PERU – ADDITIONAL DUTY ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS
(DS457)

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE THIRD PARTIES

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TABLE OF REPORTS

Short Form	**Full Citation**
Chile – Price Band (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted on 23 October 2002
Chile – Price Band (21.5) (AB)	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 on 22 May 2007
Japan – Alcohol (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996
Mexico – Antidumping Investigation of HFCS (21.5) (AB)	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 on 21 November 2001
Mexico – Taxes on Soft Drinks (AB)	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted on 24 March 2006

QUESTIONS FOR THE THIRD PARTIES

1. What is the relevance to this case of the Free Trade Agreement concluded between Peru and Guatemala? How relevant is it that the Agreement has not yet entered into force? What effects would the entry into force of the Agreement have?

1. The Free Trade Agreement ("FTA") between Peru and Guatemala does not have any relevance to this dispute. As discussed in previous U.S. submissions,[1] a determination of whether a measure is consistent with a covered agreement does not hinge on the terms of an agreement that is not a covered agreement, such as an FTA. Peru's invitation to adjudicate rights and obligations under the FTA should not be accepted, nor would it be appropriate for a panel to refrain from making findings called for by its terms of reference. Such a step would be contrary to the text of the DSU, a conclusion reached in reports in previous disputes, such as *Mexico – Taxes on Soft Drinks*.[2]

2. Equally, Peru is incorrect in suggesting that the FTA resulted in a modification or waiver of Guatemala's rights under the WTO Agreement.[3] There are three ways to interpret or modify the WTO Agreement, none of which applies here.[4] Moreover, the DSU does not provide for the waiver of Members' rights to invoke WTO dispute settlement procedures through an FTA.[5]

3. As discussed below, with respect to Question No. 3, the text of an FTA cannot give rise to a finding that a Member has invoked WTO dispute settlement proceedings in bad faith, vitiating its right to assert claims under the covered agreements.

4. The preceding observations apply regardless of whether an FTA has entered into force. However, the fact that, here, the Peru-Guatemala FTA has not entered into force is an additional reason not to credit Peru's arguments predicated on that FTA. There is no legal basis for the suggestion that a bilateral agreement *not* in force can effect an amendment of a multilateral agreement that *is* in force, waive rights under the latter agreement, or give rise to findings of bad faith with respect to conduct under the latter agreement.

2. What is the relevance to this case of Article 18 of the Vienna Convention on the Law of Treaties?

5. Article 18 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") has no bearing on this dispute.[6] Neither party appears to assert that this article serves as a relevant rule of international law applicable between the parties that should be taken into account in interpreting the term of a WTO covered agreement relevant to this dispute. Peru fails to explain how Article 18 falls within the scope of Article 31, much less how it sheds light on the interpretation of a specific provision of the covered agreements.

[1] U.S. Third Party Submission, paras. 35-51; U.S. Oral Statement, paras. 19-25.
[2] U.S. Third Party Submission, paras. 36-43; *Mexico – Taxes on Soft Drinks (AB)*, paras. 53-56.
[3] Peru's First Written Submission, paras. 4.22-4.30.
[4] U.S. Third Party Submission, para. 49.
[5] U.S. Third Party Submission, paras. 50-51; U.S. Oral Statement, para. 20.
[6] *See* U.S. Third Party Submission, para. 47; U.S. Oral Statement, para. 21.

6. Nor is Article 18 a customary rule of interpretation of public international law. Therefore, it would not be one of the rules referenced in Article 3.2 of the DSU.

7. And even aside from this, examining Article 18 on its face reveals that it is not relevant, as Peru does not allege that Guatemala has taken "acts which would defeat the object and purpose" of the WTO Agreement, which has already gone into effect. Instead, Peru has alleged that Guatemala has acted in a way that is inconsistent with the object and purpose of an FTA. Even if this allegation were true, Peru would – at most – have an issue to assert in the context of the FTA.

3. What is the scope of the obligations arising from Article 3.7 and 3.10 of the DSU? What role can the theory of abuse of rights play in the scope of the obligations set forth in those paragraphs?

8. As discussed in previous U.S. submissions,[7] Articles 3.7 and 3.10 of the DSU do not have any bearing on the Panel's analysis of the substantive provisions at issue in this dispute.

