

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

*Report of the Panel*

The report of the Panel on Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 3 May 2002 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

**Note by the Secretariat:** This Panel report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel report is available from the WTO Secretariat

## I. INTRODUCTION

1.1 On 5 October 2000, Argentina requested consultations with Chile pursuant to Article XXIII:1 of the General Agreement on Trade and Tariffs 1994 (the "GATT 1994") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") – insofar as it is an elaboration of Article XXIII:1 of the GATT 1994 – as well as Article 14 of the Agreement on Safeguards and Article 19 of the Agreement on Agriculture. This request was related to the Chilean Price Band System (hereafter "the Chilean PBS") and the imposition by the Chilean authorities of provisional and definitive safeguard measures on imports of wheat, wheat flour and edible vegetable oils.<sup>1</sup>

1.2 The consultations took place on 21 November 2000, but the parties failed to reach a mutually satisfactory solution. On 19 January 2001, Argentina requested the Dispute Settlement Body (the "DSB") to establish a panel, pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU, Article 19 of the Agreement on Agriculture and Article 14 of the Agreement on Safeguards, in order to examine the Chilean PBS, its provisional and definitive safeguard measures on imports of wheat, wheat flour and edible vegetable oils, and the extension of those measures.<sup>2</sup>

1.3 At its meeting on 12 March 2001, the DSB established a panel in accordance with Article 6 of the DSU. At that meeting, the parties agreed that the Panel should have standard terms of reference. The terms of reference of the panel were, therefore, the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Argentina in document WT/DS207/2, 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."<sup>3</sup>

1.4 On 7 May 2001, Argentina requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

"If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.5 On 17 May 2001, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Hardeep Puri  
Members: Mr. Ho-Young Ahn  
Mr. Michael Gifford

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<sup>1</sup> WT/DS207/1.

<sup>2</sup> WT/DS207/2.

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

1.6 Australia, Brazil, Colombia, Costa Rica, the European Communities, Ecuador, El Salvador, Guatemala, Honduras, Japan, Nicaragua, Paraguay, the United States and Venezuela reserved their rights to participate in the panel proceedings as third parties.

1.7 The Panel met with the parties on 12-13 September and 21-22 November 2001. It met the third parties on 13 September 2001.

1.8 The Panel submitted its interim report to the parties on 21 February 2002. On 28 February 2002, Chile submitted comments and requested the revision and clarification of certain aspects of the interim report. Chile also requested the Panel to hold a further meeting with the parties, pursuant to Article 15 of the DSU and paragraph 16 of the Panel's Working Procedures. On 28 February 2002, Argentina submitted general comments to the interim report. An Interim Review meeting was held with the parties on 14 March 2002. The Panel gave the parties the opportunity to submit further comments the following day. The Panel submitted its final report to the parties on 4 April 2002.

## II. FACTUAL ASPECTS

2.1 The dispute concerns two distinctive matters: (A) Chile's Price Band System ("PBS") and (B) Chile's provisional and definitive safeguards measures on imports of wheat, wheat flour and edible vegetable oils, as well as the extension of those measures.

### A. CHILE'S PRICE BAND SYSTEM

#### 1. Regulatory framework

2.2 Chile's regulations on its PBS are contained in Law 18.525 on the Rules on the Importation of Goods<sup>4</sup>, as amended. In particular, Article 12 of Law 18.525 provides for the methodology for the calculation of the price bands. This Article reads as follows:<sup>5</sup>

"For the sole purpose of ensuring a reasonable margin of fluctuation of domestic wheat, oil-seeds, edible vegetable oils and sugar prices in relation to the international prices for such products, specific duties are hereby established in United States dollars per tariff unit, or *ad valorem* duties, or both, and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of such goods.

The amount of these duties and rebates, established in accordance with the procedure laid down in this Article, shall be determined annually by the President of the Republic, in terms which, applied to the price levels attained by the products in question on the international markets, make it possible to maintain a minimum cost and a maximum import cost for the said products during the internal marketing season for the domestic production.

For the determination of the costs mentioned in the preceding paragraph, the monthly average international prices recorded in the most relevant markets during an immediately preceding period of five calendar years for wheat, oil-seed and edible vegetable oils and ten calendar years for sugar shall be taken into consideration.

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<sup>4</sup> Law 18.525, Official Journal of the Republic of Chile, 30 June 1986.

<sup>5</sup> Consolidated version of Law 18.525, Official Journal of the Republic of Chile, 30 June 1986 as amended by Law No. 18.591, Official Journal, 3 January 1987 and by Law No. 18.573, Official Journal, 2 December 1987. This consolidated text was included in Annex CHL-2 to Chile's First Written Submission (footnotes omitted).

These averages shall be adjusted by the percentage variation of the relevant average price index for Chile's foreign trade between the month to which they correspond and the last month of the year prior to that of the determination of the amount of duties or rebates, as certified by the Central Bank of Chile. They shall then be arranged in descending order and up to 25 per cent of the highest values and up to 25 per cent of the lowest values for wheat, oil-seed and edible vegetable oils and up to 35 per cent of the highest values and up to 35 per cent of the lowest values for sugar shall be removed. To the resulting extreme values there shall be added the normal tariffs and costs arising from the process of importation of the said products. The duties and rebates determined for wheat shall also apply to meslin and wheat flour. In this last case, duties and rebates established for wheat shall be multiplied by the factor 1.56.

The prices to which these duties and rebates are applied shall be those applicable to the goods in question on the day of their shipment. The National Customs Administration shall notify these prices on a weekly basis, and may obtain information from other public bodies for that purpose."

2.3 Chile submitted a copy of Law No. 19.772<sup>6</sup>, amending Article 12 of Law 18.525 at the second substantive meeting. Article 2 of Law No. 19.772, which entered into force on 19 November 2001, adds the following paragraph to Article 12 of Law 18.525:

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

## 2. Workings of the PBS

2.4 As a matter of practice, Chile's applied tariff rates are significantly below its bound rate. In the case of wheat, wheat flour, and edible vegetable oils, the applied rate can be increased by means of duty increases provided through the operation of the PBS.<sup>7</sup> In each case, the PBS involves an upper and a lower threshold determined on the basis of certain international prices. The bands for each product are determined once every year through a Presidential decree when a table is published containing reference prices and related specific duties. Chile also sets weekly "reference prices" based on prices in certain foreign markets. A duty increase is triggered when the "reference price", lies below the lower threshold of the band. The duty increase is equivalent to the absolute difference between the lower threshold of the band and the "reference price". Conversely, a tariff rebate is triggered when the "reference price" lies above the price that determines the upper threshold of the band. The rebate (which cannot be greater than the applied *ad valorem* rate) is equivalent to the absolute difference between the "reference price" and the upper threshold of the band.

2.5 Article 12 of Law No. 18.525 foresees the application of specific duties expressed in US dollars per tariff unit or *ad valorem* duties, or both, as well as rebates on the amount payable as specific or *ad valorem* duties or both. For this purpose, Article 12 empowers the President of the Republic of Chile to issue decrees determining the price bands annually. These bands are calculated on the basis of average monthly prices observed for the last 60 months on specific exchanges. In the

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<sup>6</sup> Official Journal of the Republic of Chile, 19 November 2001.

<sup>7</sup> As indicated in paragraph 2.3 above, Chile has informed the Panel that pursuant to Law 19.772 effective on 19 November 2001, the combination of the applied *ad valorem* rate and the PBS duty increase are capped at the bound *ad valorem* rate. Prior to that, the combination did at times surpass the bound rate.

case of wheat, the calculation is based on Hard Red Winter No. 2, f.o.b. Gulf (Kansas Exchange), while for oils, it is based on the price of crude soya bean oil, f.o.b. Illinois, on the Chicago Exchange.<sup>8</sup> As regards wheat flour, 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.<sup>9</sup> These average prices are adjusted by the percentage variation in the external price index (IPE) drawn by the Central Bank of Chile. After the prices have been readjusted, they are listed in descending order, with up to 25 per cent of the highest and lowest values being eliminated for wheat and edible vegetable oils. 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) are added to those prices thus determined in order to fix the lower and upper thresholds on a c.i.f. basis.

2.6 When a shipment of a product subject to the PBS arrives at the border for importation into Chile, the customs authorities determine the total amount of applicable duties as follows. The first step is to apply the *ad valorem* duty. Afterwards, the so-called "reference price" applicable to that given shipment has to be identified. This reference price is not the transaction price but a price which is determined weekly (every Friday) by the Chilean authorities by using the lowest f.o.b. price for the product in question on foreign "markets of concern to Chile".<sup>10</sup> In the case of edible oils, the weekly reference price corresponds to the lowest f.o.b. price in force on the markets of concern to Chile for any of the types of covered edible vegetable oils. Unlike the prices used for the composition of the PBS, the reference prices are not subject to adjustment for "usual import costs".<sup>11</sup> The applicable reference price for a particular shipment is determined in reference to the date of the bill of lading. The reference price can be consulted by the public at the offices of the Chilean customs authorities.

2.7 Once the customs authorities have identified the reference price applicable to that given shipment, they proceed to levy the duties. These will differ according to the position of the reference price as regards the upper and lower thresholds of the price band. If the reference price falls below the lower threshold, the customs authorities will levy an 8 per cent *ad valorem* duty (MFN duty), plus an additional specific duty. This additional specific duty will equal the difference between the reference price and the lower threshold. If the reference price is between the lower and upper thresholds, the customs authorities will only apply the 8 per cent *ad valorem* duty. If the reference price is higher than the upper threshold, the customs authorities will grant a rebate on the 8 per cent *ad valorem* duty equal to the difference between the upper threshold and the reference price.

## B. CHILE'S SAFEGUARD MEASURES

### 1. Regulatory Framework

2.8 The Chilean regulatory framework for the conduction of safeguards investigations and the eventual imposition of safeguards measures is contained in Law No. 19.612 of 28 May 1999<sup>12</sup> and its implementing Decree No. 909 of the Ministry of Finance of 17 June 1999.<sup>13</sup> Chile notified both legal instruments to the WTO on 23 June 1999.<sup>14</sup>

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<sup>8</sup> See Chile's response to question 10 (CHL) of the Panel.

<sup>9</sup> Article 12 of Law 18.525 and its amendment stipulates that the duties and rebates applicable to wheat flour shall be the same as for wheat, adjusted by a conversion factor of 1.41. This conversion factor was raised to 1.56 by Law 19.446 (extended by Law 19.604) (see Annex ARG-2).

<sup>10</sup> With respect to wheat, these "markets of concern" include Argentina, Canada Australia and the United States. See Chile's response to question 9(c) (CHL) of the Panel.

<sup>11</sup> See Chile's response question 9 (CHL) of the Panel.

<sup>12</sup> Official Journal of the Republic of Chile, 31 May 1999.

<sup>13</sup> Official Journal of the Republic of Chile, 25 June 1999.

<sup>14</sup> Document G/SG/N/1/CHL/2 of 24 August 1999 containing Law 19.612 and Law 18.525 (as amended by Law 19.612) as well as Decree 909/99 of the Ministry of Finance.

## 2. Provisional and definitive safeguard measures

2.9 On 23 August 1999, the Ministry of Agriculture of Chile filed a request before the National Commission in charge of investigating distortions in the prices of imported goods (hereinafter "the Commission") to initiate *ex officio* a safeguards investigation on products subject to the PBS, that is, wheat, wheat flour, sugar and edible vegetable oils. The Chilean Ministry of Agriculture also requested the Commission to recommend the imposition of provisional safeguard measures. At its Session No. 181 held on 9 September 1999, the Commission decided to initiate a safeguards investigation against imports of wheat, wheat flour, sugar and edible vegetable oils.<sup>15</sup> Imports of sugar, however, are not part of the present dispute. The decision to initiate is contained in Minutes of Session No. 181 of the Commission. The notice of initiation of the investigation was published in the Official Journal of the Republic of Chile on 29 September 1999 and notified to the WTO on 25 October 1999.<sup>16</sup> Accordingly, the investigation was initiated on 30 September 1999.

2.10 At its Session No. 185 held on 22 October 1999, the Commission decided to recommend to the President of the Republic the imposition of provisional safeguard measures. The Commission's recommendations are contained in its Minutes of Session No. 185. Upon the recommendation of the Commission, the President through the Ministry of Finance imposed provisional safeguard measures on imports of wheat, wheat flour and edible vegetable oils by Exempt Decree No. 339 of 26 November 1999.<sup>17</sup> Chile made an advance notification of these measures on 2 November 1999.<sup>18</sup> The provisional safeguard measure consisted of an *ad valorem* tariff surcharge, corresponding to the difference between the general tariff added to the *ad valorem* equivalent of the specific duty determined by the PBS and the bound tariff in the WTO for these products.

