

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

**THIRD PARTY SUBMISSION OF
THE UNITED STATES OF AMERICA**

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<i>Chile – Price Band (Panel)</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted as modified by WT/DS207/AB/R, 23 October 2002
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I. INTRODUCTION

1. As reflected in Article 4.2 of the *Agreement on Agriculture*, in the Uruguay Round Members agreed that they would convert measures such as variable import levies into ordinary customs duties, and that they would no longer adopt or maintain such measures. The measure at issue in this dispute appears to be a measure “of the kind” that falls within the scope of Article 4.2. Indeed, it appears indistinguishable from Chile’s price band system, which was the focus of the previous *Chile – Price Band* dispute. Accordingly, to the extent that the measure at issue operates as a variable import levy or other similar measure, such a measure would appear to be inconsistent with Peru’s obligations under the *Agreement on Agriculture*.

2. In this submission, the United States presents views in four areas:

- first, the appropriate order of analysis with respect to certain claims in this dispute;
- second, the issues raised by Peru’s price bands under Article 4.2 of the *Agreement on Agriculture*;
- third, Guatemala’s claim under Article II:1(b) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”); and
- finally, Peru’s assertion that Guatemala is barred from asserting its claim by virtue of the Free Trade Agreement (“FTA”) that it signed with Peru.

II. ORDER OF ANALYSIS

3. The United States suggests that the analysis should begin with Guatemala’s Article 4.2 claim. In this regard, the panel and Appellate Body reports in *Chile – Price Band* are instructive. In that dispute, the Appellate Body upheld the panel’s decision to consider the Article 4.2 claims first. The Appellate Body recognized that this provision “applies *specifically* to agricultural products, whereas Article II:1(b) of the GATT applies *generally* to trade in *all goods*.”¹ Likewise, the Appellate Body found that Article 4.2 of the *Agreement on Agriculture* “deals *more specifically* with preventing the circumvention of tariff commitments on *agricultural products* than does the first sentence of Article II:1(b) of the GATT 1994.”²

4. The Appellate Body also observed that, if a panel found an inconsistency with Article 4.2 of the *Agreement on Agriculture*, a further finding under Article II:1(b) of the GATT would not be necessary to resolve the dispute:

[I]f we were to find first that Chile’s price band system is inconsistent with Article 4.2 of the Agreement on Agriculture, we would not need to make a

¹ *Chile – Price Band (AB)*, para. 186 (emphasis in original); see also *id.* (observing that Article 21.1 of the *Agreement on Agriculture* provides that the provisions of the GATT 1994 apply “subject to the provisions” of the *Agreement on Agriculture*).

² *Chile – Price Band (AB)*, para. 187 (emphasis in original).

separate finding on whether the price band system also results in a violation of Article II:1(b) of the GATT 1994 in order to resolve this dispute. This is because a finding that Chile's price band system as such is a measure prohibited by Article 4.2 would mean that the duties resulting from the application of that price band system *could no longer be levied* – no matter what the level of those duties. Without a price band system, there could be no price band duties.³

5. But if the panel first found an inconsistency with Article II:1(b), it would still have to examine whether the measure was inconsistent with Article 4.2. The Appellate Body explained:

[I]f we were to begin our analysis with Article II:1(b) of the GATT 1994 – as Chile suggests – and were to find no violation of that provision because duties were not imposed in excess of a tariff binding – we would, nonetheless, be required to examine thereafter the consistency of Chile's price band system with Article 4.2 of the *Agreement on Agriculture*. Even if the duties resulting from the application of Chile's price band system did not exceed Chile's tariff binding, that system could nonetheless constitute a measure prohibited by Article 4.2.⁴

6. In contrast, Peru appears to be suggesting that the Panel evaluate, first, whether its price band duties are “ordinary customs duties” as that term is used in both Article II:1(b) of the GATT 1994 and footnote 1 of Article 4.2 of the *Agreement on Agriculture*. According to Peru, it would then be unnecessary to consider whether this system is a variable import levy, minimum import price, or similar measure, within the meaning of footnote 1.⁵

7. Peru's suggested approach of analyzing the claims under Article 4.2 and Article II:1(b) together risks confusion over the differences between the “distinct legal obligations” contained in Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994.⁶ In *Chile – Price Band*, the Appellate Body recognized that the term “ordinary customs duties” should be interpreted in the same way in Article 4.2 and Article II:1(b).⁷ Yet “Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994 must be examined *separately* to give meaning and effect to the distinct legal obligations arising under these two different legal provisions. The obligations arising from either of these provisions must not be read into the other.”⁸

³ *Chile – Price Band (AB)*, para. 190 (emphasis in original).

