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WT/DS457/AB/R

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PERU – ADDITIONAL DUTY ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS

AB-2015-3

Report of the Appellate Body

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
ACP	African, Caribbean, and Pacific Group of States
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
Doha Ministerial Decision	Doha WTO Ministerial 2001: Ministerial Declarations and Decisions
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Enabling Clause	GATT 1979 Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, L/4903, 28 November 1979, BISD 26S, p. 203
f.o.b.	free on board
FTA	Free Trade Agreement between Peru and the Republic of Guatemala (*Tratado de libre comercio entre la República del Perú y la República de Guatemala*), 6 December 2011
GATS	General Agreement on Trade in Services
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
ILC	International Law Commission
ILC Articles	International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its fifty-third session, in 2001, published in *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two
Lomé Convention	The Fourth ACP-EC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994; extended by EC – The Fourth ACP-EC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186
Lomé Waiver	EC – The Fourth ACP-EC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186, 18 October 1996
Panel Report	Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R
PRS	price range system
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TBT Agreement	Agreement on Technical Barriers to Trade
USD	United States dollars
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

CASES CITED IN THIS REPORT

Short Title	Full Case title and citation
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000,:IX, p. 4299
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
Canada – Renewable Energy/ Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R 24 May 2013
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, p. 3127
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
Chile – Price Band System (Article 21.5 – Argentina)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/RW and Corr.1, adopted 22 May 2007, upheld by Appellate Body Report WT/DS207/AB/RW, DSR 2007:II, p. 613
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – Rare Earths	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591

Short Title	Full Case title and citation
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Turkey – Textiles	Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, p. 2345
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – COOL (Article 21.5 – Canada and Mexico)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015

Short Title	Full Case title and citation
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417

WORLD TRADE ORGANIZATION
APPELLATE BODY

Peru – Additional Duty on Imports of Certain Agricultural Products

Peru, *Appellant/Appellee*
Guatemala, *Other Appellant/Appellee*

Argentina, *Third Participant*
Brazil, *Third Participant*
China, *Third Participant*
Colombia, *Third Participant*
Ecuador, *Third Participant*
El Salvador, *Third Participant*
European Union, *Third Participant*
Honduras, *Third Participant*
India, *Third Participant*
Korea, *Third Participant*
United States, *Third Participant*

AB-2015-3

Appellate Body Division:

Bhatia, Presiding Member
Graham, Member
Zhang, Member

1 INTRODUCTION

1.1. Peru appeals certain issues of law and legal interpretations developed in the Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*[1] (Panel Report). The Panel was established to consider a complaint by Guatemala[2] with respect to a measure taken by Peru affecting imports of certain agricultural products.

1.2. In its request for the establishment of a panel, Guatemala identified the measure at issue in this dispute as the additional duties imposed by Peru on imports of a number of agricultural products (certain types of milk, maize, rice, and sugar). As described by Guatemala, these duties are determined using a mechanism known as the "Price Range System" (PRS) (*Sistema de Franja de Precios*), which operates on the basis of: (i) a floor price and a ceiling price, respectively reflecting averages of international prices over a recent past period of 60 months for each of the specified products; and (ii) a cost, insurance, and freight (c.i.f.) reference price, reflecting the average international price over a recent past period of two weeks for each of the specified products. An additional duty is applied if the reference price of the specified product is lower than the floor price. If the reference price is above the floor price but below the ceiling price, no additional duty is applied. If the reference price exceeds the ceiling price, the applicable tariff is reduced.[3]

1.3. The factual aspects of this dispute are set forth in greater detail in paragraphs 2.1 to 2.3, 7.30 to 7.42, and 7.97 to 7.167 of the Panel Report.

1.4. Guatemala claimed before the Panel that the additional duties imposed as a result of Peru's PRS are inconsistent with Article 4.2 of the Agreement on Agriculture because they constitute variable import levies and minimum import prices, or similar border measures. Moreover, Guatemala claimed that the duties at issue are duties or charges inconsistent with the second sentence of Article II:1(b) of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Guatemala also claimed that Peru had acted inconsistently with Articles X:1 and X:3(a) of the GATT 1994 respectively by: (i) failing to publish certain essential elements of the measure at issue; and (ii) administering the PRS in a manner that is not reasonable. In addition, Guatemala raised alternative claims under Articles 1, 2, 3, 5, 6, and 7 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), in the event that the Panel were to consider the duties resulting from the PRS to be ordinary customs duties. Finally, Guatemala requested the Panel to suggest, under the second sentence of

[1] WT/DS457/R, 27 November 2014.
[2] Request for the Establishment of a Panel by Guatemala, WT/DS457/2, 13 June 2013.
[3] Panel Report, paras. 2.2 and 7.99.

Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), that Peru completely dismantle the measure at issue and eliminate the duties resulting from the PRS and the PRS itself.[4]

1.5. In response, Peru requested the Panel to find that Guatemala had not initiated these dispute settlement proceedings in good faith, contrary to Guatemala's obligations under Articles 3.7 and 3.10 of the DSU, because Guatemala had allegedly accepted the maintenance of the PRS in a free trade agreement (FTA) signed between Peru and Guatemala on 6 December 2011.[5] Peru also asserted that the duties resulting from the PRS are: (i) ordinary customs duties within the meaning of the first sentence of Article II:1(b) of the GATT 1994; and (ii) outside the scope of Article 4.2 of the Agreement on Agriculture and the second sentence of Article II:1(b) of the GATT 1994. Peru contended that it had complied with the obligations under Articles X:1 and X:3(a) of the GATT 1994, and that Guatemala's claims under the Customs Valuation Agreement must be rejected because that Agreement does not apply to specific duties. Finally, in the event that the Panel were to find that the measure at issue is not WTO-consistent, Peru contended that this would generate an inconsistency between the covered agreements of the World Trade Organization (WTO) and the FTA between Peru and Guatemala, and that, in such a case, the terms of the FTA should prevail.[6]

1.6. In the Panel Report, circulated to WTO Members on 27 November 2014, the Panel found that:

a. there is no evidence that Guatemala had brought these dispute settlement proceedings in a manner contrary to good faith, and, therefore, there was no reason for the Panel to refrain from assessing the claims put forward by Guatemala[7];

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 of Article 4.2 of the Agreement on Agriculture[8];

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 of Article 4.2 of the Agreement on Agriculture[9];

d. by maintaining measures that constitute "variable import levies" or, at the least, are border measures "similar" to a "variable import levy", and which 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[10];

e. the additional duties resulting from the PRS constitute "other duties or charges … imposed on or in connection with the importation", within the meaning of the second sentence of Article II:1(b) of the GATT 1994; and, in applying measures that constitute "other duties or charges", without having recorded them in its Schedule of Concessions, Peru is acting inconsistently with its obligations under the second sentence of Article II:1(b) of the GATT 1994[11]; and

f. inasmuch as the FTA between Peru and Guatemala had not entered into force, it was not necessary for the Panel to rule on whether the parties could, by means of the FTA,

[4] Panel Report, paras. 3.1-3.3.
[5] Free Trade Agreement between the Republic of Peru and the Republic of Guatemala (*Tratado de libre comercio entre la República del Perú y la República de Guatemala*), 6 December 2011.
[6] Panel Report, paras. 3.5-3.7.
[7] Panel Report, para. 8.1.a.
[8] Panel Report, para. 8.1.b.
[9] Panel Report, para. 8.1.c.
[10] Panel Report, para. 8.1.d.
[11] Panel Report, para. 8.1.e.

modify as between themselves their rights and obligations under the WTO covered agreements.[12]

1.7. In the light of these findings, the Panel did 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 Peru had failed to publish certain elements of the measure at issue that Guatemala considers essential[13]; and

b. Peru's actions are inconsistent with its obligations under Article X:3(a) of the GATT 1994 because Peru administers the measure at issue in a manner that is not reasonable, given that Peru fails to observe the requirements of its own legislation.[14]

1.8. Moreover, the Panel did not consider it relevant to address Guatemala's claims that Peru has acted inconsistently with its obligations under Articles 1, 2, 3, 5, 6, and 7 of the Customs Valuation Agreement inasmuch as these claims were made by Guatemala as alternative claims, in case the Panel were to find that the additional duties resulting from the PRS are ordinary customs duties.[15]

1.9. The Panel thus found that, pursuant to Article 3.8 of the DSU, and to the extent that Peru has acted inconsistently with the provisions of the Agreement on Agriculture and the GATT 1994, Peru has nullified or impaired benefits accruing to Guatemala under those Agreements.[16]

1.10. With respect to Guatemala's request under the second sentence of Article 19.1 of the DSU, the Panel did not consider it appropriate to suggest that the proper way of implementing its recommendation would be through the elimination of the underlying mechanism for calculating the additional duties. Pursuant to Article 19.1 of the DSU, and having found that Peru is acting inconsistently with the provisions of the Agreement on Agriculture and the GATT 1994, the Panel recommended that Peru bring the challenged measure into conformity with its obligations under those Agreements.[17]

1.11. On 25 March 2015, Peru notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal and an appellant's submission pursuant to Rules 20 and 21, respectively, of the Working Procedures for Appellate Review[18] (Working Procedures). On 30 March 2015, Guatemala notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 13 April 2015, Peru and Guatemala each filed an appellee's submission.[19] On 15 April 2015, Brazil, Colombia, the European Union, and the United States each filed a third participant's submission.[20] On the same day, Argentina, China, El Salvador, Honduras, and India each notified its intention to appear at the oral hearing as a third participant.[21] On 22 May 2015, Ecuador and Korea also notified the Secretariat of their intention to appear at the oral hearing.[22]

[12] Panel Report, para. 8.1.f.
[13] Panel Report, para. 8.2.a.
[14] Panel Report, para. 8.2.b.
[15] Panel Report, para. 8.3.
[16] Panel Report, para. 8.4.
[17] Panel Report, paras. 8.7-8.8.
[18] WT/AB/WP/6, 16 August 2010.
[19] Pursuant to Rules 22 and 23(4) of the Working Procedures.
[20] Pursuant to Rule 24(1) of the Working Procedures.
[21] Pursuant to Rule 24(2) of the Working Procedures.
[22] Ecuador and Korea each submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For the purposes of this appeal, we have interpreted these actions as notifications expressing the intention of Ecuador and Korea to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.

1.12. The oral hearing in this appeal was held on 26-27 May 2015. The participants and four of the third participants (Argentina, Brazil, Colombia, and India) made oral statements. The participants and the third participants responded to questions posed by the Members of the Appellate Body Division hearing this appeal.

1.13. By letter dated 22 May 2015, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period stipulated in Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision, and informed the Chair of the DSB that the Appellate Body report in this appeal would be circulated no later than 20 July 2015.[23]

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in their executive summaries, provided to the Appellate Body pursuant to its communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings".[24] The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS457/AB/R/Add.1.

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of Brazil, Colombia, the European Union, and the United States are reflected in their executive summaries, provided to the Appellate Body pursuant to its communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings"[25], and are contained in Annex C of the Addendum to this Report, WT/DS457/AB/R/Add.1.

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

a. with respect to Articles 3.7 and 3.10 of the DSU:

   i. whether Peru's arguments that Guatemala acted inconsistently with Articles 3.7 and 3.10 of the DSU are "new claims" that are not within the scope of this appeal (raised by Guatemala); and

   ii. whether the Panel erred in finding that there was "no evidence that Guatemala brought these proceedings in a manner contrary to good faith" under Articles 3.7 and 3.10 of the DSU, and that there was, therefore, "no reason for the Panel to refrain from assessing the claims put forward by Guatemala" (raised by Peru);

b. with respect to the additional duties resulting from the PRS in connection with Guatemala's claim that the measure at issue constitutes a "variable import levy" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture:

   i. whether the Panel erred in its assessment of the "variability" of the measure at issue (raised by Peru);

[23] WT/DS457/9. The Chair of the Appellate Body explained that the Appellate Body had faced a substantial workload in the first half of 2015, with several appeals proceeding in parallel, and that there was overlap in the composition of the Divisions hearing these different appeals during this period. The Chair added that, due to scheduling issues arising from these circumstances and the number and complexity of the issues raised in this and concurrent appeal proceedings, together with the demands that these concurrent appeals placed on the WTO Secretariat's translation services, and the shortage of staff in the Appellate Body Secretariat, the Appellate Body would not be able to circulate its report in this dispute within the timeframe provided for in Article 17.5 of the DSU.

[24] WT/AB/23, 11 March 2015.

[25] WT/AB/23, 11 March 2015.

ii. whether the Panel erred in its assessment of the "additional features" of the measure at issue (raised by Peru); and

iii. whether the Panel failed to make an objective assessment of the matter before it, contrary to Article 11 of the DSU, by failing to properly compare the measure with "ordinary customs duties" and "variable import levies" when examining Guatemala's claim under Article 4.2 of the Agreement on Agriculture (raised by Peru);

c. with respect to the additional duties resulting from the PRS in connection with Guatemala's claim that the measure at issue is an "other duty or charge" inconsistent with the second sentence of Article II:1(b) of the GATT 1994:

i. whether the Panel erred in finding that the additional duties are not "ordinary customs duties" under the first sentence of Article II:1(b) of the GATT 1994 on the basis of its finding under Article 4.2 of the Agreement on Agriculture (raised by Peru); and

ii. whether the Panel failed to make an objective assessment of the matter before it, contrary to Article 11 of the DSU, by failing to examine evidence submitted in connection with Guatemala's claim under Article II:1(b) of the GATT 1994 (raised by Peru);

d. with respect to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in accordance with Article 31 of the Vienna Convention:

i. whether Peru's arguments that the Panel should have taken into account the FTA between Peru and Guatemala and ILC Articles 20 and 45 under Article 31(3) of the Vienna Convention are within the scope of this appeal (raised by Guatemala);

ii. whether the Panel erred by failing to take into consideration the FTA between Peru and Guatemala as a "subsequent agreement between the parties regarding the interpretation of the treaty" under Article 31(3)(a) of the Vienna Convention (raised by Peru); and

iii. whether the Panel erred by failing to take into consideration the FTA between Peru and Guatemala and ILC Articles 20 and 45 as "relevant rules of international law applicable in the relations between the parties" under Article 31(3)(c) of the Vienna Convention (raised by Peru);

e. whether the Panel erred in finding that, since the FTA between Peru and Guatemala had not entered into force, it was not necessary for the Panel to rule on whether the parties could, by means of the FTA, modify as between themselves their rights and obligations under the WTO covered agreements (raised by Peru);

f. with respect to the additional duties resulting from the PRS in connection with Guatemala's claim that the measure at issue constitutes a "minimum import price" or a "similar border measure" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture:

i. whether the Panel erred in its interpretation of "minimum import prices", within the meaning of footnote 1 of the Agreement on Agriculture, by adopting an excessively narrow legal standard (raised by Guatemala);

ii. whether the Panel erred in finding that Peru's measure does not constitute a "minimum import price" within the meaning of footnote 1 of the Agreement on Agriculture (raised by Guatemala);

iii. whether the Panel erred in its interpretation of "similar border measures", within the meaning of footnote 1 of the Agreement on Agriculture, by conflating the legal standard for "minimum import prices" with the legal standard for border measures "similar" to "minimum import prices" (raised by Guatemala); and

iv. whether the Panel erred in finding that Peru's measure is not a border measure "similar" to a "minimum import price" within the meaning of footnote 1 of the Agreement on Agriculture (raised by Guatemala).

5 ANALYIS OF THE APPELLATE BODY

5.1 Background and overview of the measure at issue

5.1. Peru maintains a price range system (PRS)[26] that may result in the imposition of additional duties or rebates on certain types of imported rice, sugar, maize, and milk. Peru applies the PRS in addition to the tariffs that, pursuant to Article II:1 of the GATT 1994, Peru has bound at 68% *ad valorem* for the products subject to the PRS.[27] The PRS operates on the basis of the difference between (i) a floor price and a ceiling price and (ii) a reference price. The floor and ceiling prices are, respectively, averages of international prices in a specified international market[28] over a recent past period of 60 months.[29] The reference price is an average of international price quotations in the same international market over a recent past period of two weeks.[30]

5.2. The PRS imposes an additional duty on the transaction value of imports when the reference price is below the floor price.[31] The amount of the additional duty is based on the difference between the floor price and the reference price.[32] The additional duties resulting from the PRS plus Peru's *ad valorem* duties may not exceed Peru's bound tariff rate.[33] The PRS also provides for tariff

[26] Panel Report, para. 7.115 (referring to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4)). The parties disagree over the year in which the PRS was established. Peru maintains that it established a system of specific duties in 1991 and has applied it ever since, and that the PRS is merely a revised system. Guatemala rejects this assertion and maintains that Supreme Decree No. 115-2001-EF, from 2001, tacitly repealed the 1991 system of specific duties and established the PRS. (Panel Report, para. 7.101)

[27] Panel Report, para. 7.166. Except for three tariff lines for maize, to which a 6% *ad valorem* tariff is applied, Peru does not impose an *ad valorem* tariff on the products subject to the PRS. (Panel Report, para. 7.167 and fn 231 to para. 7.145)

[28] The relevant international market for each product is specified in Supreme Decree No. 115-2001-EF. (Panel Report, paras. 7.128 and 7.136)

[29] Before calculating the floor price, a confidence interval is applied to the monthly average free on board (f.o.b.) prices, which are adjusted for inflation. Outlier values above and below the confidence interval are discarded. The floor price is determined by calculating a new average with the values recorded within the confidence interval. (Panel Report, paras. 7.129-7.131) The ceiling price is obtained by adding to the floor price the standard deviation used to determine the confidence interval. (Panel Report, para. 7.132) Floor and ceiling prices, expressed in f.o.b. terms, are converted into c.i.f. terms by applying the freight and insurance costs specified in Annex V to Supreme Decree No. 115-2001-EF. (Panel Report, para. 7.133; Annexes II and V to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), pp. 204889-204890)

[30] The reference prices are converted into c.i.f. terms by applying the freight and insurance costs specified in Annex V to Supreme Decree No. 115-2001-EF. (Panel Report, para. 7.137; Article 5 and Annex V to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), pp. 204888 and204890).

[31] Panel Report, para. 7.140; Annex III to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), p. 204889. The PRS divides the tariff lines into "marker products" and "associated products". "Marker products" are defined as products whose international prices are used for calculating the floor, ceiling, and reference prices, while "associated products" are defined as products obtained by processing or mixing of marker products or those that are capable of replacing a marker product for industrial use or consumption. Each of the current four "marker products" corresponds respectively to a specific tariff line for maize, rice, sugar, and milk. Thus, pursuant to the PRS, the floor and reference prices, and ultimately the additional duty, are only calculated for each of the "marker products". The same additional duty applicable for each "marker product" is then applied to their respective "associated products". (Panel Report, paras. 7.121-7.122 and 7.125; Annexes I, II, and III to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4))

[32] The precise amount of the additional duty is the difference between the floor price and the reference price multiplied by a factor associated with import costs. (Panel Report, paras. 7.140-7.141; Annex III to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), p. 204889)

[33] Panel Report, para. 7.142 (referring to Article 4 of Supreme Decree No. 153-2002-EF of 26 September 2002 (Panel Exhibit GTM-5) p. 147).

rebates when the reference price is higher than the ceiling price.[34] A detailed description of the Panel's understanding of the scope and content of the PRS is set forth in the Panel Report.[35]

5.3. Guatemala filed a complaint against Peru claiming that Peru maintains: (i) "variable import levies" and "minimum import prices", or "similar border measures", prohibited under footnote 1 of Article 4.2 of the Agreement on Agriculture; and (ii) "other duties or charges" inconsistent with Article II:1(b) of the GATT 1994. The Panel found that the additional duties resulting from the PRS are: (i) "variable import levies", or at least a "similar border measure", inconsistent with Article 4.2 of the Agreement on Agriculture; and (ii) "other duties or charges" inconsistent with Article II:1(b) of the GATT 1994. Peru and Guatemala have appealed the Panel's findings.

5.4. Peru and Guatemala disagree on whether the measure at issue is limited to only the additional duties resulting from the PRS, or whether it also includes the PRS calculation methodology to determine the additional duties.[36] Peru suggests that the Panel could not have examined the PRS calculation methodology because it was outside the Panel's terms of reference.[37] In its request for the establishment of a panel, Guatemala identified the measure at issue as "[t]he additional duty imposed by Peru on imports of certain agricultural products".[38] Guatemala also explained that, *inter alia*, this additional duty "is determined by using a mechanism known as the 'Price Band System'[,] which … operates on the basis of two components: (i) a band made up of a floor price and a ceiling price … [and] (ii) a c.i.f. reference price".[39] The PRS calculation methodology is thus included in Guatemala's request for the establishment of a panel. Moreover, as the additional duties result from the operation of the PRS, it is clear that the PRS calculation methodology is a key component of the system. We therefore consider that the measure before the Panel comprised both the additional duties resulting from the PRS and the PRS calculation methodology.[40] We refer below to the measure at issue as the "additional duties resulting from the PRS" or the "additional duties".

5.2 Good faith under Articles 3.7 and 3.10 of the DSU

5.5. Peru appeals the Panel's conclusion that there was "no evidence that Guatemala brought these proceedings in a manner contrary to good faith" under Articles 3.7 and 3.10 of the DSU.[41] According to Peru, Guatemala waived in the FTA[42] its right to challenge the PRS through the WTO dispute settlement mechanism, and Guatemala thus acted contrary to its good faith obligations under Articles 3.7 and 3.10 when it initiated the present proceedings. We begin by first addressing Guatemala's contention that Peru's arguments in respect of good faith under Article 3.7 and 3.10 constitute "new arguments" or "new claims" that are not within the scope of this appeal. We then proceed to consider whether panels and the Appellate Body may review a Member's "exercise of its judgement as to whether action under these procedures would be fruitful" under Article 3.7. Thereafter, we determine whether the Panel erred in concluding that there was

[34] The tariff rebate is the difference between the reference price and the ceiling price multiplied by a factor associated with import costs, and may not exceed "the sum payable by the importer as the *ad valorem* duty and additional tariff surcharge corresponding to each product". (Panel Report, paras. 7.143 and 7.145 (referring to Article 8 of Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4)))

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

[36] Peru did not raise any issues, in this respect, under Article 6.2 of the DSU before the Panel, nor on appeal. Rather, in its appellant's submission, Peru argues that, when examining the "variability" of the measure at issue in the context of Guatemala's claim under Article 4.2 of the Agreement on Agriculture, the Panel confused the measure at issue with the methodology used to calculate the additional duty. Peru contends that the measure at issue is limited to only the additional duties resulting from the PRS. (Peru's appellant's submission, paras. 248-250) We also note that the Panel did not make any explicit finding on whether the PRS calculation methodology falls within its terms of reference.

[37] Peru's appellant's submission, paras. 248-251.

[38] Panel Report, para. 7.98 (referring to Request for the Establishment of a Panel by Guatemala, WT/DS457/2, p. 1).

[39] Request for the Establishment of a Panel by Guatemala, WT/DS457/2, p. 1. In its request, Guatemala also referred to the fact that the floor, ceiling, and reference prices vary periodically as a result of the application of certain formulas to the changing international prices for the products in question. (Request for the Establishment of a Panel by Guatemala, WT/DS457/2, pp. 1-2).

[40] We further explain below that the Panel had to examine the PRS calculation methodology in order to assess whether the additional duties resulting from the PRS are "variable import levies" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture. (See para. 5.43 of this Report)

[41] Panel Report, para. 8.1.a.

[42] Peru refers mainly to paragraph 9 of Annex 2.3 to the FTA between Guatemala and Peru.

no evidence that Guatemala acted inconsistently with its good faith obligations under Articles 3.7 and 3.10.

5.2.1 Whether Peru advances new claims, arguments, or defences on appeal

5.6. Guatemala contends that, while Peru raised its challenge under Articles 3.7 and 3.10 of the DSU before the Panel as an issue of jurisdiction, Peru advances this argument on appeal as a substantive claim. In particular, Guatemala asserts that Peru had argued before the Panel that Articles 3.7 and 3.10 were relevant to the issue of whether the Panel was "*procedurally barred* from engaging in a substantive consideration of the claims made by Guatemala".[43] Guatemala notes that Peru now states on appeal that "Peru does not consider that Guatemala is procedurally barred from bringing a WTO claim against the PRS".[44] Guatemala thus argues that, "*independently of the question of the Panel's jurisdiction* to hear Guatemala's claims, Peru appears to be advancing new and wholly different 'claims' of its own that Guatemala has acted inconsistently with Articles 3.7 and 3.10".[45] Guatemala maintains that Peru is not appealing a finding by the Panel; rather, Peru's new "claim" is not an issue of law covered in the Panel Report or a legal interpretation developed by the Panel within the meaning of Article 17.6 of the DSU.[46] Guatemala, therefore, contends that Peru's "claim" on appeal that Guatemala has acted inconsistently with Articles 3.7 and 3.10 of the DSU is "outside the competence of the Appellate Body to consider".[47]

5.7. At the oral hearing, Peru maintained that its arguments on appeal do not raise issues different from those presented before the Panel and addressed in the Panel Report. According to Peru, it never questioned Guatemala's right to bring a case to the WTO, but instead pointed out that Articles 3.7 and 3.10 impose certain requirements that need to be met before Guatemala's case can be considered on the merits.[48]

5.8. In previous disputes, the Appellate Body has considered that "new arguments are not *per se* excluded from the scope of appellate review, *simply because they are new*."[49] While, in principle, new arguments are not excluded from the scope of appellate review, the ability of the Appellate Body to consider new arguments is circumscribed by its mandate under Article 17 of the DSU to address "*issues of law* covered in the panel report and *legal interpretations* developed by the panel".[50] Thus, the Appellate Body has found that it would not be able to consider new arguments if such arguments required it "to solicit, receive and review new facts", or if a new argument did "not involve either an 'issue of law covered in the panel report' or 'legal

[43] Guatemala's appellee's submission, para. 322. (emphasis added)

[44] Guatemala's appellee's submission, para. 323 (quoting Peru's appellant's submission, para. 41). Peru argued before the Panel that "Guatemala is not acting in good faith by having recourse to the WTO dispute settlement procedure". In Peru's view, Guatemala committed an "abuse of right" when it initiated the WTO dispute settlement proceedings challenging the PRS, which Guatemala expressly accepted in the FTA. Further, Peru contended that Guatemala frustrated the object and purpose of the FTA within the meaning of Article 18 of the Vienna Convention on the Law of Treaties, which gives expression to the principle of good faith. Thus, Peru asserted that "the conditions laid down by the DSU for initiating a dispute settlement proceeding are not met in this case", and consequently "request[ed] the Panel not to continue with the analysis of Guatemala's claims". (Panel Report, Annex B-3, First Part of the Executive Summary of the Arguments of Peru, para. 3.9)

[45] Guatemala's appellee's submission, para. 324. (emphasis added) Peru argues on appeal that: (i) the presumption of good faith enjoyed by Members can be rebutted; (ii) the legal status of the FTA had no relevance to the Panel's task of determining whether Guatemala's use of the WTO dispute settlement system to nullify a provision in the FTA was consistent with Articles 3.7 and 3.10 of the DSU; (iii) the Panel incorrectly limited its analysis to the situation in which Guatemala expressly waived its right to challenge the PRS before the WTO dispute settlement system, when waivers may be made explicitly or by necessary implication; and (iv) Articles 20 and 45 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) support the position that Members may waive their rights expressly or by necessary implication, which Guatemala had done in this case. (Peru's appellant's submission, paras. 50, 54, 59, 67, and 69-92)

[46] Guatemala's appellee's submission, para. 324.

[47] Guatemala's appellee's submission, para. 324.

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

[49] Appellate Body Report, *Canada – Aircraft*, para. 211. (emphasis added)

[50] Emphasis added. See Appellate Body Reports, *Canada – Aircraft*, para. 211; *US – FSC*, paras. 102-103.

interpretations developed by the panel'".[51] Further, these principles have a due process dimension, in that a party must be given a fair opportunity to defend itself adequately.[52]

5.9. The questions before us in this respect are: (i) whether Peru's arguments on appeal relate to issues of law covered in the Panel Report and legal interpretations developed by the Panel; and (ii) whether these arguments require consideration of new facts. Before the Panel, Peru argued that Guatemala had not acted in good faith by "expressly accepting the [PRS] of Peru in the bilateral FTA and then resorting to the WTO dispute settlement system".[53] Peru further contended that "[g]ood faith is a requirement for initiating proceedings under the DSU, in accordance with the provisions of Articles 3.7 and 3.10 of the DSU".[54] Peru recognized that the FTA has not yet entered into force, and, therefore, referred to Article 18 of the Vienna Convention on the Law of Treaties[55] (Vienna Convention) to assert that signatories could not act contrary to the object and purpose of a treaty prior to its entry into force. On the basis of its reading of Article 18 of the Vienna Convention and Articles 3.7 and 3.10 of the DSU, Peru maintained that "a claim that is inconsistent with good faith cannot proceed."[56] Peru, therefore, requested the Panel "not to continue with the analysis of Guatemala's claims".[57]

5.10. In its Report, the Panel discussed the following issues: (i) the presumption of good faith on the part of Guatemala in exercising its judgement as to whether the initiation of this procedure would be fruitful in accordance with Article 3.7 of the DSU[58]; (ii) how to determine whether a Member initiated a procedure in a manner contrary to good faith within the context of Article 3.10 of the DSU[59], including whether Guatemala "expressly waived the right to bring a case with respect to the PRS or recognized the consistency of that measure with the WTO agreements"[60]; and (iii) the implication of the fact that the FTA had not yet entered into force vis-à-vis Article 18 of the Vienna Convention.[61] The Panel found, among other things, that: (i) Guatemala's good faith was presumed[62]; (ii) Peru's argument that Guatemala undertook in the FTA not to challenge the PRS was limited by the undisputed fact that the FTA was not yet in force[63]; (iii) the Panel was "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"[64]; and (iv) determining the object and purpose of the FTA would go beyond the Panel's terms of reference.[65] The Panel concluded that it found no evidence that Guatemala acted inconsistently with its good faith obligations under Articles 3.7 and 3.10, and thus there was no reason for it to refrain from assessing Guatemala's claims.[66]

5.11. On appeal, while "Peru does not consider that Guatemala is procedurally barred from bringing a WTO claim against the PRS", Peru argues that "Guatemala's actions – using the

[51] Appellate Body Report, *US – FSC*, paras. 102-103. Similarly, in *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body noted its report in *US – FSC* and declined to consider a new argument on appeal that would have required it "to address legal issues quite different from those which confronted the [p]anel and which may well [have] require[d] proof of new facts". (Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.349 (quoting Appellate Body Report, *US – FSC*, para. 103.))

[52] Appellate Body Report, *US – Gambling*, para. 270. Moreover, the Appellate Body has also ruled that, on appeal, "due process requires that the legal basis of a claim be sufficiently clear to allow an appellee to respond effectively." (Appellate Body Report, *Canada – Wheat Exports and Grain Imports,* para. 177) In *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body also held that "[c]onsideration of a defence raised for the first time at interim review would give rise to due process concerns." Thus, a "defence raised for the first time" that would "require[] examination of an issue for which [the parties] have [not] provided specific evidence or arguments" should likewise be excluded. (Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.379)

[53] Panel Report, Annex B-3, First Part of the Executive Summary of the Arguments of Peru, para. 3.3.

[54] Panel Report, Annex B-3, First Part of the Executive Summary of the Arguments of Peru, para. 3.5.

[55] Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.

[56] Panel Report, Annex B-3, First Part of the Executive Summary of the Arguments of Peru, para. 3.7.

[57] Panel Report, Annex B-3, First Part of the Executive Summary of the Arguments of Peru, para. 3.9.

[58] Panel Report, para. 7.75.

[59] Panel Report, para. 7.80.

[60] Panel Report, para. 7.84. (fn omitted)

[61] Panel Report, paras. 7.88-7.92.

[62] Panel Report, para. 7.75.

[63] Panel Report, para. 7.88.

[64] Panel Report, para. 7.92.

[65] Panel Report, para. 7.92.

[66] Panel Report, paras. 7.96 and 8.1.a.

