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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

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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 Agriculture³, 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 March 2015, 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 Convention⁸;
- 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

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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 PRS¹, its objectives², and the products to which it applies³. 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) threshold⁸, 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 products³, 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.

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 11:1(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 11:1(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

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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.