⁴ *Chile – Price Band (AB)*, para. 190. The panel in *Chile – Price Band (21.5)* applied the same order of analysis. *Chile – Price Band (21.5) (Panel)*, paras. 7.5, 7.117-7.120.

⁵ Peru's First Written Submission, para. 5.51 (“*Si El Grupo Especial decide que los derechos específicos del Perú son ‘derechos de aduana propiamente dichos’ mediante el análisis directo, no es necesario considerar si son similares a las medidas enumeradas en la nota de pie del Artículo 4.2 del Acuerdo sobre la Agricultura.*”). Peru addresses Guatemala's claims under Article 4.2 and Article II:1(b) in the same section of its submission, and shifts back and forth between the two provisions in its analysis. Peru's First Written Submission, Section 5.1.

⁶ *Chile – Price Band (AB)* para. 188.

⁷ *Chile – Price Band (AB)*, para. 188.

⁸ *Chile – Price Band (AB)*, para. 188. (emphasis in original)

III. PERU’S PRICE BAND SYSTEM APPEARS TO BE THE TYPE OF MEASURE PROHIBITED UNDER ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

8. Article 4.2 prohibits a Member from maintaining, resorting to, or reverting to measures “of the kind” which were required to be converted into ordinary customs duties – such as variable import levies and other similar border measures. Measures of the kind identified in footnote 1 “have in common that they restrict the volume or distort the price of imports of agricultural products.”⁹

9. As discussed below, Peru’s price band system appears to fall within the category of trade-distorting measures prohibited under Article 4.2 of the *Agreement on Agriculture*.

A. The Price Band Mechanism Appears To Be A Measure Prohibited By Footnote 1

10. Footnote 1 of Article 4.2 of the *Agreement on Agriculture* states that the measures prohibited under Article 4.2 include:

[Q]uantitative import restrictions, *variable import levies*, *minimum import prices*, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and *similar border measures* other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement (emphasis added).

11. Peru’s price band system appears to be a “variable import levy,” or at a minimum, is “similar” to both variable import levies and “minimum import prices,” within the meaning of footnote 1. In determining whether a measure is “similar” to measures listed in footnote 1, a panel must undertake a comparative analysis between an actual measure and one or more of the measures listed in footnote 1, a task that “must be approached on an empirical basis.”¹⁰ A proper comparative analysis would consider “the extent of such shared characteristics” and determine “whether these are sufficient to render the two things similar.”¹¹ Such characteristics can be identified “from an analysis of *both* the structure and design of a measure as well as the effects of that measure.”¹²

⁹ *Chile – Price Band (AB)*, para. 200; *see also id.* (the Uruguay Round negotiators “envisioned that ordinary customs duties would, in principle, become the only form of border protection. As ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers, they are also more easily compared between trading partners, and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations.”).

¹⁰ *Chile – Price Band (21.5) (AB)*, para. 163 (internal quotations and citations omitted).

¹¹ *Chile – Price Band (21.5) (AB)*, para. 189.

¹² *Chile – Price Band (21.5) (AB)*, para. 189 (emphasis in original).

12. The principal contours of the price band system appear to be undisputed. In particular, Peru’s measure:

- Operates based on a set mathematical formula, such that when the reference price falls below the lower threshold of the price band, an additional duty is applied based on the difference between the two parameters;¹³
- Employs a reference price that is updated every two weeks, based on international prices, whereas the lower threshold is drawn from average prices over the preceding five years (adjusted, among other things, to remove higher and lower values);¹⁴
- Yields duties whose amounts change every two weeks;¹⁵ and
- Results in a situation where the further the reference price is below the lower price band threshold, the higher the additional duty and greater its protective effects.¹⁶

13. These characteristics appear to meet the description of a variable import levy, within the meaning of footnote 1. As the Appellate Body found, “‘variable import levies’ are measures which themselves – as a mechanism – impose the variability of the duties, that is, measures that are ‘inherently’ variable because they ‘incorporate[] a scheme or formula that causes and ensures that levies change automatically and continuously.’”¹⁷ The level of duties generated by variable import levies is “less transparent and less predictable” than ordinary customs duties.¹⁸ As a result, variable import levies “contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.”¹⁹

14. Here, Peru’s price band mechanism employs a formula that generates additional duties, which automatically change every two weeks in response to movements in either or both of the two key parameters – *i.e.*, the lower band and the reference price. This system appears to be “inherently variable,” and, as a consequence, is less transparent and predictable than ordinary customs duties.²⁰ These features tend to distort trade volume and prices.

¹³ Guatemala’s First Written Submission, paras. 3.29-3.71, 3.85, 4.32-4.53.

