

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

**ARB-2002-2/15**

*Arbitration  
under Article 21.3(c) of the  
Understanding on Rules and Procedures  
Governing the Settlement of Disputes*

Award of the Arbitrator  
John Lockhart



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## TABLE OF ARBITRATIONS CITED IN THIS AWARD

Short Title	Full Title and Citation of Arbitration
<i>Australia – Salmon</i>	Award of the Arbitrator, <i>Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS18/9, 23 February 1999, DSR 1999:I, 267.
<i>Argentina – Hides and Leather</i>	Award of the Arbitrator, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS155/10, 31 August 2001.
<i>Canada – Autos</i>	Award of the Arbitrator, <i>Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS139/12, WT/DS142/12, 4 October 2000.
<i>Canada – Patent Term</i>	Award of the Arbitrator, <i>Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS170/10, 28 February 2001.
<i>Canada – Pharmaceutical Patents</i>	Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS114/13, 18 August 2000.
<i>Chile – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2589.
<i>EC – Bananas III</i>	Award of the Arbitrator, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS27/15, 7 January 1998, DSR 1998:I, 3.
<i>Indonesia – Autos</i>	Award of the Arbitrator, <i>Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, 4029.
<i>Korea – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937.
<i>US – Hot-Rolled Steel</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS184/13, 19 February 2002.
<i>US – Section 110(5) Copyright Act</i>	Award of the Arbitrator, <i>United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS160/12, 15 January 2001.
<i>US – 1916 Act</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS136/11, WT/DS162/14, 28 February 2001.

WORLD TRADE ORGANIZATION  
AWARD OF THE ARBITRATOR

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

Parties:

*Argentina*  
*Chile*

ARB-2002-2/15

Arbitrator:

John Lockhart

**I. Introduction**

1. On 23 October 2002, the Dispute Settlement Body ("DSB") adopted the Appellate Body report<sup>1</sup> and the panel report<sup>2</sup>, as modified by the Appellate Body report, in *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* ("*Chile – Price Band System*").<sup>3</sup> At the DSB meeting of 11 November 2002, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Chile informed the DSB of its ongoing consultations with Argentina to find a mutually agreeable solution and that it would require a "reasonable period of time", pursuant to the terms of Article 21.3, to implement the recommendations and rulings of the DSB in this dispute.<sup>4</sup>

2. On 6 December 2002, Chile notified the DSB that consultations with Argentina had not resulted in agreement on the reasonable period of time for implementation, and therefore, Chile requested that such period be determined by binding arbitration, in accordance with Article 21.3(c) of the DSU.<sup>5</sup> By joint letter dated 16 December 2002, Chile and Argentina requested that I serve as arbitrator.<sup>6</sup> They also indicated in that letter that they had agreed to extend the deadline for the completion of the arbitration until 90 days after the date of appointment of the Arbitrator.<sup>7</sup> They agreed further that, notwithstanding this extension of the 90-day period of time stipulated in

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<sup>1</sup>Appellate Body Report, WT/DS207/AB/R, adopted 23 October 2002.

<sup>2</sup>Panel Report, WT/DS207/R, 3 May 2002, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207/AB/R.

<sup>3</sup>WT/DS207/8.

<sup>4</sup>WT/DSB/M/136.

<sup>5</sup>WT/DS207/9.

<sup>6</sup>WT/DS207/11.

<sup>7</sup>*Ibid.*

Article 21.3(c) of the DSU, the arbitration award would be deemed to be an award under Article 21.3(c) of the DSU.<sup>8</sup> My acceptance of the designation as Arbitrator was conveyed to the parties by letter dated 17 December 2002.<sup>9</sup>

3. Written submissions were received from Chile and Argentina on 27 January 2003, and an oral hearing was held on 17 February 2003. Chile and Argentina each submitted additional documentation during the oral hearing. Neither raised any objection to the submission of such documentation by the other party. The parties were permitted to file written comments on each other's submissions by Thursday, 20 February. Both parties submitted comments, but raised no objection to my consideration of the new documentation. That documentation has accordingly been included in the record of this arbitration.

## **II. Arguments of the Parties**

### *A. Chile*

4. Chile requests that I determine the "reasonable period of time" to be 18 months from the date of the DSB's adoption of the panel and the Appellate Body reports in this dispute, so that the period would expire on 23 April 2004.<sup>10</sup>

5. According to Chile, implementation of the recommendations and rulings of the DSB will entail passage of a new law to modify appropriately the price band system ("PBS") found to be WTO-inconsistent by the panel and the Appellate Body in this case.<sup>11</sup> Chile states that, as a tariff measure, the PBS has the status of a tax under Chilean law.<sup>12</sup> The imposition or modification of a tax is subject to substantive and procedural limitations prescribed by the Constitution of Chile, which provides that all taxes (including the imposition and modification thereof) shall be regulated by a law passed by the National Congress.<sup>13</sup> This legislative prerogative may not be delegated to the President, thereby precluding the possibility that the PBS could be amended solely by Executive action.<sup>14</sup>

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<sup>8</sup>WT/DS207/11.

<sup>9</sup>WT/DS207/12.

<sup>10</sup>Chile's submission, para. 61.

<sup>11</sup>*Ibid.*, para. 18.

<sup>12</sup>*Ibid.*, para. 19.

<sup>13</sup>*Ibid.*

<sup>14</sup>*Ibid.*, para. 20.

1. Implementation Process in Chile

6. Chile identifies a "pre-legislative" phase through which any proposed legislation must first proceed. This phase is not governed or mandated by law in Chile.<sup>15</sup> In practice, extensive consultations take place at this stage "between the authorities and the representatives of institutions and agencies, both public and private, particularly the various organizations or associations representing the interests that will be affected by the new legislation."<sup>16</sup> For a measure modifying the PBS, discussion will involve the Interministerial Committee on International Economic Relations, a committee comprised of various government agencies whose portfolios relate to finance, agriculture, and/or foreign affairs.<sup>17</sup> Consultations at this stage include development of "technical, political, social and legal studies" on the issue to be the subject of legislation, as well as analysis and preparation of the text of a new measure.<sup>18</sup>

7. Chile says that the pre-legislative phase concerning the implementation required in this dispute has special difficulties, and emphasizes that the PBS has served as a "cornerstone" of Chile's agricultural policy for almost 20 years.<sup>19</sup> According to Chile, the PBS is intended to respond to price fluctuations stemming from market interventions by agricultural exporting countries. Chile maintains that the consequent reliance of the Chilean agricultural sector on the PBS renders the pre-legislative phase very critical, as evidenced by (i) the concern expressed by leading public officials and private sector interests at the prospect of any modification of the PBS, and (ii) "in general the irritation caused by the conclusions of the [panel and Appellate Body] reports" in this case.<sup>20</sup>

8. Given these considerations, Chile notes that "all of the Ministries and government departments involved have undertaken to ensure that the sectors in question are aware that Chile is required to make a number of adjustments to the PBS as a result of its international commitments."<sup>21</sup> To this end, the Ministry of Agriculture has held ongoing discussions with agricultural trade associations on the consequences of the panel and Appellate Body reports in this dispute for the current PBS.<sup>22</sup> Furthermore, according to Chile, until the end of 2002, Chile and Argentina were engaged in consultations with a view to arriving at a mutually satisfactory solution, not only as

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<sup>15</sup>Chile's submission, para. 23.

