example with a specific tariff, where the entry price might be no lower than the amount of the tariff itself, irrespective of the way in which the authorities of a Member determine the amount of the specific duty.

7.369. Lastly, as already stated, the duties resulting from the PRS do not operate in this respect in a manner that is different from the way in which ordinary customs duties might operate, in particular, when they are in the form of specific duties.

7.370. For the foregoing reasons, given the design and structure of the PRS and its effects, the Panel does not consider that the duties resulting from the PRS share sufficient characteristics with minimum import prices to make them, at the least, a border measure similar to a minimum import price.

7.4.4.2.6 Conclusion

7.371. The Panel, therefore, finds that the duties resulting from the PRS constitute variable import levies and, in any event, at the least, a border measure similar to a variable import levy. The Panel finds no evidence, however, that the duties resulting from the PRS constitute minimum import prices or a border measure similar to a minimum import price.

7.372. Variable import levies and similar border measures are included among the measures listed in footnote 1 to Article 4 of the Agreement on Agriculture and are thus measures of the kind which have been required to be converted into ordinary customs duties. In maintaining these measures, Peru is acting inconsistently with Article 4.2 of the Agreement on Agriculture.

7.4.4.2.7 The question of whether the duties resulting from the PRS are ordinary customs duties

7.373. As mentioned above, if a measure is a variable import levy, a minimum import price or a measure similar to either of these, which have been required to be converted into ordinary customs duties, it cannot at the same time be an ordinary customs duty. Consequently, if a panel finds that a measure is one of those listed in the footnote to Article 4.2 of the Agreement on Agriculture, it is not necessary for that panel to make a separate additional finding as to whether or not the measure is an ordinary customs duty.[492]

7.374. The Panel has concluded that the duties resulting from the PRS constitute variable import levies and, in any event, at the least a border measure similar to a variable import levy. In the light of these findings, the Panel concludes that the measure does not constitute an ordinary customs duty, and it is not necessary to undertake further analysis in this regard.

7.5 The question of whether the duties resulting from the PRS are inconsistent with the second sentence of Article II:1(b) of the GATT 1994

7.5.1 Introduction

7.375. In this section, the Panel will examine the claims of Guatemala and Peru concerning whether the duties resulting from the PRS are inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

7.376. The Panel will take up the arguments of Guatemala and Peru and the opinions of third parties regarding Guatemala's claim. Subsequently, it will pursue its analysis of this case and,

[492] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina),* paras. 167 and 171.

if appropriate, set out its findings on the consistency of the duties resulting from the PRS with the second sentence of Article II:1(b) of the GATT 1994.

7.5.2 Main arguments of the parties

7.5.2.1 Guatemala's claim

7.377. Guatemala considers that the duties resulting from the PRS constitute "other duties or charges of any kind" to which reference is made in the second sentence of Article II:1(b) of the GATT 1994 and which are inconsistent with that provision.[493]

7.378. Guatemala claims that the "other duties or charges" are: (a) customs charges; (b) other than "ordinary customs duties"; and (c) other than measures covered by Article II:2 of the GATT 1994 (internal taxes, anti-dumping or countervailing duties, or fees or charges commensurate with the cost of services rendered).[494]

7.379. According to Guatemala, it is clear that the challenged measure is a customs charge[495] other than an "ordinary customs duty". As was explained in the previous section, Guatemala claims that the duties resulting from the PRS constitute a variable import levy and a minimum import price, or at least measures similar to these, within the meaning of footnote 1 to the Agreement on Agriculture. Guatemala cites the Appellate Body in asserting that "a measure listed in footnote 1 to the Agreement on Agriculture constitutes *ipso jure* a measure other than ordinary customs duties".[496]

7.380. As a supplementary argument, Guatemala maintains that under Peru's own regulations, the duties resulting from the PRS are considered distinct from Peru's ordinary customs duties.[497] Guatemala adds that under Peru's own regulations, there are relevant factors which confirm that the duties resulting from the PRS are considered distinct from ordinary customs duties.[498] In Guatemala's opinion, the duties resulting from the PRS are set forth in a supreme decree separate from the one establishing Peru's ordinary customs duties, and those supreme decrees have no apparent links, were promulgated by two distinct types of governmental bodies and have different legal bases. Guatemala adds that the regulations governing the form of payment of the duties resulting from the PRS allude to a difference between these duties and ordinary customs duties; the duties resulting from the PRS are applied in a "temporary" and "exceptional" manner, while ordinary customs duties are applied definitively; the description of the duties resulting from the PRS under Peru's own regulations as "additional" indicates that they do not form part of the ordinary customs duties; the description of the duties resulting from the PRS under Peru's own regulations as "variable" indicates that they are distinct from ordinary customs duties which take an *ad valorem* form; the objective of the duties resulting from the PRS is distinct from that of ordinary customs duties; and the financial resources collected by the duties resulting from the PRS appear to be intended for different purposes from those of income collected by ordinary customs duties.[499] Guatemala considers that Peru did not refute those characteristics of the duties resulting from the PRS but confined itself to stating that Decree Law No. 26140 designates them as tariff duties. According to Guatemala, this argument is insufficient to rebut its argument

[493] Guatemala's first written submission, para. 4.99.
[494] Guatemala's first written submission, para. 4.110.
[495] Guatemala's first written submission, para. 4.117; second written submission, para. 5.6.
[496] Guatemala's first written submission, para. 4.120 (citing Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina*), para. 172; and Panel Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 7.104); second written submission, paras. 5.7-5.8.
[497] Guatemala's first written submission, paras. 4.123 and 4.125; second written submission, para. 5.9. See also response to Panel question No. 129; response to Panel question No. 134.
[498] See Guatemala's response to Panel question No. 134, paras. 187-188, where it states: "The Panel could reach this same conclusion [that the variable additional duties arising from the PRS are not ordinary customs duties] only by referring to its finding under Article 4.2 of the Agreement on Agriculture that the measure in question qualifies as a variable import duty or a minimum import price, or a measure similar to both these concepts. This is due to the fact that Article 4.2 itself provides, in its footnote 1, that these types of measure are not considered as ordinary customs duties.
Accordingly, Guatemala refers to these ten factors as "additional" by virtue of the fact that they serve to confirm the previous conclusion that the variable additional duties are not ordinary customs duties." See also response to Panel question No. 64, paras. 215-217; response to Panel question No. 128, paras. 159-160.
[499] Guatemala's first written submission, para. 4.125.

concerning the distinction in Peru's regulations between the duties resulting from the PRS and Peru's ordinary customs duties.[500]

7.381. Guatemala considers that it is neither valid nor necessary for the Panel to follow Peru's proposal which would consist in examining whether the challenged measure is an ordinary customs duty on the basis of positive criteria.[501] In Guatemala's opinion, "other duties or charges" are a residual category and to attempt a determination based on positive criteria would be of no value for distinguishing between an ordinary customs duty and another duty or charge.[502] Guatemala considers that Peru's analytical proposal does not take into account other relevant criteria for identifying when a measure forms part of ordinary customs duties and eliminates the distinction between that concept and that of "other duties or charges".[503] Guatemala also maintains that the application of positive criteria of the kind proposed by Peru in order to identify ordinary customs duties is contrary to the legal standard developed in the case law and would lead to an erroneous legal conclusion.[504]

7.382. In response to the criteria proposed by Peru, Guatemala considers that the fact that a customs charge is applied on the basis of most favoured nation status[505], that it is applied to imports and that the obligation to pay it arises at the time of importation[506], and the form taken by that customs charge (i.e. *ad valorem* specific or compound)[507], are not helpful criteria for determining whether that customs charge is an ordinary customs duty or whether it comes under "other duties or charges". Guatemala adds that Peru is mistaken in affirming that a relevant criterion for distinguishing ordinary customs duties from "other duties or charges" is that they may be designed to collect income and protect the domestic industry.[508] Guatemala also refers to the type of variability of ordinary customs duties and reiterates that the duties resulting from the PRS do not fall within the framework of such variability; in addition, Guatemala affirms that the fact that a charge is subject to limits (the limit bound by a Member in its schedule of concessions) does not make it an ordinary customs duty.[509] Lastly, Guatemala maintains that transparency and predictability are a criterion common to ordinary customs duties and "other duties or charges", that all measures must be published in accordance with Article X:1 of the GATT 1994, that their publication does not make them ordinary customs duties, and that Peru proposes an incorrect legal standard with respect to this requirement. [510]

7.383. Guatemala also maintains that the duties resulting from the PRS do not constitute any of the measures covered by Article II:2 of the GATT 1994.[511]

7.384. Guatemala rejects Peru's argument concerning the way in which Peru conducted the negotiation and recorded its tariff bindings during the Uruguay Round. Guatemala considers that, contrary to Peru's assertions, the negotiation of Peru's concessions cannot alter the legal nature of the measure at issue[512] and that the conduct of the other Members in reaction to Peru's offer

[500] Guatemala's second written submission, paras. 5.36-5.43.
[501] Guatemala's second written submission, paras. 5.17-5.35; opening statement at the first meeting of the Panel, paras. 48-50; response to Panel question No. 64; response to Panel question No. 128.
[502] Guatemala's opening statement at the first meeting of the Panel, paras. 48-50; response to Panel question No. 128, paras. 157-158.
[503] Guatemala's second written submission, paras. 5.17-5.21.
[504] Guatemala's second written submission, para. 5.22. See also response to Panel question No. 64, paras. 2.10-2-14 and 2.19.
[505] Guatemala's second written submission, paras. 5.23-5.26; response to Panel question No. 64, paras. 220-222.
[506] Guatemala's second written submission, paras. 5.27-5.28; response to Panel question No. 64, paras. 223-224.
[507] Guatemala's second written submission, para. 5.31 (citing Appellate Body Reports, *Chile - Price Band System*, paras. 216 and 275; *Chile - Price Band System (Article 21.5 - Argentina)*, paras. 149 and 164); response to Panel question No. 64, para. 227.
[508] Guatemala's second written submission, paras. 5.29-5.30; response to Panel question No. 64, paras. 225-226.
[509] Guatemala's second written submission, para. 5.32; response to Panel question No. 64, para. 228.
[510] Guatemala's second written submission, para. 5.33; response to Panel question No. 64, para. 229.
[511] Guatemala's first written submission, para. 4.128; second written submission, para. 5.10.
[512] Guatemala's second written submission, para. 5.47.

during the Uruguay Round negotiations does not validate the inconsistency of the measure at issue with the WTO agreements.[513]

7.385. Guatemala asserts that the way in which other Members recorded compound duties in their schedules of concessions may be a relevant context for interpreting Peru's schedule of concessions.[514] Some Members recorded a compound duty identifying the *ad valorem* component and the specific component. In contrast to that practice, Guatemala notes that Peru recorded a single amount under the *ad valorem* heading, without making any reference to an amount in terms of a specific duty.[515]

7.386. Guatemala adds that the second sentence of Article II:1(b) and the Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994 (Understanding on Article II:1(b) of the GATT 1994) impose three conditions for an "other duty or charge" to satisfy the WTO rules: (a) the "other duty or charge" or the mandatory legislation under which it is to be applied must have existed at 15 April 1994; (b) the "other duty or charge" may not exceed the levels applied on the above-mentioned date; and (c) the "other duty or charge" must have been recorded in the schedule of concessions of the importing Member.[516]

7.387. Guatemala points out that the duty resulting from the PRS was not recorded in Peru's schedule of concessions[517], was not applied on the date of entry into force of the GATT 1994 and was not envisaged in Peru's binding legislation in force on the date of entry into force of the GATT 1994.[518] In response to Peru's argument that the specific duties have existed since 1991, Guatemala considers that there are two totally different systems and that the 1991 system of specific duties was cancelled and replaced by the PRS in 2001.[519] In support of this argument[520], Guatemala claims that the Peruvian authorities themselves share that opinion.[521]

7.388. Guatemala concludes that Peru's action in applying the duties resulting from the PRS is inconsistent with the second sentence of Article II:1(b) of the GATT 1994.[522]

7.5.2.2 Peru's defence

7.389. Peru claims that the measure at issue, as an ordinary customs duty, is consistent with its obligations under the second sentence of Article II:1(b) of the GATT 1994.[523]

7.390. In Peru's view, the following are some of the characteristics of ordinary customs duties: (a) they are duties subject to most-favoured-nation (MFN) treatment, forming part of the tariff regime; (b) they are applied to imports and the obligation to pay them arises at the time of importation; (c) they may be designed to collect revenue and protect the domestic industry; (d) they may be *ad valorem*, specific or compound duties; (e) they may vary, but are subject to an upper limit, which is the level bound in the schedule of the respective Member; and (f) they are transparent and predictable.[524]

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[513] Guatemala's opening statement at the first meeting of the Panel, paras. 51-53; second written submission, paras. 5.48-5.51.

[514] Guatemala's response to Panel question No. 20, paras. 29-30.

[515] Guatemala's response to Panel question No. 20.

[516] Guatemala's first written submission, para. 4.114; second written submission, para. 5.53.

[517] Guatemala's first written submission, paras. 4.131-4.132; second written submission, para. 5.55. Guatemala indicates that Peru's schedule of concessions recorded only *ad valorem* duties of 30% for most agricultural products and of 68% for a restricted group. See response to Panel question No. 13; Relevant Sections of Peru's Schedule of Concessions (Exhibit GTM-26).