2.11 At its Session No. 189 on 25 November 1999, the Commission held a public hearing in order to receive the views of the interested parties in the safeguards investigation. The arguments of the parties are annexed to its Minutes of Session No. 189. At its Session No. 193 held on 7 January 2000, the Commission recommended the imposition of definitive safeguard measures. The recommendations of the Commission are contained in Minutes of Session No. 193. On 18 January 2000, Chile notified the WTO of the finding by the Commission of threat of injury to its domestic industry for products subject to the Chilean price band system, and of that Commission's recommendation to the President of Chile to impose definitive safeguard measures.<sup>19</sup>

2.12 On 22 January 2000, Exempt Decree No. 9 of the Ministry of Finance of Chile was published in the Official Journal, imposing definitive safeguard measures for one year on imports of wheat, wheat flour and edible vegetable oils. As in the case of the provisional measures, the definitive measures consisted, for each import transaction, of an "*ad valorem* tariff surcharge, corresponding to the difference between the general tariff added to the *ad valorem* equivalent of the specific duty

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<sup>15</sup> The products concerned by the investigation procedure and the application of safeguard measures are: wheat, classified under tariff heading 1001.9000; wheat flour, classified under tariff heading 1101.0000; sugar, classified under tariff headings 1701.1100; 1701.1200; 1700.9100 and 1701.9900; and edible vegetable oils, classified under tariff headings 1507.1000; 1507.9000; 1508.1000; 1508.9000; 1509.1000; 1509.9000; 1510.0000; 1511.1000; 1511.9000; 1512.1110; 1512.1120; 1512.1910; 1512.1920; 1512.2100; 1512.2900; 1513.1100; 1513.1900; 1513.2100; 1513.2900; 1514.1000; 1514.9000; 1515.2100; 1515.2900; 1515.5000 and 1515.9000.

<sup>16</sup> Document G/SG/N/6/CHL/2 of 2 November 1999.

<sup>17</sup> Exempt Decree No. 339 of 19 November 1999, published in the Official Journal of the Republic of Chile, 26 November 1999.

<sup>18</sup> Document G/SG/N/7/CHL/2 of 10 November 1999.

<sup>19</sup> Document G/SG/N/8/CHL/1 of 7 February 2000.

determined by the mechanism set out in Article 12 of Law 18.525 [i.e., the PBS] - and its relevant annual implementing decrees - and the level bound in the WTO for these products".<sup>20</sup>

### 3. Extension of the safeguard measures

2.13 By Order No. 792 of 10 October 2000, the Chilean Ministry of Agriculture requested the Commission to consider an extension of the definitive safeguard measures imposed by Exempt Decree No. 9 of the Ministry of Finance of Chile on imports of wheat, wheat flour and edible vegetable oils. At its Session No. 222 held on 3 November 2000, the Commission decided to initiate a procedure for the purpose of deciding whether to extend the definitive safeguard measures. The notice of initiation was published on 4 November 2000. At its Session No. 223 on 13 November 2000, the Commission held a public hearing. The details of the hearing are contained in its Minutes of Session No. 223.

2.14 At its Session No. 224 held on 17 November 2000, the Commission decided to recommend the extension of the definitive safeguard measures established by Exempt Decree No. 9 of the Ministry of Finance. The decision of the Commission is contained in Minutes of Session No. 224. Further to this decision, the extension of the safeguard measures was imposed by Exempt Decree No. 349 of the Ministry of Finance of 25 November 2000.<sup>21</sup> This Decree provides for an extension of the safeguard measures, as described in paragraph 2.12 above, for one year from the date of their expiry. In practice, they were extended until 26 November 2001. Chile notified the WTO of the extension of the measure on 11 December 2000.<sup>22 23</sup>

2.15 The extension measures for wheat and wheat flour were withdrawn by Exempt Decree No. 244 of the Ministry of Finance published on 27 July 2001.<sup>24</sup> The termination of these measures was notified to the WTO on 9 August 2001.<sup>25</sup>

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 For the reasons put forward, **Argentina** requests that the Panel:

- conclude that the Chilean PBS is inconsistent with Article II.1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;
- find that the safeguards investigation and the safeguard measures are inconsistent with Article XIX of the GATT 1994 and Articles 2, 3, 4, 5, 6 and 12 of the Agreement on Safeguards; and
- rule on all of the claims made so as to avoid any unnecessary future proceedings if the findings are eventually overturned, bearing in mind that the Appellate Body exercises procedural economy.

3.2 In light of facts and law put forward, **Chile** requests that the Panel:

- conclude that the PBS is in compliance with Article II.1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;

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<sup>20</sup> Exempt Decree No. 9 of the Ministry of Finance.

<sup>21</sup> Published in the Official Journal on 25 November 2000.

<sup>22</sup> Document G/SG/N/14/CHL/1 of 22 December 2000.

<sup>23</sup> Chile stated that the extension measure for edible vegetable oils expired on 26 November 2001 (Exempt Decree No. 559 from the Ministry of Finance).

<sup>24</sup> See Chile's response to question 16 (ARG, CHL) of the Panel.

<sup>25</sup> Document G/SG/N/10/CHL/1/Suppl. 3 of 16 August 2001.

- find that: (i) both the provisional and definitive measures that are the subject of consultations and this procedure are not in force; and (ii) the extension measures, the only ones in effect at present, were not the subject of WTO consultations, and therefore that the Panel should not rule on whether the measures in effect are consistent with specific provisions of the WTO Agreements;
- in the event that the Panel considers that it can rule on the consistency of the Chilean measures with Articles 2, 3, 4, 6, and 12 of the Agreement on Safeguards, as well as Article XIX of the GATT 1994, conclude that these are in compliance with the aforementioned Articles.

**[Parties' and Third Parties' arguments in Sections IV and V deleted from this version.]**

## VI. INTERIM REVIEW

6.1 The Panel issued its interim report on 21 February 2002. On 28 February 2002, Chile provided comments and requested the revision and clarification of certain aspects of the interim report. Chile also requested that the Panel hold a further meeting with the parties pursuant to Article 15 of the DSU and paragraph 16 of the Panel's Working Procedures. Argentina provided general comments in a letter dated 28 February 2002. The Panel held a meeting on 14 March 2002. Both parties made oral statements and were given the opportunity to provide written statements by close of business the next day.<sup>559</sup>

6.2 With regard to paragraphs 7.3 to 7.8 of the interim report, Chile argued that a distinction must be drawn between Articles 1 and 2 of Law 19.722. According to Chile, Article 2 is the provision that expressly and conclusively states that the total of the specific duties resulting from application of the price band system and the general *ad valorem* (most-favoured-nation) tariff may not exceed the bound tariff. Chile submits that this provision does not require any further implementation as it is a law and as such applies in Chile as of its publication in the *Diario Oficial de la República de Chile*, which occurred on 19 November 2001. Chile argues that the case of Article 1 of this Law is different in that it has to be implemented by the customs authorities, who took an active part in the elaboration, discussion and drafting of this Law. This implementation took effect at the same time as the publication of the Law, in the form of Exempt Resolution No. 4326, published in the *Diario Oficial de la República de Chile* on the same date as Law 19.722, i.e. 19 November 2001. Argentina responded that Chile did not inform the Panel about the existence of Exempt Resolution No. 4326 prior to the interim review meetings, and that Argentina could therefore not have been aware of this Exempt Resolution.

6.3 We note that Chile did not request any specific action by the Panel in this respect and, taking note of the late submission of this evidence by Chile, we consider that no changes to the interim report are warranted by Chile's comments.

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<sup>559</sup> At the beginning of the meeting, Chile complained that the Panel had impaired Chile's rights of defense and due process, by (1) not having postponed the first substantive meeting with the parties as requested by Chile; (2) having given insufficient time for preparation of written comments on the interim report; (3) having one Panel member participating in the interim review meeting through a telephone link, rather than through physical presence; and (4) organizing a session of limited duration as a result of a Panel member's scheduling constraints.

The Chairman of the Panel responded to Chile's comments at the meeting that the Panel had shown maximum flexibility towards both parties throughout the proceedings and had always tried to accommodate requests for schedule modifications by both parties and in agreement with both parties. Indeed, all requests made by the parties at the organizational meeting were met. With regard to the postponement of the first substantive meeting, the Chilean request was received only about a week in advance. The Panel and Secretariat expended considerable efforts to accommodate the request but were unable to find another time feasible for all the Panelists and the parties. It should also be noted that there were fourteen third parties whose interests needed to be taken into account. With respect to the time provided for written comments on the interim report, we note that the time accorded was consistent with Appendix 3 to the DSU. Furthermore, Chile did not request an extension. Regarding the use of teleconference, this was not the first time this has been used in panel proceedings and is related to the constraints imposed by Article 8.1 of the DSU as regards the individuals eligible to serve as panelists, who, given their required seniority or expertise, may be expected to face scheduling conflicts more than once. Regarding the limited duration of the interim review meeting, it should be noted that an inquiry was made of Chile as to whether they could start the meeting one hour earlier, but Chile felt unable to accommodate that request. In any event, the Chairman also indicated the Panel's readiness to hold an additional session should Chile so desire. Chile did not react to the Chairman's comments and suggestion.

6.4 With respect to paragraphs 7.17, 7.18 and 7.19, Chile argued that the Panel is mistaken in attributing to Chile the argument that the fact that the PBS was not challenged or that there were no requests to tariffify the measure, either during or after the Uruguay Round negotiations (particularly on the Agreement on Agriculture), means that the PBS cannot be challenged or considered a measure prohibited by Article 4.2. According to Chile, it had argued that the absence of any challenge or request, before, during or after the negotiations is valid evidence in support of Chile's position regarding the correct interpretation of Article 4.2. Chile therefore requests the Panel to reformulate or delete these paragraphs. Argentina considered that the Panel had correctly understood and reflected Chile's arguments, and cited a passage in Chile's rebuttal submission which it considered to confirm this understanding.

6.5 In paragraph 7.17 we summarize Chile's interpretative argument regarding Article 4.2 as follows:

Chile argues that the phrase "of the kind which have been required to be converted" and the illustrative list in footnote 1 contain two separate conditions to be met for a measure to be prohibited under Article 4.2: only those measures listed in footnote 1 which effectively "have been required to be converted into ordinary customs duties" would be prohibited under Article 4.2. Chile argues that no other Member has ever requested Chile to "tariffify" its PBS during the Uruguay Round negotiations, and that, therefore, its PBS is not a measure "of the kind which [has] been required to be converted into ordinary customs duties".

In paragraph 7.18, we state that such an interpretation "would *imply* that Members decided to forego their right to challenge measures which had not been specifically identified and converted at the end of the Uruguay Round" (emphasis added).

6.6 We note that in para. 56 of its first submission, Chile states,

In its arguments, Argentina disregards the usual meaning of the terms of Article 4.2 in its context and effectively ignores the qualifier that the measures that must not be maintained or reverted to are "measures of the kind which have been required to be converted into ordinary customs duties". *Consequently, not only do all non-tariff measures of the kind described in footnote 1 not have to be abolished, but only those of the kind that have been specified must be converted into ordinary customs duties.* If the intention of those who drafted Article 4.2 had in fact been as Argentina argues, it would have been extremely easy for them to draw up an obligation to prohibit "all measures of the kind listed in footnote 1". But they did not do this; and anyone interpreting the treaty cannot disregard the drafters' decision to include, in its place, qualifying and limitative terms with the intention of giving the Article the meaning that only measures of the kind which have been required to be converted are prohibited. (emphasis added)

6.7 In light of the above, we are of the view that we have accurately summarized Chile's arguments. Chile appears to be arguing that we examined their position as an estoppel argument. We recognized explicitly that Chile was not doing this in paragraphs 7.79 and 7.100 and footnote 654 of this report.

6.8 With respect to paragraphs 7.28 to 7.32 of the interim report, Chile considered that the text did not accurately reflect Chile's arguments. In Chile's view, it has made it clear that its argument is that a measure which is a customs duty as such cannot be considered a measure which, according to Article

4.2 of the Agreement on Agriculture, would have to be converted. Chile argues that it never claimed that Article 4.2 was confined to measures prohibited under Article XI of GATT 1994, nor did Argentina or the third parties to this dispute. According to Chile, "[t]he Panel should not explicitly or implicitly misinterpret the points of view of the parties or third parties", and therefore requested the Panel to reformulate or delete these paragraphs. Argentina considered that the Panel had correctly understood and reflected Chile's arguments.