WTO dispute settlement system to nullify a provision of the FTA – were contrary to Guatemala's good faith obligations under DSU Article 3.7 and 3.10".[67] Peru contends, among other things, that: (i) the presumption of good faith can be rebutted[68]; (ii) Members may waive their rights explicitly or by necessary implication[69]; and (iii) the fact that the FTA has not yet entered into force is not dispositive of the issue of good faith.[70]

5.12. Comparing Peru's arguments before the Panel and the Panel's consideration thereof with the arguments raised by Peru on appeal, we find that the arguments challenged by Guatemala as new relate to the same legal issues that were before the Panel and were addressed in the Panel Report. In particular, the questions both before the Panel and on appeal relate to the scope of Guatemala's good faith obligations under the DSU, the content of the FTA and its effect on Guatemala's good faith obligations, the legal significance of international instruments that have not yet entered into force, and the extent to and manner in which Members may waive their rights to institute WTO dispute settlement proceedings. Based on our review of the Panel Report and the participants' submissions on appeal, we consider that, regardless of whether Peru's objections to Guatemala's initiation of these proceedings before the Panel were viewed as procedural or substantive, Peru's arguments on appeal relate to legal issues no different from those that were before the Panel and are covered by the Panel's reasoning and findings in its Report. These arguments relate to whether Guatemala acted inconsistently with its good faith obligations under Articles 3.7 and 3.10 of the DSU when it instituted these proceedings after having allegedly waived in the FTA, either explicitly or by necessary implication, its right to have recourse to WTO dispute settlement. Thus, these arguments do not constitute new "claims", as Guatemala alleges, or a new "defence" raised by Peru as the respondent.

5.13. In addition, while Guatemala contends that we would be required to consider new facts in addressing Peru's arguments[71], it does not appear that Peru's arguments directly relating to good faith under Articles 3.7 and 3.10 involve new factual elements.[72]

5.14. In the light of the above, we find that Peru's arguments on appeal that Guatemala acted inconsistently with Articles 3.7 and 3.10 of the DSU pertain to issues of law covered in the Panel Report and legal interpretations developed by the Panel. Since these arguments relate to the same issues that were before and considered by the Panel, they do not constitute "new claims" or a "new defence". Moreover, since Peru's arguments on good faith under Articles 3.7 and 3.10 relate to the same legal issues and do not require us to solicit, receive, and review new facts, we are of the view that such arguments do not adversely affect Guatemala's due process rights, and are thus properly raised on appeal.

5.2.2 Whether panels and the Appellate Body have the authority to examine a Member's exercise of its judgement under Article 3.7 of the DSU

5.15. Citing Appellate Body jurisprudence, the Panel stated that good faith must be presumed, and in principle it is not for a panel to question a Member's exercise of its judgement as to whether initiation of a procedure would be fruitful.[73] Thus, the Panel concluded that it "d[id] not find any support either in the text of Article 3.7 of the DSU or in panel or Appellate Body reports that would

[67] Peru's appellant's submission, para. 41. (fn omitted)
[68] Peru's appellant's submission, para. 50.
[69] Peru's appellant's submission, subheading III.b.1. On this matter, Peru also argues that ILC Articles 20 and 45 (on "Consent" to an act of another state as precluding wrongfulness and the "Loss of the right to invoke responsibility") provide additional support for Peru's contention that WTO Members may waive their rights under the DSU both expressly and by necessary implication. (Peru's appellant's submission, subheading III.b.1.b)
[70] Peru's appellant's submission, subheading III.b.
[71] Guatemala's appellee's submission, paras. 49-51 and 382.
[72] According to Guatemala, these factual elements include statements or practice of WTO Members within and outside the WTO; facts relating to the negotiating history or circumstances of the conclusion of the Vienna Convention, or evidence of domestic practice and judicial decisions in the respective jurisdictions of WTO Members, especially as far as ILC Articles 20 and 45 are concerned. (Guatemala's appellee's submission, paras. 49 and 382) Guatemala, however, does not specifically identify any factual elements as far as Peru's arguments regarding good faith and Articles 3.7 and 3.10 of the DSU are concerned.
[73] Panel Report, para. 7.75 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74).

allow it … to do anything other than presume that Guatemala duly exercised its judgement as to whether the initiation of this procedure would be fruitful."[74]

5.16. Peru argues on appeal that, contrary to the Panel's ruling, dispute settlement panels have the authority to determine whether WTO Members have brought a claim contrary to the principle of good faith.[75] In Peru's view, the presumption of good faith can be rebutted.[76] In response, Guatemala contends that, while there may be exceptional cases in which it may be clear that a Member failed to exercise its judgement, it is hard to envisage a situation in which a panel would be in a position to conclude that a Member did so, and there is no basis in the DSU for panels to engage in such an exercise.[77]

5.17. Article 3.7 of the DSU reads in relevant part:

> Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.

5.18. The Appellate Body has previously held that Members enjoy discretion in deciding whether to bring a case, and are thus expected to be "largely self-regulating" in deciding whether any such action would be "fruitful".[78] The "largely self-regulating" nature of a Member's decision to bring a dispute is "borne out by Article 3.3, which provides that the prompt settlement of situations in which a Member, *in its own judgement*, considers that a benefit accruing to it under the covered agreements is being impaired by a measure taken by another Member is essential to the effective functioning of the WTO".[79] Moreover, the Appellate Body has interpreted the first sentence of Article 3.7 as "reflect[ing] 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."[80]

5.19. In our view, although the language of the first sentence of Article 3.7 of the DSU states that "a Member shall exercise *its judgement*"[81], the considerable deference accorded to a Member's exercise of its judgement in bringing a dispute is not entirely unbounded. For example, in order to ascertain whether a Member has relinquished, by virtue of a mutually agreed solution in a particular dispute, its right to have recourse to WTO dispute settlement in respect of that dispute, greater scrutiny by a panel or the Appellate Body may be necessary. This was the issue before the Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, where it ascertained whether a Member had relinquished its right to have recourse to the WTO dispute settlement mechanism. In that case, the Appellate Body had to determine whether that Member was precluded from initiating compliance proceedings.[82] In this dispute, Peru alleges that Guatemala waived in the FTA its right to have recourse to WTO dispute settlement in respect of the PRS, and consequently acted contrary to good faith when it initiated the present proceedings. Thus, in assessing whether Guatemala acted in conformity with its good faith obligations under Articles 3.7 and 3.10 of the DSU, we address below the issue of whether Guatemala has waived or relinquished its right to challenge the PRS before the WTO dispute settlement mechanism.

[74] Panel Report, para. 7.75.
[75] Peru's appellant's submission, para. 44.
[76] Peru's appellant's submission, para. 50.
[77] Guatemala's appellee's submission, paras. 344-345.
[78] Appellate Body Report, *EC – Bananas III*, para. 135.
[79] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 211. (emphasis added)
[80] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 73.
[81] Emphasis added.
[82] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 217.

5.2.3 Whether the Panel erred in finding that there was no evidence that Guatemala brought these proceedings in a manner contrary to good faith under Articles 3.7 and 3.10 of the DSU

5.20. The Panel stated that it would 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".[83] The Panel did not "consider it appropriate to make a general statement intended to cover all possible situations in which it might be found that a Member engaged in a procedure in the absence of good faith".[84] It did not find any reason to take other situations into consideration, given that no evidence suggested that Guatemala had engaged in this procedure with the intention of causing injury to another Member, or impairing its rights.[85] The Panel, however, did not ultimately examine whether the FTA contained a waiver of Guatemala's right to initiate WTO dispute settlement proceedings. Instead, the Panel reasoned that Peru's argument that paragraph 9 of Annex 2.3 to the FTA contained Guatemala's undertaking not to challenge the PRS was limited by the undisputed fact that the FTA was not in force.[86] Further, the Panel stated that it was not convinced that an alleged violation by a Member of Article 18 of the Vienna Convention – which imposes an obligation not to defeat the object and purpose of a treaty not yet in force – with respect to a treaty that is not a WTO covered agreement could constitute lack of good faith under Articles 3.7 and 3.10 of the DSU.[87]

5.21. Peru argues on appeal that the Panel failed to interpret Articles 3.7 and 3.10 of the DSU correctly when it limited its analysis to the situation in which Guatemala "expressly waived the right to bring a case with respect to the PRS or recognized the consistency of that measure with the WTO agreements".[88] According to Peru, rights under the WTO may be "waived (or modified) expressly or by necessary implication, provided that the language in the FTA reveals clearly that the parties intended to relinquish their rights."[89] Peru contends that Articles 20 and 45 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts[90] (ILC Articles) provide additional support for this interpretation.[91] Peru asserts that Guatemala "waived its right explicitly" when Guatemala agreed in the FTA that Peru may maintain the PRS.[92] Peru further argues that, alternatively, Guatemala waived its rights by necessary implication since the WTO-consistency of the PRS had been the "subject of disagreement" between Peru and Guatemala, and they had agreed in the FTA that Peru may maintain its PRS, with the FTA prevailing over WTO agreements in the event of an inconsistency.[93]

5.22. In response, Guatemala argues that the Panel took account of the possibility that a waiver of rights may be made explicitly or by necessary implication.[94] Thus, the basis of Peru's appeal is merely its disagreement with how the Panel assessed the evidence in reaching the conclusion that the FTA does not contain a waiver.[95] Moreover, Guatemala argues that Peru's arguments on the ILC Articles relating to valid consent and waiver do not add anything to Peru's case, given the absence of any dispute as to whether a waiver may be made both explicitly or by necessary implication.[96]

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[83] Panel Report, para. 7.84. (fn omitted)
[84] Panel Report, para. 7.84.
[85] Panel Report, para. 7.84.
[86] Panel Report, para. 7.88.
[87] Panel Report, para. 7.92.
[88] Peru's appellant's submission, para. 59 (quoting Panel Report, para. 7.84).
[89] Peru's appellant's submission, para. 67.
[90] ILC Articles of Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its fifty-third session, in 2001, published in *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two. See also UN Resolution 65/19 of 6 December 2010.
[91] Peru's appellant's submission, para. 69.
[92] Peru's appellant's submission, para. 89 (emphasis omitted). Peru contends that Guatemala had agreed to the continued application of the PRS in paragraph 9 of Annex 2.3 to the FTA, which provides that "Peru may maintain its Price Range System … with regard to the products subject to the application of the system marked with an asterisk (*) in column 4 of Peru's Schedule as set out in this Annex".
[93] Peru's appellant's submission, para. 92.
[94] Guatemala's appellee's submission, paras. 368-369 and 381.
[95] Guatemala's appellee's submission, para. 371.
[96] Guatemala's appellee's submission, paras. 380-381.

5.23. Article 3.7 of the DSU reads, in relevant part:

> Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.

5.24. Article 3.10 of the DSU reads, in relevant part:

> 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.

5.25. In this dispute, we are called upon to determine whether Guatemala acted contrary to good faith under Articles 3.7 and 3.10 of the DSU on account of the alleged relinquishment of its right to challenge the PRS before the WTO dispute settlement mechanism. In *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, the Appellate Body determined whether the Understandings on Bananas[97], which were notified to the DSB collectively as "a mutually agreed solution"[98], contained a waiver by the parties of their right to have recourse to compliance proceedings under Article 21.5 of the DSU.[99] The Appellate Body held that "the relinquishment of rights granted by the DSU cannot be lightly assumed", and that "the language in the Understandings must clearly reveal that the parties intended to relinquish their rights".[100] Further, the Appellate Body emphasized 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."[101] Thus, while we do not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution, as in *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, any such relinquishment must be made clearly. In any event, in our view, a Member's compliance with its good faith obligations under Articles 3.7 and 3.10 of the DSU should be ascertained on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU. Thus, we proceed to examine in this dispute whether the participants clearly stipulated the relinquishment of their right to have recourse to WTO dispute settlement by means of a "solution mutually acceptable to the parties" that is consistent with the covered agreements.[102]

5.26. Contrary to what Peru claims[103], it does not appear that – for purposes of the DSU – the FTA, and in particular paragraph 9 of Annex 2.3, constitutes a solution mutually acceptable to both parties within the meaning of Article 3.7 of the DSU. Aside from the fact that Peru and Guatemala negotiated the FTA before the initiation of the present dispute, the DSU emphasizes that "[a] solution mutually acceptable to the parties to a dispute" must be "consistent with the covered

[97] Understanding on Bananas between the European Communities and the United States signed on 11 April 2001 (WT/DS27/59, G/C/W/270; WT/DS27/58, Enclosure 1); and Understanding on Bananas between the European Communities and Ecuador signed on 30 April 2001 (WT/DS27/60, G/C/W/274; WT/DS27/58, Enclosure 2).

[98] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 8 (quoting *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Notification of Mutually Agreed Solution, WT/DS27/58, 2 July 2001).

[99] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 217.

[100] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 217. (fn omitted)

[101] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 228. (emphasis added)

[102] Article 3.5 of the DSU states that "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements." The third sentence of Article 3.7 provides that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."

[103] Peru's appellant's submission, para. 51. Peru contends that the parties to the FTA had already reached a "positive solution" within the meaning of Article 3.7 of the DSU when they agreed in the FTA that Peru may maintain its PRS.

agreements". As we have found elsewhere in this Report[104], the additional duties resulting from the PRS are inconsistent with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. Moreover, as discussed in more detail in section 5.3.3.2, the participants have raised conflicting arguments on how to read paragraph 9 of Annex 2.3 to the FTA, which provides that "Peru may maintain its [PRS]", in the context of other relevant provisions of the FTA[105], so that there appears to be ambiguity as to whether even the FTA itself, regardless of its legal status, allows Peru to maintain the PRS if it is found to be WTO-inconsistent.[106]

5.27. Further, Peru recognizes that Guatemala is not "procedurally barred *from bringing a WTO claim against the PRS*".[107] Moreover, Article 15.3 of the FTA provides that, "[i]n 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."[108] Thus, even from the perspective of the FTA, parties to the FTA have the right to bring claims under the WTO covered agreements to the WTO dispute settlement system.

5.28. Based on the foregoing discussion, we do not consider that a clear stipulation of a relinquishment of Guatemala's right to have recourse to the WTO dispute settlement system exists in this case in relation to, or within the context of, the DSU. We reach the above findings irrespective of the status of the FTA as not being ratified by both parties.[109] Consequently, we do not see how Guatemala could be considered as having acted contrary to its good faith obligations under Articles 3.7 and 3.10 of the DSU when it initiated these proceedings to challenge the consistency of the PRS with the WTO covered agreements. Therefore, we uphold the Panel's finding in paragraphs 7.96 and 8.1.a of the Panel Report, that there is "no evidence that Guatemala brought these proceedings in a manner contrary to good faith".

5.3 Peru's appeal: Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994

5.29. Peru challenges the Panel's interpretation and application of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. We examine these aspects of Peru's appeal in sections 5.3.1 and 5.3.2 below. In addition, Peru claims that the Panel erred in its interpretation of Article 4.2 of the Agreement on Agriculture by failing to take into account the FTA between Peru and Guatemala and ILC Articles 20 and 45, in accordance with Article 31(3) of the Vienna Convention. We examine the aspects of Peru's appeal concerning the FTA and the ILC Articles in section 5.3.3.

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[104] See sections 5.3.1and 5.3.2of this Report.

[105]Paragraph 9 of Annex 2.3 to the FTA provides:

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

Article 1.3 of the FTA provides:

> 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.

[106] While Article 3.7 of the DSU acknowledges that parties may enter into a mutually agreed solution, we do not consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes. In this respect, we recall that Article 23 of the DSU mandates that "[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."

[107] Peru's appellant's submission, para. 41. (emphasis added)

[108] Panel Report, para. 7.41. (emphasis original)

[109] Given our conclusion that Guatemala has not clearly waived its right to have recourse to these dispute settlement proceedings, we see no reason to address further Peru's arguments that ILC Articles 20 and 45 provide additional support for its argument that a WTO Member may waive its rights under the DSU explicitly or by necessary implication. In addition, in view of the ambiguity as to whether the FTA itself allows Peru to maintain the PRS if it is found to be WTO-inconsistent, we also do not see a reason to engage further with Peru's argument that, by agreeing in the FTA to the maintenance of the PRS and thereafter challenging it in the present proceedings, Guatemala acted inconsistently with its obligation under Article 18 of the Vienna Convention not to defeat the object and purpose of the treaty. We note that Peru has neither elaborated on the object and purpose of the FTA, nor demonstrated how maintaining the PRS forms part thereof.

5.3.1 Article 4.2 of the Agreement on Agriculture – variable import levies

5.30. The Panel found that the additional duties resulting from the PRS are "variable import levies", or at least "similar border measures", within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture, and that, by maintaining them, Peru is acting inconsistently with Article 4.2.[110] Peru challenges the Panel's findings, making three main claims of error. First, Peru contends that the Panel erred in its assessment of the "variability" of the measure at issue.[111] Second, Peru contends that the Panel erred in its assessment of the "additional features" of the measure at issue.[112] Finally, Peru claims that the Panel acted inconsistently with Article 11 of the DSU by failing to properly compare the measure at issue with "ordinary customs duties" and "variable import levies" when examining Guatemala's claim under Article 4.2 of the Agreement on Agriculture.[113] Peru requests us "to reverse and declare moot and with no legal effect" the Panel's finding that the additional duties resulting from the PRS constitute "variable import levies", or a border measure "similar" to "variable import levies", within the meaning of footnote 1, and are thus inconsistent with Article 4.2.[114] Below, we summarize the Panel's interpretation and application of Article 4.2 of the Agreement on Agriculture at issue, and set out our understanding of certain issues relating to the interpretation of Article 4.2. Thereafter, we examine each of Peru's claims.

5.3.1.1 The Panel's findings

5.31. Article 4.2 and footnote 1 of the Agreement on Agriculture provide:

> 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[1], except as otherwise provided for in Article 5 and Annex 5.
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> ———————————————————————————————————
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> [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.[115]

5.32. Before the Panel, Guatemala claimed that the measure at issue is inconsistent with Article 4.2 of the Agreement on Agriculture. Guatemala argued that the additional duties resulting from the PRS constitute prohibited "variable import levies", or a prohibited "similar border measure", within the meaning of footnote 1 of Article 4.2 because the measure at issue: (i) exhibits inherent variability; (ii) lacks transparency and predictability; and (iii) obstructs the transmission of international price developments to Peru's domestic market.[116] Peru responded that Article 4.2 is not applicable because the measure at issue is an ordinary customs duty, and is thus permissible provided the additional duties do not exceed Peru's bound rate for the relevant products. Peru also argued that the measure at issue does not exhibit characteristics of a "variable import levy", or a "similar border measure".[117]

[110] Panel Report, paras. 7.352, 7.372, and 8.1.d.
[111] Peru's appellant's submission, paras. 237-256.
[112] Peru's appellant's submission, paras. 257-289.
[113] Peru's appellant's submission, paras. 290-295.
[114] Peru's appellant's submission, para. 297 (referring to Panel Report, paras. 7.316, 7.321, 7.324, 7.325, 7.328, 7.334-7.340, 7.345-7.347, 7.349, 7.350-7.352, 7.371-7.374, 7.526-7.528, 8.1.b, 8.1.d, and 8.1.f). In addition, should we find that the measure at issue is of the type prohibited by Article 4.2 of the Agreement on Agriculture, Peru requests us to "find that the application of the Article 4.2 obligation in light of the facts in this case must lead to the conclusion that Peru did not act inconsistently with this provision." (Peru's appellant's submission, para. 298) We examine this aspect of Peru's request in section 5.3.3 below, together with Peru's arguments concerning the impact that the FTA between Peru and Guatemala should have in the assessment of Guatemala's claims under Article 4.2.
[115] Emphasis added.
[116] Panel Report, paras. 7.169-7.170, 7.172, 7.181, and 7.193.
[117] Panel Report, paras. 7.211, 7.214-7.219, 7.224-7.226, 7.230-7.233, and 7.235-7.239.

5.33. The Panel began its analysis by setting out its understanding of "variable import levies" in footnote 1 of the Agreement on Agriculture.[118] The Panel noted that "variability" within the meaning of footnote 1 and Article 4.2 of the Agreement on Agriculture requires that the measure itself, as a mechanism, impose the variability of the duties, and that variability will be inherent in a measure if it incorporates a scheme or formula that causes levies to change automatically and continuously.[119] Furthermore, the Panel noted that certain additional features may differentiate "variable import levies" from "ordinary customs duties". These features include a lack of transparency and predictability as compared to an ordinary customs duty.[120] The Panel noted that the additional features "may help to determine the type of measure in question when compared to an ordinary customs duty, but [they do] not constitute a necessary condition for qualifying the measure as a 'variable import levy'".[121]

5.34. The Panel then turned to the relationship between "variable import levies" and "ordinary customs duties". The Panel stated that, if a measure is a "variable import levy" or a "similar border measure" that has been required to be converted into an "ordinary customs duty", it cannot be an "ordinary customs duty". Thus, if a panel finds that a measure is one of those listed in footnote 1 of the Agreement on Agriculture, it may conclude that such a measure is not an ordinary customs duty.[122]

5.35. Turning to the measure at issue, the Panel noted that 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 two weeks, and that they may result in the imposition of additional duties, or granting of tariff rebates.[123] On this basis, the Panel found that the PRS, as a mechanism, contains a scheme or formula that causes and ensures automatic and continuous revision of the applicable duties or rebates[124], and thus the additional duties resulting from the PRS are "an inherently variable measure".[125] In addition, the Panel noted that the PRS exhibits a certain degree of transparency and predictability in the way in which the additional duties are calculated, making it possible for private operators to predict with a certain margin of error the additional duties for a particular period. Nevertheless, the Panel found that the PRS lacks transparency and predictability regarding the level of duties when compared to the transparency and predictability afforded by ordinary customs duties.[126] Finally, the Panel noted that the structure, design, and operation of the PRS show that the resulting additional duties act in such a way that they may distort the prices of

[118] Panel Report, paras. 7.273-7.281 (recalling the objectives of the Agreement on Agriculture and the scope of Article 4.2 of the same Agreement; and quoting Appellate Body Report, *Chile – Price Band System*, paras. 196, 200, 201, 212, 216, 217, 219, 221, and 227).

[119] Panel Report, para. 7.287 (referring to Appellate Body Reports, *Chile – Price Band System*, paras. 233-234; *Chile – Price Band System (Article 21.5 – Argentina),* paras. 155-158; and Panel Report, *Chile – Price Band System (Article 21.5 – Argentina),* para. 7.28). The Panel also stated that "[a]n 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'." (Panel Report, para. 7.288. See also paras. 7.316 and 7.320)

[120] Panel Report, para. 7.291 (referring to Appellate Body Report, *Chile – Price Band System*, para. 234).

[121] Panel Report, para. 7.292. See also para. 7.290 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina),* para. 156). In addition, the Panel addressed the meaning of "similar border measures" in footnote 1 of the Agreement on Agriculture. Recalling the Appellate Body in past cases, the Panel explained that it is necessary to examine whether a measure, in its particular features, including its structure, design, and effects, shares sufficient features with the category of prohibited measures in footnote 1 to resemble, or be of the same nature or kind, and thus be prohibited by Article 4.2 of the Agreement on Agriculture. (Panel Report, paras. 7.297-7.305)

[122] Panel Report, paras. 7.306-7.307 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina),* paras. 167 and 171).

[123] The Panel also noted that it is undisputed that the additional duties resulting from the PRS are border measures. (Panel Report, para. 7.315)

[124] Panel Report, para. 7.321.

[125] Panel Report, para. 7.325.

[126] Panel Report, paras. 7.334 and 7.340. The Panel noted that "[t]he 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." (Panel Report, para. 7.338)

imports subject to the PRS and limit the transmission of international prices to Peru's domestic market[127], and thus operate differently from ordinary customs duties.[128]

5.36. The Panel considered that the additional duties resulting from the PRS constitute "variable import levies" or a "similar border measure" and, therefore, a measure other than "ordinary customs duties". Accordingly, the Panel concluded that, in maintaining this measure, Peru is acting inconsistently with Article 4.2 of the Agreement on Agriculture.[129]

5.3.1.2 Article 4.2 of the Agreement on Agriculture

5.37. Peru's appeal requires us to interpret Article 4.2 of the Agreement on Agriculture. The preamble of the Agreement on Agriculture states that a key 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".[130] The preamble further states that, to achieve this objective, it is necessary "to provide for substantial progressive reductions in agricultural support and protection … resulting in correcting and preventing restrictions and distortions in world agricultural markets," through achieving "specific binding commitments in [*inter alia*] market access".[131]

5.38. Part III of the Agreement on Agriculture serves to correct and prevent certain restrictions and distortions of trade in agricultural products. It consists of Article 4 on market access and Article 5 on special safeguard provisions. The Appellate Body has observed that "Article 4 of the Agreement on Agriculture is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products."[132] The Appellate Body has explained the origin and function of Article 4 as follows:

> During the course of the Uruguay Round, negotiators identified certain border measures which have in common that they restrict the volume or distort the price of imports of agricultural products. The negotiators decided that these border measures should be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. Thus, they envisioned that ordinary customs duties would, in principle, become the only form of border protection. As ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers, they are also more easily compared between trading partners, and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations. The Uruguay Round negotiators agreed that market access would be improved – both in the short term and in the long term – through bindings and reductions of tariffs and minimum access requirements, which were to be recorded in Members' Schedules.[133]

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[127] The Panel stated that, 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, leading to a fall in the reference price, the PRS increases 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. In the medium term, the PRS may also distort the transmission of international prices to the domestic market because a decrease in the floor price will be much slower than that in the reference price and will be delayed by up to six months. If decreasing monthly prices fall outside the confidence interval and are eliminated, it is even possible that none of them will be incorporated into the floor price, whereas no value is omitted from the average reference price. (Panel Report, paras. 7.345-7.346)

[128] Panel Report, para. 7.349. At the end of its analysis, the Panel found that the additional duties resulting from the PRS, by their structure, design, and operation, and in their particular features, share sufficient features with "variable import levies" to be considered as a border measure "similar" to a "variable import levy". (Panel Report, para. 7.351)

[129] Panel Report, paras. 7.352, 7.371-7.372, and 8.1.d.

[130] Agreement on Agriculture, preamble, recital 2.

[131] Agreement on Agriculture, preamble, recitals 3 and 4. See also Appellate Body Report, *Chile – Price Band System*, para. 196.

[132] Appellate Body Reports, *Chile – Price Band System*, para. 201; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 145. (emphasis omitted)

[133] Appellate Body Report, *Chile – Price Band System*, para. 200.

5.39. Article 4.2 of the Agreement on Agriculture prohibits Members from maintaining, resorting to, or reverting to, "any measures of the kind which have been required to be converted into ordinary customs duties".[134] Footnote 1 provides a list of measures covered by the obligation under Article 4.2. The various measures identified in footnote 1 "have in common that they restrict the volume or distort the price of imports of agricultural products"[135] and, therefore, frustrate a key objective of the Agreement on Agriculture, namely, "to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties".[136] Some of the measures specifically identified in footnote 1 entail the payment of duties at the border, while others do not. The mere fact that a measure *results* in the payment of duties that take the same *form* as ordinary customs duties does not, by itself, mean that the measure falls outside the scope of footnote 1.[137] Thus, in order to determine whether a measure is among the "measures of the kind which have been required to be converted into ordinary customs duties", it may be necessary to conduct an in-depth examination of the design and structure of the measure itself, as well as its operation, in the light of the relevant language in Article 4.2 and footnote 1.[138]

5.40. Turning to the term "variable import levies", the Appellate Body has explained that a levy is "variable" when it is "liable to vary".[139] This characteristic alone, however, would not suffice to characterize a measure as a "variable import levy", given that an "ordinary customs duty" could also fit this description.[140] Measures constituting "variable import levies" are "inherently" variable because they "incorporate[] a scheme or formula that causes and ensures that levies change automatically and continuously".[141] This is a necessary and key element of "variable import levies".[142] The presence of this underlying scheme or formula distinguishes "variable import levies" from "ordinary customs duties", which may also be subject to variation, but through "discrete changes in applied tariff rates that occur independently, and unrelated to such … scheme or formula"[143], and usually as a result of separate administrative or legislative action.[144]

5.41. "Variable import levies" may also have additional features that compromise the objective of the Agreement on Agriculture "to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties".[145] Such additional features include "a lack of transparency and a lack of predictability in the level of duties that will result from such measures" when compared to the level of transparency and predictability of "ordinary customs duties".[146] These additional features are *not* independent or absolute characteristics that a measure must display in order to be considered a "variable import levy"[147];

[134] This requirement applies from the date of entry into force of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), regardless of whether a Member *in fact* converted such measures into ordinary customs duties. (See Appellate Body Reports, *Chile – Price Band System*, para. 212; *Chile – Price Band System (Article 21.5 – Argentina),* para. 148)

[135] Appellate Body Report, *Chile – Price Band System*, para. 200.

[136] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina),* para. 149.

[137] Appellate Body Reports, *Chile – Price Band System*, para. 216; *Chile – Price Band System (Article 21.5 – Argentina),* para. 149.

[138] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina),* para. 149.

[139] Appellate Body Reports, *Chile – Price Band System*, para. 232; *Chile – Price Band System (Article 21.5 – Argentina),* para. 155.

[140] Appellate Body Reports, *Chile – Price Band System*, para. 232; *Chile – Price Band System (Article 21.5 – Argentina),* para. 155.

[141] Appellate Body Reports, *Chile – Price Band System*, para. 233; *Chile – Price Band System (Article 21.5 – Argentina),* para. 155.

[142] Appellate Body Report, *Chile – Price Band System*, para. 234.

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

[144] Appellate Body Reports, *Chile – Price Band System*, para. 233; *Chile – Price Band System (Article 21.5 – Argentina),* para. 155. The Appellate Body further noted that the mere fact that the duties resulting from the application of a measure take the form of *ad valorem* or specific rates, or are calculated on the basis of value or volume of imports, does not, alone, imply that the underlying measure or scheme generates "ordinary customs duties" and cannot be similar to one of the categories of measure identified in footnote 1. (See Appellate Body Reports, *Chile – Price Band System*, paras. 274-279; *Chile – Price Band System (Article 21.5 – Argentina),* para. 164)

[145] Appellate Body Report, *Chile – Price Band System*, para. 234.

[146] Appellate Body Reports, *Chile – Price Band System*, para. 234; *Chile – Price Band System (Article 21.5 – Argentina),* para. 156.

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

rather, the additional features may serve to confirm that a measure is "inherently variable".[148] Finally, the Appellate Body has stated that "variable import levies" may contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.[149]

5.42. With this understanding in mind, we examine below Peru's claims of error in respect of the Panel's interpretation of "variable import levies" in footnote 1 of Article 4.2 and the Panel's application of this term to the measure at issue.

5.3.1.3 Peru's claim that the Panel erred in its assessment of the "variability" of the measure at issue

5.43. Peru argues that the Panel's analysis of "variability" confuses the measure at issue – i.e. the additional duties resulting from the PRS – with the methodology used to calculate the reference price and the potential duty.[150] By contrast, Guatemala argues that drawing a distinction between the additional duties and their calculation methodology would be inconsistent with the Panel's terms of reference.[151] As explained above[152], we consider that the measure before the Panel comprised both the additional duties resulting from the PRS and the PRS calculation methodology. Moreover, "inherent variability" must be assessed on the basis of the overall configuration of a measure and the extent to which the changes are automatic, continuous, and based on an underlying mechanism or formula.[153] Thus, we consider that the Panel was in fact required to examine the PRS calculation methodology when determining whether the additional duties resulting from the PRS are "variable import levies".

5.44. Peru also argues that the additional duties at issue "do not necessarily change as a result of the [PRS] calculation"[154], and do not vary with any regularity.[155] According to Guatemala, the fact that, in certain periods, the PRS did not give rise to a variable additional duty is not relevant to the examination of the PRS and the resulting additional duties during the periods "when they were in fact imposed".[156]

5.45. We first observe that Peru accepts that "[w]hat is inherent and automatic in the Peruvian system is the operation of a formula that calculates the relevant values for the upper and lower ranges and the reference prices."[157] We note that the PRS calculation methodology is a necessary element in the calculation of the additional duties resulting from the PRS. Duties that are calculated based on an "inherently variable" system will themselves be "inherently variable".

