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

**THIRD PARTY STATEMENT OF THE UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE MEETING
OF THE PANEL WITH THE PARTIES**

January 14, 2014

Mr. Chairperson, members of the Panel:

1. In our statement today, the United States will address four issues:

- the appropriate order of analysis;
- Guatemala's claim under Article 4.2 of the *Agreement on Agriculture*;
- Guatemala's claim under Article X of the *General Agreement on Tariffs and Trade 1994* (GATT 1994); and
- the Guatemala – Peru free trade agreement ("FTA").

2. The United States has addressed certain aspects of these issues in our written submission. Where we address them again today, we will focus on the points raised by other third parties and the list of topics recently circulated by the Panel.

I. Order of Analysis

3. Like Argentina and Brazil,[1] the United States believes that the Panel's analysis should begin with Article 4.2 of the *Agreement on Agriculture*. The panel and the Appellate Body in the original and Article 21.5 proceedings in *Chile – Price Band* followed this order of analysis. This approach also would be appropriate here, for several reasons.

4. First, for purposes of assisting the parties in finding a positive solution to the dispute, it is useful to begin the analysis of Peru's measures with the more specific provision of the covered agreements before addressing more general obligations. This is consistent with the approach of past panel and Appellate Body reports.[2] With respect to Article 4.2, the Appellate Body has

[1] Argentina's Third Party Submission, paras. 8-9; Brazil's Third Party Submission, para. 7.
[2] *See, e.g.*, *Chile – Price Band (AB)*, paras. 184-187; *EC – Bananas (AB)*, para. 204.

observed that this provision "applies specifically to agricultural products, whereas Article II:1(b) of the GATT applies generally to trade in all goods."[3]

5. Second, this approach would facilitate the exercise of judicial economy. If the Panel finds that Peru's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*, it would not need to make findings under the second sentence of GATT Article II:1(b). As the Appellate Body noted in *Chile – Price Band*, such a finding 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 may be. Without a price band system, there could be no price band duties."[4]

6. In addition, such a finding would render it unnecessary for the Panel to make findings under the *Customs Valuation Agreement* if the Panel concludes that the price band duties are found to be "ordinary customs duties," since Guatemala only asserted these claims in the alternative.[5] By definition, duties that fall within footnote 1 of the *Agreement on Agriculture* are not "ordinary customs duties."[6]

7. On the other hand, the interests of judicial economy would not be served if the Panel began with the second sentence of GATT 1994 Article II:1(b). Even if the Panel were to find that Peru breached its tariff bindings under this provision, it would still need to turn to Article 4.2 of the *Agreement on Agriculture* to resolve the dispute.[7]

[3] *Chile – Price Band (AB)*, para. 186.
[4] *Chile – Price Band (AB)*, para. 190.
[5] Guatemala's First Written Submission, para. 4.222.
[6] *Chile – Price Band (Panel)*, para. 7.50.
[7] U.S. Third Party Submission, para. 5; *Chile – Price Band (AB)*, para. 190.

II. Article 4.2 of the *Agreement on Agriculture*

8. Turning to Guatemala's claim under Article 4.2 of the *Agreement on Agriculture*, the relevant inquiry is the extent to which Peru's price band falls within the category of measures listed in footnote 1. The United States observes that Peru's price band system appears to be a "variable import levy," or at least a measure that is "similar" to a variable import levy, within the meaning of footnote 1. It is also similar to a "minimum import price."

9. The table presented by Guatemala is instructive.[8] This table compares Peru's price band system with the mechanisms from the original and Article 21.5 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. Nevertheless, it sets out the principal contours of the three price band systems and confirms the striking similarities between them. To quote the Appellate Body, each mechanism "incorporate[s] a scheme or formula that causes and ensures that levies change automatically and continuously."[9]

10. Finally, the United States also would like to comment on a related point in one third party submission. The EU suggests that, to qualify as a variable import levy, a measure must be constructed in a way that renders it impossible for a trader to effectively anticipate the duties that it will pay.[10]

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[8] Guatemala's First Written Submission, p. 34. See Topic No. 4, Panel List of Topics for Discussion with Third Parties.
[9] *Chile – Price Band (21.5) (AB)*, para. 155.
[10] EU's Third Party Submission, para. 47.