<sup>16</sup>*Ibid.*, para. 24.

<sup>17</sup>*Ibid.*, para. 27.

<sup>18</sup>*Ibid.*, paras. 24 and 26.

<sup>19</sup>*Ibid.*, para. 7.

<sup>20</sup>*Ibid.*, para. 25.

<sup>21</sup>*Ibid.*, para. 26.

<sup>22</sup>Chile's response to questioning at the oral hearing.

regards the reasonable period of time for implementation of the reports, but also with respect to the changes to the PBS that would be required by such implementation.<sup>23</sup> Also during this time, the Interministerial Committee has begun discussions on the requirements for implementation and the nature of amendments that may be needed to the PBS.<sup>24</sup> Chile states that this pre-legislative phase of consultations concerning the measure required to amend the PBS has not yet been completed.<sup>25</sup>

9. Regarding the legislative phase, Chile explains that all tax measures must be passed by the National Congress, but the President alone possesses the authority to "initiate" tax legislation.<sup>26</sup> The draft law is then sent to one house of the National Congress, the Chamber of Deputies.<sup>27</sup> "[A]nalysis of [the bill's] general aspects and main ideas" is undertaken by the Commission on Finance of the Chamber of Deputies.<sup>28</sup> The Commission's conclusions are transmitted to the full Chamber.<sup>29</sup> The Chamber then engages in a "general discussion" of the proposed law to "decide whether to approve or reject the idea of legislating" on the particular subject.<sup>30</sup>

10. After the bill is approved by the Chamber of Deputies in general discussion, it is sent to various legislative commissions that have jurisdiction over the bill.<sup>31</sup> In the case of a measure modifying the PBS, the following commissions will examine the specific content of the proposed law: Commission on Finance; Economic Commission; Commission on Agriculture; and Foreign Relations Commission.<sup>32</sup> After commission review, the Chamber as a whole studies the law in greater detail during its "specific discussion".<sup>33</sup> When the Chamber approves the bill, it is sent to the second house of the legislature, the Senate, where the bill undergoes an identical process of review.<sup>34</sup>

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<sup>23</sup>Chile's submission, para. 26.

<sup>24</sup>Chile's response to questioning at the oral hearing.

<sup>25</sup>*Ibid.*

<sup>26</sup>Chile's submission, paras. 19 and 30.

<sup>27</sup>*Ibid.*, para. 31.

<sup>28</sup>*Ibid.*, para. 34.

<sup>29</sup>*Ibid.*, para. 35.

<sup>30</sup>*Ibid.*

<sup>31</sup>*Ibid.*, para. 36.

<sup>32</sup>*Ibid.*, para. 33.

<sup>33</sup>*Ibid.*, para. 36. During the specific discussion, the Chamber may introduce amendments or return the bill to the commissions for further study. (Chile's submission, para. 36)

<sup>34</sup>Chile's submission, para. 36. If the Senate approves an amended version of the bill, both versions are discussed by a joint Chamber-Senate Commission and then a compromise version is voted upon by each house. (Chile's response to questioning at the oral hearing)



11. Once approved by both houses of the National Congress, the bill is sent to the President for approval.<sup>35</sup> Upon "endorsement" of the bill<sup>36</sup>, the President issues a decree of promulgation and submits the bill for constitutional review by the Comptroller-General.<sup>37</sup> After the bill has been declared constitutionally sound by the Comptroller-General<sup>38</sup>, the President has the bill published as law in the Official Journal.<sup>39</sup> Publication of the law is the final step required in the legislative process.

12. Chile states that the average period of time for passage of "regulatory"<sup>40</sup> legislation is approximately 24 months<sup>41</sup>, and the corresponding time for tax legislation is about 19 months.<sup>42</sup> The "urgency" procedures<sup>43</sup> have no bearing on the "reasonable period of time" for implementation because under Chilean law use of these procedures is left to the discretion of the President and, in any event, either house may reject the urgency request.<sup>44</sup> More importantly, as recognized by the Arbitrators in *Chile – Alcoholic Beverages*, and *Korea – Alcoholic Beverages*, implementing Members are not required to employ procedures outside the normal legislative processes when implementing the recommendations and rulings of the DSB.<sup>45</sup>

## 2. Chile's Proposal for a Reasonable Period of Time

13. Chile argues that the "reasonable period of time" for implementation provided for in Article 21.3(c) of the DSU should be read in the light of Article 22, which deals with the consequences of a Member's failure to comply with the recommendations and rulings of the DSB

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<sup>35</sup>Chile's submission, para. 38. If the President does not approve the bill, he or she returns it to the National Congress, with relevant comments, within thirty days. The National Congress may then approve the comments or, by special majority, reject some or all of them. It may also reject the bill in its entirety. If approved, the bill is returned to the President for promulgation. (Chile's submission, para. 38)

<sup>36</sup>Endorsement may be explicit or implicit, as when the President does not return a bill within 30 days of its transmission. (Chile's submission, para. 39)

<sup>37</sup>Chile's submission, paras. 40 and 42.

<sup>38</sup>Chile also notes that constitutional review by the Constitutional Court may be requested at any previous legislative stage, but that such "request does not suspend the processing of the draft [law]." (Chile's submission, para. 46)

<sup>39</sup>Chile's submission, paras. 43–44.

<sup>40</sup>"Regulatory" laws are laws which directly or indirectly regulate public institutions, including their establishment, their operations and functioning, their rights and obligations to citizens, and certain other matters. (Chile's response to questioning at the oral hearing)

<sup>41</sup>Chile's submission, para. 48.

<sup>42</sup>Chile's response to questioning at the oral hearing.

