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

Recourse to Article 21.5 of the DSU by Argentina

Report of the Panel

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WTO DISPUTE SETTLEMENT REPORTS AND ARBITRATION AWARDS

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, modified by Appellate Body Report, WT/DS56/AB/R, DSR 1998:III, 1033
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, modified by Appellate Body Report, WT/DS207AB/R, DSR 2002:VIII, 3127
Chile – Price Band System	Award of the Arbitrator, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS207/13, 17 March 2003, DSR 2003:III, 1237
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, modified by Appellate Body Report, WT/DS141/AB/RW, DSR 2003:IV, 1269
EC – Chicken Cuts	Award of the Arbitrator, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU*, WT/DS269/13, WT/DS286/15, 20 February 2006
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925

Short Title	Full Case Title and Citation
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Japan – Apples	Appellate Body Report, *Japan - Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
US – 1916 Act (EC)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593
US – 1916 Act (Japan)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831
US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005
US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – FSC (Article 21.5 – EC II)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, adopted 14 March 2006
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

TABLE OF ABBREVIATIONS USED IN THIS REPORT

DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
GATT	General Agreement on Tariffs and Trade
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
MFN	Most-Favoured Nation
PBS	Chile's Price Band System
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement establishing the World Trade Organization

I. INTRODUCTION

1.1 On 29 December 2005, Argentina requested the establishment of a panel pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") concerning Chile's alleged failure to implement the recommendations and rulings of the Dispute Settlement Body (hereinafter "DSB") in the dispute *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (hereinafter "*Chile – Price Band System*").[1]

1.2 At its meeting on 20 January 2006, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by Argentina in document WT/DS207/18.[2] At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Argentina in document WT/DS207/18, the matter referred to the DSB by Argentina in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[3]

1.3 On 4 April 2006, the parties agreed that the Panel would be composed as follows:

Chairman: Mr Hardeep Puri

Members: Mr Ho-Young Ahn
Mr Timothy Groser[4]

1.4 Australia, Brazil, Canada, China, Colombia, the European Communities, Peru, Thailand and the United States reserved their rights to participate in the Panel proceedings as third parties.[5]

1.5 The Panel met with the parties on 1 and 2 August 2006. It met with the third parties on 2 August 2006. The Panel issued the draft descriptive part of its report to the parties on 27 September 2006. On the same date, third parties were also sent a copy of the annexes that contained their respective submissions and oral statements. On 2 October 2006, both parties submitted comments to the draft descriptive part of the report. On 4 October 2006, the United States requested a correction into the annex that contains its oral statement made at the meeting with the Panel. The Panel issued its interim report to the parties on 11 October 2006.

II. FACTUAL ASPECTS

A. BACKGROUND

2.1 This dispute concerns the amendments made by Chile to its Price Band System ("PBS") and whether, as a result of these amendments, the modified system (the "amended PBS") complies with

[1] Request for the Establishment of a Panel, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (*Recourse to Article 21.5 of the DSU by Argentina*) (hereinafter "*Chile – Price Band System (Article 21.5 – Argentina*)"), 9 January 2006,WT/DS207/18.

[2] Constitution of the Panel (Note by the Secretariat), *Chile – Price Band System (Article 21.5 – Argentina)*, 4 April 2006, WT/DS207/19, para. 1.

[3] Ibid., para. 2.

[4] Ibid., para. 3.

[5] Ibid., para. 4.

the recommendations and rulings approved by the DSB and brings the amended PBS into conformity with Chile's obligations under the WTO covered agreements.

B. MEASURES SUBJECT TO THE ORIGINAL PROCEEDINGS

2.2 The original Panel and Appellate Body proceedings concerned two distinct matters: (a) Chile's PBS; and (b) Chile's provisional and definitive safeguard measures on imports of wheat, wheat flour and edible vegetable oils, as well as the extension in time of those measures.

C. PANEL AND APPELLATE BODY FINDINGS IN THE ORIGINAL PROCEEDINGS

2.3 With regard to Chile's PBS[6], the original Panel found that the PBS was a border measure similar to a variable import levy and to a minimum import price, other than ordinary customs duties, within the meaning of footnote 1 to the Agreement on Agriculture.[7] The Panel found additionally that the PBS was 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.[8] The Panel concluded that the PBS was inconsistent with Article 4.2 of the Agreement on Agriculture.[9]

2.4 The original Panel also found that, since the PBS duties did not constitute ordinary customs duties, the fact that those duties were not recorded by Chile in the column of "other duties and charges" in its Schedule but were nevertheless levied, made them inconsistent with the second sentence of Article II:1(b) of GATT 1994.[10]

2.5 The Appellate Body upheld the Panel's finding that Chile's PBS was a border measure similar to a variable import levy and a minimum import price and was therefore inconsistent with Article 4.2 of the Agreement on Agriculture.[11] The Appellate Body, however, disagreed with the Panel's definition of "ordinary customs duties" and reversed the Panel's finding that the term "ordinary customs duty", as used in Article 4.2 of the Agreement on Agriculture, was to be understood as "referring to a customs duty which is not applied to factors of an exogenous nature".[12]

2.6 The Appellate Body also considered that the Panel had 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, which was not part of the matter before the Panel, and thereby denying Chile the due process of a fair right of response. The Appellate Body consequently reversed the Panel's finding under Article II:1(b) of GATT 1994.[13]

[6] The original Panel also made findings with respect to Argentina's claims regarding Chile's provisional and definitive safeguards measures on imports of wheat, wheat flour and edible vegetable oils. Noting that the measures had expired, the Panel abstained from making recommendations regarding these measures. Panel Report on *Chile – Price Band System*, paras. 7.112, 7.113, 7.124, 7.126, 7.128, 7.140, 7.149, 7.162, 7.174, 7.180, 8.1 and 8.3. These findings were not appealed and the measures are not part of the matter in the current proceedings.

[7] Panel Report on *Chile – Price Band System*, paras. 7.25, 7.47 and 7.65.

[8] Ibid., 7.102.

[9] Ibid., paras. 7.102 and 8.1.

[10] Ibid., paras. 7.107, 7.108 and 8.1.

[11] Appellate Body Report on *Chile – Price Band System*, paras. 262, 280 and 288.

[12] Ibid., paras. 278 and 288. Panel Report on *Chile – Price Band System*, para. 7.52.

[13] Appellate Body Report on *Chile – Price Band System*, paras. 177 and 288.

D. CURRENT PROCEEDINGS

2.7 At its meeting on 23 October 2002, the DSB adopted the Appellate Body Report on *Chile – Price Band System* (WT/DS207/AB/R) and the Panel Report on the same case (WT/DS207/R), as modified by the Appellate Body.[14] Pursuant to said reports, the DSB requested Chile to bring its PBS, as found to be inconsistent with the Agreement on Agriculture, into conformity with its obligations under that Agreement.[15]

2.8 At the DSB meeting of 11 November 2002, pursuant to Article 21.3 of the DSU, Chile informed the DSB that it was consulting 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 the dispute. The parties did not agree on the reasonable period of time for implementation, and therefore, pursuant to Chile's request, such period was determined by binding arbitration, in accordance with Article 21.3(c) of the DSU. The award of the arbitrator was circulated to the Members on 17 March 2003.[16] It determined that the reasonable period of time for Chile to implement the recommendations and rulings of the DSB in the case was to be 14 months from the date of adoption of the Panel and Appellate Body reports by the DSB and would therefore expire on 23 December 2003.[17]

2.9 In December 2003, Argentina and Chile concluded an understanding regarding procedures under Articles 21 and 22 of the DSU with respect to the dispute. The bilateral understanding was notified to the Dispute Settlement Body by both Members through a letter dated 24 December 2003.[18]

2.10 In a communication dated 19 May 2004, Argentina requested consultations with Chile under Article 21.5 of the DSU. In that request, Argentina disagreed that the changes made to the PBS by Chile, as regards wheat and wheat flour, were in compliance with the recommendations contained in the reports of the Panel and the Appellate Body. Specifically, Argentina considered that, through the amendments incorporated by Law 19.897 and Supreme Decree 831 of 2003, imports of wheat and wheat flour were still affected by the imposition of specific duties and rebates whose application continued to be subject to floor and ceiling parameters, as well as to the reference price mechanism. This in turn apparently meant that Chile had maintained a measure similar to a variable import levy and a minimum import price with respect to those products and, at the same time, was imposing "other duties or charges" on imports that were not recorded in the relevant column of its Schedule. Argentina finally stated that this also meant that Chile granted imports treatment less favourable than that accorded to the same products of Chilean origin. Argentina concluded that Chile had not ensured the conformity of its laws, regulations and administrative procedures with its obligations as provided in the WTO Agreements and, specifically, that the measures adopted by Chile to implement the recommendations and rulings of the DSB were inconsistent, *inter alia*, with the following provisions of the covered agreements: Article 4.2 of the Agreement on Agriculture; the second sentence of

[14] *Chile – Price Band System*, Appellate Body Report and Panel Report, Action by the Dispute Settlement Body (WT/DS207/8), 29 October 2002. First written submissions of Argentina and Chile, paras. 4 and 6 respectively.

[15] Appellate Body Report on *Chile – Price Band System*, para. 289. See also, Panel Report on *Chile – Price Band System*, para. 8.3.

[16] *Chile – Price Band System*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DS207/14), 19 March 2003.

[17] *Chile – Price Band System*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes – Award of the Arbitrator (WT/DS207/13), 17 March 2003.

[18] *Chile – Price Band System*, Understanding between Argentina and Chile Regarding Procedures Under Articles 21 and 22 of the DSU (WT/DS207/16), 7 January 2004.

Article II.1(b) of the GATT 1994; paragraph 4 of Article III of the GATT 1994; and, hence, Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization.[19]

2.11 As noted, on 29 December 2005, Argentina requested the establishment of a panel pursuant to Article 21.5 of the DSU. In Argentina's view, the amendments to the Chilean PBS do not alter the PBS in its essence and do not bring it into conformity with the covered agreements.[20] The Panel was established by the DSB at its meeting on 20 January 2006.

E. MEASURE CHALLENGED BY ARGENTINA: CHILE'S AMENDED PRICE BAND SYSTEM

1. The legal instruments

2.12 The measure subject to challenge by Argentina through this recourse to Article 21.5 of the DSU is Chile's amended PBS, as applied to imports of wheat and wheat flour, based on the following legislation: (a) Law 19.897, published on 25 September 2003, establishing rules on the importation of goods into the country, which amends Article 12 of Law 18.525 and the Customs Tariff; and, (b) Supreme Decree 831 of the Ministry of Finance, published on 4 October 2003, regulating the application of Article 12 of Law 18.525, as substituted by Article 1 of Law 19.897.[21]

(a) Law 19.897

2.13 Law 19.897 modifies Article 12 of Law 18.525 on the Rules on the Importation of Goods.[22] It was published in Chile's Official Journal of 25 September 2003. The amendments entered into force for wheat and wheat flour from 16 December 2003. In turn, Law 18.525 was published in Chile's Official Journal on 30 June 1986. Chile's PBS is regulated by Article 12 of Law 18.525 as amended by Law No. 19.897.[23]

2.14 The text of the relevant portions of Article 12 of Law 18.525, after the modifications introduced through Law 19.897, is as follows:

> "Established hereunder are specific duties in United States dollars per tariff unit and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of wheat, wheat flour and sugar, as stipulated in this Law.
>
> The amount of these duties and rebates shall be established as provided for in this Article by the President of the Republic, by way of a supreme decree issued by the Chilean Ministry of Finance by order of the President of the Republic, six times for wheat in the course of each twelve-month period extending from 16 December to 15 December of the following year... in terms which, when applied to the price levels attained by the products in question on the international markets, allow domestic market stability.

[19] Request for Consultations, *Chile – Price Band System (Article 21.5 – Argentina)*, 25 May 2004, WT/DS207/17.

[20] Request for the Establishment of a Panel, *Chile – Price Band System (Article 21.5 – Argentina)*, 9 January 2006, WT/DS207/18.

[21] Ibid., pp. 1-3. See also, Argentina's reply to question 1 from the Panel and Chile's reply to question 1 from the Panel.

[22] Law 19.897, in Exhibits ARG-1 and CHL-1.

[23] In the original proceedings, the relevant text of this provision was the article as amended by Laws 18.591 (published January 3, 1987) and 18.573 (published December 2, 1987). A fifth paragraph was added to the article during the proceedings, by Law 19.772 (published November 19, 2001). Through this addition, Chile placed a cap on the duties payable so as to ensure they did not exceed the tariff limits bound in the WTO.

For the purpose of determining the duties and rebates up until the annual period ending in 2007, the floor and ceiling prices for wheat... shall be considered in the drafting of Chilean Ministry of Finance exempt decrees No. 266... published in the Official Journal of 16 May 2002, expressed in f.o.b. terms in United States dollars per tonne. There shall be established, on the one hand, specific duties when the reference price is below the floor price of US$128 for wheat... and, on the other hand, rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff when the reference price is above the ceiling price of US$148 for wheat...

For the purpose of determining the duties and rebates as from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established in the previous paragraph shall be adjusted annually by multiplying the values in force during the previous annual period by a factor of 0.985 in the case of wheat... In 2014, the President of the Republic shall evaluate the modalities and conditions of application of the price band system, taking into consideration international market conditions, the requirements of the industrial, productive and consumer sectors and Chile's trade obligations at that date.

The duties and rebates referred to in this Article shall correspond to the difference between the floor or ceiling prices determined above and a f.o.b. reference price, multiplied by a factor of one (1), plus the general *ad valorem* duty in force for these products. The f.o.b. reference price shall consist of the average of the daily international prices for wheat... recorded in the most relevant markets over a period of 15 calendar days for wheat... reckoned from the date fixed by the Regulations for each decree.

[...]

The duties and rebates for wheat flour are based on those determined for wheat, multiplied by a factor of 1.56.

The duties and rebates applicable to each import transaction shall be those in effect on the date of the waybill of the vehicle transporting the goods in question.

The duties resulting from the application of this Article, added to the *ad valorem* duty, shall not exceed the tariff rate bound by Chile under the World Trade Organization for the goods referred to in paragraph 1, 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. The rebates established as a result of the application of this Article shall in no circumstances exceed the amount corresponding to the *ad valorem* duty payable on the importation of the goods. The National Customs Service shall adopt the measures necessary to enforce the provisions of this paragraph.

The President of the Republic, by way of a supreme decree issued by the Chilean Ministry of Finance and endorsed by the Ministry of Agriculture, shall establish, pursuant to this Article, the periods in which specific duties and tariff rebates are to be established and applied. Furthermore, the President shall establish the most relevant markets for each product, the procedures and dates for calculating the

reference prices and other methodological factors necessary for the implementation of this Article."[24]

(b) Supreme Decree 831 of the Ministry of Finance

2.15 In its version amended through Law 19.897, Article 12 of Law 18.525 specifically provides for the issuance of a Supreme Decree in order to determine: (a) the periods in which specific duties and tariff rebates are to be established and applied; (b) the most relevant markets for each product; (c) the procedures for calculating the reference prices; (d) the dates for calculating the reference prices; and (e) other necessary methodological factors to implement the provisions in Article 12 of the Law.

2.16 Decree 831 of the Ministry of Finance of 26 September 2003 contains the implementing regulations for Article 12 of Law No. 18.525, as replaced by Article 1 of Law No. 19.897.[25]

"Having regard to the provisions of Article 12 of Law No. 18.525, establishing 'Rules on the importation of goods into the country', as substituted by Article 1 of Law No. 19.897, and the powers conferred upon me by paragraph 8 of Article 32 of the Political Constitution of the Republic of Chile, I hereby issue the following:

Decree:

The following regulations for the application of specific duties in dollars of the United States of America, per tariff unit, and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, referred to in Article 12 of Law No. 18.525, as substituted by Article 1 of Law No. 19.897, are hereby adopted.

§ 1. Initial Provisions

Article 1.- Specific duties and tariff rebates.

The specific duties in dollars of the United States of America, per tariff unit, and the rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, hereinafter referred to as duties and rebates, which may affect the importation of wheat, wheat flour and sugar, shall be determined in accordance with the provisions of Article 12 of Law No. 18.525, hereinafter referred to as the Law, and by the present regulations.

The amount of such duties and rebates shall be set by the President of the Republic by a supreme decree, issued by the Ministry of Finance "by order of the President of the Republic", six times for wheat in the course of each annual period extending from 16 December to 15 December of the following year, and twelve times for sugar in the course of each annual period extending from 1 December to 30 November of the following year, in terms which, when applied to the price levels attained by the products in question in international markets, are such as to lend stability to the domestic market.

[24] Law 19.897, in Exhibits ARG-1 and CHL-1. We have omitted references to sugar, which, although part of the PBS, it is not at issue in this case.

[25] Decree 831, in Exhibits ARG-2 AND CHL-2.

Article 2.- Definitions

For the purposes of these regulations and the application of duties and rebates, the following definitions shall apply:

(a) Reference price: average of the daily international wheat and sugar prices recorded in the most relevant markets, which shall be used for determining the duties and rebates under the Law;
(b) Floor price: price used to determine the specific duties under the Law, when the reference price is lower than the floor price; and
(c) Ceiling price: price used to determine the rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff under the Law, when the reference price is higher than the ceiling price.

Article 3.- Products covered

The duties and rebates established in conformity with the Law and these regulations shall apply to the following tariff codes of the Chilean Customs Tariff:

Product	**Code**	**Item**
Wheat	1001.9000	Other
Wheat flour	1101.0000	Wheat flour or meslin
Sugar	[...]	[...]

Article 4.- References to values and measures

The floor and ceiling values and the reference prices provided for in these regulations shall be expressed in f.o.b. terms in dollars of the United States of America.

The duties and rebates established in conformity with these regulations shall be applied in dollars of the United States of America, per tariff unit in the case of duties and per tonne in the case of rebates.

§ 2. Wheat

Article 5.- Issuing of decrees

Duties and rebates for wheat shall be determined six times in the course of each annual period extending from 16 December to 15 December of the following year by a supreme decree, which shall be published in the Official Journal within a period of five days prior to the date of their entry into effect.

The periods of validity for implementation of each supreme decree establishing duties or rebates shall be as follows:

- From 16 December to 15 February;
- from 16 February to 15 April;
- from 16 April to 15 June;

- from 16 June to 15 August;
- from 16 August to 15 October; and
- from 16 October to 15 December.

Article 6.- Floor and ceiling prices

The floor and ceiling prices for wheat during the period from December 2003 to December 2014 shall be as follows:

Floor and ceiling prices for wheat, by period of validity		
Period of validity	**Floor price**	**Ceiling price**
16.12.2003 to 15.12.2007	128	148
16.12.2007 to 15.12.2008	126	146
16.12.2008 to 15.12.2009	124	144
16.12.2009 to 15.12.2010	122	142
16.12.2010 to 15.12.2011	120	140
16.12.2011 to 15.12.2012	118	138
16.12.2012 to 15.12.2013	116	136
16.12.2013 to 15.12.2014	114	134

Article 7.- Reference price

The reference price for wheat shall correspond to the average of the daily prices recorded in the markets specified in Article 8, over a period of 15 days counted retroactively from the 10th day of the month in which the relevant decree is to be published.

Article 8.- Most relevant market

The most relevant market for wheat, during the period of application of duties and rebates extending from 16 December to 15 June of the following year, shall be that of *Trigo Pan Argentino,* and the prices will correspond to the daily prices quoted for that product *f.o.b. Argentine port*; during the period of application extending from 16 June to 15 December, it shall be that of *Soft Red Winter No. 2*, and the prices will correspond to the daily prices quoted for that product *f.o.b. Gulf of Mexico*.

[...]

§ 4. Determination of specific duties and tariff rebates

Article 13.- Establishment of duties and rebates

In each supreme decree issued under these regulations there shall be established, with respect to the products forming its subject matter, specific duties, when the reference price is below the floor price, and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, when the reference price is above the ceiling price.

When the reference price is above the floor price but below the ceiling price, this shall be recorded in the corresponding decree, which shall not establish duties or rebates during the period in which it remains in force.

Article 14.- Calculation of specific duties

The specific duties applicable to imports of wheat, refined sugar and raw sugar shall correspond to the difference between the floor price and the reference price of each product multiplied by a factor of one (1) plus the general *ad valorem* tariff in force established in the Customs Tariff.

Specific duty	=	(Floor price in force - reference price)	*	(1 + general *ad valorem* tariff in force, Customs Tariff)

Article 15.- Calculation of the tariff rebate

The rebates on amounts payable as *ad valorem* Customs Tariff duties, applicable to imports of wheat, refined sugar and raw sugar, shall correspond to the difference between the reference price and the ceiling price of each product multiplied by a factor of one (1) plus the general *ad valorem* tariff in force established in the Customs Tariff.

Tariff rebate	=	(Reference price - ceiling price in force)	*	(1 + general *ad valorem* tariff in force, Customs Tariff)

Article 16.- Wheat flour

In the case of wheat flour, the duties and rebates applied shall be those determined for wheat multiplied by a factor of 1.56.

Specific duty or tariff rebate for wheat flour	=	Specific duty or tariff rebate in force for wheat	*	1.56

Article 17.- Date of application of duties and rebates

The duties or rebates applicable to each import transaction, established pursuant to the procedure specified in these regulations, shall be those in effect on the date of the waybill of the vehicle transporting the goods in question.

In the case of electronic filing, the waybill date will be taken to be the date of actual acceptance of the vehicle and the goods will be considered to have been presented at the same time, in accordance with Article 37 of the Customs Ordinance.

Article 18.- Limitations on the application of duties and rebates

The duties resulting from the application of these regulations, added to the *ad valorem* duty, may not exceed the tariff rate bound by Chile under the World Trade Organization, each import transaction being considered individually and using the c.i.f. value of the goods concerned in the transaction in question as the basis for calculation.

The rebates on the amounts payable as Customs Tariff *ad valorem* duties determined for each import transaction may not exceed the amount corresponding to the *ad valorem* duty established in the Customs Tariff in force, calculated on the basis of the c.i.f. unit value of the goods.

The National Customs Service shall adopt the measures necessary to enforce the provisions of this Article.

ANNEX

Summary Table for the implementation of paragraph 2

Periods for the calculation of reference prices	Period of publication of decree	Periods of validity of specific duties or rebates	Most relevant market
26 Nov. - 10 Dec.	11-15 Dec.	16 Dec. - 15 Feb.	*Trigo Pan Argentino*
27 Jan. - 10 Feb.	11-15 Feb.	16 Feb. - 15 April	*Trigo Pan Argentino*
27 March - 10 April	11-15 April	16 April - 15 June	*Trigo Pan Argentino*
27 May - 10 June	11-15 June	16 June - 15 Aug.	*Soft Red Winter No. 2*
27 July - 10 Aug.	11-15 Aug.	16 Aug. - 15 Oct.	*Soft Red Winter No. 2*
26 Sep. - 10 Oct.	11-15 Oct.	16 Oct. - 15 Dec.	*Soft Red Winter No. 2*

[...]"

2. Workings of the amended PBS

2.17 Chile has bound its tariff rates for the products relevant in the current proceedings, wheat and wheat flour, at 31.5 per cent.[26] However, in practice, Chile's applied tariff rates are significantly below its bound rate. Not considering the specific duties applied under the amended PBS, the MFN tariff generally applicable to imports of wheat and wheat flour is 6 per cent.[27]

2.18 Under the amended PBS, the total amount of duties imposed on imports of wheat, wheat flour and sugar[28] may vary, through the imposition of additional specific duties or through the concession of rebates on the amounts payable. The total amount of duty applied to imports of wheat and wheat flour therefore consists of two components: the *ad valorem* MFN tariff and the applicable specific duty, if any, resulting from the amended PBS.[29] In other words, the total amount of duties resulting

[26] Chile's first written submission, para. 37. Chile's reply to question 71.

[27] Chile's reply to questions 47 and 71. Argentina's first written submission, para. 27. Chile's first written submission, para. 18.

[28] As noted above (see footnote 24), sugar is not at issue in this case. The original PBS was also applicable to edible vegetable oils, which have since been excluded from the system. Argentina's first written submission, paras. 21 and 22. Chile's first written submission, para. 18. Chile's reply to question 47 from the Panel.

[29] Argentina's first written submission, paras. 24 and 25. Chile's first written submission, paras. 18 and 20.

from the application of the amended PBS may vary between: (a) less than 6 per cent *ad valorem*, when a rebate is granted; (b) 6 per cent *ad valorem*, when there is no rebate granted and no additional specific duty imposed; and (c) more than 6 per cent *ad valorem*, when an additional specific duty is imposed.

2.19 The sum of the applied *ad valorem* tariff and the specific duty resulting from the amended PBS, if any, is capped at the *ad valorem* rate bound at the WTO (31.5 per cent), each import transaction being considered individually and using the CIF value of the goods concerned in the transaction in question as a basis for calculation. Likewise, the rebates on the amounts payable as Customs Tariff *ad valorem* duties determined for each import transaction, if any, may not exceed the amount corresponding to the applicable *ad valorem* duty.[30]

2.20 For the determination of the specific duty applicable, if any, the amended PBS, like the original, consists of two elements: a lower and upper threshold (the band's "floor" and "ceiling") and a reference price.

2.21 Under the amended PBS, the lower and upper thresholds of the band have been determined for the period extending from 16 December 2003 to 15 December 2014. For the period from 16 December 2003 to 15 December 2007, the lower and upper thresholds have been established at US$128 per tonne and US$148 per tonne, respectively. From 16 December 2007 to 15 December 2014, the indicated lower and upper thresholds will be adjusted annually by multiplying the prices in force during the previous annual period by a factor of 0.985. The lower and upper thresholds resulting from this operation are set out in Law 19.897 and in Supreme Decree 831.[31]

2.22 Under the previous system, the lower and upper thresholds of the PBS were determined every year on the basis of average monthly prices observed for the preceding 60 months on specific exchanges. In the case of wheat, the calculation was based on *Hard Red Winter No. 2*, FOB Gulf (Kansas Exchange). These average prices were adjusted by the percentage variation in the external price index (IPE) drawn by the Central Bank of Chile. The adjusted prices were listed in descending order, eliminating up to 25 per cent of the highest and lowest values. Tariff and importation 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) were added to the prices thus determined in order to fix the lower and upper thresholds on a CIF basis.[32]

2.23 The amended PBS also involves the use of a "reference price". This reference price is not the transaction price, but a price determined by the Chilean authorities six times in the course of each twelve-month period extending from 16 December to 15 December of the following year.[33] According to Law 19.897, the reference prices are to be based on "the average of the daily international prices for wheat... recorded in the most relevant markets over a period of 15 calendar days".[34] The most relevant markets for wheat are defined by Decree 831 to be those of *Trigo Pan*

[30] Chile's first written submission, paras. 23, 26 and 37. Chile's oral statement, paras. 22 and 24. Law 19.897, Article 1, in Exhibits ARG-1 and CHL-1. Decree 831, Article 18, in Exhibits ARG-2 and CHL-2, art. 18. See also, Chile's reply to question 66 from the Panel.

[31] Argentina's first written submission, paras. 33, 35 and 66. Chile's first written submission, paras. 28-29. Chile's oral statement, para. 25. Law 19.897, in Exhibits ARG-1, CHL-1. Decree 831, in Exhibits ARG-2 and CHL-2.

[32] Panel Report on *Chile – Price Band System*, paras. 2.4-2.5.

[33] Argentina's first written submission, para. 38. Chile's first written submission, para. 19. See also, Argentina's reply to question 12(d) from the Panel and Chile's reply to questions 12(a), 12(d) and 13 from the Panel. Law 19.897, in Exhibits ARG-1, CHL-1. Decree 831, in Exhibits ARG-2 and CHL-2.

[34] Argentina's first written submission, para. 40. Chile's first written submission, paras. 30 and 34. Law No. 19.897, in Exhibits ARG-1 and CHL-1.

Argentino and *Soft Red Winter No. 2*. The prices for those markets are to correspond to the daily prices quoted for the products *FOB Argentine port* and *FOB Gulf of Mexico*, respectively.[35]

2.24 Under the previous system, the reference prices were determined weekly (every Friday) by the Chilean authorities, using the lowest f.o.b. price for the product in question on foreign "markets of concern to Chile". With respect to wheat, these markets of concern included Argentina, Canada Australia and the United States. The reference price could be consulted by the public at the offices of the Chilean customs authorities.[36]

2.25 Under the amended PBS, a specific duty is triggered when the reference price is below the lower threshold of the band. The additional duty (which cannot bring the total duty to a level higher than the *ad valorem* rate bound at the WTO) is equivalent to the difference between the lower threshold of the band and the reference price, multiplied by a factor of one (1) plus the general *ad valorem* tariff (6 per cent). Conversely, a tariff rebate is triggered when the reference price is higher than the upper threshold of the band. The rebate (which cannot be greater than the applied *ad valorem* rate) is equivalent to the difference between the upper threshold of the band and the reference price, multiplied by a factor of one (1) plus the general *ad valorem* tariff (6 per cent).[37]

2.26 Under the previous system, a specific duty was triggered when the reference price was below the lower threshold of the band. The duty increase was equivalent to the absolute difference between the lower threshold of the band and the reference price. Conversely, a tariff rebate was triggered when the reference price was above the price that determined the upper threshold of the band. The rebate (which could not be greater than the applied *ad valorem* rate) was then equivalent to the absolute difference between the reference price and the upper threshold of the band.[38]

2.27 As regards wheat flour, and similar to the original PBS, the price band for wheat is used to calculate the duty or rebate, which is then multiplied by a factor of 1.56 to obtain the specific duty or rebate for wheat flour.[39]

2.28 According to Decree 831, duties and rebates for wheat are to be determined six times in the course of each annual period extending from 16 December to 15 December of the following year, by a Supreme Decree, which is to be published in the Official Journal of Chile within a period of five days prior to the date of its entry into effect. The periods of validity for implementation of each Decree establishing duties or rebates are as follows: 16 December to 15 February; 16 February to 15 April; 16 April to 15 June; 16 June to 15 August; 16 August to 15 October; and, 16 October to 15 December.[40]

2.29 Each of these bimonthly decrees contains the specific duties or rebates applicable for wheat and wheat flour. The decrees do not indicate the reference price calculated for each period. The

[35] Argentina's first written submission, paras. 41 and 42. Chile's first written submission, paras. 35 and 115. Decree 831, Article 8, in Exhibits ARG-2 and CHL-2.

[36] Panel Report on *Chile – Price Band System*, paras. 2.4 and 2.6.

[37] Argentina's first written submission, paras. 52, 56-57 and 62-63. Chile's oral statement, paras. 21 and 23. Chile's first written submission, paras. 21-22 and 24-25. Law 19.897, in Exhibits ARG-1, CHL-1. Decree 831, in Exhibits ARG-2 and CHL-2.

[38] Panel Report on *Chile – Price Band System*, para. 2.4.

[39] Argentina's first written submission, para. 59. Chile's first written submission, para. 27. Chile's oral statement, para. 62. Law 19.897, in Exhibits ARG-1, CHL-1. Decree 831, in Exhibits ARG-2 and CHL-2. Panel Report on *Chile – Price Band System*, para. 2.5.

[40] Chile's first written submission, para. 33. Chile's rebuttal, para. 48. Chile's reply to question 6(b) from the Panel. Decree 831, Article 5, in Exhibits ARG-2 and CHL-2.

specific duties or rebates remain valid for two months[41], "and during that period are completely disconnected from what may occur in the reference, or any other, markets."[42]

2.30 When a shipment of a product subject to the amended PBS (including wheat and wheat flour) arrives at the border for importation into Chile, the customs authorities apply the total amount of applicable duties or rebates under the amended PBS, if any, as indicated in the corresponding Decree. The specific duty or rebate, applicable to each import transaction, is the one in effect on the date of the waybill of the vehicle transporting the goods in question.[43] Under the previous system, the applicable reference price for a particular shipment was determined with reference to the date of the bill of lading.[44]

2.31 According to the data provided by Chile, during the first 109 weeks of operation of the amended PBS (from 16 December 2003 to 13 January 2006), in 57 weeks (52.3 per cent) only the general *ad valorem* tariff was applied, in 35 weeks (32.1 per cent) duty rebates were applied and in 17 weeks (15.6 per cent) specific duties were applied. From 13 January to 15 June 2006, wheat imports entered into Chile subject only to the general *ad valorem* tariff.[45]

2.32 The Law states that:

> "In 2014, the President of the Republic shall evaluate the modalities and conditions of application of the price band system, taking into consideration international market conditions, the requirements of the industrial, productive and consumer sectors and Chile's trade obligations at that date".[46]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 In turn, Argentina requests that the Panel find that through the amendments incorporated into its PBS, Chile has failed to implement the recommendations and rulings of the DSB and continues to be in breach of its obligations as a Member of the WTO. More specifically, Argentina requests that the Panel find that the amended PBS, as applied to the importation of wheat and wheat flour:

(a) Is inconsistent with Article 4.2 of the Agreement on Agriculture, since it constitutes a border measure similar to a variable import levy and a minimum import price;

(b) Is inconsistent with the second sentence of Article II:1(b) of GATT 1994, since it falls within the category of "other duties or charges", has not been recorded in the relevant column of Chile's Schedule of Concessions and is nevertheless levied; and,

[41] Decree 831, Articles 1 and 5, and Annex "Summary Table for the implementation of paragraph 2", in Exhibits ARG-2 and CHL-2.

[42] Chile's first written submission, para. 180. See also Chile's first written submission, para. 93, Chile's oral statement, paras. 31 and 63, and Chile's reply to questions 12(a), 13 and 14 from the Panel. See also, Chile's first written submission, para. 114. Chile's rebuttal, paras. 8 and 89. Chile's reply to question 14 from the Panel.

[43] Chile's first written submission, para. 36. Decree 831, Article 17, in Exhibits ARG-2 and CHL-2.

[44] Panel Report on *Chile – Price Band System*, para. 2.6.

[45] Chile's rebuttal, paras. 173 and 174. Argentina's reply to question 29 from the Panel.

[46] Law No. 19.897, in Exhibits ARG-1 and CHL-1. See also, Chile's reply to question 49 from the Panel.

(c) Does not ensure the conformity of Chile's laws, regulations and administrative procedures with its obligations as provided in the WTO Agreements, which is inconsistent with Chile's obligations under Article XVI:4 of the WTO Agreement.[47]

3.2 Chile has requested the Panel to find that the amended PBS has eliminated any inconsistency with Article 4.2 of the Agreement on Agriculture and has implemented the DSB recommendations and rulings in the original proceedings. More specifically, Chile has requested the Panel to find that:

(a) Argentina's claim under the second sentence of Article II:1(b) of GATT 1994 is outside the terms of reference of this compliance Panel;

(b) Argentina's "claim ... relating to the factor of 1.56 used to determine the duties or rebates for wheat flour" is outside the terms of reference of this compliance Panel[48];

(c) The amendments incorporated by Chile make the PBS consistent with Article 4.2 of the Agreement on Agriculture; and,

(d) As a consequence of the PBS not being inconsistent with Article 4.2 of the Agreement on Agriculture, the challenged measures are also not in breach of Article XVI:4 of the WTO Agreement.[49]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their submissions to the Panel. Submissions from the parties, including the first written submissions, rebuttals and written versions of their oral statements, are attached as annexes to the report.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties to these proceedings that presented oral statements to the Panel are attached as annexes to the report, i.e., Australia, Brazil, Canada, Colombia, the European Communities, Thailand and the United States. The only written submission received by the Panel, that presented by Brazil, is likewise attached.

VI. INTERIM REVIEW

6.1 On 11 October 2006, the Panel submitted its interim report to the parties. On 18 October 2006, Argentina and Chile submitted written requests for review of precise aspects of the interim report.

6.2 The Panel modified aspects of its report in light of the parties' comments where it considered that appropriate, as explained below. The Panel has also made some additional revisions and corrections for the purposes of clarity and accuracy. References to paragraph numbers and footnotes in this Section refer to those in the interim report, except as otherwise noted.

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[47] Request for the Establishment of a Panel, *Chile – Price Band System (Article 21.5 – Argentina)*, 9 January 2006, WT/DS207/18. See also, Argentina's first written submission, paras. 13-14 and 305, Argentina's rebuttal, paras. 320-321, and Argentina's oral statement, paras. 3-7.

[48] Chile's first written submission, paras. 58-63 and 197. Chile's rebuttal, paras. 182-195, 206 and 211. The Panel is of the view that Argentina has not raised a claim specifically related to the use of such 1.56 factor. The Panel will consider the parties' arguments related to this factor in the findings section of this Report. See para. 7.80 below.

[49] Chile's first written submission, paras. 2, 46-57, 64-197. Chile's rebuttal, paras. 6 and 211. Chile's oral statement, para. 19.

Factor applicable to wheat flour

6.3 In footnote 48, paragraph 3.2(a), of the interim report, the Panel had referred to Chile's request that the Panel find the claim raised by Argentina relating to the factor of 1.56 used to determine the duties or rebates applicable to wheat flour to be outside of its terms of reference. **Chile** requested that this argument not be confined to a footnote and that it be addressed separately and not only in the context of arguments raised by Argentina.

6.4 The Panel has reviewed paragraph 3.2 of the report, in the light of Chile's request, and has reflected Chile's argument relating to the 1.56 factor in the main body of that paragraph and not solely in a footnote.

6.5 The Panel is not persuaded, however, by Chile's interpretation that Argentina has raised a claim related to the use of a factor of 1.56. The Panel recalls the traditional definition of a claim as the affirmation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement"[50], as compared to the arguments "adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".[51] Argentina's comments regarding the 1.56 factor are not a separate claim, but rather part of its arguments to support the claim that the amended PBS is similar to a "variable import levy" and a "minimum import price," and is thus inconsistent with Article 4.2 of the Agreement on Agriculture. Accordingly, the Panel did not modify its reasoning contained in paragraph 7.80 of the interim report.

Linkage between Argentina's claim under the second sentence of Article II:1(b) of GATT 1994 and its claim under Article 4.2 of the Agreement on Agriculture

6.6 In paragraph 7.3 of the interim report, the Panel noted that Argentina has linked its claim under the second sentence of Article II:1(b) of GATT 1994 to the Panel's requested findings under Article 4.2 of the Agreement on Agriculture. That linkage is also mentioned in paragraph 7.157 of the interim report. **Argentina** requested that the Panel clarify that, in its request for the establishment of this compliance Panel, its claim under Article II:1(b) of GATT 1994 was not linked to its claim under Article 4.2 of the Agreement on Agriculture and that, furthermore, the former claim is one that stands on its own.

6.7 We take note of Argentina's explanation, and we have made corresponding adjustments in paragraphs 7.107 and 7.157, which reflect Argentina's arguments. However, we find no need to review paragraph 7.3 of the interim report, which quotes Argentina's words, linking its claim under Article II:1(b) of GATT 1994 to its claim under Article 4.2 of the Agreement on Agriculture, in order to discuss what should be the proper order of the Panel's analysis.

Mathematical calculations submitted by the parties

6.8 **Chile** requested that the Panel review Section VII.B of the interim report (paragraphs 7.6 to 7.104). In its opinion, the Panel has not considered the extensive mathematical calculations provided by the parties, regarding whether the amended PBS works similarly to a variable levy or a minimum import price, and the effects of overcompensation and isolation.

6.9 The Panel had already noted in its interim report, the extensive explanations provided by the parties regarding the operation of the amended PBS.

[50] Appellate Body Report on *Korea – Dairy*, para. 139.
[51] Ibid.

6.10 On the basis of such explanations and the evidence available, the Panel concluded that the amended PBS continues to have the same features that were found to make the original PBS similar to a "variable import levy". Such a conclusion was reached mainly on the basis that the amended PBS contains a scheme or formula that causes and ensures that the level of duties collected or rebates granted under the system changes automatically and continuously over time, as well as that the design and operation of the amended PBS continues to be characterized by a lack of both transparency and predictability, features also observed in the course of the original proceedings. These aspects affect the basic elements of the amended PBS, i.e., the reference price and the thresholds of the band.

6.11 With regard to the similarity to a "minimum import price", and also on the basis of the explanations provided by the parties and the evidence available, the Panel noted that the amended PBS operates so as to prevent the entry of imports of wheat and wheat flour into the Chilean market at prices below the lower threshold of the band. The Panel also noted that, as a result of the combined application of the *ad valorem* tariff rates and the specific duties or rebates resulting from the PBS, the Chilean domestic price has been disconnected from international price developments. The amended PBS was found to go beyond simply ensuring "a reasonable margin of fluctuation of domestic prices". Instead, specific duties resulting from the amended PBS tend to "overcompensate" for price declines and to elevate the entry price of wheat imports to Chile above the lower threshold of the price band. In these circumstances, the entry price of such imports to Chile under the amended PBS is higher than if Chile simply applied a minimum import price at the level of the lower threshold of the price band.

6.12 It is on the basis of the configuration and interaction of the different features of Chile's amended PBS, and not only on particular mathematical calculations provided by the parties, that the Panel found that the amendments introduced by Chile into its PBS have failed to convert it into a measure that is no longer a border measure similar to a "variable import levy" and to a "minimum import price", in the terms of footnote 1 to Article 4.2 of the Agreement on Agriculture. Consequently, the Panel finds no need to review Section VII.B of the report as requested by Chile.

Adjustment for import costs in the original PBS

6.13 In paragraphs 7.40(d), 7.48 and 7.50 of the interim report, the Panel had referred to the way in which prices used to determine the reference price were not adjusted for "import costs", unlike the prices used in the calculation of the upper and lower thresholds of the band. The Panel also referred to the findings made by the Appellate Body and by the original Panel in that regard. **Chile** requested that these paragraphs be reviewed, since they perpetuate a misunderstanding about the way in which the original PBS functioned.

6.14 The Panel has noted Chile's arguments in this regard.[52] It is outside the Panel's mandate, however, to review the characteristics of the original PBS, as they were described in the original proceedings by the Appellate Body and by that Panel. In any event, even if, *ad arguendo*, we were to accept Chile's explanation that there is a misunderstanding about the way in which, in the original PBS, the reference price was not adjusted for "import costs", this would not affect the conclusions contained in this compliance Panel report.

Amendments to Chile's PBS

6.15 **Chile** requested that the Panel review the language of paragraphs 7.53 and 7.92 of the interim report, referring to whether the Panel should consider "specific aspects" of the amended PBS or rather determine the nature of the amendments to the PBS and whether those amendments are sufficient to comply with the DSB's recommendations and rulings and bring the measure into conformity with the

[52] See, for example, Chile's first written submission, paras. 167-169.

WTO agreements. The Panel has reviewed the language of both paragraphs in the light of Chile's comments.

The amended PBS as a border measure other than an ordinary customs duty

6.16 Paragraph 7.109 of the interim report states that the Panel had already noted that the challenged measures are border measures "other than an ordinary customs duty". **Argentina** requested that a cross-reference be added to this paragraph to cite the corresponding section where the Panel concluded that the amended PBS is not an ordinary customs duty. The Panel has included the cross-reference requested and reviewed the language of paragraph 7.104 in the light of Argentina's comment.

Implementation of rulings and recommendations of the DSB

6.17 In light of the Panel's finding that Chile has maintained a border measure similar to a variable import levy and to a minimum import price, and consequently acted in a manner inconsistent with Article 4.2 of the Agreement on Agriculture, **Argentina** requested the Panel to make an additional explicit finding that Chile has not implemented the recommendations and rulings of the DSB to bring its measure into conformity with its obligations under the Agreement on Agriculture. The Panel has reviewed the language of paragraph 8.2(a) in the light of Argentina's comments.

Additional revisions and corrections

6.18 The Panel made additional revisions and corrections to paragraphs 1.5, 7.60 and 7.171 of the interim report, as well as to footnote 225.

VII. FINDINGS

A. ORDER OF THE PANEL'S ANALYSIS

7.1 Argentina claims that the amended PBS is inconsistent with Article 4.2 of the Agreement on Agriculture, with the second sentence of Article II:1(b) of GATT 1994 and with Article XVI:4 of the WTO Agreement.

7.2 In the original proceedings, when dealing with Argentina's claims under Article 4.2 of the Agreement on Agriculture and Article II:1(b) of GATT 1994, the Panel decided to commence its analysis with an examination of the first claim. The Panel's decision was based on the consideration "that Article 4.2 of the Agreement on Agriculture deals more specifically and in detail with measures affecting market access of agricultural products".[53] In this regard, the Appellate Body stated that, inasmuch as the two provisions "establish distinct legal obligations... the outcome of this case would be the same" whether the analysis had begun with an examination of Article 4.2 of the Agreement on Agriculture or of Article II:1(b) of the GATT 1994.[54] In any event, the Appellate Body concluded that the Panel had not erred in examining Argentina's claim under Article 4.2 of the Agreement on Agriculture before the claim under Article II:1(b) of the GATT 1994 and decided to follow the same order.[55]

7.3 There is an additional reason to follow the same order in the current proceedings. Argentina has linked its claim under the second sentence of Article II:1(b) of GATT 1994 to the Panel's requested findings under Article 4.2 of the Agreement on Agriculture. In Argentina's words:

[53] Panel Report on *Chile – Price Band System*, para. 7.16.
[54] Appellate Body Report on *Chile – Price Band System*, para. 189.
[55] Appellate Body Report on *Chile – Price Band System*, para. 191.

> "Insofar as the amended PBS is a border measure similar to a variable import levy and a minimum import price, it is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it is a measure other than an ordinary customs duty.
>
> Not being an ordinary customs duty, the amended PBS constitutes 'other duties or charges' not recorded in the appropriate column of Chile's Schedule of concessions (No. VII).
>
> Therefore, if the amended PBS was not recorded but is nonetheless being levied, it is in breach of the *second* sentence of Article II:1(b) of the GATT 1994, pursuant to the *Understanding on the Interpretation of Article II:1(b) of the GATT 1994*."[56]

7.4 Likewise, Argentina has made its claim under Article XVI:4 of the WTO Agreement contingent on the Panel making findings under Article 4.2 of the Agreement on Agriculture and the second sentence of Article II:1(b) of GATT 1994:

> "[B]eing inconsistent with Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994, the amended PBS is in breach of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* since, while it remains in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements."[57]

7.5 In light of the above, as was done in the original proceedings, we will start our analysis with an examination of the amended PBS under Article 4.2 of the Agreement on Agriculture. We will then turn to Argentina's claim under the second sentence of Article II:1(b) of GATT 1994 and finally to the claim under Article XVI:4 of the WTO Agreement.

B. ARGENTINA'S CLAIM UNDER ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

1. Arguments of the parties

7.6 Argentina claims that the amended PBS is inconsistent with Article 4.2 of the Agreement on Agriculture. It argues that the essence of the PBS was unaffected by the changes introduced by Chile through Law 19.897 and Supreme Decree 831.[58] In its view, both the way in which the amended PBS is designed as well as the way in which it operates are sufficiently similar to the characteristics of a "variable import levy" and a "minimum import price" as to make the PBS not an ordinary customs duty, but rather a "similar border measure", in the terms of footnote 1 to Article 4.2 of the Agreement on Agriculture.[59]

7.7 Argentina adds that the particular configuration and interaction of the specific characteristics of the amended PBS generate certain market access conditions that lack transparency and predictability, disconnecting the Chilean market from international price trends in a way that insulates the Chilean market from the transmission of international prices, and prevents enhanced market access for imports of wheat and wheat flour.[60] Argentina also contends that the factor of 1.56 applied to the duties and rebates determined for wheat, in order to calculate the duties and rebates applicable

[56] Argentina's first written submission, paras. 293-295 (Footnote omitted).
[57] Ibid., para. 304.
[58] Ibid., para. 70.
[59] Ibid., paras. 71, 72, 74, 285, 286 and 288. Argentina's rebuttal, paras. 5, 6 and 12.
[60] Argentina's first written submission, paras. 73 and 287. Argentina's rebuttal, paras. 7 and 13.

to wheat flour, further insulates the entry price for wheat flour from international price developments.[61]

7.8 Argentina argues that, in the light of the Appellate Body's findings in the original case, Chile should have abolished its PBS as applied to wheat and wheat flour, as it did in the case of edible vegetable oils.[62]

7.9 Chile responds that the amendments made to its PBS under Law 19.897 and its Regulations are in keeping with the findings and conclusions of the Appellate Body and that Chile has therefore complied with the recommendations and rulings of the WTO Dispute Settlement Body.[63] In Chile's opinion, it was only required to take action with respect to specific aspects of the PBS that the Appellate Body had identified.[64] Chile adds that this is without prejudice to the fact that, in its view, the amendments introduced to the PBS do not have the effects that Argentina alleges and which would continue to make it inconsistent with Article 4.2 of the Agreement on Agriculture.[65]

7.10 Chile argues that the amendments help to gradually reduce protection in the domestic wheat and milling sector. The parameters used for the assessment of specific duties, namely floor, ceiling and reference prices, have been established in a transparent and predictable manner.[66] In its opinion, the Chilean wheat and wheat flour market has been connected to the international market, and protection levels will increasingly diminish, meaning that in addition to closer connection with foreign markets, there will be a decrease in relative prices that will render Chile's wheat market more competitive.[67]

7.11 Chile states that, as a result, the new PBS operates in such a way that it does not constitute a variable import levy or a minimum import price, or a measure similar to a variable import levy or a minimum import price. Therefore, in Chile's view, the amended PBS does not constitute one of the measures cited in the footnote to Article 4.2 of the Agreement on Agriculture and is thus not among the measures required to be converted into ordinary customs duties.[68]

7.12 With respect to the factor of 1.56 used to determine the duties or rebates for wheat flour, Chile requests the Panel to find that this is a claim that falls outside the terms of reference of this compliance Panel.[69]

2. Relevant provision

7.13 In the original proceedings, the Appellate Body defined in its report Article 4 of the Agreement on Agriculture, the provision cited by Argentina, as "the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products".[70] Article 4.2 provides:

> "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."

[61] Argentina's first written submission, paras. 224-235.
[62] Argentina's rebuttal, paras. 317-319.
[63] Chile's first written submission, paras. 64, 89, 193 and 197. Chile's rebuttal, paras. 6, 81 and 207.
[64] Chile's first written submission, para. 88. Chile's rebuttal, para. 208.
[65] Chile's first written submission, para. 88.
[66] Ibid., para. 193.
[67] Ibid., para. 195.
[68] Ibid., paras. 194, 196. Chile's rebuttal, para. 210.
[69] Chile's first written submission, paras. 58-63 and 197. Chile's rebuttal, paras. 182-195, 206 and 211.
[70] Appellate Body Report on *Chile – Price Band System*, para. 201.

"

[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."

3. Panel's analysis

(a) Issues for the Panel's consideration

7.14 The main issue for the Panel to decide under this particular claim is whether the amendments introduced by Chile to its PBS are such as to make the measure consistent with Article 4.2 of the Agreement on Agriculture. More specifically, whether the measure can no longer be considered to be a border measure that is similar to a variable import levy or to a minimum import price.

7.15 In the original proceedings, Chile's PBS was not found to be a "variable import levy" or a "minimum import price" system, but rather an instrument that had sufficient likeness or resemblance to be considered similar to those schemes.[71]

7.16 Variable import levies and minimum import prices are included in the list in footnote 1 to Article 4.2 of the Agreement on Agriculture as examples of "measures of the kind which have been required to be converted into ordinary customs duties". The list in footnote 1 contains other types of measures, such as quantitative import restrictions, discretionary import licensing, non-tariff measures maintained through state-trading enterprises and voluntary export restraints.

7.17 In the current case, Argentina has argued that the amended PBS is similar to variable import levies and to minimum import prices.[72] Accordingly, the Panel will limit itself to considering the possible similarity between the amended PBS and those two categories of measures (variable import levies and minimum import prices) and not other categories of measures also listed in footnote 1 to Article 4.2 of the Agreement on Agriculture.

(b) General considerations

7.18 The Panel begins by noting the objectives of the WTO Agreement on Agriculture, as described in its preamble: "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".[73] To achieve this objective, the preamble states that it is necessary to provide for reductions in protection, "resulting in correcting and preventing restrictions and distortions in world agricultural markets,"[74] through achieving "specific binding commitments," *inter alia*, in the area of market access[75].[76]

[71] Ibid., paras. 222-262. Panel Report on *Chile – Price Band System*, paras. 7.38-7.47.

[72] Argentina's first written submission, paras. 71-72, 285-286. Argentina's rebuttal, paras. 5-6, 12, 159, 205 and 320.

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

[74] Ibid., recital 3.

[75] Ibid., recital 4.

[76] Appellate Body Report on *Chile – Price Band System*, para. 196.

7.19 As noted by the Appellate Body in the original proceedings, during the course of the Uruguay Round, negotiators decided that certain border measures, which restricted the volume of trade or distorted the price of imports of agricultural products, had to be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. This agreement is reflected in the text of Article 4 of the Agreement on Agriculture which, as its title indicates, deals with "Market Access".[77]

(c) Is the amended PBS a border measure similar to those listed in footnote 1 to Article 4.2?

(i) Border measures listed in footnote 1 to Article 4.2

7.20 We now turn to Argentina's contention that Chile's amended PBS 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.

7.21 As in the case of the original measure[78], we note that the amended PBS continues to apply exclusively to imported goods and is enforced at the border by Chilean customs authorities.[79] Chile has not disputed these facts. It is therefore clear and undisputed that the amended PBS, like the original PBS, is still a border measure.

7.22 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.[80] 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*" (emphasis added).

7.23 Argentina has alleged that Chile's amended PBS has characteristics sufficiently similar to those of a "variable import levy" and a "minimum import price" so as to render it a "similar border measure", in the terms of footnote 1 to Article 4.2 of the Agreement on Agriculture, rather than an ordinary customs duty.[81]

7.24 As indicated by the Appellate Body, in order to determine whether Chile's amended PBS 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, we should start by considering, on an empirical basis, whether it bears sufficient likeness or resemblance to those two categories of measures so as to be considered similar.[82]

7.25 We will thus compare Chile's amended PBS to those two categories of measures (i.e., variable import levies and minimum import prices). Before looking at these two categories of measures, we recall the words of the Appellate Body in the original case:

> "*[A]ll* 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

[77] Ibid., para. 200.
[78] Panel Report on *Chile – Price Band System*, para. 7.25.
[79] Law 19.897, in Exhibits ARG-1, CHL-1.
[80] 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." These "measures" are not relevant in these proceedings.
[81] Argentina's first written submission, paras. 72 and 286. Argentina's rebuttal, paras. 6 and 12. Argentina's closing oral statement, para. 19. Argentina's reply to question 5(b) from the Panel.
[82] Appellate Body Report on *Chile – Price Band System*, paras. 225-226. See also, Panel Report on *Chile – Price Band System*, para. 7.26.

> 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."[83]

(ii) Definition of the term "variable import levies" in the original proceedings

7.26 In the original proceedings, the Appellate Body noted that the terms "variable import levies" and "minimum import prices" are not defined in the Agreement on Agriculture nor in any other of the WTO Agreements.[84] In those proceedings, the Panel concluded that it could not interpret those terms solely by looking at their text and context and on the basis of the general method of interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties.[85] It consequently decided to resort to supplementary means of interpretation as codified in Article 32 of the Vienna Convention.[86] The Appellate Body disagreed with the Panel's approach and decided to interpret the terms "variable import levies" and "minimum import prices" using the customary rules of interpretation as codified in Article 31 the Vienna Convention, i.e., discussing the ordinary meaning of these terms in their context, and in the light of their object and purpose.[87]

7.27 Applying those customary rules to the interpretation of the term "variable import levies", the Appellate Body stated:

> "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.[88] An 'import' levy is, of course, a duty assessed upon importation. A levy is 'variable' when it is 'liable to vary'.[89] 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).[90] 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

[83] Appellate Body Report on *Chile – Price Band System*, para. 227.
[84] Ibid., para. 229.
[85] Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.
[86] Panel Report on *Chile – Price Band System*, para. 7.35. See also, Appellate Body Report on *Chile – Price Band System*, para. 229.
[87] Appellate Body Report on *Chile – Price Band System*, paras. 230-231.
[88] (*original footnote*) *The New Shorter Oxford English Dictionary*..., p. 1574.
[89] (*original footnote*) *Ibid.*, p. 3547.
[90] (*original footnote*) Appellate Body Report, *Argentina – Textiles and Apparel*..., para. 46.

> be varied cannot, alone, bring that duty within the category of 'variable import levies' for purposes of footnote 1.
>
> 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 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.
>
> 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.[91] '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.[92] 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."[93]

7.28 In essence, a variable import levy is a duty assessed upon importation, which is liable to vary automatically and continuously on the basis of an underlying scheme or formula that does not require any discrete or independent legislative or administrative action and is intransparent and unpredictable as to the level of resulting duties.

(iii) Definition of the term "minimum import prices" in the original proceedings

7.29 As noted above[94], the Appellate Body defined the term "minimum import prices" by using the customary rules of interpretation as codified in Article 31 the Vienna Convention, i.e., discussing the ordinary meaning of these terms in their context, and in the light of their object and purpose.[95] Applying those customary rules to the interpretation of the term "minimum import prices", the Appellate Body stated:

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[91] (*original footnote*) The participants agreed with this in their responses to questioning at the oral hearing.

[92] (*original footnote*) Argentina's responses to questioning at the oral hearing.

[93] Appellate Body Report on *Chile – Price Band System*, paras. 232-234.

[94] See para. 7.26 above.

[95] Appellate Body Report on *Chile – Price Band System*, paras. 230-231.

> "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:
>
> > [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.[96]
>
> 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.'[97] 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.'[98] (emphasis added)."[99]

7.30 In essence, a minimum import price is a measure which ensures that certain imported products will not enter a domestic market at a price lower than a certain threshold, normally by imposing an import duty assessed on the basis of the difference between such threshold and the transaction value of the imported goods.

(iv) Determination that the original PBS was similar to "variable import levies" or "minimum import prices"

7.31 After having defined the terms, the original Panel and the Appellate Body found Chile's PBS to be a border measure similar to a "variable import levy" or a "minimum import price".[100]

7.32 The original Panel highlighted the fact that Chile's PBS had features that revealed "its intrinsically unstable, intransparent and unpredictable nature, as well as the insulation of the domestic market from international price competition which it [achieved].[101] The Appellate Body emphasized the fact that "a formula inherent in Chile's price band system [caused] and [ensured] automatic and continuous variability of the duties resulting from that system".[102]

7.33 Looking at the way in which the lower and upper thresholds of Chile's PBS were determined, the original Panel noted that those thresholds varied in relation to "world prices", and not in relation to domestic prices, or to some target price set by the Chilean authorities. In the words of the Panel:

> "We recognize that, on the face of it, the Chilean PBS does not share *all* the characteristics of *both* 'variable import levies' and 'minimum import prices'... [T]he 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.

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[96] (*original footnote*) Panel Report, para. 7.36(e).
[97] (*original footnote*) *Ibid.*
[98] (*original footnote*) *Ibid.*
[99] Appellate Body Report on *Chile – Price Band System*, paras. 236-237.
[100] Panel Report on *Chile – Price Band System*, para. 7.47. Appellate Body Report on *Chile – Price Band System*, paras. 252 and 262.
[101] Panel Report on *Chile – Price Band System*, para. 7.61.
[102] Appellate Body Report on *Chile – Price Band System*, para. 241.

> Instead, it corresponds to an administratively determined threshold price which may, but will not necessarily, be equal to or above the domestic market price. Nonetheless, we consider that, 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."[103]

7.34 In other words, taking into account the evidence submitted, the original Panel considered that the lower thresholds of Chile's price bands, under the original PBS, could often, although admittedly not in all cases, be equal to or higher than the domestic price. The Panel also noted that this could have been due, in part, to the way in which the price band thresholds, which were first calculated on the basis of monthly f.o.b. world prices over the previous five years, were then converted to a c.i.f. basis.[104]

7.35 In this respect, the original Panel also noted the fact that the PBS thresholds were determined:

> "[I]*nter 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 [would] equal or exceed the higher internal price."[105]

7.36 Based on these elements, the original Panel concluded that the lower thresholds of Chile's price bands operated like *substitutes* for domestic target prices and that this feature of Chile's PBS was similar to the features of variable import levies and those of minimum import prices.[106]

7.37 The Appellate Body agreed only partially with the original Panel's assessment. In the words of the Appellate Body:

> "[T]he 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 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."[107]

7.38 The Appellate Body also found that the way in which the second essential element of Chile's PBS, i.e., the "reference price", was established was similarly affected by a lack of transparency and predictability:

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[103] Panel Report on *Chile – Price Band System*, para. 7.45.
[104] Appellate Body Report on *Chile – Price Band System*, para. 244.
[105] Panel Report on *Chile – Price Band System*, para. 7.45 (footnote omitted). See also, Appellate Body Report on *Chile – Price Band System*, para. 245.
[106] Panel Report on *Chile – Price Band System*, para. 7.46.
[107] Appellate Body Report on *Chile – Price Band System*, para. 246.

> "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."[108]

7.39 The Appellate Body thus concluded that, even assuming that one of the two parameters of the original PBS, the band thresholds, did not distort the transmission of world market prices to Chile's market, it would nevertheless remain that the other parameter, the weekly reference prices, was liable to distort, if not disconnect, that transmission by virtue of the way in which it was determined. That was because specific duties resulting from Chile's PBS were equal to the *difference* between two parameters: the annual price band thresholds and the weekly reference prices applicable to the shipment in question. Consequently, even in such a case, the duties resulting from Chile's PBS would not transmit world market price developments to Chile's market in the same way as "ordinary customs duties".[109]

7.40 The Appellate Body cited the following features that compromised transparency and predictability in the way in which the PBS's reference price was established and impeded the transmission of international price developments to Chile's market:

(a) No Chilean legislation or regulation specified how the international "markets of concern" and the "qualities of concern" were selected, so that it was not certain that the weekly reference price was representative of the current world market price.

(b) The weekly reference price was not representative of an average of current lowest prices found in all markets of concern.

(c) The same weekly reference price applied 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.

(d) Unlike with the prices used in the calculation of the upper and lower thresholds of the band, the price used to determine the weekly reference price was not adjusted for "import costs", and thus was not converted from an f.o.b. basis to a c.i.f. basis. This was likely to inflate the amount of specific duties applied under Chile's PBS, because the duties were imposed in an amount equal to the difference between the *annual* price band thresholds, based on *higher* c.i.f. prices, and the *weekly* reference prices, based on *lower* f.o.b. prices.[110]

7.41 The Appellate Body also found that, contrary to what Chile had contended, the PBS did not merely moderate the effect of fluctuations in world market prices on Chile's market, nor did it tend only to compensate for price declines. Rather, the duties resulting from Chile's PBS tended to "overcompensate" for such price declines, and to elevate the entry price of imports to Chile above the lower threshold of the relevant price band. In other words, when international prices *fell*, and when the weekly reference prices were below the lower thresholds of the band, the total duties applied to

[108] Ibid., para. 247.
[109] Ibid., para. 251.
[110] Appellate Body Report on *Chile – Price Band System*, paras. 249-250.

particular shipments would, in many cases, result in overall entry prices for those shipments that *rose* rather than *fell*.[111]

7.42 The fact that the PBS duties were "capped" at the level of the 31.5 per cent *ad valorem* tariff rate bound in Chile's WTO Schedule was not considered relevant by the Panel and the Appellate Body, with respect to whether the PBS was any less distortive or insulating.[112] In this regard, the Appellate Body found "nothing in Article 4.2 [of the Agreement on Agriculture] to suggest that a measure prohibited by that provision would be rendered consistent with it if applied with a cap."[113] The Appellate Body concluded that the fact that the duties resulting from Chile's PBS were capped at 31.5 per cent *ad valorem* reduced the extent of the trade distortions in that system by reducing the extent to which those duties fluctuate, but it did not eliminate those distortions. Moreover, the cap did not eliminate the lack of transparency, or the lack of predictability, in the fluctuation of the duties resulting from the PBS.[114]

7.43 The Appellate Body emphasized that it had reached its conclusions on the basis of the particular configuration and interaction of all the specific features of Chile's PBS.[115]

(v) Is the amended PBS still similar to "variable import levies" or "minimum import prices"?

Amendments introduced by Chile in its PBS

7.44 The parties are in agreement that Chile has amended its PBS.[116] The Panel must determine, however, if such amendments are sufficient to comply with the DSB's recommendations and rulings to bring the measure into conformity with the WTO agreements.

7.45 In this respect, we initially note that Chile has argued that it was only "required to take action" on "specific aspects of the PBS that made the system a measure similar to a variable import levy and a minimum import price", identified by the Appellate Body.[117]

7.46 Chile maintains that several features that were observed by the Panel and the Appellate Body in the course of the original proceedings, and which were related to the matter of transparency or predictability, have been modified under the amended PBS.

7.47 For example, Chile notes that the amended PBS has abolished the formula which, under the original PBS, discarded the highest 25 per cent as well as the lowest 25 per cent of world prices over the preceding five years for the calculation of the lower and upper thresholds of the band.[118] Additionally, in the amended PBS both the lower and upper thresholds of the band are to be defined in f.o.b. terms, so that there is no explicit process of conversion of prices from f.o.b. to c.i.f. and it is no longer necessary to add "import costs".[119]

7.48 Indeed, in the original proceedings, the way in which the lower threshold was determined was found to artificially increase the margin between the lower threshold of the PBS and the reference price, and thus the applicable PBS duty. This for two reasons. First, because the lowest 25 per cent

[111] Ibid., para. 260.
[112] Ibid., paras. 254-259. See also, Panel Report on *Chile – Price Band System*, footnote 608.
[113] Appellate Body Report on *Chile – Price Band System*, para. 254.
[114] Ibid., para. 259.
[115] Ibid., para. 261.
[116] See, *inter alia*, Argentina's first written submission, paras. 2, 14, 21 and 23, Chile's first written submission, paras. 15, 45, 64 and 88.
[117] Chile's first written submission, para. 88.
[118] Chile's first written submission, para. 108. See also, Law 19.897, in Exhibits ARG-1, CHL-1.
[119] Law 19.897, in Exhibits ARG-1, CHL-1. Chile's first written submission, para. 109.

of all observed international market prices over the preceding 60 months were discarded, while the prices observed in "markets of concern" used for the calculation of the reference price did not undergo the same operation. Second, because the f.o.b. prices used for the threshold values were adjusted, *inter alia*, for "usual import costs", whereas the f.o.b. prices used for the reference prices were not.[120] For the same two reasons, the Panel also found that it could not be excluded that this threshold would operate in practice as a "proxy" for a domestic target price or domestic market price.[121]

7.49 In the original proceedings, the Appellate Body had also placed considerable importance on the way in which, in determining the thresholds of the bands, "import costs" were added to convert f.o.b. prices to a c.i.f. basis. The Appellate Body found that process to be neither transparent nor predictable, since no published legislation or regulation set out how those "import costs" were calculated.[122]

7.50 The Appellate Body additionally noted that, unlike 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 was not adjusted for "import costs" and thus not converted from a f.o.b. basis to a c.i.f. basis. This made it likely that the amount of specific duties applied under Chile's PBS would be inflated, because these duties were imposed in an amount equal to the difference between Chile's *annual* price band thresholds, which were based on *higher* c.i.f. prices, and Chile's *weekly* reference prices, which were based on *lower* f.o.b. prices. This factor was found, *inter alia*, to contribute to giving Chile's PBS "the effect of impeding the transmission of international price developments to Chile's market".[123]

7.51 Chile has also highlighted the fact that, under the amended PBS, the most relevant markets for wheat in Chile are explicitly indicated in Supreme Decree 831.[124] According to Supreme Decree 831, during the yearly periods extending from 16 December to 15 June of the following year, the "most relevant market" for wheat will be that for *Trigo Pan Argentino* (Argentine bread wheat) and the prices will correspond to the daily prices quoted for that product *f.o.b. Puerto Argentino* (Argentine port). Likewise, during the period extending from 16 June to 15 December every year, the "most relevant market" will be that for *Soft Red Winter No. 2* and the prices will correspond to the daily prices quoted for that product *f.o.b. Gulf of Mexico*.[125]

7.52 In the original proceedings, the Appellate Body had called attention to the fact that no Chilean legislation specified how the international "markets of concern" to Chile and the "qualities of concern" of products actually liable to be imported to Chile were selected in order to set the reference prices. Thus, as stated by the Appellate Body it was not "certain that the weekly reference price [would be] representative of the current world market price".[126]

7.53 We have noted the features highlighted by Chile[127] and some of them will be further discussed below. However, we are not persuaded by Chile's argument that all it was required to do was to take action on certain specific aspects of the PBS. On the contrary, a determination of whether Chile has amended its PBS in a manner so as to comply with the DSB's recommendations and rulings and to bring the measure into conformity with the WTO agreements, requires a review that goes beyond the consideration of "specific aspects". We recall, in this regard, the statement of the Appellate Body in the original case:

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[120] Panel Report on *Chile – Price Band System*, para. 7.63.
[121] Ibid., para. 7.45. See also, Appellate Body Report on *Chile – Price Band System*, paras. 243-245.
[122] Appellate Body Report, *Chile – Price Band System*, para. 246.
[123] Ibid., para. 250.
[124] Chile's first written submission, paras. 35 and 115.
[125] Supreme Decree 831, Article 8, in Exhibits ARG-2 and CHL-2.
[126] Appellate Body Report on *Chile – Price Band System*, para. 249.
[127] See paras. 7.47 and 7.51 above.

> "[W]e 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."

7.54 We will thus examine Chile's amended PBS, considering the configuration and interaction of its different features, in order to determine whether it can still be considered to be a border measure similar to a "variable import levy" or a "minimum import price", in the terms of footnote 1 to Article 4.2 of the Agreement on Agriculture.

Is the amended PBS still similar to a "variable import levy"?

7.55 We have already described the considerations that led the Appellate Body to find that Chile's original PBS, in respect of its particular features, shared sufficient similarity with "variable import levies" as to resemble, or be considered to be of the same nature or kind as such levies.[128] We will now address the issue of whether the amended PBS continues to have sufficient resemblance or likeness, to a "variable import levy".

7.56 In light of the Appellate Body's interpretation of the term "variable import levies", we consider first the ordinary meaning of the words themselves. In this regard, we note that the amended PBS continues to be a system for the determination of certain duties or rebates imposed on specific products upon their importation. We also note that the duties resulting from the amended PBS (i.e., the total amount of duties resulting from the application of the amended PBS[129]) continue to be "variable", i.e., "liable to vary".[130]

7.57 Recalling a statement of the Appellate Body, Chile has stated that "the mere fact that a levy is variable does not mean that it is a 'variable import levy'."[131] Indeed, not all import duties that are liable to vary can be categorized as "variable import levies". A particular type of variability is needed to make an import levy a "variable import levy". Looking at the context in which the term "variable import levy" is used in footnote 1 to Article 4.2, the Appellate Body noted that at least one feature of "variable import levies" is the fact that the *measure* itself, as a mechanism, must impose the *variability* in the duties.

7.58 On its face, the language of the legislation for the amended PBS will necessarily result in variability in the level of duties collected or rebates granted under the system, due to the fact that such language contemplates a scheme or formula that both causes and ensures that the level of such duties or rebates changes automatically and continuously over time. Chile has contested this fact. In particular, when asked about this by the Panel, Chile asserted that:

> "[T]he changes introduced by Chile by means of Law 19.897, the price bands no longer operate as a scheme or formula for the calculation of duties or rebates at the

[128] See paras. 7.31, 7.32, and 7.37-7.43 above.

[129] The total amount of duties resulting from the application of the amended PBS will vary between: (a) less than 6 per cent *ad valorem*, when a rebate is granted; (b) 6 per cent *ad valorem*, when there is no rebate granted and no additional specific duty imposed; and (c) more than 6 per cent *ad valorem*, when an additional specific duty is imposed in cases when the reference price is below the lower threshold.

[130] Appellate Body Report on *Chile – Price Band System*, para. 232.

[131] Chile's first written submission, para. 134. Cfr., Appellate Body Report on *Chile – Price Band System*, para. 232. See also, Chile's rebuttal, para. 5.

> border, in the manner indicated by the DSB in the original proceedings... Law 19.897 establishes a single specific duty (or tariff rebate) applicable to every import operation. This duty, like any other ordinary customs duty, remains invariable until it is changed by an administrative act. The other parameters laid down in Law 19.897 are no longer part of a scheme or formula, as they were under the PBS, but are elements for defining the framework of the border protection applied by the Chilean Government."[132]

7.59 We find this statement by Chile unpersuasive in light of the available evidence to the contrary and, indeed, of Chile's own explanations of how the amended PBS operates in practice.[133] The variability of the total amount of applied duties resulting from the operation of the amended PBS is not equivalent to the result of discrete changes in tariff rates.[134] Nor is the variability in the level of such specific duties or rebates the result of separate, independent and discrete legislative or administrative acts. Rather, the level of specific duties or rebates under the amended PBS is determined and announced six times during the course of each annual period, pursuant to the mandate of the legislation itself. As noted, such legislation sets forth a scheme or formula that establishes an automatic and periodic adjustment in such levels. Furthermore, under the terms of the legislation, any administrative action is limited merely to announcing (by means of a Supreme Decree published in the Official Journal of Chile) the level of the specific duties or rebates resulting from the application of the scheme or formula set out in such legislation. Under the applicable legislation, administrative action occurs *after* the amount of the applicable duties resulting from the amended PBS has been calculated in accordance with a formula.

7.60 Chile has highlighted the fact that ordinary customs duties may also vary over time. It has illustrated this fact, by citing the changes it made in its own *ad valorem* tariff from 1984 to 2003, lowering it gradually from 35 per cent to 6 per cent. That progressive decrease of the *ad valorem* tariff was achieved through successive variations of the tariff rate, in the context of a trade liberalization policy.[135] In our opinion, however, the variable features in the amended PBS are different from the possible modifications that a Member may introduce in its ordinary customs duties. The level of ordinary customs duties is in principle stable and predictable, at least until those duties are replaced with altogether new tariff rates. Chile's programme of gradually lowering its *ad valorem* tariff is an example of a predictable movement in the conditions of market access. Indeed, Chile referred to the latter stage of that programme as "a plan for the progressive and automatic reduction of Chile's general tariff from 11 per cent to 6 per cent between January 1999 and January 2003".[136]

7.61 In contrast, the only thing truly predictable about the level of duties ultimately assessed under the amended PBS is that in principle such level will change every two months. In other words, continuous variability of the duties is a feature inherent in the amended PBS.

7.62 This being said, the amended PBS is affected by more than the lack of predictability explained above. In the original proceedings, both the Panel and the Appellate Body emphasized the fact that the measures listed in footnote 1 to Article 4.2 of the Agreement on Agriculture are

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[132] Chile's response to question 7.

[133] Law 19.897, in Exhibits ARG-1, CHL-1. Supreme Decree 831, in Exhibits ARG-2 and CHL-2. See also, Chile's response to questions 6(b) and 16.

[134] Discrete changes occur independently and unrelated to an underlying statutory scheme or formula. Cfr., Appellate Body Report on *Chile – Price Band System*, para. 233 ("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").

[135] Chile's first written submission, paras. 134-136.

[136] Chile's rebuttal, para. 105. See Exhibit CHL-8.

characterized by a lack of transparency and predictability.[137] Both these features were noted by the Appellate Body as undermining the object and purpose of Article 4 of the Agreement on Agriculture: "to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties". Accordingly, the Panel must examine whether the amended PBS lacks not only predictability but also lacks the requisite transparency.[138]

7.63 Notwithstanding the amendments incorporated by Chile into its PBS, several crucial aspects of the design and operation of the amended PBS continue to be characterized by a lack of both transparency and predictability, which was also observed in the course of the original proceedings. On its face, the amended PBS is based on a scheme or formula that determines the level of specific duties or rebates that are to be applied on imports of wheat and wheat flour. As will be discussed below, several specific features, related to the matter of transparency or predictability, that were observed by the Panel and the Appellate Body in the course of the original proceedings, have been rendered moot in the amended PBS. Further, Chile asserts that, any interested exporter with knowledge of the market should be now able to predict, by applying the PBS's formulas, the amount of applicable duties or rebates. In Chile's words:

> "[W]hat is necessary in order to foresee the amount of the specific duty is a wheat trader's own skills in predicting prices and negotiating sales or purchases."[139]

7.64 In practice, however, several features of the system continue to be affected by a lack of transparency and predictability. The basic feature of the system is that, every two months, specific duties are to be imposed when the reference price is calculated by Chilean authorities to be below the lower threshold of the band. Conversely, rebates are to be granted when the reference price is calculated to be above the upper threshold. The two basic elements of the amended PBS are thus the reference price and the thresholds of the band.[140]

7.65 Supreme Decree 831 provides a technical definition of the term "reference price": the "average of the daily international wheat and sugar prices recorded in the most relevant markets".[141] As explained in the descriptive section of this report[142], the reference price is determined by the Chilean authorities six times in the course of each year and based, by statute, on an average of the daily international prices recorded over a period of 15 calendar days for two specific qualities of wheat in two selected markets (those of *Trigo Pan Argentino* and *Soft Red Winter No. 2*, quoted f.o.b. Argentine port and f.o.b. Gulf of Mexico, respectively).

7.66 The parties have extensively discussed with the Panel the manner in which reference prices are established by Chilean authorities. Despite the technical explanation of how reference prices are supposed to be calculated, the available evidence suggests that the manner in which these prices are determined continues to be affected by a serious lack of transparency. To begin with, reference prices are supposed to be determined through a scheme or formula, based on average daily prices for 15 calendar days out of each 60-day period.[143] The fact that authorities are statutorily limited to averaging the observations made during 15 calendar days does not guarantee that the resulting reference prices will be representative for the whole period. In response to a question from the Panel, Chile has stated that:

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[137] Appellate Body Report on *Chile – Price Band System*, para. 234. Panel Report on *Chile – Price Band System*, para. 7.34.

[138] Appellate Body Report on *Chile – Price Band System*, para. 234.

[139] Chile's first written submission, para. 162.

[140] See paras. 2.20, 2.25 and 2.28 above.

[141] Supreme Decree 831, Article 2(a), in Exhibits ARG-2 and CHL-2.

[142] See para. 2.23 above.

[143] Law 19.897, in Exhibits ARG-1, CHL-1. See para. 2.23 above.

> "It has been estimated that the average price over the period of at least fifteen days closest to the date of calculation of the duty or rebate (corresponding roughly to ten working days) is the minimum necessary for the result to be representative of the conditions prevailing at that time on the market, so as to prevent that average from potentially being influenced by extreme quotations which occasionally appear in the market and which do not necessarily reflect the level and trend of prices at that point in time."[144]

7.67 It is noteworthy that Chile has stated also that "the representativeness [of the reference price] at each point in time is of no relevance" and has highlighted instead that this price is supposed to be representative "of trends in the international market".[145] In Chile's words:

> "The reference price is based on information generated in the international markets and supplied by reliable sources. At the time it is calculated, therefore, it is representative of trends in the international market. However, it should be pointed out that the reference price is used as an instrument to facilitate determination of the level of protection for wheat, and that it has no useful bearing on commercial operations in that product. Accordingly, its representativeness at each point in time is of no relevance."[146]

7.68 However, the Panel notes that, in the course of the original proceedings, the Appellate Body reached the conclusion that the process of selecting the reference price was not transparent and not predictable for traders, based *inter alia* on the fact that it was *not certain* that the weekly reference prices under the original PBS were *representative* of current world market prices.[147]

7.69 Likewise, under the amended PBS, the reference prices are supposed to correspond to the wheat prices recorded in only two markets selected by Chile, i.e., Argentina and the United States.[148] Available evidence demonstrates, however, that during the years 2004 and 2005, Canada was a larger exporter of wheat to Chile than the United States, in volume and in monetary terms.[149] In other words, at least for some periods, and despite the definition contained in the Chilean legislation, the reference price has not reflected the prices recorded in some of the most relevant markets of concern for Chile.[150]

7.70 It should be noted again that, in the original proceedings, the fact that the weekly reference price used under Chile's PBS was not representative of an average of current lowest prices found in *all* markets of concern, was another factor considered by the Appellate Body in reaching its conclusion that the process of selecting the reference price was not transparent and not predictable for traders.[151]

7.71 Furthermore, as pointed out by Argentina, because of the way in which reference prices are calculated, traders will still have difficulty to estimate the total amount of applicable duties under the amended PBS before they send a particular shipment.[152] Depending on the time it takes for a

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[144] Chile's response to question 12(a).
[145] Chile's response to question 12(b).
[146] Ibid.
[147] Appellate Body Report on *Chile – Price Band System*, para. 249.
[148] Supreme Decree 831, Article 8, in Exhibits ARG-2 and CHL-2. See para. 2.23 above.
[149] Argentina's oral statement, para. 54. See also, Exhibit ARG-31 and Chile's response to question 60.
[150] Indeed, because of the changing nature of trade patterns, which are the markets of concern for a particular product is an evolving matter. Current markets of concerns may become irrelevant in one or two years, due to many different reasons.
[151] Appellate Body Report on *Chile – Price Band System*, para. 249.
[152] Argentina's first written submission, paras. 278-280.

particular shipment to arrive to Chile, and depending on the dates of that shipment, it is possible that at the time of exportation, the 15-day period of collection of prices used by the Chilean authorities for calculating the reference prices will not have ended. Indeed, the fact that the total amount of applicable duties under the amended PBS is linked to the fluctuation of world market prices is in itself a factor of uncertainty and unpredictability. We find merit in Brazil's statement during the Panel meeting:

> "[E]ven though traders often speculate on the evolution of prices, they cannot predict changes with the certainty required to afford predictability to trade. Variable import levies are prohibited precisely because the *Agreement on Agriculture* requires that market access be based on predictable regulation that does not alter with market prices."[153]

7.72 Transparency and predictability in the system are also affected by the mere existence of a "reference price". The fact that specific duties are added to the applied *ad valorem* tariff, on the basis of some periodically determined and constantly changing reference price, rather than on the basis of either the value or the volume of the imported goods, entails a systemic lack of transparency and predictability. This in turn is likely to lead to a reduction in the volume of imports and to impede the transmission of international prices to the domestic market.

7.73 As previously noted[154], under the amended PBS, the reference price is determined by the Chilean authorities six times per year, on the basis of the daily prices recorded in the "most relevant markets for wheat" over the 15 preceding days. This reference price so determined is then used to set the level of duties or rebates under the PBS, if any, applicable to all imports of wheat, regardless of their origin, and regardless of the transaction value of the respective shipment. In other words, according to the current legislation, the same reference price, determined from prices pertaining to specific varieties of wheat from specific origins, is to be used to determine the specific duties (or rebates, if applicable) that are imposed on "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".[155] The same specific duties or rebates under the amended PBS are also applicable to all imports of wheat flour, with the corresponding conversion factor of 1.56.[156] This feature was found, in the course of the original proceedings, to contribute in giving the PBS "the effect of impeding the transmission of international price developments to Chile's market".[157]

7.74 The thresholds of the band are the second basic element of the amended PBS. Chile has set the upper and lower thresholds of the band at US$148 and US$128, respectively, which will be adjusted annually beginning in 2007.[158] When asked about the way in which these two figures were determined, Chile has explained that it was done on the basis of the floor and ceiling prices provided for under the original PBS.[159] In Chile's words:

> "[T]he f.o.b. equivalents were determined on the basis of the floor and ceiling prices provided for in Decree No. 266 of May 2002, expressed at import cost level, by deducting all import costs applicable to an ordinary trading transaction at the date of entry into force of the Law (second half of 2003)."[160]

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[153] Brazil's oral statement, para. 10.
[154] See para. 7.65 above.
[155] Cfr. Appellate Body Report on *Chile – Price Band System*, para. 250.
[156] Cfr. Chile's response to question 15.
[157] Appellate Body Report on *Chile – Price Band System*, para. 250.
[158] Law 19.897, in Exhibits ARG-1, CHL-1. See para. 2.21 above.
[159] Chile's response to question 52.
[160] Ibid.

7.75 In the course of the original proceedings, the way in which thresholds were determined (*inter alia*, after discarding 25 per cent of "atypical observations" at the bottom and at the top) was found by the Appellate Body to increase the likelihood that the lower threshold of the band would equal or exceed the higher internal price. In other words, the lower threshold of the band was found to operate like a substitute for domestic target prices.[161] For a similar reason, Chile's original PBS was also found to 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.[162]

7.76 Chile states that, under the amended PBS, in order to determine the upper and lower thresholds of the band, it has converted c.i.f. values to f.o.b. equivalents "by deducting all import costs applicable to an ordinary trading transaction at the date of entry into force of the Law".[163] In this regard, we recall the findings of the Appellate Body with respect to the manner in which Chile determined the upper and lower thresholds of the band under the original PBS. In those proceedings, the Appellate Body determined that the way in which Chile converted f.o.b. prices into a c.i.f. basis, by adding "import costs", was intransparent and unpredictable, *inter alia*, because no published legislation or regulation set out how those "import costs" were calculated.[164]

7.77 In other words, under the amended PBS the upper and lower thresholds of the band have been set on the basis of a methodology that was found, in the course of the original proceedings, to be intransparent and unpredictable and to have the effect of impeding the transmission of international price developments to the domestic market. The new thresholds are thus affected by the same deficiencies that were identified in the original PBS.

7.78 Chile has asserted that under the amended PBS it "abolished the calculation formula that included discarding the highest 25 per cent as well as the lowest 25 per cent of world prices over the past five years".[165] It has added that all prices are now "set as f.o.b., meaning that today there is no price or value that converts an f.o.b. price to a c.i.f. basis, and it is no longer necessary to add 'import costs', which makes the system a great deal more transparent".[166]

7.79 The Panel has noted, however[167], that the upper and lower thresholds of the band were set by Chile on the basis of the floor and ceiling prices provided for under the original PBS, after deducting "import costs". In other words, Chile has admitted that these thresholds were set using figures that were determined through a methodology that, in the original proceedings, was found to increase "the likelihood that the lower threshold of the PBS [would] equal or exceed the higher internal price".[168] Chile has not demonstrated that the alleged abolition of the calculation formula that included discarding the highest and lowest 25 per cent of world prices, has had any practical impact on the levels at which the upper and lower thresholds of the band have been set. Nor has Chile provided any evidence to support its assertion that "import costs" were indeed deducted in the process of calculating the current thresholds. The mere assertion by Chile that the calculation formula has been abolished and that import costs have been deducted is not enough to demonstrate that, in this regard, the current system is any less intransparent and unpredictable than the original. Moreover, under the amended PBS, the upper and lower thresholds of the band, set on the basis of the methodology described above, have been fixed until 2014, with annual predetermined adjustments that will enter in force beginning

[161] Panel Report on *Chile – Price Band System*, para. 7.45.
[162] Appellate Body Report on *Chile – Price Band System*, para. 246.
[163] Chile's response to question 52.
[164] Appellate Body Report on *Chile – Price Band System*, para. 246.
[165] Chile's first written submission, para. 108.
[166] Ibid., para. 109.
[167] See para. 7.74 above.
[168] Panel Report on *Chile – Price Band System*, para. 7.45. Appellate Body Report on *Chile – Price Band System*, para. 245.

in 2007. By fixing the thresholds in this manner, the effect of disconnecting domestic prices from international price developments, thus impeding the transmission of world market prices to the Chilean domestic market, has been carried on into the amended PBS.

7.80 Argentina has also referred to the issue of the factor of 1.56 applied to the duties and rebates determined for wheat, under the amended PBS, in order to calculate the duties and rebates applicable to wheat flour.[169] We are not convinced by Chile's contention that this is a claim that falls outside the terms of reference of this compliance Panel.[170] In our view, Argentina's comments regarding the 1.56 factor are rather part of its arguments to support its claim that the amended PBS is similar to a "variable import levy" and a "minimum import price" and is thus inconsistent with Article 4.2 of the Agreement on Agriculture. It is therefore not a separate claim. In that respect, through the 1.56 factor, wheat flour is subject to an additional element of insulation from the transmission of international prices. As explained by Chile, the figure of 1.56 results from the fact that "between January 1986 and December 1995 (the period of application of the band at that time), the average ratio of the price of flour to the price of wheat was 1.566".[171] This figure was then "built into the Chilean legislation and it has remained unchanged ever since".[172] Chile, however, admits that the ratio of the price of wheat flour to the price of wheat may change over time. Previous legislation had estimated this ratio at 1.41.[173] In conclusion, by basing the total amount of duties applicable to wheat flour on the level of duties applicable to wheat, the amended PBS is transmitting to wheat flour the same features of insulation from international price developments to the domestic market and of lack of transparency and predictability that were observed above with respect to wheat. Furthermore, these effects are compounded by having built this factor into the legislation and preventing any adjustments to the ratio.

7.81 For the reasons indicated above, we find that the amended PBS continues to have the same features which were found to make the original PBS similar to a "variable import levy".

Is the amended PBS still similar to a "minimum import price"?

7.82 We have already described the considerations that led the Appellate Body to find that Chile's original PBS, in its particular features, shared sufficient features with "minimum import prices" to resemble, or be considered to be of the same nature or kind to those measures and, thus, prohibited by Article 4.2 of the Agreement on Agriculture. We have also found that the amended PBS continues to have features which make it similar to a "variable import levy". We will now address the issue of whether the amended PBS also continues to have sufficient resemblance or likeness, to a "minimum import price".

7.83 In the original proceedings, the Appellate Body noted that 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". It went on to note that the Panel had indicated that minimum import prices "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" and had defined the term by indicating that:

> "[M]inimum 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

[169] Argentina's first written submission, paras. 224-235.
[170] Chile's first written submission, paras. 58-63 and 197. Chile's rebuttal, paras. 182-195, 206 and 211. Chile's response to question 17 (d).
[171] Chile's rebuttal, para. 201. See also, Exhibits CHL-10 and CHL-11.
[172] Ibid.
[173] Chile's rebuttal, para. 187. See also, Argentina's response to question 32 and Exhibit ARG-29.

> specified minimum import price, an additional charge is imposed corresponding to the difference."[174]

7.84 When asked by the Panel, Chile stated its view that "[t]he defining characteristic of a minimum import price is the impossibility for any commercial operation to be expressed in terms of a price lower than the established price."[175]

7.85 In the original proceedings, the Panel noted that it *could not*:

> "[B]e 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".[176]

7.86 As we have noted, the lower threshold of the band in the amended PBS was set by Chile by resorting to the figures of the lower thresholds in the original PBS.[177] In other words, the lower threshold of the band in the amended PBS was determined by resorting to a methodology that had already been found to make such a threshold operate like a substitute for domestic target prices.

7.87 Considering the available evidence, we note that the lower threshold of the band in the amended PBS appears to continue to operate in practice as a "proxy" or substitute for a minimum import price. As a result of the combined application of the *ad valorem* tariff rates and the specific duties or rebates resulting from the PBS, the Chilean domestic price has been disconnected from international price developments.[178]

7.88 Similarly to what was noted in the original proceedings, the amended PBS goes beyond simply ensuring "a reasonable margin of fluctuation of domestic prices".[179] In practice, when international prices fall, and when the reference prices are determined to be below the lower thresholds of the price band, the combined application of the *ad valorem* tariff rates and the specific duties resulting from the PBS may result in an overall entry price of that shipment that rises rather than falls. Therefore, the amended PBS does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices, even albeit to a lesser extent than the decrease in those prices. Instead, specific duties resulting from the amended PBS tend to "overcompensate" for price declines and to elevate the entry price of wheat imports to Chile above the lower threshold of the price band. In these circumstances, the entry price of such imports to Chile under the amended PBS is higher than if Chile simply applied a minimum import price at the level of the lower threshold of the price band.

7.89 According to the available evidence it seems improbable that, under the amended PBS, imports of wheat or wheat flour will enter the Chilean market at prices below the price band floor. When asked by the Panel, Chile confirmed that "the likelihood of the entry price exceeding the floor price is very high".[180] In Chile's words,

> "[T]he unlikely but not impossible situation [that imports of wheat or wheat flour may enter the Chilean market at prices lower than the lower threshold of the price

[174] Appellate Body Report on *Chile – Price Band System*, para. 236. Panel Report on *Chile – Price Band System*, para. 7.36(e).
[175] Chile's response to question 19.
[176] Panel Report on *Chile – Price Band System*, para. 7.45.
[177] See para. 7.74 above.
[178] See, e.g., Exhibits ARG-11 and ARG-12.
[179] Appellate Body Report on *Chile – Price Band System*, para. 260.
[180] Chile's response to question 58.

band] could arise whereby, once a specific duty has been established, international prices fall substantially, which in turn is reflected in c.i.f. prices low enough to result in entry prices of below US$128."[181]

7.90 As stated by Brazil in its response to a question from the Panel:

"[A]lthough imports can legally enter at prices below the price band floor, this will occur only in a highly improbable factual scenario – namely, when world market prices drop dramatically within a period of two months. Falls in the world market price of this magnitude have not happened over the lifetime of the new PBS and, to Brazil's knowledge, have not happened in recent history. Even if such improbable price decreases occurred, the new PBS would neutralize it after just two months because, at the end of the period, the reference price would be updated, thereby pushing the entry price again above the price band floor."[182]

7.91 In other words, the amended PBS operates so as to prevent the entry of imports of wheat or wheat flour into the Chilean market at prices below the lower threshold of the band.

7.92 Therefore, we find no elements that suggest that the amended PBS has been modified with respect to the features that were found to make the original PBS similar to a "minimum import price".

The issue of transparency and predictability under Chile's amended PBS

7.93 We have already noted Chile's contention that it was only "required to take action" on "specific aspects of the PBS " that had been identified by the Appellate Body.[183] Chile has further asserted that "the lack of transparency and predictability of certain aspects of the [original] PBS were called into question precisely because they led to the insulation of domestic prices".[184] Chile has contended that Argentina's claims are reduced to "[insisting] that there is a lack of transparency and predictability in irrelevant aspects of the scheme in force", but that Argentina "has been unable to show that the current scheme based on Law 19.897 is preventing the transmission of international prices to the Chilean market or restricting the volume of imports".[185]

7.94 We do not agree with Chile's view that "the lack of transparency and predictability of certain aspects of the PBS were [only] called into question... because they led to the insulation of domestic prices".[186] We have found that the amended PBS has the effect of impeding the transmission of international price developments to the domestic market. We have also found that, with respect to basic features of the system, the amended PBS is affected by a lack of transparency and predictability. We note, however, that, in the course of the original proceedings, the lack of transparency and predictability in the level of duties that resulted from the PBS was not called into question by the Appellate Body *solely* because it led to the insulation of domestic prices. Rather the Appellate Body explicitly stated that:

"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

[181] Ibid.
[182] Brazil's response to question 104, paras. 14-15.
[183] Chile's first written submission, para. 88.
[184] Chile's rebuttal, para. 207.
[185] Ibid.
[186] Chile's rebuttal, para. 207.

> market if that exporter does not know and cannot reasonably predict what the amount of duties will be."[187]

7.95 In other words, even assuming, *ad arguendo*, that Argentina had only been able to prove that the amended PBS is affected by a lack of transparency and predictability in the level of duties that result from the system, such finding would not be irrelevant. On the contrary, the configuration and interaction of all these different elements of intransparency and unpredictability, as they refer to basic features of the system, would rather demonstrate that the amended measure continues to be a border measure similar to a "variable import levy" and to a "minimum import price".

Conclusion

7.96 Having considered the configuration and interaction of the different features of Chile's amended PBS, we find that the amendments introduced by Chile into its PBS have failed to convert it into a measure which is no longer a border measure similar to a "variable import levy" and to a "minimum import price", in the terms of footnote 1 to Article 4.2 of the Agreement on Agriculture.

(d) Conditions of access to Chile's market under the amended PBS

7.97 In the course of the proceedings, Chile has stated that, under the amended PBS, the conditions of access to its market are more favourable than they would have been if the original PBS was still in force.[188] Chile has argued, for example, that:

> "Law No. 19.897 and its Regulations have improved conditions of access to the Chilean market for wheat and wheat flour. This can be seen from the amount of time for which the duties and rebates have been applied since the Law entered into force."[189]

7.98 To support this argument, Chile has stated that, under the amended PBS, in the period from 16 December 2003 to 13 January 2006, specific duties have only been imposed in 17 weeks, whereas if the original PBS had been in place they would have been imposed in 27 weeks. Moreover, in the same period, under the amended PBS, rebates were granted in 35 weeks, whereas under the original PBS they would have only been granted in 27 weeks.[190]

7.99 Chile has further stated that the scheduled reduction of the thresholds of the band indicates that, irrespective of international price levels, the amount of the specific duties under the PBS "will increasingly diminish compared to those currently being established, just as the probability of duties actually being assessed will increasingly diminish".[191] In other words, in Chile's view, under the amended PBS, there is an "in-built process of gradual reduction of border protection of wheat".[192]

7.100 Chile has finally stated that an alternative to the amended PBS would be "to increase that protection to an *ad valorem* duty of 31.5[per cent]… a scenario where Argentinean wheat producers will be worse off".[193]

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[187] Appellate Body Report on *Chile – Price Band System*, para. 234.
[188] Chile's rebuttal, para. 163.
[189] Chile's first written submission, para. 183.
[190] Ibid., paras. 183-185. See also, Argentina's rebuttal, paras. 206-216, and Chile's rebuttal, paras. 63-174.
[191] Chile's first written submission, para. 186. See also, Argentina's rebuttal, paras. 217-238, and Chile's rebuttal, paras. 175-181.
[192] Chile's first written submission, para. 192.
[193] Chile's oral statement, para. 77.

7.101 Having found that the amended PBS is a border measure similar to a "variable import levy" and to a "minimum import price", the Panel cannot agree with Chile's arguments. The amended PBS is not necessarily less trade-distorting, less insulating of Chile's domestic market, nor less inconsistent with Chile's obligations under Article 4.2 of the Agreement on Agriculture, just because it may lead to the imposition of specific duties in fewer occasions (or even to the granting of rebates in more occasions) than would have been the case under the original PBS. Nor does the fact that the amended PBS incorporates an in-built process of gradual reduction of the thresholds of the band necessarily make the amended PBS any less similar to a variable import levy or to a minimum import price. None of these two factors eliminates the lack of transparency and predictability regarding the amount of the duties that are ultimately to be imposed on imported wheat and wheat flour, under the amended PBS, as a result of the combination of the *ad valorem* tariff and the applicable duties or rebates.

7.102 The Panel recalls in this regard the statement by the Appellate Body in the original proceedings:

> "[T]he 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."[194]

7.103 The findings of the Panel in the current proceedings do not affect Chile's right to impose ordinary customs duties, based on the value or the volume of imported goods, up to its *ad valorem* rates bound in the WTO, and in accordance with its obligations under the WTO agreements.

4. Conclusion

7.104 For the reasons indicated above, the Panel concludes that Chile's amended PBS 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. As such, it is not an ordinary customs duty.

C. ARGENTINA'S CLAIM UNDER THE SECOND SENTENCE OF ARTICLE II:1(B) OF GATT 1994

1. Arguments of the parties

7.105 Argentina claims that the amended PBS is inconsistent with the second sentence of Article II:1(b) of GATT 1994, because it constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedules of Concessions.[195]

7.106 Chile responds that, since the entry into force of Law 19.897, the amended PBS is consistent with Article 4.2 of the Agreement on Agriculture and is consequently not a measure that has to be converted into an ordinary customs duty.[196] Chile argues, nevertheless, that the Panel is prevented from making findings on this claim, since the claim falls outside its terms of reference. In Chile's opinion, this is a claim Argentina could have raised in the original proceedings but did not, when it claimed

[194] Appellate Body Report on *Chile – Price Band System*, para. 258.

[195] Argentina's first written submission, paras. 289-295. Argentina's rebuttal, para. 287. Argentina's oral statement, paras. 4 and 110-112 and 118. Argentina's response to question 25.

[196] Chile's first written submission, para. 47.

instead that the PBS was in breach of both Article 4.2 of the Agreement on Agriculture and the *first* sentence of Article II:1(b) of the GATT 1994.[197]

7.107 In its rebuttal, Argentina admits that its claim under the second sentence of Article II:1(b) of GATT 1994 is a new claim that was not raised in the original proceedings.[198] Argentina argues, however, that this claim could not have been presented before, because the modified PBS is a "new" measure, different from the PBS which was at issue in the original proceedings.[199] Argentina also argues that its claim relates to the modified PBS in its entirety rather than to one aspect of this system in particular, so that it is not challenging one particular aspect of the original measure which has not changed.[200] Finally, Argentina added that, irrespective of the violation of Article 4.2 of the Agreement on Agriculture, its claim under Article II:1(b) of the GATT 1994 is one that stands on its own.[201]

2. Relevant provision

7.108 Argentina's claim in the current proceedings concerns only the second sentence of Article II:1(b) of GATT 1994. To understand the context of this sentence, it is useful to note the full text of subparagraphs (a) and (b) of Article II:1:

> "(*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, 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. 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."

7.109 The Panel has already noted that the challenged measures are border measures "other than an ordinary customs duty".[202] The Uruguay Round Understanding on the Interpretation of Article II:1(b) of the GATT 1994 ("the Understanding on Article II:1(b)") provides that such measures, other than ordinary customs duties should have been recorded by Members at the end of the Uruguay Round in a column entitled "other duties and charges" in their Schedules. Paragraph 1 of the Understanding on Article II:1(b) reads:

> "(…) [i]n order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any 'other duties or charges' levied on bound tariff items, as referred in that provision, shall be recorded in the Schedules and concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of 'other duties or charges'."

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[197] Chile's first written submission, paras. 47-48. Chile's rebuttal, paras. 202-206. Chile's oral statement, para. 13. Chile's response to question 2.

[198] Argentina's rebuttal, paras. 290 and 295. Argentina's oral statement, para. 113.

[199] Argentina's rebuttal, paras. 291-292, 296, 303 and 306. Argentina's oral statement, paras. 114-116. Argentina's response to questions 2 and 25.

[200] Argentina's rebuttal, paras. 301-302. Argentina's response to question 25.

[201] Argentina's oral statement, para. 118.

[202] See para. 7.104 above.

3. Panel's analysis

(a) Issues for the Panel's consideration

7.110 In response to Argentina's claim under the second sentence of Article II:1(b) of GATT 1994, Chile has put forward two defences.

7.111 First, Chile has argued that the amended PBS is not a measure that has to be converted into an ordinary customs duty. It has stated that as a result of the amendments introduced, the PBS is now consistent with Article 4.2 of the Agreement on Agriculture and consequently is not in breach of the second sentence of Article II:1(b) of GATT 1994.

7.112 Second, Chile has argued that in any event the Panel is precluded from making findings with regard to this claim because it is a claim that Argentina should have raised in the original proceedings but did not. In Chile's view, Argentina's claim under Article II:1(b) of GATT 1994 is therefore outside the Panel's mandate.

(b) Findings in the original proceedings

7.113 We recall the particular set of circumstances surrounding this claim. In the original proceedings, Argentina had claimed that the PBS was inconsistent with Article II of GATT 1994[203], because it led to the imposition of duties in excess of Chile's tariff rate bindings.[204] The Panel found that the PBS duties were a border measure "other than an ordinary customs duty", prohibited under Article 4.2 of the Agreement on Agriculture. The Panel also stated that the expression "ordinary customs duties" has the same meaning in Article 4.2 of the Agreement on Agriculture and in Article II:1(b) of GATT 1994. The Panel went on to find that the consistency of the duties resulting from Chile's PBS with Article II:1(b) of GATT 1994 could not be assessed under the first sentence of that provision, which deals with ordinary customs duties, but rather with the second sentence, which deals with "other duties or charges of any kind" imposed on or in connection with importation.[205]

7.114 The Panel then stated 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 the light of the Understanding on Article II:1(b). Noting that Chile did not record its PBS in the "other duties and charges" column of its Schedule, the Panel therefore found that the Chilean PBS duties were inconsistent with Article II:1(b) of GATT 1994.[206]

7.115 The Appellate Body reversed the Panel's findings regarding the breach of Article II:1(b) of GATT 1994. The Appellate Body found that the Panel had acted in a manner inconsistent with its duties under Article 11 of the DSU, since the second sentence of Article II:1(b) was not part of the matter before the Panel and, furthermore, Chile had been denied its fair right of response regarding this claim. The Appellate Body determined that, while the Panel's terms of reference, as defined in the request for the establishment of the panel, were broad enough to have included a claim under the second sentence of Article II:1(b), Argentina had not articulated a claim under that sentence, nor had it submitted any arguments on the consistency of Chile's PBS with the second sentence. Therefore, the second sentence of Article II:1(b) was not the subject of a claim before the Panel.[207]

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[203] *Chile – Price Band System*, Request for the Establishment of a Panel by Argentina (WT/DS207/2), 19 January 2001, p. 1.
[204] Panel Report on *Chile – Price Band System*, paras. 4.6-4.7.
[205] Ibid., paras. 7.104-7.105.
[206] Panel Report on *Chile – Price Band System*, para. 7.107-7.108.
[207] Appellate Body Report on *Chile – Price Band System*, paras. 173-177.

7.116 The Appellate Body's statement does not necessarily invalidate the substantive reasoning behind the Panel's findings on Article II:1(b). On the contrary, the Appellate Body confirmed the possible parallelism between the obligations in Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. Indeed, the Appellate Body indicated that a finding of violation under Article 4.2 of the Agreement on Agriculture would make it unnecessary to issue a separate finding with regard to the second sentence of Article II:1(b) of GATT 1994. In the words of the Appellate Body:

> "[I]f 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 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."[208]

(c) Need for separate findings under Article II:1(b) of GATT 1994

7.117 The Panel has already found that the amended PBS, challenged in the current Article 21.5 proceedings, is inconsistent with Article 4.2 of the Agreement on Agriculture. As noted, the Appellate Body indicated in the original proceedings that a finding of violation under Article 4.2 of the Agreement on Agriculture made it unnecessary to issue a separate finding with regard to the second sentence of Article II:1(b) of GATT 1994. It is our view that the position of the Appellate Body on that regard was not based solely on the particular characteristics of the original PBS, but rather on the basis of the respective obligations contained in Article 4.2 of the Agreement on Agriculture and in the second sentence of Article II:1(b) of GATT 1994. Consequently, we believe that having found that the amended PBS is inconsistent with the former, we do not need to make a separate finding on whether it is also a violation of the latter.

7.118 When asked by the Panel, Argentina was not able to explain why, assuming that the Panel were to make a determination that the amended PBS is in breach of Article 4.2 of the Agreement on Agriculture, the Panel would then need to make a separate finding on whether the same measure also results in a violation of Article II:1(b) of the GATT 1994 in order to resolve the dispute. Argentina only stated that, in the absence of such separate determination, Chile would try to maintain its measure with "cosmetic amendments", and that a separate determination would contribute to Chile withdrawing the inconsistent measure and that it would avoid a "never-ending cycle of dispute settlement proceedings".[209] The Panel is unconvinced by such arguments. Even leaving aside the presumption that Members should act in good faith[210], it is not clear why Chile's compliance with the determinations regarding Article 4.2 of the Agreement on Agriculture would not be enough to achieve the objectives identified by Argentina and whether a separate determination on Article II:1(b) of the GATT 1994 would have any additional effect.

7.119 The Panel notes in this regard that it does not need to examine all legal claims made by Argentina. As was stated by the Appellate Body:

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[208] Ibid., para. 190. See also para. 287.

[209] Argentina's response to question 28.

[210] "We must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law". Panel Report on *Argentina – Textiles and Apparel*, para. 6.14.

> "Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[211]

7.120 In consequence, once determined that the amended PBS is inconsistent with Article 4.2 of the Agreement on Agriculture, an additional finding on whether the same measure is also in breach of the second sentence of Article II:1(b) of GATT 1994 is not necessary in order to resolve the dispute between the parties.

(d) The issue of the Panel's mandate

7.121 In light of the consideration that a separate finding on whether the amended PBS is in breach of the second sentence of Article II:1(b) of GATT 1994 is not necessary in order to resolve this dispute between the parties, there would normally be no need to go any further. However, the Parties have extensively discussed whether Argentina's claim under Article II:1(b) has been properly brought before this Panel. This question relates to the issue of the Panel's mandate and is therefore of great systemic importance. Accordingly, and notwithstanding its decision not to make an additional finding under Article II:1(b) of GATT 1994, the Panel finds it worthwhile, *obiter dicta*, to express its views on some of the issues related to the question of the Panel's mandate under Article 21.5 of the DSU.

(i) Arguments of the parties

7.122 As described above, the parties are in agreement that Argentina did not raise a claim under the second sentence of Article II:1(b) of GATT 1994 in the course of the original proceedings. In other words, both Chile and Argentina agree that Argentina's claim in this respect constitutes a *new claim* which had not been before the original Panel. Each of the two parties, however, attaches different significance to this fact and interprets the applicable WTO precedents, on whether new claims would fall within this Panel's mandate, arriving at opposite conclusions.

7.123 Chile argues that Argentina's claim under the second sentence of Article II:1(b) falls outside the terms of reference of the Panel, because it should have been raised and substantiated during the original proceedings.[212] Chile also stresses that, should this Panel consider that such new claim falls properly within its mandate, its due process rights would be "significantly affected."[213]

7.124 Chile points primarily to the Appellate Body decision in *EC – Bed Linen (Article 21.5 – India)* in support of its position that Argentina's claim under Article II:1(b) is not within the Panel's mandate. In that case, the Appellate Body upheld the compliance panel's finding that a claim advanced by India was not properly before the panel, because it was not a *new* claim, but rather the *same* claim that had been raised before the original panel, against an *unchanged* feature of EC law. Chile argues that, as in *EC – Bed Linen*, Argentina's claim under the second sentence of Article II:1(b) of GATT 1994 relates to an *unchanged* feature of the PBS, and therefore should not be within this Panel's mandate. In this sense, Chile claims that this particular claim by Argentina is the *same* claim that Argentina could have brought, but did not, before the original panel proceedings, relating to the *same* feature of the PBS system, i.e., the imposition of duties and charges not recorded in Chile's Schedules.

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[211] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19.
[212] Chile's rebuttal, para. 204.
[213] Ibid., para. 205.

7.125 Argentina disputes Chile's interpretation. It argues that its claim refers to the "measures taken to comply", within the meaning of Article 21.5 of the DSU, which constitute a *new* and *different* measure that did not exist before. In this sense, claims relating to its overall structure and operation would be properly before this Panel. The measures adopted by Chile to comply with the DSB's recommendations and rulings, Law 19.897 and Supreme Decree 831, turned the PBS into a completely new measure.[214]

7.126 Argentina refers to the meaning attributed by the Appellate Body to the language of Article 21.5 in *Canada – Aircraft (Article 21.5 – Brazil)*, which established that, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings.

7.127 In light of the above, Argentina concludes that it could not have raised this claim during the original proceedings. For the purposes of interpreting the mandate of panels under Article 21.5, this is a *new* claim related to a *new* measure, i.e., the amended PBS.[215]

(ii) Relevant provision

7.128 Article 21.5 of the DSU states that:

> "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel ..."

(iii) Interpretation of the Panel's mandate under Article 21.5 of the DSU

7.129 The issue of whether the mandate of a Panel established under Article 21.5 of the DSU may include claims that had not been raised in the original proceedings was addressed by the Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)*. The compliance panel had declined to examine a claim by Brazil regarding a new subsidy, on the grounds that the new measure was not covered by the DSB's original recommendation that Canada should withdraw a prohibited export subsidy. The DSB recommendation did not cover the new subsidy, which did not exist at the time when such recommendation was issued.[216] In its ruling, the Appellate Body clarified that Article 21.5 proceedings were not confined to claims, arguments and factual circumstances related to the measure subject of the original proceedings, but indeed that they usually relate to a new and different measure to that before the original panel. Thus, it would only be natural that Article 21.5 panels, in carrying out their functions, would have to examine claims, arguments, and factual circumstances not addressed during the original proceedings. In the words of the Appellate Body:

> "[W]e disagree with the Article 21.5 Panel that the scope of these Article 21.5 dispute settlement proceedings is limited to 'the issue of whether or not Canada *has implemented the DSB recommendation*'. The recommendation of the DSB was that the measure found to be a prohibited export subsidy must be withdrawn within 90 days of the adoption of the Appellate Body Report and the original panel report, as modified – that is, by 18 November 1999. That recommendation to 'withdraw' the prohibited export subsidy did not, of course, cover the new measure – because the new measure did not exist when the DSB made its recommendation. It follows then

[214] Argentina's response to questions 3, 25 and 26.
[215] Argentina's rebuttal, paras. 296 and 307. Argentina's response to question 26.
[216] Appellate Body Report on *Canada –Aircraft (Article 21.5 – Brazil)*, paras. 39-40.

> that the task of the Article 21.5 Panel in this case is, in fact, to determine whether the new measure – the revised TPC programme – is consistent with Article 3.1(a) of the *SCM Agreement*.
>
> Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU."[217]

7.130 Thereafter, panels and the Appellate Body have conducted a case-by-case analysis in deciding whether it is proper to address claims that were not raised during the original proceedings. In *US – Shrimp (Article 21.5 – Malaysia)*, even though the Appellate Body recognized that the mandate of an Article 21.5 panel might require an analysis of new claims, it decided that the panel had acted correctly when it declined to address a claim made by Malaysia because it had not been put forward in its request for the establishment of a panel under Article 21.5 of the DSU. Malaysia argued that the panel in that case had improperly limited its analysis to the DSB's recommendations and rulings and had not addressed other possible inconsistencies that had not been raised by Malaysia in its request for the establishment of the Article 21.5 panel. The Appellate Body ruled that the mandate of an Article 21.5 panel is limited by its terms of reference, which are based on the claims put forward by the complainant in the request for the establishment of the panel.[218] The Appellate Body added, however, that not all claims in a request for the establishment of an Article 21.5 panel can automatically be considered to have been properly put before the panel and consequently to have become the mandate for the panel. Malaysia had presented claims against an unchanged aspect of a measure that had already been found to be WTO-consistent. The Appellate Body found that the panel had not erred when it examined the measure, found that it had not changed since the original proceedings and concluded that the earlier ruling still stood.[219] As stated by the Appellate Body:

> "[A]s we have said, it is not part of a panel's task to go beyond the particular claims that have been made with respect to the consistency of a new measure with a covered agreement when a matter is referred to it by the DSB for an Article 21.5 proceeding. Thus, it would not have been appropriate in this case for the Panel to address a claim that was *not* made by Malaysia when requesting that this matter be referred by the DSB for an Article 21.5 proceeding."[220]

[217] Ibid., paras. 40-41.
[218] Appellate Body Report on *US –Shrimp (Article 21.5 – Malaysia)*, paras. 83-88.
[219] Appellate Body Report on *US –Shrimp (Article 21.5 – Malaysia)*, paras. 89-97.
[220] Ibid., para. 88.

7.131 With respect to a claim that had been included in Malaysia's request for the establishment of a panel under Article 21.5 of the DSU, but which related to an *unchanged* aspect in the new measure, in the same case the Appellate Body stated:

> "With respect to a claim that *has* been made when a matter is referred by the DSB for an Article 21.5 proceeding, Malaysia seems to suggest as well that a panel must re-examine, for WTO-consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO – consistent* in that dispute, and that remain unchanged as part of the new measure.
>
> It is not disputed that the wording of Section 609 has not been changed since the first case. The Congress of the United States has not amended the statute. In addition, the meaning of Section 609 has not been changed by the decision of the United States Court of International Trade...
>
> As we see it, then, the Panel properly examined Section 609 as part of its examination of the totality of the new measure, correctly found that Section 609 had not been changed since the original proceedings, and rightly concluded that our ruling in *United States – Shrimp* with respect to the consistency of Section 609, therefore, still stands."[221]

7.132 In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body upheld the compliance panel's finding that a claim advanced by India was not properly before the panel, because it was not a *new* claim, but rather the *same* claim that had been raised before the original panel, against an *unchanged* feature of EC law.

> "[W]e agree with the Panel's statement distinguishing, in this respect, the *Canada – Aircraft (Article 21.5 – Brazil*) dispute from these Article 21.5 proceedings:
>
> > In that case, Canada had implemented the recommendation of the DSB by adopting a new and different measure. In the Article 21.5 proceeding, Brazil made claims regarding that measure that it had not made in the original dispute. Canada objected to claims raised by Brazil against the new measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that **could not** have been raised in the original proceedings. The issue before us is whether India should be allowed to raise, in this Article 21.5 proceeding, claims with respect to Article 3.5 which it **could and did** raise before the original panel, but which it did not pursue, and which the Panel dismissed for failure to present a *prima facie* case of violation.[Footnote omitted] (original boldface)
>
> We agree with the Panel that the *Canada – Aircraft (Article 21.5 – Brazil)* dispute involved a *new* claim challenging a *new* component of the measure taken to comply which was not part of the original measure. The situation in *Canada – Aircraft (Article 21.5 – Brazil)* was thus different from the situation in this appeal."[222]

[221] Ibid., paras. 89-96.
[222] Appellate Body Report on *EC –Bed Linen (Article 21.5 – India)*, para. 88.

7.133 In a report that was not appealed, the Article 21.5 compliance panel in the *US – Countervailing Measures on Certain EC Products* dealt with the issue of a new claim related to an aspect that was present in the original measures. The panel decided that it could not consider the new claim because it had already concluded that the challenged measure was "not an aspect of the measure taken to comply". The panel went on to indicate that, even if it were to consider that such challenged measure was an aspect of the measures taken to comply, it would nevertheless still conclude that the new claim was not within its mandate. The panel found that it was not legally empowered to consider new claims on aspects of the original measure that were unchanged and were not challenged in the original proceedings, since this would provide the complainant with a second chance to raise a claim that it had failed to raise in the original case and it would jeopardize the principles of fundamental fairness and due process. The panel framed the issue in these terms:

> "Even if we were to consider that the likelihood-of-injury analysis were an aspect of the *measures taken to comply*, we would nevertheless still conclude that the European Communities' *claim* on failure to reconsider likelihood of injury is not within our mandate. The Appellate Body jurisprudence summarized in *EC – Bed Linen (Article 21.5 – India)* seems to indicate that the European Communities is not precluded from raising claims that it did not raise in the original proceedings, provided that these claims concern the measures taken to comply and are included in the Panel request. We recall that the Appellate Body's reasoning for the inclusion of new claims in the scope of Article 21.5 proceedings was that "the 'measure taken to comply' may be *inconsistent* with WTO obligations *in ways different* from the original measure".[223] The question here is whether this conclusion should also apply to *new* claims where the measure taken to comply is unchanged from the original measure and thus allegedly inconsistent with WTO obligations in ways *identical to* (*not different from*) the original measure.
>
> In this dispute, this Panel confronts the issue of whether to consider new claims on aspects of the original measure that are unchanged and were not challenged in the original proceedings. The purpose of Article 21.5 is to provide an expeditious procedure to establish whether a Member has properly implemented the DSB recommendations and rulings. Admitting such a new claim would mean providing the European Communities with a second chance to raise a claim that it failed to raise in the original proceedings. The Appellate Body, however, has found that a party cannot cure the failure to include a claim in the panel request by raising the claim in subsequent submissions or statements.[224]

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[223] (*original footnote*) Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 79 (emphasis added); *see also* Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41; Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 86-87.

[224] (*original footnote*) In *EC – Bananas III*, the Appellate Body explained that:

> "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 in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."

Appellate Body Report on *EC – Bananas III*, para. 143; *see also* Appellate Body Report on *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 167, at p. 186 (stating that a claim falls outside a panel's terms of reference unless it is identified in the document specifying the panel's terms of reference); Appellate Body Report on *India – Patents (US)*, para. 88 (emphasizing the difference between the claims, which must be included in the request for establishment as they establish the panel's terms of reference, and the arguments, which are set out and clarified in the written submissions and oral statements throughout the panel proceedings).

> Moreover, the Panel is concerned that allowing a new claim on the likelihood-of-injury in the current proceedings may jeopardize the principles of fundamental fairness and due process. In our view, it would be unfair to expose the United States to the possibility of a finding of violation on an aspect of the original measure that the United States was entitled to assume was consistent with its obligations under the relevant agreement given the absence of a finding of violation in the original report.[225]
>
> In sum, permitting the European Communities to introduce a new claim on an aspect of the original measure that was never challenged and remained unchanged raises serious issues regarding the United States' due process rights. On balance, the utility of an Article 21.5 proceeding should not override the basic due process rights of the parties to a dispute.[226],[227]

(iv) Does Argentina's claim under Article II:1(b) of GATT 1994 fall within the Panel's mandate?

Object and purpose of Article 21.5 of the DSU

7.134 As noted above, in light of its decision not to make a separate finding under Article II:1(b) of GATT 1994, the Panel would normally not need to go any further. However, because of the broad systemic implications of the matter, the Panel finds it worthwhile to present its views, *obiter dicta*, on some of the issues related to whether Argentina's claim under Article II:1(b) could be considered to fall within the Panel's mandate.

7.135 The Panel notes in this regard that the object and purpose of Article 21.5 of the DSU is to provide for an expedited procedure through which Members can examine whether measures adopted by a Member, allegedly to comply with the recommendations and rulings of the DSB, have indeed

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[225] (*original footnote*) The Panel notes that in *EC – Bed Linen (Article 21.5 – India)*, the panel explained that, in such a situation, a defending Member would not have the opportunity to bring the measure into conformity. Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.40. Indeed, there is no provision for a "reasonable period" to implement the ruling in an Article 21.5 dispute. Thus, an Article 21.5 panel ruling on such a new claim may immediately give rise to rights for compensation or suspension of concessions under Article 22 DSU. Moreover, the parties do not have the same opportunity to present evidence and arguments in Article 21.5 proceedings.

The circumstances of the present case illustrate the potential procedural unfairness. The European Communities did not agree that the United States could submit consecutive rebuttals and required that the rebuttals be simultaneous. Therefore, the United States could only rebut the arguments in the European Communities' Second written submission during the sole meeting with the parties. Consequently, important facts and issues continued to surface quite late into the Article 21.5 proceedings, proceedings that are already abbreviated. In addition, we note that the record of the original proceedings does not even include evidence regarding the likelihood-of-injury determinations which, as noted above, were made by a different agency than the likelihood-of-subsidization determinations at issue in the original dispute. Thus, were we to consider the injury claim as within our mandate, we would have an extremely limited evidentiary basis on which to rule. Finally, the shorter timeline significantly limits both the panel's opportunity to interact with the parties and the panel's time to deliberate. The panel typically has only one opportunity to meet with the parties, unlike the normal proceedings where two substantive meetings take place.

[226] (*original footnote*) As indicated by the Panel in *EC – Bed Linen (Article 21.5 – India)*:

> "[s]uch an outcome would not seem to be consistent with the overall object and purpose of the DSU to achieve satisfactory resolution of disputes, effective functioning of the WTO, to maintain a proper balance between the rights and obligations of Members, and to ensure that benefits accruing to any Member under covered agreements are not to nullified or impaired."

Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.40.

[227] Panel Report on *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.73-7.76.

brought the original offending measure into conformity with that Member's obligations under the WTO agreements. It is in light of this object and purpose that the text of Article 21.5 of the DSU should be read.

A compliance panel's jurisdiction extends beyond the original DSB's recommendations and rulings

7.136 The task of a compliance panel under Article 21.5 of the DSU is not limited to the DSB's original recommendations and rulings. If compliance panels were so limited, the objective of these procedures could be easily rendered ineffective. As noted by the Appellate Body, the title of Article 21 of the DSU makes clear that "the task of panels under Article 21.5 forms part of the process of the '*Surveillance of Implementation of the Recommendations and Rulings*' of the DSB."[228] Ensuring implementation of the DSB's recommendations and rulings is an essential element of the WTO dispute settlement mechanism. Collective surveillance is necessary to achieve the first objective of this mechanism, as described in the DSU, "to secure the withdrawal of measures found to be inconsistent with the provisions of any of the covered agreements".[229] Implementation is in turn necessary to "preserve the rights and obligations of Members under the covered agreements", "providing security and predictability to the multilateral trading system".

7.137 In its statement in *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body made it clear that the task of a compliance panel under Article 21.5 of the DSU is not limited to the DSB's original recommendations and rulings. The Appellate Body reached its conclusion by noting that, in principle, Article 21.5 panels are faced, not with the original measure, but rather with a new and different measure which was not before the original panel. The Appellate Body also noted that the relevant facts bearing upon the "measure taken to comply" may be different from the relevant facts relating to the measure at issue in the original proceedings.

7.138 At the same time, in view of the object and purpose of Article 21.5, a compliance panel's jurisdiction is subject to certain limitations. In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body clarified the issue further, stating that Article 21.5 panels have no authority to re-examine the WTO-consistency of unchanged aspects of a new measure that are part of a previous measure that was the subject of a dispute, which were already found to be WTO-consistent in that dispute.

7.139 In its unappealed report, the Article 21.5 compliance panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* found that panels are not legally empowered to consider *new claims* on aspects of a measure that are *unchanged* and were *not challenged* in the original proceedings, since this would provide the complainant with a second chance to raise a claim that it had failed to raise in the original case and it would jeopardize the principles of fundamental fairness and due process.

7.140 In conclusion, the interpretation of Article 21.5 of the DSU makes it clear that a compliance panel is not limited to examining the consistency of the "measures taken to comply" with the original DSB's rulings and recommendations. The task of a compliance panel is rather to examine the consistency of the measures with "a covered agreement". That is, with the covered agreement that is within the terms of reference of the respective compliance panel.

[228] Appellate Body Report on *US –Shrimp (Article 21.5 – Malaysia)*, para. 87.
[229] DSU, Article 3.7.

Conditions under which a compliance panel may consider new claims, not raised before the original panel

7.141 An Article 21.5 compliance panel may accordingly consider new claims, which were not raised before the original panel. However, it is our view that in order for new claims to be properly put before an Article 21.5 compliance panel, the following conditions must be present. First, that the claim is identified by the complainant in its request for the establishment of the compliance panel. Second, that the claim concerns a new measure, adopted by the respondent allegedly to comply with the recommendations and rulings of the DSB. Third, that the claim does not relate to aspects of the original measure that remain unchanged in the new measure and were not challenged in the original proceedings or, if challenged, were addressed in those proceedings and not found to be WTO-inconsistent.

7.142 The first two conditions flow from the decisions of the Appellate Body in previous compliance proceedings under Article 21.5 that have already been commented.[230] The third condition was addressed only partially (and mainly with respect to unchanged aspects of a new measure that were already found to be WTO-consistent) by the Appellate Body in *US – Shrimp (Article 21.5 – Malaysia)* and in *EC – Bed Linen (Article 21.5 – India)*.[231] In our opinion, this third requirement is also related to the findings of the compliance panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*. In our view, while this third condition has not been fully addressed yet by the Appellate Body, it is an essential requirement to prevent the misuse of the special expedited procedures contemplated in Article 21.5 of the DSU.

7.143 Moreover, we consider that these three conditions are in line with two additional considerations highlighted in past rulings by the Appellate Body, namely that: (i) the task of Article 21.5 panels is part of the process of "surveillance of implementation of the recommendations and rulings of the DSB"[232]; and, (ii) the main test is whether or not the complaining Member could have raised its claim during the original proceedings.[233]

7.144 The first condition is formal and in the current case is clearly met. Argentina raised a specific claim under the second sentence of Article II:1(b) of GATT 1994 in its request for the establishment of the compliance panel, dated 29 December 2005.[234]

7.145 The second condition is also met. Indeed, it is a general requirement for Article 21.5 compliance proceedings. In the words of the Appellate Body:

> "Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB. In our view, the phrase 'measures taken to comply' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been 'taken to comply with the

[230] Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, Appellate Body Report on *Canada –Aircraft (Article 21.5 – Brazil)* and Appellate Body Report on *EC –Bed Linen (Article 21.5 – India)*.

[231] As noted above, in *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body agreed with the panel's rejection of a particular claim raised by Malaysia which related to *unchanged* aspects of the original measure that had been addressed by the Appellate Body in the original proceedings and found to be WTO-consistent.

[232] Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 87.

[233] Appellate Body Report on *EC –Bed Linen (Article 21.5 – India)*, para. 88.

[234] Request for the Establishment of a Panel, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Recourse to Article 21.5 of the DSU by Argentina)*, 9 January 2006, WT/DS207/18.

> recommendations and rulings' of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures[235]: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the "measures taken to comply" which are – or should be – adopted to *implement* those recommendations and rulings...."[236]

7.146 Argentina's claim under the second sentence of Article II:1(b) concerns the amended PBS, as regulated by Law 19.897 and Supreme Decree 831. This amended PBS is *formally* a new and different measure from the one that was the object of the original proceedings. The amended PBS was adopted by Chile, allegedly to comply with the recommendations and rulings of the DSB in the original case. Indeed, Argentina emphasizes this formal aspect, the fact that its claim under the second sentence of Article II:1(b) concerns a *new* measure and that it relates to the amended PBS in its entirety rather than to one aspect in particular.[237]

7.147 As proposed above[238], however, it is not enough that the claim concerns a measure that is formally different from the one that was the object of the original proceedings. In our view, a third condition needs to be fulfilled, i.e., that the claim does not relate to aspects of the original measure that remain unchanged in the new measure and either were not challenged in the original proceedings or, if challenged, were addressed in those proceedings and not found to be WTO-inconsistent. Argentina's claim under the second sentence of Article II:1(b) was not articulated in the original proceedings.[239] Accordingly, an issue for the Panel to determine, were it necessary, would be to verify whether Argentina's claim relates to aspects of the original measure that remain unchanged in the amended PBS. This determination goes beyond the verification of whether the amended PBS is *formally* a new and different measure from the one that was the object of the original proceedings. The Panel is cognizant of the practical difficulty of separating *unchanged* aspects from *changed* aspects in a new measure. However, such efforts would have been called for, in order to discourage the possibility of misuse of a compliance panel's process.

7.148 Some third parties expressed their systemic concern if the Panel were to decide that a "Member is precluded from challenging, in Article 21.5 proceedings, any aspect of a new measure that was present in the original measure but that was not challenged in the original proceedings".[240] In the words of one third party, this would add "a new and undue burden on the complaining party, since it would force it to prosecute *every conceivable violation* in the original proceedings in order to preserve its rights on implementation".[241] We agree that excluding claims against unchanged aspects of a measure that were not challenged in the original proceedings places a burden on the complaining party. However, we do not consider that this is a new or undue burden. The complaining party's burden to frame the matter brought before the original panel, in terms of identifying both the challenged measure and its legal claims, is clearly contained in Article 6.2 of the DSU:

> "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

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[235] (*original footnote*) We recognize that, where it is alleged that there exist *no* "measures taken to comply", a panel may find that there is *no* new measure.

[236] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

[237] Argentina's rebuttal, paras. 291-292, 296, 301-303, and 306. Argentina's response to questions 2, 25 and 26.

[238] See paras. 7.141-7.143 above.

[239] See para. 7.115 above. See also, Appellate Body Report on *Chile – Price Band System*, para. 173 and Argentina's oral statement, para. 113.