6.9 In para. 7.28 of the interim report, we stated,

As a preliminary matter, we note Chile's statement that "the obligations in Article 4.2 only relate to *non-tariff* barriers"<sup>560</sup> whereas "the PBS only covers the payment of *customs duties*"<sup>561</sup>. *Although Chile concedes that there is no such test in the language of the Agreement on Agriculture, it also asserts that "it might be considered that the defining characteristic should be whether the measure has the effect of a quantitative limitation".*<sup>562</sup> Thus, Chile appears<sup>563</sup> to argue that Article 4.2 was not meant to prohibit measures taking the form of duties levied by customs authorities, but only "*non-tariff barriers*" or quantitative restrictions. Along those lines, "similar border measures" would need to have the effect of a quantitative restriction. (emphasis added)

6.10 In addressing Chile's comments, we first recall that Chile explicitly made the argument at one point in its submissions that "it might be considered that the defining characteristic should be whether the measure has the effect of a quantitative limitation". Thus, by complaining about the way the Panel has summarized its argument, while not withdrawing the quoted statement, Chile must be drawing a distinction between measures whose defining characteristic is that they have the effect of a quantitative limitation, on the one hand, and quantitative restrictions, on the other. In the absence of any explanation by Chile, however, as to what such difference could be, we have proceeded by verbatim quoting Chile, while at the same time juxtaposing this argument with Chilean statements which could suggest a different path of reasoning. The issue, however, is of considerable importance for the purpose of interpreting Article 4.2 and must therefore be addressed in any event.

6.11 In light of Chile's comments, we have amended the third sentence of paragraph 7.28.

6.12 Similarly, we have also amended the second sentence of paragraph 7.29.

6.13 With respect to paragraph 7.39 of the interim report, Chile argued that the Panel mistakenly describes the structure and operation of the Chilean PBS as "rather complex". In Chile's view, the PBS is not complex at all. Argentina recalled that Chile itself, in its first written submission, had stated that "the price band formula may appear complex", and considered that the Panel's conclusion corresponds to an objective analysis.

6.14 We have reviewed the descriptions provided by the parties, including their answers to many questions by the Panel, and in light of this do not consider that Chile's comments in this respect warrant any changes to the interim report.

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<sup>560</sup> (original footnote) Chile's First Written Submission, para. 33. Chile's reply to Panel question 6. Emphasis added.

<sup>561</sup> (original footnote) *Ibid.* Emphasis added.

<sup>562</sup> (original footnote) Chile's response to Panel question 8. Emphasis added.

<sup>563</sup> (original footnote) Chile has also argued that "despite the Members' intention to reduce the number of non-tariff barriers *and other measures* covered, their intention was not to prohibit all such measures". Chile's first submission, para. 59. Emphasis added.

6.15 In the same paragraph, Chile claims that the Panel incorrectly states that the Chilean customs authorities determine the total amount of duty applicable. According to Chile, this is not correct because the calculation is made by the customs agents, which are private service organizations that provide services to importers, who must use such agents in their dealings with the customs authorities. The calculation made by these individuals may be subject to revision by the authorities, in the same way as annual income tax declarations. Argentina responded that this factual information was not provided by Chile until the interim review meeting and should therefore not be taken into account by the Panel. According to Chile, the information was not provided earlier because the Panel never put a question to Chile regarding this matter.

6.16 In the second sentence of paragraph 7.39 of the interim report, we stated,

When a product covered by the Chilean PBS arrives at the border for importation into Chile, Chilean customs authorities will *determine* the total amount of applicable duties. (emphasis added)

6.17 We note that the factual correction proposed by Chile is based on new information not presented to us before the interim review. According to Chile, the use of the term "determine" in the interim report is not correct, because the *calculation* of the applicable duties is made by private customs agents and then *revised* by the customs authorities. Since the customs authorities may revise the "declared" duties, however, it appears to us that it is the customs authorities who, at the end of the day, *determine* the total amount of applicable duties, "in the same way as annual income tax declarations". Nonetheless, as we wish our description of the operation of the Chilean PBS to be as accurate as possible, we have changed the second sentence of paragraph 7.39.

6.18 With respect to paragraph 7.41 of the interim report, Chile argues that the Panel did not take account of the facts and the evidence put forward by Chile to the effect that its PBS is legally subject to Chile's tariff binding within the WTO for products covered by the system. According to Chile, by disregarding this fact, the Panel fails to recognize that it is perfectly possible for the import cost of a product subject to the PBS to be lower than the band's lower threshold. Argentina responds that the Panel is not even addressing the bound level of Chile in paragraph 7.41 of the interim report, since it has analyzed the PBS as challenged by Argentina in these procedures. The bound level of Chile is by no means part of the Panel's argument in paragraph 7.41. Argentina therefore concludes that Chile's comments are of no relevance and are not related to the Panel's findings.

6.19 In paragraph 7.7 of our report, we state that "[w]e can only assess the relevance of the change introduced by Chile to the WTO-consistency of its PBS after having determined what Chile's obligations are with respect to its PBS under the provisions of GATT 1994 and the Agreement on Agriculture included in Argentina's request for establishment." We therefore agree with Chile that, in line with this reasoning, we should assess the relevance of the cap introduced by Chile in the course of the proceedings. We consider, however, that the change introduced by Chile is of limited relevance to our findings, and does not detract from their validity. We have amended paragraph 7.41 accordingly.

6.20 Chile stated that it could agree, in general terms, with the content of original footnote 599 of the interim report (new footnote 607 of the final report). According to Chile, however, the last sentence is inaccurate because, even though the published price for markets of concern is always taken into account, the individual prices of trade transactions are not considered. Consequently, in Chile's view, there may be imports from one of these markets at prices lower than the published prices (perhaps because of payment terms, the need to sell, the time of sale, etc.). Argentina recalled that Chile did not respond to part (b) of question 46 of the Panel, which specifically requested: "In this connection, have goods entered the Chilean market at prices below the lower level end of price band? If so, please identify as many instances as possible, and provide supporting documentation". Argentina also posited that in terms of the PBS mechanics, the freight is far from being an element of

any operational significance. According to Argentina, the irrelevance of the eventual freight variations is clearly reflected in the example provided by Chile itself in its answer to question 46, which shows an import cost differential, in percentage terms, of less than 2 % (US\$ 213/US\$210). Argentina considered that it forcefully proved the insulation effects of the PBS in exhibit ARG-41. According to Argentina, the referred exhibit shows that for a period of 24 months the weekly reference price set by the Chilean authorities was systematically lower than the weekly average f.o.b. quotations in Argentina. Therefore, Argentina argues, it can hardly be argued, as Chile did, that the entry of imports at costs below the lower end of the PBS could be of any significance, either in terms of import cost differential or in volume.

6.21 Much like the situations already discussed in the footnote, Chile has merely described a situation where the Chilean authorities relies on a published price and, therefore, may mistakenly not accurately identify the true lowest price. We decline to further amend this footnote.

6.22 According to Chile, original footnote 602 of the interim report (new footnote 611 of the final report) is correct, but incomplete. Chile considers that if the trend continued for a further year, this would be reflected in the band for the following years because the new year would be incorporated in the system for five years. According to Chile, this shows that market trends are incorporated, although in an attenuated form. With reference to paragraph 7.43 of the interim report, Chile reiterated that an Argentine exporter can export at an f.o.b. price lower than the reference price, if it is an Argentine price, because this is fixed on the basis of the prices published for the market as a whole, but many transactions take place at varying levels, either higher or lower. Taking into account the comments in the preceding two points, Chile requested the Panel to clarify why, in its opinion, despite the examples cited by Chile, which are not hypothetical but have occurred in practice, there can be no imports at f.o.b. prices lower than the reference price. In Argentina's view, the content of footnote 611 and the development of paragraph 7.43 are self-explanatory and require no further elaboration.

6.23 In light of Chile's comments, and in line with our changes to paragraph 7.41, we have changed paragraph 7.43.

6.24 With respect to paragraph 7.44 of the interim report, Chile argued that exporters do not encounter problems in finding out exactly what the reference price is at any given time. Chile claims that (1) since 1997, information on the reference price has been given on the web page of the National Customs Service; (2) any exporter's representative or customs agent in Chile has been able to consult the Customs Service directly; (3) this information is regularly transmitted to the Customs Chambers, composed of the various customs agents. Argentina reiterated that the Panel's finding that the PBS is characterized by a lack of transparency and predictability is based on an objective analysis of the evidence and facts submitted, as well as on the analysis of the way the PBS operates.

6.25 We note that we addressed Chile's first argument, raised only in its comments on the descriptive part, in paragraph 7.44 and footnote 604. We further note that the second and third arguments, both related to the role of private customs agents, have been raised for the first time by Chile during the interim review. Notwithstanding the novel character of these arguments, we have changed the second sentence of paragraph 7.44.

6.26 With respect to the same paragraph, Chile argued that it is incorrect to state that no regulation or legislation provides that the relevant date is the date of the bill of lading because this is contained in the last paragraph of Article 12 of Law 18.525. Argentina pointed out that it does not arise from the paragraph under discussion that the Panel had concluded this, particularly considering that the Panel has quoted the full text of Article 12 of Law 18.525 in the descriptive part of the interim report, paragraph 2.2.

6.27 We agree with Chile that the text of the interim report required clarification in this respect, and have changed the fifth and sixth sentences of paragraph 7.44.

6.28 With respect to paragraph 7.46, Chile argued that it would appear that the Panel wishes its conclusion on similarity to be a question of fact, which, in Chile's view, is quite clearly wrong. What is a question of fact is the operation of the PBS. The degree of similarity and how such similarity is assessed or determined is obviously a question of law. Argentina noted that in the Panel's consideration of the fact of whether the PBS constitutes a measure similar to those listed in footnote 1 to Article 4.2 of the Agreement on Agriculture, the Panel defined – as a factual matter – the PBS as a hybrid instrument sharing the characteristics of both a variable levy and a minimum import price.

6.29 In consideration of Chile's comment, we consider that the interpretation of what constitutes a "variable import levy", "minimum import price" and "similar" border measure is, of course, a matter of law. Whether or not an existing border measure, however, is, in fact, similar to a variable import levy or minimum import price, requires an assessment of the factual evidence submitted. Such an assessment is simply an application of the law, as interpreted by us, to the facts of this case. Our determination of whether or not a particular measure is "similar to" any of the measures listed in footnote 1 is roughly analogous to a determination of whether two products are "like" or "directly competitive or substitutable" in the context of Article III of GATT 1994. We therefore decline to make the requested change.

6.30 Regarding the conclusions on other means of interpretation and specifically in relation to ECA 35 and the regulation laid down therein, Chile argued that Article 24 of ECA 35 constitutes recognition that both parties have the same understanding concerning the scope and content of the Agreement on Agriculture and, in consonance with this understanding, both parties agreed to this provision in good faith. Chile requested that, if the Panel considers that this provision does not reflect such an understanding, it clarifies what, in its view, is the meaning of this provision. Argentina considered that Chile's request of clarifications from the Panel about Article 24 of the ACE 35 is not appropriate, since the Panel itself has made its rulings and Chile has made no specific comments about the paragraphs of the Interim Report addressing this matter. Consequently, the Panel should not consider Chile's comments to this paragraph.

6.31 We take note of Chile's arguments but fail to see what changes, if any, Chile considers are warranted by its comment. In our view, our conclusions in this regard are explained sufficiently and we decline to make any changes in this regard.

6.32 With respect to paragraphs 7.112, 7.113 and 7.124, Chile requested the Panel to clarify what it means by "to secure a positive solution" to the dispute and how making findings on measures that have expired would fulfil this objective, "as it is not mentioned in any part of the interim report". Argentina considered that the Panel has clarified what it understands by "to secure a positive solution" to the dispute and why the making of findings regarding "expired" measures would meet this objective.

6.33 We fail to see the relevance of Chile's comments as they relate to paragraphs 7.112 and 7.113. In paragraph 7.115, we conclude that we do not find it necessary to make findings regarding the provisional safeguard measures in order to "secure a positive solution to the dispute", a phrase drawn verbatim from Article 3.7 of the DSU. Chile's comment as regards paragraph 7.124 is addressed below.