[518] Guatemala's second written submission, para. 5.2.

[519] Guatemala's opening statement at the first meeting of the Panel, paras. 59-62. See second written submission, paras. 5.63-5.73; response to Panel question No. 133, paras. 175-185.

[520] Guatemala's second written submission, paras. 5.63-5.73; response to Panel question No. 133, paras. 175-185.

[521] Guatemala's second written submission, paras. 5.67-5.68 (citing Electro-Technical Report No. 7-2009-SUNAT/3D 0410 of the Collection Department of the Callao Maritime Customs Division (Exhibit GTM-36) and Memorandum No. 73-2009-SUNAT/2B4000 (Exhibit GTM-37)) and 5.70.

[522] Guatemala's first written submission, para. 4.134.

[523] Peru's first written submission, paras. 5.93-5.94.

[524] Ibid. para. 5.38. See also response to Panel question No. 128, where Peru explains the jurisprudential basis for the criteria it proposes for defining an ordinary customs duty.

7.391. According to Peru, the following facts demonstrate that the duties resulting from the PRS meet the above characteristics: (a) Decree Law No. 26140[525] stipulates that specific import duties, whether fixed or variable, are tariff duties subject to most-favoured-nation treatment, which shows that these specific duties are part of the Peruvian tariff regime; (b) Article 1 of Supreme Decree No. 124-2002-EF[526] stipulates that the specific duty is determined on the date of the import declaration; (c) in accordance with the provisions of Supreme Decree No. 115-2001-EF[527], the specific duties are designed as a stabilization and protection mechanism; (d) the specific duties are an element of the compound or mixed tariff that Peru applies to products subject to the PRS; (e) pursuant to Article 4 of Supreme Decree No. 153-2002-EF[528], the specific duties vary without exceeding the tariff bound in Peru's Schedule of Concessions; and (f) the specific duties are transparent and predictable.[529]

7.392. In addition, Peru maintains that these facts are confirmed and supplemented by the following: (a) the specific duties, which are the measure in question, have existed since 1991[530]; (b) the specific duties form part of the commitments that were bound by Peru during the Uruguay Round[531]; and (c) the Peruvian legal framework confirms that the specific duties are ordinary customs duties.[532]

7.393. Peru considers that Guatemala is "mistaken in concluding that the 'variable additional duty, *in Peru's own legal system*, is distinct from the ordinary customs duty'".[533] In Peru's opinion, Guatemala omits to mention that Article 1 of Decree Law No. 26140 expressly provides that the specific duties, and the *ad valorem* duties, are tariff duties.[534] In addition, Peru considers that it is irrelevant, for the purpose of determining whether the duties resulting from the PRS are an ordinary customs duty, that: the PRS is set forth in a supreme decree different from the one establishing Peru's ordinary customs duties; there is no apparent link between those supreme decrees; and the supreme decree establishing the PRS was endorsed by the Ministry of Agriculture (Peru added that the two decrees were promulgated by the Peruvian Executive). Peru adds that Guatemala is mistaken in: arguing that Circular No. INTA-CR.62-2002 "alludes" to a difference between specific duties and ordinary customs duties (Peru points out that the circular reiterates the description of specific duties as tariff duties contained in Decree Law No. 26140); maintaining that the supreme decrees establishing the PRS and the Peruvian ordinary customs duty have different legal bases, since both are based on rules governing the imposition of tariffs; arguing that under the Peruvian legislation it is relevant that a specific duty is applied during periods where the reference price is below the floor price; arguing that it is relevant that the Peruvian legislation classifies the specific duties as "additional" or "variable" (on this point Peru asserts that an ordinary customs duty may vary, provided that it is kept below the rates bound in the schedule of concessions of each Member); arguing that the distinction between the objectives of the specific duties and the *ad valorem* duties is relevant; and attaching importance to the destination of the financial resources collected from specific duties and *ad valorem* duties.[535]

7.394. Peru submits an alternative argument, in case the Panel finds that the specific duty constitutes "other duties or charges". Peru claims that, on the date of entry into force of the GATT 1994, its specific duty was already in existence and had been notified to the GATT in the context of the Uruguay Round negotiations.[536] Peru refers to paragraph 2 of the Understanding on

[525] Decree Law No. 26140 (Exhibit PER-53). See also Decree Laws Nos. 25528 and 25784 (Exhibit PER-91).
[526] Supreme Decree No. 124-2002-EF (Exhibit PER-50).
[527] Supreme Decree No. 115-2001-EF (Exhibit GTM-4).
[528] Compilation of all published Customs Tables (Exhibit GTM-5), p. 147.
[529] Peru's first written submission, para. 5.40.
[530] Peru's second written submission, paras. 3.16-3.22.
[531] Peru's second written submission, paras. 3.23-3.33. See response to Panel question No. 14; response to Panel question No. 132; Communication from Peru to the Chairman of the Negotiating Group on Market Access, 14 December 1993, Communication from the United States to Peru dated 10 December 1993, Communication from the European Union to Peru dated 12 December 1993, Communication from Japan to Peru dated 14 December 1993 (Exhibit PER-15); Schedule XXXV - Peru, Uruguay Round, 15 April 1994 (Exhibit PER-18); Communications from Peru, March 1994 (Exhibit PER-62).
[532] Peru's second written submission, para. 3.28.
[533] Peru's first written submission, para. 5.43. (emphasis original)
[534] Peru's first written submission, para. 5.44. See Decree Law No. 26140 (Exhibit PER-53). See also Decree Laws Nos. 25528 and 25784 (Exhibit PER-91).
[535] Peru's second written submission, para. 3.32.
[536] Peru's second written submission, paras. 3.16-3.22; response to Panel question No. 133.

Article II:1(b) of the GATT 1994 and suggests that the only question the Panel should consider is whether Peru has exceeded the levels it applied on 15 April 1994.[537] According to Peru, Guatemala has not met its burden of proving that the specific duty exceeds the amount of the duties applied by Peru "on the date of entry into force of the GATT 1994" and its claim that the duties resulting from the PRS are inconsistent with the second sentence of Article II:1(b) of the GATT 1994 should therefore be rejected.[538]

7.5.3 Main arguments of the third parties

7.5.3.1 Colombia

7.395. Colombia draws the Panel's attention to the need to assess the main or essential characteristics of the measure at issue, in order to determine whether it constitutes an ordinary customs duty.[539] Colombia considers that the duties resulting from the PRS match the elements of an ordinary customs duty (they are duties subject to most-favoured-nation treatment, forming part of the Peruvian tariff regime; they apply to imports; the obligation to pay arises at the time of importation; and although they may be subject to a level of variation, they are governed by clear and transparent rules and by a methodology applicable to ordinary customs duties).[540]

7.5.3.2 United States

7.396. The United States argues that, if the Panel finds that the PRS is inconsistent with Article 4.2 of the Agreement on Agriculture, it would not need to make any finding with regard to Article II:1(b) of the GATT 1994.[541]

7.397. In the event that the Panel makes findings regarding Guatemala's claims under Article II:1(b), the United States submits that the duties resulting from the PRS would not appear to constitute an ordinary customs duty, but would then fall under the residual category of other duties or charges. In addition, in the opinion of the United States, it appears to be undisputed that Peru did not record the PRS in its schedule of concessions, as called for by the Understanding on Article II:1(b) of the GATT 1994. For this reason, the duties resulting from the PRS would be imposed in excess of the amounts recorded in Peru's Schedule of Concessions, thereby violating the provisions of the second sentence of Article II:1(b) of the GATT 1994.[542]

7.5.3.3 European Union

7.398. In the European Union's opinion, the Panel should begin its analysis by considering whether the PRS constitutes an "ordinary customs duty" within the meaning of Article II:1(b) of the GATT 1994.[543]

7.399. The European Union submits that Members are free to impose the type of customs duty – *ad valorem*, specific or compound – that they deem appropriate, provided that such duties do not exceed the bound levels. Moreover, they are also entitled to modify the applied tariff from time to time.[544]

7.400. The European Union suggests that certain elements are not guiding criteria for determining whether a measure constitutes an ordinary customs duty. In this connection, the European Union indicates that neither the form of the duty (in the sense that it is not clear that bound duties are always *ad valorem* or specific), nor the factors used to calculate it (in the sense that it is not clear that customs duties must be calculated on the basis of exogenous factors, such as the interests

[537] Peru's first written submission, para. 5.98; second written submission, para. 3.34.
[538] Peru's first written submission, paras. 5.96-5.98. See also Peru's second written submission, para. 3.34.
[539] Colombia's third-party written submission, para. 34.
[540] Ibid. para. 36.
[541] United States' third-party written submission, para. 32.
[542] United States' third-party written submission, paras. 33-34.
[543] European Union's third-party written submission, para. 25.
[544] European Union's third-party written submission, para. 26 (citing Appellate Body Report, *Argentina - Textiles and Apparel*, paras. 46, 54-55).

of consumers or of domestic producers), are determinative factors.[545] The imposition of the duty at the time of importation is a necessary, but not a sufficient, criterion for confirming whether a duty is an ordinary customs duty.[546] Moreover, the rate of the duty applied may vary.[547] The European Union claims that one of the most important characteristics of an ordinary customs duty is its transparency and predictability, which help to differentiate it from the measures described in footnote 1 to the Agreement on Agriculture.[548] The European Union considers that it would be wrong to argue that, in determining whether a measure is an ordinary customs duty, price band or price range systems are subject to a stricter legal standard than other forms of customs duties, with regard to the determination of their transparency and predictability.[549] The last element which the European Union suggests may be relevant for assessing whether a measure constitutes an ordinary customs duty is the schedule of concessions of the Member concerned.[550]

7.401. In referring to other duties or charges, the European Union asserts that the objective of the second sentence of Article II:1(b) of the GATT 1994 is to protect the level of tariff concessions negotiated, thereby preventing an increase in the other duties or charges applied, and not to require Members to use a customs duty of a specific type or nature.[551] In addition, the European Union notes that other duties or charges must be recorded in the Member's schedule of concessions at the levels applied on 15 April 1994 and must not be higher than the levels so recorded.[552] In the European Union's opinion, the Panel must assess whether the duties resulting from the PRS were recorded in Peru's Schedule of Concessions or whether at 15 April 1994 any legislation was in force which required the imposition of such duties.[553]

7.5.4 Assessment by the Panel

7.5.4.1 Introduction

7.402. The Panel will now examine Guatemala's claims regarding the inconsistency of the duties resulting from the PRS with the second sentence of Article II:1(b) of the GATT 1994. The first step in the Panel's analysis is to review the scope of the obligation imposed on Members by the second sentence of Article II:1(b) of the GATT 1994. As part of its analysis, the Panel will confirm which elements are relevant in defining "other duties or charges of any kind", within the meaning of Article II:1(b) of the GATT 1994. In the light of this analysis, the Panel will consider whether duties resulting from the PRS constitute "other duties or charges". Lastly, and depending on its findings regarding the nature of the duties resulting from the PRS, the Panel will consider whether Peru complied with its obligation to record the duties resulting from the PRS in its Schedule of Concessions.

7.5.4.2 The obligation under the second sentence of Article II:1(b) of the GATT 1994

7.403. Article II:1(b) of the GATT 1994 provides as follows:

> *Schedules of Concessions*
>
> …
>
> (b) The products described in Part I of the Schedule relating to any [Member], which are the products of territories of other [Members], shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or

[545] European Union's third-party written submission, paras. 28-29. The European Union bases its argument concerning the irrelevance of whether exogenous factors are used as a basis for calculating the duty on the Panel Report, *Dominican Republic - Safeguard Measures*, para. 7.84 and the Appellate Body Report, *Chile - Price Band System*, paras. 271-278.
[546] European Union's third-party written submission, para. 30.
[547] European Union's third-party written submission, para. 31 (citing Appellate Body Report, *Chile - Price Band System*, para. 232).
[548] European Union's third-party written submission, para. 32.
[549] Ibid. para. 33.
[550] Ibid. paras. 34-35.
[551] Ibid. para. 36.
[552] Ibid. para. 37.
[553] Ibid. paras. 38-39.

> qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

7.404. The Understanding on the Interpretation of Article II:1(b) of the GATT 1994 provides that:

> 1. In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".
>
> 2. The date as of which "other duties or charges" are bound, for the purposes of Article II, shall be 15 April 1994. "Other duties or charges" shall therefore be recorded in the Schedules at the levels applying on this date …
>
> 3. "Other duties or charges" shall be recorded in respect of all tariff bindings.
>
> …
>
> 7. "Other duties or charges" *omitted from a Schedule* at the time of deposit of the instrument incorporating the Schedule in question into GATT 1994 with, until the date of entry into force of the WTO Agreement, the Director-General to the CONTRACTING PARTIES to GATT 1947 or, thereafter, with the Director-General of the WTO, *shall not subsequently be added to it* and any "other duty or charge" recorded at a level lower than that prevailing on the applicable date shall not be restored to that level *unless such additions or changes are made within six months of the date of deposit of the instrument*. (emphasis added)

7.405. In this case, Guatemala alleges a violation of the second sentence of Article II:1(b) of the GATT 1994. This sentence provides that imported goods shall be "be exempt from all other duties of any kind imposed on or in connection with the importation" if such duties or charges of any kind exceed those applied on the date of entry into force of the GATT 1994 or "those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date".

