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CHILE – PRICE BAND SYSTEM AND SAFEGUARD MEASURES RELATING TO CERTAIN AGRICULTURAL PRODUCTS

AB-2002-2

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products

Chile, *Appellant*
Argentina, *Appellee*

Australia, *Third Participant*
Brazil, *Third Participant*
Colombia, *Third Participant*
Ecuador, *Third Participant*
European Communities, *Third Participant*
Paraguay, *Third Participant*
United States, *Third Participant*
Venezuela, *Third Participant*

AB-2002-2

Present:

Abi-Saab, Presiding Member
Bacchus, Member
Lockhart, Member

I. Introduction

1. Chile appeals certain issues of law and legal interpretations developed in the Panel Report, *Chile –Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (the "Panel Report").[1]

2. The Panel was established on 12 March 2001 to consider a complaint by Argentina with respect to: (i) Chile's price band system for certain agricultural products; and (ii) Chile's provisional and definitive safeguard measures imposed on the same products.[2] Before the Panel, Argentina claimed that Chile's price band system is inconsistent with Article II:1(b) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and Article 4.2 of the *Agreement on Agriculture*. Argentina also claimed that the safeguard measures imposed by Chile constitute a violation of Article XIX:1(a) of the GATT 1994 and certain provisions of the *Agreement on Safeguards*.

[1]WT/DS207/R, 3 May 2002.

[2]WT/DS207/3, 23 May 2001. We note that Chile's price band system also applies to sugar. In its request for establishment of a Panel, Argentina challenges Chile's price band system generally without referring to any specific product categories. We note that the Panel's analysis of Chile's price band system covers the wheat, wheat flour and edible vegetable oil bands, but does not cover the sugar band.

3. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 3 May 2002, the Panel found that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994.[3] The Panel also found that Chile's safeguard measures on wheat, wheat flour and edible vegetable oils violated certain provisions of the *Agreement on Safeguards* and the GATT 1994.[4]

4. The Panel concluded that, to the extent Chile had acted inconsistently with the provisions of the GATT 1994, the *Agreement on Agriculture* and the *Agreement on Safeguards*, it had nullified or impaired the benefits accruing to Argentina under those Agreements.[5] The Panel recommended that the Dispute Settlement Body (the "DSB") request Chile to bring its price band system into conformity with the *Agreement on Agriculture* and the GATT 1994. The Panel did not, however, make recommendations with respect to the safeguard measures challenged by Argentina.[6]

5. On 24 June 2002, Chile notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[7] On 4 July 2002, Chile filed its appellant's submission.[8] On 19 July 2002, Argentina filed an appellee's submission.[9] On the same day, Australia, Brazil, Colombia, Ecuador, the European Communities, Paraguay, the United States, and Venezuela each filed a third participant's submission.[10]

[3]Panel Report, para 8.1(a).

[4]*Ibid*., para 8.1(b).

[5]*Ibid*., para. 8.2.

[6]Panel Report, para. 8.3. The Panel noted in paragraph 7.121 of its Report that "… the Panel received a communication from Chile stating that the safeguard measures on wheat and wheat flour had been terminated as of 27 July 2001" and that it was later "informed by Chile that the safeguard measure on vegetable oils would be terminated as of 26 November 2001." We note that Chile did not appeal the Panel's findings that its safeguard measures were inconsistent with certain provisions of the GATT 1994 and the *Agreement on Safeguards*.

[7]WT/DS207/5, 26 June 2002.

[8]Pursuant to Rule 21(1) of the *Working Procedures*.

[9]Pursuant to Rule 22 of the *Working Procedures*.

[10]Pursuant to Rule 24 of the *Working Procedures*.

6. On 19 July 2002, the Appellate Body received communications from Japan and Nicaragua stating that they wished to attend the oral hearing in this appeal, although neither wished to file a written submission in accordance with Rule 24 of the *Working Procedures*.[11] On 22 July 2002, the Appellate Body notified the participants and third participants that it was inclined to allow Japan and Nicaragua to attend the oral hearing as passive observers, if none of the participants or other third participants objected. No participant or third participant objected to Japan and Nicaragua *attending* the oral hearing. However, the European Communities considered that Japan and Nicaragua should be allowed to attend the oral hearing as third participants and not as passive observers. On 30 July 2002, the participants and third participants were informed that Japan and Nicaragua would be allowed to attend the oral hearing as passive observers.

7. The oral hearing was held on 6 and 7 August 2002.[12] The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Appellate Body Division hearing the appeal.

8. A description of Chile's price band system is contained in paragraphs 2.1 to 2.7 of the Panel Report. Nevertheless, we consider it useful, at this stage, to provide an overview of the operation of the price band system, in particular in the light of the amendment that Chile made to the price band system during the Panel proceedings.[13]

[11]Japan and Nicaragua were third parties in the Panel proceedings.

[12]Pursuant to Rule 27 of the *Working Procedures*.

[13]We are, of course, mindful of the scope of appellate review pursuant to Article 17.6 of the DSU.

II. Background

A. *Legal Framework of Chile's Price Band System*

9. The price band system was established under Chilean Law No. 18.525 on the Rules on Importation of Goods.[14] The methodology for the calculation of the upper and lower thresholds of the price band system is set out in Article 12 of that law.[15]

[14]Consolidated version of Law 18.525, Official Journal of the Republic of Chile, 30 June 1986 as amended by Law No. 18.591, Official Journal, 3 January 1987 and by Law No. 18.573, Official Journal, 2 December 1987. Panel Report, footnote 5 to para. 2.2. See Annex CHL-2 to Chile's First Written Submission to the Panel. Chile submits, and the Panel Report states, that a price band system has been in effect since 1983. See Panel Report, paras. 7.97 and 7.139.

[15]Article 12 of Law 18.525 states as follows:

> For the sole purpose of ensuring a reasonable margin of fluctuation of domestic wheat, oil-seeds, edible vegetable oils and sugar prices in relation to the international prices for such products, specific duties are hereby established in United States dollars per tariff unit, or *ad valorem* duties, or both, and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of such goods.
>
> The amount of these duties and rebates, established in accordance with the procedure laid down in this Article, shall be determined annually by the President of the Republic, in terms which, applied to the price levels attained by the products in question on the international markets, make it possible to maintain a minimum cost and a maximum import cost for the said products during the internal marketing season for the domestic production.
>
> For the determination of the costs mentioned in the preceding paragraph, the monthly average international prices recorded in the most relevant markets during an immediately preceding period of five calendar years for wheat, oil-seed and edible vegetable oils and ten calendar years for sugar shall be taken into consideration. These averages shall be adjusted by the percentage variation of the relevant average price index for Chile's foreign trade between the month to which they correspond and the last month of the year prior to that of the determination of the amount of duties or rebates, as certified by the Central Bank of Chile. They shall then be arranged in descending order and up to 25 per cent of the highest values and up to 25 per cent of the lowest values for wheat, oil-seed and edible vegetable oils and up to 35 per cent of the highest values and up to 35 per cent of the lowest values for sugar shall be removed. To the resulting extreme values there shall be added the normal tariffs and costs arising from the process of importation of the said products. The duties and rebates determined for wheat shall also apply to meslin and wheat flour. In this last case, duties and rebates established for wheat shall be multiplied by the factor 1.56.
>
> The prices to which these duties and rebates are applied shall be those applicable to the goods in question on the day of their shipment. The National Customs Administration shall notify these prices on a weekly basis, and may obtain information from other public bodies for that purpose.

10. At the second substantive meeting with the parties, Chile informed the Panel that Article 12 had been amended by Law 19.772, and submitted a copy of that law to the Panel.[16] The amendment is dated 19 November 2001. It provides, in relevant part, that the combination of the price band duty and the *ad valorem* duty may not exceed the rate of 31.5 per cent *ad valorem* bound in Chile's WTO Schedule (referred to below as the "cap").[17] Chile concedes that prior to the enactment of Law 19.772, the combination of the price band duty and the *ad valorem* duty did, at times, exceed Chile's bound rate.[18] At the oral hearing before us, Chile explained that Law 19.772 was merely declaratory in nature because the total amount of duties that could be applied on products subject to the price band system had been subject to a tariff binding since the Tokyo Round.

11. The objective of Chile's price band system as stated in Article 12 of Law 18.525 is to " ensur[e] a reasonable margin of fluctuation of domestic wheat, oil-seed, edible vegetable oil and sugar prices in relation to the international prices for such products … .[19] (footnotes omitted)

[16]See Panel Report, para. 2.3. The Panel was established 12 March 2001, more than six months before the amendment was enacted.

[17]Article 2 of Law No. 19.772 added the following paragraph to Article 12 of Law 18.525:

> The specific duties resulting from the application of this Article, added to the *ad valorem* duty, shall not exceed the base tariff rate bound by Chile under the World Trade Organization for the goods referred to in this Article, each import transaction being considered individually and using the c.i.f. value of the goods concerned in the transaction in question as a basis for calculation. To that end, the National Customs Service shall adopt the necessary measures to ensure that the said limit is maintained.

[18]Chile's appellant's submission, para. 3 and footnote 2 in which Chile notes "[r]ecognizing that Chile … ha[s] breached those WTO commitments, Chile passed new legislation … to avoid the possibility of recurrence of such a breach of the binding."

[19]Article 12 of Law 18.525. Panel Report, para. 7.40, referring to Chile's response to Question 9(f) of the Panel.

B. *Products Subject to Chile's Price Band System*

12. Price bands are calculated for each of the following product categories: (i) edible vegetable oils; (ii) wheat and wheat flour; and (iii) sugar.[20]

C. *Total Applicable Duties*

13. The total amount of duty that is applied to the products covered by the price band system consists of two components: (i) an *ad valorem* duty that reflects Chile's *applied* Most-Favoured Nation ("MFN") tariff rate; and (ii) a *specific price band duty* that is determined for each importation by comparing a reference price with the upper or lower threshold of a price band.

1. The *ad valorem* Duty

14. The *ad valorem* duty is the *applied* MFN rate which, under Chile's flat-tariff regime, is the same for all products. The MFN tariff rate *bound* by Chile in its WTO tariff schedule is 31.5 per cent. Chile has been reducing its *applied* MFN rates on an annual basis. The *applied ad valorem* rate in 2002 is 7 per cent.[21] It is applied to the transaction value of the imported product to achieve the *ad valorem* duty for that product.

2. The Specific Price Band Duty

15. The specific duty (the price band duty) will be examined in the following subsections, where we discuss the determination of: (i) the *upper and lower thresholds* of the price bands; (ii) the weekly *reference prices*; and (iii) the calculation of *specific price band duties* for particular shipments.

[20]The following specific HTS subheadings are covered by the price band system: In the wheat or meslin product category, HTS subheading 1001.9000. In the wheat or meslin flour product category, HTS subheading 1101.0000. In the sugar product category, HTS subheading 1701.1100 cane sugar, 1701.1200 beet sugar, 1701.9100 sugar containing added flavouring or colouring matter, and 1701.9900 other. In the edible vegetable oils product category, HTS subheading 1507.1000 crude soya-bean oil, 1507.9000 other crude soya-bean oil, 1508.1000 crude ground-nut oil, 1508.9000 other crude ground-nut oil, 1509.1000 virgin oil, 1509.9000 other, 1510.0000 other oils, 1511.1000 crude palm oil, 1511.9000 other crude palm oil, 1512.1110 crude sunflower-seed oil, 1512.1120 crude safflower oil, 1512.1910 other sunflower-seed oil, 1512.1920 other safflower oil, 1512.2100 crude cotton-seed oil, 1512.2900 other crude cotton-seed oil, 1513.1100 crude coconut (copra) oil, 1513.1900 other crude coconut (copra) oil, 1513.2100 crude palm kernel or babassu oil, 1513.2900 other crude palm kernel or babassu oil, 1514.1000 rapeseed, colza or mustard oil, 1514.9000 other, 1515.2100 maize (corn) oil, 1515.2900 other maize (corn) oil, 1515.5000 sesame oil, and 1515.9000 other sesame oil.

[21]Chile intends to achieve an applied rate of zero in the year 2010.

(a) The "Price Bands"

16. The price bands provide upper and lower thresholds that are used to calculate the specific duty applicable to each importation of products subject to the price band system.

17. These price bands are determined on an annual basis through Decrees issued by the Executive.[22] The bands that apply to *wheat* and *wheat flour* are determined for the period 16 December – 15 December[23] and the band for *edible vegetable oils* corresponds to the period 1 November – 31 October.[24]

18. The upper and lower thresholds (that is, the ceiling and the floor prices) for each price band are determined in the following way:

(a) Average monthly international prices for each product category are compiled:[25]

(i) in the case of *edible vegetable oils*, the price used is that of crude soya bean oil[26], free on board (f.o.b.) Illinois, quoted on the Chicago Exchange;[27]

(ii) the price used for *wheat* is that quoted for Hard Red Winter No. 2, f.o.b. Gulf (Kansas Exchange).

The price bands for edible vegetable oils and wheat are calculated on the basis of the average monthly prices for the previous 60 months (5 years).

[22]Panel Report, para. 2.4. See first written submission by Argentina to the Panel, footnotes 12 and 14 and Exhibits ARG-5 and ARG-7. However, the most recent decrees contained in the Panel record date from the year 1999.

[23]The price band for wheat is used, however, to calculate the specific duty or rebate, which is then multiplied by a factor of 1.56 to obtain the specific duty or rebate for wheat flour. See Article 12 of Law 18.525, Argentina's first written submission to the Panel, para. 6 and footnote 7 thereto, and Chile's first written submission to the Panel, para. 15 and footnote 13.

[24]This overview does not cover the price band for sugar.

[25]"The calculations for each price made are made once a year, once all of the necessary elements are available, in other words, usually starting around February, as soon as the relevant inflation index calculated by the Central Bank of Chile on the basis of national foreign trade data is available." Chile's response to question 10(a) of the Panel.

[26]We note, however, that edible vegetable oils cover 25 tariff lines.

[27]Panel Report, para. 2.6. Chile's response to Question 9(e) of the Panel. However, the Secretariat Report in Chile's Trade Policy Review states that the international prices used for edible oils is the f.o.b. price of raw soya in New York. WT/TPR/S/28, Box III.1, p. 46. Argentina states in its first written submission to the Panel that the price used is that of crude soya oil f.o.b. New York.

(b) These average prices are adjusted to account for international inflation using an external price index calculated by Chile's Central Bank.[28]

(c) Once adjusted for inflation**,** the compiled monthly prices are listed in descending order and the "extreme" values are eliminated.

In the case of *wheat* and *edible vegetable oils*, the prices that represent the highest 25 per cent and the lowest 25 per cent of the prices compiled are eliminated. For example, in the case of wheat and edible vegetable oils, the 15 highest and the 15 lowest prices of the 60 compiled prices are eliminated from the calculation

(d) After the "extreme" values have been eliminated, *the remaining highest and lowest prices are selected for the calculation of the price band thresholds.*

For example, in the case of wheat and edible vegetable oils, of the 60 monthly prices compiled, the 16th and 44th highest monthly prices are selected for the calculation of the upper and the lower thresholds respectively.

(e) Import costs are then added to the "highest and lowest prices" that have been selected in order to convert them to a cost, insurance and freight ("c.i.f.") basis.

These "import costs" include the *ad valorem* tariff and costs such as freight, insurance, opening of a letter of credit, interest on credit, taxes on credit, customs agents' fees, unloading, transport to the plant and wastage costs.[29]

No published legislation or regulation sets out how these "import costs" are calculated.[30]

[28]Law No. 18.525 states that the average prices shall be adjusted according to the percentage variation in the average price index relevant for Chile's foreign trade between the corresponding month and the last month in the year in which the specific duties are determined. At the oral hearing, Chile further explained that this price index also reflects domestic inflation and foreign exchange rate fluctuations.

[29]Chile's first submission to the Panel, para. 15(4).

[30]Panel Report, para. 7.44.

(f) The adjusted prices constitute the upper and the lower thresholds of the price band for the product in question.

Returning to the earlier example of wheat and edible vegetable oils, the 16th highest monthly price (adjusted to reflect import costs) will represent the upper threshold of the price band, and the 44th highest price (with the same adjustments made) will represent the lower threshold of the price band.

19. The total amount of duty applicable is calculated by a customs agent who necessarily must be hired by the importer. The calculation is subject to revision by the customs authority.[31]

20. It should be noted that Chile's price bands are based on international market prices. Thus, over the long term, the upper and lower thresholds of the bands will fall when international prices fall and they will rise when those prices rise. The bands will be wider if prices fluctuate strongly.

(b) The "Reference Price"

21. The reference prices for each product category are determined on a weekly basis (every Friday for the following week) by the customs authorities, using the *lowest* relevant f.o.b. price observed, at the time of *embarkation*, in the foreign "markets of concern" to Chile.[32] Thus, the weekly reference price will be the lowest f.o.b. price in any foreign "market of concern" during the previous week. The same weekly reference price applies to imports of all goods falling within the same product category, irrespective of the origin of the goods and regardless of the transaction value of the shipment.[33]

22. The determination of the reference price for a particular product category depends on the date of the bill of lading (more specifically, the week during which the goods are shipped). Thus, goods may arrive in Chile in *different* weeks, yet have the *same* import reference price applied to them if the dates of shipment from the exporting country fall within the *same* week. Similarly, goods may arrive in Chile in the *same* week and have *different* reference prices applied to them if the dates of shipment fall within *different* weeks.

23. There is no Chilean legislation or regulation, which specifies the international "markets of concern" to be used to calculate the applicable reference prices.[34] It seems, however, that the markets

[31]Panel Report, para. 6.15. Chile's response to questioning at the oral hearing.

[32]The reference price is thus unrelated to the transaction price of the particular shipment.

[33]Chile's response to question 9(a) of the Panel.

[34]Panel Report, para. 7.44. Chile's response to questioning at the oral hearing.

and qualities chosen are intended to be representative of products actually "liable" to be imported to Chile.[35]

24. In the case of wheat, in calculating the reference price, Chile uses the lowest f.o.b. price for that product in "any market of concern". It is not clear whether Chile will use the lowest f.o.b. price for *any* quality of wheat as a reference price for *all* qualities of wheat.[36]

25. With respect to *edible vegetable oils*, Chile stated before the Panel that "the Reference Price has [generally] coincided with the price of crude soya bean oil, but in some cases it has corresponded to that of crude sunflower-seed oil."[37] From the above, it is not clear whether the price for crude soya bean oil or crude sunflower-seed oil will be used as a reference price for *all* other edible vegetable oil products, including more expensive qualities of edible vegetable oils.

26. Contrary to the prices used for calculating the price bands, the lowest f.o.b. prices found in any market of concern and selected as reference prices are *not* adjusted for "usual import costs", and thus not converted to a c.i.f. basis.[38] We also note that the reference price will be the *lowest* f.o.b. price in *any* market of concern, and thus will *not* be representative of an average of prices found in any given foreign market of concern.

(c) Calculating the specific price band duty

27. The specific duty is levied on each shipment of a product subject to the price band system. The amount of the specific duty is determined once a week by comparing the weekly reference price with the upper and lower thresholds of the annually determined price band relating to the relevant product.

28. The specific duty, or rebate, is applied per tonne of the product as of the date of *exportation* (not importation) to Chile, regardless of the product's origin and of its transaction value.

29. The methodology used to calculate the applicable specific duty is the following:

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[35]Chile's response to questioning at the oral hearing.

[36]See Argentina's first written submission to the Panel, para. 16. See also Panel Report, para. 7.44. Chile's response to questioning at the oral hearing.

[37]These edible vegetable oils are identified by reference to 25 tariff lines. There does not seem to be any further adjustment of the prices for crude soya bean oil or crude sunflower-seed oil to the products covered by the other tariff lines relating to other edible vegetable oil products. Chile's response to question 43(b) of the Panel. There is no "mark up" for edible vegetable oil products of "outstanding quality". Chile's response to question 44 of the Panel.

[38]Chile's response to question 9(d) of the Panel. Panel Report, para. 7.39.

(a) Upon arrival of the shipment, the appropriate weekly *reference price* is selected according to the date of embarkation.

(b) The *reference price* is compared to the *upper and lower thresholds* of the relevant price band:

(i) If the weekly reference price falls between the upper and lower thresholds of the price band, no specific duty is levied.

In such case, only the *ad valorem* duty is applied (Chile's *applied* MFN rate is currently 7 per cent *ad valorem*).[39]

(ii) If the weekly reference price is higher than the upper threshold of the price band, no specific duty is assessed. Instead, a *rebate* is granted, which is equal to the difference between the reference price and the upper threshold of the relevant price band.

The rebate is deducted from the *ad valorem* applied MFN duty. The total amount of duties on a product subject to the price band system can be as low as zero.

(iii) If the weekly reference price falls below the lower threshold of the price band, a specific duty equal to the difference between the reference price and the lower threshold is levied. In such case, the *ad valorem* duty will also be applied.

To make the price band system easier to administer, the annual decrees that establish the price bands contain a table that sets out a range of reference prices and the rebate or specific duty that will be applied in the case of each of those reference prices.[40] Once the reference price that applies for a particular week has been published, the corresponding specific price band duty or rebate for that reference price can be found in the table.[41]

[39]Chile's bound MFN tariff rate is at 31.5 per cent.

[40]Panel Report, para. 4.20.

[41]If the weekly reference price is *within* the price band, only the *ad valorem* duty rate applies.

30. In order not to impose duties in excess of the tariff rate *bound* in Chile's WTO schedule, the customs authorities would have to ensure that the combination of the *applied ad valorem* duty and the specific price band duty does not exceed 31.5 per cent of the transaction value of the shipment in question.

III. Arguments of the Participants and Third Participants

A. *Claims of Error by Chile – Appellant*

1. Article 11 of the DSU

31. Chile submits that the Panel exceeded its mandate and acted inconsistently with Article 11 of the DSU in finding that the duties imposed under its price band system are "other duties or charges" that are prohibited under the second sentence of Article II:1(b) of the GATT 1994, because Argentina made no claim or argument under the second sentence of Article II:1(b).

32. Chile maintains that the Panel's finding under the second sentence of Article II:1(b) goes against Article 3.2 of the DSU, which in Chile's view is the "central element" of the dispute settlement system that ensures "security and predictability in the multilateral trading system."[42] Chile stresses that the dispute settlement system can hardly be deemed predictable if panels find it within their discretion to make claims and arguments for the parties, and to proceed to make findings based on legal claims and arguments not presented without providing the parties with an opportunity for rebuttal.

33. Chile submits that the Panel's erroneous decision to make a finding under the second sentence of Article II:1(b) of the GATT 1994 deprived it of a fair right of response. Moreover, the Panel's approach resulted in inadequate argumentation of an issue of considerable importance to all WTO Members. Chile maintains that because the issue was never claimed or argued before the Panel, Chile made only "highly summary comments" in response to comments made by the United States (a third party) with respect to the second sentence of Article II:1(b).

34. Chile concedes that Argentina asked the Panel to rule on the consistency of the price band system with Article II:1(b) of the GATT 1994, but maintains that Argentina had made clear that its claim was for a violation of the first sentence of Article II:1(b), and that Argentina had never requested a finding or made any such claim or argument with respect to the second sentence of Article II:1(b). Chile asserts that all of Argentina's claims and arguments were predicated on the view

[42]Chile's appellant's submission, para. 24.

that the duties resulting from Chile's price band system are "ordinary customs duties" that had led or could lead to a violation of the first sentence of Article II:1(b).[43] Chile argues that, had Argentina sought to maintain that the duties resulting from Chile's price band system were "other duties or charges", it would simply have requested a finding under the second sentence of Article II:1(b), because Chile obviously had not scheduled anything in the column for "other duties and charges" and the price band duties would thus have been prohibited.