6.34 With respect to paragraphs 7.124 and 7.125, Chile considered that it has demonstrated that, following the entry into force of Law 19.722, the specific duties resulting from the PBS would no longer exceed the bound tariff, so the situation could not recur. Chile asked how findings by the Panel on these measures will help in reaching a prompt settlement of the overall dispute or a positive

solution thereof. Argentina considered that Chile's comment on the sense of making findings regarding expired safeguard measures is clearly explained by the Panel both in paragraph 7.125 and in paragraphs 7.6 and 7.7 relating to the relevance of Law 19.722 to analyze the consistency of the Chilean measures vis-à-vis WTO obligations. Argentina considered that this is strengthened by the Panel's conclusion of the partial identity between the Chilean PBS and the safeguard measures.

6.35 We consider that we have clearly explained in paragraph 7.125 of our report why making findings on the withdrawn definitive safeguard measures is in our view necessary to ensure a prompt settlement of the overall dispute.

6.36 With respect to paragraphs 7.116 to 7.120, Chile claimed that the Panel confines itself to citing extracts from the text of Article 7 to support its position that an extension is not a measure distinct from the definitive safeguard measure, but merely an extension of the duration of that measure. According to Chile, nowhere does the Panel give consideration to the textual and substantive arguments put forward by Chile in support of the opposite view. Chile requested the Panel to explain why it only cited certain paragraphs of Article 7 to substantiate its conclusion, and why it did not undertake a more in-depth analysis of Article 7 for this purpose, as Chile argued in its submissions. Argentina responded that the Panel starts paragraph 7.116 by mentioning and specifically considering the two objections made by Chile, and, thus, that the Panel did consider those objections. Argentina also argued that Chile did not identify what those arguments of text and substance are that have not been considered by the Panel. According to Argentina, Chile limits itself to make a general comment with no specific detail about the arguments that in its view are missing.

6.37 We take note of Chile's comments, but consider that our report sets out in sufficient detail why we consider that Chile's arguments in this respect cannot be endorsed. We therefore decline to change these paragraphs.

6.38 With respect to paragraphs 7.131 and 7.179, Chile claimed that the Panel did make use of the Minutes of Session No. 224 to reject previous records and to make comments that go beyond a finding of inconsistency with the WTO rules. According to Chile, paragraph 7.179 is "one example". According to Chile, the Panel specifically uses the minutes of session No. 224 to link the drop in production in the period mentioned in this paragraph to drought and thus reject the minutes of session No.193, because they do not contain any analysis of injury caused by other factors. Argentina considered that the Panel can use the Minutes of Session No. 224 as factual evidence, as suggested by Chile itself, and that the Panel has done so in order to clarify and complement the minutes of session No. 193, taking into account its complete lack of data.

6.39 In commenting on Chile's arguments, we first note that Chile refers to paragraph 7.179 as only "one example", but does not provide any other such "examples". The one concrete example given by Chile to support its allegation that the Panel does not adhere to the rule it sets out in paragraph 7.131 concerns a subsidiary finding by the Panel on causation, where the Panel has already found on other grounds that the CDC failed to establish a proper causal link (see paragraphs 7.176 and 7.177). In paragraph 7.179, the Panel, addressing a particular argument by Argentina, finds that the CDC should have examined the other factor, i.e. drought, to which Argentine exporters had drawn its attention during the investigation. Argentina had raised the argument and adduced evidence showing that the competent authorities must have been aware of the possible impact of the drought factor. It was the failure by the CDC to investigate or evaluate this factor which we find fault with.<sup>564</sup> The minutes of

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<sup>564</sup> It should be recalled that, according to the Appellate Body in *US – Wheat Gluten*, "the competent authorities – and not the interested parties – [are required] to evaluate fully the relevance, if any, of 'other factors'", and "where the competent authorities do not have sufficient information before them to evaluate the possible relevance of [...] an 'other factor', they must fully investigate that 'other factor' [...]" Appellate Body report, *US – Wheat Gluten*, para. 55.

session No. 224 are therefore merely used as an *observation* on our earlier finding, consistently with paragraph 7.131, not as a basis for our finding. To avoid any misunderstanding in this respect, we have changed paragraph 7.179.

6.40 With respect to paragraph 7.128, Chile claimed that the Panel does not conform to the usual meaning of the word "publish" and, by analogy, refers to the publication requirement in the Anti-Dumping and Subsidies Agreements of the WTO. According to Chile, in no part of its arguments does the Panel explain the reasons why this usual meaning does not reflect the real scope and meaning of the obligation to publish required by Article 3.1, nor why, referring to context in determining such a meaning, the WTO Anti-Dumping and Subsidies Agreements apply. Argentina considered that the Panel made use of the methods of interpretation in compliance with the DSU in order to make findings regarding the obligations contained in Article 3.1 of the Safeguards Agreement.

6.41 In our view, the explanation in paragraph 7.128 is sufficient. We refer both to the dictionary meaning of the term and, in accordance of Article 31 of the Vienna Convention, the context provided by the WTO Agreement and its annexes. We therefore take note of Chile's comments, but consider that they do not warrant any change to paragraph 7.128.

6.42 With respect to paragraphs 7.171 and 7.172, Chile stated that it cannot understand how the Panel could find that the Minutes of the CDC do not indicate whether the data used to determine the threat of injury were, or were not, based on the most recent past and on data for the entire investigative period. According to Chile, it is obviously not necessary for the Minutes to state explicitly and specifically the commencement and the end of the period within which the data were collected when this is clear from the context of the Minutes and its considerations and conclusions. Chile requests the Panel to explain why it considered that the data relating to the most recent past should have been indicated in explicit and specific terms by the investigating authorities, without meeting the obligation in Article 4.2(a) of the Agreement on Safeguards, when this can be clearly derived from the Minutes, and on what legal grounds the Panel based its conclusion. Argentina responded that if the CDC neither provided in its minutes the data of the most recent past, nor analyzed them in the context of all the investigative period – which was not even determined –, Chile cannot expect the Panel to conclude that it did comply with its obligations under Article 4.2(a) of the Agreement on Safeguards.

6.43 In consideration of Chile's argument, we observe that we can only determine whether data for the most recent past have been used, if the published report indicates what the period of examination is in the first place. Contrary to Chile's allegation, in our view this is not clear "from the context of the Minutes". We therefore consider that no change to our report is warranted in this respect.

6.44 Also as regards paragraph 7.172, Chile argued that it is not clear what led the Panel to conclude that the CDC's projection of what would have occurred if the PBS had not been fully applied did not suffice to substantiate its determination of threat of injury. Chile stated that it fails to understand how the Panel reached this conclusion, bearing in mind that the factor analysed is not injury already caused but the threat of injury. According to Chile, the foregoing indicates that, following the Panel's line of reasoning, the Panel focused on actual injury rather than on threat of injury. Chile acknowledges that when the safeguards were adopted, the PBS was operating and sometimes, as Chile has acknowledged, the bound tariff was exceeded. In Chile's view, however, this does not detract from the fact that it is perfectly legitimate for the CDC to have estimated what would occur in the domestic industry in the absence of this situation (exceeding the binding), precisely because the safeguard justifies exceeding the threshold in the WTO. According to Chile, by forecasting what would have occurred in the absence of unrestricted operation of the PBS, the CDC did not fail to extrapolate from current trends but, quite the contrary, based its determination of threat of injury on these trends. According to Argentina, the threat of injury claimed by Chile was not backed by a projection of the future condition of the industry based on recent data in the context of the investigation period, but based on the hypothesis of the injury that would be produced if the measure

were to be removed, reasoning that is contrary to the prescriptions of Article 4.1(b) and Appellate Body precedents.

6.45 We consider that our report leaves no doubt that we were addressing Chile's argument regarding the presence of a *threat* of injury, not actual injury. We agree with Argentina that Chile's argument in its interim review comments requires a hypothesis of the state of the industry in the absence of the PBS. We do not see how use of a hypothesis in any form is sufficient to satisfy the requirements of the Agreement on Safeguards. We therefore do not consider that Chile's comments warrant any change to our report.

6.46 As regards the quotation from Chile's reply to question 7(b) from the Panel in paragraph 7.173, Chile claimed that this is only given in part as the reply did not solely refer to the situation that would have occurred if a measure already adopted were withdrawn, but also to the situation that would have occurred if an initial measure had not been adopted. Argentina considered that the Panel used Chile's answer to question 7(b) in an adequate manner.

6.47 The paragraph of Chile's answer which we did not quote in the report reads:

*Similarly, in the process of determining whether or not the conditions for adopting an initial safeguard measure have been met, it is also possible to consider what would happen if a measure, then in force, were withdrawn, given that when a safeguard measure, whether provisional or definitive, is adopted, there has to be a need to prevent or remedy serious injury.*  
(emphasis added)

6.48 Quite clearly, and contrary to Chile's assertion, this paragraph does *not* address "the situation that would have occurred if an initial measure had not been adopted". On the contrary, its proposition is to envisage what would happen if an existing measure were to be withdrawn. We consider that the last sentence of paragraph 7.173 explicitly rejects this argument presented by Chile. In any event, as noted above, we do not see how it advances Chile's position if the investigating authorities had substituted one hypothesis for another.

6.49 With respect to paragraph 7.185, Chile pointed out to the Panel that the fact of using an Appellate Body report (*US – Line Pipe*) which has not yet been adopted "appears to indicate on the Panel's part excessive zeal to determine inconsistency of the safeguards adopted by Chile with Article XIX:1(a) of the GATT and Article 5.1 of the AS." Argentina responded that the Panel used as a legal precedent for the interpretation of the obligation contained in article 5.1 of the Safeguards Agreement, the Appellate Body report in *Korea – Dairy*. Argentina considered that the Panel quotes the referenced Appellate Body report with the purpose of *additionally* pointing out that Chile did not refute the *prima facie* case presented by Argentina only once it had determined the inconsistency of Chile's safeguard measures with Article 5.1 of the Safeguards Agreement. In addition, Argentina recalls that the report was adopted by the DSB on 8 March 2002.

6.50 We note that the Appellate Body report on *US – Line Pipe* referred to in our report was, in fact, adopted by the DSB on 8 March 2002. Moreover, we consider that Chile's comments would not, in any event, have warranted any change to our report. We noted the *US – Line Pipe* decision as further support for a conclusion we reached independently. In our view, we would have been remiss in our duties to do otherwise.

6.51 With respect to the interim report's section on the extension of the safeguard measures, Chile made three comments. Firstly, if the Panel determines that this claim does not come within its terms of reference, Chile does not understand the purpose and object of the Panel's finding of inconsistency, whether indirect or implicit, as clearly shown in paragraph 7.198, and why the Panel did not rather

simply declare that it had no mandate to reach a finding on this aspect. Secondly, taking into account Chile's comments that the definitive safeguard measures and the extension measures are identical measures, Chile requested that, if the Panel insists on making findings of indirect inconsistency with Article 7 of the Agreement on Safeguards, even though this issue is outside its Terms of Reference, it should review the findings on the basis of the arguments put forward by Chile but disregarded by the Panel. Thirdly, Chile did not find any argument in the Panel's analysis that explains the reasons it took into account when determining that a definitive safeguard measure, assuming that it is inconsistent with the Agreement on Safeguards, cannot be "remedied" through an extension. In Chile's view, if the Panel, despite the fact that it has no mandate on this issue, also puts forwards arguments and makes an indirect finding of inconsistency of the extension of the Chilean safeguard measures with Article 7 of the Agreement on Safeguards, it must legally substantiate its arguments and findings. Chile therefore requested the Panel to revise this section on the basis of the arguments put forward. Regarding Chile's three comments on this issue, Argentina agreed with the Panel that the inconsistency of a definitive measure cannot be "cured" with the extension of the same measure. In Argentina's view, the Panel has analyzed *in extenso* and concluded that the extensions of safeguard measures are not new measures different to the definitive measure. Therefore, and in agreement with the finding of inconsistency of the definitive measures with different provisions of the Safeguards Agreement, there is no other way for the Panel but to conclude that "[s]uch inconsistency cannot of course be 'cured' by a decision to extend their duration".

6.52 In consideration of Chile's comments, we note that in paragraph 7.198 we stated:

If the definitive safeguard measures are inconsistent with Chile's obligations under the Agreement on Safeguards, such inconsistency can of course not be "cured" by a decision to extend their duration. On the contrary, the decision to extend their duration must, by definition, be tainted by inconsistency as well. *We recall, however, that Article 7 of the Agreement on Safeguards, which sets out the conditions for an extension, is not within our Terms of Reference. We will therefore refrain from making any finding regarding the consistency of the decision to extend the safeguard measures' duration with Article 7 of the Agreement on Safeguards.* (emphasis added)

6.53 Consequently, we clearly and explicitly refrained from making any finding of inconsistency with Article 7, considering that such a claim is not within our Terms of Reference. For the same reasons, we did not present any conclusion regarding the consistency of the extension of the definitive safeguard measure in Section VIII of our report.