11. This position lacks support in the text of the agreement, or from any panel or Appellate Body findings. In *Chile – Price Band*, the Appellate Body observed that variable import levies are characterized by a certain lack of transparency and predictability.[11] But in the Article 21.5 proceedings, the Appellate Body also made clear that:

> [T]he Appellate Body was not identifying a "lack of transparency" and a "lack of predictability" as independent or absolute characteristics that a measure must display in order to be considered a variable import levy. Rather, the Appellate Body was simply explaining that the level of duties generated by variable import levies is *less* transparent and *less* predictable than is the case with ordinary customs duties.[12]

12. In other words, "lack of transparency" and "lack of predictability" are not independent, absolute tests that a measure must pass in order to qualify as a variable import levy.[13] Instead, it is the presence of the underlying formula or scheme that renders a measure "inherently variable," because it "causes and ensures that levies change automatically and continuously."[14] It is this feature that renders the resulting duties "*less* transparent" and "*less* predictable" than ordinary customs duties.[15] A measure need not render prediction of duties "impossible," as the EU suggests. Nor can mere publication of the elements of a measure that otherwise would be inconsistent with Article 4.2 render that measure consistent with that obligation.

13. Likewise, the Appellate Body has recognized that "[t]his lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission

[11] *Chile – Price Band (AB)*, para. 234.
[12] *Chile – Price Band (21.5)(AB)*, para. 156 (emphasis added).
[13] See Topic No. 6, Panel List of Topics for Discussion with Third Parties.
[14] *Chile – Price Band (21.5)(AB)*, para. 155.
[15] *Chile – Price Band (21.5) (AB)*, para. 156 (emphasis added).

of international prices to the domestic market."[16] But this, too, should not be seen as an independent, absolute test. The design, structure, and architecture of a variable import levy render it likely that such effects will occur. There is no need to conduct statistical or econometric analyses to assess whether, in fact, the measure has impeded the transmission of world prices to the domestic market.

III. Article X of the GATT 1994

14. With respect to Guatemala's claims under GATT Article X, in the particular circumstances of this dispute, the exercise of judicial economy may be appropriate.

15. To the extent that the Panel does address Article X, the United States would note that it has difficulty understanding the basis for Guatemala's claim. Article X:1 requires prompt publication of measures of general applicability pertaining to, among other things, rates of duty. Here, it appears that Peru has published its price band system. Guatemala does not argue otherwise.

16. Rather, Guatemala relies on the "essential element" test articulated by the panel in *Dominican Republic – Cigarettes,* and using this idea, argues that Peru should have published certain methodologies.[17] In that dispute, the panel declared that, while certain average-price surveys conducted by the Central Bank were not themselves "laws, regulations, judicial decisions [or] administrative rulings," within the meaning of Article X:1, they could be seen as an "essential element" of an "administrative ruling" – *i.e.*, the determination of the tax base for

[16] *Chile – Price Band (21.5) (AB)*, para. 156. See Topic No. 5, Panel List of Topics for Discussion with Third Parties.
[17] Guatemala's First Written Submission, paras. 4.143-4.146.

cigarettes.[18] Drawing on this report, Guatemala argues that Peru should have published certain allegedly essential "methodologies" and data used in calculating price band duties.[19] Peru appears to accept the validity of the "essential element" idea, but disagrees on its application.

17. In our view, the "essential element" test articulated by the panel in *Dominican Republic - Cigarettes* should be viewed with caution. The United States has difficulty understanding a textual basis for using this type of test in the application of Article X:1. Article X:1 requires the publication of "[l]aws, regulations, judicial decisions and administrative rulings of general application." The text does not refer to "methodologies" or "data," much less "essential elements."

18. Put another way, Article X:1 is a publication requirement; it is not intended to govern the substantive content of measures. The "essential element" test, however, would seem to presume that Members' measures will include certain elements. The United States does not understand the basis for reading Article X:1 as suggesting that measures "include" methodologies or purportedly "essential" elements that are not set out in those measures. The United States considers that Article X:1 does not require the publication of every input or data point that underlies a measure of the kind subject to Article X:1 – that is, a law, regulation, judicial decision, or administrative ruling of general application. The interpretation argued for in this dispute, while purportedly limited to "essential" elements (an inherently imprecise concept), could impermissibly expand the obligations agreed in Article X:1 and impose unreasonable burdens on Members.