35. Chile asserts that the Panel made the same error as did the panel in *United States – Import Measures on Certain Products from the European Communities* ("*US – Certain EC Products*"). Chile points out that in that case, the Appellate Body concluded that the panel had erred under Article 11 of the DSU when it determined that the United States violated a provision for which the European Communities did not make a claim.[44] Chile recognizes that in that case, the Appellate Body also held that a panel could develop its own legal reasoning related to a claim or defence that had been properly put before the panel by one of the parties to the dispute. However, according to Chile, that finding applies only in cases where the complainant has made a claim, and has argued for a finding on an issue, even though the argument used to justify the claim may not have corresponded precisely to the interpretation ultimately adopted by the panel. Chile submits that, here, Argentina did not make a claim or submit legal arguments under the second sentence of Article II:1(b) of the GATT 1994, and thus the Panel was not entitled to develop its own legal reasoning with respect to such claim or argument.

2. Order of Analysis

36. Chile contends that the Panel erred in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT 1994, on the ground that Article 4.2 "deals more specifically and in detail with measures affecting market access of agricultural products."[45] The *Agreement on Agriculture* may, in some respects, be more specific and detailed than the GATT 1994, but Article 4.2 is clearly *not* more specific or detailed than Article II:1(b) with regard to tariff commitments.

37. Chile recalls, moreover, that the term "ordinary customs duties" was first used in Article II:1(b), which clearly pre-dates the *Agreement on Agriculture*. The drafters of Article 4.2 borrowed the term "ordinary customs duties" from Article II:1(b). To understand the meaning of that term, it would thus have been appropriate for the Panel to begin its analysis with Article II:1(b). Had

[43]Panel Report, paras. 4.5-4.7.

[44]Appellate Body Report, WT/DS165/AB/R, adopted 10 January 2001, paras. 110-114.

[45]Panel Report, para. 7.16.

the Panel done so, Chile suggests, it would most likely have avoided the error of inventing a new definition of ordinary customs duties that has no apparent basis in the text of Article II:1(b).

3. Article 4.2 of the *Agreement on Agriculture*

38. Chile submits that the Panel erred in concluding that the price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*. The Panel should have analyzed the text of Article 4.2 and the tariff schedules as concluded as part of the Uruguay Round Agreements, instead of basing its conclusions on pre-Uruguay Round documents. According to Chile, by doing so, the Panel would have found that the price band system is not a measure "of a kind which has been required to be converted" into ordinary customs duties, but rather is merely a system for determining the level of ordinary customs duties that will be applied up to the bound rate.

39. Chile considers that it was an error for the Panel to *first* decide that the price band system was a "similar measure" under footnote 1 of Article 4.2 before examining the main text of Article 4.2, in particular the phrase "measures of the kind which have been required to be converted into ordinary customs duties" contained therein. By doing so, the Panel did not attach sufficient weight to evidence of what was and what was not converted. In this respect, Chile notes that no country with a price band system in fact converted that system, no Member asked Chile to convert its price band system, and Argentina itself maintains a price band system for sugar.

40. Chile agrees with the Panel that the mere fact that a measure was not converted by a Member into an ordinary customs duty does not prove that the measure was not "of a kind which had been required to be converted". According to Chile, "the absence of conversions is a highly relevant fact", however[46], and the way in which the European Communities converted its variable import levy is particularly relevant because it involved binding the tariff, but left in place a system similar to Chile's price band system.[47] Thus, the European Communities converted its levies in a way that made it "crystal clear"[48] that the tariffs would continue to vary, although subject to a high absolute cap. Chile maintains that the Panel should have taken this evidence into account. It proves that the drafters of the *Agreement on Agriculture* accepted that a variable import levy could be converted into an ordinary customs duty by imposing a "cap" on the amount of duties that could be levied, even when those duties would fluctuate below that "cap" in relation to a domestic target price.

[46]Chile's appellant's submission, para. 81.

[47]*Ibid*., para. 95.

[48]*Ibid*., para. 92.

41. Although Chile agrees with the Panel that footnote 1 is significant in discerning the meaning of Article 4.2 of the *Agreement on Agriculture*, it does not agree that all the measures listed therein "are characterized either by a lack of transparency and predictability, or impede transmission of world prices to the domestic market, or both."[49] In this respect, Chile submits that transparency and predictability are clearly not the defining characteristics for what is illegal and legal under footnote 1 of Article 4.2.

42. Chile suggests, moreover, that the Panel acted inconsistently with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("the *Vienna Convention*")[50], by considering that it could "distill" the meaning of the terms "variable import levy" and "minimum import price" from selected Reports of GATT Committees and notifications of individual GATT Contracting Parties during a period before the launch of the Uruguay Round, although the Panel itself conceded that those documents do not constitute "preparatory work" within the meaning of Article 32 of the *Vienna Convention*. In making its "distillation", the Panel did not cite any evidence that the negotiators of the *Agreement on Agriculture* had even referred to the documents on which the Panel relied to "distill" its opinion of what was intended by the negotiators of that Agreement. The only justification provided by the Panel was that all GATT Contracting Parties "had access" to these documents. Chile concludes that the Panel appears to have "simply decided to invent its own definition of a variable import levy and minimum import price system, using pre-Uruguay Round documents developed for a different purpose."[51]

43. In Chile's view, the Panel then proceeded to assess incorrectly Chile's price band system by the standards it had "distilled" from those pre-Uruguay Round documents. It did not take proper account of the fact that the price band system tracks changes in world prices, moderating relatively high or low prices on a temporary basis, but always subject to a tariff binding, which prevents Chile from using the price band system to exclude goods below a target price. Chile stresses in this respect that it does not maintain target or support prices such that the lower threshold of the price band system operates as a "proxy" for internal prices.[52]

44. Moreover, in Chile's view, the Panel introduced its own objectives of transparency and predictability when interpreting Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994, rather than focusing on the *Agreement on Agriculture*, which makes no mention of such objectives. Instead, its preamble clearly states that the long-term objective of the *Agreement on*

[49]Panel Report, para. 7.34.

[50]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[51]Chile's appellant's submission, para. 104.

[52]Panel Report, para. 7.45.

Agriculture is "to provide for substantial progressive reductions in agriculture support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets." [53] According to Chile, the Panel's finding thereby produces an absurd result: contrary to the objective of obtaining lower tariffs in the *Agreement on Agriculture* and the GATT 1994, the Panel, in effect, finds the higher *bound* rate preferable to the lower *applied* rate under Chile's price band system.

45. For these reasons, Chile concludes that its price band system is consistent with Article 4.2 of the *Agreement on Agriculture*.

4. Article II:1(b) of the GATT 1994

46. Chile argues that the Panel erred in finding that the duties imposed under Chile's price band system are not "ordinary customs duties" within the meaning of the first sentence of Article II:1(b) of the GATT 1994, but rather are "other duties or charges" prohibited by the second sentence of that provision, unless scheduled according to the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 (the Understanding on Article II:1(b)). Chile submits that, under the Panel's reading of Article II:1(b), it would be prohibited from applying a duty at rates that vary between zero and its bound rate of 31.5 per cent, but at the same time, it would be free to be more protectionist by applying a constant duty at its bound rate. Chile argues that, under the Panel's reasoning, it would also be free to change its applied rate from time to time for whatever reason it might decide, so long as the change in duty is not based on a formula.

47. Chile maintains that the Panel's approach to Article II:1(b) of the GATT 1994 appears to have been based primarily on the fact that the Panel had already decided that duties applied under the price band system were not "ordinary customs duties" within the meaning of Article 4.2 of the *Agreement on Agriculture*. On that basis, the Panel found that the duties resulting from Chile's price band system could not constitute "ordinary customs duties" under Article II:1(b) of the GATT, and thus had to be "other duties or charges".

48. Chile notes in this respect that, assuming the duties applied under the price band system were "other duties or charges", they would have been in violation of Article II:1(b) of the GATT 1994 from their inception in 1983, because Chile introduced the price band system *after* binding its duties on all the products concerned in 1980.

[53] *Agreement on Agriculture*, Preamble, para. 3.

49. Chile submits that the Panel erred in finding a normative content to "ordinary" customs duties on the grounds that Members' bindings of "ordinary customs duties" are always stated in *ad valorem* or specific terms. According to Chile, the Panel also erred in finding that "ordinary customs duties" must not take account of any other, *exogenous*, factors, such as, for instance, fluctuating world market prices.[54]

50. Chile sees no basis in logic or law for the Panel's conclusion that the existence of an "exogenous" basis for setting the level of part of the duty within the binding somehow renders the resulting duty other than "ordinary". In Chile's view, bindings set a ceiling on ordinary duties that can be applied to a product, but, as the Appellate Body found in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ("*Argentina – Textiles and Apparel*"), they do not thereby prescribe what form the bound duties must take.[55] Further, nothing in Article II:1(b) limits how the level of ordinary customs duties can be determined and expressed up to the level of the binding, so long as the binding is respected.

51. Chile further maintains that the purpose of Article II:1(b) and the Understanding on Article II:1(b) was not to create some new class of charge that, although applied at a rate below the tariff binding, was nonetheless forbidden because it was not the right type or kind of duty. Rather, Chile contends, the purpose of the second sentence of Article II:1(b) and the Understanding on Article II:1(b) was to ensure that bindings on "ordinary customs duties" could not be circumvented by the creation of new types of duties or charges on imports or by increasing existing "other duties or charges".

52. Chile further argues that the Panel erred in finding that "PBS duties are neither in the nature of *ad valorem* duties, nor specific duties nor a combination thereof"[56] and points out that the decision to apply a duty at less than the bound rate will *always* be based on exogenous factors. Thus, there is no basis for saying that "exogenous factors" make applied duties not "ordinary".

53. Chile criticizes the statement of the Panel that the disallowance of the lowest 25 per cent of the monthly average prices makes the applied duty higher than it would be if all prices were included in the calculation of the price band. Chile argues that there is no legal basis in the WTO for asserting that the amount of the duty applied under the price band system is relevant in determining whether or not these duties are ordinary customs duties.

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[54]Panel Report, para. 7.52.

[55]Appellate Body Report, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003, para. 46.

[56]Panel Report, para. 7.62.

54. Finally, Chile objects to the Panel's observation whereby the fact that the duty resulting from Chile's price band system is determined as of the date of exportation of the merchandise would violate Article I of the GATT 1994. Article I does not prohibit it from using the date of exportation to determine the applicable duty because using this date does not result in discrimination based on the origin of the products. Chile further submits that a "duty does not become an 'other duty or charge' because it may be applied in violation of the MFN rule".[57]

B. *Arguments of Argentina – Appellee*

1. Article 11 of the DSU

55. Argentina disputes Chile's contention that the Panel's findings on the second sentence of Article II:1(b) are not within the Panel's mandate and are inconsistent with Article 11 of the DSU. Argentina takes the view that it properly set out a claim that the price band system violates Article II:1 of the GATT 1994 in its request for establishment of a panel. Argentina claims that its reference, in its request for establishment of a panel, to Chile's breach of "its commitments on tariff bindings" was recognized by the Panel, both parties and all third parties to refer to the obligations of Article II:1(b) of the GATT 1994.

56. Argentina asserts that it fully satisfied the requirements of Article 6.2 of the DSU, which requires that the request for the establishment of a panel identify the specific measures at issue and provide a brief summary of the legal basis of the complaint. Argentina contends that it clearly identified the measures at issue, namely Law 18.525 as amended by Law 18.591 and Law 19.546, as well as the regulations and complementary provisions and/or amendments, and that it identified the obligations of Article II as the legal basis for its claim.

57. Relying on the Appellate Body reports in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*")[58] and *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products* ("*Korea – Dairy*")[59], Argentina argues that Article 6.2 of the DSU does not require a complainant to spell out the full text of the Articles of the GATT 1994 or other covered agreements supporting a particular claim[60], and that "whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be

[57]Chile's appellant's submission, para. 76.

[58]Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 141.

[59]Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, paras. 124 and 127.

[60]Argentina's appellee's submission, para. 20.

examined on a case-by-case basis ... tak[ing] into account whether the ability of the respondent to defend itself was prejudiced ... ".[61]

58. Argentina contends that Chile's allegation as to the lack of a claim, under the second sentence of Article II:1(b), in Argentina's request for the establishment of a panel, is in fact a complaint relating to the alleged lack of arguments relating to the two sentences of Article II:1(b). Argentina recalls that the Appellate Body has clarified that, as opposed to claims, which must be set out in the panel request, "arguments" supporting those claims may be set out and progressively clarified during the course of the panel proceedings.[62] Argentina contends that this is what occurred in the proceedings before the Panel. Argentina argues that this appeal presents a different situation from that in *US – Certain EC Products*, where the panel made a finding on an issue for which a claim had not been made.

59. Argentina argues that, even if the Appellate Body determines that Article II:1(b) of the GATT 1994 sets forth more than one legal basis, it correctly identified the relevant specific legal basis. Argentina refers to *Thailand – Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H Beams*"), a case involving multiple obligations stemming from the same article, where the Appellate Body concluded that whenever a paragraph informs the rest of an article, it suffices for the complainant to refer to the language of that paragraph in order for the claims under other sub-paragraphs of the article to be properly before the Panel.[63] The Appellate Body considered sufficient the simple listing of the article in question "[i]n view of the inter-linked nature of the obligations ... " in that article.[64] Argentina argues that the same conclusion applies in this case because the obligations in the first and second sentences of Article II:1(b) are inter-linked, as is evident from the use of the word "also" connecting the second sentence to the first. Argentina contends that Chile's assumption that the first and second sentences of Article II:1(b) are independent obligations is incorrect, because both sentences relate to the obligation of Members not to exceed their tariff bindings. Therefore, according to Argentina, the examination of Chile's price band duties' consistency with Article II:1(b) cannot exclude consideration of the second sentence of that Article.

60. Argentina maintains that, because the structure of Article II:1(b) is similar to that of Article III:2 of the GATT 1994, the statements of the Appellate Body in *Canada – Certain Measures*

[61]Appellate Body Report, *Korea – Dairy*, *supra*, footnote 59, para. 127.

[62]Appellate Body Report, *EC – Bananas III*, *supra*, footnote 58, para. 141.

[63]Appellate Body Report, WT/DS122/AB/R, adopted 5 April 2001, paras. 90-93 and para. 106; Argentina's appellee's submission, para. 27.

[64]Appellate Body Report, *Thailand – H Beams*, *supra*, footnote 63, para. 93.

Concerning Periodicals (*"Canada – Periodicals*")[65] are relevant. Argentina recalls that the Appellate Body found in that case that it could move from an examination of the first sentence of Article III:2 of the GATT 1994 to an examination of the second sentence as "part of a logical continuum."[66]

61. Argentina stresses that the fact that the second sentence of Article II:1(b) of the GATT 1994 is not specifically mentioned in the terms of reference did not impair the ability of Chile to defend itself. Although Argentina concedes that it directed most of its arguments to the first sentence of Article II:1(b), it maintains that Chile had ample notice of the claim because the issue of whether the duties resulting from Chile's price band system are ordinary customs duties or not was discussed during the Panel proceedings. Argentina contests Chile's allegation that it did not raise the issue of an infringement of the second sentence of Article II:1(b), and points to paragraphs 23 and 24 of its rebuttal submission to the Panel, where, in the context of its claim under Article II:1(b) of the GATT 1994, it stated that the duties resulting from Chile's price band system are not "ordinary customs duties". In addition, Argentina addressed the second sentence in its response to Question 3 posed by the Panel.[67]

62. Argentina adds that two third parties—the European Communities and the United States—provided arguments regarding the second sentence of Article II:1(b) in responding to Question 3 of the Panel. According to Argentina, the arguments of the United States and the European Communities, supplementing its own arguments, provided a more than sufficient basis for the Panel to decide Argentina's claim under Article II:1(b). Moreover, Argentina argues that Chile's claim that it was deprived of a fair right of response regarding the second sentence of Article II:1(b)[68] is belied by the facts because Chile, like Argentina and the third parties, was itself asked to respond to Question 3 of the Panel on "other duties or charges" referred to in the second sentence of Article II:1(b). Accordingly, Chile was fully aware of the Panel's interest in the second sentence of Article II:1(b).

63. Argentina argues that, in any event, even if none of the parties had advanced arguments regarding the second sentence of Article II:1(b), the Panel would have had the right, indeed the duty, to develop its own legal reasoning to support the proper resolution of Argentina's claim. Argentina recalls that in *European Communities – Measures Concerning Meat and Meat Hormones* ("*EC – Hormones*"), the Appellate Body explicitly ruled that nothing in the DSU limits the faculty of a panel

[65]Appellate Body Report, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449.

[66]*Ibid*., at 469.

[67]Argentina's appellee's submission, para. 35.

[68]Chile's appellant's submission, para. 23.

freely to use arguments submitted by any of the parties—or to develop its own legal reasoning—to support its own findings and conclusions on the matter under its consideration.[69]

64. Argentina asserts that the Panel did no more than discharge its duty to make an objective assessment of the matter before it, by developing its legal reasoning on the basis of arguments advanced by the parties and third parties. Thus it did not breach its duty under Article 11 of the DSU. The standard for breaches of that provision is very high, as articulated by the Appellate Body in *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*").[70] In Argentina's view, Chile has not demonstrated that the Panel in this case committed any error or abused its discretion in a manner that comes even close to the level of gravity required to sustain a claim under Article 11 of the DSU.

2. Order of Analysis

65. Argentina asks the Appellate Body, *as a preliminary matter*, to reject Chile's "claim" that the Panel erred in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT 1994. That claim is not properly before the Appellate Body because Chile failed to include it in its Notice of Appeal. Argentina notes that it was first made aware of "this aspect of Chile's challenge" when it received Chile's appellant's submission. According to Argentina, "the rules regarding notice of claims are designed to protect against precisely this type of situation."[71]

66. Argentina submits that—even if the Appellate Body were to find that Chile's "claim" was properly before it as a *procedural matter*—it should nevertheless reject the claim on *substantive grounds*. Argentina recalls the finding of the Appellate Body in *EC – Bananas III* that a panel should start its examination of a claim under the agreement which "deals specifically, and in detail" with the measure being challenged.[72] Argentina agrees with the Panel that Article 4.2 of the *Agreement on Agriculture* "deals more specifically and in detail with measures affecting market

[69]Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 156.

[70]Appellate Body Report, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 266.

[71]Argentina refers more specifically to Rule 20(2)(d) of the *Working Procedures for Appellate Review*, which provides in pertinent part that:

> A Notice of Appeal shall include the following information:
>
> …
>
> (d) a brief statement of the nature of appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the Panel."

[72]Appellate Body Report, *supra*, footnote 58, para. 204.

access of agricultural products" [73] because Chile's price band system applies only to agricultural products, whereas Article II:1(b) applies generally to trade in goods.

67. According to Argentina, Chile's argument that Article 4.2 of the *Agreement on Agriculture* is not a specific or more detailed way of addressing the prohibition against exceeding tariff bindings under Article II:1(b) of the GATT 1994 is "flawed" because the obligation contained in Article 4.2 would be rendered meaningless if it were reduced, as Chile proposes, to a simple tariff measure.[74] Article 4.2 has nothing to do with the obligation to respect tariff bindings. Argentina submits that this has been recognized by all participants in these proceedings, even by Chile, which concedes that the prohibitions in Article 4.2 of the *Agreement on Agriculture* apply without regard to whether the measures breach a tariff binding.

3. Article 4.2 of the *Agreement on Agriculture*

68. Argentina endorses the Panel's finding that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*. According to Argentina, the Panel also came to the correct conclusion when it found that the duties resulting from Chile's price band system are not "ordinary customs duties" within the meaning of Article 4.2 and footnote 1 thereto.

69. Argentina submits that the Panel correctly applied the rules of interpretation under the *Vienna Convention* in its analysis of Article 4.2 and footnote 1 of the *Agreement on Agriculture*. Contrary to Chile's contention, the Panel did not proceed to analyze footnote 1 until after it had completed the analysis of the main text of Article 4.2 (on a textual and a contextual basis) and accounted for its object and purpose.

70. Argentina adds that the Panel acted consistently with Articles 31 and 32 of the *Vienna Convention* by resorting to the notifications of the GATT Contracting Parties and the Reports of the GATT Committees as supplementary means of interpretation. In doing so, the Panel examined documents which predated the entry into force of the Marrakesh Agreement Establishing the World Trade Organization (the "*WTO Agreement*"). In Argentina's view this was the correct way to proceed

[73]Panel Report, para. 7.16.

[74]Argentina's appellee's submission, para. 63.

because those documents form part of the GATT *acquis*[75] and also fall into the category of all material which the parties had before them when drafting the final text.[76]

71. Argentina points out that Chile fails to address the core issue of the Panel's findings that the price band system as such—the measure challenged by Argentina in these proceedings—is not simply a duty. Rather, it is a mechanism that imposes burdens on trade—such as lack of predictability and transparency—that are distinct from and, indeed, different in kind from ordinary customs duties. Argentina argues that Chile attempts to bridge the gap between ordinary customs duties and duties resulting from its price band system by arguing that a duty that varies by a formula is more predictable than one that varies by political decision. Argentina points out that the formula is itself based on a political decision and, moreover, the key is the variability of the duties imposed under the price band system. With the price band system one cannot know the actual duty. All that is known is a formula which will provide a number which changes over transactions. Thus Argentina concludes that, while Chile does have the power to set ordinary customs duties at or below its bound rate, this does not confer upon Chile the power to create an opaque mechanism by which it constantly varies its duties.

72. Argentina points out that, even without exceeding the bound level, the lower the applied *ad valorem* tariff (currently 7 per cent), the higher the additional specific duties resulting from the price band system. Consequently, when international prices are low, uncertainty increases, and the price band system's defective transmission of world prices insulates the domestic market from world market prices, up to the break-even prices. This inhibition of the transfer of world prices could be possible only through the application of something that is different from ordinary customs duties. According to Argentina, this is exactly the case of variable duties under the price band system, which are an exclusive function of exogenous factors, irrespective of either the transaction value, a characteristic of the product (that is, weight), or a combination thereof.

73. Argentina notes that, after making a finding as to what are the main characteristics of variable import levies and minimum import prices, the Panel concluded that a measure is similar "if, based on a weighing of the evidence before us, it shares sufficiently the fundamental characteristics outlined above."[77] Consequently, the Panel compared the price band system with the characteristics of those

[75]Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, para. 174: "Following the *Vienna Convention* approach, we have also looked to the GATT *acquis* and to the relevant negotiating history of the pertinent treaty provisions."

[76]Argentina refers to footnote 596 of the Panel Report, where the Panel quotes the Chairman of the ILC (Yb. ILC, 1966, Vol. I, Part II, 204 at para. 25).

[77]Panel Report, para. 7.37.

two listed measures in footnote 1 of Article 4.2 and found the price band system to be a "hybrid instrument."[78] According to Argentina, this clearly refutes Chile's assertion that the Panel decided to "invent its own definition"[79] of "variable import levy" and "minimum import price".