## **VII. FINDINGS**

### **A. THE CHILEAN PRICE BAND SYSTEM**

#### **1. Requested findings**

7.1 Argentina requests that the Panel conclude that the Chilean PBS is inconsistent with Article II:1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Argentina argues that the Chilean PBS violates Article II:1(b) of the GATT 1994 since its application can result and has repeatedly resulted in the collection of duties in excess of the rates bound in Chile's National Schedule No. VII, i.e. 31.5 per cent. Argentina also considers that the PBS, in addition to violating the obligations contained in Article II:1(b) of the GATT 1994, is inconsistent with Article 4.2 of the Agreement on Agriculture, because Chile maintains a measure of the kind which has been required to be converted into ordinary customs duties pursuant to Article 4.2 of the Agreement on Agriculture.

7.2 Chile requests that the Panel conclude that the PBS is consistent with both Article II:1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

## 2. Amendment to Article 12 of Law 18.525 in the course of the panel proceedings

7.3 At the second meeting with the parties, the Panel was informed by Chile that a new law 19.722 had entered into force on 19 November 2001 which inserts the following paragraph after the last paragraph of Article 12 of Law 18.525:

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

7.4 According to Chile:

"(...) these Chilean actions have eliminated the measures that Argentina has challenged before this Panel under Article II of the GATT 1994 [...]. Even if Argentina were correct in every respect in its allegations under those WTO provisions -- which Chile denies -- it is difficult to understand how, in terms of the purpose of the dispute settlement system, there could be a more "positive solution" to the dispute for Argentina than [...] the enactment of legislation assuring that the tariff binding will not be breached in the future."<sup>565</sup>

7.5 Our understanding from Chile's explanation is that this amendment to Article 12 of Law 18.525 puts in place a cap on the Chilean PBS duties to avoid that those duties, in conjunction with the 8 per cent applied rate, exceed the 31.5 per cent bound rate. Argentina has informed us in this respect that it:

"(...) is not in position to confirm the precise content of the Chilean Exhibit given that Argentina does not have adequate information to express a definitive view on this issue. As far as Argentina knows, Chile has not yet even issued the regulations necessary to implement the new measure."<sup>566</sup>

7.6 We note in this respect that the Panel in *Indonesia – Autos* stated that:

"(...) [i]n previous GATT/WTO cases, where a measure included in the terms of reference was otherwise terminated or amended after the commencement of the panel proceedings, panels have nevertheless made findings in respect of such a measure."<sup>567</sup>

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<sup>565</sup> Chile's Oral Statement at the second meeting with the parties, para. 6.

<sup>566</sup> Argentina's response to question 45 of the Panel.

<sup>567</sup> Panel report on *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, 4, adopted 23 July 1998. The panel referred to: the panel report on *United States - Measures Affecting Imports of Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/R, adopted on 23 May 1997; the US restriction was withdrawn shortly before the issuance of the panel report; panel report on *EEC - Restrictions on Imports of Dessert Apples, Complaint by Chile*, adopted on 22 June 1989, BISD 36S/93; panel report on *EEC-Restrictions on Imports of Apples, Complaint by the United States*, adopted on 22 June 1989, BISD 36S/135; panel report on *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91; panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November

7.7 We see no reason to deviate from this practice of other panels. Furthermore, we note that we would be prejudging our examination of Argentina's claims regarding the Chilean PBS if we were to accept without further analysis that the change introduced by Chile is relevant to the consistency of the Chilean PBS with its obligations under the WTO Agreement. We can only assess the relevance of the change introduced by Chile to the WTO-consistency of its PBS after having determined what Chile's obligations are with respect to its PBS under the provisions of GATT 1994 and the Agreement on Agriculture included in Argentina's request for establishment. We would be acting in a manner inconsistent with our duties under Article 11 of the DSU if we were to refrain from making findings for the sole reason that Chile amended the challenged measure at a late stage of the proceedings.

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

### 3. Order of the Panel's analysis

7.9 Argentina argues that the Chilean PBS is inconsistent with both Article II:1(b) of GATT 1994 and Article 4.2 of the Agreement on Agriculture. Both Argentina and Chile have first presented their arguments regarding Article II:1(b) of GATT 1994, and subsequently regarding Article 4.2 of the Agreement on Agriculture.<sup>568</sup> We will first examine whether we should conduct our analysis in the same order, or whether it would be more appropriate to start our analysis with the Agreement on Agriculture, and only then turn to GATT 1994.

7.10 Article II:1(b) of GATT 1994 provides:

"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."

7.11 Article 4.2 of the Agreement on Agriculture provides:

"Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties<sup>1</sup>, except as otherwise provided for in Article 5 and Annex 5."

<sup>1</sup> 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-

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1980, BISD 27S/98; and panel report on *EEC - Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49. The panel noted that in the panel report on *United States - Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted on 7 November 1989, the challenged measure was amended during the panel process but the panel refused to take into account such amendment. The panel on *Indonesia - Autos* noted that this was also the line taken by the Appellate Body in *Argentina - Textiles and Apparel*, WT/DS56/AB/R, adopted on 22 April 1998, para. 64.

<sup>568</sup> We also note, however, that Argentina has asserted that the Agreement on Agriculture is *lex specialis vis-à-vis* GATT 1994.

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.

7.12 The Appellate Body explained in its report on *EC – Bananas III*<sup>569</sup> that a panel should start with an examination of the claims under the agreement which "deals specifically, and in detail," with the matter at issue.<sup>570</sup> Consequently, in determining under which agreement we should proceed with first – GATT 1994 or the Agreement on Agriculture –, we will examine which agreement deals specifically and in detail with the matter at issue.

7.13 We note in this respect that the Chilean PBS applies exclusively to agricultural products, as defined in Annex 1 to the Agreement on Agriculture. Consequently, the provisions of the Agreement on Agriculture are applicable to the Chilean PBS.

7.14 The general aim of the Uruguay Round negotiations on agriculture was to "achieve greater liberalisation of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines".<sup>571</sup> As explained by the Panel in *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the object and purpose of the resulting Agreement on Agriculture is:

"to 'establish a basis for initiating a process of reform of trade in agriculture'<sup>572</sup> in line with, *inter alia*, the long-term objective of establishing 'a fair and market-oriented agricultural trading system'.<sup>573</sup> This objective is pursued in order 'to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets'."<sup>574 575</sup>

7.15 We consider that Article 4.2 is central to the establishment and protection of a fair and market-oriented agricultural trading system in the area of market access. Members "committed to achieving specific binding commitments [on, *inter alia*,] market access".<sup>576</sup> In particular, following Ministerial Mid-term review of the Uruguay Round negotiations and the December 1991 Draft Final Act, the negotiations on agricultural market access were undertaken on the premise that trade in agriculture was to be conducted on the basis of bound ordinary customs duties and that border measures other than ordinary customs duties would be prohibited.<sup>577</sup> This involved the conversion of a wide range of border measures into ordinary customs duties, a process which has commonly been referred to as "tariffication". In general terms, the purpose of this exercise was to enhance transparency and predictability in agricultural trade, establish or strengthen the link between domestic

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<sup>569</sup> Appellate Body report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997.

<sup>570</sup> *Ibid.*, para. 204.

<sup>571</sup> Punta del Este Declaration, Ministerial Declaration on the Uruguay Round, MIN.DEC, 20 September 1986, p. 6.

<sup>572</sup> (original footnote) Preambular paragraph 1.

<sup>573</sup> (original footnote) Preambular paragraph 2.

<sup>574</sup> (original footnote) Preambular paragraph 3.

<sup>575</sup> Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* ("*Canada – Dairy*"), WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by the Appellate Body report, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, paras. 7.25-7-26.

<sup>576</sup> Preambular paragraph 4.

<sup>577</sup> MTN.TNC/W/FA, para. 1 of Part B, Annex 3, Section A, at L.25:

The policy coverage of tariffication shall include all border measures other than ordinary customs duties [...]

and world markets, and allow for a progressive negotiated reduction of protection in agricultural trade. Article 4.2 of the Agreement on Agriculture, by prohibiting Members from maintaining, resorting to, or reverting to any measures of the kind which have been required to be converted into ordinary customs duties, accordingly provides the legal underpinning for what, in ordinary parlance, is referred to as a "tariff-only" regime for trade in agriculture.

7.16 We note that Article 4.2 of the Agreement on Agriculture and Article II:1(b) of GATT 1994 both use the phrase "ordinary customs duties". Provided this phrase has the same meaning in both provisions,<sup>578</sup> neither provision can therefore be interpreted independently from the other. However, having regard to the above, we believe that Article 4.2 of the Agreement on Agriculture deals more specifically and in detail with measures affecting market access of agricultural products.<sup>579</sup> We will therefore start our analysis with an examination of the Chilean PBS under Article 4.2 of the Agreement on Agriculture.

#### **4. The Chilean PBS and Article 4.2 of the Agreement on Agriculture**

- (a) Is the Chilean PBS a measure of the kind which has been required to be converted into ordinary customs duties?

7.17 This dispute revolves mainly around the question of what "kind" of measures have been required to be "tariffied", i.e. converted into ordinary customs duties, at the end of the Uruguay Round. Argentina and Chile disagree as to whether the Chilean PBS is such a measure "of the kind which [has] been required to be converted into ordinary customs duties". According to Argentina, although the Chilean PBS duties constitute ordinary customs duties for the purpose of Article II:1(b) of GATT 1994, the Chilean PBS *per se* constitutes a measure of the kind which has been required to be converted into ordinary customs duties. According to Chile, the Chilean PBS duties are ordinary customs duties. Chile argues that the phrase "of the kind which have been required to be converted" and the illustrative list in footnote 1 contain two separate conditions to be met for a measure to be prohibited under Article 4.2: only those measures listed in footnote 1 which effectively "have been required to be converted into ordinary customs duties" would be prohibited under Article 4.2. Chile argues that no other Member has ever requested Chile to "tariffy" its PBS during the Uruguay Round negotiations, and that, therefore, its PBS is not a measure "of the kind which [has] been required to be converted into ordinary customs duties".

7.18 Substantial elements of Article 4.2 would in our view be rendered void of meaning if that provision were to be read as only prohibiting those specific measures which other Members actually and specifically required to be converted and which were in practice converted *at the end of the Uruguay Round*. We believe that such an interpretation, which would imply that Members decided to forego their right to challenge measures which had not been specifically identified and converted at the end of the Uruguay Round, is not tenable. Pursuant to Article 4.2, measures *of the kind* which have been required to be converted cannot be *maintained*, resorted to or reverted to by any Members, whether or not the Member concerned in fact took advantage of the tariffication modalities. Thus, firstly, the insertion of the phrase "*of the kind*" between "measures" and "which have been required" in

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<sup>578</sup> See para. 7.48 below.

<sup>579</sup> We also note in this respect that Article 21.1 of the Agreement on Agriculture provides that "[t]he provisions of GATT 1994 [...] shall apply subject to the provisions of this Agreement." The Appellate Body, in its report on *EC – Bananas III* has commented on this provision,

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

Appellate Body report, *EC – Bananas III*, para. 155.

Article 4.2, as well as the reference to "*similar* border measures" in footnote 1, indicates that the drafters of the Agreement were aware of the fact that all the specific measures subject to tariffication might not be precisely identified at the time of the conclusion of the Uruguay Round in April 1994 or, in some cases, could be subject to the provisions of Annex 5 of the Agreement. On the other hand, what was clear at that time by virtue of Article 4.2 was that all measures "of the kind" would become prohibited for all Members as from the subsequent entry into force of the WTO, whether or not the measures concerned had or had not in fact been converted into ordinary customs duties in accordance with the Uruguay Round "tariffication" modalities. *A fortiori*, the mere fact that Members did not single out a specific measure at the end of the Uruguay Round and requested its tariffication at such time does not imply that the measure enjoys thereafter immunity from challenge in WTO dispute settlement. Secondly, by prohibiting all Members from *maintaining* such measures, the drafters of the Agreement also clearly envisaged the possibility that a Member at the end of the Uruguay Round had in place measures "of the kind which have been required to be converted", but decided not to convert those measures. The decision whether to tariffy a particular border measure, to eliminate that measure, or to adopt some other course, was a matter for each participant in the negotiations to decide. It can therefore not be argued that only those measures which in practice were "tariffied" in accordance with the Uruguay Round tariffication modalities are measures "of the kind which have been required to be converted" for the purposes of Article 4.2.