7.406. As Guatemala only claims a violation of the second sentence of Article II:1(b) of the GATT 1994, in the present case it is irrelevant whether the duties resulting from the PRS exceed the level bound by Peru for the products subject to the system. The Panel therefore has to decide whether the duties resulting from the PRS are, as Peru contends, part of an "ordinary customs duty" of the compound kind, which would be covered by the 68% tariff bound by Peru in its Schedule of Concessions, or whether, as Guatemala asserts, it is rather an "other duty or charge" which was not recorded at that time in Peru's Schedule of Concessions.

7.5.4.3 Definition of "other duties or charges"

7.407. In *India – Additional Import Duties*, the Appellate Body specified that "the duties and charges covered by the second sentence of Article II:1(b) are 'defined in relation to' duties covered by the first sentence of Article II:1(b), such that ODCs [other duties and charges] encompass only duties and charges that are not OCDs [ordinary customs duties]".[554] Moreover,

[554] Appellate Body Report, *India - Additional Import Duties*, para. 151 (citing Panel Report, *India - Additional Import Duties*, para. 7.125).

the category of duties and charges in the second sentence of Article II:1(b) of the GATT 1994 also does not cover the kind of charges or duties referred to in Article II:2 of the GATT 1994.[555]

7.408. Consequently, the concept of "other duties or charges of any kind" corresponds to a residual category.[556] Thus, a specific measure will be included in this category if it does not constitute an ordinary customs duty and is not covered by Article II:2 of the GATT 1994.[557]

7.409. In *Dominican Republic – Safeguard Measures*, the Panel went into detail concerning what was covered by an ordinary customs duty:

> In Spanish, the word "*propiamente*" used in "*propiamente dichos*" is related to the word "*propiedad*" [property], in the sense of "*atributo o cualidad esencial*" [essential attribute or quality] of something.[558] Hence, a "*derecho de aduana propiamente dicho*" would be a duty that possesses the essential attributes or qualities of customs duties. "*Proprement*" in the French expression "*proprement dits*" relates to the strict meaning in which an expression is used.[559] In other words, while a Member may impose various duties at the border, the expressions customs duty "*propiamente dicho*" and customs duty "*proprement dit*" emphasize that the scope of the provision is limited to customs duties in the strict sense of the term (*stricto sensu*).
>
> The expression used in the text in English suggests a slightly different shade of meaning. "Ordinary" is defined as "Belonging to or occurring in regular custom or practice; normal, customary, usual". The contrary is "Extraordinary".[560] In Spanish, "*Ordinario*" is defined as "*Común, regular y que sucede habitualmente*" [Common, regular and usually occurring]. The contrary would be "*extraordinario*" [extraordinary] or "*inusual*" [unusual].[561] In French, "*Ordinaire*" is defined as "*Conforme à l'ordre normal, habituel des choses*" [in conformity with the normal, usual order of things] or "*courant, habituel, normal, usuel*" [current, customary, normal, usual]. The contrary would be "*anormal*" [abnormal], "*exceptionnel*" [exceptional] or "*extraordinaire*" [extraordinary].[562]
>
> …
>
> All in all, using a meaning that seeks to reconcile the texts of the GATT 1994 in the various official languages, we could conclude that the expression "ordinary customs duties" in Article II:1(b) of the GATT 1994 refers to duties collected at the border which constitute "customs duties" in the strict sense of the term (*stricto sensu*) and that this expression does not cover possible extraordinary or exceptional duties collected in customs. This would be compatible with the object and purpose of the GATT 1994 which, as the Appellate Body said in *Chile – Price Band System*, seeks to ensure that the application of customs duties gives rise to transparent and predictable market access conditions and does not impede the transmission of international price developments to the domestic market of the importing country. To reach a conclusion in this respect, the Panel must consider the design and structure of the measures concerned.[563]

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[555] Panel Report, *Dominican Republic - Safeguard Measures*, paras. 7.79 and 7.88; Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.113; and Appellate Body Report, *India - Additional Import Duties*, para. 153.

[556] Panel Report, *Dominican Republic - Safeguard Measures*, para. 7.79. Regarding the difference in the nature of "ordinary customs duties" and "other duties and charges of any kind", see Appellate Body Report, *India - Additional Import Duties*, paras. 157-164.

[557] Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, paras. 7.113 and 7.114.

[558] (Footnote original) *Diccionario de la Lengua Española*, 22nd Ed. (Real Academia Española, 2001), p. 1,252.

[559] (Footnote original) *Le Nouveau Petit Robert* (*Dictionnaires Le Robert*, 2000), pp. 2,022-2,023.

[560] (Footnote original) *Shorter Oxford English Dictionary*, 6th Ed. (Oxford University Press, 2007), Vol. 2, p. 2,021.

[561] (Footnote original) *Diccionario de la Lengua Española*, 22nd Ed. (Real Academia Española, 2001), pp. 695, 878 and 1,105.

[562] (Footnote original) *Le Nouveau Petit Robert* (*Dictionnaires Le Robert*, 2000), pp. 1,732-1,733.

[563] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.82-7.83, and 7.85.

7.410. In addition, in *Dominican Republic – Safeguard Measures*[564], before deciding whether a measure is covered by the category of other duties and charges, the Panel specified that the scope of application of Article II:2 of the GATT has to be delimited. The text of this Article provides as follows:

> Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:
>
> (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;
>
> (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI*;
>
> (c) fees or other charges commensurate with the cost of services rendered.

7.411. In other words, Article II:2 excludes three categories of measure from application of the disciplines of Article II of the GATT, even if they are imposed on the import of products.

7.412. Furthermore, until now no previous decisions by panels or the Appellate Body have provided a general definition of what constitutes an ordinary customs duty and what forms part of "other duties or charges".

7.5.4.3.1 "Other duties or charges" and the internal taxes of Article III:2 of the GATT 1994

7.413. Article II:2(a) of the GATT 1994 covers charges equivalent to internal taxes payable on like domestic products or articles from which imported products have been manufactured or produced in whole or in part, in accordance with the provisions of Article III:2 of the GATT 1994. In *India - Additional Import Duties*, the Appellate Body clarified that Article II:2(a) of the GATT 1994 refers to measures imposing duties in an amount equivalent to internal taxes or charges applied to like products.[565] Such measures should be applied in a manner consistent with the provisions of Article III:2 of the GATT 1994 (on national treatment in relation to taxation).[566] The Panel in *Dominican Republic – Import and Sale of Cigarettes*, for its part, underlined the mutually exclusive nature of measures equivalent to internal taxes or charges in regard to "other duties or charges of any kind".[567]

7.414. In *China – Auto Parts*, the Panel addressed the distinction between internal taxes, governed by Article III:2 of the GATT 1994, and ordinary customs duties. In this connection, it considered that one characteristic element of "ordinary customs duties" is that they are paid at the time goods are imported.[568] It added, however, that importation is not the only element in the determination as to whether a charge falls within the scope of the first sentence of Article II:1(b) of the GATT 1994 (as an ordinary customs duty).[569]

7.5.4.3.2 "Other duties and charges" and anti-dumping duties

7.415. With regard to the measures covered by Article II:1(b) of the GATT 1994, the Panel in *United States – Zeroing (Japan) (Article 21.5 – Japan)* indicated that a Member could impose an anti-dumping duty in excess of the rate bound in its Schedule of Concessions.

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[564] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.79.
[565] Appellate Body Report, *India – Additional Import Duties*, paras. 166-175.
[566] Ibid. paras. 176-181.
[567] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.84.
[568] Panel Report, *China – Auto Parts*, paras. 7.139-7.142, 7.154-7.166, 7.182-7.185 and 7.192. See also Appellate Body Report, *China – Auto Parts*, para. 209.
[569] Panel Report, *China – Auto Parts*, fn. 316.

Such an anti-dumping duty would have to be applied in conformity with the provisions of Article VI of the GATT 1994.[570]

7.5.4.3.3 "Other duties and charges" and "fees or charges for services rendered"

7.416. Concerning the measures covered by Article II:2(c) of the GATT 1994, in *United States - Certain EC Products*, the Panel stated that this rule required proof that the charge imposed on importers represented the approximate cost of any service.[571]

7.417. In *Argentina – Textiles and Apparel,* the Panel examined the consistency of a 3% *ad valorem* statistical tax applied by Argentina on the import of certain textiles. This tax was used to finance the Argentine Customs system for collecting statistics. In this case, the Panel considered that, although Argentina had included this tax in the "other duties and charges" column in its Schedule of Concessions, the tax was inconsistent with Article VIII:1(a) of the GATT 1994 inasmuch as it gave rise to the imposition of charges in excess of the approximate costs of the services rendered, and because it was a measure of a fiscal nature.[572]

7.418. In *US – Customs User Fee*, the Panel addressed the consistency of a fee charged by the United States to customs users for certain products and the United States' obligations under the GATT 1947. The purpose of the fee was to cover the cost of processing imported goods and was calculated as an *ad valorem* percentage of the said goods. The Panel found, however, that the measure was contrary to the United States' obligations under Articles II:2(c) and VIII:1(a) of the GATT 1947 in that it exceeded the approximate costs of customs processing.[573]

7.5.4.3.4 "Other duties or charges" and Article 4.2 of the Agreement on Agriculture

7.419. As already indicated, the Panel in *Chile – Price Band System* stated that the term "ordinary customs duties" must have the same meaning in Article 4.2 of the Agreement on Agriculture and the second sentence of Article II:1(b) of the GATT 1994.[574]

7.420. In examining whether Chile's price band system constituted an ordinary customs duty, the Appellate Body in *Chile – Price Band System* made the following clarification with regard to the category of "other duties or charges":

> We further note, in examining Article 4.2 of the *Agreement on Agriculture*, that the *second* sentence of Article II:1(b) of the GATT 1994, does *not* specify what form "other duties or charges" must take to qualify as such within the meaning of that sentence. The Panel's own approach of reviewing Members' Schedules reveals that many, if not most, "other duties or charges" are expressed in *ad valorem* and/or specific terms, which does not, of course, make them "ordinary customs duties" under the first sentence of Article II:1(b).[575] (emphasis original)

7.421. Furthermore, the Panel in *Dominican Republic – Safeguard Measures* summarized the Appellate Body's findings regarding when a measure constituted an ordinary customs duty:

> In its report in *Chile – Price Band System*, the Appellate Body made it clear that what determines whether "a duty imposed on an import at the border" constitutes an ordinary customs duty is not the form which that duty takes.[576] Nor is the fact that the duty is calculated on the basis of exogenous factors, such as the interests of consumers or of domestic producers.[577] The Appellate Body also explained that a Member may periodically change the rate at which it applies an "ordinary customs

[570] Panel Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 7.207. See also Appellate Body Report, *US - Zeroing (Japan) (Article 21.5 - Japan)*, para. 209.
[571] Panel Report, *US - Certain EC Products*, para. 6.70.
[572] Panel Report, *Argentina - Textiles and Apparel*, paras. 6.81-6.83.
[573] GATT Panel Report, *United States - Customs User Fee* (BISD 35S/245), para. 125.
[574] Panel Report, *Chile - Price Band System*, para. 7.104; Appellate Body Report, *Chile - Price Band System*, para. 188.
[575] Appellate Body Report, *Chile - Price Band System*, para. 275.
[576] (Footnote original) Appellate Body Report, *Chile - Price Band System*, para. 216.
[577] Ibid. paras. 271-278.

> duty", provided it remains below the rate bound in the Member's schedule.[578] This change in the applied rate of duty could be made, for example, through an act of the Member's legislature or executive at any time. However, one essential feature of "ordinary customs duties" is that any change in them is discontinuous and unrelated to an underlying scheme or formula.[579] The Appellate Body noted that the price band system impugned in that case contained an inherent variability and had the effect of impeding the transmission of international price developments to Chile's market in the way in which *ordinary customs duties* normally would, also generating in its application a lack of transparency and predictability with respect to market access conditions.[580, 581] (emphasis original)

7.422. In *Chile – Price Band System (Article 21.5 – Argentina)*, the Appellate Body also commented on the effect of finding that a measure is similar to any of those specified in footnote 1 to Article 4.2 of the Agreement on Agriculture on the determination as to whether such a measure is an ordinary customs duty. In this connection, the Appellate Body stated:

> We recall that an examination of "similarity" cannot be made in the abstract: it necessarily involves a *comparative* analysis. That analysis can be undertaken by comparing the measure at issue with at least one of the listed measures which, by definition, have characteristics different from the characteristics of an ordinary customs duty. The term "ordinary customs duties" in footnote 1 forms part of the phrase "similar border measures other than ordinary customs duties". This phrase contains no punctuation, which suggests that the phrase as a whole defines a relevant concept for purposes of footnote 1. As we see it, "other than ordinary customs duties" is an adjectival phrase that qualifies the term "similar border measures". This language will, therefore, inform a panel's analysis of whether a measure is "similar" to one of the categories of measures listed in footnote 1. *We observe, as well, that the structure and logic of footnote 1 make clear that variable import levies and minimum import prices cannot be ordinary customs duties*. The same is true for border measures similar to variable import levies and to minimum import prices.[582] (emphasis added)

7.423. As already mentioned, a Member's measure which corresponds or is similar to any of the measures listed in footnote 1 to Article 4.2 of the Agreement on Agriculture may not correspond to the ordinary customs duty of the Member in question. The Panel has already concluded that the duties resulting from the PRS, because they are variable import levies or, at least, a measure similar to variable import levies within the meaning of Article 4.2 of the Agreement on Agriculture, may not be ordinary customs duties.[583] The Panel recalls that the parties differ as to whether there are elements in the Peruvian legislation that could characterize the duties resulting from the PRS as ordinary customs duties. However, considering that a measure that is one of those covered by footnote 1 to the Agreement on Agriculture cannot be an ordinary customs duty, the Panel does not deem it necessary to rule on the impact of the elements of the Peruvian legislation on the characterization of the duties resulting from the PRS as ordinary customs duties.