74. Finally, Argentina rejects Chile's assertion that the price band system and measures listed in footnote 1 to Article 4.2 are not similar. Argentina disagrees with Chile's contention that the Panel incorrectly assessed the price band system when it found that the lower threshold of the price band system can operate in practice as a "proxy" to a minimum import price. This is a factual finding arising from the factual evidence put forward by Chile and Argentina during the Panel proceeding and, as such, is not subject to appellate review. Argentina believes that Chile fails to show that the measures are not "similar."

4. Article II:1(b) of the GATT 1994

75. Argentina endorses the Panel's finding that Chile's price band system is "similar" to both a "variable import levy" and a "minimum import price," and that, therefore, the price band duties are *not* "ordinary customs duties", but, rather, are "other duties or charges of any kind". Argentina, moreover, agrees with the Panel that Chile's price band system is in violation of the second sentence of Article II:1(b) because Chile failed to record the duties resulting from its price band system in the "other duties and charges" column of its Schedule, as it should have done in the light of the Understanding on Article II:1(b).

76. Argentina submits that, for purposes of Article II:1(b), the Panel did not need to address the specific legal nature of the duties resulting from Chile's price band system because the legal nature of such duties would have become relevant only if the price band system were found to be consistent with Article 4.2 of the *Agreement on Agriculture*. Moreover, Argentina argues that the Panel could not have, in any event, analyzed the WTO-consistency of the price band duties in isolation from the price band system without infringing its obligations under Article 11 of the DSU.

77. Argentina also notes that, in the Panel proceedings, it did not only challenge the "duties" resulting from Chile's price band system. Rather, it challenged the price band system *as such* by arguing that the price band system "does not ensure certainty in respect of market access for agricultural products"[80] and "caused Chile to breach its commitments on tariff bindings in relation to

[78]Panel Report, para. 7.46.

[79]Chile's appellant's submission, para. 104.

[80]Argentina's appellee's submission, para. 149. See also WT/DS207/2.

the concessions set forth in its national schedule".[81] In addition to the fact that the price band system infringes Article 4.2, Argentina argues that a separate violation under Article II:1(b) can and should be found since Chile—by its own admission—has imposed duties in excess of its tariff binding.

78. Argentina thus asks the Appellate Body to uphold the Panel's finding that duties resulting from Chile's price band system constitute "other duties or charges" within the meaning of the second sentence of Article II:1(b).

79. However, if the Appellate Body were to *reverse* the Panel's findings under Article 4.2 that the price band system constitutes a similar border measure which had to be converted into an "ordinary customs duty", and to find that the price band system does not impose an "other duty or charge" within the meaning of the second sentence of Article II:1(b), Argentina requests the Appellate Body to complete the Panel's analysis by making a finding that Chile's price band system, and the variable duties resulting from it, are inconsistent with the first sentence of Article II:1(b).[82] According to Argentina, the Appellate Body would be able to complete the legal analysis in the case at hand because the factual findings of the Panel and the undisputed facts in the Panel record provide a sufficient basis for it to do so. In particular, Argentina notes that Chile has itself conceded that it has applied price band duties in excess of its tariff bindings.[83] Thus, Argentina concludes that the Appellate Body could find a violation of the first sentence of Article II:1(b) even if it were to find that the price band duties are "ordinary customs duties".[84]

C. *Arguments of the Third Participants*

1. Australia

80. Australia considers that Chile's appeal raises important systemic issues concerning several of the covered agreements, in particular, the *Agreement on Agriculture*, and maintains that Article 4.2 of that Agreement prohibits WTO Members from introducing a price band system. In Australia's view, the term "variable import levy" in footnote 1 appears to refer to any *system* that allows for variation, but not to *ad hoc* changes that a government may make to the level of an applied tariff. The term "variable", therefore, seems to refer to variability that is inherent in a system, and not to "any variability". The existence of a binding in a Member's tariff schedule is not relevant for

[81]Argentina's appellee's submission, para. 149. See also WT/DS207/2.

[82]In support of its argument, Argentina refers to the Appellate Body reports in *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031, para. 156, *Australia – Salmon*, *supra*, footnote 70, para. 117 and *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.

[83]Argentina's appellee's submission, para. 157.

[84]*Ibid*.

purposes of determining whether a measure is a prohibited "variable import levy" under Article 4.2. Rather, the question of whether a Member applies duties in excess of its tariff binding is an issue that should be examined under Article II of the GATT 1994 and not under Article 4.2 of the *Agreement on Agriculture*. With respect to the meaning of "similar border measures" in Article 4.2, Australia agrees with the United States that, to be "similar", it is sufficient for a border measure to be "similar" to any *one* of the measures listed in footnote 1—without having to be similar to *all* of those measures. Australia further agrees with the United States that, to be "similar" to a "variable import levy", a border measure does not need to share *all* the "fundamental characteristics" of such a levy.[85]

2. Brazil

(a) Article 11 of the DSU

81. Brazil submits that the Panel's finding that Chile's price band system constitutes a violation of the second sentence of Article II:1(b) of the GATT 1994, is just a logical and necessary consequence of the Panel's finding that the price band system violates Article 4.2 of the *Agreement on Agriculture*. According to Brazil, GATT/WTO practice clearly sets out that panels are not compelled to accept the interpretations or legal reasoning developed by the parties to a dispute, even if all the parties to a dispute have similar or identical views.

(b) Order of Analysis

82. Brazil considers that the Panel was correct in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT.

83. Brazil notes that the price band system applies exclusively to agricultural products and thus is subject to the *Agreement on Agriculture*. Article 21.1 of the *Agreement on Agriculture* sets out that "the provisions of GATT 1994 … shall apply subject to the provisions of [the *Agreement on Agriculture*]".[86] (underlining in original) Therefore, Article 4.2 of the *Agreement on Agriculture* takes precedence over any conflicting GATT 1994 provision, which applies to goods in general. Thus, in the present case, according to Brazil, the *Agreement on Agriculture* is *lex specialis*, regardless of how detailed Article II:1(b) of GATT 1994 may be with respect to other goods not covered by the *Agreement on Agriculture*.

[85]Australia's response to questioning at the oral hearing.

[86]Brazil's statement at the oral hearing.

(c) Article 4.2 of the *Agreement on Agriculture*

84. Brazil agrees with the Panel's conclusion that substantial elements of Article 4.2 of the *Agreement on Agriculture* would be rendered void of meaning if that provision were to be read as only prohibiting those specific measures which other Members actually and specifically required to be converted and which in practice were converted at the end of the Uruguay Round.[87] Brazil submits, in this respect, that Chile does not seem to attach the necessary importance to the verb "maintain" in Article 4.2, which, according to Brazil, was clearly drafted to encompass the possibility that, at the end of the Uruguay Round, a Member had in place measures "of the kind which have been required to be converted", but decided not to convert those measures.

85. Brazil submits that Chile put undue emphasis on the fact that other WTO Members have not challenged its price band system before, although it notes that Chile concedes that the mere fact that a measure has not been challenged does not mean *ipso facto* that the measure is consistent with the *WTO Agreement*.

3. Colombia

(a) Article 11 of the DSU

86. Colombia submits that the Panel acted inconsistently with Article 11 of the DSU by making a finding under the second sentence of Article II:1(b) of the GATT 1994 and, in doing so, deprived the parties and third parties to the dispute of a fair right of response.

(b) Article 4.2 of the *Agreement on Agriculture*

87. Colombia questions the role given by the Panel to the Punta del Este Declaration and the preamble to the *Agreement on Agriculture* when interpreting the meaning of the term "ordinary customs duties". According to Colombia, the Panel's interpretation of that term presupposes a level of commitments and a scope of obligations that are not reflected in the substantive provisions of the *Agreement on Agriculture*.

88. Colombia argues that the Panel erred in concluding that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*. This error was a result of the erroneous interpretation that the Panel gave to the term "variable import levies". In Colombia's view, variable import levies were prohibited in Article 4.2 in order to prohibit a system which led to uncertainty resulting from the absence of any limitation on tariff variability. Article 4.2 cannot be

[87]Brazil refers to paragraph. 7.18 of the Panel Report.

interpreted in isolation from other Multilateral Trade Agreements, which provide for the elimination of certain measures through commitments that are not derived from Article 4.2.

89. Colombia concludes that Article 4.2 must be assessed in the light of Articles I and II of the GATT and in the light of the fact that the European Communities and a major group of countries made commitments under Article II of the GATT. According to Colombia, seen in its proper context, Article 4.2 does not impose on WTO Members an obligation to limit their agricultural tariff policies to the point of ruling out any variation in tariffs over time. Rather, the only obligation is not to impose tariffs in excess of a tariff binding.

4. Ecuador

(a) Article 11 of the DSU

90. Ecuador argues that the Panel exceeded its terms of reference when it ruled on the inconsistency of price band systems with the second sentence of Article II:1(b) of the GATT 1994, and in so doing, acted inconsistently with Article 11 of the DSU.[88]

(b) Order of Analysis

91. Ecuador submits that the Panel erred in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT 1994. The Panel should first have determined whether the price band duties constitute "ordinary customs duties", and only then determined their conformity with Article II:1(b) and Article 4.2.

(c) Article 4.2 of the *Agreement on Agriculture*

92. Ecuador argues that the Panel erred in concluding that *all* price band systems are prohibited by Article 4.2 of the *Agreement on Agriculture*. According to Ecuador, price band systems are "similar" to variable import levies or minimum prices only to the extent that their design, structure or mode of operation are similar to those variable import levies and minimum import prices. All price band systems are not *intrinsically* unstable, unpredictable and intransparent. The degree to which these features are present in a price band system will depend on the way it is designed and operated.

93. In this respect, Ecuador argues that if, for instance, the reference price is not the *lowest* price on world markets but rather a price that is more representative of world market prices, there is no

[88]Ecuador's third participant's submission, paras. 110 and 116.

reason to consider that the domestic market would be insulated from world price trends. Ecuador adds that if a price band system operates on the basis of *ad valorem* tariffs applicable to the transaction value of the imported goods, the applicable duty will fall in proportion to the price of the goods.

94. Ecuador further submits that the Panel failed to take into account, in the interpretation of Article 4.2, Article XXXVIII:2(a) of the GATT 1994, which requires Members to devise measures designed to stabilize and improve conditions of world markets for primary (usually agricultural) products, including measures designed to attain stable, equitable and remunerative prices for their exports.

(d) Article II:1(b) of the GATT 1994

95. Ecuador maintains that the first sentence of Article II:1(b) merely lays down the obligation not to exceed tariff bindings. Article II does not prohibit the imposition of any type of duty or the use of a formula for calculating such a duty, nor does it preclude modifying the type of duty applied, provided that the tariff binding is not exceeded.

96. Ecuador argues that the Panel's interpretation, however, appears to place two additional obligations on WTO Members: (i) not to record customs duties other than those that are *ad valorem*, specific, or a combination thereof; and (ii) not to apply any kind of formula in setting such duties. Ecuador stresses that neither of these obligations is based on the ordinary meaning of Article II:1(b), read in its context, and in the light of its object and purpose.

97. Ecuador adds that in *Argentina – Textiles and Apparel*, the Appellate Body affirmed the freedom of Members to determine the types and characteristics of the duties that they apply, by specifying that the sole obligation imposed by Article II:1(b), and its first sentence in particular, was not to exceed bound ceilings.[89]

98. Ecuador notes that all tariffs are linked to a variety of exogenous factors (e.g. tax revenue requirements, seasonal influence, development needs, and other political reasons) and concludes that there is no requirement, under the first sentence of Article II:1(b), to ban duties that are based on exogenous factors.

99. Ecuador concludes that the Panel went beyond its terms of reference when, having found that certain elements of *one* price band system were inconsistent with Article 4.2 of the *Agreement on Agriculture*, it extended its reasoning to *include* any type of duty resulting from *any*

[89]Appellate Body Report, *supra*, footnote 55, para. 46.

price band system insofar as the calculation of such duty is based on exogenous factors. Ecuador submits that, by doing so, the Panel substituted itself for the will of the Members and legislated in their place by making a distinction where the rules do not, thus creating additional obligations for WTO Members and diminishing their rights under the WTO.

5. European Communities

(a) Article 11 of the DSU

100. The European Communities alleges that the Panel exceeded its terms of reference. According to the European Communities, the first and second sentences of Article II:1(b) contain distinct legal obligations. Therefore, where a Member makes reference to one of these obligations and not the other, the terms of reference of the panel will not include the latter.

101. The European Communities advances no specific arguments under Article 11 of the DSU. It claims that, as a third party, it is not in a position to comment on whether Chile's rights of defence were prejudiced by the lack of clarity in the terms of reference, but notes that the second sentence of Article II:1(b) "was not the subject of any detailed discussion in the proceedings before the Panel in which the European Communities was involved".[90] A panel is entitled to make a finding only if the complaining Member has actually made a claim with respect to a specific obligation. However, the European Communities contends that the question whether Argentina *actually* made a claim is an issue of fact that is tied to the determination of whether Chile's rights of defence were prejudiced, a subject on which it is not in a position to comment because, as a third party, it was not present during the entire Panel proceedings.

(b) Article 4.2 of the *Agreement on Agriculture*

102. The European Communities asserts that the Panel erred in its interpretation of Article 4.2 of the *Agreement on Agriculture*. The European Communities submits that the Uruguay Round tariffication process involved the transformation of non-tariff barriers into tariff equivalents and the binding of those tariffs. For products which were already subject to a bound customs duty, certain reductions were required. Unbound customs duties, on the other hand, were required to be bound, and then made subject to reduction commitments. According to the European Communities, Article 4.2 is designed to prevent a Member from using measures which were required to be tariffied. The European Communities concludes that "ordinary customs duties" could not be subject to tariffication

[90]European Communities' third participant's submission, para. 13.

and are thus not prohibited by Article 4.2. As a consequence, if Chile's price band system is found to be an ordinary customs duty, it need only be assessed for conformity with Article II:1(b) of the GATT. Should the Appellate Body consider that the Chile's price band system is not an ordinary customs duty, and that it must therefore be examined under Article 4.2, the European Communities submits that the Panel's interpretation of Article 4.2 is erroneous.

103. With respect to Article 4.2, the European Communities notes that the Panel's definition of "variable import levies" fails to capture the essential characteristics of such levies. The first essential characteristic of a variable import levy is that they are not bound and can vary without any limit. The second is that, as a result of not being bound, variable import levies have the effect of completely insulating the domestic market from any possible price competition from imports.

104. The European Communities argues that this latter essential characteristic is common to all the other measures listed in footnote 1 to Article 4.2, that is, all those measures operate to prevent price competition on all or a part of all imports. This characteristic is not shared by tariffs, however, where price competition with domestic products is (at least theoretically) possible. As Article 4.2 prohibits border measures "similar" to those listed, it must prohibit measures which prevent price competition on part of or all imports. The European Communities submits that where a tariff binding exists, price competition is at least theoretically possible for all imports. It concludes that, if a measure allows the possibility of price competition (at least theoretically), then that measure cannot be a "similar border measure" within the meaning of Article 4.2 (because it does not share the "essential characteristics" of the measures listed in footnote 1). The European Communities adds that, in its view, a measure that shares a fundamental characteristic with one, or some, of the measures listed in footnote 1, but not *all* of them, is not prohibited by Article 4.2.[91]

(c) Article II:1(b) of the GATT 1994

105. The European Communities submits that the Panel erred in its interpretation of "ordinary customs duties" in the first sentence of Article II:1(b) of the GATT 1994. First, the Panel failed to examine the relevance of the word "customs", which serves to distinguish the "ordinary customs duties" referred to in the first sentence of Article II.1(b) from "other duties and charges" in the second sentence of that provision. The principal objective behind "ordinary customs duties" is the collection of revenue and the protection of domestic production. By contrast, "other duties and charges" are typically maintained in separate legislation that does not form part of the tariff legislation. Such duties often have additional objectives beyond simple protection and revenue collection. The

[91]European Communities' responses to questioning at the oral hearing.

European Communities mentions stamp taxes, deposit schemes, revenue duties and primage duties as examples of such "other duties and charges".

106. The European Communities argues that the Panel erred in suggesting that Members "invariably" express customs duties in specific or *ad valorem* terms, or in a combination thereof, and thus no exogenous factors play a role in the application of customs duties. According to the European Communities, such a broad reading of the term "exogenous" is problematic because certain duties are expressed in foreign currencies (for example, commodities are typically traded in US dollars) and thus the duty applied will depend on exchange rate fluctuations. In addition, seasonal duties are levied by some Members on certain products (often fruit and vegetables).

107. The European Communities maintains that the Panel failed to consider the ordinary meaning of the term "ordinary customs duties" in its context and in the light of the object and purpose of the GATT 1994. An examination of the context of Article II:1(b) would lead to the conclusion that being *ad valorem* or specific (or, conversely, not based on exogenous factors) is not the distinguishing feature of an "ordinary customs duty". The European Communities notes that the special safeguard duties which a Member may impose under Article 5 of the *Agreement on Agriculture* typically take the form of *ad valorem* or specific duties, although they are clearly not considered to be "ordinary customs duties" in the sense of Article II:1(b). According to the European Communities, the Panel never explains how it can distinguish between an *ad valorem* "ordinary customs duty" and an *ad valorem* "other duty or charge".

108. The conclusion that an "ordinary customs duty" cannot be distinguished from "other duties or charges" simply on the basis that it is *ad valorem* or specific (that is, not based on exogenous factors), is supported by the purpose of Article II:1(b). According to the European Communities, the whole thrust of Article II:1(b) is to protect the level of concessions negotiated in the successive tariff reduction negotiations which took place under the GATT, rather than to require a Member to apply a particular type of customs duty.

109. The European Communities further argues that, had the Panel examined the negotiating history of Article II:1(b) of the GATT 1947, it would not have found confirmation for its view that the drafters intended to limit "ordinary customs duties" to those not based on exogenous factors. Rather than confirming the Panel's interpretation of "ordinary customs duties", the negotiating history directly contradicts the Panel's conclusion, because it involved no discussion of the type of duties concerned.

110. The European Communities maintains that the negotiators in the Uruguay Round had recognized the difficulty of defining "ordinary customs duties" in the context of discussing a proposal by New Zealand, which was later to lead to the Understanding on Article II:1(b). Given the lack of explicit instruction as to the type of duty required by the phrase "ordinary customs duty", it was not for the Panel to assume a definition prohibiting customs duties based on exogenous factors. In so doing, it lightly assumed that WTO Members had taken on a more onerous obligation than that apparent from the text, contrary to the *in dubio mitius* principle referred to by the Appellate Body in *EC – Hormones*.[92]

111. The European Communities seeks support for its reasoning in the findings of the Appellate Body in *Argentina – Textiles and Apparel*. According to the European Communities, the Appellate Body concluded in that case that Article II:1(b) does not provide for requirements as to the type of duty that a Member may apply; the essential obligation of Article II:1(b) is that customs duties should not be applied in excess of bound rates.[93]

6. United States

(a) Article 11 of the DSU

112. The United States offers no opinion in its submission as to whether Argentina presented arguments or evidence with respect to claims arising under the second sentence of Article II:1(b). However, the United States suggests that the issue is one of burden of proof rather than one of an objective assessment of the matter under Article 11 of the DSU.

(b) Order of Analysis

113. The United States submits that the Panel followed the proper order of analysis in choosing to first examine Argentina's claim under Article 4.2 of the *Agreement on Agriculture* before examining its claim under Article II:1(b) of the GATT 1994. The Panel correctly reasoned that Chile's price band system applies exclusively to agricultural products and that Article 4.2 of the *Agreement on Agriculture* deals "more specifically and in detail" with measures affecting market access of agricultural products. In any event, according to the United States, the Panel's decision to proceed first with an assessment of Argentina's claim under Article 4.2 would not be a reversible error. Even if the Panel had commenced its work by interpreting Article II:1(b), the United States believes the Panel would have reached the same conclusions.

[92]Appellate Body Report, *supra*, footnote 69, footnote 154 to para. 165.

[93]Appellate Body Report, *Argentina – Textiles and Apparel*, *supra*, footnote 55, para. 46.

(c) Article 4.2 of the *Agreement on Agriculture*

114. The United States considers that the Panel properly found that Chile's price band system is prohibited by Article 4.2 of the *Agreement on Agriculture*.

115. The United States submits that Chile's interpretation of Article 4.2 is not grounded in the text of Article 4.2 or important context. Instead, Chile presents a selective reading of the context provided by the schedule of the European Communities and "a lengthy exposition of the 'original intent' of the Uruguay Round negotiators it finds in the history surrounding the price band system and the tariffication of the European Communities' variable import levies."[94] This alleged "evidence" regarding the European Communities' variable import levies can form at most one part of a proper analysis of Article 4.2 under the customary rules of interpretation of public international law.[95] The United States notes, however, that an examination of the European Communities' schedule reveals that *all* of the products on which variable import levies existed are now subject to tariff bindings, yet these bindings contain only specific rates or *ad valorem* plus specific rates of duty in the ordinary customs duty column. The United States further notes Chile's argument that the European Communities' conversion of its variable import levies made clear that they would vary, but adds that Chile neglects to mention that the "duty-paid import price" commitments to which it refers are *not* expressed in the ordinary customs duty column; rather, they are recorded as two headnotes to Section I (on Agricultural Products) of the European Communities' Schedule. Furthermore, the United States asserts that "Chile implies incorrectly that these duties *must* vary according to a formula … but these headnotes merely provide for a cap on the duty that the EC will apply on certain goods." [96]

116. The United States also endorses the Panel's finding that, contrary to the suggestion of the European Communities and Chile, a variable levy cannot be distinguished from an ordinary customs duty simply because the latter is subject to a tariff binding. There is nothing in the texts of Article 4.2 or Article II:1(b) that suggests a variable import levy can exist *only* if it is not subject to a binding. If the Uruguay Round commitment concerning variable import levies was solely to prevent unbound levies, there would have been no need to include the variable import levy mechanism within

[94]United States' third participant's submission, para. 3.

[95]*Ibid.*, para. 11.

[96]*Ibid.*

Article 4.2.[97] Rather, it would have been sufficient to require that all agricultural tariffs be bound[98] because, as a result, variable import levies would have automatically ceased to exist. The United States also submits that a review of GATT documents reveals that there were numerous statements indicating that variable import levies could be subject to bindings without any suggestion that they would cease to be variable levies.[99]

117. For the United States, it is difficult to understand how merely *capping* the amount that can be collected *via* a variable import levy is tantamount to *converting* it into an ordinary customs duty, especially if the same measure applies both before and after. Thus, the United States concludes that "Chile's interpretation of the terms 'variable import levies' and 'ordinary customs duties' does not make sense of either the text or context of Article 4.2."[100]

118. With respect to the meaning of "similar border measures " in Article 4.2, the United States notes that, in its view, to be "similar" to a border measure listed in footnote 1, it is sufficient for a border measure to be "similar " to any *one* of the measures listed in that footnote 1—without having to be similar to *all* of those measures. A fundamental characteristic of variable import levies is not that they would *not* be subject to a binding. Even if it were, the United States maintains that to be "similar" to a "variable import levy", a border measure does not need to share *all* the "fundamental characteristics" of such a levy.[101]

(d) Article II:1(b) of the GATT 1994

119. The United States endorses the Panel's finding that Chile's price band system is an "other duty or charge" within the meaning of the second sentence of Article II:1(b) of the GATT 1994.