7.19 Furthermore, we note that "measures of the kind which have been required to be converted" *include* the measures listed in footnote 1. The measures listed in footnote 1 are therefore not exhaustive, rather they are examples of "measures of the kind" and serve an illustrative purpose. We also note in this respect that footnote 1 is inserted in the text of Article 4.2 at the end of the phrase "measures of the kind which have been required to be converted into ordinary customs duties". The first sentence of footnote 1 reads "[t]hese measures include [...]". Consequently, the phrase "these measures" in footnote 1 refers back to the entire phrase "measures of the kind which have been required to be converted into ordinary customs duties", and the specific measures listed in footnote 1 are all example of "measures of the kind which have been required into ordinary customs duties", provided they are not "maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement". In our view, Chile's position that a measure listed in footnote 1 is only prohibited under Article 4.2 if such a measure, in addition, had been singled out, or challenged, by other negotiators and "been required to be converted into ordinary customs duties" would logically only be tenable if footnote 1 had been inserted immediately following the term "measures" in the text of Article 4.2, rather than following the entire phrase ending with "ordinary customs duties". If that were the case, the specific measures listed in footnote 1 could indeed have been examples of measures *susceptible to* being considered of the kind which have been required to be converted, and not of measures *necessarily* being of such a kind. As we explained, however, the text provides differently.

7.20 Argentina has argued that the Chilean PBS is a "variable import levy", a "minimum import price", or, in any event, a "similar border measure other than ordinary customs duties", within the meaning of footnote 1. As explained above, if the Chilean PBS constitutes a measure listed in footnote 1, including such a "variable import levy", "minimum import price" or "similar border measure", it will be a measure "of the kind which [has] been required to be converted into ordinary customs duties", provided it is not "maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement". Thus, pursuant to footnote 1, for a measure to be considered "of the kind which [has] been required to be converted into ordinary customs duties" and thus prohibited for the purposes of Article 4.2, we need to establish that:

- (a) it is a quantitative import restriction, a variable import levy, a minimum import price, discretionary import licensing, a non-tariff measure maintained through state-trading

enterprises, a voluntary export restraint, or a similar border measure other than ordinary customs duties;

- (b) it is not maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

7.21 Below we will address each of these requirements separately.

- (i) *Is the Chilean PBS a border measure similar to those listed in footnote 1?*

7.22 Argentina argues that the Chilean PBS is a "variable import levy", a "minimum import price", or a border measure similar to these measures. Chile argues that its PBS does not constitute any of those measures.

7.23 We note that the illustrative list of footnote 1 contains, on the one hand, specific measures (i.e. "quantitative import restrictions", "variable import levies", etc.), and, on the other hand, a residual category of measures ("similar border measures other than ordinary customs duties"). Consequently, if the Chilean PBS is a border measure other than an ordinary customs duty which is similar to any of the preceding examples, it would be a measure of the kind which has been required to be converted for the purposes of Article 4.2, provided it is not maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

7.24 We recall that, subject to the proviso that it is not maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement, a measure explicitly listed in footnote 1 will *ipso facto* be of the kind which has been required to be converted into ordinary customs duties. Consequently, such measure is necessarily not, at the same time, an ordinary customs duty. For the same reason, we consider that a measure which is "similar to" any of the measures listed in footnote 1 will also be "other than ordinary customs duties". Our findings regarding one of those two aspects can therefore be expected to reinforce our findings regarding the other. For the sake of clarity and comprehensive analysis, however, we will address each of those two aspects in separate sections.

"Border measure"

7.25 The Chilean PBS applies exclusively to imported goods and is enforced at the border by Chilean customs authorities. It is therefore clear that the Chilean PBS is a border measure.

"Similar to" a "variable import levy" or a "minimum import price"

Determination of the meaning of "similar to a variable import levy or a minimum import price"

7.26 First, as regards the term "similar", dictionaries define this term as "having a resemblance or likeness"<sup>580</sup>, "of the same nature or kind"<sup>581</sup>, and "having characteristics in common".<sup>582</sup> Two measures are in our view "similar" if they share some, but not all, of their fundamental characteristics. If two measures share all of their fundamental characteristics, they are identical rather than similar. A border measure should therefore have *some* fundamental characteristics in common with one or more

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<sup>580</sup> The New Shorter Oxford English Dictionary (L. Brown, Ed.), at 2865.

<sup>581</sup> *Ibid.*

<sup>582</sup> Webster's Encyclopaedic English Dictionary, at 957.

of the measures explicitly listed in footnote 1. It is then a matter of weighing the evidence to determine whether the characteristics are sufficiently close to be considered "similar".

7.27 Second, as regards the measures in footnote 1 referenced by Argentina, it has been pointed out by Chile that the exact features of terms of art such as "variable import levy" and "minimum import price" may be difficult to establish on the basis of the text of the Agreement. We note in that respect that "variable import levy" and "minimum import price" are terms which may often be understood by the drafters of trade agreements in reference to one or more particular schemes used by one or more Members. In that sense, they could indeed be referred to as "terms of art". Nonetheless, we recall that these terms are subject to the rules of treaty interpretation laid down in Articles 31, 32 and 33 of the Vienna Convention. According to Article 31 of the Vienna Convention, we should first determine the ordinary meaning of the terms, in their context, and in light of the Agreement's object and purpose. Pursuant to that same provision, we should also take into account certain other international agreements and relevant rules of international law, as well as subsequent practice. Only if necessary to resolve ambiguity or to confirm the ordinary meaning determined using the tools offered by Article 31, Article 32 instructs us to take recourse to supplementary means, including the preparatory work and the circumstances of the treaty's conclusion. Accordingly, below we will proceed by first examining the ordinary meaning of these terms. In addition, we will draw, as appropriate, on other means of interpretation, including those categorized by the Vienna Convention as supplementary means.

7.28 As a preliminary matter, we note Chile's statement that "the obligations in Article 4.2 only relate to *non-tariff* barriers"<sup>583</sup> whereas "the PBS only covers the payment of *customs duties*".<sup>584</sup> Although Chile concedes that there is no such test in the language of the Agreement on Agriculture, it also asserts that "it might be considered that the defining characteristic should be whether the measure has the effect of a *quantitative limitation*".<sup>585</sup> This would seem to imply that Article 4.2 was not meant to prohibit measures taking the form of duties levied by customs authorities but only "non-tariff barriers" or quantitative restrictions.<sup>586/587</sup> Along those lines, "similar border measures" would need to have the effect of a quantitative restriction.

7.29 We cannot agree with the proposition that only measures with the effect of a quantitative restriction are measures of the kind which have been required to be converted into ordinary customs duties. Such a proposition rests on the assumption that the generic term "tariffs" can be equated with the specific phrase "ordinary customs duties". This assumption is in our view flawed: Article II:1(b) of GATT 1994 makes clear that the universe of "tariffs" is not made up of "ordinary customs duties" alone, but also includes "other duties". By deliberately limiting the mandatory result of the conversion required by Article 4.2 to "ordinary customs duties", the drafters of the Agreement on Agriculture did not exclude the possibility that certain other types of "tariffs" would need to be converted as well. If the drafters of the Agreement on Agriculture would have wanted to require conversion of only measures "other than tariffs", they would have said so, and they would not have used the specific phrase "ordinary customs duties". If they only wanted to require conversion of quantitative restrictions, they could have drawn on the language of Article XI:1 of GATT 1994, for instance,

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<sup>583</sup> Chile's First Written Submission, para. 34. Chile's response to question 6 of the Panel. Emphasis added.

<sup>584</sup> *Ibid.* Emphasis added.

<sup>585</sup> Chile's response to question 8 of the Panel. Emphasis added.

<sup>586</sup> We note that Chile has also argued that "despite the Members' intention to reduce the number of non-tariff barriers *and other measures* covered, their intention was not to prohibit all such measures". Chile's first submission, para. 59. Emphasis added.

<sup>587</sup> Chile has also argued that "despite the Members' intention to reduce the number of non-tariff barriers *and other measures* covered, their intention was not to prohibit all such measures". Chile's first submission, para. 59. Emphasis added.

which prohibits "prohibitions or *restrictions other than duties, taxes or other charges*", without distinguishing between "ordinary customs duties" and other types of duties or charges.<sup>588</sup>

7.30 Certainly, there may be some degree of co-extensiveness between the scope of "restrictions other than duties, taxes or other charges" with the scope of "similar border measures other than ordinary customs duties".<sup>589</sup> We consider that "restrictions other than duties, taxes or other charges" will be apprehended by the measures referred to by footnote 1 to the Agreement on Agriculture, including "similar border measures other than ordinary customs duties". However, this does not imply that, therefore, all "similar border measures other than ordinary customs duties" need to have the effect of a quantitative restriction. In our view, the scope of footnote 1 to the Agreement on Agriculture certainly extends to measures within the scope of Article XI:1 of GATT 1994, but also extends to other measures than merely quantitative restrictions. The group of measures included in "duties, taxes or other charges" is clearly broader than only "ordinary customs duties", and includes in our view "other duties or charges of any kind" (or, at least, "other duties") within the meaning of Article II:1(b), second sentence, of GATT 1994. Consequently, the fact that a measure is not a "restriction other than duties, taxes or other charges" within the meaning of Article XI:1 of GATT 1994 does not prevent that measure from being a "similar border measure other than ordinary customs duties" within the meaning of footnote 1 to the Agreement on Agriculture. The "restrictions other than" referred to in Article XI:1 of GATT 1994 constitute a narrower category than the "similar border measures other than" in footnote 1 to the Agreement on Agriculture.

7.31 We find our reasoning confirmed in Annex 5 to the Agreement on Agriculture. Paragraphs 6 and 10 of that Annex both provide that "*ordinary customs duties*" "shall be established on the basis of *tariff equivalents to be calculated* in accordance with the guidelines prescribed in the attachment hereto" (emphasis added). This language makes clear that the generic term "tariff" is to be distinguished from the phrase "ordinary customs duties", in that the former merely refers to the numerical form of any duty, whereas the latter connotes a specific type of duty. Put simply, all ordinary customs duties are tariffs, but not all tariffs are ordinary customs duties.

7.32 Finally, we see no reason why all the measures listed in footnote 1 should *a priori* be considered restrictions within the meaning of Article XI:1 of GATT 1994. On the contrary, it is clear that the measures listed in the footnote to Article 4.2 include a number of measures whose status under Article XI:1 was never definitively resolved under the GATT 1947. These measures included price-

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<sup>588</sup> This does not mean that that Members cannot schedule other duties or charges with respect to goods covered by the Agreement on Agriculture in the corresponding column of their Schedules. We are only saying that, *if* a measure is "of the kind which has been required to be converted into ordinary customs duties", it cannot take another form than an ordinary customs duty. Article 4.2 of the Agreement on Agriculture does not, of course, prevent Members from maintaining as other duties or charges measures which are not of that kind.

<sup>589</sup> As we will indicate below, under GATT 1947, a panel considered a minimum import scheme, for instance, a restriction within the meaning of Art XI:1. Pursuant to footnote 1 of the Agreement on Agriculture, "minimum import prices" are now measures of the kind which have been required to be converted into ordinary customs duties. Similarly, with respect to state trading operations, the panel in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* found that:

when dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of Article XI of GATT and its *Ad Note* relating to state-trading operations would necessarily constitute a violation of Article 4.2 of the *Agreement on Agriculture* and its footnote which refers to non-tariff measures maintained through state-trading enterprises.

Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("Korea – Various Measures on Beef"), WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body report, WT/DS161/AB/R, WT/DS169/AB/R, para. 762.

related measures such as variable levies, as well as measures which could be used to the same effect, such as voluntary restraint agreements and non-tariff measures applied through state trading enterprises. Moreover, one of the principal objectives of the Uruguay Round negotiations on agriculture, as stated in the 1986 Punta Del Este Declaration, was strengthened and more operationally effective GATT rules and disciplines, in line with Recommendations adopted by the Contracting Parties at their Fortieth Session in November 1984. In these recommendations explicit reference was made to the elaboration of approaches, as a basis for possible negotiations, of appropriate rules and disciplines "relating to voluntary restraint agreements, to variable levies and charges, to unbound tariffs, and to minimum import price arrangements", and in so doing made a distinction between these measures (for which there were no specific and explicit GATT rules and disciplines)<sup>590</sup> and "quantitative restrictions and other related measures".<sup>591</sup> In our view the object and purpose of Article 4.2 is to bring measures whose definitive legal status had long remained unresolved, including price-related border restrictions, under more effective GATT disciplines on the basis of an explicit prohibition, in order to protect a regime for agricultural products based on the use of ordinary customs duties which resulted from the Uruguay Round negotiations. Accordingly, we consider that the scope of the Article 4.2 prohibition is broader than that of Article XI:1.

