

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
c.i.f.	Cost, Insurance and Freight
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Enabling Clause	Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, adopted in 1979 by the CONTRACTING PARTIES to the GATT
f.o.b.	Free on board
FTA	Free Trade Agreement between Peru and Guatemala
GATT 1994	General Agreement on Tariffs and Trade 1994
PRS	Price range system
Understanding on Article II:1(b) of the GATT 1994	Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994
USD	United States dollars
Vienna Convention	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

1. INTRODUCTION

1.1 *Complaint by Guatemala*

1.1 On 12 April 2013, Guatemala requested consultations with Peru pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 19 of the Agreement on Agriculture, Article 19 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement) and

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Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), with respect to the imposition by Peru of an "additional duty" on imports of certain agricultural products.¹

1.2 Consultations were held on 14 and 15 May 2013, but failed to resolve the dispute.²

1.2 Panel Establishment and Composition

1.3 On 13 June 2013, Guatemala requested the Dispute Settlement Body (DSB) to establish a panel pursuant to Articles 4.7 and 6 of the DSU, Article 19 of the Agreement on Agriculture, Article 19 of the Customs Valuation Agreement and Article XXIII:2 of the GATT 1994, with the standard terms of reference provided for in Article 7.1 of the DSU.³ At its meeting on 23 July 2013, the DSB established a panel pursuant to the request of Guatemala in document WT/DS457/2, in accordance with Article 6 of the DSU.⁴

1.4 The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Guatemala in document WT/DS457/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁵

1.5 On 19 September 2013, the parties agreed to the following composition of the Panel:

Chairman: Mr Gary Horlick
 Members: Ms Enie Neri de Ross
 Mr Miguel Rodríguez Mendoza

1.6 Argentina, Brazil, China, Colombia⁶, Ecuador, El Salvador, the European Union, Honduras, India, the Republic of Korea and the United States reserved their right to participate in the panel proceedings as third parties.

1.3 Panel Proceedings

1.7 After consultations with the parties, the Panel adopted its working procedures on 8 October 2013⁷ and its timetable on 4 October 2013. The

¹ See request for consultations by Guatemala, document WT/DS457/1 (of 16 April 2013).

² See request for the establishment of a panel by Guatemala, document WT/DS457/2 (of 14 June 2013).

³ *Ibid.*

⁴ See minutes of the DSB meeting held in the Centre William Rappard on 23 July 2013, document WT/DSB/M/334 (of 2 October 2013) and constitution of the panel established at the request of Guatemala, document WT/DS457/3 (of 23 September 2013).

⁵ WT/DS457/3.

⁶ On 6 August 2013, Colombia notified its interest in participating as a third party.

timetable was modified on 17 February 2014 and 10 April 2014, at the suggestion of the Panel in the first instance, and of the parties in the second.

1.8 Guatemala made its first written submission on 29 October 2013. Peru made its first written submission on 9 December 2013. On 20 December 2013, the Panel received third-party written submissions from Argentina, Brazil, Colombia, the European Union and the United States.

1.9 The Panel held the first substantive meeting with the parties on 14 and 15 January 2014. A session with the third parties took place on 14 January 2014. The Panel addressed questions to the parties and third parties before the substantive meeting, on 10 January 2014. The Panel also addressed written questions to the parties and third parties after the meeting, which were transmitted to the parties on 21 January 2014 and to the third parties on 22 January 2014. On 29 January 2014, the following third parties furnished written responses to the Panel's questions: Argentina, Brazil, Colombia, Ecuador, the European Union and the United States. The parties furnished their written responses to the Panel's questions on 5 February 2014.

1.10 The parties presented their second written submissions to the Panel on 5 March 2014.

1.11 The Panel held the second substantive meeting with the parties on 2 and 3 April 2014. The Panel sent questions to the parties before the second substantive meeting on 31 March 2014. The Panel also addressed written questions to the parties after the meeting, which were transmitted to the parties on 10 April 2014. On 1 May 2014, the parties furnished written responses to the Panel's questions, and on 12 May each party submitted comments on the responses provided by the other party.

1.12 During the proceedings, the Panel reminded the parties of its readiness, under the terms of the last sentence of Article 11 of the DSU, to consult with them and give them adequate opportunity to develop a mutually satisfactory solution.