7. Venezuela

(a) Article 11 of the DSU

120. Venezuela argues that the Panel acted inconsistently with Article 11 of the DSU and exceeded its terms of reference by making a finding under the second sentence of Article II:1(b) of the GATT 1994.

[97]United States' third participant's submission, para. 13.

[98]*Ibid*.

[99]United States' statement at the oral hearing.

[100]United States' third participant's submission, para. 14.

[101]United States' response to questioning at the oral hearing.

(b) Order of Analysis

121. Venezuela submits that the Panel erred in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT 1994. According to Venezuela, the Panel should first have determined whether Chile's price band system constitutes an "ordinary customs duty", and only then determined whether it constituted a "measure of the kind which had been required to be converted" under Article 4.2 of the *Agreement on Agriculture*.

(c) Article 4.2 of the *Agreement on Agriculture*

122. Venezuela contends that the Panel erred in its interpretation of Article 4.2. Moreover, Venezuela contends that the Panel erred in extending its findings to cover all the products that are subject to the price band system, even though one product in particular had been excluded by the complainant.

(d) Article II:1(b) of the GATT 1994

123. Venezuela submits that in *Argentina – Textiles and Apparel*, the Appellate Body affirmed that WTO Members are free to decide the types and characteristics of the duties that they bind, and that the only obligation imposed by Article II:1(b) of the GATT 1994 is not to exceed bound rates.[102]

124. Venezuela concludes that the Panel went beyond its terms of reference when, having found that certain elements of *one* price band system were inconsistent with Article 4.2 of the *Agreement on Agriculture*, it extended its reasoning to *include* any type of duty resulting from *any* price band system insofar as the calculation of such duty is based on exogenous factors. Venezuela submits that by doing so, the Panel substituted itself for the will of the Members and legislated in their place by making a distinction where the rules do not, thus creating additional obligations for WTO Members and diminishing their rights under the WTO.

[102]Appellate Body Report, *supra*, footnote 55, para. 46.

IV. Issues Raised in this Appeal

125. The following issues are raised in this appeal:

(a) whether the Panel acted inconsistently with Article 11 of the DSU;

(b) whether the Panel erred in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT 1994;

(c) whether, in examining Article 4.2 of the *Agreement on Agriculture*, the Panel erred in finding that:

(i) Chile's price band system constitutes a measure "similar" to a "variable import levy" and a "minimum import price system" within the meaning of footnote 1 of the *Agreement on Agriculture*;

(ii) the duties imposed under Chile's price band system are not "ordinary customs duties" within the meaning of Article 4.2 of the *Agreement on Agriculture*; and, ultimately, that

(iii) Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*; and

(d) whether the Panel erred in finding that the price band duties imposed by Chile are "other duties or charges" and, therefore, inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

V. Amendment of the Price Band System During the Course of the Panel Proceedings

126. Before considering these issues, we find it necessary to address a preliminary question relating to the effect of the amendment that Chile made to its price band system during the course of the Panel proceedings. Earlier, we described Chile's price band system based on the factual findings in the Panel Report.[103] We observed that the price band system was established under Law No. 18.525 of 1986[104], and that the methodology for the calculation of the upper and lower thresholds of the price

[103]See Section II of this Report.

[104]See *supra*, footnote 14.

bands is set out in Article 12 of that Law. We also pointed out that Chile amended Article 12 by enacting Law 19.772 (the "Amendment") during the course of the Panel proceedings.[105] We understand the Amendment to provide, in relevant part, that the combination of the duties resulting from Chile's price band system added to the *ad valorem* duty shall not exceed the rate of 31.5 per cent *ad valorem* bound in Chile's WTO Schedule.[106] According to Chile:

> Under Chilean law, Chile considers that its WTO commitments override other domestic statutes. *Recognizing that Chile nevertheless had breached those WTO Commitments, Chile passed new legislation on November 19, 2001 (Law No. 19.772) to avoid the possibility of a recurrence of such a breach of the binding. … .* Hence, for purposes of this submission, Chile will consider that the Price Band System is subject to the 31.5% tariff binding as a matter of domestic law.[107] (emphasis added)

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[105]See *supra*, footnote 17, para. 10.

[106]Article 2 of Law No. 19.772 added the following paragraph to Article 12 of Law 18.525:

> The specific duties resulting from the application of this Article, added to the *ad valorem* duty, shall not exceed the base tariff rate bound by Chile under the World Trade Organization for the goods referred to in this Article, each import transaction being considered individually and using the c.i.f. value of the goods concerned in the transaction in question as a basis for calculation. To that end, the National Customs Service shall adopt the necessary measures to ensure that the said limit is maintained.

[107]Chile's appellant's submission, footnote 2. See also Chile's statement that:

> Chile has been able, *more often that not*, to apply duties below the bound level … (emphasis added)

Chile's appellant's submission, para. 3. In addition, Chile states:

> In 1998, there was a precipitous decline in the world price of wheat and wheat flour followed in 1999 by a similar decline in the world price of edible vegetable oil, such that fully offsetting the decline in world prices in those products relative to the previous five years under the price band formula could not be done without breaching the 31.5% binding. *To avoid disastrous effects on Chilean farmers from the plummeting world prices, Chilean authorities chose to apply duties under the price band formula without regard to the cap. Recognizing that this was inconsistent with Chilean commitments under the WTO*, the Government of Chile informed its trading partners of this situation and initiated informal consultations to obtain a waiver under Article XI of the Marrakesh Agreement. After several months of consultations, it became evident that Chile's main trading partners had strong opposition to the waiver. Instead, interested WTO members suggested that Chile either take safeguard action (during which time, the Chilean Congress was considering the implementation of a safeguard law) or renegotiate its tariff bindings according to Article XXVIII of GATT 1994. Chile chose to enact a safeguard law and took safeguard actions.[*] (emphasis added)

[*] *See* Law No. 19.612 of 28 May 1999, Official Journal of the Republic of Chile, 31 May 1999

Chile's appellant's submission, para. 13.

127. For the purpose of identifying the measure in this appeal, it is necessary to consider whether the subject of this appeal is Chile's price band system as amended by Law 19.772, or the price band system as it existed before the entry into force of that Law. To do so, we will look first at how the Panel dealt with this question, and we will look then at the views of the participants, before making our own determination.

128. Chile informed the Panel of the Amendment at the second substantive meeting with the parties.[108] The Panel explained its "understanding from Chile's explanation … that this amendment to Article 12 of Law 18.525 puts in place a cap on the Chilean PBS duties to avoid that those duties, in conjunction with the 8 per cent applied rate, exceed the 31.5 per cent bound rate."[109] The Panel also recorded Argentina's view that:

> [Argentina] is not in [a] position to confirm the precise content of the Chilean Exhibit given that Argentina does not have adequate information to express a definitive view on this issue. As far as Argentina knows, Chile has not yet even issued the regulations necessary to implement the new measure.[110]

129. The Panel recalled that previous panels had dealt with the issue of measures amended during dispute settlement proceedings, and quoted the following passage from the Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"):

> … in previous GATT/WTO cases, where a measure included in the terms of reference was otherwise terminated or amended after the commencement of the panel proceedings, panels have nevertheless made findings in respect of such a measure.[111]

[108]Panel Report, paras. 7.3 and 7.4. According to Chile:

> … these Chilean actions have eliminated the measures that Argentina has challenged before this Panel under Article II of the GATT 1994 […]. Even if Argentina were correct in every respect in its allegations under those WTO provisions -- which Chile denies -- it is difficult to understand how, in terms of the purpose of the dispute settlement system, there could be a more "positive solution" to the dispute for Argentina than […] the enactment of legislation assuring that the tariff binding will not be breached in the future.

Chile's oral statement at the Panel's second meeting with the parties, para. 6.

[109]Panel Report, para. 7.5.

[110]Argentina's response to question 45 of the Panel.

[111]Panel Report, WT/DS55/R and Corr.1,2,3,4, WT/DS59/R and Corr.1,2,3,4, WT/DS64/R and Corr.1,2,3,4, adopted 23 July 1998, DSR 1998:VI, 2201, para. 14.9.

The Panel saw "no reason to deviate from [this] practice of [previous GATT/WTO] panels".[112]

130. The Panel stated further:

> … that *we would be prejudging our examination of Argentina's claims regarding the Chilean PBS if we were to accept without further analysis that the change introduced by Chile is relevant* to the consistency of the Chilean PBS with its obligations under the WTO Agreement. We can only assess the relevance of the change introduced by Chile to the WTO-consistency of its PBS after having determined what Chile's obligations are with respect to its PBS under the provisions of GATT 1994 and the Agreement on Agriculture included in Argentina's request for establishment. We would be acting in a manner inconsistent with our duties under Article 11 of the DSU if we were to refrain from making findings for the sole reason that Chile amended the challenged measure at a late stage of the proceedings.[113] (emphasis added)

The Panel concluded as follows:

> We will therefore examine the Chilean PBS as challenged by Argentina in these proceedings, and make findings accordingly.[114]

[112]Panel Report, para. 7.7. In footnote 567 of the Panel Report, the Panel noted that the panel in *Indonesia – Autos* referred in this regard to:

> … the panel report on *United States - Measures Affecting Imports of Wool Shirts and Blouses from India ("US – Wool Shirts and Blouses")*, WT/DS33/R, adopted on 23 May 1997; the US restriction was withdrawn shortly before the issuance of the panel report; panel report on *EEC - Restrictions on Imports of Dessert Apples, Complaint by Chile*, adopted on 22 June 1989, BISD 36S/93; panel report on *EEC-Restrictions on Imports of Apples, Complaint by the United States*, adopted on 22 June 1989, BISD 36S/135; panel report on *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91; panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98; and panel report on *EEC - Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49. The panel noted that in the panel report on *United States - Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted on 7 November 1989, the challenged measure was amended during the panel process but the panel refused to take into account such amendment. We note that this was also the line taken by the Appellate Body in *Argentina - Textiles and Apparel*, WT/DS56/AB/R, adopted on 22 April 1998, para. 64.

[113]Panel Report, para. 7.7.

[114]*Ibid.*, para. 7.8.

131. In its appellant's submission, Chile describes the measure in this appeal as the price band system subject to a cap on the total duty applied equal to the bound Chilean rate of duty for the product concerned[115] and as amended by Law No. 19.772. In response to questioning at the oral hearing, Chile explained that Law 19.772 was merely declaratory in nature, because the total amount of duties that could be applied on products subject to the price band system had been subject to a tariff binding since the Tokyo Round.[116] According to Chile, the Amendment did not change this long-standing tariff binding; it merely "reinforced" Chile's existing international obligations.[117] Chile observed that the Amendment served to "reassure" Chile's trading partners that there will be no recurrence of a breach by Chile of its tariff binding.[118]

132. Argentina does not state explicitly in its appellee's submission whether, in its view, the measure in issue is Chile's price band system "as amended" by Law 19.772, or the price band system as it stood before that Amendment. Nevertheless, Argentina addresses in detail[119] Chile's arguments relating to Chile's price band system with a cap, and concludes that "the Panel's analysis is well-founded because it properly addressed Chile's arguments relating to the price band system *with* a cap."[120] (emphasis added) Earlier in its submission, Argentina notes that it "clearly identified the measures at issue: Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, as well as the regulations and complementary provisions and/or amendments." [121] Thus, although Argentina does not explicitly refer to "Law 19.772" when describing the measure, it does refer to "amendments".

133. In response to questioning at the oral hearing, Argentina maintained that the measure in issue is the price band system as set out in the Panel's terms of reference, that is, *before* the Amendment. However, Argentina also noted that the Panel appeared to have ruled on the price band system as it stood both *before and after* the Amendment. Chile agreed with Argentina that the Panel ruled on

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[115]Chile's appellant's submission, para. 11:

> To the extent the reference price of the product concerned is below the bottom of the price band as of the date of exportation to Chile, the *ad valorem* duty is increased by that specific amount per tonne, *subject to a cap on the total duty applied equal to the bound Chilean rate of duty for the product concerned* (currently 31.5% as a result of a reduction agreed in the Uruguay Round). (emphasis added)

[116]Chile's response to questioning at the oral hearing. Chile's tariff binding was at 35 per cent *ad valorem* after the Tokyo Round; it was reduced to 31.5 per cent *ad valorem* as of the conclusion of the Uruguay Round.

[117]Chile's response to questioning at the oral hearing.

[118]*Ibid.* According to Chile, Law 19.772 merely corrected a domestic administrative procedure of Chile's customs authorities.

[119]Argentina's appellee's submission, paras. 115-123.

[120]*Ibid.*, para. 122.

[121]*Ibid.*, para. 19.

both the original and the "amended" price band system.[122] According to Argentina, it was appropriate for the Panel to do so in the light of arguments put forward by Chile in the Panel proceedings regarding the "amended" price band system. Argentina argues that it was also appropriate for Argentina to react to Chile's arguments that related to the Amendment. The question whether we take the Amendment into account is not a "problem of jurisdiction", according to Argentina, because, even after the Amendment, the "identity of the measure remains the same".[123] Argentina maintains that it is "in a position to receive an adjudication" from us on the "amended" price band system.[124]

134. With these arguments in mind, we turn now to consider whether the measure in this appeal is the price band system as amended by Law 19.772, or the price band system as it existed before the Amendment.

135. First of all, we note that Argentina's request for the establishment of a panel refers to the measure in issue as the price band system "under Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, *as well as the regulations and complementary provisions and/or amendments*" (emphasis added). Such *amendments*, in our view, include Law 19.772. The broad scope of the Panel request suggests that Argentina intended the request to cover the measure even as amended. Thus, we conclude that Law 19.772 falls within the Panel's terms of reference.

136. We recall that, in *Brazil – Export Financing Programme for Aircraft*, a question arose as to the identity of the measure there. In that dispute, regulatory changes relevant to the measure were put in place after consultations were held, but before the panel was established. We determined that the regulatory changes "did not change the essence" of the measure:

> We are confident that the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that were referred to the DSB for the establishment of a panel. We emphasize that the regulatory instruments that came into effect in 1997 and 1998 *did not change the essence* of the export subsidies for regional aircraft under PROEX.[125] (emphasis added)

[122]Chile's response to questioning at the oral hearing.

[123]Argentina's response to questioning at the oral hearing.

[124]*Ibid*.

[125]Appellate Body Report, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para. 132.

137. In this case, the facts are somewhat different, because the Amendment was enacted *after* the Panel had been established and *while* the Panel was engaged in considering the measure. However, we do not see why this difference should affect our approach in determining the identity of the measure. We understand the Amendment as having clarified the legislation that established Chile's price band system. However, the Amendment does not change the price band system into a measure *different* from the price band system that was in force before the Amendment. Rather, as we have pointed out, Article 2 of Law No. 19.772 simply amends Article 12 of Law No. 18.525 by *adding* a final paragraph to that provision. In its amended form, Law No. 18.525 incorporates the additional paragraph, making explicit that there is a cap on the amount of the total tariff that can be applied under the system at the tariff rate of 31.5 per cent *ad valorem*, which has been bound in Chile's Schedule since the entry into force of the *WTO Agreement*.

138. We note, moreover, that the panel in *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear (EC)*"), decided to examine *modifications* made to the measure in issue *during* the panel proceedings, on the ground that the modifications in question did:

> … *not constitute entirely new safeguard measures* in the sense that they were based on a different safeguard investigation, but are *instead modifications of the legal form of the original definitive measure, which remains in force in substance* and which is the subject of the complaint.[126] (emphasis added)

Although we were not asked to review that particular finding on appeal, we agree with that panel's approach, which is based on sound reasoning and is consistent with our reasoning here.

139. We understand that, like the safeguard measure in the *Argentina – Footwear (EC)* case, Chile's price band system remains essentially the same after the enactment of Law 19.772. The measure is not, in its essence, any different because of that Amendment. Therefore, we conclude that the measure before us in this appeal includes Law 19.772, because that law amends Chile's price band system without *changing its essence*.

140. Our conclusion is supported by the object and purpose of the WTO dispute settlement system. Article 3.7 of the DSU provides, in relevant part, that:

> The aim of the dispute settlement mechanism is *to secure a positive solution to a dispute*. (emphasis added)

[126]Panel Report, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575, para. 8.45.

141. This is affirmed in Article 3.4 of the DSU, which stipulates:

> Recommendations or rulings made by the DSB shall be aimed at achieving a *satisfactory settlement of the matter* in accordance with the rights and obligations under this Understanding and under the covered agreements. (emphasis added)

142. We also observed, in *Australia – Salmon*, that the:

> … *aim [of the dispute settlement system] is to resolve the matter at issue and "to secure a positive solution to a dispute"*. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order *to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member* with those recommendations and rulings "in order to *ensure effective resolution of disputes to the benefit of all Members*."[127] (emphasis added)

143. Although we made this statement in a somewhat different context—relating to when panels exercise judicial economy—we believe that these general principles and considerations confirm our conclusion in this appeal. We consider it appropriate for us to rule on the price band system as currently in force in Chile, that is, as amended by Law 19.772, to "secure a positive solution to the dispute" and to make "sufficiently precise recommendations and rulings so as to allow for prompt compliance". Further, as we have observed, the participants to this dispute do not object to our doing so.

144. We emphasize that we do not mean to condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel or by us. We do not suggest that this occurred in this case. However, generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a "moving target". If the terms of reference in a dispute are broad enough to include amendments to a measure—as they are in this case—and if it is necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute.

[127]Appellate Body Report, *supra*, footnote 70, para. 223.

VI. Article 11 of the DSU

145. We next ask whether the Panel acted inconsistently with Article 11 of the DSU. Chile argues that the Panel did so because the Panel made a finding under the *second* sentence of Article II:1 (b) of the GATT 1994, even though Argentina made no claim or argument under that sentence.

146. The first sentence of Article II:1(b) of the GATT 1994 reads as follows:

> The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications *set forth in that Schedule, be exempt from ordinary customs duties in excess* of those set forth and provided therein. (emphasis added)

The second sentence of that provision states:

> Such products shall also be exempt from all *other duties or charges* of any kind imposed on or in connection with the importation *in excess* of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. (emphasis added)

147. The Panel's reasoning and findings under Article II:1(b) of the GATT 1994 may be summarized as follows. The Panel began by finding that the *first* sentence of Article II:1(b) is not applicable to the Chilean price band duties, because the Panel had already found that they are not "ordinary customs duties":

> We have found above that the Chilean PBS is a border measure "other than an ordinary customs duty", which is prohibited under Article 4.2 of the Agreement on Agriculture. We have also found that "ordinary customs duties" must have the same meaning in Article 4.2 of the Agreement on Agriculture and Article II:1(b) of GATT 1994. *Consequently, the Chilean PBS duties not constituting ordinary customs duties, their consistency with Article II:1(b) cannot be assessed under the first sentence of that provision,* which only applies to ordinary customs duties.[128] (emphasis added)

[128]Panel Report, para. 7.104.

148. Having determined that the duties resulting from Chile's price band system could not be assessed under the *first* sentence of Article II:1(b), the Panel then proceeded to examine those duties under the *second* sentence of Article II:1(b). The Panel stated:

> The next question is whether the Chilean PBS duties could be considered as "other duties or charges of any kind" imposed on or in connection with importation, under the *second* sentence of Article II:1(b). We have already indicated that all "other duties or charges of any kind" should in our view be assessed under the second sentence of Article II:1(b). Pursuant to the Uruguay Round Understanding on the Interpretation of Article II:1(b), such other duties or charges had to be recorded in a newly created column "other duties and charges" in the Members' Schedules.[129]

The Panel observed that Chile did not record its price band system in its Schedule under the column for "other duties and charges" as governed by the *second* sentence:

> If other duties or charges were not recorded but are nevertheless levied, they are inconsistent with the *second* sentence of Article II:1(b), in light of the Understanding on the Interpretation of Article II:1(b). We note that Chile did not record its PBS in the "other duties and charges" column of its Schedule.[130] (emphasis added)

The Panel concluded that:

> … the Chilean PBS duties are inconsistent with Article II:1(b) of the GATT 1994.[131]

149. Chile appeals this finding, and argues that the Panel ruled on a claim that was neither made nor argued. Chile maintains that the Panel exceeded its mandate and deprived Chile of a "fair right of response".[132] In addressing this issue, we will examine, first, whether Argentina made a claim under the second sentence of Article II:1(b) of the GATT 1994, and, next, whether the Panel acted inconsistently with Article 11 of the DSU in making a finding under that sentence. To determine whether Argentina made a claim under the second sentence of Article II:1(b), we look first

[129]Panel Report, para. 7.105.

[130]*Ibid.*, para. 7.107.

[131]*Ibid.*, para. 7.108.

[132]Chile's appellant's submission, para. 23.

to Argentina's request for the establishment of a panel, which determines the Panel's terms of reference. Argentina's request reads in relevant part:

> Under Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, as well as the regulations and complementary provisions and/or amendments, Chile applies a PBS which is inconsistent with *various provisions of the GATT 1994* and with the Agreement on Agriculture.
>
> The price band system does not ensure certainty in respect of market access for agricultural products and has caused Chile to breach its commitments on tariff bindings in relation to the concessions set forth in its national schedule. Argentina submits that the said legislation is inconsistent with *Article II of the GATT 1994* and with Article 4 of the Agreement on Agriculture.[133] (emphasis added)

150. The Panel request refers to Article II of the GATT 1994 in general terms. No specific reference is made to any of the seven paragraphs or eight subparagraphs of Article II of the GATT 1994. Argentina's request clearly does not limit the scope of Argentina's claims to the *first* sentence of Article II:1(b). Therefore, we find that Article II in its entirety—including the second sentence of Article II:1(b)—is within the Panel's terms of reference.

151. This, however, is not the end of our inquiry on this issue. Chile does not dispute that Argentina included Article II:1(b) in the request for the establishment of a panel.[134] However, Chile submits that making a general reference to Article II in the Panel request is not dispositive of whether Argentina *has actually made a claim* under the *second* sentence of Article II:1(b), and, thus, of whether the Panel was entitled to make a finding under that provision.

152. Chile argues that Argentina did not make a claim under Article II:1(b) because Argentina did not articulate such a claim in any of its submissions before the Panel. In making this argument, Chile relies on our Report in *US – Certain EC Products*, where we said, with respect to a claim relating to another provision of the covered agreements:

[133]WT/DS207/2, 19 January 2001.

[134]We note that Chile has not challenged the sufficiency of the request for establishment of a panel under Article 6.2 of the DSU. This was confirmed by Chile at the oral hearing. Therefore, we need not and do not decide whether the request for establishment of a panel would or would not be sufficient under Article 6.2 of the DSU.

> … the fact that a claim of inconsistency with Article 23.2(a) of the DSU can be considered to be within the Panel's terms of reference does not mean that the European Communities actually made such a claim.[135]

153. The question before us in this appeal is whether the claim that Argentina *actually made* before the Panel was limited to the first sentence of Article II:1(b), or whether that claim also included the second sentence of that provision.