<sup>43</sup>Argentina argues that Chile should be expected to employ the constitutionally-authorized "urgency modalities", whereby the President may seek expedited review of draft legislation. By designating a bill as "urgent", "very urgent", or "for immediate discussion", when submitting the bill to the National Congress, the President may request that the time period for the particular step of the legislative process be limited to 30 days, 10 days, or 3 days, respectively. (Argentina's submission, para. 36)

<sup>44</sup>Chile's response to questioning at the oral hearing.

<sup>45</sup>Chile's statement at the oral hearing.

within the reasonable period of time determined pursuant to Article 21.3.<sup>46</sup> In particular, when determining the "reasonable period of time", Chile contends that an arbitrator should allow time for the implementing Member to take those actions necessary for the "full and efficient implementation" of recommendations and rulings of the DSB, which is the preferred course of action prescribed by Article 22.<sup>47</sup>

14. Chile also asserts that Article 21.3(c) does not establish 15 months as a *maximum* period of time within which an arbitrator should fix the "reasonable period of time" for implementation.<sup>48</sup> Rather, establishing the reasonableness of the time for implementation requires the arbitrator to consider the specific circumstances of each case.<sup>49</sup> Chile finds the following circumstances in this case to warrant a "reasonable period of time" beyond 15 months: (i) the significance of the PBS as a "cornerstone" of Chile's agricultural policy for almost 20 years and the consequent serious impact of a modification of the PBS<sup>50</sup>; (ii) the intensity of the political opposition, both within the legislature and in the private sector, to reform of the PBS<sup>51</sup>; and (iii) the fact that implementation requires passage of a new law (as opposed to an administrative measure), and the "process" involved in that passage, namely, the pre-legislative discussions and the stages of legislation outlined by Chile in its submission.<sup>52</sup>

15. Chile points out that it does not raise simply the "contentiousness" of the PBS modification or the possible need for structural adjustment in the agricultural sector as relevant matters for consideration in fixing the "reasonable period of time", as Chile acknowledges that matters of that kind have been discounted by previous arbitrators. Rather, Chile regards the impact of any PBS modification on the sectors concerned to be relevant to my determination in terms of evaluating the complexities inherent in the pre-legislative and legislative phases, which impact upon the assessment of the reasonable period of time for implementation.<sup>53</sup>

16. Chile emphasizes Article 21.2 of the DSU, which provides that "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement." In the light of the importance of agriculture to the

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<sup>46</sup>Chile's submission, para. 54.

<sup>47</sup>*Ibid.*

<sup>48</sup>*Ibid.*, para. 52.

<sup>49</sup>*Ibid.*

<sup>50</sup>*Ibid.*, para. 51.

<sup>51</sup>*Ibid.*

<sup>52</sup>*Ibid.*, para. 53.

<sup>53</sup>Chile's statement at the oral hearing.

Chilean economy, and the longstanding role of the PBS in Chilean agricultural and trade policy, Chile argues that I should take account of its specific interests as a developing country Member when determining a "reasonable period of time" for implementation.<sup>54</sup>

17. Chile rejects the contention of Argentina that implementation in this case will be achieved only by the repeal of the PBS. Although it has not yet determined precisely what form its new law will take to implement the rulings in this dispute, Chile asserts that determining the "best" or even "only" means of implementation is beyond my competence as an arbitrator under Article 21.3(c) of the DSU. Chile maintains that, as previous arbitrators have observed, the means of implementation lie exclusively in the discretion of the implementing Member, and my sole task, according to Chile, is to evaluate what period of time would be "reasonable" for the means of implementation identified by the Member.<sup>55</sup>

18. Furthermore, Chile finds Argentina's comparison to the short periods of time required for passage of Laws 19.772 (amending the WTO bound sugar tariff) and 19.716 (implementing *Chile – Alcoholic Beverages*) to be erroneous. Law 19.772 *increased*, rather than lowered, the protection for the sugar industry, and it was also preceded by several bilateral negotiations with trading partners, both factors thereby facilitating the pre-legislative phase.<sup>56</sup> With regard to Law 19.716, Chile had been in negotiations with the European Communities for 10 months when the measure was introduced into the National Congress, and the President made use of the urgency procedure.<sup>57</sup> Therefore, Chile argues that the experience in the passage of these two laws is not relevant to my determination of a "reasonable period of time" for implementation in this case.

#### B. *Argentina*

19. Argentina requests that I determine nine months and six days to be a "reasonable period of time" under Article 21.3(c) of the DSU for implementation of the recommendations and rulings of the DSB in this case.

20. Argentina observes that, under Article 21.1 of the DSU, compliance with the recommendations and rulings of the DSB must be "prompt".<sup>58</sup> As stated by the Arbitrator in *Chile – Alcoholic Beverages*, "reading Articles 21.1 and 21.3 together, 'prompt' compliance is, in principle,

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<sup>54</sup>Chile's submission, paras. 55–59.

<sup>55</sup>Chile's statement at the oral hearing.

<sup>56</sup>*Ibid.*

<sup>57</sup>Chile's response to questioning at the oral hearing. Chile added that without the "reasonable period of time" coming to an end, it would not have been necessary to use the urgency procedure.

<sup>58</sup>Argentina's submission, para. 21.

'immediate' compliance".<sup>59</sup> In the light of this fundamental requirement of prompt, or immediate, compliance, Argentina argues that the "reasonable period of time" provided for implementation in Article 21.3 constitutes an "exception" to the general principle of prompt compliance, in the sense of immediate compliance.

21. Accordingly, Argentina agrees with Chile that the 15-month period of time identified in Article 21.3(c) is a "guideline only of an indicative nature" and that the focus of an arbitrator should be on the particular circumstances of the case.<sup>60</sup> Recalling that previous arbitrators have found that implementation should occur in the shortest period of time possible within the legal system of a Member<sup>61</sup>, Argentina submits that Chile bears the burden of establishing that the period of time proposed by Chile, which goes beyond the "shortest possible period" in its system, is justified according to the circumstances of the case.<sup>62</sup>

22. Argentina argues that "the only appropriate way to implement the DSB recommendations consists of the elimination of the PBS, inasmuch as the PBS imposes [duties on] the products covered by the dispute ... that do not constitute ordinary customs duties."<sup>63</sup> In the light of the reasoning of the Appellate Body in this dispute, according to Argentina, the only measure that Chile may implement to afford protection to the producers of the agricultural products at issue is to apply ordinary customs duties, as permitted by the *Agreement on Agriculture*.<sup>64</sup>

23. Argentina submits that, Chile has failed to adequately define the methods of implementation it intends to follow in this case. Although Chile has stated that a tax law will be required, the absence of further specificity as to the scope or text of the intended measure cannot support the 18 months requested by Chile, particularly since the implementation of the recommendations and rulings of the DSB can be achieved only through the relatively "simple" act of repeal of the PBS.<sup>65</sup> Argentina argues that this absence of further clarification from Chile as to the means of implementation should result in a shorter, not longer, "reasonable period of time" for implementation.<sup>66</sup>

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<sup>59</sup>Argentina's submission, para. 23 (quoting Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 38).