¹⁴ Guatemala’s First Written Submission, paras. 3.30-3.51, 3.85, 4.46-4.53.

¹⁵ Guatemala’s First Written Submission, paras. 3.52-3.64, 3.78-3.79, 3.85, 4.38-4.57.

¹⁶ Guatemala’s First Written Submission, paras. 3.85, 4.72-4.95. It also appears unlikely that, in most cases, the resulting entry price of the affected agricultural products (after application of the additional price band duty) will fall below the lower band threshold. Guatemala’s First Written Submission, paras. 4.85-4.95. However, this point is disputed by Peru. Peru’s First Written Submission, paras. 5.61-5.68.

¹⁷ *Chile – Price Band (21.5) (AB)*, para. 155.

¹⁸ *Chile – Price Band (21.5) (AB)*, para. 156.

¹⁹ *Chile – Price Band (21.5) (AB)*, para. 156.

²⁰ *Chile – Price Band (21.5) (AB)*, para. 212 (upholding panel’s finding that there was a “strong element of automaticity in the measure at issue, as a result of a formula that produces changes in the level of duties or rebates every two months,” features that led the panel to conclude that the measure displayed “inherent variability”); *id.*, para. 218 (finding no error in panel’s conclusion that the measure at issue, “which engineers automatic and continuous change every two months, does not afford exporters a degree of predictability similar to that of ordinary

15. By design, the structure of the price band mechanism also tends to impede the transmission of international prices to the domestic market. The additional duty is calculated based on the gap between adjusted average historic prices over a five-year period – which give rise to the lower and upper bands – and present (reference) prices, adjusted every two weeks.²¹ Moreover, the lower the reference price relative to the lower price band, the higher the additional duty and greater its protective effects.²²

16. Given the preceding features, Peru’s price band system appears to be a “variable import levy,” or at a minimum, appears to be “similar” to a variable import levy, within the meaning of footnote 1.

17. The price band measure also appears to be “similar” to a “minimum import price,” within the meaning of footnote 1. The Appellate Body has explained that “the term ‘minimum import price’ refers generally to the lowest price at which imports of a certain product may enter a Member’s domestic market.”²³ Generally speaking, under a minimum import price mechanism, “[i]f the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference.”²⁴

18. Peru emphasizes the fact that its price band system does not incorporate a target price.²⁵ But a definitive target price is not required to establish that a system is “similar” to minimum import prices. Again, the Appellate Body report in *Chile – Price Band (21.5)* is instructive. In that case, the measure also lacked a single target price, but instead had a lower band. The Appellate Body found that this feature brought the measure within the scope of Article 4.2 because it ensures that, “the more the reference prices fall below that lower threshold, the higher the specific duties imposed will be.”²⁶ Here, the “overall nature” of the measure – including its tendency to distort the transmission of declines in world prices to the domestic market – suggests that it is “similar” to a minimum import price.²⁷

19. In sum, for the above reasons, the Peruvian price band appears to be a “variable import levy” (or similar to such a measure), and appears to be similar to a “minimum import price,” within the meaning of footnote 1.

customs duties”). The Appellate Body emphasized that “transparency” is not “an independent criterion that, if satisfied, conclusively establishes that a measure cannot be similar to a variable import levy.” *Id.*, para. 220.

²¹ Guatemala’s First Written Submission, paras. 3.30-3.51, 3.85, 4.46-4.53.

²² See *Chile – Price Band (21.5) (AB)*, para. 224 (finding that the price band measure was similar to variable import levy because, *inter alia*, the lower the reference price relative to the lower band threshold, the higher the specific duty and greater the protective effects).

²³ *Chile – Price Band (21.5) (AB)*, para. 152 (quotations omitted).

²⁴ *Chile – Price Band (21.5) (AB)*, para. 152 (quotations omitted).

²⁵ Peru’s First Written Submission, paras. 5.61-5.68, 5.103.

²⁶ *Chile – Price Band (21.5) (AB)*, para. 198.

²⁷ *Chile – Price Band (21.5) (AB)*, para. 202 (finding that price band mechanism is “similar” to minimum import price on the grounds, *inter alia*, that the additional duties are calculated based on the difference between a lower band and reference price; that the lower the reference price relative to the lower band threshold, the higher the specific duty and the greater its protective effects; and that the measure distorts the transmission of declines in world prices to the domestic market).