1.13 The Panel submitted the descriptive (factual and argument) sections of its final report to the parties on 12 June 2014. On the same date, the Panel informed Argentina, Brazil, China, Colombia, Ecuador, El Salvador, the European Union, Honduras, India, the Republic of Korea and the United States that the descriptive part of the report would contain a summary of the arguments of each of them. On 24 June, Peru submitted its comments on the descriptive part of the report; on the same date, Guatemala notified that it had no comments.

1.14 The Panel issued its interim report to the parties on 12 August 2014. On 26 August, both Guatemala and Peru submitted written requests for the Panel to review specific aspects of the interim report. Neither of the parties requested a further meeting with the Panel to discuss the issues identified in their respective

⁷ See the Panel's Working Procedures in Annex A-1.

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written comments. On 4 September, each of the parties submitted written comments to the Panel on the other party's request for review.

1.15 The Panel submitted its final report to the parties on 2 October 2014.

2. FACTUAL ASPECTS

2.1 *Introduction*

2.1 In this section of the Report, the Panel will describe the measure at issue. The parties disagree on a number of factual issues. To the extent that it is necessary for the Panel to resolve those disputed factual issues, it will do so in its findings.

2.2 *Measures at Issue*

2.2 In its request for the establishment of a panel, Guatemala identified the measure at issue in this dispute as "the additional duty imposed by Peru on imports of certain agricultural products, such as milk, maize, rice and sugar" (referred to as "affected products"). As described by Guatemala, the measure has the following characteristics: (a) it has been in force since 22 June 2001; (b) it consists of a variable levy that is imposed in addition to the ordinary customs duty; (c) it is determined by using a mechanism known as the "Price Range System" (PRS) which, in its turn, operates on the basis of two components: (i) a range made up of a floor price and a ceiling price which reflect the international price over the last 60 months for the affected products; and (ii) a c.i.f. reference price which is published every two weeks and which reflects the average international market price for the affected products; (d) it may result in the imposition of an import levy on the affected products when the international reference prices of those products are below certain (floor price) levels, or in tariff rebates when these reference prices are above certain (ceiling price) levels; (e) both the price range and the c.i.f. reference prices vary periodically as a result of the application of certain formulas to the circumstances in the markets for the affected products; the price range varies every six months, while the c.i.f. reference prices vary every 15 days; (f) its amount is specific and is expressed in United States dollars (USD) per metric ton; and (g) it is payable upon importation of the affected products, together with the ordinary customs duties and other import taxes on the affected products.⁸ Hereinafter, the Panel will refer to this measure as "the duties resulting from the PRS".

⁸ See request for the establishment of a panel by Guatemala, document WT/DS457/2 (of 14 June 2013).

2.3 In its request for the establishment of a Panel, Guatemala identified the following legal instruments in which it believed the measure at issue to be contained⁹:

- a. Supreme Decree No. 115-2001-EF, published in the Official Journal "El Peruano" on 22 June 2001;
- b. Supreme Decree No. 124-2002-EF, published in the Official Journal "El Peruano" on 17 August 2002;
- c. Supreme Decree No. 153-2002-EF, published in the Official Journal "El Peruano" on 27 September 2002.
- d. Supreme Decree No. 174-2002-EF, published in the Official Journal "El Peruano" on 15 November 2002.
- e. Supreme Decree No. 184-2002-EF, published in the Official Journal "El Peruano" on 27 November 2002;
- f. Supreme Decree No. 197-2002-EF, published in the Official Journal "El Peruano" on 30 December 2002;
- g. Supreme Decree No. 003-2006-EF, published in the Official Journal "El Peruano" on 13 January 2006;
- h. Supreme Decree No. 121-2006-EF, published in the Official Journal "El Peruano" on 20 July 2006;
- i. Circular INTA-CR.62-2002 of 26 August 2002 of the National Technical Customs Department;
- j. the Supreme Decrees published semi-annually containing the customs tables for determining the floor and ceiling prices of the price range;
- k. the Vice-Ministerial Resolutions published every two weeks, containing the c.i.f. reference prices; and
- l. any other regulation, instruction, administrative or judicial practice, methodology or guideline, whether currently in force or adopted subsequently, that amends, supplements, complements, develops or is otherwise related to the aforementioned regulatory instruments.

⁹ In its request for the establishment of a panel, in addition to the instruments listed, Guatemala identified circular INTA-CR.82-2002 of 5 December 2002 of the National Customs Technical Department, Circular 002-2003-SUNAT/A of 28 February 2003 of the National Tax Administration Supervisory Authority, Circular 010-2004-SUNAT/A of 10 September 2004 of the National Tax Administration Supervisory Authority, Judgement 03041-A-2004 of the Tax Court, dated 14 May 2004, and Judgement 02364-A-2007 of the Tax Court, dated 15 March 2007. During the present proceedings, Guatemala made no reference to those instruments and did not submit them to the Panel for its consideration.