154. According to the Panel, Argentina contended, in its first written submission that:

> The PBS *as such* violates Article II:1(b) since its application has led Chile in specific cases to collect duties *in excess* of the rates bound in its National Schedule No. VII and
>
> The PBS also violates Article II:1(b) because, by its structure, design and mode of application, it *potentially* leads to the application of specific duties in violation of the bound tariff of 31.5 per cent.[136] (emphasis added)

155. Argentina's contentions, in its first submission to the Panel, referred to Article II:1(b) in general; no explicit reference is made either to the first or the second sentence. However, despite this general language, a close examination of Argentina's first submission reveals that Argentina addressed *only* the obligation set out in the first sentence of Article II:1(b), and *not* that in the second sentence.

156. In its first submission, Argentina focused on the argument that Chile exceeded its bound rate of 31.5 per cent in imposing price band duties. Argentina must necessarily have been referring in this submission only to Chile's obligations under the first sentence of Article II:1(b), because 31.5 per cent is the rate that Chile has bound in the column of its Schedule for *ordinary customs duties*. Ordinary

[135]Appellate Body Report, *supra*, footnote 44, para. 112. We also stated in that case: "An analysis of the Panel record shows that, with the exception of two instances during the Panel proceedings, the European Communities did not refer *specifically* to Article 23.2(a) of the DSU … Our reading of the Panel record shows us that, throughout the Panel proceedings in this case, the European Communities made *arguments* relating only to its claims that the United States acted inconsistently with Article 23.1 and Article 23.2(c) of the DSU." (footnotes omitted, emphasis in original). Appellate Body Report, para. 112. We noted as well that: "The Panel record does show that the European Communities made several references to what it termed the 'unilateral determination' of the United States. However, … [a]t no point did the European Communities link the notion of a 'unilateral determination' on the part of the United States with a violation of Article 23.2(a)." Appellate Body Report, para. 113.

[136]Panel Report, paras. 4.5.-4.7; Argentina's first written submission to the Panel, pp. 8 and 16.

customs duties are governed by the *first* sentence of Article II:1(b); they are not relevant to the *second* sentence. Argentina could not have been referring in this submission to Chile's obligations under the second sentence of Article II:1(b), because Chile has not scheduled any other duties or charges governed by that sentence. Argentina refered also in this submission to the "structure, design and mode of application"[137] of Chile's price band system as being *potentially* violative of the 31.5 per cent bound rate, but this rate applies only to duties falling under the first sentence of Article II:1(b).

157. We conclude, therefore, that Argentina did not articulate a claim under the second sentence of Article II:1(b) in its first submission.

158. However, as Argentina points out, we ruled in *EC – Bananas III* that:

> There is *no requirement* in the DSU or in GATT practice for arguments *on all claims* relating to the matter referred to the DSB *to be set out in a complaining party's first written submission* to the panel.
>
> …
>
> We do *not* agree with the Panel's statement that a "*failure to make a claim in the first written submission cannot be remedied by later submissions* or by incorporating the claims and arguments of other complainants".[138] (emphasis added)

For this reason, it is necessary to determine whether Argentina articulated a claim under the second sentence of Article II:1(b) in subsequent submissions to the Panel.

159. Argentina concedes that it directed most of its arguments during the Panel proceedings to the first sentence of Article II:1(b).[139] However, Argentina states that it addressed the second sentence of

[137]Argentina's second oral statement to the Panel, para. 4. Panel Report, para. 4.7.

[138]Appellate Body Report, *supra*, footnote 58, paras. 145, 147.

[139]Argentina's appellee's submission, para. 35.

that provision in its response to Question 3 posed by the Panel, which reads in relevant part as follows:[140]

> [Response to Question 3(b):] Under Article II:1(b) of the GATT 1994, other duties or charges are merely those that do not constitute "ordinary customs duties", such as the other duties or charges which appear in columns 6 and 8 of the national schedules, as appropriate.
>
> [Response to Question 3(c):] "Other duties or charges of any kind" within the meaning of Article II:1(b) of the GATT 1994 cannot be considered as "similar border measures other than ordinary customs duties".
>
> [Response to Question 3(d):] The bound duty level for what is considered to be "other duties and charges of any kind" is the rate registered in that column. Consequently, that level is the one to be considered in determining inconsistency with Article II:1(b) of the GATT 1994, without prejudice to the consistency of other duties or charges with other obligations under the GATT 1994.

160. Argentina contends that, in this response to Question 3 of the Panel, there are arguments relating to a claim under the *second* sentence of Article II:1(b). Yet this response sets out only a general description of Argentina's interpretation of the second sentence of Article II:1(b), and one that was offered by Argentina only because the Panel asked for it. There is, in this response, no discussion whatsoever of Chile's price band system, or of how it relates to the obligation in that sentence. Nor is there any suggestion in this response that Chile's price band system is in violation of the second

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[140]The following parts of Question 3 relate to the second sentence of Article II:1(b):

Question 3(b): Please discuss the difference between *ordinary* customs duties and *other* duties and charges of any kind.

Question 3(c): If "similar border measures other than ordinary customs duties" within the meaning of Footnote 1 to Article 4.2 of the *Agreement on Agriculture* cannot be considered "ordinary customs duties" within the meaning of Article II:1(b), first sentence, of GATT 1994, please state whether in your view some of those measures could be considered "other duties or charges of any kind" within the meaning of Article II:1(b), second sentence, of GATT 1994.

Question 3(d): The Understanding on the Interpretation of Article II:1(b) of GATT 1994 ("the Understanding") provides, in paragraph 1, that "the nature and level of any 'duties or charges' levied on bound tariff items […] shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff items to which they apply. Paragraph 2 of the Understanding provides that "[t]he date as of which 'other duties or charges' are *bound*, for the purposes of Article II, shall be 15 April 1994. (emphasis added) Thus, at the end of the Uruguay Round, pursuant to the Understanding, 'other duties or charges' were for the first time bound in the Schedules, in a separate column. In the light of the Understanding, are "other duties or charges of any kind" in your view inconsistent with Article II:1(b) of GATT 1994 because they exceed the bound tariff rate recorded in the bound rate column of the Schedule, or, rather, because they exceed the bound rate in the "other duties and charges" column of the Schedule? [On p. 4 of Chile's Schedule (Arg-10), for instance, these columns would correspond to columns Nos 4 ("*Tipo Consolidado del Derecho*") and 8 ("*Demas Derechos y Cargas*"), respectively.]

sentence of Article II:1(b). Furthermore, Argentina expresses no view in this response as to how the concept of "other duties or charges", within the meaning of the second sentence of Article II:1(b), could or would relate to the claims it raised. We note as well that Argentina did not refer at all to these responses in subsequent proceedings before the Panel.

161. Argentina also asserts that it articulated a claim under the second sentence of Article II:1(b) in its rebuttal submission[141], where Argentina argues:

> 23. Argentina repeats once again that it does not question and never has questioned Chile's right to apply specific duties, as long as those duties are consistent with multilateral rules and regulations. However, the Chilean PBS is not a specific duty. Indeed, by its structure, design and mode of application, the PBS violates Article II:1(b) of the GATT 1994, since it has the potential to cause Chile to exceed its tariff binding. (underlining in original)
>
> 24. This is so because, as just stated, we are not dealing with a specific duty which constitutes an "ordinary customs duty" – a duty which, since it does not result in the levying of duties in excess of the bound rate, would not be the subject of a complaint by Argentina with respect to Article II:1(b) of the GATT 1994. Here, we are dealing with a surcharge whose structure, design and mode of application potentially leads to a violation of Chile's binding.

162. Neither of these paragraphs cited by Argentina from its rebuttal submission even mentions the second sentence of Article II:1(b). Moreover, these paragraphs appear at the beginning of a section in the rebuttal submission, entitled "Potential violation", in which Argentina seeks to explain its argument that Chile's price band system potentially violates the bound 31.5 per cent tariff rate. As we have already noted, that argument cannot be related to the *second* sentence of Article II:1(b), because that sentence has nothing to do with the bound 31.5 per cent tariff rate. Moreover, Chile concedes that it did not schedule its price band system under the column for "other duties or charges" governed by the second sentence of Article II:1(b). Therefore, if a violation of the second sentence were in issue, it would not be "potential," but certain.

163. Argentina contends also that two third parties—the United States and the European Communities—"provided argumentation regarding the second sentence of Article II:1(b)."[142] In support of this contention, Argentina cites those third parties' responses to Question 3 posed by the Panel. However, even if these responses could be interpreted in the way Argentina would have us do—an issue which we need not decide in this appeal—these responses could not, in any event, assist Argentina in making a claim under the second sentence of Article II:1(b). These are the statements of

[141]Argentina's rebuttal submission to the Panel, paras. 23 and 24.

[142]Argentina's appellee's submission, para. 39.

third parties to this dispute. Third parties to a dispute cannot make claims. It was for Argentina, as the claimant, to make its claim; Argentina cannot rely on third parties to do so on its behalf. Moreover, we note that Argentina did not adopt these arguments of the third parties in subsequent proceedings.

164. In addition, Argentina contends that it made a claim under the second sentence of Article II:1(b) in the context of its arguments to the Panel under Article 4.2 of the *Agreement on Agriculture*, where it argued that duties resulting from Chile's price band system were not ordinary customs duties for the purposes of Article 4.2.[143] With this argument, Argentina appears to suggest that a claim may be made implicitly, and need not be made explicitly. We do not agree. The requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement. Only in this way will the panel, other parties, and third parties understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it. WTO Members must not be left to wonder what specific claims have been made against them in dispute settlement. As we said in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (India – Patents)*:

> All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly.[144]

165. For all these reasons, we conclude that, although Argentina's request for the establishment of a panel was phrased broadly enough to include a claim under both sentences of Article II:1(b) of the GATT 1994, a close examination of Argentina's submissions reveals that the only claim made by Argentina was under the *first* sentence of Article II:1(b).

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[143]Argentina's response to questioning at the oral hearing.

[144]Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 94. We recall that we are not, here, dealing with an issue under Article 6.2 of the DSU, which provides:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

166. We are mindful that Argentina argues that, "[e]ven if none of the parties had advanced arguments regarding the second sentence of Article II:1(b) of the GATT 1994, the Panel would have had the *right*, indeed the *duty*, to develop its own legal reasoning to support the proper resolution of Argentina's claim."[145] (emphasis added) Argentina purports to find support for this position in our ruling in *EC – Hormones*, where we said that:

> … nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration.[146]

167. However, Argentina's reliance on our ruling in *EC – Hormones* is misplaced. In *EC – Hormones*[147], and in *US – Certain EC Products*[148], we affirmed the capacity of panels to develop their own legal reasoning in a context in which it was clear that the complaining party had made a claim on the matter before the panel. It was also clear, in both those cases, that the complainant had advanced arguments in support of the finding made by the panel—even though the arguments in support of the claim were not the same as the interpretation eventually adopted by the Panel. The situation in this appeal is altogether different. No claim was properly made by Argentina under the *second* sentence of Article II:1(b). No legal arguments were advanced by Argentina under the *second* sentence of Article II:1(b). Therefore, those rulings have no relevance to the situation here.

168. Contrary to what Argentina argues, given our finding that Argentina has not made a *claim* under the *second* sentence of Article II:1(b), the Panel in this case had neither a "right" nor a "duty" to develop its own legal reasoning to support a claim under the second sentence. The Panel was not

[145]Argentina's appellee's submission, para. 48.

[146]Appellate Body Report, *supra*, footnote 69, para. 156. (Argentina's appellee's submission, para. 49) Argentina also relies on our Report in *US – Certain EC Products*, *supra*, footnote 44, at para. 123, where we held that "… the Panel was not obliged to limit its legal reasoning in reaching a finding to arguments presented by the European Communities. We, therefore, do not consider that the Panel committed a reversible error by developing its own legal reasoning." (Argentina's appellee's submission, para. 49)

[147]Appellate Body Report, *supra*, footnote 69, para. 156.

[148]Appellate Body Report, *supra*, footnote 44, para. 123. We note that the discussion above referring to our finding in *US – Certain EC Products* that a claim had not been made refers to the alleged claim under Article 23.2 of the DSU. The finding regarding a panel's ability to develop its own legal reasoning referred to a claim under Article 21.5 of the DSU, which had been made.

entitled to make a claim for Argentina[149], or to develop its own legal reasoning on a provision that was not at issue.[150]

169. With all this in mind, we turn next to examine whether the Panel acted inconsistently with Article 11 of the DSU, as claimed by Chile. Article 11 of the DSU provides:

> *Article 11*
>
> *Function of Panels*
>
> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an *objective assessment of the matter before it*, including 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. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. (emphasis added)

170. Chile argues that the Panel made a finding on a provision under which no claim or argument was made, and that this "deprived Chile of a fair right of response".[151] Therefore, according to Chile, the Panel exceeded its mandate and, thus, acted inconsistently with Article 11.

171. In contrast, Argentina argues that the Panel acted consistently with Article 11. Argentina submits that the standard for breaches of Article 11 is "very high"[152], and asserts that the Panel did not "deliberately disregard" or "refuse to consider" or "wilfully distort" or "misrepresent" the evidence before it.[153] Argentina also claims that Chile did not "demonstrate in any way that the Panel committed an 'egregious error that calls into question the good faith' of the Panel."[154] In Argentina's

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[149]Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277, paras. 129-130.

[150]Argentina also seeks to rely on our reasoning in *Canada – Periodicals*, *supra*, footnote 65, where we said that the relationship between the first and second sentences of Article III:2 of the GATT 1994 was such that we could move from an examination of the first sentence of that Article to an examination of the second sentence as "part of a logical continuum." Argentina's appellee's submission, para. 154. We do not agree with Argentina that our reasoning in *Canada – Periodicals* is relevant in this regard. In our view, the first and second sentences of Article II:1(b) prescribe distinct obligations, and do not form part of a logical continuum.

[151]Chile's appellant's submission, para. 23.

[152]Argentina's statement at the oral hearing.

[153]Argentina's appellee's submission, para. 46.

[154]*Ibid.*

view, Chile has not demonstrated that the Panel in this case abused its discretion in a manner that comes even close to the level of gravity required to sustain a claim under Article 11 of the DSU.

172. We agree with Argentina that the Panel did not refuse to consider, did not distort, and did not misrepresent any evidence relating to Chile's alleged violation of the second sentence of Article II:1(b). Indeed, there was no such evidence before the Panel. Nor, in our view, did the Panel commit an error that in any way calls into question the Panel's good faith. But the obligations under Article 11 of the DSU go beyond a panel's appreciation of the evidence before it. Article 11 obliges panels not only to make "an objective assessment of the facts of the case", but also "an objective assessment of the matter before it."

173. In this case, the Panel made a finding on a claim that was *not* made by Argentina. Having determined that the duties resulting from Chile's price band system could not be assessed under the first sentence[155] of Article II:1(b) of the GATT 1994, the Panel then proceeded to examine the measure under the second sentence of that provision. In so doing, the Panel assessed a provision that was not a part "of the matter before it". As we have explained, the terms of reference were broad enough to have included a claim under the second sentence of Article II:1(b). However, Argentina did not articulate a claim under that sentence; nor did Argentina submit any arguments on the consistency of Chile's price band system with the second sentence. Therefore, as with our finding in *US – Certain EC Products*, the second sentence of Article II:1(b) was not the subject of a claim before the Panel. Because it made a finding on a provision that was not before it, the Panel, therefore, did not make an objective assessment *of the matter before it*, as required by Article 11. Rather, the Panel made a finding on a matter that was *not* before it. In doing so, the Panel acted *ultra petita* and inconsistently with Article 11 of the DSU.

174. There is, furthermore, the requirement of due process. As Argentina made no claim under the second sentence of Article II:1(b) of the GATT 1994, Chile was entitled to assume that the second sentence was not in issue in the dispute, and that there was no need to offer a defence against a claim under that sentence. We agree with Chile that, by making a finding on the second sentence—a claim that was neither made nor argued—the Panel deprived Chile of a "fair right of response".[156]

[155]Panel Report, para. 7.104.

[156]Chile's appellant's submission, para. 23.

175. As we said in *India – Patents*, "… the demands of due process … are implicit in the DSU".[157] And, as we said in *Australia – Salmon* on the right of response, "[a] fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it".[158] Chile contends that this fundamental tenet of due process was not observed on this issue.

176. As we said earlier, Article 11 imposes duties on panels that extend beyond the requirement to assess evidence objectively and in good faith, as suggested by Argentina. This requirement is, of course, an indispensable aspect of a panel's task. However, in making "an objective assessment of the matter before it", a panel is also duty bound to ensure that due process is respected. Due process is an obligation inherent in the WTO dispute settlement system. A panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response. In this case, because the Panel did not give Chile a fair right of response on this issue, we find that the Panel failed to accord to Chile the due process rights to which it is entitled under the DSU.

177. For these reasons, we find that, by making a finding in paragraph 7.108 of the Panel Report that the duties resulting from Chile's price band system are inconsistent with Article II:1(b) of the GATT 1994 on the basis of the *second* sentence of that provision, which was not part of the matter before the Panel, and also by thereby denying Chile the due process of a fair right of response, the Panel acted inconsistently with Article 11 of the DSU. Therefore, we reverse that finding.

VII. Order of Analysis

178. Chile argues that the Panel erred in choosing to examine Argentina's claim under Article 4.2 of the *Agreement on Agriculture* before examining its claim under Article II:1(b) of the GATT 1994. Argentina, on the other hand, endorses the order of analysis followed by the Panel.

179. Before addressing the substance of Chile's argument, we note that Argentina raises a procedural objection, alleging that Chile introduced this point for the first time in its appellant's submission, when, as Argentina sees it, Chile should have included this "allegation of error" in its

[157]Appellate Body Report, *supra*, footnote 144, para. 94.

[158]Appellate Body Report, *supra*, footnote 70, para. 278.

Notice of Appeal pursuant to Rule 20(2)(d) of the *Working Procedures for Appellate Review*.[159]

180. We addressed a similar issue in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*. There, we stated that:

> The *Working Procedures for Appellate Review* enjoin the appellant to be *brief* in its notice of appeal in setting out "the nature of the appeal, including the allegations of errors". We believe that, in principle, the "nature of the appeal" and "the allegations of errors" are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel which are being appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission.[160] (underlining added, emphasis in original)

181. Further, in *EC – Bananas III*, we stated, in the context of Article 6.2 of the DSU, that:

> In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.
>
> …
>
> Article 6.2 of the DSU requires that the *claims* but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel … .[161] (emphasis in original)

182. In our view, this distinction between claims and legal arguments under Article 6.2 of the DSU is also relevant to the distinction between "allegations of error" and legal arguments as contemplated by Rule 20 of the *Working Procedures*. Bearing this distinction in mind, we do *not*

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[159]Rule 20(2)(d) of the *Working Procedures for Appellate Review* provides in pertinent part that:

> A Notice of Appeal shall include the following information:
>
> ...
>
> (d) a brief statement of the nature of appeal, including the *allegations of errors* in the issues of law covered in the panel report and legal interpretations developed by the Panel. (emphasis added)

[160]Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 95.

[161]Appellate Body Report, *EC – Bananas III*, *supra*, footnote 58, paras. 141, 143.

agree with Argentina that Chile's arguments regarding the order of analysis chosen by the Panel amount to a separate "allegation of error" that Chile *should have*—or *could have*—included in its Notice of Appeal. In fact, we do not see, nor has Argentina explained, what *separate* "allegation of error" could have been made, or what legal basis for such "allegation of error" there could have been. Rather than making a separate "allegation of error", Chile has, in our view, simply set out a *legal argument* in support of the issues it raised on appeal relating to Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994.[162]

183. Therefore, we reject Argentina's procedural objection, and we turn next to the substantive question before us, which is whether the Panel erred in deciding to address Argentina's claims under Article 4.2 of the *Agreement on Agriculture* before addressing Argentina's claims under Article II:1(b) of the GATT 1994.

184. On this substantive question, we observe first that, in approaching the analysis the way it did, the Panel relied on our ruling in *EC – Bananas III*. In that appeal, we stated that:

> Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.[163] (underlining added)

Applying this reasoning, the Panel concluded that it should begin by examining Argentina's claims under Article 4.2 of the *Agreement on Agriculture*, because that Agreement "deals more specifically and in detail with measures affecting market access of agricultural products".[164]

185. On appeal, Chile questions this decision by the Panel, and maintains that Article 4.2 of the *Agreement on Agriculture* "clearly is not specific or more detailed than Article II:1(b) with regard to tariff commitments". In Chile's view, Article II:1(b) deals with tariff bindings, whereas Article 4.2 deals with non-tariff measures.[165] Thus, as Chile sees it, the two provisions deal with *different*

[162]Indeed, Chile suggests in paragraph 34 of its appellant's submission that, had the Panel begun with Article II:1(b), it would "most likely have avoided the error of inventing a new definition of 'ordinary customs duties' which has no apparent basis in the text of Article II:1(b)." Thus Chile is in fact making a legal argument in support of a substantive claim under Article II:1(b).

[163]Appellate Body Report, *supra*, footnote 58, para. 204.

[164]Panel Report, para. 7.16.

[165]Chile's response to questioning at the oral hearing.

subjects. Accordingly, Chile appears to argue that the approach we articulated in *EC – Bananas III* does not apply to a relationship between two provisions that do not concern the same subject.

186. It is clear, as a preliminary matter, that Article 4.2 of the *Agreement on Agriculture* applies *specifically* to agricultural products, whereas Article II:1(b) of the GATT applies *generally* to trade in *all* goods. Moreover, Article 21.1 of the *Agreement on Agriculture* provides, in relevant part, that the provisions of the GATT 1994 apply "subject to the provisions" of the *Agreement on Agriculture*. In our Report in *EC – Bananas III*, we interpreted Article 21.1 to mean that:

> … the provisions of the GATT 1994 … apply to market access commitments concerning agricultural products, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter.[166]

187. With these considerations in mind, we turn now to Chile's contention that Article 4.2 of the *Agreement on Agriculture* "is not a specific or more detailed way of addressing the prohibition against exceeding tariff bindings under Article II:1(b)".[167] Our consideration of this argument requires a comparison of these two provisions in these two covered agreements. Article 4.1 of the *Agreement on Agriculture* explains that market access concessions for agricultural products relate to tariff bindings and to reductions of tariffs, as well as to other market access commitments that can be found in Members' Schedules. Article 4.2 requires Members not to maintain "any measures of the kind which have been required to be converted into ordinary customs duties", and provides an illustrative list of measures "other than ordinary customs duties". Article 4.2 prevents WTO Members from *circumventing* their commitments on "ordinary customs duties" by prohibiting them from "maintaining, reverting to, or resorting to" measures other than "ordinary customs duties". The first sentence of Article II:1(b) of the GATT 1994 *also* deals with "ordinary customs duties", by requiring Members *not* to impose "ordinary customs duties" in excess of those recorded in their Schedules. Thus, the obligations in Article 4.2 of the *Agreement on Agriculture* and those in the first sentence of Article II:1(b) of the GATT both deal with "ordinary customs duties" and market access for imported products. As we see it, the difference between the two provisions is 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. Thus, in our view, this argument by Chile is flawed.

188. Chile argues, as well, that the drafters of Article 4.2 of the *Agreement on Agriculture* borrowed the term "ordinary customs duties" from Article II:1(b) of the GATT 1947, and that,

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[166]Appellate Body Report, *supra*, footnote 58, para. 155.

