PERU – ADDITIONAL DUTY ON IMPORTS OF

CERTAIN AGRICULTURAL PRODUCTS

(WT/DS457)

EXECUTIVE SUMMARY OF THIRD PARTY SUBMISSIONS OF THE UNITED STATES OF AMERICA

February 18, 2014

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION (DECEMBER 20, 2013)

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*.

II. ORDER OF ANALYSIS

2. 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. 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. 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.

3. 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*. Peru's suggested approach 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.

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

4. 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

5. 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.

6. The principal contours of the price band system appear to be undisputed. These characteristics appear to meet the description of a variable import levy, within the meaning of footnote 1. 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. By design, the structure of the price band mechanism also tends to impede the transmission of international prices to the domestic market.

7. The price band measure also appears to be "similar" to a "minimum import price," within the meaning of footnote 1. Peru emphasizes the fact that its price band system does not incorporate a target price. But a definitive target price is not required to establish that a system is "similar" to minimum import prices. 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.

B. The Price Band Duties Are Not "Ordinary Customs Duties"

8. 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. Accordingly, this dispute does not – as Peru suggests – present the Panel with the general question of what may or may not be an "ordinary customs duty." 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." 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."

9. 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. Peru's efforts are unavailing. 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.

10. Further, Peru's assertion that ordinary customs duties "may vary" 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.

11. Peru's reliance on domestic legislative materials is equally unavailing. A Member's own characterization of a measure is not dispositive of how the measure is considered with respect to specific WTO obligations. And 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. In addition, the price band duties vary regularly, according to a mathematical formula that does not apply to the normal *ad valorem* customs duties.

12. 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." 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.

13. 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*. 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. 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

14. 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. 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."

15. 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.

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

16. The United States sees no basis for Peru's reliance on the FTA that it signed with Guatemala.

17. 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. 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.

18. The United States does not see a basis for the Panel to make findings on whether Guatemala has acted in bad faith. Peru mainly relies on Article 3.10 of the DSU. But Article 3.10 is not presented as an obligation regarding a Member's conduct. The United States also does not believe that Article 18 of the *Vienna Convention on the Law of Treaties* is relevant here.

19. Peru also errs in its assertion that the FTA resulted in a modification or waiver of Guatemala's rights under the *WTO Agreement*. A bilateral FTA – and the parties' FTA is not even in force – cannot amend the *WTO Agreement*.

20. 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. Mutually agreed

solutions are given a particular legal status under the DSU. It is a far different matter to argue that Members can waive their WTO dispute settlement rights through an FTA.

EXECUTIVE SUMMARY OF U.S. ORAL STATEMENT (JANUARY 14, 2014)

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

22. First, like Argentina and Brazil, the United States believes that the Panel's analysis should begin with Article 4.2 of the *Agreement on Agriculture*. 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 and would facilitate the exercise of judicial economy. 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).

23. Second, 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."

24. The table presented by Guatemala is instructive. 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. But it sets out the principal contours of the three price band systems and confirms the striking similarities between them.

25. 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. This position lacks support in the text of the agreement, or from any panel or Appellate Body findings.

26. "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. 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. It is this feature that renders the resulting duties less transparent and less predictable than ordinary customs duties. 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.

27. Likewise, the Appellate Body has recognized that lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of

international prices to the domestic market. But this, too, should not be seen as an independent, absolute test. 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.

28. Third, 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.

29. 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.

30. 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. 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. The text does not refer to "methodologies" or "data," much less "essential elements."

31. 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.

32. Finally, the FTA that Peru signed with Guatemala is irrelevant to the adjudication of claims in this dispute. 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.

33. 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. FTAs are not referenced in the DSU, and the DSU does not accord an (alleged) FTA provision an effect like that of a mutually agreed solution or other waiver of WTO dispute settlement rights. We also note that Article 18 of the *Vienna Convention on the Law of Treaties* – which Peru invokes – has no bearing on this dispute.

34. 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. 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." The Appellate

Body has confirmed that a Member should be presumed to have asserted a claim in good faith, and Article 3.7 neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgment.

35. 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.

36. 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.

37. In response to the Panel's query, 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.