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3. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Guatemala requests that the Panel find that:

- a. The duties resulting from the PRS are inconsistent with Article 4.2 of the Agreement on Agriculture, as they constitute variable import levies or measures similar to variable import levies;
- b. The duties resulting from the PRS are inconsistent with Article 4.2 of the Agreement on Agriculture, as they constitute minimum import prices or measures similar to minimum import prices;
- c. The duties resulting from the PRS are duties or charges inconsistent with the second sentence of Article II:1(b) of the GATT 1994;
- d. Peru's actions are inconsistent with Article X:1 of the GATT 1994, inasmuch as:
 - i. it fails to publish the international prices used as a basis for calculating the floor price and the reference price, despite the fact that these international prices are an essential element of the measure at issue;
 - ii. it has failed to publish the content of the "import costs", which is an essential element of the measure at issue; and
 - iii. it has failed to publish the methodology for determining the amounts for freight and insurance, which is an essential element of the measure at issue;
- e. Peru's actions are inconsistent with Article X:3(a) of the GATT 1994, because it administers the measure in question in a manner that is not reasonable given its failure to observe the requirements of its own legislation. Specifically, Peru's failure to comply with its own legislation is shown by the following practices:
 - i. extending the validity of the Customs Tables;
 - ii. calculating the price ranges for dairy products by reference price intervals and not for each individual value;
 - iii. calculating additional duties or customs rebates for two categories of rice (pounded and paddy rice); and
 - iv. calculating and updating the reference price for dairy products monthly rather than fortnightly.

3.2 In the event that the Panel considers that the duties resulting from the PRS are ordinary customs duties, Guatemala requests the Panel to find that Peru's actions are inconsistent with Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement, and in particular with Articles 7.2(f) and 7.2(g) of that Agreement, since Peru does not determine the customs value of the goods subject to the PRS in accordance with those provisions, but instead determines

the customs value of those goods through the use of minimum, arbitrary or fictitious customs values.

3.3 In accordance with the second sentence of Article 19.1 of the DSU, Guatemala requests the Panel to suggest that Peru should completely dismantle the measure at issue, and at the same time eliminate the duties resulting from the PRS and the PRS itself.

3.4 In response to Peru's assertions, Guatemala requests that the Panel reject the allegation that Guatemala has not acted in good faith.

3.5 Peru maintains that, although Members are entitled to engage in procedures in the framework of the WTO dispute settlement system, they must do so in a manner consistent with the requirements established in the DSU, including Articles 3.7 and 3.10 thereof. Peru requests that the Panel find that Guatemala did not act in good faith in initiating these proceedings, and consequently requests the Panel not to analyse Guatemala's claims.

3.6 Should the Panel decide to examine Guatemala's claims, Peru requests that they be rejected in their entirety by the Panel. In particular, Peru asserts that the duties resulting from the PRS are ordinary customs duties within the meaning of the first sentence of Article II:1(b) of the GATT 1994 and that they therefore stand outside the scope of the second sentence of that Article as well as Article 4.2 of the Agreement on Agriculture. Peru also asserts that the measure at issue is neither the same as nor sufficiently similar to the measures listed in footnote 1 of the Agreement on Agriculture and that Peru has complied with the obligations set forth in Article X:1 and Article X:3(a) of the GATT 1994. Lastly, according to Peru, Guatemala's claims based on the Customs Valuation Agreement must be rejected since that agreement is not applicable to specific duties.

3.7 Finally, in the event that the Panel finds that the measure at issue is inconsistent with provisions of the WTO agreements, Peru considers that an inconsistency would be generated between the Free Trade Agreement signed in December 2011 by Peru and Guatemala (FTA) and the WTO agreements, in regard to which the terms of the FTA should prevail.

4. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are reflected in the executive summaries provided to the Panel in accordance with paragraph 20 of the Working Procedures (see Annexes B-1, B-2, B-3 and B-4).

5. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of Argentina, Brazil, Colombia, Ecuador, the European Union, and the United States are reflected in the executive summaries provided to the Panel in accordance with paragraph 21 of the Working Procedures (see Annexes C-1, C-2, C-3, C-4, C-5 and C-6). China, El Salvador,

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Honduras, India and the Republic of Korea did not submit written or oral arguments to the Panel.