[167]Chile's appellant's submission, para. 29.

therefore, Article II:1(b) of the GATT 1994 should be addressed before addressing Article 4.2 of the *Agreement on Agriculture*. Certainly it is true that Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994 both refer to "ordinary customs duties". And we agree with the Panel that the term "ordinary customs duties" should be interpreted in the same way in both of these provisions. However, 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. Therefore, the mere fact that the term "ordinary customs duties" in Article 4.2 derives from Article II:1(b) of the GATT 1947 does not suggest that Article II:1(b) should be examined before Article 4.2. Thus, we find no merit in this additional argument by Chile.

189. As these two provisions, in these two covered agreements, establish distinct legal obligations, it is our view that the outcome of this case would be the same, whether we begin our analysis with an examination of the issues raised under Article 4.2 of the *Agreement on Agriculture*, or with those raised under Article II:1(b) of the GATT 1994. Indeed, Chile itself concedes that the Panel could have come to a correct interpretation of both Article 4.2 and Article II:1(b) even by following the order of analysis that the Panel chose to adopt.[168] Chile, moreover, concedes that the Panel's decision to proceed first with an assessment of Argentina's claim under Article 4.2 would "not, by itself, be a reversible error".[169] We understand Chile to mean by this that the order of analysis would not, taken alone, alter the outcome of the case.

190. Finally, as a practical matter, even if 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. Indeed, and as we have already pointed out, Article 21.1 of the *Agreement on Agriculture* mandates that the provisions of the GATT 1994 apply *subject to* the provisions of the *Agreement on Agriculture*. Hence, any finding under Article II:1(b) of the GATT 1994 would be subject to further inquiry under the *Agreement on Agriculture*. In contrast, if 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 separate finding on whether the price band system also results in a violation of Article II:1(b) of the

[168]Chile's appellant's submission, para. 35.

[169]Chile's response to questioning at the oral hearing.

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 may be. Without a price band system, there could be no price band duties.

191. We therefore conclude that the Panel did not err in choosing to examine Argentina's claim under Article 4.2 of the *Agreement on Agriculture* before examining Argentina's claim under Article II:1(b) of the GATT 1994. Our own analysis will follow the same order.

VIII. Article 4.2 of the *Agreement on Agriculture*

192. Argentina argued before the Panel that Chile's price band system is a measure "of the kind which has been required to be converted into ordinary customs duties" and which, by the terms of Article 4.2 of the *Agreement on Agriculture*, Members are required not to "maintain". Argentina claimed that, in maintaining the price band system, Chile is acting inconsistently with Article 4.2.

193. In reply, Chile contended before the Panel that Chile's price band system is *not* a measure "of the kind which has been required to be converted into ordinary customs duties" by virtue of Article 4.2 of the *Agreement on Agriculture*. According to Chile, the duties resulting from Chile's price band system are "ordinary customs duties", and Chile's price band system—which is merely a system for determining the level of those duties—is, therefore, consistent with Article 4.2.

194. The Panel found Chile's price band system to be inconsistent with Chile's obligations under Article 4.2 of the *Agreement on Agriculture*. The Panel concluded that:

> … the Chilean PBS is "a similar border measure other than ordinary customs duties" which is not maintained "under balance-of-payment 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", within the meaning of footnote 1 to the Agreement on Agriculture. We therefore conclude that the Chilean PBS is a measure "of the kind which ha[s] been required to be converted into ordinary customs duties", within the meaning of Article 4.2 of the Agreement on Agriculture. By maintaining a measure which should have been converted, *Chile has acted inconsistently with Article 4.2 of the Agreement on Agriculture*.[170]

[170]Panel Report, para. 7.102.

195. Chile appeals the Panel's findings under Article 4.2 of the *Agreement on Agriculture*, arguing that the Panel erred in finding that:

- Chile's price band system constitutes a border measure "similar to" a "variable import levy" and a "minimum import price" within the meaning of footnote 1 and Article 4.2;

- the duties imposed under Chile's price band system are not "ordinary customs duties", within the meaning of Article 4.2 and footnote 1; and, ultimately, that

- Chile's price band system is inconsistent with Article 4.2.

196. Before addressing these specific issues appealed by Chile, we recall that the preamble to the *Agreement on Agriculture* states that an objective of that Agreement is "to establish a fair and market-oriented agricultural trading system", and to initiate a reform process "through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines".[171] The preamble further states that, to achieve this objective, it is necessary to provide for reductions in protection, "resulting in correcting and preventing restrictions and distortions in world agricultural markets,"[172] through achieving "specific binding commitments," *inter alia*, in the area of market access.[173]

197. We are certainly aware of the importance of agricultural and primary products to many developing country Members of the WTO. We are mindful also that the significance of trade in such products is reflected in a number of places in the covered agreements, including the *Agreement on Agriculture*. In the preamble to the *Agreement on Agriculture*, it is said that developed country Members agreed that, in implementing their commitments on market access, they "would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members".[174] In addition, the *Agreement on Agriculture* allows for certain special and differential treatment for developing country Members relating to the treatment of agricultural

[171]Preamble to the *Agreement on Agriculture*, recital 2.

[172]*Ibid.*, recital 3.

[173]*Ibid.*, recital 4.

[174]*Ibid.*, recital 5.

products. Article 15 is the general provision of the *Agreement on Agriculture* dealing with special and differential treatment for developing country Members. It stipulates that such treatment "shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments."[175] Thus, special and differential treatment for developing country Members applies, under the *Agreement on Agriculture*, only where and to the extent that it is specifically provided for in that Agreement.

198. The *Agreement on Agriculture* does not exempt developing country Members from the requirement not to maintain measures prohibited by Article 4.2 of that Agreement. Although Annex 5 on "Special Treatment with Respect to Paragraph 2 of Article 4" permits certain derogations by developing countries from some of the requirements of Article 4.2, these are not relevant here.

199. In these circumstances, although the participants in this dispute are developing country Members, we are not required to apply any of these specialized provisions in coming to our decision in this appeal. Moreover, both Chile and Argentina confirmed, in response to questioning at the oral hearing, that the fact that they both are developing countries has no relevance in this dispute.

200. That said, we turn now to Article 4, which is the main provision of Part III of the *Agreement on Agriculture*. As its title indicates, Article 4 deals with "Market Access".[176] During the course of the Uruguay Round, negotiators identified certain border measures which have in common that they restrict the volume or distort the price of imports of agricultural products. The negotiators decided that these border measures should be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. Thus, they 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. The Uruguay Round negotiators agreed that market access would be improved—both in the short term and in the long term—through bindings and reductions of tariffs and minimum access requirements, which were to be recorded in Members' Schedules.

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[175]Article 15 on "Special Treatment" provides in relevant part:

> In keeping with the recognition that differential and more favourable treatment for developing country Members is an integral part of the negotiation, special and differential treatment in respect of commitments shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments.

[176]Part III contains only one other provision, namely, Article 5, which provides for a special safeguard mechanism that may be used to derogate from the requirements of Article 4 when certain conditions are met. We will discuss Article 5 later in this section.

201. Thus, Article 4 of the *Agreement on Agriculture* is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products. Article 4 provides, in its entirety:

> *Market Access*
>
> 1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market-access commitments as specified therein.
>
> 2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.
>
> _____
>
> [1]These measures include quantitative 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.

202. In our examination of the issues appealed relating to Article 4.2 and to footnote 1, we will address the Panel's general interpretation of both before discussing, in detail, the specific issues raised by Chile regarding these provisions. Then we will review the Panel's assessment of Chile's price band system in the light of our general interpretation of Article 4.2, and also of our interpretations of the specific categories of measures listed in footnote 1 to which the parties and the Panel referred. These categories include "variable import levies", "minimum import prices" and "similar border measures other than ordinary customs duties".

203. We emphasize that we have been asked, in this appeal, to examine the measure before us—Chile's price band system—for its consistency with certain of Chile's WTO obligations. We have not been asked to examine any other measure of any other WTO Member. Therefore, we need not, and do not, offer any view on the consistency with WTO obligations of price band systems in general, or the consistency with WTO obligations of any specific price band system that may be applied by any other Member.

A. *General Interpretative Analysis of Article 4.2 and Footnote 1*

204. We turn first to the ordinary meaning of Article 4.2, in its context and in the light of its object and purpose.[177] This provision requires Members not to maintain, resort to, or revert to certain kinds of measures with a view to "implementing their commitments on market access"[178] for imports of agricultural products. These requirements of Article 4.2, which came into effect with the entry into force of the *WTO Agreement* on 1 January 1995, apply to "any measures of the kind which have been required to be converted into ordinary customs duties". The meaning and scope of this underlined phrase is a central issue in this case.

205. We begin with a consideration of the use of the present perfect tense in the phrase "any measures of the kind which *have been required* to be converted into ordinary customs duties". Chile sees a special significance in the use of this tense; Argentina does not. Chile asserts that the use of the present perfect tense (that is, "*have been required* to be converted") in Article 4.2 should be borne in mind when interpreting this provision.[179] In Chile's view, it is "highly relevant"[180], for the interpretation of Article 4.2, that no country *actually converted* a price band system into tariffs during the Uruguay Round negotiations, and also that no Member *requested* Chile to convert Chile's price band system into tariffs during those negotiations. Chile concedes, however, that a measure is

[177]Article 31 of the *Vienna Convention*.

[178]Preamble of the *Agreement on Agriculture*, recital 5.

[179]Chile criticizes the Panel's order of analysis within Article 4. In Chile's view, the Panel moved too quickly from interpreting the terms "any measures of the kind" in paragraph 2 to the specific categories of measures listed in footnote 1. Chile alleges that, in doing so, the Panel failed to attribute sufficient significance to the entire phrase "*which have been required to be converted into ordinary customs duties"* (emphasis added) in the main text of paragraph 2, except to note that this wording did not necessarily mean that only the measures that were actually converted were banned. Chile refers in particular to paragraphs 7.18-7.19 of the Panel Report. Chile's appellant's submission, para. 87. We note, however, that the text of paragraph 2 itself directs the interpreter to footnote 1. Given that, in interpreting Article 4.2, we address the terms of the provision in a different sequence than did the Panel, and because the result of our interpretation is essentially the same as that reached by the Panel, we do not find it necessary to address Chile's contention in more detail.

[180]Chile's response to questioning at the oral hearing.

not necessarily consistent with Article 4.2 simply because the measure was neither actually converted nor requested to be converted by the end of the Uruguay Round.[181]

206. We agree with Chile that Article 4.2 of the *Agreement on Agriculture* should be interpreted in a way that gives meaning to the use of the present perfect tense in that provision—particularly in the light of the fact that most of the other obligations in the *Agreement on Agriculture* and in the other covered agreements are expressed in the present, and not in the present perfect, tense. In general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present.[182] As used in Article 4.2, this temporal connotation relates to the date *by which* Members had to convert measures covered by Article 4.2 into ordinary customs duties, as well as to the date *from which* Members had to refrain from maintaining, reverting to, or resorting to, measures prohibited by Article 4.2. The conversion into ordinary customs duties of measures within the meaning of Article 4.2 began *during* the Uruguay Round multilateral trade negotiations, because ordinary customs duties that were to "compensate" for and replace converted border measures were to be recorded in Members' draft WTO Schedules by the *conclusion* of those negotiations. These draft Schedules, in turn, had to be verified before the signing of the *WTO Agreement* on 15 April 1994. Thereafter, there was no longer an option to replace measures covered by Article 4.2 with ordinary customs duties in excess of the levels of previously bound tariff rates. Moreover, as of the date of entry into force of the *WTO Agreement* on 1 January 1995, Members are required not to "maintain, revert to, or resort to" measures covered by Article 4.2 of the *Agreement on Agriculture*.

207. If Article 4.2 were to read "any measures of the kind which *are* required to be converted", this would imply that if a Member—for whatever reason—had failed, by the end of the Uruguay Round negotiations, to convert a measure within the meaning of Article 4.2, it could, *even today*, replace that measure with ordinary customs duties in excess of bound tariff rates.[183] But, as Chile and Argentina have agreed, this is clearly not so.[184] It seems to us that Article 4.2 was drafted in the present perfect tense to ensure that measures that were required to be converted as a result of the Uruguay Round—but were not converted—could not be maintained, by virtue of that Article, from the date of the entry into force of the *WTO Agreement* on 1 January 1995.

[181]Chile's appellant's submission, para. 81.

[182]G. Leech and J. Svartvik, *A Communicative Grammar of English*, (Longman, 1979), paras 112-119. R. Quirk and S. Greenbaum, *A University Grammar of English*, (Longman, 1979), paras. 328-330.

[183]Bound tariffs could, however, be renegotiated pursuant to Article XXVIII of the GATT 1994.

[184]At the oral hearing, the participants and third participants agreed that such replacement rights expired as of the entry into force of the *WTO Agreement*.

208. Thus, contrary to what Chile argues, giving meaning and effect to the use of the present perfect tense in the phase "have been required" does not suggest that the scope of the phrase "any measures of the kind which have been required to be converted into ordinary customs duties" must be limited only to those measures which were *actually* converted, or were *requested* to be converted, into ordinary customs duties by the end of the Uruguay Round. Indeed, in our view, such an interpretation would fail to give meaning and effect to the word "*any*" and the phrase "*of the kind*", which are descriptive of the word "measures" in that provision. A plain reading of these words suggests that the drafters intended to cover a broad category of measures. We do not see how proper meaning and effect could be accorded to the word "any" and the phrase "of the kind" in Article 4.2 if that provision were read to include only those specific measures that were singled out to be converted into ordinary customs duties by negotiating partners in the course of the Uruguay Round.

209. The wording of footnote 1 to the *Agreement on Agriculture* confirms our interpretation. The footnote imparts meaning to Article 4.2 by enumerating examples of "measures of the kind which have been required to be converted", and which Members must not maintain, revert to, or resort to, from the date of the entry into force of the *WTO Agreement*. Specifically, and as both participants agree[185], the use of the word "include" in the footnote indicates that the list of measures is illustrative, not exhaustive. And, clearly, the existence of footnote 1 suggests that there will be "measures of the kind which have been required to be converted" that were *not* specifically identified during the Uruguay Round negotiations. Thus, in our view, the illustrative nature of this list lends support to our interpretation that the measures covered by Article 4.2 are not limited only to those that were *actually* converted, or were requested to be converted, into ordinary customs duties during the Uruguay Round.

210. Footnote 1 also refers to a residual category of "similar border measures other than ordinary customs duties", which indicates that the drafters of the Agreement did not seek to identify all "measures which have been required to be converted" during the Uruguay Round negotiations. The existence of this residual category confirms our interpretation that Article 4.2 covers more than merely the measures that had been specifically identified or challenged by other negotiating partners in the course of the Uruguay Round.

211. Further, the context of Article 4.2 confirms our interpretation. Article 5.1 of the *Agreement on Agriculture*, the only provision in addition to Article 4 that is included in Part III of that Agreement, specifies that a Member may, under certain conditions, impose a special safeguard on imports of an agricultural product "in respect of which measures referred to in [Article 4.2] *have been*

[185]Participants' responses to questioning at the oral hearing.

converted into an ordinary customs duty". (emphasis added) In our view, the phrase "have been required to be converted" in Article 4.2 has a broader connotation than the phrase "have been converted" in Article 5.1.[186] Therefore, it is perfectly apt that Article 5.1 speaks of such special safeguards only with respect to those agricultural products for which measures covered by Article 4.2 "have been converted"—that is, have in fact already been converted—into ordinary customs duties. Article 5.1 illustrates that, where the drafters of the *Agreement on Agriculture* wanted to limit the application of a rule to measures that have *actually* been converted, they used specific language expressing that limitation.

212. Thus, the obligation in Article 4.2 not to "maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties" applies from the date of the entry into force of the *WTO Agreement*—regardless of whether or not a Member converted any such measures into ordinary customs duties before the conclusion of the Uruguay Round. The mere fact that no trading partner of a Member singled out a specific "measure of the kind" by the end of the Uruguay Round by requesting that it be converted into ordinary customs duties, does not mean that such a measure enjoys immunity from challenge in WTO dispute settlement. The obligation "not [to] maintain" such measures underscores that Members must not continue to apply measures covered by Article 4.2 from the date of entry into force of the *WTO Agreement*.[187]

213. Chile's argument that it is "highly relevant" that no country that had a price band system in place before the conclusion of the Uruguay Round actually converted it into ordinary customs duties[188] gives rise to another question, namely: is this practice relevant in interpreting Article 4.2 because it constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", within the meaning of the customary rule of interpretation codified in Article 31(3)(b) of the *Vienna Convention*? In our Report in *Japan – Taxes on Alcoholic Beverages*, we defined such "subsequent practice" as:

[186]In this context, we note that a special safeguard can be imposed only on those agricultural products for which a Member has reserved its right to do so in its Schedule.

[187]The obligation in Article 4.2 "not [to] resort to" can be understood as meaning that Members must not introduce new measures "of the kind" that it has not had in place in the past; the obligation "not [to] revert to" can be read in the sense that Members may not, at some later stage after the entry into force of the WTO, re-enact measures prohibited by Article 4.2. At the oral hearing, the participants agreed that the obligations not to "resort to, or revert to" prohibited measures are less relevant to this dispute than the obligation to "not maintain" such measures.

[188]Chile's appellant's submission, para. 95.

> … a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation.[189]

214. Neither the Panel record nor the participants' submissions on appeal suggests that there is a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of Article 4.2. Thus, in our view, this alleged practice of some Members does not amount to "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention.*

215. The requirements not to "maintain, resort to, or revert to" in Article 4.2 apply to "measures of the kind which have been required to be *converted into ordinary customs duties*". Obviously, what already *is* an ordinary customs duty need not and cannot be *converted into* an ordinary customs duty. Both before the Panel, and also on appeal, Chile has argued that the *duties* resulting from Chile's price band system *are* "ordinary customs duties". Chile maintains also that its price band *system* is *not* a measure of the kind which has been required to be converted, but is rather a system for determining the level of ordinary customs duties that will be applied between zero and the bound rate. Chile's argument raises the question of what was meant—before the conclusion of the Uruguay Round—by the requirement to *convert* "measures of the kind" into "ordinary customs duties".

216. Article 4.2 speaks of "measures of the kind which have been required to be *converted* into ordinary customs duties". The word "convert" means "undergo transformation".[190] The word "converted" connotes "changed in their nature", "turned into something different".[191] Thus, "measures which have been required to be converted into ordinary customs duties" had to be transformed into something they were not—namely, ordinary customs duties. The following example illustrates this point. The application of a "variable import levy", or a "minimum import price", as the terms are used in footnote 1, can result in the levying of a specific duty equal to the difference between a reference price and a target price, or minimum price. These resulting levies or specific duties take the same *form* as ordinary customs duties. However, the mere fact that a duty imposed on an import at the border is in the same *form* as an ordinary customs duty, does not mean that it is *not* a "variable import levy" or a "minimum import price". Clearly, as measures listed in footnote 1, "variable import levies" and "minimum import prices" had to be *converted into* ordinary customs duties by the end of the Uruguay Round. The mere fact that such measures result in the payment of duties does not exonerate a Member from the requirement not to maintain, resort to, or revert to those measures.

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[189]Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 107.

[190]*The New Shorter Oxford Dictionary*, L. Brown (ed.) (Clarendon Press), 1993, Vol. I, p. 502.

[191]*Ibid.*

217. Article 5, also found in Part III of the *Agreement on Agriculture* on "Market Access", lends contextual support to our interpretation of Article 4.2. In our view, the existence of a market access exemption in the form of a special safeguard provision under Article 5 implies that Article 4.2 should *not* be interpreted in a way that permits Members to maintain measures that a Member would not be permitted to maintain *but for* Article 5, and, much less, measures that are even more trade-distorting than special safeguards. In particular, if Article 4.2 were interpreted in a way that allowed Members to maintain measures that operate in a way similar to a special safeguard within the meaning of Article 5—but without respecting the conditions set out in that provision for invoking such measures—it would be difficult to see how proper meaning and effect could be given to those conditions set forth in Article 5.[192]

B. *Assessment of Chile's Price Band System in the Light of Article 4.2 and Footnote 1*

218. We turn now to the Panel's finding that Chile's price band system is a border measure similar to a variable import levy and a minimum import price within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*.[193]

219. Footnote 1 lists six categories of border measures and a residual category of such measures that are *included* in "measures of the kind which have been required to be converted into ordinary customs duties" within the meaning of Article 4.2.[194] The list is illustrative, and includes "quantitative 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". These kinds of measures were identified by the negotiators of the *Agreement on Agriculture* as measures that had to be converted into ordinary customs duties in order to ensure enhanced market access for imports of agricultural products.

220. Before the Panel, Argentina alleged that Chile's price band system is a "minimum import price" or a "variable import levy" system or, in any event, a "similar border measure other than

[192]We note that Chile has not reserved, in it Schedule, the right to apply special safeguards. In response to questioning at the oral hearing, no participant suggested that the interpretation of Article 4.2 should be different depending on whether or not a Member reserved such a right.

[193]Panel Report, paras. 7.47, 7.65 and 7.102.

[194]Footnote 1 exempts "measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of the GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the *WTO Agreement*." In their responses to questioning at the oral hearing, the participants agreed that these "measures" are not relevant in this appeal.

ordinary customs duties", and that, because of the prohibition of such measures in Article 4.2, Chile's price band system must not be maintained.[195]

221. A plain reading of Article 4.2 and footnote 1 makes clear that, if Chile's price band system falls within any *one* of the categories of measures listed in footnote 1, it is among the "measures of the kind which have been required to be converted into ordinary customs duties", and thus must not be maintained, resorted to, or reverted to, as of the date of entry into force of the *WTO Agreement*.[196] Therefore, we will examine whether Chile's price band system falls within one or more of the categories of measures that are prohibited by Article 4.2 and footnote 1.

222. It must be emphasized that the Panel did not find that Chile's price band system constitutes a "variable import levy" or "minimum import price" system *per se*. Rather, the Panel found that Chile's price band system:

> … is a hybrid instrument, which has most, but not all, of its characteristics in common with either or both a variable import levy and a minimum import price. After careful assessment of the evidence before us, however, we consider as a factual matter that the Chilean PBS shares *sufficient fundamental* characteristics with those schemes for it to be considered similar to them, and that the observed differences between the Chilean PBS and either of those schemes are not of such a nature as to detract from this similarity.[197] (original emphasis, underlining added)

223. Chile argues, on appeal, that the Panel erred in finding that Chile's price band system is a border measure similar to a variable import levy or a minimum import price within the meaning of footnote 1 to Article 4.2.

224. At the outset, we stress that, as Argentina argues[198], the Panel's characterization of its finding "as a factual matter" does not mean that the issue whether Chile's price band system is a border measure similar to a variable import levy or a minimum import price is shielded from appellate review. This is a question of law, and not of fact, and thus is clearly within our jurisdiction under Article 17.6 of the DSU.[199] As we said in our Report in *EC – Hormones*, the assessment of the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty

[195]Panel Report, para. 7.20.

[196]Provided such measure is not exempted under the latter part of footnote 1.

[197]Panel Report, para. 7.46. The Panel also concluded that Chile's price band system applies exclusively to imported goods and is enforced at the border by Chile's customs authorities and that it is, therefore, clearly a *border* measure. We agree. Panel Report, para. 7.25.

[198]Argentina's appellee's submission, para. 141.