7.424. As the next step, before considering whether the measure constitutes one of the "other duties or charges" within the meaning of Article II:1(b) of the GATT 1994, the Panel would have to verify whether the measure is covered by any of the situations provided for in Article II:2. In this connection, the Panel finds that none of the parties has claimed, and there is no relevant evidence, that the duties resulting from the PRS correspond to any of the measures listed in Article II:2 (namely, charges equivalent to internal taxes imposed consistently with the provisions of Article III:2 of the GATT 1994, anti-dumping or countervailing duties applied consistently with the provisions of Article VI of the GATT 1994, or fees or other charges commensurate with the cost of services rendered).

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[578] (Footnote original) Appellate Body Report, *Chile - Price Band System*, para. 232 (citing Appellate Body Report, *Argentina - Textiles and Apparel*, fn. 56 to para. 46).

[579] (Footnote original) Appellate Body Report, *Chile - Price Band System*, paras. 232-233.

[580] Ibid. paras. 246-251.

[581] Panel Report, *Dominican Republic - Safeguard Measures,* para. 7.84.

[582] Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 167. (footnote omitted)

[583] See above, para. 7.374

7.425. Accordingly, having determined that the duties resulting from the PRS are border measures that do not constitute ordinary customs duties and do not correspond to any of the measures listed in Article II:2 of the GATT 1994, the Panel concludes that they are "other duties or charges … imposed on or in connection with the importation", within the meaning of Article II:1(b) of the GATT 1944.

7.5.4.4 Assessment of "other duties or charges" in accordance with the obligations contained in the Understanding on the Interpretation of Article II:1(b) of the GATT 1994

7.426. Having found that the measure at issue comes under "other duties or charges" referred to in Article II:1(b) of the GATT 1994, the Panel will now address the other elements in the second sentence of Article II:1(b) of the GATT 1994. In other words, it will assess whether the measure at issue is in excess of the other duties or charges imposed on the date of the GATT 1994 or "those directly or mandatorily required to be imposed thereafter by the legislation in force in the importing territory on that date", in conformity with the way in which they were recorded in Peru's Schedule of Concessions.

7.427. In this connection, in addition to the above provisions of the GATT 1994, Guatemala refers to provisions in the Understanding on the Interpretation of Article II.1(b) of the GATT 1994.[584] As already mentioned, the first two paragraphs of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 clarify the way in which Members have to record in their schedules of concessions the "other duties or charges of any kind" described in Article II:1(b) of the GATT 1994.

7.428. Some panels have reached conclusions on the Understanding on the Interpretation of Article II:1(b) of the GATT 1994. In *Dominican Republic – Import and Sale of Cigarettes*, the Panel held that:

> Reading Article II:1(b) together with paragraphs 1, 2, 7 and 4 of the Understanding as context, the Panel considers that the obligation under Article II:1(b), second sentence is for Members to record in their Schedules, within six months of the date of deposit of the instrument, all ODCs [other duties and charges] as applied on 15 April 1994 unless those levels breach previous bound levels of ODCs. In case any Member did not record the ODCs in the Schedule within six months of the date of deposit of the said instrument, the right to record it in the Schedule and to invoke it expired after six months. In the context of the recording requirements as prescribed in the Understanding, the meaning of Article II:1(b), second sentence is specifically that *imported products shall be exempted from all "other duties or charges" of any kinds in excess of those as validly recorded in the Schedule of the Member concerned*.[585]

7.429. In *Argentina – Textiles and Apparel*, the Panel stated that the inclusion of any "other duties and charges" in a Member's Schedule of Concessions does not exempt such duties and charges from an examination of their consistency with other provisions of the WTO agreements. In that particular case, Argentina claimed that, by having been recorded in its Schedule of Concessions, the contested statistical tax was automatically considered to be consistent with its obligations under Article VIII of the GATT 1994. The Panel rejected this claim.[586]

7.5.4.5 Conclusion

7.430. Given the Panel's finding that the duties resulting from the PRS come under other duties or charges, the next question facing the Panel is whether such duties satisfy the requirements of the second sentence of Article II:1(b) of the GATT 1994 and the Understanding on the Interpretation of Article II:1(b) of the GATT 1994.

7.431. According to the second sentence of Article II:1(b) of the GATT 1994 and paragraphs 1, 2, 3, 4 and 7 of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994,

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[584] Guatemala's request for the establishment of a panel, para. 2(b); first written submission, paras. 4.112-4.114; second written submission, paras. 5.52-5.55.

[585] Panel Report, *Dominican Republic - Import and Sale of Cigarettes,* para. 7.88. A similar conclusion was reached by the Panel in *Chile - Price Band System*, para. 7.107.

[586] Panel Report, *Argentina - Textiles and Apparel,* paras. 6.81-6.83.

Members are required to record in their Schedules of Concessions the other duties and charges applied in respect of all bound tariff lines. A Member which maintains or introduces a duty of this kind without having recorded it in the appropriate column in its Schedule of Concessions would be acting inconsistently with the second sentence of Article II:1(b) of the GATT 1994.

7.432. In the present case, it is a fact undisputed by the parties that the column corresponding to other duties or charges in Peru's Schedule of Concessions does not contain any record.[587] This fact shows that Peru did not record in its Schedule of Concessions any duty corresponding to "other duties or charges" within the six months following the date on which the instrument was deposited. In this respect, therefore, Peru would be acting inconsistently with its obligations under the second sentence of Article II:1(b) of the GATT 1994 if it applied a duty corresponding to "other duties or charges". The Panel recalls its finding that the duties resulting from the PRS form part of other duties or charges and notes that there is evidence that these duties or charges have been applied by Peru. Consequently, Peru has acted inconsistently with its obligations under the second sentence of Article II:1(b) of the GATT 1994.

7.6 The question of whether Peru has acted inconsistently with Article X:1 of the GATT 1994

7.6.1 Introduction

7.433. In this section, the Panel will examine Guatemala's claim that Peru did not publish certain essential elements of the challenged measure.

7.434. The Panel will commence its examination by taking up the arguments of Guatemala and Peru and the opinions of third parties regarding Guatemala's claim. It will then continue with its analysis of this case.

7.6.2 Main arguments of the parties

7.6.2.1 Guatemala's claim

7.435. Guatemala considers that Peru has violated its obligations under Article X:1 of the GATT 1994 by failing to publish certain aspects of the duties resulting from the PRS. In Guatemala's opinion, this did not prevent operators from being acquainted with the essential elements of the challenged measure.[588]

7.436. Guatemala claims that the disciplines of Article X:1 of the GATT 1994 apply to "laws, regulations, judicial decisions and administrative rulings of general application". Guatemala asserts that measures of general application are those "that apply to a range of situations or cases, rather than being limited in their scope of application".[589] Moreover, those measures must pertain to "the classification or the valuation of products for customs purposes", to "rates of duty, taxes or other charges", or to "requirements, restrictions or prohibitions on imports or exports", among other things.[590]

7.437. According to Guatemala, the publication requirement envisaged in Article X:1 of the GATT 1994 is intended to "enable governments and traders to become acquainted with [the rules in question]".[591] Guatemala asserts that the content and operation of the measures must be published in sufficient detail for economic operators to familiarize themselves with the norm.[592] Guatemala suggests that Article X:1 requires that detailed information on the content of the norm

[587] See Schedule XXXV - Peru, Uruguay Round, 15 April 1994 (Exhibit PER-18); Relevant Sections of Peru's Schedule of Concessions (Exhibit GTM-26).
[588] Guatemala's first written submission, para. 4.135.
[589] Guatemala's first written submission, para. 4.140 (citing Panel Report, *EC - Selected Customs Matters*, para. 7.116, and referring to Appellate Body Report, *EC - Poultry*, para. 111 and Panel Report, *Japan - Film*, para. 10.385).
[590] Guatemala's first written submission, para. 4.141.
[591] Guatemala's first written submission, para. 4.139.
[592] Guatemala's first written submission, para. 4.142.

should be published, "including sufficient information on the process of establishment of the essential elements of that norm."[593]

7.438. Guatemala considers that the rules governing the duties resulting from the PRS are subject to the obligations contained in Article X:1 of the GATT 1994, inasmuch as they are laws of general application which refer to "taxes or other charges".[594] Guatemala asserts that the methodologies and data used for determining the different components of the PRS are also subject to Article X:1. Those methodologies and those data constitute "essential elements" of the PRS, since they directly or indirectly determine the tax burden placed on importers.[595]

7.439. Guatemala considers that Peru failed to meet its obligation to publish the following essential elements of the challenged measure[596]: (a) the reasons for determining "import costs" at 3% of the reference price[597]; (b) the methodology for calculating the amounts for "freight" and "insurance" used to convert the ceiling, floor and reference prices from f.o.b. to c.i.f. values[598]; and (c) the international prices corresponding to the reference markets used to calculate the floor price, the ceiling price and the reference price.[599]

7.440. Guatemala also claims that Peru failed to meet its obligation to publish the rules, where these exist, authorizing its authorities to: (a) extend customs tables[600]; (b) calculate price ranges for dairy products by reference price intervals[601]; (c) calculate different duties and rebates for two categories of rice[602]; and (d) maintain the reference price for dairy products at the same level for two consecutive fortnights.[603]

7.6.2.2 Peru's defence

7.441. Peru agrees with Guatemala that the PRS as a whole is subject to the publication obligation envisaged in Article X:1 of the GATT 1994.[604] However, Peru argues that it has published the elements to which Guatemala refers and denies that it has an obligation to publish the reasoning or the components for the calculation of the PRS.[605] Thus, Peru considers that Article X:1 does not require a Member to publish all aspects of a measure, but only "the essential elements" thereof.[606]

7.442. Peru asserts that, since establishing the duties resulting from the PRS in 1991, it has published in its official journal "every one of the modifications regarding the duties, their elements and their calculation".[607] Peru adds that Supreme Decree No. 115-2001-EF itself, which was duly published, details the way in which duties or rebates operate, as well as the tariff lines subject to the PRS, the methodology for calculating the floor and ceiling prices of the range, the methodology for calculating the duty or the rebate generated by the system, the marker products and reference markets, freight and insurance, the customs tables, and amendments to the above-mentioned decree, international reference prices and applicable customs tables.[608]

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[593] Guatemala's first written submission, para. 4.146. See also second written submission, paras. 6.2-6.3 (citing Panel Reports, *Dominican Republic - Import and Sale of Cigarettes*, paras. 7.405 and 7.407; and *Thailand - Cigarettes (Philippines)*, para. 7.778).
[594] Guatemala's first written submission, para. 4.147.
[595] Ibid. paras. 4.148-4.149.
[596] Guatemala's second written submission, para. 6.4.
[597] Guatemala's first written submission, paras. 4.150-4.157; second written submission, paras. 6.11-6.16.
[598] Guatemala's first written submission, paras. 4.158-4.164; second written submission, paras. 6.17-6.23.
[599] Guatemala's first written submission, paras. 4.165-4.172; second written submission, paras. 6.6-6.10.
[600] Guatemala's first written submission, paras. 4.173-4.180.
[601] Ibid. paras. 4.181-4.185.
[602] Guatemala's first written submission, paras. 4.186-4.192.
[603] Ibid. paras. 4.193-4.195.
[604] Peru's first written submission, para. 5.112.
[605] Ibid. para. 5.104.
[606] Peru's first written submission, para. 5.109 (citing Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.405, with regard to the sufficiency of published information).
[607] Peru's first written submission, para. 5.113.
[608] Ibid.