[240] Brazil's oral statement, para. 15. See also, Canada's oral statement, para. 6-14, EC's oral statement, paras. 15-20.

[241] Brazil's oral statement, para. 16.

> provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

7.149 As has been frequently indicated, the complaining party's burden to identify its claims against the challenged measure in its initial request for the establishment of the panel serves two purposes. It defines the terms of reference of the panel and it fulfils an important due process objective, giving parties and third parties sufficient information concerning the claims at issue in the dispute, in order to allow them an opportunity to respond to the complainant's case.[242] In the words of the Appellate Body:

> "Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all."[243]

7.150 In original panel proceedings, the failure by the complaining party to identify its claims in the request for the establishment of a panel cannot be cured subsequently:

> "If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."[244]

7.151 The burden placed on the complaining party to identify its claims in the request for the establishment of a panel is related to the due process rights of the respondent to be properly informed of the nature of such claims, so that it can properly respond. As noted, it is our view that an Article 21.5 compliance panel may consider a new claim, not raised before the original panel, as long as: (a) that claim is identified by the complainant in its request for the establishment of the compliance panel; (b) the claim concerns a new measure, adopted by the respondent allegedly to comply with the DSB's recommendations and rulings; and, (c) the claim relates to *changed* aspects of the new measure.

7.152 The admission by a compliance panel of new claims, not raised before the original panel, against unchanged aspects of the original measure, would create a situation of uncertainty for the respondent. Even a respondent Member who had complied in good faith with the DSB's recommendations and rulings in a particular case, by modifying the challenged measure, without incurring any new violations, could still be subject to continuous challenges against unchanged aspects of the original measure. Moreover, this could lead to "case-splitting", a tactical decision by a complainant to advance some claims in the original proceedings, while saving some claims for the compliance stage.[245] The admission of such new claims would jeopardize the security and predictability that the WTO dispute settlement system should provide to the multilateral trading system. We recall in this regard the words of the panel in the *EC –Bed Linen (Article 21.5 – India)* case:

> "To rule on this aspect of India's claim under Article 3.5 in this proceeding would be to allow India a second chance to prevail on a claim which it raised, but did not

[242] Cfr., Appellate Body Report on *Brazil – Desiccated Coconut*, p. 22.
[243] Appellate Body Report on *Korea – Dairy*, para. 124.
[244] Appellate Body Report on *EC – Bananas III*, para. 143.
[245] This risk was identified by a third party, who was nevertheless of the view that: "Where the measure is appropriately before a panel, and the DSB has made no findings or recommendations in respect of such measure or the claims made by the complaining party, a panel may not then reject such claims or arguments on the sole basis that they could have been raised previously." Canada's oral statement, paras. 6-14.

> pursue, in the original proceeding. We cannot conclude that such a result is required by Article 21.5 of the DSU, or any other provision. The possibility for manipulative or abusive litigation tactics that would be opened by allowing Members an opportunity to obtain a ruling in an Article 21.5 that they could have sought and obtained in the original dispute would, in our view, be inestimably harmful to the effective operation of the dispute settlement system.[246] We hasten to emphasise that we do not consider that India has engaged in any such harmful tactics, or has engaged in this dispute settlement procedure in anything other than entirely good faith in an effort to resolve the dispute, as required by Article 3.10 of the DSU. We nonetheless consider that a claim which, as a legal and practical matter, could have been raised and pursued in the original dispute, but was not, cannot be raised on the same facts and legal premises in an Article 21.5 proceeding to determine the existence or consistency of measures taken to comply with the recommendation of the DSB in the original dispute. In our view, this ruling furthers the object and purpose of the DSU."[247]

7.153 On the other hand, if a WTO Member should wish to bring a legal complaint against unchanged aspects of an original measure that it did not raise before an original panel, nothing prevents that Member from bringing a new challenge under the regular procedures, by requesting consultations on the matter and then, if those consultations fail to resolve the issue, by requesting the establishment of a regular panel. In our view, what that Member is prevented from doing is to use the expedited procedures in Article 21.5 of the DSU to bring new claims that it neglected to make in the original proceedings.

7.154 As regards the determination of whether a particular claim relates to aspects that remain unchanged in a new measure, we have noted that this determination should go beyond a formal verification of the existence of a new and different measure. In previous cases, and in the context of other provisions, panels and the Appellate Body have favoured a non-formalistic approach to the issue of whether changes incorporated into a measure are enough to make that measure a *new* measure, as compared to an *old* measure. Notably, in the original *Chile – Price Band System* case, the Appellate Body found that, after the enactment of Law 19.772 during the course of the proceedings, Chile's PBS remained essentially the same, since the modifications made to the original measure had not "changed its essence".[248]

7.155 The test under Article 21.5, however, is in our opinion not whether the measure is the same, but rather whether the challenged aspects in the *new* measure are *changed* or *unchanged* when compared to the *old* measure. Despite the fact that the test is different, there is no reason why the criterion should be any more formalistic.

7.156 The parties differ on whether Argentina's claim concerns a changed or unchanged aspect of the original measure and consequently whether Argentina could have raised it during the original proceedings. Argentina argues that its claim "relates to the whole of the modified PBS, that is to say, the modified PBS in its totality rather than to one *aspect* in particular" so that it is not "challenging an *aspect* of the original measure *which has not changed*".[249] Chile contends that Argentina's challenge

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[246] (*original footnote*) As the Appellate Body has noted, "The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes". Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC*"), WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619, at para. 166.

[247] Panel Report on *EC –Bed Linen (Article 21.5 – India)*, para. 6.43.

[248] Appellate Body Report on *Chile – Price Band System*, paras. 138-139.

[249] Argentina's rebuttal, paras. 301-302. Argentina's response to questions 25 and 26.

should have been raised and substantiated in the original proceedings, because it is applicable both to the amended PBS as well as to the original measure.[250]

7.157 Argentina's claim under Article II:1(b) is that the duties from the amended PBS constitute "other duties or charges" not recorded in the appropriate column of Chile's Schedules of Concessions. Argentina argues that, since the amended PBS is inconsistent with Article 4.2 of the Agreement on Agriculture, as a border measure similar to a variable import levy and to a minimum import price, which is not an ordinary customs duty, the resulting duties constitute "other duties or charges" that have not been recorded in Chile's Schedule of concessions. In Argentina's view, this would translate into a violation of the second sentence of Article II:1(b) of GATT 1994.[251]

7.158 The amended PBS, as regulated in Law 19.897 and Supreme Decree 831, is formally a new measure from the one that was the object of the original proceedings in this case. The Panel has already noted that, in a number of important aspects, the amended PBS has changed when compared to the original measure. Such aspects include, for example, the product coverage of the PBS (since edible vegetable oils are now excluded from the system); the fact that the lower and higher thresholds of the price band (the floor and ceiling prices) have been set until December 2014, instead of being established yearly as was the case under the original PBS; and the fact that the amount of the duties and rebates is determined bimonthly through a Supreme Decree of the Ministry of Finance, rather than established for each transaction on the basis of a weekly reference price as was done previously.

7.159 Argentina has asserted that:

> "[T]he essence of the PBS was unaffected by the changes introduced by Law 19.897 and Decree 831/2003. In other words, these changes did not convert the price band system into a measure different from the price band system that was in force before the changes were introduced."[252]

7.160 When asked by the Panel, Argentina did not identify the new aspects of the amended PBS, different from those in the original measure, that were the target of its claim. Nor did Argentina explain which were the *new features* that the amended PBS contained that would, in its opinion, violate the second sentence of Article II:1(b) in ways that the original PBS did not.[253]

7.161 Having identified the issues that in our view are related to the matter, however, the Panel finds that there is no need to proceed further and make a specific finding on whether Argentina's claim under the second sentence of Article II:1(b) of GATT 1994 has been properly put before this Panel. We do not find that, under the particular circumstances of this case, such a finding would be necessary to resolve the dispute between the parties.

4. Conclusion

7.162 In light of the discussion above, and having found that the amended PBS is inconsistent with Article 4.2 of the Agreement of Agriculture, the Panel finds it unnecessary, for the resolution of this dispute, to address Argentina's claim that the amended PBS is also inconsistent with the second sentence of Article II:1(b) of GATT 1994.

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[250] Chile's first written submission, paras. 48, 50, 56. Chile's rebuttal, para. 204. Chile's response to question 2.

[251] Argentina's first written submission, paras. 289-295.

[252] Ibid., para. 190. See also, Argentina's first written submission, para. 241.

[253] Argentina's response to questions 25 and 26.

D. ARGENTINA'S CLAIM UNDER ARTICLE XVI:4 OF THE WTO AGREEMENT

1. Arguments of the parties

7.163 Argentina argues that, insofar as the amended PBS infringes both Article 4.2 of the Agreement on Agriculture and the second sentence of Article II:1(b) of the GATT 1994, it must be in breach of Article XVI:4 of the WTO Agreement, since Chile has not ensured the conformity of its existing laws, regulations and administrative procedures with its obligations under the WTO covered agreements.[254]

7.164 Chile responds that, since it has not maintained a measure inconsistent with Article 4.2 of the Agreement on Agriculture, it is not in breach of Article XVI:4 of the WTO Agreement.[255]

2. Relevant provision

7.165 Article XVI:4 of the WTO Agreement provides:

> "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

3. Panel's analysis

7.166 As noted, in response to Argentina's claim, Chile has only responded that, since the amended PBS is not inconsistent with Article 4.2 of the Agreement on Agriculture, it is not in breach of Article XVI:4 of the WTO Agreement.[256] In contrast with its response to Argentina's claim under the second sentence of Article II:1(b) of GATT 1994, Chile has not argued that the claim under Article XVI:4 of the WTO Agreement falls outside the terms of reference of the Panel.

7.167 The Panel has already found that the amended PBS, challenged in the current Article 21.5 proceedings, is inconsistent with Article 4.2 of the Agreement on Agriculture. Normally, the determination of a breach of any provision of any WTO covered agreement gives automatically rise to a violation of Article XVI:4 of the WTO Agreement. As stated by the Panel in *US – 1916 Act (Japan)*:

> "[I]f a provision of an 'annexed Agreement' is breached, a violation of Article XVI:4 immediately occurs. GATT 1994 is one of the 'annexed Agreements' within the meaning of Article XVI:4. Since we found that provisions of Article VI of the GATT 1994 has been breached, we conclude that, by violating this provision, the United States violates Article XVI:4 of the WTO Agreement."[257]

7.168 Similarly, the Panel in *US – 1916 Act (EC)* found that:

> "If Article XVI:4 has any meaning, it is that when a law, regulation or administrative procedure of a Member has been found incompatible with the WTO obligations of that Member under any agreement annexed to the WTO Agreement, that Member is also in breach of its obligations under Article XVI:4."[258]

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[254] Argentina's first written submission, paras. 296-304. Argentina's rebuttal, para. 320.
[255] Chile's first written submission, para. 197. Chile's rebuttal, para. 211.
[256] Ibid.
[257] Panel Report on *US – 1916 Act (Japan)*, para. 6.287.
[258] Panel Report on *US – 1916 Act (EC)*, para. 6.223.

7.169 Having made the determination that the amended PBS is inconsistent with Article 4.2 of the Agreement on Agriculture, it follows that Chile has not ensured the conformity of its laws, regulations and administrative procedures with the obligations established in the WTO agreements. It would flow automatically that the measure is also in breach of Article XVI:4 of the WTO Agreement. Notwithstanding the above, we do not feel that such additional finding is necessary in order to resolve the dispute between the parties.

7.170 Indeed, once it is determined that the amended PBS is inconsistent with Article 4.2 of the Agreement on Agriculture, an additional finding on whether the same measure is also in breach of Article XVI:4 of the WTO Agreement would not be necessary in order to resolve the dispute between the parties. It was already noted that a Panel does not need to examine all legal claims made by a complaining party, but just those "which must be addressed in order to resolve the matter in issue in the dispute." [259]

4. Conclusion

7.171 In light of the discussion above, and having found that the amended PBS is inconsistent with Article 4.2 of the Agreement on Agriculture, the Panel finds it unnecessary, for the resolution of this dispute, to address Argentina's claim that the amended PBS is also a violation by Chile of Article XVI:4 of the WTO Agreement, because it does not ensure the conformity of Chile's laws, regulations and administrative procedures with its obligations under the WTO covered agreements.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 As a preliminary comment, we note that the parties in this dispute are both developing country Members. However, as was the case in the original proceedings[260], there were no provisions on special and differential treatment for developing country Members invoked by any of the parties. In any event, we find that these provisions were not relevant for the resolution of the specific matter that was brought before this Panel.

8.2 In light of the findings above, we conclude that:

(a) By maintaining a border measure similar to a variable import levy and to a minimum import price, Chile is acting in a manner inconsistent with Article 4.2 of the Agreement on Agriculture, and has thus failed to implement the recommendations and rulings of the DSB;

(b) It is unnecessary, for the resolution of this dispute, to make a separate finding on Argentina's claim under the second sentence of Article II:1(b) of GATT 1994; and,

(c) It is unnecessary, for the resolution of this dispute, to make a separate finding on Argentina's claim under Article XVI:4 of the WTO Agreement.

8.3 Under Article 3.8 of the DSU, in cases where there is infringement of obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Chile has failed to rebut this presumption. Accordingly, we conclude that to the extent Chile has maintained a measure inconsistent with the provisions of the Agreement on Agriculture, it continues to nullify or impair benefits accruing to Argentina under that Agreement.

[259] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19.
[260] Appellate Body Report on *Chile – Price Band System*, paras. 196-199.

8.4 We recommend that the Dispute Settlement Body request Chile to bring its PBS into conformity with its obligations under the Agreement on Agriculture.

ANNEX A

FIRST WRITTEN SUBMISSIONS FROM PARTIES

ANNEX A-1*

FIRST WRITTEN SUBMISSION BY ARGENTINA
(19 APRIL 2006)

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* Annex A-1 contains the First Written Submission by Argentina. This text was originally submitted in Spanish by Argentina.

TABLE OF REPORTS CITED

Short title	Full title and reference
Chile – Price Band System	Report of the Appellate Body "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*" WT/DS207/AB/R, adopted 23 October 2002.
Chile – Price Band System	Report of the Panel "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*" WT/DS207/R, adopted 23 October 2002.
Canada – Aircraft (Article 21.5 – Brazil)	Report of the Appellate Body "*Canada – Measures Affecting the Export of Civilian Aircraft*". Recourse by Brazil to Article 21.5 of the DSU, WT/DS70/AB/RW, adopted 21 July 2000.
EC – Sardines	Report of the Appellate Body *"European Communities – Trade Description of Sardines"*, WT/DS231/AB/R, adopted 26 September 2002.
US – Sections 301-310	Report of the Panel "*United States – Sections 301-310 of the Trade Act of 1974"*, WT/DS152/R, adopted 22 December 1999.
US – 1916 Anti-Dumping Act	Report of the Panel "*United States – Anti-Dumping Act of 1916"* (Complaint by Japan), WT/DS162/R, adopted 29 May 2000.

A. INTRODUCTION

1. The Government of the Republic of Argentina wishes to thank the members of the Panel for the opportunity to submit for their consideration the measures adopted by the Government of the Republic of Chile for the alleged purpose of implementing the recommendations and rulings of the Dispute Settlement Body in this dispute.

2. The Government of the Republic of Argentina requests the Panel to find that the price band system that Chile applies to imports of wheat and wheat flour, as amended by Law 19.897 and Exempt Decree No. 831/2003 (hereinafter the amended PBS), is inconsistent – in itself and in its application – with Article 4.2 of the *Agreement on Agriculture*, the second sentence of paragraph (1)(b) of Article II of the GATT 1994, and paragraph 4 of Article XVI of the *Marrakesh Agreement Establishing the World Trade Organization*.

3. The Government of the Republic of Argentina considers that the recommendations of the DSB should be implemented promptly[1], fully and in accordance with the obligations assumed by Members within the framework of the WTO. As the Republic of Argentina explains below, the measures that the Republic of Chile has adopted for the alleged purpose of implementing the recommendations and rulings of the DSB in this dispute do not meet any of these requirements.

1. Background

4. On 23 October 2002, the Dispute Settlement Body (hereinafter the DSB) adopted the report of the Appellate Body[2] and the Panel report,[3] as modified by the Appellate Body, in the case "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products"* ("*Chile – Price Band System"*).

5. In its Findings and Conclusions, the Appellate Body upheld the Panel's finding that Chile's price band system was a border measure similar to variable import levies and minimum import prices.[4] The Appellate Body therefore upheld the Panel's finding that Chile's price band system was inconsistent with Article 4.2 of the *Agreement on Agriculture*.[5] On the basis of these reports, the DSB recommended that Chile should bring its price band system, as found to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement.[6]

6. On 6 December 2002, Chile requested that the determination of the reasonable period for the implementation of the recommendations and rulings of the DSB be the subject of binding arbitration, in accordance with Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter the DSU).[7]

7. On 17 March 2003, the arbitrator's award determined that the reasonable period of time for Chile to implement the recommendations and rulings of the DSB should be 14 months from the date of adoption of the above-mentioned reports, a period which expired on 23 December 2003.[8]

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[1] As required by Article 21.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).
[2] WT/DS207/AB/R.
[3] WT/DS207/R.
[4] *Chile – Price Band System*, Report of the Appellate Body, paragraph 288(c)(i).
[5] *Chile – Price Band System*, Report of the Appellate Body, paragraph 288(c)(iii).
[6] *Chile – Price Band System*, Report of the Appellate Body, paragraph 289.
[7] WT/DS207/9.
[8] WT/DS207/13.

8. On 25 September 2003, Chile published in the Official Journal Law No. 19.897[9] which establishes rules on the importation of goods and amends Article 12 of Law No. 18.525 and the Customs Tariff. On 4 October 2003, Chile published in the Official Journal Supreme Decree No. 831 of the Ministry of Finance[10] which regulates the implementation of Article 12 of Law No. 18.525, as substituted by Article 1 of Law No. 19.897.[11] This Decree governs certain aspects of the PBS, the amendments to which entered into force on 16 December 2003 for the products at issue in this dispute, with the exception of edible vegetable oils which ceased to be subject to the band system from the date of publication of Law No. 19.897.[12] Thus, Chile has implemented the recommendations and rulings of the DSB only in relation to edible vegetable oils.

9. Argentina has argued strongly that these amendments to the PBS should also implement the recommendations and rulings of the DSB in relation to wheat and wheat flour.[13]

10. On 24 December 2003, Argentina and Chile concluded an Understanding regarding procedures under Articles 21 and 22 of the DSU with respect to the present dispute.[14]

11. Early in 2004, bilateral negotiations were begun with a view to achieving the implementation of the recommendations and rulings of the DSB in relation to wheat and wheat flour. In this connection, during 2004 and 2005, various meetings were held in Geneva, Santiago de Chile and Buenos Aires and a series of documents was exchanged with a view to achieving a mutually agreed settlement of the dispute. This led to an understanding which Chile later repudiated. In relation to the price band system for wheat and wheat flour, this understanding consisted – basically – in Chile establishing an end date for the system.[15]

12. On 19 May 2004, Argentina initiated a recourse procedure under Article 21.5 of the DSU by requesting consultations with Chile.[16] These consultations were held in Geneva on 17 June 2004 but failed to lead to a settlement of the dispute.

2. Summary of claims and allegations

13. Argentina maintains that Chile has failed to implement the recommendations and rulings of the DSB and continues in breach of its obligations as a Member of the WTO.

14. This on the grounds that Chile's price band system, as amended in accordance with Law No. 19.897 and Supreme Decree No. 831/2003, *per se* and in its specific application to imports of wheat and wheat flour:

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[9] Exhibit ARG-1.

[10] Exhibit ARG-2.

[11] WT/DS207/15 of 22 September 2003, WT/DS207/15/Add.1 of 28 October 2003 and WT/DS207/15/Add.2 of 21 November 2003.

[12] Exhibit ARG-3: Circular Letter No. 292 of the National Customs Service of the Government of Chile, Technical Subsecretariat and Classification Dept., of 14 October 2003. See also the statement made by Chile at the DSB meeting on 7 November 2003 (WT/DSB/M/157, paragraph 20).

[13] See, for example, the statements made by Argentina at the DSB meetings on 2 October, 7 November and 1 December 2003 (WT/DSB/M/156, paragraphs 17 to 19; WT/DSB/M/157, paragraph 19; WT/DSB/M/159, paragraph 19, respectively); 23 January, 17 February, 19 March, 20 April, 19 May and 22 June 2004 (WT/DSB/M/163, paragraph 18; WT/DSB/M/165 and WT/DSB/M/166, paragraph 18; WT/DSB/M/167, paragraph 18; WT/DSB/M/169, paragraph 20; WT/DSB/M/171, paragraph 32). The difference of opinion was also recorded in the document WT/DS207/16 of 7 January 2004.

[14] WT/DS207/16.

[15] Note that the present System has no end date. As indicated in the legislation amending the original PBS, *"…In 2014 the President of the Republic shall <u>evaluate</u> the modalities and conditions of application of the price band system…"* (emphasis added).

[16] WT/DS207/17 of 25 May 2004.

– Is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it is a border measure similar to a variable import levy and a minimum import price;

– is inconsistent with the second sentence of Article II:(1)(b) of the GATT 1994, since it constitutes "other duties or charges" not recorded in the corresponding column of Chile's Schedule of concessions (No. VII);

– is in breach of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* since, while it remains in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements.

3. Structure of the submission

15. In Section B, Argentina gives a detailed description of the Chilean measures allegedly intended to implement the recommendations and rulings of the DSB in the present dispute.

16. In Section C, Argentina puts forward the following arguments:

– In Subsection I, Argentina shows that the amended PBS is in breach of Article 4.2 of the *Agreement on Agriculture*;

– in Subsection II, Argentina explains how the amended PBS is inconsistent with the second sentence of Article II:(1)(b) of the GATT 1994; and

– Subsection III, Argentina argues that the amended PBS is in breach of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*.

17. Finally, in Section D Argentina presents its conclusions.

B. THE FACTS

1. Measures intended to implement the recommendations and rulings of the DSB

18. On 25 September 2003, Chile published in the Official Journal Law No. 19.897,[17] whose Article 1 replaced Article 12 of Law No. 18.525. As notified by Chile, Law 19.897 established a "new" price band system which entered into force on 16 December 2003 for the products at issue in this dispute, namely, wheat and wheat flour.[18]

19. Moreover, as also notified by Chile,[19] on 4 October 2003, Chile published in the Official Journal Supreme Decree No. 831 of the Ministry of Finance (hereinafter Decree 831/2003)[20] regulating the application of Article 12 of Law No. 18.525, as substituted by Article 1 of Law No. 19.897, which governs certain fundamental aspects of the price band system.

[17] See Exhibit ARG-1.
[18] WT/DSB/M/156, paragraph 16.
[19] WT/DS207/15/Add.1.
[20] See Exhibit ARG-2.

20. The fact that both Law 19.897 and Decree 831/2003 are measures adopted by Chile to implement the recommendations and rulings of the DSB was acknowledged by Chile in the status reports its submitted to the DSB in fulfilment of its obligations under Art. 21.6 of the DSU.[21]

2. Products subject to Chile's price band system

21. In its original form, the PBS – established by Law 18.525 and amended by Laws 18.591, 18.573 and 19.772 – established price bands for each of the following product categories: (i) edible vegetable oils, (ii) wheat and wheat flour, and (iii) sugar.[22]

22. Under the amended PBS, price bands are calculated for wheat, wheat flour and sugar.[23] That is to say, only edible vegetable oils have ceased to be subject to the PBS.[24]

3. The amended PBS as compared with the original PBS

23. Below, Argentina describes the various components of the Price Band System as amended by Law 19.897 and Supreme Decree 831/2003, together with the functioning of the system, in each case drawing a comparison with the original arrangements.

3.1. Total duties applicable

24. In the case of the PBS in its original form, the total amount of duty applied to the products covered by the price band system consisted of two components: (i) an *ad valorem* duty that reflected Chile's applied Most-Favoured Nation ("MFN") tariff rate; and (ii) a specific duty determined for each importation by comparing a reference price with the upper or lower threshold of a price band.[25]

25. In the amended PBS, both these types of duty: *ad valorem* and specific are also applied.[26]

3.1.1. Ad valorem duty

26. Under the original PBS, the *ad valorem* duty was the applied MFN rate which, under Chile's flat-tariff regime, is the same for all products. The applied *ad valorem* rate in 2002 was 7 per cent. It was applied to the transaction value of the imported product to achieve the *ad valorem* duty for that product.[27]

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[21] See, for example, document WT/DS207/15/Add.3.

[22] *Chile – Price Band System*, Report of the Appellate Body, paragraph 12.

[23] See Exhibit ARG-1, Law 19.897, Art. 1: "Article 1.- Article 12 of Law No. 18.525 shall be substituted by the following: "Article 12.- Specific duties are hereby established in United States dollars per tariff unit and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of wheat, wheat flour and sugar, as stipulated in this Law…" and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 1.

[24] "…(Chile) noted that the other products at issue in this dispute, namely edible vegetable oils and oil-seeds, had been excluded from the Law and were, therefore, no longer subject to the price band system". WT/DSB/M/156, paragraph 16.

[25] *Chile – Price Band System*, Report of the Appellate Body, paragraph 13.

[26] See Exhibit ARG-1, Law 19.897, Art. 1 "…The duties that result from the application of this article, added to the *ad valorem* duty …" and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 14.

[27] *Chile – Price Band System*, Report of the Appellate Body, paragraph 14.

27. In the "new" PBS, the *ad valorem* rate applied since December 2003 is 6 per cent. It is applied to the transaction value of the imported product to achieve the *ad valorem* duty for that product.[28]

3.1.2. Specific duty

28. In their "old" form, the price bands provided upper and lower thresholds that were used to calculate the specific duty applicable to each importation of products subject to price band system.[29]

29. In the "new" PBS, the same method is employed.[30]

3.2. Period of application of the bands

30. Under the "old" PBS, the bands that applied to wheat and wheat flour were determined for the period 16 December-15 December.[31]

31. The "new" PBS has an identical provision.[32]

3.3. Floor and ceiling of the bands

3.3.1. Periodicity

32. Under the original PBS, the lower and upper thresholds of the price bands (hereinafter the floor and ceiling prices, respectively) were determined on an annual basis through decrees issued by the Chilean Executive. The floor and ceiling prices for each price band were calculated once a year, once all the necessary elements were available, 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 had been published.[33]

33. Under the amended PBS, the floor and ceiling prices of the price bands have been determined once only, for the entire period extending from 16 December 2003 to 15 December 2014.[34] That is to

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[28] According to the Chilean Customs web site. See Customs Tariff for Wheat and Wheat Flour (tariff lines 1001.90.00 and 1101.00.00, respectively).
At: http://www.aduana.cl/p4_principal/antialone.html?page=http://www.aduana.cl/p4_principal/site/edic/base/port/arancel.html, "Section II, Vegetable Products".

[29] *Chile – Price Band System*, Report of the Appellate Body, paragraph 16

[30] See Exhibit ARG-1, Law 19.897, Art. 1 "…For the determination of the duties and rebates up to the annual period ending in 2007, the floor and ceiling prices used for wheat shall be taken into account… There shall be established, on the one hand, specific duties when the reference price is below the floor price of 128 dollars for wheat… and, on the other hand, rebates on the amounts payable as *ad valorem* Customs Tariff duties when the reference price is above the ceiling price of 148 dollars for wheat… For the determination of the duties and rebates from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established above shall be adjusted annually by multiplying the prices in force during the previous annual period by a factor of 0.985 in the case of wheat…", and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 6, 13 and 14.

[31] *Chile – Price Band System*, Report of the Appellate Body, paragraph 17.

[32] See Exhibit ARG-1, Law 19.897, Art. 1: "…The amount of these duties and rebates shall be set…for each annual period extending from 16 December to 15 December of the following year…", and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 6.

[33] *Chile – Price Band System*, Report of the Appellate Body, footnote 25.

[34] See Exhibit ARG-1, Law 19.897, Art. 1: "…For the determination of the duties and rebates up to the annual period ending in 2007… For the determination of the duties and rebates from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established above shall be adjusted annually by multiplying the

say, the floor and ceiling prices of the bands will be maintained, except for the fact that they have now been established – in principle – for 11 years, whereas under the previous system they were determined annually.

3.3.2. Calculation of the floor and ceiling prices

34. Under the "old" PBS, the floor and ceiling prices of each price band were determined as follows. Average monthly international prices for each product category were compiled. The price used for wheat was that quoted for Hard Red Winter No. 2, FOB Gulf (Kansas Exchange).[35] The price bands for wheat were calculated on the basis of the average monthly prices for the previous 60 months (5 years).[36] These average prices were adjusted to account for international inflation using an external price index calculated by Chile's Central Bank. Law No. 18.525 stated that the average prices should 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 were determined.[37] Once adjusted for inflation, the compiled monthly prices were listed in descending order and the "extreme" values were eliminated. In the case of wheat, the prices that represented the highest 25 per cent and the lowest 25 per cent of the prices compiled were eliminated.[38] After the "extreme" values had been eliminated, the remaining highest and lowest prices were selected for the calculation of the price band thresholds (floor and ceiling prices).[39] Import costs were then added to the "highest and lowest prices" previously selected in order to convert them to a cost, insurance and freight ("CIF") basis. These "import costs" included 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. No published legislation or regulation set out how these "import costs" were calculated.[40] The adjusted prices constituted the upper and the lower thresholds of the price band for the product in question.[41]

35. In the case of the amended PBS, the floor and ceiling prices have been established for the entire period from 16 December 2003 to 15 December 2007 at US$128 per tonne and US$148 per tonne, respectively. From 16 December 2007 to 15 December 2014, the floor and ceiling prices indicated will be adjusted annually by multiplying the prices in force during the previous annual period by a factor of 0.985. The floor and ceiling prices resulting from this operation are set out in Law 19.897 and in Supreme Decree No. 831 of the Ministry of Finance.[42]

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prices in force during the previous annual period…" and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 6.

[35] *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(a)(ii).

[36] *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(a) *in fine*.

[37] At the hearing, Chile further explained that this price index also reflected domestic inflation and foreign exchange rate fluctuations. *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(b) and footnote 28.

[38] For example, in the case of wheat, the 15 highest and the 15 lowest prices of the 60 compiled prices are eliminated from the calculation. *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(c) *in fine*.

[39] For example, in the case of wheat and edible vegetable oils, of the 60 monthly prices compiled, the 16th and 44th highest monthly prices were selected for the calculation of the upper and the lower thresholds respectively. See *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(d).

[40] *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(e).

[41] Returning to the earlier example of wheat, the 16th highest monthly price (adjusted to reflect import costs) would represent the upper threshold of the price band, and the 44th highest price (with the same adjustments made) would represent the lower threshold of the price band. See *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(f).

[42] See Exhibit ARG-1, Law 19.897, Art. 1: "…There shall be established, on the one hand, specific duties when the reference price is below the floor price of 128 dollars for wheat… and, on the other hand, rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff when the reference price

36. Thus, the general band system, with a floor and a ceiling in relation to a reference price plus a specific duty determined in accordance with the difference between these parameters, has been left unchanged. That is to say, the floor and ceiling parameters and the reference price feature continue to exist.

3.4. Reference prices

3.4.1. Periodicity

37. In the case of the PBS in its original form, the reference prices for each product category were determined by the customs authorities on a weekly basis (every Friday for the following week).[43]

38. Now, the customs authorities determine the reference prices six times in the course of each twelve-month period extending from 16 December to 15 December of the following year, and keep it fixed for two months at a time.[44]

3.4.2. Markets of concern

39. Under the "old" PBS, although there was no Chilean law or regulation specifying the international "markets of concern" to be used for calculating the applicable reference prices,[45] it seems that the markets and qualities chosen were intended to be representative of the products actually "liable" to be imported into Chile. In the case of wheat, in calculating the reference price, Chile used the lowest FOB price for that product in "any market of concern". It was not clear whether Chile would use the lowest FOB price for any quality of wheat as a reference price for all qualities of wheat.[46]

40. Under the "new" PBS, Article 2 of Decree 831/2003 defines the reference price for the application of duties and rebates, as the "…average of the daily international wheat prices…, recorded in the markets of most concern…"[47]

41. Under the "new" PBS, the market of most concern for wheat, during the period of application of duties and rebates extending from 16 December to 15 June of the following year, will be that for *Trigo Pan Argentino*[48] and the prices will correspond to the daily prices quoted for that product FOB "Argentine port".[49] In this connection, it should be pointed out that the legislation does not specify the Argentine port in question, although the prices depend on which Argentine port is considered.[50]

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is above the ceiling price of 148 dollars for wheat… For the determination of the duties and rebates from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established above shall be adjusted annually by multiplying the prices in force during the previous annual period by a factor of 0.985 in the case of wheat…" and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 6.

[43] *Chile – Price Band System*, Report of the Appellate Body, paragraph 21.

[44] See Exhibit ARG-1, Law 19.897, Art. 1: "…The amount of these duties and rebates shall be set…six times for wheat during each annual period extending from 16 December to 15 December of the following year…" and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 5 and 7, and "Summary Table for the application of paragraph 2" (annex).

[45] *Chile – Price Band System*, Report of the Appellate Body, paragraph 249.

[46] *Chile – Price Band System*, Report of the Appellate Body, paragraphs 23 and 24.

[47] See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance.

[48] Note of the Secretariat: literal translation of this quality would be "Argentine bread wheat".

[49] See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 8.

[50] Exhibit ARG-4: Daily bread wheat prices quoted for various Argentine ports.

42. Likewise, during the application period extending from 16 June to 15 December, the market will be that for Soft Red Winter No. 2 wheat and the prices will correspond to the daily prices quoted for that product FOB Gulf of Mexico.[51]

43. As in the case of the PBS in its original form, in no legislative or regulatory provision of the amended PBS is it specified *how or on what basis* the international "markets of concern" and the "qualities of concern" are selected.[52]

44. Nor is it clear whether Chile will apply the reference price determined in accordance with the "new" PBS to any quality of wheat as a reference price for all qualities of wheat.

3.4.3. Adjustment of the reference price

45. Under the original PBS, the lowest "market of concern" price used to determine the weekly reference price was not adjusted for "import costs", and thus was not converted from an FOB to a CIF basis.[53]

46. The same applies to the reference prices in the amended PBS: the average "markets of concern" price used to determine the reference price is not adjusted for "import costs", and thus is not converted from an FOB to a CIF basis.[54]

3.4.4. Absence of a link with the transaction value

47. Under the original PBS, the same weekly reference price was applied to all goods falling within the same product category, irrespective of the origin of the goods and regardless of the transaction value of the shipment.[55] The reference price was thus unrelated to the transaction price of the particular shipment.[56]

48. In the case of the amended PBS, the same bimonthly reference price is applied to all goods falling within the same product category, irrespective of their origin and regardless of the transaction value of the shipment.

49. Therefore, despite the fact that it is now determined at different intervals, under the present system the reference price is still unrelated to the transaction value of the particular shipment.[57]

3.5. Specific duties and rebates

3.5.1. Date of application

50. Under the "old" PBS, upon arrival of the shipment the appropriate weekly reference price was selected according to the date of embarkation.[58]

51. As distinct from this, under the "new" PBS, the reference price and the duties or rebates applicable to each import operation will be those in effect on the waybill date for the vehicle

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[51] See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 8.
[52] *Chile – Price Band System*, Report of the Appellate Body, paragraph 249.
[53] *Chile – Price Band System*, Report of the Appellate Body, paragraph 250.
[54] See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 4.
[55] *Chile – Price Band System*, Report of the Appellate Body, paragraph 21.
[56] *Chile – Price Band System*, Report of the Appellate Body, footnote 32.
[57] See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 7, 13 and 14.
[58] *Chile – Price Band System*, Report of the Appellate Body, paragraph 29(a).

transporting the goods in question. In the case of electronic filing, the waybill date will be taken to be the date of actual acceptance of the vehicle and the goods will be considered to have been presented at the same time.[59]

3.5.2. Calculation of specific duties

52. Under both "old" and "new" systems, the reference price is compared with the floor of the relevant price band.

53. In the case of the "old" PBS, the specific duties imposed were equal to the difference between the annual price band floor and Chile's weekly reference prices.

54. Under the original system, if the weekly reference price fell between the floor and ceiling values of the price band, no specific duty was levied. In such cases, only the *ad valorem* duty was applied.[60] The current system is the same in this respect.[61]

55. Under the original PBS, if the weekly reference price fell below the price band floor, a specific duty equal to the difference between the floor price and the reference price was levied.[62] Expressed as a formula, the specific duty calculation – under the original PBS – can be written as follows:

Specific duty = Band floor – Reference price

56. Under the "new" PBS, the specific duties imposed are equal to the difference between the floor of the price band (note that the relevant legislation does not specify whether the values in question are FOB or CIF.) and the bimonthly reference prices based on FOB prices.[63]

57. If the bimonthly reference price lies below the price band floor, a specific duty equal to the difference between the floor price and the reference price, **multiplied by a factor of one (1) plus the general *ad valorem* tariff in force as established in the Customs Tariff**, is levied.[64] Expressed as a formula, as in Article 14 of Decree 831/2003,[65] the specific duty calculation can be written as follows:

Specific duty = (Band floor – Reference price) *** (1 + *ad valorem* tariff)**

58. Thus, the way in which the calculation of the specific duties has been changed leaves the exporter worse off, inasmuch as the specific duties now generate a cost higher than that generated by the previous method of calculation.

[59] See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, art. 17.

[60] *Chile – Price Band System*, Report of the Appellate Body, paragraph 29(b)(i).

[61] See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 13. The legislation does not specify whether, in this case, the *ad valorem* duty will also be applied, although this could be deduced from a reading of Art. 18 of Supreme Decree No. 831.

[62] *Chile – Price Band System*, Report of the Appellate Body, paragraph 29(iii).

[63] See Exhibit ARG-1, Law 19.897, Art. 1, and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Arts. 6, 7, 8, 13 and 14.

[64] See Exhibit ARG-1, Law 19.897, Art. 1, and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 13 and 14.

[65] See Exhibit ARG-2.

3.5.3. The factor for wheat flour

59. Under the original PBS, the specific duty or rebate for wheat flour was calculated by multiplying the specific duties or rebates for wheat by a factor of 1.56.[66]

60. The same applies to the amended PBS.[67]

3.5.4. Calculation of the tariff rebate

61. Under the "old" PBS, if the weekly reference price was higher than the band ceiling, a rebate equal to the difference between the ceiling of the relevant price band and the reference price was granted.[68]

62. Under the amended PBS, if the bimonthly reference price is higher than the band ceiling, the rebate granted[69] is equal to the difference between the ceiling of the relevant price band and the reference price multiplied by a factor of one (1) plus the general *ad valorem* tariff in force as established in the Customs Tariff.[70]

63. Moreover, under both the "old" and the "new" PBS, the rebate is deducted from the *ad valorem* applied MFN duty.[71]

64. As pointed out by a Chilean Senator during the discussion of the bill extending the system for setting the duties and rebates for wheat flour, the rebates applied to the *ad valorem* duties mean that Chilean domestic market prices will be lower than the international prices if the latter lie above the price band ceiling:

> *"… the prices of agricultural products have tended to rise and, consequently, the domestic price for flour and wheat is currently lower than what it would be if there were no price band… In the fat years we should be providing for the lean years, thereby ensuring the necessary stability."*[72]

3.6. Administration of the PBS

65. To make the price band system easier to administer, in the original PBS the annual decrees that established the price bands included a table that set out a range of reference prices and the specific duty or rebate that would be applied in the case of each of those reference prices. Once the reference price that applied for a particular week had been published, the corresponding specific price band duty or rebate for that reference price could be found in the table.[73]

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[66] *Chile – Price Band System*, Report of the Appellate Body, footnote 23.

[67] See Exhibit ARG-1, Law 19.897, Art. 1 "…In the case of wheat flour, the duties and rebates determined for wheat multiplied by a factor of 1.56, shall be applied..." and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 17.

[68] *Chile – Price Band System*, Report of the Appellate Body, paragraph 29(b)(ii).

[69] See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 13, 14, and 15.

[70] See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 15.

[71] See *Chile – Price Band System*, Report of the Appellate Body, paragraph 29(b)(ii), and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Arts. 13 and 15.

[72] Senator Errázuriz, 24 January 1996, in *"History of the Law. Compilation of official texts of the parliamentary debate. Law 19.446"*. Library of the National Congress. Santiago, Chile, 1997.

[73] *Chile – Price Band System*, Report of the Appellate Body, paragraph 29.

66. Under the present system, Decree 831/2003 of the Chilean Ministry of Finance includes a table giving the floor and ceiling prices of the PBS for the whole of the period from 16 December 2003 to 15 December 2014. Moreover, every two months (six times during each annual period) a decree is published establishing the amount of the specific duties or rebates applicable. So far, the bimonthly decrees appear not to indicate the reference price calculated for each period, as follows from Exhibit ARG-5 which includes all the decrees relating to the amended PBS published to date.[74]

C. ARGUMENTS

> *"…What is certain is that the bands will have to go, and it is a good thing that the country should get used to the idea that it will not be able to continue living with price bands if it wants to join the major leagues of world free trade …*
>
> *The international free trade agreements are unequivocal about wanting to see bands abolished because they undoubtedly cause distortion"* [75]

67. An Article 21.5 procedure is intended to decide disputes "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]".

68. Argentina maintains that the Price Band System as amended by Law No. 19.897 and Decree 831/2003 does not comply with the recommendations and rulings of the DSB, so that Chile is continuing to infringe its WTO obligations.

69. This is because the amended PBS, *per se* and as specifically applied to imports of wheat and wheat flour:

- Is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it is a border measure similar to a variable import levy and a minimum import price;
- is inconsistent with the second sentence of Article II:1(b) of the GATT 1994, since it constitutes "other duties or charges" not recorded in the corresponding column of Chile's Schedule of concessions (No. VII);
- is in breach of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* since, while it remains in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements.

I. THE AMENDED PBS IS INCONSISTENT WITH ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

70. Argentina maintains that the essence of the PBS was unaffected by the changes introduced by Law 19.897 and Decree 831/2003. In other words, these changes did not convert the price band

[74] Exhibit ARG-5: Exempt Decrees No. 691/2003, No. 77/2004, No. 186/2004, No. 368/2004, No. 485/2004; No. 600/2004; No. 762/2004; No. 88/2005; No. 278/05; No. 466/2005; No. 569/2005; No. 706/2005; No. 873/2005; and No. 132/2006.

[75] Senator Piñera, 24 January 1996, during the discussion of the bill extending the system for establishing duties and rebates for wheat flour. In *"History of the Law. Compilation of official texts of the parliamentary debate. Law 19.446*". Library of the National Congress. Santiago, Chile, 1997.

system into a measure different from the price band system that was in force before the changes were introduced.[76]

71. The amended PBS 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.*

72. This is because the way in which the system is designed and the way it operates in its overall nature are sufficiently similar to the characteristics of these two categories of prohibited measures as to make the amended PBS, with its particular characteristics, a "similar border measure".

73. The particular configuration and interaction of the specific characteristics of Chile's price band system generate certain market access conditions that lack transparency and predictability and disconnect the Chilean market from international price trends in a way that insulates the Chilean market from the transmission of international prices and prevents enhanced market access for imports of wheat and wheat flour.

74. Consequently, since it falls within the categories of measures prohibited by footnote 1, the amended PBS is not an ordinary customs duty and hence is a measure inconsistent with Article 4.2 of the *Agreement on Agriculture* which may not be maintained, resorted to, or reverted to.

1. WTO case-law applicable to the PBS

75. Below, Argentina notes certain Panel and Appellate Body findings relating to the PBS in its original form that continue to be valid for the amended PBS also.

76. The relevant part of Article 4.2 of the *Agreement on Agriculture* states:

> "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".

77. Moreover, according to the relevant part of footnote 1 to that Article:

> "These measures include…variable import levies, minimum import prices,…and similar border measures other than ordinary customs duties…"

78. In this connection, the Appellate Body upheld the Panel's finding[77] to the effect that:

> "… Chile's price band system is a border measure similar to variable import levies and minimum import prices within the meaning of…Article 4.2 of the Agreement on Agriculture …"

79. Before arriving at this conclusion, the Appellate Body held that:

> "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

[76] This was confirmed by the Chilean Executive itself when it stated that *"…Through this bill (Law 19.897) the Government has corrected…formal aspects challenged* [by the WTO] *while fully protecting the spirit of the bands…"* (emphasis added). Nicolás Eyzaguirre, Chilean Minister of Finance, 6 August 2003. In *"History of the Law. Compilation of official texts of the parliamentary debate. Law 19.897"*. Library of the National Congress. Santiago, Chile, 2003.

[77] *Chile – Price Band System*, Report of the Appellate Body, paragraphs 262 and 288(c)(i).

> 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*" [78]

80. Moreover, the Appellate Body noted that:

> "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 Qof 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.*"[79]

81. Likewise, it added:

> "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."[80]

82. The Appellate Body also found that the Chilean price band system could 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.[81]

83. In this connection, the Appellate Body pointed out how the PBS prevented world prices from being fully reflected in domestic prices:

> "… Chile's price band system does not simply ensure a reasonable margin of fluctuation of domestic prices. 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. 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

[78] *Chile – Price Band System*, Report of the Appellate Body, paragraph 221.
[79] *Chile – Price Band System*, Report of the Appellate Body, paragraph 212.
[80] *Chile – Price Band System*, Report of the Appellate Body, footnote 187.
[81] *Chile – Price Band System*, Report of the Appellate Body, paragraph 246.

> than if Chile simply applied a minimum import price at the level of the lower threshold of a Chilean price band."[82]

84. The Appellate Body took the view that, in addition to the lack of transparency and the lack of predictability that were inherent in how Chile's price bands were established, there were similar shortcomings in the way in which the other essential element of Chile's price band system—the reference price—was determined. The duties resulting from Chile's price band system were equal to the difference between the price band thresholds and the reference price. Chile set the reference price on a weekly basis, and did so in a way that was neither transparent nor predictable.[83]

85. In relation to the lack of transparency and predictability of the PBS in its original form, the Appellate Body noted that:

> "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". No Chilean legislation or regulation specifies how the international "markets of concern" and the "qualities of concern" are selected. 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." [84]

86. Moreover, the Appellate Body stated that, even if it were to be assumed that one feature of Chile's price band system was not similar to the features of "variable import levies" and "minimum import prices"" because the thresholds of Chile's price bands varied in relation to – albeit historic – world market prices rather than domestic target prices, this would not change its 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 …"[85]

87. Before finding that the Chilean Price Band System "is a border measure similar to a variable import levy and a minimum import price…" the Appellate Body affirmed that:

> "… 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 4make Chile's price band system—in its particular features—a "similar border measure" within the meaning of footnote 1 to Article 4.2".[86]

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[82] *Chile – Price Band System*, Report of the Appellate Body, paragraph 260.
[83] *Chile – Price Band System*, Report of the Appellate Body, paragraph 247.
[84] *Chile – Price Band System*, Report of the Appellate Body, paragraph 249.
[85] *Chile – Price Band System*, Report of the Appellate Body, paragraph 251.
[86] *Chile – Price Band System*, Report of the Appellate Body, paragraph 252.

88. In this connection, the Appellate Body stated that:

> "... 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."[87] (Emphasis added).

89. The changes introduced into the Chilean legislation did not convert the price band system into a measure essentially different from that in effect before those changes were made. Consequently, as shown below, the essence of the PBS remains intact and the comments and findings of the Appellate Body relating to the original PBS apply in full to the amended PBS. In particular, the amended PBS leads to insulation from the international market and is neither transparent nor predictable.

2. The amended PBS causes insulation from the international market

> "… *I would like to draw the attention of members to a fact that has not been brought out or emphasized sufficiently in this debate. With this bill (Law 19.897)* ***we are fixing – not stabilizing – a price … for wheat that stays the same for four years, regardless of fluctuations in the international markets …*** *price security is not just for four years but up to 2014* …" (emphasis added).
>
> Jaime Campos, Chilean Minister of Agriculture,
> 5 August 2003.[88]

90. Below, Argentina will show that, regardless of the changes made, the PBS continues to insulate Chile's market from fluctuations in international prices in a way that is inconsistent with Article 4.2 of the *Agreement on Agriculture*.

91. In various passages of its report, the Appellate Body held that the old PBS, in violation of Article 4.2 of the *Agreement on Agriculture*, failed to transmit world market price developments to the Chilean market in the same way as "ordinary customs duties".[89]

92. Moreover, the Appellate Body maintained that in the old PBS the duties resulting from the System ensured that falls in world prices were not *fully* reflected in domestic prices. The Appellate Body added:

> "... 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**

[87] *Chile – Price Band System*, Report of the Appellate Body, paragraph 190, *in fine*.

[88] "History of the Law. Compilation of official texts of the parliamentary debate. Law 19.897". Library of the National Congress. Santiago, Chile, 2003.

[89] *Inter alia*:

"... 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 [of Art 4.2 of the Agreement on Agriculture]" (*Chile – Price Band System*, Report of the Appellate Body, paragraph 246, original emphasis).

"... 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." (*Chile – Price Band System*, Report of the Appellate Body, paragraph 250);

".. .the duties resulting from Chile's price band system…would *not* transmit world market price developments to Chile's market in the same way as "ordinary customs duties". "(*Chile – Price Band System*, Report of the Appellate Body, paragraph 251; original emphasis).

shipments will, in many cases, result in an overall entry price of that shipment that *rises* rather than *falls* …"

> (Footnote: "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.")

"… 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". 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 ...."[90] (Emphasis added, footnote omitted).

93. This passage from the Appellate Body's report is very illuminating with regard to how the original PBS insulated the Chilean market from international prices in a way that is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it formulates several findings relating to the inconsistencies of the PBS. Moreover, it is very important for understanding the operation of the present PBS, since the Appellate Body's assertions all apply to the amended PBS also.

94. A careful reading of the passage cited shows that the Appellate Body makes four findings of inconsistency with regard to the old PBS, namely:

(1) The specific duties resulting from the Chilean price band system tend to elevate the entry price of Chilean imports above the price band floor;

(2) the Chilean 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 price band floor;

(3) the entry price of Chilean imports under Chile's price band system is even higher than if Chile simply applied a minimum import price at the level of the price band floor;

(4) the PBS 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.

[90] *Chile – Price Band System*, Report of the Appellate Body, paragraph 260.

95. As pointed out above, the changes made in the PBS did not convert the price band system into a measure different from that in force before. In particular, the amended PBS *continues* to impede the transmission of international price developments to the Chilean market. This is because the four Appellate Body findings relating to the old PBS are equally valid for the amended PBS.

96. Below, Argentina will show how each of the four findings in paragraph 260 of the Appellate Body's Report applies equally to the present Price Band System.

97. That is to say, Argentina will show that, like the original PBS, the amended PBS *continues* elevating the entry price of imports to Chile above the price band floor; *continues* "overcompensating" for the effect of decreases in international prices on the domestic market when reference prices are set below the price band floor; *continues* making the entry price of Chilean imports higher than if Chile applied a minimum import price at the level of the price band floor, and *continues* failing to ensure that the entry price of imports to Chile falls in tandem with falling world market prices.

98. Thus, the amended PBS disconnects the Chilean market from international price developments in a way that insulates the Chilean market from the transmission of international prices and prevents enhanced access to its market for imports of wheat and wheat flour, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

2.1. Specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor

99. Below, Argentina will show mathematically – using the PBS formula contained in Law 19.897 and Decree 831/2003 – how specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor, just like the original PBS as noted by the Appellate Body in its report. This will be demonstrated first for wheat and then for wheat flour.

(a) *Entry price of wheat*

100. The entry price of wheat imports to Chile – under the amended PBS – is equal to the result of the following sum: the CIF value **plus** the amount of total duties in absolute terms. Total duties include *ad valorem* duties (which, in accordance with Chile's General Customs Tariff, amount to 6 per cent of CIF), **plus** specific duties (equal to the band floor price less the reference price multiplied by 1 (one) plus the general *ad valorem* tariff in force as established in the Customs Tariff).[91]

101. More graphically:

Entry price of wheat under the amended PBS	=	CIF value	+	Total duties in absolute terms				
	=	CIF value	+	*Ad valorem* duties			+	Specific duty
	=	CIF value	+	CIF value	*	6%	+	Specific duty

[91] See Exhibits ARG-1 and ARG-2.

In its turn:

Specific duty[92]	=	(	Band floor price	-	Reference price)	*	(1 +	General *ad valorem* duty in force, Customs Tariff	)
	=	(	US$128	-	Reference price)	*	(1 +	6%	)

102. Mathematically, this can be expressed as follows:

$$EP = CIF + 6\% CIF + [(FP – RefP) * (1+6\%)] \quad [1]$$

where:

EP	=	entry price for wheat imports to Chile under the amended PBS
RefP	=	reference price
FP	=	floor price of the band in force
CIF	=	Cost, Insurance, Freight

103. To show that, under the amended PBS, the entry price tends to be higher than the band floor price – currently set at US$128 per tonne – equation [1] can be reformulated as follows:

EP	=	CIF + 6% CIF + [(US$128 – RefP) * (1+6%)]
EP	=	1.06 CIF + 1.06 (US$128 – RefP)
EP	=	1.06 CIF + US$135.68 – 1.06 RefP
EP	=	US$135.68 + (1.06 CIF – 1.06 RefP)

104. For the entry price (EP) to be less than US$128 per tonne – that is to say, less than the floor price (FP)- the reference price (RefP) must be greater than the CIF value by more than US$7.2453 per tonne or, alternatively, the CIF value must be less than the reference price (RefP) by more than US$7.2453 per tonne, as shown below:

US$128	=	US$135.68 + (1.06 CIF – 1.06 RefP)
US$128	=	US$135.68 + 1.06 (CIF – RefP)
- (US$7.68)	=	1.06 (CIF – RefP)
- (US$7.2453)	=	CIF – RefP

or, alternatively:

RefP	=	CIF + US$7.2453	[2]
CIF	=	RefP – US$7.2453	[3]

105. This means that <u>whenever</u> the CIF price of wheat imports to Chile is greater than the reference price, or whenever the CIF price is less than that reference price by an amount that does not exceed US$7.2453 per tonne and the reference price lies below the band floor, the amended PBS will result in the specific duties tending to elevate the entry price of the imports above the band floor.

106. Therefore, the question is whether there is any chance – with the Price Band active – of the reference price exceeding the CIF price by more than US$7.2453 per tonne. In the case of wheat, these chances are minimal.

[92] In accordance with Article 14 of Dec. 831/2003.

107. In the first place, the chances are minimal because the CIF price tends to be greater than the FOB price.

108. Secondly, in the case of wheat the chances of the reference price being higher than the CIF price by more than US$7.2453 per tonne are minimal basically because of the effective difference in the calculation of the reference price and the CIF. The reference price, as under the old PBS, is calculated on an FOB basis.[93] The CIF, as its name implies ("Cost, Insurance, Freight") consists of the FOB plus freight and insurance. Thus, for the reference price to be higher than the CIF price by more than US$7.2453 per tonne, the CIF price must fall so much that even with cost, freight and the US$7.2453 of equations [2] and [3] included, the total is lower than the reference price itself. Thus, the chances of the CIF price for wheat being lower than the reference price – calculated on an FOB basis – by more than US$7.2453 per tonne are minimal.

109. As an example, the chart in Exhibit ARG-7 and the table in Exhibit ARG-8[94] show the relationship between the CIF price and the reference price during the period of application of the amended PBS. Clearly, when specific duties were being applied – that is to say, between December 2004 and April 2005 – the CIF price of wheat imported into Chile was never lower than the reference price by more than US$7.2453 per tonne and therefore under the amended PBS the entry price was *always* above US$128 per tonne.

110. Even if we consider the historical relationship between the reference price established by Chile and the CIF price per tonne of wheat over the period of application of the amended PBS – that is to say, since 16 December 2003 – during all that time the CIF price per tonne of wheat not only was not less than the reference price but *always* higher than the reference price.

111. In addition, for the purpose of confirming that the chances of the CIF price per tonne of wheat being less than the reference price by US$7.2453 per tonne are minimal, Argentina offers as evidence, in the table in Exhibit ARG-9,[95] the CIF prices per tonne of wheat imported to Chile since 1991, together with the reference price that Chile would have set if the amended PBS had been in force since that date, based on information from the *Oficina de Estudios y Políticas Agrarias* (Office of Agricultural Studies and Policies) of the Chilean Ministry of Agriculture (hereinafter ODEPA).[96] The reference price was calculated using the average monthly FOB price of *Trigo Pan Argentino* from 1991 for the first half of the year and, for the second half, the average monthly FOB price of Soft Red

[93] The relevant part of Decree 831/2003 reads as follows:

"Article 7.- Reference price

The reference price for wheat shall be the average of the daily prices recorded on the markets indicated in Article 8, during a period of 15 days reckoned retrospectively from the 10th of the month in which the respective decree is published.

Article 8.- Market of most concern

The market of most concern for wheat, during the period of application of duties and rebates extending from 16 December to 15 June of the following year shall be that for *Trigo Pan Argentino* and the prices shall correspond to the daily prices quoted for that product FOB Argentine port, and during the period of application extending from 16 June to 15 December, that for Soft Red Winter No. 2 wheat and the prices shall correspond to the daily prices quoted for that product FOB Gulf of Mexico." (Emphasis added).

[94] Exhibits ARG-7 and ARG-8: Self-compilation based on ODEPA data.

[95] Source: Self-compilation based on ODEPA data.

[96] The ODEPA data can be found at www.odepa.gob.cl.

Winter No. 2 wheat since 1991, in the same way as the reference price is currently established under Decree 831/2003.[97]

112. The table in Exhibit ARG-9 shows the difference between the CIF price and the reference price that would have existed during the period from January 1991 to December 2003, when Chile established the amended PBS. Over this entire period, the CIF price of wheat imported to Chile was less than the reference price by more than US$7.2453 per tonne on only 13 occasions out of a total of 144 months. That is to say, during 91 per cent of the time between 1991 and 2003 the CIF price per tonne stayed above the reference price that would have existed or, if it was less than the reference price that would have existed, the difference was not greater than US$7.2453 per tonne.

113. The fact that since the amended PBS came into existence, the CIF price of a tonne of wheat was never less than the reference price, and that during 91 per cent of the time between 1991 and 2003,[98] the CIF price per tonne stayed above the reference price that would have existed (or, if it was less than the reference price that would have existed, the difference was not greater than US$7.2453 per tonne) *shows conclusively* that the chances of the CIF price of a tonne of wheat being less than the reference price by more than US$7.2453 per tonne on the basis of equations [2] and [3] are minimal.

114. Thus, Argentina has shown mathematically and empirically that with the application of the amended PBS the likelihood of the CIF price being less than the reference price by more than US$7.2453 per tonne is minimal. Therefore, it can only be concluded that, owing to its mathematical formulation, the amended PBS tends to elevate the entry price of wheat imports to Chile above the price band floor, in the same way as the original PBS.

(b) ***Entry price of wheat flour***

115. Following reasoning similar to that used in calculating the entry price for wheat imports, under the PBS as amended by Law 19.897 and Decree 831/2003, the entry price for wheat flour is equal to the result of the following sum: CIF value **plus** *ad valorem* duties (which, in accordance with the Chilean General Customs Tariff, amount to 6 per cent of the CIF) **plus** specific duties (equal to the band floor price less the reference price multiplied by one plus the general *ad valorem* tariff in force as established in the Customs Tariff) **multiplied by a factor of 1.56.**[99]

116. That is to say, the formula is the same as for the entry price for wheat save that, in the case of flour, "…to this there shall be applied the duties and rebates determined for wheat, **multiplied by a factor of 1.56**".[100] (Emphasis added).

117. Expressing the text of the previous paragraph as a formula gives:

Entry price for wheat flour under the amended PBS	=	CIF value	+	Total duties in absolute terms				
	=	CIF value	+	*Ad valorem* duties			+	Specific duties
	=	CIF value	+	CIF value	*	6%	+	Specific duties

[97] See Exhibit ARG-2, Art. 8.

[98] The figure rises to 92.4 per cent of the time if the period extending from January 2003 to March 2006, during which the CIF value per tonne was *always* greater than the reference price, is included.

[99] See Exhibits ARG-1 and ARG-2.

[100] See Exhibit ARG-2, Decree 831/2003, Article 16.

In its turn:

Specific duty[101]	=	[(	Band floor price	-	Reference price	) * (	1 +	General *ad valorem* tariff in force	)]	*	**1.56**
	=	[(	US$128	-	Reference price	) * (	1 +	6%	)]	*	**1.56**

118. Mathematically, this can be expressed as follows:

$$EPWF = CIF + 6\% CIF + [[(FP - RefP) * (1+6\%)] * 1.56] \qquad [2]$$

where:
EPWF = entry price for wheat flour imports to Chile under the amended PBS
RefP = reference price
FP = band floor price in force
CIF = Cost, Insurance, Freight

119. To show that, under the amended PBS, the entry price for wheat flour tends to be higher than the band floor price – currently set at US$128 – equation [1] can be reformulated as follows:

EPWF = CIF + 6% CIF + (US$128 – RefP) * (1+6%) *1.56
EPWF = 1.06 CIF + (US$128 – RefP) * 1.06 * 1.56
EPWF = 1.06 CIF + (US$128 – RefP) * 1.65
EPWF = 1.06 CIF + US$211.2 – 1.65 RefP

120. For the entry price for wheat flour (EPWF) to be less than US$128 per tonne – that is to say, less than the floor price (FP) – *the reference price (RefP) must be greater than the CIF value multiplied by 0.64 plus US$50.42 per tonne* or, alternatively, *the CIF value must be less than the reference price multiplied by 1.56 less US$78.49 per tonne*, as shown below:

US$128 = 1.06 CIF + US$211.2 – 1.65 RefP
-(US$83.2) = 1.06 CIF – 1.65 RefP
1.65 RefP = 1.06 CIF + US$83.2
RefP = (1.06 CIF / 1.65) + (US$83.2 / 1.65)
RefP = 0.64 CIF + US$50.42 [2]

or, alternatively:

CIF = (1.65 RefP / 1.06) – (US$83.2 / 1.06)
CIF = 1.56 RefP – US$78.49 [3]

121. Therefore, as with the entry price for wheat, the question is whether there is any chance – with the Price Band active – of *the reference price being greater than the CIF value multiplied by 0.64 plus US$50.42 per tonne* or the *CIF value being less than the reference price multiplied by 1.56 less US$78.49 per tonne.*

122. An analysis of this type would not be very useful since, according to Chile's own records, in the past the chances of the entry price for wheat flour being less than the band floor price are zero. In

[101] See Exhibit ARG-2, Decree 831/2003, Article 14.

fact, ODEPA keeps records of wheat flour imports since 1991. By taking the volumes and CIF amounts of monthly wheat flour imports it is easily possible to obtain the monthly CIF price per tonne for wheat flour since 1991.[102] The fact is that – from 1991 to date – the CIF price per tonne has *never* been less than the current and future band floor. If the CIF price per tonne was never less than the band floor, then logically the entry price for imports to Chile could not have been less than that price, since the entry price consists of the CIF price plus *ad valorem* duties and possibly specific duties.

123. Then, at first glance, the price band for wheat flour makes no sense. Why does Chile apply the price band to wheat flour *also* if, in view of the same international market dynamics, the entry price cannot be less than the band floor? The only possible conclusion is that there is an intent to add a distortion to the market in wheat and wheat products (which include wheat flour) *greater* than that already caused by the application of specific duties to wheat imports, thereby *further* isolating the Chilean wheat flour market from international markets.

124. To conclude, Argentina has shown that, in the case of wheat, the chances of the CIF price being lower than the reference price are minimal and, in the case of wheat flour, almost nil. Thus, on the basis of equations [2] and [3] – for wheat and wheat flour – and the arguments set out above, it has been shown that – as the Appellate Body found with respect to the "old" PBS – the amended PBS tends to elevate the entry price of wheat and wheat flour imports to Chile above the price band floor.

2.2. The amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor

125. Below, Argentina will show that the amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor, as pointed out by the Appellate Body in relation to the original PBS.

126. This "overcompensation" of the effect of decreases in international prices on Chile's domestic market takes place when, as the reference prices fall – in response to a fall in international FOB prices during a 15-day period – and the bands are activated by applying specific duties, the entry price not only does not decrease or remain the same but often increases, so that the general entry price for exports to Chile *rises*, instead of *falling*, as found by the Appellate Body in relation to the PBS in its original form.

(a) *Overcompensation in the case of wheat*

127. First of all, the overcompensation in the case of wheat can be demonstrated mathematically.

128. We recall equation [1] which represents the operation of the PBS in accordance with Law 19.897 and Decree 831/2003:

$$EP = CIF + 6\%\ CIF + [\ (FP - RefP) * (1+6\%)\ ] \qquad [1]$$

where:
EP = entry price for imports to Chile under the PBS
RefP = reference price
FP = floor price currently in force
CIF = Cost, Insurance, Freight

[102] Exhibit ARG-28.

129. Consider, for example, the reference price (RefP) for the band in January 2005. According to ODEPA, RefP was US$114.50 per tonne.[103] The average CIF price for that month for a tonne of wheat imported from Argentina was US$164.43 per tonne.[104] By substituting these values in equation [1] we obtain:

EP = US$164.43 + US$9.87 + [(US$128 – US$114.50) * 1.06]
EP = US$164.43 + US$9.87 + US$14.31
EP = US$188.61

130. That is to say, for the reference price and CIF price in question, the entry price for imports to Chile was US$188.61 per tonne.

131. Now, for the sake of clarity, let us suppose that the reference price – which reflects the 15-day average FOB price for *Trigo Pan Argentino* – falls by 10 per cent (being equal during the next two months to US$103.05 per tonne) whereas the CIF price does not change or, after falling, returns to the same level as in January 2005, following a rise in the FOB price (as often happens), remaining at US$164.43 per tonne. In this case, again using equation [1], we obtain:

EP = CIF + 6% CIF + [(FP – RefP) * (1+6%)] [1]
EP = US$164.43 + US$9.87 + [(US$128 – **US$103.05**) * (1+6%)]
EP = US$164.43 + US$9.87 + US$26.45
EP = US$200.75

132. That is to say, with the reference price 10 per cent lower and the CIF price unchanged, the entry price for imports to Chile is US$200.75 per tonne. Comparing this with the previous entry price of US$188.61 when the reference price was 10 per cent higher, we can see that the overcompensation effect has been mathematically proved.

133. As additional evidence, Argentina will give two examples of what *actually* happened during the period of operation of the amended PBS when, in the months from December 2004 to April 2005, the bands were activated and specific duties applied.

Example 1

134. The table below shows what happened when specific duties began to be applied on 16 December 2004 and reveals the actual effect of "overcompensation":

TABLE I

	Band ceiling	**Band floor**	**Reference price**	**FOB price *Trigo Pan Argentino***	**CIF Customs value Chile**	***Ad valorem* duty**	**Specific duty**	**Entry price**
15-Dec-04	148	128	141.73	115.00	141.45	8.49		149.94
16-Dec-04	148	128	114.50	114.00	140.22	8.41	14.30	162.93

Values in US$ per tonne
Source: ODEPA (except for FOB price and CIF, source: SAGPyA)[105]

[103] See Exhibit ARG-6.
[104] Source: ODEPA.
[105] ODEPA does not provide **daily** FOB prices for bread wheat, Argentine port (only monthly prices). The historical FOB price for *Trigo Pan Argentino* reported by Argentina's Ministry of Agriculture, Livestock, Fisheries and Food (SAGPyA) is taken instead. In order to make the analysis as accurate as possible, the price indicated in the table for 15 December 2004 corresponds to the Argentine FOB price in effect 15 days previously, since that is the approximate time taken by a cargo ship to sail from Argentina to Chile, including

135. On the basis of the FOB price of *Trigo Pan Argentino* for a shipment arriving in Chile on 15 December 2004, the reference price for that day (and the two previous months) was US$141.73 per tonne. The entry price for imports to Chile on that day, on which no specific duties were applied, was US$149.94 per tonne.

136. On the next day, 16 December 2004, Chile set a new reference price of US$114.50 per tonne, 19.21 per cent lower than the previous one. The FOB price of *Trigo Pan Argentino* for a shipment arriving in Chile on that day was US$1 (one dollar) per tonne less than on the previous day. However, when the specific duties resulting from the PBS were applied, the entry price rose from US$149.94 per tonne to US$162.93 per tonne.

137. This "overcompensation" (increase in the entry price of imports to Chile) occurred at the same time as the *transaction value decreased*, which demonstrates the total disconnection of the amended PBS from the transaction value and international prices.

Example 2

138. On 16 February 2005, Chile again set a new reference price below the band floor and lower than that in force during the previous two-month period. Therefore, specific duties higher than those for the previous period were applied. The following table summarizes what happened and again reveals the actual effect of "overcompensation":

TABLE II

	Band ceiling	**Band floor**	**Reference price**	**FOB price *Trigo Pan Argentino***	**CIF Customs value Chile**	***Ad valorem* duty**	**Specific duty**	**Entry price**
15-Feb-05	148	128	114.50	107	131.61	7.90	14.30	153.81
16-Feb-05	148	128	108.64	107	131.61	7.90	20.50	160.01

Values in US$ per tonne
Source: ODEPA (except for FOB and CIF prices, source: SAGPyA)[106]

139. On the basis of the FOB price of bread wheat, Argentine port, for a shipment arriving in Chile on 15 February 2005, the reference price for that day (and the two previous months) was US$114.50 per tonne. The entry price for imports to Chile on that day, when specific duties amounting to US$14.30 were applied, was US$153.81 per tonne.

140. On the next day, 16 February 2004, Chile set a new reference price of US$108.64 per tonne, 5.12 per cent lower than the previous one. However, the FOB price for *Trigo Pan Argentino* did not change and therefore neither did the CIF price. Nevertheless, when the PBS specific duties were applied, the entry price for Chile rose from US$153.81 per tonne to US$160.01 per tonne.

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dockside loading and unloading times. To arrive at the CIF value the FOB value was multiplied by 1.23, because the CIF value is generally (subject to periodic variations) 23 per cent higher than the FOB value for wheat, calculating maritime freight from Buenos Aires to Chile at US$24 per tonne and 0.5 per cent for insurance, on the basis of information provided by SAGPyA's Food and Agricultural Market Directorate. The calculations leading to the index 1.23 are presented in Exhibit ARG-25, taking as a basis the FOB prices, Argentine port, reported by ODEPA and carrying out the above-mentioned calculation. It should also be noted that insofar as the criterion used to arrive at the CIF value is solely for the purposes of the analysis, it being understood that the freight and insurance values depend on numerous variables, the overcompensation can be demonstrated *independently* of the relationship between the FOB and CIF values.

[106] Same as before.

141. The entry price rose by more than 4 per cent *without any change in the transaction value*, which demonstrates, as in the previous case, the total disconnection of the PBS from the transaction value and international prices.

142. Thus, Argentina has demonstrated – both mathematically and empirically – that when the reference prices are set below the price band floor, the amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market.

(b) ***Overcompensation in the case of wheat flour***

143. As with wheat, the overcompensation in the case of wheat flour can first be demonstrated mathematically.

144. We recall equation [2] which represents the operation of the PBS for wheat flour, in accordance with Law 19.897 and Decree 831/2003:

$$EPWF = CIF + 6\%\ CIF + [\ [\ (FP - RefP) * (1+6\%)\ ] * 1.56\ ] \qquad [2]$$

where:
EPWF = entry price for wheat flour imports to Chile under the amended PBS
RefP = reference price
FP = floor price of the band in force
CIF = Cost, Insurance, Freight

145. Consider, for example, the reference price (RefP) that the band had in January 2005. According to ODEPA, RefP was US$114.50 per tonne.[107] The average CIF price for that month per tonne of imported wheat flour of all origins was US$198.14 per tonne.[108] Substituting these values in equation [2], we obtain:

EPWF = US$198.14 + US$11.89 + [[(US$128 – US$114.50) * 1.06] * 1.56]
EPWF = US$198.14 + US$11.89 + [US$14.31 * 1.56]
EPWF = US$232.35

146. That is to say, with the reference price and CIF price in question, the entry price for imports to Chile was US$232.35.

147. Now, for the sake of clarity, let us suppose that the reference price – which reflects the 15-day average FOB prices for *Trigo Pan Argentino* – falls by 10 per cent (staying for the next two months at US$103.05 per tonne) and the CIF price does not change or, after falling, returns to the same level as in January 2005 following a rise in the FOB price – as often happens – remaining at US$198.14 per tonne. In this case, again using equation [2], we obtain:

EPWF = CIF + 6% CIF + [[(FP – RefP) * (1+6%)] * 1.56] [2]
EPWF = US$198.14 + US$11.89 + [[(US$128 – US$103.05) * (1+6%)] * 1.56]
EPWF = US$198.14 + US$11.89 + US$41.26
EPWF = US$251.28

148. That is to say, with the reference price 10 per cent lower and the CIF price unchanged, the entry price for imports to Chile is US$251.28. Comparing this with the previous entry price of

[107] See Exhibit ARG-6.
[108] See Exhibit ARG-28.

US$232.35 when the reference price was 10 per cent higher, we can see that the overcompensation effect has been mathematically proved.

149. As additional evidence, Argentina will give two examples of what *actually* happened during the period of operation of the amended PBS when, in the months from December 2004 to April 2005, the bands were activated and specific duties were applied.

Example 1

150. The following table shows what happened when, on 16 December 2004, specific duties began to be applied and reveals the actual effect of "overcompensation" on wheat flour:

TABLE III

	Band ceiling	**Band floor**	**Reference price**	**FOB price Argentine wheat flour**	**CIF Customs value Chile**	***Ad valorem* duty**	**Specific duty**	**Entry price**
15-Dec-04	148	128	141.73	158	221.20	13.27		234.47
16-Dec-04	148	128	114.50	158	221.20	13.27	22.30	256.77

Values in US$ per tonne
Source: Self-compilation based on ODEPA data (except for the FOB price, source: SAGPyA and the CIF price, source: FAIM).[109]

151. On the basis of the FOB price of wheat flour for a shipment arriving in Chile on 15 December 2004, the reference price for that day (and the previous two months) was US$141.73 per tonne. The entry price for Chile on that day, when no specific duties were applied, was US$234.47 per tonne.

152. The next day, 16 December 2004, Chile set a new reference price of US$114.50 per tonne, 19.21 per cent lower than the previous one. However, the FOB price of wheat flour did not change and, therefore, neither did the CIF price. Nevertheless, when the PBS specific duties were applied, the entry price for imports to Chile rose from US$234.47 to US$256.77 per tonne.

153. This "overcompensation" occurred *without any change in the transaction value*, which demonstrates the total disconnection of the amended PBS from that value and international prices.

Example 2

154. On 16 February 2005, Chile again set a new reference price below the band floor and lower than that in force during the previous two-month period. Therefore specific duties higher than during the previous period were applied. The following table summarizes what happened and again reveals the actual effect of "overcompensation":

[109] ODEPA does not provide daily FOB prices for wheat flour, Argentine port. Instead, the historical FOB price reported by SAGPyA is taken. In order to make the analysis as accurate as possible, the price indicated in the table for 15 December 2004 corresponds to the Argentine FOB price for wheat flour in effect 5 days previously, since that is the approximate time required for transport by land from Argentina to Chile. The CIF value is calculated from the FOB value, plus land freight and insurance. Normally, in the case of wheat flour, freight and insurance represent 40 per cent of the FOB value. This information was obtained from examples of actual export operations provided by the Argentine Federation of the Milling Industry (FAIM) and presented in Exhibit ARG-26. It should also be noted that, inasmuch as the criterion used to arrive at the CIF value is solely for the purposes of the analysis, it being understood that the freight and insurance values depend on numerous variables, the overcompensation can be demonstrated *independently* of the relationship between the FOB and CIF values.

TABLE IV

	Band ceiling	**Band floor**	**Reference price**	**FOB price Argentine wheat flour**	**CIF Customs value Chile**	***Ad valorem* duty**	**Specific duty**	**Entry price**
15-Feb-05	148	128	114.50	150	210.00	12.60	22.30	244.90
16-Feb-05	148	128	108.64	150	210.00	12.60	32.00	254.60

Values in US$ per tonne
Source: Self-compilation based on ODEPA data (except for the FOB price, source: SAGPyA and the CIF price, source: FAIM).[110]

155. On 15 February, the reference price for that day (and the two previous months) was US$114.50 per tonne. The entry price for imports to Chile on that day, when specific duties amounting to US$22.30 per tonne were applied, was US$244.90 per tonne.

156. The next day, 16 February 2005, Chile set a new reference price of US$108.64 per tonne, 5.12 per cent lower than the previous price. However, the FOB price of Argentine wheat flour did not change and, therefore, neither did the CIF price. Nevertheless, when the PBS specific duties were applied, the entry price for Chile rose from US$244.90 to US$254.60 per tonne.

157. The entry price rose *without any change in the transaction value*, which demonstrates, as in the previous case, the overcompensation effect and the total disconnection of the PBS from that value and international prices.

158. Thus, Argentina has shown – both mathematically and empirically – that when the reference prices are set below the price band floor, the amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market.

2.3. The entry price of Chilean imports under the amended PBS is higher than it would be if Chile were to apply a minimum import price at price band floor level

> "*From the moment that the country's wheat producers are assured of a floor, through the price band,* ***the importation of wheat at a price lower than the floor price will be prevented*** …" (Emphasis added).[111]

159. Below, Argentina will show that, under the amended PBS, the entry price for wheat and wheat flour imports is higher than it would be if Chile were to apply a minimum import price at price band floor level.

160. In the present dispute, the Appellate Body found that:

> "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."[112]

161. Thus, as noted by the Appellate Body, the establishment of a minimum import price at price band floor level would mean that if the entry price of a particular product (i.e., the CIF price plus *ad valorem* duties) were lower than that threshold (US$128 per tonne or the corresponding amount)

[110] Same as above.
[111] Deputy Patricio Melero, 24 January 1996, during the debate on the bill extending the system for establishing duties and rebates for wheat flour "History of the Law. Compilation of official texts of the parliamentary debate. Law 19.446". Library of the National Congress. Santiago, Chile, 1997.
[112] *Chile – Price Band System*, Report of the Appellate Body, paragraph 236.

an additional charge equivalent to the difference would be imposed, so that the product in question enters the Chilean market at the band floor price (currently US$128 per tonne).

(a) The case of wheat

162. In fact, during the period of application of the band (16-Dec-2004 / 15-Apr-2005) the CIF price plus *ad valorem* duties was higher than the band floor (US$128), which makes it impossible to compare the entry price for Chilean wheat imports if a minimum import price had been imposed at band floor level with the price resulting from the amended PBS.[113]

163. However, the relationship between the two variables can be calculated by selecting a period during which international prices were sufficiently low for it to be possible to show that the entry price under the amended PBS is higher than that resulting from the application of a minimum price at price band floor level.

164. The period selected by Argentina as an illustration of this covers the months of March, April and May 2000. According to the ODEPA data, this period was the only one between 1991 and 2003 during which the average CIF price of Chilean wheat imports – of all origins – plus *ad valorem* duties (6 per cent) fell below the price band floor, a situation which enables the result of applying a minimum price to be compared with the result of applying the amended PBS.[114]

165. For this period – March to May 2000 – we have calculated the reference prices and the approximate specific duties that would have resulted if at that time, using the historical prices for that period, the amended PBS as established by Law 19.897 and Decree 831/2003 had been applied.

166. As previously described, the entry price was calculated in accordance with the following formula taken from Law 19.897 and Decree 831/2003:

Entry price under the PBS	=	CIF value	+	Total duties in absolute terms						
	=	CIF value	+	*Ad valorem* duties	+	Specific duty				
Ad valorem duties	=	CIF value	*	6%						
Specific duty[115]	=	(	Band floor price	-	Reference price	) * (1 +	General *ad valorem* tariff in force, Customs Tariff	)		

167. On the basis of this formula, in the following table we have reconstructed what would have happened during that period if a minimum price had been applied at price band floor level as compared with the application of the amended PBS. The model reproduces the entry price at which a tonne of wheat exported from Argentina would have entered Chile:

[113] Exhibits ARG-23 and ARG-24.

[114] The average CIF value per tonne for the period March, April and May 2000 corresponds to imports of wheat of all origins (source ODEPA). For comparison purposes, the *ad valorem* duty rate is assumed to be the current rate (6 per cent).

[115] In accordance with Article 14 of Dec. 831/2003, Exhibit ARG-2. In its turn, the amount of the specific duties actually applied can be obtained from www.odepa.gob.cl.

TABLE V

Month	Quotation	Average international reference price[116]	Specific duty	Band floor	Average CIF price[117]	CIF + *ad valorem*	Minimum import price at band floor level	Entry price resulting from PBS
March 2000	FOB Argentine port	106.22	23.09	128.00	115.80	122.75	128.00	145.83
April 2000	FOB Argentine port	113.72	15.14	128.00	117.74	124.80	128.00	139.94
May 2000	FOB Argentine port	126.29	1.81	128.00	120.55	127.78	128.00	129.59

Values in US$ per tonne.
Source: Own compilation based on ODEPA information.

168. As can be seen from Table V, a comparison of the entry price for wheat that would have resulted from applying the amended PBS (using the actual prices for the perigod March-April-May 2000) with the price resulting from the application of a minimum import price at price band floor level shows that the entry price for imports to Chile under the amended PBS would have **always been higher** than that which would have resulted if Chile had applied a minimum import price at price band floor level, that is at US$128.

169. To make the significance of this argument clearer for the Panel, in Exhibit ARG-10 we have reproduced a chart (based on the numerical information in Table V) showing graphs of the PBS entry price that would have been observed if the amended PBS had been applied during the period March-April-May 2000. This chart also includes a graph representing the entry price for imports to Chile with a minimum import price at band floor level which would have been observed in cases in which it could have been calculated and the entry price without the application of either the PBS or a minimum price.

170. Clearly, **in all cases** the entry price for imports to Chile under the amended PBS is **higher** than the entry price with a minimum import price at band floor level.

(b) The case of wheat flour

171. It is not difficult to show that in the case of wheat flour the entry price – under the amended PBS – is higher than it would have been if Chile had applied a minimum import price at band floor level. As wheat flour is a product of wheat, its price is naturally higher than that of wheat itself. If to that price we add the specific duties resulting from the PBS, it logically follows that in each case in which the entry price of wheat – under the amended PBS – was higher than the price resulting from the application of a minimum import price, the entry price of wheat flour during the same period *must logically also have been higher* than the price resulting from the application of a minimum import price. Therefore, this must have been so both during the period in which specific duties were actually activated between December 2004 and April 2005 and during the period in which it was calculated how the amended PBS would have operated with international prices between March and May 2000 (Table V).

172. Accordingly, the entry price for wheat flour imports to Chile – under the amended PBS – is higher than it would have been if Chile had applied a minimum import price at band floor level.

[116] Based on the monthly FOB price for bread wheat, Argentine port. Source: ODEPA.
[117] Source ODEPA.

173. Consequently, both in the case of wheat and in that of wheat flour, the entry price of Chilean imports, under the amended PBS, is higher than it would have been if Chile had applied a minimum import price at price band floor level.

2.4. The amended PBS 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

174. Below, Argentina will show that the amended PBS 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. Argentina will provide evidence of what *actually* happened during the operation of the amended PBS when, between December 2004 and April 2005, specific duties were applied.

(a) The amended PBS does not ensure that the entry price of wheat imports falls in tandem with falling world wheat market prices

175. Exhibits ARG-11 and ARG-12 contain a table and a chart, respectively, showing what happened in the case of wheat when specific duties were applied starting on 16 December 2004. Clearly, as the FOB Argentine port prices were *falling*, the entry price, with the application of specific duties, *rose* significantly, demonstrating once again a total disconnection from international price developments.

176. Exhibits ARG-11 and ARG-12 show that, from 1 December 2004, the price of bread wheat FOB Argentine port fell steadily, a trend that was maintained until approximately 4 January 2005. Specifically, the initial FOB price on 1 December was US$119 per tonne, whereas at the end of the trend, on 4 January 2005, the price was US$109 per tonne.

177. A study of the entry price trend for imports to Chile due to the operation of the PBS reveals the exact opposite: the entry price rose. In fact, from 1 December the entry price for *Trigo Pan Argentino* showed a tendency to fall which, the band not being active, reflected a downward trend in FOB Argentine port prices. However, when the band was activated on 16 December 2004 and specific duties were applied, the entry price for Chile rose suddenly from US$149.94 per tonne to approximately US$162.93 per tonne. This was specifically due to the operation of the amended PBS and the application of specific duties.

178. It may be concluded that, because of the distorting effect of the amended PBS, when international prices fall the entry price for Chile rises. Therefore, the amended PBS does not ensure that the entry price for wheat imports falls in tandem with falling world wheat market prices.

(b) The amended PBS does not ensure that the entry price for wheat flour imports falls in tandem with falling world wheat market prices

179. Exhibits ARG-13 and ARG-14 contain a table and a chart, respectively, showing what happened in the case of wheat flour when specific duties were applied starting on 16 December 2004. Clearly, as the FOB Argentine port prices for wheat flour *fell*, the Chilean entry price, with the application of specific duties, *rose*, demonstrating a disconnection from international price developments

180. As Exhibits ARG-13 and ARG-14 show, from 1 November 2004 (and indeed from before that) the FOB Argentine port price for wheat flour fell steadily, a trend which was to continue until approximately March 2005. Specifically, the initial FOB price for a shipment arriving in Chile by

land on 1 November 2004[118] was US$170 per tonne, whereas at the end of the trend in March 2005 the price was US$150 per tonne.

181. A study of the trend in the Chilean entry price as a result of the operation of the PBS reveals the exact opposite: the entry price rose. In fact, from 1 November (and indeed from before that) the Chilean entry price for Argentine wheat flour had a tendency to fall which, the band not being active, reflected a downward trend in FOB Argentine port prices.[119] However, when the band was activated on 16 December 2004 and specific duties were applied, the Chilean entry price rose suddenly from US$234.47 to US$256.77 per tonne. This was specifically due to the operation of the amended PBS and the application of specific duties.

182. In addition, it should be noted that whereas during most of January and all of February 2005, specifically up until 1 March 2005, the FOB price of wheat flour – arriving in Chile by land – remained at US$150 per tonne, on 16 February the entry price rose abruptly from US$244.90 to US$254.60 per tonne, solely because of the increase in specific duties from US$22.30 to US$32.00 per tonne. It should be recalled that the application of these specific duties was related not to international wheat flour prices but to the international prices of wheat. That is to say that the PBS is also unable to ensure that, when wheat flour prices are stable, the Chilean entry price also remains stable and does not increase as a consequence of variables unrelated to the transaction value of flour, as happened in February 2005.

183. Thus, the distorting effect of the amended PBS means that when international prices fall, the Chilean entry price rises. Therefore, the amended PBS does not ensure that the price of wheat flour imports falls in tandem with the falling prices of wheat flour on the world market.

184. Thus, there can be no doubt that the amended PBS does not merely moderate the effect of fluctuations in world market prices on the Chilean market, since it does not ensure that the entry price of Chilean imports falls in tandem with falling world market prices.

185. **To conclude,** Argentina has shown, on the basis of evidence, that, like the original PBS, the "new" price band system *continues* to elevate the entry price of Chilean imports above the price band floor, *continues* "overcompensating" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor, *continues* causing the entry price of imports to Chile to be higher than it would have been if Chile had applied a minimum import price at price band floor level and *continues* not to ensure that the entry price of Chilean imports falls in tandem with falling world market prices.

186. Consequently, the new Price Band System is disconnecting the Chilean market from international price developments in such a way as to insulate the Chilean market from the transmission of international prices and is preventing enhanced access to the Chilean market for imports of wheat and wheat flour.

187. By not fully reflecting falls in world prices in domestic prices and impeding the transmission of international price developments to the Chilean market in much the same way as the other categories of prohibited measures listed in footnote 1 to Article 4.2 of the *Agreement on Agriculture* (in particular, a "minimum import price" and a "variable import levy"), **the "new" PBS** is **inconsistent with Article 4.2 of the Agreement on Agriculture.**

[118] It was calculated that it would take approximately 4 to 5 days to transport the goods by land from Argentina to Chile.

[119] See Exhibits ARG-13 and ARG-14.

2.5. The floor and ceiling of the amended PBS insulate the Chilean market from international price developments

188. In the PBS in its original form, the floor and ceiling prices of the price bands were set for a whole year (from 16 December of one year to 15 December of the next) in accordance with world prices (monthly average) over a previous five-year period (60 months).[120] In this respect, the floor and ceiling prices of Chile's price bands varied as a function of world market prices. According to the Appellate Body, the price bands could 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 to Article 4.2 of the *Agreement on Agriculture*.[121] Similarly, the floor and ceiling of the amended PBS also insulate the Chilean market from international price developments.

(a) The floor and ceiling of the amended PBS insulate the Chilean market from international price developments as a result of having been determined once only for the entire period from 16 December 2003 to 15 December 2014

189. Under the "new" PBS the floor and ceiling prices have been set for the entire period from 16 December 2003 to 15 December 2007 at US$128 per tonne and US$148 per tonne, respectively. Moreover, the new legislation stipulates that, from 16 December 2007 to 15 December 2014, these floor and ceiling prices will be adjusted annually by multiplying the values in force during the previous annual period by a factor of 0.985.[122]

190. Thus, it can be said not only that the essence of the PBS has been unaffected by the changes introduced but also that in its present form the PBS impedes even more the transmission of international price developments to the domestic market, in much the same way as other categories of prohibited measures listed in footnote 1 to Article 4.2 of the *Agreement on Agriculture*, since the floor and ceiling prices of Chile's price bands no longer vary with either world market prices or historical prices, but have been determined once only for the entire period from 16 December 2003 to 15 December 2014, without bearing any relation to international prices. Argentina questions how, in these circumstances, the new method of setting the floor and ceiling of the price bands can reflect international price developments.

191. In other words, bearing in mind that the operation of the original system was based on the use of moving averages for the previous 60 months for setting price band floor and ceiling prices, Argentina considers that the present system will distort the international price transmission process even more, since the floor and ceiling prices will not be adjusted until 2007. Similarly, considering that from that year onwards these parameters will be established on the basis of fixed coefficients, thereafter isolating the system from fluctuations on the international markets for a further period of seven years, Argentina believes that the new price band system could lead to even greater distortions.

(b) The floor and ceiling of the amended PBS insulate the Chilean market from international price developments and are non-transparent insofar as from 2007 they will be established on the basis of fixed coefficients

192. Chile has specified a factor of 0.985 for adjusting the band floor and ceiling prices during the period from the end of 2007 to 2014. This means that the band floor and ceiling prices for each annual period starting from 16 December 2007 will be the product of the floor and ceiling prices in force up to 15 December of each year and an adjustment factor of 0.985.

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[120] Art. 12 of Law No. 18.525 and Report of the Appellate Body, paragraph 17.
[121] *Chile – Price Band System*, Report of the Appellate Body, paragraph 246.
[122] Law 19.897, Art. 1, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 6.

193. The relevant part of Article 1 of Law 19.897 reads as follows:

> "For the purpose of determining the duties and rebates from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established in the previous paragraph shall be adjusted annually by multiplying the values in force during the previous annual period by a factor of 0.985 in the case of wheat."

194. The results of applying a factor of 0.985 are set out in Article 6 of Decree 831/2003, which states:

> "The floor and ceiling prices for wheat during the period from December 2003 to December 2014 shall be as follows:

Floor and ceiling prices for wheat, by period of validity

Period of validity	Floor price	Ceiling price
16-Dec-2003 to 15-Dec2007	128	148
16-Dec-2007 to 15-Dec-2008	126	146
16-Dec-2008 to 15-Dec-2009	124	144
16-Dec-2009 to 15-Dec-2010	122	142
16-Dec-2010 to 15-Dec-2011	120	140
16-Dec-2011 to 15-Dec-2012	118	138
16-Dec-2012 to 15-Dec-2013	116	136
16-Dec-2013 to 15-Dec-2014	114	134

195. **First of all**, the band floor and ceiling price adjustment factor of 0.985 does not provide for the transmission of international prices to the Chilean market.

196. Whereas in the original PBS the band floor and ceiling prices varied as a function of historical prices, under the amended PBS, thanks to the factor of 0.985, the floor and ceiling vary *without any relation* to world market or historical prices. Neither do they vary as a function of the transaction value, a characteristic shared by the entire PBS.[123]

197. Chile has decided, apparently without reference to any criterion, that the floor and ceiling prices, two fundamental elements (together with the reference prices) for establishing the level of the specific duties applicable to wheat and wheat flour, will decrease, as from December 2007, in a fixed, automatic and autonomous manner.[124] That is to say, the way in which the floor and ceiling prices are to be adjusted bears no relation to international price developments.

198. Even if this relation were based on an assumed decline in the international prices of wheat after 2007, it is baffling how Chile could, in 2003, predict the course of these prices over a period beginning four (4) years later and ending eleven (11) years after the establishment of the amended PBS.

[123] Note that the Appellate Body held that even if it were assumed that one feature of Chile's price band system was not similar to the features of "variable import levies" and "minimum import prices" because the thresholds of Chile's price bands varied in relation to—albeit historic—world market prices rather than domestic target prices, this would not change its overall assessment of Chile's price band system (Report of the Appellate Body, paragraph 251).

[124] If this criterion existed, it would not prevent the disconnection from international price developments because of the way in which the factor 0.985 was established.

199. **Secondly**, the way in which the factor 0.985 was determined is not transparent. Chile has not explained how it was calculated, or what basis there may be for this factor in the legislation that established the amended PBS.

200. The Appellate Body noted how the way in which the bands were established in the original PBS was inconsistent with Article 4.2 of the *Agreement on Agriculture*:

> "... This lack of transparency and…predictability are liable to restrict the volume of imports ... 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."[125]
>
> ...
>
> "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…is determined"[126] (emphasis added).

201. Clearly, by not explaining the origin of the factor 0.985 or the reasons for choosing it, Chile has failed to satisfy the established transparency requirements. As the Appellate Body pointed out, the lack of transparency prevents enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4 of the *Agreement on Agriculture*.[127]

202. Consequently, it is impossible to do other than conclude that the application of the factor 0.985 is contributing to the way in which the amended PBS disconnects the Chilean market from international price developments, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

2.6. The reference prices insulate the Chilean market from international price developments

203. Under the amended PBS, reference prices are established every two months on the basis of the average of the daily prices recorded in two markets specified in the Chilean legislation: the FOB price of *Trigo Pan Argentino*, for the first half of each year, and the FOB price of Soft Red Winter No. 2 Wheat, for the second half of each year.[128]

204. Thus, the reference prices remain invariable for successive two-month periods.[129]

(a) The reference prices insulate the Chilean market from international price developments by staying unchanged for two months

205. Given that under the "old" PBS reference prices were adjusted every week in accordance with the lowest FOB price in *any* external "market of concern" during the previous week, the amended PBS disconnects the Chilean market from international price developments even more than the original PBS.

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[125] Report of the Appellate Body, paragraph 234.
[126] Report of the Appellate Body, paragraph 247.
[127] Report of the Appellate Body, paragraph 258.
[128] See Exhibit ARG-2, Art. 8.
[129] See Exhibit ARG-2, Decree 831/2003, Annex, Summary Table for the application of paragraph 2.

206. Under the "new" PBS the reference prices used to calculate the specific duty for wheat and wheat flour are set 6 times a year,[130] that is, with a period of validity of 2 months during which the transmission of world market prices is disconnected.

207. Consequently, the "new" reference prices, and the "new" PBS that determines them, are not only less representative of the world market but also impede the transmission of international price developments to the Chilean market even more than the original reference prices and PBS.[131]

208. The charts in Exhibits ARG-15 and ARG-17 illustrate the development of the reference prices and the prices of wheat FOB Argentina and FOB Gulf of Mexico, respectively, during the period of validity of the amended PBS. For each period, the disconnection between the FOB prices and the reference prices, after the reference price has been set for two months, is clearly discernible. The tables that provided the information on which these charts are based can be found in Exhibits ARG-16 and ARG-18, respectively.

209. It is surprising to note the insulation from international prices that actually occurred during the period in which the operation of the PBS led to the application of specific duties. It can be seen both from the chart showing the relationship between the reference price and the Argentine port price of bread wheat during the period of operation of the amended PBS (ARG-15) and from that showing the relationship between the reference price and the Gulf of Mexico price of Soft Red Winter No. 2 wheat (ARG-17) that the disconnection occurs irrespective of the period of the year with respect to which the relationship is considered. That is to say, the reference price is disconnected from the FOB prices in the markets of concern both when the reference price is based on the Argentine FOB price and when it is based on the Gulf of Mexico FOB price, although the disconnection between the reference price and the Argentine FOB price is even greater when the reference price is calculated on the basis of the Gulf of Mexico FOB price and *vice versa*.

210. For example, if we consider the relationship between the reference price and the FOB price for *Trigo Pan Argentino* (Exhibits ARG-15 and ARG-16), we find disconnections over the entire period of validity of the amended PBS, but especially in February, early April, the end of May and early June, July, August, early September, end of October and mid-December 2004 and end of February, March, early April, end of July, end of August and beginning of September 2005.

211. Likewise, if we analyse the relationship between the reference price and the FOB price Gulf of Mexico (Exhibits ARG-17 and ARG-18), we note disconnections over the entire period of validity of the amended PBS, but especially at the end of January and beginning of February, April, end of May and early June, July, September, and early October 2004, January, February, March, early April, early August, early October and end of November 2005, and January and early February 2006.

212. As a specific example of this insulation (among many others), consider what happened when the reference price was set at 108.64 US$/tonne between 16 February and 15 April 2005, on the basis of the average of the daily prices for wheat *FOB Argentine port*. The reference price thus determined and fixed for two months did not reflect in absolute terms the increasing trend of those same FOB prices for *Trigo Pan Argentino* which, during that period, reached 140 US$/tonne,[132] close to the band ceiling from which the PBS provides for the granting of rebates rather than the levying of specific duties, which clearly reveals the enormous arbitrariness in the setting of the reference prices.

[130] See Exhibit ARG-2 (Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 5 and 7 and the "Summary Table for the application of paragraph 2" of the Annex) and Exhibit ARG-6 (History of the application of the amended PBS).

[131] This without prejudice to the inconsistencies found by the Appellate Body with respect to the reference prices in the original PBS.

[132] See Exhibit ARG-16.

213. In the case of wheat flour, the disconnection is even greater. Thus, as flour is a product of wheat, its FOB price is naturally higher since to the cost of the wheat the millers add the cost of milling plus a profit margin. Accordingly, the FOB price of wheat flour is always higher than the reference price calculated on the basis of wheat, as can be seen simply by glancing at the chart in Exhibit ARG-19 and the table in Exhibit ARG-20. The substantial disconnection observed between the FOB price of Argentine wheat flour and the reference price on the basis of which the specific duties are applied *during the entire period of validity of the amended PBS* speaks for itself and shows the distortion faced by Argentine exporters of wheat flour when trying to enter the Chilean market. The disconnection of the Chilean market from international price developments is therefore obvious.

(b) The reference prices insulate the Chilean market from international price developments as a result of their being established on the basis of the average of the daily prices recorded on only two predetermined markets

214. Under the new legislation, the reference price for wheat will correspond to the average of the daily prices – during a 15-day period reckoned retrospectively from the 10th day of the month of publication of the corresponding decree – recorded on the *Trigo Pan Argentino* market, for the first half of the year, and the Soft Red Winter No. 2 wheat market, for the second half.

215. In fact, Article 8 of Supreme Decree 831/2003 states that:

> "The market of most concern for wheat, during the period of application of duties and rebates from 16 December to 15 June of the following year, shall be that of *Trigo Pan Argentino* and the prices shall correspond to the daily prices quoted for that product *FOB Argentine port* and, during the period of application from 16 June to 15 December, shall be that of *Soft Red Winter No. 2 wheat* and the prices shall correspond to the daily prices quoted for that product *FOB Gulf of Mexico*."[133] (Original emphasis).

216. **First of all**, as in the case of the PBS in its original form, there is no legislation or regulation governing the amended PBS that specifies *how or on what basis* the "markets of concern" and "qualities of concern" are selected. Therefore, the reference price selection process has not been transparent.

217. This predetermination of the markets to be taken into account for establishing reference prices means that the Chilean market is disconnected from international price developments. Thus, the predetermination of the markets prevents Chile from ensuring that the reference prices are representative of actual world market prices.[134]

218. In fact, bread wheat is sold on at least two other markets of concern, namely, Chicago and Kansas.[135] The fact that the legislation specifies that only two markets are to be regarded as being of concern for the determination of reference prices disconnects Chile's domestic market from international price developments.

219. **Secondly**, the selection of the daily price quoted for "Argentine port" bread wheat as the basis for establishing the market of concern for the first half of the year is not transparent either, since the prices vary with the choice of Argentine port.[136]

[133] See Exhibit ARG-2.
[134] *Chile – Price Band System*, Report of the Appellate Body, paragraph 249.
[135] Based on SAGPyA data.
[136] See Exhibit ARG-4.

(c) The reference prices distort the transmission of international prices to the Chilean market by not having any link with the transaction value

220. The reference prices also distort the transmission of international prices to the Chilean market because they have no link with the transaction value.

221. In this connection, the Appellate Body cited the observations made by the Panel when it described the particular reference price used in Chile's price band system in its original form in the following terms:

> "The reference price used in the context of the Chilean PBS is clearly disconnected from the actual transaction value ..."[137]

222. In the case of the amended PBS, the same bimonthly reference price is applied to imports of all products of the same category, irrespective of their origin and the transaction value of the shipment.

223. Therefore, there is no link between the reference price and the transaction value of the shipment in question under the present scheme either, a characteristic shared by the entire PBS.

2.7. The factor of 1.56 applied to the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour insulates the entry price for wheat flour from international price developments

224. The amended PBS is applied to wheat flour by imposing a surcharge in the form of specific duties or rebates obtained by multiplying the specific duties or rebates applied to wheat by a factor of 1.56.

225. Both Law 19.897, Article 1, and Decree 831/2003, Article 16,[138] state:

> "In the case of wheat flour the duties and rebates applied shall be those determined for wheat multiplied by a factor of 1.56".

226. The specific duties applied to wheat flour, being equal to the duties applied to wheat multiplied by a factor of 1.56, produce an even greater insulation of wheat flour from international price developments than in the case of wheat.

227. There are several reasons for this:

228. **Firstly**, wheat flour exporters have to pay specific duties which not only bear no relation to the transaction value but also bear no relation to the product in question, since they are calculated on the basis of those applied to another product, namely, wheat.

229. **Secondly**, the way in which Chile determined the factor 1.56 is not transparent, since in its legislation Chile has neither explained nor justified in any way the basis on which it was established.

230. In this connection, it is worth noting the relevant observations of the Appellate Body:

> "…significant for traders, also, are the lack of transparency of certain features of Chile's price band system… These specific characteristics of Chile's price band

[137] *Chile – Price Band System*, Report of the Appellate Body, paragraph 248.
[138] See Exhibits ARG-1 and ARG-2, respectively.

> system prevent enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4"[139]

231. **Thirdly,** on the basis of the history of the Chilean legislation, it might be speculated that the application of a factor to the specific duties established for wheat in order to determine the specific duties applicable to wheat flour could be based on a price relationship derived from a technical production ratio between wheat and wheat flour. Flour being a product of wheat, its price is naturally higher since to the cost of the wheat the millers add the cost of milling plus a profit margin. This relationship is valid at international level. In the case of Argentina, if the FOB prices of bread wheat and wheat flour[140] since the amended PBS came into force are taken into account, the average price ratio is 1.3.[141] That is, the price of wheat flour is approximately 30 per cent higher than that of wheat.

232. Moreover, this was the technical ratio established by Chile in Law 19.193 which, in 1997, extended the specific duties and tariff rebates of the price band for wheat to wheat flour. At that time, the Message of the Chilean Executive relating to the amendment of Article 12 of Law 18.525 stated: *"… It is proposed to establish specific duties and rebates on the importation of flour and calculate their amount by multiplying the duties and rebates determined for wheat by the coefficient 1.3* ***which is the technical production ratio*** *…"*[142] (Emphasis added)

233. However, successive amendments incorporated in the legislation led to increases in this figure. Thus, Chile decided to raise the coefficient first from 1.3 to 1.41 and finally to 1.56 without any justification, thereby distorting – to an ever greater extent – the entry price for Chilean wheat flour imports.

234. As noted by a Chilean legislator during the debate on the bill – later Law 19.446 – extending the system for setting the duties and rebates for wheat flour:

> "*Has any justification been given for increasing the factor from 1.41 to 1.56? Absolutely none … The Executive has submitted a measure without providing any data that might support … the raising of the factor from 1.41 to 1.56 …*"[143]

235. Thus, the factor of 1.56 used to multiply the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour is not transparent and is insulating the entry price for wheat flour from international price developments to an even greater extent than that for wheat, this being another specific feature of the amended PBS that is preventing enhanced access to the Chilean market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

3. The amended PBS is neither transparent nor predictable

236. The amount of a duty is not the only concern of Chile's trading partners. As the Appellate Body also concluded,[144] 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, all characteristics carried over essentially unchanged into the amended PBS, are significant concerns of the exporters.

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[139] Report of the Appellate Body, paragraph 258.

[140] Both are products whose markets are considered to be of concern to Chile in establishing the reference prices of the amended PBS.

[141] See Exhibit ARG-29.

[142] "*History of the Law. Compilation of official texts of the parliamentary debate. Law 19.193*". Library of the National Congress. Santiago, Chile, 1997.

[143] Senator Piñera, 24 January 1996. In *"History of the Law. Compilation of official texts of the parliamentary debate. Law 19.446*". Library of the National Congress. Santiago, Chile, 1997.

[144] *Chile – Price Band System*, Report of the Appellate Body, paragraph 258.

237. On this same point, the Appellate Body noted that the lack of transparency and predictability of the old PBS would also ***contribute*** to distorting the prices of imports by impeding the transmission of international prices to the domestic market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

238. Thus, the Appellate Body observed 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. …"[145] (Emphasis added)

239. The Appellate Body added:

> "… [T]he 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. "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*. 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."[146] (Footnotes omitted, emphasis added)

240. From these statements by the Appellate Body it follows that:

(a) The presence of a formula causing automatic and continuous variability of duties is a necessary condition for a particular measure to be a "variable import levy" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*; and, moreover,

(b) the lack of transparency and the lack of predictability in the level of duties that will result from the application of variable import levies are *additional* features that undermine the object and purpose of Article 4 of the *Agreement on Agriculture*, which is to achieve improved market access conditions for imports of agricultural products by permitting the application of ordinary customs duties only.

241. As already explained, the changes introduced into the PBS did not substantially convert the price band system into a measure different from that previously in force. In particular, variability is inherent in the amended PBS since it incorporates a plan or formula that causes and ensures the automatic and continuous modification of the levies and, moreover, lacks the required transparency and predictability, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*. Thus, the findings of the Appellate Body apply with equal force to the amended PBS.

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[145] *Chile – Price Band System*, Report of the Appellate Body, paragraph 233.
[146] *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.

242. Below, Argentina shows *how* the Appellate Body's finding apply to the current price band system.

3.1. The amended PBS contains a formula that causes import duties to vary automatically and continuously

> "*… I believe that with respect to the competitiveness of the … wheat sector…we are seeking a reasonable formula for setting a floor that enables us to make productive an activity …*"[147] (Emphasis added)

243. Firstly, Argentina will show that the PBS contains a *formula* that causes import duties to *vary* and then that this variation is *automatic* and *continuous*, as specified by the Appellate Body.[148]

(a) The amended PBS contains a formula that causes import duties to vary

244. The relevant part of Article 1 of Law 19.897 amending Article 12 of Law 18.525[149] reads as follows:

> "There shall be established, on the one hand, specific duties when the reference price is below the floor price of 128 dollars for wheat ..., and, on the other hand, rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff when the reference price is above the ceiling price of 148 dollars ... The duties and rebates referred to in this Article shall correspond to the difference between the floor and ceiling prices determined above and an FOB reference price multiplied by a factor of one (1) plus the general *ad valorem* duty in force for these products. The FOB reference price shall consist of the average of the daily international prices for wheat ..., recorded in the markets of most concern during a period of 15 calendar days ... reckoned from the date fixed by the regulations for each decree".

245. Moreover, Section § 4 of Decree 831/2003[150] states:

> **§ 4. Determination of specific duties and tariff rebates**
>
> **Article 13.- Establishment of duties and rebates**
>
> In each Supreme Decree issued under these regulations there shall be established, with respect to the products forming its subject matter, specific duties, when the reference price is below the floor price, and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, when the reference price is above the ceiling price.

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[147] Senator Juan Antonio Coloma Correa, 6 August 2003. "History of the Law. Compilation of official texts of the parliamentary debate. Law 19.897". Library of the National Congress. Santiago, Chile, 2003.

[148] *Chile – Price Band System*, Report of the Appellate Body, paragraph 233: *"…. 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 …"*

[149] See Exhibit ARG-1.

[150] See Exhibit ARG-2.

When the reference price is above the floor price but below the ceiling price, this shall be recorded in the corresponding decree, which shall not establish duties or rebates during the period in which it remains in force.

Article 14.- Calculation of specific duties

The specific duties applicable to imports of wheat, refined sugar and raw sugar shall correspond to the difference between the floor price and the reference price of each product multiplied by a factor of one (1) plus the general *ad valorem* tariff in force established in the Customs Tariff.

Specific duty
=
(Floor price in force
- reference price)
*
(1 + general *ad valorem* tariff in force, Customs Tariff)

Article 15.- Calculation of tariff rebates

The rebates on amounts payable as *ad valorem* Customs Tariff duties, applicable to imports of wheat, refined sugar and raw sugar, shall correspond to the difference between the reference price and the ceiling price of each product multiplied by a factor of one (1) plus the general *ad valorem* tariff in force established in the Customs Tariff.

Tariff rebate
=
(Reference price
- ceiling price in force)
*
(1 + general *ad valorem* tariff in force established in the
Customs Tariff)

Article 16.- Wheat flour

In the case of wheat flour, the duties and rebates applied shall be those determined for wheat multiplied by a factor of 1.56.

Specific duty or tariff rebate for wheat flour
=
Specific duty or tariff rebate for wheat
*
1.56

246. The cited paragraphs of Law 19.897 and Decree 831/2003[151] clearly reveal the existence of a *formula* on the basis of which the duties resulting from the PBS are established.

247. From the text of the two above-mentioned provisions it follows that, in mathematical terms, the formula for calculating duties is:

[151] See Exhibits ARG-1 and ARG-2, respectively.

Specific duty for wheat[152]	=	(	Band floor price	-	Reference price	)	*	(	1	+	General *ad valorem* tariff in force, Customs Tariff	)	
	=	(	US$128	-	Reference price	)	*	(	1	+	0.06	)	
Specific duty for wheat flour[153]	=	[(	Band floor price	-	Reference price	)	*	(	1	+	General *ad valorem* tariff in force, Customs Tariff	)] *	**1.56**
	=	[(	US$128	-	Reference price	)	*	(	1	+	0.06	)] *	**1.56**

248. Below, Argentina will show that this formula contained in the PBS causes *variability* of the import duties payable on imports of wheat and wheat flour to Chile.

249. For this purpose, Argentina will cite three sources of evidence.

250. **Firstly,** Exhibit ARG-21 presents a table showing what the amount of specific duties would have been if the current PBS had operated with the average prices recorded between 1986 and the present on the markets of concern for Chile. The election of 1986 led in July of that year to the statutory establishment of the Price Band System in Chile.[154] Accordingly, for each year between 1986 and December 2003 the table includes the monthly average Argentine port and Gulf of Mexico FOB prices recorded for bread wheat and Soft Red Winter No. 2 wheat, and the specific duty that would have resulted from applying the amended PBS with international prices as recorded during that period. To ensure the greatest possible similarity between this model and the amended PBS, for the periods extending from January to June of each year the monthly average FOB prices for bread wheat, Argentine Port have been taken, whereas for the periods extending from July to December each year the monthly average FOB prices for Soft Red Winter No. 2 wheat, Gulf of Mexico, have been used, in accordance with the provisions of Article 1 of Law 19.897 and Article 8 of Decree 831/2003. Moreover, from December 2003 the table includes the real reference prices and specific duties *actually* established and applied by Chile.[155]

251. To sum up, the table in Exhibit ARG-21 shows, on the basis of the actual and historical prices recorded by Chile, the frequency and extent of the fluctuations of the duties established under the PBS. It can be seen how when international prices fall the amended PBS is activated and specific duties, which display pronounced variability, are applied. In fact, if the amended PBS had existed throughout this period, the specific duties would have varied (and in some cases *did* vary) between a minimum of US$0.58 and a maximum of US$64.50 per tonne.[156]

252. **Secondly,** to bring out the variability of specific duties under the PBS, Argentina presents Exhibit ARG-22 which graphically illustrates the frequency and extent of the fluctuations in specific duties that would have occurred if the amended PBS had been applied from July 1986, that is to say, from the time that the Price Band System was first established in Chile. The chart in this Exhibit is based on the data contained in the table in Exhibit ARG-21. It should be noted that from December

[152] See Exhibit ARG-2, Dec. 831/2003, Article 14.
[153] See Exhibit ARG-2, Dec. 831/2003, Article 16.
[154] The PBS was established by Law 18.525, Official Journal of the Republic of Chile, 30 June 1986. See *Chile – Price Band System*, Report of the Panel, paragraph 2.2.
[155] All the information needed to design this model was obtained from ODEPA (Exhibit ARG-6 and www.odepa.gob.cl). The formula used corresponds to that of the amended PBS, in accordance with Decree 831/2003 (Exhibit ARG-2).
[156] See June 1999 and February 1991.

2003 onwards the reference prices and specific duties used are the actual values established and applied by Chile under the amended PBS.

253. **Thirdly,** Argentina considers it useful to describe the unpredictability, frequency and extent of the fluctuations in specific duties in **statistical** terms. The fluctuations observed in the model presented in the table in Exhibit ARG-21 can be accurately translated into numerical terms. For this purpose, Argentina proposes to use a very simple statistical tool known as the standard deviation. The standard deviation is "... the square root of the arithmetic mean of the squares of the deviations from the mean ..."[157] of a population. That is, the square root of the average of the squares of the deviations of specified data from the average of those data. In brief, the standard deviation makes it possible to compare the degree of dispersion of a set of data about the mean. It tells us by how much the data of a frequency distribution vary with respect to the average of those data. In symbolic form it can be expressed as follows:

$$s_N = \sqrt{\frac{1}{N}\sum_{i=1}^{}(x_i - \overline{x})^2}\ .$$

254. In this case, the average of the specific duties that would have resulted if Chile had applied the PBS from July 1986 onwards, in accordance with the table in Exhibit ARG-21, is US$18.74 per tonne. The standard deviation of this same set of specific duties – in accordance with the formula written out above – is US$13.53 per tonne. That is to say, the specific duties that Chile would have established under the amended PBS would, on average, have been US$18.74, with an average fluctuation of +/- US$13.53 per tonne. This variation signifies an average fluctuation of +/- 72.20 per cent.[158] Considering that the average fluctuations of the FOB price, Argentine port, of bread wheat and the FOB price, Gulf of Mexico, of Soft Red Winter No. 2 wheat from July 1986 to the present were +/- 25.55 per cent and +/- 19.83 per cent, respectively,[159] an average fluctuation of +/- 72.20 per cent is more than sizeable.

255. It is clear from both the table in Exhibit ARG-21 and the chart in Exhibit ARG-22 that the frequency and extent of the fluctuations in the specific duties that were established and would have been established under the amended PBS are very substantial. Consequently, Argentina cannot see how a system that imposes a duty variability of this kind can offer the predictability required by wheat and wheat flour producers in order to export their products to Chile. What is more, it is hard to understand how a system that displays so much variability in the assessment of its duties can offer the predictability that the Appellate Body considered a measure ought to offer to be consistent with footnote 1 to Article 4.2 of the *Agreement on Agriculture*.[160]

(b) The amended PBS contains a formula that causes the import duties to vary <u>automatically</u>

256. Below, Argentina will demonstrate the ***automaticity*** of the specific duties resulting from the PBS. According to the Spanish Academy, the definition of "automatic", insofar as relevant, is as follows: *"Said of a mechanism: which functions wholly or partially by itself ... which is activated directly, and usually unfailingly, in specific circumstances"*.[161]

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[157] Blalock, H (1978) "*Estadística Social*", Fondo de Cultura Económica, Mexico City, page 93.
[158] That is, (US$13.14 / US$18.74) * 100.
[159] Exhibit ARG-27.
[160] *Chile – Price Band System*, Report of the Appellate Body, paragraphs 234, 258 and 261.
[161] Dictionary of the Spanish Language of the Spanish Academy, Twenty-second edition, at http://www.rae.es/.

257. The PBS is a mechanism which functions by itself and is activated directly and, always, unfailingly in specific circumstances. To show that it functions by itself, it is sufficient to recall that, when operating in accordance with the formulas reproduced above, the PBS is a mechanism which spontaneously assesses specific duties and rebates. In Law 19.897 and in Article 13 of Decree 831/2003 the "specific circumstances" in which it is activated are explained, namely, when the reference price is below the band floor.

258. As for its functioning directly and unfailingly, in Exhibits ARG-23 and ARG-24 Argentina presents a table and a chart, respectively, which show how the amended PBS functioned when specific duties were applied, that is to say, between 16 December 2004 and 15 April 2005.

259. The table in Exhibit ARG-23 gives all the variables needed to illustrate the operation of the PBS: the ceiling and the floor of the band at US$148 and US$128 per tonne (in accordance with Article 6 of Decree 831/2003 for the period from 16 December 2003 to 15 December 2007[162]), reference prices, FOB price, CIF price, *ad valorem* duties (6 per cent), specific duties, entry price without PBS (that is to say, the entry price that would exist if the PBS had not been applied during this period), and the price resulting from the PBS. The FOB and CIF prices are the actual FOB and CIF prices for bread wheat, Argentine port, on each of the specified dates.[163] The amount of *ad valorem* duties and the specific duty resulting from the PBS, where appropriate, are calculated for each CIF price and reference price.[164] The formulas used for calculating the values of the above-mentioned variables are the same as those used previously and, moreover, are indicated in the table.

260. To make the operation of the PBS clearer, we have included the chart in Exhibit ARG-24 which reproduces graphs for the prices of bread wheat FOB Argentine port, the reference prices, the entry price for imports to Chile resulting from the PBS and the price which would have obtained if the PBS had not been applied.

261. As the table and chart in question show, every time the reference price falls below the band floor, specific duties which, added to the *ad valorem* duties, produce an increase in the amount of total duty and hence the PBS entry price for imports to Chile are automatically, directly and unfailingly generated.

262. In case the demonstration of the operation of the PBS in Exhibits ARG-23 and ARG-24 should not be considered sufficient to show that the PBS is an automatic, direct and unfailing mechanism, in Exhibit ARG-6 Argentina presents a record of the operation of the amended PBS from the time it came into force, i.e., from 16 December 2003. This record was provided by the Office of Agricultural Studies and Policies of the Ministry of Agriculture of the Government of Chile itself.[165] Clearly, whenever the reference price of wheat fell below the band floor, specific duties were automatically generated.[166]

263. In fact, it could not have been otherwise since both Law 19.897 and Decree 831/2003 make it *mandatory* for specific duties to be established when the reference price is below the band floor. Thus, the relevant part of Law 19.897 states that "specific duties *must be established* when the reference price is below the floor price of 128 dollars for wheat. In the case of wheat flour, the duties and

[162] See Exhibit ARG-2.

[163] Based on historical prices recorded by SAGPyA, adjusted on the basis of the criterion indicated in footnote 104.

[164] Specific duties are applied if the reference price falls below the band floor price of US$128.

[165] See http://www.odepa.gob.cl/

[166] See the periods 16/Dec/04 – 15/Feb/05 and 16/Feb/05 – 15/Apr/05, when specific duties of 0.0143 US$/kg. and 0.0205 US$/kg. were applied to wheat, and 0.0223 US$/kg. and 0.0320 US$/kg. to wheat flour with reference prices of US$114.50/tonne and US$108.64/tonne, respectively.

rebates determined for wheat multiplied by a factor of 1.56 *shall be applied*" (emphasis added). In its turn, Article 13 of Decree 831/2003 reads: "In each Supreme Decree issued in accordance with this regulation specific duties *shall be established* ... if the reference price is below the floor price ..." (emphasis added).[167]

264. Clearly, expressions of the type "*must be established*" and "*shall be applied*" mean that when the reference price is below the floor price the application of specific duties will be mandatory and automatic. Therefore, the PBS is applied automatically, directly and unfailingly.

(c) The amended PBS contains a formula that causes import duties to vary <u>continuously</u>

265. The Appellate Body held that the second element of the condition necessary for a particular measure to be a "variable import levy" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture* was that the variability of the duties be "continuous".[168]

266. Despite the fact that the variation of the specific duties is no longer weekly but bimonthly, that variation is continuous.

267. In fact, in the right circumstances, that is to say, if the reference price is situated below the band floor – as happened between December 2004 and April 2005 – every two months an exporter of wheat or wheat flour to the Chilean market will face a specific duty different from that established during the previous two-month period.

268. This is clear from the table and the chart in Exhibits ARG-23 and ARG-24, which illustrate the operation of the amended PBS between 16 December 2004 and 15 April 2005.

269. Moreover, if we consider what can happen over a longer period of time, what an exporter experiences is the continuous variability of the duties. This is apparent from the table and the chart in Exhibits ARG-21 and ARG-22, which illustrate the variability of the specific duties that would have resulted if the present amended PBS had operated with the average prices recorded between 1986 and the present on the markets of concern to Chile.

270. In short, Argentina has shown that the amended PBS includes a formula that makes the variability of the duties automatic and continuous. Thus, the amended PBS satisfies the necessary condition established by the Appellate Body for a measure to be considered similar to a "variable import levy".

3.2. The lack of transparency and the lack of predictability of the duty level that result from the amended PBS are additional features that undermine the object and purpose of Article 4 of the *Agreement on Agriculture*

271. The Appellate Body held that the lack of transparency and the lack of predictability of the level of duties that result from the application of variable import levies are additional features that undermine the object and purpose of Article 4 of the *Agreement on Agriculture*, namely, to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties.[169]

272. As an example of a feature of the old PBS that illustrated its lack of transparency and predictability, the Appellate Body noted:

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[167] See also Articles 3 and 4 "shall be applied", Article 5 "the determination...shall be made", etc.
[168] *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.
[169] *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.

> "... 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".[170]

273. Argentina will show that due to the operation of the amended PBS, it is perfectly possible for an exporter to ship to Chile without being able reasonably to predict what the amount of duties payable will be.

274. Annex 2 to Decree 831/2003 establishes the periods on the basis of which duties are to be calculated and makes reference to the period for calculating the reference prices, the period of publication of the decree, the period of validity of the specific duties and the corresponding markets of most concern. The table in Annex 2 to Decree 831/2003 is reproduced below:

Periods for calculating reference prices	Period of publication of decree	Periods of validity of specific duties or rebates	Market of most concern
26 Nov–10 Dec	11-15 December	16 Dec–15 Feb	*Trigo Pan Argentino*
27 Jan–10 Feb	11-15 February	16 Feb–15 Apr	*Trigo Pan Argentino*
27 Mar–10 Apr	11-15 April	16 Apr–15 Jun	*Trigo Pan Argentino*
27 May–10 Jun	11-15 June	16 Jun–15 Aug	*Soft Red Winter No. 2*
27 Jul–10 Aug	11-15 August	16 Aug–15 Oct	*Soft Red Winter No. 2*
26 Sep–10 Oct	11-15 October	16 Oct–15 Dec	*Soft Red Winter No. 2*

(Emphasis added)

275. **First of all**, if an exporter of wheat or of wheat flour is asked by a customer to give a quotation for a delivery to be made in more than two months time, it will be impossible for that exporter to know the amount of the specific duties that *might* be applied. This constitutes a major problem in the case of wheat since on that market the *majority* of sales are made under forward contracts. In these circumstances, the uncertainty generated by the amended PBS is transferred to the exporter who has no predictable basis on which to make a quotation and hence a sale.

276. **Secondly,** even if a sale is made for delivery in less than two months, the exporter may still be unable to predict the amount of specific duties.

277. For example, for a particular specific duty that is to apply from 16 April to 15 June (highlighted), the reference prices will be calculated on the basis of the average of the daily international prices for "*Trigo Pan Argentino*" recorded between 27 March and 10 April. The Government of Chile will then have to publish the decree establishing the specific duties (or rebates, where appropriate) between 11 and 15 April.

278. Suppose an Argentinean exporter exports wheat or wheat flour to Chile on 5 April. All that the exporter will be able to predict at the time of exportation will be the band floor price, then set at US$128. However, he will not be able to predict the amount of duty payable in Chile. This is because at the time of exportation the period for calculating the reference prices, *one* of the two variables necessary for calculating the amount of specific duties, would not have ended. If the shipment of wheat or wheat flour takes **11 days or more** to arrive at the Chilean port, specific duties calculated on the basis of a period partially subsequent to the time of embarkation will be applied. In particular, the days 6, 7, 8, 9 and 10 April *will be relevant* for the calculation of the reference price and hence for the calculation of the amount of specific duties. However, having left Argentina on 5 April, during those five days the shipment of wheat or wheat flour will be en route for Chile. That is to say, if the shipment arrives in Chile on **16 April or later**, specific duties calculated on the basis of a reference price based on the average of the daily international prices for "bread wheat, Argentine port" recorded between 27 March and 10 April will be applied. However, the exporter was aware only of the prices recorded between 27 March and 5 April. Thus, the exporter will have lacked part of

[170] *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.

the period for calculating the reference price on the basis of which he would have been able to predict the amount of specific duties payable for precisely the period extending from 6 to 10 April. It should be noted that the normal time required to transport maritime cargo from Argentina to Chile is approximately 15 days.

279. Now let us take the hypothetical case of an exporter who exports wheat or wheat flour from the Gulf of Mexico area, the shipment arriving in Chile on 16 April. This exporter will find himself in an *even worse* situation than the Argentinean exporter mentioned above. A shipment from this area will inevitably take longer to reach the Chilean port than a shipment coming from Argentina. The exporter in the Gulf of Mexico area will probably have to make his shipment some time before 5 April in order for it to arrive at the same time as that of the Argentine exporter, i.e. 16 April. In these circumstances, the Gulf of Mexico exporter will, at the very least, be unaware of a greater proportion of the period for calculating the reference price on the basis of which he could have predicted the amount of specific duties. It might also happen that the Gulf of Mexico exporter exported his goods, for example, on 26 March, that is to say, *completely prior* to the period for calculating the reference prices (which, it should be recalled, extends from 27 March to 10 April). In this case, the exporter will have absolutely *no* indication of, and no way of predicting, the amount of specific duties that could be applied. Therefore, he will find himself in a situation even more disadvantageous than that of the Argentinean exporter.[171]

280. Thus, it has been shown that – under the amended PBS – it is perfectly possible for an exporter of wheat or wheat flour not to know, and to be unable to predict, how much duty will be payable when the shipment arrives at the customs office in Chile. Consequently, bearing in mind the observations made by the Appellate Body in paragraph 234 of its report, it is less likely that an exporter will ship wheat or wheat flour to the Chilean market under these conditions.

281. Following the reasoning of the Appellate Body, this lack of transparency and predictability will also *contribute* to distorting the prices of imports by impeding the transmission of international prices to the Chilean market. Thus, in lacking transparency and predictability the PBS possesses the additional features which, according to the Appellate Body,[172] undermine the object and purpose of Article 4 of the *Agreement on Agriculture*.

282. In the light of the above, it can be stated, firstly, that the PBS fulfils the conditions *necessary* for it be a measure in violation of Article 4.2 of the *Agreement on Agriculture* within the terms of footnote 1, since it contains a formula that makes the variability of duties automatic and continuous. Secondly, the amended PBS possesses additional features which undermine the object and purpose of Article 4 of the *Agreement on Agriculture*, since it lacks the transparency and predictability necessary for it to be possible to predict the level of duties that will result from its being applied.

283. As the Appellate Body observed, significant for traders are the lack of transparency; the unpredictability of the level of duties; and the automaticity, the frequency, and the extent to which the duties fluctuate since these characteristics prevent enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4 of the *Agreement on Agriculture*. Argentina has shown that the amended PBS possesses *every one* of the features mentioned.

284. Consequently, the amended PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture* and is not an ordinary customs duty.

[171] Without taking into account, moreover, the injury suffered by the Gulf of Mexico exporter in terms of **treatment less favourable** than that received by the Argentine exporter.

[172] *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.

4. Conclusions concerning the inconsistency of the amended PBS with Article 4.2 of the *Agreement on Agriculture*

285. As has been shown, the amended PBS 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*.

286. This is because the way in which the system is designed and the way it operates in its overall nature are sufficiently similar to the characteristics of these two categories of prohibited measures as to make the amended PBS, with its particular characteristics, a "similar border measure".

287. The particular configuration and interaction of the specific characteristics of Chile's price band system generate certain market access conditions that lack transparency and predictability and disconnect the Chilean market from international price trends in a way that insulates the Chilean market from the transmission of international prices and prevents enhanced market access for imports of wheat and wheat flour.

288. Consequently, since it falls within the categories of measures prohibited by footnote 1, the amended PBS is not an ordinary customs duty and hence is a measure inconsistent with Article 4.2 of the *Agreement on Agriculture* which may not be maintained, resorted to, or reverted to.

II. THE AMENDED PBS IS IN BREACH OF THE SECOND SENTENCE OF ARTICLE II:1(B) OF THE GATT 1994

289. Argentina maintains that the amended PBS infringes the second sentence of Article II:1(b) of the GATT 1994, inasmuch as it constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedule of concessions (No. VII).

290. Article II of the GATT 1994 states, in the second sentence of paragraph 1(b), that the products described in Part II of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall be *"… exempt from all other duties or charges of any kind imposed on or in connection with the importation …"*.

291. In its turn, paragraph 1 of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 reads as follows:

> "In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply …"

292. During the proceedings, Chile itself contended that "… 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'."[173] Argentina shares this view.

293. Insofar as the amended PBS is a border measure similar to a variable import levy and a minimum import price, it is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it is a measure other than an ordinary customs duty.

[173] *Chile – Price Band System*, Report of the Appellate Body, paragraph 51.

294. Not being an ordinary customs duty, the amended PBS constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedule of concessions (No. VII).