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[18] *Dominican Republic – Cigarettes (Panel)*, paras. 7.405, 7.408.
[19] Guatemala's First Written Submission, paras. 4.148-4.149.

IV. The Guatemala-Peru FTA

19. The FTA that Peru signed with Guatemala is irrelevant to the adjudication of claims in this dispute.[20] Indeed, a determination of whether a measure is consistent with a covered agreement does not hinge on the terms of an agreement not covered, such as an FTA. Accordingly, the Panel should reject Peru's apparent suggestion that the Panel decline to make findings called for under its terms of reference, and that it adjudicate rights and obligations under the FTA. Such a step would be contrary to the text of the DSU and reports in previous disputes.

20. Equally, Peru has not adequately supported its assertion that the text of an FTA – in this case, which is not even in force – can serve to bar a Member from invoking its rights under the DSU. In support of its argument, Peru cites to the mutually agreed solutions ("MAS") that Members enter into in the context of the WTO.[21] But MAS have a particular legal status under the DSU, and relate to a specific dispute.[22] By contrast, as FTAs are not referenced in the DSU, the DSU does not accord an (alleged) FTA provision an effect like that of an MAS or other waiver of WTO dispute settlement rights.

21. We also note that Article 18 of the *Vienna Convention on the Law of Treaties* – which Peru invokes – has no bearing on this dispute.[23] Guatemala is not even alleged to have taken "acts which would defeat the object and purpose" of the WTO Agreement, which, of course, has already gone into effect. Instead, Peru has alleged that it has acted in a way that is inconsistent with the object and purpose of <u>an FTA</u>. Even if this allegation were true, Peru would – at most – have an issue to assert in the context of the FTA.

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[20] See Topic No. 1, Panel List of Topics for Discussion with Third Parties.
[21] Peru's First Written Submission, para. 4.24.
[22] *See, e.g.*, DSU Article 22.8.
[23] See Topic No. 2, Panel List of Topics for Discussion with Third Parties.

22. Finally, Articles 3.7 and 3.10 of the DSU should not affect the Panel's analysis of the substantive provisions at issue in this dispute.[24] 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, a Member is "expected to be largely self-regulating in deciding whether any such action would be 'fruitful.'"[25] The Appellate Body has confirmed that a Member should be 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."[26]

23. The United States cannot envision a basis for a panel to opine on whether or not a Member has exercised its judgment "before bringing a case." Once a dispute has been brought, the Member has exercised its judgment and the provision imposes no ongoing obligation.

24. Likewise, the United States does not view the first sentence of Article 3.10 as imposing binding or enforceable obligations on Members. The first sentence of Article 3.10 provides: "[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." The text of this provision makes clear that Article 3.10 sets out a common understanding among Members as to how they "will" engage in dispute settlement, but does not contain a binding or enforceable obligation. Members knew how to draft language that would impose binding and enforceable obligations, and took evident care to avoid doing so here, perhaps to avoid arguments of the sort advanced here – as opposed to arguments relating to whether a Member has observed its substantive WTO obligations.

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[24] See Topic No. 3, Panel List of Topics for Discussion with Third Parties.
[25] *Mexico – Anti-dumping Investigation of HFCS (AB) (21.5)*, para. 73 (quoting *EC – Bananas (AB)*, para. 135).
[26] *Mexico – Anti-dumping Investigation of HFCS (AB) (21.5)*, para. 74.

25. In response to the Panel's query,[27] the United States does not view the doctrine of "*abus de droit*" as playing a role in connection with the scope of Articles 3.7 and 3.10 of the DSU. Neither provision refers to "*abus de droit*," and there is no basis for importing this doctrine into the negotiated text of these provisions.

V. **Conclusion**

26. The United States thanks the Panel for its time and attention and welcomes any questions you might have.

[27] See Topic No. 3, Panel List of Topics For Discussion with Third Parties.