7.443. Peru claims that Guatemala confuses the scope of the concept of "essential elements", seeking to extend it to information for which there is no publication requirement. Peru maintains that Guatemala is mistaken in describing certain information about the calculation of the PRS as "essential elements" and that the relevant information on the 3% import costs[609] and on the amounts for freight and insurance[610] was duly published by means of Supreme Decree No. 115-2001-EF. Peru adds that the prices used as a basis for calculating the floor price and the reference price are available to the public and that Supreme Decree No. 115-2001-EF specifies the relevant sources to which traders may have access in order to obtain those prices.[611]

7.444. Peru also claims that it has published all necessary information regarding extensions of the customs tables, the calculation of price ranges for dairy products by reference price intervals, the calculation of duties and rebates for the two categories of rice and the maintenance of the reference price for dairy products at the same level for two consecutive fortnights.[612]

7.445. Peru adds that, since the measure at issue is the duties resulting from the PRS and not the PRS itself, the elements that Guatemala describes as "essential" are unrelated to the measure and play a minor role in the calculation of such duties.[613]

7.6.3 Main arguments of the third parties

7.6.3.1 United States

7.446. The United States states that the Panel should exercise caution in applying the "essential elements" test articulated by the Panel in *Dominican Republic – Import and Sale of Cigarettes*, with respect to the publication requirement envisaged in Article X:1 of the GATT 1994. The United States has difficulty understanding what would be the basis, in the language of that provision, for invoking that test.[614]

7.6.3.2 European Union

7.447. The European Union argues that Article X:1 of the GATT 1994 requires the published information to contain a sufficient level of detail to enable the interested parties to become "acquainted" with the measures. In the European Union's opinion, the level of detail refers to the "essential elements" of the measure, as indicated by the Panel in *Dominican Republic – Import and Sale of Cigarettes*.[615]

7.448. The European Union considers that, although the elements identified by Guatemala could be subject to Article X:1 of the GATT 1994, the Panel should determine whether they are "essential elements" of the PRS.[616]

7.6.4 Assessment by the Panel

7.6.4.1 Introduction

7.449. The question the Panel has to resolve is whether, as alleged by Guatemala, Peru failed to publish certain essential elements of the duties resulting from the PRS. Guatemala contends that the following elements of the system were not published: (a) the reasons for determining "import costs" at 3% of the reference price; (b) the methodology for calculating the amounts for "freight" and "insurance" used to convert the ceiling, floor and reference prices from f.o.b. values to c.i.f. values; (c) the international prices corresponding to the reference markets used to calculate the floor, ceiling and reference prices; (d) the rules, if any exist, authorizing the Peruvian authorities to extend customs tables; (e) the rules, if any exist, authorizing the Peruvian

[609] Peru's first written submission, paras. 5.115-5.118; second written submission, paras. 4.8-4.11.
[610] Peru's first written submission, paras. 5.119-5.121; second written submission, paras. 4.12-4.13.
[611] Peru's first written submission, paras. 5.122-5.123; second written submission, paras. 4.14-4.15.
[612] Peru's first written submission, paras. 5.124-5.125.
[613] Peru's second written submission, paras. 4.1-4-2.
[614] United States' third-party statement, paras. 15-18.
[615] European Union's third-party written submission, paras. 57-58 (citing Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.405).
[616] European Union's third-party written submission, paras. 61-62.

authorities to calculate price ranges for dairy products by reference price intervals; (f) the rules, if any exist, authorizing the Peruvian authorities to calculate different additional duties and rebates for two categories of rice; and (g) the rules, if any exist, authorizing the Peruvian authorities to keep the reference price for dairy products at the same level for two consecutive fortnights.

7.6.4.2 The publication requirement under Article X:1 of the GATT 1994

7.450. Article X:1 of the GATT 1994 provides that:

> Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, *shall be published promptly in such a manner as to enable governments and traders to become acquainted with them*. Agreements affecting international trade policy which are in force between the government or a governmental agency of any [Member] and the government or governmental agency of any other [Member] shall also be published. The provisions of this paragraph shall not require any [Member] to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private. (emphasis added)

7.6.4.2.1 Measures covered by Article X:1 of the GATT 1994

7.451. The analysis under Article X:1 of the GATT 1994 entails determining whether the measure is a law, regulation, judicial decision or administrative ruling of general application made effective by any Member. In addition, the measure in question must refer to the classification or the valuation of products for customs purposes, to rates of duty, taxes or other charges, and to other matters listed in the article. It then has to be determined whether the measure in question was published promptly so that governments and traders could become acquainted with it.[617] In this regard, in *EC – Poultry*, the Appellate Body stated that Article X:1 of the GATT refers to the publication and application of measures subject to its scope and not to their substantive content.[618] The provision therefore embodies the principle of transparency.[619]

7.452. In *EC – IT Products,* the Panel held that the determination as to whether a measure is a "law", "regulation", "judicial decision" or "administrative ruling" of general application must be based primarily on the content and substance of the instrument, and not merely on its form or nomenclature.[620] In other words, a measure is not excluded from this scope simply because the Member applying it characterizes it as not belonging to the aforementioned categories.[621]

7.453. As already stated by various panels, Article X:1 of the GATT 1994 includes a wide range of measures that have the potential to affect trade and traders.[622] The Panel in *United States - COOL,* referring to the COOL law and regulations, stated: "[t]hese are formal legal instruments, which qualify as either 'laws' or 'regulations' within the meaning of Article X:1 of the GATT 1994".[623] The Panel in *Thailand – Cigarettes (Philippines)* found that the methodology used to calculate the maximum retail selling price (MRSP) of cigarettes was a measure that fell within the scope of Article X:1 of the GATT 1994.[624] In *EC – IT Products*, the Panel considered that,

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[617] Panel Report, *EC - IT Products,* para. 7.1016.
[618] Appellate Body Report, *EC - Poultry*, para. 115. See also Panel Report, *EC - IT Products*, paras. 7.1013-7.1015.
[619] Panel Report, *EC - IT Products,* fn. 1312 to para. 7.1015 (citing Appellate Body Report, *US - Underwear*, p. 21).
[620] Ibid. para. 7.1023.
[621] Ibid. paras. 7.1023 and 7.1024.
[622] Ibid. para. 7.1026.
[623] Panel Report, *US - COOL*, para. 7.815.
[624] Panel Report, *Thailand - Cigarettes (Philippines)*, paras. 7.773 and 7.778.

despite not being legally binding under EC law, the Explanatory Notes to the Combined Nomenclature (CNEN) constituted a measure within the meaning of Article X:1.[625]

7.454. Article X:1 of the GATT 1994 requires that the measures indicated be of general application. In this connection, in *EC – Selected Customs Matters*, the Panel clarified that the measures covered by Article X:1 of the GATT 1994 do not include laws, regulations, judicial decisions and administrative rulings with a limited scope of application but those which apply to a range of situations or cases.[626] Likewise, the Panel in *US – Underwear* held that an administrative ruling was of general application when it affected "an unidentified number of economic operators, including domestic and foreign producers".[627]

7.455. In *EC – IT Products*, the Panel found that the Explanatory Notes to the Combined Nomenclature (CNEN), by ensuring uniform application of the Common Customs Tariff and not applying to a single import or a single importer, fell within the category of measures of "general application".[628] In *Japan – Film*, the Panel addressed the question of whether an administrative ruling adopted in an individual case which identified criteria or principles applicable in future cases could be deemed of general application.[629] In *EC – Poultry*, the Appellate Body concluded that the EC rules pertaining to import licensing set out in a regulation were rules of general application.[630]

7.456. The next aspect which a panel has to address is whether the measure of general application refers to any of the specific elements cited in Article X:1 of the GATT 1994. These include "the classification or the valuation of products for customs purposes" and the "rates of duty, taxes or other charges" applied.[631]

7.457. With regard to the requirement that the measures must have been made effective, in *EC - IT Products*, in referring to a draft of the Explanatory Notes to the Combined Nomenclature (CNEN), the Panel considered that this category covered both measures which had been formally promulgated and those which had been brought into effect or made operative in practice.[632] In this sense, the expression "made effective" is essentially linked to the fact that the measure has been made operative.[633]

7.6.4.2.2 Aspects concerning the type of publication which Members are required to make pursuant to Article X:1 of the GATT 1994

7.458. The next requirement imposed by Article X:1 of the GATT 1994 is that the measure in question must be published promptly. In *EC – IT Products,* the Panel pointed out that "the meaning of prompt is not an absolute concept, i.e. a pre-set period of time applicable in all cases".[634] In that particular case, the Panel found that publication of CNEN amendments in the European Union's Official Journal a minimum of eight months after they had been made effective did not meet the requirement in Article X:1 of the GATT 1994.[635] Nevertheless, noting that these amendments had been published on the European Union's Comitology website (the European Union's web page on the computer network) before they became effective, it could be considered that the measure had been published promptly.[636]

7.459. The last requirement to be satisfied in determining full compliance with obligations under Article X:1 of the GATT 1994 is that the texts must be published "in such a manner as to enable governments and traders to become acquainted with them". In *EC – IT Products,* the Panel considered whether publication of the Explanatory Notes to the Combined Nomenclature (CNEN)

[625] Panel Report, *EC - IT Products*, para. 7.1029.
[626] Panel Report, *EC - Selected Customs Matters*, para. 7.116 (cited in Panel Report, *EC - IT Products*, para. 7.1032).
[627] Panel Report, *US - Underwear*, para. 7.65.
[628] Panel Report, *EC - IT Products*, para. 7.1034.
[629] Panel Report, *Japan - Film*, para. 10.388.
[630] Appellate Body Report, *EC - Poultry*, para. 111.
[631] Panel Report, *EC - IT Products*, para. 7.1035.
[632] Ibid. para. 7.1048.
[633] Ibid. paras. 7.1045-7.1047.
[634] Ibid. para. 7.1074.
[635] Ibid. para. 7.1076.
[636] Ibid. para. 7.1077.

on the Comitology website met this requirement, The first aspect clarified by the Panel was that under Article X:1, unlike Article X:2, publication does not need to be in an official publication.[637] The Panel went on to address the scope of the obligation to publish. Following the Panel's analysis in *Chile – Price Band System,* it found that the obligation analysed implied that the measures be made generally available through an appropriate medium.[638] It added that "not any manner of publication … would satisfy the requirement, but only those that would give power to or supply governments and traders with knowledge of the particular measures that is 'adequate' so that traders and Governments may become 'familiar' with them, or 'known' to them in a 'more or less complete' way".[639] In the analysis of that particular case, the Panel concluded that publication of the draft CNENs on the Comitology website did not satisfy this requirement.[640]

7.460. The Panel, in *Dominican Republic – Import and Sale of Cigarettes*, examined what aspects of a measure had to be published. In that case, the Panel had to determine whether some of the surveys undertaken by the Central Bank of the Dominican Republic, used as a basis for calculating the tax on cigarettes, were a measure covered by Article XI:1 of the GATT 1994. In its analysis, the Panel found that, even though the surveys in themselves were not administrative rulings of general application, they "would constitute an essential element of the administrative ruling: the determination of the tax base for cigarettes".[641] Because they were an essential element, the Panel found that "[i]n order to become acquainted with the process of establishing the tax base for the application of the Selective Consumption Tax on cigarettes, governments and traders would be entitled to obtain information on the results of the survey, as well as on the methodology used in order to conduct the survey".[642] The Panel therefore found that the Dominican Republic was obliged to publish information on these surveys or, alternatively, to resort to another method that would enable governments and traders to become acquainted with the method used to determine the tax base for the Selective Consumption Tax on cigarettes.[643]

7.461. In a similar vein, in *Thailand – Cigarettes (Philippines)*, the Panel addressed the issue of whether the data used by Thailand to calculate the maximum retail selling price (MRSP) for cigarettes had to be published. In the complainant's opinion, these data fell within the scope of Article X:1 of the GATT 1994 as they were "essential elements" in the terms identified by the Panel in *Dominican Republic – Import and Sale of Cigarettes.*[644] In response, Thailand asserted that such information was not of general application and included company-specific confidential data.[645] The Panel concluded that such data could not be considered generally and prospectively applicable rules as they concerned company-specific information subject to confidentiality.[646] With regard to application of the "essential element" test, the Panel found that it did not apply to that particular case as the information that was the subject of the dispute was confidential and company-specific, whereas in the case of the Dominican Republic the information in question was publicly available.[647]

7.462. With regard to the content of the publication of the relevant rules, the Panel in *Thailand - Cigarettes (Philippines)* also considered whether the methodology used to calculate the maximum retail selling price (MRSP) had been published in such a way as to enable importers to become acquainted with it. In that particular case, Thailand argued that the elements of the methodology were clear, based on certain information included in the preamble to the rules which applied the MRSPs for cigarettes. The Panel considered that the publication in question was not sufficient to fulfil obligations under Article X:1 of the GATT 1994; for importers to become acquainted with the methodology, Thailand should have enabled them to become familiar with aspects such as: how the information provided by the importers is processed and the way in which the authorities determine marketing costs (used to calculate the MRSPs for cigarettes).[648]

[637] Panel Report, *EC - IT Products*, para. 7.1082.
[638] Ibid. paras. 7.1083 and 7.1084 (citing Panel Report, *Chile - Price Band System*, para. 7.128).
[639] Ibid. para. 7.1086.
[640] Ibid. para. 7.1087.
[641] Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.405.
[642] Ibid. para. 7.407.
[643] Ibid. para. 7.414.
[644] Panel Report, *Thailand - Cigarettes (Philippines),* paras. 7.792-7.796.
[645] Ibid. paras. 7.797-7.801.
[646] Ibid. para. 7.806.
[647] Ibid. paras. 7.807-7.808.
[648] Ibid. para. 7.789.