295. Therefore, if the amended PBS was not recorded but is nonetheless being levied,[174] it is in breach of the *second* sentence of Article II:1(b) of the GATT 1994, pursuant to the *Understanding on the Interpretation of Article II:1(b) of the GATT 1994*.[175]

III. THE AMENDED PBS IS IN BREACH OF ARTICLE XVI:4 OF THE MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

296. Paragraph 4 of Article XVI of the Agreement Establishing the World Trade Organization reads as follows:

> *Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.*

297. These annexed Agreements include both the Agreement on Agriculture and the GATT 1994.

298. As stated by the Appellate Body,

> "… Moreover, as general context for all the covered agreements, Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* is of great significance … This provision establishes a clear obligation for all WTO Members to ensure the conformity of their existing laws, regulations, and administrative procedures with the obligations in the covered agreements."[176]

299. As we have argued in the course of this document, insofar as the amended PBS infringes both Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994, Chile has not ensured the conformity of its existing laws, regulations and administrative procedures with its obligations under the covered Agreements.

300. Moreover, according to WTO case-law:

> "As a general proposition, GATT *acquis*, confirmed in Article XVI:4 of the WTO Agreement and recent WTO panel reports, make abundantly clear that legislation as such, independently from its application in specific cases, may breach GATT/WTO obligations …"[177] *(emphasis added).*

301. Later, on the same subject, the Panel goes on to point out:

> "… The three types of measures explicitly made subject to the obligations imposed in the WTO agreements – 'laws, regulations and administrative procedures' – are measures that are applicable generally; not measures taken necessarily in a specific case or dispute. Article XVI:4, though not expanding the material obligations under

[174] *Chile – Price Band System*, Report of the Panel, paragraph 7.107.

[175] It should be noted that a panel established under Article 21.5 of the DSU can examine the consistency of a measure intended to implement the recommendations and rulings of the DSB not only with the provisions of the WTO Agreements invoked by the complainant in the original proceedings but also with other provisions that the complainant alleges for the first time in his Article 21.5 recourse. See *Canada – Aircraft (Article 21.5 – Brazil)*, Report of the Appellate Body, paragraph 41.

[176] *EC – Sardines*, Report of the Appellate Body, paragraph 213.

[177] *US – Sections 301-310*, Report of the Panel, paragraph 7.41.

> WTO agreements, expands the type of measures made subject to these obligations."[178]

302. Likewise, the Panel noted that:

> "Article XVI:4 goes a step further than Article 27 of the Vienna Convention. Article 27 of the Vienna Convention provides that '"[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Article XVI:4, in contrast, not only precludes pleading conflicting internal law as a justification for WTO inconsistencies, but requires WTO Members actually to ensure the conformity of internal law with its WTO obligations".[179]

303. WTO case-law has also established that:

> "… if a provision of an 'annexed Agreement' is breached, a violation of Article XVI:4 immediately occurs. GATT 1994 is one of the 'annexed Agreements' within the meaning of Article XVI:4. Since we found that provisions of Article VI of the GATT 1994 has been breached, we conclude that, by violating this provision, the United States violates Article XVI:4 of the WTO Agreement".[180]

304. Thus, being inconsistent with Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994, the amended PBS is in breach of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* since, while it remains in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements.

D. CONCLUSIONS

305. In light of the above, Argentina requests the Panel to find that Chile's Price Band System, as amended by Law No. 19.897 and Supreme Decree No. 831/2003, *per se* and in its specific application to imports of wheat and wheat flour:

- Is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it constitutes a border measure similar to a variable import levy and a minimum import price;
- is inconsistent with the second sentence of Article II:1(b) of the GATT 1994, since it constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedule of concessions (No. VII);
- is in breach of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* since, while it remains in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements.

[178] Ibid., paragraph 7.41(b), *in fine*.
[179] Ibid., footnote 652.
[180] *US – 1916 Anti-Dumping Act*, Report of the Panel, paragraph 6.287.

306. Consequently, Argentina respectfully requests the Panel to find that Chile has not implemented the recommendations and rulings of the DSB and is continuing to infringe its obligations within the framework of the WTO.

ANNEX A-2*

FIRST WRITTEN SUBMISSION BY CHILE
(3 MAY 2006)

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* Annex A-2 contains the First Written Submission by Chile. This text was originally submitted in Spanish by Chile.

TABLE OF REPORTS CITED

Short Title	Full Case Title and Citation
Argentina – Textiles and Apparel	Report of the Appellate Body, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 2002.
Chile – Price Band System	Report of the Panel, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002.
Chile – Price Band System	Report of the Appellate Body, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002.
EC – Bed Linen (Article 21.5 – India)	Report of the Panel, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003.
EC – Bed Linen (Article 21.5 – India)	Report of the Appellate Body, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003.
Canada – Aircraft (Article 21.5 – Brazil)	Report of the Appellate Body, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 21 July 2000.
US – Softwood Lumber IV (Article 21.5 – Canada)	Report of the Appellate Body, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005.
Brazil – Desiccated Coconut	Report of the Appellate Body, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997.
EC – Hormones	Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/AB/R, adopted 13 February 1998.
US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)	Final Report of the Panel, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/RW, adopted 27 September 2005.
US – Shrimp (Article 21.5 – Malaysia)	Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001.

INTRODUCTION

1. Chile wishes to thank the members of the Panel for the opportunity to state its case in this dispute, prompted by Argentina's objection to the measures adopted by Chile to comply with the recommendations and rulings of the Dispute Settlement Body (hereinafter the "DSB").

2. The measures adopted in a timely and opportune manner by Chile were aimed at making the necessary legal adjustments and Chile has therefore eliminated any inconsistency with Article 4.2 of the *Agreement on Agriculture* and has fully implemented the DSB recommendations and rulings, as will be shown in this submission.

3. To make the argument easier to follow, this submission is divided into five parts. The first sets out the salient points of the case, including Argentina's claim and the Appellate Body's ruling.

4. The second part describes the measures implemented by Chile in order to comply with the DSB's recommendations and rulings, namely Law No. 19.897 of 2003 and Chilean Ministry of Finance Regulation No. 831 of 2003.

5. In the third part, Chile asserts and demonstrates that Argentina may not bring certain issues before this Panel since the proper time to raise them was during the original proceedings and Argentina failed to do so. Those issues are therefore outside the terms of reference of this Article 21.5 Panel. The fourth part sets out the conclusions and recommendations of the DSB and demonstrates how the changes under Law No. 19.897 fully comply with WTO requirements. As further evidence, the final part of the submission demonstrates that, as a practical consequence of changes to the system, there is no variable import levy or minimum import price, and there is no measure similar to a variable import levy or to a minimum import price. The last two parts take up Argentina's arguments and show how they fail, pointing out that they are, in many respects, inaccurate and out of line with the conclusions and recommendations of the DSB.

I. BACKGROUND

1. Factual background

6. On 23 October 2002, the Dispute Settlement Body (DSB) adopted the Appellate Body Report[1] in the dispute "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*".

7. On 11 November 2002, Chile reported to the DSB that it required a reasonable period of time to implement its recommendations and rulings. In the absence of an agreement between the parties, on 6 December 2002, Chile asked the DSB[2] to allow the determination of this period to be the subject of binding arbitration, in accordance with Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter the "DSU").

8. On 17 March 2003, the award of the arbitrator[3] determined that the reasonable period of time for Chile to implement the recommendations and rulings of the DSB expired on 23 December 2003. As of September 2003, Chile has submitted monthly reports on progress in the implementation of the DSB recommendations and rulings (September 2003[4], October 2003[5] and November 2003[6]).

[1] WT/DS207/AB/R.
[2] WT/DS207/9.
[3] WT/DS207/13.
[4] WT/DS207/15.

9. On 24 December 2003, Argentina and Chile reported to the DSB that an Understanding regarding procedures under Articles 21 and 22 of the DSU with respect to this dispute had been concluded.[7]

10. On 19 May 2004, Argentina requested consultations with Chile pursuant to paragraph 1 of the Understanding between the Argentine Republic and the Republic of Chile regarding procedures under Articles 21 and 22 of the DSU and Article XXIII:1 of the GATT 1994.[8]

11. On 29 December 2005, Argentina requested[9] that, if possible, this matter be submitted to the original Panel with the standard terms of reference provided for in Article 7 of the DSU, in accordance with the Understanding concluded between the two countries regarding procedures under Articles 21 and 22 of the DSU and Article 21.5 of the DSU, since there was disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB].

12. Argentina requests that the Panel find that Chile has not taken measures to comply fully with the DSB's rulings and recommendations of 23 October 2002. In particular, Argentina requests that the Panel find that Chile's Price Band System (PBS) is inconsistent with Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994 and, hence, Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*.

2. Argentina's claims and allegations

13. On 19 April 2006, Argentina made its First Written Submission in the Recourse by Argentina to Article 21.5 of the DSU in "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*". In this submission, Argentina asserts that Chile has failed to implement the recommendations and rulings of the DSB and continues in breach of its obligations as a Member of the WTO.[10]

14. Argentina adds that the amendment to the law notified by Chile:[11]

- Is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it is a border measure similar to a variable import levy and a minimum import price;

- is inconsistent with the second sentence of Article II:1(b) of the GATT 1994, since it constitutes "other duties or charges" not recorded in the corresponding column of Chile's Schedule of Concessions (No. VII); and,

- is in breach of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* since, while it remains in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements.

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[5] WT/DS207/15/Add.1.
[6] WT/DS207/15/Add.2.
[7] WT/DS207/16.
[8] WT/DS207/17.
[9] WT/DS207/18.
[10] Written Submission by the Republic of Argentina, paragraph 13.
[11] Written Submission by the Republic of Argentina, paragraph 14.

II. DESCRIPTION OF THE MEASURES ADOPTED BY CHILE

1. Law No. 19.897 of 2003

15. On 25 September 2003, Chile published in the Official Journal Law No. 19.897[12] "amending Article 12 of Law No. 18.525 and the Customs Tariff". The new Law, which entered into force on 16 December 2003, brought Chile's price band legislation into line with the DSB's recommendations and rulings. The Law was supplemented by Supreme Decree No. 831 of the Chilean Ministry of Finance[13] approving the implementing regulations for Article 12 of Law No. 18.525, as replaced by Article 1 of Law No. 19.897 (hereinafter "the Regulations" or "Regulations of the Law").

16. As Chile has stated, all these implementation measures reflect the DSB's recommendations or rulings both in form and in substance[14] and thus constitute a measure which is WTO-consistent, and in particular consistent with Article 4.2 of the *Agreement on Agriculture*.

17. The relevant part of Article 1 of Law No. 19.897, which replaced Article 12 of Law No. 18.525 on the importation of goods into the country, reads:

> "Article 12.- Established hereunder are specific duties in United States dollars per tariff unit and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of wheat, wheat flour and sugar, as stipulated in this Law.
>
> The amount of these duties and rebates shall be established as provided for in this Article by the President of the Republic, by way of a supreme decree issued by the Chilean Ministry of Finance by order of the President of the Republic, six times for wheat in the course of each twelve-month period extending from 16 December to 15 December of the following year, [...] in terms which, when applied to the price levels attained by the products in question on the international markets, allow domestic market stability.
>
> For the purpose of determining the duties and rebates up until the annual period ending in 2007, the floor and ceiling prices for wheat [...], shall be considered in the drafting of Chilean Ministry of Finance exempt decrees No. 266 [...], published in the Official Journal of 16 May 2002, expressed in f.o.b. terms in United States dollars per tonne. There shall be established, on the one hand, specific duties when the reference price is below the floor price of US$128 for wheat [...], and, on the other hand, rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff when the reference price is above the ceiling price of US$148 for wheat [...].
>
> For the purpose of determining the duties and rebates as from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established in the previous paragraph shall be adjusted annually by multiplying the values in force during the previous annual period by a factor of 0.985 in the case of wheat. [...]. In 2014, the President of the Republic shall evaluate the modalities and conditions of application of the price band system, taking into consideration international market conditions, the requirements of the industrial, productive and consumer sectors and Chile's trade obligations at that date.

[12] Exhibit CHL-1.
[13] Exhibit CHL-2.
[14] WT/DS207/15/Add.2.

> The duties and rebates referred to in this Article shall correspond to the difference between the floor or ceiling prices determined above and a f.o.b. reference price, multiplied by a factor of one (1), plus the general *ad valorem* duty in force for these products. The f.o.b. reference price shall consist of the average of the daily international prices [...] recorded in the most relevant markets over a period of 15 calendar days [...] reckoned from the date fixed by the Regulations for each decree.
>
> [...]
>
> The duties and rebates for wheat flour are based on those determined for wheat, multiplied by a factor of 1.56.
>
> The duties and rebates applicable to each import transaction shall be those in effect on the date of the waybill of the vehicle transporting the goods in question.
>
> The duties resulting from the application of this Article, added to the *ad valorem* duty, shall not exceed the tariff rate bound by Chile under the World Trade Organization for the goods referred to in paragraph 1, 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. The rebates established as a result of the application of this Article shall in no circumstances exceed the amount corresponding to the *ad valorem* duty payable on the importation of the goods. The National Customs Service shall adopt the measures necessary to enforce the provisions of this paragraph.
>
> The President of the Republic, by way of a supreme decree issued by the Chilean Ministry of Finance and endorsed by the Ministry of Agriculture, shall establish, pursuant to this Article, the periods in which specific duties and tariff rebates are to be established and applied. Furthermore, the President shall establish the most relevant markets for each product, the procedures and dates for calculating the reference prices and other methodological factors necessary for the implementation of this Article."

2. Operation of Law No. 19.897

18. The new Law applies to imports of wheat and wheat flour[15] and provides for the possibility of (a) establishing the application of specific duties in United States dollars per tariff unit, or (b) establishing rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff. Furthermore, Chilean legislation provides for payment of the *ad valorem* duty alone, which currently corresponds to six per cent of the value of the goods.[16]

19. The Chilean Executive, represented by the President of the Republic, is responsible for establishing either such arrangement by means of a supreme decree issued and endorsed by the Chilean Ministry of Finance by order of the President of the Republic. The Law requires the administrative authority to determine the duties or rebates six times in the course of each twelve-month period extending from 16 December to 15 December of the following year.

[15] Law No. 19.897 also applies to imports of sugar, but the latter is not material to this dispute.

[16] Payment of the *ad valorem* duty of six per cent is not provided for under price band legislation, rather it is of general application, as established by Article 1 of Law No. 18.687.

3. Application of specific duties and rebates on amounts payable as ad valorem duties

20. Pursuant to Article 1 of Law No. 19.897, the authority granted to the Chilean Executive permits it to establish, by means of a Chilean Ministry of Finance decree, the application of specific duties or rebates on the amount payable as *ad valorem* duties.

(a) Determination of specific duties

21. The Chilean Ministry of Finance decree establishes a specific duty consisting of an amount in United States dollars per tariff unit (tonne) payable when the reference price established is less than US$128 per tonne (or the price in effect in the annual periods beginning with the one ending in 2008 and up until 2014).

22. The amount of specific duty established in each Chilean Ministry of Finance decree corresponds to the difference between the f.o.b. price of US$128 (or the price in effect in the annual periods beginning with the one ending in 2008 and up until 2014) and the reference price, also expressed on a f.o.b. basis, multiplied by a factor of one (1), plus the general *ad valorem* duty (6%).

23. The specific duty plus the *ad valorem* duty must not exceed the tariff rate bound by Chile under the World Trade Organization (31.5%), 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.

(b) Determination of rebates on amounts payable as *ad valorem* duties

24. The Chilean Ministry of Finance decree establishes a rebate on the amount payable as *ad valorem* duties established in the Customs Tariff when the reference price is over US$148 per tonne (or the price in effect in the annual periods beginning with the one ending in 2008 and up until 2014).

25. The rebates on amounts payable as *ad valorem* duties established in each Chilean Ministry of Finance decree correspond to the difference between the f.o.b. price of US$148 (or the price in effect in the annual periods beginning with the one ending in 2008 and up until 2014) and the reference price, also expressed on a f.o.b. basis, multiplied by a factor of one (1), plus the general *ad valorem* duty (6%).

26. The rebate on the amount payable as *ad valorem* duties established for each import transaction may not exceed the amount corresponding to the *ad valorem* duty established in the existing Customs Tariff, calculated on the c.i.f. unit value of the goods.

(c) Wheat flour

27. In the case of wheat flour, Law No. 19.897 states that the applicable specific duty or rebate on the amount payable as *ad valorem* duties established in each Chilean Ministry of Finance decree shall be those determined for wheat, multiplied by a factor of 1.56.

(d) Determination of the reference values established under the Law

28. The prices US$128 and US$148 were the parameters defined by Chile for wheat when it was required to amend its price band system in accordance with the recommendations and rulings of the DSB. These prices will remain unchanged until the annual period ending in 2007. As of the annual period ending in 2008 and up until 2014, these amounts will be reduced on an annual basis by multiplying the prices in force during the previous annual period by a factor of 0.985.

29. The floor and ceiling prices have therefore been established until 2014 as follows:

Table No. 1[17]

Floor and ceiling prices for wheat, by period of validity		
Period of validity	Floor price	Ceiling price
16.12.2003 to 15.12.2007	128	148
16.12.2007 to 15.12.2008	126	146
16.12.2008 to 15.12.2009	124	144
16.12.2009 to 15.12.2010	122	142
16.12.2010 to 15.12.2011	120	140
16.12.2011 to 15.12.2012	118	138
16.12.2012 to 15.12.2013	116	136
16.12.2013 to 15.12.2014	114	134

(e) Reference price

30. The reference price for determining both specific duties and rebates on the amount payable as *ad valorem* duties is expressed as a f.o.b. value and consists of the average of the daily international wheat prices recorded in the markets most relevant to Chile[18] over a period of 15 calendar days counted backwards from the date set out in Regulation No. 831 for each decree establishing specific duties.

4. Regulations of Law No. 19.897

31. The final paragraph of Article 1 of Law No. 19.897 provides that the President of the Republic, by way of a supreme decree issued by the Chilean Ministry of Finance and endorsed by the Ministry of Agriculture, shall establish, pursuant to that Article, *inter alia*, the periods in which specific duties and tariff rebates are to be established and applied.

32. Supreme Decree No. 831 of the Chilean Ministry of Finance[19], dated 26 September 2003 and published in the Official Journal on 4 October 2003, was issued under this provision and contains a series of stipulations which reiterate and supplement those of the Law, thereby lending greater transparency to the determination of the specific duties or tariff rebates established in each Chilean Ministry of Finance decree.

(a) Period of validity of each Chilean Ministry of Finance decree

33. The Regulations reiterate that all values applied by Law No. 19.897, and provided for in the Regulations thereto, are to be expressed on a f.o.b. basis in United States dollars. The Regulations also sets out the period of validity of each Chilean Ministry of Finance decree establishing specific duties or rebates on the amount payable as *ad valorem* duties, as follows:[20]

- 16 December to 15 February;
- 16 February to 15 April;
- 16 April to 15 June;
- 16 June to 15 August;
- 16 August to 15 October; and

[17] Article 6 of the Regulations of the Law.
[18] The Regulations of the Law also establish the markets most relevant to Chile.
[19] Exhibit CHL-2.
[20] Article 5 of the Regulations of the Law.

– 16 October to 15 December.

(b) Reference price

34. Further to Law No. 19.897, the Regulations[21] state that the reference price for wheat will correspond to the average daily prices recorded in the most relevant markets over a period of 15 calendar days counted backwards from the tenth day of the month in which the decree is published.

(c) Most relevant market

35. Furthermore, the Regulations establish the most relevant markets for wheat in Chile and provide that, during the application period extending from 16 December to 15 June of the following year, the most relevant market will be that for *Trigo pan argentino*[22] and the prices will correspond to the daily prices quoted for that product *f.o.b. Argentine port*. Likewise, during the application period extending from 16 June to 15 December, the most relevant market will be that for *soft red winter wheat No. 2* and the prices will correspond to the daily prices quoted for that product *f.o.b. Gulf of Mexico.*

(d) Date of application of duties and rebates

36. The Regulations[23] also provide that the specific duty or rebate on the amount payable as *ad valorem* duties determined by the Chilean Ministry of Finance decree applicable to each import transaction will be that in effect on the date of the waybill[24] of the vehicle transporting the goods in question, that is to say, the date of importation of the goods.

(e) Limitations on the application of specific duties

37. Both Law No. 19.897[25] and its Regulations[26] establish limitations on the application of the specific duty which the Chilean Ministry of Finance may set, and provide that specific duties, plus *ad valorem* duties, must not exceed the tariff rate bound by Chile under the World Trade Organization (31.5%), 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.

38. Both provisions add that Chile's National Customs Service shall adopt the necessary measures to ensure compliance with this obligation.

(f) Summary of time-frames and relevant markets

39. An annex to the final part of the Regulations contains a summary of the periods of validity of the Chilean Ministry of Finance decrees, the periods in which they must be issued, the periods to be taken into consideration when calculating the reference price and the markets relevant to Chile for each such decree, as follows:

[21] Article 7 of the Regulations of the Law.
[22] Note of the Secretariat: literal translation of this quality would be "Argentine bread wheat".
[23] Article 17 of the Regulations of the Law.
[24] In accordance with this same regulation, in the case of electronic filing, the waybill date will be taken to be the date of actual acceptance of the vehicle and the goods will be considered to have been presented at the same time, all pursuant to Article 37 of the Chilean Customs Ordinance.
[25] Law No. 19.897, Article 1, paragraph 9.
[26] Article 18 of the Regulations of the Law.

Reference price calculation period	Decree publication period	Period of validity for specific duties or rebates	Most relevant market
26 November-10 December	11-15 December	16 December-15 February	*Trigo pan argentino*
27 January-10 February	11-15 February	16 February-15 April	*Trigo pan argentino Trigo pan*
27 March-10 April	11-15 April	16 April-15 June	*argentino*
27 May-10 June	11-15 June	16 June-15 August	*Soft red winter wheat No.2*
27 July-10 August	11-15 August	16 August-15 October	*Soft red winter wheat No.2 Soft*
26 September-10 October	11-15 October	16 October-5 December	*red winter wheat No.2*

5. Legality of taxation (*Reserva Legal del Tributo*)

40. Chilean legislation provides that taxes, including Customs duties, may be established only by a Congress-approved law, on the basis of what is known as the principle of legality of taxation (*reserva legal del tributo*). Because of this restriction on the Chilean Executive's authority to establish Customs duties, the Chilean parliament enacted legislation – Law No. 19.897 – to provide detailed specifications for and fully regulate the procedure culminating in the issuance of a Chilean Ministry of Finance decree establishing a specific duty or a rebate on the amount payable as *ad valorem* duties.

41. Article 63.14 of the Constitution of the Republic of Chile[27] says:

> Article 63. Only the following shall be matters of law:
>
> (14) Other matters for which the Constitution indicates that the President of the Republic has the exclusive power of initiative.

43. Article 65, paragraph 4, of the Constitution[28] states the following:

> The President of the Republic shall also have the exclusive initiative for:
>
> 1. Imposing, eliminating, reducing or remitting taxes of any type or nature, establishing exemptions or amending those in effect and determining their form, proportionality or progression.

44. But application of the tax legality principle is not unqualified. Not all elements of taxation have to be governed by statute, only those which are essential; for the remaining elements the Chilean Executive has regulatory authority, albeit not unqualified authority. Although the law does not cover the aspects of regulation that relate to procedural or formal matters specific to law enforcement, such as place or date of payment, the tax must be determined or determinable on the basis of its legal origin, that is to say, the statute must either establish the tax obligation or set out criteria on which to establish it.

45. Hence, although the former system for calculating price band duties and rebates was replaced under the new Law by the issuance of Chilean Ministry of Finance decrees, the parameters for establishing the duties remained, albeit duly amended. Although the specific duties and rebates on the amount payable as *ad valorem* duties are presently established by a decree of the Chilean Ministry of Finance and this authority could determine the level of domestic protection, even in accordance with the aforementioned parameters, this is inadmissible under Chile's present legal system, since the minimum constitutional parameters for determining the level of protection agreed by the economic operators in the country must be maintained.

[27] Exhibit CHL-3.
[28] Exhibit CHL-4.

III. ARGENTINA'S CLAIMS IN RELATION TO THE SECOND SENTENCE OF ARTICLE II:1(B) OF THE GATT 1994 AND THE FACTOR OF 1.56 APPLICABLE TO WHEAT FLOUR ARE OUTSIDE THE TERMS OF REFERENCE OF THIS PANEL

1. Claim in relation to the second sentence of Article II:1(b) of the GATT 1994

46. In both its request for the establishment of a Panel and its First Written Submission, Argentina claims and tries to show that the amended PBS is in breach of the second sentence of Article II:1(b) of the GATT 1994.[29] As Argentina sees it, since the amended PBS is a border measure inconsistent with Article 4.2 of the *Agreement on Agriculture*, it is a measure other than an ordinary customs duty and therefore constitutes "other duties or charges" not recorded in the corresponding column of Chile's Schedule of Concessions (No. VII); in other words, a measure inconsistent with Article 4.2 of the *Agreement on Agriculture* is automatically inconsistent with the second sentence of Article II:1(b) of the GATT 1994 in so far as the respective Member has failed to include it in its Schedule.

47. Notwithstanding the fact that Chile will demonstrate that the regime in effect since the entry into force of Law No. 19.897 is consistent with Article 4.2 of the *Agreement on Agriculture* and so is not a measure that has to be converted into an ordinary customs duty, the Panel may not rule on this claim by Argentina given that it falls outside its terms of reference.

48. This is in fact a claim which Argentina should have raised in the initial stages of this dispute. Argentina, however, never questioned whether a measure contrary to Article 4.2 of the *Agreement on Agriculture* could thereby be inconsistent with the second sentence of Article II:1(b) of the GATT 1994, whereas it could have done so before the original Panel. On the contrary, Argentina claimed throughout the original proceedings that the PBS was in breach of both Article 4.2 and the first sentence of Article II:1(b) of the GATT 1994. Even in the course of the proceedings before the Appellate Body, when Chile rightly submitted that the Panel had acted inconsistently with Article 11 of the DSU by concluding that the PBS was inconsistent with the second sentence of Article II:1(b) of the GATT 1994, Argentina was unable to prove that it had raised (let alone pursued) a claim relating to this second sentence. A review of paragraphs 155 and 162 and, in particular, 165 and 167 of the Appellate Body report suffices to confirm that Argentina did not in fact ever raise the claims it now wishes to bring.

49. Argentina appears to use the analysis and conclusions of the original Panel to support its claim relating to the second sentence of Article II:1(b) of the GATT 1994.[30] However, the original Panel's analysis and conclusion regarding the inconsistency of the PBS with the second sentence of Article II:1(b) of the GATT 1994 were reversed by the Appellate Body[31] and therefore do not stand.

50. Argentina wishes to raise at this late stage in the proceedings a claim which it could have raised in the initial stages of the dispute, but did not. To entertain that claim now would seriously affect Chile's due process rights and would subject a case warranting a full hearing to summary and expedited proceedings.

51. It is useful to recall what was said in this respect in *EC – Bed Linen (Article 21.5 – India)* in which India raised a claim it had made before the original Panel, but had failed to pursue. This claim was therefore dismissed and India did not appeal the finding.

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[29] Section II of the First Written Submission by the Republic of Argentina.
[30] See footnote 173 to paragraph 295 of the First Written Submission by the Republic of Argentina.
[31] Paragraph 288(a) of the Report of the Appellate Body.

52. In that dispute, the Article 21.5 Panel stated the following:

> … a claim which, as a legal and practical matter, could have been raised and pursued in the original dispute, but was not, cannot be raised on the same facts and legal premises in an Article 21.5 proceeding to determine the existence or consistency of measures taken to comply with the recommendation of the DSB in the original dispute.[32] (Emphasis added.)

53. That is to say, as the Panel itself stated, neither Article 21.5 of the DSU nor any other provision entitles India to such a "second chance".[33]

54. The Appellate Body agreed with the Panel, stating:

> We conclude, therefore, that, in these Article 21.5 proceedings, India has raised the *same* claim under Article 3.5 relating to "other factors" as it did in the original proceedings. In doing so, India seeks to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent with the European Communities' WTO obligations.[34]
>
> A complainant that, in an original proceeding, fails to establish a *prima facie* case should not be given a "second chance" in an Article 21.5 proceeding, and thus be treated more favourably than a complainant that did establish a *prima facie* case but, ultimately, failed to prevail before the original panel, with the result that the panel did not find the challenged measure to be inconsistent with WTO obligations. Nor should a defending party be subject to a second challenge of the measure found not to be inconsistent with WTO obligations, merely because the complainant failed to establish a *prima facie* case, as opposed to failing ultimately to persuade the original panel.[35]

55. The Panel Report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* stated that accepting the EC's claim (with regard to likelihood of injury) would amount to providing it with "a second chance to raise a claim that it failed to raise in the original proceedings".[36] The Panel was concerned that to allow such a possibility could undermine the principles of fundamental fairness and due process, which would raise "serious issues regarding (the United States') due process rights".[37] It therefore concluded that the new claims by the EC were not properly before the Panel.

56. In this dispute, we find ourselves in the very same situation: a claim which Argentina could have raised and pursued in the original dispute, but failed to do so. Argentina has no right to such a "second chance".

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[32] *EC – Bed Linen (Article 21.5 – India)*, Report of the Panel (WT/DS141/RW), paragraph 6.43.

[33] *EC – Bed Linen (Article 21.5 – India)*, Report of the Panel (WT/DS141/RW), paragraph 6.43.

[34] *EC – Bed Linen (Article 21.5 – India)*, Report of the Appellate Body (WT/DS141/AB/RW), paragraph 87.

[35] *EC – Bed Linen (Article 21.5 – India)*, Report of the Appellate Body (WT/DS141/AB/RW), paragraph 96.

[36] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Report of the Panel (WT/DS212/RW), paragraph 7.74.

[37] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Report of the Panel (WT/DS212/RW), paragraph 7.76.

57. In view of these considerations, Chile respectfully requests that the Panel dismiss and refrain from ruling on Argentina's claim alleging inconsistency with the second sentence of Article II:1(b) of the GATT 1994, given that it is not properly before this Panel.

2. Claim in relation to the factor of 1.56

58. In Section I.C.2.6. of its First Written Submission, Argentina refers to the factor of 1.56 provided for under the PBS and applicable to the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour. In the opinion of Argentina, this factor "is not transparent and is insulating the entry price for wheat flour from international price developments to an even greater extent than that for wheat...".[38]

59. The factor used to determine the duties and rebates for wheat flour has been an element of the Price Band System since 1993[39] and has, on several occasions, been brought into line with market realities, the most recent such adjustment being by means of Law No. 19.446, published in the Official Journal on 8 February 1996[40], which set this factor at 1.56. That is to say, this factor was a feature of the PBS which existed well before Argentina challenged the system before the WTO at the end of the year 2000.

60. However, although this factor had been in existence for almost a decade, Argentina never questioned it as an element which made the PBS inconsistent with Article 4.2 of the *Agreement on Agriculture* or, for that matter, any other provision of the WTO Agreements. Quite simply no mention is made of it in Argentina's submissions. Neither, therefore, was it the subject of a ruling by either the original Panel or the Appellate Body. As a result, it did not form part of the DSB recommendations and conclusions and Chile was not "obliged" to bring that aspect of the measure into conformity with its WTO obligations, purely and simply because no such ruling of inconsistency was ever made. In this respect, and in line with what the Appellate Body has stated on the matter, Argentina may not in these proceedings raise a claim which should have been brought before the Panel at the proper time.

61. The arguments and precedents mentioned in the previous section are reproduced in full, highlighting the conclusions of the Panel in the dispute *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, given that that dispute dealt precisely with the inadmissibility of entertaining claims relating to aspects not of a "measure taken to comply" but of the original measure, and which were not raised in the original proceedings.

62. In this dispute, we once again find ourselves in the exact same situation: a claim which Argentina could have raised and pursued in the original dispute, but failed to do so. Argentina has no right to such a "second chance". To entertain this claim would mean challenging an aspect of the PBS which was never analysed in the original proceedings – and in relation to which there was consequently no finding of inconsistency (or of consistency) forcing Chile to amend that particular aspect of the PBS – and thus improperly limiting Chile's due process rights. In other words, Chile cannot be required to bring into conformity an aspect of the measure which was never found to be inconsistent because Argentina, although it had the chance to claim inconsistency, failed to do so.

[38] Paragraph 235 of the First Written Submission by the Republic of Argentina.

[39] In paragraph 232 of its First Written Submission, Argentina mistakenly states that the factor in question was established in Law No. 19.193 of 1997 and that it was originally 1.31 (paragraph 233 of its First Written Submission). In actual fact, this Law dates back to 1993 and the factor established was 1.41 (Exhibit CHL-5).

[40] Exhibit CHL-6.

63. In view of these considerations, Chile respectfully requests that the Panel dismiss and refrain from ruling on the claim raised by Argentina relating to the factor of 1.56 used to determine the duties or rebates for wheat flour, given that it is not properly before this Panel.

IV. THE CHANGES TO THE PRICE BANDS RENDER THEM CONSISTENT WITH ARTICLE 4.2 OF THE *AGREEMENT ON AGRICULTURE*

64. In this section, Chile will demonstrate that the amendments under Law No. 19.897 and its Regulations are in keeping with the findings and conclusions of the Appellate Body and that Chile has therefore complied with the recommendations and rulings of the Dispute Settlement Body.

65. However, we will first address a particularly significant issue, namely the scope of the Appellate Body's findings and conclusions.

1. Scope of the findings and conclusions of the Appellate Body

66. Argentina, in its First Written Submission, appears to read into the Appellate Body report findings and conclusions where none exist. Furthermore, it seems to confuse certain concepts and give equal weight to all obligations. For example, the lack of transparency and lack of predictability in the level of duties, which the Appellate Body states are features of variable import levies[41] and therefore refer solely and exclusively to certain specific elements which existed under the Price Band System, as will be discussed later on, and not to merely any feature, as argued by Argentina. In other words, the conclusions of the Appellate Body cannot be broadly interpreted; quite the reverse, their scope is restricted to what is clearly stated in its Report, otherwise the Member required to comply would have no parameters for knowing what has to be implemented and how.

67. An analysis of the scope of the "measures taken to comply"[42] necessarily involves examination of the recommendations and rulings contained in the original report(s) adopted by the DSB.

68. In this context, the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* stated that "the first sentence of Article 21.5 is the express link between the "measures taken to comply" and the recommendations and rulings of the DSB. Accordingly, determining the scope of "measures taken to comply" in any given case must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB".[43]

69. Article 21.5 Panels must therefore necessarily examine the scope of the recommendations in order to determine whether or not a Member has complied with them. When conducting such an examination, the Article 21.5 Panel must bear in mind the original terms of reference of both the original Panel and the Appellate Body.[44] It will thus be able to identify the claims of both the

[41] Paragraph 234 of the Report of the Appellate Body.

[42] "Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those "measures *taken to comply* with the recommendations and rulings" of the DSB". *Canada – Aircraft (Article 21.5 – Brazil)*, Report of the Appellate Body, WT/DS70/AB/RW, paragraph 36.

[43] *US – Softwood Lumber IV (Article 21.5 – Canada)*, Report of the Appellate Body, WT/DS257/AB/RW, paragraph 68.

[44] The Appellate Body in *Brazil – Desiccated Coconut* stated that "A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective -- they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute", page 21.

complainant and the defendant, which can then either be upheld or dismissed, with a statement of the reasons which led it to that particular conclusion.

70. When upholding (or dismissing) a claim, the Panel and the Appellate Body are required to state the reasons which led them to do so. Often this means developing their own legal reasoning to support their own findings and conclusions on the matter under their consideration.[45] That is to say, they can uphold (or dismiss) the claims, but for reasons or with arguments other than those adduced by the complainant.

71. The recommendations and rulings of the DSB are precisely what constitutes a **final resolution** to a dispute between the parties insofar as it bears a relation to the particular claim and the specific component of the measure. The Appellate Body has determined the following:

> "We wish to recall that panel proceedings under Article 21.5 of the DSU are, as the title of Article 21 states, part of the process of the "*Surveillance of Implementation of Recommendations and Rulings*" of the DSB. This includes Appellate Body Reports. To be sure, the right of WTO Members to have recourse to the DSU, including under Article 21.5, must be respected. Even so, it must also be kept in mind that Article 17.14 of the DSU provides not only that Reports of the Appellate Body "shall be" adopted by the DSB, by consensus, but also that such Reports "shall be ... unconditionally accepted by the parties to the dispute. ..." Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, "... unconditionally accepted by the parties to the dispute", and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute. In this regard, we recall, too, that Article 3.3 of the DSU states that the "prompt settlement" of disputes "is essential to the effective functioning of the WTO".[46] (Underlining added.)

72. Thus, an adopted Appellate Body report must be treated as a **final resolution** to a dispute between the parties.[47] The Appellate Body based this conclusion on Article 17.14 of the DSU, which deals with the effect of adopted Appellate Body reports (as opposed to *Panel* reports). The relevant part of Article 17.14 reads as follows:

> *Adoption of Appellate Body Reports*
>
> An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report. (Footnote omitted)

73. It follows that the conclusions of a Panel and/or the Appellate Body may not be broadly interpreted; on the contrary, their scope must be restricted to what is expressly stated in the report. An express limitation is required on measures that may be subject to review in proceedings under

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[45] *EC – Hormones*, Report of the Appellate Body, WT/DS48/AB/R, Footnote 74, paragraph 156, and *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Report of the Panel, WT/DS212/RW, paragraph 123.

[46] *US – Shrimp (Article 21.5 – Malaysia)*, Report of the Appellate Body, WT/DS58/AB/RW, paragraph 97.

[47] The Appellate Body has stated that "All the same, in our view, an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim". *EC – Bed Linen (Article 21.5 – India)*, Report of the Appellate Body, WT/DS141/AB/RW, paragraph 93.

Article 21.5, namely "measures taken to comply with the recommendations and rulings of the DSB". A Member's obligation is to comply with these, and not other, recommendations.

74. We are of the opinion that it is precisely such a final resolution to a dispute that establishes the limitations on the claims that a Member may raise in Article 21.5 proceedings.

75. The Appellate Body has confirmed the existence of such limitations in several cases. It has in fact affirmed that Article 21.5 Panels may not re-examine:

(a) Aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO-consistent* ... and that remain unchanged as part of the new measure".[48]

(b) Certain matters ("the particular claim and the specific component of a measure that is the subject of that claim") when the original Panel made findings in respect of these matters and those findings were not appealed.[49]

76. Similarly, aspects of a measure that were not addressed by the DSB fall outside the scope of a "measure taken to comply" in proceedings under Article 21.5.

77. The recommendations and rulings are therefore those which establish not only the framework of compliance, but also the framework for possible Article 21.5 compliance review proceedings. This does not mean that the Appellate Body's statement that the "panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings"[50] should be disregarded; rather that, although the measure taken to comply could be analysed from a standpoint other than that of the original Panel, the analysis must be based on the findings and conclusions of the original proceedings.

78. Another important factor to be taken into consideration when disallowing the examination of a new claim is due process rights. Unless there is precision as to what must be complied with, the Member concerned will not know what is expected of it. In this case, to allow Argentina's argument that the conclusions of the Appellate Body are to be interpreted in a broad and comprehensive manner would give rise to generic and unspecific obligations and create uncertainty for Chile as to what it was required to do within the reasonable period of time and expose it to censure for failing to take measures which it was unaware it was required to adopt.

79. In this context, worthy of particular mention is the statement by the Article 21.5 Panel in *US – Countervailing Measures on Certain EC Products* that allowing a new claim by a Member in Article 21.5 proceedings may undermine the principles of fundamental fairness and due process because, in such instances, a substantive analysis of an original measure is not possible as these are summary and expedited proceedings, there is no new period of time for compliance and the Member would not have the opportunity to bring the measure into conformity and would immediately risk facing retaliation.[51]

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[48] *US – Shrimp (Article 21.5 – Malaysia)*, Report of the Appellate Body, WT/DS58/AB/RW, paragraph 89.

[49] *EC – Bed Linen (Article 21.5 – India)*, Report of the Appellate Body, WT/DS141/AB/RW, paragraph 93.

[50] *Canada – Aircraft (Article 21.5 – Brazil)*, Report of the Appellate Body, WT/DS70/AB/RW, paragraph 41.

[51] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Report of the Panel, WT/DS212/RW, paragraphs 7.72-7.76.

80. The following example illustrates how Argentina wishes to give the conclusions of the Appellate Body a broad interpretation and a scope which do not correspond.

81. In paragraph 200 of its First Written Submission, Argentina transcribes two paragraphs of the Appellate Body report (234 and 247) which, in its opinion, constitute grounds for claiming that any lack of transparency leads to the conclusion that the PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*, because, says Argentina, the Appellate Body affirmed that "the lack of transparency is preventing enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4 of the *Agreement on Agriculture"*.[52]

82. An analysis of these paragraphs reveals, however, that what the Appellate Body stated was quite different.

83. Paragraph 234 sets out the features of variable import levies, which include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. However, such an analysis cannot stop there. That provision must, like all others, be read in context in order to give meaning and a precise scope to the Report and, in particular, to its conclusions and recommendations. Thus, paragraph 247 of the Appellate Body Report is preceded by paragraph 246, the relevant part of which reads:

> 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. (Footnote omitted.)

84. Therefore, paragraph 247, which begins by stating that "In addition to the lack of transparency and the lack of predictability that are inherent in how Chile's price bands are established, ...", necessarily refers to the conversion to a c.i.f. basis, plus import costs, of f.o.b. prices and to the fact that there was no legislation or regulation indicating how to calculate those import costs.

85. Moreover, Argentina omits the phrase "the reference price" from its transcription of paragraph 247. What is the significance of that phrase? It limits the issue the Appellate Body takes in the following paragraphs with the lack of transparency and predictability to that particular aspect of the PBS in force at that time.

86. Finally, paragraph 258 of the Appellate Body Report, cited by Argentina[53], is instructive. In full, it reads:

> 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. 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. (Emphasis added and footnote omitted.)

[52] First Written Submission by the Republic of Argentina, paragraph 201.
[53] First Written Submission of Argentina, paragraph 201.

87. That is to say, Argentina itself recognizes that the lack of transparency is not general, but pertains to certain characteristics, and the Appellate Body confirms that only specific characteristics of the PBS are concerned.

88. Chile will demonstrate that the Appellate Body identified specific aspects of the PBS that made the system a measure similar to a variable import levy and a minimum import price. These were the only aspects on which Chile was required to take action, as will be shown further on. The above is without prejudice to the fact that, in Section V of this submission, it will also be demonstrated that the amendments introduced do not have the effects that Argentina alleges and which underlie its claim that the PBS continues to be inconsistent with Article 4.2 of the *Agreement on Agriculture*.

2. Appellate Body analysis and Law 19.897 and its regulations

89. In view of the foregoing, Chile proposes to review the conclusions of the Appellate Body as set out in the latter's Report and not as construed by Argentina, and to compare them with the changes introduced in Law 19.897 and its Regulations, thereby demonstrating that Chile has complied, both in form and in substance, with these conclusions.

(a) Variable import duties

90. In examining the ordinary meaning of the term, the Appellate Body notes that a "variable levy" is an "import" duty, tax or charge (where it is assessed upon importation) and is liable to vary.[54] Variability alone is not conclusive, however, since an ordinary customs duty may also vary periodically, provided that the changed rates remain *below* the tariff rates bound in the Member's Schedule.[55]

91. Thus, in the Appellate Body's view, the mere fact that an import duty can be varied cannot, alone, bring that duty within the category of "variable import levies" for the purposes of footnote 1. 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. According to the Appellate Body, 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.[56]

92. The obvious conclusion to be drawn from the Appellate Body's analysis is that the changes introduced by Chile have put an end to the variability of the duties. Under the PBS structure in effect until December 2003, specific duties were established and varied automatically and continuously without legislative or administrative action being required to fix them. In practical terms, the decree setting the band and the specific duties (or rebates) to be applied using a given reference price was issued for one year. The duty (or rebate, or neither of the two) was applied once the reference price, established on a weekly basis, had been set. Two simultaneous transactions could therefore be subject to different duties.

93. Under Law 19.897, however, a specific duty (or rebate, or neither) is fixed by legal directive in the form of a decree issued by the Ministry of Finance and remains unchanged for two months, during which the duty applies on all import transactions, without the slightest variation and regardless of the transaction value, until it is changed or cancelled by a more recent administrative act.

[54] Para. 232 of the Report of the Appellate Body.
[55] Report of the Appellate Body in *Argentina – Textiles and Apparel*, footnote 56, para. 46.
[56] Para. 233 of the Report of the Appellate Body.

94. Argentina's Exhibit ARG 6 makes it easier to understand the above in that it shows the specific duty applicable during the entire life of every decree issued by the Ministry of Finance.

95. The Appellate Body having noted that "the presence of a formula causing automatic and continuous variability of duties is a necessary [...] condition for a particular measure to be a 'variable import levy' within the meaning of footnote 1",[57] the fact that variability has been eliminated – to use the Appellate Body's own words – in Law 19.897 means that this measure cannot be one of the prohibited measures listed in Article 4.2 of the Agreement on Agriculture.

96. We propose to set aside this analysis for the time being and focus on the second part of paragraph 234, which states that even though automatic and continuous variability of duties is a *necessary* condition, it is "by no means a sufficient" one to conclude that a particular measure is a "variable import levy". It should be emphasized that while part of Argentina's argument[58] relies on this very paragraph, it disregards the phrase "but by no means a sufficient", thereby seeking to challenge Chile's PBS on the claim of variability alone.

97. Since variability is a condition that is necessary but not sufficient, the Appellate Body observes in paragraph 234 that variable import levies have additional features, including lack of transparency and lack of predictability in the level of duties that will result from such measures. These are the features that are liable to restrict the volume of imports and also contribute to distortion of the prices of imports by impeding the transmission of international prices to the domestic market.

98. This finding is of signal importance because it makes it easier to discern the logic behind the Appellate Body's conclusion that the PBS in effect until December 2003 was a measure similar to a variable import levy and a minimum import price. There are only two additional features: lack of transparency and lack of predictability. On this premise, the Appellate Body analyses a limited number of features of the PBS in effect at the time. There is thus no overall lack of transparency or predictability as Argentina makes out in its First Written Submission.

99. For the sake of clarity, it should be emphasized that at the time of the original proceedings, Argentina itself highlighted the fact that "significant" ... "are the lack of transparency of certain features of Chile's price band system"[59] (emphasis added), which confirms our earlier point that the objection is not to some generalized lack of transparency. This was the understanding of the Panel and the Appellate Body in focusing their analyses on certain features found to lack transparency.

100. The foregoing also shows how the recommendations and rulings of the DSB should be implemented and facilitates appreciation of some of the errors of interpretation made by Argentina. The fact that world prices are not transmitted to the domestic market, for example, may be a consequence of the two features singled out by the Appellate Body, but it does not constitute a third feature, as Argentina appears to contend. Argentina likewise mistakenly claims that fixed floor and ceiling levels and fixed coefficients for lowering floor and ceiling levels in and of themselves insulate Chile's market from international price developments – in so doing apparently implying that such elements might be challenged *per se*. In fact, the Appellate Body's view is that insulation may result from lack of transparency and predictability, but it does not constitute a feature challengeable as such that could, on its own, lead to a finding of inconsistency.

[57] Para. 234 of the Report of the Appellate Body.
[58] Section C.3.1(a), (b) and (c) of the First Written Submission of Argentina.
[59] Para. 258 of the Report of the Appellate Body.

(b) Minimum Import Prices

101. According to the Appellate Body, minimum import prices are not very different from variable levies, except that their mode of operation is less complicated. The main difference between the two is that variable 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".[60]

102. Thus, variability is the difference between the governmentally determined threshold and the actual transaction value, which will differ from one transaction to another and will hence change the duty without any legislative or administrative action.

103. A simple glance at the charts presented by Argentina shows how the specific duties remained constant and made it impossible to maintain a minimum import price for the duration of Law 19.897 and its Regulations.

(c) Measure similar to a "variable import levy" and/or a "minimum import price"

104. After addressing the issue of variable import levies and minimum import prices, the Appellate Body turns to an analysis of whether Chile's price band system is a border measure similar to such measures. For the Appellate Body, it is a matter of determining 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, to be prohibited by Article 4.2.[61]

105. The Appellate Body's first finding[62] concurs with that of the Panel that the PBS was a measure similar to variable levies or minimum taxes (*impuestos mínimos*), but in its view the Panel placed too much emphasis on whether or not Chile's price bands were related to domestic target prices or domestic market prices. According to the Appellate Body, even though the bands were set in the same way as had been done until December 2003, the PBS could still impede 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).

106. To assess Chile's price bands, the Appellate Body therefore considers factors other than world market prices, as reasoned below.

107. The prices that represent the highest 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. The Appellate Body also places considerable importance on the intransparent and unpredictable way in which the "highest and lowest f.o.b. prices" selected are converted to a c.i.f. basis by adding "import costs". As Chile has conceded, no published legislation or regulation sets out how these "import costs" are calculated.[63]

108. With the entry into force of Law No. 19.897, Chile abolished the calculation formula that included discarding the highest 25 per cent as well as the lowest 25 per cent of world prices over the past five years, while maintaining the values in effect in 2003 until 2007, gradually reducing the level of protection from 2007 onwards and culminating with the application of duties or rebates in 2014.

[60] Para. 237 of the Report of the Appellate Body.
[61] Para. 239 of the Report of the Appellate Body.
[62] Para. 246 of the Report of the Appellate Body.
[63] Para. 246 of the Report of the Appellate Body.

109. Pursuant to this Law, all prices are set as f.o.b., meaning that today there is no price or value that converts an f.o.b. price to a c.i.f. basis, and it is no longer necessary to add "import costs", which makes the system a great deal more transparent.

110. Chile has thus taken due account of the observations made by the Appellate Body.

111. The Appellate Body then turns to the "similar shortcomings" in the way in which reference prices are determined[64] (in terms of lack of transparency and predictability[65]) and specifically the fact that reference prices are set on a weekly basis and in a manner that is neither transparent nor predictable.

(a) Setting of reference prices on a weekly basis and in a manner that is neither transparent nor predictable. Addressed in paragraphs 247 and 251 of the Appellate Body's Report.[66]

112. The Appellate Body notes that, under the PBS applied up to December 2003, when a shipment arrived in the country the customs agent was required to (a) ascertain the date of embarkation of the goods, (b) check the weekly reference price set for that date by the National Customs Service, and (c) using that price, check the year's list of f.o.b. prices in order to select the relevant specific duty. Two consignments arriving on the same day but subject to different reference prices on account of the date on which they were shipped would be charged different specific duties.

113. Moreover, the price determined by Customs was the lowest f.o.b. price observed in any market of concern, which was not specified, meaning that the reference price could even further disconnect Chile from world market prices.

114. With the entry into force of Law No. 19.897, the reference price ceased to constitute one of the elements needed by importers to ascertain the amount of duty payable upon import. As explained earlier, the duty payable upon import is established by decree issued by the Ministry of Finance and applies to all imports for as long as the decree in question remains in force.

(b) The price used to set the weekly reference price was the lowest relevant f.o.b. price observed, at the time of embarkation, in the foreign "markets of concern" to Chile for "qualities of products actually liable to be imported to Chile". No Chilean legislation or regulation specifies how the international "markets of concern" and the "qualities of concern" are selected". As a result, the process of selecting the reference price is neither transparent nor predictable for traders.[67]

115. Today, the mechanism for calculating the reference price is set forth in the Regulations, as are the most relevant markets to be considered. The Regulations stipulate that the most relevant markets are "*Trigo pan argentino*" for the period 16 December to 15 June of the following year and "*Soft Red Winter No. 2*" wheat for the period 16 June to 15 December. The reference price will correspond to the average daily prices recorded in those markets (f.o.b., Argentine port and f.o.b., Gulf of Mexico port, respectively) over a period of 15 days counted back from the 10th day of the month in which the

[64] Para. 247 of the Report of the Appellate Body.

[65] Section V explains why lack of predictability in the determination of duties and rebates was a major shortcoming in the Appellate Body's view.

[66] " ... Chile's weekly reference prices—is liable to distort—if not disconnect—that transmission (of world market prices to Chile's market) by virtue of the way it is determined on a weekly basis" (emphasis and parenthesis added).

[67] Para. 249 of the Report of the Appellate Body.

relevant decree is published.[68] [69] Chile has therefore taken due account of the Appellate Body's observation.

(c) "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".[70] Therefore, the way in which the weekly reference prices are determined contributes to giving the PBS the effect of impeding the transmission of international price developments to Chile's market.

116. Our first comment is that this account of how the reference prices were determined (also explained in paragraph 26 of the Appellate Body's Report) is wrong, since all prices (both those used to calculate the bands and those used to determine the reference prices) were converted to c.i.f. prices. The error probably stems from the fact that the annual decrees issued by the Ministry of Finance (publishing the specific duties and rebates) included prices f.o.b. (prior to conversion) so as to make it easier to apply the duties for each shipment, because the market prices used as a reference are expressed in f.o.b. terms.

117. Without prejudice to the above, as a result of the changes introduced in 2003 all values used are expressed in f.o.b. terms, that is, the reference prices are not converted to a c.i.f. basis. Thus, at no stage is it possible to inflate or increase the amount of the specific duties, so the transmission of international price developments to the domestic market is not impeded as the Appellate Body asserts.

V. ECONOMIC ANALYSIS OF THE REGIME IN EFFECT UNDER LAW NO. 19.897 AND ITS REGULATIONS

118. The Report of the Appellate Body notes that the PBS in effect until 2003 was a measure similar to a minimum import price and a variable import duty and was hence WTO-inconsistent.

119. As we understand it, the Appellate Body notes in its Report that the PBS was similar to a minimum import price or a variable import duty, depending on the behaviour of domestic market prices. The Appellate Body's reasoning is that in some way a minimum entry price for the product is maintained in one way or another, whether (a) by imposing a minimum price, (b) by applying variable duties to obtain the minimum price, or (c) both.

120. In the following section, Chile will demonstrate that it applies neither a minimum import price nor a variable import duty, since it does not maintain a domestic price for the products at issue, and that, on the contrary, Law 19.897 ensures that international prices are transmitted to the domestic market. It will also address Argentina's arguments concerning the overcompensation which it claims was generated by the PBS and is still being generated by the above Law. It will, moreover, provide evidence that market access conditions in Chile improved as of December 2003.

1. Chile does not apply a minimum entry price

121. The parameters used for calculating the duties and rebates laid down in the Law are as follows: Floor, ceiling and reference price are at f.o.b. level, in dollars per tonne.[71] The fact that parameters have been changed to f.o.b. prices shows that the floor and ceiling values constitute neither a minimum entry price nor a similar measure.

[68] See Annex to Decree 831/2003.
[69] Section V.4 explains why both are most relevant markets.
[70] Para. 250 of the Report of the Appellate Body.
[71] Article 1, Law No. 19.897 (Exhibit CHL 1).

122. Although Argentina's submission seeks to demonstrate the opposite,[72] in the normal course of international trade fob. prices, which are the unit values for exported goods at the port of origin, are always lower than c.i.f. prices, which are the unit values for imported goods at the port of destination, for the same trade transaction. The difference between the f.o.b. price and the c.i.f. price in a trade transaction is that the latter also includes at least freight and transport insurance charges.

123. Under the PBS, the price band values were determined as import costs, the figures being perfectly comparable to domestic transaction prices. In practice, the decision of wheat processors or buyers as to where to purchase their wheat grain – from domestic producers or from importers – depends on who offers the lowest price. This being customary (and reasonable) market practice, the assertion that the PBS was intended to sustain the floor price is understandable, since the latter was expressed as an import cost.

124. Under the Law, the floor and ceiling values are merely parameters of a mathematical process, and no trader could assume these to be expected values for domestic transactions.

125. The reference price, which is the other parameter in the calculation process, is also expressed in f.o.b. terms and is not directly comparable to the c.i.f. price, the entry cost, or the domestic price.

126. As the floor and the reference price are variables expressed at f.o.b. level, the purpose of calculating specific duties is obviously not to maintain an entry price; since neither the floor price nor the reference price at any given point in time can be higher than, or equal to, the c.i.f. price for a specified trade transaction.

127. This becomes even clearer in the light of the application mechanism. Any specific duties or rebates that may be determined have a period of validity of two consecutive months, during which all imports are subject either to the same specific duty or to a rebate, or to neither of the two.

128. The above is illustrated by the chart submitted by Argentina as Exhibit ARG-12, which provides a calculation of the entry price of wheat into Chile on the basis of f.o.b. prices. Over most of the period covered by the chart – i.e. November 2004 to April 2005 – the f.o.b. price is below, and the entry price lies above, the floor price.

129. This chart prompts two important comments. The first is that with this information Argentina confirms that the floor price is not comparable to the entry price, given the different cost components of importation.

130. Using the same data as those supplied by Argentina[73] – for the period 1 November 2004 to 29 April 2005 – we can see that the sum of the f.o.b. prices plus the specific duties, over the only four-month period in which they were applied, is below the f.o.b. floor price for 46% of the 81 days covered by Argentina. In other words, the evidence shows that it is impossible to maintain the floor price. The following examples, based on the data from Argentina's exhibits, serve to illustrate the above.

[72] Paras. 99 to 124 of the First Written Submission of Argentina.

[73] Strictly speaking, this calculation is based on the data from Table ARG-11 adjusted according to those from Table ARG-16. According to the official source (SAGPyA), some of the data in Table ARG-11 are incorrect. This does not affect the conclusions to be drawn from the ARG-12 chart, however.

	Example 1	*Example 2*
Date	20 January 2005	10 February 2005
	f.o.b. value (106) + specific duty (7.82) = 113.82	f.o.b. value (107) + specific duty (14.3) = 121.3
Band floor price	128	128
UNDERESTIMATION by	US$14.18/tonne	US$6.7/tonne

131. The second and perhaps most important comment is that the entry price calculated by Argentina behaves in a manner very similar to that of the f.o.b. price, which would suggest that international price trends and variations are being transmitted to Chile's home market.

132. The data from Argentina's Exhibit ARG-12 alone lead to the conclusion that the floor price is not a minimum entry price and that there is transmission of international prices or a connection between the domestic and the international market.

2. Chile does not apply a variable import duty

133. The above demonstration that the floor price and the regime as a whole are neither similar nor equivalent to a minimum import price (and hence are not inconsistent with Article 4.2 of the Agreement on Agriculture) therefore clearly shows that specific duties cannot constitute a variable levy, as their purpose is not to sustain prices – whether entry prices, c.i.f. prices or domestic market prices.

134. As the Appellate Body notes, the mere fact that a levy is variable does not mean that it is a "variable import levy" (irrespective of the premise that variability is by no means a sufficient condition for a measure to be a variable import levy[74]). A simple example suffices as a demonstration. Indeed, it would be impossible to interpret the lowering of Chile's (MFN) general *ad valorem* tariff between 1984 and 2003, under the country's gradual trade liberalization policy, as the application of a variable levy.

135. The table below lists the dates on which changes were made to Chile's *ad valorem* tariff, lowered from 35% in 1984 to 6% from 2003 to date.

Chile: Development/MFN Tariff	
Date	MFN tariff (%)
22/09/1984	35
01/03/1985	30
29/06/1985	20
08/01/1988	15
25/07/1988	11
01/01/1999	10
01/01/2000	9
01/01/2001	8
01/01/2002	7
01/01/2003	6

[74] Para. 234 of the Report of the Appellate Body.

136. The average rate of duty for the above period, calculated solely on the basis of the data in the table, was 15.1% with a standard deviation of 10.1, which means a coefficient of variation (or average fluctuation – to use Argentina's words in its report[75]) of 67%. The question that therefore needs to be answered is whether Chile's general duty constitutes a variable levy under the WTO.

137. The obvious reply is no, which implies that this analysis – like the one regarding the variability of duties[76] in Argentina's report, raises two problems – one of methodology and the other of interpretation. In the latter case, as mentioned earlier, the fact of having a duty which varies, or has varied, may be a necessary but is not a sufficient condition to affirm that such a duty qualifies as a variable levy. As regards methodology, the statistics calculated[77] are merely measures of dispersion to show the distribution of sample data according to the mean (average). In other words, they serve to illustrate the statistical distribution of a set of values but by no means to prove that the duties are variable levies, as Argentina seeks to establish.

138. Although there is no WTO definition of the term 'variable duty', as the Appellate Body notes in paragraph 229 of its Report, it is possible to offer a few economic interpretations.

139. A variable duty may be the kind of duty which is used to sustain a domestic or a minimum entry price, as can be deduced from the Appellate Body's Report, and the characteristic of which would be to gradually "adjust", with greater or lesser regularity, so as to prevent a decline in domestic prices or even to raise them.

140. It should be pointed out that a calculation formula is neither necessary nor sufficient to achieve this, because the desired outcome would be secured regardless of whether or not application was automatic.

141. Variable duties directly affect trade relations, altering relative prices (relationship between domestic market prices and international market prices) in addition to the effects resulting from the application of ordinary duties.

142. If the objective was to maintain a price level, the alteration would imply a permanent change in relative prices in order to prevent domestic market conditions from varying (price level) in the event of a change in external or import prices prior to entry. Conversely, if the duties ensure that relative prices remain stable, this means that the border measure allows external variations to be transmitted to the domestic market, albeit to a different extent. That is to say, if international prices rise so do domestic prices, and if the former decline, so will the latter.

143. In Chile today, the mere fact that the duties and rebates, or the non-application thereof, are established for a sufficiently long period of time provides certainty that any variations in international prices that may occur over this period will be transmitted to domestic wheat prices.

144. Thus, the conclusion is that, if the floor price is not a minimum price, if the specific duties and their method of application do not continuously entail import price corrections and if import prices, as Argentina shows in Exhibits ARG-11 and ARG-12, follow a pattern similar to that of the f.o.b. price of wheat, Chile's wheat import duties – even if they do undergo variations – do not constitute a variable duty within the meaning of Article 4.2 of the Agreement on Agriculture.

[75] Para. 254 of Argentina's first Submission.
[76] Section C.I.3 of Argentina's first Submission.
[77] *Standard deviation* is an absolute measure of dispersion, expressed in the same units of measurement as the sample data. The *coefficient of variation* is a relative measure of dispersion relating standard deviation and mean, and expressing standard deviation as a percentage of the mean.

3. Law No. 19.897 allows an effective transmission of price variations

145. Although arguments have already been put forward demonstrating the connection of the domestic wheat market to the world market, a few questions need to be clarified so as to provide more backing for the analysis.

146. In economic terms, price transmission from external markets to domestic or local markets is understood to occur when the latter reflect international market behaviour. In trade barrier-free markets, domestic prices should evolve in tandem with external prices, albeit to a different degree because of transfer, insurance and other costs involved in shipping the product from abroad to the same location as that of the domestic product. In other words, domestic prices are higher than international prices, but they exhibit similar behaviour.

147. In markets facing trade barriers, that is, ordinary customs duties – whether calculated as a percentage or set in a fixed amount – the situation is the same, the duties constituting added costs to trade.

148. The application of ordinary customs duties does not ultimately affect the local market's connection to the international market in terms of behaviour, but it does alter relative prices by generating an increase in domestic prices that would not have occurred had the duties not been levied.

149. As regards the PBS, it has been argued that the method used to calculate the floor and ceiling prices on the basis of a time series of international prices prevented the market from being disconnected from international price trends. True as this may be, the argument in question referred solely to the band values and not to what happened in the day-to-day course of trade and in the domestic market over the year-long period in which they were applied.

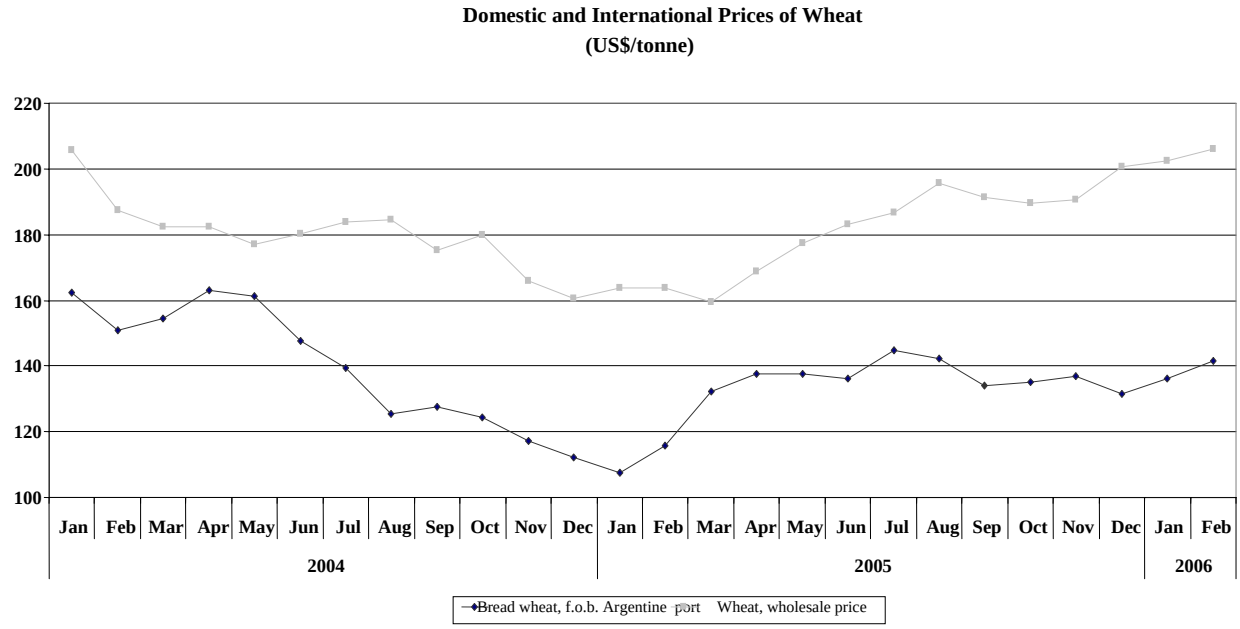
150. The levying of specific duties on a weekly basis (52 times a year) made it possible to compensate in the actual course of business for differences between transaction values and the floor price, so that any ups and downs occurring in the transactions were not able to be transmitted to the domestic market.

151. Under the PBS, the volume of trading neither reflected all the benefits deriving from falls in international prices nor was it affected by the contractions resulting from price increases: there was one import price and the difference lay in the amount of the duties.

152. This is no longer the case today because the duty or rebate, or the non-application thereof, operates in such a way as to allow the transmission of international price variations to the domestic market. That is to say, once the duty has been fixed, traders can capture the benefits of decreases in international prices, because changes in world prices do not affect the duty that they are required to pay.

153. It is the current implementation of Chile's wheat policy that allows this happen, as Argentina shows on the basis of its own figures. The existence of pre-established floor and ceiling prices does not alter the situation, basically because these are simply parameters that contribute to the determination of duties, rebates, or the non-application thereof.

154. The graph below shows the trends in Chilean wheat prices and in f.o.b. prices of *Trigo pan argentino* from January 2004 to February 2006. The price curves indicate that, first, Chilean wheat prices have varied and, second, the variation is very similar to that of export prices of Argentine wheat, confirming the connection of Chilean wheat prices to the international grain market.



155. This graph is an exact illustration of the points made by Argentina in Exhibit ARG-11, with the series of f.o.b., c.i.f. and c.i.f.-plus-duties prices, and in Exhibit ARG-12, which shows the prices in graph form. What clearly emerges is that the entry price of wheat exhibits the same behaviour as its f.o.b. price, which demonstrates price transmission and therefore the connection between the Chilean and the international market.

4. Predictability in the assessment of duties and rebates

156. Specific duties and duty rebates are currently established by decree of the Minister of Finance. As both the *ad valorem* duty and the floor and ceiling prices are known and fixed, only the reference price needs to be obtained in order to determine the amount of a specific duty or rebate, or the non-application thereof.

157. The reference price currently results from a calculation of the average of wheat prices recorded in known, public and relevant international markets, such as those of Argentina and the United States; these prices are random variables that change every day and over the course of each day, according to the behaviour of buyers and sellers in the market.

158. As those of most commodities, moreover, these prices display features that are typical of continuous series of random data, including cycles, trends and seasonality. Although this may appear complex, it is a matter of course for traders and the market in general.

159. In the case of wheat, for instance, seasonality affects market prices because harvesting is concentrated over a short period of time, whereas grain utilization extends over a longer period. The price of Argentine wheat normally declines between December and February of each crop year and begins to rise as supply contracts. In the case of the United States, harvesting is from May to July, which is the time when prices are lowest.

160. The United States and Argentina both have commodity exchanges for trading in financial derivatives on wheat,[78] which include at least futures contracts. The prices under such contracts are set for different transaction periods, including for several months ahead (more than one year). For

[78] For example, the United States' Chicago and Argentina's Rosario exchanges.

futures contracts, every closing quotation reflects what "the market" expects will happen to the price of the commodity in question. Such transactions yield price data showing anticipated market trends for different (specific) months, which normally include the current and the following marketing season.

161. It is practically impossible for wheat traders not to know or not to use such information in order to conduct their businesses, as Argentina appears to contend in its submission.[79]

162. Therefore, what is necessary in order to foresee the amount of the specific duty is a wheat trader's own skills in predicting prices and negotiating sales or purchases. Hence, the specific duties are just as predictable as the price of Argentine or United States wheat.

163. In practice, a great many grain transactions that provide for deferred delivery of the commodity rely on futures markets prices as the negotiating basis, in conjunction with the trader's own assessment of the course that prices are taking. In other words, traders have information that enables them to predict wheat price levels in the short and medium terms, and hence information to foresee the level of specific duties that might be levied on wheat imports to Chile in the near future.

5. Overcompensation

164. In its attempt to establish that the PBS is inconsistent with Article 4.2 of the Agreement on Agriculture (Part C.I.), Argentina notes the following:[80]

> The particular configuration and interaction of the specific characteristics of Chile's price band system generate certain market access conditions that lack transparency and predictability and disconnect the Chilean market from international price trends in a way that insulates the Chilean market from the transmission of international prices and prevents enhanced market access for imports of wheat and wheat flour.

165. However, Argentina confuses arguments and equates the Appellate Body's findings with other elements addressed by the Appellate Body in its Report. Indeed, the characteristics of lack of transparency and lack of predictability of the PBS in effect until December 2003 are part of the conclusions of the Appellate Body – and Chile has accordingly taken them into account – but the reference to overcompensation, which in Argentina's view results from the amended PBS, is wrong, and overcompensation cannot, on its own, be inconsistent with Article 4.2 of the Agreement on Agriculture, as Argentina erroneously claims.

166. The references cited by Argentina, in particular paragraph 260 of the Appellate Body's Report, are out of context and do not correspond to the reasoning followed by the Appellate Body, and are hence not part of its conclusions. They are actually part of the Appellate Body's analysis of whether the Panel took 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.[81]

167. Notwithstanding the above, for the sole purpose of making matters clearer for the Panel members Chile will now review some of the aspects addressed by Argentina, in order to demonstrate that even if overcompensation were at issue in these Article 21.5 proceedings, Argentina's arguments fail.

[79] Section C.3.2.
[80] Para. 73 of the First Written Submission of Argentina.
[81] Para. 253 of the Report of the Appellate Body.

168. In its Report, the Appellate Body notes that the PBS could overcompensate for international price variations and elevate the entry price of imports above the band floor.[82] Such a reading would be possible were one to assume that the floor price was determined at a market level equivalent to the cost of the imported product and for which the reference price used to calculate the specific duty was measured in f.o.b. terms, so that the difference between these values would be greater than that needed to maintain the floor price, if the latter were a minimum import price.

169. But such a reasoning rests on a misconstruction of how the PBS operated. The values of the specific duties and tax rebates were published in the form of an annual decree containing tables, the first column of which listed a series of possible f.o.b. prices, while the second contained the specific duties or rebates applicable. Although the duties and rebates appeared to be calculated using the f.o.b.-level reference price, this was not actually the case. Both variables used in the calculation were expressed in the same market level terms, namely import cost.[83] The tables listing the f.o.b. prices used in the calculation were published because it was necessary to provide for effective application of the PBS. In other words, it was easier for the National Customs Service to scan a table in order to find the reference price expressed in the same terms than it was to calculate, for every reference price, the corresponding import cost at any given moment in time.

170. There is no overcompensation now either, as has been claimed. It is actually even clearer today that overcompensation is impossible, since the floor and ceiling prices and the reference price are expressed at the same market level, i.e., as f.o.b. per tonne.

171. Moreover, the current floor and ceiling prices are expressed at a market level that is not comparable to the c.i.f. prices, entry prices or import cost, meaning that there is plainly no advantage to having these floor and ceiling prices as an objective price to be maintained or a minimum entry price.

172. The difference between a product's f.o.b. and c.i.f. price consists, at the very least, of freight and transport insurance costs. Freight costs are an exogenous variable that lies beyond a market operator's control, since they are highly dependent on fuel price trends. Therefore, using an f.o.b. price as the floor price in no way guarantees a predetermined c.i.f. price level.

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[82] Para. 260 of the Report of the Appellate Body.

[83] The calculation formula was as follows:

1. The specific duties (SD) were determined by subtracting from the floor value of the band the import cost (IC) calculated for a consecutive list of possible f.o.b. prices below this floor value, and were expressed in US$/kg.

$SD = FLOOR - IC_i$

where "i" represents all import costs lower than the band floor, up to the amount calculated using an f.o.b. price of US$50/tonne. The maximum duty was the rate whereby the amounts payable as *ad valorem* customs duties plus specific duties were equivalent to the WTO bound tariff in percentage terms.

2. The tax rebates (TR) were determined by subtracting from the import cost (IC) calculated for a consecutive list of possible f.o.b. prices above the ceiling value of the band, and were expressed in US$/tonne. The maximum tax rebate corresponded to the amount of the normal *ad valorem* duty applicable.

$TR = IC_j - CEILING$

where "j" represents all import costs higher than the band ceiling, up to the point where the amount of total final duties equals zero.

3. The tables of specific duties and tax rebates included the f.o.b. price used to calculate the import costs and indicated the corresponding amount of the duties or rebates. Such information was published in the Official Journal through an annual decree containing the tables in question.

173. A number of other necessary import costs are added to the c.i.f. price in order to determine the cost of the imported product or the import parity price. Such costs include customs duties, landing and inspection services, the various import formalities and the transfer, insurance and financing costs required to ensure that the product arrives at its place of use.

174. These costs are also beyond the control of market operators although magnitude allows economies of scale. So here again, using an f.o.b. price as the band floor in no way guarantees a pre-determined level of product import price or the product's domestic price.

175. In economic terms, a product's import cost is made up of fixed costs unrelated to the price of the product and of variable costs that depend on the transaction price, such as the *ad valorem* duty, inspection costs, the commission payable to agents handling the transaction and credit interest due. The import cost can be summarized by means of the following formula:

$IC_i = a + b * FOB_i$,
where,
IC_i = import cost of product i;
a = sum of fixed costs;
b = aggregate of variable costs; and
FOB_i = f.o.b. price of the product i.

176. In order to maintain an import cost, or parity or entry price the specific duty to be levied would have to match the value of that import cost with the reference price import cost or the import cost of a particular shipment, so that:

$SD = IC_{floor} – IC_{rp}$, where "rp" represents the reference price.

Replacing the above with the following gives:

$SD = a + b * FOB_{floor} – (a + b * FOB_{rp})$
$SD = a + b * FOB_{floor} – a – b* FOB_{rp}$
$SD = b * (FOB_{floor} – FOB_{rp})$

177. As factor "b" has more components than just the customs duty, it is obviously larger than the *ad valorem* duty.

178. Thus, if "b" is larger than the *ad valorem* duty, a specific duty calculated solely on the basis of f.o.b. values and Chile's *ad valorem* duty would unquestionably be lower than a duty obtained using import costs.

$SD = (1+ 0.06) * (FOB_{floor} – FOB_{rp})$

179. Two conclusions can be drawn from the above. First, the floor value of the band expressed in f.o.b. terms cannot be interpreted as a minimum entry price and is not a minimum entry price. Second, the duty resulting from the formula applied by Chile is lower than would be required to maintain a price at a higher level of the marketing chain – whether at c.i.f. or at import cost level. Furthermore, considering that several components of factor "b" are variables and lie beyond the control of the authorities and market operators, applying the mechanism would lead to undercompensation, if the objective were to maintain a price in the interest of domestic trade of the product.

180. A further point which demonstrates that there cannot be overcompensation and that the objective is not to maintain a parity price is that today – unlike under the former PBS when duties

were assessed once a week (i.e. 52 times a year) – the duties or rebates assessed are valid for two months (i.e. six a year), and during that period are completely disconnected from what may occur in the reference, or any other, markets.

181. In other words, the duty or rebate, or non-application thereof, is determined independently of the prices of commercial transactions, allowing international price variations to be transmitted to the domestic market and ensuring that decreases in international prices are reflected in the entry prices – albeit to a lesser extent, since there are normally duties and other import costs to be paid.

182. This means that Chile's wheat policy is no different in terms of behaviour than the application of an ordinary customs duty.

6. Change in conditions of access as a result of Law No. 19.897

183. Law No. 19.897 and its Regulations have improved conditions of access to the Chilean market for wheat and wheat flour. This can be seen from the amount of time for which the duties and rebates have been applied since the Law entered into force. For comparison purposes, a simulation of the operation of the PBS has been produced with the reference price per week calculated on the basis of the prices in effect. This was done by taking the weekly average from Friday to Thursday of each of the prices considered, selecting the lowest and comparing it with the floor and ceiling prices so as to determine whether duties or rebates had applied in the week following the calculation. This method was applied to the period from 16 December 2003 to 13 January 2006.[84]

Number of weeks of occurrence		
Measure in force	Former mechanism	Law No.19.897
Specific duties	27	17
Tax rebates	27	35
No measure	55	57

184. The results show that under the system prior to modification the time over which specific duties would have been levied amounted to 27 weeks, whereas in fact in the same time-frame it amounted to only 17. In the case of tax rebates, under the PBS they would have been applied in 27 weeks, whereas in fact there were 35 weeks with rebates.

185. In conclusion, the period of application of duties under the new regime was shorter by 10 weeks, while that of rebates was longer by 8 weeks, which represents an effective increase in favourable conditions for grain imports compared to what might have occurred under the mechanism prior to modification.

Effects of the scheduled reduction of floor and ceiling prices

186. The scheduled reduction of the floor and ceiling prices is a scenario under which, irrespective of international price levels, the amount of the specific duties will increasingly diminish compared to those currently being established, just as the probability of duties actually being assessed will increasingly diminish.

[84] Exhibit CHL-7.

187. Although this may be self-evident, we shall nevertheless use the calculation formula to explain matters. If we take the current floor price of US$128/tonne and the floor price of US$114/tonne that will apply in 2014, with an identical reference price of, say, US$110/tonne, the results are as follows:

$$SP_{2006} = 1.06 * (128 – 110) = 19.08$$
$$SP_{2014} = 1.06 * (114 – 110) = 4.24$$

188. The specific duty in 2014, using the same reference price, would be US$4.24/tonne compared to the current specific duty, using that same reference price, of US$19.08 /tonne. In other words, the specific duty in 2014 will be 78% lower than the duty that would be calculated for this year.

189. It should be noted, moreover, that in 2014 all f.o.b. reference prices ranging between 114 and 127 (both inclusive) will not trigger the assessment of specific duties, as would be the case today.

190. On the basis of the monthly series of prices of *Trigo pan argentino*, one can establish how many times (months) these prices have stood below the current floor level of 128 and below the level due to apply in 2014, that is, 114.

191. Over the period January 1986-March 2006 (period of application of the price band policy), the price of *Trigo pan argentino* stood 112 times (months) below the current floor of 128, i.e. on 46.1% of the occasions considered. The price stood under 114, namely the floor for 2014, 58 times (months), i.e. on 23.9% of the occasions considered. In other words, the probability of specific duties being applied in the year 2014 becomes lower and lower.

192. Both of the above results – that is, the reduction of duties by 2014 and the lesser probability of duty assessment – demonstrate that the current policy has an in-built process of gradual reduction of border protection of wheat.

CONCLUSION

193. With the entry into force of Law No. 19.897 and its Regulations, Chile complied in both form and substance with the recommendations and rulings of the DSB in this dispute, through the establishment of a mechanism for the assessment of specific duties, using certain parameters which, added to the general *ad valorem* duty (6%), help gradually to reduce protection in the domestic wheat and milling sector. Contrary to Argentina's assertion in its First Written Submission, these parameters – namely floor, ceiling and reference price – are established in a transparent and predictable manner. While the former are fixed and will undergo a process of liberalization as of 2008, the latter is determined on the basis of the most relevant markets for wheat, including Argentina itself – though Argentina appears to ignore that relevance. This enables any Chilean market operator to know ahead of time not only how the duties will be calculated but also the amount in which they will be due.

194. As a result, and owing to its nature, mainly the f.o.b. basis on which both prices (floor and ceiling and reference price) are determined, the new mechanism operates in such a way that it cannot constitute a variable import levy or a minimum import price, or a measure similar to a variable import levy or a minimum import price. This is evidenced by the figures and charts presented by Argentina and confirmed by Chile's arguments in this submission.

195. In other words, as of December 2003 the Chilean wheat and wheat flour market has been connected to the international market, and protection levels – that is, the occurrence of duties and their amount – will increasingly diminish, meaning that in addition to closer connection with foreign markets, there will be a decrease in relative prices that will render Chile's wheat market more competitive.

196. For the reasons set out above, the mechanism does not constitute one of the measures cited in the footnote to Article 4.2 of the Agreement on Agriculture and, consequently, is not among the measures required to be converted into ordinary customs duties.

197. Accordingly, Chile respectfully requests that the Panel:

(a) Reject Argentina's claim of inconsistency with the second sentence of Article II:1(b) of the GATT 1994 and that relating to factor 1.56 for wheat flour, to the extent that neither claim is properly before this Panel;

(b) Chile having complied with the recommendations and rulings of the DSB, find that the measure established under Law No. 19.897 and its Regulations is not a measure similar to a variable import levy or a minimum import price and is therefore not inconsistent with Article 4.2 of the Agreement on Agriculture; and,

(c) having established that Chile has not maintained a measure inconsistent with Article 4.2 of the Agreement on Agriculture, find that Chile is not in breach of Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization.

ANNEX B

THIRD PARTY SUBMISSION BY BRAZIL
(12 MAY 2006)

INTRODUCTION

As stated during the original Panel and the Appellate review stages, Brazil's interest in this dispute focuses on the operation of the Price Band System (PBS), its implications on the flow of commerce and its legality *vis-à-vis* the multilateral trading rules. The impact of such a measure and the fact that other products (wheat, wheat flour and sugar) are still subject to it motivated Brazil to submit once again its views on the case before this Panel.[1]

2. Chile claims that the adoption of Law nr. 19.897/2003 and of Decree nr. 831/2003 enacted by the Minister of Finance brought its Price Band System into conformity with its obligations under Article 4.2 of the Agreement on Agriculture, as recommended by the DSB.[2] While this is true in respect of edible vegetable oils – and Argentina recognizes it[3] -, the same cannot be said of other products still within the scope of the Chilean BPS, namely wheat and wheat flour, which were the object of the original Panel, though the PBS also affects sugar. Indeed, in Brazil's opinion, compliance with the DSB recommendations and rulings would have been achieved in regard to those two products had Chile dealt with them in the same way it did with edible vegetable oils, simply by extinguishing the Price Band System.

3. Argentina argues that the Chilean Price Band System is inconsistent, as such and as applied, with Article 4.2 of the Agreement on Agriculture; Article II:1(b) of the GATT 1994 and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization. Brazil will center its analysis on the consistency of said mechanism with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. This focus, however, should not prejudge any view Brazil may have on the other claim made by Argentina, relating to Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization.

THE APPELLATE BODY'S CONCLUSIONS

4. The Appellate Body's findings and conclusions in the original dispute could not be clearer. In regard to Article 4.2 of the Agreement on Agriculture, the Appellate Body:

- upheld 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 similar to variable import levies and minimum import prices;

- upheld 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.[4]

[1] In spite of the fact that Chile's price band system also applies to sugar, in its request for establishment of this Panel (WT/DS207/18) and throughout the original proceedings, Argentina mentioned two of the products subject to the PBS only (wheat and wheat flour).

[2] See para. 4 of Chile's first written submission.

[3] See para. 8 of Argentina's first written submission.

[4] See para. 288 of the Appellate Body Report.

5. In order to assess the consistency of Chile's Price Band System with the aforesaid article, the Panel and the Appellate Body examined the definition of "similarity". They also found necessary to identify the categories with which the system should be compared, deciding to resort to the same ones that were identified by Argentina: "variable import levies" and "minimum import prices", within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.

6. With a view to determining whether the PBS would fall under the first category of measures, "variable import levies", the Appellate Body went on to confirm that, whereas the presence of a formula causing automatic and continuous variability of the duties is a necessary condition for a particular measure to be a "variable import levy", this variability is "by no means a sufficient condition for a particular measure to be a variable import levy"[5], as meant by footnote 1. "The 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".[6]

7. Similarly, this same standard, lack of transparency and predictability, was applied by the Appellate Body in examining whether the PBS could be characterized as a "minimum import price". The Appellate Body considered "minimum import price" as referring generally to the lowest price at which imports of a certain product may enter a Member's domestic market.[7]

8. The Panel and the Appellate Body understood "lack of transparency and predictability" to mean that "no published legislation or regulation in Chile sets out which international markets are used for the calculation of the PBS values and reference price, or how the "usual import costs" which are added to the f.o.b. prices are calculated". Exporters, in this case, could "be expected to encounter serious difficulties in their commercial planning efforts in a system where weekly variations in duties are based on factors unknown. […] Such lack of predictability must affect the competitive conditions of imports *vis-à-vis* domestic production".[8]

9. Therefore, considering that the formula contained in that system resulted in:

- automatic and continuous variability of the duties and;
- lack of transparency and predictability in the level of duties resulting from the application of such measures,

the Panel and the Appellate Body concluded that the original Chilean Price Band System was a border measure similar to a variable import levy and a minimum import price, other than ordinary customs duties, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture falling under the prohibited categories of measures listed therein. The Chilean PBS was, thus, a measure of the kind which has been required to be converted into ordinary customs duties. And, "by maintaining a measure which should have been converted, Chile has acted inconsistently with Article 4.2 of the Agreement on Agriculture".[9]

THE NEW CHILEAN PRICE BAND SYSTEM

10. In order to comply with the DSB recommendations and rulings, Chile ceased to apply the price band system to edible vegetable oils. As to wheat and wheat flour, it adopted Law nr. 19.897/2003 and Decree nr. 831/2003, which would have purportedly implemented those rulings by means of:

[5] See para. 234 of the Appellate Body Report.
[6] *Id. ib*.
[7] See para. 236 of the Appellate Body Report.
[8] See para. 7.44 of the Panel Report.
[9] See para. 7.102 of the Panel Report.

- eliminating the "variability" inherent in the measures[10] and
- providing the PBS with transparency and predictability.

11. As regards "variability", Chile argues that under the new PBS the specific duty, rebate or their non-application are now established for a two-month period, without varying every week in accordance with the reference price, as was the case before. During this two-month period, the specific duty is applicable to every import transaction, with no variation and "regardless of the transaction price".[11] Furthermore, today, the specific duties, rebate or their non-application are determined by a decree of the Minister of Finance, whereas in the previous system there was no need for a legislative or an authority act to set out said duties, since they would be established and vary in an automatic and continuous manner.[12]

12. Chile contends that the twelve-month automatically and continuously variable specific duty was substituted by a specific duty that is established by decree or an act of an authority (therefore supposedly no longer automatic), which remains fixed for periods of two months. By purportedly eliminating the automatic and continuous nature of the specific duties and changing the period of validity of i) the reference price, from one week to two months[13], and ii) the bands, from one to eleven years, Chile claims to have eliminated the variability aspect of the BPS, as well its lack of transparency.

13. Even assuming, for the sake of argument, that the system is more transparent after Law nr. 19.897/2003 and Decree nr. 831/2003, transparency alone is not sufficient to render the PBS consistent with the multilateral trading rules.

14. With respect to the lack of predictability, Chile contends that the 11-year bands and the two-month specific duties may provide the exporter with the necessary predictability of the level of specific duty to be paid, considering that the duties, rebates or their non-application are established for a span long enough to afford security to the exporter.[14]

15. This is only partially true. First, because the 11-year period has the side effect of aggravating the distortion of domestic price *vis-à-vis* international ones. While such a long period may afford some predictability, the new PBS is more rigid and inflexible, given that, in practice, the Chilean market will be insulated from fluctuations in the world prices for eleven years. Should there be a significant downward movement in the international wheat prices, the 0.985 factor may not be sufficient to account for the necessary reductions in the lower and upper thresholds of the price bands. Hence, in spite of the application of the 0.985 multiplier, one of the main elements of the SBP (the bands themselves) will remain virtually unchanged for more than a decade, preventing the fluctuation of international prices from being transmitted to the Chilean market.

16. Second, the new PBS contributes to distorting the prices of imports even more, inasmuch as a new coefficient is added to the formula used to calculate the duty level. Under the previous system, if the weekly reference price fell below the lower threshold of the price band, a specific duty equal to the difference between the reference price and the lower threshold would be levied.[15] In the current system, the specific duty level is magnified by the introduction of a new unexpected multiplier consisting of 1 plus the general *ad valorem* duty in force.

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[10] See para. 92 of Chile's first written submission
[11] *Ibid.*, para. 93
[12] *Ibid.*, para. 92
[13] See para. 21 of the Appellate Body Report and para. 39 of Chile's first written submission.
[14] See para. 143 of Chile's first written submission.
[15] See para. 29 (b) iii of the Appellate Body Report.

17. As Argentina correctly points out,

> "el esquema de las bandas, con un piso y un techo en relación a un precio de referencia, sumado a un derecho específico, según la diferencia entre aquellos parámetros, se ha mantenido inalterado. Es decir, siguen existiendo los parámetros de piso y techo y la figura de los precios de referencia".[16]

18. Brazil is of the view that the changes introduced in the system by Law nr. 19.897/2003 and Decree nr. 831/2003 were cosmetic ones. They are insufficient to render the Chilean Price Band System consistent with multilateral trading rules, since the fundamental elements of the mechanism remained unchanged. The current design of the PBS aggravates the already existing disconnection between domestic from international price developments, thus impeding more rigidly the transmission of world market prices to the domestic market.

19. The revised PBS still resorts to measures expressly prohibited by the Uruguay Round Agreements as contained in Article 4.2 footnote 1 of the Agreement on Agriculture. If the system operated until 2003 as a border measure similar to a variable levy modified weekly, now it behaves as a border measure similar to a variable levy revised every two months. The reference price (defined on a weekly or two-month basis), fixed by the Minister of Finance, continues to be a border measure to some extent similar to a minimum import price acting as a substitute for the transaction value contained in the invoice.

20. The PBS, under its current structure, results in controlling prices of imports in order to meet or converge to a target price that isolates the domestic market from actual international prices. Its effect is to create the type of barrier that Article 4.2 of the Agreement on Agriculture sought to eliminate.

21. Were the Panel to confirm the insufficiency of the measures taken by Chile to comply with the DSB rulings, then it would be finding that the Chilean Price Band System continues to operate as border measure similar to a variable levy that relies on reference prices which are not allowed under Article 4.2 footnote 1 of the Agreement on Agriculture and that the present reference prices still constitute a border measure similar to minimum import prices, as set out in said article. Therefore, Chile would be maintaining measures of the kind which had been required to be converted into ordinary customs duties at the end of the Uruguay Round. And, again, by maintaining a measure which should have been converted, it would be in breach of Article 4.2 of the foregoing Agreement.

22. With a view to implementing the DSB decisions thoroughly, Chile could have treated wheat and wheat flour as it did with edible vegetable oils, putting an end once and for all to the applicability of the price band system to those products.[17]

ARGENTINA'S CLAIM UNDER ARTICLE II:1(B) OF THE GATT 1994

23. Regarding Argentina's claim with respect to Article II:1(b) of the GATT 1994, Brazil stresses that the conclusion reached by the Appellate Body – to the effect that such a claim was not properly before the original Panel – should not prevent Argentina from presenting it before this Article 21.5 Panel. As Argentina recalled,

[16] See para. 36 of Argentina's first written submission

[17] Brazil notes that the same parameters (price bands, reference prices and the multiplier [1+ *ad valorem* tariff in force]) are also applicable to sugar.

> "In carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. (…) Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU".[18]

24. In analysing Argentina's "claim" under Article II of the GATT 1994, the Appellate Body ruled on a formal matter, i.e., the difference between making a general reference to an article in the Panel request and actually developing a claim under that article. The situation would be different had the Appellate Body considered the measure itself *vis-à-vis* the above-mentioned article.

25. Considering that neither finding nor conclusion were reached with respect to the substance of Article II:1(b) itself, Brazil sees no reason why Argentina should be prevented from including that claim in its request for the establishment of Article 21.5 Panel and elaborating it as appropriate before this Panel.

26. Moreover, Brazil is of the opinion that if this Panel finds that the Chilean Price Band System remains inconsistent with Article 4.2 of the Agreement on Agriculture, then it would also conclude that such a measure constitutes "other duties or charges", within the meaning of Article II:1(b) of the GATT 1994, and should have been scheduled under the column for "other duties or charges" governed by the second sentence of Article II:1(b).

CONCLUSION

27. Brazil respectfully submits that the Panel find the Chilean Price Band System continues to be in breach of Article 4.2 of the Agreement on Agriculture and is inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

[18] See para. 41 of the Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil).*

ANNEX C

REBUTTALS FROM PARTIES

ANNEX C-1*

REBUTTAL BY ARGENTINA
(17 MAY 2006)

TABLE OF CONTENTS

* Annex C-1 contains the rebuttal by Argentina. This text was originally submitted in Spanish by Argentina.

TABLE OF REPORTS CITED

Short title	Full title and reference
Chile – Price Band System	Appellate Body Report "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products"* WT/DS207/AB/R, adopted 23 October 2002.
Chile – Price Band System	Panel Report "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products"* WT/DS207/R, adopted 23 October 2002.
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report "*United States – Import Prohibition of Certain Shrimp and Shrimp Products* – Recourse by Malaysia to Article 21.5 of the DSU", WT/DS58/AB/RW, adopted 22 October 2001.
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report "*Canada – Measures Affecting the Export of Civilian Aircraft"*. Recourse by Brazil to Article 21.5 of the DSU, WT/DS70/AB/RW, adopted 21 July 2000.
EC – Bed Linen (*Article 21.5 – India*)	Appellate Body Report "*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* – Recourse by India to Article 21.5 of the DSU", WT/DS141/AB/RW, adopted 8 April 2003.
US – Certain EC Products (Article 21.5 – EC)	Panel Report "*United States – Countervailing Measures on Certain EC Products* – Recourse by the European Communities to Article 21.5 of the DSU", WT/DS212/RW, adopted 17 August 2005.
Korea – Dairy Products	Appellate Body Report *"Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products"* WT/DS98/AB/R, adopted 14 December 1999.

A. INTRODUCTION

1. The Government of the Argentine Republic thanks the members of the Panel for enabling it to submit for their consideration its Rebuttal of the arguments put forward by the Government of Chile in its written submission of 3 May 2006 (hereinafter "Chile's First Written Submission").

2. Argentina takes this opportunity to reiterate that, as follows from its written submission of 19 April 2006 (hereinafter "Argentina's First Written Submission"), Chile has failed to implement the recommendations and rulings of the Dispute Settlement Body (DSB), and that the Price Band System (PBS) which Chile applies to imports of wheat and wheat flour, as modified by Law 19.897 and Exempt Decree No. 831/2003 (hereinafter the "amended PBS") – that is to say, the measure taken to comply – is inconsistent with the agreements concerned in this dispute.

3. **First of all**, Argentina will address Chile's claims relating to the inconsistency of the amended PBS with Article 4.2 of the *Agreement on Agriculture* (Section B).

4. In this connection, Argentina will demonstrate to the Panel that Chile is seeking to show that it has complied with the recommendations and rulings of the DSB by putting its own construction on what the DSB said. At the same time, Chile fails to show that the amended PBS is a measure consistent with the *Agreement on Agriculture*.

5. In this respect, Argentina reaffirms that, as demonstrated in its First Written Submission, the amended PBS 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*.[1]

6. Argentina reiterates that "this is because the way in which the system is designed and the way it operates in its overall nature are sufficiently similar to the characteristics of these two categories of prohibited measures as to make the amended PBS, with its particular characteristics, a 'similar border measure'".[2]

7. Thus, Argentina will make it clear to the Panel that Chile has been unable to refute that "the particular configuration and interaction of the specific characteristics of Chile's price band system generate certain market access conditions that lack transparency and predictability and disconnect the Chilean market from international price trends in a way that insulates the Chilean market from the transmission of international prices and prevents enhanced market access for imports of wheat and wheat flour", in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[3]

8. **Secondly**, Argentina will explain why the arguments relating to the factor of 1.56 applicable to wheat flour and the claim concerning the second sentence of Article II:1(b) of the GATT 1994 can and should be examined by this Panel (Section C).

9. Thus, Argentina requests the Panel to examine the arguments relating to the factor of 1.56 applicable to wheat flour inasmuch as these arguments help to show that the amended PBS is a measure inconsistent with Article 4.2 of the *Agreement on Agriculture*.

10. Moreover, Argentina requests the Panel to find that the amended PBS is in breach of the second sentence of Article II:1(b) of the GATT 1994, given that it was not recorded in the corresponding column of Chile's Schedule of concessions (No. VII) but is nevertheless being applied.

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[1] Argentina's First Written Submission, paragraph 71.
[2] Argentina's First Written Submission, paragraph 72.
[3] Argentina's First Written Submission, paragraph 73.

11. **Finally**, Argentina presents its conclusions (Section D) and requests the Panel to find that the measure taken to comply – that is to say, the amended PBS – is inconsistent, both in itself and as applied, with Article 4.2 of the *Agreement on Agriculture*, the second sentence of Article II:1(b) of the GATT 1994, and Article XVI.4 of the *Marrakesh Agreement Establishing the World Trade Organization*.

B. THE AMENDED PBS IS IN BREACH OF ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

12. In its First Written Submission, Argentina showed that the amended PBS 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*, because the way in which the system is designed and the way it operates in its overall nature are sufficiently similar to the characteristics of these two categories of prohibited measures as to make the amended PBS, with its particular characteristics, a "similar border measure".[4]

13. Argentina has shown, on the basis of evidence, that the amended PBS causes insulation from the international market by disconnecting the Chilean market from the transmission of international prices and impeding enhanced access to the Chilean market for imports of wheat and wheat flour, and that it is neither transparent nor predictable as only ordinary customs duties can be.[5]

14. In its First Written Submission, Chile fails to refute any of the claims and evidence put forward by Argentina. Below, Argentina presents its analysis of the defence offered by Chile, seeking to organize Chile's arguments according to how they presumably should correspond to the Argentine claims.

1. Scope of the present proceedings under Article 21.5 of the DSU

15. Chile devotes an entire section to an attempt to "demonstrate" that the changes introduced by Law 19.897 and its Regulations reflect the findings and conclusions of the Appellate Body. Thus, Chile claims to have complied with the recommendations and rulings of the Dispute Settlement Body.[6]

16. However, the changes made to the Price Band System do not make it consistent with Article 4.2 of the *Agreement on Agriculture* and consequently Chile has not implemented the recommendations and rulings of the Dispute Settlement Body.

17. Argentina cannot agree with Chile's contention that:

> "… The recommendations and rulings are therefore those which establish not only the framework of compliance, but also the framework for possible Article 21.5 compliance review proceedings …"[7]

18. This is incorrect. In a compliance review proceeding under Article 21.5 of the DSU it is not simply a question of whether the Member has complied with the recommendations of the DSB. It is also a question of whether the measures taken to comply are consistent with the covered agreements.

[4] Argentina's First Written Submission, Section C.I.
[5] Argentina's First Written Submission, Sections C.I.2 and C.I.3.
[6] Chile's First Written Submission, Section IV.
[7] Chile's First Written Submission, paragraph 77.

19. This was established by the Appellate Body when it held that panels established under Article 21.5 of the DSU are not merely called upon to assess whether "measures taken to comply" implement specific "recommendations and rulings" adopted by the DSB in the original dispute but, "more frequently" should assess the "*consistency with a covered agreement*" of the implementing measures:

> "We addressed the function and scope of Article 21.5 proceedings for the first time in *Canada – Aircraft (Article 21.5 – Brazil)*. There, we found that Article 21.5 panels are not merely called upon to assess whether 'measures taken to comply' implement specific 'recommendations and rulings' adopted by the DSB in the original dispute. We explained there that the mandate of Article 21.5 panels is to examine either the 'existence' of 'measures taken to comply' or, more frequently, the '*consistency with a covered agreement'* of implementing measures …"[8]

20. Moreover, Chile misinterprets the findings and conclusions of the Panel and the Appellate Body when it suggests that there were only "specific aspects" of the PBS that had to be brought into conformity.[9]

21. Chile disregards the fact that, as follows from a simple reading of the recommendations and rulings in the reports of both the Panel and the Appellate Body adopted by the DSB, its obligation was to bring its inconsistent Price Band System into conformity with the *Agreement on Agriculture*.

22. Thus, the Panel stated that:

> "We recommend that the Dispute Settlement Body request Chile to bring its PBS into conformity with its obligations under the Agreement on Agriculture".[10] (Underlining added).

23. In its turn, 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".[11] (Underlining added)

24. Thus, it is clear that in these – as in the original – proceedings the various components of the PBS are not being called into question in isolation, but rather that the issue before the DSB is – and was – the system as a whole, the system as such.

25. In its First Written Submission, Argentina examined the various components of the amended PBS in order demonstrate analytically and mathematically that, in structure and design, the modified system is a measure similar to a variable import levy or a minimum import price, that is to say, a measure of the kind that has been required to be converted into ordinary customs duties. It is the combination of these components that makes it a measure inconsistent in its totality with Article 4.2 of the *Agreement on Agriculture*.

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[8] *EC – Bed Linen (Article 21:5 – India)*, Appellate Body Report, paragraph 79 (footnotes omitted).
[9] Chile's First Written Submission, paragraph 88.
[10] *Chile – Price Band System*, Panel Report, paragraph 8.3.
[11] *Chile – Price Band System*, Appellate Body Report, paragraph 289.

26. The same analysis was made by the Appellate Body in the original proceedings in arriving at the conclusion that the original PBS was inconsistent with Article 4.2 of the *Agreement on Agriculture*:

> "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 …
>
> 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*".[12]

27. In the rest of this Section B, Argentina will consider Chile's claims and show that Chile has failed to refute the arguments and evidence submitted by Argentina to the effect that the amended PBS causes insulation from the international market, is not transparent or predictable, and is a border measure similar to a variable import levy and a minimum import price. Finally, Argentina will show that, contrary to what Chile claims, the amended PBS has not produced any improvement in the conditions of access to the Chilean market.

2. The amended PBS causes insulation from the international market

> "… [T]oday … the duties or rebates assessed are valid for two months (i.e., six times a year), and during that period are completely disconnected from what may occur in the reference, or any other, markets… In other words, the duty or rebate, or its non-applicability, is determined independently of the commercial transaction prices …"[13]

28. Argentina has shown that the amended PBS causes insulation from the international market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[14]

29. Chile maintains that, according to the Appellate Body, insulation may result from a lack of transparency and predictability, but does not constitute a feature challengeable as such that could, on its own, lead to a finding of inconsistency.[15]

30. Once again, Chile fails to understand the findings of the Appellate Body.

31. According to the Appellate Body, the distortion of the transmission of world market prices *is* a feature challengeable as such. This is shown in various passages of its report where the Appellate Body specifically examines the way in which the original PBS insulated the Chilean market from world market price developments.[16]

32. Moreover, it is especially clear from its conclusions, where the Appellate Body finds that the insulation and lack of transparency and predictability are separate and cumulative violations of the PBS.

33. In this connection, in the paragraph already cited by Argentina, the Appellate Body stated:

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[12] *Chile – Price Band System*, Appellate Body Report, paragraphs 261 and 262.
[13] Chile's First Written Submission, paragraphs 180 and 181.
[14] Argentina's First Written Submission, Section C.2.
[15] Chile's First Written Submission, paragraph 100.
[16] *Chile – Price Band System*, Appellate Body Report, paragraphs 250 and 251, inter alia.

> "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."[17]

34. In short, the insulation from international markets caused by the amended PBS is a feature that gives rise to an inconsistency on its own.

2.1 The amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor[18]

35. In an attempt to discredit the evidence submitted by Argentina in support of its claim that the amended PBS tends to "overcompensate" for the effect of decreases in international prices on Chile's domestic market when the reference prices are set below the price band floor, Chile argues that the reference to the overcompensating effect of the PBS is wrong and overcompensation cannot, on its own, be inconsistent with Article 4.2 of the *Agreement on Agriculture*.[19] It then adds that these references do not form part of the conclusions:

> "The references cited by Argentina, in particular paragraph 260 of the Appellate Body's Report, are out of context and do not correspond to the reasoning followed by the Appellate Body, and are hence not part of its conclusions. They are actually part of the Appellate Body's analysis of whether the Panel took 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."[20]
>
> (footnote: Paragraph 253 of the Appellate Body Report)

36. Chile's argument is very odd and without foundation.

37. **First of all**, contrary to what Chile says, paragraph 260 of the Appellate Body Report is an integral part of its conclusions. This follows from its place in that report. In fact, paragraph 260 summarizes the findings relating to Article 4.2 of the *Agreement on Agriculture*, and the whole of Section VIII.B of the report relating to "Assessment of Chile's Price Band System in the Light of Article 4.2 and Footnote 1" ends no more than two paragraphs after paragraph 260, with the upholding of the Panel's finding in paragraph 262.

38. **Secondly**, Chile appears not to have read paragraph 261, that is, the paragraph immediately following paragraph 260. That paragraph begins as follows:

> "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." (Underlining added)

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[17] *Chile – Price Band System*, Appellate Body Report, paragraph 261 (underlining added).
[18] Argentina's First Written Submission, Section C.I.2.2.
[19] Chile's First Written Submission, paragraph 165.
[20] Chile's First Written Submission, paragraph 166.

39. Clearly, the words "conclusion" and "these specific features" can only refer to paragraph 260. If they did not, then the beginning of paragraph 261 would not make sense. Therefore, contrary to what Chile maintains, the overcompensation constitutes, on its own, a violation of Article 4.2 of the *Agreement on Agriculture*.

40. **Furthermore**, Chile seeks to discredit the Argentine argument by trying to explain that after the entire panel proceeding and the appeal proceeding – during which Chile had ample opportunity to explain the operation of the PBS – the Appellate Body misconstrued how the PBS operated.[21] There have not been many instances in the history of the WTO dispute settlement system of a Member alleging, as a defence, that the Appellate Body erred in its analysis. If this was the case, then Chile probably failed to explain the operation of the original PBS correctly or simply did not understand its own measure.

41. Chile bases its argument on the fact that the band floor and ceiling and the reference price are expressed at the same market level. As Argentina will show, the floor and ceiling prices are not FOB prices, despite the fact that the law and the decree say that they are. They are two figures chosen arbitrarily and without the use of any criterion. They could be CIF, FOB or ex-works. It is simply not known and there is no way of knowing, unless Chile were to make more **transparent** its reasons for setting the floor and ceiling of the band at US$128 and US$148 per tonne, respectively.

42. This is shown by the fact that the FOB price for Argentine bread wheat has been both higher and lower than these two prices. One need do no more than note the reference prices (based on the average FOB prices for bread wheat, Argentine port) established by Chile over the period of implementation of the PBS. For example, between 16 of April and 15 June 2004, the reference price was US$165 per tonne, and between 16 February and 15 April 2005 US$108.64 per tonne. Chile must have been aware of this since the figures were its own official data (ODEPA).[22]

43. **In short**, Argentina has shown, on the basis of evidence, that the amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor. This is clear from the analysis made by Argentina in Section C.I.2.2 of its First Written Submission, which includes actual examples of the overcompensation produced by the amended PBS. Chile has been unable to refute any of the Argentine arguments.

2.2 The amended PBS 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

44. Chile seeks to show that, as a consequence of the PBS, Chilean import prices for wheat and wheat flour follow a pattern similar to that of the FOB price and that, therefore, there is no insulation from the international market. Chile argues that, being established for a "sufficiently long" period of time, the specific duties of the amended PBS allow international price variations to be transmitted to the price of wheat:

> "If the objective was to maintain a price level, the alteration would imply a permanent change in relative prices in order to prevent domestic market conditions from varying (price level) in the event of a change in external or import prices prior to entry. Conversely, if the duties ensure that relative prices remain stable, this means that the border measure allows external variations to be transmitted to the domestic market,

[21] Chile's First Written Submission, paragraph 169.
[22] See Exhibit ARG-6.

> albeit to a different extent. That is to say, if international prices rise so do domestic prices, and if the former decline, so will the latter.
>
> In Chile today, the mere fact that the duties and rebates, or the non-application thereof, are established for a sufficiently long period of time provides certainty that any variations in international prices that may occur over this period will be transmitted to domestic wheat prices.
>
> Thus, the conclusion is that, if the floor price is not a minimum price, if the specific duties and their method of application do not continuously entail import price corrections and if import prices, as Argentina shows in Exhibits ARG-11 and ARG-12, follow a pattern similar to that of the f.o.b. price of wheat, Chile's wheat import duties – even if they do undergo variations – do not constitute a variable duty within the meaning of Article 4.2 of the Agreement on Agriculture."[23]

45. It is worth noting that Chile makes special reference to Exhibits ARG-11 and ARG-12, since it is precisely these exhibits that clearly show how Chile's statement that "import prices... follow a pattern similar to that of the f.o.b. price of wheat"[24] is without foundation.

46. Exhibits ARG-11 and ARG-12 contain a table and a chart, respectively, which show what happened, in the case of wheat, with the imposition of specific duties as from 16 December 2004. They show how – at the same time as FOB prices, Argentine port, were falling – the Chilean entry price, with the imposition of specific duties, rose substantially, thereby demonstrating a total disconnection from international price developments.

47. From 1 December 2004 the FOB price of bread wheat, Argentine port, fell steadily, a trend which was to be maintained until approximately 4 January 2005. Specifically, the initial FOB price on 1 December was US$119 per tonne, whereas at the end of the trend, on 4 January 2005, the price stood at US$109 per tonne.

48. If we consider the trend in the Chilean entry price as a consequence of the operation of the PBS, we observe the exact opposite: the entry price rose. In fact, from 1 December the Chilean entry price for Argentine bread wheat was tending to fall which, since the band was not active, reflected the falling trend in FOB prices, Argentine port. However, when the band was activated on 16 December 2004 and specific duties were imposed, the Chilean entry price rose suddenly from US$149.94 per tonne to approximately US$162.93 per tonne. This happened as a result of the operation of the amended PBS itself and the imposition of specific duties.

49. Moreover, on 16 February 2005 Chile established a new reference price below the band floor and lower than that in force during the previous two-month period. Therefore specific duties higher than during the previous period were imposed. On the basis of the FOB price for bread wheat, Argentine port, corresponding to a shipment arriving in Chile on 15 February, the reference price for that date (and the two previous months) was US$114.50 per tonne. The Chilean entry price on that date, when specific duties of US$14.30 were imposed, was US$153.81 per tonne.

50. On the next day, 16 February 2005, Chile established a new reference price at US$108.64 per tonne, 5.12 per cent less than the previous figure. However, the FOB price for Argentine bread wheat did not change and, therefore, neither did the CIF value. Nonetheless, when the specific duties resulting from the PBS were applied, the Chilean entry price rose from US$153.81 to US$160.01 per tonne.

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[23] Chile's First Written Submission, paragraphs 142 to 144.
[24] Chile's First Written Submission, paragraph 144.

51. In conclusion, it is clear from Exhibits ARG-11 and ARG-12 that, contrary to the Chilean claims, the import prices for wheat do not follow a pattern similar to that of the FOB price of wheat. In particular, on 16 December 2004, the entry price rose whereas the FOB price *fell*, and on 16 February 2005, whereas the FOB price remained steady, the entry price *increased.* However much Chile would have the Panel believe the opposite, the natural tendency of the amended PBS is to move in the opposite direction to international price trends. And it could not be otherwise since the PBS *would make no sense* if that were not its purpose.

52. If Chile wanted import prices to follow the same pattern as FOB prices, it need only apply an *ordinary customs duty*. Chile knows this, but Chile *does not apply* an ordinary customs duty precisely in order *to avoid* the effects of ordinary customs duties and be able to insulate the Chilean market from international market developments. It is pure logic.

53. In this connection, it is astonishing that Chile should assert that the duties resulting from the PBS are unaffected by changes in world prices:

> "... the duty or rebate, or the non-application thereof, operates in such a way as to allow the transmission of international price variations to the domestic market. That is to say, once the duty has been fixed, traders can capture the benefits of decreases in international prices, because changes in world prices do not affect the duty that they are required to pay."[25] (Underlining added)

54. Chile's description of its amended PBS is simply wrong. The specific duties remain unchanged only during the two months stipulated in Decree 831/2003. At the end of these two months, the specific duty will necessarily change because the reference price will have changed. Whenever, while situated below the band floor, the prices on the markets of concern (Argentine bread wheat or Soft Red Winter No. 2, Gulf of Mexico) vary, the specific duty applied will necessarily change. That is to say, as the FOB prices on the two markets of concern *fall* the specific duty will *increase*.

55. As Argentina explained in its previous submission, this is a simple mathematical conclusion that follows from the PBS formula, according to which:

Specific duty[26]	= (	Band floor price	-	Reference price	) * (	1 +	General *ad valorem* tariff in force, Customs Tariff	)
	= (	US$128	-	Reference price	) * (	1 +	6%	)

56. Moreover, this can be seen from the ODEPA data themselves.[27] As the reference prices varied due to changes in the prices on the markets of concern, the specific duties changed.

57. Chile attempts to show that because the duties remain the same for two months, international prices are transmitted. However, there is no such transmission. The duty established for two months has an inherent defect: it is the product of an initial disconnection which arises on the first day of the period (for example, 16 December 2004). To this initial disconnection there must be added the disconnection that *inevitably* occurs at the end of these two months (for example, 16 February 2005), when a new reference price and the resulting specific duty are established. This was demonstrated by Argentina in Sections C.2.2 and C.2.4 of its submission.

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[25] Chile's First Written Submission, paragraph 152.
[26] In accordance with Article 14 of Dec. 831/2003. See Exhibit ARG-2.
[27] See Exhibit ARG- 6, in particular the periods 16/Dec/04 – 15/Feb/05 and 16/Feb/05 – 15/Apr/05.

58. It is paradoxical that what Chile refers to as a feature of the amended PBS that helps to transmit international price developments (i.e., the fact that the duty is unaffected by international price changes during the two-month period) is precisely a feature that insulates the Chilean market from international prices.

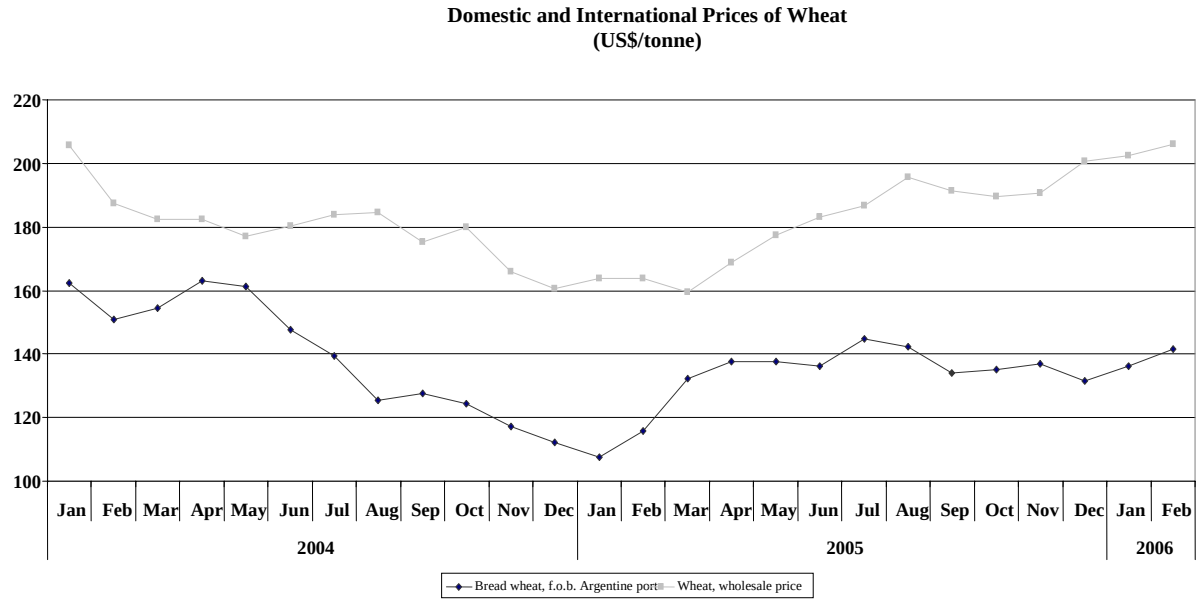
59. In fact, the specific duties do not vary for two months because, as Chile accepts without discussion, "the duty applies on all import transactions, without the slightest variation and regardless of the amount of the transaction."[28]

60. As the Appellate Body held with respect to the original PBS, "[t]he Reference Price used in the context of the Chilean PBS is clearly disconnected from the actual transaction value... " [29], and as Argentina explained in its submission and Chile confirmed, this statement is fully applicable to the amended PBS.[30]

61. Moreover, in an attempt to demonstrate "the connection of Chilean wheat prices to the international grain market",[31] Chile submits a graph (unnumbered) supposedly derived from the values provided by Argentina in Exhibit ARG-11 which form the basis of the chart that Argentina attached as Exhibit ARG-12.

62. According to Chile:

> "The graph below shows the trends in Chilean wheat prices and in f.o.b. prices of Argentine bread wheat from January 2004 to February 2006. The price curves indicate that, first, Chilean wheat prices have varied and, second, the variation is very similar to that of export prices of Argentine wheat, confirming the connection of Chilean wheat prices to the international grain market.



[28] Chile's First Written Submission, paragraph 93.
[29] *Chile – Price Band System*, Appellate Body Report, paragraph 248.
[30] Argentina's First Written Submission, paragraphs 220 to 223.
[31] Chile's First Written Submission, paragraph 154.

> This graph is an exact illustration of the points made by Argentina in Exhibit ARG-11, with the series of f.o.b., c.i.f. and c.i.f.-plus-duties prices, and in Exhibit ARG-12, which shows the prices in graph form. What clearly emerges is that the entry price of wheat exhibits the same behaviour as its f.o.b. price, which demonstrates price transmission and therefore the connection between the Chilean and the international market."[32]

63. There are several flaws in Chile's reasoning.

64. **Firstly**, contrary to what Chile claims, this graph cannot be "an exact illustration of the points made by Argentina in Exhibit ARG-11". The Chilean graph is based on monthly (apparently average) prices, whereas Exhibit ARG-11 is based on *daily* prices. Therefore, the Chilean graph is a reworking (recalculation) of information ostensibly provided by Argentina.

65. Secondly, Exhibit ARG-12, contrary to what Chile maintains, does not plot all the prices in Exhibit ARG-11, but merely reproduces a graph based on prices calculated for the period extending from 1 November 2004 to 29 April 2005, i.e., a period much shorter than the total period of implementation of the amended PBS, within which specific duties were applied.

66. Therefore, the Chilean graph does not represent only the periods in which the bands were activated, or the periods relevant for the analysis, but the trend in FOB prices for Argentine bread wheat and the Chilean entry price from December 2003 to February 2006. In fact, as follows from Exhibit ARG-6, specific duties were applied between December 2004 and April 2005, due to the prices recorded by wheat on the markets of concern from the entry into force of the amended PBS.[33] This is the relevant period for observing the behaviour of the amended PBS. As distinct from the Chilean graph, Exhibit ARG-12 plots only the period of application of specific duties.

67. As regards what Chile seeks to show, the evidence provided by Chile itself demonstrates the disconnection between the entry price and the FOB price that arises when the specific duties are activated.

68. A careful study of the graph submitted by Chile reveals that during the period of application of specific duties, the entry price follows a trajectory opposite to that of the FOB price in at least three of the four periods of concern in which specific duties are applied.

69. According to the Chilean graph:

- Between December 2004 and January 2005, the FOB price fell while the entry price rose;
- between January and February 2005, the FOB price rose while the entry price remained stable;
- between February and March 2005, the FOB price rose while the entry price fell.

70. Moreover, in March and April 2005, the entry price rose more than proportionally relative to the FOB price, that is to say, increased more steeply.

71. If, moreover, we consult the chart in Exhibit ARG-12 and the table in Exhibit ARG-11 to see what happens to the entry price on 16 December 2004 and 16 February 2005, we observe that as a

[32] Chile's First Written Submission, paragraphs 154 and 155.
[33] Rebates were also applied from December 2003 to August 2004.

consequence of the specific duties resulting from the amended PBS the Chilean entry price for wheat does not vary in the same way as the FOB price for the same product.[34]

72. In short, both from the evidence submitted by Chile itself and from that provided by Argentina it is clear that, while the specific duties were being activated during the periods in question the Chilean entry price was never "very similar" to the variation of the FOB price as Chile claims and, in at least three of the four periods, the entry price varied in the **opposite direction** to the FOB price.

73. To this there should be added the overcompensation effectively produced and the fact that the amended PBS 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, the cogency of both these arguments having been demonstrated in the corresponding sections, charts and tables.[35]

2.3 The floor and ceiling of the amended PBS insulate Chile's market from international price developments and are not transparent, having been determined once only for the entire period extending from 16 December 2003 to 15 December 2014 and having been established as from 2007 on the basis of fixed coefficients

74. Chile's confirmation that the reduction in floor and ceiling prices was scheduled "irrespective of international price levels" is enlightening:

> "The scheduled reduction of the floor and ceiling prices is a scenario under which, irrespective of international price levels, the amount of the specific duties will increasingly diminish compared to those currently being established, just as the probability of duties actually being assessed will increasingly diminish."[36] (Underlining added)

75. Thus, Chile confirms the Argentine claim to the effect that the amended PBS "…impedes even more the transmission of international price developments to the domestic market…since the floor and ceiling prices of Chile's price bands no longer vary with either world market prices or historical prices…"[37]

76. Chile maintains that given the way in which the bands are established in the amended PBS "Chile has … taken due account of the observations made by the Appellate Body". According to Chile:

> "With the entry into force of Law No. 19.897, Chile abolished the calculation formula that included discarding the highest 25 per cent as well as the lowest 25 per cent of world prices over the past five years, while maintaining the values in effect in 2003 until 2007, gradually reducing the level of protection from 2007 onwards and culminating with the application of duties or rebates in 2014.
>
> Pursuant to this Law, all prices are set as f.o.b., meaning that today there is no price or value that converts an f.o.b. price to a c.i.f. basis, and it is no longer necessary to add 'import costs', which makes the system a great deal more transparent.

[34] Argentina's First Written Submission, Section C.I.2.4.
[35] Argentina's First Written Submission, Section C.I.2.2.
[36] Chile's First Written Submission, paragraph 186.
[37] Argentina's First Written Submission, paragraph 190.

Chile has thus taken due account of the observations made by the Appellate Body."[38]

77. At the very least, Chile's argument is hard to follow. Chile claims that the Panel accepts that because Chile established the band floor and ceiling *without the use of any criterion* in fixed form from 2003 to 2014, adjusting both parameters by means of a fixed coefficient (0.985) the basis for calculating which Chile *is unable to explain*, Chile "has…taken due account of the observations made by the Appellate Body". The way in which Chile established the floor and ceiling of the band is not transparent. The fact that the floor and ceiling prices of the band feature in Decree 831/2003 does not mean that they were established transparently or justifiably.

78. Thus, Chile is simply evading the substance of the issue raised by Argentina, that is to say, that the floor and ceiling of the amended PBS insulate Chile's market from international price developments and are not transparent, having been determined once only for the entire period extending from 16 December 2003 to 15 December 2014 and having been established as from 2007 on the basis of fixed coefficients. Chile has not said how it calculated the factor of 0.985 or explained the basis for it in the legislation establishing the amended PBS. Moreover, nowhere in its submission does Chile address these issues.

79. The way in which the floor and ceiling are established in the amended PBS has transformed the PBS into a more rigid and inflexible system. As Brazil points out:

> "… the 11-year period has the side effect of aggravating the distortion of domestic price vis-à-vis international ones. While such a long period may afford some predictability, the new PBS is more rigid and inflexible, given that, in practice, the Chilean market will be insulated from fluctuations in the world prices for eleven years. Should there be a significant downward movement in the international wheat prices, the 0.985 factor may not be sufficient to account for the necessary reductions in the lower and upper thresholds of the price bands. Hence, in spite of the application of the 0.985 multiplier, one of the main elements of the PBS (the bands themselves) will remain virtually unchanged for more than a decade, preventing the fluctuation of international prices from being transmitted to the Chilean market."[39]

80. Furthermore, in Section C.I.2.5 Argentina explained how the floor and ceiling of the amended PBS insulate Chile's market from international price developments and are not transparent. Argentina cites those arguments as Chile has not rebutted any of the claims raised therein.

2.4 The reference prices insulate Chile's market from international price developments by remaining unchanged for two months, by being established on the basis of the average of the daily prices recorded on only two predetermined markets and in being unrelated to the transaction price

81. In paragraph 117 of its submission, Chile argues that the reference prices of the amended PBS do not impede the transmission of international price developments to the domestic market since it is not "possible to inflate or increase the amount of the specific duties":

> "... as a result of the changes introduced in 2003 all values used are expressed in f.o.b. terms, that is, the reference prices are not converted to a c.i.f. basis. Thus, at no stage is it possible to inflate or increase the amount of the specific duties, so the

[38] Chile's First Written Submission, paragraphs 108 to 110.

[39] *Chile – Price Band System* … Recourse to Article 21.5 of the DSU, Third Party Submission by Brazil, paragraph 15.

> transmission of international price developments to the domestic market is not impeded as the Appellate Body asserts."

82. However, Chile appears not to have read Argentina's arguments in which it is shown that in remaining unchanged for two months, in being established on the basis of the average of the daily prices recorded on only two predetermined markets and in being unrelated to the transaction price, the reference prices insulate Chile's market from international price developments.[40] The corresponding Argentine arguments hold true *regardless* of whether or not the reference prices are converted to a CIF basis.

83. Also in relation to the changes introduced into the reference prices of the amended PBS, in paragraph 180 Chile seeks to argue that there cannot be overcompensation and that "the objective is not to maintain a parity price" [*sic*], simply because duties are now assessed six times a year rather than 52 times a year as in the original PBS:

> "A further point which demonstrates that there cannot be overcompensation and that the objective is not to maintain a parity price is that today – unlike under the former PBS when duties were assessed once a week (i.e. 52 times a year) – the duties or rebates assessed are valid for two months (i.e. six a year), and during that period are completely disconnected from what may occur in the reference, or any other, markets."

84. The argument speaks for itself: Chile says that now the PBS is not "so" inconsistent as before. Now the PBS is inconsistent "only" 6 times a year. There is no basis for this in the WTO Agreements or, more particularly, in the DSU or the *Agreement on Agriculture*.

85. A measure taken to comply is not "less" inconsistent because it is applied on fewer occasions than the original measure. There is no basis for making a claim of this kind.

86. In particular, the last part of the paragraph cited "... the duties or rebates assessed are valid for two months (i.e. six a year), and during that period are completely disconnected from what may occur in the reference, or any other, markets", simply verifies and confirms what Argentina maintained in its First Written Submission, namely, that under the "new" PBS the reference prices used to calculate the specific duty for wheat and wheat flour are set 6 times a year, that is, with a period of validity of 2 months during which the transmission of world market prices is disconnected.[41]

87. In its First Written Submission, Argentina offered evidence of this disconnection, which Chile now confirms, illustrating the development of the reference prices and the prices for wheat f.o.b. Argentine port and f.o.b. Gulf of Mexico, respectively, during the period of implementation of the amended PBS and clearly showing, for each period, the disconnection produced.[42] The reference prices insulate Chile's market from international price developments.

88. **In conclusion**, as will be clear to the Panel, Chile has also been unable to refute the arguments and evidence put forward by Argentina in Section C.I.2.6 in confirmation of the fact that the amended PBS causes insulation from the international market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

[40] Argentina's First Written Submission, Section C.I.2.6.
[41] Argentina's First Written Submission, paragraph 206.
[42] Argentina's First Written Submission, paragraph 208 and Exhibits ARG-15, 16, 17 and 18.

3. The amended PBS is neither transparent nor predictable

89. With respect to the requirement that the amended PBS be transparent and predictable, Chile completely distorts Argentina's position and makes its own reading of the Appellate Body and Panel reports adopted by the DSB.

90. Chile maintains that:

> "... to allow Argentina's argument that the conclusions of the Appellate Body are to be interpreted in a broad and comprehensive manner would give rise to generic and unspecific obligations and create uncertainty for Chile as to what it was required to do within the reasonable period of time and expose it to censure for failing to take measures which it was unaware it was required to adopt."[43]

91. Chile's interpretation of the Argentine position is simply wrong. Nowhere in its submission does Argentina maintain that "the conclusions of the Appellate Body are to be interpreted in a broad and comprehensive manner [that] would give rise to generic and unspecific obligations". In fact, Chile is unable to cite a single such paragraph in the Argentine submission because there are none.

92. In offering the only example that it can find of the alleged Argentine position, Chile misreads paragraph 201 of Argentina's First Written Submission, maintaining that:

> "[I]n paragraph 200 of its First Written Submission, Argentina transcribes two paragraphs of the Appellate Body report (234 and 247) which, in its opinion, constitute grounds for claiming that any lack of transparency leads to the conclusion that the PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*."
>
> (Original footnote: First Written Submission by the Argentine Republic, paragraph 201).[44]

93. Once again, Chile's claim with respect to the alleged Argentine position is mistaken.

94. **First of all**, nowhere in its submission does Argentina claim that paragraphs 234 and 247 of the Appellate Body Report would serve as a basis for alleging that any lack of transparency leads to the conclusion that the PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*. Once again, Chile is unable to indicate the relevant paragraph of Argentina's submission in which this claim might be found, because there is no such paragraph.

95. **Secondly**, paragraphs 200 and 201 of Argentina's submission do not interpret the conclusions of the Appellate Body in a broad and comprehensive manner, as Chile maintains.

96. In those paragraphs Argentina stated that:

> "200. The Appellate Body noted how the way in which the bands were established in the original PBS was inconsistent with Article 4.2 of the *Agreement on Agriculture*:
>
> > '... This lack of transparency and…predictability are liable to restrict the volume of imports... This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding

[43] Chile's First Written Submission, paragraph 78.
[44] Chile's First Written Submission, paragraph 81.