9. The first sentence of Article 3.7 provides that, "[b]efore bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful." As the Appellate Body observed in *Mexico – Anti-dumping Investigation of HFCS (21.5)*, a Member is "expected to be largely self-regulating in deciding whether any such action would be 'fruitful.'"[8] A Member is presumed to have asserted a claim in good faith, "having duly exercised its judgment as to whether recourse to that panel would be 'fruitful.' *Article 3.7 neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgment*."[9] Once a dispute has been brought, the Member has exercised its judgment, and Article 3.7 imposes no ongoing obligation.

10. Likewise, the first sentence of Article 3.10 of the DSU does not impose binding or enforceable obligations on Members. Article 3.10 sets out a common *understanding* of the Members as to how they "will" engage in dispute settlement – *i.e.*, "[i]t is understood that . . . if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." Members knew how to draft language that would impose binding and enforceable obligations, but took evident care to avoid doing so here.[10]

11. In this respect, the United States notes that the doctrine of abuse of rights does not play a role in connection with the scope of Articles 3.7 and 3.10 of the DSU.[11] Neither provision refers to "abuse of rights," and there is no basis for importing this doctrine into the negotiated text of these provisions.

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[7] U.S. Third Party Submission, paras. 44-46; U.S. Oral Statement, paras. 22-25.
[8] *Mexico – Antidumping Investigation of HFCS (21.5) (AB)*, para. 73 (quoting *EC – Bananas (AB)*, para. 135).
[9] *Mexico – Antidumping Investigation of HFCS (21.5)(AB)*, para. 74 (emphasis added).
[10] Even if Article 3.10 imposed binding obligations, Peru would need to bring a separate dispute concerning Guatemala's alleged breach of this obligation. The DSU is itself a covered agreement. A claim by Peru against Guatemala for breach of a covered agreement is not within the terms of reference of the Panel; consequently, it would not be appropriate for the Panel to make a finding that Guatemala has breached Article 3.10. *See* U.S. Third Party Submission, fn.65. Similar considerations would also apply with respect to a claim of breach of Article 3.7.
[11] U.S. Oral Statement, para. 25.

12. Thus, the DSU does not require or permit the Panel to "look behind" a Member's decision to assert a claim under the DSU, or to "question its exercise of judgment."[12] Articles 3.7 and 3.10 do not countenance such an inquiry, much less provide a basis for concluding that a claim was asserted in bad faith. Where, as here, allegations of bad faith are predicated on the terms of an agreement other than a covered agreement, such as an FTA, they are even more groundless.

13. To the extent that there is concern over a Member's decision to assert a WTO claim, other Members have numerous avenues at their disposal. If they view such an action as breaching the terms of an FTA, they can pursue available remedies under the FTA. They may also pursue informal diplomatic avenues.

4. Please compare the price band systems that were the subject of Panel and Appellate Body findings in the original proceedings and the compliance proceedings in DS207 (Chile – Price Band System) with the price band system in the current proceedings. In your view, is Guatemala's comparison of the two different systems in paragraph 3.85 of its first written submission (page 34) correct? How is this relevant to the current dispute?

14. As Guatemala's comparison table reveals, there are striking similarities between Peru's price band system and the mechanisms found to be WTO-inconsistent in the original and compliance proceedings in *Chile – Price Band*. Guatemala's table is in certain respects a simplification – for instance, it does not address mechanisms for converting to CIF values – and should be read in conjunction with the surrounding descriptive material in Guatemala's submission. But the table nevertheless sets out the principal contours of the three mechanisms at issue and conveys the remarkable degree of convergence between them.

15. The similarity between the three mechanisms confirms that there is no credible basis for distinguishing the measure at issue in *Chile – Price Band* from the measure at issue in this dispute in terms of the application of the relevant provisions of the covered agreements. The guidance provided by the panels and Appellate Body appears to be helpful to the Panel and persuasive.[13]

16. For further discussion of the apparent inconsistency between Peru's price band mechanism and Article 4.2 of the *Agreement on Agriculture*, the United States refers the Panel to paragraphs 8-19 of its third party submission, and paragraphs 8-9 of its oral statement at the third party meeting.

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[12] *Mexico – Antidumping Investigation of HFCS (21.5) (AB)*, para. 74

[13] In this regard, the United States recalls that Article 11 of the DSU provides that the role of a panel is "to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." As a result, while the findings in one dispute are not controlling for purposes of another dispute, they may nevertheless assist a panel in its task and the reasoning used to the extent a panel finds it persuasive. *See, e.g., Japan – Alcohol (AB)*, p. 15.