5.46. Moreover, the Panel's finding of "variability" is not based on the frequency of change in the duties at issue. Rather, the Panel based its finding on the fact that the PRS contains a scheme or formula that causes and ensures automatic and continuous revision of the applicable duties.[158] In addition, the Panel explicitly addressed the frequency of change, stating that "[t]he fact that the result may be the same for some or several fortnightly periods as a result of applying the formulas … does not mean that the PRS, as a mechanism, does not impose fortnightly variability of duties."[159] The Appellate Body has noted that the frequency of change effected by a measure may be relevant in determining whether such measure is "variable", but "[n]o specific frequency of change in resulting duties is required in order for a measure to be considered 'variable' within the

[148] The Appellate Body has examined "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.'" (Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 156 (quoting Appellate Body Report, *Chile – Price Band System*, para. 234))

[149] Appellate Body Reports, *Chile – Price Band System*, para. 234; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 156.

[150] Peru's appellant's submission, para. 248.

[151] Guatemala's appellee's submission, para. 112.

[152] See para. 5.4 of this Report.

[153] Appellate Body Reports, *Chile – Price Band System*, para. 233; *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 155 and 211.

[154] Peru's appellant's submission, para. 250.

[155] Peru's appellant's submission, paras. 249-251.

[156] Guatemala's appellee's submission, para. 116. (emphasis omitted)

[157] Peru's appellant's submission, para. 251.

[158] Panel Report, para. 7.321.

[159] Panel Report, para. 7.324.

meaning of footnote 1" of the Agreement on Agriculture.[160] That a measure produces duties that vary with *every* transaction is not a necessary condition for a measure to be "variable".[161]

5.47. We also note Peru's objection to the Panel's statement that the variability imposed by the PRS cannot be compared to the fact that "ordinary customs duties" may occasionally vary. Peru argues that changes of both the additional duties resulting from the PRS and "ordinary customs duties" are neither constant nor mechanical.[162] Guatemala responds that the evidence submitted by Peru reveals that the variation of the additional duties resulting from the PRS is significantly greater than the variation of "ordinary customs duties".[163]

5.48. In our view, the fact that a levy is "variable" is not sufficient for characterizing a measure as a "variable import levy" because an "ordinary customs duty" could also fit this description.[164] Rather, "variable import levies" are distinct from "ordinary customs duties" because of the presence of an underlying scheme or formula in the measure at issue that causes those levies to change automatically and continuously.[165] Thus, we consider that the Panel was correct in stating that the "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".[166]

5.49. In addition, Peru contends that, while the Panel correctly identified the legal standard for "variable import levies", the Panel relied "too heavily" on "inherent variability" in finding that the measure is a "variable import levy".[167] Guatemala argues that "the Panel did not rely entirely on the inherent variability" of the measure and that, in any event, inherent variability "*is* the key criterion for the finding of a variable import levy".[168] In our view, Peru's argument does not find support in the Panel Report. The Panel examined certain "additional features" of the measure at issue to confirm its finding of "inherent variability".[169] Furthermore, the Panel found that "[t]he PRS … 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" and that it is thus "clear that the PRS, as a mechanism, imposes the variability of the additional duties."[170] Such a finding of "variability" based on an underlying formula "that causes and ensures that levies change automatically and continuously"[171] is a necessary and key element for a finding of "variable import levies" within the meaning of footnote 1 of the Agreement on Agriculture. We, therefore, disagree with Peru's argument that the Panel erred by "relying too heavily" on this aspect in its analysis.

5.50. Finally, Peru submits an argument that relates the Panel's findings concerning "variable import levies" with those concerning "minimum import prices". Peru contends that the Panel's finding, that the PRS floor price does not prevent the entry of imports priced below it[172], should

[160] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 211.

[161] Rather, "variability" must be assessed on the basis of the overall configuration of a measure and the interaction of its specific features. (Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 211)

[162] Peru's appellant's submission, paras. 252-255 (referring to Panel Report, para. 7.324).

[163] Guatemala refers to evidence concerning boneless bovine meat, and argues that an ordinary customs duty that was changed "by discrete, discretionary and unannounced acts of the Peruvian authorities seven times over the past 23 years" is not the same as "a duty generated by an automatic, fortnightly mathematical formula that has changed over 400 times since 2001". (Guatemala's appellee's submission, para. 117)

[164] Appellate Body Reports, *Chile – Price Band System*, para. 232; *Chile – Price Band System (Article 21.5 – Argentina),* para. 155. Moreover, we recall that no specific frequency of change in resulting duties is required in order for a measure to be considered "variable" within the meaning of footnote 1 of the Agreement on Agriculture. (Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 211)

[165] In this context, the Appellate Body has noted that "ordinary customs duties" are subject to discrete changes in applied tariff rates that occur independently from and unrelated to an underlying scheme or formula, and as a result of separate administrative or legislative action. (See Appellate Body Reports, *Chile – Price Band System*, para. 233; *Chile – Price Band System (Article 21.5 – Argentina),* para. 155)

[166] Panel Report, para. 7.324.

[167] Peru's appellant's submission, para. 247.

[168] Guatemala's appellee's submission, para. 92. (emphasis original)

[169] See Panel Report, paras. 7.326-7.349.

[170] Panel Report, para. 7.321.

[171] Appellate Body Reports, *Chile – Price Band System*, para. 233; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 155.

[172] Peru's appellant's submission, para. 240 (referring to Panel Report, para. 7.357). See also paras. 237, 241, 242, and 245 (referring to Panel Report, paras. 7.361, and 7.366-7.369).

have led the Panel to conclude that the additional duties resulting from the PRS are not "variable import levies", nor "similar border measures".[173] Peru argues that the legal standards for "variable import levies" and "minimum import prices" share common characteristics, in particular, the use of a minimum or threshold price.[174] In contrast, Guatemala argues that the legal standard for "variable import levies" does not require a minimum-price component, and that "variable import levies" and "minimum import prices" are two distinct concepts.[175]

5.51. We first note that Peru refers to a minimum *or* threshold price. The narrative of Peru's argument – in particular, the reference to the Panel's finding that the floor price used in the PRS does not act as a threshold preventing the entry of imports priced below it – suggests that Peru is not referring to just any threshold, but to a particular one, i.e. a minimum threshold. The term "variable import levies", within the meaning of footnote 1 of the Agreement on Agriculture, however, has not been interpreted as necessarily comprising a minimum import price threshold. Rather, as explained above[176], "variable import levies" are import levies characterized as "inherently variable" because they contain a mechanism that causes the levies to change automatically and continuously.[177] A given measure may contain elements that are common to both "variable import levies" and "minimum import prices". A "variable import levy", however, need not necessarily contain a certain *minimum* threshold for it to be characterized as "variable", or more precisely as "inherently variable".[178]

5.52. On the basis of the foregoing, we find that Peru has not established that the Panel erred in its assessment of the "variability" of the measure at issue.[179]

5.3.1.4 Peru's claim that the Panel erred in its assessment of the "additional features" of the measure at issue

5.53. Peru claims that the Panel erred in its assessment of the "additional features" of the measure at issue when finding that the additional duties resulting from the PRS constitute "variable import levies" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.

5.54. With respect to the Panel's assessment of the transparency and predictability of the measure at issue, Peru first contends that the Panel erred by conflating the ability to forecast duties with transparency and predictability.[180] Guatemala disagrees and points out that, while the rate of ordinary customs duties can change, such rates are fixed and thus predictable until such change.[181] Given the structure, design, and operation of the PRS, and in particular the recalculation of the potential additional duties every two weeks, we see no error in the Panel's explanation that the PRS lacks transparency and predictability regarding the level of the additional

[173] Peru's appellant's submission, para. 243.
[174] Peru's appellant's submission, paras. 238 and 241 (referring to Appellate Body Report, *Chile – Price Band System*, paras. 236-238, 246, 252, and 262; and Panel Report, *Chile – Price Band System*, paras. 7.36(c) and 7.36(e)).
[175] Guatemala's appellee's submission, paras. 100 and 104.
[176] See paras. 5.40-5.41 above.
[177] "Variable import levies" are also characterized by certain "additional features", which serve to confirm the finding of "inherent variability".
[178] To the extent that Peru's argument may be understood as referring to *any* threshold, we note that the Panel explicitly referred to, *inter alia*, the fact that the PRS contains a "series of steps and mathematical formulas for calculating the ceiling and floor prices" when concluding that the PRS "contains a scheme or formula which causes and ensures automatic and continuous revision of the applicable duties or rebates". (Panel Report, para. 7.321) Thus, the Panel found "inherent variability" on the basis of, *inter alia*, the existence of a floor price threshold in the PRS. This floor price threshold, however, need not necessarily be akin to, or operate as, a "minimum import price" for a finding of "variable import levies" within the meaning of footnote 1 of the Agreement on Agriculture.
[179] See Panel Report, paras. 7.318-7.325.
[180] Peru's appellant's submission, paras. 258-266. Peru submits that data and formulas are "beneficial", as they enhance – rather than limit – predictability, particularly when compared to WTO-consistent ordinary customs duties that "can change without warning". (Peru's appellant's submission, paras. 258-260)
[181] Guatemala submits that, in practice, ordinary customs duties remain unchanged over large periods of time. (Guatemala's appellee's submission, para. 119)

duties when compared to the transparency and predictability afforded by ordinary customs duties.[182]

5.55. Moreover, Peru contends that any "variability" of the measure is due to the fluctuations in world market prices. As the Panel concluded that "such fluctuations may … become an additional factor in lack of transparency and predictability", Peru contends that the Panel incorrectly found that the measure lacked transparency and predictability *because* of its alleged "inherent variability".[183] Guatemala responds that, while Peru may rely on international prices to adjust its ordinary customs duties "through discrete and independent acts of its authorities", Peru may not "design import charges whose level depends mathematically on international prices and that are updated periodically via an automatic mechanism".[184] The Panel concluded that the "inherent variability" of the PRS relates to the "series of steps and mathematical formulas for calculating the ceiling and floor prices … and the reference prices".[185] By contrast, in its analysis of transparency and predictability, the Panel observed that, in the context of the PRS, the difficulty in estimating future international prices leads to a lack of transparency and predictability when compared to the level of transparency and predictability of ordinary customs duties.[186] We disagree with Peru's argument that, in this part of the Panel's analysis, the Panel associated the lack of transparency and predictability of the PRS with the "inherent variability" of the measure at issue.[187]

5.56. With respect to the Panel's assessment of whether the measure at issue distorts the transmission of international prices to Peru's market, Peru argues that the Panel failed to provide a reasonable basis for its finding because the Panel relied solely on a theoretical analysis, and did not include an empirical assessment of the "observable effects of the measure".[188] Guatemala responds that there is nothing "theoretical" about the Panel's analysis, and that the Panel did not ignore, but was simply not convinced by, the evidence presented by Peru.[189] The Panel examined the declared objective of the PRS; the structure and design of the PRS, including the short-term and medium-term effects; and statistical evidence on sugar and maize.[190] We note that a panel is not required to focus its examination primarily on numerical or statistical data regarding the effects of the measure in practice. Rather, 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."[191] The weight and significance to be accorded to such evidence will depend on the circumstances of each case.[192]

5.57. In addition, Peru argues that the Panel's analysis appears to contradict the Panel's finding that the measure at issue is not a minimum import price.[193] By contrast, Guatemala considers that a measure may "neutralize, distort, impede or cushion" the transmission of international prices regardless of whether it also qualifies as a "minimum import price".[194] Peru's argument associates elements of the Panel's examination of whether the measure at issue is a "variable import levy" with elements of the Panel's examination of whether the measure at issue is a "minimum import

[182] In addition, as noted by Guatemala, Peru appears to refer to two different concepts of "change", when Peru compares a "change" in the level of ordinary customs duties with a "change" in the additional duties resulting from the PRS. The change in the PRS that would, by its nature, correspond to the discretionary and unannounced changes of an ordinary customs duty would be a *modification* of the PRS itself. We agree with Guatemala that such change is distinct from the variation of the PRS additional duty, which results from the application of the PRS formula and has no equivalent in a system of ordinary customs duties. (See Guatemala's appellee's submission, para. 131)

[183] Peru's appellant's submission, paras. 267-269 (referring to Panel Report, para. 7.336). (emphasis omitted)

[184] Guatemala's appellee's submission, para. 139.

[185] Panel Report, para. 7.321. See also paras. 7.322-7.325.

[186] See Panel Report, paras. 7.334-7.338 and 7.340.

[187] We further note that the Appellate Body considered transparency and predictability in relation to the level of resulting duties in *Chile – Price Band System*. (See Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 156)

[188] Peru's appellant's submission, para. 276 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 189). See also para. 278.

[189] Guatemala's appellee's submission, paras. 148-149.

[190] Panel Report, paras. 7.344-7.347.

[191] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 189. (emphasis added)

[192] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 189.

[193] Peru's appellant's submission, paras. 282-283.

[194] Guatemala's appellee's submission, para. 156.

price". According to the Panel, the question of whether the measure at issue is a "variable import levy" that distorts the transmission of international prices to the domestic market concerns the issue of whether the measure "insulates domestic prices from international price developments and thus impedes the transmission of world market prices to the domestic market."[195] Conversely, the question of whether a measure qualifies as a "minimum import price" concerns the issue of whether it "refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market".[196] Even if these questions address features of "variable import levies" and "minimum import prices" that are related to each other, whether a measure falls within the scope of one or of another measure listed in footnote 1 of the Agreement on Agriculture nonetheless remains a separate question. Thus, we see no inconsistency in the Panel's analysis of "variable import levies" and its analysis of "minimum import prices" in this regard.

5.58. Peru also contends that the Panel overlooked the fact that the PRS is incapable of preventing the transmission of international prices to the domestic market for all products covered because it operates on the basis of only four "marker products".[197] Guatemala argues that, even for "associated products", the PRS ensures that international price fluctuations are neutralized or distorted. According to Guatemala, "a variable duty will always tend to distort the transmission of price changes onto the destination market".[198] Even if we were to assume, as suggested by Peru, that the prices of "associated products" and the relevant "marker product" are unrelated[199], Peru's argument fails to explain how an import levy, varying according to the international price of another agricultural product (i.e. the "marker product"), would not distort the transmission of international prices of "associated products" to Peru's market, or how the effects of such levy could nevertheless be considered equivalent to the impact of an "ordinary customs duty".

5.59. Finally, Peru contends that, in contrast to Chile's price band system, the PRS results in a close correlation between international and domestic prices.[200] Guatemala responds that the differences between the PRS and Chile's price band system identified by Peru are inaccurate and, in any event, irrelevant.[201] Simply stating, as Peru does, that the PRS is less distortive than the Chilean measure is insufficient to demonstrate that the PRS does not distort the transmission of international prices to Peru's domestic market. The Panel examined in detail the elements of the PRS, and specifically took into account the floor and reference prices when concluding that the short-term and medium-term effects of the PRS distort the transmission of international prices to the domestic market, differently from "ordinary customs duties".[202] Furthermore, as the Panel found[203], the use of a floor price updated every six months, and the use of a reference price updated every two weeks, are key elements of a system that is designed to, and indeed does to a certain extent, "neutralize" or dilute fluctuations in international prices.[204] As for Peru's argument that the PRS results in a close correlation between international and domestic prices because it lacks a minimum import price[205], we have explained above[206] that the issue of whether a measure is a "variable import levy" that distorts the transmission of international prices to the domestic market is separate from the issue of whether such measure also qualifies as a "minimum import price".

[195] Panel Report, para. 7.343.
[196] Appellate Body Reports, *Chile – Price Band System*, para. 236; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 152.
[197] Peru stresses that the PRS operates on the basis of only four "marker products", and that, "among [the] 47 tariff lines [subject to the PRS], the prices can vary significantly". (Peru's appellant's submission, para. 284. See also para. 285)
[198] Guatemala's appellee's submission, para. 158.
[199] We note that Peru and Guatemala disagree on the extent to which the international price of the relevant "marker product" can be said reasonably to represent the international price of the "associated products". (See Peru's appellant's submission, para. 284; Guatemala's appellee's submission, para. 158)
[200] Peru's appellant's submission, paras. 286-289. Peru argues that the PRS results in a close correlation between international and domestic prices because: (i) the floor and ceiling prices are updated every six months (twice as often as in Chile's price band system); (ii) the reference price is updated every two weeks; and (iii) the PRS lacks a minimum import price (unlike Chile's price band system). (Peru's appellant's submission, para. 288)
[201] Guatemala's appellee's submission, paras. 162-163.
[202] Panel Report, paras. 7.97-7.167, 7.344-7.347, and 7.349.
[203] Panel Report, paras. 7.344-7.349.
[204] Panel Report, paras. 7.344 and 7.346.
[205] See fn 200.
[206] See para. 5.51 above.

5.60. Overall, we consider that the term "variable import levies"[207], within the meaning of footnote 1 of the Agreement on Agriculture, refers to import levies characterized as being "inherently variable". "Variable import levies" are also characterized by certain "additional features"[208], which serve to confirm a finding of "inherent variability", and are *not* independent or absolute characteristics that a measure must display in order to be considered a "variable import levy".[209] Peru's appeal assigns too prominent a role to the assessments of a lack of transparency and predictability, and of distortion of the transmission of international prices to the domestic market, within the context of an analysis of whether a measure is a "variable import levy". Given that the "additional features" are not independent or absolute characteristics that a measure must display in order to be considered a "variable import levy", their assessment should not be given more prominence in a panel's analysis than the determination of whether a measure can be characterized as "inherently variable", which is a necessary and key element for a finding of "variable import levy".[210] Peru's arguments do not suffice to show that the Panel erred in its approach to resolving this issue. In particular, Peru's arguments do not undermine the fact that the Panel's assessment of these additional features confirms the Panel's conclusion that the additional duties resulting from the PRS are "inherently variable".

5.61. In the light of the foregoing, we find that Peru has not established that the Panel erred in its assessment of the "additional features" of the measure at issue when it found that the additional duties resulting from the PRS were "variable import levies", or at least a "similar border measure".

5.3.1.5 Peru's claim that the Panel acted inconsistently with Article 11 of the DSU

5.62. Peru claims that the Panel acted inconsistently with Article 11 of the DSU by failing to properly compare the measure at issue with "ordinary customs duties" and "variable import levies" when examining Guatemala's claim under Article 4.2 of the Agreement on Agriculture.[211]

5.63. We recall that the Panel found that the additional duties resulting from the PRS exhibit "inherent variability", which cannot be compared to the fact that "ordinary customs duties" may occasionally vary.[212] In addition, the Panel noted that the PRS lacks transparency and predictability regarding the level of the additional duties when compared to the transparency and predictability of "ordinary customs duties".[213] Finally, the Panel noted that the structure, design, and operation of the PRS show that the resulting additional duties act in such a way that they may distort the prices of imports subject to the PRS and limit the transmission of international prices to Peru's domestic market, and thus operate differently from ordinary customs duties.[214] On this basis, the Panel considered that the additional duties resulting from the PRS constitute "variable import levies" or a "similar border measure", inconsistent with Article 4.2 of the Agreement on

[207] See paras. 5.40-5.41 above.

[208] The Appellate Body has noted that these "additional features" include a lack of transparency and a lack of predictability in the level of duties that will result from such measures when compared to the level of transparency and predictability of ordinary customs duties. (See Appellate Body Reports, *Chile – Price Band System*, para. 234; *Chile – Price Band System (Article 21.5 – Argentina),* para. 156)

[209] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina),* para. 156. The Appellate Body has also observed that "variable import levies" contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market. (Appellate Body Reports, *Chile – Price Band System*, para. 234; *Chile – Price Band System (Article 21.5 – Argentina),* para. 156)

[210] In *Chile – Price Band System (Article 21.5 – Argentina)*, the Appellate Body also noted that Chile had made extensive arguments regarding the alleged errors made by the panel in examining the "additional features" of the measure at issue, and that "Chile seem[ed] to [have] assign[ed] too prominent a role to these 'additional features'." (Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina),* para. 214) In that case, the Appellate Body noted that those arguments rested on the mistaken assumption that the "additional features" were independent criteria that, if satisfied, conclusively establish that the measure cannot be a "variable import levy". Referring specifically to the assessment of "transparency" within the context of an examination of whether the measure is "similar" to a "variable import levy", see Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina),* para. 220.

[211] Peru's appellant's submission, paras. 290 and 295.

[212] Panel Report, paras. 7.321-7.325. In particular, the Panel found that, since the PRS contains a series of steps and mathematical formulas for calculating the ceiling and the floor prices every six months, and the reference prices every fortnight, the PRS, as a mechanism, imposes the variability of the additional duties.

[213] Panel Report, paras. 7.334 and 7.340.

[214] Panel Report, paras. 7.343-7.349. At the end of its analysis, the Panel also found that, in any event, the additional duties resulting from the PRS, by their structure, design, and operation, and in their particular features, are border measures "similar" to a variable import levy. (Panel Report, para. 7.351)

Agriculture.[215] The Panel further observed that, if a measure is a "variable import levy" or a "similar border measure" that has been required to be converted into an "ordinary customs duty", such measure cannot be, at the same time, an "ordinary customs duty". The Panel held that, consequently, it is "not necessary … to make a separate additional finding as to whether or not the measure is an ordinary customs duty."[216] In the light of these findings, the Panel concluded that "the measure does not constitute an ordinary customs duty, and it is not necessary to undertake further analysis in this regard."[217]

5.64. Peru contends that the Panel's finding, that Peru's additional duties are "variable import levies" or a "similar border measure", was based upon an incomplete analysis, given that the Panel failed to identify the relevant characteristics of an ordinary customs duty on a number of instances.[218] Peru submits that the Appellate Body's jurisprudence should not be understood as meaning "that relevant characteristics of an ordinary customs duty need not be identified in order to properly conduct a comparative analysis as to whether specific characteristics of a measure are more similar to a variable import levy or to an ordinary customs duty".[219] Thereby, Peru argues that the Panel's "attempted" comparative analysis of whether the measure at issue is more similar to a "variable import levy" than to an "ordinary customs duty" fails to meet the required standard under Article 11 of the DSU to make an objective assessment of the facts of the case.[220]

5.65. Guatemala submits that the Panel did not fail to make an objective assessment of the matter before it, and that we should reject Peru's claim under Article 11 of the DSU.[221] Guatemala contends that Peru's arguments address the legal standard applied by the Panel rather than any lack of objectivity in the Panel's assessment of the facts. Guatemala contends that, in any event, Peru is simply attempting to re-argue the facts, asking us to replace the Panel's assessment of facts, without explaining how the objectivity of the Panel's analysis was affected.[222]

5.66. In previous disputes, the Appellate Body has noted that a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".[223] Within these parameters, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings."[224] A claim that a panel has failed to conduct an "objective assessment of the matter before it" is "a very serious allegation".[225] An appellant may not effectively recast its arguments before the panel under the guise of an Article 11 claim, but must identify specific errors[226] that are so material that, "taken together or singly"[227], they undermine the objectivity of the panel's assessment of the matter before it.[228] A challenge under Article 11 of the DSU must "stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary

[215] Panel Report, paras. 7.352, and 7.371-7.372.
[216] Panel Report, para. 7.373 (referring to Appellate Body Report, *Chile – Price Band System*, paras. 167 and 171).
[217] Panel Report, para. 7.374.
[218] Peru's appellant's submission, paras. 290, 292, 294, and 295. Peru argues that, when examining the inherent variability of the measure, the Panel merely asserted that the fortnightly variability of the PRS and the normal variability of an ordinary customs duty cannot be compared. Peru also submits that the Panel failed to identify the level of transparency and predictability of an ordinary customs duty. In addition, Peru contends that the Panel failed to explain how the transmission of international market prices to the domestic market with respect to the PRS is different from the transmission associated with ordinary customs duties. (Peru's appellant's submission, paras. 294-295)
[219] Peru's appellant's submission, para. 293.
[220] Peru's appellant's submission, paras. 291-293.
[221] Guatemala's appellee's submission, paras. 394 and 401.
[222] Guatemala's appellee's submission, paras. 393-394.
[223] Appellate Body Report, *China – Rare Earths*, para. 5.178 (quoting, *inter alia*, Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185).
[224] Appellate Body Report *US – COOL*, para. 299 (quoting Appellate Body Report, *EC – Hormones*, para. 135).
[225] Appellate Body Report, *China – Rare Earths*, para. 5.227 (quoting Appellate Body Report, *EC – Poultry*, para. 133).
[226] Appellate Body Report, *EC – Fasteners (China)*, para. 442.
[227] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318. See also Appellate Body Report, *EC – Fasteners (China)*, para. 499.
[228] Appellate Body Report, *China – Rare Earths*, para. 5.179.

argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement."[229]

5.67. In essence, Peru takes issue with the nature and scope of the comparative analysis conducted by the Panel, under which the Panel allegedly failed to identify the characteristics of "ordinary customs duties", confining its analysis to an assessment of "variable import levies" and "similar border measures" only. We note, however, that, in *Chile – Price Band System (Article 21.5 – Argentina)*, the Appellate Body found that an "inconsistency with Article 4.2 [of the Agreement on Agriculture] 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 [of the Agreement on Agriculture]".[230] Although a panel may undertake "[a] separate analysis of whether, or an additional demonstration that, the measure is 'other than ordinary customs duties'", in order to confirm a finding of inconsistency with Article 4.2, such analysis is "not indispensable for reaching a conclusion on the categories listed in footnote 1".[231] Nevertheless, Peru claims that the Panel's failure to provide the "other half" of the comparative analysis "by inadequately identifying the corresponding characteristic of an ordinary customs duty amounts to legal error and undermines the basis on which the conclusions rest".[232] Peru's challenge does not concern the Panel's proper weighing and appreciation of the evidence or the objectivity of the Panel's assessment of the matter before it. Rather, Peru's challenge relates to the legal standard applied by the Panel under Article 4.2.[233] Peru has not explained the basis for requesting an *additional* examination of the Panel's assessment of the matter before it in the context of an Article 11 claim.

5.68. For the foregoing reasons, we find that the Panel did not act inconsistently with Article 11 of the DSU in its examination of Guatemala's claim under Article 4.2 of the Agreement on Agriculture.

5.3.2 Article II:1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

5.69. We now turn to Peru's appeal in connection with the additional duties resulting from the PRS and Article II:1(b) of the GATT 1994. Overall, Peru raises two claims of error concerning the Panel's analysis of whether the additional duties are inconsistent with Article II:1(b). First, Peru contends that the Panel erred in finding that the additional duties are not "ordinary customs duties" under Article II:1(b) of the GATT 1994 on the basis of its finding under Article 4.2 of the Agreement on Agriculture.[234] Second, Peru claims that the Panel acted inconsistently with Article 11 of the DSU by failing to examine evidence submitted in connection with Guatemala's claim under Article II:1(b) of the GATT 1994.[235] Peru requests us to reverse and "declare moot and with no legal effect" the Panel's findings that the additional duties resulting from the PRS constitute "other duties or charges … imposed on or in connection with the importation", within the meaning of the second sentence of Article II:1(b).[236] Peru further requests us to complete the

[229] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 337 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; *Australia – Apples*, para. 406). In case of similarly overlapping claims of error in the application of a legal standard to the relevant facts of a case and under Article 11 of the DSU, there is no basis to have a separate and additional examination of whether a panel has conducted an objective assessment of the facts under Article 11 of the DSU. (Appellate Body Report, *China – Rare Earths*, para. 5.174 (referring to Appellate Body Report, *China – GOES*, para. 184))

[230] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 171.

[231] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 171. In that case, the Appellate Body rejected Chile's argument that the panel should have conducted an analysis as to whether the measure constituted an "ordinary customs duty" in addition to its examination of whether the measure was "similar" to a "variable import levy" or a "minimum import price". (Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 165-167 and 171)

[232] Peru's appellant's submission, para. 294.

[233] We recall that we have examined above Peru's challenges to the legal standard adopted by the Panel under Article 4.2 of the Agreement on Agriculture, and the Panel's application of such standard in this case.

[234] Peru's appellant's submission, paras. 308-315.

[235] Peru's appellant's submission, paras. 316-324.

[236] Peru's appellant's submission, para. 326 (referring to Panel Report, paras. 7.423, 7.425-7.426, 7.430-7.432, 7.526-7.528, 8.1.e and 8.1.f). (emphasis omitted) See also para. 309. In addition, should we find that Article II:1(b) of the GATT 1994 does not permit the measure at issue, Peru requests us to "find that the application of the … Article II:1(b) obligation in light of the facts in this case must lead to the conclusion that Peru did not act inconsistently with this provision". (Peru's appellant's submission, para. 327) We examine this aspect of Peru's request in section 5.3.3 below, together with Peru's arguments concerning the impact the FTA between Peru and Guatemala should have in the assessment of Guatemala's claims under Article II:1(b).

legal analysis and find that Peru is acting consistently with its obligations under Article II:1(b) of the GATT 1994.[237] We examine each of Peru's claims below.

5.3.2.1 Peru's claim that the Panel erred in finding that the measure at issue is not an "ordinary customs duty" under Article II:1(b) of the GATT 1994

5.70. Peru claims that the Panel erred in finding that the additional duties resulting from the PRS are not "ordinary customs duties" under Article II:1(b) of the GATT 1994 on the basis of its finding under Article 4.2 of the Agreement on Agriculture.[238] While Peru argues that the Panel should have examined separately whether the measure at issue is an "ordinary customs duty" under Article II:1(b) of the GATT 1994[239], Guatemala contends that the Panel was correct to conclude that the measure at issue is not an "ordinary customs duty" under Article II:1(b) of the GATT 1994, having found that such measure falls under the scope of footnote 1 of Article 4.2 of the Agreement on Agriculture.[240]

5.71. The question before us is whether the Panel erred by finding that the measure at issue is not an "ordinary customs duty" under the first sentence of Article II:1(b) of the GATT 1994 on the basis of the Panel's earlier finding that the measure at issue is a "variable import levy" or a "similar border measure" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.

5.72. Article 4.2 of the Agreement on Agriculture and the first sentence of Article II:1(b) of the GATT 1994 contain different obligations. Article 4.2 of the Agreement on Agriculture provides that "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". The first sentence of Article II:1(b) of the GATT 1994 provides that certain products shall "be exempt from ordinary customs duties in excess of those set forth and provided" in the relevant Schedule of Concessions. We note that both provisions refer to "ordinary customs duties".

5.73. As explained above[241], footnote 1 of the Agreement on Agriculture provides a list of measures covered by the obligation under Article 4.2 of the Agreement on Agriculture. The list in footnote 1 includes "variable import levies", "minimum import prices", and "similar border measures". We also recall that, with respect to footnote 1, the Appellate Body has stated that "the structure and logic of footnote 1 make clear that variable import levies and minimum import prices cannot be ordinary customs duties."[242] In the context of deciding the order of analysis in a case with claims under both Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994, the Appellate Body has stated that "the term 'ordinary customs duties' should be interpreted in the same way in both of these provisions."[243] In this dispute, both Peru and Guatemala agree with the Panel's statement that "the term 'ordinary customs duties' must have the same meaning in Article 4.2 of the Agreement on Agriculture and the [first] sentence of Article II:1(b) of the GATT 1994."[244]

5.74. The Panel found that the additional duties resulting from the PRS constitute "variable import levies" or a border measure "similar" to a "variable import levy" within the meaning of footnote 1 of the Agreement on Agriculture.[245] On this basis, the Panel concluded, when examining Guatemala's claim under Article 4.2 of the Agreement on Agriculture, that the additional duties cannot at the same time constitute an "ordinary customs duty", and stated that "it [was] not

[237] Peru's appellant's submission, para. 328. Peru submits that the necessary facts and arguments are in the record of the Panel proceedings should we decide to complete the legal analysis. (Peru's appellant's submission, para. 324 (referring to Panel Report, paras. 7.212-7.239 and 7.377-7.394))
[238] Peru's appellant's submission, paras. 308-315.
[239] Peru's appellant's submission, para. 314.
[240] Guatemala's appellee's submission, paras. 299-301 and 304.
[241] See para. 5.39 above.
[242] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 167.
[243] Appellate Body Report, *Chile – Price Band System*, para. 188.
[244] Peru's appellant's submission, paras. 311-312, and Guatemala's appellee's submission, para. 300 (both referring to Panel Report, para. 7.419); Peru's and Guatemala's responses to questioning at the oral hearing.
[245] Panel Report, paras. 7.371-7.372.

necessary to undertake further analysis in this regard".[246] In the context of its analysis under Article II:1(b) of the GATT 1994, the Panel recalled the statement in *Chile – Price Band System* that "the term 'ordinary customs duties' must have the same meaning" in both Article 4.2 of the Agreement on Agriculture and the first sentence of Article II:1(b) of the GATT 1994.[247] The Panel also recalled its earlier conclusion that the additional duties are not "ordinary customs duties" in the context of Article 4.2 of the Agreement on Agriculture.[248] On the basis of the above considerations, the Panel concluded that the additional duties at issue are "other duties or charges" within the meaning of Article II:1(b) of the GATT 1994.[249] Given the Panel's finding that the additional duties resulting from the PRS fall within footnote 1 of the Agreement on Agriculture and that "variable import levies" cannot be "ordinary customs duties" within the meaning of Article 4.2, we consider that the Panel was correct in finding that such additional duties are also not "ordinary customs duties" within the meaning of the first sentence of Article II:1(b) of the GATT 1994.