> the transmission of international prices to the domestic market (Appellate Body Report, paragraph 234)'
>
> ...
>
> '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 … is determined (emphasis added). (Appellate Body Report, paragraph 247)'.

201. Clearly, by not explaining the origin of the factor of 0.985 or the reasons for choosing it, Chile has failed to satisfy the established transparency requirements. As the Appellate Body pointed out, the lack of transparency prevents enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4 of the *Agreement on Agriculture* (footnote: Appellate Body Report, paragraph 258)."

97. Chile is particularly interested in paragraph 247, in connection with which it notes that:

> "… Argentina omits the phrase 'the reference price' from its transcription of paragraph 247. What is the significance of that phrase? It limits the issue the Appellate Body takes in the following paragraphs with the lack of transparency and predictability to that particular aspect of the PBS in force at that time".[45]

98. Chile appears to overlook the part of the paragraph which Chile itself transcribes. Chile itself points out that:

> "… paragraph 247 [of the Appellate Body Report]…begins by stating that 'In addition to the lack of transparency and the lack of predictability that are inherent in how Chile's price bands are established,... ' necessarily refers to the conversion to a c.i.f. basis, plus import costs, of f.o.b. prices and to the fact that there was no legislation or regulation indicating how to calculate those import costs."[46]

99. That is to say, paragraph 247 begins by referring to the lack of transparency and predictability of the way in which the price bands (i.e., the floor and ceiling) were established, as explained in paragraph 246 of the Appellate Body Report. When paragraphs 246 and 247 are read in conjunction it is clear that in this passage the Appellate Body was referring to the way in which the price bands (i.e., the floor and ceiling) were established. Starting from paragraph 247, the Appellate Body *begins* to refer to the lack of transparency and predictability of the reference prices. But in paragraph 246 and at the beginning of 247 it refers specifically to the lack of transparency and predictability in the way in which the bands (i.e., the floor and ceiling) are established.

100. Paragraph 200 of Argentina's First Written Submission forms part of Section C.I.2.5(b) which is entitled "The floor and ceiling of the amended PBS insulate the Chilean market from international price developments and are non-transparent insofar as from 2007 they will be established on the basis of fixed coefficients", that is to say, it refers, *inter alia*, to the lack of transparency of the floor and ceiling of the amended PBS, which are nothing other than the floor and ceiling of the *bands*.

[45] Chile's First Written Submission, paragraph 85.
[46] Chile's First Written Submission, paragraph 84.

101. In paragraphs 199 to 201 Argentina explains why the way in which the bands (i.e., the floor and ceiling) are established is non-transparent, namely, because of the failure to explain in the legislation either the origin of the method or the reasons for choosing the factor of 0.985 by which the floor and ceiling of the band are to be multiplied from 2007.

102. Thus, there can be no doubt that Argentina is applying the findings of the Appellate Body with respect to the transparency and predictability of the floor and ceiling of the original PBS to the way in which those parameters are established in the amended PBS.

103. Finally, the Appellate Body's conclusions have not been interpreted "in a broad and comprehensive manner", as Chile would have the Panel believe. Argentina has interpreted those conclusions fairly.

104. As Argentina has already pointed out, what Chile is seeking to do is simply to avoid addressing the substance of the issue raised by Argentina, that is to say, that the floor and ceiling of the amended PBS insulate Chile's market from international price developments and are non-transparent, having been determined once only for the entire period extending from 16 December 2003 to 15 December 2014 and having been established as from 2007 on the basis of fixed coefficients. As the Panel will have been able to confirm, Chile has explained neither how the factor of 0.985 was calculated nor what basis there is for it in the legislation that established the amended PBS.

105. In relation to the Argentine claim that the amended PBS is neither transparent nor predictable, in paragraph 114 of its submission Chile *acknowledges* that, thanks to the change in price, the importer (and hence the exporter) does not know in advance the amount of the specific duties payable:

> "With the entry into force of Law No. 19.897, the reference price ceased to constitute one of the elements needed by importers to ascertain the amount of duty payable upon import." (Underlining added)

106. This merely confirms what Argentina previously demonstrated in Section C.I.3.2, namely, that both in the old and in the new PBS, the exporter cannot reasonably predict what the amount of the specific duties will be.

107. In paragraph 115, Chile maintains that, given the choice of markets of concern in the amended PBS (Argentine bread wheat and Soft Red Winter No. 2), the reference prices are now more transparent. Chile reasons as follows:

> "Today, the mechanism for calculating the reference price is set forth in the Regulations, as are the most relevant markets to be considered. The Regulations stipulate that the most relevant markets are '*Argentine bread wheat*' for the period 16 December to 15 June of the following year and '*Soft Red Winter No. 2*' wheat for the period 16 June to 15 December. The reference price will correspond to the average daily prices recorded in those markets (f.o.b., Argentine port and f.o.b., Gulf of Mexico port, respectively) over a period of 15 days counted back from the 10th day of the month in which the relevant decree is published. Chile has therefore taken due account of the Appellate Body's observation."

108. Argentina has explained how the way in which the markets of concern were established is non-transparent. Once again, the fact that the decree specifies the markets of concern and says how

the reference prices are to be calculated does not mean that their establishment is transparent. Chile has not explained how or on what basis the markets and quantities of concern were selected.[47]

109. Likewise, the fact that the system – in Chile's words – may have become "more transparent" because "…pursuant to this Law (19.897), all prices are set as f.o.b.…"[48] (which, as Argentina has already explained, is not the case) does not make the amended PBS a measure consistent with Article 4.2 of the *Agreement on Agriculture*.

110. Moreover, Chile transcribes paragraph 258 of the Appellate Body Report and states:

> "... Argentina itself recognizes that the lack of transparency is not general, but pertains to certain characteristics, and the Appellate Body confirms that only specific characteristics of the PBS are concerned."[49]

111. Let us take a look then at the specific characteristics to which the Appellate Body referred in its report.

112. First of all, the Appellate Body noted that the Panel, in paragraphs 7.44 and 7.61 of its report, had described Chile's price band system as having an "intrinsically unstable, intransparent and unpredictable nature …" and "a considerable lack of transparency and unpredictability".[50]

113. The Panel's observations and findings in these paragraphs were not questioned by the Appellate Body and were adopted by the DSB.

114. Now let us see what "specific characteristics" the Panel was referring to in these paragraphs.

115. The Panel held that "several crucial stages of the operation of the Chilean PBS" were characterized by a considerable lack of transparency and predictability.[51] That is more comprehensive than the specific features to which Chile refers in its submission. Among these crucial stages the Panel mentions:

- How the reference price was arrived at;
- how the PBS values (i.e., the band floor and ceiling) were arrived at;
- how the "usual import costs" added to the f.o.b. prices were calculated.

116. The Appellate Body referred to the lack of transparency and predictability in the following aspects of the PBS:

- The way in which the price bands are established in Chile (paragraphs 246 and 247);
- the way in which the reference prices are determined (paragraph 247);
- the fluctuation of the duties resulting from Chile's price band system (paragraph 259).

117. **In conclusion**, contrary to what Chile claims in paragraphs 66 and 85 of its submission, the Panel and then the Appellate Body did not limit "the issue [taken] with the lack of transparency and

[47] Argentina's First Written Submission, Section C.I.2.6.b, paragraph 214 ff.
[48] Chile's First Written Submission, paragraph 109.
[49] Chile's First Written Submission, paragraph 87.
[50] *Chile – Price Band System*, Appellate Body Report, paragraph 240.
[51] *Chile – Price Band System*, Panel Report, paragraph 7.44 (emphasis added).

predictability" solely to the aspects in which the PBS was similar to a variable import levy and to the reference prices.

118. What Chile is unwilling to accept, although demonstrated by the actual reports themselves, is that, in having taken issue, on grounds of their lack of transparency and predictability, with such fundamental and central aspects of the PBS as the elements mentioned, the Panel and the Appellate Body addressed most, if not all, of the "specific features of the PBS", or at least the fundamental ones. There is simply no support for Chile's argument.

119. In fact, what the Appellate Body recommended is 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."[52]

120. However, there is an even more serious aspect to Chile's reasoning. According to that reasoning, the transparency and predictability required by the Appellate Body and the Panel are only applicable to certain specific elements of the PBS (not clearly defined by Chile in its submission). If the Panel were to accept this argument, the logical consequence *would be that transparency and predictability would not be required of the rest of the amended PBS* which, according to Chile, was not the subject of findings on the part of the Panel and the Appellate Body. This outcome would not be consistent with the spirit of Article 4 of the *Agreement on Agriculture*.

121. The standards of transparency and predictability do not apply partially as Chile suggests, but are requirements derived from Article 4 of the *Agreement on Agriculture* itself with respect to the measure taken to comply as a whole.

122. As Argentina pointed out earlier, throughout its submission Chile appears to "forget" that the task of a panel in an Article 21.5 proceeding is not only to determine the existence of measures taken to comply with the recommendations and rulings of the DSB but also *the consistency of those measures with a covered agreement*.

123. As noted by the Appellate Body in paragraph 258 of its report, the lack of transparency and the unpredictability of the PBS are contrary to the object and purpose of Article 4 of the *Agreement on Agriculture*.

124. Consequently, even in the very unlikely event of some "specific features of the PBS" not having been included in the criticism of the system by the Panel and the Appellate Body for its lack of transparency and predictability in the original proceedings, the amended PBS can be called into question in its totality for not being transparent or predictable and the obligations of transparency and predictability established by the DSB with respect to Article 4.2 of the *Agreement on Agriculture* apply to it in full.

125. In Section V.4 of its submission, Chile attempts to argue that a wheat trader can predict the future specific duty for wheat on the basis of the prices foreseen in financial derivatives such as futures contracts.[53] According to Chile:

> "... what is necessary in order to foresee the amount of the specific duty is a wheat trader's own skills in predicting prices and negotiating sales or purchases …"[54]

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[52] *Chile – Price Band System*, Appellate Body Report, paragraph 289.
[53] Chile's First Written Submission, paragraphs 156 to 163.

126. Chile tries to reassure the Panel by maintaining that this prediction is not "complex" and "a matter of course" for traders:

> "… Although this may appear complex, it is a matter of course for traders and the market in general."[55]
>
> ...
>
> "It is practically impossible for wheat traders not to know or not to use such information in order to conduct their businesses, as Argentina appears to contend in its submission."[56]

127. In this connection, it should be recalled that in this dispute the Appellate Body held that:

> "... 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."[57]

128. For its part, in Section C.I.3.2 of its First Written Submission, Argentina showed that – under the amended PBS – it is perfectly possible for an exporter of wheat and wheat flour not to know and not to be able to predict what the amount of duties payable on arrival at the Chilean customs office will be. Therefore, in these circumstances an exporter will be less likely to ship wheat or wheat flour to the Chilean market.

129. Even if this were not evidence enough, there are further problems involved in not being able to predict the amount of the duties and what an exporter may expect.

130. If an exporter decides to export wheat to Chile in March 2007, the first thing he has to do, in addition to dealing with his own business, is to find out the dates on the basis of which the reference price in effect in March 2007 is going to be established. As stipulated in Article 7 of Decree 831/2003, "the reference price for wheat shall be the average of the daily prices recorded on the markets indicated in Article 8, during a period of 15 days reckoned retrospectively from the 10th of the month in which the respective decree is published".[58]

131. The next step is to ascertain the market of concern for this period, in accordance with the provisions of Article 8 of Decree 831/2003. In this example, it is bread wheat, Argentine port. Here the exporter will encounter his first problem, since Decree 831/2003 does not say which Argentine port is of concern for the purposes of calculating the reference price.

132. The exporter will not be able to find out the daily price quoted for bread wheat, "Argentine port" as a basis for establishing the market of concern for the first half of the year, since prices vary depending on the Argentine port chosen.[59] As Argentina shows in Exhibit ARG-4, there are at least 4 (four) different prices quoted for Argentine bread wheat (Port of Buenos Aires, Port of Bahía Blanca, Port of Quequén, and Port of Rosario).

133. According to Chile, the exporter must ascertain the future price of bread wheat in (one of) these Argentine ports for this period and then calculate the period average to obtain the presumed *future* reference price.

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[54] Chile's First Written Submission, paragraph 162 (emphasis added).
[55] Chile's First Written Submission, paragraph 158.
[56] Chile's First Written Submission, paragraph 161.
[57] *Chile – Price Band System*, Appellate Body Report, paragraph 234.
[58] See Exhibit ARG-2.
[59] Argentina's First Written Submission, paragraph 219.

134. Thus, another of the problems faced by the exporter in estimating the future amount of duties payable is the fact that future prices are precisely that: future and are therefore estimates rather than solid data. That is to say, there could be variations due to circumstances unknown at the time that could cause these *future* prices of July 2006 to differ from the prices actually made *in the future* between 27 January and 10 February 2007.

135. Therefore, as the estimated future reference price could differ from the reference price determined in the future, there could be a difference between the amount of the specific duties estimated and those actually established in the future. Consequently, the relationship between the specific duty and the transaction value, in the presence of a variation in the amount of the duties, will necessarily differ from that which would have existed if there had been no such variation.

136. Chile cannot maintain that this is the transparency and predictability required by Article 4 of the *Agreement on Agriculture*. The amended PBS simply is neither transparent nor predictable, since it is not an ordinary customs duty.

137. **In conclusion**, as will be clear to the Panel, Chile has been unable to rebut the arguments and evidence submitted by Argentina, thereby confirming that the amended PBS is non-transparent and unpredictable, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

4. The amended PBS is a measure similar to a variable import levy

> "Variable duties directly affect trade relations, altering relative prices (relationship between domestic market prices and international market prices), in addition to the effects resulting from the application of ordinary duties."

138. This statement would appear to have been taken from Argentina's submission regarding the way in which the amended PBS operates. In fact, however, it comes from paragraph 141 of Chile's submission.

139. According to Chile, it is clear that "… specific duties cannot constitute a variable levy, as their purpose is not to sustain prices – whether entry prices, c.i.f. prices or domestic market prices"[60] (underlining added). Thus, Chile contradicts the actual provisions of Law 19.897 and Decree No. 831/2003 which state:

> "… The amount of such duties and rebates shall be established … in terms which, when applied to the price levels attained by the products in question on the international markets, *allow domestic market stability*".[61] (Emphasis added)

140. In its submission Chile refers to paragraph 233 of the Appellate Body Report, the relevant part of which states that variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously.

141. "Forgetting" that Argentina has shown how the amended PBS meets each of these requirements, Chile summarily concludes that:

> "The obvious conclusion to be drawn from the Appellate Body's analysis is that the changes introduced by Chile have put an end to the variability of the duties".[62]

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[60] Chile's First Written Submission, paragraph 133.

[61] See Law 19897, Art. 1, second paragraph and Decree 831/2003 Art. 1, second paragraph, Exhibits ARG-1 and ARG-2, respectively.

[62] Chile's First Written Submission, paragraph 92.

142. As the sole justification for this conclusion Chile adds that:

> "… Under Law 19.897, however, a specific duty (or rebate, or neither) is fixed by legal directive in the form of a decree issued by the Ministry of Finance and remains unchanged for two months, during which the duty applies on all import transactions, without the slightest variation and regardless of the amount of the transaction, until it is changed or cancelled by a more recent administrative act."[63]

143. Leaving aside its virtual "confession" that the duties resulting from the PBS are unrelated to the transaction value and therefore insulate Chile's market from international price developments, Chile bases all its reasoning on the fact that the duties remain unchanged for a period of two months "until…changed or cancelled by a more recent administrative act".

144. **First of all**, the phrase "... until … changed or cancelled by a more recent administrative act" is somewhat misleading since decrees, under the Chilean legislation, are issued in *binding* form and have been issued *continuously* since the amended PBS first came into force.[64]

145. **Secondly**, the fact that the specific duties vary not weekly but every two months does not mean that those duties are no longer variable levies. As Argentina maintained in its First Written Submission, in the right circumstances, every two months an exporter is *guaranteed* to face a specific duty different from that established during the previous two-month period. Moreover, in the longer term, what the exporter experiences is the continuous variability of the duties.[65]

146. **Thirdly**, Chile appears to disregard the fact that the time factor, that is to say the period of time during which the specific duties remain unchanged, is not one of the necessary and sufficient conditions or additional features which, according to the Appellate Body, characterize variable import levies.[66] Argentina also notes that, in its submission, it showed how the amended PBS meets each and every one of the requirements for the amended PBS to be similar to a variable import levy.[67]

147. Later, Chile contends that the specific duties cannot constitute a variable levy as their purpose is not to sustain prices and they do not have the characteristic of gradually "adjusting" so as to prevent a decline in domestic prices or even to raise them :

> "The above demonstration that the floor price and the regime as a whole are neither similar nor equivalent to a minimum import price (and hence are not inconsistent with Article 4.2 of the Agreement on Agriculture) therefore clearly shows that specific duties cannot constitute a variable levy, as their purpose is not to sustain prices – whether entry prices, c.i.f. prices or domestic market prices."[68]

> "A variable duty may be the kind of duty which is used to sustain a domestic or a minimum entry price, as can *be deduced from the Appellate Body's Report*, and the characteristic of which would be to gradually 'adjust', with greater or lesser regularity, so as to prevent a decline in domestic prices or even to raise them." (emphasis added)[69]

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[63] Chile's First Written Submission, paragraph 93.
[64] See Argentina's First Written Submission, paragraphs 263 and 264 and Exhibits ARG-5 and ARG-6.
[65] See Argentina's First Written Submission, paragraphs 266 to 270 and Exhibits ARG-21, ARG-22, ARG-23 and ARG-24.
[66] *Chile – Price Band System*, Appellate Body Report, paragraphs 233 and 234.
[67] Argentina's First Written Submission, Section C.3.
[68] Chile's First Written Submission, paragraph, 133.
[69] Chile's First Written Submission, paragraph, 139.

148. **Firstly**, as Argentina has previously pointed out, it is Law 19.897 itself and Decree 831/2003 that give it to be understood that the objective of the amended PBS is to support prices, insofar as they state that "[t]he amount of such duties and rebates shall be established … in terms which, when applied to the price levels attained by the products in question on the international markets, *allow domestic market stability*" (emphasis added).[70]

149. **Secondly**, the Appellate Body did not establish that "… [a] variable duty may be the kind of duty which is used to sustain a domestic or a minimum entry price …".

150. In this dispute, the Appellate Body has clearly defined the necessary, sufficient and additional features that characterize variable import levies. These features **do not include** the sustaining of entry prices, c.i.f. prices or domestic market prices or price "adjustment", as Chile maintains.

151. On the contrary, the Appellate Body found as follows:

> "… 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 …"[71] (emphasis added)
>
> ...
>
> "… [T]he 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. '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*. 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".[72] (footnotes omitted, emphasis added)

152. Argentina has correctly interpreted the features identified by the Appellate Body in this dispute and shown how the amended PBS is characterized by each of them and hence that the amended PBS is a measure similar to a variable import levy.[73]

153. Chile attempts to call into question Argentina's demonstration that the amended PBS is similar to a variable levy – in paragraphs 134 to 137 of its submission – on the basis of a very simple

[70] See Law 19897, Art. 1, second paragraph, and Decree 831/2003 Art. 1, second paragraph, Exhibits ARG-1 and ARG-2, respectively.
[71] *Chile – Price Band System*, Appellate Body Report, paragraph 233.
[72] *Chile – Price Band System*, Appellate Body Report, paragraph 234.
[73] Argentina's First Written Submission, Section C.I.3.

argument, namely, by showing that its MFN tariff had a variability of 67 per cent from 1984. Chile asks whether this variability alone could mean that the duty constitutes a variable levy and adds:

> "The obvious reply is no, which implies that this analysis – like the one regarding the variability of duties in Argentina's report (footnote: First Written Submission by Argentina, Section C.I.3), raises two problems – one of methodology and the other of interpretation. In the latter case, as mentioned earlier, the fact of having a duty which varies, or has varied, may be a necessary but is not a sufficient condition to affirm that such a duty qualifies as a variable levy. As regards methodology, the statistics calculated are merely measures of dispersion to show the distribution of sample data according to the mean (average). In other words, they serve to illustrate the statistical distribution of a set of values but by no means to prove that the duties are variable levies, as Argentina seeks to establish."[74] (footnote omitted)

154. For Argentina, too, the obvious reply is no, but for totally different reasons which Chile seems to ignore: basically because the reduction in Chile's general ad valorem (MFN) tariff was not the result of a scheme or formula that caused and ensured that the tariff would change automatically and continuously.[75]

155. In this respect, in Section C.I.3 of its submission, Argentina showed how the amended PBS possesses all of the features which, according to the Appellate Body, identify a variable import levy:

(a) A formula that causes import duties to vary;
(b) a formula that causes import duties to vary *automatically*;
(c) a formula that causes import duties to vary *continuously*;
(d) lack of transparency and predictability of the duty level.

156. Chile appears not to understand the Argentine argument. The dispersion (standard deviation) analysis to which Argentina refers is used only to show that the amended PBS contains a formula that causes import duties to vary *continuously*, i.e., requirement "c" above, and does not constitute the basis for all of Argentina's reasoning concerning variable levies as Chile claims.[76]

157. As Chile points out, the existence of a duty that varies or has varied, even though a necessary condition, is not sufficient for it to be described as a variable levy. It is one feature that must be present as a necessary condition, but it is not sufficient.

158. Therefore, Argentina showed, over the entire length of Section C.I.3, how the amended PBS fulfils all the conditions set by the Appellate Body including, *among other requirements*¸ a formula that causes import duties to vary continuously.

159. **In conclusion**, as will be clear to the Panel, Chile has failed to rebut the Argentine allegation that the amended PBS is a measure similar to a variable import levy.

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[74] Chile's First Written Submission, paragraph 137.

[75] *Chile – Price Band System*, Appellate Body Report, paragraph 233 "…[A]t 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".

[76] Argentina's First Written Submission, paragraph 269, and Exhibits ARG-21 and ARG-22.

5. The amended PBS is a measure similar to a minimum import price

160. Chile begins its plea that the PBS does not constitute a minimum entry price [*sic*] by arguing that, in paragraphs 99 to 124 of its submission, Argentina claims to show that FOB prices are higher than CIF prices:

> "Although Argentina's submission seeks to demonstrate the opposite, in the normal course of international trade f.o.b. prices, which are the unit values for exported goods at the port of origin, are always lower than c.i.f. prices, which are the unit values for imported goods at the port of destination, for the same trade transaction. The difference between the f.o.b. price and the c.i.f. price in a trade transaction is that the latter also includes at least freight and transport insurance charges."[77] (original underlining, footnote omitted)

> "As the floor and the reference price are variables expressed at f.o.b. level, the purpose of calculating specific duties is obviously not to maintain an entry price; since neither the floor price nor the reference price at any given point in time can be higher than, or equal to, the c.i.f. price for a specified trade transaction."[78] (underlining added)

161. **Firstly**, it is astonishing how Chile seeks to distort what Argentina said in its First Written Submission. Argentina would prefer to think of it as an error of interpretation, but this is not easy to accept considering the detailed explanations which Argentina offered in paragraphs 99 to 124 of its submission and which Chile never refutes.

162. For example, let us see what Argentina said in those paragraphs:

> "... the CIF price tends to be greater than the FOB price"[79];

> "... the chances of the reference price being higher than the CIF price by more than US$7.2453 per tonne are minimal basically because of the effective difference in the calculation of the reference price and the CIF. The reference price, as under the old PBS, is calculated on an FOB basis. The CIF, as its name implies ("Cost, Insurance, Freight") consists of the FOB plus freight and insurance"[80]; (underlining added)

> "… during all that time the CIF price per tonne of wheat not only was not less than the reference price but *always* higher than the reference price [calculated on an FOB basis]"[81];

> "... Argentina has shown that, in the case of wheat, the chances of the CIF price being lower than the reference price are minimal and, in the case of wheat flour, almost nil."[82]

163. Clearly, Argentina tried to demonstrate the exact opposite of what Chile alleges, namely, that the CIF price is **naturally** higher than the FOB price.

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[77] Chile's First Written Submission, paragraph 122.
[78] Chile's First Written Submission, paragraph 126.
[79] Argentina's First Written Submission, paragraph 107.
[80] Argentina's First Written Submission, paragraph 108. Argentina points out that the FOB price to which Chile refers is the reference price.
[81] Argentina's First Written Submission, paragraph 110.
[82] Argentina's First Written Submission, paragraph 124.

164. **Secondly**, what Argentina shows in paragraphs 99 to 124 of its submission is that the specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor, now US$128 per tonne. For this purpose it uses the amended PBS formula, concluding that for the entry price to be less than US$128 per tonne – i.e., less than the floor price – an *improbable* condition must be fulfilled, namely, that the reference price must be higher than the CIF price by more than US$7.2453 per tonne or, what amounts to the same thing, the CIF must be lower than the reference price by more than US$7.2453 per tonne.[83]

165. Argentina having shown that the chances of this condition being satisfied are minimal, it is very difficult, with the PBS active (that is to say, when specific duties are being applied), for the entry price per tonne of wheat to be lower than the band floor. Thus, Argentina has shown that the specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor, as the Appellate Body found in relation to the original PBS and as confirmed by Chile with respect to the amended PBS.[84]

166. In fact, the Chilean assertion provides very useful support for Argentina's argument. Chile asserts that FOB prices are *always* lower than CIF prices: "... in the normal course of international trade fob. prices…are always lower than c.i.f. prices"[85] (original underlining).

167. This relieves Argentina of the need to provide further mathematical proof. As follows from the PBS formula, for the amended PBS not to elevate the entry price of imports to Chile above the price band floor the above-mentioned condition must be satisfied, i.e., the reference price (calculated on an FOB basis) must be higher than the CIF price of an individual export transaction by more than US$7.2453 per tonne or, what amounts to the same thing, the CIF price of that transaction must be lower than the reference price by more than US$7.2453 per tonne.

168. If this condition is not met, the amended PBS will *mathematically* elevate the entry price of imports to Chile above the price band floor. If, as Chile argues, FOB prices are always lower than CIF prices, this condition cannot be fulfilled so that the amended PBS will always tend to elevate the entry price of imports to Chile above the price band floor.

169. **Consequently**, Chile's arguments confirm Argentina's claim, namely, that the amended PBS constitutes a measure similar to a minimum import price.

170. In paragraphs 128 to 132 of its First Written Submission, Chile seeks to show that the amended PBS is not a minimum import price or does not tend to elevate the entry price above the band floor, because in almost 50 per cent of cases the FOB value plus specific duties was lower than the band floor:

> "Using the same data as those supplied by Argentina (footnote omitted) – for the period 1 November 2004 to 29 April 2005 – we can see that the sum of the f.o.b. prices plus the specific duties, over the only four-month period in which they were applied, is below the f.o.b. floor price for 46 per cent of the 81 days covered by Argentina. In other words, the evidence shows that it is impossible to maintain the floor price. The following examples, based on the data from Argentina's exhibits, serve to illustrate the above.

[83] Argentina's First Written Submission, paragraph 104.
[84] Argentina's First Written Submission, paragraph 114.
[85] Chile's First Written Submission, paragraph 122.

	Example 1	*Example 2*
Date	20 January 2005	10 February 2005
	f.o.b. value (106) + specific duty (7.82) = 113.82	f.o.b. value (107) + specific duty (14.3) = 121.3
Band floor price	128	128
UNDERESTIMATION by	US$14.18/ton	US$6.7/ton"[86]

171. **First of all**, Chile is getting the analysis wrong. According to Chile, the sum of the f.o.b. prices plus the specific duties, over the only four-month period in which they were applied, was below the f.o.b. floor price for 46 per cent of the 81 days covered by Argentina. However, it makes no sense to compare the *FOB price plus the specific duties* with the band floor.

172. The relevant comparison as far as this dispute is concerned is with the behaviour of the *entry price* of wheat imports to Chile. The Appellate Body held that:

> "… specific duties resulting from Chile's price band system tend... to elevate the entry price of imports to Chile above the lower threshold of the relevant price band …"[87]

173. As Argentina repeatedly made clear in the course of its First Written Submission[88], the entry price of wheat imports to Chile – under the amended PBS – is equal to the result of the following sum: CIF value plus the amount of total duties in absolute terms. Total duties include *ad valorem* duties (which, under Chile's General Customs Tariff, amount to 6 per cent of the CIF), plus specific duties (equal to the band floor price less the reference price multiplied by 1 (one) plus the general *ad valorem* tariff in force as published in the Customs Tariff).[89]

174. More graphically[90]:

Entry price of wheat under the amended PBS	=	CIF value	+	Total duties in absolute terms			
	=	CIF value	+	*Ad valorem* duties		+	Specific duty
	=	CIF value	+	CIF value	* 6%	+	Specific duty

[86] Chile's First Written Submission, paragraph 130.
[87] *Chile – Price Band System*, Appellate Body Report, paragraph 260.
[88] Argentina's First Written Submission, paragraph 100 ff.
[89] According to Brazil, "…the new PBS contributes to distorting the prices of imports even more, inasmuch as a new coefficient is added to the formula used to calculate the duty level… In the current system, the specific duty level is magnified by the introduction of a new unexpected multiplier consisting of 1 plus the general *ad valorem* duty in force". *Chile – Price Band System* … Recourse to Article 21.5 of the DSU, Third Party Submission by Brazil, paragraph 16.
[90] Argentina's First Written Submission, paragraph 101.

175. Mathematically, this can be expressed as follows[91]:

$$EP = CIF + 6\% CIF + [(FP – RefP) * (1+6\%)]$$

where:

EP	=	entry price for wheat imports to Chile under the amended PBS
RefP	=	reference price
FP	=	floor price of the band in force
CIF	=	Cost, Insurance, Freight

176. In other words, in paragraphs 128 to 132, Chile "forgets" to include in its analysis at least two significant factors that make up the entry price to which the Appellate Body referred:

(1) the difference between the FOB price and the CIF price, that is, insurance and freight;
(2) the ad valorem duties (6 per cent of MFN).

177. If Chile had included these two factors in its analysis, the result would have been different: during 100 per cent of the time in which specific duties were being applied between December 2004 and April 2005, the entry price was above the band floor, in the terms expressed by the Appellate Body. This is clear from Exhibits ARG-11 and ARG-12 to which Chile referred.

178. Therefore, as Argentina showed in Section C.I.2.1 of its submission, under the amended PBS the findings of the Appellate Body with respect to the original PBS are confirmed, that is, the specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor.

179. **Secondly**, in footnote 72 to paragraph 130 of its submission, Chile states:

> "Strictly speaking, this calculation is based on the data from Table ARG-11 adjusted according to those from Table ARG-16. According to the official source (SAGPyA), some of the data in Table ARG-11 are incorrect."

180. Chile claims to adjust the data from the table in Exhibit ARG-11 according to those from the table in Exhibit ARG-16, on the grounds that data from the table in Exhibit ARG-11 are incorrect "according to the official source".

181. There is nothing "incorrect" about the table in Exhibit ARG-11. A time adjustment has been made to the FOB prices in Exhibit ARG-11 on the basis of the explanation given in footnote 104 to Table I of the Argentine submission. As explained in that footnote:

> "ODEPA does not provide **daily** FOB prices for bread wheat, Argentine port (only monthly prices). The historical FOB price for Argentine bread wheat reported by Argentina's Ministry of Agriculture, Livestock, Fisheries and Food (SAGPyA) is taken instead. In order to make the analysis as accurate as possible, the price indicated in the table for 15 December 2004 corresponds to the Argentine FOB price in effect 15 days previously, since that is the approximate time taken by a cargo ship to sail from Argentina to Chile, including dockside loading and unloading times …"

182. Thus, the table in Exhibit ARG-11 reflects the reality that the FOB price reported by SAGPyA is the FOB price for a date "X" of shipment in Argentina. When the consignment arrives in

[91] Argentina's First Written Submission, paragraph 102.

Chile, this will be the FOB price for Chilean customs purposes, which may differ from the FOB price at that point in the Argentine port.

183. For example, in Exhibit ARG-16 the FOB price for 1 November 2004 is US$119 per tonne. It is clear from Exhibit ARG-11 that this is the FOB price for Chilean customs purposes approximately 15 days later, on 16 November. In other words, the shipment that left Argentina on 1 November at US$119 per tonne FOB price continues to be valued at US$119 per tonne FOB price plus costs in order to arrive at the CIF price. Nevertheless, on 16 November, the FOB price in Argentina was US$115 per tonne, as may be seen from Exhibit ARG-16. In other words, there is nothing incorrect about Exhibit ARG-11 as Chile suggests.

184. On the other hand, in Exhibit ARG-16 Argentina did not make a time adjustment, since the purpose of that exhibit is different from that of Exhibit ARG-11. Thus, Exhibit ARG-16 is intended to show the disconnection between the FOB price of Argentine bread wheat and the reference price established by Chile *on the same day*, for each day of the period of implementation of the amended PBS. To make things clearer for the Panel, in Exhibit ARG-30 Argentina gives details of the exhibits in which a time adjustment has been made.

185. It is not clear from paragraphs 171 to 182 of Chile's First Written Submission whether Chile is seeking to refute Argentina's demonstration of the tendency of the specific duties resulting from the amended PBS to elevate the entry price of imports to Chile above the price band floor (i.e., Section C.I.2.1 of the Argentine submission); whether it is seeking to refute Argentina's demonstration of overcompensation (i.e., Section C.I.2.2 of the Argentine submission); or whether it is seeking to refute Argentina's demonstration that the entry price of imports to Chile, under the amended PBS, is higher than it would be if Chile were to apply a minimum import price at price band floor level (i.e., Section C.I.2.3 of the Argentine submission).

186. This pervasive lack of clarity in Chile's First Written Submission is aggravated by the fact that in these paragraphs there is no reference to the Argentine submission.

187. Nevertheless, it may be concluded, on the basis of the observations made at the end of paragraph 179 of its submission, that Chile is referring to Argentina's demonstration of the tendency of the specific duties resulting from the amended PBS to elevate the entry price of imports to Chile above the price band floor (i.e., Section C.I.2.1 of Argentina's First Written Submission), and of the fact that the entry price of imports to Chile – under the amended PBS – is higher than it would be if Chile were to apply a minimum import price at price band floor level (i.e., Section C.I.2.3 of Argentina's First Written Submission).

188. In other words, Chile is attempting to rebut two *different* Argentine arguments through a single argument of its own.

189. The basis of Chile's reasoning – contained in paragraphs 175 to 179 of its submission – is that the specific duty resulting from the PBS is less than the duty that would be required to establish a minimum entry price.

190. Mathematically, this argument can be expressed as follows, again in Chile's own terms:

Duty to maintain an import cost, or parity or entry price (minimum price)		**Specific duty resulting from the PBS**
SD = b * (FOBfloor - FOBrp)[92]	>	SD = (1+ 0.06) * (FOBfloor – FOBrp)

[92] Chile's First Written Submission, paragraph 176.

191. This would be so because, according to Chile,

> "if 'b' is larger than the *ad valorem* duty, a specific duty calculated solely on the basis of f.o.b. values and Chile's *ad valorem* duty [*sic*] would unquestionably be lower than a duty obtained using import costs"[93] (underlining added).

192. There are several problems with this reasoning.

193. **Firstly**, once again, Chile describes its own PBS incorrectly. Strictly speaking, the specific duty is not calculated "solely" on the basis of [literally, does not solely include] f.o.b. values and the *ad valorem* tariff. In fact, it "includes" nothing. The specific duty is calculated simply on the basis of the difference between the floor price and the reference price multiplied by 1 plus 0.06, i.e., the *ad valorem* tariff.[94]

194. **Secondly**, as Argentina previously pointed out, there is no "FOB floor" price in the legislation on which the amended PBS is based.[95] The PBS legislation merely refers to "floor and ceiling values".[96] Not even in the definitions of Article 2 of Decree 831/2003 is there any mention of it being a question of FOB values.[97] These are merely arbitrary values chosen without the use of any criterion. There is no indication of their being either FOB or CIF.

195. To avoid questions being raised, Chile included the following sentence in Article 4 of Decree 831/2003[98]:

> "The floor and ceiling values and the reference prices for which the regulations provide *shall be expressed* in FOB terms in United States dollars." (Emphasis added)

196. This is not enough to show that FOB values are involved; that would require Chile to produce the evidence on which it based its choice of floor and ceiling values.

197. **Thirdly**, for the following reasons, Chile gets the definition of the duty established on the basis of a minimum import price completely wrong.

198. In this same dispute, the Panel held that a minimum price scheme operates in relation to the actual *transaction value* of the imports.[99] The Appellate Body incorporated this aspect of minimum import prices in its report.[100] In its reasoning, Chile calculates the duty resulting from a minimum price on the basis of the difference between the band floor and the *reference price*.[101] The reference price – which has nothing to do with the transaction value – is simply an average price on a market of concern.

199. Then, as also noted by the Appellate Body in this dispute and in accordance with Argentina's observations in its First Written Submission[102], the establishment of a minimum import price at price

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[93] Chile's First Written Submission, paragraph 178.
[94] Argentina's First Written Submission paragraphs 100 ff.
[95] See Law 19.897, Art. 1 paragraphs 3, 4 and 5, and Decree 831/2003, Arts. 2, 4, 6, 13, 14, Exhibits ARG-1 and ARG-2, respectively.
[96] See Law 19.897, Art. 1 paragraphs 3, 4 and 5, and Decree 831/2003, Arts. 2, 4, 6, 13, 14, Exhibits ARG-1 and ARG-2, respectively.
[97] See Exhibit ARG- 2.
[98] See Exhibit ARG- 2.
[99] *Chile – Price Band System*, Panel Report, paragraph 7.36(e).
[100] *Chile – Price Band System*, Appellate Body Report, paragraph 237.
[101] Chile's First Written Submission, paragraph 176.
[102] Argentina's First Written Submission, paragraph 161.

band floor level would mean that if the entry price of a particular product (i.e., the CIF price plus *ad valorem* duties) were lower than that threshold (US$128 per tonne or the corresponding amount) an additional charge equivalent to the difference would be imposed, so that the product in question entered the Chilean market at the band floor price (currently US$128 per tonne).[103]

200. The formula that follows from this definition is:

Duty resulting from minimum import price = floor price – (CIF value + *ad valorem* duties)

Duty resulting from minimum import price = floor price – (CIF value * 1.06)

201. The formula outlined by Chile bears no relation either to the definition of minimum import price or to that of the charge resulting from the imposition of a minimum import price, as established in this dispute.

202. Chile has determined a factor "b" that includes a set, both loose and broad, of variable costs "such as" the *ad valorem* duty, inspection costs, the commission payable to agents handling the transaction, and credit interest due.[104] The multiplication of this factor "b" by the difference between a floor value and a reference price has no basis in or relation to a minimum import price.

203. Thus, Chile employs confused reasoning, based on definitions other than those established by the Appellate Body.

204. If Chile had used the formula in the Appellate Body report, it would have arrived at the same conclusion as that reached by the Appellate Body with respect to the original PBS and by Argentina with respect to the amended PBS, namely, that the entry price of imports to Chile, under the amended PBS, is higher than it would be if Chile were to apply a minimum import price at price band floor level. In Section C.I.2.3 of its submission, Argentina demonstrated this with the aid of concrete examples and charts based on Chile's own data.[105]

205. **In conclusion**, as will be clear to the Panel, Chile has failed to rebut Argentina's claim that the amended PBS is a measure similar to a minimum import price, inconsistent with Article 4.2 of the *Agreement on Agriculture*.

6. The amended PBS has not produced any improvement in the conditions of access to the Chilean market

206. In the first part of Section V.6 of its submission – specifically in paragraphs 183 to 185 – Chile repeats an argument already familiar at this stage, namely, that simply because under the amended PBS specific duties were allegedly applied on fewer occasions than they would have been under the original PBS there has been an improvement in the conditions of access of wheat to the Chilean market. The same reasoning is applied to rebates. Thus, under the amended PBS, since 16 December 2003, more rebates are said to have been granted than would have been during the same period if the original PBS had been applied so that, in Chile's view, the favourable conditions for imports are more extensive.

[103] *Chile – Price Band System*, Appellate Body Report, paragraph 236.
[104] Chile's First Written Submission, paragraph 175.
[105] Argentina's First Written Submission, paragraphs 159 to 173, and Exhibit ARG-10.

207. Chile argues:

> "In conclusion, the period of application of duties under the new regime was shorter by 10 weeks, while that of rebates was longer by 8 weeks, which represents an effective increase in favourable conditions for grain imports compared to what might have occurred under the mechanism prior to modification."[106]

208. **Firstly**, this amounts to saying that exporters of wheat and wheat flour to Chile should not be concerned about the distorting effects of the amended PBS, since under the amended PBS the distorting effects resulting from the application of specific duties occurred "only" 17 times, whereas under the original PBS they would have occurred 27 times. Chile claims that this represents an improvement in conditions of access.

209. Once again, it can only be said that the access conditions continue to be unfavourable despite the duties allegedly being applied on fewer occasions than in the case of the original PBS. Chile's reasoning has no basis in the WTO Agreements and, in particular, not in the DSU or the *Agreement on Agriculture*. A measure taken to comply is not "less" inconsistent because the inconsistency occurs less frequently than in the case of the original measure. There is no basis for drawing such a conclusion.

210. **Secondly**, it is interesting to note the table which Chile itself introduces in paragraph 183. This table confirms that the amended PBS is very similar to the original PBS. The period between 16 December 2003 and 13 January 2004, during which the amended PBS was not applied, was 57 weeks long. This means that the PBS was applied for 52 weeks (out of a total of 109). Following the same reasoning, the original PBS would not have been applied during 55 weeks, that is to say it would have been applied during 54.

211. To sum up, the original PBS would have been applied for 50 per cent of the time, whereas the amended PBS was applied for 48 per cent of the time. Clearly, the two systems are very similar and, therefore, the degrees of distortion they cause are also similar.

212. In Exhibit CHL-7, as evidence which, it claims, supports this reasoning, Chile submits a table that summarizes how the application of the original PBS would have compared with the application of the amended PBS. Chile begins by failing to comply with the minimum requirement of indicating the source of its data, as Argentina did with all the information it provided.

213. Moreover, it is impossible to verify whether the calculations relating to the alleged behaviour of the old PBS from 16 December 2003 are consistent or not. There is no means of knowing what were the calculations that led Chile to determine the reference prices that would have been established under the original PBS. It is precisely these prices that form the basis for determining whether the old PBS would have been applied or not. Therefore, Exhibit CHL-7 is not based on verifiable evidence and has no foundation.

214. To sum up, in the table in Exhibit CHL-7 which Chile offers as alleged evidence there is no indication of the source of the data. Nor is there any indication of the basis for the calculation of such a key variable as the reference prices of the original PBS.

215. Even if this table were based on evidence, Chile considers the "new" PBS to be different and less distortive because it was applied for 48 per cent of the time whereas the old PBS would have been applied for 50 per cent of the time. That does not seem to be much of a difference.

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[106] Chile's First Written Submission, paragraph 185.

216. As if this were not enough, in Chile's opinion, wheat and wheat flour exporters should rejoice because they have faced distortions resulting from specific duties for "only" 17 weeks. These are Chile's grounds for arguing that the amended PBS has improved conditions of access. Chile's argument is without foundation. The amended PBS continues to be inconsistent.

Effect of the scheduled reduction in floor and ceiling prices

217. In paragraphs 186 to 192 of its submission, Chile seeks to argue that as the floor and ceiling prices will be reduced in the future, the amount of the duties will be lower and the probability of their being assessed will also diminish:

> "The scheduled reduction of the floor and ceiling prices is a scenario under which, irrespective of international price levels, the amount of the specific duties will increasingly diminish compared to those currently being established, just as the probability of duties actually being assessed will increasingly diminish."[107]

218. Chile's argument is simply wrong. The reality is that neither the amount of the specific duties nor the probability of their being assessed is "irrespective of international price levels" and indeed the opposite is true: the amount of the specific duties and the probability of their being assessed do depend on international price levels.

219. Law 19.897 and Decree 831/2003 refer to precisely that, i.e., the dependence of the amount of the specific duties on international price levels.[108]

220. Over and above the provisions of the legislation governing the amended PBS itself, this is clear from the following simple example:

221. According to the "History of application of the amended PBS"[109], between 16 December 2004 and 15 December 2005 the PBS floor price for wheat was (and is) US$128 per tonne. The reference price between 16 December 2004 and 15 February 2005 was established at US$114.50 per tonne. This gave a specific duty of US$14.30 per tonne.

222. In accordance with Art. 6 of Decree 831/2003, between 16 December 2011 and 15 December 2012 the PBS floor price for wheat will be US$118 per tonne. If the reference price is established at US$103.7 per tonne during any two months of that year, the specific duty during that period will be US$14.30 per tonne, the same as established on 16 December 2004. Even if the reference price is less than US$103.7 per tonne, the specific duty will naturally be higher and not lower, as Chile argues.

223. When this reasoning is applied to the example given by Chile in paragraphs 187 and 188 of its submission, it becomes clear that the Chilean example has no foundation. Chile argues:

> "Although this may be self-evident, we shall nevertheless use the calculation formula to explain matters. If we take the current floor price of US$128/tonne and the floor price of US$114/tonne that will apply in 2014, with an identical reference price of, say, US$110/tonne, the results are as follows:

[107] Chile's First Written Submission, paragraph 186.

[108] See Law 19.897, Art. 1 paragraphs 3, 4 and 5, and Decree 831/2003, Arts. 2, 4, 6, 13, 14, Exhibits ARG-1 and ARG-2, respectively: "The amount of such duties and rebates shall be established … in terms which, when applied to the price levels attained by the products in question on the international markets, *allow domestic market stability*" (emphasis added).

[109] Exhibit ARG-6.

$SP_{2006} = 1.06 * (128 – 110) = 19.08$

$SP_{2014} = 1.06 * (114 – 110) = 4.24$

> The specific duty in 2014, using the same reference price, would be US$4.24/tonne compared to the current specific duty, using that same reference price, of US$19.08/tonne. In other words, the specific duty in 2014 will be 78 per cent lower than the duty that would be calculated for this year." (underlining added)

224. To spot the flaws in this argument it is only necessary to consider the basic assumption, namely, that in no less than eight years' time (2014) the reference price will be the same as it is today (2006), or US$110 per tonne, according to the example.

225. The fact is that there is no evidence for determining today that in eight years' time the reference price will be the same. At the very least, it is a rash assertion. In all probability, the reference price will change, as has always happened since the establishment of the amended PBS.

226. As previously explained, the amount of the specific duties will depend on the future levels of international or reference prices. With this in mind, we can reformulate Chile's second equation so that the reference price changes:

$SP_{2014} = 1.06 * (114 – 94.92) = 19.08$

227. It is now "self-evident" that if the reference price is US$94.92 per tonne in 2014, the amount of the specific duties will be the same as in 2006 or, in accordance with the Chilean example, US$19.08, or 0 per cent (zero per cent) lower than in 2006.

228. It is therefore clear that the amount of the specific duties and the probability of their being assessed depend on international price levels. It is by no means sure that these amounts and the probability of their being assessed will increasingly diminish, as Chile argues. The Chilean argument is incorrect and without foundation.

229. In paragraph 191, Chile returns to an argument that is no longer sustainable at this stage, namely, that according to the historical wheat price series the probability of wheat prices standing below US$114 per tonne (i.e., the floor price in 2014) is 23.9 per cent, as compared with 46.1 per cent for the probability of prices lying below US$128 per tonne:

> "Over the period January 1986-March 2006 (period of application of the price band policy [*sic*]), the price of Argentine bread wheat stood 112 times (months) below the current floor of 128, i.e. on 46.1 per cent of the occasions considered. The price stood under 114, namely the floor for 2014, 58 times (months), i.e. on 23.9 per cent of the occasions considered. In other words, the probability of specific duties being applied in the year 2014 becomes lower and lower."

230. The problems presented by arguments of this kind are set out below.

231. **First of all**, as Argentina has already pointed out, the amended PBS is not "less" inconsistent because the inconsistency will arise on fewer occasions in the future than at present. There is no basis for making an assertion of this kind.

232. **Secondly**, according to Chile's reasoning, there is a more than 46 per cent probability, while the floor is situated at US$128 per tonne, of wheat and wheat flour exporters experiencing the distortions caused by specific duties. That is not encouraging for exporters planning to export wheat

and wheat flour to Chile up to December 2007. We recall that until then the floor price will remain at US$128 per tonne. Therefore, the probability indicated by Chile is not at all encouraging.

233. **Thirdly**, Chile indicates neither the source of its information nor the numerical basis for the calculations made to arrive at the conclusion reached in this paragraph. Chile simply fails to provide any evidence at all.

234. **Fourthly**, even if Chile's reasoning had any validity, Chile's calculations are wrong. Chile takes only the lowest future floor price of all those scheduled under Decree 831/2003, i.e., US$114 per tonne, corresponding to 2014. Chile should have incorporated in its calculations a weighting that takes into account the time during which the price of Argentine bread wheat lay below the future floor prices not considered by Chile: 126, 124, 122, 120, 118 and 116 US$ per tonne. As these prices are all higher than US$114 per tonne, the percentage should logically be higher than the 23.9 per cent calculated by Chile.

235. Argentina reiterates that the way in which the floor and ceiling of the amended PBS are established has transformed the PBS into a more rigid and inflexible system.[110]

236. Chile concludes by referring to a process of gradual reduction of border protection of wheat:

> "Both of the above results – that is, the reduction of duties by 2014 and the lesser probability of duty assessment – demonstrate that the current policy has an in-built process of gradual reduction of border protection of wheat."[111] (original underlining)

237. **To sum up**, Chile wrongly disregards the fact that the level of specific duties resulting from the PBS obviously depends on international price levels, attempting to argue that in 8 (eight) years time the reference price will be the same as it is at present. Moreover, Chile repeats the argument that the amended PBS will be "less" inconsistent in the future because the inconsistency will arise on fewer occasions than at present, while basing its case on calculations made without providing the source of the evidence and without including most of the relevant period of application of the amended PBS up to 2014.

238. Moreover, Chile chooses to disregard the fact that by keeping the floor and ceiling inflexible the amended PBS insulates the domestic market from international price developments. This is the basis for its concluding that the amended PBS ("the current policy") has an in-built process of gradual reduction of border protection of wheat. Chile's conclusion has no basis in fact or in law.

[110] As Brazil has pointed out:

"… the 11-year period has the side effect of aggravating the distortion of domestic prices vis-à-vis international ones. While such a long period may afford some predictability, the new PBS is more rigid and inflexible, given that, in practice, the Chilean market will be insulated from fluctuations in the world prices for eleven years. Should there be a significant downward movement in the international wheat prices, the 0.985 factor may not be sufficient to account for the necessary reductions in the lower and upper thresholds of the price bands. Hence, in spite of the application of the 0.985 multiplier, one of the main elements of the PBS (the bands themselves) will remain virtually unchanged for more than a decade, preventing the fluctuation of international prices from being transmitted to the Chilean market". *Chile – Price Band System* … Recourse to Article 21.5 of the DSU, Third Party Submission by Brazil, paragraph 15.

[111] Chile's First Written Submission, paragraph 192.

C. THE ARGUMENT RELATING TO THE FACTOR OF 1.56 APPLICABLE TO WHEAT FLOUR AND THE CLAIM RELATING TO THE SECOND SENTENCE OF ARTICLE II:1(B) OF THE GATT 1994 FALL WITHIN THE TERMS OF REFERENCE OF THE PRESENT PANEL

239. In Part III of its First Written Submission, Chile suggests that Argentina's claims relating to the factor of 1.56 applicable to wheat flour and the second sentence of Article II:1(b) of the GATT 1994 lie outside the Panel's terms of reference.

240. In this way, Chile avoids responding to the Argentine assertion that the factor of 1.56 used to multiply the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour is not transparent and insulates the entry price for wheat flour from international price developments to an even greater extent than that for wheat, this being a specific feature of the amended PBS that prevents enhanced access to the Chilean market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[112]

241. Similarly, in this way Chile avoids having to argue against the contention that, pursuant to the *Understanding on the Interpretation of Article II:1(b) of the GATT 1994*, the amended PBS is in breach of the second sentence of Article II:1(b) of the GATT 1994, since it was not recorded in the appropriate column of Chile's Schedule of concessions (No. VII), but is nevertheless being applied.[113]

242. Argentina's argument relating to the factor of 1.56 applicable to wheat flour and Argentina's claim relating to the second sentence of Article II:1(b) of the GATT 1994 lie within the terms of reference of the present Panel, and Chile has been unable to refute that the factor of 1.56 is a specific feature of the amended PBS that prevents enhanced access to Chile's market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*, and that the amended PBS is in breach of Article II:1(b) of the GATT 1994, second sentence.

243. Below, Argentina will deal separately with Chile's claims concerning (i) the factor of 1.56 applicable to wheat flour and (ii) the second sentence of Article II:1(b) of the GATT 1994, respectively.

1. Argentina's argument relating to the factor of 1.56 applicable to wheat flour lies within the terms of reference of the present Panel

(a) The questioning of the factor of 1.56 applicable to wheat flour is an argument, not a claim

244. Chile maintains that Argentina's arguments relating to the factor of 1.56 applicable to wheat flour lie outside the terms of reference of the present Panel, since they concern "a claim which Argentina could have raised and pursued in the original dispute, but failed to"[114] Chile therefore requests that the Panel dismiss the claim raised by Argentina relating to the factor of 1.56, given that it is not properly before the Panel.[115]

245. In support, Chile cites the case *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, arguing that claims relating to aspects of an original measure which were not raised in the original proceedings are inadmissible. According to Chile:

[112] Argentina's First Written Submission, Section C.I.2.7.
[113] Argentina's First Written Submission, Section C.II.
[114] Chile's First Written Submission, paragraph 62.
[115] Chile's First Written Submission, paragraph 63.

> "The arguments and precedents mentioned in the previous section, which highlight the conclusions of the Panel in the dispute *US – Countervailing Measures on Certain EC Products (Article 21.5 - EC)*, are reproduced in full, given that that dispute dealt precisely with the inadmissibility of entertaining claims relating to aspects not of a 'measure taken to comply' but of the original measure, and which were not raised in the original proceedings."[116]

246. Chile's argument is mistaken. Chile appears not to understand the difference between "claims" and "arguments".

247. In fact, Argentina's questioning of the factor of 1.56 is not a claim, it is an *argument*.

248. A claim is a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. An *argument* is adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified provision. Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and the panel meetings.

249. This was made clear by the Appellate Body in *Korea — Dairy Products*:

> "By '*claim*' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the arguments adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision. Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties. In *European Communities – Hormones*, we emphasized the substantial latitude enjoyed by panels in treating the arguments presented by either of the parties and said:
>
> > […] 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" (footnotes omitted, original emphasis).[117]

250. In the present proceedings, Argentina has raised claims with respect to the inconsistency of the amended PBS with the second paragraph of Article 4 of the *Agreement on Agriculture*, the second sentence of Article II:1(b) of the GATT 1994, and paragraph 4 of Article XVI of the *Marrakesh Agreement Establishing the World Trade Organization.*

251. However, Argentina's questioning of the factor of 1.56, included in the PBS for the purpose of assessing the duties applicable to imports of wheat flour, is an additional argument which shows that the amended PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*. There is no question of a "claim".

252. The claim to which the Argentine argument concerning the factor of 1.56 refers is that relating to the inconsistency of the amended PBS with Article 4.2 of the *Agreement on Agriculture*.

[116] Chile's First Written Submission, paragraph 61.
[117] WT/DS98/AB/R, paragraph 139

Chile has not argued that this claim does not lie within the terms of reference of the present Panel. Therefore the Panel can rule on the Argentine arguments relating to the factor of 1.56.

253. Consequently, the cases cited by Chile in its First Written Submission, namely, *EC – Bed Linen (Article 21.5 – India*) and *US - Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, are not applicable as regards the factor of 1.56, insofar as these cases concern the admissibility in Article 21.5 proceedings of *claims* made during the original proceedings with respect to unchanged aspects of the measure to be taken or claims which were not made during the original proceedings with respect to unchanged aspects of the measure to be taken, but could have been invoked during those proceedings.

254. Therefore the Panel is fully competent to accept and make free use of the arguments submitted by Argentina with respect to the factor of 1.56 in order to show the inconsistency of the amended PBS with the second paragraph of Article 4 of the *Agreement on Agriculture*, since it is not a question of an independent claim but of an argument in support of a claim. Thus, Chile's argument that Argentina's claim relating to the factor of 1.56 applicable to wheat flour falls outside the terms of reference of the present Panel should be dismissed.

(b) Even if the Panel were to find that the Argentine arguments relating to the factor of 1.56 applicable to wheat flour constitute a new "claim", those arguments fall within the terms of reference of the present Panel

255. If the Panel were to find that the Argentine arguments relating to the factor of 1.56 applicable to wheat flour constitute a "claim" and not an "argument", as Argentina maintains, these arguments would fall within the terms of reference of the present Panel.

256. Argentina has shown that the factor of 1.56 used to multiply the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour is not transparent and insulates the entry price for wheat flour from international price developments to a greater extent than that for wheat, being a specific feature of the amended PBS that prevents enhanced access to Chile's market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[118]

257. In its First Written Submission, Chile was unable to rebut the arguments and evidence put forward by Argentina. It merely argues that the questioning of the factor of 1.56 is a new claim by Argentina that falls outside the Panel's terms of reference.

258. However, Argentina's arguments relating to the factor of 1.56 applicable to wheat flour fall within the terms of reference of the present Panel.

259. In fact, the Argentine arguments relating to the factor of 1.56 constitute new arguments. This is acknowledged by Chile when it observes, in relation to the factor of 1.56:

> "Quite simply no mention is made of it in Argentina's submissions. Neither, therefore, was it the subject of a ruling by either the original Panel or the Appellate Body"[119] (original underlining).

260. Argentina points out that, within the framework of the current Article 21.5 proceedings, Argentina is entitled to submit new arguments in order not to undermine the utility of the review envisaged under Article 21.5 of the DSU since, if it were not allowed to do so, the present Panel

[118] Argentina's First Written Submission, Section C.I.2.7.
[119] Chile's First Written Submission, paragraph 60.

would be unable to examine fully the consistency of the amended PBS with the *Agreement on Agriculture*.[120]

261. In *EC – Bed Linen (Article 21.5 – India)*, which Chile cites, the Appellate Body held that:

> "… This implies that an Article 21.5 panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the original proceedings. Moreover, the relevant facts bearing upon the 'measure taken to comply' may be different from the facts relevant to the measure at issue in the original proceedings. It is to be expected, therefore, that the claims, arguments, and factual circumstances relating to the 'measure taken to comply' will not, necessarily, be the same as those relating to the measure in the original dispute. Indeed, a complainant in Article 21.5 proceedings may well raise new claims, arguments, and factual circumstances different from those raised in the original proceedings …"[121] (underlining added, footnotes omitted)

262. Contrary to what Chile says, the fact that there was "… no finding of inconsistency (or of consistency) forcing Chile to amend that particular aspect of the PBS …"[122] does not prevent the present Panel from considering Argentina's new arguments relating to the factor of 1.56. The factor in question forms part of both the new measure itself and its application. It should be borne in mind that this factor is a fundamental and essential part of the amended PBS applicable to imports of wheat flour.

263. Argentina's new arguments concerning the factor of 1.56 will make it easier for the present Panel to fulfil its task of considering the amended PBS in its totality. In this connection, the Appellate Body has held that:

> "When the issue concerns the consistency of a new measure 'taken to comply' the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality. The fulfilment of this task requires that a panel consider both the measure itself and the measure's application …"[123] (underlining added)

264. Below, Argentina refers to Chile's observations in paragraph 55 of its First Written Submission where it cites the panel report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*.[124]

265. In that paragraph Chile stated that:

> "The Panel Report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* stated that accepting the EC's claim (with regard to likelihood of injury) would amount to providing it with 'a second chance to raise a claim that it

[120] *Canada – Aircraft (Article 21.5 – Brazil)*, Appellate Body Report, paragraph 41.
[121] *EC – Bed Linen (Article 21.5 – India)*, Appellate Body Report, paragraph 79.
[122] Chile's First Written Submission, paragraph 62 (underlining added).
[123] *US – Shrimp (Article 21.5 – Malaysia)*, paragraph 87 (WT/DS58/AB/RW).
[124] Although this paragraph corresponds to Chile's arguments relating to Article II:1(b), second sentence, of the GATT 1994, in paragraph 61 of its submission – which corresponds to the arguments relating to the factor of 1.56 – Chile indicates that it is reproducing in full the arguments and precedents mentioned in that section, which highlight the conclusions of the Panel in the dispute *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*.

> failed to raise in the original proceedings'.[125] The Panel was concerned that to allow such a possibility could undermine the principles of fundamental fairness and due process, which would raise 'serious issues regarding (the United States') due process rights'.[126] It therefore concluded that the new claims by the EC were not properly before the Panel."

266. The paragraphs that Chile cites from this dispute do not fit Argentina's new arguments with respect to the factor of 1.56. These new arguments relate to an aspect of the measure taken to comply that has changed with respect to the original measure. This is because under the amended PBS the factor of 1.56 is applied on a basis completely different from that on which it was applied under the original PBS.

267. What Argentina is submitting for the Panel's consideration is the factor of 1.56 which, in the amended PBS, is a changed aspect relative to the PBS in its original form, and which constitutes a specific feature of the measure taken to comply that prevents enhanced access to Chile's market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[127]

268. Therefore, the new arguments relating to the factor of 1.56 can be examined by an Article 21.5 panel and fall within the terms of reference of the present Panel.

269. In its arguments, Chile "forgets" to cite those paragraphs in which that panel held that an Article 21.5 panel can consider new claims concerning aspects of the measure taken to comply that have changed relative to the original measure.

270. In that case, the affirmative likelihood-of-subsidization re-determinations of the Section 129 determination – measure taken to comply – were based on different reasoning and different factual circumstances than those in the original sunset review.[128] Here the weight given in the re-determination to the subsidy programmes to which the evidence related was necessarily different than in the original sunset review.

271. Therefore, despite the fact that the USDOC's affirmative likelihood-of-subsidization re-determination was maintained in the Section 129 determination, it was included in the terms of reference of the Article 21.5 panel, inasmuch as the United States had revised the likelihood-of-subsidization determination by changing the legal and factual basis of the conclusion concerning the continuation or repetition of the subsidy. Thus, the new claims relating to the evidence referred to an aspect of the measure taken to comply that had changed as compared with the original measure. Consequently, the panel arrived at the conclusion that the USDOC's affirmative likelihood-of-subsidization re-determination was included in its terms of reference.

272. In fact, the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* held that:

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[125] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Panel Report (WT/DS212/RW), paragraph 7.74.

[126] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Panel Report (WT/DS212/RW), paragraph 7.76.

[127] This is why Argentina is challenging the utility of Exhibits CHL-5 and CHL-6, insofar as they relate to the original PBS, that is to say, a measure different from the amended PBS.

[128] In this connection, in paragraph 7.69 of its report, the Panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* considered that:

"... the affirmative likelihood-of-subsidization determination in the original sunset reviews rested only upon the continuation of the benefit from pre-privatization, non-recurring subsidies, while the affirmative likelihood-of-subsidization determination in the UK and Spain Section 129 determinations rested only upon subsidy programmes other than pre-privatization non-recurring programmes."

> "... the relative importance of the evidence concerning non-pre-privatization subsidies and Glynwed's sale of relevant production facilities has changed as a consequence of the new basis for the affirmative likelihood-of-subsidization re-determinations. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body explained that an Article 21.5 panel should be able to consider new claims where 'the relevant facts bearing upon the "measure taken to comply" may be different from the relevant facts relating to the measure at issue in the original proceedings'.[129] In this dispute, the affirmative likelihood-of-subsidization re-determinations are now based on different reasoning and different factual circumstances than those in the original sunset review…Thus, the weight given in the re-determination to the subsidy programmes to which the evidence relates is necessarily different than in the original sunset review.
>
> ...
>
> In addition, the European Communities could not have meaningfully raised the treatment of evidence in the original proceedings because the basis for the affirmative likelihood-of-subsidization determination in the original sunset review was different than that in the affirmative likelihood-of-subsidization re-determination set out in the Section 129 determinations."[130]

273. Therefore, despite the fact that the factor of 1.56 was *formally* maintained in the amended PBS, the Argentine arguments relating to the factor of 1.56 are included in the terms of reference of the present Panel inasmuch as Chile has changed the basis to which that factor is applied and hence the result of its application.

274. If both the basis and the duties resulting from the application of the factor of 1.56 in the amended PBS are necessarily different from the basis and the duties resulting from the application of the factor of 1.56 in the original PBS, then the relative weight of the factor of 1.56 has also changed in the measure taken to comply.

275. In this respect, it should be recalled that the specific duty or rebate for wheat, which constitutes the basis of calculation to which the factor of 1.56 is applied to arrive at the specific duty or rebate for wheat flour, is calculated from the difference between the *floor or ceiling price* and the *reference price* by multiplying that difference by 1 plus the *ad valorem* tariff. Given that Chile has changed both the way in which the floor and ceiling prices are calculated[131] and the way in which the reference prices are established[132], as well as the method of calculating the specific duties[133], the basis to which the factor of 1.56 is applied and the results of its application have necessarily changed. The application of the factor of 1.56 in the amended PBS results in a different amount of duties and forms part of both the measure itself and its method of application.

276. In other words, the consequences of applying the factor of 1.56 in the amended PBS are different from the consequences of applying it in the original PBS.

277. In conclusion, just as the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* held that the claims relating to the Section 129 affirmative likelihood-of-subsidization re-determination fell within the panel's terms of reference because the basis for that re-

[129] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, paragraph. 41 (original footnote).

[130] Panel Report on *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paragraphs 7.69 and 7.70 (underlining added).

[131] Argentina's First Written Submission, Section B.3.3.

[132] Argentina's First Written Submission, Section B.3.4.

[133] Argentina's First Written Submission, Section B.3.5.2.

determination was different from that for the affirmative determination in the original sunset review, the arguments relating to the factor of 1.56 fall within the terms of reference of the present Panel since the basis on which that factor is calculated is also different from that in the original PBS.

278. Thus, the new arguments relating to the factor of 1.56 relate to an aspect of the measure taken to comply that has changed with respect to the original measure. Consequently, the Panel should conclude that Argentina's arguments concerning the factor of 1.56 fall within its terms of reference.

279. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held that Article 21.5 proceedings involve not the original measure but rather a new and different measure which was not before the panel and it was natural, therefore, that, as the relevant facts bearing upon the "measure taken to comply" were different from the relevant facts relating to the original measure, the claims, arguments and factual circumstances pertinent to the "measure taken to comply" would not necessarily be the same as those which were pertinent in the original dispute:

> "... in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU."[134] (Underlining added)

280. As the panel found in *EC – Bed Linen (Article 21.5 – India)*, in *Canada – Aircraft (Article 21.5 – Brazil)* Canada had implemented the recommendation of the DSB by adopting a new and different measure. In the Article 21.5 proceeding, Brazil made claims regarding that measure that it had not made in the original dispute. Canada objected to claims raised by Brazil against the new measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that could not have been raised in the original proceedings.[135] The Appellate Body agreed with the panel's conclusion.[136]

281. In the present dispute the situation is similar. The factor of 1.56 – as a changed aspect of the measure taken to comply – was not before the original panel. As pointed out above, the relevant facts bearing upon the factor of 1.56 are obviously different from the relevant facts relating to the factor of 1.56 in the original PBS. It is therefore natural that Argentina should present arguments and factual circumstances pertinent to the factor of 1.56 in the amended PBS that are different from those that were pertinent to the factor of 1.56 in the original PBS.

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[134] WT/DS70/AB/RW, paragraph 41.
[135] WT/DS141/RW, paragraph 6.48.
[136] WT/DS141/AB/RW, paragraph 88.

282. In the present Article 21.5 proceedings, Argentina, like Brazil in Canada – Aircraft, puts forward arguments relating to the factor of 1.56 that it did not raise in the original dispute. Chile, like Canada in that dispute, challenges these arguments claiming that they should have been raised in the original proceedings. If the Panel were to uphold the Chilean challenge, Argentina, like Brazil in that dispute, would not have the opportunity to put forward arguments that could not have been raised in the original proceedings, as the factor of 1.56 is a changed aspect of the measure taken to comply.

283. Moreover, Chile's due process rights have not been unduly impaired in these proceedings since in changing the factual basis on which the factor of 1.56 would be applied and hence the results of applying it Chile could have anticipated[137] that new arguments relating to that factor would be raised.

284. In this connection, that panel held that:

> "… The United States itself introduced the issue of treatment of evidence by revising the entire likelihood-of-subsidization determination and by changing the legal basis of the affirmative conclusion of likelihood of continuation or recurrence of subsidization. The United States therefore could have anticipated a claim on the USDOC's treatment of evidence. Accordingly, the Panel concludes that the European Communities' claim on evidence falls within this Panel's mandate."[138] (Underlining added)

285. Furthermore, Argentina's arguments relating to the factor of 1.56 were not brought up at a late stage of the Article 21.5 proceedings. Thus, due process has not been adversely affected, as shown by the fact that Chile was able to rebut these arguments in its First Written Submission.

286. In the light of the above, should the Panel consider that the arguments put forward by Argentina in relation to the factor of 1.56 constitute a new claim, Argentina respectfully requests that the Panel consider the said arguments, since they fall within the terms of reference of the present Panel, and find that the factor of 1.56 is a specific feature of the amended PBS that impedes enhanced access to Chile's market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[139]

2. The Argentine claim relating to the second sentence of Article II:1(b) of the GATT 1994 falls within the Panel's terms of reference

287. As already pointed out by Argentina[140], the amended PBS infringes the second sentence of Article II:1(b) of the GATT 1994 inasmuch as it constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedule of concessions (No. VII).

288. In its First Written Submission, Chile could not – and cannot – refute the arguments put forward by Argentina. It merely argued that the Argentine claim in relation to the second sentence of paragraph 1(b) of Article II of the GATT 1994 falls outside the Panel's terms of reference.

289. However, the Argentine claim relating to the second sentence of Article II:1(b) of the GATT 1994 falls within the terms of reference of the present Panel.

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[137] Report by the Panel on U*S – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paragraph 7.71.

[138] Report by the Panel on *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paragraph 7.71.

[139] Argentina's First Written Submission, Section C.I.2.7.

[140] Argentina's First Written Submission, Section C.II.

290. **First of all**, Chile itself expressly acknowledges that this claim was not raised by Argentina during the original proceedings.[141] Argentina did not submit claims or evidence relating to this provision in the original proceedings. This is a new claim which Argentina is entitled to raise in the context of the current Article 21.5 proceedings.

291. **Secondly**, the Argentine claim relating to the second sentence of Article II:1(b) of the GATT 1994 falls within the Panel's terms of reference since it is a new claim with respect to a new measure.

292. In fact, as Chile itself has stated on at least two occasions, the amended PBS is a "new" PBS.[142]

293. Chile seeks to apply the findings in *EC – Bed Linen (Article 21.5 – India)* to the present case.[143] However, in trying to apply this case to the present dispute Chile makes two mistakes. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body held that India raised the same claim that it had raised in the original proceedings in respect of an unchanged component of the measure taken to comply. Chile has not understood the Appellate Body's finding in that case. The Appellate Body held that:

> "... Here, India did not raise a *new* claim before the Article 21.5 Panel; rather, India reasserted in the Article 21.5 proceedings the same claim that it had raised before the *original* panel in respect of a component of the implementation measure which was the same as in the original measure. This same claim was dismissed by the original panel, and India did not appeal that finding."[144] (Underlining added)

294. In these Article 21.5 proceedings, the situation is completely different.

295. **Firstly**, as Chile acknowledges, the Argentine claim relating to the second sentence of Article II:1(b) of the GATT 1994 is a new claim that Argentina never raised in the original proceedings.[145] This is not in dispute.

296. **In addition**, Argentina could never have made this claim during the initial stage of the present dispute, as Chile maintains[146], since the amended PBS is a measure different from the PBS which formed the subject of the original proceedings. As Chile has pointed out, this is a "new" PBS.[147]

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[141] Chile's First Written Submission, paragraph 48: "…Argentina was unable to prove that it had raised (let alone pursued) a claim relating to this second sentence…Argentina did not in fact ever raise the claims it now wishes to bring".

[142] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system…" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "…the new price band system entered into force on 16 December 2003…" (underlining added).

[143] Chile's First Written Submission, paragraph 51.

[144] WT/DS141/AB/RW, paragraph 80.

[145] Chile's First Written Submission, paragraph 48: "... Argentina, however, never questioned whether a measure contrary to Article 4.2 of the *Agreement on Agriculture* could thereby be inconsistent with the second sentence of Article II:1(b) of the GATT 1994". See also Chile's First Written Submission, paragraph 56: "In this dispute, we find ourselves in the very same situation: a claim which Argentina could have raised and pursued in the original dispute, *but failed to do so*... "

[146] Chile's First Written Submission, paragraphs 50 and 56.

[147] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system…" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "…the new price band system entered into force on 16 December 2003…" (underlining added).

297. In *EC – Bed Linen (Article 21.5 – India)*, the claim raised by India in the Article 21.5 proceedings had been raised by India during the original proceedings, had not been pursued and was dismissed by the original panel.

298. On the other hand, in the present proceedings there has been no previous finding during the original proceedings, either by the Panel or by Appellate Body, "dismissing" the claim which Argentina is now raising.[148]

299. Later in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body noted that India was seeking to challenge an aspect of the original measure which had not changed:

> "We conclude, therefore, that, in these Article 21.5 proceedings, India has raised the same claim under Article 3.5 relating to 'other factors' as it did in the original proceedings. In doing so, India seeks to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent with the European Communities' WTO obligations."[149] (Underlining added)

300. In the present case, the Argentine is raising a different claim in respect of the second sentence of Article II:1(b) of the GATT 1994.

301. **First of all**, this claim relates to the whole of the amended PBS, that is to say, the amended PBS in its totality rather than to one *aspect* in particular.

302. Consequently, the PBS being a "new measure", with this new claim Argentina necessarily cannot be challenging an *aspect* of the original measure *which has not changed*.

303. **Secondly**, as Chile itself acknowledges, the Argentine claim challenges a "new" PBS, that is to say, a new measure.

304. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held that Article 21.5 proceedings involve not the original measure but rather a new and different measure which was not before the panel and it was natural, therefore, that, as the relevant facts bearing upon the "measure taken to comply" were different from the relevant facts relating to the original measure, the claims, arguments and factual circumstances pertinent to the "measure taken to comply" would not necessarily be the same as those which were pertinent in the original dispute.[150]

305. As the panel found in *EC – Bed Linen (Article 21.5 – India)*, in *Canada – Aircraft (Article 21.5 – Brazil)*, Canada had implemented the recommendation of the DSB by adopting a new and different measure. In the Article 21.5 proceeding, Brazil made claims regarding that measure that it had not made in the original dispute. Canada objected to claims raised by Brazil against the new measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that could not

[148] The Appellate Body did not rule on the consistency of the PBS with the second sentence of Article II:1(b) of the GATT 1994, but on the inconsistency of the Panel's finding relating to the second sentence of Article II:1(b) of the GATT 1994 with its obligations under Article 11 of the DSU.

[149] WT/DS141/AB/RW, paragraph 87.

[150] *Canada – Aircraft (Article 21.5 – Brazil)*, Appellate Body Report, paragraph 41 (underlining added).

have been raised in the original proceedings.[151] The Appellate Body agreed with the panel's conclusion.[152]

306. In the present dispute the situation is similar. The amended PBS is a new measure that was not before the original panel. As pointed out above, the relevant facts bearing upon the amended PBS are obviously different from the relevant facts relating to the original PBS. It is therefore natural that Argentina should present arguments and factual circumstances pertinent to the amended PBS that are different from those that were pertinent to the original PBS.

307. In the present Article 21.5 proceedings, Argentina, like Brazil in *Canada – Aircraft*, raises claims relating to the second sentence of Article II:1(b) of the GATT 1994 in respect of the amended PBS that it did not raise in the original dispute. Chile, like Canada in that dispute, challenges the claims raised by Argentina against the amended PBS arguing that no claims relating to the second sentence of Article II:1(b) of the GATT 1994 were raised against the original PBS. If the Panel were to uphold the Chilean challenge, Argentina, like Brazil in that dispute, would not have the opportunity to raise claims that could not have been raised in the original proceedings, because the amended PBS is a new measure.

308. **In addition**, Chile is wrong to cite as a precedent paragraph 96 of the Appellate Body report in *EC – Bed Linen (Article 21.5 – India)*.[153] In that paragraph the Appellate Body said that India would be being given a second chance to establish something which it had claimed but not proved in the original proceedings.

309. In the present Article 21.5 proceedings there would be no "second chance" to establish what was claimed but not proved in the original proceedings since, as Chile states and agrees: "Argentina did not in fact ever raise the claims it now wishes to bring"[154] and, consequently, this is the "first chance" to establish a new claim which, as we have argued, Argentina is entitled to raise. The claim relating to the second sentence of Article II:1(b) of the GATT 1994 is a new claim and, therefore, falls within the terms of reference of the present Article 21.5 Panel.

310. In *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, cited by Chile in paragraph 55 of its First Written Submission, the Panel found as follows:

> "The circumstances of the present case illustrate the potential procedural unfairness … [T]he United States could only rebut the arguments in the European Communities' Second written submission during the sole meeting with the parties. Consequently, important facts and issues continued to surface quite late into the Article 21.5 proceedings…"[155]

311. In the present case, as Chile acknowledges[156], the claim in respect of the second sentence of Article II:1(b) of the GATT 1994 did not surface late into the present Article 21.5 proceedings in such a way as to raise "serious issues regarding [Chile's] due process rights". This is shown by the fact that Chile was able to put forward arguments against this claim in its First Written Submission.[157]

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[151] WT/DS141/RW, paragraph 6.48.
[152] *EC – Bed Linen* (*Article 21.5 – India*), Appellate Body Report, paragraph 88.
[153] Chile's First Written Submission, paragraph 54.
[154] Chile's First Written Submission, paragraph 48.
[155] Report by the Panel on *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, footnote 294, second paragraph.
[156] Chile's First Written Submission, paragraph 46.
[157] Chile's First Written Submission, paragraph 46 ff.

312. In the light of the above, Argentina respectfully requests that the Panel rule on the claim raised by Argentina concerning the inconsistency of the amended PBS with the second sentence of Article II:1(b) of the GATT 1994 since, being properly before the present Panel, it falls within its terms of reference. Argentina therefore respectfully requests that the Panel find that the amended PBS is in breach of the second sentence of Article II:1(b) of the GATT 1994.

D. CONCLUSIONS

313. Chile has not implemented the rulings and recommendations of the DSB in this dispute and its measure taken to comply, namely, the amended PBS, is not consistent with its obligations within the framework of the WTO.

314. Through procedural arguments, without legal basis or valid precedent, Chile seeks to prevent the Panel from examining two key aspects of the measure taken to comply, namely, the consistency of the factor of 1.56, i.e., the very essence of the amended PBS as applied to wheat flour, and the fact that Chile did not include the price band system in the corresponding schedule, thereby infringing a basic obligation, namely Article II of the GATT 1994, relating to the consistency of the internal trading system itself.

315. In addition, without producing evidence or well-founded arguments, and without refuting any of the arguments put forward by Argentina in its First Written Submission, Chile seeks to argue that the amended PBS is transparent and predictable and does not insulate Chile's market from international market developments.

316. This is Chile's only basis for arguing that it has implemented the recommendations and rulings of the DSB.

317. The fact is that Chile should have abolished its inconsistent price band system applied to wheat and wheat flour, as it did in the case of edible vegetable oils. This is what the Appellate Body established when it held that a finding that Chile's PBS as such was a measure prohibited by Article 4.2 meant that the duties resulting from the application of that system could no longer be levied:

> "... [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."[158]

318. By not abolishing the PBS as it applies to wheat and wheat flour – as it should have done according to the Appellate Body – Chile has forced Argentina to resort to the WTO's dispute settlement mechanism for a second time. The result is that Chile has evaded its multilateral responsibilities by maintaining a border measure other than an ordinary customs duty which it did not even include in its Schedule. Thus, three and a half years after the DSB adopted the Appellate Body and Panel reports, that is to say, after Chile was required to bring its system into conformity, the dispute remains unsettled and Argentina's benefits under the WTO Agreements are still being impaired.

319. Chile's declared objective in maintaining an inconsistent measure in force, despite the express recommendations of the WTO, has been to provide unlawful protection for wheat and wheat flour. In its First Written Submission, Argentina included evidence that this protection was acknowledged by

[158] *Chile – Price Band System*, Appellate Body Report, paragraph 190 in fine.

the very Chilean officials who were involved in approving the amended PBS.[159] In addition, in its First Written Submission, Chile acknowledged the existence of this protection: "... the current policy [*sic*] has an in-built process of gradual reduction of border protection of wheat" (original underlining). This border protection is in addition to that afforded by ordinary customs duties.

320. For these reasons, Argentina respectfully requests the Panel to reject Chile's arguments in their totality and to find that Chile's price band system, as amended in accordance with Law No. 19.897 and Supreme Decree No. 831/2003, in itself and in its specific application to imports of wheat and wheat flour:

- Is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it is a border measure similar to a variable import levy and a minimum import price;

- is inconsistent with the second sentence of Article II:(1)(b) of the GATT 1994, since it constitutes "other duties or charges" not recorded in the corresponding column of Chile's Schedule of concessions (No. VII);

- is in breach of Article XVI.4 of the *Marrakesh Agreement Establishing the World Trade Organization* since, while it remains in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements.

321. Consequently, Argentina respectfully requests the Panel to find that Chile has not implemented the recommendations and rulings of the DSB and is continuing to infringe its obligations within the framework of the WTO.

[159] Argentina's First Written Submission, footnotes 75, 87, 110 and 146.

ANNEX C-2*

REBUTTAL BY CHILE
(24 MAY 2006)

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* Annex C-2 contains the rebuttal by Chile. This text was originally submitted in Spanish by Chile.

TABLE OF REPORTS CITED

Short title	Full title and reference
Chile – Price Band System	Panel Report "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*" WT/DS207/R, adopted 23 October 2002.
Chile – Price Band System	Appellate Body Report "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*" WT/DS207/AB/R, adopted 23 October 2002.
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report "*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* – Recourse by India to Article 21.5 of the DSU", WT/DS141/AB/RW, adopted 24 April 2003.
EC – Poultry Cuts (Article 21.3)	Award of the Arbitrator, "*European Communities – Customs Classification of Frozen Boneless Chicken Cuts*". Arbitration under Article 21.3(c) of the DSU, WT/DS269/13 and WT/DS286/15
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report "*Canada – Measures Affecting the Export of Civilian Aircraft*". Recourse by Brazil to Article 21.5 of the DSU, WT/DS70/AB/RW, adopted 21 July 2000.
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*. Recourse by Canada to Article 21.5 of the DSU, WT/DS257/AB/RW, adopted 20 December 2005.
US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)	Panel Report "*United States – Countervailing Measures on Certain EC Products* – Recourse by the European Communities to Article 21.5 of the DSU", WT/DS212/RW, adopted 27 September 2005.

I. INTRODUCTION

1. In its written rebuttal Chile will show, as clearly and technically as possible, without resorting to euphemisms or pleas that add no value to the discussion, that it did correctly understand the Appellate Body's conclusions, as well as Argentina's arguments, even though it certainly does not agree with them. Chile considers that those arguments are based on a misunderstanding of the Appellate Body's conclusions, especially with respect to the characteristics that make a levy that varies a "variable levy" inconsistent with Article 4.2 of the Agreement on Agriculture and a minimum import price a border measure inconsistent with that same article.

2. Since, in its rebuttal, Argentina[1] calls into question the defence offered by Chile, we consider it our duty to make it clear to the members of the Panel that what is important is to examine how Chile has implemented the recommendations and rulings of the DSB rather than to attempt to refute each and *every one* of the claims raised by Argentina, especially those that do not fit in with the findings of the DSB. Chile's objections to Argentina's claims and arguments will become clear from reading our arguments, since Argentina's analysis is based on an approach different from that taken by the Appellate Body in reaching its decisions and displays an ignorance of the changes introduced by Law 19.897 and Regulation No. 831/2003.

3. If Chile were to confine itself to refuting each of Argentina's claims individually, it would lose the opportunity to focus on the issues of relevance to a recourse to Article 21.5 of the DSU. Moreover, proceeding in that way would be of little use in helping the members of the Panel to understand how the changes which Chile has introduced have made it possible to implement the recommendations of the DSB in full.

4. Since for Argentina[2] the measure is still similar to a variable import levy and/or a minimum import price, the point of departure can only be that indicated by the Panel and the Appellate Body with respect to the elements which make up such measures. As no definition of these terms exists, Chile must seek one in the rulings and recommendations of the DSB.

5. Chile has defined a "variable levy" as it was understood by the Appellate Body and as we believe it to be understood by the Members of the WTO, although apparently not by Argentina. The Appellate Body has stated, and Chile agrees, that a levy is not necessarily a "variable levy" just because it varies, not even if it incorporates a formula that makes the variability automatic and continuous.[3] This is not a sufficient condition. It is also necessary to make sure that there is no transmission of international prices to domestic prices. To prevent variations in international prices being reflected in the domestic market, a price must be "sustained", a questionable feature of "variable levy" systems. In the opinion of the Appellate Body, the PBS did precisely this because <u>certain</u> features – that is to say, only some of them – made it non-transparent and unpredictable.

6. In amending its legislation, in accordance with the recommendations and rulings of the DSB, Chile dealt with these "certain features" identified, analysed and questioned by the Appellate Body. Without them it is impossible to sustain a price, as Chile comprehensively showed in its First Written Submission, and the system now in force is not inconsistent with the aforementioned Article 4.2, although Argentina takes a different view.

7. The original panel noted that whereas variable levies are generally based on the difference between a *governmentally determined threshold* and the lowest world market offer price, minimum import price schemes generally operate in relation to the *actual transaction value* of the imports.

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[1] Argentina's Second Written Submission, paragraph 14.
[2] Argentina's Second Written Submission, paragraph 12.
[3] Paragraph 234 of the Appellate Body Report

8. At present, in Chile, specific duties are applied by decree and do not vary throughout the period of validity of that decree, that is to say, the duty is the same irrespective of the transaction price or a governmentally determined price. For the system to have been comparable with a minimum price, a specific price would have had to have been established and, in all cases, a duty equivalent to the difference between that price and the transaction value of an import would have had to have been demanded, a situation which does not exist in Chile either by design or through the effects of the duties applied. Thus, from this standpoint, the system currently in force is likewise not inconsistent with the aforementioned Article 4.2.

9. Argentina says that Chile should have abolished its PBS because the Appellate Body so established.[4] Firstly, we do not share this view because nowhere in its report does the Appellate Body require (or even recommend) Chile to abolish its PBS. Secondly, it is settled WTO case-law that Members have a measure of discretion in selecting the means of implementation. And, thirdly, the Appellate Body does not say what Argentina claims it does, because although it may be true that if a measure was inconsistent with Article 4.2 it would not be possible to continue levying duties resulting from the application of that measure, if the measure in question was not inconsistent with that article – like the system in force since the enactment of Law 19.897 and its Regulations – then those duties could be levied.

10. For the sake of an orderly discussion, this written submission will follow the outlines of Argentina's rebuttal (hereinafter, the Rebuttal or Second Written Submission), although this should not be taken to imply that we agree with that order or, for that matter, with the arguments used by our neighbour country. On the contrary, while following Argentina's structure, we will address those aspects that are worth refuting from the technical point of view but at the same time centre the analysis on that which is relevant to the Panel's decision.

11. Finally, as part of this effort to focus on the essentials of the dispute, it is worth commenting on paragraph 14 of the Rebuttal. In its First Written Submission, Chile actually refrained from refuting several of Argentina's erroneous statements because, through a biased interpretation of the Appellate Body's conclusions, they sought to lead the discussion toward nonessential issues. As follows from the aforementioned paragraph, Argentina now seeks to lead the discussion towards what it considers to be the central issue by trying to organize Chile's arguments "according to how they presumably should correspond to the Argentine claims".[5]

II. SCOPE OF THE PRESENT ARTICLE 21.5 PROCEEDINGS

12. Chile shares the view expressed by Argentina in paragraph 18 of its Rebuttal, which also reflects the findings of the Appellate Body, that is, that the consistency of a measure taken to comply should be examined in the light of the covered agreements. However, the point raised by Chile in Section IV.1 of its First Written Submission is very different.

13. Argentina does not base its claims or arguments on new inconsistencies; on the contrary, it focuses on Article 4.2 of the Agreement on Agriculture. What Argentina does is to offer a (in Chile's view, mistaken) reading of what the Appellate Body understood to be the lack of transparency and predictability of certain features of the PBS and the insulation that it produces with respect to domestic prices.

14. In its First Written Submission, Chile showed what was the correct interpretation of the scope of the recommendations and rulings of the DSB. In its Rebuttal, Argentina confines itself to claiming

[4] Paragraph 317 of the Rebuttal
[5] Paragraph 14 of Argentina's Rebuttal

that Chile misinterpreted the findings and conclusions of the Panel and the Appellate Body[6], without explaining why Chile failed to interpret them correctly, or giving its own interpretation (presumably the correct one) of the scope of these findings and conclusions. Argentina merely transcribes the final paragraphs of the reports of the original panel and the Appellate Body, which only recommended that the DSB request Chile to brings its PBS into conformity.

15. As we stated in paragraph 67 ff. of our First Written Submission, the determination of the scope of "measures taken to comply" should include the examination of the recommendations and rulings in the original report or reports adopted by the DSB, as the Appellate Body stated in *US – Softwood Lumber IV (Article 21.5 – Canada)*, recommendations and rulings which, being a "final resolution" of the dispute, cannot have a broad interpretation without thereby impairing the due process rights of the parties to the dispute.

16. Therefore, in analysing the "measures taken to comply", an Article 21.5 panel and the Appellate Body must necessarily study the scope of the recommendations and rulings of the DSB. Argentina, moreover, appears to be aware of this standard when in paragraph 102 of its Rebuttal it states: "Thus, there can be no doubt that Argentina is applying the findings of the Appellate Body with respect to the transparency and predictability of the floor and ceiling of the original PBS to the way in which those parameters are established in the amended PBS".

17. However, even though Argentina's starting point appears to be correct, the end result is wrong because in its claims and arguments it applies an erroneous interpretation of the findings of the Appellate Body, as Chile showed in its First Written Submission.

18. In other words, although an Article 21.5 review may not be confined to the claims, arguments and factual circumstances relating to the measure that formed the subject of the original proceedings[7] and although, on the contrary, the analysis may be conducted from a standpoint different from that taken by the original panel, this must necessarily be based on the findings and conclusions of the original proceedings. It is these findings and conclusions, expressed in a recommendation, that must be "implemented" and not something which another Member would prefer to believe.

19. Paragraph 261 of the Appellate Body's report cited by Argentina[8] says precisely what Chile maintains, namely, that the Appellate Body did not question all the features of the PBS but only certain features. This paragraph expressly refers to "… *all these specific features of Chile's price band system.*" That is to say, it is not a question of any feature, as Argentina alleges, but of (1) specific (and thus limited) features and (2) features analysed by the Appellate Body. If it had wanted to refer to any feature of the PBS, the Appellate Body would have used other terms such as, for example, the features of the PBS. However, it did not.

20. Support for this interpretation comes from the phrase in the above-mentioned paragraph 261 of the Appellate Body's report which reads: "… particular configuration and interaction ..." (underlining added). The word "particular" suggests that the PBS was, in the Appellate Body's opinion, inconsistent with Article 4.2 not only because it possessed certain features but also because of the special or unique way in which these features were configured and interacted. Thus, the Appellate Body itself said that it was not going to take 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".[9]

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[6] Paragraph 20 of the Rebuttal
[7] *Canada – Aircraft (Article 21.5 – Brazil)*, Appellate Body Report, WT/DS70/AB/RW, paragraph 41.
[8] Paragraph 26 of the Rebuttal
[9] Paragraph 203 of the Appellate Body Report.

21. However, when one reads Argentina's submissions it is clear that all this analysis by the Appellate Body has been ignored and that Argentina argues by citing isolated passages from the reports or sentences from Chile's arguments that are incomplete or taken out of context, thereby developing a reasoning that somehow distorts the meaning and scope of the recommendations and rulings of the DSB.

22. Moreover, even though it runs counter to its main tactic of questioning the system in general, starting with paragraph 111, Argentina attempts to identify these special features, despite the fact that the Appellate Body has already done so in its report. Argentina, however, seeks them primarily in the Panel Report, particularly in its paragraphs 7.44 and 7.61.

23. However, the first of these paragraphs does not mention any different circumstance[10], in the determination of the reference prices, not subsequently picked up by the Appellate Body and taken into account by Chile in enacting Law 19.897 and its Regulations. That is to say, the difficulties encountered by exporters in knowing how the reference price was arrived at are, as the Panel said, factors unknown.

24. Furthermore, Argentina itself appears to acknowledge this, since in paragraph 115 it mentions the "crucial stages" identified by the Panel which are nothing other than those always referred to by Chile (because the Appellate Body so concluded): the determination of the reference price; the determination of the floor and ceiling; and the conversion to c.i.f. prices.

25. In the next paragraph Argentina identifies the paragraphs of the Appellate Body's report which incorporate the findings of the original panel and which, again, side with Chile. Even though Argentina neglects to mention the paragraphs of that report in which the Appellate Body explains how the specific characteristics of the PBS are actually manifested, for example, paragraphs 249 and 251, the first two references coincide with what Chile has said. However, an inspection of the third reveals another error in Argentina's conclusions, possibly attributable to its partial reading of the Appellate Body's report. The paragraph in question states:[11]

> "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."

26. The text is the conclusion of the analysis made by the Appellate Body concerning the incorporation of a bound tariff "cap" in the PBS. However, it is not necessary to analyse the whole of the reasoning and its context, since a mere reading of the paragraph is sufficient to reveal Argentina's misinterpretation. The analysis of the incorporation of the bound tariff cap made by the Appellate Body naturally incorporates the other elements of its analysis concerning the PBS where, as has been pointed out, the application of the system led to two simultaneous transactions being assessed with

[10] Nor does paragraph 7.63 of the original panel's report, since they were also picked up by the Appellate Body.

[11] Appellate Body Report, paragraph 259.

different specific duties, all of which led the Appellate Body to conclude that the system was inconsistent with Article 4.2 of the Agreement on Agriculture.

27. Having performed this analysis, the Appellate Body also considered whether the existence of the cap had any relevance. Its reply can be found in the paragraph cited where it concludes that it did not, since the existence of the cap did not affect its conclusion that the PBS was a measure similar to variable import levies and minimum import prices. In this context, Argentina's reference to the fluctuation of duties (which is unrelated to the variability) concerns the possible interference from the application of the cap which, as the Appellate Body pointed out, "does not *eliminate* the lack of transparency or the lack of predictability".

28. Furthermore, in paragraph 118 of its Rebuttal, Argentina acknowledges that the reports of the original panel and the Appellate Body did not address all the "specific features of the PBS". If these other features were not addressed, there cannot have been a finding and, therefore, Argentina cannot conclude that these other features also form part of the Appellate Body's conclusion in the sense that they suffer from a lack of transparency or predictability. Quite simply, the Appellate Body did not address them (and did not rule on them) because they were not "such fundamental and central aspects" of the PBS. In other words, they were not what made the PBS a measure similar to a variable import levy or minimum import price.

1. Spirit of Article 4 of the Agreement on Agriculture

29. Article 4.2 of the Agreement on Agriculture does not contain the words transparency and predictability. The Appellate Body noted that the measures mentioned in the footnote to that article "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."[12] Later, in examining variable levies, the Appellate Body pointed out that they have additional features (over and above the variability of the duties), including a lack of transparency and predictability. Features which also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.[13]

30. Consequently, in the light of these references, it is difficult to argue that the requirements of transparency and predictability are part of the "spirit"[14] or "requirements derived"[15] from Article 4 of the Agreement on Agriculture. Argentina appears to extend the Appellate Body's analysis of certain additional features of variable levies – an analysis that was applied to the PBS - to any measure envisaged in Article 4.2. That is to say, to create obligations where the negotiators did not.

31. In other words, Argentina appears to claim that any measure applied in the agricultural sector that is not transparent and/or predictable is inconsistent with Article 4.2 of the Agreement on Agriculture.

III. THE SYSTEM IN FORCE SINCE THE ENACTMENT OF LAW 19.897 AND ITS REGULATIONS DOES NOT DISCONNECT THE INTERNATIONAL MARKET

32. At the beginning of Section B.5 of its Rebuttal, Argentina transcribes parts of paragraphs 180 and 181 of Chile's First Written Submission without explaining why it did so. However, the underlining would appear to suggest that what concerns our neighbour is the fact that the specific duties (or rebates) assessed under the law currently in force are unrelated to the commercial

[12] Paragraph 227 of the Appellate Body Report.
[13] Paragraph 234 of the Appellate Body Report.
[14] Paragraph 120 of the Rebuttal
[15] Paragraph 121 of the Rebuttal

transactions. Or as stated in other paragraphs of its Rebuttal[16], the resulting duties are unaffected by changes in international prices.

33. This shows that Argentina, despite the explanations offered by Chile (as, for example, in the part of paragraph 181 of its First Written Submission that Argentina does not transcribe), still fails to understand how the system established by Law 19.897 operates. The fact that the duties (or rebates) applicable are unrelated to the value of international transactions and international prices, as Argentina repeatedly asserts, is an inherent feature of any specific duty. It is in the nature of these duties to be applied independently of the transaction value, thereby allowing goods to enter at any price subject to the application of a given specific duty, which in this case does not vary for two months with the price of the goods or with world price trends. That is to say, international prices may fall (or rise) during the application of a specific duty but the latter will remain the same, and therefore the entry price will necessarily reflect any fluctuations.

34. More particularly, Chile cannot let pass the assertion in paragraph 143 of Argentina's Rebuttal. Chile's alleged "confession" should necessarily end with the words "transaction value" since Chile never said that the duties applied "are … insulating Chile's market from international price developments". Firstly, because it is logically incorrect and, secondly, because it would confirm what Argentina claims, which we certainly do not accept. Without prejudging Argentina's motivation, we regret all assertions of this kind as they merely confuse the issue.

35. In order to defend its position that the distortion of price transmission "is a feature challengeable as such"[17] Argentina refers to paragraphs 250 and 251 of the Appellate Body's report. However, a reading of these paragraphs leads to quite the opposite conclusion.

36. The relevant part of paragraph 250 reads as follows:

> "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" (underlining added).

37. While the relevant part of 251 states:

> "… 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" (underlining added).

38. In the first citation, the Appellate Body notes that the lack of transmission is the effect[18] of the way in which the reference prices are determined, i.e., the cause. In the second, the Appellate Body makes this point again, with respect to the reference prices being determined on a weekly basis.

39. In support of its argument Argentina also makes reference to the much-mentioned paragraph 261.[19] But once again, this paragraph states precisely the opposite. Namely, that no particular feature of the PBS has the effect of disconnecting Chile's market from international price developments.

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[16] For example, paragraphs 53 and 143.
[17] Paragraph 31 of the Rebuttal.
[18] According to the Dictionary of the Spanish Academy:
Effect (from Lat. *effectus*) 1. That which follows by virtue of a cause.
[19] Paragraph 33 of the Rebuttal.

40. Finally, Argentina has been unable to point to any paragraph of the Appellate Body's report in which it is indicated that the lack of transmission is not the effect of the lack of transparency and predictability of certain features of the PBS but a feature proper, separate and challengeable in itself. Unfortunately for Argentina, this paragraph does not exist, because the disconnection of the domestic market or lack of transmission of international prices is the consequence (and often the deliberate objective) of the lack of transparency and predictability of certain features of the measures listed in the footnote to Article 4.2 of the Agreement on Agriculture, of which, in the opinion of the Appellate Body, the PBS was one.

41. Nevertheless, to clarify the issue for the Panel, Chile will review the various points raised by Argentina in its efforts to prove the disconnection of Chile's market from international markets and show that, in addition to having no basis in the recommendations and rulings of the DSB, they are incorrect.

1. The overcompensation alleged by Argentina does not exist

42. In its Rebuttal, Argentina[20] challenges paragraphs 165 ff. of Chile's First Written Submission and concludes, firstly, that "contrary to what Chile says, paragraph 260 of the Appellate Body Report is an integral part of its conclusions." Secondly, it adds that Chile appears not to have read paragraph 261, from which, in its opinion, it is clear that the words "conclusion" and "these specific features" can only refer to paragraph 260.

43. Chile has already referred to this point and has given clear expression to the reasoning of the Appellate Body, which, indeed, calls for nothing more than an attentive reading of the relevant paragraphs taken in conjunction.

44. Likewise, although this dispute may have been unique in several respects, it is not because Chile has alleged that the Appellate Body erred in its analysis, as Argentina says.[21] The misconstruction arises from a lack of clarity in Chile's explanation of how the PBS operated. The fact that Chile failed to explain its operation properly cannot justify its now being argued that the PBS functioned differently from the way it did during the original dispute.

45. Chile's intention was simply to show that there was no overcompensation either in the past or now following the changes. Chile is not evading its responsibility for the misconstruction, but that does not invalidate what it said in its First Written Submission.

46. Moreover, with respect to the existence of overcompensation, Chile showed that such overcompensation does not exist.[22]

47. Argentina refers to its mathematical demonstration of overcompensation in paragraphs 127 to 132 of its First Written Submission, where it concludes that as international prices – for both wheat and flour – fall, Chilean entry prices increase.

48. Argentina's error is rooted in the fact that it disregards the existence of a definite schedule for the application of specific duties or rebates, or neither. This schedule is as follows:[23]

From 16 December to 15 February;
From 16 February to 15 April;

[20] Rebuttal, paragraph 37 ff.
[21] Paragraph 40 of the Rebuttal.
[22] Section V.5 of Chile's First Written Submission.
[23] Article 5 of the Regulations.

From 16 April to 15 June;
From 16 June to 15 August;
From 16 August to 15 October;
From 16 October to 15 December.

49. What Argentina calls "additional evidence"[24] corresponds to two specific dates (from 15 to 16 December 2004 and from 15 to 16 February 2005) when the border tariffs changed as a result of the above-mentioned schedule. These moments in time at which what Argentina calls "overcompensation" can occur are a reflection of the change in specific duties. Naturally, if the duty changes – as a consequence of price developments on the markets of concern – there will be a change in specific duties (or rebates or nothing will happen). This adjustment may be greater on the dates on which one market of concern is changed for another, but that will only reflect the difference of prices between the United States and Argentina at the changes of season.

50. Nevertheless, this change does not mean that domestic prices are disconnected from international ones but rather that once the change has occurred domestic prices go back to following the international trend, albeit with a greater (or lesser) difference between the two, which will depend on the price variation on the markets of concern before and after the change.

51. The situation is exactly the same if we consider what happens when an *ad valorem* duty changes, and is even clearer in countries with seasonal tariffs, where the protection changes (rises or falls) on the day that the tariff changes. In other words, the day on which an increase (or reduction) in the duties applied by a Member takes effect the "overcompensation" alleged by Argentina (or under-compensation) will always follow, but immediately afterwards international prices will continue being reflected in the domestic market prices.

52. Finally, it should be noted that Argentina's demonstration with respect to wheat flour suffers from the same defects as in the case just mentioned.

2. The "modified system" does not moderate the fluctuations of world market prices

53. In Section 2.2 of its Rebuttal, Argentina persists in referring to the dates on which the tariffs change in accordance with the pre-established schedule, arguing that this seasonality constitutes a defect. However, the border duties levied by Chile on wheat and wheat flour behave in the same way as an *ordinary customs duty*.

54. Although Argentina says otherwise, Exhibits ARG-11 and ARG-12, together with the graph mentioned in paragraph 154 of Chile's First Written Submission, show that there is a correlation between international prices, entry prices and the domestic price.[25] Nevertheless, this correlation clearly cannot be perfect, as Argentina seems to believe.[26] Firstly, as has been repeatedly pointed out, the fact is that the tariffs on wheat change in accordance with a pre-established schedule. This explains the specific changes to which Argentina refers in paragraph 71 of its submission.

[24] Paragraph 133 of Argentina's First Written Submission.

[25] According to paragraph 64 of Argentina's Rebuttal, Exhibits ARG-11 and ARG-12 cannot be an "illustration" of the same as the graph in paragraph 154 of Chile's submission because the former are based on daily data and the latter on monthly data. Without getting into a semantic discussion of the meaning of the word "illustration", **Chile would like to make it clear that irrespective of the period of measurement of the information, the objective is to observe the behaviour of the variables in time, and in this respect the information provided by Chile "shows" the same thing**. The sources of the information, both daily and monthly, are clearly indicated in all cases (SAGPyA and ODEPA).

[26] Paragraphs 68 and 69 of the Rebuttal.

55. Secondly, the Chilean graph cited by Argentina in paragraphs 68 and 69 compares the trend in the f.o.b. price for *Argentine bread wheat* with the price of wheat on the wholesale market ("wholesale wheat price"), and not with the entry price, as Argentina suggests. The price of wheat – and its fluctuations – on the wholesale market is heavily influenced by the domestic wheat supply naturally available during the harvest months (December to March). Thus, it is impossible to claim a complete connection, as Argentina seeks to do.

56. In paragraph 59 of the Rebuttal, Argentina again misunderstands the changes introduced by Law 19.897. It notes that the specific duties do not vary and from that it deduces non-compliance with the recommendations and rulings of the DSB insofar as the transaction price is of no consequence, in circumstances in which, as has repeatedly been pointed out, Chile applies a specific duty. Moreover, citing[27] the Appellate Body on the disconnection of the reference price under the PBS, Argentina asserts that this disconnection is maintained. This assertion is false.

57. Finally, Chile would like to comment on paragraph 66 of Argentina's Rebuttal. This reads:

> "Therefore, the Chilean graph does not represent *only* the periods in which the bands were activated, or the periods relevant for the analysis, but the trend in FOB prices for Argentine bread wheat and the Chilean entry price from December 2003 to February 2006. In fact, as follows from Exhibit ARG-6, specific duties were applied between December 2004 and April 2005, due to the prices recorded by wheat on the markets of concern from the entry into force of the amended PBS.[28] This is the relevant period for observing the behaviour of the amended PBS. As distinct from the Chilean graph, Exhibit ARG-12 plots only the period of application of specific duties."

58. Argentina is apparently seeking to introduce a new assessment parameter for the rulings and recommendations of the DSB, the "relevant period". In addition to it being odd that measures should have to be judged on the basis of the effects they produce in certain periods, with any Member being able to define which periods are most relevant, the argument is at least as strange when contrasted with what Argentina has been insinuating throughout the present dispute.

3. The parameters of the Law are not insulating Chile's market

59. In Sections 2.3 and 2.4 of the Rebuttal, Argentina argues that the changes introduced by Chile have not contributed to improving the insulation of domestic prices from international price variations because the floor, ceiling and reference price parameters are not now directly linked with the international prices in effect.

(a) Floor and ceiling

60. Contrary to what Argentina says[29], there are no explanations, evidence or arguments in Sections 2.5 and 2.6 of its First Written Submission to confirm that the current parameters mentioned above are insulating Chile's domestic market from international price fluctuations. The sections in question only conclude that these parameters are perfectly well known and that therefore transparency exists in this respect.

61. Argentina appears to interpret the Appellate Body report as requiring specific changes in the PBS, in the sense that the floors and ceilings, like the reference prices used for determining the specific duties (or rebates or neither), should be established strictly as a function of the international

[27] Paragraph 60 of the Rebuttal.
[28] Rebates were also applied from December 2003 to August 2004.
[29] Paragraphs 80 and 88 of the Rebuttal.

prices in effect. If so, it would be helpful if Argentina were to indicate the precise part of the Appellate Body's report on which its interpretation is based.

62. It can be inferred from Argentina's reasoning that to prevent disconnection and allow price transmission it is essential that prices be based on international prices. Nevertheless, Argentina fails to offer any argument or demonstration that could be regarded as positive proof of this. Chile, on the other hand, does demonstrate the existence of price transmission following the changes introduced by Law 19.897.[30]

63. In fact, Chile clearly explains that the floor and ceiling parameters (and reference prices) have, as a product of the new law, the sole purpose of making it possible to determine the border protection that will be applied to wheat and wheat flour in accordance with a pre-established schedule. From a reading of Argentina's submissions it follows that it is perfectly familiar with the parameters in question, that is to say that the changes have achieved the objective of ensuring transparency.

64. In spite of this, Section 2.3 of Argentina's Second Written Submission goes further and questions the origin of the floor and ceiling parameters. Thus, Argentina appears to take "transparency" to mean the implementation by Chile of a parameter selection mechanism that would have been acceptable to Argentina.

65. The origin of the parameters is not relevant for determining whether or not Law 19.897 is in conformity with Chile's WTO commitments. They make it possible to establish, transparently and predictably, the border protection which Chile, like any other Member of the WTO, has independently found to be reasonable and appropriate for wheat and wheat flour. Argentina appears to take the requirements of transparency to the extreme. However, there is no WTO provision that obliges a Member to provide explanations of why it has established a particular level of tariff protection, why the levels are differentiated or why they are lower than the bound tariff level. All it is obliged to do is to honour its commitments, that is to say, not to exceed the bound tariff level.

66. Obviously, any change in the parameters will affect the level of protection granted to these products. For example, if the floor parameter were established at 110 dollars, the resulting level of protection would be lower. On the other hand, if it were established at 140 dollars, the resulting protection would be higher.

67. Finally, the reduction of the floor parameter from 128 to 114 dollars and the ceiling parameter from 148 to 134 dollars has nothing to do with the objectives of preventing the disconnection of the domestic market and improving price transmission. Its purpose is gradually, over a period of years, to improve access to the Chilean market. Chile clearly explains and demonstrates that improvement in market access in Section V.6. of its First Written Submission. In this connection, it is important to note that at no point did the Appellate Body lay down such an improvement in access conditions as a requirement; nevertheless Chile independently judged it desirable to implement the aforementioned reduction.

(b) Reference prices

68. According to paragraph 91 of the Rebuttal, Chile has been unable to show that Argentina interprets the conclusions of the Appellate Body in a broad and comprehensive manner. A good example of this is paragraph 82 of the Rebuttal. In that paragraph, Argentina appears to be saying that the way in which the specific duties are assessed on the basis of Law 19.897 and its Regulations is insulating the Chilean market from international price developments.

[30] Section V.3. of Chile's First Written Submission.

69. The Appellate Body noted that this insulation occurred, as far as the determination of reference prices is concerned, for two reasons only. The first was because the prices were set in a way that was neither transparent nor predictable, the second because they were set on a weekly basis.[31]

70. Nevertheless, in adapting its legislation, Chile corrected these aspects also, as explained in paragraphs 111 ff. of its First Written Submission. Now, however, Argentina alleges that Chile was required not only to publish the reference markets but also to explain why it chose those markets[32], adding that the reference price cannot be maintained unchanged and ought to be linked with the transaction value.

71. Under the PBS the reference price was never linked with the transaction value, but in addition, as there was no relevant provision in the laws and regulations, it was possible for the "markets of concern" to be chosen arbitrarily by the authorities for price maintenance purposes. In other words, it was possible to seek a reference price that enabled the amount of the specific duties to be "inflated", a term used by the Appellate Body in referring to the conversion to c.i.f. prices[33] but equally valid here, precisely because the end purpose was to maintain a price.

72. The reference prices now correspond to f.o.b. prices on the two markets of most concern for Chile. According to recent world statistics[34], the United States is the world's leading producer and exporter of wheat, with Argentina being the second largest producer and exporter in the southern hemisphere (after Australia). In the last six years (2000-2006) 40 per cent of Chilean wheat imports came from the United States and 31 per cent from Argentina.

73. Consequently, in order to determine the reference prices, valid sources of information for both these origins were sought. In the case of the United States, that source is the Chicago Exchange (http://www.cbot.com/), the world's largest agricultural *commodity* futures market. This is the source for the Gulf f.o.b. price of *Soft Red Winter No. 2 wheat*. In the case of Argentina, the source of information is the Department of Agriculture, Livestock, Fisheries and Food (http://www.sagpya.mecon.gov.ar/) of the Ministry of the Economy, which regularly publishes figures for *bread wheat, Argentine port* (so-called *Official Fob Price*) in the form of an average for various ports.

74. These two wheat varieties are similar and the prices are taken on the basis of the corresponding times for harvesting and marketing.

75. It is curious that Argentina should question the importance of its market for wheat[35], which is one of the markets of concern for determining the reference price, or the seasonality of wheat production in the two hemispheres and that in one half of the year the United States market should be of greater concern and in the other half that of Argentina. But it is even stranger that Argentina should claim to be unaware of the source of the information for the f.o.b. price of *bread wheat, Argentine port*, even though in its two submissions it cites the official source, i.e., SAGPyA, in almost all its examples.

76. The reason why Chile has recourse to an official source (SAGPyA) is precisely that indicated by Argentina.[36]

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[31] Paragraph 247 of the Appellate Body Report.
[32] Paragraph 108 of the Rebuttal.
[33] Paragraph 250 of the Appellate Body Report.
[34] FAO statistics (http://faostat.fao.org/).
[35] For example, paragraph 108 of the Rebuttal.
[36] Paragraph 132 of Argentina's Second Written Submission.

> "As Argentina shows in Exhibit ARG-4, there are at least 4 (four) different prices quoted for Argentine bread wheat (Port of Buenos Aires, Port of Bahía Blanca, Port of Quequén, and Port of Rosario)."

77. Chile simply did not find any justification for picking out any one of the ports in particular, particularly as there were official figures published by the Government of Argentina.

78. Finally, Argentina appears to question the price calculation formula, that is to say, the averaging which reflects the variations of the price of the product on this market better than taking a price on a particular date (which could be very high or very low depending on the circumstances).

79. On the other hand, Argentina appears to get things mixed up when in paragraph 84 of its Rebuttal it makes a partial quotation from Chile's First Written Submission where it is said that during the two months in which the specific duties remain unchanged, they are completely disconnected from what may occur in the reference markets. According to Argentina, this confirms its claim that because they remain in effect for two months the reference prices disconnect price transmission. Without wishing to be too insistent, it is clear that if the specific duties (or rebates) remain unchanged for a long period of time, world price developments will be transmitted to the domestic market since there is no way of "managing" the reference prices to increase the resulting specific duties and thereby sustain a price to prevent world price developments from being reflected internally.

80. Argentina claims that Chile has argued that the system in force would be inconsistent only six times a year.[37] Chile has shown that the system is always consistent. There are no time-related inconsistencies as seems to be alleged by Argentina, which by focusing its arguments on these bimonthly "overcompensations" (even though it could only offer two examples: 15 and 16 December 2004 and 15 and 16 February 2005) would appear to be saying that only on these days is Chile in violation of its WTO obligations.

IV. OTHER CLAIMS UNDER ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

81. Chile has developed the line of reasoning pursued by the Appellate Body and shown how it has complied with the recommendations and rulings of the DSB. At the same time, it has provided evidence to show how in presenting its arguments Argentina has distorted the findings of the Panel and the Appellate Body.

82. Nevertheless, below, for the benefit of the present Panel and to facilitate Argentina's understanding, Chile will deal with the relevant arguments raised by Argentina in Section B.2-6.

1. The "modified system" is transparent and predictable

83. Although Chile has dealt with Argentina's arguments relating to the scope of the present proceedings, it is also necessary to respond to Argentina's observations in paragraphs 91 ff. Apart from declaring that Chile misreads its position and trying to discredit the "only example" given, Argentina is unable to show that the Appellate Body has set a standard concerning transparency and predictability in the way in which the bands were established.

84. Paragraph 247 of the Appellate Body's report which refers to "how Chile's price bands are established" is not preceded by any paragraph indicating how the bands are established other than paragraph 246. And the latter refers only to "the intransparent and unpredictable way in which the 'highest and lowest f.o.b. prices'… are converted to a c.i.f. basis". Thus, the Appellate Body did not

[37] Paragraph 84 of the Rebuttal.

say that all the elements of the way in which the floors and ceilings were established were non-transparent and unpredictable.

85. Why not? Because all the elements were transparent and predictable, even though they were questionable for other reasons, for example, because they could have had the effect of impeding price transmission, but not because they were non-transparent or unpredictable.

86. Finally, Argentina is mistaken in claiming that the factor of 0.985 was established in a non-transparent manner.[38] This factor is established in the Law and is known by all and the fact that it is being applied up until 2014 is a guarantee of its predictability for market operators.

87. Chile has explained the real meaning and scope of the references to transparency and predictability made by the Appellate Body. However, it must also deal with certain claims raised by Argentina in its Rebuttal since they are particularly serious – not because of their substance but because of the errors they contain.

88. Argentina states:[39]

> "With regard to the Argentine allegation that the amended PBS is neither transparent nor predictable, in paragraph 114 of its submission Chile *acknowledges* that, due to the change in price, the importer (and hence the exporter) does not know in advance the amount of the specific duties payable:
>
> 'With the entry into force of Law No. 19.897, the reference price ceased to constitute one of the elements needed by importers to ascertain the amount of duty payable upon import'." (Underlining added).

89. Although Chile believes that this statement by Argentina reflects its misunderstanding of the changes introduced by Law 19.897, this does not detract from the seriousness of the matter since in taking sentences out of context and drawing erroneous conclusions it could mislead the members of the Panel. The text cited is the conclusion of previous reasoning relating to the questioning by the Appellate Body of the way in which the reference price was established and set under the PBS, when that price had to be known by the importers in order for them to be able to calculate the specific duty payable. After the changes introduced by Law 19.897, the specific duty is now determined by a decree of the Ministry of Finance and therefore neither the exporter nor the importer needs to know the reference price (as was the case under the PBS) in order to know the amount of specific duty payable.

90. In paragraphs 128 to 137 of Section B.3. of its Rebuttal, Argentina disparages Chile's arguments concerning predictability in the determination of duties and rebates.[40] Curiously, Argentina bases its case on the "inability" of its exporters, firstly, to find out about the conditions of access to the Chilean wheat market and, secondly, reasonably to foresee the international prices in effect at the time their transactions take place.

[38] Certainly, the second half of paragraph 247 does not serve Argentina's purpose because it relates to the lack of transparency and predictability of the way in which the reference prices are determined.

[39] Argentina's Second Written Submission, paragraphs 105 and 106.

[40] Section V.4. of Chile's First Written Submission.

91. With regard to its exporters, Argentina states that:[41]

> "If an exporter decides to export wheat to Chile in March 2007, the first thing he has to do, in addition to dealing with his own business, is to find out ..."

92. Argentina then lists the **additional factors** that the A**rgentine exporter wanting to export to Chile** has to find out. This implies that it is not part of his own business as such – but an additional task – to find out about the conditions of access to his chosen export market, all of which are clearly set out in the Chilean Law and its Regulations and, moreover, published on the Internet. Nor apparently is it part of an Argentine exporter's own business to have a reasonable knowledge of the international prices prevailing at the time his transactions take place. In these circumstances, one might well ask what is part of the "own business" of an Argentine exporter.

93. Even though Chile does not know precisely how these exporters operate, **it does not seem reasonable to assume such ignorance**. Chile's arguments are not based solely on theory but also on how the international trade in agricultural commodities operates in practice.

94. An example is provided by the case of Chilean, and doubtless Argentinean, exporters of fresh apples to the European market. They are thoroughly familiar with the market access system with which they have to deal. They know that at certain times of the year the border duties assessed will vary with the entry price prevailing at the time of arrival of the shipment. Although they do not know in advance what that entry price will be and hence the exact amount of the duty payable, they can reasonably predict it. This is clearly an indispensable requirement for staying in business.

95. Argentina appears to be arguing, indirectly, that the Argentine exporter does not know today the precise customs duty that will be payable on wheat in March 2007 and that this is a violation of WTO rules. But, clearly, there is no WTO requirement that the precise level of customs duties must be known a certain period of time in advance of their entering into force and there can be no guarantee that, for example, the *ad valorem* duties applied by WTO Members will be the same in March 2007 as they are today.

96. In fact, to take the same example of the Argentine exporter, it might be asked whether, in the light of what has happened in recent years, that exporter could predict whether or not in 2007 he will be paying taxes on his exports in Argentina and how much they might be. Certainly Chile cannot be blamed for this lack of predictability.

2. The "modified system" is not a measure similar to a variable import levy

97. As Chile pointed out in its First Written Submission[42], even though the decisive feature of the variable levies prohibited under footnote 1 to Article 4 is their variability, this alone is not conclusive, since an ordinary customs duty can also be described in this way. Thus, the Appellate Body observed:[43]

> ".... **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).* **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

[41] Paragraph 130 of Argentina's Second Written Submission.
[42] Chile's First Written Submission, paragraphs 90 ff.
[43] Appellate Body Report, paragraph 232.

> 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" (our highlighting).

98. In its First Written Submission, Argentina – in Section C3.1 – stated that "[T]he amended PBS contains a formula that causes import duties to vary automatically and continuously" and divided its analysis into three parts, i.e., *variation* that is *automatic* and *continuous*.

99. In order to prove the alleged variability, Argentina shows that the specific duties have varied since the PBS came into existence. However, Chile has never suggested otherwise, and neither did the Appellate Body in the paragraph just cited.

100. As far as automaticity is concerned, although Argentina focused its analysis on dictionary definitions, the heart of the matter does not lie there but in the findings of the Appellate Body in this respect. The Appellate Body found as follows:[44]

> "[T]he 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."

101. In its First Written Submission, Chile pointed out that under the changes introduced by Law 19.897 the specific duties applied require a specific administrative act to establish them and in the absence of this act the duty does not vary in amount. The situation was different under the PBS, where, because of its structure, the duties applied to two simultaneous import transactions varied without the intervention of any administrative act, which led to the assessment of different import duties, even when the value (transaction price) and volume (metric units) of the goods were identical. Today, two simultaneous import transactions, with the same transaction value and volume, will always pay the same import duty. Thus, Chile has implemented the rulings and recommendations of the DSB.

102. With respect to continuous variation, in its First Written Submission Argentina states "[D]espite the fact that the variation of the specific duties is no longer weekly but bimonthly, that variation is continuous."[45] The proof offered consists of the table and chart in Exhibits ARG-23 and ARG-24, which are supposed to illustrate "the operation of the amended PBS between 16 December 2004 and 15 April 2006"[46], and moreover the table and chart in Exhibits ARG-21 and ARG-22, which illustrate the variability of the specific duties.[47] On this basis, Argentina concludes that it "has shown that the amended PBS includes a formula that makes the variability of the duties automatic and continuous".[48]

103. It will again be appreciated how that analysis differs from the findings of the DSB and the changes introduced by Chile. Argentina's reasoning contains an obvious *non sequitur*. It again seeks to show that the duties vary, but only to conclude that this variation is continuous, without providing any evidence of this, which is what counts.

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[44] Appellate Body Report, paragraph 233.
[45] Argentina's First Written Submission, paragraph 266.
[46] Argentina's First Written Submission, paragraph 268.
[47] Argentina's First Written Submission, paragraph 269.
[48] Argentina's First Written Submission, paragraph 270.

104. Argentina's only argument is that the variation is bimonthly. However, continuous variation has nothing to do with the fact that once the specific duty has been fixed it is changed every two months. Moreover, the argument contradicts the findings of the Appellate Body which observed that the duties can be periodically changed without the variation being continuous on that account. Putting Argentina's argument into practice would mean maintaining that any seasonal duty or scheduled reduction in *ad valorem* tariffs would be tantamount to the establishment of a variable import levy.

105. In this connection, Argentina raises an interesting question concerning the reduction in Chile's *ad valorem* tariff, to the effect that there was no scheme or formula that caused and ensured that the tariff would change (be reduced) automatically and continuously.[49] The text of Law 19.589, appended as Exhibit CHL – 8, demonstrates the exact opposite. When it was enacted, a plan for the progressive and automatic reduction of Chile's general tariff from 11 per cent to 6 per cent between January 1999 and January 2003 was established. No one could maintain that, despite this continuous, automatic and planned variation, Chile's general *ad valorem* tariff is not an ordinary customs duty.

106. Finally, the Appellate Body observed that variable import levies have additional features which undermine the object and purpose of Article 4 of the Agreement on Agriculture. These additional features include a lack of transparency and a lack of predictability in the level of the duties that would result from the application of these measures, elements no longer present following the changes that Chile has made to its legislation.

107. Thus, there being no variability – a necessary condition for any variable import levy – there is no inconsistency with Article 4.2 of the Agreement on Agriculture. Moreover, even if there were still variability, it would not be sufficient since the additional features identified by the Appellate Body would have to exist and these were addressed by Law 19.897 and its Regulations.

3. The "modified system" does not sustain a price

108. In paragraph 139 of its Rebuttal, Argentina stated that Chile contradicts the terms of its Law and Regulations by asserting that the specific duties are not a variable levy inasmuch as they are not intended to sustain a price[50], quoting the text of the legislation which reads:

> "The amount of such duties and rebates shall be established … in terms which, when applied to the price levels attained by the products in question on the international markets, *allow domestic market stability*"[51] (emphasis added).

109. Leaving aside the arguments mentioned above, there is no such contradiction. Chile has established a mechanism for **stabilizing** the domestic market, which is a completely different thing from **sustaining** prices. Stabilizing means preventing sudden and extreme changes that affect activity, whereas sustaining means defending or supporting an activity through improved prices.[52]

110. **First of all**, the current system envisages the application of specific duties, rebates on the amounts payable as *ad valorem* duties under the customs tariff, and the application of the general tariff alone. Where tax rebates or the general tariff alone are applied, the imported product enters the

[49] Paragraph 154 of the Rebuttal.

[50] Chile's First Written Submission, paragraph 133.

[51] See Law 19.897, Article 1, second paragraph, and Decree No. 831/2003, Article 1, second paragraph, in Exhibits CHL-1 and CHL-2, respectively.

[52] The same stability as established by Decree 797/92 (still in force) of the Argentine Republic which defines the measure Additional Sugar Import Duties and stipulates, inter alia: "… it is desirable to put into effect Article 673 of the Argentine Customs Code in order to stabilize the internal price in periods of severe distortion on the world market."

country with advantages over other traded products or on the same terms as other products, as the case may be. In neither case is any price sustained.

111. **Secondly**, as Chile argued and explained in Section V.1 and 2 of its First Written Submission, all the parameters currently in use, i.e., the floor and ceiling prices and the reference price, are expressed in terms of f.o.b. prices. The f.o.b. price for any individual commercial transaction is always lower than the c.i.f. price, the entry price and the domestic price. A simple review of the basic legislation is enough to show that it is impossible to sustain any price, as Chile demonstrated in Section V.1 and 2.

112. According to Argentina, in paragraph 143 of its Rebuttal:

> "Leaving aside Chile's virtual '**confession**' that the duties resulting from the PBS are unrelated to the transaction value and are therefore insulating Chile's market from international price developments…" (highlighting added).

113. As already explained, Chile makes no confession but rather an assertion, by pointing out that:

> "Under Law 19.897, however, a specific duty (or rebate, or neither) is fixed by legal directive in the form of a decree issued by the Ministry of Finance and remains unchanged for two months, during which the duty applies on all import transactions, without the slightest variation and regardless of the amount of the transaction, until it is changed or cancelled by a more recent administrative act."[53]

114. It is perfectly true that specific duties and tax rebates do not depend on the transaction value, which makes it possible to assert that since the changes introduced in 2003 Chile has not applied variable levies or similar measures and, therefore, is not insulating the domestic market but rather the exact opposite, that is, allowing the transmission of international prices.

115. Later, Argentina states that the Appellate Body did not establish that "a variable duty may be the kind of duty which is used to sustain a domestic or a minimum entry price"[54], as Chile explained in its First Written Submission.[55] Argentina adds:

> "In this dispute, the Appellate Body has clearly defined the necessary, sufficient and additional features that characterize variable import levies. These features **do not include** the sustaining of entry prices, c.i.f. prices or domestic market prices or price 'adjustment', as Chile maintains"[56] (original emphasis).

116. The Appellate Body did not have to define these features inasmuch as they had already been defined within the context of the WTO and can be found in the Panel's report.[57] These fundamental characteristics of variable import levies and minimum import prices are:

> "(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 <u>above the domestic market price</u>.** <u>The</u>

[53] Chile's First Written Submission, paragraph 93.
[54] Argentina's Rebuttal, paragraph 149.
[55] Chile's First Written Submission, paragraphs 139 to 144.
[56] Argentina's Rebuttal, paragraph 150.
[57] Paragraph 7.36 of the Panel Report, WT/DS207/R

import border or price reference may correspond to individual shipment prices but is more often an administratively determined lowest world market offer price. (Emphasis and underlining added.)

(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.** (Emphasis and underlining added.)

(c) **Variable levies** generally **operate so as to prevent the entry of imports priced below the threshold or minimum entry price**. In this respect, i.e. 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. (Emphasis and underlining added.)

(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.** (Emphasis added.)

(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.**" (Emphasis and underlining added.)

117. From these fundamental characteristics it is clear that a variable levy or minimum import price is intended to sustain a price and that that price is measured as an entry price, as an internal price, as a value linked to the internal price, or as an administratively determined price which is above the domestic price.

118. Under the present system, the floor price is not an entry price, is not fixed on the basis of the internal price, is not linked with it, and is not fixed at a price above it. For its part, the reference price is not a border price or expressed in c.i.f. terms. Neither does it correspond to the price of a shipment, nor is it a lowest world market offer price or determined administratively. Therefore, the current parameters do not have the fundamental characteristics of a variable levy as described in paragraph (a).

119. The specific duty is not "the difference between … the import entry price and the lowest world market offer price for the product concerned". Nor does the specific duty "change systematically in response to movements in either or both of these price parameters"; on the contrary, it remains fixed for an extended period, regardless of what happens to these parameters. Therefore, the specific duties do not have the fundamental characteristics of a variable levy as described in paragraph (b).

120. The specific duty does not prevent the entry of imports priced below a threshold or entry price, inasmuch as the floor price is not a threshold price or an internal market price or linked therewith, and is not an entry price. The tariff charge determining the specific duty remains constant until changed or cancelled by a more recent administrative act. Therefore, the specific duties do not have the fundamental characteristics of a variable levy as described in paragraph (c).

121. The mechanism currently in force allows international price variations to be transmitted to the domestic market, inasmuch as the specific duties and rebates are not adjusted on the basis of what happens to external prices or adjusted for the prices of shipments, as Chile showed in Section V of its First Written Submission. Therefore, the specific duties do not have the fundamental characteristics of a variable levy as described in paragraph (d).

122. The specific duties are not determined as a function of the actual transaction value of the imports, nor do they correspond to the difference between the entry price or threshold and the actual transaction value, as would be the case with a minimum import price. Therefore, the specific duties do not have the fundamental characteristics of a variable levy or minimum import price as described in paragraph (e).