B. The Price Band Duties Are Not “Ordinary Customs Duties”

20. If the Panel were to find that Peru’s price band system is within the scope of the measures covered by Article 4.2 and footnote 1 of the *Agreement on Agriculture*, then these measures would not be ordinary customs duties. As the Appellate Body found in *Chile – Price Band*:

[W]e are of the view that inconsistency with Article 4.2 can be established when it is shown that a measure is a border measure similar to one of the measures explicitly identified in footnote 1. A separate analysis of whether, or an additional demonstration that, the measure is ‘other than ordinary customs duties’ may also be undertaken to confirm such a finding. However, these are not indispensable for reaching a conclusion on the categories listed in footnote 1. . . . *Having found that the measure was similar to a variable import levy and to a minimum import price, the Panel could properly conclude from these findings that, ‘as[] such, it is not an ordinary customs duty.’*”²⁸

21. Accordingly, this dispute does not – as Peru suggests²⁹ – present the Panel with the general question of what may or may not be an “ordinary customs duty.” Rather, once the measure is found to be within the scope of Article 4.2, any definitional question is more than adequately answered for the purpose of this dispute. There is no basis for Peru’s argument that the Panel – including through recourse to supplementary means of interpretation³⁰ – should attempt to develop an elaborate definition of what is or is not an “ordinary customs duty.”

22. Put differently, it is sufficient to note that an “ordinary customs duty” can be defined by exclusion – *i.e.*, by ascertaining whether a measure is of a type that does not constitute “ordinary customs duties.”³¹ In the context of this dispute, the most important category of measures that are, by definition, not “ordinary customs duties” are those specifically enumerated in footnote 1 – *i.e.*, variable import levies, minimum import prices, or measures similar to these instruments.³² Because Peru’s price band system appears to be similar to the measures specifically enumerated in footnote 1, the price band duties would, by definition, not be “ordinary customs duties.”³³

²⁸ *Chile – Price Band (21.5)(AB)*, paras. 171-72 (emphasis added).

²⁹ Peru’s First Written Submission, paras. 5.28-5.37.

³⁰ Peru’s First Written Submission, paras. 5.18-5.25. The United States does not agree that the phrase “ordinary customs duties” is ambiguous, warranting recourse to such supplementary materials.

³¹ Peru asserts that, under its “direct” approach, the fact that the additional duties are “ordinary customs duties” means that they cannot be inconsistent with Article 4.2. Peru’s First Written Submission paras. 5.51-5.52, 5.101. Peru criticizes Guatemala for its “negative” approach – *i.e.*, for evaluating first whether the price band system is a prohibited measure enumerated in footnote 1, and concluding on that basis that the price band duties are not “ordinary customs duties.” *Id.*, para. 5.52.

³² See *Chile – Price Band (21.5) (AB)*, para. 167. Likewise, “ordinary customs duties” do not include “other duties and charges” within the meaning of GATT Article II:1(b), second sentence, or any of the measures identified in GATT Article II:2 (*i.e.*, internal taxes, antidumping or countervailing duties, and fees or other charges commensurate with the cost of services rendered). *Chile – Price Band (AB)*, para. 156 (“Ordinary customs duties are governed by the *first* sentence of Article II:1(b); they are not relevant to the *second* sentence.”) (emphasis in original); *China – Auto Parts (Panel)*, para. 7.175; *Dominican Republic – Cigarettes (Panel)*, para. 7.25.

³³ *Chile – Price Band (21.5) (AB)*, para. 167.

23. The United States nonetheless observes that the Appellate Body has offered additional indications as to the characteristics of “ordinary customs duties.” For instance, the Appellate Body has recognized that “an ordinary customs duty is a charge imposed *on products, on their importation*,”³⁴ and that a Member’s right to impose such charges accrues at the moment the product enters its customs territory.³⁵ Moreover, ordinary customs duties “are expressed in the form of *ad valorem* or specific rates and are calculated on the basis of the value and/or volume of imports.”³⁶ Such ordinary customs duties are “more transparent and easily quantifiable than non-tariff barriers, they are more easily compared between trading partners, and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations.”³⁷

24. In its submission, Peru offers a list of characteristics that it claims are “clear features” of “ordinary customs duties,” and attempts to map those features onto its price band scheme.³⁸ Peru’s efforts are unavailing. Both ordinary customs duties and variable import levies involve the application of a charge on the importation of a product, and thus these two types of measures necessarily share certain attributes. But the issue in this dispute is in which of these two categories – ordinary customs duties or measures within the scope of Article 4.2 – Peru’s price band system should be classified. For that purpose, Peru’s listing of common attributes is of no utility.

25. In some cases, measures that qualify as ordinary customs duties may display attributes from Peru’s list. For instance, Peru notes that ordinary customs duties must be applied on an MFN basis.³⁹ Likewise, Peru points out that “ordinary customs duties” may be *ad valorem*, specific, or compound.⁴⁰ But Peru does not explain why the same cannot be said for a variable import levy. In this context, it is important to distinguish between duties and the underlying measure by which they are imposed. As the Appellate Body observed, “the fact that the *duties* that result from the application of Chile’s price band system take the same form as ‘ordinary customs duties’ does not imply that the underlying measure is consistent with Article 4.2 of the *Agreement on Agriculture*.”⁴¹ Again, a list that may include certain common attributes is not instructive as to whether a particular border charge is an ordinary customs duty, or instead is a variable import levy or other type of measure that is prohibited under Article 4.2.

