

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

Short Title	Full Case Title and Citation
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>US – 1916 Act (EC)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by the European Communities</i> , 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
<i>US – 1916 Act (Japan)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by Japan</i> , 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
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/AB/R, adopted 28 November 2005
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – FSC (Article 21.5 – EC II)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2, adopted 14 March 2006
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , 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 Groser⁴

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 PBS⁶, 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 <i>ad valorem</i> tariff in force, Customs Tariff)
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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 <i>ad valorem</i> tariff in force, Customs Tariff)
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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
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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.	<i>Trigo Pan Argentino</i>
27 Jan. - 10 Feb.	11-15 Feb.	16 Feb. - 15 April	<i>Trigo Pan Argentino</i>
27 March - 10 April	11-15 April	16 April - 15 June	<i>Trigo Pan Argentino</i>
27 May - 10 June	11-15 June	16 June - 15 Aug.	<i>Soft Red Winter No. 2</i>
27 July - 10 Aug.	11-15 Aug.	16 Aug. - 15 Oct.	<i>Soft Red Winter No. 2</i>
26 Sep. - 10 Oct.	11-15 Oct.	16 Oct. - 15 Dec.	<i>Soft Red Winter No. 2</i>

[...]"

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 sugar²⁸ 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 months⁴¹, "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 Panel⁴⁸;
- (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.

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 duties¹, 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 measure⁷⁸, 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 above⁹⁴, 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:

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.

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:

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 Chile¹²⁷ 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:

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 PBS¹²⁹) 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

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 report¹⁴², 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:

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

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 noted¹⁵⁴, 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

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, however¹⁶⁷, 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

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'."

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 1994²⁰³, 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

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 faith²¹⁰, 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:

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.

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

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

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 measures²³⁵: 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 above²³⁸, 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

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

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.

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

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 proceedings²⁶⁰, 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.