[199]Article 17.6 of the DSU provides: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."

provision is an issue of legal characterization.[200] The mere assertion by a panel that its conclusion is a "factual matter" does not make it so. Here, the Panel's interpretation of the terms "variable import levies", "minimum import prices", and "similar border measures other than ordinary customs duties", as these terms are used in footnote 1, constitutes, not a *factual* determination, but rather a *legal* interpretation of the words of Article 4.2. Hence, these interpretations are within the purview of appellate review under Article 17.6 of the DSU. Moreover, the Panel's appraisal of Chile's price band system in the light of its legal interpretation is an application of the law to the facts of the case. All the same, in reviewing the Panel's assessment of Chile's price band system, we are mindful of the need to give due deference to the discretion of the Panel, as the "trier of fact", to weigh the evidence before it.

225. The Panel described its approach to assessing whether Chile's price band system is *similar* to "variable import levies" and/or "minimum import prices" within the meaning of footnote 1 as follows:

> First, as regards the term "similar", dictionaries define this term as "having a resemblance or likeness", "of the same nature or kind", and "having characteristics in common". Two measures are in our view "similar" if they share some, but not all, of their fundamental characteristics. If two measures share all of their fundamental characteristics, they are identical rather than similar. A border measure should therefore have *some* fundamental characteristics in common with one or more of the measures explicitly listed in footnote 1. It is then a matter of weighing the evidence to determine whether the characteristics are sufficiently close to be considered "similar".[201] (emphasis added, footnotes omitted)

226. We agree with the first part of the Panel's definition of the term "similar" as "having a resemblance or likeness", "of the same nature or kind", and "having characteristics in common".[202]

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[200] In our Report in *EC – Hormones*, we held that:

> Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. … Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. *The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question.* (emphasis added)

Appellate Body Report, *supra*, footnote 69, para. 132.

[201] Panel Report, para. 7.26.

[202] *The New Shorter Oxford English Dictionary*, *supra*, footnote 190, p. 2865.

However, in our view, the Panel went unnecessarily far in focusing on the degree to which two measures share characteristics of a "fundamental" nature. We see no basis for determining similarity by relying on characteristics of a "fundamental" nature. The Panel seems to substitute for the task of defining the term "similar" that of defining the term "fundamental". This merely complicates matters, because it raises the question of how to distinguish "fundamental" characteristics from those of a *less than* "fundamental" nature. The better and appropriate approach is to determine similarity by asking the question whether two or more things have likeness or resemblance sufficient to be similar to each other. In our view, the task of determining whether something is similar to something else must be approached on an empirical basis.

227. As suggested by Argentina, the Panel decided to assess Chile's price band system by comparing it to several individual categories of measures listed in footnote 1. Before looking at these categories of measures, we note that *all* of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do. Moreover, *all* of these measures have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market. However, even if Chile's price band system were to share these common characteristics with all of these border measures, it would not be sufficient to make that system a "similar border measure" within the meaning of footnote 1. There must be something more. To be "similar", Chile's price band system—in its specific factual configuration—must have, to recall the dictionary definitions we mentioned, sufficient "resemblance or likeness to", or be "of the same nature or kind" as, *at least one* of the specific categories of measures listed in footnote 1.

228. Before addressing the issue of *how much* or *what kind* of "similarity" Chile's price band system must display to be a measure prohibited by Article 4.2, it is necessary for us to identify *with what* that system is required to be similar. Any examination of "similarity" presupposes a *comparative* analysis. Thus, to determine whether Chile's price band system is "similar" within the meaning of footnote 1, it is necessary to identify *with which categories* that system must be compared. The Panel compared Chile's price band system with the same categories as those identified by Argentina. While Chile disagreed with the conclusions the Panel reached in relying on that comparison, Chile does not dispute the choice of those categories.

229. In assessing whether Chile's price band system is a "similar border measure", the Panel compared Chile's system to "variable import levies" and "minimum import prices" within the meaning of footnote 1. WTO Members have not chosen to define any of these "terms of art" in the *Agreement on Agriculture* or anywhere else in the *WTO Agreement.* The Panel concluded that it could not

develop an interpretation of the term "variable import levies" solely on the basis of the methods of interpretation codified in Article 31 of the *Vienna Convention*.[203] The Panel decided, therefore, to have recourse to "supplementary means of interpretation" within the meaning of Article 32 of that Convention. This led to the Panel's identification of what the Panel described as "fundamental characteristics" of "variable import levies" and "minimum import prices".[204]

230. In response to our questioning at the oral hearing, the participants said that they agree with these characteristics, although Chile believes that the Panel's list is incomplete.[205] However, we do

[203]Panel Report, para. 7.35.

[204]The characteristics identified by the Panel in paragraph 7.36 of its Report, are the following:

> (a) Variable levies generally operate on the basis of two prices: a threshold, or minimum import entry price and a border or c.i f. price for imports. The threshold price may be derived from and linked to the internal market price as such, or it may correspond to a governmentally determined (guide or threshold) price which is above the domestic market price. The import border or price reference may correspond to individual shipment prices but is more often an administratively determined lowest world market offer price.
>
> (b) A variable levy generally represents the difference between the threshold or minimum import entry price and the lowest world market offer price for the product concerned. In other words, the variable levy changes systematically in response to movements in either or both of these price parameters.
>
> (c) Variable levies generally operate so as to prevent the entry of imports priced below the threshold or minimum entry price. In this respect, that is, when prevailing world market prices are low relative to the threshold price, the protective effect of a variable levy rises, in terms of the fiscal charge imposed on imports, whereas this charge declines in the case of *ad valorem* tariffs or remains constant in the case of specific duties.
>
> (d) In addition to their protective effects, the stabilization effects of variable levies generally play a key role in insulating the domestic market from external price variations.
>
> (e) Notifications on minimum import prices indicate that these measures are generally not dissimilar from variable levies in many respects, including in terms of their protective and stabilization effects, but that their mode of operation is generally less complicated. Whereas variable import levies are generally based on the difference between the governmentally determined threshold and the lowest world market offer price for the product concerned, minimum import price schemes generally operate in relation to the actual transaction value of the imports. If the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference.

In paragraph 7.34 of the Panel Report, the Panel also states:

> As regards the context of those terms in footnote 1, we note that all the measures listed there are instruments which are characterized either by a lack of transparency and predictability, or impede transmission of world prices to the domestic market, or both.

[205]Participants' responses to questioning at the oral hearing. In Chile's view, the list of characteristics of "variable import levies" should include the absence of a "cap" at the level of the tariff binding.

not believe that the Panel properly applied Article 32 of the *Vienna Convention* in its analysis;[206] nor do we find it useful to endorse the characteristics identified by the Panel through this process as being of a "fundamental" nature.

231. Instead, we proceed to interpret the terms "variable import levies" and "minimum import prices, using the customary rules of interpretation as codified in the *Vienna Convention.* As always, in employing these rules, we discuss the ordinary meaning of these terms in their context, and in the light of their object and purpose.

232. We begin with the interpretation of "variable import levies". In examining the ordinary meaning of the term "*variable import levies*" as it appears in footnote 1, we note that a "levy" is a duty, tax, charge, or other exaction usually imposed or raised by legal execution or process.[207] An "import" levy is, of course, a duty assessed upon importation. A levy is "variable" when it is "liable to vary".[208] This feature alone, however, is not conclusive as to what constitutes a "variable import levy" within the meaning of footnote 1. An "ordinary customs duty" could also fit this description. A Member may, fully in accordance with Article II of the GATT 1994, exact a duty upon importation and periodically change the rate at which it applies that duty (provided the changed rates remain *below* the tariff rates bound in the Member's Schedule).[209] This change in the *applied* rate of duty could be made, for example, through an act of a Member's legislature or executive at any time. Moreover, it is clear that the term "variable import levies" as used in footnote 1 must have a meaning different from "ordinary customs duties", because "variable import levies" must be *converted into* "ordinary customs duties". Thus, the mere fact that an import duty can be varied cannot, alone, bring that duty within the category of "variable import levies" for purposes of footnote 1.

233. To determine *what kind* of variability makes an import levy a "variable import levy", we turn to the immediate context of the other words in footnote 1. The term "variable import levies" appears after the introductory phrase "[t]hese *measures* include". Article 4.2—to which the footnote is

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[206]Panel Report, para. 7.35. The Panel attempted to "distill" fundamental characteristics of "variable import levies" and "minimum import prices" from GATT 1947 committee reports and other documents from the period between 1958-1986. (See Panel Report, para. 7.35). Although the Panel conceded that these documents were not "preparatory works" within the meaning of Article 32, it considered them to form part of the "circumstances of the conclusion" of the *WTO Agreement*, because Uruguay Round negotiators "had access" to these documents during the negotiations. (See Panel Report, footnote 596). However, in response to questioning at the oral hearing, the participants did not contest that the Panel acted, in accordance with Article 13 of the DSU within its authority "to seek information from any relevant source" (although Chile maintained that the documents referred to by the Panel would not qualify as "supplementary means of interpretation" within the meaning of Article 32 of the *Vienna Convention*).

[207]*The New Shorter Oxford English Dictionary*, *supra*, footnote 190, p. 1574.

[208]*Ibid.*, p. 3547.

[209]Appellate Body Report, *Argentina – Textiles and Apparel*, *supra*, footnote 55, para. 46.

attached—also speaks of "*measures*". This suggests that at least one feature of "variable import levies" is the fact that the *measure* itself—as a mechanism—must impose the *variability* of the duties. Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Ordinary customs duties, by contrast, are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula. The level at which ordinary customs duties are applied can be *varied* by a legislature, but such duties will not be automatically and continuously *variable.* To vary the applied rate of duty in the case of ordinary customs duties will always require *separate* legislative or administrative action, whereas the ordinary meaning of the term "variable" implies that *no* such action is required.

234. However, in our view, the presence of a formula causing automatic and continuous variability of duties is a *necessary*, but by no means a *sufficient*, condition for a particular measure to be a "variable import levy" within the meaning of footnote 1.[210] "Variable import levies" have additional features that undermine the object and purpose of Article 4, which is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. This lack of transparency and this lack of predictability are liable to restrict the volume of imports. As Argentina points out, an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be.[211] This 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.

235. We turn now to the interpretation of the term "*minimum import prices*". Argentina alleges, and the Panel found, that Chile's price band system is similar also to a "minimum import price"[212], which is another prohibited measure listed in footnote 1 of Article 4.2.

236. 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. Here, too, no definition has been provided by the drafters of the *Agreement on Agriculture*. However, the Panel described "minimum import prices" as follows:

[210]The participants agreed with this in their responses to questioning at the oral hearing.

[211]Argentina's responses to questioning at the oral hearing.

[212]Panel Report, para. 7.46; Argentina's appellee's submission, para. 71.

> [these] schemes generally operate in relation to the actual transaction value of the imports. If the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference.[213]

237. The Panel also said that minimum import prices "are generally not dissimilar from variable import levies in many respects, including in terms of their protective and stabilization effects, but that their mode of operation is generally less complicated."[214] The main difference between minimum import prices and variable import levies is, according to the Panel, that "variable import levies are generally based on the difference between the *governmentally determined threshold* and the lowest world market offer price for the product concerned, while minimum import price schemes generally operate in relation to the *actual transaction value* of the imports."[215] (emphasis added)

238. In response to questioning at the oral hearing, the participants said they do not object to the Panel's definition of a "minimum import price". Their disagreement relates instead to whether Chile's price band system is *similar* to a minimum import price system prohibited by Article 4.2.

239. We turn next to the Panel's determination that Chile's price band system is a border measure *similar* to "variable import levies" and "minimum import prices". We must determine whether Chile's price band system—in its particular features—shares sufficient features with these two categories of prohibited measures to resemble, or "be of the same nature or kind" and, thus, also to be prohibited by Article 4.2.

240. The Panel described Chile's price band system as having an "intrinsically unstable, intransparent and unpredictable nature …".[216] Indeed, the Panel saw "a considerable lack of transparency and unpredictability" in the measure.[217] On appeal, Argentina emphasizes that the combination of a lack of transparency and a lack of predictability are the features of Chile's price band system that, most of all, make it "similar" to "variable import levies" within the meaning of footnote 1.[218]

241. We note that it is undisputed between the participants that a formula inherent in Chile's price band system causes and ensures automatic and continuous variability of the duties resulting from that system. However, one of Chile's arguments on appeal relates to the particular formula used in

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[213]Panel Report, para. 7.36(e).

[214]*Ibid.*

[215]*Ibid.*

[216]Panel Report, para. 7.61.

[217]*Ibid.*, para. 7.44.

[218]Argentina's appellee's submission, paras. 80, 122 and 147.

establishing the price bands in Chile's system. Chile alleges that the Panel did not take sufficient account of the fact that the lower and upper thresholds of Chile's price bands vary in relation to "world prices", and not in relation to domestic prices, or to some Chilean target price.[219] Chile argues that its price band system compares "current world prices" with "historic world prices" over a five-year period, rather than comparing them with prices on Chile's domestic market. Chile maintains that the lower thresholds of Chile's price bands are different in this respect from the floor or minimum price that the Panel thought was one of the characteristics of both variable import levies and minimum import price systems.[220]

242. The Panel stated that:

> the lower threshold of the Chilean PBS is not explicitly derived from, or linked to, an internal market-related price, as is often the case in variable import levy schemes.[221]

The Panel thus recognized that Chile's price bands vary in relation to "world prices", and that, in this respect, Chile's price band system is not *identical* to a variable import levy or a minimum import price scheme. The fact that Chile's price bands vary in relation to—albeit historic—world prices, rather than in relation to domestic market or target prices, does not suggest—at first glance—that Chile's price band system effectively disconnects the domestic market from international price developments. We will, however, return to this issue later.

243. The Panel also stated that Chile's price band system *need not be identical* to variable import levies or minimum import prices to be considered *similar* to these prohibited categories of measures listed in footnote 1, provided that Chile's price band system bears sufficient resemblance to such measures. The Panel went on to examine whether the determination of the lower thresholds of Chile's price bands operates in such a way as to render it similar to a domestic target price or domestic market price. The Panel noted that:

[219]Here, Chile refers to the Panel's characterization of "variable import levies" as "generally operat[ing] on the basis of … a threshold price [that] may be derived from and linked to the internal market price as such, or it may correspond to a governmentally determined (guide or threshold) price which is above the domestic market price". Panel Report, para. 7.36(a).

[220]Chile's appellant's submission, para. 110.

[221]Panel Report, para. 7.45.

> on the basis of the evidence before us, it cannot be excluded that the lower threshold of the PBS, given the way in which it is designed, particularly with the many adjustments made by the administering agencies to the basic world market price quotations employed, including for inflation, operates in practice as a "proxy" for such internal prices.[222]

244. In Chile's view, the Panel erred in law in finding "similarity" based on what "cannot be excluded". We believe that Chile reads too much into the Panel's formulation. The Panel *did not equate* Chile's price band system with variable import levies or minimum import price systems that are related to domestic target prices. Rather, taking into account the evidence submitted, the Panel stated only that the lower thresholds of Chile's price bands may often, but not in all cases, be equal to or higher than the domestic price. This may be due—in part—to the way in which the price band thresholds, which are first calculated on the basis of monthly f.o.b. world prices over the last five years, are converted to a c.i.f. basis. As Chile points out, this may also be due—in part—to the way in which domestic prices to a certain extent reflect changes in world market prices.[223] As we see it, the Panel found "similarity" based on actual evidence, and not, as Chile implies, on conjecture.

245. We also find merit in the Panel's finding that:

> the PBS thresholds are determined, inter alia, after discarding 25 per cent of "atypical observations" at the bottom and at the top, hence substantially increasing the likelihood that the lower threshold of the PBS will equal or exceed the higher internal price.[224]

Based on this, the Panel concluded that the lower thresholds of Chile's price bands operate like *substitutes* for domestic target prices. Hence, the Panel was satisfied that this feature of Chile's price band system was also similar to the features of variable import levies and minimum import prices.

246. We agree with the Panel's view—to a point. But we believe that the Panel placed too much emphasis on whether or not Chile's price bands are related to domestic target prices or domestic market prices. In our view—even though Chile's price bands are set in relation to world prices from a past five-year period—Chile's price band system can still have the *effect* of impeding the transmission of international price developments to the domestic market in a way similar to that of other categories of prohibited measures listed in footnote 1. There are factors other than world market prices that are relevant to the assessment of Chile's price bands. The prices that represent the highest

[222]Panel Report, para. 7.45.

[223]In Chile's view, the fact that the products at issue are commodities makes domestic prices more prone to align with prices for commodities in any foreign market, because of the high degree of substitutability. Chile's response to questioning at the oral hearing.

[224]Panel Report, para. 7.45.

25 per cent as well as the lowest 25 per cent of the world prices from the past five years are discarded in selecting the "highest and lowest f.o.b. prices" for the determination of Chile's annual price bands. Furthermore, we place considerable importance on the intransparent and unpredictable way in which the "highest and lowest f.o.b. prices" that have been selected are converted to a c.i.f. basis by adding "import costs". As Chile concedes, no published legislation or regulation sets out how these "import costs" are calculated.[225]

247. In addition to the lack of transparency and the lack of predictability that are inherent in how Chile's price bands are established, we see similar shortcomings in the way the other essential element of Chile's price band system—the reference price—is determined. As we have explained, the duties resulting from Chile's price band system are equal to the difference between the price band thresholds and the reference price. Chile sets the reference price on a weekly basis, and it does so in a way that is neither transparent nor predictable.

248. The Panel described the particular reference price used in Chile's price band system in the following terms:

> The Reference Price used in the context of the Chilean PBS is clearly disconnected from the actual transaction value, unlike minimum import price schemes. It does use a lowest "market of concern" price, however, similar to the lowest market offer price generally used in variable import levy schemes.[226]

249. Under Chile's price band system, the price used to set the weekly reference price is the lowest f.o.b. price observed, at the time of embarkation, in any foreign "market of concern" to Chile for "qualities of products actually liable to be imported to Chile".[227] No Chilean legislation or regulation specifies how the international "markets of concern" and the "qualities of concern" are selected.[228] Thus, it is not by any means certain that the weekly reference price is representative of the current world market price. Moreover, the weekly reference price used under Chile's price band system is certainly *not* representative of an average of current lowest prices found in *all* markets of concern. As a result, the process of selecting the reference price is not transparent, and it is not predictable for traders.

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[225]Chile's responses to questioning at the oral hearing.

[226]Panel Report, para. 7.45.

[227]Chile's response to questioning at the oral hearing. Chile informed the Panel that, "the weekly reference price corresponds to the lowest f.o.b. price for wheat during that week for the markets and qualities of concern to Chile, i.e. for the wheat actually liable to be imported". Chile's response to question 9(c) of the Panel.

[228]Chile's response to questioning at the oral hearing.

250. Furthermore, under Chile's system, the same weekly reference price applies to imports of *all* goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value of the shipment. Moreover, unlike with the five-year average monthly prices used in the calculation of Chile's annual price bands, the lowest "market of concern" price used to determine the weekly reference price is not adjusted for "import costs", and thus is not converted from an f.o.b. basis to a c.i.f. basis. This is likely to inflate the amount of specific duties applied under Chile's price band system, because these duties are imposed in an amount equal to the difference between Chile's *annual* price band thresholds, which are based on *higher* c.i.f. prices, and Chile's *weekly* reference prices, which are based on *lower* f.o.b. prices. Therefore, the way in which Chile's weekly reference prices are determined contributes to giving Chile's price band system the effect of impeding the transmission of international price developments to Chile's market.

251. Consequently, even if were to assume, for the moment, that one feature of Chile's price band system is *not* similar to the features of "variable import levies" and "minimum import prices" because the thresholds of Chile's price bands vary in relation to—albeit historic—world market prices rather than domestic target prices, this would not change our overall assessment of Chile's price band system. This is because specific duties resulting from Chile's price band system are equal to the *difference* between two parameters—the annual price band thresholds and the weekly reference prices applicable to the shipment in question. Therefore, continuing with our hypothesis, even if we were to assume that one of the two parameters—Chile's annual price band thresholds—does *not* distort the transmission of world market prices to Chile's market, it would nevertheless remain that the other parameter—Chile's weekly reference prices—is liable to distort—if not disconnect—that transmission by virtue of the way it is determined on a weekly basis. Consequently, even in such a hypothetical case, the duties resulting from Chile's price band system, which are equal to the difference between these two parameters, would *not* transmit world market price developments to Chile's market in the same way as "ordinary customs duties".

252. Thus, although there are some dissimilarities between Chile's price band system and the features of "minimum import prices" and "variable import levies" we have identified earlier, the way Chile's system is designed, and the way it operates in its overall nature, are sufficiently "similar" to the features of both of those two categories of prohibited measures to make Chile's price band system—in its particular features—a "similar border measure" within the meaning of footnote 1 to Article 4.2.

253. However, Chile argues that, in making its finding, the Panel failed to take proper account of the fact that the total amount of duties that may be levied as a result of Chile's price band system is "capped" at the level of the tariff rate of 31.5 per cent *ad valorem* bound in Chile's Schedule.

According to Chile, the existence of this cap differentiates Chile's price band system from a "variable import levy". Chile argues that Chile's price band system enables imports to enter Chile's market below the lower thresholds of Chile's price bands when world market prices drop below a certain level, while allowing imports to enter at duty rates that can be as low as zero when the weekly reference prices rise above the upper thresholds of Chile's price bands. Chile submits that the cap makes Chile's price band system less distortive and less insulating than if Chile simply levied duties at its bound tariff level.[229]

254. This argument by Chile compels us to consider whether Chile's price band system ceases to be similar to a "variable import levy" because it is subject to a cap. In doing so, we find nothing in Article 4.2 to suggest that a measure prohibited by that provision would be rendered consistent with it if applied with a cap. Before the conclusion of the Uruguay Round, a measure could be recognized as a "variable import levy" even if the products to which the measure applied were subject to tariff bindings.[230] And, there is nothing in the text of Article 4.2 to indicate that a measure, which was recognized as a "variable import levy" before the Uruguay Round, is exempt from the requirements of Article 4.2 simply because tariffs on some, or all, of the products to which that measure *now* applies were bound as a result of the Uruguay Round.

255. The context of Article 4.2 lends support to this interpretation. That context includes the *Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraph 6 and 10 of this Annex ("Guidelines"),* which are an Attachment to *Annex 5 on Special Treatment with respect to Paragraph 2 of Article 4.* Both the Attachment and the Annex form part of the *Agreement*

[229]Chile's appellant's submission, paras. 106-109. Moreover, Chile submits that the way in which the European Communities converted its pre-Uruguay Round variable import levies is "highly relevant" because it reveals what negotiators meant by the "unclear provisions of Article 4.2". Chile points out that the European Communities' conversion of its pre-Uruguay Round variable import levies involved binding the tariff in a way that made clear that those levies would continue to vary below a cap, but would not exceed that cap. Chile concedes, however, that the European Communities' pre-Uruguay Round variable import levies and its post-Uruguay Round converted systems are not at issue in this appeal. Chile's appellant's submission, paras. 91-92.