123. Consequently, the current parameters do not possess any of the fundamental characteristics which the WTO itself has defined and discussed for variable import levies and minimum import prices. Therefore, the Chilean system established by Law 19.897 and its Regulations is not inconsistent with the Article 4.2 in question.

124. Argentina also claims that Chile appears not to understand the Argentine argument which uses dispersion (standard deviation) analysis solely to show that Chile is applying a formula that causes import duties to vary continuously. It adds that this demonstration does not constitute the basis for all of its reasoning concerning variable levies.[58]

125. Then, in paragraph 157, Argentina states that:

> "As Chile points out, the existence of a duty that varies or has varied, even though a necessary condition, is not sufficient for it to be described as a variable levy. It is one feature that must be present as a necessary condition, but it is not sufficient."

126. Chile shares the view expressed by Argentina in the preceding paragraph, but cannot agree that the dispersion exercise in Section C.I.3 of its First Written Submission shows that the measure applied in Chile is similar to a variable levy. The only conclusion that can be drawn from this demonstration is, as has already been pointed out, that the specific duties vary, something which Chile has never denied.

4. The "modified system" is not a measure similar to a minimum import price

127. In Section V.1 of its First Written Submission, Chile addressed the arguments put forward by Argentina in Section C.2.1 headed "Specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor".[59]

128. Chile showed that the system in force, based on Law 19.897 and its Regulations, is neither a minimum import price nor similar to such a price, bearing in mind the fundamental characteristics of measures of that kind identified by the WTO.

[58] Paragraph 156 of the Rebuttal.
[59] Argentina's First Written Submission, Section C.2.1, paragraphs 99 to 124.

129. Among other things, Chile establishes the indisputable fact that in any ordinary individual trade transaction the f.o.b. price is always lower than the c.i.f. price and does not "tend" to it, as Argentina maintains.

130. In this respect, in Section 5 of its Rebuttal, Argentina states that Chile, with these arguments[60], "seeks to distort what Argentina said in its First Written Submission" and that Argentina would prefer "to think of it as an error of interpretation".

131. Chile neither intended nor intends to distort arguments or figures of any kind or source. Neither is it an error of interpretation. In fact, in paragraph 163 of the Rebuttal, Argentina states

> "Clearly, Argentina tried to demonstrate the exact opposite of what Chile alleges, namely, that the CIF price is **naturally** higher than the FOB price" (original emphasis).

132. Whereas in paragraph 99 of its First Written Submission it says that:

> "Below, Argentina will show mathematically – using the PBS formula contained in Law 19.897 and Decree 831/2003 – how specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor …" (emphasis added).

133. Chile's interpretation of all the arguments and methods incorporated in Section C.2.1 of Argentina's First Written Submission is correct. In that Section Argentina seeks to show that the specific duties tend to elevate the entry price of imports to Chile "above the price band floor".

134. Chile cannot accept that the entire section in question was used by Argentina solely to show that "the CIF price is **naturally** higher than the FOB price".

135. Even though Chile has already shown that this is self-evident, it is worth noting that all the values used as parameters (floor, ceiling and reference prices) are expressed in f.o.b. terms. Therefore, in any ordinary individual trade transaction, the c.i.f. price and the entry price of that transaction will **always** be higher than the f.o.b. price, although not necessarily higher than the floor price.

136. This is because the floor price is not a threshold, an entry price or a minimum import price. It is not, nor is it intended to be, a price that impedes trade or prevents the transmission of international prices. The floor price is simply a parameter that impacts solely on the assessment of the specific duties, and those duties do not have as either their object or the result of their application the maintenance of border or entry prices or their adjustment to the floor price

137. In their turn, the specific duties assessed naturally increase the entry price, by the same amount for any transaction, a universal and natural characteristic of ordinary customs duties. Although that is certainly true, it does not form the substance of this dispute, which is that the result of their application does not constitute a measure similar to a variable levy or a minimum import price.

138. Therefore, any mathematical demonstration provided by Argentina, even though unnecessary, will show that the specific duties increase the entry price, like any ordinary customs duty. That is not a sufficient condition for asserting that, solely because they increase the entry price, they constitute a measure similar to a minimum import price.

[60] Paragraph 161 of the Rebuttal.

139. As the Panel report states in describing the fundamental characteristics of measures of this kind, "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".[61]

140. Chile does not determine specific duties in relation to the actual transaction value nor is their amount equal to the difference between that actual transaction value and a minimum import price. In fact, neither is the floor price a c.i.f. price or an entry price. Consequently, the floor price is not similar to or the same as a minimum entry price, and the application of specific import duties is not inconsistent with Article 4.2 of the Agreement on Agriculture.

141. Continuing its argument, in paragraphs 170 to 177, Argentina maintains that Chile is mistaken in its analysis when it compares the floor price with the series of f.o.b. prices plus specific duties during the only four months in which the latter were applied and states that "[t]he relevant comparison as far as this dispute is concerned is with the behaviour of the *entry price* of wheat imports to Chile".[62]

142. Chile agrees that what is important (in the present dispute) is what happens to entry prices. Chile has already shown, using Argentina's own information, that entry prices for wheat imports to Chile follow a pattern similar to that displayed by the international price. However, it has also shown that the domestic price of wheat has likewise followed a pattern similar to that of the international price, thereby confirming that the Chilean market is connected with the international one and that the modified system allows variations in external prices to be transmitted to the local market.

143. Moreover, in paragraphs 130 to 132 of its First Written Submission, Chile explains how, in the event of the floor price being interpreted as a minimum entry price, the actual evidence of its application shows that that price is not maintained inasmuch as it is not a minimum price and the specific duty is not the difference between the floor price and the actual transaction value.

144. As already explained at some length, the floor price is expressed in f.o.b. terms, so that it is not pertinent (or consistent) to compare it with a c.i.f. value or an entry price. Therefore, in order to verify that the specific duty applied is not the same as the difference between the floor price and the actual transaction value, and to confirm that the application of the specific duty does not lead to a price equal to the floor price, a comparison was made using prices expressed in the same market terms, namely, f.o.b.

145. If the floor price were a minimum import price, the result of applying the specific duties would be that minimum price. In its First Written Submission, Chile shows that out of 81 days on which specific duties were applied, on 46 per cent of those days the sum of the f.o.b. price and the specific duty in force was less than the floor price.

146. In paragraphs 179 to 184 of its Rebuttal, Argentina explains the contents of Exhibit ARG-11, which formed part of its First Written Submission, given that Chile used that information and had to make changes on finding that the data in that Exhibit differed from the series of daily f.o.b. prices for Argentine bread wheat published by the Department of Agriculture, Livestock, Fisheries and Food of the Republic of Argentina.

147. From the explanation that Argentina gave in its Rebuttal, Chile understands that for the purpose of its demonstrations Argentina made a time adjustment to the daily data, advancing them by 15 days relative to the actual date on which those prices were in effect, so that by taking into account

[61] *Chile – Price Band System*, Panel Report, paragraph 7.36.e.
[62] Paragraph 172 of the Rebuttal.

the time required to transport the goods it could simulate the price at which exports would arrive in Chile after shipment. Chile welcomes Argentina's explanation.

148. However, Chile must point out that, while acknowledging the time adjustment made by Argentina to the daily price figures for Argentine bread wheat, for the purposes of Chile's arguments those prices should have been those in effect on the day they represent, inasmuch as the time adjustment made by Argentina was used to simulate the effect of an actual trade transaction and compare that f.o.b. price with the floor price and the entry price that would result from applying to that f.o.b. price the specific duties in force.

149. This calls for two comments. Firstly, the Chilean system provides for the application of the same specific duties to all imports made during the period in which they are in force, without distinction as to origin, date of shipment or the actual transaction value, like ordinary customs duties (specific duties). Therefore, it is not necessary to make any sort of time adjustment for transport since, like the general *ad valorem* tariff, the specific duty is applied to all transactions on an equal basis.

150. Secondly, the relevance of this time adjustment presupposes that the application of the specific duties is linked with the actual transaction value, which is why a comparison is made with what would happen to the entry price for this simulated value of the actual price. However, the specific duties do not depend on the actual transaction value; on the contrary, they are independent of it, and as long as they apply do not vary with changes in international prices, which does not prevent such changes being reflected in the entry price and the domestic price.

151. Thus, entry prices follow a pattern different from that of the reference prices which are used as parameters, and moreover are not linked with or adjusted to the floor price level. This is because entry prices are not linked with the parameters or with the specific duties, but with international prices. Chile has already shown that entry prices and domestic prices are connected with the international market.

152. Elsewhere[63], Argentina questions Chile's description of the use of only f.o.b. prices, claiming that the specific duty does not include f.o.b. prices and that it "includes" nothing. The Law and its Regulations stipulate that all the parameters used should be expressed in f.o.b. terms, and that both the specific duties and the tax rebates should be assessed using those parameters, i.e., f.o.b. prices, as the sole reference.

153. Argentina's comments relate to paragraphs 175 to 179 of Chile's First Written Submission, in which it was demonstrated that the specific duties assessed are always less than those that were assessed under the PBS for the same reference price, with a view to showing that wheat now enjoys more favourable conditions of access.

154. This demonstration is based on the possibility of expressing the import cost in the following form:

(1) $IC_i = a + b * FOB_i$,

where,
IC_i = product import cost i;
a = sum of fixed costs;
b = aggregate of variable costs; and
FOB_i = f.o.b. price of the product i.

[63] Argentina's Rebuttal, paragraphs 189 to 196.

155. The PBS used this expression to determine the specific duties (SD) as follows:

(2) $SD = IC_{floor} - IC_{rp}$, where "rp" represents the reference price.

156. Substituting, we obtain:

(3) $SD = a + b * FOB_{floor} – (a + b * FOB_{rp})$
(4) $SD = a + b * FOB_{floor} – a – b* FOB_{rp}$
(5) $SD = b * (FOB_{floor} – FOB_{rp})$

157. The last of these expressions, (5), is that used by the PBS to calculate the specific duties applied weekly to wheat imports.[64] As explained in the First Written Submission, the factor "b" is the aggregate of the variable costs incurred in a normal import process, including the general *ad valorem* tariff.

158. From expression (5) it follows that the specific duty is less for any reference price as its determination includes only the general *ad valorem* tariff (1+0.06) and excludes all the variable costs incurred in a normal import process, this being because the latter are nontransparent and unpredictable, whereas the general *ad valorem* duty is known. All this is reflected in the following expression contained in the Regulations implementing the Law:

(6) $SD = (1+ 0.06) * (FOB_{floor} – FOB_{rp})$

159. Argentina continues its argument, in paragraphs 197 to 204 of its Rebuttal, by seeking to show that "Chile gets the definition of the duty established on the basis of a minimum import price completely wrong". In this connection, Chile welcomes the clarifications offered by Argentina insofar they contribute to a better understanding of the Chilean arguments, especially those contained in paragraph 198:

> "In this same dispute, the Panel held that a minimum price scheme operates in relation to the actual *transaction value* of the imports. The Appellate Body incorporated this aspect of minimum import prices in its report. In its reasoning, Chile calculates the duty resulting from a minimum price on the basis of the difference between the band floor and the *reference price*. **The reference price – which has nothing to do with the transaction value – is simply an average price on a market of concern.**" (Emphasis added. Original italics. Footnotes omitted.)

160. In fact, what Chile demonstrated with its arguments is what Argentina asserts in this paragraph, namely, that the reference price "has nothing to do with the transaction value", because the Chilean system is actually neither a minimum import price nor similar to one, just as it is neither a variable import levy nor similar to one.

161. Finally, Argentina ends the arguments in Section 5 of its Rebuttal by asserting that:

> "If Chile had used the formula which follows from the Appellate Body report, it would have arrived at the same conclusion as that reached by the Appellate Body with respect to the original PBS and by Argentina with respect to the amended PBS, namely, that the entry price of imports to Chile, under the amended PBS, is higher

[64] In the case of tax rebates (TR) the expression was:
TR = = b * (FOBrp - FOBceiling)

than it would be if Chile were to apply a minimum import price at price band floor level."[65]

162. In fact, if Chile had used the formula which follows from the Appellate Body report it would have arrived at the same conclusion, and **that is precisely why Chile did not use the same formula**, so that there was no inconsistency with Article 4.2 of the Agreement on Agriculture.

5. The "modified system" improves the conditions of access to the Chilean market

163. Even though the conditions of access for wheat lie outside the scope of the present dispute, they naturally form part of the anticipated results. Therefore, Chile addressed this point by showing that with the changes introduced by Law 19.897 the conditions of access are more favourable than they would have been if the PBS[66] were in force.

164. However, Argentina interprets Chile's arguments in a way that is not consistent with what Chile actually said. In point of fact, when Chile states that "In conclusion, the period of application of duties under the new regime was shorter by 10 weeks, while that of rebates was longer by eight weeks, which represents an effective increase in favourable conditions for grain imports compared to what might have occurred under the mechanism prior to modification"[67], it is basing itself on a simulation of what would have happened if the PBS had continued in force.

165. Thus, the figures presented in Exhibit CHL-7 correspond to the daily series of international prices for *bread wheat, f.o.b. Argentine port*, and *Soft Red Winter No. 2 wheat, f.o.b. Gulf of Mexico*, used to simulate the application of the PBS. All the information in that exhibit comes from ODEPA, i.e., from Chile's Ministry of Agriculture, and is based on statistics published by Argentina's Department of Agriculture, Livestock, Fisheries and Food (the same source as used by the other party) and Chicago Exchange statistics published by Reuters.[68]

166. As explained in paragraph 183 of Chile's First Written Submission, the exercise consisted in simulating the operation of the PBS "with the reference price per week calculated on the basis of the prices in effect. This was done by taking the weekly average from Friday to Thursday of each of the prices considered, selecting the lowest and comparing it with the floor and ceiling prices so as to determine whether duties or rebates had applied in the week following the calculation. This method was applied to the period from 16 December 2003 to 13 January 2006". The procedure is the same as that used in the PBS.

167. An important difference between the system in force and the PBS is that in the latter the specific duties and rebates were calculated weekly, so that they were linked with the international prices in effect. Now, instead of being linked with the international prices in effect the specific duties and rebates, once made official by the authorities, remain fixed for two months.

168. Argentina questions the results of the exercise although it also uses them to draw conclusions which cannot be derived from these results. Chile's simulation shows that the present mechanism gives fewer weeks of application of specific duties and more weeks of application of tax rebates than would have been the case under the PBS.

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[65] Argentina's Rebuttal, paragraph 204.

[66] Chile's First Written Submission, Section 6 "Change in conditions of access as a result of Law No. 19.897".

[67] Chile's First Written Submission, paragraph 185.

[68] Chile is sorry that the unintentional omission of the source of the information should have led to confusion, since it had assumed it to be obvious that both parties to the dispute were using the same source, namely, ODEPA, which is characterized by its transparency and reliability and the availability of the information to the general public.

169. It is true that in this simulation we used only two prices for determining the market low and selecting it as the reference price. However, the conclusions would not have been any different if we had use more prices to find the market low. In fact, if there had been prices lower than those used in the exercise, then, where the application of specific duties is concerned, what would have happened is that the duties assessed would have been higher and duties would probably have been applied during more weeks. In other words, it would merely have confirmed what Chile is saying, namely, that better conditions of access now exist. In the case of tax rebates, the situation is similar: if lower prices had existed they would have resulted in a smaller rebate or the application of the general *ad valorem* tariff only. If there had been prices higher than those used, the amount of the rebates would have been greater and there would have been more weeks with rebates being applied. In other words, this would again merely have confirmed what Chile has said, namely, that the conditions of access have improved.

170. At the same time, Chile also considers irrelevant Argentina's arguments to the effect that:

> "… this is the same as saying that exporters of wheat and wheat flour to Chile should not be concerned about the distorting effects of the amended PBS, since under the amended PBS the distorting effects resulting from the application of specific duties occurred 'only' 17 times, whereas under the original PBS they would have occurred 27 times. Chile alleges that this means an improvement in conditions of access ".[69]

171. The basis of this dispute is not the trade-distorting effect of customs duties or how often they are applied. The mere existence of customs duties, of whatever kind, is enough to distort trade, in other words it is an inherent feature of those duties and not something peculiar to the Chilean system.

172. Finally, Argentina develops a line of reasoning based on the number of times the current system and the PBS were applied or would have been applied, as the case may be, in relation to the occasions on which specific duties and tax rebates were assessed. Firstly, it should be noted that in connection with most of its arguments, with this one exception, Argentina always considers the period of application to be that in which specific duties were assessed, leaving out completely the other periods, certainly much longer, in which rebates, or nothing at all, were applied. Secondly, it seems obvious, to Chile at least, that applying specific duties is not the same as applying tax rebates, and it does not seem reasonable to combine the two concepts and periods of application in order to assert that the two policies are similar. If, as Argentina says, the specific duty has a distorting effect, by increasing the entry price, the tax rebate also has a *distorting* effect by reducing the entry price to the point of leaving the trade transactions without a tariff charge.

173. In 35 (32.1 per cent) of the 109 weeks in which the current system has been in force (16 December 2003 to 13 January 2006) tax rebates have been applied, in 17 (15.6 per cent) specific duties have been applied, and in 57 (52.3 per cent) only the general *ad valorem* tariff has been applied.

174. From 13 January to 15 June 2006 wheat imports were entering Chile subject only to the general *ad valorem* tariff, extending even further the period of improved access conditions.

(a) Effects of the scheduled reduction in the floor and ceiling prices

175. In its First Written Submission, Chile showed how a gradual process of reduction of the border protection for wheat and wheat flour had been built in. In particular, as a result of the scheduled reduction in the floor and ceiling prices, the amount of the specific duties will always be less than that currently being assessed, just as the probability of duties being assessed will also always

[69] Argentina's Rebuttal, paragraph 208.

be less. Argentina disregards the evidence produced by Chile and offers its own hypothetical examples, seeking to show the contrary, that is to say, that in 2014 the specific duties will be equal to or greater than those in force at the beginning of 2005.[70] That, however, is mere supposition.

176. Chile could "invent" dozens of reference prices to show that from a certain date there will only be rebates. That is not the point. What Chile showed is that using the same reference price – which is something certain and not hypothetical – the parameters based on the scheduled reduction in floor and ceiling prices will always result in a lower specific duty. In other words, its impact will be less. Chile did not say that the reference price used in its example would be in effect in 2014, since it is impossible to know that so far in advance.

177. When Chile says that the scheduled reduction in the floor and ceiling prices will translate into less border protection, it states a true fact. In its First Written Submission it showed mathematically what will actually happen in the future, namely, that to the extent that the floor price is reduced, the specific duties assessed will always be less than they are at present. The following example illustrates this situation. Using the scheduled floor prices and a reference price of 100 dollars per tonne, we obtain:

$SD_{2003\text{-}2007} = 1.06 * (128 - 100) = 29.68$
$SD_{2007\text{-}2008} = 1.06 * (126 - 100) = 27.56$
$SD_{2008\text{-}2009} = 1.06 * (124 - 100) = 25.44$
$SD_{2009\text{-}2010} = 1.06 * (122 - 100) = 23.32$
$SD_{2010\text{-}2011} = 1.06 * (120 - 100) = 21.20$
$SD_{2011\text{-}2012} = 1.06 * (118 - 100) = 19.08$
$SD_{2012\text{-}2013} = 1.06 * (116 - 100) = 16.96$
$SD_{2013\text{-}2004} = 1.06 * (114 - 100) = 14.84$

178. That is to say that for the same reference price the specific duties assessed will always be less than those that would have been assessed before the floor price was reduced. This holds for any reference price level.

179. Clearly, if in this exercise the reference price were less than 100 dollars, the specific duties would be higher than those calculated, but nevertheless those duties would decrease with time. For example, using the value of 94.92 dollars per tonne proposed by Argentina in paragraph 226 of its Rebuttal, we obtain:

$SD_{2003\text{-}2007} = 1.06 * (128 - 94.92) = 35.06$
$SD_{2007\text{-}2008} = 1.06 * (126 - 94.92) = 32.95$
$SD_{2008\text{-}2009} = 1.06 * (124 - 94.92) = 29.08$
$SD_{2009\text{-}2010} = 1.06 * (122 - 94.92) = 28.70$
$SD_{2010\text{-}2011} = 1.06 * (120 - 94.92) = 26.58$
$SD_{2011\text{-}2012} = 1.06 * (118 - 94.92) = 24.46$
$SD_{2012\text{-}2013} = 1.06 * (116 - 94.92) = 22.34$
$SD_{2013\text{-}2004} = 1.06 * (114 - 94.92) = 20.22$

180. In other words, if this reference price were to apply this year, the resulting specific duty would be 35.06 dollars per tonne, whereas in 2014 the resulting specific duty would be 20.22 dollars per tonne, or 42.3 per cent less than that which would be assessed currently.

181. Chile did not use different values for the reference price to show that the nominal protection for wheat will be lower. This would not be consistent with an evaluation methodology. It is a fact

[70] Paragraphs 221 and 222 of the Rebuttal.

that the conditions of access to the Chilean market have changed since the scheduled reduction in the general *ad valorem* tariff, from 35 per cent in 1984 to 6 per cent as from 2003.[71] The same will happen on the wheat market following the entry into force of Law 19.897 for that product.

V. THE CLAIMS RELATING TO THE FACTOR OF 1.56 AND ARTICLE II:1.B, SECOND SENTENCE, OF THE GATT 1994 DO NOT FALL WITHIN THE TERMS OF REFERENCE OF THE PRESENT PANEL

1. The factor of 1.56 does not fall within the terms of reference of the present Panel

182. In seeking to show that the factor of 1.56 falls within the terms of reference of the present Panel, Argentina bases its reasoning on two premises. The first, that its questioning is not a claim but an argument.[72] The second, that this is a new argument relating to an aspect of the measure taken to comply that has changed.

183. Argentina's questioning is an independent claim and not an argument to illustrate a claim. In fact, the word questioning used by Argentina shows it to be asserting that Chile has infringed a specific provision of a specific agreement. According to the Spanish Academy, to question means: *1. tr. To dispute about a doubtful point, by putting forward reasons, evidence and grounds for and against.* In other words, questioning is something different from arguments or reasons, evidence and grounds.

184. By applying the reference to *Korea – Dairy Products* in the Rebuttal to Argentina's First Written Submission, it is possible to distinguish the **claim** – "The factor of 1.56 ... insulates the entry price of wheat flour from international price developments" – from the **arguments** – the specific duties on wheat flour are calculated on the basis of those applied to another product[73] and the way in which that factor was established is not transparent.[74]

185. Therefore, it is clearly a question of an independent claim that Argentina is making at this stage of the proceedings and one which it did not make in the original dispute although it could have done so, since Argentina itself acknowledges that that factor had already been in effect for more than ten years.

186. In seeking support for its arguments, Argentina repeatedly asserts that the factor of 1.56 is an aspect that has changed relative to the PBS or an aspect of the measure taken to comply that has changed relative to the original measure.[75] However, it is a factor that has been in existence since 1993 and which in its present form has been in effect since 1996, as Argentina itself observes in its First Written Submission.[76]

187. It should be pointed out that in all the texts cited in this dispute, the factor is always similarly expressed. Thus, for determining the duties and rebates for wheat flour, "the duties and rebates determined for wheat shall be multiplied by a factor of 1.41"[77] or "there shall be applied the duties and

[71] If in 1984 any goods had entered at a c.i.f. price of 100 dollars per tonne, they would have had to pay 35 dollars per tonne in duty (35 per cent ad valorem). Other goods entered in 2004 at a c.i.f. price of 583.40 dollars per tonne would have had to pay 35 dollars per tonne in duty (6 per cent ad valorem). In no way can it be concluded from this equality of the duty on both consignments that the conditions of access were the same in 1984 and 2004.

[72] Paragraph 247 of the Rebuttal.

[73] Paragraph 228 of the Rebuttal.

[74] Paragraph 229 of the Rebuttal.

[75] For example, paragraphs 271, 278, 281, 282 of the Rebuttal.

[76] Paragraph 232 of Argentina's First Written Submission.

[77] Law 19.193.

rebates determined for wheat multiplied by a factor of 1.56".[78] In other words, as a mathematical calculation.

188. Despite the above, Argentina adds a new element by maintaining that the "basis" on which the factor of 1.56 is applied is different under the scheme introduced by Law 19.897 and its Regulations and is therefore a new aspect of the modified measure.

189. However, in its First Written Submission Argentina bases its claim mainly on the fact that the factor in question translates into the application to a product (wheat flour) of specific duties which, rather than being linked to that product, are derived from the duties applied to another product (wheat), adding that the price relationship between the two could be based on a technical production ratio between flour and wheat. Moreover, in Argentina's opinion, "this relationship is valid at international level".[79] Argentina concludes by stating that, in its own case, this technical ratio would be approximately 1.3, "that is, the price of wheat flour is approximately 30 per cent higher than that of wheat".

190. In its Rebuttal, Argentina adds a new element never previously mentioned. According to Argentina, the difference between now and the PBS is that the factor is applied on a completely different basis. Consequently, the result of applying it is also different. Therefore, it is a changed aspect that can be included within the terms of reference of the present Panel.

191. As an initial response, it should be pointed out that what Argentina originally questioned was the factor of 1.56, whereas now it is questioning the basis on which the factor is applied. In Chile's opinion, these are two very different things and certainly in most of its submissions Argentina has sought to question the basis on which the specific duties are assessed under Law 19.897 (from which the duties applicable to wheat flour are determined).

192. Then again, a more detailed analysis of *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* would show that this precedent cannot be used in this case since it concerns a dispute about subsidies in which the change in the basis of a re-determination is an essential element for determining the likelihood of subsidization. Finally, any change in the basis will necessarily affect the result. In this case, the consequences are the same now as under the PBS: an increase in the specific duties applied to flour by a factor of 1.56 relative to the duties applied to wheat, and in its First Written Submission Argentina questioned this increase for being higher than the technical ratio which it calculated would be correct, i.e., 1.3, and because "in its legislation Chile has neither explained nor justified in any way the basis on which it was established".[80]

193. In other words, it would appear that only on 19 April 2006 did Argentina notice that the factor of 1.56 in effect since 1996 is not transparent and increases the insulation of the domestic market from international price developments.

194. Chile does not question the right of any Member to raise a new claim relating to an aspect of the measure taken to comply that constitutes a new or changed element of the original measure nor dispute the validity of the precedents cited in this respect in the Rebuttal, but Argentina bases its argument on an erroneous premise. As we have shown, the factor of 1.56 is not a new or changed element of the original measure and therefore Argentina should have introduced it into the original dispute, being precluded from doing so at this late stage.

[78] Article 1 of Law 19.897.
[79] Paragraph 231 of the Rebuttal.
[80] Paragraph 229 of Argentina's First Written Submission.

195. Allowing Argentina to have this "second chance" (as it was called by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* and by the Panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*) to take issue with the factor of 1.56 before this Panel would be to call into question Chile's due process rights to a proper defence of its duties.

(a) Technical basis of the factor of 1.56

196. Without prejudice to the foregoing, Chile will explain the technical reasons for using a factor of 1.56 to assess the duties or rebates applicable to wheat flour.

197. As Argentina acknowledges when it refers to the ("internationally valid") technical production ratio, the specific duty or rebate, as appropriate, for wheat flour is determined simply by multiplying the duty or rebate in effect for wheat imports by a factor of 1.56. The reason for increasing the duty (or rebate) by a certain proportion is simply to maintain a similar nominal level of protection for both products. As is well known, one of the characteristics of specific duties is that their impact is inversely proportional to the price of the product. In other words, the greater the value of the product the less protection the tariff provides. Wheat flour is a processed product whose essential raw material is wheat. Therefore, the price of wheat flour will be directly related to the price of wheat, but will always be higher.

198. If the same specific duty were levied on both products, the protection provided for wheat flour would be reduced as compared with that for wheat, which would indirectly favour flour imports. In fact, this is precisely what Argentina does with its differential export tax mechanism, which provides for exports with a higher value added to pay significantly lower taxes than exports of basic products, the object being to give industrial exports an artificial advantage.

199. Differential tariffs for products with higher value added are a reality throughout the world, including in Argentina itself. Moreover, there are no rules establishing the precise amount by which the tariffs on products higher up the processing chain have to be increased. It would be extremely difficult to arrive at any consensus on this.

200. The factor used by Chile has undergone occasional adjustments to take account of the relation between the prices of the two products and since 1996 has been fixed at 1.56. In formulating Law 19.446[81] which set that value consideration was given to the information available at that time.

201. This indicated that between January 1986 and December 1995 (the period of application of the band at that time), the average ratio of the price of flour to the price of wheat was 1.566.[82] Therefore, this was the factor that was built into the Chilean legislation and it has remained unchanged ever since.

2. Argentina's claim with respect to the second sentence of Article II:1(b) of the GATT 1994 likewise does not fall within the terms of reference of the present Panel

202. As Chile has pointed out, Argentina acknowledges that during the original proceedings it never raised a claim relating to the second sentence of Article II:1(b) of the GATT 1994.[83] Therefore, the discussion should focus on whether it is a question of a claim relating to the new measure or one relating to the PBS.

[81] Exhibit CHL–6.
[82] Exhibits CHL–9, 10 and 11.
[83] Paragraph 295 of the Rebuttal.

203. As Chile understands it, Argentina is claiming that a violation of Article 4.2 of the Agreement on Agriculture would automatically translate into a violation of Article II:1(b), second sentence, of the GATT 1994, insofar as the Member had not incorporated the measure in its Schedule. And that would apply both to the PBS and to any other measure that violates Article 4.2.

204. Accordingly, this is a claim which Argentina should have raised and substantiated in the original proceedings, because, in accordance with its reasoning in the Rebuttal, the PBS would also have been found to be in violation of Article II:1(b) once it had been concluded that it was inconsistent with the aforementioned Article 4.2. However, Argentina did not do so and cannot raise the claim before this Panel.

205. Contrary to what Argentina maintains, Chile's due process rights are being seriously impaired by this decision to introduce at this stage a substantive claim such as that relating to Article II:1(b), second sentence. Argentina, on the other hand, appears to rely on the reference cited in paragraph 310 of its Rebuttal. But this relates to arguments which could not be rebutted in good time and not to claims, as in the present case.

206. Consequently, Argentina's claims relating to the factor of 1.56 and to the alleged inconsistency with the second sentence of Article II:1(b) of the GATT 1994 fall outside the terms of reference of the present Panel, insofar as they concern aspects relating to the original measure (PBS) which Argentina could have raised in the original dispute but did not.

VI. CONCLUSION

207. Argentina has been unable to show that the current scheme based on Law 19.897 is preventing the transmission of international prices to the Chilean market or restricting the volume of imports. On the contrary, it insists that there is a lack of transparency and predictability in irrelevant aspects of the scheme in force. Chile has shown that the lack of transparency and predictability of certain aspects of the PBS were called into question precisely because they led to the insulation of domestic prices. These defects having been corrected and other changes introduced, the current scheme does not produce the effects which Appellate Body identified as being the common object and purpose of the measures listed in Article 4.2 of the Agreement on Agriculture. Argentina has been unable to prove that Law 19.897 and its Regulations generate those effects.

208. As a last resort, Argentina claims that Chile should have abolished its PBS because the Appellate Body so established.[84] Even though we may agree with the Appellate Body that duties resulting from the application of a measure inconsistent with Article 4.2. of the Agreement on Agriculture cannot go on being levied, the fact that the current system based on Law 19.897 and its Regulations is not inconsistent with that provision allows Chile to continue levying any specific duties that may be applicable.

209. Furthermore, it should be recalled that, as stated in the Article 21.3 arbitration in *EC – Poultry Cuts*, "the implementing Member has a measure of discretion in selecting the means of implementation that it deems most appropriate".[85] Therefore, Argentina cannot oblige Chile to comply in a particular way with the recommendations and rulings of the DSB.

210. Members of the Panel, Law 19.897 and its subsequent Regulations established a mechanism which on the basis of transparent and predictable parameters makes it possible to establish specific duties or rebates, or neither of the two, on wheat and wheat flour in accordance with world market

[84] Paragraph 317 of the Rebuttal.

[85] *EC – Poultry Cuts (Article 21.3)*, Award of the Arbitrator (WT/DS269/13 and WT/DS286/15), paragraph 49.

developments, including references to one of the markets of most concern, namely, that of Argentina. These duties or rebates remain unchanged for two months, which allows variations in international prices to be reflected in domestic prices. Thus, if the international price falls, the internal price falls by a similar amount and if the international price rises, the internal price rises in the same way. This is not what variable import levies or minimum import prices do.

211. Therefore, the system in force in Chile up to 2014 is not inconsistent with Article 4.2 of the Agreement on Agriculture and hence does not violate paragraph 4 of Article XVI of the Marrakesh Agreement Establishing the World Trade Organization. Chile requests the present Panel to find accordingly, while rejecting Argentina's claims in relation to the alleged inconsistency with Article II:1(b), second sentence, of the GATT 1994 and in relation to the factor of 1.56 for wheat flour, inasmuch as neither was properly brought before it.

ANNEX D

ORAL STATEMENTS OF THE PARTIES AT THE SUBSTANTIVE MEETING OF THE PANEL

ANNEX D-1

**OPENING STATEMENT BY ARGENTINA
(1 AUGUST 2006)**

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I. INTRODUCTION

Mr. Chairman, Members of the Panel:

1. Argentina appreciates the opportunity to submit to your consideration its arguments in the light of the First Written Submission by Chile and its Rebuttal.

2. This dispute has a very straightforward solution: a finding that the amended PBS cannot be maintained because it is not an ordinary customs duty.

3. A plain reading of the legislation enforcing the amended PBS shows that this measure is not expressed in the *form* of "*ad valorem* or specific rates". To the contrary, the amended PBS is a complex mechanism that, as a border measure, has no resemblance with an ordinary customs duty. By not being an ordinary customs duty, the amended PBS violates Article 4.2 of the *Agreement on Agriculture*.

4. Furthermore, by being "other duties or charges" not recorded in the corresponding column of Chile's Schedule of Concessions (No. VII), the amended PBS violates the second sentence of Article II:(1)(b) of the GATT 1994.

5. Finally, by maintaining a prohibited measure in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements, in violation of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*.

6. Chile was found in breach of its WTO obligations. The Appellate Body found that Chile's PBS was a border measure similar to a variable import levy and a minimum import price, and therefore was inconsistent with Article 4.2 of the *Agreement on Agriculture.* Thus, Chile's PBS was not an ordinary customs duty and could not be maintained.

7. Chile did not comply. It has "cosmetically" amended the old PBS while maintaining its distortive effects and fully preserving its lack of transparency and predictability.

8. Furthermore, Chile has tried to convince this Panel that its obligations to comply were very narrow in scope arguing that "… in analysing the 'measures taken to comply' an Article 21.5 Panel … must necessarily study the scope of the recommendations and rulings of the DSB".[1] This is incorrect. A proceeding under Article 21.5 of DSU is not only about the compliance with the recommendations and rulings of the DSB but also about the consistency of the measure taken to comply with a covered agreement.[2]

9. Finally, Chile agreed with Argentina's position: in addition to DSB's recommendations and rulings, Chile had to comply with the covered agreements[3], particularly in this case, the *Agreement on Agriculture*, the GATT 1994 and the WTO Agreement. However, Chile did not bring this understanding into practice: Chile not only has evaded DSB's recommendations and rulings but also has violated those agreements in further new ways.

10. In another attempt to disregard its WTO obligations, Chile has misinterpreted DSB's recommendations and rulings when stating that there were only "specific aspects" of the PBS that it

[1] Rebuttal by Chile, para. 16.

[2] *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Recourse to Article 21.5 of the DSU by India, Report of the Appellate Body (WT/DS141/AB/RW), para. 79.

[3] Rebuttal by Chile, para. 12.

should have brought into conformity.[4] Chile has had a big trouble with Argentina's claim that the amended PBS is inconsistent as a whole.[5] Not surprisingly, Chile's strategy has been to deviate the attention and to focus the discussion on a few specific features of Chile's PBS amendments.

11. Chile argues that Argentina, by identifying the amended PBS specific inconsistent features, goes against its own position.[6] That argument has shown to be untenable. Any Member alleging the incompatibility of any other Member's measure, necessarily has to identify specific aspects of that measure that turn it inconsistent with WTO obligations. That was the reasoning the Appellate Body developed in order to reach its conclusions.[7] Indeed, that is also what Argentina has done during these proceedings: based on specific features which are the core of the amended PBS, a conclusion was reached regarding the amended PBS in general.

12. Regarding its response to Argentina's claims in these proceedings, Chile has not countered many of Argentina's arguments. Chile erroneously believes that it is not Chile's obligation to refute *all* and each of Argentina's claims.[8] Nevertheless, Chile's defense is not properly substantiated if it does not respond each of Argentina's arguments. The Appellate Body stated that the burden of proof is shifted to the defending party once the claimant has established a *prima facie* case of inconsistency with a particular provision, which must in turn counter or refute the claimed inconsistency.[9]

13. Chile cannot simply maintain that its "… objections … to Argentina's claims and arguments are clarified from the reading of [its] arguments".[10] Thus, Chile wants the Panel to find that it has refuted all of Argentina's arguments from the simple reading of a few arguments that Chile considers "relevant". Chile's position is baseless, and impairs the possibility to exactly identify which arguments have been responded, how they have been responded, what proofs have been provided for or if those arguments have effectively been responded.

14. This is how Chile purports to convince this Panel it has complied: by misinterpreting the recommendations and rulings of the DSB and by narrowing its obligations under the covered agreements, Chile has "cosmetically" amended its PBS, fully preserving its distortive effects, and has avoided to substantially address each of Argentina's claims. This Panel should not be misled by Chile's attempt and should find that the amended PBS is inconsistent which Chile's obligations under the WTO.

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[4] First Written Submission by Chile, para. 88.

[5] Rebuttal by Chile, paras. 15 and 19 to 28.

[6] Rebuttal by Chile, para. 22. The features identified by Argentina are the ones that rendered the "old" PBS intransparent and unpredictable. Argentina was answering Chile's argument that only a few minor features of the PBS were inconsistent due to lack of transparency and predictability (see Rebuttal by Argentina, para. 110 and ss.).

[7] *Chile – Price Band System*, Report of the Appellate Body, para. 261: "… we reach our conclusion <u>on the basis</u> of the particular configuration and interaction of all these specific features of Chile's price band system …" (underlining added).

[8] Rebuttal by Chile, paras. 2 and 3.

[9] In *US – Wool Shirts and Blouses* (WT/DS33/AB/R, WT/DS33/AB/R/Corr.1, page 16) the Appellate Body stated: "… [I]t is a generally-accepted canon of evidence … that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or ***defense***. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, ***who will fail unless it adduces sufficient evidence to rebut the presumption***". (Emphasis added; footnote omitted). This principle was recalled by the Appellate Body in *EC – Hormones* (WT/DS26/AB/R, WT/DS48/AB/R, para. 98), *Japan – Apples* (WT/DS245/AB/R, para. 154) and *EC – Tariff Preferences* (WT/DS246/AB/R, para. 104).

[10] Rebuttal by Chile, para. 2.

II. THE AMENDED PBS IS INCONSISTENT WITH ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

1. The amended PBS is inconsistent with Article 4.2 of the Agreement on Agriculture because it is not an ordinary customs duty

15. As stated before, this Panel could bring an end to this dispute by providing the parties with a very straightforward finding: the amended PBS cannot be maintained because it is not an ordinary customs duty.

16. Article 4.2 of the *Agreement on Agriculture* is not an ordinary provision. By requiring Members not to maintain measures other than ordinary customs duties, it is –by its own nature- a fundamental provision of the trading system. Article 4.2 reads in its relevant part:

> "Members shall not maintain, resort to or revert to measures of the kind which have been required to be converted into ordinary customs duties…"

17. The original Panel in these proceedings stated that "Article 4.2 is central to the establishment and protection of a fair and market-oriented agricultural trading system in the area of market access…Article 4.2 of the *Agreement on Agriculture*, by prohibiting Members from maintaining, resorting to, or reverting to any measures of the kind which have been required to be converted into ordinary customs duties, accordingly provides the legal underpinning for what, in ordinary parlance, is referred to as a "tariff-only" regime for trade in agriculture".[11]

18. In addition, the Appellate Body established that the object and purpose of Article 4 is to achieve improved market access conditions for imports of agricultural products by permitting **only** the application of **ordinary customs duties.**[12]

19. Chile's PBS is not an ordinary customs duty. This is clear from what the Appellate Body established in this dispute. When interpreting the term "Ordinary Customs Duties" as used in Article 4.2 of the *Agreement on Agriculture*", the Appellate Body established that "…all that is required is that 'ordinary customs duties' be expressed in the form of '*ad valorem* or specific rates'".[13]

20. A plain reading of Law 19.897 and Decree 831/2003[14], the legislation enforcing the amended PBS, shows that this measure is not expressed in the *form* of "*ad valorem* or specific rates". There is no ad valorem or specific *rate* expressed in those measures. To the contrary, the amended PBS is a complex mechanism that, as a border measure, has no resemblance with an ordinary customs duty.

21. As its own name implies, the amended PBS is a *system* consisting *inter alia*, of ceiling and floor prices, reference prices, a formula, a fixed coefficient of 0,985, a factor of 1,56, relevant periods for the determination of the reference prices and others for the establishment of the duties, some predetermined relevant markets and some predetermined qualities of concern. There is no similarity between this *system* and an ad valorem or specific duty rate or, in other words, an ordinary customs duty. In this sense, it is clear that the amended PBS is considerably less amenable to negotiated

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[11] *Chile – Price Band System*, Report of the Panel, para. 7.15.

[12] *Chile – Price Band System*, Report of the Appellate Body, para. 234.

[13] *Chile – Price Band System*, Report of the Appellate Body, para. 277 (underlining added). The Appellate Body found contextual support for interpreting the term "ordinary customs duties" in Annex 5 to the Agreement on Agriculture, establishing that "Annex 5, read together with the Attachment to Annex 5 … contemplates the calculation of 'tariff equivalents' in a way that would result in ordinary customs duties 'expressed as *ad valorem* or specific rates'".

[14] See ARG-1 and ARG-2

reduction that an ordinary customs duty, contrary to the object and purpose of the Agreement on Agriculture.[15]

22. The possibility of the *resulting* duties taking the form of ad valorem or specific duties is meaningless regarding of whether the *underlying measure* is consistent. In this respect, the Appellate Body established that "…the fact that the duties that result from the application of Chile's PBS 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*".[16] This is a very important distinction that Chile has constantly tried to obscure, deviating the discussion to an analysis of the consistency of the amended PBS *resulting* duties.[17] However, contrary to what Chile asserts, the duties that result from the application of Chile's amended PBS are not the object of these proceedings. The object of this dispute is the underlying measure, the PBS by itself.

23. The amended PBS did not turn the system into an ordinary customs duty and continues to be a measure of the kind which was required to be converted into an ordinary customs duty, and could not be maintained in conformity with Article 4.2 and footnote 1 of the *Agreement on Agriculture*.

2. The amended PBS causes insulation from the international market

24. In addition to not being an ordinary customs duty because it is not expressed in the form of an *ad valorem* or specific rates, the PBS -regardless the "cosmetic" changes made-, continues to insulate Chile's market from fluctuations in international prices in a way that is inconsistent with Article 4.2 of the *Agreement on Agriculture*.

25. In particular, like the original PBS, the amended PBS continues to elevate the entry price of imports to Chile above the price band floor; continues to "overcompensate" for the effect of decreases in international prices on the domestic market when reference prices are set below the price band floor; continues to make the entry price of Chilean imports higher than if Chile applied a minimum import price at the level of the price band floor, and continues to fail to ensure that the entry price of imports to Chile falls in tandem with falling world market prices.

26. Furthermore, the disconnection produced by the amended PBS stems from the existence of floor and ceiling values determined once for the entire period from 16 December 2003 to 15 December 2014, and established from 2007 on the basis of fixed coefficients; reference prices staying unchanged for two months, established on the basis of only two qualities of concern and of daily prices recorded on only two predetermined markets; a multiplier consisting of 1 plus the general *ad valorem* duty added to the formula used to calculate the duty levels; a factor of 1,56 applied to the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour; and from a complete absence of any relation to the transaction value of the shipments.

27. Each argument has been based on analytical, mathematical and/or empirical evidence.

28. Chile's response to Argentina's arguments has been confusing and contradictory.

29. **First**, Chile has offered the surprising argument that the Appellate Body did not request that the reference price and the floor and ceiling of the PBS be established in connection with international prices[18], when that is exactly what the Appellate Body meant.[19]

[15] See *Chile – Price Band System*, Report of the Panel Report, footnote 638.
[16] *Chile – Price Band System*, Report of the Appellate Body, para. 279.
[17] See, for example, Rebuttal by Chile, para. 137.
[18] Rebuttal by Chile, para. 61.

30. **Second**, the only "evidence" Chile submitted in rebuttal to Argentina's arguments is an unsupported graph.[20] Argentina pointed out a whole set of inconsistencies and contradictions in that graph which, in turn, supported Argentina's argument that the amended PBS causes insulation from the international market.[21] After that Chile exposed a perplexing set of contradictions.[22]

31. **In the end**, Chile's explicit conclusion is that, in spite of the Appellate Body findings and Chile's previous statements, there is no connection between the wheat FOB price, the entry price and the internal market.[23] This is the basis for Chile's argument that the PBS does not have the effect of disconnecting Chile's market from international price developments. Chile's arguments are untenable. Argentina has demonstrated that the amended PBS causes insulation from the international market.

32. Additionally, Argentina has demonstrated how each of the Appellate Body findings in the original proceedings apply to the amended PBS.

33. **First,** Argentina has shown mathematically and empirically -both for wheat and wheat flour- how specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor.[24] That is to say, when specific duties are applied the entry price is *always* above US$128 per tonne, as Chile has confirmed.[25]

34. **Second,** Argentina has also shown that the amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor.

35. Chile's position regarding overcompensation is self-contradictory. First Chile argues that it does not exist.[26] Afterwards Chile affirms that what Argentina calls "overcompensation" can occur and, indeed, occurred.[27] Chile misleadingly states that overcompensation only occurred in two specific dates: from 15 to 16 December 2004 and from 15 to 16 February 2005. Afterwards "international prices will continue being reflected in the domestic prices".[28] There are many problems with this reasoning.

36. On the one hand, it must be clear at this stage that international prices are <u>not</u> reflected in the domestic prices due to the amended PBS. As follows from the PBS formula, for the modified PBS <u>not to elevate</u> the entry price of imports to Chile above the price band floor, an improbable condition must

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[19] *Chile – Price Band System*, Report of the Appellate Body, paras. 249 and 251.

[20] First Written Submission by Chile, para. 154.

[21] First Written Submission by Argentina, 61 to 72.

[22] In its First Written Submission, paras. 154 and 155, Chile stated that the graph revealed that during the period of application, the wheat *entry price* had the same behaviour as its FOB price and that both prices' variation had "large similarities" that showed the connection between Chile's internal price and the international market. In its Rebuttal, para. 55, after Argentina showed that Chile's arguments were baseless, Chile contradicts itself stating that, in reality, the graph was comparing wheat FOB price with wheat *wholesale* price. Moreover, Chile curiously maintains that the connection required by Argentina *cannot exist*. According to Chile, the reason for this is that internal market wheat price is influenced by wheat internal supply. In sum, the evidence submitted by Chile to convince the Panel that the amended PBS does not cause insulation from the international market, not only supports Argentina's arguments, but also is full of self-contradictions. On top of that, when the relevant parameter of comparison is between the FOB price and the *entry price*, as the Appellate Body established in paragraph 260 of its Report, Chile incorporates a new variable never addressed by the Appellate Body nor by Argentina: the *wholesale price*.

[23] Rebuttal by Chile, para. 55

[24] First Written Submission by Argentina, Section C.I.2.1..

[25] See Rebuttal by Argentina, paras. 164 to 169.

[26] Rebuttal by Chile, para. 46.

[27] Rebuttal by Chile, para. 49.

[28] Rebuttal by Chile, para. 51.

be satisfied: the reference price (calculated on a FOB basis) must be higher than the CIF price of an individual export transaction by more than US$7,2453 per tonne or, what amounts to the same thing, the CIF price of that transaction must be lower than the reference price by more than US$7,2453 per tonne. In other words, as far as the CIF price of an individual export transaction exceeds the reference price, or falls below that price by no more than US$7,2453 per tonne, the entry price of that transaction *will be* above the band floor.

37. Argentina is sure that at least two out of three Members of this Panel remember the notion of the *break even point* from the original proceeding. In that case, Argentina demonstrated how, after a break even point was reached, the duties resulting from the PBS violated Chile's consolidated tariff binding, therefore infringing Article II of the GATT 1994. Chile has now established a *new* break even point: the point were the reference price exceeds the CIF price by US$7,2453 per tonne.

38. Argentina showed how improbable reaching that break even point is.[29] As far as that point is not reached, the modified PBS will mathematically elevate the entry price of imports to Chile above the price band floor. Chile explicitly recognized that FOB prices are always lower than CIF prices.[30] As the reference price is calculated on a FOB basis, therefore the condition cannot be fulfilled: the modified PBS will always tend to elevate the entry price of imports to Chile above the price band floor.

39. Bearing this formula in mind, it is easy to see that, even if international prices were reflected in the domestic prices after the initial overcompensation as Chile states, the amended PBS provides an end to *any* transmission when the entry price approaches the band floor. Due to the formula, the PBS will not allow any transmission of international prices in the case that the entry price falls below the floor price. Simply put: the formula, together with the band floor, work as a "brake" for the decline in the entry price and for any transmission of international prices below the level of the floor. If a decline in international prices *cannot be* reflected below the price band floor, then it is impossible to argue that the amended PBS reflects international prices.

40. On the other hand, the initial overcompensation which, according to Chile, takes place at the beginning of the two-month period, inevitably taints the rest of that period: the level of duties and the entry price after that moment will be affected by the original overcompensation. In fact, if overcompensation did not occur, the level of duties and the entry price resulting from the two-month period would be lower. Thus, the effects of overcompensation taint and affect the level of duties and entry price resulting from the PBS, which are higher than they would be if overcompensation simply did not exist.

41. Moreover, the situation is not different with what occurred in the original proceedings. According to the original PBS, the specific duties were established for a period of one week.[31] Assuming *arguendo* that overcompensation only took place at the beginning of that period of one week, it nevertheless affected the level of duties and the entry price for the rest of that period. That was enough for the Appellate Body to find that the original PBS overcompensated for the decreases in international prices.[32] The situation with the amended PBS is worse: while in the original PBS the effects of overcompensation tainted the level of duties and the entry price for a week, now that period has been extended to two months. The fact is that Chile has not been able to rebut Argentina's

[29] First Written Submission by Argentina, paras. 109-114.
[30] See Rebuttal by Argentina, paras. 164 to 169.
[31] *Chile – Price Band System*, Report of the Appellate Body, paras. 21 to 29.
[32] *Chile – Price Band System*, Report of the Appellate Body, para. 260

arguments regarding the overcompensation produced by the amended PBS and recognized by Chile itself.[33]

42. Chile's last bid to argue that the amended PBS could equate to an "ordinary customs duty" is its attempt to equate the overcompensation effect with an alleged overcompensation produced by *ad valorem* duties or by seasonal duties. If what happens with *ad valorem* duties or with seasonal duties could be equated with the "overcompensation" produced by the amended PBS, which it can not, it is certainly not a result of a pre-established mathematic formula inherent to those measures that guarantees that "overcompensation" *will* occur when international prices in relevant markets fall, as a consequence of a floor and a ceiling price, reference prices based on predetermined markets and qualities of concern, a factor of 1,56 and a coefficient of 0,985.

43. Contrary to what Chile states, Argentina does not focus its argumentation only in "overcompensation".[34] The "overcompensation" is one *additional* feature of the amended PBS that contributes to disconnect Chile's market from international price developments. As the Appellate Body stated when finding the old PBS inconsistent[35], it is the configuration and interaction of Chile's PBS features that insulate Chile's market from the transmission of international prices. Overcompensation then, is one of those features that, together with many other features, renders Chile's amended PBS inconsistent with Article 4.2 of the *Agriculture Agreement*.

44. **Third,** Argentina has also shown that, under the amended PBS, the entry price for wheat and wheat flour imports is higher than it would be if Chile were to apply a minimum import price at price band floor level.

45. As can be clearly seen from Table V of Argentina's First Written Submission[36], in all cases the entry price for imports to Chile under the amended PBS is higher than the entry price with a minimum import price at the band floor level.

46. **Fourth,** Argentina provided evidence that the amended PBS does not ensure that the entry price of wheat and wheat flour imports to Chile falls in tandem with falling world market prices. There can be no doubt that the amended PBS does not merely moderate the effect of fluctuations in world market prices on the Chilean market.

47. To ensure that the entry prices of imports to Chile behave the same way as FOB prices, Chile had just to apply an *ordinary customs duty*. Chile knows this, but it does not apply an ordinary customs duty, precisely to avoid ordinary customs duties' effects and to insulate Chilean market from international market evolutions. It is pure logic. Why, if not, Chile has avoided applying an *ad valorem* or specific duty and attempted for the second time to maintain a system as complex as the amended PBS?

The floor and ceiling of the amended PBS insulate the Chilean market from international price developments

48. In its present form the PBS impedes the transmission of international price developments to the domestic market, in much the same way as other categories of prohibited measures listed in footnote 1 to Article 4.2 of the *Agreement on Agriculture*, since the floor and ceiling prices of Chile's price bands no longer vary with either world market prices or historical prices, but have been

[33] First Written Submission by Argentina, Section C.I.2.2.
[34] Rebuttal by Chile, para. 80.
[35] *Chile – Price Band System*, Report of the Appellate Body, para. 261.
[36] First Written Submission of Argentina, para. 167.

determined once for the entire period from 16 December 2003 to 15 December 2014, without bearing any relation to international prices.

49. Argentina considers that the current system has a further distortive effect, since the floor and ceiling prices will not be adjusted until 2007. Similarly, the new PBS leads to even greater distortions considering that from 2007 onwards these parameters will be established on the basis of fixed coefficients, thereafter isolating the system from fluctuations on the international markets for a further period of seven years, or probably more.[37]

50. Under the amended PBS, due to the factor of 0,985, the floor and ceiling vary *without any relation* to world market or historical prices. Neither do they vary as a function of the transaction value, a characteristic shared by the entire PBS.

51. Chile asserts that the fact that the factor of 0,985 is applied until 2014 is a predictability guarantee for market players.[38] The predictability Chile refers to does not exist. It is clearly evident from Law 19.897 that there is no *guarantee* that the PBS will be dismantled in 2014. If there is any predictability, it is the certainty that international prices *will not* be reflected by the floor and ceiling of the amended PBS in Chile's internal market. That is the only guarantee the PBS can offer.

The reference prices of the amended PBS insulate the Chilean market from international price developments

52. Argentina has demonstrated that the amended PBS reference prices, by the way they are established, are neither transparent nor predictable and insulate the Chilean market from international price developments.[39]

53. Regarding the insulation consequences deriving from the fact that the amended PBS reference prices are based on only two predetermined **markets of concern**, Argentina recalls that bread wheat is sold -at least- in two other markets than the ones selected by Chile and which are not reflected on the reference price: Chicago and Kansas.[40]

54. Regardless, Chile has tried to justify the establishment of the reference prices based on FOB prices in Argentina and United States, because according to Chile, "[i]n the last six years (2000-2006) 40 per cent of Chilean wheat imports came from the United States and 31 per cent from Argentina".[41] It is strange that Chile does not provide a reference quoting the source of that information. Nevertheless, Argentina had access to Chile's own records for the period during which the amended PBS has been in force. Those records show a different story: during the two complete years since the establishment of the amended PBS (i.e. 2004-2005), Canada has always been a larger exporter of wheat to Chile than the United States, either in volume as well as in amount. I will ask the Members of the Panel to turn your attention to Exhibit ARG-31 which is being distributed now. This is a printout of ODEPA's (Chile's official source) webpage showing Chile's records of wheat imports for 2004 and 2005. As it is clear from the first page of this exhibit, in 2004 Canada exported around 54 million tons of wheat while the United States accounted for almost 40 million tons. If we now turn to the second page, showing wheat imports for 2005, the difference between Canada and the United

[37] In effect, the amended PBS has no ending date. Law 19.897 establishes that "In 2014, the President of the Republic shall evaluate the modalities and conditions of application of the price band system, taking into consideration international market conditions, the requirements of the industrial, productive and consumer sectors and Chile's trade obligations at that date." See Exhibit ARG-1.

[38] Rebuttal by Chile, para. 86

[39] First Written Submission by Argentina, paras. 214 to 219 and Rebuttal by Argentina, paras. 107 and 108.

[40] First Written Submission by Argentina, para. 218.

[41] Rebuttal by Chile, para. 72.

States is even larger: Canada accounted for almost 40 million tons while the United States accounted for around 20 millions. It is clear that Canada has been a relevant exporter to Chile. However for Chile's PBS, this is meaningless. Although Canada is certainly a market of concern for Chile, the amended PBS will never reflect Canada's relevance in Chilean foreign trade of wheat, nor Canadian prices will be reflected in Chile's internal markets. Therefore, Chile's argument that the amended PBS "reference prices now correspond to f.o.b. prices on the two markets of most concern for Chile"[42] is baseless. To put it in the Appellate Body words, it is not by any means certain that the reference price used under the PBS is representative of the current world market price, and it is certainly *not* representative of prices in *all* markets of concern.[43]

55. Regarding the problems with the sources for the reference price, after Argentina insisted twice on this issue, Chile finally revealed the mystery: for the first semester (Bread Wheat, Argentine Port) Chile uses SAGPyA's quotation (http://www.sagpya.mecon.gov.ar), the official argentine source which provides "Official FOB Prices". For the second semester (Soft Red Winter No.2 wheat), Chile uses the information from the Chicago Board of Trade (http://www.cbot.com).[44]

56. After Chile's unveiling the source for the establishment of the reference price, the problems have become clearer.

57. **First**, contrary to what Chile affirms, the official Argentinean source (SAGPyA) does not publish the quotation of "Bread Wheat, Argentine Port". Instead, as Chile acknowledges, what SAGPyA publishes is the "*Official FOB Price*" for bread wheat, which is not "Bread Wheat, Argentine Port" FOB price. I would like to turn your attention to Exhibit ARG-32 which we are distributing now. It is a printout of SAGPyA's "Official FOB Prices" from some days ago. As it can be clearly seen, the header reads "Precios FOB Oficiales", which is the Spanish translation for "Official FOB Prices". It is clear now that the quotation "*Bread Wheat, Argentine Port*" (or its translation to Spanish "Trigo Pan Puerto Argentino") is not published by SAGPyA as Chile states.[45] Indeed, "*bread wheat, Argentine port*" is a theoretical construction, not developed by SAGPyA.

58. **Second**, unless Argentina had initiated this dispute, wheat and wheat flour exporters from all over the world would have not known where to look for the future reference price. No matter what "abilities" and market knowledge the exporters had[46], it would have been very difficult for them to establish the future amount of duties resulting from the difference between an intransparent future reference price and the floor price. Now, it is clear that SAGPyA does not publish what Chile affirms. In fact, if the exporter recurs to SAGPyA, he will not a get a "Bread Wheat Argentine Port" quotation.

59. In the same way that Chile gives now this *ex-post* clarification regarding the source for "*Bread Wheat, Argentine Port*", Chile now submits that the source of information for the "Soft Red Winter" FOB Price (Gulf) is the Chicago Board of Trade.[47] In this case, the information is not publicly available. In fact, it is paid information. It is an extra charge exporters face for accessing the Chilean market.[48] This is how transparent and predictable Chile's amended PBS is.

60. Regarding the **qualities of concern**, contrary to what the Appellate Body established[49], Chile did not explain how they were are selected. Chile's amended PBS establishes the references prices

[42] Rebuttal by Chile, para. 72.
[43] *Chile – Price Band System*, Report of the Appellate Body, para 249.
[44] Rebuttal by Chile, para. 73.
[45] See SAGPyA's web page: http://www.sagpya.mecon.gov.ar/scripts/0-2/fobtodo.asp
[46] First Written Submission by Chile, para. 162.
[47] Rebuttal by Chile, para. 73.
[48] See http://www.esignal.com/cbot/pricing/default.asp. Esignal.com is a sub page (link) of CBOT.com where pricing information is provided.
[49] *Chile – Price Band System*, Report of the Appellate Body, para 249.

based on only *two* of those qualities, namely "Bread Wheat, Argentine Port" and "Soft Red Winter". However, there are many types or qualities involved in the international trade of wheat. Indeed, according to Chile's own records there are at least two other qualities or types of wheat relevant for Chile: "Soft White Winter No 2" and "Western White Winter No 2". At this respect, I would like to turn your attention to Exhibit ARG-33, being distributed now. There you can see ODEPA's prices record for different qualities of wheat since 1991. In the first and second columns you can see the FOB prices for the two qualities of concern relevant for the amended PBS and now familiar to us. In the third and fourth columns, ODEPA records the FOB price for the two other qualities just mentioned: "Soft White Winter No 2" and "Western White Winter No 2". Thus, according to its own records there are at least two other qualities or types of wheat relevant for Chile. Therefore, it is clear that Chile knows that there are at least two, and presumably more, other relevant qualities of concern and probably Chile knew it at the time the PBS was amended.

61. It is noteworthy that among the -at least- four relevant qualities and markets of concern, Chile chose those qualities that since 1991 have been the lowest priced. I would ask the Panel at this point to turn to page 4 of the same Exhibit ARG-33 where the average of the prices of these four categories recorded since 1991 are highlighted at the bottom. Clearly, the qualities "Bread Wheat, Argentine Port" and "Soft Red Winter" have the lowest FOB prices. Thus, the gap between the reference price and the floor price is further expanded, more duties are levied and the entry price is higher than if Chile took into account all the qualities of concern. Again, it is useful recalling that the Appellate Body found that "[u]nder 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'".[50]

62. Furthermore, Chile does actually import wheat of qualities different from those used for the calculation of the reference prices. In Exhibit ARG-34, being distributed now, you can see a selection of import data from the Chamber of Commerce of Santiago de Chile (in Spanish "Camara de Comercio de Santiago de Chile") for 2004 and 2005. There you can see on the first page that, for example, in March 2004, Chile imported wheat of the type "Soft White". Similarly, on the second page of the same Exhibit you can see that, for example, in July 2005, Chile imported wheat of the type "Canadian 3WR". Page 3 of the same Exhibit shows imports to Chile of wheat of the type "Western Red Spring" and "Canadian 1WR". So, not only Chile imports wheat of qualities different from those taken into account for the establishment of the reference prices but also Chile applies to those imports reference prices based on the two predetermined qualities of concern established by the amended PBS.

63. Summing up, through the reference prices, the amended PBS impedes the transmission to the Chilean market of the prices of other qualities of wheat. By not taking into account all the relevant markets and qualities of concern for the calculation of the reference prices, the amended PBS also insulates Chile's market from international price developments. In fact, if an exporter ships any other type or quality of wheat rather than "Bread Wheat, Argentine Port" or "Soft Red Winter No. 2", Chile will apply to that shipment a reference price and levy specific duties based on one of those two qualities, different from the quality actually being imported. It is worth recalling at this point that the Appellate Body found that the "… 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".[51]

64. The problem with the amended PBS's reference price is that, compared to the original PBS, the insulating consequences are much worse. In fact, international price developments of an extense

[50] *Chile – Price Band System*, Report of the Appellate Body, para. 249 (Underlining added).
[51] *Chile – Price Band System*, Report of the Appellate Body, para. 249 (Emphasis in the original, underlining added).

period of the year are not reflected at all by the amended PBS. According to Chart 2 of the Annex to the Decree 831/2003, the relevant price leading to the establishment of the reference price, are those recorded between 26 November to 10 December, 27 January to 10 February, 27 March to 10 April, 27 May to 10 June, 27 July to 10 August, and 26 September to 10 October. Those are the relevant time periods for the calculation of the reference prices. These groups of days account for a total of … 90 days. Taking into account that a year has 365 days, that is less than 25 per cent of the year. More explicitly, international price developments recorded during 275 days or 75 per cent of the year will never be reflected in the reference price. For the amended PBS the international prices recorded during all those 275 days simply *do not exist*. As regards to the daily prices recorded during each day of each of the 15-day periods that form the remaining 90 days, they are reflected *after* they are recorded, with a delay ranging from 6 days to two months.[52]

65. Thus, the situation now is even *worse* than with the original WTO-inconsistent PBS. In fact, although completely full of distortive effects, the original PBS, at least took into account all the 52 weeks of each year to establish the weekly reference price. As it is clear now, for the amended PBS only 13 of those weeks (25 per cent of the year) are now relevant.

66. In short, Chile wants this Panel to find that the amended PBS reflects international price developments, overlooking the fact that the floor price, will never transmit international prices. For the other fundamental feature for the assessment of duties, the reference price, prices recorded during 275 days of the year cannot be reflected: simply they *do not exist*. More over, the remaining 90 days are recorded in only two markets of concern, when there are at least four more (Chicago, Kansas, Portland and Canada) and one of them (Canada) has been at least as relevant as the two established "markets of concern". Furthermore, the reference prices are based on the two lowest priced qualities of concern, when there are at least two further relevant qualities of concern for Chile. If this were not enough, the same reference price applies to all imports that Chile *does* import, regardless the origin, quality of concern and transaction value.[53] This is how Chile pretends to argue that the amended PBS transmits international prices.

The amended PBS has no relation to the transaction value

67. Chile maintains that what "worries" Argentina is that the specific duties resulting from the amended PBS are neither related with commercial transactions nor modified by changes in international prices.[54] Chile distorted Argentina's argument. Argentina is not questioning the resulting duties. Argentina's arguments relate to the underlying measure, the amended PBS.

68. **First**, what Argentina argues is that one additional aspect of the amended PBS that insulates Chile's market from the transmission of international prices, is the complete absence of any relation of all of its features with the transaction value of the shipments.[55] In fact, the amended PBS is totally unrelated to the transaction value. Simply put, within the amended PBS, the transaction value has no meaning.

69. **Second**, although the amended PBS has no relation with the transaction value, contrary to Chile's assertion, the resulting *duties* are, in fact, modified by international prices. As Argentina asserted, although specific duties resulting from the amended PBS do not vary during the two-month

[52] For example, the prices recorded between 27 January and 10 February, will be reflected in the reference price established for the period 16 February to 15 April.

[53] *Chile – Price Band System*, Report of the Appellate Body, para. 250.

[54] Rebuttal by Chile, para. 32.

[55] First Written Submission by Argentina, paras. 137, 141, 153, 157, 182, 196, 220, 222, 223 and 228; Rebuttal by Argentina, paras. 60, 82, 143 and 198.

period, they change following price changes in the markets of concern.[56] The paradox is that they change in opposite directions: when international prices fall, specific duties rise.[57] It is as simple as that. To make this clearer, I would like to turn the Panel's attention to Exhibits ARG-35 and ARG-36 which are being distributed now. I want you to pay special attention to the graph in Exhibit ARG-35. That graph is based on data from the Chart in exhibit ARG-36, which in its turn is based on ODEPA's information. It reflects the trajectory in indexed terms of the specific duties and reference prices during the period in which, as a result of the amended PBS, the duties were imposed (16 December 2004 – 15 April 2005). This graph is factual evidence that clearly shows the point: when the reference prices fall, the specific duties move in an opposite direction, or in other words, rise, completely undercutting the effect of the decline in wheat international prices. It is worth highlighting that this graph has not involved any calculation, other than the necessary for indexing and simply stems from evidence already presented by Argentina in this proceeding.[58] In fact, these exhibits are exclusively based on data provided by ODEPA.[59] Argentina does not understand how, then, Chile can argue that the amended PBS does not disconnect Chile's market from international price developments.[60]

3. The amended PBS is neither transparent nor predictable

70. With the purpose of preserving the intransparent and unpredictable aspects of the amended PBS from the Panel's scrutiny, during this proceeding Chile has systematically maintained the argument that transparency and predictability are not requirements of Article 4.2 of the *Agreement on Agriculture*. Furthermore Chile affirmed that the Appellate Body just found that only variable import levies are intransparent and unpredictable.[61]

71. Argentina demonstrated that the Panel and the Appellate Body found that the core and fundamental features of the old PBS lacked transparency and predictability.[62] The logical extension is that the amended PBS can be challenged for its lack of transparency and predictability.

72. Even in the unlikely event that certain specific features of the PBS had not been addressed by the Panel or the Appellate Body findings, the amended PBS should *still* be found intransparent and unpredictable.

73. Chile's last bid has been to maintain that Article 4.2 of the *Agreement on Agriculture* does not contain the words transparency and predictability.[63] However, in spite of Chile's wishes, transparency and predictability are implicit requirements of Article 4.2 of the *Agreement on Agriculture*.[64] **First**, the Appellate Body has already recognized that the lack of transparency and predictability "… contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market".[65] **Second**, the Appellate Body established that the lack of transparency and

[56] First Written Submission by Argentina, Section C.I.2.4 and Rebuttal by Argentina, Section B.2.2.
[57] First Written Submission by Argentina, para. 54
[58] For example, *inter alia*, Exhibit ARG-6 or Tables I and II, paras. 134 and 138, respectively.
[59] See Exhibit ARG-6.
[60] What should be also highlighted is that the amount levied by ordinary specific duties does not vary when international prices change. In those cases, what varies is the amount of the duty in relative terms (percentage) with respect to the international price but, usually, the absolute amount does not change. In the case of the amended PBS, following the decline of the reference prices below the price band floor, the amount of the duty varies in relative and absolute terms.
[61] *Inter alia*, First Written Submission by Chile, para. 66, 81 and 83, and Rebuttal by Chile, paras. 29 and 30.
[62] First Written Submission by Argentina, Section C.I.3 and Rebuttal by Argentina, Section B.3.
[63] Rebuttal by Chile, para. 29.
[64] Rebuttal by Argentina, para. 124.
[65] *Chile – Price Band System*, Report of the Appellate Body, para. 234.

predictability prevents enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4 of the Agreement on Agriculture.[66]

74. According to Chile, "… Argentina appears to claim that any measure applied in the agricultural sector that is not transparent and/or predictable is inconsistent with Article 4.2 of the *Agreement on Agriculture*".[67] Rather, Argentina's position is that an intransparent and/or unpredictable border measure applied to agricultural imports cannot be consistent with Article 4.2. To the contrary, the logical extension of Chile's position would be that any not transparent and/or predictable border measure applied to the agricultural sector would anyhow be consistent with Article 4.2 of the *Agreement on Agriculture*, in manifest contradiction to what the Appellate Body established regarding the object and purpose of Article 4 of the Agreement on Agriculture.

75. Chile stated that the fact that Argentinean exporters do not know today the duties they will pay in the future is not prohibited by any WTO provision and nobody can guarantee that the ad valorem duties applied today by the WTO members will be the same in 2007.[68] In addition to that, Chile stresses that nobody can argue that its MFN general ad valorem duty is not an ordinary customs duty because, due to a plan, it has progressively and automatically been reduced from 11% to 6% between 1999 and 2003.[69]

76. **First**, unlike the amended PBS, Chile's MFN general ad valorem duty is an ordinary customs duty because it is expressed as an ad valorem rate, as the Appellate Body required. Chile's PBS is clearly not expressed in and ad valorem or specific duty rate.

77. **Second**, unlike the amended PBS, Chile's MFN general ad valorem duty has not varied due to a *formula*. Additionally, its variation has certainly been transparent and predictable. As Chile itself proved, Chile's MFN general ad valorem duty has varied due to a plan.[70]

78. **Third**, the fact that an exporter does not know and cannot reasonably predict what the amount of duties will be, is one among several characteristics that renders the amended PBS inconsistent with Article 4.2 of the *Agreement on Agriculture*. This was the Appellate Body reasoning[71], and the reasoning followed by Argentina. Argentina has explained all the problems with this[72], as well as with Chile's counterarguments.[73] Instead of rebutting the fact that an exporter does not know and cannot reasonably predict what the amount of duties will be, Chile's answer to this was that "[e]ven though Chile does not know precisely how these exporters operate, **it does not seem reasonable to assume such ignorance**".[74] Additionally, Chile argues that Argentina's extensive listing of all the additional steps an exporter has to take in order to predict future reference prices "…implies that it is not part of his own business as such – but an additional task – to find out about the conditions of access to his chosen export market …". Then Chile asks "what is part of the 'own business' of an Argentine exporter."[75] Argentina would reply with the following question: Can Chile reasonably argue that carrying with the burden of finding out about the unfair conditions of access imposed by a measure other than an ordinary customs duty, is part of an exporter's own business? There is one clear answer to this: no. If Chile imposed an ordinary customs duty expressed in the form of an ad valorem or

[66] *Chile – Price Band System*, Report of the Appellate Body, para. 258.
[67] Rebuttal by Chile, para. 31.
[68] Rebuttal by Chile, para. 95.
[69] Rebuttal by Chile, para. 105.
[70] See Exhibit CHL-8: Law 19.589 providing for a rebate on the tariff rate and introducing amendments to other fiscal and economic legislation. Published in the Official Journal on 14 November 1998
[71] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[72] First Written Submission by Argentina, Section C.I.3.2.
[73] Rebuttal by Argentina, paras. 125-135.
[74] Rebuttal by Chile, para. 93.
[75] Rebuttal by Chile, para. 92.

specific duty, the exporter would not have to face all the complexities described by Argentina. The Panel should not be misled by Chile's argument.

79. If in the amended PBS there is any chance of predicting intransparent future reference prices, which there is none, that chance is not different from the possibility that existed with the original PBS. Future prices for wheat existed then, as they exist now, and the same problems that Argentina now highlights existed at the time of the original proceeding as well. In fact, that was enough for the Appellate Body to find that the original PBS was inconsistent because an exporter was less likely to ship to a market if that exporter could not predict what the amount of duties would be.[76] So Chile's arguments are unsustainable.

80. **Fourth**, it is obvious that *ad valorem* duties can change and no one can guarantee otherwise. That is what happens with any ordinary customs duty. However, unlike the amended PBS, ordinary customs duties do not include a formula that causes import duties to vary automatically and continuously and, on top of that, they are transparent and predictable. Conversely, what is *guaranteed* is that, due to the PBS, if the required conditions are met, an exporter will mandatorily face a different duty every two months.[77] In fact, contrary to what Chile has asserted in its submissions[78], the PBS Law and Regulation give no discretion to Chile to decide whether or not to impose the duties: if the reference prices fall below the band floor, specific duties will be levied.

4. The amended PBS is similar to a variable import levy and a minimum import price

81. As it has been shown, the amended PBS 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*.

82. The Appellate Body has clearly defined the necessary and the additional features of the variable import levies: the presence of a formula causing automatic and continuous variability and the lack of transparency and predictability in the level of duties that will result from such measures. Argentina has shown how the amended PBS fulfils all the requisites and includes the features referenced by the Appellate Body to be characterized as a variable import levy.[79]

83. Chile has repeatedly stated that for a border measure to be a variable import levy, it must "sustain" a price.[80] However, when defining "variable import levies" in this dispute the Appellate Body said nothing about *price sustainment*. The Panel made reference to this[81] but its finding was rejected by the Appellate Body.[82] So this Panel should reject Chile's argument that for a border measure to be a variable import levy, it must "sustain" a price.

84. Nevertheless, should the Panel accept Chile's incorrect definition -which it should not- Argentina has already demonstrated that the amended PBS, in fact, sustains a price, because the specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor and the entry price of Chilean imports under the amended PBS is higher than it would be if Chile were to apply a minimum import price at the price band floor level.

[76] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[77] Rebuttal by Argentina, para. 145.
[78] First Written Submission by Chile, para. 93 and Rebuttal by Chile para. 101 and 120.
[79] First Written Submission by Argentina, paras. 236 to 283. Rebuttal by Argentina, paras. 138 to 159.
[80] Rebuttal by Chile, para. 5
[81] *Chile – Price Band System*, Report of the Panel, para. 7.36.
[82] *Chile – Price Band System*, Report of the Appellate Body, paras. 230 and ss.

85. In its Rebuttal Argentina has clarified why the PBS is a border measure similar to a minimum import price.[83] In spite of that, Chile has repeatedly argued that unlike its PBS, "minimum import price schemes generally operate in relation to the actual transaction value of the imports".[84] Chile has repeatedly emphasized that, because the PBS does not operate in relation to the actual transaction value but to a reference price, it is not similar to a minimum import price.

86. **First**, Argentina has not argued that the PBS is *identical* to a minimum import price. Rather, Argentina's argument is that the amended PBS is a border measure *similar* to a minimum import price. The fact that the PBS does not operate in relation to the actual transaction value of the imports does not mean it is not similar to a minimum import price. Chile's PBS needs not to be identical to variable import levies or minimum import prices to be a prohibited measure, provided that the amended PBS bears sufficient resemblance to the measures listed in footnote 1 to Article 4.2 of the Agreement on Agriculture. Indeed, that same reasoning was developed by the original Panel and upheld by the Appellate Body.[85]

87. **Second**, the Panel described "minimum import prices" as follows: "schemes [that] generally operate in relation to the actual transaction value of the imports".[86] The Appellate Body did not reverse that finding. The word "generally" implies "usually", but not "always". This is an important distinction. If the Panel had meant "always", it would have so stated. Therefore, there are some cases where border measures do not operate in relation to the actual transaction value of the imports, but are similar to minimum import prices, just like the amended PBS.

88. In fact, the original PBS, like the amended PBS, did not have any relation with the actual transaction value of the imports. In spite of that, the Panel and the Appellate Body in the original proceedings found that the old PBS was a border measure similar to a minimum import price. Indeed, the absence of any relation with the transaction value of the shipments was an aspect of the old PBS that contributed to enhance the distorting effects of the old PBS[87] and to enhance the distorting effects of the amended PBS as well.

89. Even if the Panel were to consider that the amended PBS is not similar to a minimum import price, *quod non*, evidence shows that, as a distorting measure, its consequences are either similar or worse than those resulting from a minimum import price. Argentina has demonstrated that the specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor.[88] Additionally, Argentina has provided the formula for calculating the import price resulting from the Appellate Body Report, showing what the entry price would be if Chile applied a minimum import price.[89] Chile recognized that that formula was correct.[90] Then, Argentina demonstrated that the entry price of Chilean imports under the amended PBS is higher than it would be if Chile were to apply a minimum import price at price band floor level.[91] In fact, as stated before, due to the formula, the PBS does not permit any transmission if that means that the entry price has to fall below the floor price, the formula together with the band floor work as a *brake* for the decline in the entry price and for any transmission of international prices below the level of the floor.

90. The Appellate Body found that that Chile's old PBS could have the *effect* of impeding the transmission of international price developments to the domestic market in a way similar to that of

[83] Rebuttal by Argentina, Section B.5
[84] Rebuttal by Chile, para. 7.
[85] *Chile – Price Band System*, Report of the Appellate Body, para. 243 and 244
[86] *Chile – Price Band System*, Report of the Panel, para. 7.36(e). Emphasis added.
[87] *Chile – Price Band System*, Report of the Appellate Body, para. 250.
[88] First Written Submission by Argentina, Section C.I.2.1.
[89] First Written Submission by Argentina, Section C.I.2.3.
[90] Rebuttal by Chile, para. 162.
[91] First Written Submission by Argentina, Section C.I.2.3.

other categories of the prohibited measures listed in footnote 1 of Article 4.2.[92] Therefore, if the distorting effects of the amended PBS are either similar or worse than the distorting effects of minimum import prices, it logically follows that the amended PBS cannot be consistent with Article 4.2 of the Agreement on Agriculture.

5. The amended PBS does not result in any improvement of access conditions to the Chilean market

91. During this dispute Chile repeatedly stated that the amended PBS has resulted in an improvement to Chilean market access conditions[93] and that due to the scheduled reduction of floor and ceiling prices, in 2014 market access will be better than today.[94]

92. Argentina has clarified the problems with these arguments.[95] With regard to the improved market access since the amended PBS is in force, there were several inconsistencies, *inter alia*, in Chile's only evidence (Exhibit CHL-7). In fact, Chile recognized that the exhibit is not accurate.[96] Furthermore, Chile comes up with the surprising argument that the distorting effects resulting from the PBS are common to all customs duties *of any kind*.[97] Beside the fact that this statement is a recognition that the amended PBS effectively distorts, it is simply incorrect and Argentina strongly disagrees. The Appellate Body has clarified that, like the PBS, all the border measures listed in footnote 1 have in common that they restrict the volumes and distort the price of imports of agricultural products in ways different from the ways that ordinary customs duties do.[98]

93. With respect to Chile's argument regarding the future improvement in market access in 2014 due to the scheduled reduction of floor and ceiling prices, that argument runs contrary to the argument that the PBS is consistent with Article 4.2 of the Agreement on Agriculture. If such consistency exists, why is Chile so worried about showing that *in the future* market access will be improved? Does it mean that present market access is not guaranteed? In any case, if the amended PBS were consistent, there would be no need to be confident on *future* market access. Argentina has highlighted all the problems with such an argument.[99] Chile continues to rely on its main assumption (i.e. that the reference price will remain stable until 2014)[100], although explicitly having recognized it was baseless, because it is impossible to determine it so far in advance.[101] There is simply no evidence to assert that market access will improve in the future.

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[92] *Chile – Price Band System*, Report of the Appellate Body, para. 246.
[93] First Written Submission by Chile, Section V.6 and Rebuttal by Chile, Section IV.5
[94] First Written Submission by Chile, paras. 186 to 192 and Rebuttal by Chile, paras. 175 to 181.
[95] Rebuttal by Argentina, Section B.6.
[96] Rebuttal by Chile, para. 169.
[97] Rebuttal by Chile, para. 171.
[98] *Chile – Price Band System*, Report of the Appellate Body, para. 200: "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" (Underline added). See also *Chile – Price Band System*, Report of the Appellate Body, para 227.
[99] Rebuttal by Chile, para. 217 to 238.
[100] See for example, Rebuttal by Chile, paras. 177 and 179
[101] Rebuttal by Chile, para. 176, *in fine*.

III. ARGENTINA'S ARGUMENTS IN RELATION TO THE FACTOR OF 1,56 APPLICABLE TO WHEAT FLOUR ARE WITHIN THE TERMS OF REFERENCE OF THIS PANEL

94. Chile argues that Argentina's arguments in relation to the factor of 1,56 applicable to wheat flour are not within the terms of reference of this Panel, because it is "a claim which Argentina could have raised and pursued in the original dispute, but failed to do so".[102]

95. Chile's argument is incorrect. Chile seems not to see the difference between "claims" and "arguments". Argentina's argument in relation to the factor of 1,56 is not a claim: it is an *argument*.

96. As the Appellate Body stated in *Korea – Dairy Products*, "By 'claim' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".[103]

97. In these proceedings Argentina has raised claims with respect to the amended PBS inconsistency with Article 4.2 of the *Agreement on Agriculture*, the second sentence of Article II:1(b) of the GATT 1994 and Article XVI.4 of the *Agreement establishing the World Trade Organization*. The argument in relation to the factor of 1,56 supports the claim of the PBS inconsistency with Article 4.2 of the *Agreement on Agriculture*. It is an additional argument showing that the amended PBS causes insulation from the international market. A plain reading of the Table of Contents of Argentina's Written Submission is enough to understand this simple argumental structure.

98. The factor of 1,56 applied to the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour, insulates the entry price of wheat flour from international price developments.[104] Three sub-arguments support this main argument[105]: (1) wheat flour exporters have to pay specific duties which not only bear no relation to the transaction value but also bear no relation to the product in question, since they are calculated on the basis of those applied to another product, namely, wheat; (2) the way in which Chile determined the factor 1,56 is not transparent, since in its legislation Chile has neither explained nor justified in any way the basis on which it was established; (3) the 1,56 factor is baseless from a technical or price-based point of view. Therefore, it is an argument that support the claim of inconsistency of the amended PBS with Article 4.2 of the *Agreement on Agriculture*.

99. Chile has not argued that the claim related to Article 4.2 of the *Agreement on Agriculture* is not within the terms of reference of this Panel. Thus, this Panel is completely free to accept and analyse Argentina's arguments in relation to the factor of 1,56[106] in order to find that the amended PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*.

100. In the alternative, even if the Panel found that Argentina's arguments in relation to the factor of 1,56 are a new "claim", those arguments are within the terms of reference of this Panel. As Chile itself admits, the arguments regarding the factor of 1,56 are new ones. Therefore, the fact that there has been "… no finding of inconsistency (or of consistency) forcing Chile to amend that particular aspect

[102] First Written Submission by Chile, paragraph 62.
[103] WT/DS98/AB/R, paragraph 139
[104] First Written Submission by Argentina, Section C.I.2.7.
[105] First Written Submission by Argentina, paras. 228 to 234.
[106] Consequently, it is not applicable to the factor of 1,56 what was said in the cases *EC – Bed Linen (Article 21.5 – India)* and *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* as those cases dealt with the admissibility of entertaining claims and not arguments.

of the PBS…"[107] does not prevent this Panel to consider the new arguments in relation to the factor of 1,56.

101. Only a few months ago the Appellate Body established three scenarios in which the scope of proceedings under Article 21.5 may be limited by the scope of the original proceedings[108], therefore precluding the complaining party from raising certain claims in a compliance proceeding: (1) a party cannot make the same claim of inconsistency against the same measure (or component of a measure) in an Article 21.5 proceeding if the original Panel and Appellate Body found the measure to be consistent with the obligation at issue, (2) if the original Panel found that the complaining party had not made out its claim with respect to the measure (or component of a measure) and, (3) a party may not, in proceedings under Article 21.5 of the DSU, seek to have the Appellate Body "revisit the original Panel report" when that report was not appealed. As this Panel can clearly observe, those scenarios do not exist in the present case.

102. The new arguments raised by Argentina will facilitate this Panel to examine the amended PBS in its integrity. They refer to an aspect of the measure taken to comply that was modified with respect to the original measure. In the amended PBS the factor of 1,56 is applied to a completely different basis from that to which it was applied in the original measure.

103. Even when in the amended PBS the factor of 1,56 *formally* remains, the arguments in relation to this factor are within the terms of reference of this Panel because Chile modified the basis and consequently the result of its application.

104. The specific duties applied to wheat are the basis of calculation to which the factor of 1,56 will be applied to determine the specific duties of wheat flour. The former duties are calculated as the difference between floor and reference prices, multiplied by 1 plus the *ad valorem* duty. As Chile has modified the way in which floor prices are calculated[109], the way in which reference prices are established[110], and the way to calculate the specific duties (due to the product by 1 plus the *ad valorem* duty)[111], then the basis to which the factor of 1,56 is applied has necessarily been modified and also have the results of its application.[112]

105. The application of the factor of 1,56 in the amended PBS leads to a *different* amount of duties than the amount of duties resulting from the original PBS. In other words, the consequences of the application of the factor of 1,56 in the amended PBS are different from the consequences of its application in the original PBS.

106. Chile maintains that Argentina's arguments regarding the different basis and consequences for the application of the factor of 1,56 is a new argument that was not raised in the first submission.[113] According to Chile, Argentina originally questioned the factor 1,56 itself and afterwards it changed its position questioning the base to which it is applied.[114] That is incorrect. Argentina's has always questioned the factor 1,56 itself.[115] Argentina never changed its position. Argentina's arguments regarding the different basis and consequences of the application of the factor of 1,56 were developed

[107] First Written Submission by Chile, para. 62. (Underlining added).

[108] Appellate Body Report *US – Softwood Lumber VI (Article 21.5 – Canada)*; WT/DS277/AB/RW, 13 April 2006, footnote 150.

[109] First Written Submission by Argentina, Section B.3.3.

[110] First Written Submission by Argentina, Section B.3.4.

[111] First Written Submission by Argentina, Section B.3.5.2.

[112] Contrary to Chile's assertion, this was the case in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, as Argentina stated in its Written Submission, paras. 269-278.

[113] Rebuttal by Chile, paras. 188-190.

[114] Rebuttal by Chile, paras. 191.

[115] First Written Submission by Argentina, Section C.I.2.7.

only after Chile argued that Argentina's original arguments were not within the Panel terms of reference. The arguments included in Argentina's Rebuttal are simply not Argentina's main arguments. Those arguments were developed in Argentina's First Written Submission.

107. Furthermore, Chile's due process rights are not impaired in these proceedings. Argentina has not had a "second chance" to bring these arguments to the DSB because Chile has modified the factual basis on which the factor of 1,56 is applied and the results of its application, turning it into a modified aspect of the measure taken to comply. This was the *first* chance for Argentina to raise these arguments. Chile could have foreseen that new arguments in relation to the factor of 1,56 would be raised when it modified the basis and the consequences of its application.[116] Additionally, Argentina's arguments in relation to that factor were not raised in an advanced stage of these DSU Article 21.5 proceedings. Evidence of that is that Chile was able to raise its arguments concerning Argentina's arguments in its First Written Submission.

108. It is telling that Chile has not argued in its submissions that the factor of 1,56 does not distort the transmission of international prices. Indeed, after Argentina showing how, for many reasons, the factor of 1,56 insulates the entry price for wheat flour from international price developments, Chile's only justification for its application is that the factor has been fixed at 1,56 since 1996 because "between January 1986 and December 1995, the average ratio of the price of flour to the price of wheat was 1,566". Therefore, as Chile recognizes, that was the factor that was "built into" the Chilean legislation and it has remained "unchanged" ever since.[117]

109. Thus, in addition to not having any relation to the transaction value, to the product in question, and to the technical production ratio between wheat and wheat flour, Chile applies a factor that, at the time of the entry into force of the amended PBS, reflected a price relation that was, at least, eight years old, and at the time of these compliance proceeding the delay with regard to any meaningful price relation has reached a decade. This is how Chile purports to justify the application of the factor of 1,56 and the reason behind Chile's argument to leave the factor far away from the scrutiny of the Panel.

IV. THE AMENDED PBS IS INCONSISTENT WITH THE SECOND SENTENCE OF ARTICLE II.1(B) OF THE GATT 1994 AND ARGENTINA'S CLAIM IN RELATION TO THAT PROVISION IS WITHIN THE TERMS OF REFERENCE OF THIS PANEL

110. During all these proceedings Argentina has claimed that the amended PBS violates the second sentence of Article II:1(b) of the GATT 1994, inasmuch as it constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedule of Concessions (No. VII).[118] That fact is so obvious that Chile cannot counter nor refute it. Instead of that, in order to avoid addressing Argentina's claim, Chile introduced a procedural issue deviating the focus of the discussion: that the amended PBS is inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

111. As Argentina previously stated "all that is required for a measure to be an ordinary customs duty is that "… be expressed in the *form* of '*ad valorem* or specific rates' ".[119] A plain reading of the legislation enforcing the amended PBS shows that this measure is not expressed in the *form* of

[116] As it was stated in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Panel Report, paragraph 7.71.

[117] Rebuttal by Chile, paras. 200-201.

[118] First Written Submission by Argentina, paras. 289 to 295 (Section C.II); Rebuttal by Argentina, para. 241, 287 and 288.

[119] *Chile – Price Band System*, Report of the Appellate Body, para. 277.

"*ad valorem* or specific rates". To the contrary, the amended PBS is a complex mechanism that, as a border measure, has no resemblance with an ordinary customs duty.

112. By not being an ordinary customs duty, the amended PBS constitutes "other duties or charges" in the sense of the second sentence of Article II:(1)(b) of the GATT 1994. By not being recorded in the corresponding column of Chile's Schedule of Concessions (No. VII), as it is mandated by paragraph 1 of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, the amended PBS violates the second sentence of that Article.

113. As Chile explicitly recognized[120], Argentina did not raise nor pursued a claim in relation to that provision during the original proceedings. It is indeed a new claim that Argentina has the right to raise in the frame of a proceeding under Article 21.5 of the DSU.

114. On the other hand, Argentina's claim in relation to the second sentence of Article II:1(b) of the GATT 1994 is within the terms of reference of this Panel as it is a new claim with respect to a new measure, as Chile itself admitted.[121]

115. Chile faces a curious dilemma: Argentina could never have raised this same claim during the original proceedings as Chile states[122], because the amended PBS is a new measure, different from the original measure. As Chile has properly established, it is a "new" PBS.[123] However, if Chile argues that the amended PBS is *not* a different measure, it would automatically be recognizing the amended PBS is equally inconsistent as the original PBS was.

116. Chile's last attempt to convince the Panel that this new claim is not within of its terms of reference is twofold. **First**, Chile comes up with the now familiar argument that Argentina should have made this claim in the original proceeding because, following Argentina's reasoning, if the GATT violation follows the violation of Article 4.2 of the *Agreement on Agriculture*, Argentina had to make this claim in the original proceeding. But, in this sense, the original proceeding is irrelevant because we are now in front of a new measure, a "new PBS".[124] Therefore, Argentina could not have raised this claim in the original proceeding because the claims necessarily have to be different.[125]

117. **Second**, Argentina has made its claims at the *earliest* possible stage in these proceedings. Therefore, Chile *has* had the chance to rebut Argentina's claim in its First Submission, the Panel *has* had a sufficient evidentiary basis on which to rule and *has* had enough time to deliberate. Chile's arguments are unsustainable: its due process rights have not been impaired at all.[126]

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[120] First Written Submission by Chile, para. 48.

[121] See Status Reports by Chile WT/DS207/15/Add.1, dated on 28 October 2003, third paragraph, and WT/DS207/15/Add.3, dated on 14 January 2004, second paragraph. Rebuttal by Argentina, para. 292.

[122] First Written Submission by Chile, para. 50 y 56.

[123] See footnote 122 above.

[124] First Written Submission by Argentina, para. 292.

[125] That was so established by the Appellate Body. *Canada – Aircraft (Article 21.5 – Brazil)*, Report of the Appellate Body, para 41.

[126] Chile argues that footnote 294 of the Panel Report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* is related to arguments and not to claims, and therefore is not relevant as a precedent to show that Chile's due process rights are impaired (Rebuttal by Chile, para 205). However, that is not an accurate reading of the footnote. In fact, the Panel did refer to the new claims on the likelihood of injury determinations, stating that, as a consequence of the United States' only chance to make its rebuttal during the meeting with the parties, it could not consider the new injury claim because of the limited evidentiary basis on which to rule and the limited amount of time to interact with the parties and for the Panel to deliberate (*US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Report of the Panel, footnote 294 *in fine*). Thus, in that dispute, contrary to what Chile asserts, the Panel did refer to new *claims*, as in the present case.

118. **Third**, it is true that a violation of Article II:1(b), second sentence, of GATT 1994 follows a breach of Article 4.2 of the *Agreement on Agriculture*. In fact, it is obvious that if the Panel finds the amended PBS not to be an ordinary customs duty, then, the amended PBS is an "other duties or charges" that, by not being recorded in Chile's list (VII), is a measure inconsistent with the second sentence of Article II:1(b) GATT 1994. However, Argentina's claim regarding the second sentence of Article II:1(b) stands by its own. The amended PBS is also inconsistent with this provision, insofar as it is not expressed in *ad valorem* or specific rates, and therefore is not an ordinary customs duty.[127]

V. CONCLUSIONS

119. Chile did not comply. It has "cosmetically" amended the old PBS while maintaining its distortive effects and fully preserving its lack of transparency and predictability. The measure taken to comply is not consistent with its obligations as a Member of the WTO.

120. **First**, the Appellate Body established that "…all that is required is that 'ordinary customs duties' be expressed in the form of '*ad valorem* or specific rates'. By not being expressed in the form of '*ad valorem* or specific rates, Chile's amended PBS is not an ordinary customs duty.

121. **Second**, in addition to not being an ordinary customs duty - because it is not expressed in the form of ad valorem or specific rates-, Chile's amended PBS insulates Chile's market from the transmission of international prices. As Argentina has lengthily demonstrated along its Submissions, the disconnection of Chile's market from international price developments results from the fact that the amended PBS:

- continues to elevate the entry price of imports to Chile above the price band floor;
- continues to "overcompensate" for the effect of decreases in international prices on the domestic market when reference prices are set below the price band floor;
- continues to make the entry price of Chilean imports higher than if Chile applied a minimum import price at the level of the price band floor, and
- continues to fail to ensure that the entry price of imports to Chile falls in tandem with falling world market prices.

122. That disconnection is the obvious and unavoidable consequence of the existence of:

- a formula that precludes the entry price of imports from falling below the price band floor;
- floor and ceiling values determined once for the entire period from 16 December 2003 to 15 December 2014 and, established from 2007 on the basis of a fixed coefficient of 0,985;
- reference prices staying unchanged for two months, established on the basis of the average of the daily prices recorded on only two predetermined markets, on only two predetermined qualities of concern and during only 90 out of 365 days;
- a multiplier consisting of 1 plus the general *ad valorem* duty added to the formula used to calculate the duty levels;

[127] *Chile – Price Band System*, Report of the Appellate Body, para. 277.

– the factor of 1,56 applied to the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour.

– the complete irrelevance of the transaction value.

All of them are insulating features inherent to the amended PBS.

123. Similarly, the insulation of Chile's market from the transmission of international prices results from:

– the lack of transparency in the establishment of fixed floor and ceiling values for the entire period from 16 December 2003 to 15 December 2014;

– the lack of transparency in the establishment of the floor and ceiling values on the basis of fixed coefficients from 2007 onwards;

– the lack of transparency in the way in which the factor of 0,985 was determined;

– the lack of transparency in the reference prices sources and selection process – involving, *inter alia*, the selection of only two predetermined markets and the qualities of concern;

– the lack of transparency in the establishment of a factor of 1,56 in order to calculate the duties and rebates applicable to wheat flour;

– the lack of transparency and predictability in the existence of a formula that causes import duties to vary automatically and continuously;

– the lack of predictability in the level of such duties;

– the lack of predictability in the frequency and the extent to which those duties fluctuate.

All of them are features inherent to the amended PBS that create intransparent and unpredictable market access conditions.

124. Therefore, this Panel should find that the amended PBS violates Article 4.2 of the *Agreement on Agriculture* also because the particular configuration and interaction of all these amended PBS features create intransparent and unpredictable market access conditions and have the effect of disconnecting Chile's market from international price developments. Thus, the amended PBS insulates Chile's market from the transmission of international prices, and prevents enhanced market access for imports of wheat and wheat flour.

125. Chile should have dismantled its PBS applied to wheat and wheat flour as Chile did with respect to edible vegetable oils. The explicit wording of Article 4.2 of the *Agreement on Agriculture* mandates that Members "… shall not *maintain* … measures of the kind which have been required to be converted into ordinary customs duties …".[128]

126. Thus, according to Article 4.2 of the *Agreement on Agriculture*, Chile could not maintain its PBS after a WTO inconsistency ruling. As the Appellate Body established "… Article 4.2 was drafted in the present perfect tense to ensure that measures that were required to be converted as a result of

[128] Emphasis added.

the Uruguay Round—but were not converted—could not be maintained, by virtue of that Article …".[129] Indeed, that interpretation is confirmed by the wording of footnote 1 to the *Agreement on Agriculture*. That footnote gives meaning to Article 4.2 by enumerating examples of measures other than ordinary customs duties which, according to the Appellate Body, "… Members must not maintain, revert to, or resort to, from the date of the entry into force of the *WTO Agreement*".[130] Moreover, the Appellate Body established that the obligation "not [to] maintain" such measures underscores the fact that "… Members must not continue to apply measures covered by Article 4.2 from the date of entry into force of the *WTO Agreement*".[131]

127. However, the fact that a measure prohibited by Article 4.2 of the *Agreement on Agriculture* could not be maintained was completely ignored by Chile and it is the reason why Argentina had to resort to the WTO dispute settlement proceedings for the second time.

128. The result is that Chile has evaded its multilateral obligations maintaining a border measure other than an ordinary customs duty that Chile did not even include in its List. Thus, more than three years and a half after the adoption of the Panel and Appellate Body reports by the DSB, the dispute remains unsolved, and Chile continues to give wheat and wheat flour an illegal protection. This result is especially serious when the very provision at issue -aimed to "achie[ving] improved market access conditions for imports of agricultural products by permitting only the application of *ordinary customs duties*"[132] requires the Member not to *maintain* the prohibited measure.

129. In addition to all this, by not being and ordinary customs duty, the amended PBS constitutes "other duties or charges" not recorded in the corresponding column of Chile's Schedule of Concessions (Nro. VII), and violates the second sentence of Article II:1(b) of the GATT 1994.

130. Therefore, Argentina requests the Panel to find that Chile's Price Band System, as amended by Law No. 19.897 and Supreme Decree No. 831/2003:

- Is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it is not an ordinary customs duty and, in addition, it constitutes a border measure similar to a variable import levy and a minimum import price;
- is inconsistent with the second sentence of Article II:1(b) of the GATT 1994, since it constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedule of Concessions (No. VII);
- is in breach of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* since, while it remains in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements.

131. Consequently, Argentina respectfully requests the Panel to find that Chile has not implemented the recommendations and rulings of the DSB and continues to infringe its obligations under the WTO.

Thank you.

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[129] *Chile – Price Band System*, Report of the Appellate Body, para. 207.
[130] *Chile – Price Band System*, Report of the Appellate Body, para. 209.
[131] *Chile – Price Band System*, Report of the Appellate Body, para. 212. (Underlining added).
[132] *Chile – Price Band System*, Report of the Appellate Body, para. 234. (Emphasis added).

ANNEX D-2

CLOSING STATEMENT BY ARGENTINA
(2 AUGUST 2006)

Mr. Chairman, Members of the Panel:

1. As stated yesterday, this dispute has a very straightforward solution: a finding that the amended PBS cannot be maintained because it is not an ordinary customs duty.

2. To consistently implement the DSB´s recommendations and rulings, Chile had to dismantle the PBS. The explicit wording of Article 4.2 of the *Agreement on Agriculture* (AoA) mandates that Members "… shall not maintain … measures of the kind which have been required to be converted into *ordinary customs duties* …"

3. However, Chile maintained the PBS arguing that nowhere in the Appellate Body Report it is mandated that Chile had to eliminate it. Chile insists in ignoring an explicit finding of the Appellate Body, who stated that a finding that Chile's PBS is inconsistent with Article 4.2 of the *AoA* means that the duties resulting from the application of that PBS cannot longer be levied because such PBS cannot longer exist.[1]

4. In fact, the Appellate Body found that Chile's PBS was a measure prohibited by Article 4.2 of the *AoA*, but Chile confidently ignores that finding, continues to levy the resulting duties and maintains the PBS in force.

5. Even if that explicit finding were not enough, the Appellate Body went on and found that if Chile's PBS fell within any one of the categories of measures listed in footnote 1, it could not be maintained. The Appellate Body established that "*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.*"[2]

6. Evidently, the reading Chile made of Article 4.2 *AoA* and footnote 1 was not as plain as required. Nor it was as clear to Chile as it was for the Appellate Body that if the PBS fell within any one of the categories of the measures listed in footnote 1, it was a measure not to be maintained. Indeed, contrary to the Appellate Body's explicit finding, Chile maintained its PBS although it fell within one of the categories of measures listed in footnote 1.

7. Article 4.2 of the *AoA* explicitly provides that "[m]embers shall not maintain … any measures of the kind …". Thus Chile could not maintain its PBS after the DSB established it was inconsistent with the *Agreement on Agriculture*. The object and purpose of Article 4.2 circumscribe Chile's options to comply. Chile agrees to that when it states that it may be accurate that if a measure violates Article 4.2 *AoA* the resulting duties could no longer be levied[3].

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[1] *Chile – Price Band System*, Report of the Appellate Body, paragraph 190: "[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."

[2] *Chile – Price Band System*, Report of the Appellate Body, para. 221.

[3] Rebuttal by Chile, para. 9.

8. The Appellate Body stated that: "… *the object and purpose of Article 4 … is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties*".[4] Furthermore, the Appellate Body said "… *all that is required is that 'ordinary customs duties' be expressed in the form of 'ad valorem or specific rates'*"[5]. The legislation enforcing the amended PBS shows that this measure is not expressed in the *form* of "*ad valorem* or specific rates". There is no ad valorem or specific *rate* expressed in those measures. The amended PBS is a complex "mechanism"[6] that, as a border measure, has no resemblance with an ordinary customs duty.

9. If this was not clear enough, the Appellate Body also stated that *"[o]rdinary customs duties…are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula."*[7] It is undisputed that the amended PBS contains a formula, that is, the underlying formula to calculate the specific duties for wheat and wheat flour.[8]

10. The possibility of the *resulting* duties taking the form of *ad-valorem* or specific duties is meaningless regarding of whether the *underlying measure* is consistent. In this respect, the Appellate Body established that "… *the fact that the duties that result from the application of Chile's PBS 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*".[9]

11. Regarding Argentina's claim about the amended PBS inconsistency with the second sentence of Article II:(1)(b) of GATT 1994, Chile has recurred to a last minute resort, claiming that Argentina has not made a *prima facie* case under DSU Article 3.8 with respect to its claim.[10] Argentina is surprised by this argument.

12. In the case *US – Wool Shirts and Blouses*, the Appellate Body stated that: "… the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence *sufficient* to raise a presumption that what is claimed is true, the burden then shifts to the other party, who *will fail* unless it adduces sufficient evidence to rebut the presumption".[11]

13. Argentina submitted ample evidence to make a *prima facie* case. First, regarding the violation of the second sentence of Article II:1(b) of GATT 1994 as a result of an inconsistency with Article 4.2, Chile has persistently stated that the term "ordinary customs duties" has the same meaning in Article 4.2 of the *AoA* as it has in Article II:1(b) of GATT 1994.[12] Argentina has dedicated large parts of its submissions and oral statement, including 36 Exhibits, to demonstrate why the amended PBS is inconsistent with Article 4.2 and therefore is a measure other than an ordinary customs duty. Argentina wonders if for Chile that is not "sufficient" to make a *prima facie* case. So, given that Argentina submitted sufficient evidence as to make a *prima facie* case regarding the Article 4.2, and that Chile agreed that the "ordinary customs duties" of Article 4.2 are the "ordinary customs duties" of

[4] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[5] *Chile – Price Band System*, Report of the Appellate Body, para. 277.
[6] In its Oral Statement Chile referred to its PBS as a "mechanism", para. 2.
[7] *Chile – Price Band System*, Report of the Appellate Body, para. 233.
[8] Law 19.897, Art 1 (ARG-1), and Decree 831/2003, Art.14 (ARG-2).
[9] *Chile – Price Band System*, Report of the Appellate Body, para. 279.
[10] Oral Statement by Chile, para. 14.
[11] WT/DS33/AB/R, WT/DS33/AB/R/Corr.1, page 16. (Emphasis added; footnote omitted)
[12] See Panel Report, para. 4.84 "Chile considers that the term "ordinary customs duties" has the same meaning in Article 4.2 of the Agreement on Agriculture as it has in Article II:1(b) of the GATT"; para. 4.85: "Chile points out that all parties to the dispute agree that "ordinary customs duties" has the same meaning in Article 4.2 and its footnote as in Article II:1(b) of the GATT 1994." In fact, the Panel agreed with Chile (para. 7.49) and its finding was not reversed by the Appellate Body.

Article II:1(b), it therefore results that *sufficient* evidence has been provided for the Article II:1(b) claim, and a prima facie case has been made.

14. Indeed, it is evident that if, under these circumstances, the Panel finds the amended PBS not to be an ordinary customs duty, then it is an "other duties or charges" that, by not being recorded in Chile's list (VII) – a fact that remains uncontested- is a measure inconsistent with the second sentence of Article II.1(b) of GATT 1994.

15. Second, Argentina also stated that the second sentence of Article II:1(b) of GATT 1994 claim stands by its own.[13] In fact, Argentina has given the arguments to support this claim[14], the main one being the obvious: that "*all that is required for a measure to be an ordinary customs duty is that it '… be expressed in the form of "ad valorem or specific rates"*.[15] Therefore it constitutes "other duties or charges" within the meaning of Article II:1(b) of GATT 1994.

16. The fact is that, to put it in the Appellate Body words, Argentina has adduced evidence more than sufficient to raise a presumption that what is claimed is true and the burden was shifted to Chile who has failed to adduce sufficient evidence to rebut the presumption. In fact, Chile has never argued that the amended PBS is expressed in the *form* of an *ad valorem* or specific duty rate.

17. Chile did not comply. In addition to not being an ordinary customs duty the PBS, continues to insulate Chile's market from fluctuations in international prices in a way that is inconsistent with Article 4.2 of the *AoA*. Chile has "cosmetically" amended the old PBS while maintaining its distortive effects and fully preserving its lack of transparency and predictability.

18. If Chile gave some meaning to Article 4.2 of the *AoA* and Article II:(1)(b) of GATT 1994, Chile could not have made a statement affirming that the only obligation the WTO imposes to Chile is not establishing customs duties in excess of those set in its schedule of concessions.[16] That is simply incorrect and should be undisputed at this stage. Nevertheless, yesterday Chile went further and stated: "… any WTO Member can do what it wants to up to the level of its binding commitments".[17]

19. Chile has more obligations than merely "doing what it wants". Chile is bound by all the covered agreements and especially by Article 4.2 of the *Agreement on Agriculture*. However, it is evident that in the implementation of the recommendations and rulings in this dispute Chile has done what it wanted: it has maintained a border measure other than an ordinary customs duty with all the distortive, intransparent and unpredictable features inherent to measure similar to a minimum import price or a variable import levy as Argentina has lengthily described along its submissions and oral statement.

20. With respect the so called "variability" component, Chile has claimed to have abolished it because now "… the duty is fixed by a legal directive in the form of a decree issued by the Ministry of Finance …". The automatic variability still remains. Chile has no discretion not to impose the duties if the reference price falls below the band floor[18] and has not argued otherwise. In fact, the exporter can count with the *guarantee* that it *will* face a different duty every two months. In this respect, as the

[13] Oral Statement by Argentina, para. 118.
[14] Oral Statement by Argentina, para. 111.
[15] *Chile – Price Band System*, Report of the Appellate Body, para. 277.
[16] Rebuttal by Chile, para. 65 *in fine*: "… All it is obliged to do (a Member of the WTO) is to honour its commitments, that is to say, not to exceed the bound tariff level".
[17] Oral Statement by Chile, para. 45.
[18] First Written Submission by Argentina, paras. 263 and 264.

US asserted this morning, there is no basis to discern a distinction between a variation occurring every two months rather than one week.[19]

21. As regards to the similarity between the amended PBS and a minimum import price, Argentina would like to stress that it has mathematically demonstrated that the amended PBS provides an end to *any* transmission when the entry price approaches the band floor. Due to the formula, the PBS will not allow any transmission of international prices in the case that the entry price falls below the floor price[20]. That was the "internal political agreement" Chile referred to yesterday.[21]

22. Evidently, Article 4.2 of the *Agreement on Agriculture* is meaningless for Chile. If that were not the case Chile could not have stated that: "… no violation of Article 4.2 can exist on the sole basis that a measure does not allow the transmission of international prices". According to Chile, insulation from the transmission of international prices is not a problem. However, for the Appellate Body it is more than a problem: it is a breach of Article 4.2. Chile has went further and stated that "… it is difficult to argue that the requirements of transparency and predictability are part of the 'spirit' or 'requirements' derived from Article 4 of the Agreement on Agreement on Agriculture"[22] because "[it] does not contain the words transparency and predictability". It is unworthy to repeat again the lack of basis of these assertions and Argentina would just limit itself to kindly request the Panel to review its submissions and oral statements. Argentina is certain that the Appellate Body would be, at least, surprised about these statements, especially taking into account its Report in this dispute .

23. It was the Chilean Executive itself who stated that "… Through this bill (Law 19.897) the Government has corrected … formal aspects challenged [by the WTO] while fully protecting the spirit of the bands …"[23]. Argentina does not see what can be more explicit than this statement from the Government of Chile itself. Given the clarity of Article 4.2 of the *AoA* and the second sentence of Article II:(1)(b) of GATT 1994, this should be enough for the Panel to find that Chile did not comply with the recommendations and rulings of the DSB.

24. The Appellate Body has stated that "*interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility*."[24] This Panel has now the opportunity to enforce a two main provisions of the WTO Agreements. In fact, Article II:(1)(b) of GATT 1994 and Article 4.2 *AoA* would have no meaning if Chile could implement the recommendations and rulings of the DSB by merely "cosmetically" modifying its PBS while, at the same time maintaining a border measure other than an ordinary customs duty, preserving its insulating and distorting effects and its lack of transparency and predictability. This is the precedent Chile seeks to establish in this dispute. This is how Chile's violation continues to nullify and impair Argentina's benefits accruing to it under the WTO Agreements.

Thank you

[19] Oral Statement by the US, para. 13.
[20] First Written Submission by Argentina, C.I.2.1
[21] Oral Statement by Chile, para. 25.
[22] Rebuttal by Chile, para 30.
[23] First Written Submission by Argentina, footnote 75.
[24] *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R, adopted 20 May 1996, at 23.

ANNEX D-3

**OPENING STATEMENT BY CHILE
(1 AUGUST 2006)**

I. INTRODUCTION

1. Thank you Mr. Chairman and members of the Panel for giving Chile a new opportunity to express its views on this important and long dispute. One should first ask why we are meeting today on a National holiday and in the middle of the European Summer. It is not Chile who requested this meeting nor these procedures. We complied with the rulings and recommendations of the DSB adopting important legislative changes concerning the way specific duties are established for wheat and wheat flour.

2. It is Argentina who, based on a wrong reading and interpretation of the Appellate Body's conclusions, decided to question those changes. Changes that Argentina seems not to understand. We have tried to explain in detail how the system adopted in 2003 operates and we are going to do it today once again with the help of graphs so no doubt can remain on how it works, and on how different it is from the PBS. These are two completely different mechanisms, even though some names remain the same.

3. Argentina throughout this process[1] and in bilateral discussions has been demanding Chile to eliminate the PBS because in its opinion it is the only way to comply and also because allegedly the AB so established it. Even though precedents in this house are clear, "the implementing Member has a measure of discretion in selecting the means of implementation that it deems most appropriate"[2], nothing in the AB report obliges or even recommends Chile to implement in one way or another.

4. Argentina's argument is based on the conclusion of the AB that no duties can be levied from the application of a measure inconsistent with Article 4.2 of the Agreement on Agriculture. The same is true for duties or charges resulting from measures that violate other provisions of that Agreement or any other Covered Agreement for that sake. But if a measure is not inconsistent with the WTO, duties can be levied. And Argentina hasn't been able to prove that the current system based on Law 19.897 and its Regulations is inconsistent with Article 4.2 or any other provision. Furthermore, Chile has demonstrated that the system is consistent with such provision, so it can levy the specific duties up to the bound level in its Schedule.

5. During this presentation we will first address Argentina's claims that are outside the terms of reference of this Panel. Then, we will focus on the correct reading and interpretation of the AB findings and conclusions and how the changes were made to the PBS taking into account those findings and conclusions, resulting in full and timely implementation of the rulings and recommendations of the DSB. Through graphs we will show how the PBS worked and how the current system operates. This will certainly help to eliminate once and forever the confusion that Argentina still seems to have and will clearly demonstrate that the regime applicable since 2003 doesn't have certain characteristics and features of the PBS questioned by the AB and consequently doesn't produce the effects common to the measures enumerated in Article 4.2 of the Agriculture Agreement. We will finish this presentation demonstrating why Law 19.897 and its Regulations are not a variable import duty or similar to it nor a minimum import price or similar to it.

[1] For example, paragraph 317 of the Rebuttal from Argentina.

[2] *EC – Chicken Cuts (Article 21.3)*, Award of the Arbitrator (WT/DS269/13 and WT/DS286/15), paragraph 49.

II. SOME OF ARGENTINA'S CLAIMS ARE OUTSIDE THE TERMS OF REFERENCE OF THIS PANEL

6. Using semantics Argentina tries to argue that its claims regarding the factor 1.56 used to determine the duties or rebates applicable to wheat flour are properly within this Panel. First, Argentina has acknowledged that it never raised this point during the original proceeding. Secondly, by trying to make a distinction between claims and arguments Argentina tries to avoid the application of well known precedents, even though throughout its submission Argentina challenges the factor using different arguments. The reference in paragraph 261 of Argentina's rebuttal to what the AB said in the *EC – Bed Linen (Article 21.5 – India)* is out of context. The AB is not opening the door to the possibility to challenge the implementing measure on the basis of new arguments or claims that could have been raised in the original proceedings. Argentina's reading would lead to the absurd that a measure or an aspect of a measure determined to be consistent could be challenged in a 21.5 Panel based on a different argument.

7. Applying the approach in *Korea – Dairy Products* we showed the difference between Argentina's claim regarding how "The factor of 1.56 ... insulates the entry price of wheat flour from international price developments", from its arguments "the specific duties on wheat flour are calculated on the basis of those applied to another product[3] and the way in which that factor was established is not transparent".[4] Clearly we are in front of an independent claim that Argentina did not make in the original dispute although it could have done so, since Argentina itself acknowledges that that factor had already been in effect for more than ten years.

8. In its presentations Argentina has recognized that the price of wheat flour is higher than the price of wheat[5] and this price relationship could be based on a technical production ratio between both products. Moreover, in Argentina's opinion, not only "this relationship is valid at international level"[6] but it should be approximately 1.3 ("that is, the price of wheat flour is approximately 30 per cent higher than that of wheat"). In other words, a mathematical formula applied to one product to determine the price of another.

9. But in its Rebuttal, Argentina adds a new element never mentioned before, that is that the factor is applied on a completely different basis. Consequently, it is a modified aspect of the measure taken to comply. Curious that during the original proceeding Argentina never questioned the basis for the application of the factor in circumstances that that basis was the PBS itself. If it would have done so, and Argentina would have prevailed, Chile would have been under the obligation to implement those rulings, but certainly that wasn't the case. The factor for determining the duties and rebates for wheat flour was never found in violation of Article 4.2 so no obligation to comply was established. Only now Argentina finds that the basis for the application of the factor is a relevant element that deserves a challenge. We have shown that the premises of this claim are not well founded and Chile should not be burdened with the obligation to address a claim that clearly Argentina could have made in the original Panel.

10. If the Panel decides that this new claim is within its term of reference, Chile has demonstrated with numbers the reasons to use what Argentina calls an "international valid technical production ratio".

11. Let me turn to the second sentence of Article II:1(b) of GATT 1994.

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[3] Paragraph 228 of the Rebuttal.
[4] Paragraph 229 of the Rebuttal.
[5] For example, paragraph 171 of Argentina's First Written Submission.
[6] Paragraph 231 of the Rebuttal.

12. Needless to say that this was an important issue during the Appeal. As you may remember during the original Panel, Argentina claimed that the PBS was inconsistent with Article 4.2 of the Ag Agreement and with Article II:1(b). of GATT of 1994. After concluding that the PBS was inconsistent with 4.2., hence it was one of the measures that had to be converted into an ordinary customs duty, the challenge under the first sentence of Article II:1(b). (that Chile exceeded the bound rate) was essentially a contradiction. From a logical point of view, it could have been correct your conclusion that the PBS was inconsistent with the second sentence of that provision. But from the point of view of Chile's due process rights that conclusion could not sustain, so the AB reversed it.

13. For similar reasons, Argentina cannot bring back as its own new claim your original conclusion. It could have raised it during the original proceeding but wrongly it focused on the first sentence of Article II:1(b).

14. And even if the Panel considers that it could raise in this late stage of this dispute such an important claim, Argentina hasn't shown in which way the current system in force since 2003 is inconsistent with the second sentence of Article II:1(b). of GATT 1994. The mere claim that a violation of Article 4.2 of the Agreement on Agriculture automatically involves a violation of the second sentence of II.1.b is not enough. Automatic violations of WTO provisions do not exist. Argentina has to fulfill its burden of proof under Article 3.8 of the DSU establishing a *prima facie* presumption. And it hasn't done so!

III. CORRECT UNDERSTANDING OF THE AB FINDINGS AND CONCLUSIONS

15. Let me start by recalling what the Appellate Body stated in the 21.5 proceedings in *Softwood Lumber IV*. The determination of the scope of "measures taken to comply" should include the examination of the recommendations and rulings in the original report or reports adopted by the DSB. In other words, this Article 21.5 Panel must necessarily study first the scope of the recommendations and rulings of the DSB before analysing the system in force since 2003. Only in that way, it can be clarified what was Chile obliged to implement and only in that way the changes introduced by virtue of Law 19.897 and its Regulations can be fully understood.

16. Broad interpretations of the findings and conclusions of the original Panel and AB reports would result in imposing to the Member obligations to implement that didn't exist, thereby impairing its due process rights. In its written submissions Argentina has given a broad and erroneous interpretation of the conclusions of the AB, claiming inconsistencies where the AB didn't find one, or reading requirements that the AB never put in its report. We have no time to go through all of them but let me give you one example.

17. Regarding the liberalization process introduced to the system by virtue of a gradual reduction of the values of the parameters floor and ceiling, Argentina claims[7] that Chile hasn't explained how the reduction process through a factor was calculated. First, not only the AB could have never questioned the reduction process but most important, it is one aspect of the measure taken to comply that Chile freely and unilaterally decided to introduce to gradually reduce the border protection of the products concerned and not because it was part of the implementation requirements.

18. Examples like this are many but Chile shall concentrate on what the AB said and not on what Argentina says the AB said.

[7] Paragraph 199 of Argentina's First Written Submission.

IV. THE CURRENT SYSTEM

19. On the basis of the DSB's recommendations and rulings Chile brought its measure into conformity with its WTO obligations through the enactment of Law 19.897 which is in force since December 16, 2003. This Law is supplemented by Supreme Decree No. 831 of the Chilean Ministry of Finance

20. The Law applies to imports of wheat and wheat flour[8] and provides for, by means of a Chilean Minister of Finance decree, the possibility of:

(a) establishing the application of specific duties in US dollars per tariff unit, or

(b) establishing rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff.

(a) Determination of specific duties

21. The Chilean Ministry of Finance decree establishes a specific duty consisting of an amount in USD per tariff unit (tonne) payable when the reference price established is less than USD128 per tonne.

22. The specific duty plus the *ad valorem* duty must not exceed the tariff rate bound by Chile under the World Trade Organization (31.5%). Each import transaction shall be considered individually using the c.i.f. value of the goods concerned in the transaction in question as a basis for calculation.

(b) Determination of rebates on amounts payable as *ad valorem* duties

23. The decree determines a rebate on the amount payable as *ad valorem* duties established in the Customs Tariff when the reference price is over US$148 per tonne.

24. The rebate on the amount payable as *ad valorem* duties established for each import transaction may not exceed the amount corresponding to the *ad valorem* duty calculated on the c.i.f. unit value of the goods.

(c) Determination of the 'floor' and 'ceiling' values established under the Law

25. Facing the need to adjust its legislation in accordance to the WTO obligations, Chile reached an internal political agreement which defined a framework to afford some level of protection to this productive private sector up to 2014, which is established by Law with these parameters: US$ 128 and US$ 148. These values will remain unchanged until the end of 2007. From thereon and until 2014, these amounts will be reduced on an annual basis.

(d) Reference price

26. The reference price for determining specific duties (or rebates) is expressed as a f.o.b. value and consists of the average of the daily international wheat prices recorded in the markets most relevant to Chile[9] which is explained later on.

[8] Law No. 19.897 also applies to imports of sugar, but the latter is not material to this dispute.
[9] The Regulations of the Law also establish the markets most relevant to Chile.

27. The Regulations[10] supplement those provisions of the Law, thereby providing full clarity to the determination of the specific duty (or tariff rebates) established in each Chilean Minister of Finance decree. It reiterates that all values applied by Law are to be expressed on a f.o.b. basis in US dollars. The Regulations also set out the period of validity of each decree establishing a specific duty (or rebates) and the most relevant markets for wheat in Chile.

V. CHILE HAS FULLY COMPLIED WITH THE AB'S RULINGS AND RECOMMENDATIONS

28. Pursuant to the provisions of Article 21.5 of the DSU this Panel has to analyse the scope and conformity of the Chilean measure in light of the recommendations and rulings of the DSB which must be treated as a final resolution to a dispute between the parties.

29. In view of the foregoing, Chile will review the conclusions of the Appellate Body as set out in its Report and not as construed by Argentina, and to compare them with the changes introduced in Law 19.897 and its Regulations, thereby demonstrating that Chile has complied, both in form and in substance, with these conclusions.

30. The AB interpreted "variable import levies", concluding that 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 of Article 4.2.[11] There is something more and that is the fact that the measure itself—as a mechanism—must impose the variability of the duties.[12] 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".[13] In other words, an ordinary customs duty may also vary periodically, provided that the changed rates remain *below* the tariff rates bound in the Member's Schedule.[14]

31. Law 19.897 abolished the variability component. Now the specific duty is fixed by legal directive in the form of a decree issued by the Ministry of Finance and remains unchanged for two months, during which the duty applies on all import transactions, without the slightest variation and regardless of the amount of the transaction, until it is changed or cancelled by a more recent administrative act.

32. Since the variability and automaticity is not sufficient, the AB stated that an additional feature of variable levies was the lack of transparency and predictability in the level of duties that will result from such measures.

33. Why this was important for the AB? Because it contributes to distorting the prices of imports by impeding the transmission of international prices to the domestic market.

34. Here is worth noting that contrary to what Argentina keeps claiming, the isolation of domestic prices is not a characteristic *per se* of variable import levies but the effect of the lack of transparency and predictability. Hence no violation of Article 4.2 can exist on the sole basis that a measure doesn't allow the transmission of international prices to the domestic market.

35. Then the Appellate Body analysed 'minimum import prices' stating that they are not very different from variable levies, except that their mode of operation is less complicated, but in both

[10] Supreme Decree No. 831 of the Chilean Ministry of Finance.
[11] Paragraph 232 of the AB Report.
[12] Paragraph 233 of the AB Report.
[13] Paragraph 234 of the AB Report.
[14] Report of the Appellate Body in *Argentina – Textiles and Apparel*, footnote 56, para. 46.

cases the result is the same: to sustain a domestic price. In this case, variability is the difference between the governmentally determined threshold and the actual transaction value, which will differ from one transaction to another and will hence change the duty without any legislative or administrative action.

36. With these conclusions in mind the AB analysed how the PBS is similar to a variable import levy and a minimum import price. During the appeal Argentina picked your finding that considerable lack of transparency and unpredictability in the PBS and emphasized that the combination of a lack of transparency and a lack of predictability were the features of the PBS that, most of all, make it similar to variable import levies.

37. The AB disregarded to some extent the emphasis of the Panel on the fact that whether the PBS was related to domestic target prices or domestic market prices. For the AB there are other factors relevant to the assessment of the PBS.

38. First, the fact that the highest 25 per cent as well as the lowest 25 per cent of the world prices from the past five years were discarded in selecting the highest and lowest f.o.b. prices for the determination of the annual price bands.[15] With the entry into force of Law No. 19.897, Chile abolished this calculation formula introducing fixed parameters.

39. Second, the AB places considerable importance on the non-transparent and unpredictable way in which the "highest and lowest f.o.b. prices" selected were converted to a c.i.f. basis by adding "import costs". Pursuant to the Law, all values are set as f.o.b., meaning that it is no longer necessary to add "import costs", making the system easier and fully transparent.

40. Thirdly, the AB analysed how the reference price was determined, observing similar shortcomings. On one hand, the price was established in a manner that was neither transparent nor predictable. Specifically, that nowhere was specified how the international "markets of concern" and the "qualities of concern" were going to be selected.[16] Thus, it was by no any means that the weekly reference price was representative of the current world market price. Additionally, since the reference price was not adjusted for import costs, as were the price bands, it was likely to inflate the amount of specific duties applied under the PBS. As we have explained previously, this last point is based on the failure of Chile to correctly explain how the system operated.

41. Currently, the Regulations specify the calculation mechanism, the markets of concern and their qualities to be considered. Besides that, all prices are taken in a f.o.b. basis.

42. On the other hand, the AB questioned the fact the reference price was established on a weekly basis. So even if the first one of the parameters (the bands) did not distort —if not disconnect—that transmission, because it was determined on a weekly basis.[17] This is the crux of the AB analysis. The weekly and unpredictable determination of a reference price with no link to international markets resulted not only in specific duties that constantly (and automatically) vary but with the specific objective to "sustain" a certain target price. Much to the contrary of Argentina's wishes, the sustainability of a certain target price is the main objective of measures similar to variable import levies and minimum import prices. And that is why the PBS was condemned.

43. Summing up, Argentina is wrong when it thinks that what it considers a lack of transparency/predictability and isolation of the domestic market test can be applied to any feature of any measure that it doesn't like.

[15] Paragraph 246 of the AB Report.
[16] Paragraph 246 of the AB Report.
[17] Paragraph 251 of the AB Report.

44. Having clarified how the original Panel and AB have to read, let me introduce our colleague who is going to show how the changes introduced by Chile in 2003 apply in practice.

Power Point Presentation

45. This morning Argentina told us that they do not understand how Chile can argue that the amended PBS does not disconnect Chile's market from international price developments.[18] We will try once again to make Argentina understand this important element.

46. Through this power point presentation we will highlight the changes introduced in 2003 and how the current system operates. But before that let me describe the operation of the PBS and the main steps for the application of a specific duty.

(Slide 1)

47. This chart shows domestic demand and offer curves for wheat. International prices are far below the domestic equilibrium given by the intersection of those curves, indicating that Chile is clearly an importing country.

48. As any imported good, wheat is taxed with an *ad valorem* duty of six percent. In addition, the PBS provided for the possibility of applying specific duties in US dollars per unit when the import price (and we mean by import price the cost of the imported product at domestic level) was lower than a previously fixed target price.

49. For establishing the target price, once a year monthly data of international prices from the five preceding years was collected. These f.o.b. prices were ranked from lowest to highest and adjusted using a price deflator, eliminating the extremes (25% each). The remaining values were used as the "base" to calculate the minimum import cost ("the floor") as well the maximum import cost ("the ceiling").

50. All normal costs associated with import operation, such as *ad valorem* duties, transport costs, insurance and customs charges were added to the floor price. The objective of this exercise was precisely to express the floor price in terms of the cost of imports at domestic level.

51. Then, the PBS needed a value to compare with the floor. The international price used for this comparison was the lowest weekly average price available, no matter the market of origin or type of wheat. This average was the reference price and was informed once a week based on data available the week before.

52. For the calculation of a specific duty the reference price was expressed at domestic level as well; that is, adding the same import costs used for the floor and ceiling prices.

53. The specific duty was calculated as the difference between floor and reference prices, both expressed at domestic levels.

54. As the reference price was informed every week the determination of a specific duty, rebate, or none of them, was set 52 times a year. Furthermore there were no laws or regulations describing the procedures for calculating specific duties or rebates. As a result the AB concluded that the PBS worked as a measure similar to a Import Variable Levy or a Minimum Import Price, i.e. through the support of a domestic target price.