7.463. In *Thailand – Cigarettes (Philippines)*, the Panel also examined the sufficiency of the publication of the generally applicable rules governing the right of importers to restitution of the guarantees deposited for the payment of certain internal taxes. In this connection, the Panel concluded that the rules did not clearly explain the existence of such a right, so importers might not be aware of its exact nature. In the Panel's view, this was a violation of the obligation contained in Article X:1 of the GATT 1994.[649]

7.464. Article X:1 of the GATT 1994 also provides that "[t]he provisions of this paragraph shall not require any [Member] to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private".

7.465. Concerning the confidentiality requirement, in *Thailand – Cigarettes (Philippines)*, the Panel considered whether publication of the data used to calculate the maximum retail selling price (MRSP) of cigarettes would be equivalent to disclosing "confidential information" within the meaning of Article X:1 of the GATT 1994. The Panel had already found that it was not of general application, being company-specific information; therefore, for the sake of argument, it considered that the Philippines had not met the burden of proving a *prima facie* violation of the obligation to publish certain measures, inasmuch as it had acknowledged the confidential nature of the information which it claimed should be published. The Panel concluded that there was no obligation under Article X:1 of the GATT 1994 to publish a non-confidential summary of the confidential information.[650]

7.6.4.3 Conclusion

7.466. The Panel has already determined that the duties resulting from the PRS are inconsistent with Peru's obligations under Article 4.2 of the Agreement on Agriculture and the second sentence of Article II:1(b) of the GATT 1994.[651] As recognized by the Appellate Body, panels are not obliged to deal with all the legal arguments put forward by the parties.[652] The Appellate Body explained that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'."[653]

7.467. Having found that the duties resulting from the PRS are inconsistent with Peru's substantive obligations under the WTO agreements, it is not necessary for the Panel also to address the issue of whether certain elements of the system were published in the manner required by Article XI:1 of the GATT 1994. Any finding on the latter aspect would not alter the previous findings and would not help the DSB to make sufficiently precise recommendations to enable prompt compliance on the part of Peru. The Panel will not therefore rule on the claims made by Guatemala under Article X:1 of the GATT 1994 as regards failure to publish certain essential elements of the measure at issue.

7.7 The question of whether Peru has acted inconsistently with Article X:3(a) of the GATT 1994

7.7.1 Introduction

7.468. In this section, the Panel will examine Guatemala's claim that Peru did not administer the challenged measure in a reasonable manner. The Panel will commence its examination by presenting the arguments of Guatemala and Peru and the opinions of third parties with regard to Guatemala's claim. The Panel will then set forth its analysis of the issue.

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[649] Panel Report, *Thailand - Cigarettes (Philippines),* paras. 7.858-7-861.
[650] Ibid. para. 7.819.
[651] See above, paras. 7.371-7.372 and 7.431-7.432.
[652] See Appellate Body Report, *US - Wool Shirts and Blouses,* pp. 21-22 (citing, *inter alia*, GATT Reports, *EEC - Import* Restrictions, BISD 30S/129, para. 33; *Canada - FIRA*, BISD 30S/140, para. 5.16; *US - Sugar Quota*, BISD 31S/67, paras. 4.5 and 4.6; *Japan - Semi-Conductors*, BISD 35S/116, para. 122; and *US - MFN Footwear,* BISD 39S/128, para. 6.18.
[653] Appellate Body Report, *Australia - Salmon*, para. 223.

7.7.2 Main arguments of the parties

7.7.2.1 Guatemala's claim

7.7.2.1.1 Lack of uniformity and impartiality in applying the rounding method

7.469. Guatemala initially claimed that Peru acted inconsistently with Article X:3(a) of the GATT 1994 owing to lack of uniformity and impartiality in calculating the additional duties and tariff rebates resulting from the PRS, in application of the rounding method. Guatemala contended that Peru facilitated upward rounding for the calculation of duties, and downward rounding for the calculation of rebates.[654]

7.470. During the proceedings, Peru explained that rounded values are presented in its publications, but that the values are not rounded for the purpose of the actual calculations.[655] In the light of these explanations and information submitted by Peru, Guatemala withdrew this claim.[656] The Panel will therefore not address this issue.

7.7.2.1.2 Lack of reasonableness in observance of the statutory provisions of the Price Range System

7.471. Guatemala claims that Peru administers the measure at issue in an unreasonable manner inasmuch as, with respect to four specific practices, Peru does not comply with the requirements of its own legislation.[657] Guatemala asserts that the administration of a measure that is not carried out in conformity with the relevant domestic legislation does not meet the requirement of reasonableness provided for in Article X:3(a) of the GATT 1994.[658]

7.472. First of all, Guatemala claims that Peru extended the customs tables for the previous six months instead of carrying out a new calculation, a situation not provided for in the rules governing the PRS, and for which Peru provided no legal justification.[659]

7.473. Guatemala rejects the idea that, in order to comply with Article X:3(a) of the GATT 1994, it is sufficient for the Executive to have an "inherent power" to exercise discretion in the administration of a measure, if this has no basis in the text of the measure.[660] Guatemala asserts that an authority's exercise of discretion must conform to the limits set forth in Article X:3(a), that is to say that it cannot entail unreasonable administration.[661]

7.474. Secondly, Guatemala maintains that, in the customs tables for dairy products, Peru uses reference price intervals instead of individual reference prices in accordance with the prescribed formulas. Guatemala states that, if the regulations were applied correctly, the result would lead to an additional duty for each reference price.[662]

7.475. Guatemala does not consider relevant the fact that the first customs tables, in 2001, contained intervals for dairy products. Guatemala asserts that the fact that the first customs tables contained such intervals means that Peru has acted contrary to its legislation since the first act implementing Supreme Decree No. 115-2001-EF.[663]

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[654] Guatemala's first written submission, paras. 4.206-4.217; Peruvian practices of rounding additional duties and rebates (Exhibit GTM-18).

[655] Peru's first written submission, paras. 5.134-5.136; response to Panel question No. 65, para. 156; "There is no rounding problem" (Exhibit PER-45); Rounding (Exhibit PER-73).

[656] Guatemala's second written submission, paras. 7.23-7.24.

[657] Guatemala's first written submission, para. 4.129; opening statement at the first meeting of the Panel, paras. 68-70.

[658] Guatemala's first written submission, para. 4.204 (citing Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, paras. 7.385-7.388); second written submission, para. 7.2; response to Panel question No. 79, paras. 264-267.

[659] Guatemala's second written submission, paras. 7.3-7.6.

[660] Peru's second written submission, para. 4.5.

[661] Guatemala's opening statement at the second meeting of the Panel, paras. 35-37.

[662] Guatemala's first written submission, paras. 4.219-4.220; second written submission, paras. 7.7-7.12.

[663] Guatemala's response to Panel question No. 143, paras. 201-206.

7.476. Thirdly, Guatemala argues that Peru keeps the reference price for dairy products at the same level for two consecutive fortnights, in breach of its internal regulations. Guatemala considers that the fact that the price of the marker product is published monthly does not lessen the requirement in the Peruvian regulations that reference prices must be furnished every two weeks.[664]

7.477. Finally, Guatemala contends that Peru uses different additional duties and tariff rebates for "pounded rice" and "paddy rice" in relation to each reference price for the rice customs tables. In Guatemala's view, the proper implementation of the regulations would generate a single duty or rebate for each reference price under the customs table.[665]

7.478. Guatemala indicates that the instruments containing the breakdown of products are not relevant because they belong to the legal framework of the 1991 specific duty system, which is not in force.[666] Nor does Guatemala consider relevant the fact that the first PRS customs tables contained two separate categories of rice, which means that Peru has acted in a manner contrary to its legislation since the first act of implementation of Supreme Decree No. 115-2001-EF.[667]

7.7.2.2 Peru's defence

7.479. Peru states that its practice is reasonable and that Guatemala is seeking to equate the obligation of reasonableness with the publication obligation.[668] Peru points out that Article X:3(a) of the GATT 1994 does not affect the "inherent authority" of each Member to exercise its discretion with regard to the management and administration of its measures, provided that it acts "within the international tariff binding limits" and within the national limit imposed by its own legal order.[669]

7.480. First, with respect to the extension of the customs tables, Peru claims that the Supreme Decrees are a modification (in the form of an extension) of the measure and not an application of the measure.[670] Peru asserts that the possibility for a State to amend its regulations is supported by its normative framework, since the Executive has the inherent authority to issue supreme decrees amending Supreme Decree No. 115-200-EF, which does not prohibit extensions.[671] Peru also asserts that the extension or non-extension of customs tables is a matter of sovereign authority, in the area of trade policy, to decide whether or not to maintain a certain level of trade protection. Peru adds that such actions were taken in accordance with the relevant constitutional and legal requirements and sufficiently well in advance to enable traders to become acquainted with them.[672]

7.481. Secondly, with respect to the intervals used in the customs tables for dairy products, Peru asserts that the intervals are clearly indicated in Annex VI to Supreme Decree No. 115-2001-EF, and the fact that Annex III does not mention them is not related to the application of the duty resulting from the PRS. Peru adds that there is nothing absurd about the use of intervals for dairy products, since it is consistently applied and published with no element of surprise or arbitrariness, under the authority of the Executive.[673] Peru adds that the use of intervals for dairy products pre-dates the publication of Supreme Decree No. 115-2001-EF, as is shown in previous instruments.[674] Peru also explains that dairy product prices have historically

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[664] Guatemala's first written submission, paras. 4.219-4.220; second written submission, paras. 7.13-7.18.

[665] Guatemala's first written submission, paras. 4.219-4.220; second written submission, paras. 7.19-7.22.

[666] Guatemala's opening statement at the first meeting of the Panel, para. 71; response to Panel question No. 142, paras. 197-200.

[667] Guatemala's response to Panel question No. 143, paras. 201-206.

[668] Peru's first written submission, paras. 5.137-5.138.

[669] Peru's second written submission, paras. 4.16-4.17.

[670] Peru's second written submission, para. 4.19 (referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.380-7382).

[671] Peru's second written submission, paras. 4.19-4.21.

[672] Peru's response to Panel question No. 136, paras. 134-135.

[673] Peru's second written submission, paras. 4.22-4.24.

[674] Peru's response to Panel question No. 143, paras. 142-143; Supreme Decree No. 133-94-EF (Exhibit PER-74); Supreme Decree No. 083-98-EF (Exhibit PER-25); Supreme Decree No. 133-99-EF (Exhibit PER-26); Supreme Decree No. 021-2001-EF (Exhibit PER-49).

been subject to a wide monthly variation, which would make it impractical for their presentation to be similar to that of other products.[675]

7.482. Thirdly, with respect to the maintenance of dairy product reference prices at the same level for two consecutive fortnights, Peru asserts that, as established in Supreme Decree No. 115-2001-EF, the international prices of marker products used as a basis for calculating those reference prices are published monthly.[676]

7.483. Fourthly, Peru claims that paddy rice and pounded rice have been treated separately since the establishment of the duty system in 1991, and that the distinction between the two categories of rice is made in Supreme Decree No. 114-93-EF and has not been revoked or replaced. In Peru's opinion, it is not unreasonable to apply different amounts to products that are different (in this case, the raw material – paddy rice – and the final product – pounded rice).[677]

7.7.3 Main arguments of the third parties – European Union

7.484. The European Union points out that Article X:3(a) of the GATT 1994 concerns the method of application of the measures identified in Article X:1 of the GATT 1994 and that the requirements of uniformity, impartiality and reasonableness are distinct from each other.[678] The European Union also asserts that the complainant must present solid evidence to demonstrate a breach of that Article and that the probative value of the evidence will depend on the circumstances of each case.[679]

7.485. The European Union refers to the interpretation of the terms uniform, impartial and reasonable, and states that the Panel in *Dominican Republic – Import and Sale of Cigarettes* found with regard to the Selective Consumption Tax of the Dominican Republic that the fact of not relying on the rules in force at the time of the decision, disregarding them and using other methods, amounted to an unreasonable administration.[680]

7.486. The European Union does not question the characterization of the Peruvian measure in respect of Article X:1 of the GATT 1994, but asserts that the Panel will have to decide whether Guatemala has succeeded in demonstrating the alleged lack of uniform, impartial and reasonable administration.[681]

7.7.4 Assessment by the Panel

7.7.4.1 Article X:3(a) of the GATT 1994

7.487. Article X:3(a) of the GATT 1994 provides as follows:

> Each [Member] shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

[675] Peru's response to Panel question No. 137, para. 136.
[676] Peru's second written submission, paras. 4.25-4.26; response to Panel question No. 139, para. 137.
[677] Peru's second written submission, paras. 4.27-4.28; response to Panel question No. 142, paras. 140-141; response to Panel question No. 143, paras. 142-143; and Supreme Decree No. 114-93-EF (Exhibit PER-24).
[678] European Union's third-party written submission, paras. 64-65.
[679] Ibid. paras. 66-67.
[680] Ibid. paras. 68-71.
[681] Ibid. para. 74.

7.7.4.2 General considerations

7.488. In *US – Shrimp*, the Appellate Body indicated the following with regard to the essence of this obligation:

> It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations.[682]

7.489. The Appellate Body also noted that:

> [A]llegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances. Such allegations should not be brought lightly, or in a subsidiary fashion. A claim under Article X:3(a) of the GATT 1994 must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a) of the GATT 1994.[683]

7.7.4.3 Measures covered

7.490. The text of Article X:3(a) of the GATT 1994 shows that the obligation contained therein extends to the application of the laws, regulations, judicial decisions and administrative rulings referred to in Article X:1.