5.75. Contrary to Peru's argument, the Panel's approach and reasoning do not suggest that the Panel found an inconsistency with Article II:1(b) of the GATT 1994 "by implication" from a finding of inconsistency with Article 4.2 of the Agreement on Agriculture.[250] Article 4.2 prohibits "measures of the kind which have been required to be converted into ordinary customs duties". In turn, the first sentence of Article II:1(b) of the GATT 1994 provides that certain products shall "be exempt from ordinary customs duties in excess of those set forth and provided" in the relevant Schedule of Concessions. The second sentence of Article II:1(b), read together with the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, prohibits the imposition of "other duties or charges" in excess of those recorded in the relevant Member's Schedule of Concessions. In line with the understanding that Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 contain "distinct legal obligations arising under … two different legal provisions"[251], the Panel examined both provisions separately in different sections of its Report, and did not make a consequential finding of inconsistency with the second sentence of Article II:1(b) based on its earlier finding under Article 4.2.

5.76. On the basis of the foregoing, we find that Peru has not established that the Panel erred in finding that the measure at issue is not an "ordinary customs duty" under the first sentence of Article II:1(b) of the GATT 1994.

5.3.2.2 Peru's claim that the Panel acted inconsistently with Article 11 of the DSU

5.77. Peru claims that the Panel acted inconsistently with Article 11 of the DSU by failing to examine evidence relevant to the determination of whether Peru correctly scheduled the additional duties resulting from the PRS as "ordinary customs duties" within the meaning of Article II of the

[246] Panel Report, para. 7.374. See also para. 7.373. The Panel referred to the Appellate Body's statement in *Chile – Price Band System (Article 21.5 – Argentina)* that, once it is shown that a measure falls into one of the categories prohibited in footnote 1, a "separate analysis of whether, or an additional demonstration that, 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." (Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 171)

[247] Panel Report, para. 7.419 (referring to Panel Report, *Chile – Price Band System*, para. 7.104; and Appellate Body Report, *Chile – Price Band System*, para. 188). We also note the Appellate Body's statements in *Chile – Price Band System*, para. 188 ("'[o]rdinary customs duties' should be interpreted in the same way in both [Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994]"), and *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 167 and 171.

[248] Panel Report, para. 7.423.

[249] Panel Report, para. 7.425. In its analysis under Article II:1(b) of the GATT 1994, the Panel noted that "other duties or charges of any kind" correspond to a residual category of measures not falling under "ordinary customs duties" or under the three categories of measures covered by Article II:2 of the GATT 1994. (Panel Report, paras. 7.407-7.412) Thereafter, the Panel examined each of the three categories covered by Article II:2 – namely: (i) internal taxes; (ii) anti-dumping duties; and (iii) fees or charges for services rendered – and found that there is no relevant evidence that the additional duties resulting from the PRS correspond to any of them. (Panel Report, paras. 7.413-7.418) In response to questioning at the oral hearing and in their oral statements, the participants confirmed that Article II:2 of the GATT 1994 is not implicated in this appeal.

[250] Peru's appellant's submission, para. 314.

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

GATT 1994.[252] Peru contends that, instead, the Panel found an inconsistency with the second sentence of Article II:1(b) of the GATT 1994 "by implication" of its finding of inconsistency with Article 4.2 of the Agreement on Agriculture.[253] Guatemala argues that, to the extent that the Panel failed to consider any facts, this was a result of the Panel's use of the correct legal standard, rather than any failure to conduct an objective assessment within the meaning of Article 11 of the DSU.[254] Thus, Guatemala submits that we need not complete the legal analysis in this regard.[255]

5.78. We have addressed above the standard articulated by the Appellate Body concerning a panel's duty under Article 11 of the DSU[256] and, in particular, that a challenge under Article 11 of the DSU must "stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement."[257]

5.79. We note that the Panel did not "deem it necessary" to rule on the impact of certain facts submitted by Peru.[258] The Panel, however, made this statement following its understanding that: (i) the term "ordinary customs duties" must have the same meaning in both Article 4.2 of the Agreement on Agriculture and the first sentence of Article II:1(b) of the GATT 1994[259]; and (ii) "the structure and logic of footnote 1 make clear that variable import levies and minimum import prices cannot be ordinary customs duties".[260] Thus, the Panel concluded that examination of the evidence presented by Peru was not necessary for its analysis of whether the measure at issue is an "ordinary customs duty". To that end, Peru's claim does not challenge any lack of objectivity in the Panel's assessment of the facts, but the correctness of the Panel's legal analysis. The Panel expressly acknowledged 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"[261], but chose to rely only on those pieces of evidence that it considered relevant in the light of the articulated legal standard. Moreover, we observe that Peru put forward an analogous claim of error concerning the legal standard applied by the Panel when examining Guatemala's claim under the second sentence of Article II:1(b) of the GATT 1994. We have rejected Peru's claim above.[262] As we have noted, a challenge under Article 11 of the DSU should not merely be put

[252] Peru lists three "relevant facts" that the Panel did not "deem necessary to examine": (i) "the specific duties … were created in 1991, not in 2001", and were therefore part of Peru's customs tariff at the time of the Uruguay Round negotiations; (ii) during the Uruguay Round, the modalities agreed for the negotiation allowed developing countries to schedule "ordinary customs duties" by setting a tariff ceiling, "which is precisely what Peru did with respect to the tariff items subject to the specific duties"; and (iii) Peru confirmed, in the final days of the negotiations, that "its specific duties were not 'other duties or charges' required to be scheduled as such". (Peru's appellant's submission, para. 321.)

[253] Peru's appellant's submission, paras. 319 and 322-323. Peru takes issue with the Panel's statement that it "[did] 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." (Peru's appellant's submission, para. 319 (referring to Panel Report, para. 7.423))

[254] Guatemala's appellee's submission, para. 307. See also paras. 308-309 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.80). According to Guatemala, the Panel acknowledged that Peru had made certain factual assertions relating to the measure at issue, but found that their examination was unnecessary given its previous characterization of the measure as a "variable import levy". Guatemala submits that any error in the Panel's approach would therefore be an error of law, not an inconsistency with Article 11 of the DSU. (Guatemala's appellee's submission, para. 400)

[255] Guatemala's appellee's submission, paras. 310-311.

[256] See para. 5.66 above.

[257] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 337 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; and *Australia – Apples*, para. 406.) In case of similarly overlapping claims of error in the application of a legal standard to the relevant facts of a case and under Article 11 of the DSU, there is no basis to have a separate and additional examination of whether a panel has conducted an objective assessment of the facts under Article 11 of the DSU. (Appellate Body Reports, *China – Rare Earths*, para. 5.174 (referring to Appellate Body Report, *China – GOES*, para. 184))

[258] Panel Report, para. 7.423.

[259] Panel Report, para 7.419 (referring to Panel Report, *Chile – Price Band System*, para. 7.104, and Appellate Body Report, *Chile – Price Band* System, para. 188 (where the Appellate Body agreed that "'ordinary customs duties' should be interpreted in the same way in both [Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994]").

[260] Panel Report, para. 7.422 (emphasis omitted) (quoting Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 167).

[261] Panel Report, para. 7.423.

[262] See paras. 5.70-5.76 above.

forth as a subsidiary argument or claim in support of a claim that a panel failed to construe or apply correctly a particular provision.[263]

5.80. On the basis of the foregoing, we find that the Panel did not act inconsistently with Article 11 of the DSU in its examination of Guatemala's claim under Article II:1(b) of the GATT 1994. Having found that the Panel did not err in finding that the measure at issue is not an "ordinary customs duty" under the first sentence of Article II:1(b) of the GATT 1994, and having found that the Panel did not act inconsistently with Article 11 of the DSU, we need not address Peru's request to complete the legal analysis.

5.3.3 Relationship between WTO and FTA provisions

5.3.3.1 New arguments

5.81. Guatemala contends that Peru's arguments that the Panel erred in its interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 by failing to take into account Article 31(3) of the Vienna Convention were not raised before the Panel and are accordingly not properly within the scope of the appeal.[264] Guatemala objects that it is confronted for the first time on appeal with these arguments and with extensive supporting materials.[265] Guatemala thus requests us to exclude from the scope of this appeal these arguments, which, according to Guatemala, would require us to consider new facts[266] and to address issues that are not issues of law covered in the Panel Report or legal interpretations developed by the Panel. Guatemala contends that our consideration of Article 31(3)(a) and (c) of the Vienna Convention, either with respect to the FTA or ILC Articles 20 and 45, would thus be contrary to Article 17.6 of the DSU[267] and would violate Guatemala's due process rights.[268]

5.82. At the oral hearing, Peru responded that the Appellate Body's jurisprudence does not support the conclusion that all issues must be raised at each stage of the proceedings. Rather, according to the jurisprudence, WTO Members have the right to raise new arguments on appeal, provided these do not require the Appellate Body to solicit or review new facts.

5.83. In previous disputes, the Appellate Body has considered that, while in principle new arguments are not excluded from the scope of appellate review, its ability to consider new arguments is circumscribed by Article 17.6 of the DSU.[269] In particular, the Appellate Body has found that it would be able to consider new arguments if: (i) they do not require it "to solicit, receive and review new facts"[270]; and (ii) they "involve either an 'issue of law covered in the panel report' or 'legal interpretations developed by the panel'".[271] In any event, such consideration must not compromise a party's due process rights to have a fair opportunity to defend itself adequately.[272]

5.84. Peru claims on appeal that the Panel erred in the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 because it failed to take into account the FTA between Peru and Guatemala and ILC Articles 20 and 45, in accordance with Article 31(3) of the Vienna Convention. Nevertheless, Peru also requests us "to *declare moot and with no legal effect*" the Panel's findings in paragraphs 7.525-7.528 and to reverse the Panel's findings in paragraph 8.1.f of the Panel Report[273], which are not those findings concerning the interpretation of Article 4.2 and Article II:1(b), but rather those concerning the question of whether, by means of the FTA, the parties modified their WTO rights between themselves. We thus note that, while Peru's arguments on appeal focus on the interpretation of Article 4.2 and Article II:1(b) under Article 31(3)(a) and (c) of the Vienna Convention, Peru also requests the reversal of the Panel's findings on the alleged modification of WTO provisions by means of the FTA.

[263] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 337.
[264] Guatemala's appellee's submission, paras. 42-44.
[265] Guatemala's appellee's submission, para. 44.
[266] Guatemala's appellee's submission, para. 49.
[267] Guatemala's appellee's submission, para. 53.
[268] Guatemala's appellee's submission, para. 65.
[269] Appellate Body Report, *Canada – Aircraft*, para. 211.
[270] Appellate Body Report, *US – FSC*, para. 102.
[271] Appellate Body Report, *US – FSC*, para. 103.
[272] Appellate Body Report, *US – Gambling*, para. 270.
[273] Peru's appellant's submission, para. 204.

5.85. We note that, before the Panel, Peru did not raise arguments in respect of the FTA or ILC Articles 20 or 45 under Article 31(3)(a) or (c) of the Vienna Convention. Its arguments in respect of the FTA were that, even assuming that Peru's PRS was WTO-inconsistent, Peru and Guatemala had *modified* between themselves the relevant WTO provisions to the extent that the FTA allowed Peru to maintain the PRS. Peru referred to Article 41 of the Vienna Convention in support of its argument that parties to a multilateral treaty may modify their obligations as between themselves.[274]

5.86. Although, before the Panel, Peru did not raise arguments on the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 on the basis of Article 31(3)(a) or (c) of the Vienna Convention, it did raise arguments concerning the interpretation of Article 4.2 and Article II:1(b). Peru's arguments on appeal, albeit new, are framed as concerning the interpretation of WTO provisions, namely, Article 4.2 and Article II:1(b), which were raised before the Panel and are covered in the Panel Report. Therefore, Peru's new arguments on appeal can be considered as relating to "issues of law covered in the panel report" or "legal interpretations developed by the panel".[275] We consider that although arguments relating to the FTA and the ILC Articles 20 and 45 under Article 31(3) of the Vienna Convention were not raised before the Panel, those arguments can be addressed in this appeal to the extent they concern issues of law and legal interpretations covered in the Panel Report, and without prejudicing Guatemala's due process rights. In addition, we are of the view that the consideration of provisions of an FTA for the purpose of determining whether a Member has complied with its WTO obligations involves legal characterizations that fall within the scope of appellate review under Article 17.6 of the DSU.[276]

5.87. We now turn to Guatemala's contention that, in order to address the new arguments raised by Peru, we would have to consider facts that were not presented to the Panel.[277] We agree that if Peru's new arguments on appeal required us to review new facts, we would not be able to address such arguments to that extent. However, to the extent Peru's arguments would require us to consider the provisions of the FTA and ILC Articles 20 and 45 to determine the consistency of the PRS with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994, we are not persuaded that consideration of Peru's arguments on appeal would require us to review new facts.

[274] Panel Report, para. 7.508.

[275] Before the Panel, Peru also claimed that, if the Panel were to conclude that the PRS is inconsistent with the WTO agreements, the terms of the FTA should be considered as having modified as between the parties to the FTA their WTO rights and obligations. (Panel Report, para. 7.507) Thus, even if one were to take the view, as Guatemala does, that such arguments do not in fact concern interpretations but rather modifications of WTO provisions, they could be considered as relating to "issue[s] of law covered in the panel report" or "legal interpretations developed by the panel", to the extent they concern the Panel's finding on the alleged modification of WTO rights and obligations by means of the FTA.

[276] In respect of the provisions of the FTA at issue, we note that FTAs among WTO Members are permitted by Article XXIV of the GATT 1994 and by Article V of the General Agreement on Trade in Services (GATS) provided they fulfil specific conditions set forth in these provisions of WTO law. Article XXIV of the GATT 1994 and Article V of the GATS necessitate consideration of relevant FTA provisions and thus provide a basis for panels and the Appellate Body to determine the meaning of the provisions in such FTAs in order to determine their consistency with WTO law. We further recall that, in *EC – Bananas III*, the Appellate Body was confronted with the issue of whether the panel erred in conducting an objective examination of the requirements of the Fourth ACP-EC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994; extended by EC – The Fourth ACP-EEC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186 (Lomé Convention). In that dispute, the GATT Contracting Parties granted the European Communities a waiver from Article I of the GATT 1947. (The EC – The Fourth ACP-EC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186 (Lomé Waiver) to permit the European Communities to provide preferential treatment to products originating from the African, Caribbean, and Pacific Group of States (ACP) to the extent required under the Lomé Convention.) The Appellate Body agreed with the panel that, since the GATT Contracting Parties "incorporated a reference to the Lomé Convention into the Lomé Waiver, the meaning of the Lomé Convention became a GATT/WTO issue" to the extent necessary to interpret the Lomé Waiver. (See Appellate Body Report, *EC – Bananas III*, para. 167)

[277] In particular, Guatemala refers to statements or practice by WTO Members in WTO bodies or outside the WTO, facts pertaining to the negotiating history or circumstances of the conclusion of the Vienna Convention, and evidence of domestic practices and judicial decisions as well as the provisions of the FTA. (Guatemala's appellee's submission, paras. 49-50)

5.88. In the light of the above, we are of the view that Peru's arguments on appeal regarding the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in accordance with Article 31(3)(a) and (c) of the Vienna Convention are new, but concern "issues of law covered in the panel report" or "legal interpretations developed by the panel". Therefore, to the extent that consideration of these arguments does not require us to consider new facts, we are of the view that such arguments do not adversely affect Guatemala's due process rights and were properly raised on appeal.

5.89. Guatemala further contends that, even accepting that Peru can raise its new arguments on appeal, the Panel was not obliged to address these arguments on its own motion, considering that Peru did not raise them before the Panel. Guatemala contends that the Panel cannot be faulted because it failed to address arguments that Peru did not raise in the Panel proceedings.[278] In Guatemala's view, in the absence of arguments by Peru, the Panel was not required to develop on its own motion an interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 under Article 31(3) of the Vienna Convention that took into account the FTA and ILC Articles 20 and 45.

5.90. These arguments by Guatemala do not concern the *admissibility* of Peru's arguments on appeal, but, rather, the *merits* of the Panel's findings on the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. Therefore, these arguments should not be considered separately from the issue of whether the Panel committed an error in its interpretation of Article 4.2 and Article II:1(b).

5.3.3.2 Peru's arguments under Article 31 of the Vienna Convention

5.91. Peru contends that the Panel should have interpreted the term "shall not maintain" in Article 4.2 of the Agreement on Agriculture in the light of the provisions of the FTA between Peru and Guatemala as allowing Peru to maintain the PRS. More specifically, Peru argues that paragraph 9 of Annex 2.3 to the FTA, providing that "Peru may maintain its Price Range System" with regard to imports of certain products, is relevant to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in accordance with Article 31(3)(a) and (c) of the Vienna Convention.[279] Peru also contends that, according to ILC Article 20, Guatemala's approval and ratification of the FTA amounts to "consent" precluding the wrongfulness of Peru's maintenance of the PRS, and that "Guatemala's ratification of the FTA amounts to a waiver in the sense of Article 45(a) of the ILC Articles".[280] Peru makes, *mutatis mutandis*, the same arguments in respect of Article II:1(b) of the GATT 1994.[281]

5.92. Guatemala responds that Peru is misusing Article 31 of the Vienna Convention, which is about the *interpretation* of a treaty, and that Peru does not want us merely to *interpret* Article 4.2 in the light of the FTA or the ILC Articles. Rather, in Guatemala's view, Peru wants us to *modify* and *amend* Article 4.2, and to *apply* the provisions of the FTA or certain ILC Articles.[282] Guatemala submits that a treaty interpreter is constrained, in the interpretative exercise, by the natural limits of the treaty language being interpreted and that Peru is requesting us to modify or amend WTO law and *apply* it in a manner that no longer corresponds to its wording.[283]

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[278] Guatemala's appellee's submission, para. 179.

[279] Article 31 of the Vienna Convention, entitled "General rule of interpretation", states in relevant part:

1. 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.

...

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

[280] Peru's appellant's submission, paras. 213-215. Peru refers to ILC Articles 20 and 45 (on the validity of "consent" by a state that precludes wrongfulness of an act of another state within the limits of that consent and the "loss of the right to invoke responsibility of a state" in circumstances where the injured state has validly waived the claim).

[281] Peru's appellant's submission, paras. 301, 303, 305, and 307.

[282] Guatemala's appellee's submission, para. 182.

[283] Guatemala's appellee's submission, para. 197.

5.93. We note that Peru argues that, by relying on paragraph 9 of Annex 2.3 to the FTA and on ILC Articles 20 and 45, the Panel should have interpreted the terms "shall not maintain" in Article 4.2 of the Agreement on Agriculture as meaning "may maintain" in the relationship between Peru and Guatemala.[284] By the same token, we understand Peru to suggest that, by relying on paragraph 9 of Annex 2.3 to the FTA and on ILC Articles 20 and 45, the Panel should have interpreted Article II:1(b) of the GATT 1994 as allowing Peru to maintain the PRS. Article 31 – included in Part III, Section 3 of the Vienna Convention, entitled "Interpretation of Treaties" – is meant to assist an interpreter in ascertaining the ordinary meaning of treaty terms, reflecting the common intention of the parties to the treaty. Under Article 31, treaty terms should be interpreted in accordance with their ordinary meaning in their context and in the light of the object and purpose of the treaty.

5.94. While context is a necessary element of an interpretative analysis under Article 31 of the Vienna Convention, its role and importance in an interpretative exercise depends on the clarity of the plain textual meaning of the treaty terms. If the meaning of treaty terms is difficult to discern, determining the ordinary meaning under Article 31 may require more reliance on the context and the object and purpose of the treaty and possibly other elements considered "together with the context" and the tools mentioned in Article 32. However, we do not see how, in an interpretative exercise under Article 31, elements considered "together with the context" can be used to reach the conclusion that the textual terms "shall not maintain" in Article 4.2 of the Agreement on Agriculture should be read as meaning "may maintain" based on a particular provision found in the FTA. We do not consider that Article 31 can be used to develop interpretations based on asserted subsequent agreements or asserted "relevant rules of international law applicable in the relations between the parties" under Article 31(3)(a) and (c) that appear to subvert the common intention of the treaty parties as reflected in the text of Article 4.2 and Article II:1(b).

5.95. Moreover, Peru clarified at the oral hearing that it is advocating an interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 as permitting the PRS exclusively in the relations between Peru and Guatemala, who are the parties to the FTA.[285] Article 31(1) of the Vienna Convention states that "[a] treaty shall be interpreted" such that the object of the interpretative exercise is the treaty as a whole, not the treaty as it may apply between some of its parties. We thus understand that, with multilateral treaties such as the WTO covered agreements, the "general rule of interpretation" in Article 31 of the Vienna Convention is aimed at establishing the ordinary meaning of treaty terms reflecting the common intention of the parties to the treaty, and not just the intentions of some of the parties. While an interpretation of the treaty may in practice apply to the parties to a dispute, it must serve to establish the common intentions of the parties to the treaty being interpreted.

5.96. Therefore, although Peru submits on appeal that the Panel erred in the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994, in our view, these arguments are beyond the scope of an interpretative exercise as envisaged in Article 3.2 of the DSU and in Article 31 of the Vienna Convention. They are essentially the same arguments Peru made before the Panel when it argued that, by virtue of the FTA, Peru and Guatemala modified between themselves their obligations under the relevant WTO provisions.[286] This is also confirmed by the fact that, in concluding its arguments that Article 4.2 and Article II:1(b) should be interpreted taking into account the FTA under Article 31(3)(a) and (c) of the Vienna Convention, Peru requests us to reverse the Panel's findings concerning the alleged modification of WTO provisions by means of the FTA.[287]

5.97. Having concluded that Peru's arguments in fact amount to arguments about alleged modifications of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 as between Peru and Guatemala, and not to their interpretations under Article 31 of the Vienna Convention, we now turn to consider whether other arguments made by Peru on the basis of

[284] Paragraph 9 of Annex 2.3 to the FTA states that "Peru may maintain its Price Range System".

[285] Peru is not arguing that its interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 based on Article 31(3)(a) and (c) of the Vienna Convention would equally apply to other WTO Members. As considered above in sections 5.3.1 and 5.3.2, Peru advocates a "multilateral" interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in arguing that the measure at issue in an "ordinary custom duty" and does not constitute a "variable import levy" or "similar border measure".

[286] Panel Report, paras. 7.506-7.510.

[287] Peru's appellant's submission, para. 204.

Article 31(3)(a) and (c) of the Vienna Convention would confirm or change our conclusion that Peru's arguments do not concern interpretations within the meaning of Article 31.

5.98. Peru's argues that the FTA and ILC Articles 20 and 45 constitute relevant rules of international law applicable in the relations between the parties within the meaning of Article 31(3)(c) of the Vienna Convention and that, in addition, the FTA constitutes a "subsequent agreement between the parties" under Article 31(3)(a). In this respect, Peru's arguments require us to address the threshold question of whether the FTA and ILC Articles 20 and 45 are instruments that could be taken into account "together with the context" under Article 31(3)(a) and (c) of the Vienna Convention in the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994.

5.99. In particular, Peru contends that the both the FTA and the ILC Articles are "rules of international law", that they are "applicable" between the parties, that they are "relevant" to the interpretation of the above-mentioned WTO provisions, and that "parties" in Article 31(3)(c) of the Vienna Convention should be understood to mean the parties to the dispute.[288] Similarly, Peru argues that the FTA is a "subsequent agreement", that it is "regarding the interpretation" of a treaty, and that the term "parties" in Article 31(3)(a) should be understood to mean the parties to the dispute.[289] Guatemala rejects all these arguments by Peru.[290]

5.100. We begin by examining, without addressing whether they are rules of international law applicable between the parties, whether the FTA and ILC Articles 20 and 45 can be considered as "relevant" to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 within the meaning of Article 31(3)(c) of the Vienna Convention, and whether the FTA can be considered as a subsequent agreement "regarding the interpretation" of these WTO provisions within the meaning of Article 31(3)(a) of the Vienna Convention.

5.101. In order to be "relevant" for purposes of interpretation, rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention must concern the same subject matter as the treaty terms being interpreted.[291] In *EC and certain member States – Large Civil Aircraft*, the Appellate Body considered that Article 4 of the 1992 Agreement between the EEC and the United States on Trade in Civil Aircraft[292] was not relevant to the interpretation of "benefit" in Article 1.1(b) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), because, while imposing certain quantitative limits on the amount of government support that may be provided for the development of large civil aircraft programmes, it did not "speak to the market-based concept of 'benefit' as reflected in Article 1.1(b) of the SCM Agreement and the market-based benchmark reflected in Article 14(b)".[293] The Appellate Body has also considered that agreements "regarding the interpretation of the treaty or the application of its provisions" within the meaning Article 31(3)(a) of the Vienna Convention are "agreements bearing specifically upon the interpretation of a treaty".[294]

5.102. Paragraph 9 of Annex 2.3 to the FTA states that "Peru may maintain its Price Range System". ILC Article 20 addresses the issue of validity of consent by a State that precludes the wrongfulness of a given act by another State within the limits of that consent. ILC Article 45,

[288] See Peru's appellant's submission paras. 161-198 and 205-212.

[289] See Peru's appellant's submission paras. 226-233.

[290] Guatemala's appellee's submission paras. 206-287.

[291] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 308; *EC and certain member States – Large Civil Aircraft*, para. 846.

[292] Done at Brussels on 17 July 1992, *Official Journal of the European Communities*, L Series, No. 301 (17 October 1992), p. 32.

[293] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 851.

[294] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 390. In *US – Clove Cigarettes*, the Appellate Body found that it was not possible to discern a function of paragraph 5.2 of the 2001 Doha Ministerial Decision "*other than* to interpret the term 'reasonable interval'" in the Agreement on Technical Barriers to Trade (TBT Agreement), and it was therefore considered to "*bear[] specifically* upon the interpretation" of that term. (Appellate Body Report, *US – Clove Cigarettes*, para. 266 (emphasis original)) In *US – Tuna II (Mexico)*, the Appellate Body found that a TBT Committee Decision could be considered as a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention. The Appellate Body considered that the extent to which the Decision would inform the interpretation and application of a term or provision of the TBT Agreement would depend on the degree to which it "bears specifically" on the interpretation and application of a term or provision "in a specific case". (Appellate Body Report, *US – Tuna II (Mexico)*, para. 372)

paragraph (a) concerns the loss of right to invoke responsibility of a State, in circumstances where the injured State has validly waived the claim.

5.103. The specific interpretative issues arising under Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in question in this dispute are not whether Peru "may maintain" its PRS with regard to designated products[295], or whether Guatemala has consented to the maintenance of the PRS or waived its right to challenge it.[296] Rather, in order to determine whether Peru could maintain its PRS, the Panel had to interpret the meaning of the terms in Article 4.2 and footnote 1 of the Agreement on Agriculture, and find whether the additional duties resulting from the PRS could be characterized as "variable import levies", "minimum import prices" or "similar border measures" rather than "ordinary customs duties" within the meaning of footnote 1. With respect to Article II:1(b) of the GATT 1994, the Panel had to determine whether the additional duties resulting from the PRS could be characterized as "other duties or charges" or "ordinary custom duties". Paragraph 9 of Annex 2.3 to the FTA and ILC Articles 20 and 45 do not provide "relevant" interpretative guidance in this respect. Thus, we do not see how the FTA and ILC Articles 20 and 45 can be considered as rules concerning the same subject matter as Article 4.2 and Article II:1(b), or as bearing specifically upon the interpretation of these provisions.

5.104. Thus, without reaching the questions of whether the FTA and ILC Articles 20 and 45 are "rules of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the Vienna Convention and whether the FTA is an "agreement" within the meaning of Article 31(3)(a), we disagree with Peru that the FTA and ILC Articles 20 and 45 are "relevant" rules of international law within the meaning of Article 31(3)(c) and that the FTA is a subsequent agreement "regarding the interpretation" of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 within the meaning of Article 31(3)(a) of the Vienna Convention.

5.105. Having concluded that the FTA and ILC Articles 20 and 45 are not "relevant" to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 within the meaning of Article 31(3)(c) of the Vienna Convention, and that the FTA does not qualify as a subsequent agreement "regarding the interpretation" of these provisions within the meaning of Article 31(3)(a), there is no need for us to address whether the FTA and ILC Articles 20 and 45 are "rules of international law applicable in the relations between the parties", or the meaning of the term "parties" in both Article 31(3)(a) and (c) of the Vienna Convention. Similarly, there is no need for us to address whether the FTA can be considered as an "agreement" within the meaning of Article 31(3)(a) for purposes of Article 4.2 and Article II:1(b).

[295] We further note that, even from the perspective of the FTA, other FTA provisions seem to give priority to WTO law and can be read as qualifying paragraph 9 of Annex 2.3. Thus, under Article 1.3, paragraph 1, of the FTA, "[p]arties confirm their existing mutual rights and obligations under the WTO Agreement". In the context of tariff elimination, Article 2.3, paragraph 2 provides that "[e]xcept 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." If paragraph 9 of Annex 2.3 is considered to be "relevant" to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994, we fail to see why these other FTA provisions could not be "relevant" as well. To the extent that these other provisions of the FTA are also "relevant" to the interpretation of Article 4.2 and Article II:1(b), they point to a conclusion contrary to Peru's contention that, by means of the FTA, Guatemala has consented to Peru maintaining a PRS that is not WTO-consistent. While noting these discrepancies between various FTA provisions, we see no need to resolve them here.

[296] We also note that the relevance of the ILC Articles to Peru's interpretation of Articles 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 appears to be premised on the assumption that the FTA allows Peru to maintain a PRS that would otherwise be in breach of WTO obligations, considering that ILC Article 20 addresses the issue of validity of consent by a State that precludes the wrongfulness of a given act by another State within the limits of that consent and that ILC Article 45, paragraph (a) concerns the loss of right to invoke responsibility of a State, in circumstances where the injured State has validly waived the claim. As we have already considered above, it is not clear whether paragraph 9 of Annex 2.3 of the FTA, which states that Peru may maintain the PRS, can be construed as allowing Peru to maintain a WTO-inconsistent PRS, when read together with other provisions of the FTA, such as paragraph 1 of Article 1.3 of the FTA which states that the parties confirm their existing rights and obligations under the WTO Agreement. Thus, in the absence of clarity as to whether the FTA rules allow Peru to depart from its WTO obligations, we do not see how the ILC Articles that address consent to wrongful acts and consent to a waiver can be relevant to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994.

5.106. We note, however, that Peru has not yet ratified the FTA. In this respect, it is not clear whether Peru can be considered as a "party" to the FTA. Moreover, we express reservations as to whether the provisions of the FTA (in particular paragraph 9 of Annex 2.3), which could arguably be construed as to allow Peru to maintain the PRS in its bilateral relations with Guatemala, can be used under Article 31(3) of the Vienna Convention in establishing the *common* intention of WTO Members underlying the provisions of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. In our view, such an approach would suggest that WTO provisions can be interpreted differently, depending on the Members to which they apply and on their rights and obligations under an FTA to which they are parties.

5.107. In the light of the above, we consider that, while Peru has brought arguments on appeal under Article 31(3)(a) and (c) of the Vienna Convention concerning the Panel's interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994, in fact, Peru's arguments go beyond the interpretation of these provisions in accordance with Article 3.2 of the DSU and Article 31 of the Vienna Convention, and amount to arguing that, by means of the FTA, Peru and Guatemala actually modified these WTO provisions between themselves.

5.108. We further observe that Peru's arguments regarding the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994, on the basis of relevant provisions of the FTA, presuppose that the FTA provisions permit the maintenance of the PRS and the resulting additional duties, even if they are found to be WTO-inconsistent. We have upheld the Panel's findings that the duties resulting from the PRS constitute "variable import levies" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture and "other duties or charges" within the meaning of Article II:1(b) of the GATT 1994, which were not recorded in Peru's Schedule of Concessions, and that Peru is therefore acting inconsistently with these provisions. We further note that the parties to this dispute disagree on whether the provisions of the FTA indeed permit Peru to maintain a WTO-inconsistent PRS.