<sup>60</sup>*Ibid.*, para. 27.

<sup>61</sup>*Ibid.*, paras. 28–29.

<sup>62</sup>*Ibid.*, paras. 29–30; Argentina's statement at the oral hearing.

<sup>63</sup>Argentina's submission, para. 18.

<sup>64</sup>*Ibid.*, paras. 19(a)–(e).

<sup>65</sup>Argentina's statement at the oral hearing.

<sup>66</sup>*Ibid.*

24. Argentina acknowledges that, under the Chilean Constitution and the Constitutional Organic Law of the National Congress, the passage of legislation requires Presidential initiation and discussion in the National Congress, followed by Presidential endorsement and promulgation before publication.<sup>67</sup> According to Argentina, Chilean law provides that this legislative process may "extend up to five months".<sup>68</sup> With regard to the "pre-legislative" phase described by Chile, however, Argentina argues that no such phase is mandated by Chilean law, and therefore, it should not be taken into account in my determination of the "reasonable period of time" for implementation.<sup>69</sup> Should I find the pre-legislative phase to be relevant, Argentina requests that I accord little weight to this step in the legislative process.

25. Argentina also notes that Article 52 of the Chilean Constitution establishes "urgency modalities" whereby the President may seek expedited review of draft legislation.<sup>70</sup> Under this urgency procedure, the President may designate a bill as "urgent", "very urgent", or "for immediate discussion", when submitting the bill to the National Congress.<sup>71</sup> Such designation limits the period of time for the particular step of the legislative process to 30 days, 10 days, or 3 days, respectively.<sup>72</sup> Argentina submits that, in complying with its international obligations, Chile should reasonably be expected to employ the urgency procedure, which factor should be considered in my determination of the "reasonable period of time" for implementation.<sup>73</sup>

26. Notwithstanding the nomenclature of "urgency" attached to this procedure, Argentina suggests that this practice is indeed a "normal and usual" part of Chile's legislative process.<sup>74</sup> Referring to 23 laws that it states were passed in 2002 under the urgency procedure, Argentina argues that this option is exercised by the President with sufficient regularity, when seeking to expedite legislation, to justify its employment by Chile in the present matter.<sup>75</sup> Argentina argues that I should therefore take the availability of the urgency procedure into account when fixing the "reasonable period of time" for implementation of the recommendations and rulings of the DSB.

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<sup>67</sup>Argentina's submission, para. 35.

<sup>68</sup>*Ibid.*

<sup>69</sup>Argentina's statement at the oral hearing.

<sup>70</sup>Argentina's submission, para. 36.

<sup>71</sup>*Ibid.*

<sup>72</sup>*Ibid.*

<sup>73</sup>*Ibid.*, Argentina's statement at the oral hearing.

<sup>74</sup>Argentina's statement at the oral hearing.

<sup>75</sup>*Ibid.*

27. That legislation may be passed far more expeditiously than suggested by Chile is evident, according to Argentina, when examining the passage of Chilean Law 19.772, which, *inter alia*, amended Chile's WTO bound tariff rate for certain sugars.<sup>76</sup> Only 69 days passed between the submission of the bill to the National Congress and its publication in the Chilean Official Journal.<sup>77</sup> As a tariff measure, that law was subject to the same legislative procedures as would be followed by any draft law modifying the PBS, and therefore, in Argentina's submission, serves as a useful comparison to evaluate how long a "reasonable period of time" should be for implementation in this case.

28. Argentina similarly points to Chile's rapid implementation of the legislation modifying the tax law found to be WTO-inconsistent in *Chile – Alcoholic Beverages*. That new law was passed within approximately one month of presentation before the National Congress, due to the President's resort to the urgency procedure provided for by the Chilean Constitution.<sup>78</sup>

29. Rejecting the relevance of the longstanding importance of the PBS to the agricultural sector in Chile, Argentina argues that previous arbitrators have specifically rejected similar claims of difficulties stemming from political opposition to implementation. To permit such a rationale for assessing the "reasonable period of time", in Argentina's submission, would indefinitely postpone implementation, contrary to the DSU's requirement of prompt compliance.<sup>79</sup>

30. With regard to Chile's claim for consideration as a developing country Member, Argentina says it is "surprised" that such a claim has been made, because both parties agreed during the Appellate Body hearing that their respective developing country status had no relevance in this dispute.<sup>80</sup> Nevertheless, Argentina states that the plain text of Article 21.2 makes no distinction between complainants and respondents when providing that particular attention should be paid to matters affecting the interests of developing countries. In this regard, Argentina submits that its own status as a developing country warrants particular attention in this determination, as Argentina's rights have been nullified and impaired by the continued operation of the PBS.<sup>81</sup> In any event, says Argentina, no specific economic difficulties face Chile as a developing country in this case, in

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<sup>76</sup>Argentina's submission, para. 38 and Annex ARG-3.

<sup>77</sup>*Ibid.*, para. 35 and Annex ARG-3.

<sup>78</sup>Argentina's statement at the oral hearing.

<sup>79</sup>*Ibid.*

<sup>80</sup>*Ibid.*

<sup>81</sup>*Ibid.*

contrast to the financial situation of Indonesia found to be relevant under Article 21.2 in *Indonesia – Autos*.<sup>82</sup>

31. Finally, Argentina states that Chile has been aware of its international obligation to comply with the recommendations and rulings of the DSB at least since the adoption of the panel and Appellate Body reports on 23 October 2002. More than four months have passed since then and, Argentina argues, Chile has not undertaken sufficient steps towards implementation during that time. Accordingly, Argentina submits that this lack of progress, particularly with regard to the pre-legislative consultations, should be taken into account in my determination, as stated by the Arbitrator in *US – Section 110(5) Copyright Act*.<sup>83</sup>

### III. Reasonable Period of Time

32. My task in this arbitration is to determine the "reasonable period of time" (the term used in Article 21.3 of the DSU) for the implementation of the recommendations and rulings of the DSB in *Chile – Price Band System*. In doing so, I recognize that I am not asked to determine or even suggest the manner in which a Member should implement its international obligations. My function is to fix a "reasonable period of time" appropriate to the means proposed by the implementing Member.<sup>84</sup> I therefore agree with the statement by the Arbitrator in *Korea – Alcoholic Beverages*, that "[c]hoosing the means of implementation is, and should be, the prerogative of the implementing Member, as long as the means chosen are consistent with the recommendations and rulings of the DSB and the provisions of the covered agreements."<sup>85</sup>

33. Article 21.1 of the DSU, which provides relevant context for understanding the remaining paragraphs of Article 21, states that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." Recognizing that "prompt compliance" may not always be "immediate" compliance, however, the chapeau of Article 21.3 provides, "If it is impracticable to comply immediately with the recommendations and rulings [of the DSB], the Member concerned shall have a reasonable period of

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<sup>82</sup>Argentina's statement at the oral hearing.