[18] Paragraph 69 of Argentina's Oral Statement.

(Slide 2)

55. Law 19.897 and its Regulations provide for the application of a specific duty on a seasonal basis and depending on prices. A specific duty applies when the international price is below a fixed value. Both prices being expressed in f.o.b. terms.

56. One of the parameters of the current system is a fixed f.o.b. value: the "floor price". The objective of this value is just to allow the calculation of a specific duty under certain circumstances. **So there is no more a domestic target price or a minimum price to support**. Floor and ceiling prices were fixed at US$128 and US$148 per ton respectively. These prices will remain unchanged until the end of 2007 and from there until 2014 they will be reduced by 1.5% per year. The official values are set in the Law.

(Slide 3)

57. The other parameter is an international price used to make the comparison with the floor value. This reference price is also expressed in f.o.b. terms.

58. Reference prices come from the relevant markets for wheat: United States and Argentina.

59. Let me divert a couple of minutes from the presentation and address some points raised by Argentina this morning.

- The relevant markets used to establish the reference price are not only the ones relevant to Chile but relevant for international trade in wheat. Even Argentina seems to recognize this in par. 53 of its presentation when it signals out Chicago and Kansas, exactly one of the prices used.

- In its web page Argentina's Agriculture, Livestock, Fish and Food Secretary and under the section "Monthly Prices" publishes two international prices for wheat: *Fob Golfo* and *Fob Puertos Argentinos*. Annex CHL-12

- In paragraph 54 of its oral presentation Argentina through Annex ARG 31, tries to demonstrate that Canada was a relevant market because it has been the second import market for Chile. First, the relevant markets are not just the relevant ones for Chile in terms of the origin of its imports but "relevant for wheat".[19] Second, if the former would have been the case, Canada was not a relevant market during 2003 nor 2002, when the Regulations were enacted. Annex CHL-13 By the way as you can see the source of information is the same as ARG 31 and the statement that Argentina reproduced in paragraph 54.

- Without prejudging intentions, we cannot accept the assertion of Argentina in paragraph 58 and 59 of its statement that Chile is "constructing" a price that is "intransparent". Annex ARG 32 shows a price series under the name "*Precios FOB oficiales*" (on a daily basis) printed "some days ago". We have printed a couple of minutes ago, from the same source, the same series of prices but on a monthly basis, where the name "*FOB Puertos Argent*" (we assume it is Argentina) is used. Another series printed from the same source under the name "*Precios FOB oficiales*" but on a monthly basis will show that we are talking about the same prices. Annex CHL-14. When Chile enacted the Regulations in 2003 the daily series used the same name as in the monthly series. Now seems to be some difference in terminology but clearly,

[19] Article 8 of Supreme Decree 821.

the official Argentinean source still collects, publishes and uses "*Trigo Pan Puerto Argentino*".

- The AB questioned the PBS on the issue that the relevant market was not established in any regulation and the authority could use "any foreign market of concern".[20] What Argentina suggested this morning is that Chile should change the relevant market to determine the reference price according to its trade patterns. This not only would render the determination of the reference price non transparent and non predictable but very difficult to do because the use of a relevant markets doesn't preclude imports coming from other markets. So Annex ARG 34 is not a surprise in that sense.

60. As explained in the legislation, the reference price is an average of the daily international prices of "*Trigo Pan f.o.b. Puerto Argentino*" on one half of the 12 month period and "*Soft Red Winter N° 2 FOB Gulf of Mexico*" for the rest of the period. The price used is the officially published by Agriculture, Livestock, Fish and Food Secretary of Argentina and the Chicago Board of Trade/Reuters, respectively.

(Slide 4)

61. Under the current regime the amount of specific duty equals the difference between the floor price and the reference price, multiplied by a factor of one plus the general *ad valorem* duty (6%).

62. In the case of wheat flour the applicable specific duty shall be that determined for wheat, multiplied by a factor of 1.56.

63. Specific duties (or rebates) are applied by decree published six times a year in the periods established in the regulation. The duties, rebates or none of them, do not vary throughout the two month period of validity of the decree, that is: the duty is the same irrespective of the transaction price, a governmentally determined price or world price trends.

64. The specific duty plus the *ad valorem* duty must not exceed Chile's tariff bound rate (31.5%).

65. Total tariffs levied by Chile on wheat and wheat flour behave in the same way as an ordinary customs duty. **This means that the price of imports in the domestic market (import price) is the sum of the transaction f.o.b. value, total tariffs and the rest of import costs.**

(Slide 5)

66. The import price could result above the fixed f.o.b. value, as in this example. Or could be lower than the fixed f.o.b. value, depending on the transaction f.o.b. value.

67. Although apparently Argentina doesn't like it (and they repeated it a couple of times this morning[21]), duties currently are applied independently of the transaction value as is the case with any specific duty, thereby allowing goods to enter at any price subject to the application of a given specific duty. **That is to say, international prices may fall (or rise) during the application of a specific duty but the latter will remain the same, and therefore the entry price will necessarily reflect any fluctuation.**

[20] Paragraph 249 of the AB Report.
[21] For example paragraphs 26 and 56 of Argentina's Oral Presentation.

68. After 2003, the parameters floor, ceiling and reference prices have the sole purpose of making possible the determination of the border protection that will be applied to wheat and wheat flour in accordance with a pre-established schedule.

(Slide 6)

69. The following graph compares the price of wheat on the Chilean wholesale market (green line) with two international prices: the *Trigo Pan Puerto Argentino* (blue line), and the *Soft Red Winter Nº2* (orange line), from January 2004 to June 2006. Also, the Floor value appears in red.

70. The graph shows that:

- The floor value is far below the wholesale market price, below Soft Red Winter Nº2 price, and most of the time below the *Trigo Pan Puerto Argentino* price.
- Chilean wheat prices have varied.
- Most of the time this variation is very similar to that of export prices of Argentine wheat, confirming the connection of Chilean wheat prices to the f.o.b. price from Argentina.

71. As we explained in our second submission it is impossible to claim a complete connection. Firstly, the price of wheat – and its fluctuations – on the wholesale market is heavily influenced by the domestic wheat supply naturally available during the harvest months (December to March). Secondly, Argentina is not the only Chilean wheat supplier. For example, in June 2006 the wholesale price falls, following the trend in *Soft Red Winter Nº2* which is lower while the price in Argentina rises.

(Slides 7, 8 and 9)

CONCLUSIONS

72. Mr. Chairman and members of the Panel throughout this long dispute we have always claimed that any WTO Member can do what it wants to up to the level of its binding commitments. In other words, no other Member can expect or request a tariff treatment different to the one consolidated in other Members' Schedule. That is their legitimate expectations. That means that Argentina shouldn't expect from Chile a certain tariff treatment for the products object of these procedures.

73. Notwithstanding the above, the original Panel and the AB concluded that Article 4.2 prohibits certain type of measures that have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products, mainly through the disconnection of domestic prices from international price developments.[22] The particular configuration and interaction of all the specific features of the PBS addressed by the AB created non transparent and unpredictable market access conditions insulating Chile's market from the transmission of international prices, preventing enhanced market access for imports of wheat and wheat flour.

74. Chile respected this decision and although none of the features of the PBS on its own has the effect of insulating our market as the AB stated, and conscious of the sovereign right of any WTO Member to establish the level of protection up to its bound level, it decided to radically modify the import regime for the products in question.

[22] Paragraph 227 of the AB Report.

75. A central part of the Chilean trade policy looks for low and flat tariffs for every good, including agricultural products. However, since wheat and wheat flour are sensitive products Law 19.897 and its Regulations establish a mechanism to provide additional protection (above the 6%) under specific circumstances related to seasons and prices. In our view the application of the bound level of 31.5% could mean unnecessary over protection for producers.

76. An example of the magnitude of this overprotection is provided in the following chart where we simulated the application of an *ad valorem* duty equivalent to our bound rate in the period between January 2004 and June 2006 to the whear imported from Argentina. This chart shows actual c.i.f values (white bars), the *ad valorem* tariff of 6% (orange bars) and the specific duty effectively applied (yellow bars). The green bars represent the difference to reach a 31.5% tariff. In other words, what Argentina is "saving" with the application of the system that it is challenging today.

77. Clearly the alternative, still valid, to increase that protection to an *ad valorem* duty of 31.5% is a scenario where Argentinean wheat producers will be worse off.

78. The current system allows the Executive Power to establish six times a year duties or rebates or none of them (the level of protection) for a fixed period of time based on parameters calculated on f.o.b. value. During that period the specific duties will not vary, allowing the transmission of international prices and trends into the Chilean market. Without mentioning that all the parameters and elements of the system are on legislation and hence well known by importers, producers and exporters including those from Argentina.

79. Based on the arguments and evidence presented in our submissions we respectfully request you to reject Argentina's claims. First, because some of them are out of the terms of reference of this Panel and second, because Argentina has not been able to establish a presumption of inconsistency of Law 19.897 and its Regulations with Article 4.2 of the Agriculture Agreement or with any WTO provision. On the contrary, Chile has demonstrated that the current system is not a variable import levy or a measure similar to it nor a minimum import price nor a measure similar to it.

Thank you.

ANNEX D-4

**CLOSING STATEMENT BY CHILE
(2 AUGUST 2006)**

1. Let me first make a couple of comments on the statements of the Third Parties this morning. First, we listen from some of them a good description of how the current system is designed in the Law and its Regulations. On that basis these Third Parties concluded that the current system is similar to the PBS and hence similar to a variable import duty or a minimum import price. But it is not a comparison of names and parameters what the Panel is requested to do but to look to the "*de facto*" operation of the system and especially its effects. It is the interaction and configuration what matters. As the US correctly pointed out, it is not transparency and predictability *per se*, but in the level of duties that will result from the measure.

2. Our second point relates to the scope of these proceedings. Chile doesn't deny that new measures can be challenged on new grounds and under new provisions of the Covered Agreements. But that is not the case. Factor 1,56 is a valid ratio between wheat and wheat flour prices – as recognized by Argentina – that allows the determination of a duty. The factor has been in place for more that 10 years. We don't know why Argentina didn't challenge it during the original proceeding, but on taking that path you and the AB were never confronted with that element so you never ruled about this alleged inconsistency. Consequently, Chile was never requested to put the Factor 1.56 into conformity. It is an element of the old measure that Chile didn't changed because it was not obliged to do so. And on the Article II:1(b) claim, let me just say that 21.5 Panels are not called to mend errors committed by the disputing parties during the original proceedings.

3. Our reading of paragraph 289 of the AB Report is clear. Chile had to put the PBS into conformity with its WTO obligations. That is exactly what we have done and we have explained those changes and the implications of those changes.

4. We have always understood that a WTO Member can decide the level of protection that it considers appropriate for its market. The only limit of that protection being the bound tariff level scheduled in its list. The AB added that under its bound commitments Members cannot maintain measures prohibited by Article 4.2. These measures restrict trade and distort prices disconnecting domestic markets from international price development because they result in levies that vary continuous and automatically and lack transparency and predictability in the level of those duties.

5. The AB pointed out specific features of the PBS concluding that the particular configuration and interaction of all these specific features were the determinative elements that made it a measure similar to a variable import levy or a minimum import price. Logically, if those features are not present the measure in question cannot be similar to a variable import levy or a minimum import price. Consequently no violation of Article 4.2 of the AA can be established.

6. With this in mind Chile put in place a mechanism that provides a legitimate level of protection below the bound tariff rate and in full compliance with the DSB recommendations and rulings.

7. Chile has eliminated all the negative features of the PBS as singled out by the AB, namely the lack of transparency and predictability in the way the prices bands were established as well as the way the reference price was determined on a weekly basis and also in an intransparent and unpredictable manner.

8. The parameters established in the current system are an instrument that is used only for the purpose of determining the specific duties or the level of protection that Chile has decided for its market. The duties, if any, are applied in the same way to all the imports within a certain period of time (two months), without consideration of the actual transaction value as all specific duties and with absolute transparency and therefore predictability. As a matter of fact all the information about the present system provided by Argentina was obtained through Chilean web pages.

9. As any border protection measure the specific duty increases domestic prices because its objective is to provide for a certain level of prices that favour the domestic production. The duty will directly affect the entry price of those imported goods that compete with the domestic product.

10. But most importantly, being a fixed amount that doesn't change during a two month period already known, the rise or fall of international prices will be transmitted through the entry prices to the domestic market without insulating domestic prices from the fluctuation of international markets.

11. On Argentina's arguments that the parameters of the current system have to reflect or be related to international market, we emphasize – once again – that there is no need to do so because it is the behaviour of the specific duty that directly affects the possibility of price's transmission. We have clearly shown how the current system does exactly that. Nevertheless, values related to the international market are used for the calculations in order to avoid undesired levels of protection. This may occur if the parameters are established in an arbitrary and non transparent manner. Furthermore public and easily available information allows all market agents make their own commercial decisions based on the same information and don't have to wait for some administrative act that formalizes the level of protection that will be valid during a certain period.

12. Argentina throughout this process has claimed that the reference point to any measure that Chile could adopt is the application of a single *ad valorem* duty fixed at a certain rate. Naturally, they assume is not the bout tariff (31.5%) but a lower one. That is not the reference point that has to be read from the AB Report.

13. Argentina hasn't been able to demonstrate that the system established under Law 19.897 and its Regulations disconnects the Chilean market from the evolution of international prices, or what is the same, that the system is sustaining a certain target price. Moreover, Argentina tries to question only certain periods of application of the system, when a specific duty has been applied as they stated yesterday, as if the application of the duty is the breaking point to define if a measure is or is not inconsistent with 4.2. Curiously, Argentina claims at the same time in paragraph 22 of its oral statement that the duties resulting from the application of the system are not the subject of this proceeding.

14. Mr. Chairman and members of the Panel. It should be clear by now that Law 19.897 and its Regulations are not a measure similar to the measures listed in the footnote of Article 4.2 but an ordinary custom duty. Mainly because the current system does not produce the effects identified by the AB. Consequently, Argentina's claims should be rejected confirming that Chile has implemented the rulings and recommendations of the DSB.

Thank you.

ANNEX E

ORAL STATEMENTS OF THIRD PARTIES AT THE SUBSTANTIVE MEETING OF THE PANEL

ANNEX E-1

ORAL STATEMENT BY AUSTRALIA
(2 AUGUST 2006)

Mr Chairman,

1. Australia has read with interest the submissions of the parties to this dispute and the points raised by third parties.

2. Australia joined the original dispute as a third party in view of our systemic interests in the questions under consideration. We retain a systemic interest in the issues being considered in the current proceedings brought by Argentina under Article 21.5 of the DSU.

3. Our systemic interest in these proceedings concerns the consequences of the Price Band System (PBS). In particular, Australia wishes to draw the Panel's attention to the continued potential of the PBS to distort trade, and to the reasons why Australia agrees with Argentina that the new PBS is inconsistent with Article 4.2 of the Agreement on Agriculture.

4. Australia makes this oral statement, however, in a constructive spirit bearing in mind our excellent bilateral relations with Chile, especially as a fellow Cairns Group member, and Chile's commendably low general tariff structure.

5. Australia notes that on 23 October 2002 the DSB adopted the Appellate Body Report on *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* and the Panel Report as modified by the Appellate Body Report. The Appellate Body recommended that the DSB request Chile to bring its price band system, as found to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement (paragraph 289 AB report).

6. Chile claims to have complied with this recommendation by adopting Law number 19.897/2003 and Decree number 831/2003. Argentina states in its rebuttal submission that Chile's modified PBS is still 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.

7. In Australia's view, the question before the Panel is whether the new amendments are sufficient to convert the PBS into a measure that does not have the restrictive features that characterise border measures prohibited under footnote 1 of Article 4.2. Australia respectfully submits that despite Chile's best efforts, they are not. Although we concede that the amendments do go some way to ameliorate the more obviously inconsistent aspects of the measure, we are nevertheless of the view that inherent inconsistencies remain unchanged.

8. The Panel will recall that the *raison d'etre* of Article 4.2 is improved market access for agricultural imports by permitting only the application of ordinary customs duties. To this end, border measures that are trade distorting, such as those listed in the footnote to Article 4.2, are prohibited. As the Appellate Body noted, this is because they have the objective 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….[they]…disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market" (paragraph 227). Fundamentally therefore, any measure that is consistent with Article 4.2 must necessarily be shown to be absent of this trade restrictive objective and effect. This is made clearer by the Appellate Body's deliberations in paragraphs 260 and 261 where it explains that the effect of a measure is relevant, that is whether a measure creates "intransparent and unpredictable market access" and "prevent[s] enhanced market access for imports".

9. In Australia's opinion, the Chilean revised PBS for wheat and wheat flour remains a system which distorts the price of imports of agricultural products in a different way from ordinary customs tariffs and continues to insulate the Chilean domestic market from international price fluctuations. As such, we submit that it must be found to be akin to a "variable import levy" and inconsistent with Article 4.2.

Variability

10. The meaning of the term "variable import levy" was considered by the Appellate Body and it is instructive to recall its comments. It decided that a "necessary condition" for a variable levy is the presence of a formula causing automatic and continuous variability of duties. In contrast ordinary customs duties are as set out in paragraph 233: "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."

11. Chile in its first submission states that under Law 19.897, the duty (or rebate or neither) is now fixed by legal directive in the form of a decree issued by the Ministry of Finance, and then remains unchanged for two months until a subsequent administrative act (paragraph 93). Chile's submission claims that the effect of this change is that the new system is no longer "variable" as decided by the Appellate Body.

12. With respect, Australia submits that this argument is misplaced. It is correct that the new Chilean system has moved to require separate executive action to instigate each variation in applicable duties. However this only partially meets the conditions that the Appellate Body noted are required to convert such a levy into an ordinary customs duty. The Appellate Body also noted that ordinary customs duties cannot simply reflect changes mechanistically determined by an underlying scheme or formula, which we consider remains the case with the Chilean Law.

Transparency and predictability

13. As Chile notes in its submission, the Appellate Body stated in paragraph 232 that "variability" was a necessary but by no means "sufficient" condition for a particular measure to be a "variable import levy". In addition, lack of transparency and predictability that flow from such measures are also important.

14. Chile submits that the revised PBS is both more transparent and more predictable than its predecessor. Under the old PBS, the reference price was changed every week. Under Law 19.897 it is now changed every two months. In addition the price bands were previously adjusted on a yearly basis. Now they are in place for eleven years. On this basis, Chile argues that these changes provide stable conditions to afford better predictability to exporters.

15. That much is correct. The material question however is whether it is sufficient. Australia does accept that these changes give greater transparency and stability. However, the underlying structure of the measure remains the same. Even though this instability is partially offset by the introduction of 11 year periods of application for price bands, fluctuations in the reference price cannot be predicted. More broadly, this mechanism in itself has the effect of insulating the Chilean market from international price fluctuations as it is less flexible. Accordingly, it cannot be said that predictability for exporters has improved. As such, the trade distorting aspects of the PBS have not been remedied.

16. In conclusion, Australia submits that despite the changes to the Chilean PBS, they are insufficient to achieve consistency with Chile's rights and obligations under Article 4.2 of the Agriculture Agreement. It continues to preserve an underlying structure of variability and unpredictability that is non-transparent and contrary to the object and purpose of the Agreement on Agriculture.

17. Australia would respectfully encourage the Panel to find the Chilean Price Bands System continues to be inconsistent with Article 4.2 of the *Agreement on Agriculture* and that Chile has therefore not complied with the recommendations and rulings of the Dispute Settlement Body in this dispute.

ANNEX E-2

ORAL STATEMENT BY BRAZIL
(2 AUGUST 2006)

I. Introduction

1. Mr. Chairman, distinguished Panelists, and members of the Secretariat, Brazil welcomes the opportunity to present its views to you this morning. In our statement, we will address Article 4.2 of the *Agreement on Agriculture* as well as the Panel's terms of reference.

II. Article 4.2 of the Agreement on Agriculture

2. The claim under Article 4.2 of the *Agreement on Agriculture* is that, by adopting the new PBS, Chile has "resort[ed]" to another measure of the kind that had to be converted into ordinary customs duties at the end of the Uruguay Round. Specifically, the new PBS is a measure similar to a "variable import levy" and to a "minimum import price" ("MIP").

3. In addressing these claims, the Panel is assisted by the findings of the original panel and the Appellate Body. Both found that the old Chilean PBS was a measure similar to both a variable import levy and a MIP. On implementation, the key prohibited elements of the old PBS have not been touched, and are part and parcel of the new PBS. Thus, the essence of the PBS seems to remain the same.

Variable Import Levies

4. Chile's new PBS meets all the characteristics of a *variable import levy*.

5. First, the amount of the duty is the difference between two parameters: (i) the *floor of the price band* and (ii) a *reference price* fixed by the government based on world market prices. The reference price changes every two months, thereby purportedly ensuring that the duty varies frequently to reflect the most recent developments in world market prices.

6. Second, under the new PBS, imports are very unlikely to enter at prices below the price band floor. Argentina has explained to the Panel in detail why this is so.[1] Although this can legally occur, it will happen only in very unusual factual circumstances—namely, when world market prices drop by 20 to 30 per cent within a period of two months. And *even if* this improbable price decrease occurred, the new PBS would neutralize it after just two months because the reference price would be updated.

7. Third, the Chilean measure stabilizes the price of imports by neutralizing decreases in world market prices. The PBS is designed – and operates – such that the entry price is virtually always above the lower threshold and also such that the entry price does not exceed the upper threshold of the band system by much. Importantly, as world market prices decrease, the duty increases, thereby exercising a stabilizing effect on prices in Chile that insulates its producers from the fluctuations in the world prices.

8. On implementation, Chile has not altered the fundamental characteristics of a measure that continues to meet the requirements of a variable import levy or a measure similar thereto. In short, the changes made are more of form than substance.

[1] Argentina's First Written Submission, paras. 100–114.

9. Contrary to Chile's arguments, variation in the duty continues to be an integral and automatic feature of the measure, and it occurs frequently. Also, as the world market price falls, protection under the PBS rises, insulating Chile's market from the world market.

10. Chile suggests somewhat improbably that duties imposed under the new PBS are predictable because traders can predict future world market prices. Thus, it believes, traders can foresee the duties that will be imposed under the PBS as market prices evolve.[2] Yet, even though traders often speculate on the evolution of prices, they cannot predict changes with the certainty required to afford predictability to trade. Variable import levies are prohibited precisely because the *Agreement on Agriculture* requires that market access be based on predictable regulation that does not alter with market prices.

11. Chile also asserts that there is greater transparency in the new PBS because: the price band floors and ceilings have been fixed 11 years in advance[3]; the "markets of concern" have been identified[4]; and the amount of the special PBS duty is published every two months.[5] This misses the point. The WTO consistency of the PBS does not change solely because the features making it a variable import levy are now openly published. The measure continues to lack both predictability and transparency because its level varies at an unpredictable rate, making the measure intransparent.

Minimum Import Prices

12. It is also claimed that the new PBS is a minimum import price This is because the floor of the price band functions as a *de facto* MIP. Despite the minor changes Chile has made to the PBS, it continues to guarantee that – in all but the most exceptional situations – the entry price of imports will not fall below the price band floor.

III. The Panel's Terms of Reference

13. Brazil turns to address Chile's contention that Argentina cannot challenge certain features of the new PBS, namely the wheat conversion factor, and also cannot challenge the new measure under Article II:1(b) of the GATT 1994. Chile argues that, because Argentina did not make these claims in the original proceedings, it is now barred from doing so in the current Article 21.5 proceedings.

14. First, in both the original proceedings and these Article 21.5 proceedings, Argentina made a claim under Article 4.2 of the *Agreement on Agriculture*. In these proceedings, Argentina relies on the wheat conversion factor as an *argument* to demonstrate that the new PBS is inconsistent with Article 4.2. Invoking the wheat conversion factor does not, therefore, involve a new *claim* but rather a new *argument* to substantiate an old claim. Nothing precludes a WTO Member from making *arguments* in Article 21.5 proceedings that it did not make in the original dispute.

15. Secondly, and more importantly, Brazil is concerned about the systemic implications of Chile's argument. Chile is essentially asking the panel to rule that a Member is precluded from challenging, in Article 21.5 proceedings, any aspect of a new measure that was present in the original measure but that was not challenged in the original proceedings.

16. In Brazil's view, Chile's approach intends to add a new and undue burden on the complaining party, since it would force it to prosecute *every conceivable violation* in the original proceedings in order to preserve its rights on implementation.

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[2] Chile's First Written Submission, paras. 158 to 163.
[3] Chile's First Written Submission, para. 108; Chile's Second Written Submission, para. 73.
[4] Chile's First Written Submission, para. 115.
[5] Chile's First Written Submission, para. 93. Chile's Second Written Submission, paras. 89-90.

17. Chile's arguments also compel a complaining party to assess, as early as its initial request for consultations, how its claims will fare in dispute settlement: which claims might be upheld, and which might be subject to judicial economy. It also compels an assessment of the many ways in which a respondent might choose to implement, while leaving intact objectionable parts of a challenged measure.

18. Not surprisingly, Chile does not cite to any treaty text in order to support its approach. In fact, this is because there is nothing in the text of the DSU that precludes a complaining Member from bringing a claim that was not brought in the original proceedings. According to the DSU, Article 21.5 proceedings may, in principle, involve claims made under any provision of any covered agreement.[6] Any limitations to the scope of an Article 21.5 dispute must be found in the treaty text. It was precisely on the basis of treaty text that the Appellate Body found in *US – Shrimp* and *EC – Bed Linen (Article 21.5 – India)* that there are certain limitations on the claims that can be made in Article 21.5 proceedings. The Appellate Body ruled that a complainant cannot pursue a claim against an aspect of a measure when, in the original proceedings, that same claim was *rejected*, for example, because the complainant failed to prove its case.[7] This limitation was based on treaty text in Articles 16.4, 17.14, 19.1, Article 21(1) and (3), and Article 22.1 of the DSU. The limitation corresponds to the well-established legal principle, *non bis in idem*. In layman's terms, no person can be tried *twice* for the same alleged offense.

19. No equivalent treaty text support Chile's position that a Member cannot contest for the first time an aspect of a new measure that also featured in an old measure.

IV. Conclusion

20. Mr. Chairman, distinguished members of the panel, Brazil thanks you for the opportunity of presenting its views and looks forward to responding any questions you may have.

[6] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79 and Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40-41.

[7] Appellate Body Report, *EC – Bed Linen (Article21.5 – India)*, paras. 96-99.

ANNEX E-3

ORAL STATEMENT BY CANADA
(2 AUGUST 2006)

Introduction

1. Canada welcomes the opportunity to participate in this proceeding. Canada's submission today is limited to the question of the jurisdiction of this Panel to consider arguments that had not been put before the original panel.

2. Specifically, Argentina claims that the Chilean measures are a violation of *GATT* Article II:1(b), second sentence. It considers that this Panel has the jurisdiction to hear such a claim. Chile disagrees. It submits that this claim was not articulated before the original panel and that, therefore, this Panel does not have the jurisdiction to consider the claim. In Canada's view, the Panel has such jurisdiction.

Legal Analysis

3. What is the scope of a Member's right to raise new claims and arguments before an Article 21.5 panel?

4. It is incontestable that a Member has the right to bring new claims and arguments before a panel relating to *new* measures, as the facts, claims, and arguments relevant to those measures may be distinct from measures previously considered.[1] The Appellate Body determined in *Canada – Aircraft (Article 21.5 – Brazil)* that:[2]

> "… the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure …"

5. Canada recognizes that such a right is not absolute. As Chile correctly notes, where a Member has challenged a measure but has failed to make out a *prima facie* case, it may not re-argue the *same* claim before an Article 21.5 panel. This would permit one Member to engage others in endless litigation, thereby undermining predictability and security in the dispute settlement mechanism of the WTO.

6. However, that is not the question before you. Rather, the question is whether a panel is prohibited from considering arguments and claims on the sole basis that they *could* have been made before the original panel but were not. Where the measure is appropriately before a panel, and the DSB has made no findings or recommendations in respect of such measure or the claims made by the complaining party, a panel may not then reject such claims or arguments on the sole basis that they could have been raised previously. And this is so for at least three reasons.

7. First, the *DSU* makes no provision for such a rejection. The Panel is required by Article 11 of the *DSU* to assess objectively the matter before it, that matter consisting of the measure and the claims

[1] *Canada – Aircraft (Article 21.5 – Brazil)*, Appellate Body Report, paras. 40-42; See also *US – FSC (Article 21.5 – EC)*, Appellate Body Report para. 62, footnote 119.

[2] Para. 41.

of violation. If the measure and the claims are appropriately before the Panel under Articles 6.2, 7.1 and 21.5 of the *DSU*, the Panel should exercise caution in declining jurisdiction to hear a claim.

8. Second, the findings of the Appellate Body in respect of the jurisdiction of an Article 21.5 panel to consider claims already litigated were based on particular facts that do not apply here. Chile does not suggest that Argentina's claim has already been considered and rejected; it argues merely that Argentina could have articulated that claim earlier. Canada is not aware of any rule or precedent in the jurisprudence of the WTO that would require a Member to make all of its arguments and bring all of its claims at one time. Of course, in bringing a dispute Members should exercise good faith; a Member ought not, in principle, engage in litigation techniques such as "case splitting". But neither the *DSU* nor principles of due process enjoin an Article 21.5 panel from considering a claim on the sole ground that it could have been brought earlier.

9. Finally, Canada questions the wisdom of such an approach from a systemic perspective. For one thing, it would force a complaining Member to overburden its original submissions with any and all arguments and claims, regardless of their merit, to avoid a procedural challenge later on. This, despite the fact that the object of dispute settlement is to settle disputes, not to make claims based on a fear of later procedural challenges. For another, if the Panel allows Chile's position to succeed, it would invite highly contentious arguments before Article 21.5 panels concerning whether claims and arguments could have been made before on previous facts, and whether or not certain facts are actually new. Such an approach would constrain an Article 21.5 panel from considering claims and arguments which could not reasonably have been contemplated at the time of the original panel – and notably those based upon subsequent rulings and recommendations of the DSB.

10. Let me now turn to this case. The right of a complaining Member to raise claims and arguments based upon the rulings and recommendations of the DSB is particularly relevant here. Before the original panel, Argentina based its argument upon its position that the duties imposed through the price band system were "ordinary customs duties" within the meaning of both Article 4.2 of the *Agreement on Agriculture*, and *GATT* Article II:1(b). Argentina thus argued under the first sentence of Article II:1(b), which relates to "ordinary customs duties". The original panel found that the duties were not "ordinary customs duties", and so Article II:1(b), first sentence could not apply. Significantly, while the Appellate Body disagreed, it did not come to any conclusion as to whether the Chilean duties are in fact "ordinary customs duties". Nor did it consider it necessary to consider Article II:1(b), first sentence, since it found a violation under Article 4.2 of the *Agreement on Agriculture*.[3]

11. Argentina considers that this presents a valid ground to raise the relevance of the second sentence of Article II:1(b). Chile has argued that "[t]o entertain that claim now would seriously affect Chile's rights and would subject a case warranting a full hearing to summary and expedited proceedings".[4]

12. Canada disagrees with Chile's assessment. The application of *GATT* Article II:1(b), second sentence is a legal issue of interpretation grounded in the facts as established. There is no prejudice to Chile if the existing factual record – with consideration given to new Chilean measures – is raised in support of Argentina's claim. Further, accepting Chile's interpretation would suggest that new arguments could never be entertained in "summary and expedited proceedings" – a position clearly rejected by the Appellate Body. This is not a case involving a wholly new argument, such as *United States – Countervailing Measures Concerning Certain Products from the European Communities*

[3] *Chile – Price Band System*, Panel Report, paras. 7.55-7.60 and 7.104-7.108; Report of the Appellate Body, paras. 165, 278-287.

[4] Chilean submissions, para. 50.

(Article 21.5 – EC), where a party is seeking, for all intents and purposes, a *de novo* review.[5] Canada notes that the possibility that Article II:1(b), second sentence, could be applicable to this case was raised by the original panel on its own initiative. While that consideration was found to be outside the panel's jurisdiction by the Appellate Body, it is unreasonable now for Chile to suggest that they are taken by surprise by Argentina's argument based upon that very same sentence.

13. In the instant case, the Appellate Body found that Argentina did not articulate a claim under Article II:1(b), second sentence.[6] With no claim, there could be no finding that Argentina failed to make a *prima facie* case, much less a finding against them on this point. To now deprive Argentina of the right to bring a claim which it never previously raised, and to make that claim in respect of Chile's *new* measures, would greatly limit Members in their ability to present their strongest case, and would improperly curtail the ability of Article 21.5 panels to review fully the compliance of Members with their WTO obligations.

14. For these reasons, Canada submits that this Panel should find that it has jurisdiction to consider Argentina's claim concerning GATT Article II:1(b), second sentence. We thank the Panel, and welcome any questions that you may have.

[5] Report of the Panel (WT/DS212/RW), paras. 7.72-7.76.
[6] Report of the Appellate Body, para. 168.

ANNEX E-4*

ORAL STATEMENT BY COLOMBIA
(2 AUGUST 2006)

1. Colombia has reserved its third party rights in the case brought by Argentina against the measures taken by Chile to comply with the recommendations of the WTO Dispute Settlement Body (DSB).

2. Argentina requested that the Panel find that the new price band system applied by Chile to imports of wheat and wheat flour[1] is "inconsistent – in itself and in its application – " with Article 4.2 of the Agreement on Agriculture, with the second sentence of paragraph 1(b) of Article II of the GATT 1994, and with paragraph 4 of Article XVI of the Marrakesh Agreement Establishing the World Trade Organization.

3. For Colombia, it is clear that the complainant may not put forward new facts. The dispute comes under Article 21.5 of the Dispute Settlement Understanding (DSU), and WTO case law establishes that in such cases, the scope of DSB reports must be restricted to their express terms[2], based on the interpretation of paragraph 14 of the DSU.

4. It is also clear to Colombia that Argentina, as the complainant, bears the burden of proof with respect to Article 21.5 proceedings and that the Article 21.5 panel must rely on the relevant data submitted to it, as established in WTO case law.[3]

5. Chile maintains that the new measures adopted represent a substantial change from the previous price band system and that "as a practical consequence of changes to the system, there is no variable import levy or minimum import price", nor any similar measure which operates in this way, within the meaning of Article 4.2 of the Agreement on Agriculture.

6. The Panel's assessment must be limited exclusively to an examination of the new Chilean price band system, that is, to the measures taken by Chile to comply with the recommendations and rulings of the DSB.

7. The Appellate Body has made it clear that an import levy may vary and that this fact alone does not enable the measure to be qualified as a variable levy within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture. This is borne out by the fact that WTO Members are authorized to change their tariffs, at any time, provided that the changed tariff does not exceed bound levels. The Appellate Body has also clearly pointed out that 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.

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* Annex E-4 contains the oral statement by Colombia. This text was originally submitted in Spanish by Colombia.

[1] Law 19.897 and Exempt Decree No. 831/2003.

[2] "14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[8] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

[3] The Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)* determined that the examination of "measures taken to comply" is based on the relevant facts proved, by the complainant, in the Article 21.5 panel proceedings: "We add also that the examination of "measures taken to comply" is based on the relevant facts proved, by the complainant, to the Article 21.5 panel, during the panel proceedings".

8. The Appellate Body has also pointed out that import levies have additional features which include "a lack of transparency and a lack of predictability" in the level of duties that result from such measures. In the opinion of the Appellate Body, such features are liable to restrict the volume of imports and distort the prices of imports by impeding the transmission of international prices to the domestic market.

9. In this context, Chile's new system contained a number of changes, including: (i) the abolition of the formula that discarded the highest and lowest 25 per cent of the prices observed, (ii) the elimination of discretion in the determination of import costs, (iii) the use of f.o.b. values in the different parameters of the system and (iv) express identification of relevant markets for the purpose of determining the reference price. In Colombia's opinion, these changes help make the Chilean price band system more transparent and predictable.

10. The Appellate Body also refers to the following definition given by the Panel: "[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". In this connection, Chile's new mechanism uses the system's parameters to calculate the customs duties that will be applied on the transaction value and not on a minimum price.

ANNEX E-5

ORAL STATEMENT BY THE EUROPEAN COMMUNITIES (2 AUGUST 2006)

I. INTRODUCTION

1. Mr. Chairman, Distinguished Members of the Panel, the European Communities ("EC") would like to thank the Panel for this opportunity to submit observations on the present dispute.

2. As is customary, the EC will refrain from analysing in detail the facts of this case, and from applying the law to those facts. The EC will present its views on a number of issues which raise systemic concerns. It will first consider the appropriate interpretation of Article 4.2 of the *Agreement on Agriculture*. Thereafter, it examines the extent to which a complainant may raise new claims in an Article 21.5 proceeding.

II. INTERPRETATION OF ARTICLE 4.2 OF THE *AGREEMENT ON AGRICULTURE*

3. The task of the Panel is to determine whether the revised Price Band System (PBS) is consistent with Article 4.2 of the *Agreement on Agriculture*. In order to prevail, Argentina must convince you that the revised PBS is a measure which would have been required to be converted into ordinary customs duties. The revised PBS will not be such a measure unless it can be shown to be "a similar border measure" to "variable import levies" or "minimum import prices".

4. As you are well aware, the Appellate Body has had occasion to examine these terms. The Appellate Body concluded that a "variable import levy" had the following characteristics:

- Continuous variation;
- Automatic variation;
- A lack of transparency; and,
- A lack of predictability.[1]

5. The Appellate Body emphasised that the first two of these conditions were *necessary* characteristics but that they were not *sufficient* in themselves.[2] This can only be taken as meaning that at least all four conditions must be present for a variable import levy to exist. Of course here, the Panel is tasked with analysing whether a measure *similar* to a variable import levy is being maintained by Chile. In the words of the Appellate Body, the measure being examined must "share sufficient features" with a variable import levy before it can be considered "similar".[3]

6. The EC must express a certain amount of sympathy with the Panel and the main parties to this dispute. Defining how "continuous" the variation must be, how "automatic" it should be, and whether the measure is sufficiently "transparent" or "predictable" is no easy task. Once defined, deciding whether there is sufficient sharing of features so as to make the measure "similar" is again far from clear. Unfortunately, as currently framed, there is little which is transparent or predictable about this test. Nevertheless, in the view of the EC, the high standards Argentina is asking you to set for this test

[1] Appellate Body Report, *Chile – Price Band System*, paras. 233 and 234.
[2] Ibid. para. 234.
[3] Ibid. para. 239.

are not supported by the text of Article 4.2 *Agreement on Agriculture*. To give one concrete example, the "transparency" obligation does not, in the view of the EC, require a WTO Member to explain why it chose particular reference prices, provided it explains what those prices are.

7. Argentina's attempt to load obligations onto the back of Article 4.2 should be kept carefully in context. It should be recalled that the *Agreement on Agriculture* is the start of a reform process in the field of international agricultural trade, intended eventually to bring the obligations on agricultural products in line with those applicable to industrial products. The scope of Article 4.2 should not be expanded into a soul-searching transparency exercise, or a blunt instrument intended to prohibit alleged "disconnects" between international and domestic prices. This is particularly the case when no such requirements exist under the law applicable to trade in industrial goods, and when such requirements clearly go beyond those features distinctive to the types of measures brought under the scope of Article 4.2.

8. The EC starts its analysis by recalling that the Appellate Body has determined that GATT 1994 does not regulate the type of duties which can be imposed. In *Argentina – Footwear* the Appellate Body held that Argentina could apply a specific duty provided that the *ad valorem* equivalent of that specific duty did not exceed the bound rate (which was expressed in *ad valorem* form).[4] That case concerned a specific duty calculated on the basis of a "representative international price". Members are thus in a position to apply different types of duties. They can calculate such duties in a number of different manners without acting inconsistently with GATT 1994. A Member may even decide a particular tariff on the basis of no form of calculation – other than a non-arithmetical political or economic one. Further, as the Appellate Body recognised, varying a duty is a common occurrence and a perfectly legal one at that. To provide a concrete example, it is perfectly legal for a WTO Member to review, from time-to-time, an applied duty, and to adjust it in the light of market developments (i.e. to increase the duty as international prices decrease), provided of course the Member stays within its bound levels.

9. Given variations of tariffs, the transparency of the calculation of the tariff, the predictability of the moment of the change of the tariff (provided there is appropriate publication) and frequent variation of the tariff are not regulated by the GATT the question arises as to when such elements are such as to give rise to an inconsistency with Article 4.2 of the *Agreement on Agriculture*. In the view of the EC, it is only when the measures clearly have sufficient similarity to measures coming under the scope of Article 4.2 - that is features unique to the measures listed in the footnote to Article 4.2 are also found in the measures challenged - that there is a possible violation of Article 4.2. The existence of features which are not unique to the measures found under Article 4.2 cannot be sufficient, on their own, to render a measure inconsistent with Article 4.2.

10. The Appellate Body stressed that the variation in the amount of the duties had to be "continuous". What amounts to a "continuous" variation is not clear. In the original case, neither Argentina nor Chile disputed that the variation was continuous. In the original PBS, the variation in the amount of the duties occurred every week, i.e. 52 times a year. In the revised PBS, the variation takes place every two months, i.e. six times a year. The EC has considerable difficulty in describing a variation which takes place so infrequently as "continuous."

11. The criterion of automaticity is likewise far from clear. A variation in a duty could be brought about automatically in the sense that no legislative or executive action is required to vary the duty. If the executive has no discretion, but yet still has to act in order to vary the duty, and the nature of the variation in the duty is determined by a formula, then it is hard to describe that variation of the duty as anything other than automatic.

[4] See, Appellate Body Report, *Argentina – Footwear (EC)*, para. 55.

12. As already noted, the key features of a variable import levy are the continuous and automatic variation, and a lack of transparency and predictability. The EC considers that for a measure to be "similar" to such a measure, it must display all of these features. If these first conditions are met, the question then arises as to how untransparent and how unpredictable the measure must be, and whether other criteria also have to be met. The EC submits that provided all the elements of the calculation are published, and if all of the data used is publicly available, then the system is both transparent and predictable because an interested economic operator will be in a position to predict the nature of a change in the amount of the duties – where that is necessary because a change is pending. In particular, in the view of the EC, it is not necessary that transparency extend to why a particular market has been chosen to calculate representative prices, provided it is clear what prices are to be used.

13. Both Argentina and Brazil make a great deal of an alleged "disconnect" between domestic Chilean and international prices. The Appellate Body never explicitly addressed the weight, if any, to be given to this issue. In the view of the EC, the Panel should be very cautious in approaching this issue. It is a feature of tariffs to soften the impact of, or disconnect international prices from domestic markets. This is the effect of any tariff, whether specific or *ad valorem*. The extent of the softening or disconnect varies from case to case. Further, the extent of the softening can be adjusted, either by varying an applied tariff within the limits of bindings or even by undertaking Article XXVIII negotiations. So, in the view of the EC, decisive weight cannot be given to the existence of any disconnect or softening in assessing consistency with Article 4.2, since the extent of such a disconnect or softening will always be a relative analysis. For these reasons, the EC suggests that extreme caution be used in analysing this issue.

14. In terms of conclusion on Article 4.2, the EC would like to stress than in its view, for a measure similar to a measure listed in the footnote of Article 4.2 to exist, the measure must exhibit all of the features identified by the Appellate Body in the original dispute. That is, any duty must vary continuously and automatically, but in addition, the measure must lack transparency and predictability. In the view of the EC it is not necessary that a measure explain why certain choices have been made, provided those choices are clearly made public and are predictable. Finally, the EC is far from convinced that the question of the alleged disconnect between international and domestic price should be given anywhere near the importance it appears to have been given by Argentina.

III. SCOPE OF ARTICLE 21.5 PROCEEDINGS

15. A first observation of the EC in relation to the issues at stake under this section is that the parties do not dispute the fact that the revised price band system is a "new measure". The core of the claims on the nature of this new measure is whether it is, as the previous PBS was determined to be, a "similar border measure" inconsistent with Article 4.2 of the *Agreement on Agriculture*. In this respect, the revised PBS may also be seen as similar to the original one, but it is both formally and substantially different, and this seems undisputed.

16. On this basis, the EC generally holds the view that the mere fact that the measure is a new one globally entails the emergence of new factual circumstances and thus a broad right to bring new claims against the new measure in all its elements, irrespective of the fact that a new claim may concern an aspect or element of the new measure which was taken over from the previous regulatory framework without any formal change, provided, of course, that this element is part of "the measure taken to comply".

17. What is important then is that the new factual and legal contexts will, as a matter of principle, provoke a change in the factual circumstances – "the relevant facts" - on the basis of which the conformity or not of the new measure with any provision of the covered agreements should be analysed. Both parties have referred to the Appellate Body report in the *EC-Bed Linen* (Art 21.5

India) case, where indeed this right for a complainant in Article 21.5 proceedings to raise new claims, arguments and factual circumstances different from those raised in the original proceedings is acknowledged[5].

18. Whether the invocation by Argentina of the 1.56 conversion factor is to be construed as a new argument or as a new claim, the factual circumstances of its operation have changed with the adoption of the revised PBS, and thus the examination of its effect on the conformity of the revised PBS with Article 4.2 of the *Agreement on Agriculture* should fall within the terms of reference of this Panel.

19. As regard the claim made by Argentina relating to the second sentence of Article II:1(b) of the GATT, and in the view of the EC, what counts in this context is again the fact that the new measure (the revised PBS) has created a new set of regulatory and factual circumstances which imply that the claim is new insofar that it is directed against a different set of measures under a different set of "relevant facts". Therefore, the fact that a similar claim may have been brought against a similar measure in the original dispute should be held as irrelevant.

20. Further, the EC contends that in any case, it is not a claim from the original dispute where Argentina would have "failed to establish a prima facie case", pursuant to the standard retained by the Appellate Body in the *EC – Bed Linen (Article 21.5 India)*[6] and therefore the right to bring such a claim should not be excluded on the basis of such a precedent. Nevertheless, since the EC believes that the PBS system should be considered an ordinary customs duty, the EC has some difficulty in identifying a substantive breach of the second sentence of Article II:1(b).

IV. CONCLUSION

21. Mr. Chairman, Distinguished Members of the Panel, the EC is grateful for this opportunity to present its views and trusts they will be taken into account as you draw your own conclusions in this dispute. The EC will, of course, be happy to answer any questions which you may have. Thank you.

[5] See para. 79 of the Appellate Body's report.
[6] Para. 96.

ANNEX E-6

**ORAL STATEMENT BY THAILAND
(2 AUGUST 2006)**

I. INTRODUCTION

Mr. Chairman and Members of the Panel,

1. Thailand appreciates the opportunity to participate in this proceeding and to present its views on this matter to the Panel today.

II. COMMENTS

2. Thailand believes that the task before this Panel is simple and straightforward. As the Appellate Body expressed in *Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU* (DS70), the standard for an Article 21.5 panel is to examine whether a revised measure is in conformity with WTO rules.[1] The Appellate Body subsequently refined this standard in *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada, Recourse by Canada to Article 21.5 of the DSU* (DS257), emphasizing the express link contained in Article 21.5 between "measures taken to comply" and the recommendations and rulings of the Dispute Settlement Body (DSB).[2]

3. Therefore, the task before you is to examine the WTO-consistency of the revised price band measures taken by Chile taking into account the DSB recommendations and rulings in the original dispute.

4. In that dispute, both the Panel and the Appellate Body found that Chile's price band system was inconsistent with Article 4.2 of the Agreement on Agriculture and made simple and straightforward recommendations and rulings: Chile must bring its price band system into conformity with Article 4.2 of the Agreement on Agriculture, which requires Members to not "maintain . . . any measures of the kind which have been required to be converted into ordinary customs duties."[3] In this regard, the Appellate Body found Chile's price band system to be a border measure of such kind, and in particular, similar to, *inter alia*, a variable import levy.[4] The Appellate Body further found that the right of WTO Members to maintain such a measure, including that of Chile, ended from the date of entry into force of the WTO Agreement.[5]

Mr. Chairman and Members of the Panel,

5. Chile claims to have ended its WTO-inconsistent price band system through the instigation of Law No. 19.897 of 2003. This new law introduces some changes to Chile's price band system. For example, it narrows the scope of the system by excluding edible vegetable oils, it establishes the price

[1] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/R, paras. 36 and 41.

[2] Appellate Body Report, *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada, Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/R, para. 68.

[3] Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, paras. 288-289.

[4] *Ibid*, paragraph 238.

[5] *Ibid*, paragraph 212.

band's floor and ceiling prices for 11 years (albeit with annual adjustments) as opposed to on an annual basis, and it determines the reference price on a bi-monthly basis instead of a weekly one.[6]

6. However, Thailand is of the view that despite these changes, the WTO-inconsistent price band system is well and alive. As Argentina has clearly demonstrated, the fundamental elements of the illegal system remain in place. Firstly, the total duties applicable still comprise ad valorem and specific duties, like its predecessor. Secondly, the calculation of the specific duty still involves the comparison of the floor and ceiling of the price band to a reference price, all of which are determined in a non-transparent manner (albeit on a less frequent basis). Thirdly, because duties under the new system continue to vary depending on price fluctuations, under Law No. 19.897 of 2003 Chile still maintains a variable import levy prohibited by Article 4.2 of the Agreement on Agriculture. In effect, Chile's maintenance of the price band system resulting in a variable import levy undermines an essential goal of the Agreement on Agriculture, namely, to ensure that market access commitments on agricultural products are secure, transparent and predictable for traders.

7. Thailand will not examine in detail the precise elements or formula of Chile's new price band system to demonstrate that it is a variable import levy. We consider that Argentina has already undertaken a thorough and comprehensive analysis in this regard. We also take no view on other issues subject to the review of this Panel. Suffice it to say that Thailand fully supports Argentina's assertion that Chile's implementing measures fail to bring it into compliance because they maintain a price band system in violation of Chile's obligations under the Agreement on Agriculture in much the same way as their predecessor did.

III. RECOMMENDATION

Mr. Chairman and Members of the Panel,

8. Article 11 of the DSU provides that one of the functions of panels is to make findings that will assist the DSB in making recommendations. In addition, DSU Article 3.7 establishes that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute". In light of these provisions, and to avoid infinite compliance procedures, Thailand strongly believes that this Panel should find that any price band system resulting in the application of customs duties that vary depending on the fluctuations of international prices constitutes a mechanism leading to the imposition of variable import levies, a border measure that is prohibited under Article 4.2 of the Agriculture Agreement. Thailand thus believes that this Panel should recommend Chile to withdraw its price band system in order to act consistently with the covered agreements, to implement the DSB recommendations and rulings in the original dispute, and to provide a positive solution to this dispute.

IV. CONCLUSION

9. Thailand hopes that these views will assist the Panel in considering the issues brought before it. Again, we thank you for this opportunity to appear before you today.

[6] First Written Submission of Argentina, 19 April 2006, paras. 8, 33, and 38.

ANNEX E-7

**ORAL STATEMENT BY THE UNITED STATES
(2 AUGUST 2006)**

1. Mr. Chairman and Members of the Panel, the United States is pleased to present its views as a third party in this Article 21.5 proceeding.

2. As the Panel knows, the United States was not in a position to make written submissions prior to this meeting. As a result, our statement today is effectively our only opportunity to present our views to the Panel, and it is therefore longer than it might otherwise have been. We thank the Panel and the other delegations present today, in advance, for their attention to these comments.

3. This proceeding concerns the modifications that Chile has made to its price band system, a measure found to have been inconsistent with Article 4.2 of the *Agreement on Agriculture*.[1] Argentina argues that the modified system is inconsistent, as such and as applied to imports of wheat and wheat flour, with three WTO provisions: (1) Article 4.2 of the *Agreement on Agriculture*; (2) the second sentence of Article II:1(b) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"); (3) and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*.[2] The United States would like to offer some observations today on the first two of these claims. As for the third claim, we note simply that it is a derivative claim dependent upon a finding of inconsistency on the basis of one or both of the first two claims.

Article 4.2 of the Agreement on Agriculture

1. The Proper Interpretive Approach

4. In this proceeding, as in the original, the central question raised by Argentina's Article 4.2 claim is whether the measure at issue is "similar" to a "variable import levy" or "minimum import price." Interpretation of the terms "variable import levy" and "minimum import price" is key to the resolution of the question presented. Pursuant to Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and as the Appellate Body explained in the original proceeding, these terms must be interpreted using the customary rules of interpretation of public international law,[3] in particular, according to their ordinary meaning, in their context, and in the light of the object and purpose of the WTO agreements.

5. The United States thus cannot support Chile's assertion that, in the absence of any definition for the terms "variable import levy and/or a minimum import price, the point of departure can *only* be that indicated by the Panel and the Appellate Body with respect to the elements which make up such measures."[4] It is of course correct that the issue before this compliance Panel involves the findings of

[1] *See* Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted as modified 23 October 2002, para. 8.1(a) (hereinafter "Panel Report"); Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted as modified 23 October 2002, para. 288(c)(iii) (hereinafter "Appellate Body Report").

[2] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse by Argentina to Article 21.5*, First Written Submission by Argentina, para. 2 (19 April 2006) (hereinafter "Argentina First Written Submission")

[3] Appellate Body Report, para. 231.

[4] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse by Argentina to Article 21.5*, Chile Rebuttal Submission, para. 4 (24 May 2006) (hereinafter "Chile Rebuttal Submission") (emphasis added).

the Panel and Appellate Body in the original proceeding, because Article 21.5 of the DSU concerns the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the Dispute Settlement Body. However, the Appellate Body has also explained, in the *Canada – Aircraft* Article 21.5 proceeding, that "the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute."[5]

6. Chile's argument appears to be that: (a) in the original proceeding, the Appellate Body identified only "specific (and thus limited) features"[6] of the price band system as being the "fundamental and central aspects" that "made the [system] a measure similar to a variable import levy or minimum import price;"[7] and (b) "Chile dealt with those 'certain features' identified, analysed and questioned by the Appellate Body."[8]

7. The United States disagrees with Chile's premise (a). To the contrary, the Appellate Body expressly *rejected* any attempt to assess the WTO-consistency of the original price band system based on whether it shared characteristics of a "fundamental" nature with variable import levies and minimum import prices.[9] According to the Appellate Body: "[t]his merely complicates matters, because it raises the question of how to distinguish 'fundamental' characteristics with those of a *less than* 'fundamental' nature."[10]

8. The Appellate Body endorsed, instead, a comprehensive analysis, using as the point of departure the ordinary meaning of the terms "variable import levies" and "minimum import prices" in their context, and in light of the object and purpose of the WTO agreements.[11] The Appellate Body's analysis resulted in a finding that though there were "some dissimilarities between Chile's price band system and the features of 'minimum import prices' and 'variable import levies' ... *the way Chile's system is designed, and the way it operates in its overall nature*, are sufficiently 'similar' to the features of both 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."[12]

9. An assessment of the modified measure in this Article 21.5 proceeding requires the same comparison of the price band system, as it is designed and as it operates in its overall nature, to variable import levies and minimum import prices. It is not sufficient merely to compare the original and modified price band systems to determine whether Chile has addressed the "certain features" of the former that allegedly are "fundamental."

2. The Modified Price Band System Appears to be "Similar" To A Variable Import Levy and a Minimum Import Price Within the Meaning of Article 4.2 of the Agreement on Agriculture

10. Although Chile asserts that it has changed the price band system in such a way as to render it WTO-consistent, it appears that Chile's modified price band mechanism continues to vary the applicable duty based on the difference between a floor price and a calculated reference price. Chile appears just to have modified somewhat the way in which those parameters are determined. The price band system with these modifications would therefore still appear to be a measure similar to variable

[5] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft: Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, para. 41.
[6] Chile Rebuttal Submission, para. 19.
[7] Chile Rebuttal Submission, para. 28.
[8] Chile Rebuttal Submission, para. 6.
[9] Appellate Body Report, para. 226.
[10] Appellate Body Report, para. 226 (emphasis in original).
[11] Appellate Body Report, para. 232.
[12] Appellate Body Report, para. 252 (emphasis added).

import levies and minimum import prices within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*.

(*a*) *Variable Import Levy*

11. Examining the ordinary meaning of the term "variable import lev[y]" in light of its context, and the object and purpose of the agreements, the Appellate Body explained that a "variable import levy" is a "duty, tax, charge or other exaction" "assessed upon importation" that is "liable to vary."[13] Further, given the context in which the term is used in footnote 1 of Article 4.2, the Appellate Body clarified that the variability must be intrinsic to the measure itself, for example, because of the incorporation into the measure of a "scheme or formula that causes and ensures that levies change automatically and continuously."[14] Apart from these elements, the Appellate Body noted that a common feature of variable import levies is "a lack of transparency and lack of predictability in the level of duties that will result from such measures."[15] The Appellate Body indicated that a measure "similar" to variable import levies would also share that feature.[16]

12. Chile's modified price band system would appear to be a measure similar to variable import levies under this reasoning. The price band duty under the modified system is a "duty, tax, charge or other exaction" "assessed upon importation." Moreover, Chile's Law No. 19.897 sets out a formula that must be applied by the Chilean Executive every two months to establish a new amount of duty under the price band system. In the case of wheat, this duty is the (positive) difference between a reference price and the floor price "multiplied by a factor of one (1), plus the general *ad valorem* duty in force" for wheat.[17] In the case of wheat flour, it is the duty determined using the formula for wheat multiplied by a factor of 1.56.[18] The price band duty is, thus, "liable to vary" because of an intrinsic "formula that causes and ensures that levies change automatically and continuously."

13. Chile has argued that the price band duty has ceased varying "continuously" because it now changes once every two months, rather than once every week as it did under the original price band system. We cannot discern, nor has Chile identified, a basis for such a distinction to be drawn.

14. Similarly, the fact that Chile has added a new administrative requirement that the Chilean Executive publish the amount of the price band duty in a Ministry of Finance Decree at the start of every two-month period does not alter the conclusion that the price band duty varies "automatically" because of the formula set out in Law No. 19.897. Chile correctly notes the Appellate Body's clarification that "[t]o 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."[19] However, it is not clear how simply interjecting a layer of clerical tasks could break the link between the formula established as part of the price band system and the level of the duties automatically calculated through its application.

15. As for the Appellate Body's observation that a common feature of variable import levies is "a lack of transparency and lack of predictability *in the level of duties that will result from such measures*,"[20] we note that it is not just any "lack of transparency" and "lack of predictability" that is of

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[13] Appellate Body Report, paras. 232-233.
[14] Appellate Body Report, paras. 233.
[15] Appellate Body Report, para. 234 (emphasis added).
[16] Appellate Body Report, paras. 234 and 246-252.
[17] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse by Argentina to Article 21.5*, First Written Submission by Chile, para. 17 (3 May 2006) (hereinafter "Chile First Written Submission")
[18] Chile First Written Submission, para. 17.
[19] *See* Chile Rebuttal Submission, para. 100 (quoting Appellate Body Report, para. 233)
[20] Appellate Body Report, para. 234 (emphasis added).

concern. Rather, it is a "lack of transparency" or "lack of predictability" regarding "the level of duties that will result from such measures." It is not clear to us that this aspect of "transparency" is being addressed in the debate between the parties on issues of transparency relating to other aspects of the price band system.

16. When one looks at Chile's modified price band system and variable import levies from the standpoint of an exporter, the measures do seem to be similar in the lack of transparency and predictability in the level of the duties resulting from their application. In both cases, the lack of transparency and predictability results from the complex nature of the mechanism applied to determine the level of the duties and the fact that it may be difficult to ascertain – if not impossible to know ahead of time – all of the elements necessary to determine the precise level of duties.

17. To illustrate, consider the fact that to determine the level of the duty under Chile's modified price band system, it is necessary to know the reference price that will be compared to the price band threshold. The reference price consists of "the average of the daily international wheat prices recorded in the markets most relevant to Chile over a period of 15 calendar days counted backwards from the [bi-monthly] date set out in Regulation No. 831 for each decree establishing specific duties."[21] Unless an exporter sells, ships, and lands the shipment within the current two-month window – which would be unusual, according to Argentina, as a "*majority* of sales are made under forward contracts"[22] – the exporter will simply not know the level of the duty that will apply to its exports.[23]

18. Chile attempts to minimize this result by arguing that wheat traders could use futures contracts prices and their "own skills in predicting prices" to try to determine what the reference prices might be in the future.[24] The same assertion, however, could be made about variable import levies – and yet, all agree that those measures are within the ambit of Article 4.2 of the *Agreement on Agriculture*. The United States submits that the question is not whether a trader can attempt to make an educated guess as to what the level of the duty might be. Rather, the question is whether a trader can "*know* and ... *reasonably predict* what the amount of duties will be" in much the same way as if an ordinary customs duty were in place.[25] As the Appellate Body explained, in the absence of that kind of transparency and predictability about the level of the duties, there is a danger that exporters will not ship to the market in question, which will impede the transmission of international prices to the domestic market.[26]

(*b*) *Minimum Import Price*

19. Turning next to the question of whether the modified price band system is similar to a minimum import price, it would appear that there has been little change to the price band system that would make it any *less* similar to a minimum import price now than it was before.

20. Chile asserts that "minimum import price schemes generally operate in relation to the actual transaction value of ... imports."[27] However, neither the original price band system nor the modified system calculates duties by reference to actual transaction prices. Rather, both use as the reference price the price for a certain quality of wheat in the foreign "markets of concern." Chile argues that because "the reference price [in the modified price band system] has nothing to do with the

[21] Chile First Written Submission, para. 30.
[22] Argentina First Written Submission, para. 275 (emphasis in original).
[23] Argentina First Written Submission, para. 275.
[24] Chile First Written Submission, paras. 158-163.
[25] Appellate Body Report, para. 234 (emphasis added).
[26] Appellate Body Report, para. 234.
[27] Chile Rebuttal Submission, para. 139.

transaction value" the system is "neither a minimum import price nor similar to one."[28] However, this distinction did not preclude a finding of "similarity" in the original proceeding,[29] and it is not clear why it would do so now.

21. We also question whether the analysis of similarity to a minimum import price system is affected by the fact that the price band thresholds are expressed in Law No. 19.589 in "FOB terms," rather than as a "minimum import price," "a CIF price," or "an entry price."[30] If so, a Member could avoid the obligations of Article 4.2 of the *Agreement on Agriculture* by maintaining a minimum import price (or a measure similar to one) and simply labelling the threshold price as something other than a "minimum import price," "a CIF price," or "an entry price."

(c) "Sustaining" an entry price, internal price, or an administratively determined price above the domestic price

22. Finally, Chile makes a general argument regarding the alleged "fundamental characteristics" of variable import levies and minimum import prices that we would like to address. Specifically, Chile argues that a "fundamental characteristic" of these measures is the intent "to sustain a price and that that price is measured as an entry price, as an internal price, as a value linked to the internal price, or as an administratively determined price which is above the domestic price."[31] Chile cites, as the basis for this assertion, a listing of "fundamental characteristics of variable import levies and minimum import price" from the Panel Report in the original proceeding, which the Panel said it had "distilled from the pre-Uruguay Round notifications and examination thereof by the GATT Contracting Parties."[32]

23. Chile argues that since the two prices compared to determine the price band duty – the modified floor and reference price – are not the exact same as the ones used in the case of variable import levies and minimum import prices according to the Panel's list, "the current parameters do not possess any of the fundamental characteristics which the WTO itself has defined and discussed for" those two categories of measures."[33] Chile concludes that, "[t]herefore, the Chilean system established by Law 19.897 and its Regulations is not inconsistent with ... Article 4.2."[34]

24. We note that the Appellate Body agreed with the arguments that Chile advanced in the original proceeding, that it is not useful to endorse certain characteristics "as being of a 'fundamental' nature."[35] Instead of endorsing the kind of assessment that Chile is now urging of "fundamental characteristics," the Appellate Body conducted an analysis involving an examination of the ordinary meaning of the terms "variable import levy" and "minimum import price" in their context, and in light of the object and purpose of the agreements.[36] There is no reason why the same approach should not be used here.

Article II:1(b) of the GATT 1994

25. The Appellate Body has explained that, if the price band system is found to be inconsistent with Article 4.2 of the *Agreement on Agriculture*, it is not necessary to consider whether the price band system also results in a breach of Article II:1(b) of the GATT 1994. "This is because a finding

[28] Chile Rebuttal Submission, para. 160.
[29] Appellate Body Report, para. 248, 252.
[30] Chile Rebuttal Submission, para. 140.
[31] Chile Rebuttal Submission, para. 117.
[32] Panel Report, para. 7.37-7.37.
[33] Chile Rebuttal Submission, para. 123.
[34] Chile Rebuttal Submission, para. 123.
[35] Appellate Body Report, para. 230.
[36] Appellate Body Report, para. 231.

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."[37] Applying this reasoning, we believe that this Panel can properly end its analysis in this proceeding with a finding under Article 4.2 of the *Agreement on Agriculture*.

* * * * *

26. This concludes the oral statement of the United States. Thank you for your attention.

[37] Appellate Body Report, para. 190.

ANNEX F

REPLIES BY PARTIES TO QUESTIONS POSED BY THE PANEL AND OTHER PARTIES AFTER THE SUBSTANTIVE MEETING OF THE PANEL

ANNEX F-1

REPLIES BY ARGENTINA TO QUESTIONS POSED BY THE PANEL

FOR BOTH PARTIES

1. Article 21.5 of the DSU provides that:

> **"Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute..." (emphasis added)**

Please identify which are the relevant "measures taken to comply with the recommendations and rulings" at issue in these proceedings. Do those measures refer to the PBS in its entirety, the amendments introduced to the PBS, particular features of the PBS, or something else? Please make reference to relevant sections of the Panel and Appellate Body reports in the original proceedings to support your answer, if needed.

Answer to Question 1:

The relevant measures taken to comply with the recommendations and rulings at issue in these proceedings are Law No. 19.897, whose Article 1 replaced Article 12 of Law No. 18.525[1], and Decree No. 831 of the Ministry of Finance (hereinafter Decree 831/2003)[2], regulating the application of Article 12 of Law No. 18.525, as substituted by Article 1 of Law No. 19.897.

The fact that both Law 19.897 and Decree 831/2003 are measures adopted by Chile to implement the recommendations and rulings of the DSB was acknowledged by Chile in the status reports it submitted to the DSB in fulfilment of its obligations under Art. 21.6 of the DSU.[3]

Those measures refer to the PBS in its entirety.

2. Could the parties please comment on whether their reply to the previous Question has any bearing on the issue of whether Argentina's claim under Article II:1(b) of the GATT 1994 falls within this Panel's terms of reference.

Answer to Question 2:

Argentina's answer to the previous question bears on the issue of whether Argentina's claim under Article II:1(b) of the GATT 1994 falls within this Panel's terms of reference as fas as the amended PBS is a new measure recognized like that by Chile itself.[4]

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[1] See Exhibit ARG-1. As notified by Chile, Law 19.897 established a "new" price band system which entered into force on 16 December 2003 for the products at issue in this dispute, namely, wheat and wheat flour. (WT/DSB/M/156, paragraph 16).

[2] See Exhibit ARG-2.

[3] See, for example, document WT/DS207/15/Add.3 and *inter alia* First Written Submission by Argentina, paras. 18 to 20.

[4] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system…" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "… the new price band system entered into force on 16 December 2003…" (underlining added).

In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held :

> "... in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU." [5] (Underlining added.)

Thus, Argentina's claim relating to the second sentence of Article II:1(b) of the GATT 1994 falls within the Panel's terms of reference since it is a new claim with respect to a new measure.

3. During the meeting with the Panel, regarding the issue of whether Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994 falls within the mandate of this Panel, Canada asserted that it "is not aware of any rule or precedent in the jurisprudence of the WTO that would require a Member to make all of its arguments and bring all of its claims at one time" (See paragraph 8 of the written version of Canada's oral statement). Assuming Members are then free to choose which claims to bring against a specific measure in the original proceedings and which other claims to bring later, during Article 21.5 proceedings, would there be the risk, as Canada itself suggests, that Members could then tactically decide to "split claims" between the original proceedings and the Article 21.5 proceedings (see paragraph 9 of the written version of Canada's oral statement)?

Answer to Question 3:

Like the Appellate Body held in *Canada – Aircraft (Article 21.5 – Brazil)*[6], Article 21.5 proceedings involve, in principle, not the original measure but rather a new and different measure which was not before the panel and it is natural, therefore, that, as the relevant facts bearing upon the "measure taken to comply" are different from the relevant facts relating to the original measure, the claims, arguments and factual circumstances pertinent to the "measure taken to comply" would not necessarily be the same as those which were pertinent in the original dispute.

Therefore, as the relevant facts bearing upon the "measure taken to comply" are different from the relevant facts relating to the original measure in the case at issue in this dispute, there is no risk that Argentina could have "tactically" decided to "split claims" between the original proceedings and the Article 21.5 proceedings.

[5] WT/DS70/AB/RW, paragraph 41.
[6] WT/DS70/AB/RW, paragraph 41.

4. Do the parties consider that the laying down of all parameters of the PBS applicable until 2014 makes it easier to predict the specific duties applicable to imports? Could a degree of uncertainty be associated with the dates of delivery?

Answer to Question 4:

The laying down of some parameters of the amended PBS applicable until 2014 *does not* make it easier to predict the specific duties applicable to imports.

First, not all parameters have been layed out until 2014. In particular, the reference prices will mandatorily change every two months as they have changed every two months since the amended PBS was established.[7] This provides no predictability for exporters.

According to Chile, the exporter must ascertain the future price of bread wheat in the relevant market of concern in the 15-day future period and then calculate that 15-day period average price to obtain the presumed *future* reference price.

Thus, one of the problems faced by the exporter in estimating the future amount of duties payable is the fact that future prices are precisely that: future, and therefore, they are estimates rather than solid data. That is to say, there could be variations due to circumstances unknown at the time that could cause these *future* prices to differ from the prices actually recorded *in the future.* Consequently, the relationship between the specific duty and the transaction value, in the presence of a variation in the amount of the duties, will necessarily differ from that which would have existed if there had been no such variation.

If in the amended PBS there is any chance of predicting future reference prices, *quod non*, that chance is not different from the possibility that existed with the original PBS. Future prices for wheat existed then, as they exist now, and the same problems that Argentina now highlights existed at the time of the original proceeding as well. In fact, that was enough for the Appellate Body to find that the original PBS was inconsistent because an exporter was less likely to ship to a market if that exporter could not predict what the amount of duties would be.[8]

Second, it is not clear that the amended PBS, included its parameters, will not continue to exist after 2014. The amended PBS has no end date. As indicated in the legislation amending the original PBS, "… In 2014 the President of the Republic shall evaluate the modalities and conditions of application of the price band system …".[9] So, Chile has not even provided the certainty that the amended PBS will be dismantled by middle of next decade.

With respect to the degree of uncertainty related to the delivery dates, Argentina demonstrated how, taking into account the specific delivery dates, as a result of the amended PBS an exporter may not know and may not reasonably predict what the amount of duties will be. Argentina respectfully refers the Panel to paras. 271 to 274 of its First Written Submission.

5. Argentina has noted in paragraph 58 of its first submission, that the way in which the calculation of the specific duties has been changed under the amended PBS "leaves the exporter worse off, inasmuch as the specific duties now generate a cost higher than that generated by the previous method of calculation".

[7] First Written Submission by Argentina, para. 256 to 270 and Exhibit ARG-6.
[8] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[9] Law 19.897/2003, Art. 1. See Exhibit ARG-1.

(a) Could Argentina clarify whether, in its view, this particular fact *per se* would make the amended measure inconsistent with the WTO covered agreements. If so, could Argentina identify the legal basis for that argument.

Answer to Question 5(a):

The fact that the way in which the calculation of the specific duties has been changed under the amended PBS "leaves the exporter worse off, inasmuch as the specific duties now generate a cost higher than that generated by the previous method of calculation" is a cumulative insulation factor if compared to the original PBS.

This fact is a "specific feature" that contributes to the particular configuration and interaction of all the amended PBS specific features described by Argentina along its submissions and oral statements that have the effect of disconnecting Chile's market from international price developments.

Argentina finds legal basis for this interpretation in footnote 1 to Article 4.2 of the Agreement on Agriculture. Footnote 1 reads in its relevant part:

> "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…"

This cumulative insulation factor (i.e. the fact that the way in which the calculation of the specific duties has been changed under the amended PBS leaves the exporter worse off) contributes to the amended PBS *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.

In that sense, the Appellate Body found:

> "In our view … 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".[10]

This *effect* was one of the features the Appellate Body referred to when finding the original PBS inconsistent with Article 4.2. The Appellate Body stated:

> "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 …"[11] (underline added)

(b) In this respect, can Argentina comment on Chile's statement that it has taken the necessary steps to ensure that duties never exceed its tariff rate level bound in the WTO (see, for example, paragraph 37 of Chile's first submission). In the opinion of the Parties, what is at issue in these proceedings, the level of the duties or their alleged variability, or both?

[10] *Chile – Price Band System*, Report of the Appellate Body, para. 246.
[11] *Chile – Price Band System*, Report of the Appellate Body, para. 261 (underline added).

Answer to Question 5 (b):

Chile's comment is familiar to Argentina because it is not the first time that Chile raises this argument.[12]

The fact that Chile has taken the necessary steps to ensure that duties never exceed its tariff rate level bound in the WTO is meaningless with relation to whether the amended PBS is consistent with Chile's obligations under the WTO. The Appellate Body has extensively dealt with this argument and has clearly rejected it.[13] It is useful to recall that the Appellate Body stated:

> … 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 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*.
>
> 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 …[14]

With respect to the second part of this question ("what is at issue in these proceedings, the level of the duties or their alleged variability, or both?"), there is much more at issue in these proceedings than just the variability of the duties.

While the *level* of the duties *per se* is not inconsistent with Chile's WTO obligations, what is at stake in these proceedings is the fact that the amended PBS continues to elevate the entry price of imports to Chile above the price band floor; continues to "overcompensate" for the effect of decreases in international prices on the domestic market when reference prices are set below the price band floor; continues to make the entry price of Chilean imports higher than if Chile applied a minimum import price at the level of the price band floor, and continues to fail to ensure that the entry price of imports to Chile falls in tandem with falling world market prices. In addition to this, the amended PBS is a border measure similar to a variable import levy a minimum import price, is instransparent and unpredictable and, on top of that, is not an ordinary customs duty.

At this point Argentina would like to recall that it has not only claimed that the amended PBS is a border measure similar to a variable import levy. Argentina has made its strongest effort also to demonstrate that the amended PBS is a border measure similar to a minimum import price.[15] The formula developed in Argentina's First Written Submission, Section C.I.2.1 deciphered how the amended PBS works from a mathematical point of view.[16] In fact, due to **that formula**, the PBS does not permit any transmission if that means that the entry price has to fall below the floor price. The formula together with the band floor work as a *brake* for the decline in the entry price and for any transmission of international prices below the level of the floor.[17]

Additionally, Argentina has provided another formula for calculating the import price resulting from the Appellate Body Report, showing what the entry price would be if Chile applied a minimum import

[12] See for example *Chile – Price Band System*, Report of the Appellate Body, para. 253.
[13] *Chile – Price Band System*, Report of the Appellate Body, paras. 254 to 259.
[14] *Chile – Price Band System*, Report of the Appellate Body, paras. 257 and 258 (footnotes omitted)
[15] Argentina's First Written Submission, para. 99-124, 159-173; Rebuttal by Argentina, paras. 160-205, Oral Statement by Argentina, para. 32-41, 85-90; and Closing Statement by Argentina, para. 21.
[16] First Written Submission by Argentina, paras. 102 to 105
[17] Oral Statement by Argentina paras. 36 to 41

price.[18] Chile recognized that that formula was correct.[19] Then, Argentina demonstrated that the entry price of Chilean imports under the amended PBS is higher than it would be if Chile were to apply a minimum import price at price band floor level.[20]

So, again, the variability of the duties is not the only issue at stake. Argentina is confident that the panel will thoroughly address all of Argentina's arguments.

6. During the substantive meeting with the Panel, Argentina stated that "contrary to what Chile has asserted in its submissions (footnote omitted), the PBS Law and Regulation give no discretion to Chile to decide whether or not to impose the duties" (see paragraph 80 of the written version of Argentina's oral statement, original emphasis).

(a) Can Argentina elaborate on the relevance of whether the amended PBS allows any discretion to Chilean authorities to levy the specific duties or grant the rebates, as appropriate.

Answer to Question 6:

The Appellate Body held that the fact that the *measure* itself – as a mechanism –imposes the *variability* of the duties is one feature of "variable import levies":

> "… 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. …"[21] (Underlining added, emphasis in the original)

Both Law 19.897 and Decree 831/2003 incorporate "a scheme or formula that causes and ensures that levies change automatically and continuously", making it *mandatory* for specific duties to be established when the reference price is below the band floor.

The relevant part of Law 19.897 states that "specific duties *must be established* when the reference price is below the floor price of 128 dollars for wheat. In the case of wheat flour, the duties and rebates determined for wheat multiplied by a factor of 1.56 *shall be applied*" (emphasis added).

Article 13 of Decree 831/2003 reads: "In each Supreme Decree issued in accordance with this regulation specific duties *shall be established* ... if the reference price is below the floor price ..." (emphasis added).

Clearly, expressions of the type "*must be established*" and "*shall be applied*" mean that when the reference price is below the floor price the application of specific duties will be mandatory and automatic. Therefore, the PBS is applied automatically, directly and unfailingly.

Thus, the fact that the amended PBS itself –as a mechanism- imposes the variability of the duties, together with the fact that it does not allow any discretion to Chilean authorities to levy the specific

[18] First Written Submission by Argentina, Section C.I.2.3.
[19] Rebuttal by Chile, para. 162.
[20] First Written Submission by Argentina, Section C.I.2.3.
[21] *Chile – Price Band System*, Report of the Appellate Body, paragraph 233.

duties or grant the rebates is one of the characteristics that makes the amended PBS be similar to a variable import levy.

7. Do the Parties consider that the price bands, as defined under the amended PBS, are used as part of a scheme or formula for the calculation of additional duties or rebates (as the case may be) at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory?

Answer to Question 7:

Yes, the price bands (or the floor and ceiling values) as defined under the amended PBS, are used as part of a scheme or formula for the calculation of additional duties or rebates (as the case may be) at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory.

In the case of wheat Article 14 of Decree 831/2003 provides that "the specific duties applied to wheat **imports** … will correspond to the difference between the floor price and the reference price … multiplied by the factor one (1) plus that Customs Tariff's general ad valorem tariff.

Specific duty = (**Floor value in force** – Reference price) * (1 + *ad valorem* tariff)"[22]

In the case of wheat flour Article 16 of Decree 831/2003 provides that "In the case of wheat flour the duties and rebates determined for wheat, multiplied by the factor of 1,56 will be applied.

Specific duty or rebate to the tariff for wheat flour = Specific duty or rebate to the tariff for wheat * 1,56 [23]

In this case, it is clear that as the formula for the calculation of specific duties to be levied on wheat flour imports includes the specific duty for wheat, it therefore incorporates the floor value used in the formula to calculate that duty.

These formulas are contained in the Law 19.897 and Decree 831/2003 and that is an incontestable fact.

8. Chile asserts that, under the present PBS, the reference price is *not* a border price, does *not* correspond to the price of a shipment, *nor* is it expressed in CIF terms (see, for example, paragraph 118 of its rebuttal submission).

(a) Notwithstanding the fact that FOB prices do not reflect all the costs associated with traded wheat and wheat flour, do the Parties consider that the price of the goods (normally reflected in the related commercial documents, such as invoices) can serve as the starting point to determine the full transaction value?

Answer to Question 8(a):

Argentina agrees that the price of the goods (normally reflected in the related commercial documents, such as invoices) can serve as the starting point to determine the full transaction value. However the transaction value of the shipments (reflected in the commercial invoice or otherwise) has no relevance

[22] See ARG-2 (emphasis added, unofficial translation)
[23] See ARG-2 (emphasis added, unofficial translation)

or meaning within the amended PBS. Argentina has extensively referred to this aspect of the amended PBS.[24]

(b) Notwithstanding the fact that the reference price is *not expressed in CIF terms*, can the FOB valuation of the "markets of concern" be used as a starting point to obtain an approximation of the *CIF value for reference prices*?

Answer to Question 8(b):

If the FOB valuation recorded in a certain market of concern, for a certain quality of concern and for a specific point in time were adjusted adding up insurance and freight, the result would a *CIF value* for that market, that quality of concern and for that specific point in time. In that case the FOB valuation of the "markets of concern" could be used as a starting point to obtain an approximation of the *CIF value*.

That is the approach followed by Argentina, for example, in Exhibits ARG-11, ARG-12, ARG-13, ARG-14, ARG-23, ARG-24, ARG-25, and Tables I, II, III and IV of Argentina's First Written Submission.

(c) If the Panel were to assume that the PBS does not sustain internal prices, as argued by Chile (see paragraphs 109-126 and 154 of its first submission), would the Parties consider that the FOB, CIF or wholesale prices could be considered as "*proxies*" for certain analytical purposes, for example, in order to study price behaviour, while taking fully into account the complexities involved?

Answer to Question 8(c):

Argentina agrees that FOB and CIF prices can be considered as "proxies" for certain analytical purposes.

However, "wholesale prices" should not be used for any analytical purpose in this dispute. This variable is not relevant in this case. Neither the Panel nor the Appellate Body addressed the notion of "wholesale prices" in this dispute. The relevant parameter of comparison is between the FOB price and the *entry price*, as the Appellate Body established in paragraph 260 of its Report. The *wholesale price* is a new variable incorporated by Chile, never addressed by the Appellate Body nor by Argentina.

Second, in its First Written Submission, paras. 154 and 155, Chile presented a graph stating that it revealed that during the period of application, the wheat *entry price* had the same behaviour as its FOB price and that both prices' variation had "large similarities" that showed the connection between Chile's internal price and the international market. In its Rebuttal, para. 55, after Argentina showed that Chile's arguments were baseless, Chile contradicts itself stating that, in reality, the graph was comparing wheat FOB price with wheat *wholesale* price. Moreover, Chile curiously maintains that the connection required by Argentina *cannot be complete*: "…it is impossible to claim a complete connection…"[25] According to Chile, the reason for this is that internal market wheat price is influenced by wheat internal supply: "The price of wheat – and its fluctuations – on the wholesale market is heavily influenced by the domestic wheat supply…"[26] In sum, the evidence submitted by

[24] First Written Submission by Argentina, paras. 47-49, 137, 141, 153, 157, 182, 196, 220-223, and 228 and, Oral Statement by Argentina, paras. 67 and 68.

[25] Rebuttal by Chile, para 55.

[26] Rebuttal by Chile, para 55.

Chile to convince the Panel that the amended PBS does not cause insulation from the international market, is full of self-contradictions.

Moreover, while the relevant variable to analyse is the entry price as the Appellate Body established, *inter alia*, in paragraph 260 of its Report, the fact recognized by Chile that internal market wheat price is "**heavily**" influenced by wheat internal supply, distorts the very variable Chile purports to incorporate to this dispute, in which the influence of wheat internal supply has never been addressed.

Even if, in spite of the various reasons that Argentina provided for not using "wholesale prices" for any analytical purpose in this dispute, the Panel found that wholesale prices could be considered for analytical purposes, it is difficult for Argentina to describe the evolution of Chilean wholesale prices of wheat and wheat flour over the period addressed by the Panel because all the evidence that Chile has provided for the period January 2004 to February 2006 is an unsupported graph.

First, the graph in para. 154 of Chile's first written submission only addresses ***wheat*** wholesale prices. *Wheat flour* wholesale prices are not addressed in that graph. In fact, wheat flour wholesale price have not been addressed before in this dispute at all.

Second, Chile never provided any chart or any further information to clarify the numerical data that could be the basis for the wheat "wholesale prices" line plotted in that graph, as Argentina did with all of its Exhibits. Argentina has explained all the problems with this graph and the conclusions Chile draws from it. [27] Furthermore, it is not clear what is the source of that graph. Chile states that "The sources of the information, both daily and monthly, are clearly indicated in all cases (SAGPyA and ODEPA)"[28], but it is clear that in para. 154 of Chile's first written submission there is no indication of the sources of the information used to produce the graph.

Furthermore, there are inconsistencies in what Chile apparently is purporting to show. It is not clear whether Argentine FOB price is compared against "Chilean wheat prices", "wheat wholesale prices" or just against the "entry price":

- In paragraph 154 Chile states: "The graph below shows the trends in *Chilean wheat prices* and in f.o.b. prices of Argentine bread wheat …"

- The legend of the graph reads "wheat *wholesale price*"

- In paragraph 155 Chile states: "What clearly emerges is that the *entry price* of wheat exhibits the same behaviour as its f.o.b. price…"

During the meeting of the Panel with the Parties on 1 August Chile exposed in a PowerPoint presentation what appeared to be the same graph. Argentina specifically asked, through an oral question, if that graph showed the same wheat wholesale prices Chile had included in its graph in paragraph 154 of its first submission. Chile's answer was affirmative. However, Argentina neither received an electronic or paper copy of that graph nor of the remaining PowerPoint computer presentation. In fact, Argentina has never seen the numerical basis of that graph.

In spite of all these inconveniences resulting from Chile's lack of clarity and, what is worse, supporting evidence, Argentina made its best effort to describe what it can be observed in that graph.[29]

[27] See Rebuttal by Argentina, para. 61- 66 and Oral Statement by Argentina 30-31.
[28] See Rebuttal by Chile, footnote 25.
[29] Rebuttal by Argentina, paras. 68-70

A careful study of the graph, including a comparison of the trends of each the "bread wheat FOB Argentine port price" (lower line) and the "wheat wholesale price" (upper line) shows that during most of the period both prices moved in different directions. In fact, both prices showed an **opposite** trajectory during the following periods:

- February-March 2004
- March-April 2004
- May-June 2004
- June-July 2004
- July-August 2004
- August-September 2004
- September-October 2004
- December 2004 – January 2005
- January-February 2005
- February-March 2005
- April-May 2005
- May-June 2005
- July-August 2005
- September-October 2005
- November-December 2005

Therefore, Chile statements that "[t]he price curves indicate that…the variation [of Chilean wheat prices] is very similar to that of export prices of Argentine wheat…"[30] and "the entry price of wheat exhibits the same behaviour as its f.o.b. price, which demonstrates price transmission and therefore the connection between the Chilean and the international market"[31] are baseless from every point of view.

9. Do the Parties consider that the actual transaction value of a good is *always* unrelated to its FOB valuation? If not, what adjustments should be made to the FOB price to get an estimate of the transaction value?

Answer to Question 9:

From a theoretical point of view, the actual transaction value of a good has to be related to its FOB valuation. If one considers the transaction value as the invoice FOB price, then no adjustments are necessary. If one considers the transaction value as the CIF price one possible adjustment could be to turn the invoice FOB price into a CIF price.

10. Do the Parties consider that the actual transaction value of wheat and wheat flour is *always* unrelated to its FOB valuation? If not, what adjustments should be made to the FOB price to get an estimate of the transaction value of wheat and wheat flour?

Answer to Question 10:

The actual transaction value of wheat and wheat flour is related to its FOB valuation. If one considers the transaction value as the invoice FOB price, then no adjustments are necessary. If one considers the transaction value as the CIF price one possible adjustment could be to turn the invoice FOB price into

[30] Chile First Written Submission, para. 154.
[31] Chile First Written Submission, para. 155.

a CIF price. Argentina has provided several examples on how this was done for the purposes of this dispute in the case of wheat[32] and in the case of wheat flour.[33]

11. Can it be said that the reference price as defined under the PBS is used as part of a scheme or formula for the calculation of additional duties or rebates (as the case may be) at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory?

Answer to Question 11:

Yes.

In the case of wheat Article 14 of Decree 831/2003 provides that "the specific duties applied to wheat **imports** … will correspond to the difference between the floor price and the reference price … multiplied by the factor one (1) plus that Customs Tariff's general ad valorem tariff.

Specific duty = (Floor value in force – **Reference price**) * (1 + *ad valorem* tariff)"[34]

Article 16 of Decree 831/2003 provides that "In the case of wheat flour the duties and rebates determined for wheat, multiplied by the factor of 1,56 will be applied.

Specific duty or rebate to the tariff for wheat flour = Specific duty or rebate to the tariff for wheat * 1,56 [35]

In this case, it is clear that the formula for the calculation of specific duties to be levied on wheat flour imports includes the specific duty for wheat, it therefore incorporates the Reference Price used in the formula to calculate that duty.

These formulas are contained in the Law 19.897 and Decree 831/2003 and that is an incontestable fact.

12. Article 7 of Chilean Supreme Decree No. 831 provides that the FOB reference price for wheat "correspond[s] to the average of the daily prices recorded in the markets specified in Article 8 over a period of 15 days counted retroactively from the 10th day of the month in which the relevant decree is to be published".

(d) Do the Parties concur that the reference price used to trigger the calculation of additional duties (or rebates) changes six times in the course of any 12-month period?

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[32] See Argentina's First Written Submission, footnote 104: "… To arrive at the [wheat] CIF value the FOB value was multiplied by 1.23, because the CIF value is generally (subject to periodic variations) 23 per cent higher than the FOB value for wheat, calculating maritime freight from Buenos Aires to Chile at US$24 per tonne and 0.5 per cent for insurance, on the basis of information provided by SAGPyA's Food and Agricultural Market Directorate. The calculations leading to the index 1.23 are presented in Exhibit ARG-25, taking as a basis the FOB prices, Argentine port, reported by ODEPA and carrying out the above-mentioned calculation." See also Exhibit ARG-25.

[33] See Argentina's First Written Submission, footnote 108: "… The [wheat flour] CIF value is calculated from the FOB value, plus land freight and insurance. Normally, in the case of wheat flour, freight and insurance represent 40 per cent of the FOB value. This information was obtained from examples of actual export operations provided by the Argentine Federation of the Milling Industry (FAIM) and presented in Exhibit ARG-26 …" See also Exhibit ARG-26.

[34] See ARG-2 (emphasis added, unofficial translation).

[35] See ARG-2 (emphasis added, unofficial translation).

Answer to Question 12(d):

Yes, the reference price used to trigger the calculation of additional duties (or rebates) changes six times in the course of any 12-month period.[36]

13. Do the Parties consider that the fixing of reference prices for a period of 60 days constitutes a cumulative insulation factor, in view of the fixing of price bands for a period of 11 years?

Answer to Question 13:

Yes. The fixing of reference prices for a period of 60 days constitutes a cumulative insulation factor for two main reasons.

First, as Argentina pointed out in its First Written Submission, given that under the "old" PBS reference prices were adjusted every week in accordance with the lowest FOB price in *any* external "market of concern" during the previous week, the amended PBS disconnects the Chilean market from international price developments even more than the original PBS.

Under the "new" PBS the reference prices used to calculate the specific duty for wheat and wheat flour are set 6 times a year,[37] that is, with a period of validity of 2 months during which the transmission of world market prices is disconnected.

Consequently, the "new" reference prices, and the "new" PBS that determines them, are not only less representative of the world market but also impede the transmission of international price developments to the Chilean market even more than the original reference prices and PBS.[38]

The charts in Exhibits ARG-15 and ARG-17 illustrate the development of the reference prices and the prices of wheat FOB Argentina and FOB Gulf of Mexico, respectively, during the period of validity of the amended PBS. For each period, the disconnection between the FOB prices and the reference prices, after the reference price has been set for two months, is clearly discernible. The tables that provided the information on which these charts are based can be found in Exhibits ARG-16 and ARG-18, respectively.

It is surprising to note the insulation from international prices that actually occurred during the period in which the operation of the PBS led to the application of specific duties. It can be seen both from the chart showing the relationship between the reference price and the Argentine port price of bread wheat during the period of operation of the amended PBS (ARG-15) and from that showing the relationship between the reference price and the Gulf of Mexico price of Soft Red Winter No. 2 wheat (ARG-17) that the disconnection occurs irrespective of the period of the year with respect to which the relationship is considered. That is to say, the reference price is disconnected from the FOB prices in the markets of concern both when the reference price is based on the Argentine FOB price and when it is based on the Gulf of Mexico FOB price, although the disconnection between the reference price and the Argentine FOB price is even greater when the reference price is calculated on the basis of the Gulf of Mexico FOB price and *vice versa*.

[36] See Exhibit ARG-6.

[37] See Exhibit ARG-2 (Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 5 and 7 and the "Summary Table for the application of paragraph 2" of the Annex) and Exhibit ARG-6 (History of the application of the amended PBS).

[38] This without prejudice to the inconsistencies found by the Appellate Body with respect to the reference prices in the original PBS.

For example, if we consider the relationship between the reference price and the FOB price for Argentine bread wheat (Exhibits ARG-15 and ARG-16), we find disconnections over the entire period of validity of the amended PBS, but especially in February, early April, the end of May and early June, July, August, early September, end of October and mid-December 2004 and end of February, March, early April, end of July, end of August and beginning of September 2005.

Likewise, if we analyse the relationship between the reference price and the FOB price Gulf of Mexico (Exhibits ARG-17 and ARG-18), we note disconnections over the entire period of validity of the amended PBS, but especially at the end of January and beginning of February, April, end of May and early June, July, September, and early October 2004, January, February, March, early April, early August, early October and end of November 2005, and January and early February 2006.

As a specific example of this insulation (among many others), consider what happened when the reference price was set at 108.64 US$/tonne between 16 February and 15 April 2005, on the basis of the average of the daily prices for wheat *FOB Argentine port*. The reference price thus determined and fixed for two months did not reflect in absolute terms the increasing trend of those same FOB prices for Argentine bread wheat which, during that period, reached 140 US$/tonne,[39] close to the band ceiling from which the PBS provides for the granting of rebates rather than the levying of specific duties, which clearly reveals the enormous arbitrariness in the setting of the reference prices.

In the case of wheat flour, the disconnection is even greater. Thus, as flour is a product of wheat, its FOB price is naturally higher since to the cost of the wheat the millers add the cost of milling plus a profit margin. Accordingly, the FOB price of wheat flour is <u>always</u> higher than the reference price calculated on the basis of wheat, as can be seen simply by glancing at the chart in Exhibit ARG-19 and the table in Exhibit ARG-20. The substantial disconnection observed between the FOB price of Argentine wheat flour and the reference price on the basis of which the specific duties are applied *during the entire period of validity of the amended PBS* speaks for itself and shows the distortion faced by Argentine exporters of wheat flour when trying to enter the Chilean market.

In paragraph 180 of its First Written Submission Chile seeks to argue that there cannot be overcompensation and that "the objective is not to maintain a parity price" [*sic*], simply because duties are now assessed six times a year rather than 52 times a year as in the original PBS:

> "A further point which demonstrates that there cannot be overcompensation and that the objective is not to maintain a parity price is that today – unlike under the former PBS when duties were assessed once a week (i.e. 52 times a year) – the duties or rebates assessed are valid for two months (i.e. six a year), and during that period are completely disconnected from what may occur in the reference, or any other, markets."

Now the PBS is inconsistent "only" 6 times a year. Chile's arguments speak for themselves. In particular, the last part of the paragraph cited "...the duties or rebates assessed are valid for two months (i.e. six a year), and during that period are <u>completely disconnected</u> from what may occur in the reference, or any other, markets", simply verifies and confirms that under the "new" PBS the reference prices provide for a period of validity of <u>2 months</u> during which the <u>transmission of world market prices is completely disconnected</u>.[40]

Second, as Argentina maintained in its Oral Statement, the problem with the amended PBS's reference price is that, compared to the original PBS, the insulating consequences are much worse. In

[39] See Exhibit ARG-16.
[40] Argentina's First Written Submission, paragraph 206.

fact, international price developments of an extense period of the year are not reflected at all by the amended PBS.

Below, Argentina has attached the Chart for the Application of paragraph 2 of Decree 831/2003 ("Cuadro resumen para la aplicación del párrafo 2"), found in the annex of this Decree.

Períodos para el cálculo de los precios de referencia	Período de publicación del decreto	Períodos de vigencia de los derechos específicos o rebajas	Mercado de mayor relevancia
26 nov – 10 dic	11-15 diciembre	16 dic – 15 feb	*Trigo pan argentino*
27 ene – 10 feb	11-15 febrero	16 feb – 15 abr	*Trigo pan argentino*
27 mar – 10 abr	11-15 abril	16 abr – 15 jun	*Trigo pan argentino*
27 may – 10 jun	11-15 junio	16 jun – 15 ago	*Soft Red Winter N° 2*
27 jul – 10 ago	11-15 agosto	16 ago – 15 oct	*Soft Red Winter N° 2*
26 sep – 10 oct	11-15 octubre	16 oct – 15 dic	*Soft Red Winter N° 2*

According to Chart 2 of the Annex to the Decree 831/2003 (shown above), the relevant prices leading to the establishment of the reference price, are those recorded between 26 November to 10 December, 27 January to 10 February, 27 March to 10 April, 27 May to 10 Jun, 27 July to 10 August, and 26 September to 10 October (See first column on the left). Those are the relevant time periods for the calculation of the reference prices. These groups of days account for a total of 90 days. Taking into account that a year has 365 days, that is less than 25 per cent of the year. More explicitly, international price developments recorded during 275 days or 75 per cent of the year will never be reflected in the reference price. For the amended PBS the international prices recorded during all those 275 days simply *do not exist*. As regards to the daily prices recorded during each day of each of the 15-day periods that form the remaining 90 days, they are reflected *after* they are recorded, with a delay ranging from 6 days to two months.[41]

Thus, the situation now is even *worse* than with the original WTO-inconsistent PBS. In fact, although completely full of distortive effects, the original PBS, at least took into account all the 52 weeks of each year to establish the weekly reference price. As it is clear now, for the amended PBS only 13 of those weeks (25 per cent of the year) are now relevant.

In short, Chile wants this Panel to find that the amended PBS reflects international price developments, overlooking the fact that the floor and ceiling prices, will never transmit international prices. For the other fundamental feature for the assessment of duties, the reference price, prices recorded during 275 days of the year cannot be reflected: simply they *do not exist.*

14. What significance, if any, do Parties attribute to the fact that the amended PBS provides that references prices are established bimonthly instead of weekly, as was the case previously?

Answer to Question 14:

There are two answers for this question. One is from the point of view of the **insulation**, which has already been addressed in the answer to question 13 above.

[41] For example, the prices recorded between 27 January and 10 February, will be reflected in the reference price established for the period 16 February to 15 April.

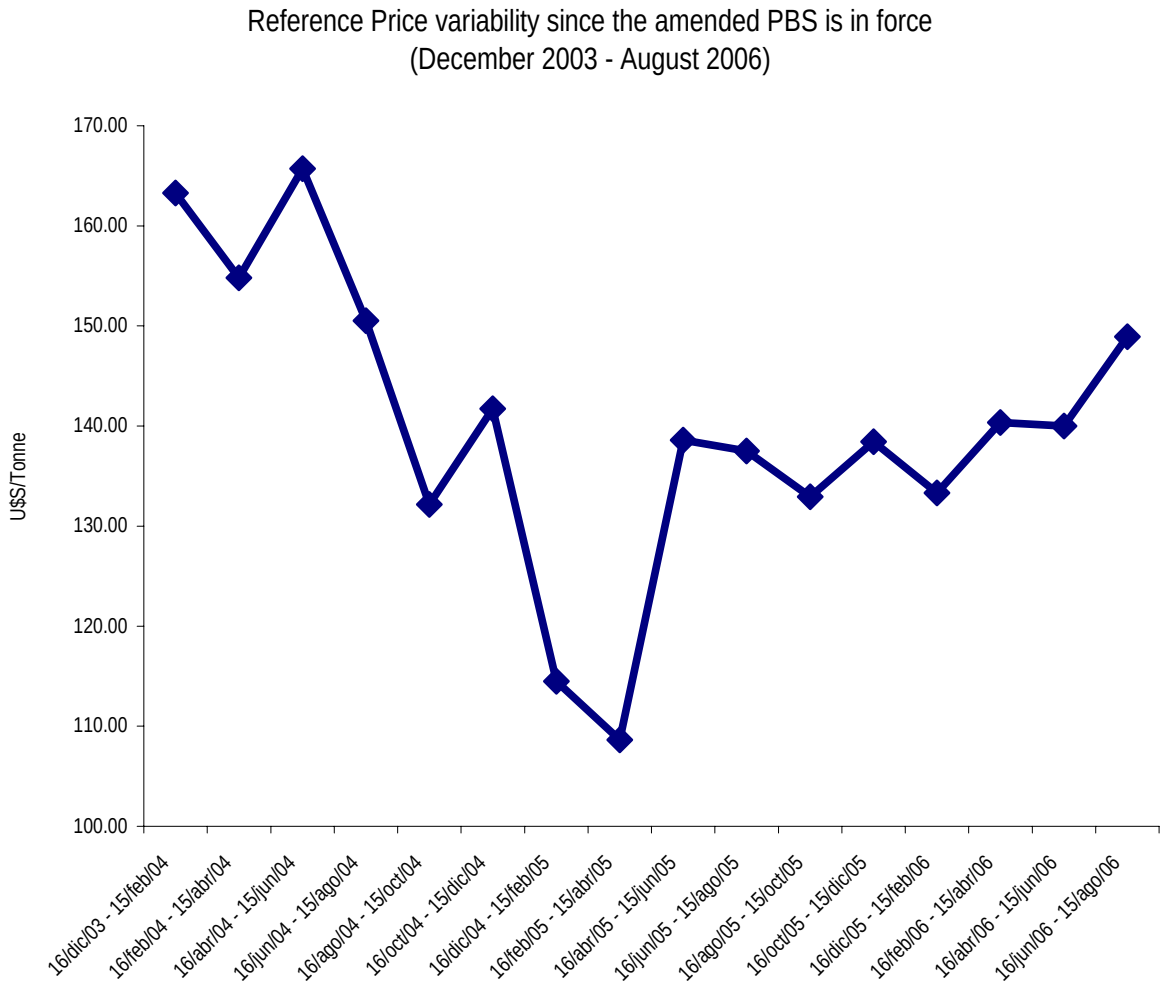
The other one is from the point of view of the **variability** of the PBS and the reference prices. In this respect, the variability remains, regardless the fact that references prices are established bimonthly instead of weekly.

In accordance to what the United States stated during the meeting of Panel with third parties, we cannot see, nor Chile has identified, a basis for a distinction between a variation once every two months rather than once every week.[42] Despite the fact that the variation of the reference price is no longer weekly but bimonthly, that variation is continuous and automatic.

Graph I below shows the variation of the reference price since the amended PBS is in force. It can clearly be seen that despite Chile's arguments, variability in the reference price remains.[43] The fact that the reference price varies bimonthly rather than weekly has not changed its intrinsic and visible variability.

[42] Oral Statement by the United States, para. 13.
[43] Numeric data supporting this graph can be seen in Exhibit ARG-38. The source is ODEPA (Chile).

GRAPH I



Source: own elaboration based on ODEPA (Chile)

Moreover, in the right circumstances, that is to say, if the reference price is situated below the band floor – as happened between December 2004 and April 2005 – every two months an exporter of wheat or wheat flour to the Chilean market will face a specific duty different from that established during the previous two-month period. This is clear from the table and the chart in Exhibits ARG-23 and ARG-24, which illustrate the operation of the amended PBS between 16 December 2004 and 15 April 2005. Moreover, if we consider what can happen over a longer period of time, what an exporter experiences is the continuous variability of the duties, resulting from the continuous variation of the reference price. This is apparent from the table and the chart in Exhibits ARG-21 and ARG-22, which illustrate the variability of the specific duties that would have resulted if the present amended PBS had operated with the average prices recorded between 1986 and the present on the markets of concern to Chile.

15. The amended PBS provides that the same reference price still applies to all goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value of the shipment. Could Parties please comment on the effects of this feature on the transmission of international price developments into the Chilean market.

Answer to Question 15:

When examining the original PBS reference prices, the Appellate Body said:

> 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…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.[44]

The Appellate Body saw the insulating effects of a measure that *among other features* had no relation with the **transaction value** of the shipments. That feature, according to the Appellate Body, "… contribute[d] to … impeding the transmission of international price developments to Chile's market."

The reason is straightforward: as stated in response to question 10 the actual transaction value of wheat and wheat flour is related to its FOB valuation. The particular transaction value of a shipment reflects the FOB price of a specific type of product, from a specific origin and in a specific point in time. That is, the transaction value of a shipment of Soft White Winter Nº2 wheat, departing from Canada on 16 August 2006 will be very close (if not equal) to the FOB price of Soft White Winter Nº2 in the same Canadian port on that date. In other words: the transaction value of a shipment clearly reflects the price of the respective good shipped in its port of shipment for that specific date. Simply put: the transaction value is the best "vehicle" from the undistorted transmission of international prices. No notion of "Reference Price" can come even close to transmit international prices as real transaction values do. That is why the absence of any relation to the transaction value in the amended PBS impedes the transmission of international price developments to Chile's market.

In its Oral Statement Argentina further developed why the fact that the same reference price still applies to all goods falling within the same product category, regardless of the origin of the goods, impedes the transmission of international price developments to Chile's market. Regarding the insulation consequences deriving from the fact that the amended PBS reference prices are based on only two predetermined markets of concern (i.e. regardless of the origin of the goods), Argentina recalled that bread wheat is sold -at least- in two other markets than the ones selected by Chile and which are not reflected on the reference price: Chicago and Kansas.[45]

Regardless, Chile has tried to justify the establishment of the reference prices based on FOB prices in Argentina and United States, because according to Chile, "[i]n the last six years (2000-2006) 40 per cent of Chilean wheat imports came from the United States and 31 per cent from Argentina".[46] It is strange that Chile does not provide a reference quoting the source of that information. Nevertheless, Argentina had access to Chile's own records for the period during which the amended PBS has been in force. Those records show that during the two complete years since the establishment of the amended PBS (i.e. 2004-2005), Canada has always been a larger exporter of wheat to Chile than the United States, either in volume as well as in amount. Exhibit ARG-31 is a printout of ODEPA's (Chile's official source) webpage showing Chile's records of wheat imports for 2004 and 2005. As it is

[44] *Chile – Price Band System*, Report of the Appellate Body, paras. 250.
[45] First Written Submission by Argentina, para. 218.
[46] Rebuttal by Chile, para. 72.

clear from the first page of this exhibit, in 2004 Canada exported around 54 thousand tons of wheat while the United States accounted for almost 40 thousand tons. In 2005, the difference between Canada and the United States has been even larger: Canada accounted for almost 40 thousand tons while the United States accounted for around 20 thousand tons.[47] It is clear that Canada has been a relevant exporter to Chile. However for Chile's PBS, this is meaningless. Although Canada is certainly a market of concern for Chile, the amended PBS will never reflect Canada's relevance in Chilean foreign trade of wheat, nor Canadian prices will be reflected in Chile's internal markets.

Therefore, Chile's argument that the amended PBS "reference prices now correspond to f.o.b. prices on the two markets of most concern for Chile"[48] is baseless. To put it in the Appellate Body words, it is not by any means certain that the reference price used under the PBS is representative of the current world market price, and it is certainly *not* representative of prices in *all* markets of concern.[49]

The logical consequence of this is that the amended PBS **will not transmit** Canadian prices nor the prices of wheat being imported from *any* origin different from Argentina or the Gulf of Mexico. Moreover, should Argentina or the United States became *less* relevant for Chile's foreign trade in the future and another Member became *more* relevant (like it happened with Canada during 2004 and 2005) the amended PBS will prevent the prices of that new trade partner be transmitted to Chile's internal market.

Regarding the fact that the amended PBS provides that the same reference price still applies to all goods falling within the same product category or quality of concern, Chile's amended PBS establishes the references prices based on only two of those qualities, namely "Bread Wheat, Argentine Port" and "Soft Red Winter". However, there are many types or qualities involved in the international trade of wheat. Indeed, according to Chile's own records there are at least two other qualities or types of wheat relevant for Chile: "Soft White Winter No 2" and "Western White Winter No 2". At this respect in Exhibit ARG-33, ODEPA's prices record for different qualities of wheat since 1991 can be observed. In the first and second columns the FOB prices for the two qualities of concern relevant for the amended PBS can be seen. In the third and fourth columns, ODEPA records the FOB price for the two other qualities just mentioned: "Soft White Winter No 2" and "Western White Winter No 2". Thus, according to its own records there are at least two other qualities or types of wheat relevant for Chile. Therefore, it is clear that Chile knows that there are at least two, and presumably more, other relevant qualities of concern and probably Chile knew it at the time the PBS was amended.

Furthermore, it is noteworthy that among the -at least- four relevant qualities and markets of concern, Chile chose those qualities that since 1991 have been the lowest priced. In Page 4 of the same Exhibit ARG-33 the average of the prices of these four categories recorded since 1991 are highlighted at the bottom. Clearly, the qualities "Bread Wheat, Argentine Port" and "Soft Red Winter" have the lowest FOB prices. Thus, the gap between the reference price and the floor price is further expanded, more duties are levied and the entry price is higher than if Chile took into account all the qualities of concern. Again, it is useful recalling that the Appellate Body found that "[u]nder 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'".[50]

[47] In the written version of the Oral Statement by Argentina, para. 54, where it reads "million" it should be read "thousand"; where it reads "millions" it should be read "thousands". Argentina's argument is not altered in its substance.

[48] Rebuttal by Chile, para. 72.

[49] *Chile – Price Band System*, Report of the Appellate Body, para 249.

[50] *Chile – Price Band System*, Report of the Appellate Body, para. 249 (Underlining added).

Additionally, Chile does actually import wheat of qualities different from those used for the calculation of the reference prices. In Exhibit ARG-34 a selection of import data from the Chamber of Commerce of Santiago de Chile (in Spanish "Camara de Comercio de Santiago de Chile") for 2004 and 2005 can be observed. On the first page it can be seen that, for example, in March 2004, Chile imported wheat of the type "Soft White". Similarly, on the second page of the same Exhibit, for example, in July 2005, Chile imported wheat of the type "Canadian 3WR". Page 3 of the same Exhibit shows imports to Chile of wheat of the type "Western Red Spring" and "Canadian 1WR". So, not only Chile imports wheat of qualities different from those taken into account for the establishment of the reference prices but also Chile applies to those imports reference prices based on the two predetermined qualities of concern established by the amended PBS.

Summing up, through the reference prices, the amended PBS **will not transmit** to the Chilean market of the prices of *other* qualities of wheat than the ones established as "relevant" by the legislation enforcing the PBS. By not taking into account all the relevant markets and qualities of concern for the calculation of the reference prices, the amended PBS also insulates Chile's market from international price developments. In fact, if an exporter ships any other type or quality of wheat rather than "Bread Wheat, Argentine Port" or "Soft Red Winter No. 2", Chile will apply to that shipment a reference price and levy specific duties based on one of those two qualities, different from the quality actually being imported. It is worth recalling again at this point that the Appellate Body found that the "… 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".[51]

16. Do the Parties agree that the specific duties or rebates under Chile's PBS are calculated according to "*a formula or scheme*" which involves several parameters?

Answer to Question 16:

Argentina's answer is Yes. The specific duties or rebates under Chile's PBS are calculated according to "*a formula or scheme*" which involves several parameters.

Article 14 of Decree 831/2003 provides that "the specific duties applied to wheat imports…will correspond to the difference between the floor price and the reference price…multiplied by the factor one (1) plus that Customs Tariff's general ad valorem tariff.

> **Specific duty**
> **or rebate** = (Floor value in force – Reference price) * (1 + *ad valorem* tariff)"[52]

Article 16 of Decree 831/2003 provides that "In the case of wheat flour the duties and rebates determined for wheat, multiplied by the factor of 1,56 will be applied".

> **Specific duty or rebate** to the tariff for wheat flour = Specific duty or rebate to the tariff for wheat * 1,56 [53]

These formulas are contained in the Law 19.897 and Decree 831/2003 and that is an incontestable fact.

[51] *Chile – Price Band System*, Report of the Appellate Body, para. 249 (Emphasis in the original, underlining added).
[52] See ARG-2 (emphasis added, unofficial translation).
[53] See ARG-2 (emphasis added, unofficial translation).

17. Argentina has stated in paragraph 229 of its first submission that "the way in which Chile determined the factor 1.56 is not transparent, since in its legislation Chile has neither explained nor justified in any way the basis on which it was established".

(a) Could Argentina clarify whether in its view this particular fact *per se* would make the amended measure inconsistent with the WTO covered agreements.

Answer to Question 17(a):

The fact that "the way in which Chile determined the factor 1.56 is not transparent" is a cumulative intransparent factor that makes the amended PBS inconsistent with the WTO covered agreements. It is another specific feature of Chile's price band system that renders the whole system inconsistent with Article 4.2 of the Agreement on Agriculture.

(b) If so, could Argentina identify the relevant legal basis.

Answer to Question 17(b):

The relevant legal basis in the WTO covered agreements not to maintain an intransparent border measure is Article 4.2 of the Agreement on Agriculture and its footnote 1.

When finding the original PBS inconsistent with Article 4.2, the Appellate Body, *inter alia*, held:

> "… [W]e place considerable importance on the intransparent … 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.
>
> In addition to the lack of transparency … 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 … is determined…"[54]

The fact that no legislation or regulation set out how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.

Similarly, the fact that Law 19.897 and Decree 831/2003 do not set out how the factor of 1,56 was calculated leads to the conclusion that the establishment of the factor of 1,56 was not transparent.

Therefore, according to the Appellate Body, Chile is under the legal obligation to explain the basis on which the factor 1,56 was determined.

(c) Could Argentina elaborate on the reason why the lack of explanation or justification as to the exact figure of the factor fixed by Chile would *per se* affect market access for imports of agricultural products.

Answer to Question 17(c):

As pointed out above, the fact that no legislation *explained* how the price bands were calculated, led the Appellate Body to find that the lack of transparency was inherent in how Chile's price bands were established.[55]

[54] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.

The Appellate Body found that the lack of transparency contributed to distorting the prices of imports by impeding the transmission of international prices to the domestic market:

> "… This lack of transparency … will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market".[56]

In addition, in assessing the original PBS, the Appellate Body found that:

> "… 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 …"[57]

The Appellate Body emphasized that it reached its conclusion regarding the inconsistency with the WTO covered agreements

> "… on the basis of the particular configuration and interaction of all these specific features of Chile's price band system ..." [58]

Consequently, the lack of explanation or justification as to the exact figure of the factor fixed by Chile leads to a lack of transparency which, according to the Appellate Body, affects market access for imports of wheat and wheat flour.

18. Citing the original Panel's finding in paragraph 7.36 to the effect that "minimum import prices *generally* operate in relation to the actual transaction value" (emphasis added), Chile claims that the specific duties resulting from the new PBS are not based on transaction values, and therefore they are not "variable import levies" (see, for example, paragraph 114 of its rebuttal submission). Do the Parties consider that minimum import prices *always* operate in relation to actual transaction values?

<u>Answer to Question 18</u>:

Argentina has already clarified why the PBS is a border measure similar to a minimum import price.[59] In spite of that, Chile has repeatedly argued that unlike its PBS, "minimum import price schemes generally operate in relation to the actual transaction value of the imports".[60] Chile has repeatedly emphasized that, because the PBS does not operate in relation to the actual transaction value but to a reference price, it is not similar to a minimum import price.

First, Argentina has not argued that the PBS is *identical* to a minimum import price. Rather, Argentina's argument is that the amended PBS is a border measure *similar* to a minimum import price. The fact that the PBS does not operate in relation to the actual transaction value of the imports does not mean it is not similar to a minimum import price. Chile's PBS needs not to be identical to variable import levies or minimum import prices to be a prohibited measure, provided that the amended PBS bears sufficient resemblance to the measures listed in footnote 1 to Article 4.2 of the

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[55] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.
[56] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[57] *Chile – Price Band System*, Report of the Appellate Body, para. 258.
[58] *Chile – Price Band System*, Report of the Appellate Body, para. 261.
[59] Rebuttal by Argentina, Section B.5, Oral Statement by Argentina, paras. 85 to 90.
[60] Rebuttal by Chile, para. 7.

Agreement on Agriculture. Indeed, that same reasoning was developed by the original Panel and upheld by the Appellate Body.[61]

Second, the Panel described "minimum import prices" as follows: "schemes [that] generally operate in relation to the actual transaction value of the imports".[62] The Appellate Body did not reverse that finding. The word "generally" implies "usually", but not "always".[63] This is an important distinction. If the Panel had meant "always", it would have so stated. Therefore, there are some cases where border measures do not operate in relation to the actual transaction value of the imports, but are similar to minimum import prices, just like the amended PBS.

In fact, the original PBS, like the amended PBS, did not have any relation with the actual transaction value of the imports. In spite of that, the Panel and the Appellate Body in the original proceedings found that the old PBS was a border measure similar to a minimum import price. Indeed, the absence of any relation with the transaction value of the shipments was an aspect of the old PBS that contributed to enhance the distorting effects of the old PBS[64] and contributes to enhance the distorting effects of the amended PBS as well.

19. In the view of the Parties, what would be the defining characteristic to determine whether a system operates as a minimum import price? Would that defining characteristic be the fact that the system operates in relation to the actual transaction value of the imports? Would it be the fact that it leads to a certain entry price into the domestic market?

Answer to Question 19:

The Appellate Body found in this dispute that:

> "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."[65]

Therefore, 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.

Whether a system operates *as* a minimum import price should be determined by looking at its effects, assessing its consequences. This is regardless of whether the system operates in relation to the actual transaction value of the imports or not.[66]

The fact that the system leads to a certain entry price into the domestic market, as the Appellate Body implied, may be a defining characteristic to determine whether a system operates as a minimum import price. If that system *tends* to elevate the entry price of imports to above a certain explicit or implicit lowest threshold, it therefore operates *as* a minimum import price.

20. Can Argentina comment on Chile's statement in paragraph 143 of its first submission, that "the mere fact that the duties and rebates, or the non-application thereof, are established for a sufficiently long period of time provides certainty that any variations in international

[61] *Chile – Price Band System*, Report of the Appellate Body, para. 243 and 244.
[62] *Chile – Price Band System*, Report of the Panel, para. 7.36(e). Emphasis added.
[63] The definition of " generally ", insofar as relevant, is: "usually, or in most situations". Cambridge Advanced Learner's Dictionary in http://dictionary.cambridge.org/.
[64] *Chile – Price Band System*, Report of the Appellate Body, para. 250.
[65] *Chile – Price Band System*, Report of the Appellate Body, paragraph 236.
[66] See Argentina's answer to question 18.

prices that may occur over this period will be transmitted to domestic wheat prices". In Chile's view, does this statement imply that this "mere fact" *per se* is decisive?

Answer to Question 20:

Chile seeks to show that, as a consequence of the PBS, Chilean import prices for wheat and wheat flour follow a pattern similar to that of the FOB price and that, therefore, there is no insulation from the international market. Chile argues that, being established for a "sufficiently long" period of time, the specific duties of the modified PBS allow international price variations to be transmitted to the price of wheat:

> "In Chile today, the mere fact that the duties and rebates, or the non-application thereof, are established for a sufficiently long period of time provides certainty that any variations in international prices that may occur over this period will be transmitted to domestic wheat prices.
>
> Thus, the conclusion is that, if the floor price is not a minimum price, if the specific duties and their method of application do not continuously entail import price corrections and if import prices, as Argentina shows in Exhibits ARG-11 and ARG-12, follow a pattern similar to that of the f.o.b. price of wheat, Chile's wheat import duties – even if they do undergo variations – do not constitute a variable duty within the meaning of Article 4.2 of the Agreement on Agriculture."[67]

First, Argentina disagrees with Chile's qualifying the period of two months as "sufficiently long". There is no legal basis to assert that two months is sufficient for a period to be considered *long*. In accordance to what the United States stated during the meeting of Panel with third parties, we cannot see, nor Chile has identified, a basis for a distinction between a variation once every two months rather than once every week.[68] Indeed, if that period of two months is compared against the period of time that remains until 2014, it does not look long at all. If one takes into account that the PBS has no end date, then that period of two months starts looking *short* rather than long.

Second, it is worth noting that Chile makes special reference to Exhibits ARG-11 and ARG-12, since it is precisely those exhibits that clearly show how Chile's statement that "import prices...follow a pattern similar to that of the f.o.b. price of wheat"[69] is without foundation.

Exhibits ARG-11 and ARG-12 contain a table and a chart, respectively, which show what happened, in the case of wheat, with the imposition of specific duties as from 16 December 2004. They show how – at the same time as FOB prices, Argentine port, were falling – the Chilean entry price, with the imposition of specific duties, rose substantially, thereby demonstrating a total disconnection from international price developments.

From 1 December 2004 the FOB price of bread wheat, Argentine port, fell steadily, a trend which was to be maintained until approximately 4 January 2005. Specifically, the initial FOB price on 1 December was US$119 per tonne, whereas at the end of the trend, on 4 January 2005, the price stood at US$109 per tonne.

If we consider the trend in the Chilean entry price as a consequence of the operation of the PBS, we observe the exact opposite: the entry price rose. In fact, from 1 December the Chilean entry price for Argentine bread wheat was tending to fall which, since the band was not active, reflected the falling

[67] Chile's First Written Submission, paras. 143 and 144.
[68] Oral Statement by the United States, para. 13.
[69] Chile's First Written Submission, paragraph 144.

trend in FOB prices, Argentine port. However, when the band was activated on 16 December 2004 and specific duties were imposed, the Chilean entry price rose suddenly from US$149.94 per tonne to approximately US$162.93 per tonne. This happened as a result of the operation of the modified PBS itself and the imposition of specific duties.

Moreover, on 16 February 2005 Chile established a new reference price below the band floor and lower than that in force during the previous two-month period. Therefore specific duties higher than during the previous period were imposed. On the basis of the FOB price for bread wheat, Argentine port, corresponding to a shipment arriving in Chile on 15 February, the reference price for that date (and the two previous months) was US$114.50 per tonne. The Chilean entry price on that date, when specific duties of US$14.30 were imposed, was US$153.81 per tonne.

On the next day, 16 February 2005, Chile established a new reference price at US$108.64 per tonne, 5.12 per cent less than the previous figure. However, the FOB price for Argentine bread wheat did not change and, therefore, neither did the CIF value. Nonetheless, when the specific duties resulting from the PBS were applied, the Chilean entry price rose from US$153.81 to US$160.01 per tonne.

In conclusion, it is clear from Exhibits ARG-11 and ARG-12 that, contrary to the Chilean claims, the import prices for wheat do not follow a pattern similar to that of the FOB price of wheat. In particular, on 16 December 2004, the entry price rose whereas the FOB price *fell*, and on 16 February 2005, whereas the FOB price remained steady, the entry price *increased.* However much Chile would have the Panel believe the contrary, the natural tendency of the modified PBS is to move in the opposite direction to international price trends. And it could not be otherwise since the PBS *would make no sense* if that were not its purpose.

If Chile wanted import prices to follow the same pattern as FOB prices, it would only need to apply an *ordinary customs duty*. Chile knows this, but Chile *is not applying* an ordinary customs duty precisely in order *to avoid* the effects of ordinary customs duties and be able to insulate the Chilean market from international market developments. It is pure logic.

In this connection, it is astonishing that Chile asserts that the duties resulting from the PBS are unaffected by changes in world prices:

> "... the duty or rebate, or the non-application thereof, operates in such a way as to allow the transmission of international price variations to the domestic market. That is to say, once the duty has been fixed, traders can capture the benefits of decreases in international prices, because changes in world prices do not affect the duty that they are required to pay."[70] (Underlining added)

Chile's description of its modified PBS is simply wrong. The specific duties remain unchanged only during the two months stipulated in Decree 831/2003. At the end of these two months, the specific duty will necessarily change because the reference price will have changed. Whenever, while situated below the band floor, the prices on the markets of concern (Argentine bread wheat or Soft Red Winter No. 2, Gulf of Mexico) vary, the specific duty applied will necessarily change. That is to say, as the FOB prices on the two markets of concern *fall* the specific duty will *increase*.

[70] Chile's First Written Submission, paragraph 152.

As Argentina explained in its First Submission, this is a simple mathematical conclusion that follows from the PBS formula, according to which:

Specific duty[71]	=	(	Band floor price	-	Reference price	)	*	(1 +	General *ad valorem* tariff in force, Customs Tariff	)
	=	(	US$128	-	Reference price	)	*	(1 +	6%	)

Moreover, this can be seen from the ODEPA data themselves.[72] As the reference prices varied due to changes in the prices on the markets of concern, the specific duties changed.

Third, Chile misleadingly states that overcompensation only occurred in two specific dates: from 15 to 16 December 2004 and from 15 to 16 February 2005. Afterwards "international prices will continue being reflected in the domestic prices".[73] There are many problems with this reasoning.

On the one hand, it must be clear at this stage that international prices are not reflected in the domestic prices due to the amended PBS. As follows from the PBS formula, for the modified PBS not to elevate the entry price of imports to Chile above the price band floor, an improbable condition must be satisfied: the reference price (calculated on a FOB basis) must be higher than the CIF price of an individual export transaction by more than US$7,2453 per tonne or, what amounts to the same thing, the CIF price of that transaction must be lower than the reference price by more than US$7,2453 per tonne. In other words, as far as the CIF price of an individual export transaction exceeds the reference price, or falls below that price by no more than US$7,2453 per tonne, the entry price of that transaction *will be* above the band floor.

Argentina is sure that at least two out of three Members of this Panel remember the notion of the *break even point* from the original proceeding. In that case, Argentina demonstrated how, after a break even point was reached, the duties resulting from the PBS violated Chile's consolidated tariff binding, therefore infringing Article II of the GATT 1994. Chile has now established a *new* break even point: the point were the reference price exceeds the CIF price by US$7,2453 per tonne.

Argentina showed how improbable reaching that break even point is.[74] As far as that point is not reached, the modified PBS will mathematically elevate the entry price of imports to Chile above the price band floor. Chile explicitly recognized that FOB prices are always lower than CIF prices.[75] As the reference price is calculated on a FOB basis, therefore the condition cannot be fulfilled: the modified PBS will always tend to elevate the entry price of imports to Chile above the price band floor.

Bearing this formula in mind, it is easy to see that, even if international prices were reflected in the domestic prices after the initial overcompensation as Chile states, the amended PBS provides an end to *any* transmission when the entry price approaches the band floor. Due to the formula, the PBS will not allow any transmission of international prices in the case that the entry price falls below the floor price. Simply put: the formula, together with the band floor, work as a "brake" for the decline in the entry price and for any transmission of international prices below the level of the floor. If a decline in international prices *cannot be* reflected below the price band floor, then it is impossible to argue that the amended PBS reflects international prices.

[71] In accordance with Article 14 of Dec. 831/2003. See Exhibit ARG-2.
[72] See Exhibit ARG- 6, in particular the periods 16/Dec/04 – 15/Feb/05 and 16/Feb/05 – 15/Apr/05.
[73] Rebuttal by Chile, para. 51.
[74] First Written Submission by Argentina, paras. 109-114.
[75] See Rebuttal by Argentina, paras. 164 to 169.

On the other hand, the initial overcompensation which, according to Chile, takes place at the beginning of the two-month period, inevitably taints the rest of that period: the level of duties and the entry price after that moment will be affected by the original overcompensation. In fact, if overcompensation did not occur, the level of duties and the entry price resulting from the two-month period would be lower. Thus, the effects of overcompensation taint and affect the level of duties and entry price resulting from the PBS, which are higher than they would be if overcompensation simply did not exist.

Fourth, the situation is not different with what occurred in the original proceedings. According to the original PBS, the specific duties were established for a period of one week.[76] Assuming *arguendo* that overcompensation only took place at the beginning of that period of one week, it nevertheless affected the level of duties and the entry price for the rest of that period. That was enough for the Appellate Body to find that the original PBS overcompensated for the decreases in international prices.[77] The situation with the amended PBS is worse: while in the original PBS the effects of overcompensation tainted the level of duties and the entry price for a week, now that period has been extended to two months. The fact is that Chile has not been able to rebut Argentina's arguments regarding the overcompensation produced by the amended PBS and recognized by Chile itself.[78]

It is paradoxical that what Chile refers to as a feature of the modified PBS that helps to transmit international price developments (i.e., the fact that the duty is unaffected by international price changes during the two-month period) is precisely a feature that insulates the Chilean market from international prices. At this point, Argentina would kindly refer the Panel to Argentina's answers to questions 13 and 14 above.

21. During the meeting with the Panel, the EC stated that, in its view,

> **"it is only when the measures clearly have sufficient similarity to measures coming under the scope of Article 4.2 – that is features unique to the measures listed in the footnote to Article 4.2 are also found in the measures challenged – that there is a possible violation of Article 4.2. The existence of features which are not unique to the measures found under Article 4.2 cannot be sufficient, on their own, to render a measure inconsistent with Article 4.2" (see paragraph 9 of the written version of the EC's oral statement).**

Could the Parties comment on the EC's statement.

Answer to Question 21:

Argentina does not see a legal basis to assert that the features found in the measures challenged have to be ***unique*** to the measures listed in the footnote 1 to find a possible violation of Article 4.2. The EC has not made reference to any WTO jurisprudence.

Article 4.2 and footnote 1, in its relevant part, state:

> 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.

[76] *Chile – Price Band System*, Report of the Appellate Body, paras. 21 to 29.
[77] *Chile – Price Band System*, Report of the Appellate Body, para. 260.
[78] First Written Submission by Argentina, Section C.I.2.2.

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> [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…

The Appellate Body found that the category of measures covered by Article 4.2 and footnote 1 is rather broad, including measures *of the kind*, not restricted only to those specific measures that were singled out to be converted into ordinary customs:

> "… 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."[79]

In particular, the word "include" indicates that the list of measures in footnote 1 is illustrative and that there may be further measures that may fall under the category *of the kind* covered by Article 4.2:

> "… 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.[80]

However, it is clear that to be "similar", Chile's amended PBS must have sufficient resemblance or be of the same kind as at least one of the specific categories of measures listed in footnote 1. The Appellate Body found:

> "To be 'similar', Chile's price band system—in its specific factual configuration—must have … 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."[81] (Emphasis in the original)

The Appellate Body did not assert that to find a possible violation of Article 4.2 the features found in the measures challenged have to be ***unique*** to the measures listed in the footnote to Article 4.2. All that the Appellate Body stated is that, in the case of the original PBS, it needed to determine whether

[79] *Chile – Price Band System*, Report of the Appellate Body, para. 208.
[80] *Chile – Price Band System*, Report of the Appellate Body, para. 209.
[81] *Chile – Price Band System*, Report of the Appellate Body, para. 227.

that measure shared sufficient features with "minimum import prices" or "variable import levies" to be of the same kind, and thus prohibited by Article 4.2:

> "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."[82] (Emphasis in the original).

Finally, the Appellate Body found that the PBS could be similar to the categories of prohibited measures listed in footnote 1 in terms of its *effect*:

> "… 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 …"[83] (Emphasis in the original).