5.109. In this respect, we note that paragraph 1 of Article 1.3 of the FTA states that the parties confirm their existing rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), while paragraph 2 of the same provision states that, in the event of any inconsistency between the FTA and the WTO covered agreements, the provisions of the FTA shall prevail to the extent of the inconsistency.[297] A reading of these provisions on their face reveals that it is not clear whether paragraph 9 of Annex 2.3, which states that Peru may maintain the PRS, should necessarily be construed as allowing Peru to maintain a WTO-inconsistent PRS, when read together with other provisions of the FTA.

5.110. As we have considered above, modifying or interpreting the obligations in Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in the light of the FTA presupposes that the FTA provisions permit the maintenance of a WTO-inconsistent PRS. However, having concluded that, even under the FTA itself, there is ambiguity as to whether the FTA allows Peru to maintain a WTO-inconsistent PRS, we do not consider that it can be argued that, by means of the FTA, the parties have agreed between themselves to modify Article 4.2 and Article II:1(b).

5.111. In any event, even assuming *arguendo* that the provisions of the FTA allowed Peru to maintain a WTO-inconsistent PRS, we are not convinced that, as Peru suggested before the Panel, such alleged modification as between the FTA parties would be subject to Article 41 of the Vienna Convention. Part IV of the Vienna Convention, which is entitled "Amendment and Modification of Treaties", provides rules for the modifications of treaty terms. In particular, Article 41 concerns

[297] On the one hand, paragraph 9 of Annex 2.3 to the FTA, when read together with paragraph 2 of Article 1.3 of the FTA, seems to suggest that the FTA would prevail over WTO law to the extent that these provisions permit a WTO-inconsistent PRS; on the other hand, when paragraph 9 of Annex 2.3 is read together with paragraph 1 of Article 1.3, which confirms the parties' WTO rights and obligations, it seems to suggest that the FTA would only permit a WTO-consistent PRS. Moreover, paragraph 2 of Article 2.3 states that, [e]xcept 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." (Emphasis added) Paragraph 2 of Article 2.3 and paragraph 9 of Annex 2.3 could be read together so that the phrase "[e]xcept as otherwise provided" in paragraph 2 of Article 2.3 refers also to paragraph 9 of Annex 2.3, which states that "Peru may maintain its Price Range System". The PRS would thus represent an exception to the obligation in paragraph 2 of Article 2.3 to the FTA that requires the elimination of all customs tariffs; at the same time it would have to remain consistent with WTO rights and obligations, as provided for in paragraph 1 of Article 1.3 of the FTA.

"Agreements to modify multilateral treaties between certain of the parties only."[298] Before the Panel, Peru seemed itself to rely on the distinction that the Vienna Convention draws between rules of interpretation and rules concerning modifications, when it referred to Article 41 of the Vienna Convention in making its arguments that the FTA provisions modified the relevant WTO provisions between Peru and Guatemala.[299]

5.112. Nevertheless, we note that the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements[300], which prevail over the general provisions of the Vienna Convention, such as Article 41. This is particularly true in the case of FTAs considering that Article XXIV of the GATT 1994 specifically permits departures from certain WTO rules in FTAs. However, Article XXIV conditions such departures on the fulfilment of the rule that the level of duties and other regulations of commerce, applicable in each of the FTA members to the trade of non-FTA members, shall not be higher or more restrictive than those applicable prior to the formation of the FTA.

5.113. In the light of the above, we consider that the proper routes to assess whether a provision in an FTA that may depart from certain WTO rules is nevertheless consistent with the covered agreements are the WTO provisions that permit the formation of regional trade agreements – namely: Article XXIV of the GATT 1994, or the Enabling Clause[301] as far as agreements between developing countries are concerned, in respect of trade in goods; and Article V of the General Agreement on Trade in Services (GATS) in respect of trade in services.

5.114. While it did not invoke Article XXIV of the GATT 1994 as a defence, in its appellant's submission, Peru recalls that the Appellate Body in *Turkey – Textiles* had made clear that "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions", provided that certain conditions are met.[302] Before the Panel, Peru had argued that "Article XXIV of the GATT 1994 demonstrates that Members may modify their WTO rights by means of regional trade agreements".[303] Guatemala responds that "Peru … makes no attempt to justify the departure from Article 4.2 using the test applied by the Appellate Body in *Turkey – Textiles*".[304] In Guatemala's view, the consequence of Peru's arguments is that "Article XXIV is redundant or, at a minimum, overridden by an alleged principle of 'systemic integration'" and that "WTO Members could rely on provisions of bilateral agreements … as amending their obligations under WTO law,

[298] Article 41 of the Vienna Convention, entitled "Agreements to modify multilateral treaties between certain of the parties only", states:

> 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.

[299] Panel Report, para. 7.508 (referring to Peru's first written submission to the Panel, para. 4.28; and second written submission to the Panel para. 2.59).

[300] Article X of the WTO Agreement sets out detailed procedures "to amend the provisions of this Agreement or the Multilateral Trade Agreements". Article IX of the WTO Agreement gives the Ministerial Conference and the General Council the exclusive authority to adopt interpretations of the WTO Multilateral Trade Agreements and to waive obligations imposed on Members under these agreements. Importantly, Article XXIV of the GATT 1994 and Article V of the GATS provide for regional trade exceptions, allowing WTO Members to depart from specific rights and obligations under the WTO covered agreements when they form customs unions, free trade areas or agreements liberalizing trade in services. Developing countries entering into regional trade agreements covering trade in goods with other developing countries may also avail themselves of the exception provided by the Enabling Clause. We note, however, that neither participant has invoked or relied upon the Enabling Clause in respect of the FTA at issue.

[301] GATT 1979 Decision o Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, L/4903, 28 November 1979, BISD 26S, P. 203.

[302] Peru's appellant's submission, para. 197 (referring to Appellate Body Report, *Turkey – Textiles*, para. 58).

[303] Panel Report, para. 7.508 (referring to Peru's first written submission to the Panel, para. 4.28).

[304] Guatemala's appellee's submission, para. 204.

regardless of whether the conditions for exceptions or defences under WTO law under Articles XXIV or XX of the GATT 1994 have been established."[305]

5.115. In *Turkey – Textiles,* the Appellate Body considered that Article XXIV of the GATT 1994 may provide justification for measures that are inconsistent with certain other GATT 1994 provisions, provided that two cumulative conditions are fulfilled: (i) the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union or FTA that fully meets the requirements of Article XXIV; and (ii) that party must demonstrate that the formation of that customs union or FTA would be prevented if it were not allowed to introduce the measure at issue.[306]

5.116. In setting out the above cited conditions for a GATT 1994-inconsistent measure to be justified as part of a customs union or FTA under paragraph 5 of Article XXIV of the GATT 1994, in *Turkey – Textiles*, the Appellate Body relied also on paragraph 4 of this provision, which states that the purpose of a customs union or FTA is "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries.[307] We further note that paragraph 4 qualifies customs unions or FTAs as "agreements, of *closer* integration between the economies of the countries parties to such agreements".[308] In our view, the references in paragraph 4 to facilitating trade and closer integration are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements.

5.117. In the present dispute, Peru has not invoked Article XXIV of the GATT 1994 in order to justify the inconsistency of the PRS with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 and the parties agree that the FTA has not entered into force. At the oral hearing, Peru and Guatemala agreed that an agreement that is not yet in force cannot benefit from the defence of Article XXIV.[309] Moreover, as we have considered above, it is not clear whether the FTA allows Peru to maintain a WTO-inconsistent PRS. In the light of this, we do not need to consider whether the PRS is consistent with the requirements set forth in Article XXIV.

5.3.3.3 Conclusions

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

5.119. Moreover, while Peru is asking us to reverse the Panel's findings that, "inasmuch as the Free Trade Agreement signed by Peru and Guatemala in December 2011 ha[d] not entered into force, it [was] not necessary for [the] Panel to rule on whether the parties [could], by means of the FTA, modify as between themselves their rights and obligations under the covered agreements"[310], on appeal, Peru has not challenged the Panel's finding that an agreement that has not yet entered into force, such as the FTA, cannot modify the rights and obligations under the

[305] Guatemala's appellee's submission, para. 204.
[306] Appellate Body Report, *Turkey – Textiles*, para. 58.
[307] Appellate Body Report, *Turkey – Textiles*, para. 57.
[308] Emphasis added.
[309] The Article XXIV defence applies also in respect of "an interim agreement necessary for the formation of a customs union or of a free-trade area". We understand, however, that also such "interim agreement" would need to be in force for the defence to apply.
[310] Panel Report, para. 8.1.f. See also para. 7.528.

covered agreements.[311] In the light of this, we find that the Panel did not err in declining to make findings as to whether the FTA modified the WTO rights and obligations between Peru and Guatemala because the FTA was not in force.

5.3.4 Overall conclusions

5.120. On the basis of the foregoing, we find that Peru has not established Peru's claim that the Panel erred in finding that the additional duties resulting from the PRS are "variable import levies" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.[312] Thus, we uphold the Panel's findings, in paragraph 8.1.b of the Panel Report, that the additional duties resulting from the PRS constitute "variable import levies" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture, and in paragraph 8.1.d of the Panel Report, that, by maintaining a measure that constitutes a "variable import levy", Peru acts inconsistently with its obligations under Article 4.2 of the Agreement on Agriculture.

5.121. On the basis of the foregoing, we also find that Peru has not established Peru's claim that the Panel erred in finding that the measure at issue is not an "ordinary customs duty" under the first sentence of Article II:1(b) of the GATT 1994.[313] Thus, we uphold the Panel's findings, in paragraph 8.1.e of the Panel Report, that the additional duties resulting from the PRS constitute "other duties or charges … imposed on or in connection with the importation", within the meaning of the second sentence of Article II:1(b) of the GATT 1994, and that, by applying such measure without having recorded it in its Schedule of Concessions, Peru acts inconsistently with its obligations under the second sentence of Article II:1(b) of the GATT 1994.

5.4 Guatemala's appeal: Article 4.2 of the Agreement on Agriculture – minimum import prices

5.122. We now turn to Guatemala's other appeal in connection with the additional duties resulting from the PRS, and Article 4.2 and footnote 1 of the Agreement on Agriculture. Overall, Guatemala questions the Panel's interpretation and application of the terms "minimum import prices" and "similar border measures" in footnote 1 of Article 4.2 of the Agreement on Agriculture.[314] Guatemala requests us to reverse the Panel's finding that the measure at issue constitutes neither a "minimum import price" nor a "similar border measure".[315] In addition, Guatemala requests us to complete the legal analysis and find that the measure at issue constitutes a "minimum import price" or at least a "similar border measure".[316] Below, we summarize the Panel's interpretation and application of Article 4.2 and footnote 1 of the Agreement on Agriculture at issue. Thereafter, we examine each of Guatemala's claims.

5.4.1 The Panel's findings

5.123. Before the Panel, Guatemala claimed that the additional duties resulting from the PRS constitute "minimum import prices", or measures "similar" to minimum import prices, within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture, because the PRS prevents goods from entering Peru at a price below the PRS floor price. Guatemala also argued that the PRS ensures that no import will enter Peru at a price below the sum of the relevant lowest international

[311] Panel Report, para. 7.527. At the oral hearing Peru acknowledged that "an agreement that is not in force could not … constitute a treaty that could modify obligations in the sense of Article 41 of the Vienna Convention".

[312] See Panel Report, paras. 7.352, 7.371-7.372, 8.1.b, and 8.1.d. The Panel found that the additional 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". (Panel Report, para. 8.1.b) We note that Peru does not appeal separately the Panel's finding that the additional duties resulting from the PRS constitute at least a border measure "similar" to "variable import levies". Thus, our analysis is limited to the Panel's finding that the additional duties constitute "variable import levies".

[313] See Panel Report, paras. 7.423, 7.425, and 8.1.e.

[314] Guatemala's other appellant's submission, paras. 65-118.

[315] Guatemala's other appellant's submission, paras. 119 and 141 (referring to Panel Report, paras. 7.370, 7.371, and 8.1.c).

[316] Guatemala's other appellant's submission, paras. 120-141.

price and the additional duty, thus establishing a *de facto* minimum import price threshold.[317] Peru replied that the PRS does not operate as to impose a minimum import price, either by impeding the entry of goods at a price below a specified minimum level, or by varying the levy to equalize import prices with a minimum threshold. Peru further argued that the measure at issue has neither the objective nor the capacity to arrive at an indicative target price, and applies the same additional duty regardless of the transaction value.[318]

5.124. The Panel noted that 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.[319] Referring to the original and compliance panels in *Chile – Price Band System*, the Panel noted that "minimum import prices" are schemes that generally or normally operate in relation to the actual transaction value of imports, so that, if the transaction price of an import is below a specified minimum import price, an additional charge is imposed corresponding to the difference.[320]

5.125. The Panel also examined the meaning of "similar border measures" in footnote 1 of the Agreement on Agriculture. The Panel noted that the word "similar" suggests a comparison with the types of measures listed in footnote 1.[321] The Panel considered 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".[322]

5.126. The Panel then turned to examine whether the measure at issue constituted a "minimum import price". It found that there was "no evidence at all" that the additional duties resulting from the PRS directly impede the entry of products at prices below a certain threshold in a way different from what would occur with ordinary customs duties and, in particular, with a specific import tariff.[323]

5.127. Having concluded that the measure at issue does not constitute a "minimum import price", the Panel went on to consider whether the measure at issue nonetheless constitutes a border measure "similar" to a "minimum import price". Despite the fact that the additional duties resulting from the PRS have some similarly to the measure that was at issue in *Chile – Price Band System*[324], the Panel noted that Peru had presented evidence that the additional duties do not impede the entry of imports into the Peruvian market at transaction values below the PRS floor

[317] Panel Report, paras. 7.354-7.355 (referring to Guatemala's first written submission to the Panel, paras. 4.84-4.95, 4.141; second written submission to the Panel, paras. 4126-4.141; opening statement at the first meeting of the Panel, paras. 37-39; and response to Panel question No. 126, paras. 135-152).

[318] Panel Report, para. 7.356 (referring to Peru's first written submission to the Panel, paras. 5.58-5.68; second written submission to the Panel, paras. 3.36 and 3.41).

[319] Panel Report, para. 7.295 (referring to Appellate Body Report, *Chile – Price Band System*, para 236). The Panel also observed that the ordinary meaning of "minimum" is "[t]he smallest amount or quantity possible, usual, attainable, etc." (Panel Report, para. 7.293 (referring to *Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 1789))

[320] Panel Report, para. 7.295 (referring to Panel Reports, *Chile – Price Band System*, para. 7.36(e);and Chile – *Price Band System (Article 21.5 – Argentina),* para. 7.30; and Appellate Body Report, *Chile – Price Band System*, paras. 236-237).

[321] Panel Report, para. 7.302 (referring to Appellate Body Report, *Chile – Price Band System*, para. 228). The Panel also noted that the determination of whether a measure is similar to something else must be approached on an empirical basis. (Panel Report, paras. 7.298-7.299 (referring to Appellate Body Reports, *Chile – Price Band System*, para 226; *Chile – Price Band System (Article 21.5 – Argentina),* para. 189))

[322] Panel Report, para. 7.359 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina),* para. 193). According to the Panel, for a measure to qualify as a border measure "similar" to a minimum import price, it must, in its particular features, share "sufficient features with [this] categor[y] of prohibited measure[] to resemble, or be of the same nature or kind and thus be prohibited by Article 4.2" of the Agreement on Agriculture. (Panel Report, para. 7.303 (referring to Appellate Body Report, *Chile – Price Band System*, para 239)) The Panel observed that the term "similar" means "having a resemblance or likeness", "of the same nature or kind", and "having characteristics in common". (Panel Report, para. 7.297 (referring to Appellate Body Report, *Chile – Price Band System*, para 226))

[323] Panel Report, paras. 7.360-7.361.

[324] The Panel observed that the measure at issue in *Chile – Price Band System* was considered to be "similar" to a minimum import price inasmuch as it operated in practice as a "proxy" or "substitute" for a minimum import price. According to the Panel, this conclusion was "based on the fact that the measure operated in such a way as to impede the entry of imports … at prices below the lower threshold in the band". (Panel Report, para. 7.362 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 194-195))

price.[325] Moreover, the Panel was not convinced that the additional 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. According to the Panel, this situation is not different from a specific tariff.[326] On this basis, the Panel found that the PRS does not share sufficient characteristics with "minimum import prices" to make it a border measure "similar" to a "minimum import price".[327]

5.4.2 Guatemala's claim that the Panel erred in its interpretation and application of "minimum import prices"

5.4.2.1 Interpretation of "minimum import prices"

5.128. Guatemala claims that the Panel erred in its interpretation of "minimum import prices", in footnote 1 of Article 4.2 of the Agreement on Agriculture, by adopting an excessively narrow legal standard, requiring that such a measure must impose duties based on the transaction value of imports, and must prevent each and every import from entering below a specified threshold.[328] Peru argues that the Panel adopted the correct legal standard for "minimum import prices". Peru contends that the Panel neither stated that, under such a measure, each and every import must be prevented from entering the market below a specified threshold, nor suggested that a measure relying on reference prices, instead of transaction values, cannot be considered a "minimum import price" scheme.[329]

5.129. The Appellate Body explained in *Chile – Price Band System* that "[t]he term 'minimum import price' refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market."[330] It further noted that "no definition has been provided by the drafters of the Agreement on Agriculture."[331] The Appellate Body has also referred to the explanation given by the panel in that dispute that "minimum import price" schemes "generally operate in relation to the actual transaction value of the imports", and that, under such a scheme, "[i]f the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference."[332] Moreover, the Appellate Body has further stated 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."[333] While the Appellate Body has noted that minimum import prices schemes "generally operate" in relation to the actual transaction value of imports and that a "typical" minimum import price scheme would involve such a comparison, we consider that these qualifications suggest that there can be other examples of benchmarks for determining "the lowest price at which imports … may enter a … market". The Appellate Body has not excluded the possibility that measures that define in a different manner the lowest price at which imports may enter a market could nevertheless qualify as a "minimum import price" scheme or as a "similar border measure".[334] Such an assessment would have to be made on the basis of the total configuration of the measure. Thus, in our view, a panel's examination of whether a measure is a "minimum import price" within the meaning of footnote 1 of the Agreement on Agriculture should

[325] Panel Report, para. 7.366.
[326] Panel Report, para. 7.368.
[327] Panel Report, para. 7.370.
[328] Guatemala's other appellant's submission, paras. 61, 71, and 73.
[329] Peru's appellee's submission, paras. 9-13.
[330] Appellate Body Reports, *Chile – Price Band System*, para. 236; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 152.
[331] Appellate Body Report, *Chile – Price Band System*, para. 236.
[332] Appellate Body Reports, *Chile – Price Band System (Article 21.5 – Argentina),* para. 152; *Chile – Price Band System*, paras. 236-237 (both quoting Panel Report, *Chile – Price Band System*, para. 7.36(e)).
[333] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina),* fn 267 to para. 195. (emphasis original)
[334] We recall that this Panel observed that the measure at issue in *Chile – Price Band System* was considered to be "similar" to a minimum import price inasmuch as it operated in practice as a "proxy" or "substitute" for a minimum import price. According to the Panel, this conclusion was "based on the fact that the measure operated in such a way as to impede the entry of imports … at prices below the lower threshold in the band." (Panel Report, para. 7.362 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 194-195))

be based on evidence, where available, concerning the operation and impact of the measure, as well as an analysis of the design and structure of the measure.[335]

5.130. As stated above[336], with respect to the meaning of the term "minimum import prices" in footnote 1 of the Agreement on Agriculture, the Panel relied on the relevant passages of the Appellate Body report in *Chile – Price Band System*. In particular, the Panel noted that 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.[337] The Panel noted that "minimum import prices" are schemes that generally or normally operate in relation to the actual transaction value of imports, so that, if the price of an individual import is below a specified minimum import price, an additional charge is imposed corresponding to the difference.[338] Turning to the measure at issue, the Panel found that there was "no evidence at all" that the additional duties resulting from the PRS directly impede the entry of products at prices below a certain threshold, in a way different from what would occur with ordinary customs duties, and, in particular, with a specific import tariff.[339]

5.131. Guatemala argues that the Panel's finding "appears to be premised on the fact that the duties resulting from the PRS are not linked to the transaction price of individual shipments, but to a reference price, based on an average of world prices".[340] Guatemala contends that the Appellate Body has not indicated "categorically that minimum import prices must *always* be applied to the actual transaction value of imports".[341] Thus, Guatemala submits that the Panel "erroneously held … that the definition of a minimum import price includes *only* measures that are applied with respect to the actual transaction value of each shipment of imports."[342] Peru responds that the Panel did not adopt the legal standard, as suggested by Guatemala, to "disqualify any system using a reference price 'based on an average of world prices' from being a minimum import price within the meaning of Article 4.2 of the Agreement on Agriculture".[343]

5.132. Contrary to Guatemala's submission, the Panel did not interpret the term "minimum import prices" in footnote 1 of the Agreement on Agriculture to mean that a measure must necessarily operate in relation to the transaction values of imports. Moreover, we do not consider the Panel to have adopted such a standard when examining the measure at issue. In particular, the Panel did not find that the additional duties resulting from the PRS cannot constitute "minimum import prices" because the PRS operates in relation to reference prices instead of transaction values. Rather, the Panel noted statistical evidence submitted by Peru showing that certain transactions entered Peru's market at a price below the PRS floor price.[344] The Panel also noted that there was no evidence at all that the additional duties resulting from the PRS directly impede the entry of

[335] In the context of different WTO provisions, the Appellate Body has noted that, in assessing a measure, a panel should take into account its design, and structure, as well as the operation of a measure. (See e.g. Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 29; *China – Raw Materials*, para. 5.96)

[336] See paras. 5.123-5.127 above.

[337] Panel Report, paras. 7.295-7.296 (referring to Appellate Body Report, *Chile – Price Band System*, para. 236).

[338] Panel Report, para. 7.295 (referring to Panel Reports, *Chile – Price Band System*, para. 7.36(e); *Chile – Price Band System (Article 21.5 – Argentina),* para. 7.30; and Appellate Body Report, *Chile – Price Band System*, paras. 236-237).

[339] Panel Report, paras. 7.360-7.361.

[340] Guatemala's other appellant's submission, para. 70.

[341] Guatemala's other appellant's submission, paras. 71-74 (referring to Appellate Body Reports, *Chile – Price Band System (Article 21.5 – Argentina),* para. 153; *Chile – Price Band System*, para. 236). (emphasis original)

[342] Guatemala's other appellant's submission, para. 74. (emphasis original)

[343] Peru's appellee's submission, para. 12.

[344] The Panel noted that, *inter alia*, Peru submitted statistical evidence to the Panel for the period between 2001 and 2013, demonstrating that, in approximately 57% of the two-week 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." (Panel Report, para. 7.357 (referring to Peru's first written submission to the Panel, paras. 5.62-5.68; response to Panel question No. 123, paras. 98-99; and Panel Exhibit PER-90))

products at prices below a certain threshold, in a way different from what would occur with ordinary customs duties.[345]

5.133. In addition, Guatemala contends that "the Panel adopted an excessively narrow legal standard, requiring that, in order to constitute a minimum import price, a measure … has to prevent, in each and every import, that a product enter below a given threshold."[346] Guatemala argues that "the correct legal characterization of a measure is not affected by the fact that the measure may not produce its intended effects with respect to 100 per cent of imports."[347] Peru contends that the Panel did not adopt the excessively narrow legal standard suggested by Guatemala. Rather, according to Peru, the Panel followed the understanding of "minimum import prices" set out in past reports, where such excessively narrow legal standard was not used.[348]

5.134. We fail to see, and Guatemala has not explained, where in the Panel Report the Panel required that, for a measure to constitute a "minimum import price" scheme, such measure must prevent each and every import transaction from entering at prices below a specified threshold. The Panel noted evidence submitted by Peru demonstrating that a certain percentage of imports entered the domestic market at a price below the PRS floor price.[349] We do not consider the Panel to have interpreted "minimum import prices" as implying that a measure requires that "each and every import" enter at or above a specified threshold.

5.135. On the basis of the foregoing, we find that Guatemala has not established that the Panel erred in its interpretation of "minimum import prices", in footnote 1 of Article 4.2 of the Agreement on Agriculture, by requiring that a measure must impose duties based on the transaction value of imports, and must prevent each and every import from entering below a specified threshold.

5.4.2.2 Application of "minimum import prices"

5.136. Guatemala claims that the Panel erred in finding that Peru's measure is not a "minimum import price" despite the existence of an implicit or *de facto* threshold.[350] According to Guatemala, the PRS contains an implicit or *de facto* threshold, which consists of the lowest international price of the relevant product in the previous two-week period plus the additional duty resulting from the PRS.[351] In essence, Guatemala argues that, without regard to the floor price, transaction prices of imports will always reach the implicit threshold of the PRS, "except in highly unlikely and unproven circumstances".[352] Guatemala contends that, since basically no import can enter the Peruvian market below the implicit threshold, the measure at issue qualifies as a "minimum import price", and is thus inconsistent with Article 4.2 of the Agreement on Agriculture.[353]

5.137. Peru submits that the implicit threshold identified by Guatemala is based upon a calculation that is not part of the PRS, and that the Panel was correct to find that there is no

[345] Panel Report, paras. 7.360-7.361. In our view, simply because a measure operates in relation to a reference price, instead of the transaction value of imports, does not *necessarily* mean that it is incapable of preventing the entry of imports priced below a certain threshold. The measures at issue in *Chile – Price Band System* operated in relation to a reference price, and, in those cases, the panels and the Appellate Body accepted that it was "highly improbable" that a product would enter the Chilean market below the lower threshold price of those measures. (See Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 202 and 224; and Panel Reports, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 7.89; *Chile – Price Band System*, para. 7.41 and fn 607 thereto) In both the original and compliance proceedings in *Chile – Price Band System*, the measures at issue were found to be "similar" to a minimum import price. We examine in paras. 5.136-5.142 below Guatemala's claim that the Panel erred in its application of Article 4.2 of the Agreement on Agriculture, including the term "minimum import prices" in footnote 1 of the Agreement on Agriculture, to the measure at issue.

[346] Guatemala's other appellant's submission, para. 61.

[347] Guatemala's other appellant's submission, para. 75.

[348] Peru's appellee's submission, paras. 10-11 (referring to Panel Report, para. 7.358 (quoting Panel Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 7.30) and para. 7.363 (quoting Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 195).

[349] See Panel Report, para. 7.357 (referring to Peru's first written submission to the Panel, paras. 5.62-5.68; and response to Panel question No. 123, paras. 98-99).

[350] Guatemala's other appellant's submission, paras. 84-85.

[351] Guatemala's other appellant's submission, paras. 44, 48, 84, 97 and 111. See also Guatemala's second written submission to the Panel, para. 4.141.

[352] Guatemala's other appellant's submission, para. 100. See also paras. 87-88.

[353] Guatemala's other appellant's submission, para. 101.

de facto or implicit threshold in the PRS.[354] Peru contends that operators are free to transact at any price. Peru argues that, if transaction prices are unlikely to be below the lowest international price contemplated in the PRS reference price, this is a result of the tendency of import prices to follow international prices, and not a result imposed by the PRS.[355]

5.138. The Panel noted statistical evidence submitted by Peru showing that certain transactions entered Peru's market at a price below the PRS floor price.[356] The Panel stated that, "[t]aking 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 … 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."[357] The Panel then compared the operation of the additional duties resulting from the PRS with the operation of ordinary customs duties, in particular, specific import tariffs. According to the Panel, "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)."[358] With respect to this example, the Panel concluded that this effect "would not convert the specific tariff into a minimum import price or a measure other than ordinary customs duties".[359] Finally, the Panel turned to examine the *de facto* threshold of the PRS, as identified by Guatemala. The Panel was not convinced that "the duties resulting from the PRS lead to the establishment of a minimum import price with a *de facto* threshold".[360] According to the Panel, the situation involving an alleged *de facto* threshold is also not different from "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".[361]

5.139. Where available, statistical evidence concerning the impact of the measure is relevant to a panel's examination.[362] There may be, however, additional elements relevant to a panel's examination of whether a measure is a "minimum import price" within the meaning of footnote 1 of the Agreement on Agriculture. For purposes of such examination, a panel should also analyse the design, structure, and operation of a measure. In this case, the Panel's finding was based on the statistical evidence submitted by Peru. The Panel stated that, "[t]aking into account the structure and design of the measure at issue, as well as the details concerning its operation", there is no evidence that the measure ensures that imports will not enter below a certain threshold.[363] Beyond this sentence, the Panel did not explain any further how it had analysed the design and structure of the measure at issue. Thus, the Panel did not sufficiently engage with the relevant elements of the design, structure, and operation of the measure at issue that could have supported the conclusion the Panel drew.

5.140. The only element concerning the operation of the measure examined by the Panel, in the context of Guatemala's claim relating to "minimum import prices", was the operation of the additional duties resulting from the PRS in comparison with the operation of ordinary customs duties. The Panel concluded that the additional duties operate similarly to a specific tariff "irrespective of the way in which the authorities of a Member determine the amount of the specific duty".[364] We consider that the Panel could not have reached such a conclusion without conducting a more thorough examination of the design, structure, and operation of the measure in its relevant context. The mere fact that a measure results in the payment of duties that may take the same form as ordinary customs duties does not necessarily mean that the measure falls outside the

[354] Peru's appellee's submission, paras. 24-25.
[355] Peru's appellee's submission, para. 28.
[356] See fn 348 above.
[357] Panel Report, para. 7.360.
[358] Panel Report, para. 7.361.
[359] Panel Report, para. 7.361.
[360] Panel Report, para. 7.368.
[361] Panel Report, para. 7.368.
[362] The weight and significance to be accorded to such evidence will, as is the case with any evidence, depend on the circumstances of each case. In this regard, with respect to an examination of whether a measure is a "similar border measure" within the meaning of footnote 1 of the Agreement on Agriculture, see Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina),* para. 189.
[363] Panel Report, para. 7.360.
[364] Panel Report, para. 7.368.

scope of footnote 1.[365] A measure may result in the imposition of specific duties that resemble ordinary customs duties and nevertheless comprise a scheme imposing an explicit or implicit minimum import price. For these reasons, the "way in which the authorities of a Member determine the amount of the … duty"[366], together with the design, structure, and operation of the measure, are relevant elements that must form part of a panel's examination because they assist in distinguishing "minimum import prices" from "ordinary customs duties".

5.141. Thus, the Panel did not sufficiently examine the explicit or the implicit threshold identified by Guatemala. In particular, the Panel did not properly examine to what extent the implicit threshold, as identified by Guatemala[367], can be said to form part of the design and structure of the PRS. Furthermore, the Panel did not determine whether the reference price of the PRS serves as an appropriate proxy for transaction values of imports entering the Peruvian market. In this regard, there was no examination of: (i) the relationship between the prices of "marker products" and the prices of "associated products"[368]; (ii) the fact that the reference price is calculated on the basis of only a particular specified international market; and (iii) the impact, if any, of the two-week gap in time between the international prices used to calculate the reference price and the transaction values of imports entering the Peruvian market.

5.142. On the basis of the foregoing, we find that the Panel erred in its analysis of whether the measure at issue is a "minimum import price" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture because the Panel did not properly examine the design, structure, and operation of the measure when addressing Guatemala's claim. Consequently, we reverse the Panel's finding, in paragraphs 7.371 and 8.1.c of the Panel Report, that the additional duties resulting from the PRS do not constitute "minimum import prices" within the meaning of footnote 1 of Article 4.2.