7.491. In relation to Article X:1 of the GATT 1994, the kind of measures covered by this paragraph were examined.[684] That analysis will not be repeated here.

7.7.4.4 Meaning of administration

7.492. With regard to the term "administration", in *EC – Bananas III*, the Appellate Body explained that the obligation in Article X:3(a) of the GATT 1994 refers to the administration of the rules and not to their substantive content.[685] Likewise, the Appellate Body stated that:

> [To] the extent that [an] appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication* or *administration*, that appeal falls outside the scope of Article X of the GATT 1994. The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994.[686]

7.493. The Appellate Body summarized its reasoning in the two above-mentioned paragraphs in the following way:

> [I]n *EC – Bananas III* and *EC – Poultry*, the Appellate Body distinguished between, on the one hand, the laws, regulations, judicial decisions, and administrative rulings of general application set out in Article X:1 of the GATT 1994 and, on the other hand, the administration of these legal instruments. The Appellate Body reasoned that, as Article X:3(a) establishes disciplines on the *administration* of the legal instruments of the kind described in Article X:1, claims concerning the *substantive content* of these Article X:1 legal instruments fall outside the scope of Article X:3(a).[687]

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[682] Appellate Body Report, *US - Shrimp*, para. 183.
[683] Appellate Body Report, *US - Oil Country Tubular Goods Sunset Reviews*, para. 217.
[684] See above, paras. 7.451-7.457.
[685] Appellate Body Report, *EC - Bananas III*, para. 200.
[686] Appellate Body Report, *EC - Poultry*, para. 115. (footnote omitted)
[687] Appellate Body Report, *EC - Selected Customs Matters*, para. 199.

7.494. Lastly, it should be pointed out that the Panel in *US – Stainless Steel (Korea)* stated that Article X:3(a) of the GATT 1994 does not serve to test the consistency of a measure with a Member's domestic law or practice:

> [T]he WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements".[688] It was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system[689], and a function WTO panels would be particularly ill-suited to perform.[690]

7.7.4.5 The requirement of reasonableness

7.495. In *Argentina – Hides and Leather*, the Panel explained that the requirements of uniformity, impartiality and reasonableness are legally independent:

> As a preliminary matter, we note that Article X:3(a) provides that the administration of Customs laws, regulations and rules must be uniform, impartial and reasonable. Normally, we would address these three considerations in the order they appear in the treaty text. However, we note that in this instance the three requirements are legally independent in that Customs laws regulations and rules must satisfy each of the three standards. This gives us some freedom in the manner of discussing them.[691]

7.496. Following the withdrawal of the claim regarding the method of rounding, the present case only concerns the claims raised by Guatemala with respect to the reasonableness requirement, so this will be the only requirement to be examined by the Panel.

7.497. With regard to the reasonableness requirement, in *Dominican Republic – Import and Sale of Cigarettes,* the Panel explained the following:

> Read in the context of Article X, which is entitled "Publication and Administration of Trade Regulations", the ordinary meaning of the word "reasonable", refers to notions such as "in accordance with reason", "not irrational or absurd", "proportionate", "having sound judgement", "sensible", "not asking for too much", "within the limits of reason, not greatly less or more than might be thought likely or appropriate", "articulate".[692, 693] (emphasis original)

7.498. In *China – Raw Materials*, the Panel added the following:

> Applying this definition to the facts, reasonable administration could be considered to be administration that is equitable, appropriate for the circumstances and based on rationality.[694]

7.499. Lastly, in *US – COOL*, the Panel explained that the analysis of a claim of violation of the reasonableness requirement entails a case-by-case examination of the facts:

> In our view, whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails a consideration of factual circumstances specific to each case. This is confirmed by previous disputes where the requirement of reasonable administration was understood as requiring the examination of the

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[688] (Footnote original) *DSU* Article 3.2.
[689] (Footnote original) It is for this reason that both Article X:3(b) of *GATT 1994* and Article 13 of the *Anti-Dumping Agreement* require Members to maintain appropriate judicial, arbitral or administrative tribunals or procedures.
[690] Panel Report, *US - Stainless Steel (Korea)*, para. 6.50.
[691] Panel Report, *Argentina - Hides and Leather*, para. 11.86.
[692] (Footnote original) *The New Shorter Oxford English Dictionary*, *supra* note 52, Vol. II, p. 2,496.
[693] Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.385.
[694] Panel Report, *China - Raw Materials,* para. 7.696. (The Appellate Body declared part of the Panel's analysis superfluous and having no legal effect for procedural matters).

features of the administrative act at issue in the light of its objective, cause or the rationale behind it.[695, 696]

7.7.4.6 Conclusion

7.500. The Panel has already determined that the duties resulting from the PRS are inconsistent with Peru's obligations under Article 4.2 of the Agreement on Agriculture and the second sentence of Article II:1(b) of the GATT 1994.[697] As already mentioned, panels are not obliged to address all the legal claims made by the parties and only have to consider those claims for which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings to allow for prompt compliance by a Member with those recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all Members.

7.501. Having found that the duties resulting from the PRS are inconsistent with Peru's substantive obligations under the WTO agreements, it is not necessary for the Panel also to address the question of whether, in certain respects, Peru administers the system in a reasonable manner, as required by Article X:3(a) of the GATT 1994. Any finding on the latter aspect could not modify the previous conclusions and would not help the DSB in making sufficiently precise recommendations to allow for prompt compliance by Peru. The Panel therefore expresses no opinion on the claims made by Guatemala relating to Article X:3(a) of the GATT 1994 as regards unreasonable administration of the challenged measure.

7.8 Alternative claim under the Customs Valuation Agreement

7.502. Guatemala puts forward an alternative claim under the Customs Valuation Agreement, but only in the event that the Panel finds that the duties resulting from the PRS are ordinary customs duties within the meaning of Article II of the GATT 1994. If this were to be the case, Guatemala contends that this system leads to customs valuation of certain agricultural products on the basis of a minimum, arbitrary or fictitious price scheme, which is inconsistent with the obligations in Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement, more particularly paragraphs (f) and (g) of Article 7.2 thereof.[698]

7.503. Inasmuch as the Panel has found that the duties resulting from the PRS are not ordinary customs duties, Guatemala's proviso in relation to examination of its claim under the Customs Valuation Agreement has not been met. Accordingly, it is not appropriate for the Panel to express any opinion on Guatemala's alternative claim under the Customs Valuation Agreement.

7.504. The Panel, nevertheless, notes that in the section 7.3 on the factual description of this dispute, there are sufficient factual elements so that if the criterion for making the alternative claim is met in any appeal, the Appellate Body may complete the analysis of Guatemala's alternative claim.

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[695] (Footnote original) In *Argentina - Hides and Leather*, for example, the Panel considered access to confidential information by a competitor in the market to be a relevant factor in determining reasonableness of the administrative action in that dispute (para. 11.86). We further recall the Appellate Body's analysis in *Brazil - Retreaded Tyres* that "the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence" (Appellate Body Report, *Brazil - Retreaded Tyres*, para. 226; Panel Report, *Thailand - Cigarettes*, para. 7.291). In *Thailand - Cigarettes (Philippines),* the Philippines claimed that the appointment of dual function officials as directors of a company under administrative proceedings constituted unreasonable administration because the officials were in a position where they could gather and reveal confidential information on Philippines industries' direct competitors. The Panel found that Thailand did not act inconsistently with Article X:3(a). However, the overall delays in the administrative proceedings shown throughout the course of the review process of customs valuation were considered by the panel "*not* appropriate or proportionate" considered against the nature of the circumstances concerned, and therefore, the administration was considered to be "unreasonable" (Panel Report, *Thailand - Cigarettes*, para. 7.969). In *Dominican Republic - Import and Sale of Cigarettes*, the Panel found that the Dominican Republic had administered the provisions governing the Selective Consumption Tax in a manner that was "unreasonable" and therefore inconsistent with Article X:3(a) of GATT 1994 (paras. 7.365-7.394).

[696] Panel Report, *US - COOL,* para. 7.851.

[697] See above, paras. 7.371-7.372 and 7.431-7.432.

[698] Guatemala's first written submission, paras. 4.222-4.229; second written submission, paras. 8.1-8.18.

7.9 The question of whether, by means of the FTA, the parties modified their WTO rights between themselves

7.9.1 Introduction

7.505. This Panel has found that the duties resulting from the PRS are inconsistent with Article 4.2 of the Agreement on Agriculture, with the second sentence of Article II:1(b) of the GATT 1994 and with the Understanding on Article II:1(b) of the GATT 1994. In the light of these findings, the condition for the Panel to address Peru's defence that, by means of the FTA, the parties modified any provision of the WTO agreements which prohibits the PRS has been met.[699]

7.9.2 Main arguments of the parties

7.9.2.1 Peru

7.506. Peru states that, as a result of the mutual concessions that were negotiated, Guatemala agreed in paragraph 9 of Annex 2.3 to the FTA that Peru could maintain its PRS; Guatemala also gave an undertaking that, in the event of any inconsistency between the FTA and the WTO Agreement, the provisions of the FTA would prevail.[700]

7.507. According to Peru, if the Panel were to conclude that the PRS is inconsistent with the WTO agreements, it would not be possible for Peru to maintain the PRS, and this would create a conflict with what was agreed by the parties in the FTA.[701] Peru argues that, inasmuch as the parties agreed that the FTA would prevail in such situations, this would result in the modification, as between the parties, of their WTO rights and obligations, to the extent that such rights and obligations might be inconsistent with the provisions of the FTA.[702]

7.508. Peru refers to Article 41 of the Vienna Convention[703] in support of its argument that two States parties to a multilateral treaty may modify their obligations as between themselves.[704] Peru maintains that the Appellate Body has recognized that Members may waive their rights in the WTO framework or modify them, expressly or tacitly.[705] Peru states that Article XXIV of the GATT 1994 demonstrates that Members may modify their WTO rights by means of regional trade agreements.[706] Peru asserts that a modification of rights and obligations of this kind, which would

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[699] Peru's second written submission, para. 2.63.

[700] Peru's first written submission, paras. 3.74, 3.82, 4.3 and 4.29; second written submission, paras. 2.17, 2.19-2.22 and 2.52; opening statement at the first meeting of the Panel, paras. 8, 18, 24-25 and 27; opening statement at the second meeting of the Panel, paras. 5, 8 and 46.

[701] Peru's second written submission, paras. 2.63-2.65; opening statement at the second meeting of the Panel, para. 58.

[702] Peru's first written submission, paras. 4.22 and 4.26; second written submission, paras. 2.3, 2.17 and 2.63; opening statement at the first meeting of the Panel, para. 27; opening statement at the second meeting of the Panel, paras. 57-58; response to Panel question No. 37, para. 82; response to Panel question No. 38, para. 86; response to Panel question No. 97, para. 25.

[703] Article 41 of the Vienna Convention provides as follows:

> **Agreements to modify multilateral treaties between certain of the parties only**
> 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
> (a) the possibility of such a modification is provided for by the treaty; or
> (b) the modification in question is not prohibited by the treaty and:
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
> 2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

[704] Peru's first written submission, para. 4.28; second written submission, para. 2.59.

[705] Peru's first written submission, paras. 4.23-4.25 (citing Appellate Body Report, *EC - Bananas III (Article 21.5 - Ecuador II) / EC - Bananas III (Article 21.5 - US)*, para. 217); second written submission, para. 2.60; opening statement at the first meeting of the Panel, para. 27; response to Panel question No. 37, paras. 80-81.

[706] Peru's first written submission, para. 4.28 (citing Appellate Panel Report *Turkey - Textiles*, para. 9.103); opening statement at the first meeting of the Panel, paras. 26-27; opening statement at

not affect the other WTO Members, is different from the multilateral amendment procedure provided for in Article X of the WTO Agreement.[707]

7.509. In other words, Peru suggests that, even if Guatemala considered that it has a WTO right to challenge the application of the PRS, that right was concretely and unequivocally modified by the terms agreed in the FTA, to the effect that Peru could maintain the PRS and that the provisions of the FTA would take precedence over those of the WTO.[708]

7.510. In Peru's opinion, it would be neither useful nor correct for the Panel to analyse Guatemala's claims as if the FTA did not exist.[709] Peru states that, if the Panel were to accept Guatemala's claims, it would be encouraging WTO Members to have recourse to the DSB in order to repudiate bilateral agreements signed under Article XXIV of the GATT 1994 and alter the balance achieved in the framework of such agreements.[710] Peru therefore requests that the Panel conclude that, by virtue of what was agreed by the parties in the FTA: (a) Guatemala may not engage in a procedure against Peru; or alternatively (b) the parties modified their rights and obligations under the WTO agreements, to the extent that such rights and obligations might be incompatible with the provisions of the FTA.[711]

7.9.2.2 Guatemala

7.511. Guatemala asserts that, regardless of whether or not the FTA is in force, it has no relevance to this dispute.[712] According to Guatemala, Peru proposes that the Panel examine whether there is an inconsistency between the FTA and the WTO Agreement and that it determine whether, through the FTA, Guatemala modified its WTO rights.[713] In Guatemala's opinion, such an assessment would require the Panel to act outside its terms of reference, since panels cannot entertain disputes not related to the WTO covered agreements.[714]

7.512. Guatemala contends that the rights and obligations contained in the WTO agreements can only be modified through the procedures established in Article X of the WTO Agreement and not through a bilateral treaty.[715] Nor does Guatemala accept that the Parties can waive their WTO rights through an FTA, since such a waiver could only be made in the legal framework of the WTO, either in the context of a dispute settlement procedure, by means of a mutually agreed solution, or under multilaterally agreed decisions (such as the Ministerial Decision of 7 December 2013 on "Public stockholding for food security purposes").[716]

7.513. Guatemala argues that, even if it were accepted that the free trade agreement can be a legal vehicle for waiving WTO rights, Peru would have had to demonstrate that Guatemala, in the

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the second meeting of the Panel, paras. 9-10; response to Panel question No. 37, para. 82; response to Panel question No. 97, paras. 23-24.