7.33 We will now turn to an interpretive analysis of the specific measures in footnote 1 with which Argentina argues, the Chilean PBS is similar: "variable import levy" and "minimum import price".

7.34 As regards the literal meaning of "variable import levy", we note that a levy is a duty or charge; an import levy is a duty assessed upon importation; a levy is variable when it is "liable to vary"<sup>592</sup>. These features can of course not be conclusive as to what constitutes a "variable import levy", since any "ordinary customs duty" could also fit this description: Members may periodically change the level or type<sup>593</sup> of their applied rates, provided they remain below the bound rate. Thus, mere variability does not distinguish ordinary customs duties from "variable import levies". As regards the literal meaning of "minimum import price", on the other hand, this phrase would logically refer to a certain price level below which imported products may not enter a Member's market.<sup>594</sup> As regards the context of those terms in footnote 1, we note that all the measures listed there are instruments which are characterized either by a lack of transparency and predictability, or impede transmission of world prices to the domestic market, or both.

7.35 We consider, however, that the text and context of "variable import levy" and "minimum import price" alone do not enable us to determine the meaning of those terms without ambiguity. The determination of their meaning should therefore include an analysis which "go[es] beyond a purely grammatical or linguistic interpretation".<sup>595</sup> Pursuant to Article 32 of the Vienna Convention, we will take recourse to supplementary means of interpretation. In this case, we consider that certain documents, which predate the entry into force of the Agreement on Agriculture but are strictly

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<sup>590</sup> We note that a particular minimum import price scheme was found inconsistent with Article XI by a panel under GATT 1947 (*EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, adopted 18 October 1978, BISD 25S/68). Nonetheless, it was a price-based measure other than a traditional quantitative restriction such as a quota.

<sup>591</sup> BISD, 33S/19, at 24; 31S/10, at 11.

<sup>592</sup> The New Shorter Oxford English Dictionary (L. Brown, Ed.), at 3547.

<sup>593</sup> Appellate Body report, *Argentina – Textiles and Apparel*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, para. 46.

<sup>594</sup> We consider that, as a practical matter, this could result from a prohibition on imports priced below the minimum, or because such imports are subject to an additional charge in order to raise their entry price above the specified minimum.

<sup>595</sup> Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., 1984), p. 121.

speaking not part of the preparatory work<sup>596</sup>, can shed light on what the WTO Members meant to express by using those "terms of art".<sup>597</sup>

7.36 Both variable levies and minimum import price arrangements, along with other border restrictions, were the subject of extensive examination in bodies established by the GATT Contracting Parties. These included Committee II (1958-1962); the post-Kennedy Round Agriculture Committee (1967-1973); and the Committee on Trade in Agriculture (1982-1986) which developed the parameters for negotiations in the Uruguay Round on improved and more operationally effective GATT rules and disciplines for trade in agriculture. The work of these Committees was undertaken on the basis, *inter alia*, of notifications by Members covering all instruments of support and protection. Thus, in the case of the 1982-1986 Committee on Trade in Agriculture, reference was made in the information provided by the Contracting Parties to the GATT 1947 provisions under

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<sup>596</sup> We believe that Article 32 of the Vienna Convention allows us to use such documents, to which all GATT Contracting Parties had access before and during the negotiations of the Uruguay Round, as a supplementary means of interpretation. First, in our view, they are part of "the circumstances of the conclusion" of the WTO Agreement, including the Agreement on Agriculture. Second, it should be recalled that a treaty interpreter is not restricted to the supplementary means explicitly listed in Article 32 of the Vienna Convention. The use of the term "including" clearly indicates that the supplementary means explicitly mentioned by article 32 are not the only ones a treaty interpreter can have recourse to (Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités*, Rec., 1976-III, at 79 and 98; Sinclair, *The Vienna Convention on the Law of Treaties*, *supra*, at 153). As stated by Mr. Ago at the 872<sup>nd</sup> meeting of the ILC,

[...] the word "including" made it clear that recourse could be had to means other than preparatory work or the circumstances of the conclusion of the treaty, though it probably would be wiser not to mention them expressly.

(Yb.ILC, 1966, Vol. I, Part II, 202, at para.50.)

We see no reason why we could not draw on the referenced GATT 1947 documents pursuant to Article 32 of the Vienna Convention. As stated by Mr. Yasseen, then Chairman of the ILC, at its 873<sup>rd</sup> meeting:

[T]he very nature of a convention as an act of will made it essential to take into account all the work which had led to the formation of that will - *all material which the parties had had before them when drafting the final text*.

(Yb.ILC, 1966, Vol. I, Part. II, 204, at para. 25. Emphasis added.)

<sup>597</sup> We note that GATT 1947 jurisprudence provides only limited guidance in this respect.

As regards variable import levies, the Panel in *The Uruguayan Recourse to Article XXIII* (adopted 16 November 1962, BISD 11S/95, 100) examined a number of measures described as "import charges" (varying according to divergences between domestic prices and imported prices but not exceeding the bound rate); "variable surtaxes" (charged over and above the normal duties and varying from time to time to take account of differences between domestic and imported prices); "variable import levies" (raising the price of the imported product approximately to the levels maintained for the domestic product); "variable charges" (price supplements levied in order to maintain the price of imported products at the level of the like domestic products) (*Ibid.*, at 104, 107, 134, and 143). The Panel did not consider it "appropriate to examine the consistency or otherwise of these measures under the [GATT 1947]", although it considered that there were "a priori grounds for assuming that those measures could have an adverse effects on Uruguayan exports." (*Ibid.*, at 135)

As regards minimum import prices, we note that the Panel in *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* (adopted 18 October 1978, BISD 25S/68) ruled that a particular minimum import price scheme maintained by the EC was inconsistent with Article XI of GATT 1947 (*Ibid.*, para. 4.14.). The Panel in that case considered that the minimum import price system, as enforced by the additional security, was a restriction other than duties, taxes, or other charges within the meaning of Article XI:1, although one member of the Panel considered that the minimum import price system was not being enforced in a manner which would qualify it as a restriction within the meaning of Article XI:1 (*Ibid.*, para. 4.9).

which individual border measures were being maintained.<sup>598</sup> On the basis of the notifications submitted on variable levies and minimum import prices, as well as the related examinations undertaken by Contracting Parties, it appears to us that such measures can be analysed as generally having the following fundamental characteristics:<sup>599</sup>

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

7.37 These fundamental characteristics of variable import levies and minimum import prices, which can be distilled from the pre-Uruguay Round notifications and examination thereof by the GATT Contracting Parties, provide in our view a useful indication of what GATT Contracting Parties understood to constitute variable import levies and minimum import prices. To that extent, we believe that they are also helpful in interpreting those terms as they appear in Article 4.2 of the Agreement on

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<sup>598</sup> AG/W/2 and "Information on Measures Affecting Trade" in the series AG/FOR/...

<sup>599</sup> Reports of Committee II - Programme for expansion of international trade - Agricultural protection: Second Report, BISD 9S/110, 116 (paragraph 13(b)); Third Report, BISD 10S/135, 137 (Committee's "General Findings", at paragraph 6); Report of Committee II on the consultation with the European Economic Community - L/1910 ("Technical Discussion" of variable levy and import reference prices at pp.5 to 33 - report adopted 16 November 1962: SR.20/12). Agriculture Committee (1967-1973): COM.AG/W/68/Add.3 and COM.AG/W/84 and Addenda thereto ("Import Measures - Variable Levies and Other Special Charges"). Committee on Trade in Agriculture (1983-1986): AG/W/2 and AG/FOR/REV - country by country series - "Information on Measures Affecting Trade"; AG/W/12, paras. 22 to 31.

Agriculture. In conclusion, we consider that a measure will be similar to a variable import levy or minimum import price if, based on a weighing of the evidence before us, it shares sufficiently the fundamental characteristics outlined above.

Application of the Panel's interpretation of "similar to a variable import levy or a minimum import price" to the Chilean PBS

7.38 We now turn to an examination of the Chilean PBS in light of the meaning of "similar border measures other than ordinary customs duties", as determined above. In particular, we will examine whether the Chilean PBS is similar to a variable import levy or a minimum import price, taking into account the fundamental characteristics of those measures outlined above.

7.39 We will first recall the rather complex structure and operation of the Chilean PBS. When a product covered by the Chilean PBS arrives at the border for importation into Chile, Chilean customs authorities will determine whether the total amount of applicable duties declared by the importer corresponds to the amount due under Chilean legislation, and, if necessary, revise the amount accordingly. In application of the Chilean PBS, they will levy an 8 per cent *ad valorem* duty, plus an "additional specific duty" if an administratively determined lowest offer price from a selected foreign market (hereinafter referred to as "the Reference Price") falls below the lower threshold of the PBS. They will apply only the 8 per cent *ad valorem* duty if the same Reference Price is between the lower and upper thresholds of the PBS. They will grant a "rebate" on the 8 per cent *ad valorem* duty if the Reference Price is above upper threshold of the PBS. The PBS is determined annually on the basis of f.o.b. prices observed on a particular international market over the course of the preceding 60 months<sup>600</sup>, which are adjusted in accordance with a Central Bank of Chile index, and listed in descending order. The lower and upper thresholds of the PBS are obtained by discarding 25 per cent at the bottom and at the top of that list and adding "usual import costs" to the prices.<sup>601</sup> The lowest and highest prices which are obtained after these operations constitute the lower and upper thresholds of the PBS. The specific duties and rebates corresponding to different f.o.b. prices are published in the Official Journal of Chile. The Reference Price is determined weekly, every Friday, using the lowest f.o.b. price for the covered products on foreign "markets of concern to Chile".<sup>602</sup> Unlike the prices used for the composition of the PBS, it is not subject to adjustment for "usual import costs".<sup>603</sup> The applicable Reference Price for a particular shipment is determined in reference to the date of the bill of lading. The Reference Price is not published, but can be consulted by the public at the offices of the Chilean customs authorities.<sup>604</sup> As indicated, if the Reference Price falls below the lower

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<sup>600</sup> The international markets used for the calculation of the PBS are, according to Chile's response to questions 9(c) and (e) of the Panel, Hard Red Winter No. 2 on the Kansas Exchange, f.o.b. Gulf, for wheat, and Crude Soya Bean Oil on the Chicago Exchange, f.o.b. Illinois.

<sup>601</sup> Chile's first submission, para. 15(h).

<sup>602</sup> With respect to wheat, these "markets of concern" include Argentina, Australia, and Canada. Chile's response to question 9(c) of the Panel.

<sup>603</sup> Chile's response to question 9(d) of the Panel.

<sup>604</sup> Chile's response to question 10(e) of the Panel. However, in contrast to this response, in its comments on the draft descriptive part of this report, Chile requested the following text to be inserted:

The reference price is published weekly on the webpage of the Chilean Customs Service. It is also distributed to all Chilean Customs branches and Customs Chambers (formed by Customs Agents) through official communications.\* [a newly inserted footnote referred to [www.aduana.cl](http://www.aduana.cl).]

Nowhere in its submissions or answers did Chile provide this information. Argentina, however, appears to confirm that the daily Reference Prices are currently available on the referenced website, in a footnote to the Panel's last question to Argentina (see Argentina's response to question 53 of the Panel). We have no means of knowing, though, as of when this information would have been made available through the internet.

threshold of the PBS, an "additional specific duty" will be levied in addition to the 8 per cent *ad valorem* applied rate. We will term this additional duty the PBS duty. The PBS duty will equal the difference between the Reference Price applicable on the date of the bill of lading and the lower threshold of the PBS.

7.40 The stated objective of the Chilean PBS is to "ensur[e] a reasonable margin of fluctuation of domestic wheat, oil-seed, edible vegetable oil and sugar prices in relation to the international prices for such products"<sup>605</sup>, by "*introducing a controlled distortion which maintains a minimum import cost if the international price is too low [...]*".<sup>606</sup> As explained below, on the basis of the evidence before us, we consider that the Chilean PBS has many fundamental characteristics of both a variable import levy and a minimum import price.