5.4.3 Guatemala's claim that the Panel erred in its interpretation and application of "similar border measures"

5.4.3.1 Interpretation of "similar border measures"

5.143. Guatemala claims the Panel erred in its interpretation of "similar border measures", in footnote 1 of Article 4.2 of the Agreement on Agriculture, by conflating the legal standard for "minimum import prices" with the legal standard for border measures "similar" to minimum import prices. In Guatemala's view, the Panel failed to give effect to the term "similar" in footnote 1 of the Agreement on Agriculture.[369] Peru contends that the Panel applied the correct legal test in determining that the additional duties are not "similar" to "minimum import prices".[370]

5.144. Article 4.2 of the Agreement on Agriculture prohibits Members from maintaining, resorting to, or reverting to, "any measures of the kind which have been required to be converted into ordinary customs duties". Footnote 1 of the Agreement on Agriculture provides a list of measures covered by the obligation under Article 4.2. The various border measures identified in footnote 1, which include "minimum import prices" and "variable import levies", have different forms and structures and apply to imports in different ways. Yet, these measures "have in common that they restrict the volume or distort the price of imports of agricultural products".[371] Footnote 1 includes a category of "similar border measures other than ordinary customs duties". The Appellate Body has endorsed the definition of "similar" as "having a resemblance or likeness", "of the same nature or

[365] Appellate Body Reports, *Chile – Price Band System*, para. 216; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 149.
[366] Panel Report, para. 7.368.
[367] According to Guatemala, this *de facto* or implicit threshold consists of the sum of the lowest relevant international price and the additional duty resulting from the PRS. (Guatemala's other appellant's submission, paras. 44-48, 84, 97, 111-113, and 115. See also Guatemala's second written submission to the Panel, para. 4.141.)
[368] We note that the floor and reference prices, and ultimately the additional duty resulting from the PRS, are calculated only for the four "marker products". The same additional duty applicable for each "marker product" is then also applied to the respective "associated products". See fn 31 and para. 5.163 below.
[369] Guatemala's other appellant's submission, paras. 63 and 107-109.
[370] Peru's appellee's submission, paras. 32-34.
[371] Appellate Body Report, *Chile – Price Band System*, para. 200.

kind", and "having characteristics in common".[372] Similarity must be established by undertaking a comparative analysis between an actual measure and one or more of the measures explicitly listed in footnote 1, and such a task must be approached on an empirical basis.[373] A measure need not be *identical* to one of the prohibited categories of measures in footnote 1 to fall nevertheless within the scope of this provision. Rather, in order to be a "similar border measure", a measure must, in its specific configuration, have 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.[374] Thus, a measure is "similar" to a "minimum import price" scheme when it shares a sufficient number of characteristics with, and has a design, structure, operation, and impact similar, to a minimum import price, even if it is not "identical" to such a scheme in all respects.[375]

5.145. In setting out its understanding of "similar border measures" in footnote 1 of the Agreement on Agriculture[376], the Panel relied on the Appellate Body reports in the original and compliance proceedings in *Chile – Price Band System*. Recalling that Article 4 of the Agreement on Agriculture prohibits border measures that do not constitute "ordinary customs duties", the Panel found 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 … or to an ordinary customs duty".[377]

5.146. Guatemala asserts that, by definition, a measure that is "similar" will not be exactly the same as a measure that is a minimum import price, and does not need to be "'identical' to such scheme in all respects".[378] Guatemala contends that the Panel ignored the fact that "minimum import prices" and measures "similar" to minimum import prices are two different types of measures.[379] In Guatemala's view, under the Panel's logic, a measure would qualify as a "similar border measure" only if it shared all necessary attributes with one of measures enumerated under footnote 1 of the Agreement on Agriculture.[380]

5.147. In our view, the Panel did not find that, for a measure to qualify as a "similar border measure", within the meaning of footnote 1 of the Agreement on Agriculture, it must share all necessary attributes with "minimum import prices". Rather, quoting from the Appellate Body Report in *Chile – Price Band System (Article 21.5 – Argentina)*, the Panel stated 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."[381] As stated above[382], a proper interpretation of "similar border measures" requires a panel to examine whether a measure shares a sufficient number of characteristics with at least one of the specific categories of measures listed in footnote 1. In its examination, a panel must analyse the design, structure, and operation of the measure at issue. In this regard, the Panel's interpretation of "similar border measures" is an accurate rendering of the meaning of this expression, as interpreted by the Appellate Body.

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[372] Appellate Body Reports, *Chile – Price Band System*, paras. 225-226; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 163.

[373] Appellate Body Reports, *Chile – Price Band System*, paras. 226-228; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 163. In the compliance proceedings in *Chile – Price Band System*, the Appellate Body explained that, in advocating that the approach be taken "on an empirical basis", the Appellate Body in the original proceedings was contrasting this to, and counselling against, an approach that focused on the *fundamental nature* of the shared characteristics. In the compliance proceedings, the Appellate Body concluded that the panel was not required to focus its examination *primarily* on numerical or statistical data regarding the effects of that measure in practice. Rather, where available, 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. (Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 189)

[374] Appellate Body Reports, *Chile – Price Band System*, para. 227; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 163.

[375] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 193.

[376] See para. 5.125 above.

[377] Panel Report, para. 7.305.

[378] Guatemala's other appellant's submission, para. 106 (quoting Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina*), para. 193). (emphasis omitted)

[379] Guatemala's other appellant's submission, paras. 106-107.

[380] Guatemala's other appellant's submission, para. 108.

[381] Panel Report, para. 7.359 (quoting Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 193).

[382] See para. 5.144 above.

5.148. On the basis of the foregoing, we find that Guatemala has not established that the Panel erred in its interpretation of "similar border measures" in footnote 1 of Article 4.2 of the Agreement on Agriculture by conflating the legal standard for "minimum import prices" with the legal standard for border measures "similar" to minimum import prices. We note, however, that the Panel stated that "it [is] necessary …. to examine whether the particular features of the measure … make it *similar* to the categories of measures prohibited by footnote 1 … *or to an ordinary customs duty*."[383] Footnote 1 of the Agreement on Agriculture, however, does not refer to measures "similar" to "ordinary customs duties". Rather, footnote 1 includes within the scope of the prohibition in Article 4.2 of the Agreement on Agriculture certain types of measures including "similar border measures other than ordinary customs duties". Thus, we disagree with this statement by the Panel to the extent that the Panel suggested that it is necessary to examine whether a measure is "similar" to an "ordinary customs duty".

5.4.3.2 Application of "similar border measures"

5.149. Guatemala claims that the Panel erred in finding that Peru's measure is not "similar" to a "minimum import price" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture. Guatemala argues that, contrary to what the Panel implies, the measure contains two mechanisms preventing imports from entering the Peruvian market at prices below certain thresholds, namely, the explicit threshold and the implicit threshold. Thus, in Guatemala's view, Peru's measure is at least "similar" to a "minimum import price".[384] Peru responds that Guatemala failed to submit examples of any shared characteristics that would make the Peruvian measure "similar" to a minimum import price, and has simply re-stated its arguments regarding the explicit and implicit thresholds that were presented to the Panel.[385]

5.150. After concluding that the additional duties resulting from the PRS do not constitute a "minimum import price", the Panel considered whether the duties nonetheless constitute a border measure "similar" to a "minimum import price". The Panel observed that, similarly to the measure at issue in *Chile – Price Band System*[386], the additional duties resulting from the PRS are calculated on the basis of the difference between the floor price and the reference price.[387] The Panel also noted that, under the PRS, "[t]he lower the reference price in comparison with the floor price, the higher the specific duty and the greater its protective impact."[388] The Panel noted, however, that Peru had presented evidence that the additional duties resulting from the PRS do not impede the entry of imports into the Peruvian market at transaction values below the PRS floor price.[389] Moreover, the Panel was not convinced that the additional 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. According to the Panel, this situation was no different from 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 determine the amount of the specific duty.[390] On this basis, the Panel found that the PRS does not share sufficient characteristics with minimum import prices to make them a border measure "similar" to a "minimum import price".[391]

[383] Panel Report, para. 7.305. (emphasis added)

[384] Guatemala's other appellant's submission, paras. 111-113. Guatemala also alleges that the Panel conflated and thus misapplied the concept of "similar border measures" because, in its view, the Panel's factual basis for finding that the measure at issue is not "similar" to a minimum import price is essentially the same as the factual basis for finding that the measure is not a "minimum import price". (Guatemala's other appellant's submission, paras. 102-103)

[385] Peru's appellee's submission, para. 35.

[386] The Panel observed that the measure at issue in *Chile – Price Band System* was considered to be "similar" to a "minimum import price" inasmuch as it operated in practice as a "proxy" or "substitute" for a "minimum import price". According to the Panel, "[t]his conclusion was based on the fact that the measure operated in such a way as to impede the entry of imports … at prices below the lower threshold in the band." (Panel Report, para. 7.362 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 194-195))

[387] Panel Report, para. 7.364.

[388] Panel Report, para. 7.365.

[389] Panel Report, para. 7.366.

[390] Panel Report, paras. 7.368-7.369.

[391] Panel Report, para. 7.370.

5.151. As we have stated above[392], the Panel's comparison between the operation of the additional duties resulting from the PRS and the operation of ordinary customs duties is inadequate, since the Panel did not sufficiently examine the design, structure, and operation of the measure in its relevant context. Despite having distinct legal standards, the same or equivalent factual elements or aspects of the design, structure, or operation of a measure may be relevant for an assessment of whether such measure constitutes a "minimum import price" or a "similar border measure". As the Panel relied on the same comparison to reach its finding concerning whether the measure at issue is "similar" to a minimum import price[393], our earlier analysis is also relevant here.

5.152. Moreover, the Panel considered that the additional duties resulting from the PRS operate in a manner similar to the measure that was at issue in *Chile – Price Band System*. In particular, the Panel noted that the additional duties resulting from the PRS are calculated on the basis of the difference between the floor price and the reference price, and that, under the PRS, the lower the reference price in comparison with the floor price, the higher the specific duty and the greater its protective impact.[394] Despite the fact that the measure in *Chile – Price Band System* was found to be "similar" to a minimum import price, the Panel gave prominence to statistical evidence submitted by Peru showing that certain transactions entered Peru's market at a price below the PRS floor price.[395] The Panel then concluded that the statistical evidence presented by Peru "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".[396]

5.153. As we have noted above in our analysis of whether the PRS is a "minimum import price"[397], where available, statistical evidence concerning the impact of the measure is relevant to a panel's examination.[398] There may be, however, additional elements relevant to a panel's examination of whether a measure is a border measure "similar" to a "minimum import price" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture. For purposes of this examination, a panel should also analyse the design, structure, and operation of a measure. This is particularly important for an examination of whether a measure is "similar" to one of the prohibited categories of measures listed in footnote 1. Also as stated above[399], a measure is "similar" to a minimum import price scheme when it shares a sufficient number of characteristics with, and has a design, structure, operation and impact similar to, a minimum import price, even if it is not "identical" to such a scheme in all respects.[400] The Panel's finding was based essentially on the statistical evidence submitted by Peru. Thus, by failing to analyse sufficiently the design, structure and operation of the measure at issue, the Panel did not conduct a proper analysis as to whether the additional duties resulting from the PRS, even if not identical to a "minimum import price" scheme, may nonetheless constitute a "similar border measure" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.

5.154. As noted earlier[401], the Panel did not sufficiently examine the explicit or the implicit threshold identified by Guatemala. The Panel also failed to determine whether the reference price of the PRS serves as an appropriate proxy for transaction values of imports entering the Peruvian market. These factual elements or aspects of the design, structure, and operation of the PRS are relevant for both an assessment of whether the measure at issue meets the legal standard for "minimum import prices" or the legal standard for "similar border measures".[402]

5.155. On the basis of the foregoing, we find that the Panel erred in its analysis of whether the measure at issue is a border measure "similar" to a "minimum import price" within the meaning of

[392] See para. 5.139 above.
[393] See Panel Report, paras. 7.368-7.369.
[394] Panel Report, paras. 7.363-7.365 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 195).
[395] Panel Report, para. 7.366 (referring to Panel Exhibit PER-90).
[396] Panel Report, para. 7.366.
[397] See para. 5.139 above.
[398] The weight and significance to be accorded to such evidence will, as is the case with any evidence, depend on the circumstances of each case. (See Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 189)
[399] See para. 5.144 above.
[400] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 193.
[401] See para. 5.141 above.
[402] See para. 5.151 above.

footnote 1 of Article 4.2 of the Agreement on Agriculture because the Panel did not properly examine the design, structure, and operation of the measure at issue when addressing Guatemala's claim. Consequently, we reverse the Panel's finding, in paragraphs 7.370 and 8.1.c of the Panel Report, that the measure at issue does not share sufficient characteristics with "minimum import prices" to be considered a border measure "similar" to a "minimum import price" within the meaning of footnote 1 of Article 4.2.

5.4.4 Guatemala's request for completion of the legal analysis

5.156. Guatemala requests that we complete the legal analysis and find that Peru's measure is inconsistent with Article 4.2 of the Agreement on Agriculture because, as Guatemala argues, the measure is either a "minimum import price" or a measure "similar" to a minimum import price. Guatemala's request is contingent on whether we reverse the Panel's findings on "minimum import prices" or on "similar border measures".[403] Having reversed both of these findings, we now consider whether we can complete the legal analysis as requested by Guatemala.

5.157. In previous disputes, the Appellate Body has completed the legal analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.[404] The Appellate Body has, however, held that it can do so only if the factual findings of the panel and the undisputed facts on the panel record provide it with a sufficient basis for its own analysis.[405] Reasons that have prevented the Appellate Body from completing the legal analysis include the absence of full exploration of the issues before the panel, and, consequently, considerations for parties' due process rights.[406]

5.158. Guatemala submits that the measure at issue is a "minimum import price" or a "similar border measure" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture because the measure prevents imports from entering the Peruvian market at prices below the explicit threshold of the PRS, namely, the floor price.[407] Alternatively, even if Peru's measure does not raise, in all instances, the entry prices of imports to the level of the floor price, Guatemala contends that the measure raises the entry price for the specified imports at least to the level of a *de facto* or implicit threshold. According to Guatemala, this *de facto* or implicit threshold consists of the sum of the lowest relevant international price and the additional duty resulting from the PRS.[408]

5.159. Pursuant to Guatemala's request for completion, the issue before us is whether the measure at issue contains a "minimum import price" or a "similar border measure" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture. As stated above[409], the term "minimum import price" in footnote 1 "refers generally to the lowest price at which imports of a

[403] Guatemala's other appellant's submission, para. 120.

[404] See e.g. Appellate Body Reports, *Australia – Salmon*, paras. 117-118; *US – Wheat Gluten*, paras. 80-92; *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

[405] See Appellate Body Reports, *US – Gasoline*, p. 19, DSR 1996:I, p. 17; *Canada – Periodicals*, p. 24, DSR 1997:I, p. 469; *EC – Poultry*, para. 156; *US – Shrimp*, paras. 123-124; *US – FSC*, para. 133; *Australia – Salmon*, paras. 117-119; *Canada – Autos*, paras. 133 and 144; *Korea – Various Measures on Beef*, para. 125 and fn 62 thereto; *US – Lamb*, paras. 150 and 172; *US – Section 211 Appropriations Act*, paras. 343 and 352; *EC and certain member States – Large Civil Aircraft*, paras. 1174-1178; *US – Large Civil Aircraft (2nd complaint)*, paras. 1272-1274; *US – Carbon Steel (India)*, para. 4.483. In certain disputes, the Appellate Body could not complete the legal analysis in the absence of sufficient factual findings or undisputed facts on the panel record. (See Appellate Body Reports, *EC – Asbestos*, paras. 78 and 82; *EC – Hormones*, para. 251; *Korea – Dairy*, paras. 92 and 102; *US – Hot-Rolled Steel*, paras. 180 and 236; *US – Softwood Lumber IV*, para. 118; *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 157 and 161; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 219-220; *US – Upland Cotton*, para. 693; *US – Zeroing (EC)*, paras. 228 and 243; *EC – Selected Customs Matters*, para. 286; *US – Continued Zeroing*, para. 194; *US – Anti-Dumping and Countervailing Duties (China)*, para. 537; *EC and certain member States – Large Civil Aircraft*, paras. 736, 990, and 993; *US – COOL*, para. 481)

[406] See Appellate Body Reports, *EC – Export Subsidies on Sugar*, fn 537 to para. 339; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.124.

[407] Guatemala's other appellant's submission, paras. 44, 48, 83, 111-113, and 115.

[408] Guatemala's other appellant's submission, paras. 44-48, 84, 97, 111-113, and 115. See also Guatemala's first written submission to the Panel, para. 4.140.

[409] See para. 5.129 above.

certain product may enter a Member's domestic market".[410] With respect to "similar border measures" in footnote 1[411], a measure is "similar" to a "minimum import price" scheme when it shares a sufficient number of characteristics with, and has a design, structure, operation and impact similar to, a "minimum import price", even if it is not identical to such a scheme in all respects.[412] Thus, in order to determine whether a measure contains either a "minimum import price" or a "similar border measure", a panel's analysis should include a thorough assessment of the design, structure, and operation of the measure at issue considered in its relevant context. The mere fact that a measure results in the payment of duties that take the same form as ordinary customs duties does not, alone, mean that the measure falls outside the scope of footnote 1.[413] Thus, we are required to examine whether, and to what extent, either of the two thresholds identified by Guatemala constitutes a minimum import price threshold. We shall do so by considering the design and structure of the measure at issue, as well as its application.

5.160. As summarized in the Panel Report, the PRS imposes an additional duty on imports of certain products when the reference price is below the floor price.[414] The floor price is based on an average of international prices in a specified international market over a recent past period of 60 months.[415] The reference price is based on an average of international price quotations in the same specified international market over a recent past period of two weeks.[416] The additional duty is the difference between the floor price and the reference price multiplied by a factor associated with the import costs.[417] The Panel found that "[t]he lower the reference price in comparison with the floor price, the higher the specific duty and the greater its protective impact."[418] Under Peru's regulations, the additional duties resulting from the PRS, plus Peru's *ad valorem* duties, may not exceed Peru's bound tariff rate.[419]

5.161. We have found that the Panel did not sufficiently examine the explicit or the implicit threshold identified by Guatemala.[420] The Panel record also does not contain undisputed facts concerning to what extent, in the light of the design, structure and operation of the measure, either of these thresholds serves, even if not in all instances, as a minimum price threshold for imports entering the Peruvian market, so as to qualify the measure as at least a "similar border measure" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.

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[410] Appellate Body Reports, *Chile – Price Band System*, para. 236; *Chile – Price Band System (Article 21.5 – Argentina),* para. 152. The Appellate Body has also explained that, generally speaking, under a minimum import price scheme, "[i]f the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference". (Appellate Body Reports, *Chile – Price Band System (Article 21.5 – Argentina),* para. 152; *Chile – Price Band System*, para. 236 (referring to Panel Report, *Chile – Price Band System*, para. 7.36(e)))

[411] See also para. 5.144 above.

[412] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 193.

[413] Appellate Body Reports, *Chile – Price Band System*, para. 216; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 149.

[414] Panel Report, para. 7.140; Annex III to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4, p. 204889).

[415] The floor price is to be updated every six months. (Panel Report, para. 7.135; Article 6 of Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), p. 204888) The floor prices, which are expressed in f.o.b. terms, are converted into c.i.f. terms by applying the freight and insurance costs specified in Annex V to the Supreme Decree No. 115-2001-EF. (Panel Report, para. 7.133; Annexes II and V to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), pp. 204889-204890) Annex V indicates the applicable freight and insurance costs for each "marker product" and identifies the General Secretariat of the Andean Community as the source of these costs. The Panel observed that these values coincide with the costs indicated in Annex 3 to Decision 371 of the Andean Price Band System. (Panel Report, para. 7.134; Commission of the Cartagena Agreement, Decision 371: Andean price Band System, 1994 (Panel Exhibit PER-27), Annex 3) The Panel noted that Decision 371 contains no explanation as to how these values were determined. (Panel Report, para. 7.134)

[416] The reference price is to be updated every two weeks. (Panel Report, para. 7.136; Article 4 of Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), p. 204888) The reference prices are to be converted into c.i.f. terms by applying the freight and insurance costs specified in Annex V to the Supreme Decree No. 115-2001-EF. (Panel Report, para. 7.137; Article 5 and Annex V to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), pp. 204888 and 204890)

[417] Panel Report, paras. 7.140-7.141; Annex III to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), p. 204889.

[418] Panel Report, para. 7.365.

[419] Panel Report, para. 7.142 (referring to Article 4 of Supreme Decree No. 153-2002-EF of 26 September 2002 (Panel Exhibit GTM-5), p. 147).

[420] See paras. 5.139-5.142 and 5.151-5.155 above.

5.162. Moreover, the Panel record does not contain undisputed facts concerning whether the reference price of the PRS serves as an appropriate proxy for transaction values of imports entering the Peruvian market. Guatemala argues that the reference price is designed to operate as an accurate and reliable proxy for typical transaction values of current imports entering the Peruvian market in any given two-week period.[421] In contrast, Peru contends that the reference price is not a proxy for transaction values of current imports entering the Peruvian market.[422] Without examining this issue, the Panel simply concluded that the statistical evidence submitted by Peru revealed 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."[423]

5.163. We note that the floor and reference prices, and ultimately the additional duty resulting from the PRS, are calculated only for the four "marker products" at issue.[424] The same additional duty applicable for each "marker product" is then also applied to the respective "associated products".[425] There is, however, no undisputed evidence on the Panel record concerning the relationship between the prices of "marker products" and the prices of "associated products". In addition, the reference price is calculated on the basis of only a particular specified international market.[426] There is no undisputed evidence on the Panel record concerning to what extent such market can be said to adequately reflect global prices of a particular "marker product". Furthermore, there is no evidence on the Panel record concerning the impact, if any, of the two-week gap in time between the international prices used to calculate the reference price and the transaction values of imports entering the Peruvian market. Finally, the main statistical evidence referred to by Peru and Guatemala, and relied on by the Panel[427], reveals, with respect to specific two-week periods, only the number of import transactions with a value below the floor price and the percentage that this number represents against the total number of import transactions within the same two-week period. It is not possible to conclude from this evidence overall how representative or close the reference price is to the actual import transaction values entering the Peruvian market. Without these factual elements, it is not possible to consider, on the basis of the Panel record, whether, and to what extent, the reference price serves as an

[421] Guatemala's other appellant's submission, paras. 10, 20, 33-34, 48, 52, 77, 111, 118, and 126-127. Guatemala contends that statistical evidence on the Panel record supports its argument. In particular, with respect to sugar imports since 2001, Guatemala contends that 97% of imports have entered at or above the floor price. (Guatemala's other appellant's submission, paras. 81 and 131)

[422] Peru's appellee's submission, para. 22. Peru submitted statistical evidence to the Panel for the period between 2001 and 2013, with respect to the four "marker products", demonstrating that, in approximately 57% of the two-week periods since Supreme Decree No. 115-2001-EF came into force, "various trade transactions entered Peru at a price lower than … the floor price in the range, accounting for more than one third of trade transactions recorded over these periods." (Panel Report, para. 7.357 (referring to Peru's first written submission to the Panel, paras. 5.62-5.68; response to Panel question No. 123, paras. 98-99; and Panel Exhibit PER-90)) The Panel also noted that Peru cited examples of import transactions for sugar whereby the transaction value of imports was below the floor price. In particular, according to the Panel, in the case of sugar, transaction values of imports were below the floor price in 224 transactions, "amounting to approximately 3% of sugar imports since the introduction of the PRS." (Panel Report, para. 7.357) According to Peru, disaggregated data per two-week period reveals that, in a particular two-week period, 46% of sugar imports entered below the floor price. (Peru's appellee's submission, para. 17)

[423] Panel Report, para. 7.366. See also paras. 7.360-7.361. The Panel also stated that, "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." (Panel Report, para. 7.367) In our view, the Panel's statement does not constitute a conclusion on whether the reference price operates as a proxy for transaction values of imports entering the Peruvian market, in the light of the evidence on the Panel record and the design, structure, and operation of the PRS. Rather, the Panel's statement at issue merely recalls that the reference price is based on international prices, instead of transaction values of imports entering the Peruvian market.

[424] Supreme Decree No. 115-2001-EF divides the tariff lines subject to the PRS into two groups: (i) four "marker products" and (ii) several "associated products". "Marker products" are defined as products whose international prices are used for calculating the floor, ceiling and reference prices, while "associated products" are defined as products obtained by processing or mixing of marker products or those that are capable of replacing a "marker product" for industrial use or consumption. Each of the four "marker products" corresponds to a specific tariff line for rice, maize, milk, and sugar, respectively. Several "associated products" are grouped under each "marker product". (Panel Report, paras. 7.120-7.122; Annexes I and II to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), pp. 204888-204889)

[425] Panel Report, para. 7.125; Annex III to Supreme Decree No. 115-2001-EF (Panel Exhibit GTM-4), p. 204890.

[426] The relevant international market for each product is specified in Supreme Decree No. 115-2001-EF. (Panel Report, paras. 7.128 and 7.136)

[427] See chart submitted by Peru showing statistical data of product entries below the minimum price (Panel Exhibit PER–90).

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

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

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

6 FINDINGS AND CONCLUSIONS

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

a. finds that Peru's arguments on appeal are not "new claims" or a "new defence" and are within the scope of this appeal;

b. finds that Guatemala has not relinquished its right to have recourse to the WTO dispute settlement mechanism in respect of Peru's PRS; and

c. consequently, upholds the Panel's finding, in paragraph 8.1.a of the Panel Report, that there is "no evidence that Guatemala brought these proceedings in a manner contrary to good faith", and that there was, therefore, "no reason for the Panel to refrain from assessing the claims put forward by Guatemala".

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

a. finds that Peru has not established that the Panel erred in its assessment of the "variability" of the measure at issue;

b. finds that Peru has not established that the Panel erred in its assessment of the "additional features" of the measure at issue; and

c. finds that the Panel did not act inconsistently with Article 11 of the DSU in its examination of Guatemala's claim under Article 4.2 of the Agreement on Agriculture.

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

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

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

a. finds that Peru has not established that the Panel erred in finding that the measure at issue is not an "ordinary customs duty" under the first sentence of Article II:1(b) of the GATT 1994; and

b. finds that the Panel did not act inconsistently with Article 11 of the DSU in its examination of Guatemala's claim under Article II:1(b) of the GATT 1994.

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

a. finds that Peru's arguments regarding the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in accordance with Article 31(3)(a) and (c) of the Vienna Convention are within the scope of this appeal;

b. finds that Peru's arguments, that the Panel erred in its interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 because it failed to take into account under Article 31(3) of the Vienna Convention the FTA and ILC Articles 20 and 45, go beyond the interpretation of Article 4.2 and Article II:1(b) in accordance with Article 3.2 of the DSU and Article 31 of the Vienna Convention and amount to arguing that, by means of the FTA, Peru and Guatemala actually modified these WTO provisions between themselves;

c. finds that the FTA between Peru and Guatemala and ILC Articles 20 and 45 are not "relevant" to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 within the meaning of Article 31(3)(c) of the Vienna Convention and that the FTA is not a subsequent agreement "regarding the interpretation" of these WTO provisions within the meaning of Article 31(3)(a); and, therefore,

d. finds that the Panel did not commit an error by not interpreting Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 taking into account the provisions of the FTA and ILC Articles 20 and 45 under Article 31(3) of the Vienna Convention.

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

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

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

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

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

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

a. finds that Guatemala has not established that the Panel erred in its interpretation of the term "minimum import prices" in footnote 1 of Article 4.2 of the Agreement on Agriculture;

b. reverses the Panel's finding, in paragraph 8.1.c of the Panel Report, that the measure at issue does not constitute a "minimum import price" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture;

c. finds that Guatemala has not established that the Panel erred in its interpretation of the term "similar border measures" in footnote 1 of Article 4.2 of the Agreement on Agriculture;

d. reverses the Panel's finding, in paragraph 8.1.c of the Panel Report that the measure at issue does not share sufficient characteristics with "minimum import prices" to be considered a border measure "similar" to a "minimum import price" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture; and

e. is unable to complete the legal analysis under Article 4.2 and footnote 1 of the Agreement on Agriculture and determine whether the measure at issue constitutes a "minimum import price" or a border measure "similar" to a "minimum import price" within the meaning of footnote 1.

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

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

_____
Ujal Singh Bhatia
Presiding Member

_____
Thomas Graham
Member

_____
Yuejiao Zhang
Member

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WORLD TRADE ORGANIZATION

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PERU – ADDITIONAL DUTY ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS

AB-2015-3

Report of the Appellate Body

Addendum

This *Addendum* contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS457/AB/R.

The Notices of Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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ANNEX A

NOTICES OF APPEAL

ANNEX A-1

PERU'S NOTICE OF APPEAL*

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review ("Working Procedures"), Peru hereby notifies its decision to appeal certain issues of law and legal interpretation in the Report of the Panel in *Peru – Additional Duty on Imports of Certain Agricultural Products* (WT/DS457) (the "Panel Report").

2. Peru appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect the findings, conclusions and recommendations of the Panel with respect to the following errors of law and legal interpretations contained in the Panel Report:[1]

I. The Panel Erred in Law by Failing to Find that Guatemala Acted Inconsistently with Its Good Faith Obligations under DSU Articles 3.7 and 3.10

3. Peru seeks review by the Appellate Body of the Panel's findings and conclusions that there was "no evidence that Guatemala brought these proceedings in a manner contrary to good faith" within the meaning of DSU Articles 3.7 and 3.10, and its concomitant conclusion that "there is therefore no reason for the Panel to refrain from assessing the claims put forward by Guatemala".[2]

4. The Panel's errors of law and legal interpretation include its assumption that the legal status of the Peru-Guatemala Free Trade Agreement ("FTA") was dispositive to its ruling on good faith. The status of the FTA has no bearing on the issue of whether Guatemala acted contrary to its good faith obligations under DSU Article 3.7 and 3.10. The Panel's interpretation of the requirements of DSU Articles 3.7 and 3.10 was thus fundamentally flawed.

5. Accordingly, Peru requests the Appellate Body to declare moot and with no legal effect the Panel's findings in paragraphs 7.75, 7.84, 7.88, 7.91-7.93, 7.96, 7.526-7.528, and to *reverse* the Panel's conclusion in paragraphs 8.1(a), 8.1(f), and 8.8. Peru also respectfully requests the Appellate Body to complete the analysis and find that Guatemala has acted inconsistently with its obligations under DSU Articles 3.7 and 3.10.

II. The Panel Erred in Law by Finding that Peru Acted Inconsistently with Article 4.2 of the Agreement on Agriculture

6. Peru seeks review of the Panel's findings and conclusions that the duties resulting from the Price Range System ("PRS") constitute variable import levies or 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[3], and that by maintaining such measures Peru is acting inconsistently with its obligations under Article 4.2 of the Agreement on Agriculture.[4]

7. The Panel's errors of law and legal interpretation include:

- The Panel erred in its interpretation of Article 4.2 of the Agreement on Agriculture by failing to take into account the FTA as a relevant rule of international law within the meaning of Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("Vienna Convention")[5];

* This document, dated 25 March2015, was circulated to Members as document WT/DS457/7.

[1] Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of Peru to refer to other paragraphs of the Panel Report in the context of its appeal.

[2] See Panel Report, paras. 7.66-7.96 and 8.1(a).

[3] Panel Report, para. 8.1(b).

[4] Panel Report, para. 8.1(d).

[5] See Panel Report, paras. 7.525-7.528 and 8.1(f).

- The Panel erred in its interpretation of Article 4.2 of the Agreement on Agriculture by failing to take into account Articles 20 and 45 of the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") as relevant rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention;

- The Panel erred in its interpretation of Article 4.2 of the Agreement on Agriculture by failing to take into account the FTA as a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the Vienna Convention; and

- The Panel erred in finding that the measure was a variable import levy or similar measure and thus a violation of Article 4.2 of the Agreement on Agriculture.[6] In addition, the Panel failed to make an objective assessment of the matter before it, as required by DSU Article 11.

8. Accordingly, Peru requests the Appellate Body to declare moot and with no legal effect the Panel's findings in paragraphs 7.316, 7.321, 7.324-7.325, 7.328, 7.334-7.340, 7.345-7.347, 7.349, 7.350-7.352, 7.371-7.374, and 7.526-7.528 and to reverse the Panel's conclusions in paragraph 8.1(b) and 8.1(d), 8.1(f), and 8.8.