³⁴ *China – Auto Parts (AB)*, para. 153 (emphasis in original).

³⁵ *China – Auto Parts (AB)*, para. 158.

³⁶ *Chile – Price Band (21.5) (AB)*, para. 164.

³⁷ *Chile – Price Band (AB)*, para. 200.

³⁸ Peru’s First Written Submission, para. 5.38 (“... *podemos concluir que los ‘derechos de aduana propiamente dichos’ tienen ciertas características claras, incluyendo las siguientes*”); *id.*, paras. 5.38-5.50.

³⁹ Peru’s First Written Submission, paras. 5.38, 5.40.

⁴⁰ Guatemala’s First Written Submission, para. 4.104; Peru’s First Written Submission, paras. 5.38, 5.40.

⁴¹ *Chile – Price Band (AB)*, para. 279 (emphasis in original); *see also id.*, paras. 215-16. The fact that a charge on a product may ultimately be expressed in *ad valorem*, specific, or compound terms does not prove that the charge is an ordinary customs duty. In fact, “other duties or charges” subject to the second sentence of Article II:1(b) GATT 1994 may also be expressed in those terms, but by definition could not be ordinary customs duties. *Id.*, para. 275.

26. Further, Peru’s assertion that ordinary customs duties “may vary”⁴² misses the mark. Although a Member may decide to change the applied rates of ordinary customs duties, variation is not an inherent or necessary characteristic of such duties. The Appellate Body’s findings in *Chile – Price Band* are, again, instructive: “Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously.”⁴³ By contrast, ordinary customs duties may be altered through “discrete changes in applied tariff rates that occur independently and as a result of separate administrative or legislative action.”⁴⁴

27. Peru’s reliance on domestic legislative materials is equally unavailing. Peru points to a decree and information circular, both of which allegedly assert that specific duties, whether fixed or variable, are customs duties.⁴⁵ The United States observes, however, that a Member’s own characterization of a measure is not dispositive of how the measure is considered with respect to specific WTO obligations.⁴⁶

28. Likewise, if one does consider Peru’s legislative framework, it does not, in fact, appear to support Peru’s argument that its measures are ordinary customs duties. Peru’s price band system and its ordinary customs regime are set out in different legislative and administrative instruments, enacted by different government bodies.⁴⁷ In addition, the price band duties vary regularly, according to a mathematical formula that does not apply to the normal *ad valorem* customs duties.⁴⁸

29. Finally, contrary to Peru’s assertion, the final offer tabled by Peru during the Uruguay Round negotiations cannot transform its price band duties into “ordinary customs duties.”⁴⁹ Peru’s final offer – which became its WTO Schedule – does not include or even obliquely refer to a price band scheme, much less the price band scheme later put in place by Peru in 2001.

⁴² Peru’s First Written Submission, para. 5.38.

⁴³ *Chile – Price Band (AB)* para. 233.

⁴⁴ *Chile – Price Band (21.5) (AB)*, para. 155. The United States also disagrees with Peru’s assertion that a “clear feature” of ordinary customs duties is that they “can be designed to raise revenue and protect domestic industry,” to the extent Peru is arguing that these are the only purposes for ordinary customs duties. Peru FWS, para. 5.38. Members may assess ordinary customs duties for a myriad of reasons, including reasons other than raising revenue and protecting domestic industry. *India – Additional Duties (AB)*, para. 158. In any event, intent to raise revenue and/or protect domestic industry is not a means of distinguishing between “ordinary customs duties” and other types of import charges. In determining whether duties are “ordinary customs duties,” one should evaluate the design, structure, and architecture of the relevant measures. In that context, one may consider statements attributable to the relevant Member concerning the measure’s objective, including the terms of applicable laws and regulations.

⁴⁵ Peru’s First Written Submission, para. 5.44.

⁴⁶ *China – Auto Parts (AB)*, para. 1768 (“[T]he way in which a Member’s domestic law characterizes its own measures, although useful, cannot be dispositive of the characterization of such measures under WTO law. Secondly, the ‘intent, stated or otherwise, of the legislators is not conclusive’ as to such characterization.”) (citations omitted).

⁴⁷ Guatemala’s First Written Submission, paras. 4.122-4.125

⁴⁸ Guatemala’s First Written Submission, paras. 3.5-3.7, 3.55-3.64, 3.72-3.79, 3.84, 4.125.