6. INTERIM REVIEW

6.1 In accordance with Article 15.3 of the DSU, this section of the report sets out the Panel's response to the parties' arguments made at the interim review stage, providing explanations where necessary. This section forms an integral part of the Panel's findings in the present case. The Panel thoroughly examined the parties' requests for review and took them into account before issuing this final report. As explained below, the Panel modified aspects of its report in the light of the parties' comments when it considered it appropriate to do so.¹⁰

6.2 Guatemala requests the Panel to make it clear at the end of paragraph 2.2 that it has used an abbreviated form, throughout the report, to refer to the measure at issue. Guatemala also suggests adjusting the way in which the Panel refers to the measure in two entries in the interim report.¹¹ Peru opposes Guatemala's request, as it considers that the way in which the report refers to the measure at issue reflects the Panel's analysis.¹² The Panel added a final sentence at the end of paragraph 2.2, based on the text suggested by Guatemala. The Panel also adjusted the language in various paragraphs of the report, in order to use a single identifying term for the measure at issue (the "duties resulting from the PRS"). These adjustments were made in paragraph 7.321, at the request of Guatemala, and in the other following paragraphs of the report: 2.2, 3.1, 3.2, 3.3., 3.6, 7.40, 7.55, 7.99, 7.101, 7.113, 7.114, 7.126, 7.141, 7.149, 7.163, 7.164, 7.174, 7.308, 7.309, 7.312, 7.313, 7.314, 7.315, 7.317, 7.318, 7.319, 7.321, 7.325, 7.326, 7.327, 7.330, 7.333, 7.339, 7.344, 7.348, 7.349, 7.350, 7.351, 7.352, 7.358, 7.359, 7.360, 7.364, 7.366, 7.367, 7.368, 7.371, 7.400, 7.417, 7.418, 7.419, 7.439, 7.443, 7.460, 7.461, 7.494, 7.495, 7.496, 7.497, 7.499, 8.1 and 8.7. For the same reason, the Panel made a similar adjustment to the title of section 7.4.4.2.3, at the request of Guatemala, and to the titles of the other following sections and subsections of the report: 7.3.2.5, 7.3.2.5.3, 7.3.2.6.3, 7.4.2.1.1, 7.4.2.1.1.1, 7.4.2.1.2, 7.4.4.2, 7.4.4.2.4, 7.4.4.2.4.4, 7.4.4.2.5 and 7.4.4.2.7.

6.3 With regard to the claim concerning the existence of minimum import prices or measures similar to minimum import prices, Guatemala requests that a review be made of the sections summarizing its arguments on an alleged *de facto* threshold.¹³ Peru opposes Guatemala's request which it considers would amount to adducing arguments already put forward by the parties, with a view to

¹⁰ The numbering of paragraphs and footnotes in the final report has changed in relation to the numbering in the interim report. The text of this section refers to the paragraph numbers of the interim report.

¹¹ Guatemala's request for review of the interim report, paras. 2.2-2.5.

¹² Peru's comments on Guatemala's request for review of the interim report, para. 5-8.

¹³ Guatemala's request for review of the interim report, paras. 3.4-3.6.

changing the Panel's analysis.¹⁴ The Panel modified paragraphs 7.209 and 7.223, and introduced a new paragraph supplementing the former paragraph 7.353, in order to give a more precise reflection of the parties' arguments. In the light of Guatemala's request, the Panel also modified the language of paragraph 7.365 and inserted a new paragraph after that paragraph.

6.4 Guatemala requests that, in the description of the basic aspects of the structure and operation of the PRS contained in paragraph 7.317, the Panel should refer to the fact that, on various occasions, both the floor price and the ceiling price had been extended for successive periods, instead of being updated.¹⁵ Peru considers that the addition is unnecessary, since this matter is dealt with in other sections of the report.¹⁶ As a supplement to the summary of the basic aspects of the structure and operation of the PRS, the Panel added a further section at the end of paragraph 7.317, based on the text suggested by Guatemala.

6.5 In the same paragraph 7.317, Guatemala requests that the description of the PRS be supplemented by a reference to the fact that the customs tables announce the resulting duties and rebates.¹⁷ Peru does not consider this addition to be necessary, but does not oppose it.¹⁸ The Panel modified subparagraph (b) of paragraph 7.317, on the basis of the text suggested by Guatemala.