<sup>83</sup>*Ibid.*

<sup>84</sup>Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 43.

<sup>85</sup>Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45.

time in which to do so." The allowance of a "reasonable period of time" for implementation, therefore, is premised on it being impracticable for the Member to comply "immediately".<sup>86</sup>

34. Article 21.3(c) provides for an arbitrator a "guideline" of a maximum of 15 months from the date of adoption of the panel and Appellate Body reports when establishing a "reasonable period of time" for implementation. Notwithstanding this "guideline", I must ultimately be informed, as Article 21.3(c) instructs, by the "particular circumstances" of a given case, which may counsel in favour of shorter or longer periods.<sup>87</sup> As previous arbitrators have observed, the controlling principle is that the "reasonable period of time" should be "the shortest period possible within the legal system of the Member to implement the relevant recommendations and rulings of the DSB"<sup>88</sup>, in the light of the "particular circumstances" of the dispute.

35. The following issues arise in this arbitration:

- (a) whether there is only one possible course of action which Chile, as the implementing Member, can follow in order to comply with the recommendations and rulings of the DSB, namely, eliminating the PBS in respect of the products in dispute;
- (b) whether pre-legislative consultations, being engaged in by Chile, but not mandated by the law of Chile, are relevant considerations and, if so, in what respects and to what extent;
- (c) whether the action taken by Chile to implement those recommendations and rulings or its delay in taking such action, since the adoption of the panel and Appellate Body reports, should be taken into account in fixing the reasonable period of time;
- (d) whether domestic political and industry opposition in Chile to the modification of the PBS is relevant, and if so, to what extent;

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<sup>86</sup>Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 45; Award of the Arbitrator, *Australia – Salmon*, para. 30; Award of the Arbitrator, *US – Hot-Rolled Steel*, para. 25. I note that both parties in this arbitration argue that new legislation is necessary for implementation of the recommendations and rulings of the DSB, and therefore, appear to agree that "immediate" compliance by Chile is impracticable. The impracticability of Chile's immediate compliance has not been raised as an issue for decision in this arbitration.

<sup>87</sup>Award of the Arbitrator, *Canada – Patent Term*, para. 36; Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 36.

<sup>88</sup>See for example, Award of the Arbitrator, *US – 1916 Act*, para. 32 (citing, *inter alia*, *Canada – Pharmaceutical Patents*, para. 47).



- (e) what relevance and weight should be attached to procedures within Chile's legal system for expediting legislation, the passage of which is necessary to comply with the recommendations and rulings of the DSB; and
- (f) of what significance in this arbitration are the interests of developing countries, which here includes both Chile and Argentina.

36. Argentina argues that "the only appropriate way to implement the DSB recommendations consists of the elimination of the PBS, inasmuch as the PBS imposes [duties on] the products covered by the dispute ... that do not constitute ordinary customs duties."<sup>89</sup> The straightforward nature of this action, in Argentina's submission, contradicts Chile's claim for a significant period of time to draft a replacement law after discussion with and input from other agencies and interest groups. Whether elimination of the PBS, in so far as it impacts upon the relevant products, is the "only appropriate" means of implementation (as opposed to a modification of the PBS) is not an issue for decision in this arbitration.<sup>90</sup> As discussed above, the focus of my inquiry and determination relates to the period of *time* needed to implement the recommendations and rulings of the DSB, not to the *manner* in which Chile intends to implement them.<sup>91</sup> I therefore do not accept Argentina's argument.

37. The fact that an Article 21.3(c) arbitration focuses on the period of time for implementation, however, does not render the substance of the implementation, that is, the precise means or manner of implementation, immaterial from the perspective of the arbitrator. In fact, the more information that is known about the details of the implementing measure, the greater the guidance to an arbitrator in selecting a reasonable period of time, and the more likely that such period of time will fairly balance the legitimate needs of the implementing Member against those of the complaining Member. Nevertheless, the arbitrator should still avoid deciding what a Member must do for proper implementation.<sup>92</sup> I accept Chile's stated intention to pass new legislation modifying the PBS so as to render it consistent with Chile's WTO obligations. How it does this is a matter for Chile.

38. Chile identifies a "pre-legislative" phase followed by an extensive lawmaking procedure through which any law implementing the DSB's recommendations and rulings must pass.<sup>93</sup> The multi-step process of legislating, which involves the participation of several legislative committees

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<sup>89</sup>Argentina's submission, para. 18.

<sup>90</sup>The Arbitrator in *Canada – Pharmaceutical Patents* rejected a similar challenge by the European Communities, which had claimed that Canada was required to repeal a provision of its Patent Act instead of implementing new regulations in order to comply with the recommendations and rulings of the DSB. Award of the Arbitrator, paras. 37–40.

<sup>91</sup>See *supra*, para. 32 of this Award.

<sup>92</sup>Award of the Arbitrator, *US – Hot-Rolled Steel*, para. 30.

<sup>93</sup>See *supra*, paras. 37–43 of this Award.

with at least two rounds of review ("general" and "specific", as labelled by Chile) by not only those committees, but also by each house of Congress itself, highlights the complexity of the *process* Chile will undergo during implementation. I find the intricacy of the lawmaking process relevant to my determination<sup>94</sup>, and I agree with the observation of previous arbitrators that implementation through legislation is likely to require a longer time for implementation than administrative rulemaking or other exclusively Executive action.<sup>95</sup>

39. That said, however, I am also conscious of the fact that most steps in Chile's lawmaking procedure, while required by law, are not subject to statutory or constitutional time limits. Therefore, there appears to be a certain amount of "flexibility"<sup>96</sup> within the normal legislative process, particularly in terms of steps such as the "general discussions" and Presidential endorsement, that Chile may fairly be expected to utilize in good faith so that it may promptly develop a new law repealing or modifying the PBS and otherwise ensure that it conforms with its WTO obligations.