III. The Panel Erred in Law by Finding that Peru Acted Inconsistently with Article II:1(b) of the GATT 1994

9. Peru seeks review of the Panel's findings and conclusions that the additional duties resulting from the PRS constitute "other duties or charges … imposed on or in connection with the importation", within the meaning of the second sentence of GATT Article II:1(b), and that in applying measures, Peru acted inconsistently with its obligations under the second sentence of Article II:1(b) of the GATT 1994.[7]

10. The Panel's errors of law and legal interpretation include:

- The Panel erred in its interpretation of the second sentence of GATT Article II:1(b) by failing to take into account the FTA as a relevant rule of international law within the meaning of Article 31(3)(c) of the Vienna Convention[8];

- The Panel erred in its interpretation of the second sentence of GATT Article II:1(b) by failing to take into account Articles 20 and 45 of the ILC Articles as relevant rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention;

- The Panel erred in its interpretation of the second sentence of GATT Article II:1(b) by failing to take into account the FTA as a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the Vienna Convention; and

- The Panel erred in finding that the additional duties were other duties or charges and thus a violation of the second sentence of GATT Article II:1(b). In addition, the Panel failed to make an objective assessment of the matter before it, as required by DSU Article 11.

11. Accordingly, Peru requests the Appellate Body to declare the Panel's findings in paragraphs 7.423, 7.425-7.426, 7.430-7.432, 7.526-7.528, 8.1(e), 8.1(f), and 8.8 to be moot and of no legal effect.

12. The reasons for Peru's appeal are further elaborated in its submission to the Appellate Body.

[6] See Panel Report, paras. 7.371-7.372 and 8.1(b)-(d).
[7] Panel Report, para. 8.1(e).
[8] Panel Report, paras. 7.525-7.528 and 8.1(e) and (f).

ANNEX A-2

GUATEMALA'S NOTICE OF OTHER APPEAL[*]

Pursuant to Article 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23(1) of the Working Procedures for Appellate Review, Guatemala hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report on *Peru – Additional Duty on Imports of Certain Agricultural Products* (WT/DS457/R), which was circulated on 27 November 2014 (the "Panel Report"). Pursuant to Rule 23(3) of the Working Procedures for Appellate Review, Guatemala is simultaneously filing this Notice of Other Appeal and its Other Appellant's Submission with the Appellate Body Secretariat.

Guatemala appeals the Panel's finding on paragraphs 7.370, 7.371 and 8.1(c) of the Panel Report that the duties resulting from Peru's Price Range System ("the measure at issue") does not fall within the category of "minimum import prices … and similar border measures" prohibited under Article 4.2 and footnote 1 of the Agreement on Agriculture.[1]

Guatemala seeks review by the Appellate Body of the following errors of law by the Panel in the Panel Report:

I. The Panel erred in applying an excessively narrow legal standard to define measures that constitute a minimum import price within the meaning of Article 4.2 and footnote 1 of the Agreement on Agriculture

1. The Panel erred in law in concluding that the measure at issue was not a minimum import price because it was not applied by reference to the actual transaction value of each shipment of imports. In reaching this finding, the Panel applied an excessively narrow legal definition of "minimum import prices" within the meaning of Article 4.2 and footnote 1 of the Agreement on Agriculture.

2. Nothing in the definitions used by the panels and the Appellate Body in the *Chile – Price Band System* disputes implies that the concept of minimum import price includes only measures that are applied with respect to the actual transaction value of each shipment.

3. The reference price of Peru's Price Range System ("PRS") is designed to operate as a substitute or proxy for the typical transaction value of any given shipment. In this sense, the reference price and the manner in which it is calculated, ensures that the floor price functions as a true minimum import price, even if the PRS does not operate directly by reference to actual transaction values of individual shipments.

4. The Panel improperly rejected Guatemala's argument that the measure at issue constitutes a minimum import price even if it does not in every instance equalize entry prices with the floor price. The essential legal character of the measure does not change even if it does not achieve its purpose in every instance.

II. The Panel erred in finding that the measure at issue is not a minimum import price despite the existence of an implicit minimum threshold

5. The Panel's finding that the measure at issue does not constitute a minimum import price failed to consider that the measure's design, structure and operation gives rise to an implicit minimum price threshold. This threshold consists of the sum of the lowest transaction price of the previous fortnight and the duty resulting from the PRS.

[*] This document, dated 30 March 2015, was circulated to Members as document WT/DS457/8.

[1] The Panel's errors in law are contained *inter alia* in paragraphs 7.360, 7.361, 7.366-7.371 and 8.1(c) of the Panel Report. In accordance with Rule 23(2)(c)(ii)(C), the foregoing is an indicative list of the paragraphs of the Panel report containing the alleged errors.

6. Even though, in certain instances, the final entry value of an imported product may not reach the floor price, it will always reach or exceed the alternative implicit threshold. It is highly unlikely that a shipment will arrive in Peru at a price lower than the lowest price observed in the international reference market designated by Peru's legislation.

7. The Panel also incorrectly equated the effects of the implicit threshold with those produced by ordinary customs duties in the form of a specific tariff. The implicit threshold contained in the measure at issue affords a specific type of protection not afforded by ordinary specific duties. As acknowledged by the Panel, the PRS has the declared objective of being a "stabilization and protection mechanism that serves to neutralize fluctuations in international prices and limit the negative effects of falls in such prices".[2] Unlike the implicit threshold of Peru's measure, the threshold generated by a specific duty does not respond to changes in world prices of a particular commodity. Additionally, while the implicit threshold is inherently linked to the lowest transaction of the previous fortnight, any ordinary specific duty would lack any such characteristic.

III. The Panel erred in conflating the legal standard for minimum import prices with the legal standard for measures "similar" to minimum import prices

8. The Panel conducted a legally incorrect analysis of whether the measure was "similar" to a minimum import price within the meaning of footnote 1 of the Agreement on Agriculture. The Panel's reasons for finding that the measure at issue is not *similar* to a minimum import price are essentially the same as those for finding that the measure is not a minimum import price. The Panel thus conflated two related but different legal concepts: a minimum import price and a measure similar to a minimum import price.

9. Under the Panel's legal interpretation, a measure could only be "similar" to a minimum import price if, in effect, it *is* a minimum import price.

10. By using a definition of "similar" that was the same as the definition used for minimum import prices, the Panel failed to give effect to the concept of "similar" measures in the context of footnote 1 to Article 4.2 of the Agreement on Agriculture.

IV. The Panel erred in finding that Peru's measure is not similar to a minimum import price because it does not impede imports from entering Peru at a price below a certain threshold

11. The Panel erred in finding that the measure at issue is not similar to a minimum import price because it does not impede imports from entering the Peruvian market at prices below a certain threshold.

12. Contrary to the Panel's conclusion, the design, structure and operation of the measure at issue shows the existence of an explicit threshold, which is the floor price itself. The floor price acts as a true threshold because it operates on the basis of a reference price, which is calculated in a manner that mimics the value of actual transactions.

13. The measure at issue also contains an implicit threshold, which consists of the lowest transaction of the previous fortnight plus the additional duties generated by the PRS. Even if, in certain limited cases, the application of the additional duties fails to elevate the price to the level of the floor price, those shipments will not enter the Peruvian market below the alternative implicit threshold.

* * *

For the above reasons, the Panel erred in law in finding that the measure at issue is neither a minimum import price nor a measure similar to an import price within the meaning of Article 4.2 and footnote 1 of the Agreement on Agriculture. Guatemala, therefore, requests the Appellate Body to reverse the Panel's finding contained in paragraphs 7.370, 7.371 and 8.1 (c) of the Panel Report.

[2] Panel Report, para. 7.317(a).

Additionally, Guatemala requests that the Appellate Body complete the legal analysis and find that the measure at issue is inconsistent with Article 4.2 of the Agreement on Agriculture because it is either a minimum import price or a measure similar to a minimum import price. The factual findings contained in the Panel Report, as well as the undisputed facts on the record, constitute a sufficient basis to conclude that the measure at issue is a minimum import price or a measure similar to a minimum import price.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF PERU'S APPELLANT'S SUBMISSION

I. INTRODUCTION

1. This appeal will determine whether Peru may maintain its Price Range System ("PRS") for certain designated goods in its bilateral trade with Guatemala. This is a surprising question to be placed before the WTO dispute settlement system because Peru and Guatemala already addressed this issue in their 2011 Free Trade Agreement ("FTA"). The FTA states expressly that "Peru may maintain its Price Range System" for certain designated products from Guatemala. It also states that, in the event of any inconsistency between the FTA and the WTO, the provisions of the FTA would prevail.

2. After having expressly accepted in the FTA the right of Peru to maintain the PRS, Guatemala has sought to neutralize this provision through the use of the WTO dispute settlement system. Such an approach should be of grave concern to the Appellate Body, and indeed to all WTO Members.

3. Peru has signed the FTA but, in light of Guatemala's WTO challenge, has not ratified it. While Peru wants the FTA to enter into force, it is unwilling to give Guatemala the benefits of the FTA in light of Guatemala's attempt to use the WTO dispute settlement system to rewrite or delete a key provision of the bilateral agreement. Peru cannot accept Guatemala's attempt to secure through the WTO what it failed to achieve during the negotiating process for the FTA.

4. Unfortunately, the Panel in this dispute rewarded Guatemala for its two-track approach. It ruled that Guatemala did not act inconsistently with its good faith obligations under DSU Articles 3.7 and 3.10. It also ruled that, by maintaining the PRS, Peru violated its obligations under Article 4.2 of the Agreement on Agriculture and under the second sentence of Article II:1(b) of the GATT 1994. The Appellate Body should reverse these findings and declare them to be moot and without legal effect. It should also complete the analysis and find that Guatemala acted inconsistently with its good faith obligations under the DSU.

1 FACTUAL BACKGROUND

5. The measure in dispute is the additional duties resulting from the PRS. The Panel properly found that Guatemala challenged the additional duties, rather than the calculation mechanism (the PRS) as such.

6. The additional duties have been part of Peru's tariff policy since 1991, with modifications to the underlying calculation methodology occurring over the years, but without changes in the nature of the duties. They were part of Peru’s tariff policy when Peru scheduled its tariff commitments at the end of the Uruguay Round. Of the subsequent modifications, the most relevant occurred in 2001, when Supreme Decree No. 115-2001-EF refined the calculation methodology, establishing for the first time an upper range that would allow for the rebate of duties. When considered with the existing lower range, a "price range system" resulted.

7. The additional duties resulting from the PRS applied to specific agricultural imports from Guatemala (and other countries) for many years. Because it was important to both Peru and Guatemala, the two countries agreed to include the issue in the negotiation of their FTA.

8. In the resulting FTA, Peru and Guatemala agreed to eliminate custom tariffs on goods originating in the other Party, "in accordance with Annex 2.3". Annex 2.3, in turn, expressly provides that "Peru may maintain its Price Range System" with respect to certain designated products. Such products are designated with an asterisk in Peru's FTA Tariff Schedule, and are the same products Peru listed as having differential bound tariff treatment at the formation of the WTO. Peru and Guatemala confirmed their "existing mutual rights and obligations under the WTO Agreement", and this would include the WTO provisions cited by Guatemala in this dispute. The Parties agreed to a specific exception to such WTO rights and obligations by agreeing that, in the event of any inconsistency between the FTA and the WTO Agreements, the FTA "shall prevail

to the extent of the inconsistency". Thus, the provision through which the Parties agreed that "Peru may maintain its Price Range System" was part of the balance of the rights and obligations negotiated and agreed by the two countries.

9. After reaching a final agreement and concluding negotiations, the FTA was (a) signed by both parties on 6 December 2011; (b) approved by the Guatemalan Congress; and (c) formally ratified by the Guatemalan President. Guatemala notified Peru in 2014 that it had fulfilled the legal requirements for the entry into force of the FTA. In parallel, Guatemala had by then initiated proceedings in the WTO seeking a ruling that Peru must "dismantle" the PRS.

2 THE PANEL ERRED IN LAW BY FAILING TO FIND THAT GUATEMALA ACTED INCONSISTENTLY WITH ITS GOOD FAITH OBLIGATIONS UNDER DSU ARTICLES 3.7 AND 3.10

10. Peru argued before the Panel that by using the WTO dispute settlement system to challenge Peru's specific duties, Guatemala violated the obligation to engage in WTO dispute settlement procedures in good faith. The Panel erred in law by finding that Guatemala had not violated DSU Articles 3.7 and 3.10, and by not dismissing Guatemala's claims on this basis.

11. Peru does not consider that Guatemala is procedurally barred from bringing a WTO claim against the PRS. Rather, the Panel should have found that Guatemala's actions – using the WTO dispute settlement system to nullify a provision of the FTA – were contrary to Guatemala's good faith obligations under DSU Articles 3.7 and 3.10.

12. WTO panels have the authority to determine that WTO Members have brought a claim contrary to the principles of good faith, as found by the Appellate Body in *US – Offset Act (Byrd Amendment*). Yet, in the present dispute, the Panel declined to rule that Guatemala acted contrary to the principles of good faith. It reviewed a number of factors and then stated its conclusions as follows: "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." While the Panel purported to base its conclusion on "no evidence", its rulings on this issue were founded on its own failure to apply the correct legal principles. The Panel's findings on good faith are thus vitiated by errors of law.

13. The Panel erred in law by assuming that the legal status of the FTA was dispositive to its ruling on good faith. The Panel considered that the legal status of the FTA – rather than the actions of Guatemala in bringing this dispute – to be determinative to the issue of whether Guatemala acted consistently with its obligations under DSU Articles 3.7 and 3.10. The Panel stated that "[t]he mere signing of a treaty, before it enters into force, imposes only limited obligations on the parties", and that it could not "attribute to the FTA a legal value that it does not currently possess". But it is critical to stress that the task before the Panel was to *determine whether Guatemala's use of the WTO dispute settlement system to nullify a provision of the FTA was consistent with DSU Articles 3.7 and 3.10*. That the FTA is not in force does not preclude finding a good faith violation when a party waives a right, consents to conduct, or acts to nullify the object and purpose of a treaty not yet in force.

14. The Panel failed to interpret and correctly apply Articles 3.7 and 3.10 of the DSU because it limited its analysis only to the situation in which Guatemala "expressly waived the right to bring a case with respect to the PRS or recognized the consistency of that measure with the WTO agreements". Yet the Appellate Body made clear in *EC – Bananas III (Article 21.5 – Ecuador II)/ EC – Bananas III (Article 21.5 – US)*, that WTO Members may waive rights either explicitly or by necessary implication. Moreover, Members may waive substantive, in addition to procedural, rights and may do so unilaterally.

15. The International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") provide further support for the proposition that the Panel erred in law by ruling that WTO Members can only waive their WTO rights "expressly", or through treaties that are ratified and in force. ILC Articles 20 and 45 codify general principles of law and are directly relevant in this context.

16. Guatemala *waived its right explicitly because it agreed explicitly that Peru may maintain the PRS*. In the alternative, the Panel should have concluded, on the basis of the uncontested facts before it, that Guatemala waived its rights by necessary implication.

17. Whether the waiver by Guatemala is considered to be explicit or implied, the status of the FTA has no bearing on the issue of whether Guatemala acted contrary to its good faith obligations under DSU Article 3.7 and 3.10. If the Panel had focused on the conduct of Guatemala, rather than whether the FTA was in force, it could only have concluded that Guatemala acted inconsistently with DSU Articles 3.7 and 3.10.

18. A party's conduct in violation of Article 18 of the Vienna Convention on the Law of Treaties ("Vienna Convention") may also demonstrate a lack of good faith. An action by a state to defeat the object and purpose of a treaty, particularly a treaty explicitly permitted by GATT Article XXIV and GATS Article V, can indeed constitute evidence of a lack of good faith under DSU Articles 3.7 and 3.10, and it is an error of law to dismiss the possibility of examining such actions.

3 THE PANEL ERRED IN LAW BY FINDING THAT PERU ACTED INCONSISTENTLY WITH ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

19. The Panel's finding that Peru violated Article 4.2 of the Agreement on Agriculture is based on legal error. The Panel improperly interpreted the provision in isolation of other relevant rules, and it misapplied the Appellate Body's clarifications of Article 4.2.

20. DSU Article 3.2 requires panels to interpret the existing provisions of the WTO Agreements "in accordance with customary rules of interpretation of public international law". Among these customary rules of interpretation of public international law is Article 31(3)(c) of the Vienna Convention, which requires the treaty interpreter to take into account relevant rules of international law applicable in the relations between the parties. The Panel erred in its interpretation of Article 4.2 by failing to take into account the FTA as a relevant rule of international law applicable in the relations between Peru and Guatemala within the meaning of Article 31(3)(c) of the Vienna Convention.

21. The Panel refused to take the FTA into account because it is not in force. However, treaties that are not in force, or have not been ratified by the disputing parties, can and have been used as "relevant rules of international law" for the purposes of Article 31(3)(c) of the Vienna Convention. The FTA is a "rule of international law" that is "relevant" and "applicable" between Peru and Guatemala, who are the relevant "parties".

22. If the Panel had properly interpreted Article 4.2 of the Agreement on Agriculture in light of the requirements of Article 31(3)(c) of the Vienna Convention, it should not have found Peru to have violated its obligations under Article 4.2 of the Agreement on Agriculture.

23. Articles 20 and 45 of the ILC Articles are also "relevant rules of international law applicable in the relation between the parties" within the meaning of Article 31(3)(c). Guatemala, by ratifying the FTA, has validly consented to Peru's maintenance of the PRS within the meaning of ILC Article 20, and has validly waived any claim it may have had against this measure within the meaning of ILC Article 45. The Panel erred in law by failing to take into account ILC Articles 20 and 45 as relevant rules of international law applicable in the relations between the parties when interpreting Article 4.2 of the Agreement on Agriculture.

24. The Panel also failed to take into account the FTA as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", as required by Article 31(3)(a) of the Vienna Convention. Had the Panel done so, it should have found that Peru did not violate Article 4.2 of the Agreement on Agriculture by maintaining the PRS. In *US – Clove Cigarettes*, the Appellate Body found that a "subsequent agreement" in the sense of Article 31(3)(a) of the Vienna Convention may take various forms. In Peru's view, it is not limited to a decision adopted by all WTO Members. That is one form of subsequent agreement, but it is not exhaustive of the forms that could validly apply under Article 31(3)(a). The Panel was required by Article 3.2 of the DSU to take into account the FTA, which constitutes a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". The Panel's failure to do so constitutes an error of law.

25. The Panel also erred by misapplying the Appellate Body's clarifications of the obligations of Article 4.2 of the Agreement on Agriculture. The Panel's findings regarding Article 4.2 are erroneous and its analysis is incomplete. A thorough analysis applying the proper legal standards demonstrates that the additional duties do not violate Peru's obligations under Article 4.2 of the Agreement on Agriculture.

26. First, the PRS does not share with variable import levies the characteristic of having a threshold or minimum price. The existence of a threshold price – a common characteristic of both minimum import prices and variable import levies – was found to be absent in the Peruvian system, unlike in *Chile – Price Band System*, and the Panel confirmed that the floor price used in the PRS does not act as a threshold preventing entry of imports priced below it. The Panel then found that the specific duties resulting from the PRS are no different than ordinary customs duties in this regard. Although no one characteristic may be determinative, a specific finding that the Peruvian measure contains no threshold or minimum price means that there is an important difference between the Peruvian measure and a variable import levy. Imports subject to the additional duties resulting from the PRS can enter Peru at any price; no imports are prohibited from entering Peru by the PRS or any resulting duties.

27. The Panel also erred in assessing inherent variability, treating this characteristic as if it were sufficient to qualify the measure as prohibited by Article 4.2 of the Agreement on Agriculture. While the Panel correctly stated the test, it incorrectly applied that test. In the end, it relied too heavily on the use of a "scheme or formula" in the calculation methodology, even though it acknowledges that the formula itself may not produce any variability at all in the duty level. As a result of this approach, the Panel reached the wrong conclusion, and one that does not withstand scrutiny.

28. As an initial matter, the Panel's analysis of variability confuses the measure at issue with the methodology used to calculate the reference price and the potential duty. The distinction is clear, and it is extremely relevant for the Panel's analysis of the measure – particularly the analysis of the important characteristic of inherent variability. The measure at issue in the dispute – the additional duties resulting from the PRS – cannot vary with any regularity, and are not inherently variable. The only regularity is the fact that the calculation mechanism – the PRS – continuously functions, but it does not always result in additional duties. There is no inherent variability in the additional duties.

29. The Panel erred in its legal analysis regarding the predictability and transparency of the measure at issue. The Panel committed three legal errors in assessing the measure's level of transparency and predictability. First, the Panel conflated the opportunity to perform calculations to predict the additional duties with a lack of transparency and predictability. Second, the Panel applied the erroneous test proposed by Guatemala that a measure's variability could prevent it from being transparent and predictable even after the Panel confirmed that variability is a separate analysis from transparency and predictability. Third, the Panel erroneously concluded the measure lacked transparency and predictability because it is based on an exogenous factor – international prices – when the Appellate Body has held that ordinary customs duties may be calculated on the basis of exogenous factors.

30. The Panel also erred in its legal analysis of the supposed inhibition of the transmission of international prices to the domestic market. Its reliance solely on a theoretical analysis was legal error. An empirical approach by the Panel would have shown that the specific duties resulting from the PRS act like ordinary customs duties with respect to the transmission of international prices to the domestic market. The PRS does not distort or impede the transmission of international prices to the domestic market in a way that is different than other ordinary customs duties.

31. The Panel claimed that the additional duties were more like prohibited variable import levies than they were like permissible ordinary customs duties. Its actual analysis does not comply with the requirements of Article 11 of the DSU. Although the Panel said that it was doing a comparative analysis, it did not compare variable import levies and ordinary customs duties with respect to any characteristics. It merely asserted differences, and it often assumed that the ordinary customs duty would necessarily remain unchanged. Thus, there is no real comparison underlying the alleged "comparative" analysis on which the Panel relies.

4 THE PANEL ERRED IN LAW BY FINDING THAT PERU ACTED INCONSISTENTLY WITH ARTICLE II:1(B) OF THE GATT 1994

32. The Panel's finding that Peru violated the second sentence of Article II:1(b) of the GATT 1994 is based on legal error. Just as it did in its interpretation of Article 4.2 of the Agreement on Agriculture, the Panel improperly interpreted Article II of the GATT 1994 in isolation of other relevant rules.

33. The arguments presented above by Peru in the context of Article 4.2 of the Agreement on Agriculture apply, *mutatis mutandis*, to the arguments under GATT Article II:1(b). That is, a proper interpretation of Article II:1(b) of the GATT 1994 would have required the Panel to take into account: (1) the Peru-Guatemala FTA as a relevant rule of international law within the meaning of Article 31(3)(c) of the Vienna Convention; (2) Articles 20 and 45 of the ILC Articles as relevant rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention; and (3) the FTA as a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the Vienna Convention. If the Panel had properly interpreted Article II:1(b) of the GATT 1994 by taking these instruments into account, it should have found that Peru did not violate the second sentence of GATT Article II:1(b) by maintaining the PRS.

34. The Article II analysis also falls short of the Panel's obligations under DSU Article 11. While the Panel properly framed the important Article II issue in the case, it then decided not to engage in an assessment of the relevant facts. Instead, the Panel found a violation of Article II:1(b) of the GATT 1994 not because of its analysis of the requirements of Article II:1(b) and the design, structure and architecture of the Peruvian measure, but rather because of its conclusion that the duties resulting from the PRS are "at least […] similar" to the class of measures referred to as "variable import levies" in the Agreement on Agriculture. Having done so, the Panel explicitly did "not deem it necessary to rule" on the aspects of the PRS that might, in fact, reveal that the PRS is more appropriately considered to be an ordinary customs duty within the meaning of both Article II of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

35. The Panel failed to comply with its obligations under DSU Article 11. Facts are necessary to understand the measure, and a proper understanding of the measure is necessary to determine whether it is an "ordinary customs duty" within the meaning of Article II of GATT 1994. Peru submits that this is particularly true in a case such as this where the Member scheduled the duties pursuant to the rules established for the negotiation and specifically differentiated in its scheduled the agricultural products that would be subject to a different and higher tariff ceiling.

36. The Panel committed legal error, and the Appellate Body should declare as moot and with no legal effect the Panel's conclusion that Peru violated the second sentence of Article II:1(b) of the GATT 1994. Should the Appellate Body decide to complete the analysis, it has the necessary facts and argument in the record of the Panel proceedings, as aptly summarized by the Panel before it decided not to assess the facts.

ANNEX B-2

EXECUTIVE SUMMARY OF GUATEMALA'S OTHER APPELLANT'S SUBMISSION

1. Guatemala seeks review by the Appellate Body of the Panel's findings that the measure at issue is not a "minimum import price[] … and similar border measure" within the meaning of Article 4.2 and footnote 1 of the Agreement on Agriculture.

A. THE MEASURE AT ISSUE

2. The measure at issue in this dispute is Peru's Price Range System (PRS) and the "variable additional duty" imposed thereunder. The Panel Report contains a detailed description of the design, structure and operation of the PRS[1], its objectives[2], and the products to which it applies[3]. Paragraph 7.317 of the Panel Report also contains a summary of this description.

B. THE ISSUE BEFORE THE PANEL

3. Guatemala claimed that the measure at issue is a minimum import price or similar border measure that is inconsistent with Article 4.2 of the Agreement on Agriculture. Peru argued that the measure was not inconsistent with Article 4.2 it lacked a "target price" and, therefore, did not seek to equalize the price of every import with the floor price.

C. THE PANEL'S ANALYSIS

4. The Panel found that the measure at issue does not constitute a minimum import price, stating that "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".[4] The Panel stated that the measure at issue operated in the same manner as a specific import tariff".[5] The Panel also found that Peru's measure is not a measure "similar" to a minimum import price because: (a) the PRS does not operate in relation to the actual transaction value; (b) Peru demonstrated that some imports over the 13-year duration of the PRS entered below the floor price; and (c), the measure did not impose an implicit or de facto threshold, given that an ordinary customs duty in the form of a specific tariff would have the same effect as the measure at issue.

D. THE PANEL ERRED IN CONCLUDING THAT THE MEASURE AT ISSUE IS NOT COVERED BY ARTICLE 4.2 EITHER AS MINIMUM IMPORT PRICE OR AS A MEASURE SIMILAR TO A MINIMUM IMPORT PRICE

The Panel made the following legal errors:

5. First, the Panel adopted an excessively narrow legal standard, requiring that, in order to constitute a minimum import price, a measure must impose duties based on the transaction value and has to prevent, in each and every instance, that a product enter below a given threshold.

6. In the original *Chile – Price Band System* dispute, the Appellate Body indicated that "minimum import price schemes generally operate in relation to the actual transaction value of the imports" (emphasis added), implying that a minimum import price may occasionally not operate in relation to the actual transaction value.[6]

[1] Panel Report, paras. 7.126-7.167.
[2] Panel Report, paras. 7.118-7.119.
[3] Panel Report, paras. 7.118-7.119.
[4] Panel Report, para. 7.360.
[5] Ibid.
[6] Appellate Body Report, *Chile – Price Band System*, para. 7.295 (quoting the Panel Report, *Chile – Price Band System*, para. 7.36(e)).

7. Similarly, the correct legal characterization of a measure is not affected by the fact that the measure may not produce its intended effects with respect to 100 per cent of imports.[7]

8. Furthermore, the reference price of Peru's PRS is designed to operate as a substitute or proxy for the typical transaction value of any given shipment, in any given fortnight.

9. Second, in its finding that Peru's measure is not a minimum import price, the Panel also relied on the legally-incorrect proposition that, if Guatemala's claim were accepted, any ordinary customs duty in the form of a specific tariff would constitute a minimum import price.

10. Even if Peru's measure does not, in every single instance, equalize entry prices with the floor price, it nevertheless equalizes entry prices with another implicit (or de facto) threshold[8], consisting of the sum of the lowest transaction price and the duty resulting from the PRS.

11. Third, in its finding that the measure at issue was not even similar to a minimum import price, the Panel applied exactly same legal standard it used to determine whether the measure was a minimum import price. This fails to give any meaning to the term "similar" in Article 4.2 and footnote 1.

12. Fourth, the Panel incorrectly found that Peru's measure is not similar to a minimum import price because it does not impede imports from entering Peru at a price below a certain threshold and the PRS do not operate differently than ordinary customs duties. Even if it is accepted that the floor price does not constitute a minimum threshold, the undisputed evidence makes clear that the measure imposes an implicit de facto threshold. Moreover, this threshold operates very differently than a specific tariff, in that it is based on the sum of the administratively chosen lowest transaction value from the previous fortnight and a variable additional duty that was calculated on data including that lowest transaction value. A specific ordinary customs duty simply does not operate in this manner.

E. REQUEST FOR COMPLETION OF THE LEGAL ANALYSIS

13. The conditions articulated by the Appellate Body for it to complete the analysis are met in this case. Using the correct legal standard for determining whether a measure is a minimum import price, the Appellate Body should find that this measure is a minimum import price, regardless of the fact that it is applied to a proxy reference price and that a few transactions may enter below the threshold of the floor price. In addition, it is an undisputed fact that the measure ensures that goods will not enter at a price below the implicit or de facto threshold value.

14. Even if the Appellate Body were to adopt a narrow reading of the term "minimum import price", such that the above features of the PRS were to fall short of that standard; Guatemala believes that the system must qualify, at the very least, as a measure similar to a minimum import price.

15. The PRS and the variable additional duties have, at the very least, strong "likeness" or "resemblance" to a minimum import price scheme. Such "likeness" or "resemblance" exists both for the individual components of the regime, as well as for the system as a whole. The reference price, the price range floor and the implicit threshold bear strong "likeness" or "resemblance" to a transaction value, a minimum threshold and a minimum import price. The declared goal of the PRS is to "neutralize" and "stabilize" fluctuations in international prices.[9]

F. CONCLUSION

16. Guatemala respectfully requests the Appellate Body to reverse the Panel's findings in paragraphs 7.370, 7.371 and 8.1(c) of the Panel Report and complete the legal analysis concerning Guatemala's claim that Peru's measure is a minimum import or a measure similar to a minimum import price within the meaning of Article 4.2 of the AoA.

[7] Appellate Body Report, *US – FSC (21.5 I)*, para. 221.
[8] Panel Report, para. 7.209.
[9] Panel Report, para. 7.317, quoting the preambular language of Supreme Decree No. 115-2001-EF.

ANNEX B-3

EXECUTIVE SUMMARY OF PERU'S APPELLEE'S SUBMISSION

1. The Panel correctly determined that the additional duties did not constitute a minimum import price, were not similar to a minimum import price, and were like an ordinary customs duty. The Appellate Body should reject Guatemala's invitation to re-weigh the evidence and reject Guatemala's requested findings.

2. An interpretation of Peru's obligations under Article 4.2 of the Agreement on Agriculture must consider the Peru-Guatemala Free Trade Agreement ("FTA") including the good faith obligations of Guatemala under the DSU, and the understanding reached by the parties that Peru may maintain the Peruvian Price Range System ("PRS"). Even if the Appellate Body reaches the merits of Guatemala's appeal, it should uphold the Panel's conclusions that the measure at issue is not – and is not similar to – a minimum import price.

3. The Panel correctly found that the additional duties do not have an explicit threshold. It employed the correct legal standard to determine that the measure did not constitute a minimum import price and properly evaluated the evidence proving that the measure's "design, structure, and effect" do not create a threshold price. Nowhere does the Panel suggest an inflexible standard which would require that imports enter above the alleged threshold in "each and every instance", nor a legal standard that would disqualify any system using a reference price "based on an average of world prices" from being a minimum import price.

4. The evidence presented showed that adding the additional duties to the freely established transaction price yielded landed, duty-paid prices that were both above and below the floor price in the PRS. Guatemala mischaracterizes the data and the Panel's analysis regarding imports entering below the floor price. Peru provided data in the aggregate and for individual fortnights showing up to 100% of transactions for a product entering below the floor price in certain fortnights.

5. Nor is the reference price a proxy for transaction prices, which would be impossible because, among other reasons, the PRS uses international prices (not transaction prices) for four "marker products", not all forty-seven products to which the measure applies. Moreover, no pattern of "self-correct[ion]" results from the fortnightly updating of the reference price. The data shows that imports enter the Peruvian market at prices below the lower band of the PRS on a regular basis.

6. The Panel also correctly found that the additional duties do not have an implicit threshold. The "lowest transaction recorded in the international reference market during the previous fortnight" is a factor that is irrelevant to the PRS and any resulting duties and does not prevent operators from transacting at any price.

7. The Panel applied the correct legal test for determining that the measure is not similar to a minimum import price. The Panel's analysis showed that the Peruvian measure does not have similar characteristics to a minimum import price, and in fact operates no differently than an ordinary customs duty. The Appellate Body should reject Guatemala's request to reverse the Panel's finding that the Peruvian measure is not, and is not similar to, a minimum import price.