Therefore, Argentina does not see a legal basis to assert that the features found in the measures challenged have to be ***unique*** to the measures listed in the footnote 1 to find a possible violation of Article 4.2.

22. Can the Parties provide a copy of the relevant sections of the documents "*Historia de la Ley. Compilación de textos oficiales del debate parlamentario*" to which Argentina refers throughout its first written submission.

Answer to Question 22:

The relevant sections of the documents "*Historia de la Ley. Compilación de textos oficiales del debate parlamentario*" to which Argentina refers throughout its first written submission are submitted in Exhibit ARG-37.

23. Can the Parties confirm whether Decree No. 401 of 15 June 2006 by the Ministry of Finance of Chile is the latest decree issued pursuant to the PBS.

Answer to Question 23:

Decree No. 401 of 15 June 2006 by the Ministry of Finance of Chile is the latest decree issued pursuant to the PBS. However, according to Decree 831/2003, a new Decree pursuant to the PBS applicable to wheat and wheat flour imports is being established on 16th August 2006, the date on which these answers are submitted to the Panel.

24. Could the Parties comment on the "understanding which Chile later repudiated" that Argentina refers to in paragraph 11 of its first written submission. Would such understanding have any relevance in the present case?

Answer to Question 24:

As Argentina stated in its first written submission, after the expiring of the reasonable period Chile had for the implementation of the recommendations and rulings of the DSB in December 2003,

[82] *Chile – Price Band System*, Report of the Appellate Body, para. 239.
[83] *Chile – Price Band System*, Report of the Appellate Body, para. 246.

bilateral negotiations were begun early in 2004 with a view to achieving the implementation regarding to wheat and wheat flour.

Those negotiations led to a mutually agreed settlement of the dispute at that very moment. That understanding is not relevant now in the present case.

Argentina mentioned it as background in its First Written Submission to show that Argentina made all its efforts in an attempt to reach a mutually agreed solution of the dispute and not to recur to this dispute settlement proceedings for the second time, in conformity with DSU Article 3.7.

FOR ARGENTINA

25. In the light of Argentina's statement in paragraphs 301 and 302 of its rebuttal submission, can Argentina clarify whether the amended PBS contains specific new features that would, in its opinion, violate the second sentence of Article II:1(b) of the GATT 1994 in a way that the original PBS did not. If so, can Argentina identify those specific new features of the amended PBS that would be in violation of Article II:1(b), and in what manner those features differ from the ones in the original PBS.

Answer to Question 25:

The amended PBS is a new measure containing a new scheme or formula for the calculation of additional duties at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory. The amendments introduced by Chile turned the PBS into a completely new measure as Chile has recognized.[84] Chile has changed both the way in which the floor and ceiling prices are established and the way in which the reference prices are calculated, as well as the method of calculating the specific duties. Chile has also changed the products subject to the PBS. Argentina has extensively developed how the amended PBS contains specific new features that have rendered it to be a new and different measure. Argentina would kindly refer the Panel to Section B of its First Written Submission, paragraphs 18 to 66.

Whether the original PBS through its specific features violated the second sentence of Article II.1.b) of GATT 1994 was not part of the Appellate Body findings[85], and it was not a claim raised by Argentina in the original proceedings, as the Appellate Body found[86] and Chile recognized.[87]

As Argentina stated in paragraphs 301 and 302 of its rebuttal submission, the claim with respect to the second sentence of Article II.1(b) of the GATT 1994 relates to the whole of the modified PBS.

In this regard, by being a new measure that was not before the original panel, the relevant facts bearing upon the modified PBS are obviously different from the relevant facts relating to the original PBS, in that, on the basis of the particular configuration described above, the amended PBS is not an ordinary customs duty.

By not being an ordinary customs duty, the amended PBS constitutes "other duties or charges" in the sense of the second sentence of Article II:(1)(b) of the GATT 1994. By not being recorded in the corresponding column of Chile's Schedule of Concessions (No. VII), as it is mandated by paragraph 1

[84] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system…" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "… the new price band system entered into force on 16 December 2003 …" (underlining added).

[85] *Chile – Price Band System*, Report of the Appellate Body, para. 288.

[86] *Chile – Price Band System*, Report of the Appellate Body, para. 165.

[87] Chile's First Written Submission, paragraph 48.

of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, the amended PBS violates the second sentence of that Article.

As Chile explicitly recognized,[88] Argentina did not raise nor pursued a claim in relation to that provision during the original proceedings. It is indeed a new claim that Argentina has the right to raise in the frame of a proceeding under Article 21.5 of the DSU.

It is therefore natural that, in this regard, Argentina submitted a claim pertinent to the modified PBS that is different from those that were pertinent to the original PBS.

In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held:

> "... in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU." [89] (Underlining added.).

In the present Article 21.5 proceedings there would be no "second chance" to establish what was claimed but not proved in the original proceedings as in the case of *EC – Bed Linen (Article 21.5 – India)* since, as Chile states and agrees: "Argentina did not in fact ever raise the claims it now wishes to bring".[90] Consequently, this is the "first chance" to establish a new claim which Argentina is entitled to raise.

The claim relating to the second sentence of Article II:1(b) of the GATT 1994 is a new claim with respect to a new measure and, therefore, falls within the terms of reference of the present DSU Article 21.5 Panel.

26. Referring to its claim under Article II:1(b) of the GATT 1994, Argentina declared during the substantive meeting with the Panel (see paragraph 115 of the written version of its oral statement) that it "could never have raised this same claim during the original proceedings" Can Argentina explain the reason why it could not have raised its claim under Article II:1(b) of the GATT 1994 in the original proceedings? Is Argentina arguing *that the original PBS was not inconsistent* with the second sentence of Article II:1(b) of the GATT 1994, while the amended PBS is inconsistent? Is that circumstance (the fact that it could not have raised this particular claim in the original proceedings), in Argentina's view, an appropriate test to assess whether the claim falls within the Panel's mandate?

[88] First Written Submission by Chile, para. 48.
[89] WT/DS70/AB/RW, paragraph 41.
[90] Chile's First Written Submission, paragraph 48.

Answer to Question 26:

First, it should be undisputed at this stage that the amended PBS is a new measure. In fact, as Chile itself has stated on at least two occasions, the modified PBS is a "new" PBS.[91]

Argentina could never have made this same claim relating to the same PBS aspects during the initial stage of the present dispute, as Chile maintains[92], since the modified PBS is a measure different from the PBS which formed the subject of the original proceedings. As Chile has pointed out, this is a "new" PBS.

In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held that Article 21.5 proceedings involve not the original measure but rather a new and different measure which was not before the panel and it was natural, therefore, that, as the relevant facts bearing upon the "measure taken to comply" were different from the relevant facts relating to the original measure, the claims, arguments and factual circumstances pertinent to the "measure taken to comply" would not necessarily be the same as those which were pertinent in the original dispute.[93]

As the panel found in *EC – Bed Linen (Article 21.5 – India)*, in *Canada – Aircraft (Article 21.5 – Brazil)*, Canada had implemented the recommendation of the DSB by adopting a new and different measure. In the Article 21.5 proceeding, Brazil made claims regarding that measure that it had not made in the original dispute. Canada objected to claims raised by Brazil against the new measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that could not have been raised in the original proceedings.[94] The Appellate Body agreed with the panel's conclusion.[95]

In the present dispute the situation is similar. The modified PBS is a new measure that was not before the original panel. The relevant facts bearing upon the modified PBS are obviously different from the relevant facts relating to the original PBS. It is therefore natural that Argentina should present claims, arguments and factual circumstances pertinent to the modified PBS that are different from those that were pertinent to the original PBS.

In the present Article 21.5 proceedings, Argentina, like Brazil in *Canada – Aircraft (Article 21.5 – Brazil)*, raises claims relating to the second sentence of Article II:1(b) of the GATT 1994 in respect of the modified PBS that it did not raise in the original dispute. Chile, like Canada in that dispute, challenges the claims raised by Argentina against the modified PBS arguing that no claims relating to the second sentence of Article II:1(b) of the GATT 1994 were raised against the original PBS. If the Panel were to uphold the Chilean challenge, Argentina, like Brazil in that dispute, would not have the opportunity to raise claims that could not have been raised in the original proceedings, because the modified PBS is a new and different measure that was not before the original panel.

Finally, in *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body warned against the consequences of undermining the utility of the review envisaged under Article 21.5 of the DSU and the ability of a panel to examine fully the "consistency with a covered agreement of the measures

[91] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system…" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "… the new price band system entered into force on 16 December 2003 …" (underlining added).

[92] Chile's First Written Submission, paragraphs 50 and 56.

[93] *Canada – Aircraft (Article 21.5 – Brazil)*, Appellate Body Report, paragraph 41 (underlining added).

[94] WT/DS141/RW, paragraph 6.48.

[95] *EC – Bed Linen* (*Article 21:5 – India*), Appellate Body Report, paragraph 88.

taken to comply", as required by Article 21.5 of the DSU, that could result if a Panel were restricted to examining the new measure only from the perspective of the claims related to the original measure:

> "Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU."[96]

In this case, the consequences against which the Appellate Body warned would take place if this Panel were restricted to examining the new PBS from the perspective of the claims that related to the original PBS. Its ability to examine fully the "consistency with a covered agreement" of the amended PBS, as required by Article 21.5 of the DSU would be seriously impaired.

Second, as it was already stated[97], whether the original PBS was inconsistent with the second sentence of Article II:1(b) of the GATT 1994 was not part of the Appellate Body findings in the original proceedings.

Third, as stated before, Argentina could not have raised this particular claim in the original proceedings.

However, even if Argentina could have raised its Article II:1(b) GATT 1994 claim in the original proceedings, *quod non*, that circumstance is not an appropriate test to assess whether the claim falls within the Panel's mandate.

A panel is not prohibited from considering arguments and claims on the sole basis that they *could* have been raised during the original proceedings with respect to a different original measure. As Canada stated in its oral intervention:

> Where the measure is appropriately before a panel, and the DSB has made no findings or recommendations in respect of such measure or the claims made by the complaining party, a panel may not then reject such claims or arguments on the sole basis that they could have been raised previously.[98]

First, there is no legal basis in any provision of the DSU to assert that a party cannot raise a claim before an Article 21.5 panel because a possibility existed that it *could* have raised the same claim during the original proceeding when the original measure was not the measure at issue in the compliance proceedings. What is more, Chile has not made reference to any legal provision in support of this argument. Argentina shares Brazil's view on this point:

> Not surprisingly, Chile does not cite to any treaty text in order to support its approach. In fact, this is because there is nothing in the text of the DSU that precludes a complaining Member from bringing a claim that was not brought in the original proceedings. According to the DSU, Article 21.5 proceedings may, in principle, involve claims made under any provision of any covered agreement.[99]

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[96] WT/DS70/AB/RW, Appellate Body Report, paragraph 41. (underlining added).
[97] See Argentina's answer to question 25 above.
[98] Third Party Oral Statement by Canada, para. 6.
[99] Third Party Oral Statement by Brazil, para. 18.

Second, Argentina cannot recall any *WTO jurisprudence* that supports Chile's argument that a party cannot raise a claim before an Article 21.5 panel because a possibility existed that it *could* have raised the same claim during the original proceeding, when the original measure was not the measure at issue in the compliance proceedings.

Furthermore, Argentina is not aware of any provision in the DSU or WTO jurisprudence that required a complaining party to bring all its *possible* claims at once in the original proceedings. As Brazil stated,

> … Chile's approach [would] add a new and undue burden on the complaining party, since it would force it to prosecute every conceivable violation in the original proceedings in order to preserve its rights on implementation.[100]

If Chile's argument were accepted, the door would be open to a whole new set of controversial procedural claims during DSU Article 21.5 proceedings concerning whether certain claims could have *possibly* been made with respect to the original measure, even if, as in the present case, the original measure was different, in its particular configuration and features, to the measure at issue in the compliance proceeding.[101]

Finally, in this case, given that the amended PBS is a new and different measure, the claim related to Article II:1(b) GATT 1994 is, in any event, different from the Article II:1(b) GATT 1994 claim that could eventually have been raised in the original proceedings, as far as it challenges a different measure including a whole new configuration and features. Although the EC did not completely agree with all of Argentina's arguments, it is telling that it shared Argentina's approach regarding whether this claim falls within the Panel's mandate:

> As regard the claim made by Argentina relating to the second sentence of Article II: 1 (b) of the GATT, and in the view of the EC, what counts in this context is again the fact that the new measure (the revised PBS) has created a new set of regulatory and factual circumstances which imply that the claim is new insofar that it is directed against a different set of measures under a different set of "relevant facts". Therefore, the fact that a similar claim may have been brought against a similar measure in the original dispute <u>should be held as irrelevant</u>.[102]

27. Can Argentina also clarify whether the amended PBS contains specific new features that would, in its opinion, violate Article XVI:4 of the WTO Agreement in a way that the original PBS did not. If so, can Argentina identify those specific new features of the amended PBS that would be in violation of Article XVI:4, as well as the manner in which those features differ from the ones in the original PBS.

<u>Answer to Question 27</u>:

The claim with respect to Article XVI:4 of the WTO Agreement relates to the modified PBS in its entirety rather than to one aspect or specific new features in particular.

The amended PBS is a new measure containing a new scheme or formula for the calculation of additional duties at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory. The amendments introduced by Chile turned the PBS into a completely new

[100] Third Party Oral Statement by Brazil, para. 16.
[101] See Third Party Oral Statement by Canada, para. 9.
[102] Third Party Oral Statement by the European Communities, para. 19 (underline added).

measure as Chile has recognized.[103] Chile has changed both the way in which the floor and ceiling prices are established and the way in which the reference prices are calculated, as well as the method of calculating the specific duties. Chile has also changed the products subject to the PBS. Argentina has extensively developed how the amended PBS contains specific new features that have rendered it to be a new and different measure. Argentina would kindly refer the Panel to Section B of its First Written Submission, paragraphs 18 to 66.

Thus, Argentina could never have raised its claim of violation of Article XVI:4 of the WTO Agreement during the original proceedings as far as the amended PBS is a new measure, different in many ways from the original PBS.

There is no legal basis to assert that a WTO Member cannot raise new claims with respect to new measures under Article 21.5 proceedings.

Rather, as Argentina and Chile have already cited, in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body held that:

> "… This implies that an Article 21.5 panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the original proceedings... Indeed, a complainant in Article 21.5 proceedings may well raise new claims, arguments, and factual circumstances different from those raised in the original proceedings …"[104] (underlining added, footnotes omitted)

28. Assuming that the Panel were to agree with Argentina's claim that the amended measure is in breach of Article 4.2 of the Agreement on Agriculture, could Argentina explain why, in its opinion, the Panel would then need to make a separate finding, or should then make a separate finding, on whether the same measure also results in a violation of Article II:1(b) of the GATT 1994 in order to resolve this dispute. Could Argentina please refer in its reply to the statement made by the Appellate Body in paragraph 190 of its report in *Chile – Price Band System*.

Answer to Question 28:

Argentina is fully convinced that this Panel needs to make a separate finding on whether the amended PBS results in a violation of Article II:1(b) of the GATT 1994 in order to resolve this dispute.

In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, after finding that "Mexico ha[d] not explained why an additional finding…[was] necessary to resolve the dispute"[105], the Appellate Body found that there was not a necessity of such an additional finding. It logically follows that in a case where a party does explain the necessity of a separate finding in order to ensure the resolution of a dispute a panel is allowed to make such an additional finding.

This finding was perfectly consistent with the Appellate Body previous finding in *Australia – Salmon.* According to the Appellate Body, the principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a

[103] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system …" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "… the new price band system entered into force on 16 December 2003 …" (underlining added).

[104] *EC – Bed Linen (Article 21.5 – India),* Appellate Body Report, paragraph 79.

[105] WT/DS282/AB/R, para. 282

positive solution to a dispute".[106] To provide only a *partial* resolution of the matter at issue would be *false* judicial economy. In particular, the Appellate Body said that 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'[according to DSU article 21.1]."[107] (Underlining added)

Under the circumstances of the *present case*, the necessity of a finding to determine whether the PBS is inconsistent with Article II:(1)(b) of GATT 1994 is clear. This panel has to address this claim, because it is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by Chile and to ensure an effective and positive resolution of this dispute.

Argentina completely agrees with the Appellate Body, who stated that a finding that Chile's PBS is inconsistent with Article 4.2 of the Agreement on Agriculture means that the duties resulting from the application of that PBS cannot longer be levied because such PBS cannot longer exist.[108]

It was precisely on the basis of that reasoning that the Appellate Body held that:

> "… 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 GATT 1994 in order to resolve this dispute."[109]

However, at that time, the Appellate Body could not forsee that Chile would confidently ignored this finding, arguing that nowhere in the Appellate Body Report it is mandated that Chile had to eliminate the PBS. Consequently, more than three years and a half after the adoption of the Panel and Appellate Body reports by the DSB, the dispute remains unsolved.

Evidently, according to the reading Chile made of the Appellate Body's finding, it was not as clear to Chile as it was for the Appellate Body and for Argentina that the PBS was a measure not to be maintained. Indeed, Chile did maintain its PBS although it was found to be inconsistent with Article 4.2 of the *Agreement on Agriculture.*

It is evident that, under these particular circumstances, a finding regarding Argentina's claim about the amended PBS inconsistency with the second sentence of Article II:(1)(b) of GATT 1994 results to be necessary to make it clear to Chile that the amended PBS is a measure not to be maintained, and to secure, finally, a *definitive* solution to the dispute.

By virtue of the particular circumstances present in the current proceedings, a separate finding determining whether the PBS is inconsistent with Article II:(1)(b) of GATT 1994, results to be necessary, *inter alia*, for the following reasons.

First, Argentina has fully proved in these proceedings that the amended PBS is inconsistent with Article II:(1)(b) of GATT 1994. However, without a separate finding, Chile would try to maintain its PBS with "cosmetic amendments" in flagrant violation with that provision.

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[106] DSU, Article 3.7.
[107] *Australia-Salmon*, WT/DS18/AB/R, Report of the Appellate Body, para. 223 (underlining added).
[108] *Chile – Price Band System*, Report of the Appellate Body, paragraph 190.
[109] *Chile – Price Band System*, Report of the Appellate Body, paragraph 190.

In spite of the Appellate Body findings, the circumstances of this case demonstrate that for Chile to dismantle its amended PBS, a finding of inconsistency with Article 4.2 may not be enough. Chile should have dismantled its PBS applied to wheat and wheat flour as Chile did with respect to edible vegetable oils.

The explicit wording of Article 4.2 of the *Agreement on Agriculture* mandates that Members "… shall not *maintain* … measures of the kind which have been required to be converted into ordinary customs duties …".[110] Thus, according to Article 4.2 of the *Agreement on Agriculture*, Chile could not maintain its PBS after a WTO inconsistency ruling. As the Appellate Body established "… 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 …".[111] Indeed, that interpretation is confirmed by the wording of footnote 1 to the *Agreement on Agriculture*. That footnote gives meaning to Article 4.2 by enumerating examples of measures other than ordinary customs duties which, according to the Appellate Body, "…Members must not maintain, revert to, or resort to, from the date of the entry into force of the *WTO Agreement*".[112] Moreover, the Appellate Body established that the obligation "not [to] maintain" such measures underscores the fact that "… Members must not continue to apply measures covered by Article 4.2 from the date of entry into force of the *WTO Agreement*".[113]

Chile maintained the PBS arguing that nowhere in the Appellate Body Report it is mandated that Chile had to eliminate it. Chile insists in ignoring an explicit finding of the Appellate Body, who stated that a finding that Chile's PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture* means that the duties resulting from the application of that PBS cannot longer be levied because such PBS cannot longer exist:

> "… 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."[114]

The Appellate Body went further and established that:

> "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."[115]

It is evident now that it was not clear to Chile as it was for the Appellate Body that if the PBS fell within any one of the categories of the measures listed in footnote 1, it was a measure not to be maintained. However, contrary to the Appellate Body's explicit finding, Chile maintained its PBS although it fell within one of the categories of measures listed in footnote 1. The fact that a measure prohibited by Article 4.2 of the *Agreement on Agriculture* could not be maintained was completely ignored by Chile who maintained the PBS with "cosmetic amendments". This is the reason why Argentina had to resort to the WTO dispute settlement proceedings for the second time. That is why,

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[110] Emphasis added.
[111] *Chile – Price Band System*, Report of the Appellate Body, para. 207.
[112] *Chile – Price Band System*, Report of the Appellate Body, para. 209.
[113] *Chile – Price Band System*, Report of the Appellate Body, para. 212. (Underlining added).
[114] *Chile – Price Band System*, Report of the Appellate Body, paragraph 190.
[115] *Chile – Price Band System*, Report of the Appellate Body, para. 221.

under the *circumstances of this case*, a separate finding of inconsistency with Article II:(1)(b) of GATT 1994 is also required.

Second, DSU Article 3.7 provides that "… the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements". Given the measures taken to comply by Chile preceding Argentina's recourse to DSU Article 21.5, a separate finding of inconsistency with Article II:(1)(b) of GATT 1994 by this Panel will certainly contribute to achieving the abovementioned first objective of the dispute settlement mechanism.

Third, the Appellate Body has established that panel rulings in compliance proceedings should not "lead to a potentially 'never-ending cycle' of dispute settlement proceedings and inordinate delays in the implementation…".[116] Despite Argentina's claims and what the Appellate Body has established, *experience in this case* tells that a finding of inconsistency with Article 4.2 may not lead to a positive solution of the dispute by Chile, again, maintaining its PBS with "cosmetic amendments". This could lead to that potentially "never-ending cycle" of dispute settlement proceedings. It is precisely to avoid this result that Argentina respectfully requests this Panel to address its Article II:(1) (b) of GATT 1994 claim.

In light of the above reasons and facts and consistent with what the Appellate Body established in *Australia – Salmon* and *US – Anti-Dumping Measures on Oil Country Tubular Goods*, Argentina respectfully asks the Panel to make a separate finding under Article II:(1)(b) of GATT 1994, and to secure by this separate finding an effective and *definitive* resolution of this old dispute, preventing a never-ending cycle of dispute settlement proceedings.

29. Referring to the way the amended PBS has worked in practice, Chile has asserted in paragraphs 173 and 174 of its rebuttal submission that:

> **"In 35 (32.1 per cent) of the 109 weeks in which the current system has been in force (16 December 2003 to 13 January 2006) tax rebates have been applied, in 17 (15.6 per cent) specific duties have been applied, and in 57 (52.3 per cent) only the general *ad valorem* tariff has been applied.**
>
> **From 13 January to 15 June 2006 wheat imports were entering Chile subject only to the general *ad valorem* tariff, extending even further the period of improved access conditions."**

Based on the information available, does Argentina agree with Chile's statement?

Answer to Question 29:

Argentina disagrees.

First, Chile puts forward arguments that, according to Chile itself, are not part of the present dispute. Chile has stated that "… the conditions of access for wheat lie [lay] outside the scope of the present dispute …".[117] Afterwards it maintained that "[t]he basis of this dispute is not … how often [customs duties] are applied."[118]

[116] *United States-Tax Treatment For "Foreign Sales Corporations"* Second Recourse to Article 21.5 of the DSU by the European Communities, Report of the Appellate Body, WT/DS108/AB/RW2, para. 86.
[117] Rebuttal by Chile, para. 163.
[118] Rebuttal by Chile, para. 171 (underline added).

Second, Argentina disagrees with the statement "From 13 January to 15 June 2006 wheat imports were entering Chile subject only to the general *ad valorem* tariff, *extending even further the period of improved access conditions*".

As Argentina pointed out[119], access conditions continue to be unfavourable despite the duties allegedly being applied on fewer occasions than in the case of the original PBS. Chile's argument amounts to saying that exporters of wheat and wheat flour to Chile should not be concerned about the distorting effects of the modified PBS, since under the modified PBS the distorting effects resulting from the application of specific duties occurred "only" 17 times, whereas under the original PBS they would have occurred 27 times. Chile claims that this represents an improvement in conditions of access. There is no improvement. Chile's reasoning has no basis in the WTO Agreements and, in particular, not in the DSU or the *Agreement on Agriculture*. A measure taken to comply is not "less" inconsistent because the inconsistency occurs on fewer occasions than in the case of the original measure. There is no basis for drawing such a conclusion.

30. In paragraph 77 of its rebuttal submission, Argentina suggests that Chile should explain the criteria that led it to fixing the floor and ceiling of the band at US$128 and US$148 per tonne, respectively. Could Argentina clarify whether, in its view, Chile is under a legal obligation to advance that explanation and, if so, could Argentina identify the relevant legal basis in the WTO covered agreements.

Answer to Question 30:

The legal basis in the WTO covered agreements not to maintain an intransparent border measure is Article 4.2 of the Agreement on Agriculture and its footnote 1.

When finding the original PBS inconsistent with Article 4.2, the Appellate Body, *inter alia*, held:

> "… [W]e 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.
>
> 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 … is determined …"[120] (Emphasis added)

The fact that no legislation set out how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.

Similarly, the fact that Law 19.897 and Decree 831/2003 do not set out the criteria that led Chile to fixing the floor and ceiling of the band at US$128 and US$148 per tonne, respectively, lead to the conclusion that the establishment of the floor and ceiling was not transparent.

Therefore, Chile is under the legal obligation to advance the criteria that led it to fixing the floor and ceiling of the band at US$128 and US$148 per tonne, respectively.

[119] Rebuttal by Argentina, para. 208-209.
[120] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.

As pointed out above, the fact that no legislation *explained* how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.[121]

The Appellate Body found that the lack of transparency contributed to distorting the prices of imports by impeding the transmission of international prices to the domestic market.[122]

Afterwards, in assessing the original PBS, the Appellate Body found that:

> "… 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 …"[123]

The Appellate Body emphasized that it reached its conclusion regarding the inconsistency with the WTO covered agreements

> "… on the basis of the particular configuration and interaction of all these specific features of Chile's price band system ..."[124]

Consequently, the lack of explanation or justification as to the criteria that led Chile to fixing the floor and ceiling of the band at US$128 and US$148 per tonne, respectively, leads to a lack of transparency which, according to the Appellate Body, affects *per se* market access for imports of wheat and wheat flour.

Regarding the transparency requirement derived from Article 4.2 and footnote 1, the original Panel in these proceedings found 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".[125]

Moreover, the original Panel also observed:

> "… several crucial stages of the operation of the Chilean PBS are characterized by a considerable lack of transparency and predictability. For instance, exporters can be expected to have difficulties knowing how the applicable Reference Price is arrived at."[126]

Those findings are completely applicable to the amended PBS.

Finally, in its analysis of whether the original PBS was a border measure similar to a variable import levy and a minimum import price, the original Panel in these proceedings found, in a finding not reversed by the Appellate Body:

> "… we have already highlighted the features of the Chilean PBS which reveal its intrinsically unstable, *intransparent* and unpredictable nature, as well as the

[121] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.
[122] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[123] *Chile – Price Band System*, Report of the Appellate Body, para. 258.
[124] *Chile – Price Band System*, Report of the Appellate Body, para. 261.
[125] *Chile – Price Band System*, Report of the Panel, paragraph 7.34.
[126] *Chile – Price Band System*, Report of the Panel, paragraph 7.44.

> insulation of the domestic market from international price competition which it achieves ..."[127] (Emphasis added)

Regardless the fact it did not find useful to endorse the characteristics identified by the Panel as being of a "fundamental" nature, the Appellate Body established in paragraph 234 of its Report:

> "… [T]his lack of transparency and this lack of predictability are liable to restrict the volume of imports … 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."

31. With regard to the factor 1.56 applicable to wheat flour, Argentina asserted during the substantive meeting with the Panel (see paragraph 107 of the written version of its oral statement) that, "[t]his was the *first* chance for Argentina to raise these arguments". (Original emphasis.) Would that circumstance (the fact that these Article 21.5 proceedings were the first chance for Argentina to raise the argument) constitute an appropriate test to assess whether the issues relating to factor 1.56 fall within this Panel's mandate?

Answer to Question 31:

The appropriate test to assess whether the issues relating to factor 1,56 fall within this Panel's mandate is the fact that Argentina's argument in relation to the factor 1,56 is not a claim: it is an argument.

Chile argues that Argentina's arguments in relation to the factor of 1,56 applicable to wheat flour are not within the terms of reference of this Panel, because it is "a claim which Argentina could have raised and pursued in the original dispute, but failed to do so".[128] Chile's argument is incorrect. Chile seems not to see the difference between "claims" and "arguments". Argentina's argument in relation to the factor of 1,56 is not a claim: it is an *argument*.

As the Appellate Body stated in *Korea – Dairy Products*, "By 'claim' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".[129]

In these proceedings Argentina has raised claims with respect to the amended PBS inconsistency with Article 4.2 of the *Agreement on Agriculture*, the second sentence of Article II:1(b) of the GATT 1994 and Article XVI.4 of the *Agreement establishing the World Trade Organization*. The argument in relation to the factor of 1,56 supports the claim of the PBS inconsistency with Article 4.2 of the *Agreement on Agriculture*. It is an additional argument showing that the amended PBS causes insulation from the international market. A plain reading of the Table of Contents of Argentina's Written Submission is enough to understand this simple argumental structure.

The factor of 1,56 applied to the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour, insulates the entry price of wheat flour from international price developments.[130] Three sub-arguments support this main argument[131]: (1) wheat flour exporters have to pay specific duties which not only bear no relation to the transaction value but also bear no relation to the product in question, since they are calculated on the basis of those applied to another product, namely, wheat; (2) the way in which Chile determined the factor 1,56 is not transparent,

[127] *Chile – Price Band System*, Report of the Panel, paragraph 7.61.
[128] First Written Submission by Chile, paragraph 62.
[129] WT/DS98/AB/R, paragraph 139.
[130] First Written Submission by Argentina, Section C.I.2.7.
[131] First Written Submission by Argentina, paras. 228 to 234.

since in its legislation Chile has neither explained nor justified in any way the basis on which it was established; (3) the 1,56 factor is baseless from a technical or price-based point of view. Therefore, it is an argument that support the claim of inconsistency of the amended PBS with Article 4.2 of the *Agreement on Agriculture*.

Chile has not argued that the claim related to Article 4.2 of the *Agreement on Agriculture* is not within the terms of reference of this Panel. Thus, this Panel is completely free to accept and analyze Argentina's arguments in relation to the factor of 1,56[132] in order to find that the amended PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*.

In the alternative, if this Panel found the argument in relation to the factor of 1,56 constitute a new "claim", the fact that these Article 21.5 proceedings are the first chance for Argentina to raise the argument could constitute one of the appropriate tests to assess whether the issues relating to factor 1.56 fall within this Panel's mandate, because the amended PBS is a new measure, different from the original PBS and, therefore, Argentina could not have raised the arguments in relation to that factor in the original proceedings.

Despite the fact that the factor 1.56 was *formally* maintained in the modified PBS, Argentina's arguments relating to that factor are included in the terms of reference of the present Panel inasmuch as Chile has changed the basis to which that factor is applied and hence the result of its application.

If both the basis and the duties resulting from the application of the factor 1.56 in the modified PBS are necessarily different from the basis and the duties resulting from the application of the factor 1.56 in the original PBS, then the relative weight of the factor 1.56 has also changed in the measures taken to comply.

In this respect, it should be recalled that the specific duty or rebate for wheat, which constitutes the basis of calculation to which the factor 1.56 is applied to arrive at the specific duty or rebate for wheat flour, is calculated from the difference between the *floor or ceiling price* and the *reference price* by multiplying that difference by 1 plus the *ad valorem* tariff. Given that Chile has changed both the way in which the floor and ceiling prices are calculated[133] and the way in which the reference prices are established[134], as well as the method of calculating the specific duties[135], the basis to which the factor 1.56 is applied and the results of its application have necessarily changed. The application of the factor 1.56 in the modified PBS results in a different amount of duties and forms part of both the measure itself and its method of application.

In other words, the consequences of applying the factor 1.56 in the modified PBS are different from the consequences of applying it in the original PBS.

In conclusion, just as the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* held that the claims relating to the Section 129 affirmative likelihood-of-subsidization re-determination fell within the panel's terms of reference because the basis for that re-determination was different from that for the affirmative determination in the original sunset review, the arguments relating to the factor 1.56 fall within the terms of reference of the present Panel since the basis on which that factor is calculated is also different from that in the original PBS.

[132] Consequently, it is not applicable to the factor of 1,56 what was said in the cases *EC – Bed Linen (Article 21.5 – India)* and *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* as those cases dealt with the admissibility of entertaining claims and not arguments.

[133] Argentina's First Written Submission, Section B.3.3.

[134] Argentina's First Written Submission, Section B.3.4.

[135] Argentina's First Written Submission, Section B.3.5.2.

Thus, the new arguments relating to the factor 1.56 relate to an aspect of the measure taken to comply that has changed with respect to the original measure. Consequently, the Panel should conclude that Argentina's arguments concerning the factor 1.56 fall within its terms of reference.

In *Canada – Aircraft (Article 21.5 – Brazil)* [136], the Appellate Body held that Article 21.5 proceedings involve not the original measure but rather a new and different measure which was not before the panel and it was natural, therefore, that, as the relevant facts bearing upon the "measure taken to comply" were different from the relevant facts relating to the original measure, the claims, arguments and factual circumstances pertinent to the "measure taken to comply" would not necessarily be the same as those which were pertinent in the original dispute.

As the panel found in *EC – Bed Linen (Article 21.5 – India)*, in *Canada – Aircraft (Article 21.5 – Brazil)* Canada had implemented the recommendation of the DSB by adopting a new and different measure. In the Article 21.5 proceeding, Brazil made claims regarding that measure that it had not made in the original dispute. Canada objected to claims raised by Brazil against the new measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that could not have been raised in the original proceedings.[137] The Appellate Body agreed with the panel's conclusion.[138]

In the present dispute the situation is similar. The factor 1.56 – as a changed aspect of the measure taken to comply – was not before the original panel. As pointed out above, the relevant facts bearing upon the factor 1.56 are obviously different from the relevant facts relating to the factor 1.56 in the original PBS. It is therefore natural that Argentina should present arguments and factual circumstances pertinent to the factor 1.56 in the modified PBS that are different from those that were pertinent to the factor 1.56 in the original PBS.

In the present Article 21.5 proceedings, Argentina, like Brazil in *Canada – Aircraft*, puts forward arguments relating to the factor 1.56 that it did not raise in the original dispute. Chile, like Canada in that dispute, challenges these arguments claiming that they should have been raised in the original proceedings. If the Panel were to uphold the Chilean challenge, Argentina, like Brazil in that dispute, would not have the opportunity to put forward arguments that could not have been raised in the original proceedings, as the factor 1.56 is a changed aspect of the measure taken to comply.

Moreover, Chile's due process rights have not been unduly impaired in these proceedings since in changing the factual basis on which the factor 1.56 would be applied and hence the results of applying it Chile could have anticipated that new arguments relating to that factor would be raised.

In this connection, in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, the panel held that:

> "… The United States itself introduced the issue of treatment of evidence by revising the entire likelihood-of-subsidization determination and by changing the legal basis of the affirmative conclusion of likelihood of continuation or recurrence of subsidization. The United States therefore could have anticipated a claim on the USDOC's treatment of evidence. Accordingly, the Panel concludes that the European Communities' claim on evidence falls within this Panel's mandate."[139]

[136] WT/DS70/AB/RW, paragraph 41.
[137] WT/DS141/RW, paragraph 6.48.
[138] WT/DS141/AB/RW, paragraph 88.
[139] WT/DS212/RW, Report by the Panel, paragraph 7.71.

Furthermore, Argentina's arguments relating to the factor 1.56 were not brought up at a late stage of the Article 21.5 proceedings. Thus, due process has not been adversely affected, as shown by the fact that Chile was able to rebut these arguments in its First Written Submission.

In the light of the above, should the Panel consider that the arguments put forward by Argentina in relation to the factor 1.56 constitute a new claim, Argentina respectfully requests that the Panel consider the said arguments, since they fall within the terms of reference of the present Panel, and find that the factor 1.56 is a specific feature of the modified PBS that is impeding enhanced access to Chile's market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[140]

32. In paragraphs 196 to 201 of its rebuttal submission, Chile has explained the technical reasons for using a factor of 1.56 to assess the duties or rebates applicable to wheat flour. Chile has stated that the reason for increasing the duty (or rebate) by a certain proportion "is simply to maintain a similar nominal level of protection for both products". Chile argues that the factor it has used for wheat flour has undergone occasional adjustments to take account of the relation between the prices of the two products and since 1996 has been fixed at 1.56. Chile set the value at 1.56 taking into consideration the information available at that time, which "indicated that between January 1986 and December 1995 (the period of application of the band at that time), the average ratio of the price of flour to the price of wheat was 1.566". Can Argentina comment on Chile's assertions in this regard, as well as on the evidence submitted as Exhibits CHL-9, CHL-10 and CHL-11.

Answer to Question 32:

As Argentina has already stated, it is telling that Chile has not argued in its submissions that the factor of 1,56 does not distort the transmission of international prices. Indeed, Argentina showed how, for many reasons, the factor of 1,56 insulates the entry price for wheat flour from international price developments:

First, wheat flour exporters have to pay specific duties which not only bear no relation to the transaction value but also bear no relation to the product in question, since they are calculated on the basis of those applied to another product, namely, wheat.

Second, Chile's only justification for its application is that the factor has been fixed at 1,56 since 1996 because "between January 1986 and December 1995, the average ratio of the price of flour to the price of wheat was 1,566". Therefore, as Chile recognizes, the factor was "built into" the Chilean legislation and it has remained "unchanged" ever since.

In an effort to give any validity to its argument, Chile submitted Exhibits CHL-9 (Table of wholesale prices for wheat and wheat flour), CHL-10 (Graph of wholesale prices for wheat and wheat flour) and CHL-11 (Graph showing the relation between the price of wheat flour and the price of wheat) that show that the average ratio of the price of flour to the price of wheat was 1.566 between January 1986 and December 1995.

Those Exhibits reflect a price relation that was, at least, eight years old at the time of the entry into force of the amended PBS. Moreover, the delay with regard to any meaningful price relation has reached a decade at the time of these compliance proceedings.

[140] Argentina's First Written Submission, Section C.I.2.7.

On the other hand, as it has been already stated[141], in the case of Argentina, if the FOB prices of bread wheat and wheat flour[142] since the amended PBS came into force are taken into account, the average price ratio is 1.3, as it has been shown in Exhibit ARG-29.

Moreover, in paragraphs 196 to 201 Chile *has not* explained the "technical" reasons for using a factor of 1,56. In fact, Chile explicitly acknowledged that the reason for establishing the factor at 1,56 "…is simply to maintain a similar nominal level of protection for [wheat and wheat flour]".[143] Clearly, this is not a technical explanation. If Chile had provided the technical explanation given by the Chilean Executive it should be clear that the technical ratio is 1,3. In 1993, the Message of the Chilean Executive relating to the amendment of Article 12 of Law 18.525 stated: *"… It is proposed to establish specific duties and rebates on the importation of flour and calculate their amount by multiplying the duties and rebates determined for wheat by the coefficient 1.3* ***which is the technical production ratio*** *…"*[144] (Emphasis added)

Even if the reason for the establishment of the factor was the technical production ratio, the factor should not have "undergone occasional adjustments to take into account the relation between the prices of the two products". Technical ratios are not adjusted due to any price relation because they are just that: technical.

Thus, in addition to not having any relation to the transaction value, to the product in question, and to the technical production ratio between wheat and wheat flour, Chile applies a factor that is different from the price relation in, at least, one of Chile's markets of concern and, at the time of the entry into force of the amended PBS, reflected a price relation that was, at least, eight years old, and at the time of these compliance proceeding the delay with regard to any meaningful price relation has reached a decade. This is how Chile purports to justify the application of the factor of 1,56.

Therefore, the factor of 1.56 used to multiply the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour is not transparent and insulates the entry price for wheat flour from international price developments to an even greater extent than that for wheat, this being another specific feature of the amended PBS that prevents enhanced access to the Chilean market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

33. In paragraph 232 of its first submission, Argentina states that the factor applied to determine the specific duties of wheat flour was the "technical ratio established by Chile in Law 19.193 which, in 1997, extended the specific duties and tariff rebates of the price band for wheat to wheat flour". Chile has argued in footnote 38 of its first submission that Argentina's statement includes factual errors. Could Argentina please comment on Chile's argument, taking also into account Chile's Exhibit CHL-5.

Answer to Question 33:

On the basis of the history of the Chilean legislation, it might be speculated that the application of a factor to the specific duties established for wheat in order to determine the specific duties applicable to wheat flour could be based on a price relationship derived from a technical production ratio between wheat and wheat flour. Flour being a product of wheat, its price is naturally higher since to the cost of the wheat the millers add the cost of milling plus a profit margin. This relationship is valid

[141] First Written Submission by Argentina, para. 231.

[142] Both are products whose markets are considered to be of concern to Chile in establishing the reference prices of the amended PBS.

[143] Rebuttal by Chile, para. 197.

[144] "*History of the Law. Compilation of official texts of the parliamentary debate. Law 19.193*". Library of the National Congress. Santiago, Chile, 1997. See Exhibit ARG-37, page 19.

at international level. In the case of Argentina, if the FOB prices of bread wheat and wheat flour[145] since the amended PBS came into force are taken into account, the average price ratio is 1.3.[146] That is, the price of wheat flour is approximately 30 per cent higher than that of wheat.

Moreover, this was the technical ratio proposed by the Chilean Executive at the moment of passing the bill for the approval of Law 19.193 which, in 1993, extended the specific duties and tariff rebates of the price band for wheat to wheat flour. At that time, the Message of the Chilean Executive relating to the amendment of Article 12 of Law 18.525 stated: *"… It is proposed to establish specific duties and rebates on the importation of flour and calculate their amount by multiplying the duties and rebates determined for wheat by the coefficient 1.3* ***which is the technical production ratio*** *…"*[147] (Emphasis added)

Notwithstanding the above, the factor was fixed in 1,41 and that is what Chile shows in Exhibit CHL-5 containing Law No. 19.193.

However, successive amendments incorporated in the legislation led to an increase in this figure. Thus, Chile decided to raise the coefficient from 1.41 to 1.56 without any justification, thereby distorting –to an ever greater extent- the entry price for Chilean wheat flour imports.

As noted by a Chilean legislator during the debate on the bill – later Law 19.446 – extending the system for setting the duties and rebates for wheat flour:

> *"Has any justification been given for increasing the factor from 1.41 to 1.56? Absolutely none … The Executive has submitted a measure without providing any data that might support … the raising of the factor from 1.41 to 1.56 …"*[148]

Thus, in addition to not having any relation to the transaction value, to the product in question, and to the technical production ratio between wheat and wheat flour, Chile applies a factor that is different from the price relation in, at least, one of Chile's markets of concern and, at the time of the entry into force of the amended PBS, reflected a price relation that was, at least, eight years old, and at the time of these compliance proceeding the delay with regard to any meaningful price relation has reached a decade. This is how Chile purports to justify the application of the factor of 1,56.

Therefore, the factor of 1.56 used to multiply the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour is not transparent and insulates the entry price for wheat flour from international price developments to an even greater extent than that for wheat, this being another specific feature of the amended PBS that prevents enhanced access to the Chilean market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

34. Argentina has stated in paragraph 199 of its first submission that the way in which Chile determined the 0.985 adjustment factor for the band floor and ceiling prices was not transparent, that Chile did not explain how this factor was calculated, nor what basis there was for this factor in the legislation that established the amended PBS.

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[145] Both are products whose markets are considered to be of concern to Chile in establishing the reference prices of the amended PBS.

[146] See Exhibit ARG-29.

[147] "*History of the Law. Compilation of official texts of the parliamentary debate. Law 19.193*". Library of the National Congress. Santiago, Chile, 1997. See Exhibit ARG-37, page 19.

[148] Senator Piñera, 24 January 1996. In *"History of the Law. Compilation of official texts of the parliamentary debate. Law 19.446*". Library of the National Congress. Santiago, Chile, 1997. See Exhibit ARG-37, page 14.

(a) Could Argentina clarify whether in its view this particular fact *per se* would make the amended measure inconsistent with the WTO covered agreements.

Answer to Question 34(a):

The fact that "the way in which the factor 0.985 was determined is not transparent. Chile has not explained how it was calculated, or what basis there may be for this factor in the legislation that established the amended PBS" is a cumulative intransparent factor that makes the amended PBS inconsistent with the WTO covered agreements. It is another specific feature of Chile's amended PBS that renders the whole system inconsistent with Article 4.2 of the Agreement on Agriculture.

(b) If so, could Argentina identify the relevant legal basis.

Answer to Question 34(b):

The relevant legal basis in the WTO covered agreements not to maintain an intransparent border measure is Article 4.2 of the Agreement on Agriculture and its footnote 1.

When finding the original PBS inconsistent with Article 4.2, the Appellate Body, *inter alia*, held:

> "… [W]e place considerable importance on the intransparent … 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.
>
> In addition to the lack of transparency … 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 … is determined …"[149]

The fact that no legislation set out how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.

Similarly, the fact that Law 19.897 and Decree 831/2003 do not set out how the way in which the factor 0.985 was determined lead to the conclusion that the establishment of the factor 0.985 was not transparent.

Therefore, Chile is under the legal obligation to explain the way in which it determined the 0.985 adjustment factor for the band floor and ceiling prices.

(c) Could Argentina elaborate on whether such lack of explanation by Chile would *per se* affect market access for imports of agricultural products.

Answer to Question 34(c):

As pointed out above, the fact that no legislation *explained* how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.[150]

The Appellate Body found that the lack of transparency contributed to distorting the prices of imports by impeding the transmission of international prices to the domestic market.[151]

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[149] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.
[150] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.

Afterwards, in assessing the original PBS, the Appellate Body found that:

> "… 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 …"[152]

The Appellate Body emphasized that it reached its conclusion regarding the inconsistency with the WTO covered agreements

> "… on the basis of the particular configuration and interaction of all these specific features of Chile's price band system ..." [153]

Regarding the context of the terms in footnote 1, the original Panel in these proceedings found 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."[154]

Moreover, the original Panel also observed:

> "… several crucial stages of the operation of the Chilean PBS are characterized by a considerable lack of transparency and predictability. For instance, exporters can be expected to have difficulties knowing how the applicable Reference Price is arrived at."[155]

Those findings are completely applicable to the amended PBS.

Finally, in its analysis of whether the original PBS was a border measure similar to a variable import levy and a minimum import price, the original Panel in these proceedings found, in a finding not reversed by the Appellate Body:

> "… we have already highlighted the features of the Chilean PBS which reveal its intrinsically unstable, *intransparent* and unpredictable nature, as well as the insulation of the domestic market from international price competition which it achieves ..."[156] (Emphasis added).

Regardless the fact it did not find useful to endorse the characteristics identified by the Panel as being of a "fundamental" nature, the Appellate Body established in paragraph 234 of its Report:

> "… [T]his lack of transparency and this lack of predictability are liable to restrict the volume of imports … 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".

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[151] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[152] *Chile – Price Band System*, Report of the Appellate Body, para. 258.
[153] *Chile – Price Band System*, Report of the Appellate Body, para. 261.
[154] *Chile – Price Band System*, Report of the Panel, paragraph 7.34.
[155] *Chile – Price Band System*, Report of the Panel, paragraph 7.44.
[156] *Chile – Price Band System*, Report of the Panel, paragraph 7.61.

Moreover, in paragraph 258 of its Report the Appellate Body held that "… significant for traders, also, are the lack of transparency of certain features of Chile's price band system …"

As the Appellate Body held with respect to the original PBS[157] and Argentina maintains with respect to the amended PBS: "… we reach our conclusion [regarding the inconsistency with the WTO covered agreements] on the basis of the particular configuration and interaction of all these specific features of Chile's price band system …" (underlining added)

Consequently, the lack of explanation or justification as to the exact figure of the factor fixed by Chile leads to a lack of transparency which, according to the Appellate Body, affects market access for imports of wheat and wheat flour.

35. Could Argentina comment on Chile's argument in paragraph 103 of its first submission, that "a simple glance at the charts presented by Argentina" shows how the specific duties have remained constant for the duration of Law No. 19.897 and its Regulations, leading it to conclude that it is impossible to maintain a minimum import price.

Answer to Question 35:

Chile's argument in paragraph 103 of Chile's first submission is completely unsubstantiated. Argentina fully disagrees with that statement.

Paragraph 103 is within of Section 2 of part IV of Chile's first submission. Section 2 title reads "Appellate Body Analysis And Law 19.897 And Its Regulations". In this Section Chile gives its interpretation on the Appellate Body findings and how the legislation enforcing the amended PBS has allegedly addressed those findings. In particular, para. 103 is within subsection (b) "Minimum Import Prices". Section (b) includes only three paragraphs: 101, 102 and 103.

In para. 101 Chile provides the Appellate Body's alleged definition of minimum import prices and variable import levies:

> According to the Appellate Body, minimum import prices are not very different from variable levies, except that their mode of operation is less complicated. The main difference between the two is that variable 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". (footnote omitted).

In para. 102 Chile appears to provide the alleged definition of "variability":

> Thus, variability is the difference between the governmentally determined threshold and the actual transaction value, which will differ from one transaction to another and will hence change the duty without any legislative or administrative action.

That is Chile's whole basis to conclude in para. 103 that:

> A simple glance at the charts presented by Argentina shows how the specific duties remained constant and made it impossible to maintain a minimum import price for the duration of Law 19.897 and its Regulations.

[157] *Chile – Price Band System*, Report of the Appellate Body, para. 261.

That's all. No more explanations. No more comments. End of Section IV.2.b. End of the story.

Chile's line of argumentation speaks for itself. Chile's conclusion in para. 103 is not based on evidence. It is not even reasoned. Although Chile refers to the "charts presented by Argentina", there is no single Chart identified or cited by Chile in para. 103 or in the section in which para. 103 is located. In fact, there is not even one reference to any Chart presented by Argentina under whole Section "Appellate Body Analysis And Law 19.897 And Its Regulations". Chile's "glance" at Argentina's charts must have been so "simple" that Chile probably supposed it did not need to provide further explanations. This is how Chile purports to convince this Panel that the amended PBS is not a border measure similar to a minimum import price.

Argentina was required by the Panel to make comments on Chile's assertion. The lack of clarity and objectivity of Chile's argument makes it difficult to comment on. Chile states that "…it impossible to maintain a minimum import price for the duration of Law 19.897 and its Regulations". Argentina would kindly refer the Panel to the sections of its submissions and oral statements where Argentina clarified why the amended PBS is a border measure similar to a minimum import price, including references to the graphs, charts, statistics and mathematic formulas Chile failed to identify.[158]

36. Argentina has quoted, in paragraph 272 of its first submission, paragraph 234 of the Appellate Body's report in *Chile – Price Band System*, stating that "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". Does Argentina consider that an exporter would not know better and reasonably predict what the amount of duties will be when the formula to calculate those duties is published, fixed and capped at 31.5 per cent, even if specific figures in the formula are set by the importing country without providing a justification?

Answer to Question 36:

The fact that the formula used to calculate the amount of duties is published, fixed and capped at 31.5 per cent is not relevant to whether an exporter might know better and reasonably predict what the amount of duties will be in the future.

The source of the lack of transparency and predictability of the amount of the duties and the inconsistency related to it, as Argentina has explained, lays elsewhere.

Argentina's argument is that "the lack of transparency and the lack of predictability of the duty level that result from the amended PBS are additional features that undermine the object and purpose of Article 4 of the Agreement on Agriculture".[159] This is because 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, as it is the case with the amended PBS.[160]

The Appellate Body found the original PBS inconsistent with Article 4.2 of the *Agreement on Agriculture* because, *inter alia*, the lack of transparency and the lack of predictability of the duty level was an additional feature that undermined the objective of achieving improved access conditions for imports of agricultural products.[161] Thus, the issue was not whether the formula to calculate those duties was published, fixed and capped at 31.5 per cent, but whether the *duty level* resulting from the amended PBS was transparent or predictable, which, in the case of the PBS, it was not.

[158] Argentina's First Written Submission, para. 99-124, 159-173; Rebuttal by Argentina, paras. 160-205, Oral Statement by Argentina, para. 32-41, 85-90; and Closing Statement by Argentina, para. 21

[159] First Written Submission by Argentina, para. 271 and ss.

[160] Rebuttal by Argentina, para. 128 and ss., Oral Statement by Argentina, para. 76 and ss.

[161] *Chile – Price Band System*, Report of the Appellate Body, para. 234.

Argentina has extensively explained why the level of duties resulting from the amended PBS is neither transparent nor predictable as well.[162]

The fact that the formula is published does not eliminate the distortion in the transmission of world market prices to Chile's market, nor it makes the PBS more transparent or predictable. The formula is a means to the lack of transparency and predictability in the level of duties, which still remain. When the Appellate Body made its assessment about whether the original PBS was similar to a variable import levy it said:

> … [T]he presence of a formula causing automatic and continuous variability of duties is a *necessary* … condition for a particular measure to be a "variable import levy" within the meaning of footnote 1.[163]

For the Appellate Body the "presence" of a formula causing automatic and continuous variability of duties was a necessary condition for a particular measure to be a "variable import levy" within the meaning of footnote 1. The Appellate Body did not specified whether that "presence" had to be "published". Thus, the fact that the formula used to calculate the amount of duties is published is not relevant to whether an exporter might know better and reasonably predict what the amount of duties will be in the future.

Although the formula is fixed, the relevant issue is that the reference prices and specific duties are not fixed. They are variable and they are fundamental components of that formula. In particular, the specific duties are liable to vary every two months as far as the reference price, when varying, falls below the floor price. In the amended PBS it is *guaranteed* that, if the required conditions are met, an exporter will mandatorily face a different duty every two months.[164] In fact, contrary to what Chile has asserted in its submissions[165], the PBS Law and Regulation give no discretion to Chile to decide whether or not to impose the duties: if the reference prices fall below the band floor, specific duties will be levied. The lack of transparency and predictability are inherent to the amended PBS, because of the reasons Argentina has described in the answer to this question and along its submissions.[166]

With regard to the fact that the duty level is capped at 31.5 per cent, the Appellate Body stated that "… the existence of [a] tariff binding will not eliminate the distortion in the transmission of world market prices to Chile's market…where the combination of the duties resulting from Chile's price band system, when added to the applied *ad valorem* duty rate, remains below Chile's bound rate of 31,5 per cent *ad valorem*".[167] In this regard, the lack of transparency and predictability in the level of duties, even below Chile's bound rate of 31,5 per cent, still remains. The Appellate Body, accordingly observed:

> "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

[162] First Written Submission by Argentina, para. 271 and ss., Rebuttal by Argentina, para. 89 and ss, 138 and ss.
[163] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[164] Rebuttal by Argentina, para. 145.
[165] First Written Submission by Chile, para. 93 and Rebuttal by Chile para. 101 and 120.
[166] First Written Submission by Argentina, para. 271 and ss., Rebuttal by Argentina, para. 89 and ss, 138 and ss.
[167] *Chile – Price Band System*, Report of the Appellate Body, para. 257.

> import levy' even if the products to which the measure applied were subject to tariff bindings. 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."[168]

The presence or absence of a cap to the tariff binding is not essential in determining whether or not Chile's PBS is similar to a measure prohibited by Article 4.2 or if the level of the duties is transparent or predictable. That argument advanced by Chile could not persuade the Appellate Body during the original proceeding. Argentina would kindly refer the Panel to the further analysis the Appellate Body developed with respect to this issue in paras. 255 to 259 to its Report.

37. In paragraph 23 of its report in *Chile – Price Band System*, the Appellate Body stated that "[while t]here is no Chilean legislation or regulation, which specifies the international 'markets of concern' to be used to calculate the applicable reference prices" it seemed, nevertheless, "that the markets and qualities chosen [were] intended to be representative of products actually 'liable' to be imported to Chile." Argentina notes as much in paragraph 39 of its first written submission. Does Argentina consider that the markets and the qualities chosen in the amended PBS to calculate the reference prices are likewise intended to be representative of products actually "liable" to be imported into Chile? If not, in what respect does the fact that markets and qualities are now explicitly indicated make it less likely than before that they would be intended to be representative?

Answer to Question 37:

The markets and the qualities chosen in the amended PBS to calculate the reference prices *are not* representative of products actually "liable" to be imported into Chile. The fact that markets and qualities are now explicitly indicated has only clarify that, by not taking into account all the relevant markets and qualities of concern for the calculation of the reference prices, the amended PBS insulates Chile's market from international price developments.

In its First Written Submission, in its Rebuttal and its Oral Statement, Argentina pointed out the problems with the markets and the qualities chosen in the amended PBS to calculate the reference prices.

The fact that the amended PBS provides that the same reference price still applies to all goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value of the shipment, means that the Chilean market is disconnected from international price developments, as referred by Argentina in its answer to question N° 15. Argentina has demonstrated that the amended PBS reference prices, by the way they are established, are neither transparent nor predictable and insulate the Chilean market from international price developments.

Regarding the fact that the amended PBS provides that the same reference price still applies to all goods falling within the same product category, regardless of its origin, Argentina has already highlighted that, contrary to what the Appellate Body established,[169] Chile did not explain how the qualities and markets of concern were selected. As in the case of the PBS in its original form, there is no legislation or regulation governing the amended PBS that specifies how or on what basis the "markets of concern" and "qualities of concern" are selected. Therefore, the reference price selection process has not been transparent.

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[168] *Chile – Price Band System*, Report of the Appellate Body, para. 254 (footnotes omitted)
[169] *Chile – Price Band System*, Report of the Appellate Body, para 249.

The disconnection of the amended PBS reference prices from the international price developments also derives from the fact that Chile's amended PBS establishes the references prices based on only *two* qualities of concern, namely "Bread Wheat, Argentine Port" and "Soft Red Winter". However, as it was already stated, there are many types or qualities involved in the international trade of wheat. As Argentina has shown from Chile's own records[170], there are at least two other qualities or types of wheat relevant for Chile ("Soft White Winter No 2" and "Western White Winter No 2").

What is worse is that among the -at least- four relevant qualities and markets of concern shown by Argentina on the basis of Chile's own records, Chile chose those qualities that since 1991 have been the lowest priced. Thus, the gap between the reference price and the floor price is further expanded, more duties are levied and the entry price is higher than if Chile took into account all the qualities of concern, disconnecting also in this way the amended PBS reference prices from the international price developments.

Even if that was not enough, Argentina has also shown[171] that Chile *does* actually import wheat of qualities different from those used for the calculation of the reference prices. Thus, not only Chile imports wheat of qualities different from those taken into account for the establishment of the reference prices but also Chile applies to those imports reference prices based on the two predetermined qualities of concern established by the amended PBS.

On the other hand, the reference prices also insulate the Chilean market from international price developments as a result of their being established on the basis of the average of the daily prices recorded on only two predetermined markets. That predetermination of the markets prevents Chile from ensuring that the reference prices are representative of actual world market prices.

Regarding the insulation consequences deriving from the fact that the amended PBS reference prices are based on only two predetermined markets of concern, Argentina has already recalled that bread wheat is sold -at least- in two other markets than the ones selected by Chile and which are not reflected on the reference price: Chicago and Kansas.[172] Thus, the fact that the legislation specifies that only two markets are to be regarded as being of concern for the determination of reference prices disconnects Chile's domestic market from international price developments.

Argentina has already pointed out the problems related to the selection of the daily price quoted for "*Bread Wheat, Argentine Port*" as the basis for establishing the market of concern for the first half of the year is not transparent either, since the prices vary with the choice of Argentine port. Moreover, as Argentina has demonstrated in Exhibit ARG-32, the quotation "*Bread Wheat, Argentine Port*" (or its translation to Spanish "Trigo Pan Puerto Argentino") is not published by SAGPyA on a daily basis.[173] Chile did not provide evidence of the quotation "*Bread Wheat, Argentine Port*", under that specific denomination, being published by SAGPyA on a daily basis, which is the only basis on which the 15-day reference prices can be calculated.[174]

[170] Exhibit ARG-33.
[171] Exhibit ARG-34.
[172] First Written Submission by Argentina, para. 218.
[173] See SAGPyA's web page: http://www.sagpya.mecon.gov.ar/scripts/0-2/fobtodo.asp
[174] The only evidence submitted by Chile arguing that SAGPyA publishes the quotation "*Bread Wheat, Argentine Port*" (FOB Puertos Argentinos), CHL-12 and CHL-14, shows FOB prices on a monthly basis. Argentina stresses again that the reference price is calculated on the average of a 15-day period. Therefore, only quotations on a daily basis, as the ones submitted by Argentina in Exhibit ARG-32, are useful for that calculation.

Therefore, unless Argentina had initiated this dispute, wheat and wheat flour exporters from all over the world would have not known where to look for the future reference price. No matter what "abilities" and market knowledge the exporters had[175], it would have been very difficult for them to establish the future amount of duties resulting from the difference between an intransparent future reference price and the floor price. In fact, wheat and wheat flour exporters will not find the quotation "*Bread Wheat, Argentine Port*" ("Trigo Pan Puerto Argentino") on a daily basis because it is not published by SAGPyA on that basis.

Regarding the problems with the source for the establishment of the reference prices for the second semester (Soft Red Winter No.2 wheat), Chile gave an *ex-post* clarification stating that it uses the information from the Chicago Board of Trade (http://www.cbot.com).[176] In this case, as Argentina has already pointed out, the information is not publicly available; it is paid information. It is an extra charge exporters face for accessing the Chilean market.[177]

Summing up, through the reference prices, the amended PBS impedes the transmission to the Chilean market of the prices of other qualities of wheat. By not taking into account all the relevant markets and qualities of concern for the calculation of the reference prices, the amended PBS also insulates Chile's market from international price developments. In fact, if an exporter ships any other type or quality of wheat rather than "Bread Wheat, Argentine Port" or "Soft Red Winter No. 2", Chile will apply to that shipment a reference price and levy specific duties based on one of those two qualities, different from the quality actually being imported.

It is worth recalling at this point what the Appellate Body found:

> "… the 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."[178]

38. With respect to the previous Question, can Argentina comment on the relevance of its assertion during the substantive meeting with the Panel, regarding the fact that the amended PBS would not reflect Canada's relevance in Chilean foreign trade of wheat, nor would Canadian prices be reflected in Chile's internal markets.

Answer to Question 38:

Regarding the fact that the amended PBS would not reflect Canada's relevance in Chilean foreign trade of wheat, nor would Canadian prices be reflected in Chile's internal markets, as Argentina asserted during the substantive meeting with the Panel, that is another proof that the amended PBS is certainly *not* representative of prices found in *all* markets of concern and of the current world market price.[179]

Chile has tried to justify the establishment of the reference prices based on FOB prices in Argentina and United States, because according to Chile, "[i]n the last six years (2000-2006) 40 per cent of Chilean wheat imports came from the United States and 31 per cent from Argentina"[180], Argentina has

[175] First Written Submission by Chile, para. 162.
[176] Rebuttal by Chile, para. 73.
[177] See http://www.esignal.com/cbot/pricing/default.asp. Esignal.com is a sub page (link) of CBOT.com where pricing information is provided.
[178] *Chile – Price Band System*, Report of the Appellate Body, para. 249 (Emphasis in the original, underlining added).
[179] *Chile – Price Band System*, Report of the Appellate Body, para. 249.
[180] Rebuttal by Chile, para. 72.

demonstrated that, according to Chile's official source, for the period during which the amended PBS has been in force[181], Canada has always been a larger exporter of wheat to Chile than the United States, either in volume as well as in amount.

In Exhibit ARG-31, first page, it is possible to observe that in 2004 Canada exported around 54 thousand tons of wheat while the United States accounted for almost 40 thousand tons. The second page of the same Exhibit shows wheat imports to Chile for 2005, where the difference between Canada and the United States is even larger: Canada accounted for almost 40 thousand tons while the United States accounted for around 20 thousand tons.[182]

Thus, it is clear that Canada has been a relevant exporter to Chile. However for Chile's PBS, this is meaningless. Although Canada is certainly a market of concern for Chile, the amended PBS will never reflect Canada's relevance in Chilean foreign trade of wheat, nor Canadian prices will be reflected in Chile's internal markets.

Therefore, Chile's argument that the amended PBS "reference prices now correspond to f.o.b. prices on the two markets of most concern for Chile"[183] is baseless.

To put it in the Appellate Body words, it is not by any means certain that the reference price used under the PBS is representative of the current world market price, and it is certainly *not* representative of prices in *all* markets of concern.[184]

39. Argentina has noted in paragraphs 41 and 219 of its first submission and then in paragraphs 131 and 132 of its rebuttal, that under the amended PBS there is no indication of which Argentine port is of concern for the purposes of calculating the reference price. Could Argentina clarify whether, in its view, Chile is under a legal obligation to identify such ports and, if so, could Argentina identify the relevant legal basis in the WTO covered agreements.

Answer to Question 39:

Chile's obligation is to provide a transparent and predictable border measure. The relevant legal basis in the WTO covered agreements not to maintain an intransparent and unpredictable border measure is Article 4.2 of the Agreement on Agriculture and its footnote 1.

When finding the original PBS inconsistent with Article 4.2, the Appellate Body, *inter alia*, held:

> "… [W]e place considerable importance on the intransparent … 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.
>
> In addition to the lack of transparency … 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 …"[185]

[181] Exhibit ARG-31.

[182] In the written version of the Oral Statement by Argentina, para. 54, where it reads "million" it should be read "thousand"; where it reads "millions" it should be read "thousands". Argentina's argument is not altered in its substance.

[183] Rebuttal by Chile, para. 72.

[184] *Chile – Price Band System*, Report of the Appellate Body, para 249.

[185] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.

The fact that no legislation set out how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.

Similarly, the fact that Law 19.897 and Decree 831/2003 do not set out which Argentine port is of concern for the purposes of calculating the reference price lead to the conclusion that the calculation of the reference prices is not transparent.

Therefore, Chile is under the legal obligation to indicate which Argentine port is of concern for the purposes of calculating the reference price.

Further to Law N° 19.897, Decree N° 831/2003 states in its Article 7 that the reference price for wheat will correspond to the average daily prices recorded in the *most relevant markets* over a period of 15 calendar days counted backwards from the tenth day of the month in which the decree is published. In its turn, Article 8 establish the most relevant markets for wheat in Chile and provide that, during the application period extending from 16 December to 15 June of the following year, the most relevant market will be that for *Argentine bread wheat* and the prices will correspond to the daily prices quoted for that product *f.o.b. Argentine port*.

Argentina has already pointed out the problems with the sources for the reference price.

Chile stated that for the first semester "the source of information is the Department of Agriculture, Livestock, Fisheries and Food (http://www.sagpya.mecon.gov.ar/) of the Ministry of the Economy, which regularly publishes figures for *bread wheat, Argentine port* (so-called *Official Fob Price*) in the form of an average for various ports".[186]

However, Argentina has already shown in Exhibit ARG-32 that the quotation "Bread Wheat, Argentine Port" is not published by SAGPyA on a daily basis.[187] Chile did not provide evidence of the quotation "*Bread Wheat, Argentine Port*", under that specific denomination, being published by SAGPyA on a daily basis, which is the only basis on which the 15-day reference prices can be calculated.[188]

Therefore, unless Argentina had initiated this dispute, wheat and wheat flour exporters from all over the world would have not known where to look for the future reference price. No matter what "abilities" and market knowledge the exporters had[189], it would have been very difficult for them to establish the future amount of duties resulting from the difference between an intransparent future reference price and the floor price. Now, it is clear that SAGPyA does not publish what Chile affirms. In fact, wheat and wheat flour exporters will not find the quotation "*Bread Wheat, Argentine Port*" ("Trigo Pan Puerto Argentino") on a daily basis because it is not published by SAGPyA on that basis.

In fact, the legislation enforcing the amended PBS is intransparent and inaccurate and leads to confusion. Thus, the fact that that under the amended PBS there is no indication of which Argentine port is of concern for the purposes of calculating the reference price is another cumulative factor that makes the amended PBS inconsistent with Article 4.2 of the Agreement on Agriculture.

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[186] Rebuttal by Chile, para. 73.

[187] See SAGPyA's web page: http://www.sagpya.mecon.gov.ar/scripts/0-2/fobtodo.asp

[188] The only evidence submitted by Chile arguing that SAGPyA publishes the quotation "*Bread Wheat, Argentine Port*" (FOB Puertos Argentinos), CHL-12 and CHL-14, shows FOB prices on a monthly basis. Argentina stresses again that the reference price is calculated on the average of a 15-day period. Therefore, only quotations on a daily basis, as the ones submitted by Argentina in Exhibit ARG-32, are useful for that calculation.

[189] First Written Submission by Chile, para. 162.

As the Appellate Body found with respect to the original PBS and Argentina maintains with respect to the amended PBS,

> "… 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… [A]n 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. 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."[190]

40. Argentina has noted in paragraph 66 of its first submission that "[s]o far the bimonthly decrees [under the amended PBS] appear not to indicate the reference price calculated for each period". Could Argentina clarify whether, in its view, this particular fact *per se* would make the amended measure inconsistent with the WTO covered agreements and, if so, could Argentina identify the relevant legal basis.

Answer to Question 40:

The particular fact that the bimonthly decrees appear not to indicate the reference price calculated for each period is another cumulative factor that makes the amended PBS inconsistent with the WTO covered agreements.

The legal basis in the WTO covered agreements not to maintain a border measure intransparent and unpredictable is Article 4.2 of the Agreement on Agriculture and its footnote 1.

Regarding the context of the terms in footnote 1, the original Panel in these proceedings found 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."[191]

Moreover, the original Panel also observed:

> "… several crucial stages of the operation of the Chilean PBS are characterized by a considerable lack of transparency and predictability. For instance, exporters can be expected to have difficulties knowing how the applicable Reference Price is arrived at."[192]

Those findings are completely applicable to the amended PBS.

Finally, in its analysis of whether the original PBS was a border measure similar to a variable import levy and a minimum import price, the original Panel in these proceedings found, in a finding not reversed by the Appellate Body:

> "… we have already highlighted the features of the Chilean PBS which reveal its intrinsically unstable, *intransparent* and unpredictable nature, as well as the

[190] *Chile – Price Band System*, Report of the Appellate Body, para. 234. (Footnote omitted).
[191] *Chile – Price Band System*, Report of the Panel, paragraph 7.34.
[192] *Chile – Price Band System*, Report of the Panel, paragraph 7.44.

> insulation of the domestic market from international price competition which it achieves ..."[193] (Emphasis added)

Regardless the fact it did not find useful to endorse the characteristics identified by the Panel as being of a "fundamental" nature, the Appellate Body established in paragraph 234 of its Report:

> "… [T]his lack of transparency and this lack of predictability are liable to restrict the volume of imports … 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."

Moreover, in paragraph 258 of its Report the Appellate Body held:

> "… significant for traders, also, are the lack of transparency of certain features of Chile's price band system …"

As the Appellate Body held with respect to the original PBS[194] and Argentina maintains with respect to the amended PBS:

> "… we reach our conclusion [regarding the inconsistency with the WTO covered agreements] on the basis of the particular configuration and interaction of all these specific features of Chile's price band system …" (Underlining added)

41. Argentina has noted in paragraph 183 of its first submission that "the amended PBS does not ensure that the price of wheat flour imports falls in tandem with the falling prices of wheat flour on the world market". Argentina has added in paragraph 187 of its first submission that, "[b]y not fully reflecting falls in world prices in domestic prices and impeding the transmission of international price developments to the Chilean market..." the amended PBS is inconsistent with Article 4.2 of the Agreement on Agriculture. Could Argentina clarify whether, in its view, there is a legal obligation under the WTO covered agreements that a measure such as Chile's PBS should: (i) ensure that entry prices of imports rise or fall in tandem with rising or falling world market prices; (ii) fully reflect any increases or falls in world prices in domestic prices; and, (iii) ensure the transmission of international price developments to the relevant domestic market. If so, could Argentina identify the relevant legal basis for such obligation.

Answer to Question 41:

The legal basis for such an obligation is Article 4 of the *Agreement on Agriculture*, which is the main provision of Part III of that Agreement and, as its title indicates, deals with "Market Access". The provision that more specifically address the obligation reproduced in the Panel's question 41 is Article 4.2.

Article 4.2 states in its relevant part:

> 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.

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[193] *Chile – Price Band System*, Report of the Panel, paragraph 7.61.
[194] *Chile – Price Band System*, Report of the Appellate Body, para. 261.

> [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…

Footnote 1 together with Article 4.2 provide that, by not being ordinary customs duties, 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, shall not be maintained, resorted to, or reverted to.

In other words, all the measures listed in footnote (including *similar* border measures) are inconsistent with Article 4.2 because they are not ordinary customs duties and cannot be maintained, resorted to, or reverted to.

The Appellate Body stated that those measures have also in common that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market:

> "… 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."[195] (Underlining added)

If the measures listed in footnote 1 impede the transmission of world market prices to the domestic market and by being maintained, resorted to or reverted to, violate Article 4.2, therefore Article 4.2 includes the legal obligation that a border measure (such as Chile's PBS) should ensure the transmission of international price developments to the relevant domestic market.

The Appellate Body also found that:

> "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 predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.[196] (footnotes omitted, underlining added)

If variable import levies, by lacking transparency and predictability, impede the transmission international prices to the domestic market, and by being maintained, resorted to or reverted to, violate Article 4.2, therefore Article 4.2 includes the legal obligation that a border measure (such as Chile's PBS) should ensure the transmission of international prices to the domestic market.

[195] *Chile – Price Band System*, Report of the Appellate Body, para. 227.
[196] *Chile – Price Band System*, Report of the Appellate Body, para. 233.

The Appellate Body went further and found:

> 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.[197]

If the measures listed in footnote 1 have the effect of impeding the transmission of international price developments to the domestic market and by being maintained, resorted to or reverted to, violate Article 4.2, therefore Article 4.2 includes the legal obligation that a border measure (such as Chile's PBS) should ensure the transmission of international price developments to the relevant domestic market.

Furthermore, the Appellate Body highlighted several characteristics of the original PBS that had the effect of impeding the transmission of international price development to Chile's market:

> "… 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.[198]
>
> … 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'."[199]

In the end, just one paragraph after the above quoted, the Appellate Body concluded that the way Chile's original PBS was designed (including the particular features identified) and its overall nature

> "… [were] 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."

The features identified by the Appellate Body in paras. 250 and 251 cited above led to the conclusion that Chile's price band system – in its particular features – was "similar border measure" within the meaning of footnote 1 to Article 4.2. Argentina recalls that the Appellate Body said that all of the border measures listed in footnote 1 "… 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."[200] Therefore, Article 4.2 includes the legal obligation that a border measure (such as Chile's PBS) should ensure the transmission of international price developments to the relevant domestic market.

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[197] *Chile – Price Band System*, Report of the Appellate Body, para. 246.
[198] *Chile – Price Band System*, Report of the Appellate Body, para. 250.
[199] *Chile – Price Band System*, Report of the Appellate Body, para. 251.
[200] *Chile – Price Band System*, Report of the Appellate Body, para. 227.

Article 4.2 of the Agreement on Agriculture also includes the legal obligation that a border measure (such as Chile's PBS) should ensure that entry prices of imports rise or fall in tandem with rising or falling world market prices and reflect falls in world prices in domestic prices. In this regard, the Appellate Body said:

> Therefore, contrary to what Chile contends, Chile's price band system does not simply ensure a reasonable margin of fluctuation of domestic prices. 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 overall entry price of that shipment that *rises* rather than *falls*. 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". 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.[201] (emphasis in the original; footnotes omitted; underlining added)

In sum, in the cited paragraph, the Appellate Body found that, due to the original PBS, when international prices fell, the total duties applied to particular shipments would, in many cases, result in an overall entry price of that shipment that rose rather than fell. In addition, the Appellate Body found that the original PBS did not ensure that the entry price of imports to Chile fell in tandem with falling world market prices. Those findings (among others) led to the conclusion that Chile's original PBS was 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*:

> 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.
>
> 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

[201] *Chile – Price Band System*, Report of the Appellate Body, para. 260.

> 'minimum import prices'" within the meaning of footnote 1 and Article 4.2 of the *Agreement on Agriculture*.[202] (Underlining added)

Thus, the fact that due to the original PBS when international prices fell, the total duties applied to particular shipments would, in many cases, result in an overall entry price of that shipment that rose rather than fell, and the fact that the original PBS did not ensure that the entry price of imports to Chile fell in tandem with falling world market prices, led to the conclusion that Chile's original PBS was 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*. Therefore, this provision includes the legal obligation that a border measure (such as Chile's PBS) should ensure that entry prices of imports rise or fall in tandem with rising or falling world market prices and reflect falls in world prices in domestic prices.

42. In paragraph 92 of its first submission, Argentina reads paragraph 260 of the Appellate Body's report in *Chile – Price Band System*, as stating that under the previous PBS "the duties resulting from the System ensured that falls in world prices were not *fully* reflected in domestic prices" (original emphasis). Please contrast this reading with the Appellate Body's statement in the same paragraph that a "reasonable margin of fluctuation of domestic prices... would mean that duties resulting from Chile's [PBS] would ensure that declines in world prices would not be *fully* reflected in domestic prices".

Answer to Question 42:

Argentina's main argument in relation to this point is that the amended PBS disconnects the Chilean market from international price developments in a way that insulates the Chilean market from the transmission of international prices[203], in a manner similar to the original PBS.

Appellate Body's statement that a "reasonable margin of fluctuation of domestic prices... would mean that duties resulting from Chile's [PBS] would ensure that declines in world prices would not be *fully* reflected in domestic prices" means that a "moderat[ion of] the effect of fluctuations in world market prices on Chile's market"[204] might be reasonable. However, when that statement is read in the context of the rest of paragraph 260, it is clear that the specific duties resulting from the Chilean price band system tended to elevate the entry price of Chilean imports above the price band floor; that the Chilean price band system tended to "overcompensate" for the effect of decreases in international prices on the domestic market when weekly reference prices are set below the price band floor; that the entry price of Chilean imports under Chile's price band system was even higher than if Chile simply applied a minimum import price at the level of the price band floor; and that the PBS did not ensure that the entry price of imports to Chile fell in tandem with falling world market prices. In that context, that "reasonable margin of fluctuation" and that reflection of "declines in world prices … in domestic prices" did not exist at all.

Argentina has demonstrated that the amended PBS *continues* to elevate the entry price of imports to Chile above the price band floor; *continues* to "overcompensate" for the effect of decreases in international prices on the domestic market when reference prices are set below the price band floor; *continues* to make the entry price of Chilean imports higher than if Chile applied a minimum import price at the level of the price band floor, and *continues* failing to ensure that the entry price of imports to Chile falls in tandem with falling world market prices. On top of that Argentina has demonstrated

[202] *Chile – Price Band System*, Report of the Appellate Body, para. 261-262.
[203] See for example, Argentina's First Written Submission, paras. 95 and 98 and Argentina's Oral Statement paras. 121-122.
[204] *Chile – Price Band System*, Report of the Appellate Body, para. 260.

why the amended PBS is a border measure similar to a minimum import price or a variable import levy.

In this respect, it is clear that Chile's amended PBS does not merely *moderate* the effect of fluctuations in world market prices on Chile's market. In fact, that "reasonable margin of fluctuation" and that reflection of "declines in world prices … in domestic prices" the Appellate Body referred to does not exist at all in the amended PBS either.

43. Does Argentina consider that the fixing of price bands for a period of 11 years constitutes a factor of insulation, despite the scheduled reduction of the band's floor and ceiling by way of the application of the 0.985 adjustment factor? How would Argentina define "insulation" *versus* "stability", in view of Chile's explanations in paragraphs 183 to 192 of its first submission, regarding "gradual" market access improvement?

Answer to Question 43:

The fixing of price bands for a period of 11 years *does* constitute a factor of insulation, despite the scheduled reduction of the band's floor and ceiling by way of the application of the 0.985 adjustment factor because, as it was explained in Argentina's answer to question 34 (c), due to the factor of 0.985 the band floor and ceiling prices vary *without any relation* to world market or historical prices. Neither do they vary as a function of the transaction value, a characteristic shared by the entire PBS.[205]

Thus, the floor and ceiling prices, two fundamental elements (together with the reference prices) for establishing the level of the specific duties applicable to wheat and wheat flour, will decrease, as from December 2007, in a fixed, automatic and autonomous manner. That is to say, the way in which the floor and ceiling prices are to be adjusted bears no relation to international price developments.

Even if this relation were based on an assumed decline in the international prices of wheat after 2007, it is surprising how Chile could, in 2003, predict the course of those prices over a period beginning four (4) years later and allegedly ending eleven (11) years after the establishment of the amended PBS.

The fixing of price bands for a period of 11 years has transformed the PBS into a more rigid and inflexible system. Indeed, the 11-year period has the side effect of aggravating the distortion of domestic price vis-à-vis international ones.

In practice, the Chilean market will be insulated from fluctuations in the world prices for eleven years or even more, taking into account that the amended PBS has no end date.

As Brazil stated, "… Should there be a significant downward movement in the international wheat prices, the 0.985 factor may not be sufficient to account for the necessary reductions in the lower and upper thresholds of the price bands. Hence, in spite of the application of the 0.985 multiplier, one of the main elements of the PBS (the bands themselves) will remain virtually unchanged for more than a

[205] Note that the Appellate Body held that even if it were assumed that one feature of Chile's price band system was not similar to the features of "variable import levies" and "minimum import prices" because the thresholds of Chile's price bands varied in relation to—albeit historic—world market prices rather than domestic target prices, this would not change its overall assessment of Chile's price band system (Report of the Appellate Body, paragraph 251).

decade, preventing the fluctuation of international prices from being transmitted to the Chilean market."[206]

Chile's explanations in paragraphs 183 to 192 of its first submission regarding "gradual" market access improvement are baseless. As Argentina has already pointed out, there are several errors in those explanations:

First, what Chile argues that "… the period of application of duties under the new regime was shorter by 10 weeks, while that of rebates was longer by 8 weeks, which represents an effective increase in favourable conditions for grain imports compared to what might have occurred under the mechanism prior to modification", amounts to saying that exporters of wheat and wheat flour to Chile should not be concerned about the distorting effects of the modified PBS, since under the modified PBS the distorting effects resulting from the application of specific duties occurred "only" 17 times, whereas under the original PBS they would have occurred 27 times. That cannot obviously represent an improvement in conditions of access. Wheat and wheat flour exporters are not rejoiced because they have faced distortions resulting from specific duties for "only" 17 weeks. These are Chile's grounds for arguing that the modified PBS has improved conditions of access. Chile's argument is without foundation.

Access conditions continue to be unfavourable despite the duties *allegedly* being applied on fewer occasions than in the case of the original PBS. Chile's reasoning has no basis in the WTO Agreements and, in particular, not in the DSU or the *Agreement on Agriculture*. A measure taken to comply is not "less" inconsistent because the inconsistency occurs less frequently than in the case of the original measure. There is no basis for drawing such a conclusion.

Second, as Argentina has already stated in its Rebuttal, it is interesting to note the table which Chile itself introduces in paragraph 183, which confirms that the modified PBS is very similar to the original PBS. The period between 16 December 2003 and 13 January 2004, during which the modified PBS was not applied, was 57 weeks long. This means that the PBS was applied for 52 weeks (out of a total of 109). Following the same reasoning, the original PBS would not have been applied during 55 weeks, that is to say it would have been applied during 54. Thus, the original PBS would have been applied for 50 per cent of the time, whereas the modified PBS was applied for 48 per cent of the time. Clearly, the two systems are very similar and, therefore, the degrees of distortion they cause are also similar.

Third, regarding Chile's argument that "[T]he scheduled reduction of the floor and ceiling prices is a scenario under which, irrespective of international price levels, the amount of the specific duties will increasingly diminish compared to those currently being established, just as the probability of duties actually being assessed will increasingly diminish"[207], Argentina has already stated that that argument is simply wrong. The reality is that neither the amount of the specific duties nor the probability of their being assessed is "irrespective of international price levels" and indeed the opposite is true: the amount of the specific duties and the probability of their being assessed *do* depend on international price levels.

Both Law 19.897 and Decree 831/2003 refer to precisely that, i.e., the dependence of the amount of the specific duties on international price levels in the following terms: "The amount of such duties and rebates shall be established … in terms which, when applied to the price levels attained by the products in question on the international markets, allow domestic market stability." (Underlining added)

[206] *Chile – Price Band System* … Recourse to Article 21.5 of the DSU, Third Party Submission by Brazil, paragraph 15.

[207] Chile's First Written Submission, paragraph 186.

In addition, as Argentina showed in its Rebuttal , this is also clear from the following simple example:

According to the "History of application of the modified PBS"[208], between 16 December 2004 and 15 December 2005 the PBS floor price for wheat was (and is) US$128 per tonne. The reference price between 16 December 2004 and 15 February 2005 was established at US$114.50 per tonne. This gave a specific duty of US$14.30 per tonne.

In accordance with Art. 6 of Decree 831/2003, between 16 December 2011 and 15 December 2012 the PBS floor price for wheat will be US$118 per tonne. If the reference price is established at US$103.7 per tonne during any two months of that year, the specific duty during that period will be US$14.30 per tonne, the same as established on 16 December 2004. Even if the reference price is less than US$103.7 per tonne, the specific duty will naturally be higher and not lower, as Chile argues.

When this reasoning is applied to the example given by Chile in paragraphs 187 and 188 of its submission, it becomes clear that the Chilean example has no foundation, being only necessary to consider its basic assumption, namely, that in no less than eight years' time (2014) the reference price will be the same as it is today (2006), according to Chile's example. The fact is that there is no evidence for determining today that in eight years' time the reference price will be the same. What is more probable is that the reference price will change, as has always happened since the establishment of the modified PBS.

Thus, the amount of the specific duties and the probability of their being assessed will depend on international price levels. It is by no means sure that these amounts and the probability of their being assessed will increasingly diminish, as Chile argues. The Chilean argument is incorrect and without foundation.

In paragraph 191, Chile returns to the untenable argument that according to the historical wheat price series the probability of wheat prices standing below US$114 per tonne (i.e., the floor price in 2014) is 23.9 per cent, as compared with 46.1 per cent for the probability of prices lying below US$128 per tonne. Argentina has already stated the problems presented by arguments of this kind:[209]

First of all and again, the modified PBS is not "less" inconsistent because the inconsistency will arise on fewer occasions in the future than at present. There is no basis for making an assertion of this kind.

Second, according to Chile's reasoning, there is a more than 46 per cent probability, while the floor is situated at US$128 per tonne, of wheat and wheat flour exporters experiencing the distortions caused by specific duties. That is not encouraging for exporters planning to export wheat and wheat flour to Chile up to December 2007. Argentina recalls that until then the floor price will remain at US$128 per tonne. Therefore, the probability indicated by Chile is not at all encouraging.

Third, Chile indicates neither the source of its information nor the numerical basis for the calculations made to arrive at the conclusion reached in this paragraph. Chile simply fails to provide any evidence at all.

Fourth, even if Chile's reasoning had any validity, Chile's calculations are wrong. Chile takes only the lowest future floor price of all those scheduled under Decree 831/2003, i.e., US$114 per tonne, corresponding to 2014. Chile should have incorporated in its calculations a weighting that takes into account the time during which the price of Argentine bread wheat lay below the future floor prices not considered by Chile: 126, 124, 122, 120, 118 and 116 US$ per tonne. As those prices are all higher

[208] Exhibit ARG-6.
[209] Rebuttal by Argentina, paras. 231 to 238.

than US$114 per tonne, the percentage should logically be higher than the 23.9 per cent calculated by Chile.

Argentina reiterates that the way in which the floor and ceiling of the modified PBS are established has transformed the PBS into a more rigid and inflexible system.[210]

Chile concludes in paragraph 192 by referring to a process of gradual reduction of border protection of wheat, stating that "[B]oth of the above results – that is, the reduction of duties by 2014 and the lesser probability of duty assessment – demonstrate that the current policy has an in-built process of gradual reduction of border protection of wheat".[211] (original underlining)

To sum up, Chile wrongly disregards the fact that the level of specific duties resulting from the PBS obviously depends on international price levels, attempting to argue that in 8 (eight) years time the reference price will be the same as it is at present. Moreover, Chile repeats the argument that the modified PBS will be "less" inconsistent in the future because the inconsistency will arise on fewer occasions than at present, while basing its case on calculations made without providing the source of the evidence and without including most of the relevant period of application of the modified PBS up to 2014.

Moreover, Chile chooses to disregard the fact that by keeping the floor and ceiling inflexible the modified PBS insulates the domestic market from international price developments. This is the basis for its concluding that the modified PBS ("the current policy") has an in-built process of gradual reduction of border protection of wheat. Chile's conclusion has no basis in fact or in law.

In view of the above comments on Chile's explanations in paragraphs 183 to 192 of its first submission, Argentina refers now to the definition of the terms "insulation" *versus* "stability".

The definition of "*insulation*", insofar as relevant, is: "protection of something from outside influences". The definition of "*stability*", insofar as relevant, is: "when something is not likely to move or change".[212]

Taking into account the definitions cited above and the fact that both Law 19.897 and Decree 831/2003 make it mandatory for specific duties to be established "… in terms which … allow domestic market stability", the purpose of the amended PBS seems to be even worse than that alleged by Argentina. The amended PBS not only insulates or "protect Chilean market from international price developments" but what is worse, seeks not to allow domestic market prices "to move or change", despite international price developments.

Therefore, it appears that the measures taken to comply refute by themselves Chile's argument regarding "gradual" market access improvement.

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[210] As Brazil has pointed out:

"… the 11-year period has the side effect of aggravating the distortion of domestic prices vis-à-vis international ones. While such a long period may afford some predictability, the new PBS is more rigid and inflexible, given that, in practice, the Chilean market will be insulated from fluctuations in the world prices for eleven years. Should there be a significant downward movement in the international wheat prices, the 0.985 factor may not be sufficient to account for the necessary reductions in the lower and upper thresholds of the price bands. Hence, in spite of the application of the 0.985 multiplier, one of the main elements of the PBS (the bands themselves) will remain virtually unchanged for more than a decade, preventing the fluctuation of international prices from being transmitted to the Chilean market". *Chile – Price Band System* … Recourse to Article 21.5 of the DSU, Third Party Submission by Brazil, paragraph 15.

[211] Chile's First Written Submission, paragraph 192.

[212] Both definitions from Cambridge Advanced Learner's Dictionary in http://dictionary.cambridge.org/.

44. Argentina has stated in paragraph 241 of its first submission that "variability is inherent in the amended PBS since it incorporates a plan or formula that causes and ensures the automatic and continuous modification of the levies and, moreover, lacks the required transparency and predictability, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*". Could Argentina clarify whether, in its view, "variability of duties" and "lack of transparency and predictability" are two different and separate factors, or rather variability of duties will necessarily be linked to a lack of transparency and predictability.

Answer to Question 44:

The Appellate Body stated 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. …"[213]

In addition the Appellate Body observed:

> "… [T]he 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. "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. 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."[214]

From these statements by the Appellate Body it follows that:

(a) The presence of a formula causing automatic and continuous variability of duties is a necessary condition for a particular measure to be a "variable import levy" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*; and, moreover,

(b) the lack of transparency and the lack of predictability in the level of duties that will result from the application of variable import levies are *additional* features that undermine the object and purpose of Article 4 of the *Agreement on Agriculture*, which is to achieve improved market access conditions for imports of agricultural products by permitting the application of ordinary customs duties only.

Therefore, the Appellate Body has clearly defined the necessary and the additional features of the variable import levies: the presence of a formula causing automatic and continuous variability **and** the

[213] *Chile – Price Band System*, Report of the Appellate Body, paragraph 233.
[214] *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.

lack of transparency and predictability in the level of duties that will result from such measures. It results then that "variability of duties" and "lack of transparency and predictability" are two different and separate factors. Argentina has shown how the amended PBS fulfils all the requisites and includes the features referenced by the Appellate Body to be characterized as a variable import levy.[215]

45. Could Argentina elaborate on the claim it has presented under paragraph 4 of Article XVI of the WTO Agreement. Could Argentina formally identify the measure that would be relevant in order for the Panel to be able to make findings regarding this claim.

Answer to Question 45:

Article XVI:4 of the WTO Agreement establishes that "[E]ach Member shall ensure the conformity of its *laws, regulations* and administrative procedures with its obligations as provided in the annexed Agreements". (Emphasis added)

Thus, the relevant measures for the Panel to be able to make findings regarding Argentina's claim under paragraph 4 of Article XVI of the WTO Agreement, are both Law 19.897 and Decree 831/2003 enforcing the amended PBS. As Chile itself states, Decree 831/2003 is the *regulations* of Law 19.897.[216]

Insofar as the amended PBS enforced by Law 19.897 and Decree 831/2003 infringes both Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994, Chile has not ensured the conformity of its Law 19.897 and Decree 831/2003 with its obligations under the covered Agreements.

In the case *United States – 1916 Anti-Dumping Act*, the Panel established that:

> "… if a provision of an 'annexed Agreement' is breached, a violation of Article XVI:4 immediately occurs. GATT 1994 is one of the 'annexed Agreements' within the meaning of Article XVI:4. Since we found that provisions of Article VI of the GATT 1994 has been breached, we conclude that, by violating this provision, the United States violates Article XVI:4 of the WTO Agreement".[217]

Thus, being the amended PBS inconsistent with Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994, Chile violates Article XVI:4 of the WTO Agreement since, while the amended PBS remains in force, Chile is not ensuring the conformity of its Law 19.897 and Decree 831/2003 with its obligations under the WTO Agreements.

46. Can Argentina describe the evolution of Chilean wholesale prices of wheat and wheat flour over the period January 2004 to February 2006? (See paragraph 154 of Chile's first submission.)

Answer to Question 46:

As stated in Argentina's Answer to question 8(c) above, "wholesale prices" should not be used for any analytical purpose in this dispute. This variable is not relevant in this case. Neither the Panel nor the Appellate Body addressed the notion of "wholesale prices" in this dispute. The relevant parameter of comparison is between the FOB price and the *entry price*, as the Appellate Body established in

[215] First Written Submission by Argentina, paras. 236 to 283. Rebuttal by Argentina, paras. 138 to 159.
[216] See, for example, First Written Submission by Chile, paras. 31 and 32.
[217] WT/DS162/R, Report of the Panel, paragraph 6.287.

paragraph 260 of its Report, Chile incorporates a new variable never addressed by the Appellate Body nor by Argentina: the *wholesale price*.

Even if, in spite of the various reasons that, in its answer to question 8 (c) above, Argentina provided for not using "wholesale prices" for any analytical purpose in this dispute the Panel found that wholesale prices could be considered, it is difficult for Argentina to describe the evolution of Chilean wholesale prices of wheat and wheat flour over the period addressed by the Panel because all the evidence that Chile has provided for the period January 2004 to February 2006 is un unsupported graph.

First, the graph in para. 154 of Chile's first written submission only addresses ***wheat*** wholesale prices. *Wheat flour* wholesale prices are not addressed in that graph. In fact, wheat flour wholesale have not been addressed in this dispute at all (at least not by Chile, Argentina the Appellate Body or the Panel).

Second, Chile never provided any chart or any further information that could clarify the numerical data that could be the basis for the wheat "wholesale prices" line plotted in that graph, as Argentina did with all of its Exhibits. Argentina has explained all the problems with this graph and the conclusions Chile draws from it. [218] Furthermore, it is not clear what is the source of that graph. Chile states that "The sources of the information, both daily and monthly, are clearly indicated in all cases (SAGPyA and ODEPA)"[219], but it is clear that in para. 154 of Chile's first written submission there is no indication of the sources of the information used to produce the graph.

Furthermore, there are inconsistencies in what Chile apparently is purporting to show. It is not clear whether Argentine FOB price is compared against "Chilean wheat prices", "wheat wholesale prices" or just against the "entry price":

- In paragraph 154 Chile states: "The graph below shows the trends in *Chilean wheat prices* and in f.o.b. prices of Argentine bread wheat…"

- The legend of the graph reads "wheat *wholesale price*"

- In paragraph 155 Chile states: "What clearly emerges is that the *entry price* of wheat exhibits the same behaviour as its f.o.b. price…"

During the meeting of this Panel with the parties, Chile exposed in a PowerPoint presentation what appeared to be the same graph. Argentina specifically asked, through an oral question, if that graph showed the same wheat wholesale prices Chile had included in its graph in paragraph 154 of its first submission. Chile's answer was affirmative. However, in spite of Chile's announces during the audience, Argentina neither received an electronic or paper copy of that graph nor was provided with the remaining PowerPoint computer presentation. In fact, Argentina has never seen the numerical basis of that graph.

In spite of all these inconveniences resulting from Chile's lack of clarity and, what is worse, supporting evidence, Argentina made its best effort to describe what it can be observed in that graph.[220]

A careful study of the graph, including a comparison of the trends of each the "bread wheat FOB Argentine port price" (lower line) and the "wheat wholesale price" (upper line), reveals that during

[218] See Rebuttal by Argentina, para. 61- 66 and Oral Statement by Argentina 30-31.
[219] See Rebuttal by Chile, footnote 25.
[220] Rebuttal by Argentina, paras. 68-70.

most of the period both prices moved in different directions. In fact, both prices showed an **opposite** trajectory during the following periods:

- February-March 2004
- March-April 2004
- May-June 2004
- June-July 2004
- July-August 2004
- August-September 2004
- September-October 2004
- December 2004-January 2005
- January-February 2005
- February-March 2005
- April-May 2005
- May-June 2005
- July-August 2005
- September-October 2005
- November-December 2005

Therefore, Chile statements that "[t]he price curves indicate that…the variation [of Chilean wheat prices] is very similar to that of export prices of Argentine wheat …"[221] and "the entry price of wheat exhibits the same behaviour as its f.o.b. price, which demonstrates price transmission and therefore the connection between the Chilean and the international market"[222] are baseless from every point of view.

[221] Chile First Written Submission, para. 154.
[222] Chile First Written Submission, para. 155.

ANNEX F-2

REPLIES BY ARGENTINA TO QUESTIONS POSED BY THE EUROPEAN COMMUNITIES

Argentina thanks the EC for its contribution to the further clarification of the substantive obligations derived from Article 4 of the Agreement on Agriculture.

102. Argentina argues that the Price Band System (PBS) is not predictable, because traders cannot predict future developments of commodity markets, and hence cannot calculate what the PBS duties will be in the future.

(a) The EC notes that a WTO Member may:

(i) increase an applied duty within a bound rate without notice (Article X GATT only requires prompt publication); and,

(ii) impose anti-dumping duties or apply a provisional safeguard measure in certain circumstances without notice being provided to economic operators.

Assuming, as Argentina argues, that traders cannot predict future price developments (despite e.g. the existence of futures markets etc) but, accepting that all the other elements of the functioning of the PBS are made public, what makes the PBS less predictable than the examples of governmental action given in (i) and (ii) above?

Answer to Question 102(a):

Argentina's argument is that "the lack of transparency and the lack of predictability of the duty level that result from the amended PBS are additional features that undermine the object and purpose of Article 4 of the Agreement on Agriculture".[1] This is because 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, as the case is with the amended PBS.[2] The Appellate Body found the original PBS inconsistent because, *inter alia*, the lack of transparency and the lack of predictability of the duty level was an additional feature undermined the objective of achieving improved access conditions for imports of agricultural products.[3]

With regard to the EC question, the Appellate Body stated, "… the existence of [a] tariff binding will not eliminate the distortion in the transmission of world market prices to Chile's market … where the combination of the duties resulting from Chile's price band system, when added to the applied *ad valorem* duty rate, remains below Chile's bound rate of 31,5 per cent *ad valorem*".[4]

[1] First Written Submission by Argentina, para. 271 and ss. (underline added).
[2] Rebuttal by Argentina, para. 128 and ss., Oral Statement by Argentina, para. 76 and ss.
[3] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[4] *Chile – Price Band System*, Report of the Appellate Body, para. 257.

Argentina has extensively explained why the level of duties resulting from the amended PBS is neither transparent nor predictable.[5] In particular, the answer to the EC question in relation to point (i) was provided in Argentina's Oral Statement, para 70 and ss.

In particular, it is obvious that applied duties can change and no one can guarantee otherwise. That is what happens with any ordinary customs duty. However, unlike the amended PBS, ordinary customs duties are expressed in the form of *ad valorem* or specific duties rates, are not similar to variable import levies or minimum import prices, do not include a formula that causes import duties to vary automatically and continuously and, on top of that, they are transparent and predictable. The presence or absence of a cap to the tariff binding is not essential in determining whether or not Chile's PBS is similar to a measure prohibited by Article 4.2. That argument could not persuade the Appellate Body during the original proceeding.

In the case of the amended PBS, what is *guaranteed* is that, due to the PBS, if the required conditions are met, an exporter will mandatorily face a different duty every two months.[6] In fact, contrary to what Chile has asserted in its submissions[7], the PBS Law and Regulation give no discretion to Chile to decide whether or not to impose the duties: if the reference prices fall below the band floor, specific duties will be levied. In fact, the lack of transparency and predictability are inherent to the amended PBS, because of the reasons Argentina has described.

With respect to point (ii) of EC's questions, it is strange that the EC tries to compare the amended PBS with anti-dumping duties when Article II:2 GATT 1994 explicitly provides that anti-dumping duties are not ordinary customs duties. In that sense, the Appellate Body said:

> 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".[8]

(b) Again, assuming that traders cannot predict future price developments, and that, for commodity products, the actual price which an operator sells for is determined by international markets, how can a trader predict the monetary equivalent of an *ad valorem* tariff ? To take an example, with an *ad valorem* tariff of 30%, if international prices are at $100 the tariff will be $30, if they are at $150 the tariff will be $45 and if they are at $50 the tariff will be $15. Recall also that commodity prices can fluctuate substantially in periods significantly shorter than 2 months. Can Argentina explain why the fixed specific duties of the PBS are less predictable than the monetary equivalents of *ad valorem* tariffs?

[5] First Written Submission by Argentina, para. 271 and ss., Rebuttal by Argentina, para. 89 and ss, 138 and ss.

[6] Rebuttal by Argentina, para. 145.

[7] First Written Submission by Chile, para. 93 and Rebuttal by Chile para. 101 and 120.

[8] *Chile – Price Band System*, Report of the Appellate Body, para. 276.

Answer to Question 102(b):

One of the differences between the amended PBS and an *ad valorem* duty is that, as stated before, in the case of the amended PBS, what is *guaranteed* is that, due to the PBS, if the required conditions are met, an exporter will mandatorily face a different duty every two months.[9]

The lack of predictability of the amended PBS is not similar to the predictability *ad-valorem* duties can offer. This is because ad valorem duties do not change as a result of a pre-established mathematic formula inherent to those measures that guarantees the duties *will* vary when international prices in relevant markets fall, as a consequence of a floor and a ceiling price, reference prices based on predetermined markets and qualities of concern, a factor of 1,56 and a coefficient of 0,985. Therefore, ad-valorem duties are more predictable.

Specific duties are not "fixed" as the EC states. They are variable, and are liable to vary every two months as far as the reference price is below the floor price. If there's any predictability related to the specific duties, *quod non*, that predictability is short lived, because it will end after 60 days. In accordance to what the United States stated during the meeting of Panel with third parties, we cannot see, nor Chile has identified, a basis for a distinction between a variation once every two months rather than once every week.[10]

As regards for the monetary equivalent the EC points out, as Argentina already pointed out, the amount levied by ordinary specific duties does not vary when international prices change. In those cases, what varies is the amount of the duty in relative terms (percentage) with respect to the international price but, usually, the absolute amount does not change. In the case of the amended PBS, following the decline of the reference prices below the price band floor, the amount of the duty varies in relative and absolute terms.[11]

103. In para. 273 of the Appellate Body report in the original dispute, the Appellate Body states:

> **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]**
>
> **Footnote 253 reads:**
>
> **We stated in *Argentina – Textiles and Apparel, supra*,[ ], 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**

[9] Rebuttal by Argentina, para. 145.
[10] Oral Statement by the United States, para. 13.
[11] Oral Statement by Argentina, para 60.

"*exogenous*" factors. <u>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.</u> [underlining added]

(a) If a Member may change its tariff on the basis of developments in world markets, and that tariff is considered an "ordinary customs duty", why is it that, when a tariff is changed on the basis of a formula which reflects developments in world markets, it is not an "ordinary customs duty" ? (Argentina argues that it is a "similar border measure other than [an] ordinary customs dut[y]" in the sense of footnote 1 to Article 4.2.)

<u>Answer to Question 103(a)</u>:

First, the object of these proceedings are not the resulting duties, but the underlying measure, the amended PBS.

Second, contrary to what the EC state, the fact that a Member may change its tariff on the basis of developments in world markets does not mean that that tariff is an "ordinary customs duty". Although the Appellate Body said that the duties resulting from the original PBS took the same form as "ordinary customs duties", it underlined that it was not saying that they *were* ordinary customs duties and that it was not trying to qualify them as "ordinary customs duties" or as "any other duties or charges"[12]

Indeed, the Appellate Body said that "… 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*"[13]

Third, it is obvious that Members can and will doubtless take into account factors such as world market prices and domestic price developments. However, the Appellate Body clearly stated that "[o]rdinary customs duties…are subject to discrete changes in applied tariff rates that occur independently, and unrelated to…an underlying scheme or formula".[14] There is no doubt that the amended PBS *is* related to a scheme or formula that causes the variation of the resulting duties. Furthermore, according to the Appellate Body[15], in order to be an ordinary customs duty, the amended PBS should be expressed in the form of *ad valorem* or specific rates. However, A plain reading of Law 19.897 and Decree 831/2003[16], the legislation enforcing the amended PBS, shows that this measure is not expressed in the *form* of "*ad valorem* or specific rates". There is no ad valorem or specific *rate* expressed in those measures. To the contrary, the amended PBS is a complex mechanism that, as a border measure, has no resemblance with an ordinary customs duty.

(b) In *Argentina – Textiles and Apparel* the Appellate Body held that the DIEM system applied by Argentina was consistent with Article II.1(b) GATT (provided kept within the relevant binding), and thus an "ordinary customs duty". The DIEM system consisted of the calculation of specific duties derived from "representative international prices" which were "adjusted from time to time".

[12] *Chile – Price Band System*, Report of the Appellate Body, footnote 254.
[13] *Chile – Price Band System*, Report of the Appellate Body, para. 279.
[14] *Chile – Price Band System*, Report of the Appellate Body, para. 233.
[15] *Chile – Price Band System*, Report of the Appellate Body, para. 277.
[16] See ARG-1 and ARG-2.

With the exception of the fact that the DIEM system representative prices were re-calculated from "time to time" and the PBS duties are re-calculated according to a known schedule, can Argentina identify any material differences between the DIEM system and the PBS that leads to the conclusion that one is an "ordinary customs duty" and the other is not ?

Answer to Question 103(b):

It is remarkable that the case the EC recalls supports Argentina's and not Chile's arguments in these proceedings.

First, the EC errs when stating that In *Argentina – Textiles and Apparel* the Appellate Body held that the DIEM system applied by Argentina was *consistent* with Article II.1(b) GATT. Contrarily, the Appellate Body finding in that case was that the DIEM regime was inconsistent with Argentina's obligations under the WTO:

> Argentina has acted inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994, because the DIEM regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of customs duties in excess of the bound rate of 35 per cent ad valorem in Argentina's Schedule[17]

Second, the issue of whether the DIEM by itself, the underlying measure was or was not an ordinary customs duty was not addressed by the Appellate Body. That issue was not decided by the Appellate Body[18] and was not even an issue raised in appeal.[19]

Third, EC's interpretation of the Appellate Body's finding is simply wrong. Contrarily to what the EC imply, the Appellate Body did not conclude that the *Argentine* DIEM regime was an ordinary customs duty, even if kept within the relevant binding.

Along its report, the Appellate Body was careful to never refer to the DIEM regime as an ordinary custom duty. Rather, when referring to the duties resulting from the DIEM regime, it called them just "customs duties", without the word "ordinary". This is very clear, *inter alia*, from its conclusions:

> For the reasons set out in this Report, the Appellate Body …modifies the Panel's findings in paragraphs 6.31 and 6.32 of the Panel Report by concluding that the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994 to the extent that it results in **ordinary** customs duties being levied in excess of those provided for in that Member's Schedule. In this case, Argentina has acted inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994, because the DIEM regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of **customs duties** in excess of the bound rate of 35 per cent ad valorem in Argentina's Schedule (emphasis and underline added)[20]

As can be seen from the cited finding, the Appellate Body only referred to "ordinary" customs duties when addressing Member's obligation not to apply a type of duty different from the type provided for

[17] *Argentina – Textiles and Apparel*, Report of the Appellate Body, para. 87 (a) (underline added).
[18] See *Argentina – Textiles and Apparel*, Report of the Appellate Body, para. 87.
[19] *Argentina – Textiles and Apparel*, Report of the Appellate Body, para. 38.
[20] *Argentina – Textiles and Apparel*, Report of the Appellate Body, para. 87.

in a Member's Schedule to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Schedule, in violation of Article II:1(b), first sentence, of the GATT 1994. However, when addressing the DIEM regime resulting duties, the Appellate Body referred to them just as "customs duties".[21]

The result is that this finding supports Argentina's arguments in these proceedings. Probably, in *Argentina – Textiles and Apparel* the Appellate Body saw the implications of finding the DIEM regime resulting duties as "ordinary" customs duties, and refrained from making such a finding taking into account the issue was not under appeal.

[21] See also *Argentina – Textiles and Apparel*, Report of the Appellate Body, para. 55.

ANNEX F-3*

REPLIES BY CHILE TO QUESTIONS POSED BY THE PANEL

FOR BOTH PARTIES

1. Article 21.5 of the DSU provides that:

> **"Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute … " (emphasis added)**

Please identify which are the relevant "measures taken to comply with the recommendations and rulings" at issue in these proceedings. Do those measures refer to the PBS in its entirety, the amendments introduced to the PBS, particular features of the PBS, or something else? Please make reference to relevant sections of the Panel and Appellate Body reports in the original proceedings to support your answer, if needed.

The Chilean measure taken to comply with the DSU's recommendations and rulings consists in the establishment of specific duties, in United States dollars, and of rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of wheat and wheat flour, in the manner indicated by Law 19.897 of 2003 and the Regulation thereto contained in Ministry of Finance Supreme Decree 831 of 2003. This measure is substantially different from the price band system (PBS). Although some headings were retained, this was done for reasons unrelated to compliance, and certainly has no effect on the consistency of the new measure with Chile's WTO obligations.

The foregoing is a consequence of the implementing action taken by Chile on the basis of the recommendations of the DSB, which only questioned certain characteristics of the PBS that made it inconsistent with specific obligations under the WTO Agreements, namely the following.

– Weekly determination of a reference price, established in a manner that was neither transparent nor predictable (paragraphs 247 to 250 of the Appellate Body Report).

– Variability of specific duties, in relation to their weekly application, to compensate for fluctuations in international prices (paragraph 260 of the Appellate Body Report), but also, and more importantly, in relation to the fact that different duties could be applied on the same date to different import operations.

2. Could the parties please comment on whether their reply to the previous question has any bearing on the issue of whether Argentina's claim under Article II:1(b) of the GATT 1994 falls within this Panel's terms of reference.

There is no connection. Chile has already indicated in response 1 what measures it had to adopt in order to comply with the recommendations and rulings of the DSU, and these constitute the framework or terms of reference for this proceeding under Article 21.5 of the DSU.

Despite the assertion made by Argentina in its rebuttal, this is not a new claim with respect to a new measure. On the contrary, Argentina claims that the Chilean measure is inconsistent with

* Annex F-3 contains the Replies by Chile to Questions Posed by the Panel. This text was originally submitted in Spanish by Chile.

Article II:1(b), *second sentence* of the GATT 1994, because of an alleged failure to comply with Article 4.2 of the Agreement on Agriculture. As a result of this alleged inconsistency, as Argentina sees it, the Chilean measure is a measure "other than an ordinary customs duty" and therefore constitutes "other duties or charges". Failure to record the measure in the corresponding column of a Member's Schedule of Concessions is alleged to entail a violation of the above mentioned *second sentence* of Article II:1(b) of the GATT 1994. This reasoning on the part of Argentina is said to be valid for both the PBS and the Chilean measure in force since 2003, and Argentina should therefore have raised this question at that time.

Finally, it may be recalled that the Appellate Body reversed the original Panel's finding in respect of the *second sentence* of Article II:1(b) of the GATT 1994, since that question was not before the Panel.[1]

3. During the meeting with the Panel, regarding the issue of whether Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994 falls within the mandate of this Panel, Canada asserted that it "is not aware of any rule or precedent in the jurisprudence of the WTO that would require a Member to make all of its arguments and bring all of its claims at one time" (See paragraph 8 of the written version of Canada's oral statement). Assuming Members are then free to choose which claims to bring against a specific measure in the original proceedings and which other claims to bring later, during Article 21.5 proceedings, would there be the risk, as Canada itself suggests, that Members could then tactically decide to "split claims" between the original proceedings and the Article 21.5 proceedings (see paragraph 9 of the written version of Canada's oral statement)?

Chile's contention is that, if a party decides not to challenge certain aspects of a measure and subsequently raises such a challenge at the stage of discussion of the other Member's implementation of measures in response to DSB recommendations (Article 21.5), then the due process rights and guarantees of the latter Member would be jeopardized. Article 21.5 proceedings are abbreviated, and their purpose is to analyse the measures that have been taken to comply with DSB recommendations and rulings. There can therefore be no discussion in these proceedings of claims and arguments concerning the original measure or unchanged aspects of the original measure forming part of compliance, which the complaining party did not wish to raise in the original proceedings. Canada is correct when it points out that Members must act in good faith and this means that, in Article 21.5 proceedings, no claims or arguments may be presented that could have been raised in the original proceedings and were not – either by way of a litigation tactic, by oversight or because other claims or arguments were raised in error, as is the case under Article II:1(b) in this dispute. Canada may be right in the sense that there is no obligation on a Member to put forward all its claims or arguments, but not doing so has a "consequence".

The Panel in *EC – Bed Linen (Article 21.5 – India)* ruled on that consequence as follows:[2]

> *The possibility for manipulative or abusive litigation tactics that would be opened by allowing Members an opportunity to obtain a ruling in an Article 21.5 [proceeding] that they could have sought and obtained in the original dispute would, in our view, be inestimably harmful to the effective operation of the dispute settlement system. We hasten to emphasize that we do not consider that India has engaged in any such harmful tactics, or has engaged in this dispute settlement procedure in anything other than entirely good faith in an effort to resolve the dispute, as required by Article 3.10 of the DSU. We nonetheless consider that a claim which, as a legal and practical matter, could have been raised and pursued in the original dispute, but was not, cannot be*

[1] Report of the Appellate Body, paragraph 288(a).
[2] Report of the Article 21.5 Panel in *EC – Bed Linen* (WT/DS141/RW), paragraph 6.43.

> *raised on the same facts and legal premises in an Article 21.5 proceeding to determine the existence or consistency of measures taken to comply with the recommendation of the DSB in the original dispute. In our view, this ruling furthers the object and purpose of the DSU (footnote omitted).*

As the Article 21.5 Panel noted in *US – Countervailing Measures on Certain EC Products*, a Member cannot be precluded from "raising claims that it did not raise in the original proceedings, provided that these claims concern the measures taken to comply and are included in the Panel request". However, in that dispute (as in this one), the question is whether that conclusion should also apply to new claims where the measure taken to comply is unchanged from the original measure and thus allegedly inconsistent with WTO obligations in ways identical to (not different from) the original measure. It should be recalled that this also applies to the factor of 1.56.

On that occasion, the Panel stated:[3]

> *In this dispute, this Panel confronts the issue of whether to consider new claims on aspects of the original measure that are unchanged and were not challenged in the original proceedings. The purpose of Article 21.5 is to provide an expeditious procedure to establish whether a Member has properly implemented the DSB recommendations and rulings. Admitting such a new claim would mean providing the European Communities with a second chance to raise a claim that it failed to raise in the original proceedings.*

In short, the decision (for example, what Canada calls "split claims"), omission (the factor of 1.56 in Argentina's case) or error (Argentina's complaint concerning Article II:1(b)) involved in raising only certain claims or arguments in the original proceedings cannot be justified at the cost of calling in question the due process guarantees protecting the respondent.

4. Do the parties consider that the laying down of all parameters of the PBS applicable until 2014 makes it easier to predict the specific duties applicable to imports? Could a degree of uncertainty be associated with the dates of delivery?

The Chilean measure challenged by Argentina in these proceedings is an ordinary customs duty and the only guarantees of certainty or predictability required by the GATT for market access are laid down, firstly, in Article II:1(b), first sentence, which provides that a Member may not impose customs duties in excess of the levels bound in the appropriate Schedule and, secondly, in Article X:1, which provides that trade legislation by which customs duties are imposed shall be published promptly so that due acquaintance therewith can be gained. The Chilean measure fully complies with both those requirements of the GATT 1994.

Nonetheless, in the determination of the specific duty provided for by Law 19.897, parameters are used which, with the sole exception of the reference price, entail no degree of uncertainty since their values are determined in the Law itself. Regarding the reference price, the degree of uncertainty associated therewith depends on international market behaviour and trends, but that does not make the policy more uncertain than the international market itself. Nor, by the way, is it made more uncertain than any other ordinary customs duty, which may change at any time without prior notice to traders. Traders have no absolute certainty today about what the Chilean *ad valorem* duty will be in the future, they only know that it will be no higher than the Chilean tariff bound in the Uruguay Round. Nor, for their part, do Argentine exporters know what their own taxes will be in the future, such as the withholding taxes on exports of wheat and wheat flour applied by Argentina.

[3] Report of the Article 21.5 Panel in *US – Countervailing Measures on Certain EC Products* (WT/DS212/RW), paragraph 7.74.

5. Argentina has noted in paragraph 58 of its first submission, that the way in which the calculation of the specific duties has been changed under the amended PBS "leaves the exporter worse off, inasmuch as the specific duties now generate a cost higher than that generated by the previous method of calculation".

(a) Could Argentina clarify whether, in its view, this particular fact *per se* would make the amended measure inconsistent with the WTO covered agreements. If so, could Argentina identify the legal basis for that argument.

(b) In this respect, can Argentina comment on Chile's statement that it has taken the necessary steps to ensure that duties never exceed its tariff rate level bound in the WTO (see, for example, paragraph 37 of Chile's first submission). In the opinion of the Parties, what is at issue in these proceedings, the level of the duties or their alleged variability, or both?

In Chile's opinion, since Law 19.897 replaced the duties resulting from the PBS by an ordinary customs duty (the specific duty under consideration), it is not necessary to discuss whether, as a result of the application of the above-mentioned law, the burden is higher or lower than in the past, except to the extent that the specific duty applied exceeds the tariff bound by Chile in the Uruguay Round, which is not the case.

Thus, the analysis of an ordinary customs duty must be limited to questions of level (i.e. whether or not it exceeds the bound level). Argentina seeks to evade this simple restriction by casting doubt on the status of "ordinary customs duty" vested in the specific duty established by Law 19.897. As it seeks to categorize the duty as something similar to a variable levy or minimum import price, Argentina should concentrate on proving, *inter alia*, the alleged variability of the measure.

(c) Could Chile clarify whether the new formula also means that specific tariff rebates under the amended PBS would be higher than those generated by the previous method of calculation.

The current calculation method in any event generates lower values for specific duties and tariff rebates, compared with the ones previously applied under the PBS. This finding was demonstrated in paragraphs 175-178 of Chile's First Written Submission in respect of the specific duty.

*<u>*Under the PBS*</u>

In the case of the tariff rebate, under the PBS formula the import cost was previously defined as follows:

$IC_i = fc + (1+vc) * FOB_i$,
Where,
IC_i = product import cost i;
fc = sum of fixed costs;
vc = aggregate of variable costs, and
FOB_i = FOB price of the product i.

The tariff rebate was then determined by subtracting the ceiling import cost from the value of the reference price expressed as the import cost described above:

$REBATE = IC_{rp}-IC_{ceiling}$,
where "rp" represents the reference price.

By substitution the following formula is obtained:

$REBATE = fc + (1 + vc)* FOB_{rp}- (fc + (1+ vc)* FOB_{ceiling})$
$REBATE = fc + (1 + vc)* (FOB_{rp} – fc – (1 + vc)* FOB_{ceiling}$
$REBATE = (1 + vc)* (FOB_{rp} – FOB_{ceiling})$

It should be recalled that "vc" corresponded to the variable import costs equivalent to a set of expenditures incurred in a commercial import operation and that they include the costs associated with credit operations, insurance, agents' fees and the customs duty, all of which are applied on a percentage basis to the amount of the import operation.

**Under Law 19.897*

The current formula for calculating the rebate is expressed as follows:

$REBATE = (1 + 0.06)* (FOB_{rp} – FOB_{ceiling})$

The difference between the current method of calculating the tariff rebate and the method provided for in the PBS lies in the elimination of the set of costs associated with importation (vc) which are not perfectly identical values for any operation, leaving only the applied *ad valorem* customs tariff.

The conclusion to be drawn from the foregoing is that the value of the variable costs used in the PBS (vc) is always greater than the customs duty alone, so that the rebates determined by means of the procedures laid down in Law 19.897 are always smaller than those that would be determined using the PBS procedure for the same reference price.

6. During the substantive meeting with the Panel, Argentina stated that "contrary to what Chile has asserted in its submissions (footnote omitted), the PBS Law and Regulation give no discretion to Chile to decide whether or not to impose the duties" (see paragraph 80 of the written version of Argentina's oral statement, original emphasis).

(a) Can Argentina elaborate on the relevance of whether the amended PBS allows any discretion to Chilean authorities to levy the specific duties or grant the rebates, as appropriate.

(b) Can Chile confirm whether the relevant legal instruments grant any discretion to Chilean authorities in this regard. If so, has such discretion ever been exercised? Please provide examples and evidence, if any, to support your answer.

In its oral statement, Chile drew the Panel's attention to a series of false allegations made by Argentina. At that time, Chile did not respond to each and every one of them, and merely referred, by way of example, to two allegations made in Argentina's oral statement. We now once again find ourselves faced with assertions which, whether deliberate or not, at least reflect a serious lack of rigour on the part of Argentina.

In paragraph 80 of its oral statement, Argentina attributes to Chile the contention that Law 19.897 gives it discretion to decide whether or not to impose duties. It bases this argument on paragraph 93 of Chile's First Written Submission and paragraphs 101 and 120 of Chile's Rebuttal. However, a reading of the paragraphs in question enables this assertion to be rejected.

Paragraph 93[4] states that, under Law 19.897, the specific duty or rebate is established by decree and its amount remains unchanged until it is changed or cancelled by a more recent administrative act. Paragraph 101[5] refers to the fact that the specific duties applied require a specific administrative act to establish them, and in the absence of this act, the duty does not vary in amount. Finally, paragraph 120[6] states that the tariff charge determining the specific duty remains constant until changed or cancelled by a more recent administrative act.

In none of these paragraphs does Chile mention whether or not the Law grants discretion to the administrative authority. Chile considers that discretion in imposing a specific duty (or rebate) is not an element that was considered by the Appellate Body (AB) for the purposes of the application of specific duties.

As Argentina correctly points out in paragraph 80 of its oral statement, it is obvious that *ad valorem* duties can change and no one can guarantee otherwise. That is what happens with any ordinary customs duty. However, Argentina vitiates its analysis of the AB ruling when it associates automatic and continuous variability with discretion in issuing the Decree.

The key to this point is contained in paragraph 233 of the AB Report[7], which concludes that 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**

[4] 93. Under Law 19.897, however, a specific duty (or rebate, or neither) is fixed by legal directive in the form of a decree issued by the Ministry of Finance and remains unchanged for two months, during which the duty applies on all import transactions, without the slightest variation and regardless of the amount of the transaction, until it is changed or cancelled by a more recent administrative act.

[5] 101. In its First Written Submission, Chile pointed out that under the changes introduced by Law 19.897 the specific duties applied require a specific administrative act to establish them and in the absence of this act the duty does not vary in amount. The situation was different under the PBS, where, because of its structure, the duties applied to two simultaneous import transactions varied without the intervention of any administrative act, which led to the assessment of different import duties, even when the value (transaction price) and volume (metric units) of the goods were identical. Today, two simultaneous import transactions, with the same transaction value and volume, will always pay the same import duty. Thus, Chile has implemented the rulings and recommendations of the DSB.

[6] 120. The specific duty does not prevent the entry of imports priced below a threshold or entry price, inasmuch as the floor price is not a threshold price or an internal market price or linked therewith, and is not an entry price. The tariff charge determining the specific duty remains constant until changed or cancelled by a more recent administrative act. Therefore, the specific duties do not have the fundamental characteristics of a variable levy as described in paragraph (c).

[7] 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 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.

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.

As can be seen, the AB requires separate legislative or administrative action, but not discretionary or mandatory action, since variability, as it points out, is associated with the fact that the *measure* itself, as a mechanism, imposes the *variability* of the duties, but not with how it is generated. Thus, variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Under Law 19.897, once a duty or rebate is applied, the tax burden is not changed automatically and continuously, but a new administrative act is necessarily required.

Thus, regarding Argentina's analysis as to whether Law 19.897 gives discretion to the authorities, it can be stated that the wording of the law is dictated more by reasons of legislative technique than by a purpose associated with the DSB's rulings. As Chile has stated[8], its measure is designed to afford additional protection above the 6 per cent *ad valorem* tariff that Chile applies to all its imports. Consequently, the legislature's intention was that duties and rebates should be applied in accordance with Law 19.897.

Furthermore, and following Argentina's reasoning, it could be argued that Law 19.897 authorizes the administrative authority to fix a duty or rebate six times a year, but does not determine the occasions for so doing, a matter governed by Decree 831 which, moreover, may be modified by the same administrative authority by means of a new decree. To date, the Minister of Finance has regularly issued decrees establishing a specific duty or tariff rebate. What is more, and even though the Law does not so require, in addition to decrees imposing specific duties or tariff rebates, decrees have also been issued in accordance with the dates established in Decree 831, in cases where Chile has not imposed specific duties or tariff rebates, that is, in cases where only payment of the *ad valorem* tariff has been required.

7. Do the Parties consider that the price bands, as defined under the amended PBS, are used as part of a scheme or formula for the calculation of additional duties or rebates (as the case may be) at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory?

No. With the changes introduced by Chile by means of Law 19.897, the price bands no longer operate as a scheme or formula for the calculation of duties or rebates at the border, in the manner indicated by the DSB in the original proceedings.

Currently, Law 19.897 establishes a single specific duty (or tariff rebate) applicable to every import operation. This duty, like any other ordinary customs duty, remains invariable until it is changed by an administrative act.

The other parameters laid down in Law 19.897 are no longer part of a scheme or formula, as they were under the PBS, but are elements for defining the framework of the border protection applied by the Chilean Government.

8. Chile asserts that, under the present PBS, the reference price is *not* a border price, does *not* correspond to the price of a shipment, *nor* is it expressed in CIF terms (see, for example, paragraph 118 of its rebuttal submission).

(a) Notwithstanding the fact that FOB prices do not reflect all the costs associated with traded wheat and wheat flour, do the Parties consider that the price of the

[8] Paragraph 25 of Chile's oral statement.

goods (normally reflected in the related commercial documents, such as invoices) can serve as the starting point to determine the full transaction value?

The value or price recorded in a transaction document corresponds to the amount that the buyer will pay the seller for the product. If the transaction is an import transaction and, as normally occurs, is based on delivery at the port of origin (f.o.b.), it then corresponds to the actual transaction value, which is the definitive value for both seller and buyer. However, the buyer has other costs associated with transport of the goods and entry into the country of destination, including processing costs. Thus, the actual transaction price for the buyer constitutes the starting point for determining the total transaction value entailed by the importation of the product.

(b) Notwithstanding the fact that the reference price is *not expressed in CIF terms*, can the FOB valuation of the "markets of concern" be used as a starting point to obtain an approximation of the *CIF value for reference prices*?

The price quotations or reports issued by the markets correspond to indicative values for transactions involving goods in trade, without necessarily reflecting the value of any one particular transaction. The price that is fixed between buyer and seller may be based on an international market quotation, but will be determined in accordance with other parameters such as quality, quantity, delivery point, date of receipt, *inter alia*, so that the international price does not necessarily reflect the product value agreed by buyers and sellers between themselves. However, as international prices are indicative of price levels and trends on world markets, they serve as reference or approximation for estimating the cost of an import, whether at c.i.f. level or as an entry price, if all the costs are known that go to make up the c.i.f. price or the entry price.

(c) If the Panel were to assume that the PBS does not sustain internal prices, as argued by Chile (see paragraphs 109-126 and 154 of its first submission), would the Parties consider that the FOB, CIF or wholesale prices could be considered as "*proxies*" for certain analytical purposes, for example, in order to study price behaviour, while taking fully into account the complexities involved?

Yes. This is the way in which economic studies are usually carried out: if the required information is available, it is used, otherwise approximations are made on the basis of reference values representative of commercial operations. This is the way in which countries' levels of protection, such as nominal protection and effective protection indicators, are calculated.

In the case of studies on nominal and effective protection, the method involves comparison of entry prices subject or not subject to border measures and seeks to measure the degree of difference in the level and behaviour of internal prices in relation to what would occur if border protection measures were not applied.

Using these economic price analysis techniques, based on data estimates or approximations, an assessment can be made of price behaviour and the extent to which domestic prices are associated with international prices.

Moreover, the usual way of evaluating price transmission is by means of methods that measure how international or border price fluctuations are reflected in domestic prices, generally using an indicator known as price transmission elasticity.

9. Do the Parties consider that the actual transaction value of a good is *always* unrelated to its FOB valuation? If not, what adjustments should be made to the FOB price to get an estimate of the transaction value?

No. The f.o.b. valuation of a good is the actual transaction price of a good if it corresponds to the price recorded in the documents or invoices of the commercial import operation and if it constitutes the final transaction value for the seller and the buyer.

If it is wished to determine or estimate a value at a level different from the import operation, that is, at c.i.f. or domestic market level, on the basis of the price paid by the buyer, the costs of transporting the good must be added in order to estimate or calculate the c.i.f. value, and the costs of entry into the destination country (commissions, sanitary inspection, credits, tariffs, unloading and internal freight, etc) must be added to determine its domestic market value.

10. Do the Parties consider that the actual transaction value of wheat and wheat flour is *always* unrelated to its FOB valuation? If not, what adjustments should be made to the FOB price to get an estimate of the transaction value of wheat and wheat flour?

In the case of wheat and wheat flour, the situation is exactly the same as that described in the previous response (No. 9). In other words, the f.o.b. price recorded in the commercial operation documents corresponds to the actual transaction value for buyer and seller, even though other costs have to be added in order to determine the full transaction value for the buyer.