40. According to Chile, in the time since the adoption of the panel and Appellate Body reports on 23 October 2002, it has begun to implement the recommendations and rulings of the DSB. When questioned at the oral hearing, Chile identified the following as actions it has undertaken in furtherance of implementation: (i) consultations with Argentina, in addition to other trading partners, on a reasonable implementation period and on possible actions required for implementation; (ii) discussions between the Chilean Ministry of Agriculture and agricultural trade associations; (iii) deliberations within the Interministerial Committee on changes to the PBS that may be necessitated by virtue of the panel and Appellate Body reports.

41. These actions that have been undertaken by Chile in the last several months constitute part of the "pre-legislative" phase of Chile's lawmaking process. Chile argues that this phase is an integral component of its implementation of the recommendations and rulings of the DSB. Argentina submits that, because this phase is not mandated by Chilean law, Chile should be expected to use its "flexibility" to pass over or minimize the time required for this phase. Accordingly, Argentina suggests that time requested by Chile for the pre-legislative phase should not be relevant to my determination of a "reasonable period of time" for implementation.

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<sup>94</sup>Award of the Arbitrator, *EC – Bananas III*, para. 19; Award of the Arbitrator, *US – 1916 Act*, paras. 38–39.

<sup>95</sup>See for example, Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 34; Award of the Arbitrator, *Australia – Salmon*, para. 38; Award of the Arbitrator, *Canada – Patent Term*, para. 41.

<sup>96</sup>Award of the Arbitrator, *Canada – Patent Term*, para. 64; Award of the Arbitrator, *US – 1916 Act*, para. 39; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, paras. 38–39.

42. The absence of a requirement under Chile's laws to engage in pre-legislative consultations is not sufficient, in my view, to dismiss the relevance of such consultations for purposes of this Article 21.3(c) arbitration. As other arbitrators have noted<sup>97</sup>, and as Chile has emphasized, the consultation phase is important for laying the foundation upon which a proposed law passes through the legislative process. Although not mandated by law, consultations within government agencies as well as with the affected sectors of society are typically a concomitant of lawmaking in contemporary polities, and such consultations should be taken into account when fixing a "reasonable period of time" for implementation.

43. Even if the "pre-legislative" phase is treated as relevant, Argentina additionally requests that I interpret Chile's actions thus far as a lack of progress in implementation by Chile, as more than four months have passed since the DSB's adoption of the panel and Appellate Body reports in this dispute and little positive progress appears to have been made. A Member's obligation to implement the recommendations and rulings of the DSB is triggered by the DSB's adoption of the relevant panel and/or Appellate Body reports. Although Article 21.3 acknowledges circumstances where *immediate* implementation is "impracticable", in my view the implementation process should not be prolonged through a Member's inaction (or insufficient action) in the first months following adoption. In other words, whether or not a Member is able to *complete* implementation promptly, it must at the very least promptly *commence* and continue concrete steps towards implementation. Otherwise, inaction or dilatory conduct by the implementing Member would exacerbate the nullification or impairment of the rights of other Members caused by the inconsistent measure. It is for this reason that arbitral awards under Article 21.3(c) calculate "reasonable period[s] of time" as from the date of adoption of panel and/or Appellate Body reports.

44. Therefore, in the light of the importance of prompt compliance in WTO dispute settlement, I concur with the Arbitrator in *US – Section 110(5) Copyright Act*:

... an implementing Member must use the time after adoption of a panel and/or Appellate Body report to begin to implement the recommendations and rulings of the DSB. Arbitrators will scrutinize very carefully the actions an implementing Member takes in respect of implementation during the period after adoption of a panel and/or Appellate Body report and prior to any arbitration proceeding. If it is perceived by an arbitrator that an implementing Member has not adequately begun implementation after adoption so as to effect "prompt compliance", it is to be expected that the arbitrator will take this into account in determining the "reasonable period of time".<sup>98</sup>

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<sup>97</sup>Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 43; Award of the Arbitrator, *US – Hot-Rolled Steel*, para. 38.

<sup>98</sup>Award of the Arbitrator, para. 46.

45. Based on Chile's description of the steps it has taken towards implementation, it is unclear to me what results have been achieved by the various consultations thus far. Almost five months have passed between adoption of the panel and Appellate Body reports and issuance of this award. Chile states that the pre-legislative phase is "by no means over".<sup>99</sup> As discussed above, I realize the value of thorough pre-legislative activities, particularly so as to ensure passage of final legislation and thereby achieve "full implementation".<sup>100</sup> I also recognize that consultations, discussions and deliberations, by their very nature, are indeterminate and cannot be subject to arbitrary time limits, particularly because the extensiveness of these activities may change with each measure in issue. Nevertheless, for purposes of calculating a "reasonable period of time" under Article 21.3(c), such activities should not be assumed to be without reasonable limits.<sup>101</sup> I do not suggest that Chile's pre-legislative activities in this case should necessarily have concluded by this time; but, in my view, this phase should reasonably have proceeded further than it has.

46. Chile emphasizes that the PBS has served as a "cornerstone"<sup>102</sup> of its agricultural policy for almost 20 years, its purpose having been to mitigate price fluctuations in the world markets for certain Chilean products. These price fluctuations, according to Chile, are attributable to the interventionist policies of other agricultural exporting States. Furthermore, Chile claims that the PBS was well-known to exist by Chile's trading partners during the Uruguay Round and that such partners provided assurances of the consistency of the PBS with Chile's commitments under the *Agreement on Agriculture*. As a result, Chile identifies a large opposition in Chile, that resists the modification of the PBS in the light of what Chile says such opposition views to be a defensive measure used to counteract others' distortive policies and a fully transparent mechanism previously understood and accepted by other WTO Members.<sup>103</sup>

47. Argentina does not dispute the existence of significant opposition in Chile to repeal or reform of the PBS, nor does it contest the implications of such opposition for the passage of a WTO-consistent implementing measure. Instead, Argentina refers to previous arbitrators that have rejected the domestic "contentiousness" of a proposed measure as a basis for granting longer implementation periods.<sup>104</sup> In this regard, it has been rightly said that "[a]ll WTO disputes are 'contentious' domestically at least to some extent; if they were not, there would be no need for recourse by WTO

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<sup>99</sup>Chile's response to questioning at the oral hearing.

<sup>100</sup>Article 22.1 of the DSU.