6.6 Peru requests that paragraph 7.319 of the report provide clarification of its position regarding the way in which the customs tables and reference prices are published.¹⁹ Guatemala makes no comments on this point. In the light of Peru's request, the Panel made a clarificatory adjustment to paragraph 7.319 of the report, as well as to paragraph 7.239.

6.7 Peru requests modification of the reference in paragraph 7.321 of the report to the fact that the PRS contains a scheme or formula which causes and ensures automatic and continuous revision of the applicable duties. In Peru's opinion, the formula used by the PRS cannot ensure revisions of the applicable duties.²⁰ Guatemala opposes Peru's request and considers that the affirmation contained in the report that the PRS ensures the revision of the applicable duties is correct.²¹ The Panel rejects Peru's request, considering that the description contained in the paragraph corresponds to the description of the facts as reflected in the evidence and the arguments submitted by the parties.

6.8 Guatemala requests that paragraphs 7.322 and 7.323 include a reference to a similar finding issued by the Panel and the Appellate Body in *Chile - Price*

¹⁴ Peru's comments on Guatemala's request for review of the interim report, para. 18.

¹⁵ Guatemala's request for review of the interim report, para. 2.8.

¹⁶ Peru's comments on Guatemala's request for review of the interim report, para. 23.

¹⁷ Guatemala's request for review of the interim report, paras. 2.9-2.10.

¹⁸ Peru's comments on Guatemala's request for review of the interim report, para. 24.

¹⁹ Peru's request for review of the interim report, p. 2.

²⁰ Peru's request for review of the interim report, pp. 2-3.

²¹ Guatemala's comments on Peru's request for review of the interim report, paras. 2.5-2.11.

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Band System (Article 21.5 – Argentina), as well as a reference to Guatemala's second written submission.²² Peru disagrees with the findings contained in these paragraphs of the report. Furthermore, Peru considers that, since the paragraphs in question contain factual findings, it would be unnecessary for the Panel to cite a different case.²³ The Panel considers that, inasmuch as the paragraphs in question contain factual findings, it is inappropriate to add the references to a different case or to Guatemala's second written submission, as requested by Guatemala.

6.9 Peru requests that, in paragraph 7.323, the Panel should make it clear that the PRS legislation makes no mention of the possibility of extending the customs tables, and that such extensions are acts within the discretion of the Peruvian Executive.²⁴ Guatemala does not object to the report mentioning that the PRS legislation makes no reference to the possibility of extending the customs tables.²⁵ However, Guatemala does object to the assertion in the report that the act of extending the customs tables is a discretionary act on the part of the Peruvian Executive, but is not opposed to it being indicated that Peru has made that assertion.²⁶ Pursuant to Peru's request, the Panel made some clarificatory adjustments to paragraph 7.323. In addition, in paragraph 7.151, the Panel included a reference to the fact that the PRS legislation makes no mention of the possibility of extending the customs tables. The Panel does not consider it appropriate to affirm, as a matter of fact, that such extensions are a discretionary act on the part of the Peruvian Executive, as this point is disputed between the parties, and in the Panel's opinion was not conclusively demonstrated in the course of the proceedings. However, Peru's arguments in this respect are reflected in the report, for example in paragraph 7.480.

6.10 Guatemala requests clarification by the Panel of the findings contained in paragraphs 7.332 to 7.335. In this connection, Guatemala disagrees with the assertion that Peru used futures prices to make price estimates.²⁷ Guatemala also considers that, in the wording of the interim report, the findings contained in paragraphs 7.332 to 7.335 do not reflect the totality of the arguments, the evidence or the estimates submitted by the parties.²⁸ In this connection, Peru considers that the description given by the Panel is correct and does not need to be modified. In Peru's opinion, the additions proposed by Guatemala are incorrect and do not include the rebuttals submitted by Peru.²⁹ Pursuant to Guatemala's request, the Panel modified the language contained in paragraphs

²² Guatemala's request for review of the interim report, paras. 2.11-2.12.

²³ Peru's comments on Guatemala's request for review of the interim report, paras. 9-10.

²⁴ Peru's request for review of the interim report, p. 2.

²⁵ Guatemala's comments on Peru's request for review of the interim report, para. 2.2.

²⁶ Guatemala's comments on Peru's request for review of the interim report, paras. 2.3-2.4.

²⁷ Guatemala's request for review of the interim report, paras. 2.18-2.20.

²⁸ Guatemala's request for review of the interim report, paras. 2.21-2.25.

²⁹ Peru's comments on Guatemala's request for review of the interim report, paras. 11-13.