5. If the price band system in the current proceedings has the effect of isolating the Peruvian domestic market from international prices, how relevant is that to the analysis of the case?

17. The focus of the inquiry under Article 4.2 of the *Agreement on Agriculture* is the design, structure, and architecture of the challenged measure. In determining whether a measure is "of the kind" that was required to be converted into ordinary customs duties under Article 4.2, one should consider whether that measure constitutes one of the six examples of prohibited measures enumerated in footnote 1, such as a variable import levy, or instead falls into the "residual category" noted in footnote 1 – *i.e.*, it constitutes a "similar border measure[ ] other than ordinary customs duties."[14] Article 4.2 does not impose an "effects" test, or require a finding that Peru's price band mechanism isolates the domestic market.

18. Even if a measure never causes any measurable, direct adverse trade effects – for instance, because international reference prices never fall below the lower threshold set in a price band – it may still be prohibited under Article 4.2.

19. In determining whether a measure is a variable import levy, it will be highly relevant that the measure "incorporates a scheme or formula that causes and ensures that levies change automatically and continuously."[15] It is this feature that renders a variable import levy "*less* transparent and *less* predictable than is the case with ordinary customs duties".[16] There is no need to engage in statistical and econometric analyses of whether a price band mechanism insulates the domestic market from international prices.[17]

20. To the extent that evidence of the effects of a price band is available, it may be taken into account. But its relevance is secondary, and this evidence should be viewed with caution. One should take care in interpreting this data, including the time periods selected and assumptions made. Moreover, this evidence should be viewed with an eye to understanding the inherent characteristics of the measure, how it operates, and its similarity to the measures enumerated in footnote 1.

6. In the case of the products subject to the price band system, to what extent is it possible, in your opinion, for traders to predict the final amount of duties they will have to pay (including possible additional duties plus the* ad valorem *duties) before selling or exporting to Peru?

21. As discussed in the U.S. response to Question No. 5, Article 4.2 of the *Agreement on Agriculture* does not impose an "effects test." For a price band mechanism to qualify as a variable import levy, there need not be evidence that traders experience difficulty in predicting duties. Nor does Article 4.2 require evidence that this lack of predictability has yielded adverse trade effects.

[14] *Chile – Price Band (AB)*, paras. 209-210.
[15] *Chile – Price Band (AB)*, para. 233.
[16] *Chile – Price Band (21.5) (AB)*, para. 156 (emphasis added).
[17] *See* U.S. Oral Statement, para. 13.

22. Put differently, "lack of predictability" is not an independent test that a measure must pass in order to qualify as a variable import levy.[18] Instead, it is the presence of an underlying formula or scheme that renders a measure "inherently variable," because it "causes and ensures that levies change automatically and continuously."[19] It is this feature that renders the resulting duties "*less* predictable" than ordinary customs duties.[20]

23. The United States offers no view on whether, in practice, traders have experienced difficulty in predicting the duties that they will pay under the Peruvian price band scheme. Nonetheless, we note that under a system in which additional duties are subject to change every two weeks, traders are likely to experience such difficulties – particularly in the context of forward or long-term contracts. This, in turn, has the potential to increase the risk associated with imports and deter trading activity.

7. Regarding Guatemala's claims under Article 4.2 of the Agreement on Agriculture and under the second sentence of Article II:1(b) of the GATT, what is your view on the order in which the Panel should examine these two claims? If it begins the analysis with Article 4.2 of the Agreement on Agriculture, should the Panel start by examining whether the measure constitutes variable import levies, minimum import prices or similar measures, or by examining whether the measure constitutes ordinary customs duties?

24. The United States suggests that the Panel begin its analysis with the claims under Article 4.2 of the *Agreement on Agriculture*. If the Panel concludes that the challenged measure is inconsistent with Article 4.2, it need not render findings on Guatemala's claim under the second sentence of Article II:1(b) of the GATT 1994. In this respect, we refer the Panel to paragraphs 3-7 and 32-34 of the U.S. written submission, and paragraphs 3-7 of the U.S. oral statement.