<sup>101</sup>Award of the Arbitrator, *Canada – Autos*, para. 49.

<sup>102</sup>Chile's submission, para. 7.

<sup>103</sup>*Ibid.*, paras. 8–9, 51, and 57–58.

<sup>104</sup>See for example, Award of the Arbitrator, *Canada – Patent Term*, para. 58; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 42.

Members to dispute settlement."<sup>105</sup> Simple contentiousness may thus not be a sufficient consideration under Article 21.3(c) for a longer period of time.

48. Nevertheless, the facts of this dispute, as identified by Chile and uncontested by Argentina, raise special concerns that warrant my taking them into account in my determination. I am of the view that the PBS is so fundamentally integrated into the policies of Chile, that domestic opposition to repeal or modification of those measures reflects, not simply opposition by interest groups to the loss of protection, but also reflects serious debate, within and outside the legislature of Chile, over the means of devising an implementation measure when confronted with a DSB ruling against the original law. In the light of the longstanding nature of the PBS, its fundamental integration into the central agricultural policies of Chile, its price-determinative regulatory position in Chile's agricultural policy, and its intricacy, I find its unique role and impact on Chilean society is a relevant factor in my determination of the "reasonable period of time" for implementation.

49. Previous arbitrators have noted that an implementing Member "may reasonably be expected to use all the flexibility available within its normal legislative procedures to enact the required legislation as speedily as possible."<sup>106</sup> Argentina refers to the "urgency procedure" provided for in the Constitution of Chile as the "flexibility" to which Chile should be expected to resort in this case and thus more promptly achieve implementation.<sup>107</sup> Both parties agree that Article 71 of the Constitution of Chile authorizes the President to denote before the National Congress the "urgency for passing a bill" ("*la urgencia en el despacho de un proyecto*")<sup>108</sup>, and that this procedure is governed in greater detail by Law 18.918.<sup>109</sup> This "urgency procedure" permits (but does not require) the President, at each stage of the legislative process, to designate a bill as "urgent", "very urgent", or "for immediate discussion"<sup>110</sup>, and thereby seek to reduce the time for consideration of the bill at such stage to 30 days, 10 days, or 3 days, respectively.<sup>111</sup> Notwithstanding the President's designation, either house of the National Congress may reject the President's request for speedier consideration of the bill and revert to unlimited time for analyzing the bill.<sup>112</sup> If the President's designation is accepted by the

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<sup>105</sup> Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 60.

<sup>106</sup> Award of the Arbitrator, *US – 1916 Act*, para. 39. See also Award of the Arbitrator, *US – Section 110(5) Copyright Act*, paras. 38–39; Award of the Arbitrator, *Canada – Patent Term*, para. 64.

<sup>107</sup> Argentina's statement at the oral hearing.

<sup>108</sup> Constitution of Chile, Art. 71, attached as Annex ARG-2 to Argentina's submission.

<sup>109</sup> Argentina identified the Chilean Constitution and Law 18.918 as the basis for the urgency procedure, and Chile did not contest this characterization. Argentina's and Chile's statements and responses to questioning at the oral hearing.

<sup>110</sup> Article 26 of Law 18.918, attached as Annex ARG-4 to Argentina's statement at the oral hearing.

<sup>111</sup> Article 27 of Law 18.918, attached as Annex ARG-4 to Argentina's statement at the oral hearing.

<sup>112</sup> Chile's response to questioning at the oral hearing.

particular house of the National Congress, review of the bill at such stage will be subject to these time limits, in contrast to the lack of time constraints generally governing each stage of the legislative process.<sup>113</sup> The "urgency procedure" is thus envisioned by Chilean law as an expedited means of legislative review, distinct from the typical process because of the additional limitations accepted by the legislature.

50. Although referred to by the Chilean Constitution as an "urgency" measure, Argentina argues that the President's designation of a bill as "urgent" is, in fact, a "standard procedure" under Chilean law to which the President "regularly" makes recourse.<sup>114</sup> In support of its argument, Argentina identifies 23 laws promulgated in Chile in 2002 following Presidential invocation of the urgency procedure.<sup>115</sup> Whether these 23 laws evidence a consistent practice of using the "urgency procedure" so as to render it a *de facto* normal part of the Chilean legislative process cannot be determined on the basis of the evidence before me. The regularity of the "urgency procedure" cannot be evaluated without knowing, *inter alia*, how many laws in all were promulgated in Chile in 2002, for Argentina's argument is implicitly premised on the fact that the "urgency procedure" was employed for a statistically significant percentage of laws. In addition, the static portrait revealed by an examination of laws in one legislative year may not provide sufficient basis to deduce the "standard" nature of Executive practice in the process of lawmaking in Chile.

51. I referred earlier to the special status of the PBS in Chile's agricultural policy and the consequent difficulties imposed on the formulation of legislation to implement the recommendations and rulings of the DSB in this case.<sup>116</sup> Having recognized the need for thorough discussion on any implementing measure modifying the PBS, it would not be right for me to *expect* that the President of Chile will necessarily seek truncated review of such a measure in the very legislative body intended for deliberation and debate on behalf of the public it represents. This severe reduction of legislative deliberation is precisely what Argentina seeks when suggesting that I factor the strict time limits of the "urgency procedure" into my determination of the "reasonable period of time" for implementation. Therefore, I find it unreasonable for me to *expect* or assume that Chile will necessarily make use of the "flexibility" arguably provided by the extraordinary "urgency procedure" when implementing legislation that modifies the PBS. Indeed, there is sufficient flexibility within the *ordinary* legislative procedure of Chile to enable it to implement the recommendations and rulings of the DSB in this case within a time frame of less than the 18 months which it seeks.

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<sup>113</sup>Chile's response to questioning at the oral hearing.

<sup>114</sup>Argentina's comments on the document presented by Chile at the oral hearing, 20 February 2003.

<sup>115</sup>Annex ARG-5 to Argentina's statement at the oral hearing.

<sup>116</sup>See *supra*, paras. 46–48 of this Award.

52. Nevertheless, the relevant laws of Chile, namely, the Constitution and Law 18.918, appear to enable Chile to resort to this "extraordinary" legislative procedure when proposing a law to modify the PBS. Because of the significant passage of time since adoption of the panel and Appellate Body reports in this case, and the lack of progress made thus far in implementing the recommendations and rulings of the DSB<sup>117</sup>, Chile may itself decide to resort to the "urgency procedure" at certain stages of the legislative process. Chile recognizes that it must implement those recommendations and rulings in good faith towards other Members of the WTO. It must therefore do everything it reasonably can to act expeditiously in this process of implementation. Perhaps this will call for Chile to invoke its "urgency procedure". Perhaps it will not. On the facts of this case and the evidence before me, I believe that whether and at what stages Chile utilizes the "urgency procedure" are questions for Chile to determine for itself. But, whatever it does, Chile must implement the recommendations and rulings of the DSB promptly.