⁴⁹ Peru’s First Written Submission, paras. 5.46-5.50.

30. The United States notes that, even if Peru had incorporated a price band system into its Schedule, this would not immunize that measure against a challenge under Article 4.2. In *EC – Sugar*, the Appellate Body confirmed that the provisions of the *Agreement on Agriculture* prevail over a Member’s Schedule (which are an integral part of the GATT 1994).⁵⁰ Assuming that Peru included a tariff binding in its Schedule with respect to a measure that is inconsistent with Article 4.2, this would not cure the inconsistency; it would only add a tariff binding.

31. Peru emphasizes that it had in place a predecessor version of its current price band system prior to the entry into force of the *WTO Agreement*.⁵¹ But if that price band mechanism fell within the scope of footnote 1, and Peru failed to convert it into “ordinary customs duties,” Article 4.2 would bar Peru from “maintain[ing]” this scheme as of the date of the entry into force of the *WTO Agreement* – *i.e.*, January 1, 1995.⁵² Likewise, under Article 4.2, Peru would not be permitted to “resort to” new measures of the kind listed in footnote 1, such as the price band system challenged by Guatemala in this dispute.

IV. ARTICLE II:1(B) OF THE GATT 1994

32. As explained above, if the Panel finds that Peru’s price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*, resolution of the dispute would not require the Panel to make findings on Guatemala’s claim under Article II:1(b), second sentence, of the GATT 1994. As noted above, a finding of inconsistency with Article 4.2 means that “the duties resulting from the application of that price band system *could no longer be levied* – no matter

⁵⁰ The Appellate Body grounded its finding in Article 21 of the *Agreement on Agriculture* and the General Interpretative Note to Annex 1A of the WTO Agreement:

[W]e note that Article 21 of the *Agreement on Agriculture* provides that: ‘[t]he provisions of [the] GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.’ In other words, Members explicitly recognized that there may be conflicts between the *Agreement on Agriculture* and the GATT 1994, and explicitly provided, through Article 21, that the *Agreement on Agriculture* would prevail to the extent of such conflicts. Similarly, the *General interpretative note to Annex 1A to the WTO Agreement* states that, ‘[i]n the event of a conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A . . . , the provision of the other agreement shall prevail to the extent of the conflict.’ The *Agreement on Agriculture* is contained in Annex 1A to the WTO Agreement. As we noted above, Footnote 1, being part of the European Communities’ Schedule, is an integral part of the GATT 1994 by virtue of Article 3.1 of the *Agreement on Agriculture*. Therefore, pursuant to Article 21 of the *Agreement on Agriculture*, the provisions of the *Agreement on Agriculture* prevail over Footnote 1.

EC – Sugar (AB), paras. 221-222; *see also* Paragraph 3 of the *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994*; *US – Sugar (GATT)*, para. 5.7 (“Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and [] the provisions in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions . . . inconsistent with the application of Article XI:1.”).

⁵¹ Peru’s First Written Submission, paras. 3.25-3.32, 5.45-5.46.

⁵² *Chile – Price Band (AB)*, paras. 207-212.

what the level of those duties. Without a price band system, there could be no price band duties.”⁵³

33. If the Panel makes findings on this claim, the United States observes that the price band duties would, by definition, appear not to constitute “ordinary customs duties.” They would not appear to fall within the first sentence of Article II:1(b), which imposes disciplines on ordinary customs duties. Instead, the price band duties would then fall within the “residual category” of Article II:1(b), second sentence, as “other duties or charges of any kind.”⁵⁴

34. It appears to be undisputed that Peru did not record its price band system in its Schedule, as called for by the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*. Accordingly, the price band duties would be imposed in excess of the amounts permitted under Peru’s Schedule, and would thus be inconsistent with Article II:1(b) of the GATT 1994, second sentence.⁵⁵

V. THE FTA BETWEEN GUATEMALA AND PERU DOES NOT BAR CLAIMS UNDER THE DSU

35. The United States sees no basis for Peru’s reliance on the FTA that it signed with Guatemala. Peru asserts that the FTA’s provisions show that Guatemala’s claim was not brought in good faith.⁵⁶ But regardless of how Peru characterizes Guatemala’s decision to bring this dispute, the United States fails to see how such arguments provide any basis for the Panel not to making findings on the merits of this dispute. Alternatively, Peru asserts that the FTA modified the parties’ rights under the WTO Agreement and/or that Guatemala waived its right to challenge Peru’s price band system before the WTO.⁵⁷ The United States cannot see a legal basis for these positions.