ANNEX B-4

EXECUTIVE SUMMARY OF GUATEMALA'S APPELLEE'S SUBMISSION

I. INTRODUCTION

1. Guatemala requests the Appellate Body to dismiss Peru's appeal in its entirety.

II. BACKGROUND TO THIS DISPUTE

A. The measure at issue

2. The Panel correctly defined the measure at issue as "the duties resulting from the PRS".[1] This is consistent with the content of Guatemala's request for the establishment of a panel.[2] In this context, Peru's arguments that the Panel should have only examined the variable duties themselves without looking at their underlying mechanism (i.e. the PRS) are without merit.

B. The FTA

3. Paragraph 9 of Annex 2.3 to the FTA cannot be read as a waiver – explicit or implicit – of the right to bring a complaint under the DSU with regard to the PRS or the duties resulting from the PRS. Article 1.3.1 of the FTA makes clear that Guatemala fully reserved its rights under the WTO Agreements. Article 2.3.1 of the FTA, read in conjunction with paragraph 9 of Annex 2.3 to the FTA does not in any way waive or reduce Peru's *obligation* to comply with the WTO Agreements. Rather, it grants Peru the right to maintain the PRS for a limited number of products[3], but only as long as it does so in a manner consistent with its obligations under the WTO Agreements.

4. The phrase "may maintain the PRS" in paragraph 9 of Annex 2.3 cannot be interpreted as prejudging the consistency or inconsistency of the PRS with Article 4.2 of the Agreement on Agriculture or Article II of the GATT of 1994. There is nothing to suggest that the Parties intended to interpret the WTO Agreements through the FTA, let alone modify their WTO obligations.

III. PERU'S NEW ARGUMENTS UNDER ARTICLES 31.3(A) AND 31.3(C) OF THE VIENNA CONVENTION ARE NOT PROPERLY WITHIN THE SCOPE OF THIS APPEAL

5. Guatemala raises a procedural objection to Peru's arguments relating to the FTA and the Articles 20 and 45 of the ILC Articles in the context of Articles 31.3(a) and 31.3(c) of the Vienna Convention.[4] These arguments are entirely new, were never raised before the Panel, and are not properly within the scope of this appeal.

6. The Appellate Body has previously found that new arguments must be excluded from the scope of an appeal when their consideration would necessitate consideration of new facts.[5] Furthermore, the Appellate Body has also exclude new arguments when there were no relevant legal findings or legal interpretations by a panel, in particular when the inability of the panel to address the issues now being raised was "due to the failure of the respondent Member properly to litigate the matter before the Panel".[6] Moreover, the Appellate Body has consistently stated that due process rights of a party would be infringed if issues were raised and decided on appeal without having been first examined by a panel.

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[1] Panel Report, para. 2.2.

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

[3] It should be noted that paragraph 9 of Annex 2.3 of the FTA *limits* the application of the PRS to the 47 products identified in Peru's Schedule set out in the FTA.

[4] Peru's Appellant's Submission, paras. 109 to 204, 205 to 216, 217 to 234, 302 to 303, 304 to 305, and 217 to 234.

[5] Appellate Body Report, *Canada – Aircraft Subsidies*, para. 211; Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 340.

[6] Appellate Body Report, *US – FSC*, para. 103.

7. Peru's new arguments should be excluded because:

- The Appellate Body might have to review and consider new facts;
- Peru's arguments do not address issues of law covered in the panel report or the Panel's legal interpretations. As in *US – FSC*, the Panel did not address the issues now raised by Peru because Peru failed to raise these issues during the panel proceedings. The lack of relevant panel findings is "due to the failure of [Peru] properly to litigate the matter before the Panel";[7] and
- Consideration of these new arguments would violate Guatemala's due process rights. Peru had ample opportunity to raise these arguments before the Panel; however, Peru chose to raise entirely different arguments. Guatemala's ability to properly respond and argue this case before the Appellate Body, during the short deadlines applicable in appellate proceedings, should not be affected by Peru's choice to drop its previous arguments and explore new ones. Moreover, Peru relies on new materials of a length of approximately 2,000 pages, none of which it has submitted with its appellant's submission.

IV. THE APPELLATE BODY SHOULD UPHOLD THE PANEL'S FINDINGS UNDER ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE AND SHOULD REJECT PERU'S NEW ARGUMENTS UNDER ARTICLE 31 OF THE VIENNA CONVENTION

A. The appellate Body should uphold the panel's findings that the measure at issue is a variable import levy within the meaning of Article 4.2 of the agreement on agriculture

8. Peru raises numerous objections to the Panel's finding that the PRS duties are a variable import levy or a measure similar to a variable import levy. All of these arguments should be dismissed.

(a) The Appellate Body should reject Peru's contention that the PRS duty "does not share with variable import levies the characteristic of having a threshold or minimum import price"

9. Peru argues that the Panel could not find that the variable additional duty was a variable import levy because it does not entail a threshold or minimum import price. According to Peru, the Panel "inexplicably" did not apply its analysis from the minimum import price section to its reasoning with respect to a variable import levy.[8]

10. Peru's argument is incorrect because variable import levies and minimum import prices are two distinct concepts; therefore, a variable import levy does not require for its existence a minimum price component. Inherent variability has to do with periodic automatic changes in the level of the duty without any particular prescribed minimum or maximum level for that duty. The Appellate Body's definition of a variable import levy from *Chile – Price Band System (21.5 – Argentina)* does not even refer to a threshold, much less to a threshold that would simultaneously satisfy the definition of a minimum threshold for a minimum import price.

(b) The Appellate Body should reject Peru's claims that the Panel improperly treated the measure's inherent variability as sufficient for a finding under Article 4.2

11. Peru is incorrect in arguing that the Panel's analysis confuses the measure at issue with the methodology used to calculate the reference price and the potential duty".[9] The Panel could not have drawn this distinction, because it is impossible to divorce the PRS duty from the way in which they are calculated. Moreover, Guatemala explicitly challenged the PRS duties as calculated by the PRS regime, in its panel request and its submissions. The Appellate Body has also held that the form of a duty is not decisive for its legal characterization and that it is necessary to consider how it has been calculated.

[7] Appellate Body Report, *US – FSC*, para. 103.
[8] Peru's Appellant's Submission, para. 243.
[9] Peru's Appellant's Submission, para. 248.

12. Guatemala also rejects Peru's arguments that the PRS duty is not variable because, since 2001, the PRS has not always given rise to a duty. However, that absence of duties during a certain period is not relevant for the periods in which the PRS duty *was* in fact imposed. During these periods, the duty varied, due to its inherent variability.

13. Finally, contrary to Peru's arguments, the variability of the PRS duties cannot be compared to the normal variability of ordinary customs duties. Referring to an example put by Guatemala before the Panel, the PRS has been updated over 400 times since 2001, whereas the ordinary customs duty for boneless bovine meat was changed only seven times over the past 23 years. This demonstrates that the PRS, and its variable import duties, operates very different from ordinary customs duties.

(c) The Panel did not err when analyzing the lack of predictability and transparency of the measure at issue

14. Peru incorrectly argues that the PRS duties are just as predictable and transparent as ordinary customs duties. This is incorrect, because ordinary customs duties remain the same until they are modified, whereas the PRS duties are guaranteed to change every fortnight. Contrary to Peru's arguments, economic operators are not better off because they know the abstract components on the basis of which the variable additional duty is calculated. Rather, the system guarantees them uncertainty, due to an unpredictable, ever-changing duty. Peru cannot claim that it publishes in advance all the actual data on which the duty will be calculated, which would be impossible because the data do not exist at present and are therefore unpredictable. Moreover, Peru does not even publish all of the historical data on which the past duties were based. To access certain data, economic operators require a fee-based subscription to internet websites.

15. Guatemala also demonstrated before the Panel that it is impossible to guess or estimate the level of future duties, be it in the short or long run. The Panel therefore correctly concluded that, even if operators may attempt to estimate future duties, this does not afford them a level of transparency and predictability comparable to that afforded by an ordinary customs duty.

16. The duties are also unpredictable and intransparent because Peru publishes the reference price on average on day eight of any given fortnight. Moreover, shipments from foreign ports may leave their port of departure without knowing what the applicable duty will be on arrival, which adds to the lack of predictability and transparency.

17. Finally, contrary to its arguments, Peru is not precluded by the Panel's finding from taking into account international price fluctuations when setting the level of duties through discrete, independent acts of its authorities. Rather, Peru may not take into account international prices by embedding them into an automatic formula that generates a periodically-changing import duty.

(d) The Panel did not err in finding that the PRS and the PRS duties inhibit the transmission of international prices to the domestic market

18. The Panel correctly found that, in the short run, the variable additional duty isolates Peru's internal market entirely from international price fluctuations. This is because the variable additional duty fills the gap between international prices and the price range floor price. In the medium and long run, the system at least severely distorts the transmission of international prices. The Panel correctly relied on these elements and did not conduct, as Peru argues, a merely "theoretical" analysis.

19. Peru proposed a novel test to the Panel, never previously required by panels or the Appellate Body, pursuant to which a duty is not a variable import levy under Article 4.2 unless an econometric study demonstrates the absence of any correlation between international and domestic prices. The Panel correctly rejected this novel test because factors other than an import levy can impact the transmission of international prices. For instance, Peru exempts the majority of its sugar imports from the PRS. Guatemala also pointed out numerous other methodological problems and errors in Peru's analysis.

20. Moreover, as Guatemala has previously pointed out, Peru's test has no basis in the treaty text and case law. It would also introduce an "economic effects" test into Article 4.2, which test has been consistently rejected by GATT and WTO panels and the Appellate Body.

21. In reality, Peru's appeal is directed at how the Panel weighed the evidence. However, the fact that Peru disagrees with the Panel does not mean that the Panel erred.

22. Peru is incorrect in arguing that ordinary customs duties distort international prices in the same manner as its PRS duties. To the contrary, as Guatemala's charts demonstrate, ordinary customs duties merely track international price fluctuations and do not impede or distort their transmission on the domestic market.

23. Peru is also incorrect in comparing its PRS to the price band system in *Chile – Price Band System*; on those aspects mentioned by Peru, the Peruvian PRS is very similar to, or even more distorting than, the Chilean PBS.

B. The Appellate Body should reject Peru's arguments under Article 31 of the Vienna Convention

24. Should the Appellate Body decide to address the substance of Peru's new arguments, Guatemala submits that these arguments should be rejected, for the following reasons.

25. First, that the Panel did not err in not engaging in the legal analysis proposed by Peru, because it was not obliged to do so. The Appellate Body has consistently held that panels are not required to address all arguments raised by the parties to the dispute.[10] Contrary to Peru's arguments under Article 3.2 of the DSU, the Panel's faithful adherence to the Vienna Convention is discernible throughout its report.[11] To the extent that Peru argues that the Panel erred by not making arguments for Peru that Peru itself did not make, Guatemala requests the Appellate Body to reject Peru's contentions.

26. Second, Guatemala argues that Peru's argument is fundamentally flawed, because Peru is not asking the Appellate Body to *interpret* WTO provisions – that is, Article 4.2 of the Agreement on Agriculture, Article II:1(b) of the GATT 1994 and Articles 3.7 and 3.10 of the DSU – in a particular manner, but rather to *modify* or *amend* them, *apply* them in a particular fashion or to *apply the provisions of the FTA or the ILC Articles*. The Appellate Body has consistently drawn a clear line between "interpretation" and "application" of law.[12] Peru's arguments would have the Appellate Body do something that far exceeds the interpretative exercise envisaged in Article 3.2 and, therefore, is beyond the competence of the Appellate Body.

27. Third, Peru's reading of Article 31 of the Vienna Convention with respect to Article 4.2 of the Agreement on Agriculture is wrong as a matter of substance. Specifically:

- The Appellate Body should reject Peru's argument that Article 31.3(c) requires that the FTA be taken into consideration as a "rule of international law applicable in the relations between the parties". The FTA is not "applicable" and is not a "rule of international law" because it is not yet in force. It is also not "relevant" to Article 4.2, because it does not purport to interpret Article 4.2. Moreover, the term "parties" in Article 31.3(c) refers to the parties of the treaty being interpreted, not the parties to the dispute. In any event, Peru's argument would require that the Appellate Body resolve a dispute between Guatemala and Peru concerning a non-WTO treaty;

- Second, Peru incorrectly asserts that Article 4.2 should be interpreted in the light of Articles 20 and 45 of the ILC Articles on State Responsibility, by virtue of Article 31.3(c) of the Vienna Convention. Peru does not demonstrate why these provisions of the ILC Articles are "rules of international law". Additionally, Article 20 and 45 of the ILC

[10] Appellate Body Report, *US – OCTG (Mexico)*, para. 134. Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 12.

[11] See for instance, Panel Report, paras. 7.283, 7.286, 7.289, 7.293, 7.305, 7.328, 7.329, 7. 409, and 7.497.

[12] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 316. See also Panel Report, *Argentina – Poultry*, para. 4.71.

Articles are not "relevant" to Article 4.2 as both sets of provisions do not address the same subject matter.

- Finally, the Appellate should reject Peru's argument that the FTA is a subsequent agreement, within the meaning of Article 31.3(a) of the Vienna Convention, and should inform the interpretation of Article 4.2 of the Agreement on Agriculture. As noted, the FTA is not in force and is therefore not an "agreement" within the meaning of Article 31.3(a). The term "parties" refers to all WTO parties. Moreover, the FTA is not "concerned with the interpretation" of Article 4.2 or its "application".

V. THE PANEL'S FINDINGS UNDER ARTICLE II:1(B) ARE CORRECT AND THE APPELLATE BODY SHOULD REJECT PERU'S APPEAL FROM THESE FINDINGS

28. Peru's appeal arguments can be divided in two parts. First Peru incorporates its previous arguments concerning Articles 31.3(a) and 31.3(c) of the Vienna Convention. Second, Peru submits that the Panel acted inconsistently with its obligation under Article 11 of the DSU by not making an objective assessment of matter before it.

29. As to the first part of Peru's argumentation, Guatemala refers to its earlier rebuttal of Peru's arguments relating to the FTA as well as Articles 20 and 45 of the ILC Articles in the context of Articles 31.3(c) and 31.3(a) of the Vienna Convention.

30. With respect to Article 11 of the DSU, the Appellate Body should dismiss Peru's arguments that the Panel acted inconsistently with this obligation for the following reasons:

- Peru's primary concern appears to be that the Panel used an incorrect legal standard in making a finding under Article II:1(b) that essentially depended on its finding under Article 4.2. The Panel's approach, however, is correct as it reflects the principle that measures falling within the scope of footnote 1 to Article 4.2 of the Agreement on Agriculture are, by definition, not ordinary customs duties.

- Peru contends that the Panel's decision not to examine additional factual aspects of the measure amounts to a failure to discharge its duties under Article 11 of the DSU. However, the fact that Peru disagrees with the Panel's conclusion on the need to examine additional facts does not mean that the Panel "deprived Peru of an objective assessment".[13]

31. In the event that the Appellate Body reverses the Panel's finding and proceeds to complete the legal analysis, Guatemala requests that the Appellate Body take into account certain factual assertions that Guatemala made before the Panel and that Peru did not contest, including the nature of Peru's measure under Peruvian law.[14]

VI. THE PANEL DID NOT ERR IN LAW BY FAILING TO FIND THAT GUATEMALA ACTED INCONSISTENTLY WITH ITS GOOD FAITH OBLIGATIONS UNDER ARTICLES 3.7 AND 3.10 OF THE DSU

A. The Appellate Body should reject Peru's "claims" under Article 3 of the DSU

32. Peru requests the Appellate Body to "complete the analysis and find that Guatemala has acted inconsistently with its obligations under DSU Articles 3.7 and 3.10".[15] However, Peru explicitly admits that it no longer argues that Guatemala is procedurally barred from bringing the present dispute. Thus, Peru's "claims" have no procedural connection with this dispute, which signifies that Peru is advancing new and wholly different "claims" of its own. The Appellate Body lacks jurisdiction to consider *ab initio* claims by a *defending* Member in dispute settlement proceedings seeking a finding that the *complaining* Member has acted inconsistently with provisions of the covered agreements.

[13] Peru's Appellant's Submission, para. 323.
[14] Panel Report, para. 7.380.
[15] Peru's Appellant's Submission, para. 107.

B. The Appellate Body should reject Peru's arguments with respect to Article 3.7 of the DSU

33. Peru contends that "while a Member invoking WTO dispute settlement proceedings enjoys a presumption of good faith, this presumption can be rebutted".[16] However, the Appellate Body clarified that the first sentence of Article 3.7 "neither requires nor authorizes a panel to look behind that Member's decision and to question the exercise of judgement".[17] The first sentence of Article 3.7 simply calls on Members to reflect carefully on whether to proceed with dispute settlement proceedings.

34. Peru also argues that the FTA is, in effect, a positive solution to the dispute within the meaning of Article 3.7.[18] However, the FTA does not make reference to this dispute; it was signed before the dispute arose between the Parties; it provides for the possibility to resort to WTO dispute settlement; and, even if it were considered as a mutually agreed solution, it would require the valid consent of both parties to a dispute and Peru has not given yet its consent.

C. The Appellate Body should reject Peru's arguments with respect to Article 3.10 of the DSU

35. Peru's arguments under Article 3.10 are without merit. First, contrary to Peru's allegations, the Panel did not exclude that a waiver can be given implicitly. Rather, it repeatedly referred to, and acknowledged, the Appellate Body findings in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*. The Panel was also right in concluding that the FTA provisions at issue do not contain a waiver of anything by Guatemala, "clear" or otherwise. Third, the Panel correctly relied on the fact that the FTA had not yet entered into force. An alleged waiver in a bilateral agreement cannot take effect unless that agreement is in force. Peru seeks to derive benefits from the FTA even though it is denying Guatemala benefits under the same FTA by refusing to ratify it.

36. Fourth, the Panel correctly found that, in order to reach the outcome desired by Peru, it would have to resolve a dispute under an agreement that is not a WTO covered agreement. Doing so would be beyond the Panel's jurisdiction. The Appellate Body has in the past also declined to assume the role of an FTA dispute settlement body.

37. Fifth, an FTA is not a permissible vehicle for a waiver under Article 3.10. WTO Members can waive their right to bring a dispute only in a multilateral context. Moreover, permitting WTO Members to waive their WTO rights in FTAs would be a potentially dangerous precedent, as it would create the risk for pressures in FTA negotiations to sign away WTO rights.

38. With respect to Peru's reliance on the ILC Articles, it is unclear what they add to Peru's case. The ILC Articles would merely confirm the Appellate Body's previous reading of Article 3.10. In reality, Peru's appeal is nothing but a disagreement with the Panel as to whether the facts of this case demonstrate that Guatemala clearly waived its right to bring a WTO dispute.

39. In any event, Peru's arguments concerning ILC Articles are not properly within the scope of this appeal and there is no panel finding that ILC Articles 20 and 45 are customary international law or general principles of law, such that they can qualify as a "rule of international law" under Article 31.3(c). The Appellate Body is not in a position to complete the analysis on this point.

40. Finally, Peru reads the Panel finding on Article 18 of the Vienna Convention as precluding the possibility that "[a] party's conduct in violation of [that provision] may also demonstrate a lack of good faith".[19] However, the Panel correctly found that, for an assessment under Article 3.10, it is immaterial whether the relevant conduct at the same qualifies legally as an Article 18 violation or not. What matters under Article 3.10 is whether the conduct at hand satisfies the legal standard of a "clear" waiver of the right to bring a WTO dispute.

[16] Peru's Appellant's Submission, para. 50.
[17] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74.
[18] Peru's Appellant's Submission, para. 51.
[19] Peru's Appellant's Submission, para. 97.

VII. THE APPELLATE BODY SHOULD REJECT PERU'S APPEAL UNDER ARTICLE 11 OF THE DSU

41. In its claim under Article 11 of the DSU regarding the Panel's Article 4.2 analysis, Peru commits the common flaw in Article 11 claims of simply trying to re-argue the facts and asking the Appellate Body to replace the Panel's assessment of the facts with an assessment more to Peru's liking.

42. Peru argues that the Panel failed to identify the level of transparency and predictability of an ordinary customs duty in determining that the measure at issue lacked transparency and predictability.[20] Nevertheless, Peru ignores the Panel's statements that contain precisely the type of comparative analysis Peru appears to be seeking.[21] This flaw is also seen in Peru's argument that the Panel failed to consider properly how the measure at issue distorted the transmission of international prices to the domestic market differently than an ordinary customs duty.[22]

43. With respect to Peru's Article 11 claims under Article II:1(b) of the GATT 1994, Peru's arguments seem to be based entirely on the legal standard used by the Panel. To the extent that the Panel analyzed the measure at issue and found that it fell within the scope of Article 4.2 and footnote 1, the Panel was not required as a matter of law to conduct the additional analysis sought by Peru. Any error in the Panel's approach would be an error of law, not a violation of the Panel's obligations under Article 11 of the DSU.

VIII. CONCLUSIONS AND REQUEST FOR FINDINGS

44. For the above reasons, Guatemala respectfully requests the Appellate Body to

- exclude from the scope of the appeal all of Peru's new arguments concerning the FTA and Articles 20 and 45 of the ILC Articles in the context of Articles 31.3(a) and 31.3(c) of the Vienna Convention;
- to refrain from making a finding that Guatemala acted inconsistently with its obligations under Articles 3.7 and 3.10 of the DSU;
- to uphold the Panel's findings that the measure at issue is a variable import levy in violation of Article 4.2 of the Agreement on Agriculture;
- to uphold the Panel's findings that the measure at issue is not an ordinary customs duty in violation of Article II:1(b) of the GATT of 1994; and
- to uphold the Panel's findings that there was no evidence that Guatemala brought these proceedings in a manner contrary to good faith under Articles 3.7 and 3.10 of the DSU.

[20] Peru's Appellant's, para. 294, second bullet point.
[21] Panel Report, paras. 7.335 and 7.337.
[22] Peru's Appellant's Submission, para. 294, third bullet point.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

1. Brazil considers some of the statements made by the Panel of significant systemic interest, in particular concerning the legal standard applied the existence of a minimum import price.

2. Brazil finds that the approach followed by the Panel in this topic is questionable. Neither the text of the Agreement of Agriculture nor the previous guidance provided by Appellate Body suggest that only measures that achieve absolute effectiveness in its objective of establishing a floor for the price that a product may enter the domestic market are properly characterized as minimum import prices (or measures similar to minimum import prices).

3. Brazil considers that the proper assessment of whether a measure is a minimum import price does not require that the measure act *directly* to establish the lowest prices at which a certain product may enter a Member's domestic market. In addition, Brazil does not believe that a measure must *ensure* that imports *will not* enter the domestic market below such lowest price to be properly considered a minimum import price. Brazil considers that measures that do not use the actual transaction value as a benchmark may also be considered similar to minimum import prices.

ANNEX C-2

EXECUTIVE SUMMARY OF COLOMBIA'S THIRD PARTICIPANT'S SUBMISSION

1. Colombia will provide its views on: (a) The claim presented by Peru regarding the Panel's interpretation of the good faith principle, and (b) the Panel's interpretation of the PRS as a variable import levy, specifically in its analysis of the elements of predictability and transparency of the PRS.

2. A way to violate the principle of good faith understood as *pacta sunt servanda* is to undertake actions or inactions that frustrate the object and purpose of a treaty. In the case at hand, apparently Guatemala accepted the PRS application by signing the FTA with Peru. However, by bringing a claim to the WTO DSB in order to seek the elimination of the PRS, Guatemala, eventually frustrated the object and purpose of the bilateral treaty. This could be construed as contrary to the Good Faith Principle in relation to the "*pacta sunt servanda*" application.

3. According to the DSB doctrine, "Estoppel" as a principle might be applied to WTO cases. The question seems to be whether there is estoppel when a party has notified a measure or because of its statements, bearing in mind that the other party had legitimately relied on the notification of that measure, and was now suffering the negative consequences resulting from a change in the first party's position.[1] Apparently Peru relied on Guatemala's explicit manifestation on the consistency of PRS under the covered agreements, when agreed upon the FTA between these two WTO members. Then a Party's action could not be awarded if it represents a change on a position that in itself involves a sacrifice of the Good Faith Principle.

4. Colombia considers that the AB should also bear for its analysis articles 3.7 and 3.10 of the DSU in deciding this case according to Good Faith Principle, taking into account for this purpose all relevant facts in order to fulfill its obligation of Article 11 of the DSU. Even though the FTA between Peru and Guatemala has not yet entered into force, it is still a relevant fact that should be taken into account.

5. On the issue of the PRS as a variable import levy, the Appellate Body, has defined a variable import levy as a duty assessed upon importation, which is liable to vary automatically and continuously on the basis of an underlying scheme or formula that does not require any discrete or independent legislative or administrative action and is in-transparent and unpredictable, as to the level of resulting duties.[2] In Colombia's opinion, the elements of transparency and predictability differ from the concept of inherent variability. Colombia suggests that the Appellate Body should recognize that the standard set out for variable import levies does not include a measure that is transparent and predictable enough, so that even if it varies, it is not, ultimately, a variable import levy.

[1] Panel Report on *EC – Asbestos*, para 8.60.
[2] Appellate Body Report. *Chile - Price Band System (Article 21.5 - Argentina)*. Para 155-158.

ANNEX C-3

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION

1. Under Article 3.7 of the DSU a Member has broad (although not unlimited) discretion in deciding whether to bring a case against another Member. Article 3.10 of the DSU requires WTO Members to engage in WTO dispute settlement procedures in good faith and all WTO Members benefit from the presumption of good faith.

2. The European Union does not consider that, in light of the evidence adduced by Peru, Guatemala had clearly waived its right to bring WTO dispute settlement procedures against the PRS. The Panel properly observed that the FTA in question was not yet in force and, consequently, its provisions should be regarded as having limited legal effects in the dispute at issue. The FTA provisions seem to be contradictory. In addition, the parties did not make an early announcement in accordance with the RTA Transparency Mechanism.

3. Article 18 of the Vienna Convention should not be read as requiring the provisional application of the entirety of an international agreement before it formally enters into force. In principle, the recognition of the right to use the PRS against Guatemala's products is not among the object and purpose of the FTA.

4. With regard to Articles 20 and 45 of the ILC Articles it is important to distinguish between the rules establishing when a "valid consent" by a State has been provided and the rules determining when such consent produces legal effects.

5. Rules of public international law may be invoked to properly interpret a relevant provision of the covered agreements that has been invoked by one of the parties in a WTO dispute.

6. Article 31(3)(a) of the Vienna Convention would capture subsequent agreements (i.e. post 1994) between the parties to the covered agreement (i.e. in principle all Members) regarding the interpretation or application of a covered agreement (as opposed to its amendment or modification). It would thus appear that a bilateral agreement between two WTO Members which amend or change any of its WTO commitments would not fall under the scope of Article 31(3)(a) of the Vienna Convention.

7. The European Union agrees that Article 31(3)(c) of the Vienna Convention should be understood as reflecting the principle of "systemic integration". Thus, in principle, a bilateral agreement between the parties to a dispute could be considered as part of the normative environment reflecting the individual WTO Member's international obligations which should be taken into account when giving coherence and meaningfulness when interpreting the scope of the rights and obligations contained in the covered agreements. Such an approach is possible only by means of agreements that are "applicable", which means into force.

8. The European Union considers that one of the key characteristics of variable import duties and minimum import prices is that they generally prevent price competition on all imports. They can thus be distinguished from ordinary bound customs duties, which depending on the level of binding, permit, at least potentially, price competition on all imports.

9. Nevertheless, the European Union disagrees that both variable import levies and minimum import prices also share as a common feature that both prevent the importation of goods below a threshold price. 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.

10. With respect to "similar border measures", it may happen that the measure at issue shares some of the features of different measures enunciated in footnote 1 to the [Agreement on Agriculture] AoA. In any event, those measures should be "sufficiently similar" (as opposed to just similar) to the ones listed in footnote 1.

11. "Ordinary customs duties" and the other measures listed in footnote 1 of the AoA share several features, including their variability. For instance, an "ordinary customs duty" may be tied to an exchange rate when expressed in a foreign currency, or may be subject to changes depending on the seasonality of the product. In this respect, the Member's tariff Schedule may shed light on whether a particular measure forms part of the "ordinary customs duties" of the Member concerned. However, the main differences between the two categories lie in their transparency, predictability and trade effects on imports.

ANNEX C-4

EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION

I. ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

1. The defining characteristic of a variable import levy is inherent variability, according to a formula or scheme. This formula may, but need not in every case, incorporate a threshold price along the lines suggested by Peru. Here, the PRS imposes additional duties based on the difference between a lower band and the applicable reference price. This is an inherently variable mechanism based on a formula or scheme, and the Panel did not err in finding that the measure can fall within the definition of a "variable import levy".

2. Peru incorrectly suggests that by providing a certain degree of transparency and predictability and by only impeding the transmission of international prices into the domestic market to a certain degree, a variable import levy can somehow be rendered to be an ordinary customs duty. A lack of transparency or predictability or impeding the transmission of international prices may be further evidence that a measure is a variable import levy. However, the opposite is not true. The fact that a measure provides some degree of transparency or predictability to traders does not preclude a finding that the measure is a variable import levy. Finally, contrary to Peru's assertion, it also is not necessary to engage in a detailed comparison between the features of a measure and those of ordinary customs duties.

3. With respect to the Panel's finding that the PRS was not "similar" to a "minimum import price", the United States notes that to be "similar," a measure must have "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." The Panel appeared also to require consideration of whether the challenged measure is "similar" to an ordinary customs duty. This requirement has no grounding in the text of footnote 1 or the Appellate Body's guidance in the *Chile – Price Band System disputes*.

II. THE PERU-GUATEMALA FTA

4. Article XXIV of the GATT 1994 provides an exception from particular WTO disciplines for certain measures related to an FTA. Under these exceptions, a Member may invoke an FTA as the basis for a defense to a claim that a measure is inconsistent with the Member's obligations under the GATT 1994. Peru argues that its FTA with Guatemala was "negotiated under Article XXIV", but does not attempt to invoke Article XXIV in its defense; therefore, the Panel was not called on to examine whether the FTA between Peru and Guatemala could justify a derogation from Peru's WTO obligations. And of course, Article XXIV would not be available as an exception with respect to an FTA that is not in force.

5. Peru appears to ask the Appellate Body to interpret and apply the provisions of the FTA. However, that is inconsistent with the text of the DSU, which applies only to disputes brought under *the covered agreements*. Despite its claim to be offering the FTA as a tool for "interpretation," Peru attempts to use the FTA to depart from its WTO obligations. Even were Peru asking for the FTA to be used for interpretative purposes, an FTA cannot serve as a "relevant rule[] of international law applicable in the relations between the parties" under Article 31(3)(c) of the VCLT or a "subsequent agreement between the parties" under Article 31(3)(a) of the VCLT for purposes of interpreting provisions of WTO Agreements. An FTA, if it were in force, would constitute an agreement between the parties to the FTA only – and not between *the WTO Members*.

6. Peru's argument that Guatemala asserted its claims contrary to its obligations under Articles 3.7 and 3.10 of the DSU because the FTA effected a "waiver" of Guatemala's substantive rights should also be rejected. The WTO Agreement provides a mechanism for obtaining a waiver, but that mechanism was not invoked here.

7. Articles 3.7 and 3.10 also would not permit the Panel to refrain from adjudicating Guatemala's claims. Regarding Article 3.7, there is no basis for a panel to opine on whether or not a Member has exercised its judgment "before bringing a case." Nor did the Panel err in failing to find that Guatemala's presumption of good faith had been rebutted. Peru's arguments in this respect are at odds with the text of Article 3.7, as interpreted in *Mexico – Corn Syrup* (*Article 21.5 – US*). Likewise, the first sentence of Article 3.10 of the DSU is expressed as an "understanding" by all Members rather than as imposing binding or enforceable obligations on a particular Member.

8. Peru appears to have augmented its arguments before the Panel by invoking Articles 20 and 45 of the International Law Commission's draft Articles on State Responsibility. But Peru's reliance on these articles is premised on Peru's other arguments having already been accepted, and so these articles do not help support Peru's interpretation. To the extent they are relevant, they do not address the meaning of the term "good faith", or actions taken "to resolve [a] dispute" under the covered agreements.

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