53. Argentina refers to the passage of Laws 19.772 and 19.716 as examples of analogous situations in which the Chilean legislature acted promptly when it was sufficiently motivated to do so. Law 19.772 established, *inter alia*, a new bound tariff rate for sugar. The law was passed by the National Congress subsequent to a series of consultations with Chile's trading partners because Chile had invoked GATT Article XXVIII.<sup>118</sup> Pursuant to those discussions, Chile *raised* its bound tariff rate on sugar beyond that which had been established in the Uruguay Round as part of Chile's GATT Article II tariff bindings.<sup>119</sup> Law 19.772, in this regard, focused on *one* particular product (that is, sugar) and provided *increased* protection to sugar producers by raising the maximum possible tariff that Chile could apply to sugar imports. In contrast, compliance with the recommendations and rulings of the DSB in this case, as Chile observes, will require modifications to the price band *system*, thereby possibly affecting a much larger portion of the agricultural sector, and will be unlikely to

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<sup>117</sup>See *supra*, paras. 43–45 of this Award.

<sup>118</sup>Chile's response to questioning at the oral hearing. Article XXVIII of GATT provides, in part, as follows:

... a contracting party ... may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest ... and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest in such concession, modify or withdraw a concession included in the appropriate schedule annexed to this Agreement. (footnotes omitted)

<sup>119</sup>Chile's response to questioning at the oral hearing.

provide greater protection than that afforded by the status quo.<sup>120</sup> I therefore do not find the passage of Law 19.772 to be of guidance in calculating the period of time for passage of a measure to modify the PBS for the purposes of this dispute.

54. Law 19.716 was enacted to modify Chile's spirits taxes in accordance with the findings of the panel and Appellate Body in *Chile – Alcoholic Beverages*. The Article 21.3(c) arbitration in that dispute established 14 months and nine days as the "reasonable period of time" for implementation.<sup>121</sup> Chile engaged in consultations with the European Communities, the complainant in that case, for approximately ten months as part of the pre-legislative phase discussed earlier.<sup>122</sup> Additionally, in the light of the short time remaining within the "reasonable period of time" determined by the Arbitrator in *Chile – Alcoholic Beverages*, the President employed the urgency procedure to seek particularly expeditious consideration of the proposed implementing legislation.<sup>123</sup> As noted earlier, the use of the urgency procedure in a previous instance does not convince me that Chile should be expected to employ the same means of truncated review when passing a law to modify what I find to be a significantly more complex and systemic measure than that at issue in *Chile – Alcoholic Beverages*, that is, the PBS. Accordingly, I find the analogy to the passage of Law 19.716 inapposite to my determination of the "reasonable period of time" for implementation in this dispute. However, what the passage of that law does show is that the legislative processes of Chile are sufficiently tractable to enable Chile to adopt the urgency procedure in an appropriate case.

55. Finally, the DSU renders relevant to my determination the developing country status of Members involved in dispute settlement. Article 21.2 of the DSU provides:

Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

I agree with the following statement by the arbitrator in *Chile – Alcoholic Beverages* that "an arbitrator functioning under Article 21.3(c) [must] be *generally mindful* of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB."<sup>124</sup> This arbitration is, however, the first arbitration under Article 21.3(c) to include developing countries as both complainant *and* respondent. The period of

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<sup>120</sup>Chile's statement at the oral hearing.

<sup>121</sup>Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 46.

<sup>122</sup>Chile's response to questioning at the oral hearing.

<sup>123</sup>*Ibid.* Chile reported the use of the urgency procedure by its President in Chile's status report to the DSB on implementation. See *Status Report by Chile: Addendum*, WT/DS87/17/Add.1, WT/DS110/16/Add.1, 19 January 2001.

<sup>124</sup>Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 45 (emphasis added).



time for implementation of the recommendations and rulings of the DSB in this case is thus a "matter[] affecting the interests" of both Members: the general difficulties facing Chile as a developing country in revising its longstanding PBS, and the burden imposed on Argentina as a developing country whose access to the Chilean agricultural market is impeded by the PBS, contrary to WTO rules.

56. Furthermore, Chile has not pointed to additional *specific* obstacles that it faces *as a developing country* under present circumstances. This is a matter which I should take into account in evaluating whether a longer period of time may be needed for implementation. The absence of presently-existing, concrete difficulties in Chile's position as a developing country stands in contrast to previous arbitrations, wherein Members have identified, not simply their positions as developing countries, but also "severe"<sup>125</sup> or "dire"<sup>126</sup> economic and financial situations existing at the time of the proposed period of implementation. In contrast, the acuteness of Argentina's burden as a developing country complainant that has been successful in establishing the WTO-inconsistency of a challenged measure, is amplified by Argentina's daunting financial woes at present. Accordingly, I recognize that Chile may indeed face obstacles as a developing country in its implementation of the recommendations and rulings of the DSB, and that Argentina, likewise, faces continuing hardship as a developing country so long as the WTO-inconsistent PBS is maintained. In the unusual circumstances of this case, therefore, I am not swayed towards either a longer or shorter period of time by the "[p]articular attention"<sup>127</sup> I pay to the interests of developing countries.

57. Looking at the matter sensibly, reasonably, and fairly, and having reviewed the shortest period possible in which Chile may be expected to implement the recommendations and rulings of the DSB, and evaluating the particular circumstances claimed by the parties in this dispute, I do not find Chile's proposal of 18 months to be necessary, nor do I find Argentina's proposal of nine months and six days to be a sufficiently "reasonable" period within which Chile should complete implementation.

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<sup>125</sup>Award of the Arbitrator, *Argentina – Hides and Leather*, para. 51.

<sup>126</sup>Award of the Arbitrator, *Indonesia – Autos*, para. 24.

<sup>127</sup>Article 21.2 of the DSU.

**IV. The Award**

58. For the reasons set out above, I determine that the "reasonable period of time" for Chile to implement the recommendations and rulings of the DSB in this case is 14 months from the date of adoption of the panel and Appellate Body reports by the DSB, namely, 23 October 2002. The "reasonable period of time" will therefore expire on 23 December 2003.

Signed in the original at Geneva this 28th day of February 2003 by:

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John Lockhart  
Arbitrator