A. The Panel Cannot, As Peru Requests, Make Findings Regarding Rights And Obligations Under The Peru-Guatemala FTA Nor Decline To Make Findings On Guatemala’s WTO Claims

36. Peru asks the Panel “not to continue the analysis of Guatemala’s claims” in light of Guatemala’s alleged bad faith.⁵⁸ Given the terms of the FTA, Peru asserts that Guatemala

⁵³ *Chile – Price Band (AB)*, para. 190 (emphasis in original). Citing the Appellate Body’s reasoning, the panel in *Chile – Price Band (21.5)* applied the same order of analysis. *Chile – Price Band (21.5)*, para. 173.

⁵⁴ *Chile – Price Band*, para. 7.50; *Chile – Price Band (AB)*, n.150, n.242.

⁵⁵ *Chile – Price Band (AB)*, para. 162; *Dominican Republic – Cigarettes*, paras. 7.84-7.90, 7.116-7.122. Contrary to Peru’s suggestion, it is irrelevant whether Peru maintained a previous version of its price band system as of April 15, 1994. Peru’s First Written Submission, paras. 5.96-5.98. Any such price band duties were not incorporated into Peru’s Schedule as “other duties and charges,” contrary to the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*.

⁵⁶ Peru’s First Written Submission, paras. 4.1-4.21.

⁵⁷ Peru’s First Written Submission, paras. 4.22-4.30.

⁵⁸ Peru’s First Written Submission, para. 4.21 (“*En tal sentido, el Perú solicita al Grupo Especial no continuar con el análisis de las alegaciones de Guatemala.*”).

“cannot initiate proceedings against Peru.”⁵⁹ To the extent that Peru is asking the Panel to make findings regarding obligations under something other than a covered agreement – *i.e.*, the Peru-Guatemala FTA – and to refrain from making findings on claims under the covered agreements, Peru’s request must be rejected.

37. Peru’s request would be inconsistent with the text of the DSU. Article 1.1 of the DSU affirms that the DSU only applies to disputes brought under the covered agreements; the DSU does not provide a forum for resolving disputes under other agreements. Likewise, Article 3.2 of the DSU affirms that the role of the WTO dispute settlement process is to:

preserve the rights and obligations of Members *under the covered agreements*, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements.* (emphasis added)

38. Article 7 of the DSU also sets out a panel’s terms of reference. Article 7.1 states that a panel’s task is “[t]o examine, in the light of the relevant provisions” in the “*covered agreement(s)* cited by the parties to the dispute,” “the matter referred to the DSB,” and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in *that/those agreement(s)*” (emphasis added). Equally, Article 7.2 provides that “[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.”

39. Article 11 of the DSU confirms that the function of Panels is to assist the DSB in “discharging its responsibilities under this Understanding and the covered agreements.” Panels are required to make an

objective assessment of the facts of the case and the applicability of 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.

40. Further, Article 23 of the DSU affirms that Members shall have recourse to the rules and procedures of the DSU when they “seek the redress of a violation of obligations . . . under the covered agreements.”

41. These provisions confirm that there is no basis in the DSU for Peru’s request that the Panel make findings with respect to the parties’ respective rights and obligations under a non-covered agreement – *i.e.*, the Peru-Guatemala FTA – for which it does not invoke a defense under Article XXIV of the GATT 1994. Nor does the text of the DSU permit a panel to decline

⁵⁹ Peru’s First Written Submission, para. 4.30 (“*... que Guatemala no puede entablar un procedimiento contra el Perú*”).

to make findings on the claims that are set out in Guatemala’s panel request, and that are thus within the Panel’s terms of reference.

42. The reports in *Mexico – Taxes on Soft Drinks* are instructive. In that dispute, the Appellate Body upheld the panel’s rejection of a similar request that it decline to exercise validly established jurisdiction, given the pendency of an allegedly broader dispute under the North American Free Trade Agreement (“NAFTA”).⁶⁰ The Appellate Body explained that such a step would “diminish’ the right of a complaining Member to ‘seek the redress of a violation of obligations’ within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU.”⁶¹ The Appellate Body also rejected the respondent’s effort to have the Appellate Body decide whether the complaining party had acted inconsistently with its NAFTA obligations. The Appellate Body explained that it saw “no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes.”⁶²

43. Consistent with the Appellate Body’s findings in *Mexico – Taxes on Soft Drinks*, the Panel should reject Peru’s apparent suggestion that the Panel decline to make the findings called for under its terms of reference. The DSU provides no express authority for such an extraordinary step, or for Peru’s request that the Panel adjudicate rights and obligations under the FTA.

B. Peru Has Not Established That Guatemala Acted In Bad Faith

44. To the extent that Peru considers its “bad faith” argument to arise under the WTO Agreement, the United States does not see a basis for the Panel to make findings on whether Guatemala has acted in bad faith.