[230]In this respect, we note that, as illustrated by documents from GATT 1947, Contracting Parties to GATT 1947 regarded import levies which were applied to products subject to a tariff binding as variable import levies in spite of the existence of that binding:

> The General Agreement contains no provision on the use of 'variable import levies'. It is obvious that *if any such duty or levy is imposed on a 'bound' item,* the rate must not be raised in excess of what is permitted by Article II … . (emphasis added)

See Note by the Executive Secretary on "Questions relating to Bilateral Agreements, discrimination and Variable Taxes", dated 21 November 1961, GATT document L/1636, paras. 7-8.

on Agriculture. Paragraph 6 of the Guidelines[231] envisages that tariff equivalents resulting from conversion of measures within the meaning of Article 4.2 may *exceed previous bound rates*. This implies that, even if the product to which that measure applied was in fact subject to a tariff binding before the Uruguay Round, conversion of that measure may nevertheless have been required. Therefore, a measure cannot be excluded *per se* from the scope of Article 4.2 simply because the products to which that measure applies are subject to a tariff binding.

256. Relevant context can also be found in Articles II and XI of the GATT 1994. If Members were free to apply a measure with a "cap"—which, in the absence of that "cap", would be a prohibited "variable import levy"—Article 4.2 would, in our view, add little to the longstanding requirements of Articles II:1(b) and XI:1 of the GATT 1947. In fact, Chile concedes that the scope of measures prohibited by Article 4.2 extends beyond the tariffs in excess of bound rates that are prohibited by Article II and the "restrictions other than taxes, duties and charges" that are prohibited by Article XI:1.[232] In any event, it is difficult to see why Uruguay Round negotiators would "compensate" Members for converting prohibited measures by permitting them to raise tariffs on certain products, while permitting those Members to retain those measures and, at the same time, impose those higher tariffs on those same products. It is not clear why, if this were so, a Member would ever have converted a measure. All that a Member would have had to do to comply with Article 4.2 would have been to adopt a tariff binding—even at a higher level—on the products covered by the original measure. Had this been the intention of the Uruguay Round negotiators, there would have been no need to list price-based measures in footnote 1 among the categories of measures prohibited by Article 4.2. The drafters of the *Agreement on Agriculture* simply could have adopted a requirement that all tariffs on agricultural products be bound.

257. Contrary to Chile's view, we are not persuaded that the presence or the absence of a cap is essential in determining whether or not Chile's price band system is similar to a measure prohibited by Article 4.2. Chile's tariff binding will impose a limit on the total amount of duties that may be applied, and thus permit fluctuations in world market prices to be reflected in Chile's market, in cases when the duties resulting from Chile's price band system, when added to the applied *ad valorem* duty, exceed that tariff binding. However, the existence of the tariff binding will not eliminate the distortion in the transmission of world market prices to Chile's market in all other cases, where the

[231]Paragraph 6 provides:

> Where a tariff equivalent resulting from these guidelines is negative or lower than the *current bound rate*, the initial tariff equivalent may be established at the *current bound rate* or on the basis of national offers for that product. (emphasis added)

[232]Chile's appellant's submission, para. 81.

combination of the duties resulting from Chile's price band system, when added to the applied *ad valorem* duty, remains below Chile's bound rate of 31.5 per cent *ad valorem*.[233]

258. Moreover, contrary to what Chile argues, Chile's price band system is not necessarily less trade-distorting Nor does it insulate Chile's domestic market less, than it would, if Chile simply imposed duties at the *bound* tariff level of 31.5 per cent.[234] As Argentina stresses, the amount of a duty is not the only concern of Chile's trading partners. As Argentina argues, significant for traders, also, are the lack of transparency of certain features of Chile's price band system; the unpredictability of the level of duties; and the automaticity, the frequency, and the extent to which the duties fluctuate. These specific characteristics of Chile's price band system prevent enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4.

259. The fact that duties resulting from Chile's price band system are "capped" at 31.5 per cent *ad valorem* merely reduces the extent of the trade distortions in that system by reducing the extent to which those duties fluctuate. It does not, however, eliminate those distortions. Moreover, the cap does not *eliminate* the lack of transparency, or the lack of predictability, in the fluctuation of the duties resulting from Chile's price band system. Thus, the fact that Chile's price band system is subject to a "cap" may be said to make this system *less* inconsistent with Article 4.2. But this is not enough. Article 4.2 not only prohibits "similar border measures" from being applied to *some* products, or to *some* shipments of *some* products with low transaction values, or the imposition of duties on *some* products in an amount *beyond* the level of a bound tariff rate. Article 4.2 prohibits the application of such "similar border measures" to *all* products in *all* cases.

260. Therefore, contrary to what Chile contends, Chile's price band system does not simply ensure a reasonable margin of fluctuation of domestic prices.[235] In our view, "such reasonable margin of fluctuation" would mean that duties resulting from Chile's price band system would ensure that declines in world prices would not be *fully* reflected in domestic prices. However, when international prices *fall*, and when the weekly reference prices are below the lower thresholds of Chile's price bands, the total duties applied to particular shipments will, in many cases, result in an

[233]Panel Report, footnote 608.

[234]Chile's appellant's submission, para. 108.

[235]See Article 12 of Law 18.525. Chile's appellant's submission, para. 12.

overall entry price of that shipment that *rises* rather than *falls*.[236] Therefore, Chile's price band system does not merely moderate the effect of fluctuations in world market prices on Chile's market because it does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices—albeit to a lesser extent than the decrease in those prices. Nor does it tend only to "compensate" for these price declines. Instead, specific duties resulting from Chile's price band system tend to "overcompensate" for them, and to elevate the entry price of imports to Chile above the lower threshold of the relevant price band. In these circumstances, the entry price of such imports to Chile under Chile's price band system is even higher than if Chile simply applied a minimum import price at the level of the lower threshold of a Chilean price band. Therefore, we disagree with Chile that its price band system simply "moderates the effect of fluctuations in international prices on Chile's market".[237] Chile's price band system tends to "overcompensate" for the effect of decreases in international prices on the domestic market when weekly reference prices are set below the lower threshold of the relevant price band—up to the level at which Chile's tariff binding imposes a limit on the amount of duties that can be levied.

261. We emphasize that we reach our conclusion on the basis of the particular configuration and interaction of all these specific features of Chile's price band system. In assessing this measure, no *one* feature is determinative of whether a specific measure creates intransparent and unpredictable market access conditions. Nor does any particular feature of Chile's price band system, on its own, have the effect of disconnecting Chile's market from international price developments in a way that insulates Chile's market from the transmission of international prices, and prevents enhanced market access for imports of certain agricultural products.

262. We, therefore, uphold the Panel's finding, in paragraph 7.47 of the Panel Report, that Chile's price band system is a "border measure similar to 'variable import levies' and 'minimum import prices'" within the meaning of footnote 1 and Article 4.2 of the *Agreement on Agriculture.*

263. We turn now to examine the Panel's findings regarding the meaning of the term "ordinary customs duties" under Article 4.2 of the *Agreement on Agriculture*. We look first to the Panel's consideration of that term, and then review the Panel's interpretation in the light of Chile's objections on appeal.

[236]This is so because, when the weekly reference price is below the lower threshold of a Chilean price band, the specific duties resulting from Chile's price band system are equal to the difference between the lower price band threshold and the f.o.b. reference price, while the total duties applied to a particular shipment are added to that shipment's c.i f. transaction value.

[237]Panel Report, para. 4.49.

C. *The Interpretation of the Term "Ordinary Customs Duties" as used in Article 4.2 of the Agreement on Agriculture*

264. The Panel observed, first, that a measure of the kind which has been required to be *converted into* ordinary customs duties pursuant to Article 4.2 of the *Agreement on Agriculture* "is necessarily *not*, at the same time, an ordinary customs duty."[238] Accordingly, the Panel found that "a measure which is 'similar to' any of the measures listed in footnote 1 will also be 'other than ordinary customs duties'."[239] The Panel concluded, therefore, that a finding that Chile's price band system is "other than an ordinary customs duty" could "be expected to reinforce" its finding that Chile's price band system is similar to a variable import levy and a minimum import price.[240] For this reason, the Panel went on to examine whether Chile's price band system is "other than an ordinary customs duty" within the meaning of Article 4.2 of the *Agreement on Agriculture*. The Panel found that Article II:1(b) of GATT 1994 provides relevant context for the interpretation of the term "ordinary customs duties" in Article 4.2 of the *Agreement on Agriculture*.[241]

265. The Panel observed that neither Article 4.2 of the *Agreement on Agriculture* nor Article II:1(b) of the GATT 1994 defines explicitly what should be understood by "ordinary customs duties".[242] From an examination of the ordinary meaning of the term in the three official languages of the WTO[243], the Panel concluded that the term should be considered from two perspectives—one "empirical" and one "normative". The Panel explained:

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[238]Panel Report, para. 7.24. The Panel notes that this is, of course, subject to the proviso that such measure is not maintained under balance-of-payments provisions or other general, non-agriculture-specific provisions of the GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the *WTO Agreement*.

[239]Panel Report, para. 7.24.

[240]*Ibid.*

[241]*Ibid.*, para. 7.49.

[242]The Panel noted that these provisions do "give some indication as to what is *not* an 'ordinary' customs duty. On the one hand, Article II:1(b) of the GATT 1994 distinguishes 'ordinary' customs duties in its first sentence from 'all other duties or charges of any kind imposed on, or in connection with, the importation' in its second sentence. The latter category of '*other* duties or charges *of any kind*' appears to be a residual category, encompassing duties or charges imposed on or in connection with importation that cannot be considered 'ordinary' customs duties. On the other hand, Article 4.2 prohibits Members from maintaining, resorting to, or reverting to any measures of the kind which have been required to be converted into ordinary customs duties. As indicated earlier, all the measures listed in footnote 1 to Article 4.2 are, by definition, not 'ordinary' customs duties". Panel Report, para. 7.50.

[243]The Panel reasoned: "We note that 'ordinary customs duties' appear in the co-authentic French and Spanish versions as '*droits de douane proprement dits*' and '*derechos de aduana propiamente dichos*'. The dictionary meaning of 'ordinary" is 'occurring in regular custom or practice', 'of common or everyday occurrence, frequent, abundant', 'of the usual kind, not singular or exceptional, commonplace, mundane'. '*Propiamente dicho*' has been translated as 'true (something)' or '(something)' in the strict sense'". '*Proprement dit*' has been explained as '*au sens exact et restreint, au sens propre*' and '*stricto sensu*'". Panel Report, para. 7.51.

> It appears from these dictionary meanings that the English text, on the one hand, and the French and Spanish texts, on the other, differ in terms of the perspective from which they define "ordinary": the use of "ordinary" in the English text appears to define a particular kind of "customs duties" in reference to the *frequency* with which such customs duties can be found, whereas the French and Spanish texts suggest that the *narrow sense* of the term "customs duties" is being referred to. Thus, the English version describes a particular kind of customs duty from an *empirical* perspective, whereas the French and Spanish versions describe it from a *normative* perspective. We will therefore proceed to examine what should be considered "ordinary" both on an empirical and a normative basis."[244] (original emphasis, footnotes omitted)

266. With respect to these two perspectives, the Panel then provided its findings:

> As an *empirical* matter, we observe that Members, in regular practice, invariably express commitments in the ordinary customs duty column of their Schedules as *ad valorem* or specific duties, or combinations thereof. All "ordinary" customs duties may therefore be said to take the form of ad valorem or specific duties (or combinations thereof). As a *normative* matter, we observe that those scheduled duties always relate to either the value of the imported goods, in the case of *ad valorem* duties, or the volume of imported goods, in the case of specific duties. [245] (emphasis in the original, footnotes omitted)

267. The Panel conceded, however, that its own proposition is not valid in the reverse:

> We do not believe, however, that, conversely, the fact that a duty ultimately is labelled as an *ad valorem* or specific duty necessarily qualifies that duty as an ordinary customs duty. As a matter of fact, quite some "other duties or charges", registered as such in the "other duties and charges" column of Members' Schedules, appear to be expressed in specific or *ad valorem* terms. Put another way, a duty or charge can be expressed either in *ad valorem* or specific terms, but nevertheless not constitute an "ordinary" customs duty.[246]

268. Reasoning that the consideration of "exogenous" factors was also significant, the Panel concluded:

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[244]Panel Report, para. 7.51.

[245]*Ibid.*, para. 7.52.

[246]Panel Report, footnote 624 to para. 7.52.

> Such ordinary customs duties, however, do not appear to involve the consideration of any *other, exogenous, factors, such as, for instance, fluctuating world market prices*. We therefore consider that, for the purpose of Article II:1(b), first sentence, of GATT 1994 and Article 4.2 of the Agreement on Agriculture, an "ordinary" customs duty, that is, a customs duty *senso strictu*, is to be understood as referring to a customs duty which is *not applied on the basis of factors of an exogenous nature*.[247] (emphasis added)

269. In examining whether the duties resulting from Chile's price band system are "ordinary customs duties" in the light of the interpretation that it had developed for that purpose (that is, whether they are based on exogenous factors), the Panel found that such duties are "neither in the nature of *ad valorem* duties, nor specific duties, nor a combination thereof, in the sense that they are not just assessed on the transaction value of individual shipments, nor just on the volume of the goods"[248], but rather are assessed on the basis of "exogenous price factors i.e. the [difference between the] lower threshold of the PBS and the Reference Price."[249] For this reason, the Panel found that the *duties* resulting from Chile's price band system are not "ordinary customs duties".

270. On appeal, Chile challenges the Panel's interpretation that the term "ordinary customs duties" has a *normative* connotation. Chile also contests the Panel's interpretation that "ordinary customs duties" must not be applied on the basis of *exogenous* factors such as, *inter alia*, fluctuating world market prices, and argues that a decision to apply a duty at less than the bound rate will *always* be based on exogenous factors. We share Chile's misgivings about the Panel's definition of "ordinary customs duties".

271. We do not agree with the Panel's reasoning that, necessarily, "[a]s a *normative* matter, … those scheduled duties always relate to either the value of the imported goods, in the case of *ad valorem* duties, or the volume of the imported goods, in the case of specific duties."[250] (emphasis in original, underlining added) Indeed, the Panel came to this conclusion by interpreting the French and Spanish versions of the term "ordinary customs duty" to mean something *different* from the ordinary meaning of the English version of that term. It is difficult to see how, in doing so, the Panel took into

[247]Panel Report, para. 7.52.

[248]*Ibid.*, para. 7.62.

[249]*Ibid.*

[250]*Ibid.*, para. 7.52.

account the rule of interpretation codified in Article 33(4) of the *Vienna Convention* whereby "when a comparison of the authentic texts discloses a difference of meaning …, the meaning which best *reconciles* the texts … shall be adopted." (emphasis added).

272. We also find it difficult to understand how the Panel could find "normative" support for its reasoning by examining the Schedules of WTO Members. We have observed in a previous case that "[t]he ordinary meaning of the term 'concessions' suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations".[251] A Member's Schedule imposes obligations on the Member who has made the concessions. The Schedule of one Member, and even the scheduling practice of a number of Members, is not relevant in interpreting the meaning of a treaty provision, unless that practice amounts to "subsequent practice in the application of the treaty" within the meaning of Article 31(3)(b) of the *Vienna Convention*.[252] In this case the Panel Report contains no support for the conclusion that the scheduling activity of WTO Members amounts to "subsequent practice".

273. Surely Members will ordinarily take into account the interests of domestic consumers and domestic producers in setting their *applied* tariff rates at a certain level. In doing so, they will doubtless take into account factors such as world market prices and domestic price developments. These are *exogenous* factors, as the Panel used that term. According to the Panel, duties that are calculated on the basis of such *exogenous* factors are *not* ordinary customs duties. This would imply that such duties be *prohibited* under Article II:1(b) of the GATT unless recorded in the "other duties or charges" column of a Member's Schedule. We see no legal basis for such a conclusion.[253]

274. Moreover, not each and every duty that is calculated on the basis of the *value* and/or *volume* of imports is necessarily an "ordinary customs duty". For example, in the case at hand, the *ad*

[251]Appellate Body Report, *EC – Bananas III*, *supra*, footnote 58, para. 154. Panel Report in *United States Restrictions on Imports of Sugar*, adopted 22 June 1989, BISD 36S/331, para. 5.2.

[252]Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, paras. 84, 90 and 93. See also our paras. 213-214 of this Report.

[253]We stated in *Argentina – Textiles and Apparel*, *supra*, footnote 55, para. 46, that "a tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to apply a rate of duty that is less than that provided for in its Schedule." Thus, the fact that the "cap" (recorded in the ordinary customs duty" column of a schedule) is a specific or an *ad valorem* duty does not mean that a Member will not apply a tariff at a lower rate, or that the rate it applies will not be based on what the Panel calls "*exogenous*" factors. Indeed, as we noted above, it is difficult to conceive that a Member would ever make changes to its applied tariff rate except based on *exogenous* factors such as the interests of domestic consumers or producers.

valorem duty is calculated on the *value* of the imports. The calculation of the *specific* duty resulting from Chile's price band system is, on the other hand, based, not only on the difference between the lower threshold of the price band and the applicable reference price, but also on the *volume* per unit of the imports.

275. We further note, in examining Article 4.2 of the *Agreement on Agriculture*, that the *second* sentence of Article II:1(b) of the GATT 1994, does *not* specify what form "other duties or charges" must take to qualify as such within the meaning of that sentence. The Panel's own approach of reviewing Members' Schedules reveals that many, if not most, "other duties or charges" are expressed in *ad valorem* and/or specific terms, which does not, of course, make them "ordinary customs duties" under the first sentence of Article II:1(b).

276. As context for this phrase in Article 4.2 of the *Agreement on Agriculture*, we observe that Article II:2 of the GATT 1994 sets out examples of measures that do *not* qualify as either "ordinary customs duties" or "other duties or charges". These measures include charges equivalent to internal taxes, anti-dumping and countervailing duties, and fees or other charges commensurate with the cost of services rendered. They too may be based on the value and/or volume of imports, and yet Article II:2 distinguishes them from "ordinary customs duties" by providing that "[n]othing in [Article II] shall prevent any Member from imposing" them "at any time on the importation of any product".

277. Contextual support for interpreting the term "ordinary customs duties" also appears in Annex 5 to the *Agreement on Agriculture*. Annex 5, read together with the Attachment to Annex 5 ("*Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex*"), contemplates the calculation of "tariff equivalents" in a way that would result in ordinary customs duties "expressed as *ad valorem* or specific rates". We do not find an obligation in either of those provisions that would require Members to refrain from basing their duties on what the Panel calls "exogenous factors". Rather, all that is required is that "ordinary customs duties" be expressed in the *form* of "*ad valorem* or specific rates".

278. In the light of the foregoing, we disagree with the Panel's definition of "ordinary customs duties" and, therefore, we *reverse* the Panel's finding, in paragraph 7.52 of the Panel Report, that the term "ordinary customs duty", as used in Article 4.2 of the *Agreement on Agriculture*, is to be understood as "referring to a customs duty which is not applied to factors of an exogenous nature".[254]

[254]In doing so, we wish to underline that we are not saying that Chile's price band duties *are* "ordinary customs duties" within the meaning of Article 4.2 of the *Agreement on Agriculture*. We are merely saying that Chile's price band duties take the *form* of "ordinary customs duties", rather than seeking to qualify them as "ordinary customs duties" or as "any other duties or charges".

279. This does not change our conclusion that Chile's price band system is a *measure* "similar" to "variable import levies" or "minimum import prices" within the meaning of Article 4.2 and footnote 1 of the *Agreement on Agriculture*. In other words, 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*.

280. We find, therefore, that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture.*

IX. Article II:1(b) of the GATT 1994

281. In addressing Argentina's claim under Article II:1(b) of the GATT 1994, the Panel recalled that it had found Chile's price band system to be a border measure "other than an ordinary customs duty", which is prohibited under Article 4.2 of the *Agreement on Agriculture*. Having also found that "ordinary customs duties" must have the same meaning in Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994, the Panel then concluded that duties resulting from Chile's price band system do not constitute "ordinary customs duties" and that, therefore, "their consistency with Article II:1(b) cannot be assessed under the first sentence of that provision." [255]

282. The Panel further observed that Chile did not record its price band system in the column of its Schedule for "other duties and charges" and stated, in this respect, that:

> If other duties or charges were not recorded but are nevertheless levied, they are inconsistent with the *second* sentence of Article II:1(b), in light of the Understanding on the Interpretation of Article II:1(b). We note that Chile did not record its price band system in the "other duties and charges" column of its Schedule.[256] (emphasis added)

283. Based on this reasoning, the Panel then concluded that:

> … the Chilean PBS duties are inconsistent with Article II:1(b) of the GATT 1994.[257]

284. On appeal, Chile argues that the Panel erred in finding that the duties resulting from Chile's price band system are "other duties or charges" prohibited by the second sentence of Article II:1(b).

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[255]Panel Report, para. 7.104.

[256]*Ibid.*, para. 7.107.

[257]*Ibid.*, para. 7.108.

285. We have reversed the Panel's finding that the duties resulting from Chile's price band system constitute a violation of the *second* sentence of Article II:1(b) on the grounds that the Panel acted inconsistently with Article 11 of the DSU. We also note that the Panel made no finding on the *first* sentence of Article II:1(b), because, in the Panel's view, the consistency of the duties resulting from Chile's price band system could not be assessed under that provision.

286. Argentina asks us to rule that Chile's price band system is inconsistent with the *first* sentence of Article II:1(b). Argentina's request is, however, conditioned on our reversal of the Panel's finding that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*. As this condition has not been fulfilled, and as Chile has not requested a finding with respect to the *first* sentence of Article II:1(b), we do not see it as necessary for us to rule on whether Chile's price band system is inconsistent with the first sentence of Article II:1(b) of the GATT 1994.

287. In this respect, we also recall our earlier conclusion on the issue of the order of analysis between Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994. We said that, if we were to find that Chile's price band system is inconsistent with Article 4.2 of the *Agreement of Agriculture*, we would not need to make a separate finding on whether Chile's price band system also results in a violation of Article II:1(b) of the GATT 1994 to resolve this dispute.[258] Thus, we make no ruling on Article II:1(b) of the GATT 1994.

X. Findings and Conclusions

288. For the reasons set out in this Report, the Appellate Body:

(a) finds that the Panel acted inconsistently with Article 11 of the DSU by making its finding, in paragraph 7.108 of the Panel Report, that the duties resulting from Chile's price band system are inconsistent with Article II:1(b) of the GATT 1994, on the basis of the *second* sentence of that provision, which was not before the Panel, and, therefore, reverses this finding;

(b) decides that the Panel did not err in choosing to examine Argentina's claim under Article 4.2 of the *Agreement on Agriculture* before examining Argentina's claim under Article II:1(b) of the GATT 1994;

(c) with respect to Article 4.2 of the *Agreement on Agriculture*:

[258]See para. 190 of this Report.

(i) upholds the Panel's finding, in paragraphs 7.47 and 7.65 of the Panel Report, that Chile's price band system is a border measure that is similar to variable import levies and minimum import prices;

(ii) reverses the Panel's finding, in paragraphs 7.52 and 7.60 of the Panel Report, that an "ordinary customs duty" is to be understood as "referring to a customs duty which is not applied on the basis of factors of an exogenous nature";

(iii) upholds the Panel's finding, in paragraphs 7.102 and 8.1(a) of the Panel Report, that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*;

(d) decides, in the light of these findings, that it is not necessary to rule on whether Chile's price band system is consistent with the *first* sentence of Article II:1(b) of the GATT 1994.

289. The Appellate Body recommends that the DSB request Chile to bring its price band system, as found, in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 9th day of September 2002 by:

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Georges Michel Abi-Saab
Presiding Member

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James Bacchus
Member

John Lockhart
Member