25. In carrying out analysis under Article 4.2, one should examine whether Peru's price band system constitutes a variable import levy, minimum import price, or similar measure, within the meaning of footnote 1. Article 4.2 requires a panel to determine whether a measure is "of the kind" that is required to be converted into ordinary customs duties. To make this determination, "it is necessary to conduct an in-depth examination of the measure itself. *Such an examination must take due account of the scope and meaning of the relevant language in footnote 1*."[21]

26. Here, Guatemala has alleged that Peru's price band scheme is a variable import levy, minimum import price, or similar measure. Guatemala has invoked these specific categories

[18] U.S. Third Party Submission, paras. 12-14; U.S. Oral Statement, paras. 10-12.
[19] *Chile – Price Band (21.5) (AB)*, para. 155.
[20] *Chile – Price Band (21.5) (AB)*, para. 156 (emphasis added).
[21] *Chile – Price Band (21.5) (AB)*, para. 149 (emphasis added).

from footnote 1, and the inquiry then is whether, in fact, these categories apply.[22] This approach was upheld by the Appellate Body in *Chile – Price Band*.[23]

27. It is difficult to see how the Panel could begin its analysis under Article 4.2 by opining on whether Peru's price band measure is an "ordinary customs duty." Although the term "ordinary customs duty" appears in Article 4.2, this provision does not set out an abstract definition of what constitutes an "ordinary customs duty." Instead, Article 4.2 describes what measures were required to be "*converted into*" ordinary customs duties, with respect to covered agricultural products. And the drafters of Article 4.2 did not rest on this general language, but gave specific examples in footnote 1 of the type of prohibited measures they had in mind. It would be more informative to first analyze this specific language, rather than the more general and undefined term, "ordinary customs duty."[24]

28. Finally, we note that, if the Panel concludes that Peru's price band scheme is a variable import levy, minimum import price, or similar measure, the measure is, by definition, not an "ordinary customs duty."[25] There would then be no need to make additional findings on whether the price band duties are "ordinary customs duties."

8. Please give your opinion regarding the statements made by the European Union in its written submission (paragraphs 49-50) and in its oral statement (paragraph 17) that "a variable import levy system has a very particular trade effect, which is preventing price competition on all imports. Traditionally, variable import levy systems attempt to equalise the import price of all goods by imposing an extra charge or levy on import values." Could the European Union please explain the legal basis for this statement?

29. The United States does not understand the basis for the statements made by the European Union.

30. As a threshold matter, we note that it is not necessary to determine whether a challenged measure has given rise to certain effects. The presence of such effects – including price effects – is not an absolute, independent criterion in determining whether a measure constitutes a "variable import levy."

31. In any event, the European Union's characterization of the likely effects of a variable import levy is inaccurate. Such levies are less transparent and predictable than ordinary customs duties. They can distort the transmission of declines in world prices to the domestic market.[26]

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[22] Guatemala's challenge is founded on the *nature* of the price band mechanism – for instance, its variability – elements that are regulated by Article 4.2. Its claim does not go to the *level of duties* that result from that mechanism – matters which are more properly dealt with by the first sentence of Article II:1(b) of the GATT 1994, which governs the binding of "ordinary customs duties."

[23] *Chile – Price Band (AB)*, paras. 220-280; *Chile – Price Band (21.5) (AB)*, paras. 149, 190, 202, 224-226.

[24] *Cf. Chile – Price Band (21.5) (AB)*, para. 167 ("[A]n examination of 'similarity' cannot be made in the abstract; it necessarily involves a *comparative* analysis. That analysis can be undertaken by comparing the measure at issue with at least one of the listed measures which, by definition, have characteristics different from the characteristics of an ordinary customs duty.").

[25] *Chile – Price Band (21.5) (AB)*, para. 167.

[26] *Chile – Price Band (AB)*, para. 234.

But variable import levies need not "prevent[ ] price competition on all imports," as the European Union suggests.[27]

32. Nor do variable levy mechanisms always "equalise" import prices for all goods.[28] We do not understand the factual or legal basis for the European Union's comment, and do not see such an equalizing effect as being a defining characteristic of variable import levies.

33. The European Union's comments also appear to focus unduly on price, and ignore possible effects on volume. The Appellate Body has observed that measures prohibited under footnote 1 may "*restrict[ ] the volumes*, and distort[ ] the prices, of imports of agricultural products in ways different from the way that ordinary customs duties do."[29] Variable import levies may deter traders from shipping goods in the first place by, *inter alia*, making it difficult to predict the level of duties that will ultimately apply or because restricting price competition can make it more difficult for exporters to make sales.

[27] EU Oral Statement, para. 17.
[28] EU Oral Statement, para. 17.
[29] *Chile – Price Band (AB)*, para. 227.