11. Can it be said that the reference price as defined under the PBS is used as part of a scheme or formula for the calculation of additional duties or rebates (as the case may be) at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory?

Since a Ministry of Finance decree enacted under Law 19.897 establishes a specific duty or a rebate on the amount payable as customs duty, the determination of the reference price is no longer relevant for the calculation of duties or rebates, as it was under the PBS, where traders were required to have knowledge of that price in order to calculate the tariff charge at the border.

Today, when traders enter with their products, they are aware of the amount of the *ad valorem* tariff and the specific duty or rebate on the *ad valorem* tariff, as the case may be, which have been previously established by the authority. In both cases, as in all countries where customs duties are applied, the reasons for fixing the tariff charge or the procedures whereby it is determined are not relevant to traders, or at least do not constitute a requirement under WTO rules, insofar as the tariff charge does not exceed the level of Chile's bound tariff.

12. Article 7 of Chilean Supreme Decree 831 provides that the FOB reference price for wheat "correspond[s] to the average of the daily prices recorded in the markets specified in Article 8 over a period of 15 days counted retroactively from the 10th day of the month in which the relevant decree is to be published".

(a) Could Chile explain what is the rationale for taking into account *only the last 15 days* when calculating each of the six reference prices which are to be maintained for a period of 60 days?

First of all, it should be mentioned that the reference price is not maintained for a period of sixty days. This parameter is used only once, when it is necessary to calculate specific duties or rebates (six times a year). The level of protection additional to the *ad valorem* tariff provided by the specific duty (or the rebate, as the case may be) is maintained unaltered for a period of two months, during which time the reference price has no bearing on commercial operations.

It has been estimated that the average price over the period of at least fifteen days closest to the date of calculation of the duty or rebate (corresponding roughly to ten working days) is the minimum necessary for the result to be representative of the conditions prevailing at that time on the

market, so as to prevent that average from potentially being influenced by extreme quotations which occasionally appear in the market and which do not necessarily reflect the level and trend of prices at that point in time.

(b) Can Chile comment on how representative is the reference price for wheat?

The reference price is based on information generated in the international markets and supplied by reliable sources. At the time it is calculated, therefore, it is representative of trends in the international market. However, it should be pointed out that the reference price is used as an instrument to facilitate determination of the level of protection for wheat, and that it has no useful bearing on commercial operations in that product. Accordingly, its representativeness at each point in time is of no relevance.

If the reference price were calculated more frequently, for example, every fifteen days or every month, that would not change its representativeness, inasmuch as it is only an indicator of the level of international prices at the time when the reference price is calculated. Any reference price calculated in January will doubtless not be representative of prices for subsequent months, or even for the months preceding January.

It is important to emphasize that, if Chile's measure used a more frequently calculated reference price and determined duties or rebates with the same degree of frequency, it would undoubtedly constitute a mechanism for correcting differential increases or reductions in international prices, as was the case with the PBS, which did so every week, thus making it difficult for fluctuations in international prices to be transmitted to the domestic market.

(c) Can Chile also respond in this regard to Argentina's assertion during the substantive meeting with the Panel (see paragraphs 64 and 65 of the written version of Argentina's oral statement) that the fact that the amended PBS considers only the prices of 90 days out of the year makes the situation "even *worse* than with the original WTO-inconsistent PBS". (Original emphasis.)

Law 19.987 differs from the PBS in the method of applying duties and rebates. The PBS provided for adjustments to entry prices to compensate for fluctuations in international prices by means of the weekly adjustment of duties and rebates. Under this procedure, it was essential that the reference price accurately reflect what was happening in wheat transactions so that the optimum level of compensation could be calculated, and also that it be as low as possible to prevent any import operation in particular from being unable to reach the band floor level. That procedure does not exist under the current law, and compensation is irrelevant, since once the duties or rebates are determined, it is these values which are fixed and applied for a period of two months, without regard to developments in international prices during that period of application, in the same way as with any ordinary customs duty.

Again, the comparison is not relevant because today the specific duty or rebate is not intended to maintain a correspondence with international prices, nor is it intended to compensate for ups and downs in international prices so that they are not transmitted to the domestic market.

It is necessary to point out that, under the PBS, specific duties and rebates were calculated once a year for a series of possible prices, so that the reference price was the key variable in the mechanism as it was the parameter required for ascertaining what duty or rebate would be in force in any particular week of the year. In that case, the reference price was an important element in the market, because it dictated the level of border protection.

Under Law 19.897, the duty or rebate is simply established and published every two months, so that the market no longer needs to ascertain, estimate or take into account a reference price, but only the value of the duty or rebate applied, which, moreover, are not constantly adjusted in line with the changes in any reference price.

The latter situation is not worse and is not WTO-inconsistent, since it is precisely this dissociation of applied duties and rebates from the international price or from a reference price which is one of the inherent characteristics of ordinary customs duties.

(d) Do the Parties concur that the reference price used to trigger the calculation of additional duties (or rebates) changes six times in the course of any 12-month period?

The determination as to whether to apply specific duties, rebates or neither of the two is made six times a year, hence the level of protection may also change six times a year. The reference price used for this determination is calculated with the same frequency, six times a year, and logically may change just as frequently.

13. Do the Parties consider that the fixing of reference prices for a period of 60 days constitutes a cumulative insulation factor, in view of the fixing of price bands for a period of 11 years?

The reference price is not maintained unchanged for 60 days, nor is it used during that period for any particular purpose. The specific duty or rebate, or the non-application thereof, is what remains unchanged for 60 days. The reference price does not constitute an insulation factor in any way. Whether a particular market, like that of Chile, is insulated from international markets is measured through the behaviour of domestic prices.

When there is price transmission, and international market fluctuations are transmitted to the local market, domestic prices exhibit a pattern of behaviour and a trend similar to that shown by international prices, even though that behaviour is attenuated by the existence of border duties or other factors (costs) not necessarily related to the market for the product (oil, exchange rate, harvest periods). Even with extremely high levels of border duties, there is no guarantee of domestic market insulation, only a higher level of protection.

Insulation of the domestic market from the international market is achieved by applying measures that prevent transmission of variations, for example through variable levies determined on a case by case basis or frequently adjusted in a direction and amount contrary to the trend in international prices.

Nor does the fixing of other parameters of the system constitute an insulation factor, since market insulation is measured and must be measured in relation to the way in which domestic prices behave *vis a vis* fluctuations and trends in international prices.

If Chilean policy used no parameter to determine the level of protection desired for wheat, but maintained its method of modifying the specific duty or rebate every two months, the levels thereof being determined by the authority without recourse to support mechanisms, the situation would be that Chile would have a policy for the application of duties and rebates that would be fixed bimonthly. In a situation like the one described, there would be no discussion concerning the level of international prices, the reference price or any other parameter, since there would be only an applied duty or rebate.

In such a scenario there would certainly be no questioning of whether or not the policy is WTO-consistent, but questions would undoubtedly be raised concerning the level of duties and rebates, and perhaps as to how the authority determines those levels.

Under such a scenario we would undoubtedly not be involved in this Panel proceeding, since for one thing the national authority has sovereign discretion to determine the duties and rebates that it deems appropriate domestically, and for another the only WTO commitment in such circumstances is that the level of protection at the border should not exceed the bound tariff rate.

In practice, the scenario described is the one that actually establishes current policy on wheat and wheat flour. It is no different in its operation from simply imposing duties and rebates on a two-monthly basis, as established by an administrative act.

Nor is it possible to question how the authority determines the level of protection, the type of information it uses or any action that comes within its field of competence, provided that the law and international commitments are respected.

Chile has taken the view that its policy must be completely transparent and non-discretionary, that even the authority's own actions are subject to bounds or restrictions, so as to prevent conflicts of interest within the country.

The supporting elements for this objective, such as the parameters and the formula used, are designed exclusively to establish guidelines for action by the authority in order to achieve the level of protection that Chile deems appropriate for wheat and wheat flour. These parameters have no other purpose and have no bearing on the way in which duties and rebates are applied. The same results could doubtless be obtained without using them, albeit with a lower level of transparency and with an element of discretion.

It is for this reason that Chile has stressed that the substance of this dispute should focus on how the policy of border protection is applied and what results are observed in the market, none of them being different from what occurs with ordinary customs duties.

14. What significance, if any, do Parties attribute to the fact that the amended PBS provides that references prices are established bimonthly instead of weekly, as was the case previously?

In Chile's opinion, the establishment of reference prices is no longer relevant. It has already been mentioned that, under the PBS, the reference price was determined weekly by Customs and was to be considered by economic operators in each import operation, which produced the effect that the duties collected were constantly adjusted, even during those weekly periods.

As was also stated before, under Law 19.897, reference prices are not established bimonthly, but are an element used by the administrative authority to fix the specific duty to be imposed on imports, and it is that specific duty (or rebate), and not the reference price, which is currently applicable for a period of two months.

However, under the PBS, the determination of a weekly specific duty using a reference price calculated weekly was extremely important as it facilitated rapid adjustment in the level of border protection which, if applied inversely to changes in international prices, served to compensate for such price changes by impeding the transmission of external price variations. At the same time, this weekly determination caused uncertainty by preventing traders from being informed 52 times a year of the level of border protection or the reference price that would be applied to them.

Under Law 19.897, the duty, rebate or neither of the two is determined six times a year. Unlike the PBS, the fixed duty or rebate cannot be used to compensate for external price variations and are values established by a public and publicised administrative act.

15. The amended PBS provides that the same reference price still applies to all goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value of the shipment. Could Parties please comment on the effects of this feature on the transmission of international price developments into the Chilean market.

It is Chile's understanding that the Panel is referring to the specific duty established under Law 19.897 and not to the reference price. Assuming that we are talking about the specific duty, the Panel's statement would read as follows: " ... the same *specific duty* still applies to all goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value of the shipment". These three features are not novel, as they are features common to any tariff applied in the form of a specific duty. And like any specific duty, this specific duty in particular does not impede the transmission of prices to the Chilean market.

In particular, if different duties were applied according to the origin of the goods, that would violate the MFN principle, by discriminating in trade against certain countries that could apply a higher tariff charge. If different duties were applied according to the value of the shipment, that would discriminate against and probably punish operations effected at lower prices. At the same time, the application of a uniform duty for all products under a tariff item affords equality of treatment to all commercial operations, enabling lower-priced products also to enter at lower prices, and not limiting commercial opportunities.

It should be pointed out that, according to economic theory, it is the price itself which transmits all the information on international markets to domestic markets. Tariffs will always distort such information by inserting an arbitrary wedge (but a legitimate one from the standpoint of the WTO agreements) in the price variable. Consequently, since the transmission of prices will never be perfect where a (specific or *ad valorem*) tariff exists, in the case of the specific duty established by Law 19.897, such transmission occurs, but as with any specific duty or ordinary customs duty, it is not perfect.

16. Do the Parties agree that the specific duties or rebates under Chile's PBS are calculated according to "*a formula or scheme*" which involves several parameters?

In general terms, the answer should be affirmative. However, in Chile's opinion, Argentina erroneously interprets the AB's rulings and the changes introduced by Law 19.897, and attempts to draw parallels between the current regulations and the system that existed under the PBS.

At the present time, the tariff charge on wheat and wheat flour in Chile consists of the amount of the specific duty (or rebate) and the *ad valorem* tariff. Both duties are applied in the same manner to every import operation. A change in this tariff charge requires a change in the *ad valorem* tariff or specific duty.

A change in the *ad valorem* tariff will require compliance with the rules governing enactment of the law as contained in the Constitution, which, as is the case in most States, do not provide for parameters for defining the application of a six percent tariff, for example, and the same is true for practically the entire universe of tariff headings in Chile. Still less do they provide for the periodicity of possible changes to *ad valorem* duties. What Argentina regards as an obvious lack of transparency and predictability is not, since the commitment by WTO Members under GATT Article II is not to demonstrate the reasons for establishing a specific tariff charge or to maintain their customs duties

unaltered, but as the DSB has indicated, predictability is determined by WTO Members' commitment not to exceed the bound tariff.

In Chile's opinion, the same reasoning applies to the specific duties established by Law 19.897. These are identical to those imposed by many WTO country Members, and have been recognized by the WTO. The only difference between the imposition of the specific duty under Law 19.897 and the *ad valorem* tariff is that the calculation of the amount of the specific duty is not left to the discretion of the administrative authority, but that the law sets out the prescribed conditions and level of protection.

In view of the foregoing, in response to the question whether the specific duties imposed by Chile are ***calculated*** in accordance with a mechanism which includes various parameters, strictly speaking the answer must be affirmative. However, there is a qualitative difference compared with previous practice under the PBS, which Argentina does not appear to understand in this dispute. Today, the parameters of the law are used to calculate the amount of the specific duty, but the same duty is applied to any import operation at the border. Under the PBS, on the other hand, the specific duty was not established by the administrative authority, but a series of combined parameters were applied independently of the authority; these parameters were not a tool for calculating the duty but ultimately determined the level of the duty, and their interaction caused variations in the amount of the duties in a manner similar to variable import levies, with the result that, as was pointed out by the AB, two simultaneous operations could be subject to different duties.

17. Argentina has stated in paragraph 229 of its first submission that "the way in which Chile determined the factor 1.56 is not transparent, since in its legislation Chile has neither explained nor justified in any way the basis on which it was established".

(a) Could Argentina clarify whether in its view this particular fact *per se* would make the amended measure inconsistent with the WTO covered agreements.

(b) If so, could Argentina identify the relevant legal basis.

(c) Could Argentina elaborate on the reason why the lack of explanation or justification as to the exact figure of the factor fixed by Chile would *per se* affect market access for imports of agricultural products.

(d) <u>Can Chile comment on this point</u>.

Regarding point (d), in the first place Chile considers that it is for Argentina to substantiate its own claims for the Panel's benefit. By way of a general comment, Argentina seeks to extend the scope of the Appellate Body's pronouncements on the question of transparency.

In fact, the AB based its conclusions regarding the lack of transparency on <u>certain</u> characteristics of the PBS and its particular configuration and interaction (in the same way as for the determination of import costs and reference price under the PBS).[9] Moreover, it should be remembered that <u>the factor of 1.56 was not challenged by Argentina in those proceedings</u>, and consequently Chile reiterates that this claim by Argentina does not fall within the terms of reference for these proceedings, as was indicated in the first[10] and second[11] submissions by Chile.

[9] See paragraphs 246, 247, 249 and 258 of the AB report.
[10] First written submission of Chile, paragraphs 58 to 63.
[11] Second written submission of Chile, paragraphs 182 to 195.

18. Citing the original Panel's finding in paragraph 7.36 to the effect that "minimum import prices *generally* operate in relation to the actual transaction value" (emphasis added), Chile claims that the specific duties resulting from the new PBS are not based on transaction values, and therefore they are not "variable import levies" (see, for example, paragraph 114 of its rebuttal submission). Do the Parties consider that minimum import prices *always* operate in relation to actual transaction values?

No. To secure a minimum price, it is necessary to be aware of the actual transaction value or some supplementary information enabling an accurate estimate to be made by using an alternative price as a means of determining a level of protection sufficient to cover or exceed the minimum import price. This can be done by using administrative or market values equal to or lower than the lowest possible price for an actual commercial transaction. However, this is not sufficient to maintain a minimum price, for which purpose an operational mechanism is required to preclude the possibility of any particular shipment entering at a value lower than the minimum price. It is for this reason that the actual transaction value is usually employed, inasmuch as it serves effectively to prevent the entry of products below the minimum price since it is applied on an operation by operation basis.

Where the transaction value is not used to determine the customs duty required and the mechanism does not take account of a high frequency of application, administrative prices or extremely low reference prices are normally used to ensure attainment of the objective over a long period of time. This is because prices even lower than those used could appear in the course of application, thereby nullifying the desired effect.

Where the mechanism operates on a frequent application basis, weekly for example, sufficiently low comparison parameters, albeit within customary international price ranges, are used: in this case, it is sufficient to ascertain the lowest price for the period of application, since if commercial operations at lower prices are found to exist, this difference is rapidly adjusted in subsequent application of the measure.

Minimum prices are determined at local market level in units equivalent to the domestic price or at entry price level, which corresponds to a stage prior to entry into the local market. In any event, it is absolutely essential that the minimum price be determined in a market position that enables the necessary correction or compensation to be applied by means of measures (duties or taxes), so as to maintain the minimum price. It is for this reason that use is commonly made of the price on the market in which typical transactions in the product occur: the wholesale or consumer market. This ensures that that price, at the level of interest to the local market, is maintained.

Where the minimum price is fixed below the local market level, that is, at the entry price or c.i.f. price level, the mechanism does not necessarily apply a domestic price because there may, and normally do, exist differences in commercial operations which cause the final price within the country to be non-uniform for all traders or commercial operations. For example, differences resulting from economies of scale applied by enterprises, which enable the largest ones to secure lower freight costs, credit interest rates, storage and other credit associated with the import and market operation. In such cases, a minimum entry price or c.i.f. price can be secured, but not a minimum price at the level of the domestic market, which is what is normally of interest to countries.

The foregoing explains why minimum import prices are usually based on the actual transaction value: because the latter is the one most frequently applied (one for each commercial operation); and why they are fixed at domestic market level: because that is precisely where the minimum price is wished to be reflected.

In the case of Law 19.897, the bimonthly establishment of the duty does not serve to correct the value of imports and thereby to maintain a minimum price. The determination of the floor value at f.o.b. level makes that possibility even more remote, since substantial costs have to be incurred for the purpose of placing the product on the local market, most of which, such as freight costs and credit interest payments, for example, are beyond administrative control and are factors that frequently produce major economies of scale for importing companies. In this connection, low frequency of application and the use of f.o.b. values means that the current mechanism is unable to maintain an entry or local market price at c.i.f. level, since the specific duties correspond to an ordinary customs duty.

19. In the view of the Parties, what would be the defining characteristic to determine whether a system operates as a minimum import price? Would that defining characteristic be the fact that the system operates in relation to the actual transaction value of the imports? Would it be the fact that it leads to a certain entry price into the domestic market?

The defining characteristic of a minimum import price is the impossibility for any commercial operation to be expressed in terms of a price lower than the established price.

The operation of a minimum import price in relation to the actual transaction value is the mechanism by which the minimum price can be guaranteed with absolute certainty; in fact, this is the perfect scenario, since every operation can be corrected independently, leaving no gaps that would impair the threshold value. This is in fact the basic characteristic.

Where the measure is indicative of a domestic market entry price, this would not necessarily be a defining characteristic of a minimum entry price, since the possibility of that price being genuinely indicative would depend on the mechanism applied. Indeed, if there are no mechanisms for adjusting the values of imports in order to approach or approximate the indicative price, the desired effect will not be achieved.

In other words, if an indicative price is determined and, at a particular point in time, a certain level of duty is required to obtain that price on the basis of existing import values, if that duty is not changed over a long period of time and the import prices vary, the entry values or prices will vary in line with trends in import or international prices.

In such circumstances, a mechanism is required that is capable of correcting the level of protection whenever import prices deviate or change level. That is to say, when there is a high frequency of changes in the duty, the most extreme example of which is its determination on a case-by-case basis when the value of each commercial operation is used.

20. Can Argentina comment on Chile's statement in paragraph 143 of its first submission, that "the mere fact that the duties and rebates, or the non-application thereof, are established for a sufficiently long period of time provides certainty that any variations in international prices that may occur over this period will be transmitted to domestic wheat prices". In Chile's view, does this statement imply that this "mere fact" *per se* is decisive?

The Appellate Body held that the PBS was a measure similar to a variable import levy and/or a minimum import price. An important factor in arriving at this conclusion was the variability of duties, whereby two shipments entered at the same point in time could be subject to different duties.

Pursuant to Law 19.897, the Ministry of Finance decree fixes a specific duty or tariff rebate or provides for payment of the *ad valorem* duty only. Taking the example of the application of a specific duty, Ministry of Finance Decree 88, published in the Official Journal of 14 February 2005, provided for the payment of a specific duty of 0.0205 US$/kg. As a result, all imports of wheat and wheat flour

into Chile were subject to payment of the specific duty and to payment of the *ad valorem* tariff of 6 per cent between 16 February and 15 April.

Consequently, and inasmuch as this was an ordinary customs duty, if international prices rose, the entry price rose, and if international prices fell, the entry price also fell.

This was not the case under the PBS, where Customs on a weekly basis adjusted the reference price to the lowest price on the international markets, a fact which, in the AB's opinion, prevented domestic prices from following – or at least failed to guarantee their following – variations in international prices, even though they did not do so automatically.

21. During the meeting with the Panel, the EC stated that, in its view,

> **"it is only when the measures clearly have sufficient similarity to measures coming under the scope of Article 4.2 – that is features unique to the measures listed in the footnote to Article 4.2 are also found in the measures challenged – that there is a possible violation of Article 4.2. The existence of features which are not unique to the measures found under Article 4.2 cannot be sufficient, on their own, to render a measure inconsistent with Article 4.2" (see paragraph 9 of the written version of the EC's oral statement).**

Could the Parties comment on the EC's statement.

What the Panel offers for comment is only a part of paragraph 9 of the EC's statement at the recent meeting. Chile agrees with the EC's contention that the paragraph in question should be read in its entirety. In other words, Chile supports the fundamental point raised by the EC, namely that the GATT neither regulates nor precludes variation in the establishment of customs duties (provided that they do not exceed the level bound in the Schedule), that the GATT makes no reference to the predictability of the change in a customs duty (without prejudice to its appropriate publication) or to the frequency of the variation in the said customs duty, so that the question to be analysed is whether any of these situations could give rise to an inconsistency with the provisions of Article 4.2 of the Agreement on Agriculture. That is precisely the point to be kept in mind in relation to the EC's further argument, and it is this last part of the paragraph that the Panel separates for comment.

The Chilean measure contained in Law 19.897 and the Regulation thereto, which is an ordinary customs duty, possesses parameters that render determinable the establishment of specific duties (or rebates), which is to be done every two months, but this variation in no sense implies the configuration of any of the situations referred to in Article 4.2 of the Agreement on Agriculture.

22. Can the Parties provide a copy of the relevant sections of the documents "*Historia de la Ley. Compilación de textos oficiales del debate parlamentario*" to which Argentina refers throughout its first written submission.

This is a public document, published by the Library of the Chilean National Congress, and it contains the opinions formulated by government authorities and parliamentarians in the legislative approval discussion process. In this connection, Chile would remind the Panel of what was stated by the WTO Appellate Body in *Japan – Alcoholic Beverages*:

> *"it is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish*

legislative or regulatory intent. [...] This is an issue of how the measure in question is applied."[12]

Chile has provided only one copy (Exhibit CHL-15) of this document since, as will be noted by the Panel, it is a voluminous document of more than 150 pages in Spanish, and it is not available as an electronic file.

23. Can the Parties confirm whether Decree 401 of 15 June 2006 by the Ministry of Finance of Chile is the latest decree issued pursuant to the PBS.

Pursuant to the last paragraph of Article 1 of Law 19.897, Article 5 of Decree 831 established the periods of validity of each supreme decree determining duties or rebates on wheat and wheat flour. Since the law came into effect, 16 decrees have been issued, the last one to have been published being Decree 401 of 15 June 2006, which will remain in force until 15 August 2006. However, pursuant to the provisions of that enactment, between 11 and 15 August it will be necessary to issue a new decree establishing the new duty or rebate, or neither of the two, to be applied during the period from 16 August to 15 October 2006.

24. Could the Parties comment on the "understanding which Chile later repudiated" that Argentina refers to in paragraph 11 of its first written submission. Would such understanding have any relevance in the present case?

In paragraph 11 of its first written submission, Argentina states that various negotiations in 2004 and 2005 led "to an understanding which Chile later repudiated". This assertion by Argentina is incorrect. Moreover, Chile considers that any bilateral negotiation that produces a mutually agreed settlement in respect of a dispute already brought before the WTO can only be discussed within the Organization after the parties have notified the settlement to the DSB and the competent WTO councils and committees.

FOR CHILE

47. The Panel has noted that edible vegetable oils have ceased to be subject to the PBS since the entry into force of Law No. 19.897 (see, for example, Argentina's first submission, paragraphs 8 and 22. Argentina's rebuttal submission, paragraph 317). Can Chile describe the trade regime applicable to imports of edible vegetable oils, after they were excluded from the PBS.

A decision was taken, in keeping with Chile's trade liberalization policy, to restrict the application of Law 19.897 to wheat, wheat flour and sugar, thereby excluding all edible vegetable oils falling under Chapter 15 of the Harmonized Customs Tariff, products with regard to which the former system was already inoperative at the time of the change of law.

As of the entry into force of the new Law, imports of these products come under a general regime, that is to say, they are subject to a tariff of 6 per cent, with the exception of those from countries with which Chile has established tariff preferences, in which case the tariff is lower.

48. Could Chile explain what the rationale is for setting the year 2014 as the date for the President to evaluate the modalities and conditions of application of the PBS.

[12] *Japan – Alcoholic Beverages*, Appellate Body, Document WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R, pages 30 and 31.

Pursuant to Law 19.897, in 2014 the President of the Republic will evaluate the modalities and conditions of application of the Law, taking into consideration international market conditions, the requirements of the industrial, productive and consumer sectors and Chile's trade obligations at that date. The latter was key in determining the time-frame, mainly because of the effects of the tariff liberalization established under various bilateral agreements, such as the Free Trade Agreement with the US, a major wheat producer, whereby wheat and wheat flour will be subject to a zero tariff as of 2015. An analysis of the scenario of reduced border protection for wheat thus led to the conclusion that, at the levels fixed for 2014, the chances of specific duties being applied would be virtually nil or, were they to be applied, their effect would be marginal, meaning that the policy would in fact be non-operational.

49. In paragraph 108 of its first submission, Chile argues that the level of protection granted by the PBS will be gradually reduced from 2007 onwards "culminating with the application of duties or rebates in 2014". Could Chile clarify the meaning of "culminate" *vis-à-vis* paragraph 4 of Article 1 of the aforementioned law, insofar as it states that "[i]n 2014, the President of the Republic shall *evaluate* the modalities and conditions of application of the price band system, taking into consideration international market conditions, the requirements of the industrial, productive and consumer sectors and Chile's trade obligations at that date." Please respond taking into account the statement of Argentina in paragraph 33 of its first submission, that "the floor and ceiling prices of the bands will be maintained, except for the fact that they have now been established – in principle – for 11 years, whereas under the previous system they were determined annually".

Law 19.897 provides for the application of duties and rebates until 2014. The protection granted to wheat and wheat flour under current legislation therefore terminates at that date.

Furthermore, Article 1.4 of the Law states that, in 2014, the President of the Republic shall evaluate the modalities and conditions of application of the price band system in accordance with the factors specified in the Law.

In the light of these two provisions, the application of duties and rebates under current legislation terminates in 2014. If a decision is taken in 2014 to alter this situation, the President of the Republic will have to submit a draft law for approval by the Legislature; that is to say, for the measure to remain in place, specific legislation will have to be introduced on the issue. Such a measure would, in any case, be new.

Contrary to Argentina's assertions, Chile has no facts on which to affirm that Law 19.897 has been established "in principle" for 11 years, given that, in a country governed by the rule of law, such as Chile, the decisions of the Executive and the Legislature at that date cannot be anticipated, nor can there be any guarantee that the Law, as it exists today, will remain unchanged until that year. Chile can only state that, in its present form, the measure allows duties or rebates on amounts payable as duties to be fixed only up until 2014.

50. Chile has asserted in paragraph 118 of its rebuttal submission that, under the present PBS, "the floor price is *not* an entry price, is *not* fixed on the basis of the internal price, is *not* linked with it, and is *not* fixed at a price above it" (emphasis added). Chile has stated what the price band floor is *not,* could it define for the Panel its understanding of what the floor price *is*?

The band floor is one of the objective parameters established for the calculation of the tariff level for border protection for wheat and wheat flour. It may be used only on the dates on which such protection is to be determined, i.e., six times per year, and only if another of the objective parameters provided for in Law 19.897, namely the reference price, is lower.

As is stated in the documents submitted by Chile to the Panel, fixing and gradually lowering this value, known as the floor price, enables a maximum level of border protection, as permitted by the WTO for its Members, to be established. This would apply to both wheat and wheat flour in accordance with a pre-established schedule for purposes of transparency and predictability. A trader monitoring international prices - on the basis of which the reference price is determined - could therefore estimate in advance the level of protection his product would face upon entering the Chilean market as from the year in which these values were fixed. It should be pointed out that since Law 19.897 entered into effect, specific duties have only been established for a limited period; most of the time goods are subject only to the 6 per cent *ad valorem* duty, with rebates being granted the rest of the time.

51. Could Chile comment on the following section of Law No. 19.897 which describes how the system as a whole is to be re-assessed at the end of the first implementation period through 2014, and the factors to be taken into account:

> **"In 2014, the President of the Republic shall evaluate the modalities and conditions of application of the price band system, taking into consideration international market conditions, the requirements of the industrial, productive and consumer sectors and Chile's trade obligations at that date." (Emphasis added).**

In view of the above, would this mean that, despite Chile's assertion that the floor price "is not fixed on the basis of the internal price", *internal market conditions* are indeed among the essential factors that are, *by law*, considered by the Government of Chile in fixing all the required methodological PBS parameters, including the floor price?

No. The factors specified in Article 1.4 are not related to the way in which Law 19.897 is structured at present, rather they refer to the conditions to be evaluated by the President of the Republic when the application of duties and rebates terminates in 2014.

None of these characteristics comes under the parameters currently provided for in Law 19.897. This Law pertains to international market conditions, with reference to existing distortions in such markets and the outcome of WTO multilateral negotiations. The requirements of the industrial, productive and consumer sectors are related to how the protection afforded under Law 19.897 affects the various economic agents. Finally, Chile's trade obligations at that date relate to the fact that Chile has signed a number of trade agreements which could have an impact on wheat and wheat flour protection.

52. Can Chile explain the nature and the parameters on the basis of which the floor and ceiling of the band were determined. How were the threshold figures of US$128 and US$148 eventually determined?

These values were determined in accordance with Law 19.897, which establishes that "the values considered shall be the floor and ceiling prices used for wheat and sugar in the drafting of Chilean Ministry of Finance Exempt Decrees Nos. 266 and 268, published in the Official Journal of 16 May 2002, in United States dollars f.o.b. per tonne".

Accordingly, the f.o.b. equivalents were determined on the basis of the floor and ceiling prices provided for in Decree No. 266 of May 2002, expressed at import cost level, by deducting all import costs applicable to an ordinary trading transaction at the date of entry into force of the Law (second half of 2003).

53. Could Chile elaborate on how the fact that the price band floor and ceiling have been set at US$128 and 148 leads to compliance with the DSB's rulings and recommendations in the original case.

The reference value parameters established by the Chilean measure as the floor (US$128) and ceiling (US$148) prices are an objective element, *inter alia*, for determining the ordinary customs duty, as a specific duty or a rebate, as the case may be. These parameters are fully consistent with the recommendations adopted by the DSB in this dispute. In this connection, special consideration should be given to the fact that, in the context of those recommendations, paragraph 261 of the Report of the Appellate Body states that, in assessing the PBS, "no one feature is determinative of whether a specific measure creates intransparent and unpredictable market access conditions". In the same paragraph, the AB declares that it reached its conclusion "on the basis of the particular configuration and interaction of all these specific features" of the PBS. This necessarily leads to the conclusion that the isolated analysis of a single parameter of the Chilean measure is inappropriate; rather, this measure must be assessed with regard to the configuration and interaction of all of its features in relation to its consistency with the specific and pertinent obligations under the WTO Agreements at issue in this dispute.

54. Could Chile comment on Argentina's statement in paragraph 41 of its rebuttal submission that the floor and ceiling of the band "are two figures chosen arbitrarily and without the use of any criterion. They could be CIF, FOB or ex-works. It is simply not known and there is no way of knowing, unless Chile were to make more transparent its reasons for setting the floor and ceiling of the band at US$128 and US$148 per tonne, respectively". (Original emphasis).

Firstly, the origin of these amounts has been broadly explained in the Chilean submissions. Furthermore, in Chile's opinion, the said paragraph 41 is based on an incorrect interpretation of the recommendations and rulings of the DSB. Argentina claims that the values are not f.o.b. values in spite of the fact that the Law states this to be the case. Chile has shown that the values used are f.o.b. values and has demonstrated how they operated under Law 19.897.

Moreover, Argentina takes the transparency requirement established by the AB to extremes which, if accepted, would render virtually all ordinary customs duties WTO-inconsistent. As previously noted, the AB found a lack of transparency and predictability in certain features of the PBS, which made it a measure *similar* to those listed in footnote 1 to Article 4.2. of the Agreement on Agriculture.

To maintain that the transparency requirement applies in the terms set out by Argentina would mean that almost all *ad valorem* duties would not be transparent and would therefore cease to be ordinary customs duties upon being characterized as measures similar to those in the above-mentioned footnote 1. In point of fact, few, if any, laws state reasons for the establishment of an *ad valorem* duty. On the basis of Argentina's argument, we could maintain that such tariffs are "figures chosen arbitrarily and without the use of any criterion".

However, this is not the case for the obligations under Article II of the GATT. It would occur to very few countries, as Argentina claims, that these *ad valorem* duties would be WTO-inconsistent, given that the amount established by Members is one which is "simply not known and there is no way of knowing", unless the Parties had made "more **transparent** [their] reasons for setting" it.

55. Could Chile explain the rationale behind the introduction of a multiplier consisting of 1 plus the generally applicable *ad valorem* duty, for the purposes of calculating the specific duty, in cases where the reference price falls below the lower threshold price.

In order to determine the specific duty under the PBS, consideration was given to a series of fixed and variable costs involved in an ordinary import process, including the general *ad valorem* tariff. To make determination of the duty more transparent and predictable, Law 19.897 excluded all these costs, other than the general tariff (given that this is a known value), from the calculation of the duty. The following formula for calculating the specific duty was therefore established in the Regulation to the Law:

$$SD = (1+ 0.06) * (FOB_{floor} – FOB_{rp})$$

It should be pointed out that, on the basis of this formula, it follows that the specific duty under current Chilean policy is less for any reference price, given that its determination includes only the general *ad valorem* tariff and excludes all the other variable costs which formed part of the PBS.

For a more detailed explanation of this formula, see the reply to Question 5.(c).

56. Could Chile explain what the rationale is for setting the adjustment factor at precisely 0.985.

As has already been explained[13], the price band system was modified in response to a broad political consensus, as well as an agreement between the various actors involved, with regard to the level of protection which should be granted to wheat and wheat flour in Chile.

Pursuant to this agreement, Chile maintained a level of protection in addition to the *ad valorem* tariff on products under the bands, allowing producers to be protected from distortions in international markets, without overprotecting them, on the condition that such protection would be reduced and the market fully liberalized on a gradual basis. Moreover, the decision to do this has also been incorporated in the negotiations relating to some of Chile's regional trade agreements.

Additional protection was consequently calculated for the sector up to 2014 and a factor enabling a gradual reduction of protection was applied. It may be added, by way of background information, that, in line with the historical average prices for wheat, the band is likely to be inoperative by 2014 since it will be lower than international prices.[14]

57. Is Chile arguing in section V.1 of its first submission (paragraphs 121-132), that the reason why the floor of the price band may not be considered as a minimum import price is that it has now been established on a FOB basis? Does that also mean that the reason why the original PBS was found to be similar to a minimum import price was because the floor of the price band was established on a CIF basis?

One feature of Law 19.897 is that the parameter used is expressed on an f.o.b. basis, but this is neither the only nor the most relevant one. Law 19.897 provides for the establishment of specific duties which correspond to ordinary customs duties and the existence of parameters supporting their determination does not alter this situation.

With regard to the PBS, the band floor price was fixed at domestic market level as an import cost directly comparable to the domestic price, not on a c.i.f. basis. This is one of the features of minimum import prices, but was not by itself sufficient to justify a finding that the PBS was similar to a minimum import price.

[13] Paragraph 28 of Chile's oral statement.
[14] See Response No. 48 to the questions by the Panel.

Other features include the non-transparent method of calculating the reference price, the determination of the reference price on a weekly basis and the fact that this price is fixed on the basis of the lowest price in the markets of concern. To this can be added the absence of public and official documents containing definitions of the markets of concern and of the reference price itself and, finally, the features of lack of transparency and predictability.

58. Can Chile respond to Argentina's assertion during the substantive meeting with the Panel (see paragraph 33 of the written version of Argentina's oral statement) that "when specific duties are applied the entry price is *always* above US$128 per tonne". If it does not agree with this statement, can Chile provide evidence of actual situations under the amended PBS when imports of wheat or wheat flour have entered the market at prices lower than the lower threshold of the price band.

In paragraph 33, Argentina states that it has shown mathematically and empirically that the specific duties resulting from Law 19.897 tend to elevate the entry price of imports above US$128. Argentina goes on to assert that when specific duties are applied entry prices are always above US$128, as allegedly confirmed by Chile.

Firstly, Argentina's mathematical demonstration (see Section C.I.2.1. of the First Written Submission by the Republic of Argentina) only reveals that, given that the floor price is determined on an f.o.b. basis and the entry price is calculated on the basis of a c.i.f. value (corresponding to an f.o.b. price plus international freight and insurance) and total tariffs, the likelihood of the entry price exceeding the floor price is very high. Clearly, this is true even without the application of tariffs (either *ad valorem* or specific) being taken into consideration.

Secondly, the actual data on the c.i.f. prices of imports from Argentina for the period from 16 December 2003 to 15 December 2005 confirm the above (see Exhibit CHL-16). Throughout the period, the c.i.f. prices are between 22 and 107 per cent higher than the floor price (US$128). Given that the entry prices correspond to the c.i.f. prices, plus tariffs, it is clearly very difficult for them to fall below US$128, irrespective of whether or not specific duties are applied.

Nevertheless, and as shown mathematically by Argentina, the unlikely but not impossible situation could arise whereby, once a specific duty has been established, international prices fall substantially, which in turn is reflected in c.i.f. prices low enough to result in entry prices of below US$128.

59. In paragraphs 161 to 163 of its first submission, Chile argues that "traders have information that enables them to predict wheat price levels in the short and medium terms, and hence information to foresee the level of specific duties that might be levied on wheat imports to Chile in the near future" and that "[i]t is practically impossible for wheat traders not to know or not to use" information on trading in financial derivatives on wheat, which include at least futures contracts, from commodity exchanges in the US and Argentina, in order to conduct their businesses. Would it be right then to presuppose the intervention of professional wheat traders in every transaction involving the importation of wheat into Chile? If so, does this fact have any bearing in conditions of market access into Chile for imports of wheat and wheat flour?

As has been noted throughout this process, information on the conditions of application of duties and rebates for wheat and wheat flour is public and easily accessible to any Chilean citizen or foreigner, whether or not professionally engaged in foreign trade. The same is true for information on the payment of *ad valorem* duties, customs provisions, certification requirements and other issues related to import trade as such. Anyone wishing to know the conditions of access to the Chilean market for wheat and wheat flour can therefore have recourse to public and easily accessible sources

of information, as well as being able to carry out all the procedures necessary for a foreign trade operation directly.

Nevertheless, in Chile, as in most countries, international goods transactions are conducted by professionals who obviously have a better and more thorough command of all the elements involved in import and export operations. This activity, the world over, implies an awareness of a considerable amount of background information, in addition to the ordinary duties themselves. The case of wheat and wheat flour in Chile is no exception.

The fact that transactions are conducted by "professionals" cannot therefore be interpreted as being a consequence of the conditions of application of wheat and wheat flour tariffs.

60. In paragraph 72 of its rebuttal submission, Chile stated that "[t]he reference prices now correspond to f.o.b. prices on the two markets of most concern for Chile … In the last six years (2000-2006) 40 per cent of Chilean wheat imports came from the United States and 31 per cent from Argentina." In this regard, can Chile respond to Argentina's assertion during the substantive meeting with the Panel (see paragraph 54 of the written version of Argentina's oral statement) that, "[a]lthough Canada is certainly a market of concern for Chile, the amended PBS will never reflect Canada's relevance in Chilean foreign trade of wheat, nor Canadian prices will be reflected in Chile's internal markets".

With regard to Argentina's assertions in paragraph 54 of the written version of its oral statement, we wish to clarify the following:

- The information submitted by Chile on average wheat imports for the period 2000-2006, that contained in Argentine Exhibit ARG-31 on imports in 2004 and 2005, and that submitted by Chile in Exhibit CHL-13 on imports in 2002 and 2003 all originate from the same source.

- The source of this information is www.odepa.gob.cl.

As was indicated by Chile in its oral statement (see paragraph 59 of the written version), the markets used to establish the reference prices meet two conditions:

- Firstly, two markets are recognized worldwide as reference markets for the international price of wheat of the category in question (i.e. wheat classified under tariff heading 1001.90). These apparently also serve as reference markets for the Argentine Government. Exhibit CHL-12 contains a table published by Argentina's Secretariat of Agriculture, Livestock, Fisheries and Food (*Secretaría de Agricultura, Ganadería, Pesca y Alimentos*, SAGPyA, www.sagpya.gov.ar) with information for its users on international prices and entitled: "Trends in the external prices of the main cereals" (*Evolución de los precios externos de los principales granos*). The prices "FOB GOLFO" and "FOB PTOS. ARG." ("f.o.b. Gulf" and "f.o.b. Argentine ports") are quoted for wheat.

- Secondly, they correspond to wheat from two of the markets of most concern to Chile. In point of fact, in the two years prior to the entry into force of Law 19.897, the period taken into consideration when developing the modifications to the PBS, they were actually the most relevant markets. Even if a longer price series is considered (2000-2006), the figures show that they continue to be the most relevant markets.

The existence of a number of wheat-exporting countries (Australia, Canada, France, *inter alia*) and, at the same time, of several varieties of wheat falling under the classification 1001.9000 does not make the reference markets used or varieties of wheat selected any less representative. Given that wheat is a commodity, and bearing in mind differences in quality, the international prices of wheat from a number of sources are unquestionably related.

61. In paragraph 41 of its first submission, Argentina argues that the amended regulations do not specify which relevant port will be considered in order to determine the relevant FOB "Argentine port" prices used to calculate the reference prices. In paragraph 132 of its rebuttal submission (see Exhibit ARG-4), Argentina noted the existence of prices for at least four different ports (*Buenos Aires, Bahía Blanca, Quequén, and Rosario*). Chile has responded in paragraph 77 of its rebuttal submission that it "did not find any justification for picking out any one of the ports in particular, particularly as there were official figures published by the Government of Argentina". Could Chile:

(a) Provide any evidence that demonstrates the way in which market information from Argentina is actually used for the purpose of calculating the reference price;

The source of information for "*Trigo Pan* Argentine Port" (*Trigo Pan Puerto Argentino*) prices, also known as the "Official Price of *Trigo Pan*" (*Precio Oficial del Trigo Pan*), is the Secretariat of Agriculture, Livestock, Fisheries and Food (SAGPyA) (http://www.sagpya.mecon.gov.ar/), under Argentina's Ministry of the Economy. The Office for Agricultural Research and Policy (*Oficina de Estudios and Políticas Agrarias*, ODEPA), under the Chilean Ministry of Agriculture, takes these prices directly from the SAGPyA website on a daily basis.

With regard to differences in the names of price series, we would make the following points:

- The SAGPyA publishes daily and monthly reports on these prices. Chile has already submitted, in Exhibit CHL-14, two monthly series from the SAGPyA website which contain the same information, albeit with different series names.

- The Directorate of Agrifood Markets (*Dirección de Mercados Agroalimentarios*, DIMEAGRO), under the SAGPyA, publishes daily official prices under the name "*Trigo Pan* f.o.b. Argentine Ports" (*Trigo Pan f.o.b. Puertos Argentinos*) (see Exhibit CHL-17).

- The Buenos Aires Cereals Exchange (*Bolsa de Cereales de Buenos Aires*) publishes the daily prices "f.o.b. Argentine Ports" (*f.o.b. Puertos Argentinos*), the source of information for which is the SAGPyA. Exhibit CHL-17 also contains information from the Exchange's website. The information on wheat in the table is identical to that set out in Argentine Exhibit ARG-32.

Chile considers that there is enough evidence to show that the price series "*Trigo Pan* Argentine Port" (*Trigo Pan Puerto Argentino*) and "Official Price of *Trigo Pan*" (*Precio Oficial del Trigo Pan*) are identical.

(b) Clarify whether the use of an "average of different ports" for the determination of the reference price, in the case of wheat prices from Argentina, is a mandatory feature of the PBS and, if so, identify the relevant legal basis.

There is no legal obligation to use an average of different ports as a reference price. Article 8 of Regulation 831 provides that:

> "The market of most concern for wheat, during the period of application of duties and rebates from 16 December to 15 June of the following year, shall be that of *Trigo Pan Argentino* and the prices shall correspond to the daily prices quoted for that product f.o.b. Argentine port … ".

In the context of the changes required to establish duties and rebates in a transparent and predictable manner, it was necessary to select a reference price reflecting the level of the f.o.b. prices of *Trigo Pan Argentino*. Chile considered that the prices which have been published by the Argentine Government for more than 30 years under the title "*Trigo Pan* Argentine Port" (*Trigo Pan Puerto Argentino*), nowadays also entitled "Official Prices of *Trigo Pan*" (*Precios Oficiales Trigo Pan*), constituted accurate data on this level, which originated, moreover, from a reliable source. This price series has traditionally represented the price level at various Argentine ports.

62. Could Chile comment on Argentina's statement in paragraph 66 of its first submission in the sense that "[s]o far, the bimonthly decrees appear not to indicate the reference price calculated for each period".

Argentina's statement appears to be the result of its failure to appreciate the changes introduced by Chile. As has repeatedly been pointed out, under Law 19.897, the reference price is the price used by the administrative authority to determine the framework of protection applicable at the border, protection which is currently determined by a decree establishing a specific duty or a rebate on the *ad valorem* tariff, payable on all imports into Chile. Therefore, as distinct from the situation under the PBS, under Law 19.897 the publication of the reference price is of no relevance as far as the importer is concerned.

In fact, as also pointed out, under the PBS, the administrative authority established the specific duty (or rebate) once a year for a given price series and that corresponding to each import transaction was determined by the commercial operator on the basis of the tables of prices and associated duties already mentioned, in accordance with the date of shipment of the goods, and the reference price published by customs. Now, all that has been replaced, as appropriate, by a specific duty in dollars per kilo or a rebate in dollars per tonne, applied at the border together with the *ad valorem* tariff.

63. Law 19.897 states that the FOB reference price "shall consist of the average of the daily international prices … recorded in the most relevant markets over a period of 15 calendar days … " Can Chile explain the way in which these average prices are obtained. Does Chile transform these daily averages into monthly averages? If so, how is this transformation done? By using weighted averages of the daily prices or simple averages? Can Chile provide evidence to support its response.

As noted in Chile's Second Written Submission (paragraph 73), the sources of information are:

- For Soft Red Winter No. 2 wheat, the Gulf f.o.b. price published by the Chicago Exchange (http://www.cbot.com/)

- For *Trigo Pan*, f.o.b. Argentine port, the price (also known as the "Official Price"), published by the Secretariat of Agriculture, Livestock, Fisheries and Food (http://www.sagpya.mecon.gov.ar/).

ODEPA records these prices daily. In addition, since 1975, ODEPA has published an historical series of monthly prices for both products on its web page (www.odepa.gob.cl).

The reference price for each period of application is the average of the daily prices recorded on the previous 15 calendar days reckoned retrospectively from the 10th day of the month of publication of the corresponding decree. In making the calculation, days on which no figures were recorded (weekends and public holidays) are disregarded.

The daily prices considered are:

- During the six-month period from 16 June to 15 December: Soft Red Winter No. 2 wheat

- During the six-month period from 16 December to 15 June: *Trigo Pan*, f.o.b. Argentine port (also known as the "Official Price")

It is a question of a simple average of daily prices. There are no transformations of any kind.

For further clarification concerning how the calculation is made, Exhibit CHL-16 can be revised using the information requested in question 73. For example, to determine the amount of the rebates during the period from 16 February 2005 to 15 April 2005, the daily price data from 27 January 2004 to 10 February 2005 were used:

Day	Date	*Trigo Pan Argentino*
		f.o.b. US$/tonne
1	Tuesday 27/ January/ 2004	162
2	Wednesday 28/ January/ 2004	158
3	Thursday 29/ January/ 2004	156
4	Friday 30/ January/ 2004	154
5	Saturday 31/ January/ 2004	-
6	Sunday 01/ February/ 2004	-
7	Monday 02/ February/ 2004	154
8	Tuesday 03/ February/ 2004	154
9	Wednesday 04/ February/ 2004	153
10	Thursday 05/ February/ 2004	153
11	Friday 06/ February/ 2004	153
12	Saturday 07/ February/ 2004	-
13	Sunday 08/ February/ 2004	-
14	Monday 09/ February/ 2004	153
15	Tuesday 10/ February/ 2004	153
	Average	**154.82**

The simple average of the 15 days with data amounts to US$154.82 per tonne. Therefore the rebate is equal to US$154.82 less US$148, multiplied by 1.06. The result of the operation is a rebate of US$7.23 per tonne.

64. In paragraph 142 of its first submission, Chile argues that a border measure which maintains a stable relative price allows for the transmission of external variations to the domestic market, "albeit to a different extent". What would be the permissible "different

extent" which would allow for sufficient transmission of prices so that a market would not be considered to be insulated?

A simple way of assessing the relationship between two prices is to divide one by the other. In this case, for example, by calculating the ratio of the domestic price of wheat in Chile to the f.o.b. price for Argentine exports.

$$\text{Domestic to international price ratio} = \frac{\text{Price of wheat in Chile}}{\text{Price f.o.b. Argentina}}$$

Bearing in mind that the domestic price is affected by other factors, such as the seasonal supply at harvest time and changes in freight costs, the ratio cannot be stable over each calculation period. However, its behaviour should be characterized by a relatively small deviation from the average.

This can be measured by calculating the coefficient of variation of the data series, i.e., the standard deviation of the series divided by the mean.

Even though the maximum value which a coefficient of variation should have for the series to be stable is not perfectly definable, that value should be as low as possible.

In comparing the Chilean price with the Argentine export price, it would be reasonable to conclude that if the variability was not more than 15 per cent then prices were being satisfactorily transmitted, bearing in mind the various other factors that affect the domestic price and the fact that there are also other markets supplying the product to Chile whose prices do not necessarily behave in the same way as Argentine prices.

For greater clarity, it should be pointed out that the greater the distance between the prices compared the greater the possible variability, given that they will be separated by greater intermediation costs. In other words, the ratio of a domestic price to an f.o.b. price may be expected to be more variable than the ratio of a domestic price to a c.i.f. price.

During the period from January 2004 to June 2006, the coefficient of variation (or variability about the mean) of the ratio of the domestic price of wheat in Chile to the f.o.b. price of Argentine wheat was 9.5 per cent.

The coefficient of variation of this ratio between January 2000 and December 2003 was 16.7 per cent.

Although it is hard to say what would be a reasonable level of variability that would confirm the presence of price transmission, there can be no doubt that during the period of validity of Law 19.897 the variability has been reduced and low enough to be explicable in terms of other factors and the existence of other markets that also supply wheat for Chile.

Ratio of the price of wheat in Chile to the export price for Argentine wheat			
Month	F.o.b. price Argentina	Chilean domestic price	Price ratio
Jan-00	99.29	176.52	1.78
Feb-00	102.43	176.64	1.72
Mar-00	106.22	190.93	1.80
Apr-00	113.72	193.54	1.70
May-00	126.29	188.51	1.49

Ratio of the price of wheat in Chile to the export price for Argentine wheat			
Month	F.o.b. price Argentina	Chilean domestic price	Price ratio
Jun-00	129.05	187.45	1.45
Jul-00	130.43	185.30	1.42
Aug-00	128.59	184.49	1.43
Sep-00	127.45	184.63	1.45
Oct-00	131.38	184.61	1.41
Nov-00	130.14	174.75	1.34
Dec-00	115.32	157.51	1.37
Jan-01	117.18	162.61	1.39
Feb-01	124.60	171.12	1.37
Mar-01	122.05	164.48	1.35
Apr-01	124.28	163.09	1.31
May-01	131.86	163.35	1.24
Jun-01	130.50	162.03	1.24
Jul-01	125.05	160.02	1.28
Aug-01	122.96	161.27	1.31
Sep-01	119.65	155.79	1.30
Oct-01	126.00	145.95	1.16
Nov-01	120.18	151.46	1.26
Dec-01	108.94	153.36	1.41
Jan-02	112.05	152.33	1.36
Feb-02	116.68	155.07	1.33
Mar-02	114.68	159.12	1.39
Apr-02	123.10	163.23	1.33
May-02	135.73	163.13	1.20
Jun-02	151.26	158.45	1.05
Jul-02	168.77	156.52	0.93
Aug-02	179.91	160.73	0.89
Sep-02	195.71	164.83	0.84
Oct-02	186.14	163.18	0.88
Nov-02	141.91	168.94	1.19
Dec-02	129.58	164.06	1.27
Jan-03	143.73	170.40	1.19
Feb-03	147.00	167.81	1.14
Mar-03	151.75	170.70	1.12
Apr-03	149.50	176.30	1.18
May-03	162.52	176.00	1.08
Jun-03	160.70	173.92	1.08
Jul-03	159.27	176.84	1.11
Aug-03	164.25	176.53	1.07
Sep-03	160.41	184.15	1.15
Oct-03	165.45	190.34	1.15
Nov-03	169.65	191.44	1.13
Dec-03	163.39	191.56	1.17
Jan-04	162.50	205.58	1.27
Feb-04	150.80	187.55	1.24
Mar-04	154.61	182.30	1.18
Apr-04	163.11	182.23	1.12

Ratio of the price of wheat in Chile to the export price for Argentine wheat			
Month	F.o.b. price Argentina	Chilean domestic price	Price ratio
May-04	161.25	177.19	1.10
Jun-04	147.57	180.28	1.22
Jul-04	139.48	183.73	1.32
Aug-04	125.52	184.63	1.47
Sep-04	127.41	175.22	1.38
Oct-04	124.50	179.97	1.45
Nov-04	117.05	165.91	1.42
Dec-04	112.11	160.37	1.43
Jan-05	107.62	163.87	1.52
Feb-05	115.75	163.59	1.41
Mar-05	132.18	159.56	1.21
Apr-05	137.57	168.92	1.23
May-05	137.48	177.38	1.29
Jun-05	136.24	183.07	1.34
Jul-05	144.86	186.79	1.29
Aug-05	142.14	195.72	1.38
Sep-05	134.18	191.37	1.43
Oct-05	135.20	189.65	1.40
Nov-05	136.77	190.72	1.39
Dec-05	131.37	200.49	1.53
Jan-06	136.23	202.37	1.49
Feb-06	141.65	206.18	1.46
Mar-06	139.45	207.95	1.49
Apr-06	142.11	213.29	1.50
May-06	160.67	209.95	1.31
Jun-06	183.71	203.09	1.11
Source: ODEPA (www.odepa.gob.cl)			

65. Can Chile comment on the graph presented by Argentina as Exhibit ARG-35 during the substantive meeting with the Panel, according to which "when international prices fall, specific duties rise" (see paragraph 69 of the written version of Argentina's oral statement during the substantive meeting with the Panel).

The graph presented by Argentina in Exhibit ARG-35 contains two curves: the reference price index curve and the specific duty index curve, for the period from 1 November 2004 to 25 April 2005. The graph does not include actual international prices for that period. Accordingly, Chile cannot agree with the statement "when international prices fall, specific duties rise" made by Argentina in connection with this graph.

The graph confirms that, in fact, when the reference price falls below US$128, a specific duty is applied, in accordance with a pre-established schedule. It also confirms that the greater the fall, the higher the specific duty applicable. Therefore, what can be stated is that, regardless of the level of the international prices prevailing during the period in question, specific duties amounting to US$14.3 per tonne were collected between 16 December 2004 and 15 February 2005 and specific duties amounting to US$20.5 per tonne between 16 February 2005 and 15 April 2005.

66. Chile has cited the case of "seasonal tariffs" and "entry prices" in support of its arguments relating to "overcompensation" (see, for example, paragraphs 51 and 94 of its

rebuttal submission). Can Chile confirm whether it reserved its right in its WTO Schedule to apply seasonal tariffs in respect of wheat and wheat flour. How does Chile justify the fact that the applied duties may potentially change six times in the course of any 12-month period, if, unlike some other WTO Members, it has not reserved the right to do so in its Schedule?

Chile's tariff commitment for wheat and wheat flour in the Uruguay Round (UR) was to reduce the tariff of 35 per cent previously bound to 31.5 per cent. Nevertheless, in Chile, as in many other countries, the applied tariffs are lower than the WTO bound levels. In the case of wheat and wheat flour, it was determined that they would receive protection additional to that provided by the general *ad valorem* tariff, which is well below 31.5 per cent, but still within the bound level. The tariffs applied by Chile to wheat and wheat flour may, in fact, change six times a year, but they may never exceed Chile's bound tariff under the WTO.

In the UR there was no obligation to "reserve a right" subsequently to change the tariffs if those changes are made within the bound levels. Therefore, there was no possibility of Chile's reserving a right of this kind. Countries are at liberty to set the tariff levels they consider appropriate and to change them, provided that they apply ordinary customs duties and the bound level is respected. The duties and rebates resulting from Law 19.897 are ordinary customs duties.

67. Could Chile comment on Argentina's argument in paragraphs 97, 125-158 and 185 of its first submission, that the specific duties resulting from Chile's PBS tend to overcompensate for falling world market prices when the reference price is set below the lower threshold of the price band, elevating the entry price of imports above the band floor. The Panel has noted Chile's comments in paragraphs 49-51 of its rebuttal submission. Is the Panel correct in understanding that Chile is acknowledging that this "overcompensation" may occur, and in fact has occurred, but that it is limited in time?

Chile does not acknowledge the existence of compensation or overcompensation in the application of the duty or rebate to wheat and wheat flour imports. Compensation consists in establishing a tariff that makes it possible to achieve a certain level for a specific price. In that case, overcompensation would mean that the proceeds of the application of a tariff would exceed that level. Law 19.897 establishes a duty or a rebate and not a mechanism designed to "compensate" for changes in the value of imports or the change in international prices.

What Chile does believe and acknowledge is that whenever customs duties are modified, there is a change in the total tariff charge affecting all imports, which increases when duties rise and decreases when they fall or when a rebate is applied. These differences also arise when countries change their tariffs, but do not constitute compensation or overcompensation or undercompensation, but merely a new tariff charge which may be higher or lower than that which previously existed.

68. Can Chile respond to Argentina's assertion during the substantive meeting with the Panel (see paragraphs 40 and 41 of the written version of Argentina's oral statement) that, while overcompensation may take place at the beginning of the two-month period, it "inevitably taints the rest of that period" because "the level of duties and the entry price after that moment will be affected by the original overcompensation".

Chile has shown that in no circumstances do the effects produced by a change in the tariffs in force constitute or take the form of compensation. Therefore, there is no possibility of "overcompensation" and Argentina's statement does not make sense.

69. In response to Argentina's arguments regarding "overcompensation", Chile has stated in paragraph 51 of its rebuttal submission that the situation described by Argentina would be "exactly the same if we consider what happens when an *ad valorem* duty changes", adding that

this would be "even clearer in countries with seasonal tariffs, where the protection changes (rises or falls) on the day that the tariff changes". Is Chile in some manner linking the functioning of the PBS to the way in which seasonal tariffs work?

The similarity between the duties and rebates established under Law 19.897 and seasonal tariffs is that in both cases, within the same calendar year, there are changes in the levels of protection. It was only in this sense that Chile used seasonal tariffs as an example.

70. In Section II.5 of its first submission (paragraphs 40-45), Chile has referred to the principle of legality of taxation within its domestic legal system. Could Chile elaborate on its arguments in this regard? Is Chile arguing that it has experienced difficulties to comply with the DSB's rulings and recommendations in the original case that may be explained because of limitations in its domestic law? If not, please explain the relevance of the section identified above.

No. Chile has not experienced difficulties in complying with the DSB's rulings and recommendations; on the contrary, it has amended its legislation to make it fully consistent with its WTO obligations.

The reference to the principle of legality of taxation was intended to facilitate understanding of the changes introduced by Chile and goes to the heart of the paradox posed by the present dispute.

If Chile had amended the PBS by giving the administrative authority the power to establish specific duties or to increase the *ad valorem* duty at its discretion, as happens in many legal systems, we would be unlikely to be facing the present proceeding, as long as the bound tariff rate was not exceeded.

However, in Chile, under the Constitution, it is not possible for the administrative authority to establish specific duties arbitrarily; instead the institution, modification and abolition of taxes must be determined by law.

This explains why, although under Law 19.897 the PBS was modified by establishing a specific duty, the law also had to take into consideration all the parameters necessary for the administrative authority (the Ministry of Finance) to be able to determine the amount of that duty.[15]

Under the present rules, the parameters no longer form part of a scheme or formula that provides for automatic and continuous variability, as under the PBS; instead parameters such as reference, floor and ceiling prices and markets of concern are only used by the authority to determine the amount of the specific duty applicable to imports.

Curiously, on the basis of the Appellate Body's conclusions, Argentina applies the transparency and predictability requirements to all the parameters considered by Chile, although the omission of those parameters would have brought Chile into full compliance with the rulings and recommendations of the DSB.

71. Can Chile confirm whether it has reserved the right in its WTO Schedule to apply the Special Agricultural Safeguard (SSG, i.e. Article 5 of the Agreement on Agriculture), which is an exception to Article 4.2 of the Agreement on Agriculture. If it has not reserved such right,

[15] Another possibility would have been to establish the protection additional to the *ad valorem* tariff directly by law, but as already noted the price bands are intended to correct the distortions on the international markets and not to overprotect the domestic productive sector, a possible consequence of establishing protection by law due to the greater rigidity as regards modification.

can Chile justify the fact that the applied duties are calculated based on a scheme which would appear to be more *flexible* and *permissive* than Article 5 in many respects, since it:

(a) Is not designed to respond to surges of imports or price falls only, as in the case of the SSG provisions, but has a "stabilization" objective;

(b) Compensates for more than the full difference between a reference price and a price floor, due to the application of a multiplier in the price-gap formula; whereas the remedy foreseen under the SSG is calculated based on a degressive schedule of cumulative additional duties;

(c) Allows Chile to modify trigger factors six times a year, whereas the trigger price under SSG provisions is fixed and unchanging (linked to the 1986-88 base period);

(d) Is not subject to prior notice, whereas transparency and notification requirements must be complied under Article 5 of the Agreement on Agriculture, prior to the activation of the SSG;

(e) Does not appear to allow for goods in transit under the bimonthly reference price adjustments, while Article 5.3 of the Agreement on Agriculture provides that no additional duty under Articles 5.1(a) and 5.4 may be imposed.

Chile would like to point out that the Special Agricultural Safeguard (SSG) of the Agreement on Agriculture (AA) is an exceptional mechanism that allows certain Members to exceed their WTO bound tariff commitment.

Law 19.897 now in force in Chile (and before that the PBS) provides for additional protection for wheat and wheat flour, over and above the 6 per cent MFN tariff in force, on condition that Chile's WTO bound tariff of 31.5 per cent is not exceeded. Therefore, it would be wrong to draw parallels or comparisons between the two, and especially to claim that the SSG mechanism of the AA constitutes a model for establishing the tariff levels in a country Member.

Moreover, Chile is unfamiliar with the details of the operation of the SSG given that it did not have the right to reserve its use for any product since it was not subject to the "tariffication" process. As was pointed out in the answer to question 66, before the UR Chile already had a bound tariff of 35 per cent as its sole border protection.

72. Developing the information supplied by the Parties, in particular in paragraph 154 of Chile's first submission and Argentina's exhibits ARG-11 and ARG-12, could Chile provide the following additional information on *total import flows into Chile* for:

(a) HS positions 1001.9000 (wheat) and 1101.0000 (wheat flour or *meslin*) – Separate table outputs;

(b) Reporting periods: 2004 and 2005;

(c) Frequency: monthly and quarterly;

(d) Units of measure: in US$, in quantity units (wheat equivalent), and in CIF import unit values (proxy for "entry prices");

(e) Data to be ranked by major origin of imports.

See Exhibit CHL-18.

The source of the information is www.odepa.gob.cl

73. Behaviour of price indicators: Without prejudice to the Parties' position as regards the relevant reporting periods, relevant price series, markets of concerns, seasonality, etc., the Panel would like to enhance its understanding of the issues and parameters involved. To facilitate the Panel's examination of these matters on a *comparable basis*, could Chile plot the following data *in one single graph*, providing the sources and methodologies used to derive each data series:

(a) Reporting period: 16 December 2003 to 15 December 2005;

(b) Chilean wholesale price;

(c) Applicable reference prices and price floor during that period;

(d) For the periods 16 December to 15 June: daily prices quoted for *Trigo Pan Argentino* FOB Argentine port;

(e) For the periods 16 June to 15 December: daily prices quoted for *SRW no.2* FOB Gulf of Mexico;

(f) Entry prices in the Chilean customs territory (i.e. duty-paid for wheat and wheat flour).

Set out below is the graph requested, based on the information contained in Exhibit CHL-16. The sources of the information presented in that Exhibit are as follows:

(1) Wholesale Market Price: monthly prices on the Santiago wholesale market (www.odepa.gob.cl)

(2) Floor: floor price established in Law 19.897 (US$128)

(3) Ceiling: ceiling price established in Law 19.897 (US$ 148)

(4) Reference value: reference price calculated on the basis of Law 19.897 and the Regulation thereto (see answer 63).

(5) Argentine Trigo Pan: daily price series published by SAGPyA.

(6) Soft Red Winter No. 2: daily price series published by the Chicago Exchange.

(7) Law Specific Duty: duty calculated as (floor price – reference price) x 1.06

(8) Law Rebate: rebate calculated as (reference price – ceiling price) x 1.06

(9) C.i.f. values: actual monthly average values (US$/tonne) of Chilean imports of wheat of all origins (www.odepa.gob.cl).

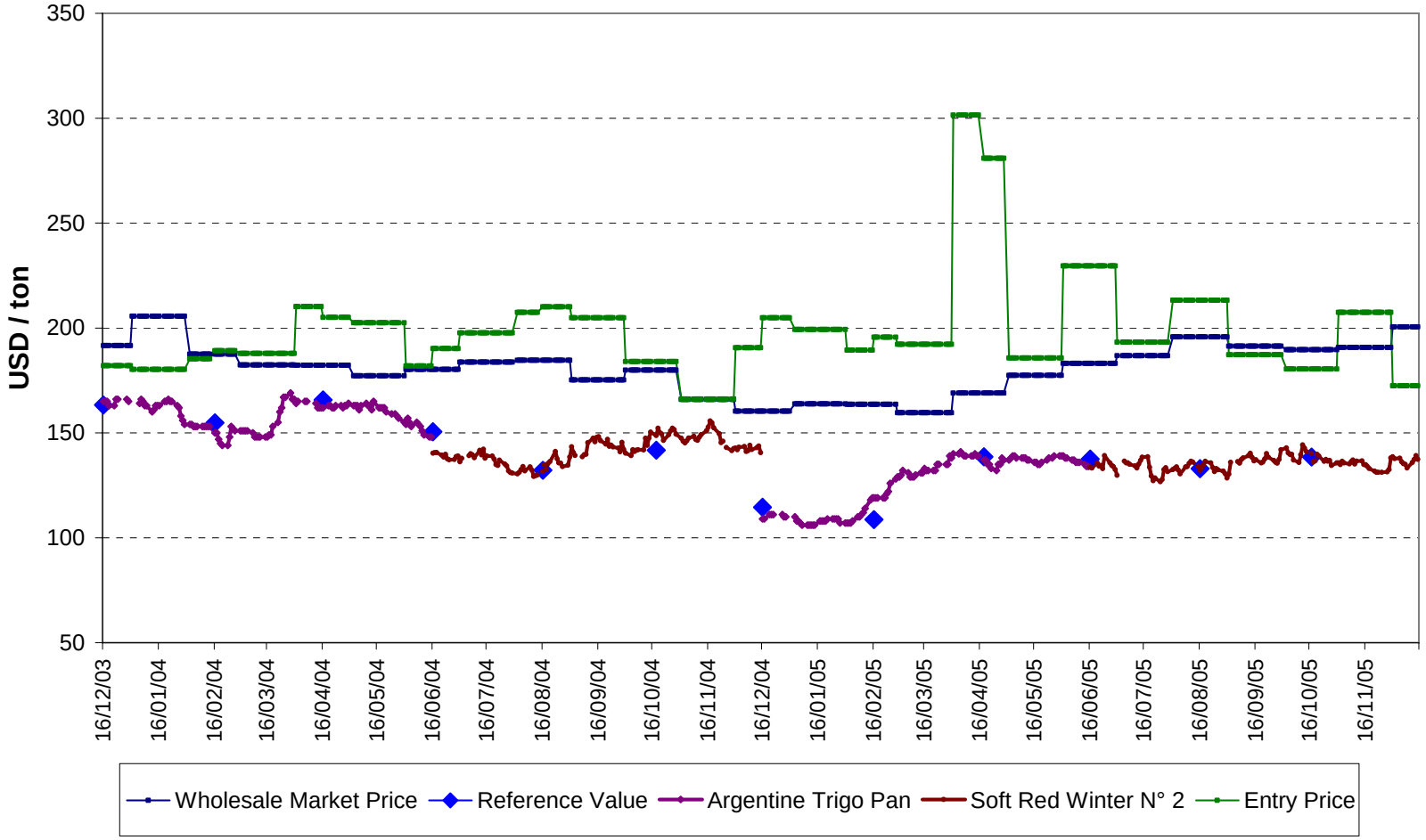
(10) *Ad valorem* duty: MFN tariff of 6 per cent

(11) Entry Price: entry price calculated as: c.i.f. x (1 + 6%) + specific duty or tariff rebate, as appropriate.

(12) Maximum rebate according to c.i.f.: maximum rebate in US$/tonne to be deducted from the *ad valorem* tariff payable, in order not to exceed 6 per cent of the c.i.f. price

(13) Maximum Specific Duty to 31.5%: maximum specific duty in US$/tonne in order not to exceed 31.5%.

Wheat: Chilean Wholesale Market, Argentine Trigo Pan f.o.b., Soft Red Winter Nª2 and Entry Prices



Source: See answer number 73

74. In paragraph 58 of its rebuttal submission, Chile appears not to share Argentina's views regarding the most relevant period for plotting the data. Could Chile indicate which period, if any in particular, it considers relevant for the Panel to examine the data elements relating to the functioning of the PBS?

The measure in question is the specific duty or rebate or neither of the two, established under Law 19.897. In Chile's opinion, the right way to assess whether this measure takes into account the rulings and recommendations of the DSB with regard to the PBS is, firstly, to analyse the structure of the measure (which corresponds to an ordinary customs duty). Then, if it were necessary to assess the effect of the measure over time, all the available information from the time during which it has been in force should be used. In other words, from 16 December 2003 to the last period available.

To analyse only the period during which the specific duty applied was positive (i.e., from 16 December 2004 to 15 April 2005), as suggested by Argentina, would mean using partial information about the measure in order to skew the analysis. In this case, it could be argued that the supposed "variability" of the duty alleged by Argentina does not exist since during the entire period the duty was the same or, at most, varied once (which would likewise not constitute what has been called variability of the duties), when the duty changed from 0.0143 US$/kg to 0.0205 US$/kg on 16 February 2005.

Moreover, if Argentina's request concerning the "relevant period" were to be accepted, Argentina would have to revise its arguments – against the system as a whole – and restrict its claims solely to what happened in the period which, in its opinion, is the "relevant" one (i.e., the period in which the specific duty was positive).

75. Pending the receipt of the detailed information requested above, the Panel has examined the graph supplied by Chile under paragraph 154 of its first submission (Domestic and International Prices for Wheat (US$/tonne), which is based on monthly data). In that paragraph, Chile submits that the Chilean wholesale price for wheat has varied and that "the variation is very similar to that of export prices of Argentine wheat, confirming the connection of Chilean wheat prices to the international grain market".

(a) How does Chile explain the fact that during the periods March-April 2004; May-October 2004; December 2004-March 2005; April-June 2005; July-August 2005; and November-December 2005, the domestic and international prices have actually evolved in opposite directions?

The graph supplied by Chile under paragraph 154 of its First Written Submission shows that the fluctuations in international prices over time are in fact transmitted to domestic prices. Price transmission is an effect that should be observed over a time series; therefore it cannot be measured at one or two isolated points. In addition to consideration of the differences in the costs of importing from different suppliers and the special circumstances that determine prices on the domestic market, a fundamental aspect that should be kept in mind is the fact that changes in international prices will necessarily be reflected in the domestic prices with a certain time lag.

Two prices which can be compared at the same moment of time are the actual c.i.f. prices of the imports and the entry prices (c.i.f. plus tariffs). In all the months mentioned the c.i.f. and entry prices were moving in the same direction (see Exhibit CHL-16).

(b) What could be, in Chile's opinion, the factors accounting for this?

As already noted, there are many possible explanations why at a particular moment of time the international price should rise and the domestic price fall. These include: the time lag in price

transmission, exchange rate fluctuations, changes in transport costs, changes in interest rates, changes in the cost of insurance, the quantity and quality of the product imported during a particular month, etc.

(c) Does Chile consider that "the competitive conditions of imports *vis-à-vis* domestic production" might have been "affected" during at least some of the above periods, in particular when international prices were decreasing while internal prices were increasing? Please take into consideration in this regard the statement in paragraph 7.44 of the Panel's report in *Chile – Price Band System*.

Chile does not consider that the competitive conditions of imports *vis-à-vis* domestic production were affected during any of the periods mentioned under (a).

Paragraph 7.44 of the Panel Report, cited in this question, deals with the lack of transparency and predictability in the determination of PBS reference prices, prior to the modifications introduced by Law 19.897 and its Regulations. Chile does not see the connection between the Panel's findings on that occasion with respect to the "markets of concern for Chile" and the main thrust of the question, namely, the existence of price transmission.

(d) Can Chile contrast the observations presented under the preamble of this question, and its own statement in paragraph 142 of its rebuttal submission, to the effect that it "has also shown that the domestic price of wheat has … followed a pattern similar to that of the international price … and that the *modified system allows variations in external prices to be transmitted to the local market*" (emphasis added).

Price trends must necessarily be assessed on the basis of a series of prices rather than on the basis of spot situations which are, by definition, the result of transitory market conditions, which could be influenced by a whole range of factors (exchange rate, internal supply, origin of the imports, quantity and quality of the imports, interest rates, transport costs, insurance costs, etc.), not to mention the time lag required for the domestic markets to respond to international price trends.

In this context, Chile's statement with regard to the transmission of international prices to the domestic market is perfectly valid, regardless of the fact that at certain particular moments of time the international price on a specific market may fall while the domestic price rises or vice versa.

76. Can Chile please clarify which are the "charts presented by Argentina" to which it refers in paragraph 103 of its first submission.

Paragraph 103 of Chile's First Written Submission refers to the charts presented by Argentina in Exhibits ARG-12 and ARG-14.

The chart ARG-12 and the table of data in ARG-11 corroborate the statement made in paragraph 103 and the information contained in answer 58 of this questionnaire: throughout the period the c.i.f. prices are above the floor of US$128, so that it is impossible to claim that this is a price indicative of the domestic market, given that this price is not even close to that at which wheat is traded in Chile.

77. Can Chile please indicate the source of the information contained in the chart regarding "Domestic and International Prices of Wheat" in paragraph 154 of its first submission.

The sources of the information are: ODEPA (www.odepa.gob.cl) for domestic wheat prices (Wholesale Market Price) and SAGPyA (www.sagpya.gov.ar) for the f.o.b. prices of *Trigo Pan* (Official Prices or *Trigo Pan* Prices, f.o.b. Argentine Port).

ANNEX F-4*

REPLIES BY CHILE TO QUESTIONS POSED BY ARGENTINA

1. Can Chile explain what did its Government mean when, at the time of proposing the passing of the bill for the approval of Law 19.897, stated: "Through this bill the Government has corrected … formal aspects challenged [by the WTO] while fully protecting the spirit of the bands … "?

Contrary to what Argentina appears to be arguing, Chile has stated that the relevant issue in these proceedings is not the intentions of the Parties, let alone the statements by their authorities[1], but the manner in which the recommendations and rulings of the DSB are complied with in practice.

If statements by the authorities or even the legal texts were sufficient, there would be no need to resort to these proceedings, since the drafting history of the law and the text itself would obviously show compliance with the rulings and recommendations of the DSB. Moreover, on the basis of that argument, it would suffice for Members implementing measures to "affirm" compliance when amending or adopting such measures, if such were the proof needed to demonstrate this at a later stage. In fact, the message from the President of the Republic attached to the draft law states that the latter's objectives include "harmonization with the principles established in the WTO ruling". Likewise, when referring to the content of the draft, the message states that the draft makes adjustments to the PBS "that ensure its consistency with the rulings and recommendations of the WTO Dispute Settlement Body".

Nevertheless, what is asserted in the message appears to be insufficient. However, the question posed provides an opportunity to emphasize how, from the substantive and procedural standpoints, Chile has been mindful at all times of the requirements of the DSB and of the need to modify the price bands in accordance with the WTO's rulings. The excerpt cited is a response to the oral statement made by the then Minister for Finance, Mr Nicolás Eyzaguirre, in the hall of the Senate on 6 August 2003.

In order to be understood, the quotation needs to be read in context. Its scope plainly emerges from the preceding paragraph, in which the Minister states: "First, why are we discussing this? Because there is a legal vacuum that has impeded continuity in agriculture? No. Because the Government intends to change the rules of the game in agriculture? No, again. We are discussing these matters because the World Trade Organization has objected to the way in which the price bands are calculated, the transparency thereof and the mechanisms for setting them".

Seen in its context, the quotation is self-explanatory. The Minister was expressing the Government's opinion that the changes introduced by Chile remedied the aspects, which in his view were formal aspects, challenged by the DSB, whilst adhering to the underlying spirit of the Chilean price bands, which is to afford additional protection above the 6 per cent *ad valorem* tariff on certain agricultural products, without, however, overprotecting such products to the detriment of the other economic operators, who might possibly be affected by such protection.

It seems unnecessary to expand any further on the matter, but the history of the Law includes numerous statements by Government authorities, reiterating how the changes introduced by Law 19.897 comply with the recommendations and rulings of the DSB.

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* Annex F-4 contains the Replies by Chile to Questions Posed by Argentina. This text was originally submitted in Spanish by Chile.

[1] See Response 22 by Chile to the Panel.

Ordinary customs duties

2. The Appellate Body established that " … all that is required is that ordinary customs duties … be expressed in the form of ad valorem or specific rates". Furthermore, the Appellate Body established that "the fact that the duties that result from the application of Chile's PBS 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".

(a) Is the amended PBS, the underlying measure as expressed in Law 19.897 and Decree 831/2003 and not the resulting duties, expressed in the form of ad valorem or specific duties?

(b) If the answer is affirmative, please identify how is it expressed in the form of ad valorem or specific rates?

(c) If the answer is negative, how can Chile affirm that the amended PBS is an ordinary customs duty?

References to the Appellate Body's statements are the key to understanding the ruling on the PBS and ultimately to understanding how the changes introduced by Law 19.897 have fully complied with the rulings and recommendations of the DSB.

The Appellate Body held that the PBS was a measure *similar* to those listed in footnote 1 to Article 4.2 of the Agreement on Agriculture, but before addressing the issue of *how much* or *what kind* of "similarity", it identified *with what* the PBS was required to be similar, concluding that the PBS was similar to a variable import levy and/or a minimum import price. In order to determine when the measure was similar, the Appellate Body interpreted both terms using the rules codified in the *Vienna Convention*, discussing the ordinary meaning of these terms in their context and in the light of their object and purpose.

In the case of variable levies, the Appellate Body concludes that what distinguishes them from ordinary customs duties is variability. However, this feature alone is not conclusive, since an "ordinary customs duty" can also be varied and, fully in accordance with Article II of the GATT 1994, an import duty may be established, and the rate at which the duty is applied may be changed periodically (provided that the changed rate remains *below* the tariff rates bound in the Member's Schedule).[2] **Such a change in the *applied* rate can be made at any time, for example, through an act of a Member's legislature or executive.**

In order to determine *what kind* of variability makes an import levy a *variable* import levy, the Appellate Body turns to the immediate context of the other words in footnote 1 to Article 4.2, concluding 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 will be inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously.**

As was noted by the Appellate Body itself, "[t]he 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**

[2] Report of the Appellate Body in *Argentina – Textiles and Apparel*, *supra*, footnote 56, para. 46.

require *separate* legislative or administrative action, whereas the ordinary meaning of the term "variable" implies that *no* such action is required".[3]

The Appellate Body added that the presence of **a formula causing automatic and continuous variability of duties was a necessary, but by no means a sufficient, condition** for a particular measure to be a variable import levy, specifying that there are additional features that undermine the object and purpose of Article 4, including, *inter alia*, lack of transparency and lack of predictability in the level of duties that will result from the application of such measures, which are liable to restrict the volume of imports.

The Appellate Body reaches a conclusion similar to the above as regards minimum import prices, except for the fact that minimum import price schemes generally operate in relation to the *actual transaction value* of the imports.[4]

Pursuing its analysis, the Appellate Body undertook to establish whether the PBS was *similar* to the measures listed in footnote 1 to Article 4.2, concluding that the task must be approached on an empirical basis"[5], and notes 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 products in ways different from the ways that ordinary customs duties do;

– that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market.

Nonetheless, this is not sufficient. In order to be "similar", the PBS, in its specific factual configuration, must have 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.

The Appellate Body agrees with the Panel's view in considering the PBS to be a measure similar to variable import levies or minimum import prices but disagrees with the importance placed by the Panel on the question of whether or not Chile's price bands were related to domestic target prices or domestic market prices.

Assessment of the price bands requires taking into account factors other than world market prices, among which the Appellate Body emphasizes the fact that the prices which represent the highest 25 per cent as well as the lowest 25 per cent of the world prices from the past five years are discarded, and 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".

The Appellate Body also saw the following similar shortcomings in the way the other essential elements of Chile's PBS, that is, the reference prices, were determined:

– The reference price was set on a weekly basis, in a way that was neither transparent nor predictable.

– No Chilean legislation or regulation specified how the international "markets of concern" and the "qualities of concern" are selected.

[3] Para. 233.
[4] Report of the Panel, para. 7.36(e).
[5] Para. 226.

– The process of selecting the reference prices was not transparent, and it was not predictable for traders.

– The same weekly reference price applied to imports of *all* goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value.

– Moreover, unlike 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.

In the Appellate Body's view, although there are some dissimilarities between the PBS and the features of minimum import prices and variable import levies, the way in which Chile's system was designed and the way it operated in its overall nature were sufficiently "similar" to the features of the prohibited measures to make the price band system, in its particular features, a "similar border measure" within the meaning of footnote 1 to Article 4.2, although the *duties* resulting from application of the PBS took the same form as "ordinary customs duties".

As Chile has repeatedly stated throughout the course of these proceedings, there was no specific duty applicable under the PBS but a system essentially based on three parameters: the date of shipment of the goods, the reference price set by Customs and the table of duties and rebates associated with the reference price on the date of shipment.

The combination of these factors ultimately determined the duty payable, which could vary from one operation to another, meaning that two consignments arriving on the same day could be charged different duties. Moreover, since the duties associated with the reference prices were set on an annual basis, whereas the reference prices were published on a weekly basis, the price was adjusted on an ongoing basis to the band floor.

As a result, duties applied under the PBS varied automatically and continuously, without executive or legislative action. However, in addition to variability, which is a necessary, though not a sufficient, condition, the Appellate Body ruled on the other features of the PBS that made it *similar* to the measures listed in footnote 1, which were characterized by their lack of transparency and predictability.

The changes introduced by Law 19.897 substantially modified the operation of Chile's price bands, by incorporating all the recommendations and rulings of the DSB.

The variability of the duties was eliminated. Today, the duties are no longer adjusted automatically and continuously but derive from an administrative act which sets the amount of a specific duty or tariff rebate, so that as long as a specific duty remains in effect different operations cannot be charged different duties: the duty remains the same for as long as it is not changed through an administrative act.

Predictability being a necessary condition, this would suffice to establish the WTO consistency of Law 19.897. Nevertheless, should even that not be sufficient, Law 19.897 also takes all the elements identified by the Appellate Body which made the PBS a measure *similar* to those listed in footnote 1 to Article 4.2 and corrects them according to the terms specified in the Appellate Body's ruling.

If, as the Appellate Body held, in order to be "similar" the PBS in its specific factual configuration had to have 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, the elimination of all the features identified by the Appellate Body means that Law 19.897 is clearly no longer a *similar* measure, since it no longer has "sufficient resemblance or likeness to" and is no longer "of the same nature or kind".

3. Where in the text of Law 19.897 and Decree 831/2003 can the ad valorem or specific rate be found (excluding the resulting duties)?

Article 1, paragraph 1, of Law 19.897 reads as follows:

> "There shall be established specific duties in United States dollars per tariff unit and rebates on the amounts payable as *ad valorem* duties under the Customs Tariff, which could affect the importation of wheat, wheat flour and sugar, as stipulated in this law."

As has been stated repeatedly, in the WTO customs duties on merchandise imports may be levied on an *ad valorem* basis (percentage of value) or on a specific basis ($7 per 100 kg.). In both instances, tariffs on imports give a price advantage to similar locally produced goods and raise revenues for the Government.[6]

As a result of the changes introduced by Law 19.897, imports of wheat and wheat flour are subject to payment of a specific duty in dollars per tonne, exactly as specified in the description provided in the glossary of WTO terms.

The reference by Argentina to the resulting duties, as indicated in the previous question, is based on the Appellate Body's conclusions and in fact relates to the way in which the PBS used to operate, levying duties that were not ultimately ordinary customs duties. Law 19.897 provides for the application of a specific duty that is set by a supreme decree of the Minister for Finance applicable to any import operation, which can be changed only through a new administrative act.

4. The Appellate Body established that " … ordinary customs duties … are … unrelated to … an underlying scheme or formula." It is clear that the amended PBS, the underlying measure that, among other features, contains a formula. Then, how could Chile argue that the amended PBS is an ordinary customs duty?

As indicated in the response to question 2, Law 19.897 eliminated the application of a formula for the determination of duties resulting from the price bands and established a specific duty in dollars per tonne, which is set once every two months by the Minister for Finance through a supreme decree.

This specific duty satisfies all the requirements of ordinary customs duties. Argentina's misunderstanding stems from the fact that Law 19.897 retained terms used under the PBS, such as reference prices, floor and ceiling prices and the existence of markets of concern. However, these elements are no longer part of a system for the determination of the resulting duty in terms of a formula, as concluded by the DSB, but they now serve as parameters enabling the administrative authority to determine the margin of protection for wheat and wheat flour through the establishment of a particular specific duty (or rebate, as the case may be).

Under Law 19.897, the parameters are not part of the scheme or formula as they used to be under the PBS; rather, they are elements that eliminate the Chilean authorities' discretion to establish the tariff charge on wheat and wheat flour, with the proviso that the tariff charge in question may never exceed Chile's bound tariff under the WTO.

[6] http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm

5. In para. 2 of its Oral Statement Chile recognized that the amended PBS is a "mechanism". How can Chile explain that the amended PBS, the underlying measure, not the resulting duties, is expressed in the form of ad valorem or specific rates?

Paragraph 2 only mentions that the PBS should not be compared with Law 19.897, because these are two completely different mechanisms. Chile does not consider it strange to use the term "mechanism" in this context, and would even agree that there are *mechanisms* for the collection of ordinary customs duties.

Nevertheless, it cannot be concluded from the above, as Argentina does, that Chile recognizes that it applies a mechanism and therefore a measure similar to the PBS. Chile has clearly established its position throughout the course of this dispute and trusts that the consistency analysis of Law 19.897 will be technical and exacting.

If mentioning the mere use of terms could be used as evidence in these proceedings, the Panel should reach conclusive findings in favour of Chile's position. Firstly, because the sole reading of paragraph 2 shows that Chile does not use the term "mechanism" in the sense suggested by Argentina. But furthermore, because if the same parameter is used, there is no dispute in these proceedings, because in all of its presentations Argentina has consistently referred to the **specific duties** applied by Chile. Solely by way of example, in its first written submission Argentina used this expression in referring to the duties under Law 19.897 on more than forty occasions (i.e. in paragraphs 99, 105, 109, 123, 126, 133, 134, 135, 136, 138, 139, 140, 149, 150, 151, 152, 154, 155, 156, 165, 171, 174, 175, 176, 177, 179, 181, 182, 197, 206, 209, 212, 213, 224, 226, 228, 231, 250, etc.).

Article 4.2 of the *Agreement on Agriculture*

6. What is for Chile the meaning of the terms " … *Members shall not maintain … any measures of the kind which have been required to be converted into ordinary customs duties* …"?

It would be pointless to elaborate on an interpretation of this provision, since the Appellate Body gave a general interpretative analysis of Article 4.2 of the Agreement on Agriculture in paragraphs 204 to 217 of its Report, which was adopted by WTO Members, including Chile, convened as the Dispute Settlement Body. Consequently, the meaning of the terms contained in the provision is set out therein.

7. Chile stated that " … all it is obliged to do [a Member] of the WTO is to honour its commitments, that is to say, not exceed the bound tariff level".[7] Furthermore Chile stated that " … any WTO Member can do what it wants to up to the level of its binding commitments … "[8]

(a) What does Chile consider is the object and purpose of Article 4.2 of the *Agreement on Agriculture*?

The object and purpose of Article 4.2 of the Agreement on Agriculture is to require Members not to maintain, resort to, or revert to certain kinds of measures with a view to implementing their commitments on market access for imports of agricultural products. This provision applies to any measures of the kind which have been required to be converted into ordinary customs duties. Footnote 1 to Article 4.2 contains an illustrative list of such measures.

[7] Rebuttal by Chile, para. 65 *in fine*.
[8] Oral Statement by Chile, para. 45.

Thus the object of Article 4.2 (supplemented by its footnote 1) is to prohibit measures that restrict the volumes and distort the prices of imports of agricultural products in ways different from the ways that ordinary customs duties do. The measures prohibited under Article 4.2 also have in common that they disconnect domestic prices from international price developments and impede the transmission of world market prices to the domestic market.

(b) Does Chile consider that Article 4.2 of the *Agreement on Agriculture* contains an obligation not to exceed the tariff binding?

The obligation not to exceed the level bound in the appropriate Schedule is laid down in Article II.1 of the GATT 1994.

(c) Does Chile consider that, even if a measure does not exceed the bound tariff level, it can still violate Article 4.2 of the *Agreement on Agriculture*?

The Appellate Body found nothing in Article 4.2 of the Agreement on Agriculture to suggest that a measure prohibited by that provision (other than an ordinary customs duty) would be rendered consistent with it if applied with a cap.[9] As an additional consideration, specific duties (or rebates) applied in conformity with Law 19.897 constitute ordinary customs duties.

8. The Appellate Body stated that:

> **"'Variable import levies' have additional features that undermine the object and purpose of Article 4 … . These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures"[10]**

Also, the Appellate Body established that:

> **" … 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 … 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."[11]**

Chile stated that " … in examining variable levies, the Appellate Body pointed out that they have additional features (over and above the variability of the duties), including a lack of transparency and predictability".[12]

(a) Does Chile consider that transparency and predictability are features inherent to variable import levies?

(b) Does Chile consider that variable import levies are inconsistent with Article 4.2?

(c) Are transparency and predictability requirements of Article 4.2? Please explain your answer.

(d) Do transparency and predictability have any meaning within Article 4.2?

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[9] See para. 254 of the Report of the Appellate Body.
[10] Report of the Appellate Body, para. 234.
[11] Report of the Appellate Body, para. 258.
[12] Rebuttal by Chile, para 29.

The response to questions (a), (c), and (d) is identical. Chile complied with the recommendations and rulings of the DSB by enacting Law 19.897 and the regulation thereto, and in so doing it took special account of the findings set out in the Report of the Appellate Body, which are contained in the ruling of the DSB. Consequently, the response to Argentina's concerns regarding "transparency" and "predictability" can be found in the Report adopted by the Body in question.

As to the response to question 8(b), in Chile's view a variable import levy is a category of measure identified in footnote 1 to Article 4.2 of the Agreement on Agriculture.

9. Could an intransparent and unpredictable border measure applied to agricultural imports be consistent with article 4.2?

The Appellate Body referred to transparency and predictability in the manner in which the duties were determined according to certain specific features of the PBS analysed at the time, "on the basis of the particular configuration and interaction" of all of these specific features. In assessing the PBS, the Appellate Body held that no one feature was determinative of whether a specific measure created intransparent and unpredictable market access conditions.[13]

Chile has corrected these particular features, and today the application of specific duties (or rebates) under the current measure is very far from being intransparent and unpredictable.

10. Does Chile consider that the lack of transmission of international prices developments is a feature that renders a border measure applied to the agricultural imports inconsistent with Article 4.2 of the *Agreement on Agriculture*? If no, please explain.

The explanation was given by the Appellate Body itself when it stated that the measures referred to in Article 4.2 of the Agreement on Agriculture "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".[14]

Floor and ceiling of the PBS

11. How do the floor and ceiling prices transmit international price developments if they are fixed?

The sole purpose of the floor and ceiling prices under Law 19.897 is to permit the calculation of duties and tariff rebates. The fact that they are fixed values does not impede the transmission of international prices, because it is the way in which the duties and tariff rebates are determined that allows price transmission.

12. On what basis did Chile establish the floor in US$128 per tonne?

The determination of the floor price is consistent with the provisions of Law 19.897, which stipulates that "the values considered shall be the floor and ceiling prices used for wheat and sugar in the drafting of Chilean Ministry of Finance exempt decrees No. 266 and No. 268, published in the Official Journal of 16 May 2002, expressed in United States dollars f.o.b. per tonne".

Details of how the price of US$128 was obtained can be found in the response to question 52 of the Questions Posed by the Panel to the Parties.

[13] Report of the Appellate Body, para. 261.
[14] Report of the Appellate Body, para. 227.

13. On what basis did Chile establish the ceiling in US$148 per tonne?

The determination of the ceiling price is consistent with the provisions of Law 19.897, which stipulates that "the values considered shall be the floor and ceiling prices used for wheat and sugar in the drafting of Chilean Ministry of Finance exempt decrees No. 266 and No. 268, published in the Official Journal of 16 May 2002, expressed in United States dollars f.o.b. per tonne".

Details of how the price of US$148 was obtained can be found in the response to question 52 of the Questions Posed by the Panel to the Parties.

14. On what basis was the fixed factor 0.985 established?

The factor of 0.985 corresponds to a reduction of 1.5 per cent. Chile considered that over and above the changes necessary to comply with the recommendations and rulings of the DSB, a gradual reduction in the additional protection above the 6 per cent *ad valorem* tariff under Law 19.897 for wheat and wheat flour was appropriate. A reduction of 1.5 per cent was estimated to be sufficient.

15. How does the fixed factor of 0.985 allow the transmission of international prices fluctuations?

The 1.5 per cent reduction in the floor and ceiling prices as of 2008 is not intended for, nor is it related to, the transmission of international prices. It is simply what was considered the appropriate way of gradually reducing the protection afforded to wheat and wheat flour.

Reference Price

16. How can Chile affirm that the reference prices fully reflect international price developments when they only account for the prices recorded during 90 out of 365 days?

The reference prices are parameters for determining the level of duties or rebates. They are determined six times a year, so there is no need to use these values more than the same number of times. The average of 15 days reckoned retrospectively is a good reflection of international price levels whenever a duty or rebate has to be established. For a better understanding of the matter, see the response to question 12(c) of the Questions of the Panel to the Parties.

17. In connection with the transparency and predictability of the reference prices:

Articles 7 and 8 of Decree 831/2003 establish that the reference price for wheat will result from the average of the daily FOB prices of, *inter alia*, "Bread Wheat Argentine Port" during a period of 15 days before day "10" of the month in which the respective Decree for the establishment of the reference price is published.[15] In its Rebuttal, Chile clarified that the basis of the daily FOB prices for "Bread Wheat Argentine Port" was SAGPyA (Argentina's Official Source).

On the other hand, during the hearing, the Chilean delegate from ODEPA appeared to recognize that SAGPyA does not publish "Bread Wheat Argentine Port" under that specific denomination on a daily basis. Argentina argued that the only "Bread Wheat FOB price" is published on a daily basis by SAGPyA is the "Official FOB Price" and, therefore, there is an inconsistency between what the Decree establishes and what SAGPyA publishes on a daily basis. The Chilean delegate from ODEPA appeared to recognize that, in effect, ODEPA bases its

[15] ARG-2.

average "Bread Wheat Argentine Port" FOB price on SAGPyA's daily "Official FOB Price". Furthermore Chile provided two exhibits (CHL-12 and 14) which only showed monthly averages.

(a) Does Chile consider that SAGPyA publish "Bread Wheat Argentine Port" FOB price on a daily basis? Could you please provide evidence?

(b) Does ODEPA base its "Bread Wheat Argentine Port" FOB price on SAGPyA's *daily* "Official FOB Price"?

(c) If the answer is yes, is there an inconsistency between Decree says to be the basis for the calculation of the reference price and what SAGPyA publishes?

(d) Does Chile consider that, if an exporter resorts to SAGPyA's website, he will be able to find "Bread Wheat Argentine Port" FOB prices under that specific denomination?

At the hearing, Chile explained that SAGPyA published the official prices of *Trigo Pan* under two denominations: "*Precio Oficial*" (Official Price) and "*Precio Puertos Argentino*" (Price Argentine Ports). To illustrate this point, Chile provided two exhibits (CHL-12 and CHL-14) containing series of monthly prices that use both denominations.

Response to (a)

Yes. Through the Directorate of Agrifood Markets (DIMEAGRO), SAGPyA publishes the "*información diaria de cotizaciones*" (daily quotations bulletin) for *Trigo Pan* "FOB Argentine Ports" on a daily basis. This quotation corresponds to the "Official Price" it publishes in the section on international prices. Exhibit CHL-17 contains a printout of the information supplied by DIMEAGRO.

The information can also be downloaded directly from the following web pages:

www.sagpya.mecon.gov.ar/new/0-0/programas/dma/Cartilla_Granos/01_cartilla_actual.php
www.sagpya.mecon.gov.ar/new/0-0/agricultura/diario/cartilla.XLS

Additionally, Exhibit CHL-17 contains a printout of the web page of the Buenos Aires Cereals Exchange with the daily wheat prices for the month of July 2006, under the denomination "*cotizaciones FOB Puertos Argentinos*" (quotations FOB Argentine Ports). The information was supplied by SAGPyA and is identical to the data provided by Argentina in Exhibit ARG – 32. This information can be found at:

www.bolcereales.com.ar/precios.asp?idioma=esp

Response to (b)

Chile uses the official source, which is SAGPyA. In the light of the foregoing, it is plain that the Official Price corresponds to the quotation for *Trigo Pan* "FOB Argentine Ports".

Response to (c)

No, in view of the evidence provided. The fact that there are two denominations for the same series of prices does not constitute inconsistency with the Decree.

Response to (d)

Yes.

Variable import levies

18. Chile stated that "Law 189.897 abolished the variability component. Now the specific duty by legal directive in the form of a decree issued by the Ministry of finance …".[16]

The relevant part of Law 19.897 states that "specific duties *must be established* when the reference price is below the floor price of 128 dollars for wheat. In the case of wheat flour, the duties and rebates determined for wheat multiplied by a factor of 1.56 *shall be applied*" (emphasis added). In its turn, Article 13 of Decree 831/2003 reads: "In each Supreme Decree issued in accordance with this regulation specific duties *shall be established* … if the reference price is below the floor price … " (emphasis added).

Argentina argued that Law 19.897 and Decree 831/2003 make it *mandatory* for specific duties to be established when the reference price is below the band floor and that expressions of the type "*must be established*" and "*shall be applied*" mean that when the reference price is below the floor price the application of specific duties will be mandatory and automatic. Therefore, the PBS is applied automatically, directly and unfailingly.[17]

(a) Does the Chilean Executive have any discretion no to impose specific duties when the reference price falls below the floor price (today at US$128)?

(b) If the answer is affirmative, Could Chile explain what is the discretion Chilean Executive has?

(c) If the answer is negative, does Chile agree that the amended PBS provides for " … the presence of a formula causing automatic … variability of duties"?[18]

In its response to question 2 from Argentina, Chile specified the substance and scope of the variability component of the duties and how such variability had been abolished under Law 19.897.

Furthermore, in its response to question 6 of the Panel, Chile developed its position concerning the mandatory or discretionary nature of the rules set forth in the Law. In this connection, it not only pointed out that this does not appear to be covered by the Appellate Body's analysis, but it also indicated that the way in which the rules are worded has to do with the method of drafting legal rules in Chile rather than with any consideration regarding Chile's obligations under the recommendations and rulings of the DSB.

Chile sees the legal provision as being intended to afford an additional margin of protection for wheat and wheat flour (above the *ad valorem* tariff) where the requirements and conditions stipulated in the Law are fulfilled, which may even lead to a reduction in payment of the tariff when the need for such protection does not arise.

Moreover, even if we accept Argentina's approach, we cannot analyse the actual wording of the provision cited without bearing in mind Article 1, paragraph 1, of the Law, which, despite what Argentina suggests, provides that "[t]here shall be established specific duties in United States dollars

[16] Oral Statement by Chile, para 31.
[17] First Written Submission by Argentina, paras. 263 and 264.
[18] Report of the Appellate Body, para. 233.

per tariff unit and rebates on the amounts payable as *ad valorem* duties under the Customs Tariff, **which could affect the importation of wheat, wheat flour and sugar, as stipulated in this law**".

Calculation of the resulting duties

19. In the amended PBS the specific duty is magnified by the introduction of a multiplier consisting of 1 plus the general ad valorem duty in force. Which was the purpose of adding this new coefficient?

Under the PBS, a series of fixed and variable costs incurred in a normal import process, including the general *ad valorem* tariff, were considered in determining specific duties. As a way of making duty determination more transparent and predictable, under Law 19.897 all such costs except the general tariff, because this is a known value, were excluded from calculation of the duties. Thus, the following formula for calculating the specific duties was established in the Law's Regulations:

$$SD = (1 + 0.06) * (FOB_{floor} - FOB_{rp})$$

It should be emphasized that from this expression it follows that under Chile's current policy the specific duty is lower for any given reference price, as its determination includes only the general *ad valorem* tariff and excludes all the other variable costs that previously formed part of the PBS.

For further details of this expression, see Chile's response to question 5(c) of the Panel.

Terms of reference

20. In *Korea – Dairy Products* the Appellate Body established "By '*claim*' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from an identified provision of a particular agreement".[19]

In paragraph 7 of its Oral Statement Chile affirms that it has applied the approach in *Korea – Dairy Products* to show that Argentina's argument in relation to the factor of 1.56 is an "independent claim".

In paragraph 184 of its Rebuttal, Chile clarified what it argues is Argentina's claim: "The factor of 1.56 … insulates the entry price of wheat flour from international price developments"

(a) Can Chile identify the provision supposedly violated in Argentina's alleged claim regarding the factor of 1.56?

(b) Did Argentina identify any provision of any particular agreement violated by the insulation by the factor of 1.56 of the entry price of wheat flour from international price developments?

(c) Did Argentina separately identify the claim regarding the factor of 1.56 in its DSU Art. 21.5 Panel request?

21. In its Oral Statement (paragraph 9) Chile states that " … the basis for the application of the factor … was the PBS itself … ". It is undisputed that the amended PBS is a new measure. Does Chile agree that the amended PBS has modified:

[19] *Korea – Dairy Products*, Report of the Appellate Body, para. 139, WT/DS98/AB/R (emphasis added).

(a) How floor prices are established?

(b) how reference prices are calculated?

(c) how specific duties are calculated?

22. If the answers to the above questions are affirmative, does Chile agree that the basis for the application of the factor of 1.56 has changed with respect to the original measure? If the answers are negative, please explain how would then the PBS be consistent with Art. 4.2 AoA?

23. If the answer to question 21 is affirmative, Why cannot Argentina raise the argument in relation to the factor of 1.56 in the 21.5 proceedings if the basis for its application has changed?

Response to questions 20 to 23:

It was Argentina that claimed that the factor of 1.56 as applied would not be in compliance with Chile's WTO obligations. In stating that this is an "an independent claim"[20] by Argentina, Chile was merely emphasizing that Argentina did not question that factor in the original Panel's proceedings and that that was where it should have done so; hence this issue does not fall within the terms of reference for the current proceedings, as Chile has demonstrated in its second written submission (Rebuttal).[21]

Pursuant to the recommendations and rulings of the DSB, Chile implemented a new measure (Law 19.897 and its Regulations) with its parameters for establishing and setting specific duties (or rebates).

If Argentina failed to take issue with the factor of 1.56 in a timely and appropriate manner, it was not for the original Panel or the Appellate Body to rule on this matter, a circumstance that is determinative of Chile's obligation to implement its compliance measures by conforming with what was decided and adopted by the DSB, changing what it was required to change and without changing what it was not obligated to change.

This was acknowledged by the Appellate Body in *EC – Bed Linen (21.5 India)* when it stated that "India seeks to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent with the European Communities' WTO obligations".[22]

<u>Minimum import prices</u>

27. Argentina has argued that the amended PBS is a measure similar to minimum import prices. Chile has persistently objected that statement. In that sense, could Chile please explain what did the Chilean Executive mean when, at the time of proposing the passing of the bill corresponding to Law 19.897, stated the following:

" … I would like to draw the attention of members to a fact that has not been brought out or emphasized sufficiently in this debate. With this bill (Law 19.897) we are fixing - not stabilizing - a price … for wheat that stays the same for four years, regardless of fluctuations in

[20] Rebuttal by Chile, para. 185.
[21] Rebuttal by Chile, paras. 182 to 195.
[22] Report of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)*, para. 87.

the international markets … price security is not just for four years but up to 2014 … " (emphasis added).[23]

Argentina's reference needs to be understood in the context of the debate and the discussion that took place during the preparation of the law.

The assessment of the similarity of Law 19.897 to a minimum import price should not be conducted in the light of an isolated statement taken out of context but in relation to the way in which the Law operates – or at least in the light of the words of the message from the Executive attached to the draft tabled in Congress. However, Argentina has not succeeded in demonstrating that in practice Law 19.897 establishes a minimum price or at least is a measure similar to a minimum price, nor does it make any reference whatsoever to the message underpinning the draft, which, on the contrary, repeatedly asserts that its objective was to bring the price band legislation into line with the WTO rulings and recommendations.

Moreover, if Argentina fully understood the changes introduced by Law 19.897, it could not fail to conclude that the assertion it makes in this question is technically wrong.

[23] Chilean Minister of Agriculture, 5 August 2003."History of the Law. Compilation of official texts of the parliamentary debate. Law 19.897". Library of the National Congress. Santiago, Chile, 2003.

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS207/18
9 January 2006

(06-0102)

Original: Spanish

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

Recourse to Article 21.5 of the DSU by Argentina

Request for the Establishment of a Panel

The following communication, dated 29 December 2005, from the delegation of Argentina to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 23 October 2002, the Dispute Settlement Body (DSB) adopted the Report of the Appellate Body[1] and the report of the Panel[2] as modified by the Appellate Body in the dispute *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Chile – Price Band System).*

The Appellate Body upheld the Panel's finding that Chile's price band system (hereinafter PBS) is a border measure that is similar to variable import levies and minimum import prices[3], inconsistent with Article 4.2 of the *Agreement on Agriculture*.[4]

In accordance with these reports, the DSB requested Chile to "bring its price band system, as found ... to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement."

On 6 December 2002, Chile communicated a request to the DSB that the determination of a reasonable period of time for implementation of the recommendations and rulings of the DSB be the subject of binding arbitration, in accordance with Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter the DSU).[5]

[1] WT/DS207/AB/R.
[2] WT/DS207/R.
[3] WT/DS207/AB/R, paragraph 228(c)(i).
[4] WT/DS207/AB/R, paragraph 288(c)(iii).
[5] WT/DS207/9.

On 17 March 2003, the award of the arbitrator determined that the reasonable period of time for Chile to implement the recommendations and rulings of the DSB was 14 months from the date of the adoption of the above-mentioned reports. This reasonable period of time expired on 23 December 2003.

On 25 September 2003, Chile published in the Official Journal Law No. 19.897 establishing rules on the importation of goods into the country, amending Article 12 of Law No. 18.525 and the Customs Tariff, and on 4 October 2003 Chile published in the Official Journal Supreme Decree No. 831 of the Ministry of Finance regulating the application of Article 12 of Law 18.525, as substituted by Article 1 of Law 19.897.[6] This Decree regulates certain aspects of the PBS, the modifications of which entered into force on 16 December 2003 for the products at issue in this dispute, with the exception of edible vegetable oils, which ceased to be subject to the PBS as of the date of publication of Law No. 19.897.[7]

Argentina strongly disagreed that these changes to the PBS, as regards wheat and wheat flour, were in compliance with the recommendations and rulings of the DSB.[8]

On 24 December 2003, Argentina and Chile concluded an Understanding regarding procedures under Articles 21 and 22 of the DSU with respect to this dispute, a copy of which is attached hereto (WT/DS207/16 of 7 January 2004).

On 19 May 2005, Argentina initiated proceedings under Article 21.5 of the DSU, requesting consultations with Chile.[9] These consultations were held in Geneva on 17 June 2004, but failed to settle the dispute. Consequently, there is disagreement, under Article 21.5 of the DSU, as to the existence or consistency with a covered agreement of the measures taken to comply with the recommendations and rulings of the DSB.

In Argentina's view, the changes to Chilean legislation on the PBS do not bring the measure into conformity and are inconsistent with the covered agreements.

Specifically, imports of wheat and wheat flour are still affected by the imposition of specific duties and rebates whose application continues to be subject to floor and ceiling parameters, as well as to the reference price mechanism and other components that do not alter the PBS in its essence.

Thus, Chile continues to maintain a measure similar to a variable import levy and a minimum import price with respect to the products at issue as referred to in the findings contained in the Appellate Body Report.[10]

Similarly, by maintaining the PBS unaltered in its essence and failing to exempt wheat and wheat flour from the measure, Argentina considers that Chile is imposing "other duties or charges"

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[6] WT/DS207/15 of 22 September 2003, WT/DS207/15/Add.1 of 28 October 2003, and WT/DS207/15/Add.2 of 21 November 2003.

[7] National Customs Service of the Government of Chile, Technical Undersecretariat and Department of Classification, Circular No. 292 of 14 October 2003. See also Chile's statement to the DSB of 7 November 2003 (WT/DSB/M/157, paragraph 20).

[8] See, for example, Argentina's statements to the DSB of 2 October, 7 November and 1 December 2003 (WT/DSB/M/156 paragraphs 17-19; WT/DSB/M/157 paragraph 19; and WTO/DSB/M/159 paragraph 19, respectively); 23 January, 17 February, 19 March, 20 April, 19 May and 22 June 2004 (WT/DSB/M/163 paragraph 18; WT/DSB/M/165 and WT/DSB/M/166 paragraph 18; WT/DSB/M/167 paragraph 18; WT/DSB/M/169 paragraph 20; WT/DSB/M/171 paragraph 32). The difference of opinion was also recorded in document WT/DS/207/16.

[9] WT/DS207/17 of 25 May 2004.

[10] WT/DS207/AB/R, paragraph 288(c)(i).

within the meaning of Article II of the GATT 1994 that are not recorded in the relevant column of its Schedule.

In other words, Chile has not ensured the conformity of its laws, regulations and administrative procedures with its obligations as provided in the WTO Agreements.

Consequently, Argentina considers that the measures adopted by Chile to implement the recommendations and rulings of the DSB are inconsistent, *inter alia,* with the following provisions of the covered agreements:

- Article 4.2 of the *Agreement on Agriculture*;
- the second sentence of Article II:1(b) of the GATT 1994;

and hence,

- Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization.*

Thus, in the light of the Understanding concluded between the two countries regarding procedures under Articles 21 and 22 of the DSU (WT/DS207/16), and in accordance with Article 21.5 of the DSU, since "there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB, Argentina requests that if possible, this matter be submitted to the original panel with the standard terms of reference provided for in Article 7 of the DSU.

Argentina requests the Panel to find that Chile has not taken measures to comply fully with the rulings and recommendations of the DSB of 23 October 2002. In particular, Argentina requests the Panel to find that Chile's PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994, and hence, Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization.*

ANNEX

WORLD TRADE ORGANIZATION

WT/DS207/16
7 January 2004

(04-0040)

Original: Spanish

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

Understanding Between Argentina and Chile Regarding Procedures Under Articles 21 and 22 of the DSU

The following communication, dated 24 December 2003, from the delegation of Argentina and the delegation of Chile to the Chairman of the Dispute Settlement Body, is circulated at the request of these delegations.

The Argentine Republic and the Republic of Chile would like to inform the Dispute Settlement Body that they have concluded the attached "Understanding between the Argentine Republic and the Republic of Chile Regarding Procedures Under Articles 21 and 22 of the DSU with Respect to the Dispute *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (WT/DS207)".

(signed)
Alicia de Hoz
Minister
Chargé d'Affaires a.i.
Permanent Mission of the Argentine Republic
to the United Nations Office at Geneva

(signed)
Alejandro Jara Puga
Ambassador
Permanent Representative of Chile
to the WTO

Understanding Between the Argentine Republic and the Republic of Chile Regarding Procedures Under Articles 21 and 22 of the DSU with Respect to the Dispute *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (WTO/DS207)

Considering that on 23 October 2002 the Dispute Settlement Body (DSB) adopted the Report of the Appellate Body[11] and the Report of the Panel[12] as modified by the Appellate Body in the dispute *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products;*

Recalling that on 6 December 2002, Chile communicated a request to the DSB "that the determination of a reasonable period be the subject of binding arbitration, in accordance with Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes."[13]

Given that on 17 March 2003, the award of the arbitrator determined that the reasonable period of time for Chile to implement the recommendations and rulings of the DSB was 14 months from the date of adoption of the above-mentioned reports, and that this reasonable period of time expired on 23 December 2003;

Considering that Argentina and Chile disagree, within the meaning of Article 21.5 of the DSU, as to the consistency of the measures taken by Chile with the recommendations and rulings of the DSB, and that it is therefore necessary to agree on the rules of procedure applicable to Article 21.5 and 22.6 of the DSU for the exclusive purposes of the dispute referred to as WT/DS207;

The Argentine Republic and the Republic of Chile hereby agree as follows:

1. If it so deems appropriate, Argentina shall request consultations, which the parties shall agree to hold within 15 days from the date of circulation of the request. Argentina and Chile agree that at the end of such consultations, should either party so state, the parties shall jointly consider that the consultations have failed to settle the dispute.

2. Consequently, as from the date of the said statement, Argentina shall be entitled to request the establishment of a panel pursuant to Article 21.5 of the DSU.

3. At the first DSB meeting in which Argentina's request for the establishment of an Article 21.5 panel appears on the agenda, Chile shall accept the establishment of that panel.

4. Argentina and Chile shall cooperate to enable the Article 21.5 panel to circulate its report within 90 days of the panel's establishment, excluding such time during which the panel's work may be suspended pursuant to Article 12.12 of the DSU.

5. In case there is an appeal against the Article 21.5 panel report, Argentina and Chile shall cooperate to enable the Appellate Body to circulate its report within no more than 90 days from the date of notification of the appeal to the DSB.

6. With respect to the adoption of the panel and Appellate Body reports in the Article 21.5 proceedings, the time-frames of Articles 16 and 17.14 of the DSU shall apply.

[11] WT/DS207/AB/R.
[12] WT/DS207/R.
[13] WT/DS207/9.

7. Argentina shall not request authorization to suspend concessions or other obligations under Article 22 of the DSU until the adoption by the DSB of the Article 21.5 reports. If on the basis of the results of these reports, Argentina should decide to initiate proceedings under Article 22 of the DSU, Chile shall not assert that Argentina is precluded from obtaining DSB authorization because its request was made outside the 30-day time-period specified in Article 22.6 of the DSU. This is without prejudice to Chile's right to have the matter referred to arbitration in accordance with Article 22.6.

8. If Argentina requests authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU, and if Chile objects under Article 22.6 of the DSU to the level of suspension of concessions or other obligations and/or makes a claim under DSU Article 22.3, the matter shall be referred to arbitration pursuant to DSU Article 22.6. Argentina shall not pose any objection to the referral of the matter to such arbitration.

9. If any of the original panellists were not available either for the Article 21.5 panel or for the Article 22.6 arbitration, or both, Argentina and Chile agree to request the Director-General of the WTO to appoint, as soon as possible, a replacement for the proceeding or proceedings in which such a replacement is required.

10. Argentina and Chile agree to continue to cooperate in all matters referred to in this Understanding and not to raise any procedural objections to any of the steps set out therein. If, during the application of these procedures, Argentina and Chile consider that a procedural aspect has not been properly addressed they shall endeavour to find a solution within the shortest time possible that will not affect the other aspects and steps herein agreed.

Agreed in Geneva on 24 December 2003

(signed)
Alicia de Hoz
Minister
Chargé d'Affaires a.i.
Permanent Mission of the Argentine Republic
to the United Nations Office at Geneva

(signed)
Alejandro Jara Puga
Ambassador
Permanent Representative of Chile
to the WTO

ANNEX H

WORKING PROCEDURES FOR THE PANEL

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following working procedures shall apply.

2. The Panel will provide the Parties[1] and Third Parties[2] with a timetable for its proceedings. The timetable may be modified by the Panel as appropriate, after having consulted the Parties.

3. The Panel shall meet in closed session. The Parties, and interested Third Parties, shall be present at the meetings only when invited by the Panel to appear before it.

4. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU, nor in these Working Procedures, precludes a Party or a Third Party from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. As provided in Article 18.2 of the DSU, where a Party submits a confidential version of its written submissions to the Panel, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be normally submitted no later than one week after the written submission is presented to the Panel.

5. Before the substantive meeting of the Panel with the Parties, and in accordance with the timetable approved by the Panel, the Parties shall transmit to the Panel written submissions and subsequently written rebuttals in which they present the facts of the case, their arguments and their counter-arguments, respectively. Third Parties may transmit to the Panel written submissions after the first written submissions of the Parties have been presented, and in accordance with the timetable approved by the Panel.

6. All Third Parties shall be invited in writing to present their views during a session of the substantive meeting of the Panel set aside for that purpose. Third Parties may be present during the entirety of this session.

7. At its substantive meeting with the Parties, the Panel shall ask Argentina to present its case first. Subsequently, and still at the same meeting, Chile will be asked to present its point of view. At a separate session of the same meeting set aside for that purpose, Third Parties will be asked to present their views thereafter. Parties will then be allowed an opportunity for final statements, with Argentina presenting its statement first.

8. The Panel may at any time put questions to the Parties and to the Third Parties and ask them for explanations either in the course of the substantive meeting or afterwards in writing. Replies to questions shall be submitted in writing by the dates specified by the Panel after consultation with the Parties.

9. Each Party shall make available to the Panel and to the other Party a written version of its oral statements, preferably at the end of the meeting with the Panel, and in any event not later than the

[1] Throughout this document, the term "Party" refers to either Argentina or Chile, as appropriate. The term "Parties" refers to both Argentina and Chile.

[2] Throughout the document, the term "Third Parties" refers to Australia, Brazil, Canada, China, Colombia, the European Communities, Peru, Thailand and the United States.

working day following the presentation. Any Third Party that wishes to present its views shall similarly make available to the Panel and to the Parties and other Third Parties a written version of their oral statements, preferably at the end of the meeting with the Panel, and in any event not later than the working day following the presentation. Parties and Third Parties shall provide the Panel and other participants at the respective session with a provisional written version of their oral statements at the time that the statements are made.

10. In the interest of full transparency, the oral presentations shall be made in the presence of the Parties. Moreover, each Party's written submissions, including replies to questions put by the Panel, shall be made available to the other Party. Third Parties shall receive copies of the Parties' first written submissions and rebuttals. Parties shall submit all factual evidence to the Panel as early as possible and no later than during the substantive meeting, except with respect to evidence necessary for purposes of answering to questions. Exceptions will be granted upon a showing of good cause. In such cases, the other Party shall be accorded a period of time for comment, as appropriate.

11. The Panel will incorporate the submissions from the Parties and Third Parties, including the first written submissions, rebuttals and written versions of oral statements as an appendix to the report. Parties and Third Parties will be free, if they so wish, to provide the Panel with a shorter version of their submissions for this purpose.

12. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular the references to exhibits submitted by Parties, Parties shall sequentially number their exhibits throughout the course of the dispute. For example, exhibits submitted by Argentina should be numbered ARG-1, ARG-2, etc. If the last exhibit in connection with the first submission was numbered ARG-5, the first exhibit of the next submission thus should be numbered ARG-6. Exhibits submitted by Chile should be numbered CHL-1, CHL-2, etc.

13. The Parties and Third Parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include, as representatives of the government concerned, private counsel and advisers. The Parties and Third Parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations, as well as any other advisors consulted by a Party or Third Party, act in accordance with the rules of the DSU and the working procedures of this Panel, particularly in regard to confidentiality of the proceedings. Parties shall provide a list of the participants of their delegation before or at the beginning of any meeting with the Panel.

14. Any request for a preliminary ruling (including rulings on jurisdictional issues) to be made by the Panel shall be submitted no later than in a Party's first written submission. If Argentina requests any such ruling, Chile shall submit its response to such a request in its first written submission. If Chile requests any such ruling, Argentina shall submit its response to such a request in its rebuttal submission. Exceptions to this procedure will be granted upon a showing of good cause.

15. The following procedures regarding service of documents shall apply:

(a) Each Party shall serve its submissions directly on the other Party. Each Party shall, in addition, serve its first written submission and rebuttals on Third Parties. Each Third Party shall serve its submissions on the Parties and other Third Parties. Each Party and Third Party shall confirm in writing, at the time it provides the submission to the Secretariat, that copies have been served as required.

(b) The Parties and Third Parties shall provide their written submissions to the Panel, through the Secretariat, by 5.00 p.m., local Geneva time, on the deadlines established by the Panel.

(c) Parties and Third Parties shall provide the Secretariat with written copies of their oral statements on the working day following the date of the presentation.

(d) The Parties and Third Parties shall provide the Secretariat with ten (10) paper copies of all their submissions as well as an "electronic" copy on a CD-ROM, diskette or as an e-mail attachment, in a format compatible with the Secretariat's software. Paper copies shall be delivered to the Dispute Settlement Registrar, ****** (Room ****). Electronic copies should be sent by e-mail to ***** at *****@wto.org, ***** at *****@wto.org and ***** at *****@wto.org.

(e) The Panel will provide Parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the Parties or Third Parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

16. These working procedures may be modified by the Panel as appropriate, after having consulted the Parties.

ANNEX I

LISTS OF EXHIBITS SUBMITTED BY THE PARTIES

LIST OF EXHIBITS SUBMITTED BY ARGENTINA

ARG-1	Law No.19.897 of the Ministry of Finance of the Republic of Chile
ARG-2	Supreme Decree No.831 of the Ministry of Finance of the Republic of Chile
ARG-3	Circular Letter No.292 of the National Customs Service of the Government of Chile
ARG-4	Daily bread wheat prices quoted for various Argentine ports.
ARG-5	Exempt Decrees No. 691/2003, No. 77/2004, No. 186/2004, No. 368/2004, No. 485/2004; No. 600/2004; No. 762/2004; No. 88/2005; No. 278/05; No. 466/2005; No. 569/2005; No. 706/2005; No. 873/2005; No.132/2006.
ARG-6	History of application of the amended PBS, including No. of Exempt Decree, reference price, specific duties and rebates on *ad valorem* tariff.
ARG-7	Chart: Relationship between the CIF price and the reference price during the period of application of the amended PBS
ARG-8	Table: Relationship between of the CIF price and the reference price during the period of application of the amended PBS
ARG-9	Table: Relationship between of the CIF price and the reference price from 1991 to 2003
ARG-10	Chart: Relationship between the Chilean entry price under the amended PBS between March and May 2000 and the price that would have resulted if Chile had applied a minimum import price.
ARG-11	Table: The amended PBS does not ensure that the price of wheat imports to Chile falls in tandem with world market prices.
ARG-12	Chart: The amended PBS does not ensure that the price of wheat imports to Chile falls in tandem with world market prices.
ARG-13	Table: The amended PBS does not ensure that the price of wheat flour imports to Chile falls in tandem with world market prices.
ARG-14	Chart: The amended PBS does not ensure that the price of wheat flour imports to Chile falls in tandem with world market prices.
ARG-15	Chart: Disconnection between the FOB price of *Trigo Pan Argentino* and the reference price established by Chile during the period of operation of the amended PBS.
ARG-16	Table: Disconnection between the FOB price of *Trigo Pan Argentino* and the reference price established by Chile during the period of operation of the amended PBS.
ARG-17	Chart: Disconnection between the FOB price of Soft Red Winter No. 2 wheat and the reference price established by Chile during the period of operation of the amended PBS.
ARG-18	Table: Disconnection between the FOB price of Soft Red Winter No. 2 wheat and the reference price established by Chile during the period of operation of the amended PBS.
ARG-19	Chart: Disconnection between the FOB price of Argentine wheat flour and the reference price established by Chile during the period of operation of the amended PBS.

ARG-20	Table: Disconnection between the FOB price of Argentine wheat flour and the reference price established by Chile during the period of operation of the amended PBS.
ARG-21	Table: Amount of specific duties that would have resulted if the present amended PBS had operated with the average prices recorded between 1986 and the present on the markets of concern for Chile.
ARG-22	Chart: Amount of specific duties that would have resulted if the present amended PBS had operated with the average prices recorded between 1986 and the present on the markets of concern for Chile.
ARG-23	Table: The amended PBS contains a formula that causes import duties to vary automatically.
ARG-24	Chart: The amended PBS contains a formula that causes import duties to vary automatically.
ARG-25	Table: Relationship between the FOB and CIF prices for bread wheat, Argentine port, transported by sea.
ARG-26	Actual cases of wheat flour exports from Argentina to Chile, transported by land.
ARG-27	Percentage variation of the FOB price for bread wheat and Soft Red Winter No. 2 Wheat from July 1986 to March 2006
ARG-28	Table: Volumes and CIF prices of Chilean monthly wheat flour imports since 1991
ARG-29	Table: Relationship between the FOB price of *Trigo Pan Argentino* and that of wheat flour during the period of application of the amended PBS

EXHIBIT ARG-30

Details of exhibits in which Argentina has made a time adjustment

Exhibit	Time adjustment (YES/NO)
ARG-7	NO
ARG-8	NO
ARG-9	NO
ARG-10	NO
ARG-11	YES, on the basis of footnote 104 to Table I of the Argentine submission
ARG-12	YES, on the basis of footnote 104 to Table I of the Argentine submission
ARG-13	YES, on the basis of footnote 108 to Table III of the Argentine submission
ARG-14	YES, on the basis of footnote 108 to Table III of the Argentine submission
ARG-15	NO
ARG-16	NO
ARG-17	NO
ARG-18	NO
ARG-19	NO
ARG-20	NO

ARG-21	NO
ARG-22	NO
ARG-23	YES, on the basis of footnote 104 to Table I of the Argentine submission
ARG-24	YES, on the basis of footnote 104 to Table I of the Argentine submission
ARG-25	NO
ARG-26	NO
ARG-27	NO
ARG-28	NO
ARG-29	NO

ARG-31	Table: ODEPA's record of wheat imports by origin (2004-2005)
ARG-32	Table: SAGPyA's official FOB prices (July 2006)
ARG-33	Table: ODEPA's price record of different wheat qualities since 1991
ARG-34	Imports to Chile of different qualities of wheat (2004-2005)
ARG-35	Insulation from international price developments: specific duties rise while international prices fall (graph)
ARG-36	Insulation from international price developments: specific duties rise while international prices fall (chart)
ARG-37	Answer to question 22: Extracts of the document "Historia de la Ley. Compilación de textos oficiales del debate parlamentario" to which Argentina refers in its first written submission
ARG-38	Table: Reference price variation since the amended PBS is in force (December 2003-August 2006)

LIST OF EXHIBITS SUBMITTED BY CHILE

CHL-1	Law No. 19.897, published in the Official Journal on 25 September 2003
CHL-2	Supreme Decree No. 831 of the Chilean Ministry of Finance approving the implementing regulations for Article 12 of Law No. 18.525, as replaced by Article 1 of Law No. 19.897
CHL-3	Article 63.17 of the Constitution of the Republic of Chile
CHL-4	Article 65 of the Constitution of the Republic of Chile
CHL-5	Law No. 19.193, published in the Official Journal on 16 January 1993
CHL-6	Law No. 19.446, published in the Official Journal on 8 February 1996
CHL-7	Simulation of the operation of the PBS (by number of weeks)
CHL-8	Law 19.589 providing for a rebate on the tariff rate and introducing amendments to other fiscal and economic legislation. Published in the Official Journal on 14 November 1998
CHL-9	Table of wholesale prices for wheat and wheat flour
CHL-10	Graph of wholesale prices for wheat and wheat flour
CHL-11	Graph showing the relation between the price of wheat flour and the price of wheat
CHL-12	Table: "Monthly prices" of wheat from the website of Argentina's Agriculture, Livestock, Fish and Food Secretary.
CHL-13	Table: Wheat imports of Chile in 2002 and 2003 (ODEPA)
CHL-14	Table of external prices "*Trigo Pan*" FOB Argentine ports; and Table of official prices "*Trigo Pan*" – monthly averages. Both from the website of Argentina's Agriculture, Livestock, Fish and Food Secretary.
CHL-15	Copy of "Historia de la Ley. Compilación de textos oficiales del debate parliamenario"
CHL-16	Chart and Table: Wheat: Chilean wholesale market, Argentine *Trigo Pan* f.o.b., soft red winter No. 2 and entry prices. 16 December 2003 to 15 December 2005.
CHL-17	Daily official prices of "*Trigo Pan* f.o.b. Argentine ports", by SAGPyA (July 2006)
CHL-18	Tables: Imports to Chile of wheat and wheat flour (2004 and 2005) (ODEPA). Imports according to country of origin (ODEPA). Monthly imports (ODEPA) (2004 and 2005). Quarterly imports (2004 and 2005).

WORLD TRADE ORGANIZATION

WT/DS207/RW/Corr.1[1]
15 January 2007

(07-0161)

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

Recourse to Article 21.5 of the DSU by Argentina

Report of the Panel

Corrigendum

In Annex A-1, para. 253, the formula was incorrectly printed and should read as follows:

$$s_N = \sqrt{\frac{1}{N}\sum_{i=1}^{N}(x_i - \overline{x})^2}\ .$$

[1] In English only.