45. Peru mainly relies on Article 3.10 of the DSU.⁶³ But this provision does not provide a basis for the Panel to make findings on the good or bad faith of the complaining party. Article 3.10 provides in relevant part:

It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members *will engage in these procedures in good faith* in an effort to resolve the dispute (emphasis added).⁶⁴

⁶⁰ *Mexico – Taxes on Soft Drinks (AB)*, para. 53.

⁶¹ *Mexico – Taxes on Soft Drinks (AB)*, para. 53. The Appellate Body also observed that such a step would be inconsistent with a panel’s obligations under Articles 3.2 and 19.2 of the DSU. *Id.*

⁶² *Mexico – Taxes on Soft Drinks (AB)*, para. 56 (emphasis added). *Cf. Brazil – Tyres (AB)*, para. 228 (MERCOSUR ruling did not justify deviation from GATT non-discrimination principles).

⁶³ Peru’s First Written Submission, paras. 4.13-4.18.

⁶⁴ Peru also cites Article 3.7 of the DSU, which requires that Members “exercise judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.” Peru’s First Written Submission, paras. 4.142, 4.17-4.18. In the view of the United States, Guatemala has not asserted a frivolous claim or failed to exercise judgment in bringing its claim.

46. Article 3.10 is not presented as an obligation regarding a Member’s conduct. Instead, the provision sets out a common understanding of how Members will engage in dispute settlement procedures. In addition, nothing in Article 3.10 states or implies that engagement in less than good faith provides any defense to the responding party. Article 3.10 also does not set out parameters for characterizing good faith or bad faith engagement in dispute settlement.⁶⁵

47. Finally, the United States does not believe that Article 18 of the *Vienna Convention on the Law of Treaties* is relevant here. We offer no view as to whether Guatemala has taken “acts which would defeat the object and purpose” of the FTA pending its ratification. But if it did, Peru would – at most – be entitled to assert claims under the dispute settlement provisions of the FTA. These matters have no bearing on Guatemala’s ability to assert a claim under the DSU.

C. The Peru-Guatemala FTA Does Not Amend The *WTO Agreement* Or Result In A Waiver Of Guatemala’s Rights

48. Peru errs in its assertion that the FTA resulted in a modification or waiver of Guatemala’s rights under the *WTO Agreement*.⁶⁶

49. A bilateral FTA – and the parties’ FTA is not even in force – cannot amend the *WTO Agreement*. There are three ways to interpret or modify the *WTO Agreement*: (1) waivers (Article IX:3), (2) multilateral interpretations (Article IX:2), and (3) multilateral amendments (Article X).⁶⁷ None applies here.⁶⁸

50. The United States also does not agree with Peru’s assertion that the text of an FTA may result in a waiver of Members’ right to invoke WTO dispute settlement. In support of its argument, Peru cites the mutually agreed solutions (“MAS”) that WTO parties may enter into with respect to particular disputes, and thereby waive their dispute settlement rights in respect of a particular dispute.⁶⁹ But mutually agreed solutions are given a particular legal status under the DSU.⁷⁰ It is a far different matter to argue that Members can waive their WTO dispute settlement rights through an FTA.

51. The United States does not consider that the Panel would need to examine Peru’s specific argument on the contents of the Peru-Guatemala FTA. But we note that, were the Panel to

⁶⁵ To the extent that Peru were alleging that Guatemala has breached Article 3.10, Peru would need to bring a separate dispute against Guatemala. 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.

⁶⁶ Peru’s First Written Submission, paras. 4.22–4.30

⁶⁷ *EC – Bananas III (21.5 – II)(AB)* paras. 378-385.

⁶⁸ This case does not involve the modification of Schedules of Concessions, through the special procedures set out in Article XXVIII of the GATT 1994 or through multilateral rounds of tariff negotiations. Nor is the Guatemala – Peru FTA a “subsequent agreement” within the meaning of Article 31(3)(a) of the *Vienna Convention*. Among other things, this FTA does not constitute a “subsequent agreement” between Guatemala and Peru – much less all of WTO Members – that Peru’s price band system is WTO-consistent.

⁶⁹ Peru’s First Written Submission, para. 4.24.

⁷⁰ See, e.g., DSU Article 22.8.

entertain this argument, it would be engaged in interpreting a non-WTO instrument for purposes of ascertaining the alleged scope of Guatemala's rights under the DSU, absent any provision in the DSU that would give the FTA such effect. As noted above, the United States would disagree with such an approach.

VI. CONCLUSION

52. The United States thanks the Panel for considering the U.S. views on the important issues at stake in this proceeding.