[707] Peru's second written submission, paras. 2.56 and 2.61; opening statement at the second meeting of the Panel, para. 60.

[708] Peru's first written submission, para. 4.26; opening statement at the first meeting of the Panel, paras. 25 and 28; response to Panel question No. 38, paras. 83-86.

[709] Peru's first written submission, paras. 4.27 and 4.29.

[710] Peru's second written submission, paras. 2.66-2.68; opening statement at the first meeting of the Panel, para. 10; opening statement at the second meeting of the Panel, para. 12.

[711] Peru's first written submission, para. 4.30.

[712] Guatemala's response to Panel question No. 21, paras. 33 and 39; response to Panel question No. 22, para. 40.

[713] Guatemala's second written submission, paras. 9.29-9.30; response to Panel question No. 21, para. 34.

[714] Guatemala's second written submission, paras. 9.22-9.31 (citing Panel Report, *Mexico - Taxes on Soft Drinks*, paras. 56 and 78); response to Panel question No. 21, paras. 35 and 39.

[715] Guatemala's second written submission, para. 9.39-9.40; response to Panel question No. 21, para. 35.

[716] Guatemala's second written submission, paras. 9.8 and 9.16-9.18 (citing Appellate Body Report, *EC - Bananas III (Article 21.5 - Ecuador II) / EC - Bananas III (Article 21.5 - US)*, para. 228); opening statement at the first meeting of the Panel, para. 82; response to Panel question No. 21, paras. 36-37; response to Panel question No. 91, para. 19; comments on Peru's response to Panel question No. 97, para. 27.

FTA, waived its right to challenge the PRS before the WTO.[717] In Guatemala's opinion, no provision of the FTA contains such a statement of waiver and, on the contrary, Article 1.3.1 of the FTA confirms the WTO rights and obligations of both Parties; moreover, by means of Article 15.3 of the FTA, the Parties reserved the right to have recourse to the WTO dispute settlement mechanism.[718]

7.514. Guatemala asserts that, although paragraph 9 of Annex 2.3 to the FTA grants Peru the authority to maintain its PRS in respect of certain products, this does not represent a recognition that the PRS is WTO-consistent, nor does it exempt Peru from fulfilment of its obligations under the FTA itself and under the WTO agreements, nor again can it be read as an implicit or explicit relinquishment of the right to bring a case in accordance with the DSU.[719] Guatemala notes that the provisions of the FTA, read in conjunction and in their proper context, indicate that Peru has the authority to maintain its PRS in respect of a limited number of products, as long as, at the same time, it complies with its obligations under the WTO agreements, which does not prevent Guatemala from exercising its WTO rights.[720]

7.515. With respect to the possible inconsistency between the FTA and WTO rules, Guatemala affirms that in public international law there is a presumption against conflict.[721] In this connection, Guatemala maintains that, in this case, there are no mutually exclusive obligations, but only the exercise of a right under the FTA and compliance with an obligation under the WTO agreements, for which reason Peru could comply with its obligations under both instruments (the FTA and the WTO agreements).[722]

7.516. Guatemala also claims that Article XXIV of the GATT 1994 allows an exception to fulfilment of the most-favoured-nation treatment obligation in the context of a free trade agreement. Although this would enable the parties to grant each other greater rights, as between themselves, than under WTO rules, the free trade agreement could not modify the rights and obligations that continue to be vested in the Parties under the multilateral legal framework.[723]

7.517. Finally, Guatemala draws attention to the danger of WTO Members being permitted to waive their right to challenge measures through free trade agreements. In Guatemala's opinion, this would open the way for political pressures and negotiating power imbalances to impair the rights of smaller and weaker parties.[724]

7.9.3 Main arguments of the third parties

7.9.3.1 Brazil

7.518. In Brazil's opinion, if the FTA were in force, it could be relevant to determine Peru's and Guatemala's rights and obligations within the ambit of their bilateral relations and with regard to their bilateral commitments. However, as it has not entered into force, the FTA does not appear to be relevant as a rule of international law applicable between the parties, or to determine the law applicable in this dispute, which can be scrutinized in accordance with the covered agreements.[725]

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[717] Guatemala's second written submission, para. 9.14; opening statement at the first meeting of the Panel, paras. 81, 83 and 84 (citing Appellate Body Report, *EC - Bananas III (Article 21.5 - Ecuador II) / EC - Bananas III (Article 21.5 - US)*, para. 217); response to Panel question No. 21, para. 36.

[718] Guatemala's second written submission, para. 9.13; opening statement at the first meeting of the Panel, para. 83; opening statement at the second meeting of the Panel, para. 49; response to Panel question No. 21, para. 36.

[719] Guatemala's second written submission, paras. 9.9-9.10 and 9.42; opening statement at the first meeting of the Panel, para. 84; response to Panel question No. 25, paras. 49-51.

[720] Guatemala's second written submission, paras. 9.11-9.12 and 9.44; opening statement at the first meeting of the Panel, paras. 84-85; response to Panel question No. 25, paras. 50-51.

[721] Guatemala's second written submission, paras. 9.47-9.48 (citing Panel Report, *Indonesia - Autos*, para. 14.28 and fn. 649), response to Panel question No. 25, paras. 54-55.

[722] Guatemala's second written submission, paras. 9.49-9.51; response to Panel question No. 25, para. 56.

[723] Guatemala's opening statement at the second meeting of the Panel, paras. 47-48 (citing Appellate Body Report, *Turkey - Textiles*, para. 45 and fn. 13); comments on Peru's response to Panel question No. 97, para. 25.

[724] Guatemala's second written submission, paras. 9.19 and 9.20; response to Panel question No. 21, para. 38; comments on Peru's response to Panel question No. 97, paras. 28-29.

[725] Brazil's response to Panel question No. 1, p. 1.

7.9.3.2 United States

7.519. The United States considers that the FTA is not relevant to resolving this dispute.[726] The United States asserts that, if Peru is asking the Panel to make findings with regard to obligations outside the covered agreements or to refrain from making findings within its terms of reference, such a request should be rejected.[727] The United States asserts that there is no basis in the DSU for panels or the Appellate Body to resolve disputes unrelated to the WTO or to apply rules from other agreements in order to examine compliance with obligations contained in the WTO agreements.[728] Nor would there be any basis in the DSU for the Panel to decline to make findings on claims that fall within its terms of reference.[729]

7.520. The United States also asserts that the rights contained in the WTO agreements can only be modified by means of waivers, multilateral interpretations or amendments, in accordance with the provisions of the agreements themselves.[730] With regard to the possibility of waiving the right to have recourse to the WTO dispute settlement mechanism, the United States considers that a bilateral agreement lacks the particular status that mutually agreed solutions would have under the DSU.[731]

7.521. Finally, according to the United States, the fact that the FTA has not entered into force would be an additional reason for rejecting Peru's arguments, as there is no legal basis for Peru's assertion that provisions have been amended or rights waived under an existing multilateral agreement.[732]

7.9.3.3 European Union

7.522. The European Union asserts that the possibility for Members to waive their rights under the WTO agreements has been recognized by the Appellate Body.[733] In its opinion, when interpreting the WTO agreements, it may be relevant to consider both subsequent agreements between the parties regarding the application of the agreements and any relevant rule of international law applicable in the relations between the parties (without this implying that the FTA should be applied instead of, or in precedence to, the WTO agreements).[734] Consequently, the possibility that a Member, through a free trade agreement, may waive its rights in respect of WTO dispute settlement should not be dismissed *a priori*, and the analysis should be made on a case by case basis.[735]

7.523. The European Union considers that the analysis should begin with an assessment as to whether or not a Member has made a specific commitment to refrain from challenging a certain measure.[736] In the present case, an analysis would be required as to whether the FTA contains a clear commitment on the part of Guatemala to refrain from challenging the PRS in the WTO.[737]

7.524. The European Union considers that there is an apparent contradiction between Articles 1.3.1 and 1.3.2 of the FTA, to the extent that the first provision states that the parties

[726] United States' third-party statement, para. 19; response to Panel question No. 1, para. 1.
[727] United States' third-party written submission, paras. 36-43; third-party statement, para. 19; response to Panel question No. 1, para. 1.
[728] United States' third-party written submission, paras. 41-42 and 51 and fn. 62, (citing Appellate Body Reports, *Mexico - Taxes on Soft Drinks*, para. 56; *Brazil - Retreaded Tyres*, para. 228); third-party statement, para. 19.
[729] United States' third-party written submission, paras. 41-43 (citing Appellate Body Report, *Mexico - Taxes on Soft Drinks*, para. 53); response to Panel question No. 1, para. 1.
[730] United States' third-party written submission, para. 49; response to Panel question No. 1, para. 2.
[731] United States' third-party written submission, para. 50; third-party statement, para. 20.
[732] United States' response to Panel question No. 1, para. 4.
[733] European Union's third-party written submission, para. 17 (citing Appellate Body Report, *EC - Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 - US)*, para. 217).
[734] European Union's third-party written submission, para. 17 (citing Panel Report, *EC – Bananas III (Article 21.5 - Ecuador II),* para. 7.58; response to Panel question No. 1, para. 3 (citing Appellate Body Report, *US - Gasoline*, p. 17).
[735] European Union's response to Panel question No. 1, para. 2.
[736] European Union's third-party written submission, para. 17 (citing Appellate Body Report, *EC - Bananas III (Article 21.5 - Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 228).
[737] European Union's third-party written submission, para. 18; response to Panel question No. 1, para. 1.

consider their rights and obligations to be in conformity with their WTO obligations, while the second states that, in the event of inconsistency, the FTA rules shall prevail.[738] The European Union also observes that Article 15.3 of the FTA is confined to permitting the complaining party to choose the forum in which it wishes to bring its case and expressly mentions the WTO dispute settlement mechanism as one of the possible forums to which the parties may have recourse.[739]

7.9.4 Assessment by the Panel

7.525. Peru affirms that, if the Panel finds that the PRS is inconsistent with its obligations under the WTO agreements, there would be an inconsistency between the FTA (which allows Peru to maintain the PRS) and the WTO agreements (which prohibit the PRS). In the light of such inconsistency, Peru states that it should be understood that, the FTA has modified, as between the parties, those provisions of the WTO agreements which prohibit Peru from maintaining its PRS. Peru therefore claims that Guatemala waived the rights which it might have had under the WTO Agreement in relation to the PRS.

7.526. Peru's argument that the relevant clauses in the FTA – i.e. paragraph 9 of Annex 2.3 and Article 1.3 – modified certain obligations between the parties under the WTO agreements presupposes that those provisions in the FTA are legally binding on Guatemala and Peru. For this to be the case, the FTA would have had to enter into force. It is, however, an undisputed fact that the FTA has not yet entered into force.

7.527. As discussed above, a treaty signed by the parties but which has not yet entered into force has only limited legal effects. Inasmuch as the FTA has not entered into force, its relevant provisions are not currently legally binding on the parties.[740]

7.528. In the light of this fact, it is not necessary for this Panel to express an opinion on whether the parties may, through the FTA, modify between themselves their rights and obligations under the covered agreements; or whether there is a conflict of rules between the FTA and the covered agreements and the consequences such a conflict would have.

7.10 Special and differential treatment

7.529. Pursuant to Article 12.11 of the DSU:

> Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

7.530. Moreover, Article 12.10 of the DSU provides as follows:

> [I]n examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation.

7.531. In the present proceedings, none of the parties, neither the complainant nor the defendant, has invoked any provision of the WTO agreements in respect of special and differential treatment for developing countries. In any event, the Panel has taken into account the status of the parties as developing country Members, particularly when preparing the timetable for the proceedings after having heard their respective views. There are no other provisions on differential and more favourable treatment for developing country Members that should be the subject of special consideration by the Panel.

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[738] European Unions' third-party written submission, para. 18.
[739] Ibid. para. 19.
[740] See above, para. 7.88.

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.[741] 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".[742]

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.[743] 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.[744] 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.[745]

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.[746] 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.

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[741] Guatemala's first written submission, para. 5.2. See also second written submission, para. 10.2.

[742] Ibid.

[743] 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.

[744] 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.

[745] 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.

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