7.41 The Chilean PBS operates on the basis of two prices: the lower threshold of the PBS and the Reference Price. The variable PBS duty represents the difference between the lower threshold of the PBS and the lowest relevant market price for the product concerned. Generally, a covered product will not be able to enter the Chilean market at an import cost below the lower threshold of the PBS.<sup>607</sup> Indeed, for all practical purposes, and subject to the exceptional instance where the total applied duties would exceed Chile's 31.5 per cent bound rate in the absence of an effective cap,<sup>608</sup> the PBS duty will equal the difference between the lower threshold of the PBS and the Reference Price. As a result, whenever the Reference Price falls below the lower PBS threshold, and subject to the exceptional instance where the total applied duties would exceed Chile's 31.5 per cent bound rate in the absence of an effective cap, a duty will be applied equalling the difference between those two values. The Reference Price is the *lowest* f.o.b. price observed at the time of the shipment in the markets of concern to Chile. Consequently, if we take the example of an exporter from a "market of concern to Chile" for the purpose of setting a particular week's Reference Price, unless he exports his product at such a low price below the lower threshold of the PBS that the total applied duties would exceed Chile's bound rate in the absence of an effective cap, he will generally not be able to export his product at a duty-paid price below the lower PBS threshold, because even if he can export at a lower price than exporters from other markets of concern, a PBS duty will still be applied for an amount

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<sup>605</sup> Article 12 of Law 18.525.

<sup>606</sup> Chile's response to question 9(f) of the Panel. Emphasis added.

<sup>607</sup> In its response to the Panel's question regarding this matter, Chile has indicated that the import price *can* nevertheless go below the lower threshold in two instances. First, when international freight costs decrease sharply. Second, when the import price is lower than the Reference Price. This reply by Chile, however, does not invalidate our view that the lower threshold operates generally as a minimum import price. First, we had asked Chile whether "goods [have] entered the Chilean market at prices below the lower end of price band", and, if so, "to identify as many instances as possible, and provide supporting documentation" (Question 46). Chile, however, has not provided us with any such evidence. Second, Chile's reply to Question 46 refers to two hypothetical instances which merely confirm that the purpose of the measure is to function as a type of minimum import price and that this measure, if implemented "correctly", in fact operates that way. The first scenario results only from the requirement of Article 12 of Law 18.525 that freight costs be estimated. If Chilean authorities make a wrong estimation, it appears possible that the actual c.i.f price might be a little lower than the lower PBS threshold. This scenario, however, is contingent upon the Chilean authorities themselves not adequately making the estimation required by law. The second scenario would only arise either if Chilean authorities fail to identify the lowest f.o.b. price on the markets of concern, or in the equally marginal hypothesis that an exporter from a market other than those of concern to Chile would export to Chile at a price below the Reference Price. Exporters from markets of concern to Chile cannot, by definition, undercut the lowest price set by themselves.

<sup>608</sup> Chile has stated that the total applied duties exceeded the bound rate only "on occasion", and that the circumstances leading to this exceeding of its bound rate were of "an extraordinary nature". See para. 4.9 of our report. In such exceptional instances, it is possible that the imported product comes in at a total import cost below the lower threshold of the PBS. However, even then, a cap at any level, whether it be 80, 50 or 31.5 per cent may ameliorate the inhibition of the transfer of world market prices into the Chilean market which results from the PBS, but it cannot eliminate it.

equal to the difference between the weekly Reference Price, set on the basis of the fob price in his market (which is the lowest among the markets of concern to Chile), and the lower threshold of the PBS. Imports from other markets will, by operation of the system, normally come in at higher f.o.b. prices. Thus, the Chilean PBS operates to insulate the Chilean market from world market prices.<sup>609</sup>

7.42 This insulation of the Chilean market from world market prices is accentuated by the fact that the PBS thresholds are determined, *inter alia*, after discarding 25 per cent of "atypical observations" at the bottom and at the top. By eliminating the lowest quarter of prices observed, Chile substantially increases the likelihood that the lower threshold of the PBS will equal or exceed the higher internal price. Chile admits that "25 per cent may seem excessive", but explains that "this percentage is linked to the actual purpose of the [PBS], which is to maintain a domestic price that is related to international prices in the medium term".<sup>610</sup> In our view, by discarding 25 per cent of the lowest 60-month values observed, the PBS clearly eliminates much more than just "atypical observations". In fact, by not accounting for the lowest of each four observed prices over the course of five years, the PBS may result in the imposition of highly trade-distortive duties.<sup>611</sup>

7.43 For example, an Argentinean wheat exporter will generally not be able to export wheat at an f.o.b. price below the Reference Price, since Argentina is "a market of concern to Chile". If the Argentinean wheat exporter becomes more efficient and can export at lower f.o.b. prices to Chile, the Reference Price will fall accordingly. The lower the Reference Price, the larger the gap between the lower threshold and the Reference Price, and the greater the PBS duty. If Argentinean wheat exporters happen to export at the Reference Price level, their wheat will normally enter Chile at a total import cost equal to the lower threshold of the PBS. If Argentinean wheat exporters can only export at an f.o.b. price above the applicable Reference Price – because exporters from other relevant markets produce more efficiently – their wheat will come in at a total import cost which normally exceeds the lower threshold of the PBS.

7.44 Moreover, we observe that several crucial stages of the operation of the Chilean PBS are characterized by a considerable lack of transparency and predictability. For instance, exporters can be expected to have difficulties knowing how the applicable Reference Price is arrived at. No legislation or regulation in Chile specifies which international markets are used for the calculation of the Reference Price. Chile's replies to the Panel's questions indicate that these are "markets of concern to Chile". Chile has informed the Panel that it uses the *lowest* f.o.b. price on these markets of concern to

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<sup>609</sup> This can be expressed mathematically in the following way:

Where Imp = Import price; CIF = c.i.f. price; PB = lower threshold of the Price Band; RP = Reference Price; r = applied *ad valorem* rate; (PB - RP) = Price Band duties:

(a)  $\text{Imp} = \text{CIF} + (\text{PB} - \text{RP}) + (\text{CIF} \times r)$

(b)  $\text{Imp} + \text{RP} = \text{CIF} + \text{PB} + (\text{CIF} \times r)$

(c)  $\text{CIF} \geq \text{RP}$

(d) Therefore, after removing CIF and RP from the equation:  $\text{Imp} \geq \text{PB} + (\text{CIF} \times r)$

<sup>610</sup> Chile's response to question 10(d) of the Panel.

<sup>611</sup> For example, if prices on the international market were stable or rose during the first four years of the 60 month period, and have steadily declined during the last year of the 60 month period, to a price level below the lowest price in any of the first four years, the values corresponding to that last year would all be discarded in application of the 25 per cent rule. As a result, if the trend of decreasing prices continues or even simply halts without rebounding during the period immediately following the 60 month period, all imports during that period will nevertheless be subject to PBS duties equalling the difference between current international prices and much higher international prices of more than a year earlier.

determine the Reference Price. None of these practices appear to be provided for in Chilean legislation or regulation. Article 12 of Law 18.525 only provides that the relevant date is the date of the bill of lading. When asked whether the Reference Prices, determined on a weekly basis, are published, Chile informed the Panel that they are "available to the public at the National Customs Service". In its comments on the descriptive part of our report, however, Chile has added that they are also available now through a Chilean governmental website.<sup>612</sup> Moreover, as regards the application of the Chilean PBS to the edible vegetable oils identified by reference to 25 tariff lines, Chile has stated that "[i]n general, the Reference Price has coincided with the price of crude soya bean oil, but in some cases it has corresponded to that of crude sunflowerseed oil".<sup>613</sup> Apparently, there is no means of knowing when one or the other Reference Price will be used. Furthermore, although the PBS values themselves are published each year, exporters have no means of knowing how the PBS values are actually arrived at: no published legislation or regulation in Chile sets out which international markets are used for the determination of the PBS values, or how the "usual import costs" which are added to the f.o.b. prices are calculated. It appears to us that exporters can be expected to encounter serious difficulties in their commercial planning efforts in a system where weekly variations in duties are based on factors unknown, i.e. the future evolution of prices in "markets of concern to Chile". Such lack of predictability must affect the competitive conditions of imports *vis-à-vis* domestic production.

7.45 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". First, whereas a "variable import levy" will generally use as a reference price an administratively determined lowest world market offer price, a "minimum import price" will generally use the actual transaction value of the imported good. The Reference Price used in the context of the Chilean PBS is clearly disconnected from the actual transaction value, unlike minimum import price schemes. It does use a lowest "market of concern" price, however, similar to the lowest market offer price generally used in variable import levy schemes. Second, the lower threshold of the Chilean PBS is not explicitly derived from, or linked to, an internal market-related price, as is often the case in variable import levy schemes. 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. It should be recalled in this respect that the PBS thresholds are determined, *inter alia*, after discarding 25 per cent of "atypical observations" at the bottom and at the top<sup>614</sup>, hence substantially increasing the likelihood that the lower threshold of the PBS will equal or exceed the higher internal price.

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

7.47 We therefore find that the Chilean PBS is a border measure "similar to" both a "variable import levy" and a "minimum import price".

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<sup>612</sup> See footnote 604.

<sup>613</sup> Chile's response to question 43(a) of the Panel.

<sup>614</sup> We consider that the fact that the PBS operates symmetrically by rebating import duties when world prices are relatively high is not a relevant consideration for the purposes of our examination of whether the PBS is a measure of the kind prohibited under Article 4.2.

"Other than ordinary customs duties"

Determination of the meaning of "ordinary customs duties"

7.48 We have already noted above that our findings regarding "similar to variable import levy and minimum import price" and "other than ordinary customs duties" are mutually reinforcing.<sup>615</sup> We also note that, in Chile's view, the Chilean PBS duties constitute "ordinary" customs duties.

7.49 We recall that the use of the phrase "ordinary customs duties" is common to Article II:1(b) of GATT 1994 and Article 4.2 of the Agreement on Agriculture. Given the central place of this phrase in both provisions, it would appear that the scope of the obligations resulting from these provisions is, in part, determined by the interpretation of that phrase. We note in this respect that the parties<sup>616</sup> and third parties to this dispute all agree that the phrase must have the same meaning in both provisions. We see no reason to disagree with this proposition. Nothing in the text of either GATT 1994 or the Agreement on Agriculture suggests that this identical phrase should be given a different meaning in each of those two provisions. On the contrary, it appears from the drafting history of Article 4.2 of the Agreement on Agriculture that the drafters of that Agreement actually drew on Article II:1(b) of GATT 1947 with respect to the use of the term "ordinary".<sup>617</sup> Article II:1(b) of GATT 1994 provides therefore relevant context for the interpretation of this phrase in Article 4.2 of the Agreement on Agriculture.

7.50 Neither Article II:1(b) of GATT 1994 nor Article 4.2 of the Agreement on Agriculture, however, defines explicitly what should be understood by "ordinary" customs duties. Both provisions do give some indication as to what is *not* an "ordinary" customs duty. On the one hand, Article II:1(b) of GATT 1994 distinguishes "ordinary" customs duties in its first sentence from "all other duties or charges of any kind imposed on, or in connection with, the importation" in its second sentence. The latter category of "*other* duties or charges of any kind" appears to be a residual category, encompassing duties or charges imposed on or in connection with importation which cannot be considered "ordinary" customs duties.<sup>618</sup> On the other hand, Article 4.2 prohibits Members from maintaining, resorting to, or reverting to any measures of the kind which have been required to be converted into ordinary customs

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<sup>615</sup> See para. 7.24 above.

<sup>616</sup> Responses by Argentina and Chile to question 2 of the Panel.

<sup>617</sup> We also note in this regard that an earlier draft text of the Agreement on Agriculture by the Chairman used the phrase "normal customs duties" ("Framework Agreement on Agriculture Reform Programme, Draft Text by the Chairman", MTN.GNG/NG5/W/170, para. 12). The fact that the drafters of the Agreement on Agriculture subsequently replaced "normal" with "ordinary" confirms in our view that the phrase "ordinary customs duties" in Article 4.2 of the Agreement on Agriculture was drawn from Article II:1(b) of GATT 1994 and intended to have the same meaning.

<sup>618</sup> According to the Report of the Review Session Working Party on "Schedules and Customs Administration" (L/329, adopted 26 February 1955, 3S/205, 209, para. 7), "[i]t is considered that the language of this sentence [, the second sentence of Art II:1(b),] is all-inclusive [...]". A WTO panel considered as "duties or charges of any kind" certain interest charges, costs and fees. See Panel report on *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R and Add.1, adopted 10 January 2001, as modified by the Appellate Body report, WT/DS165/AB/R. GATT working parties and panels have considered as "duties or charges of any kind" certain import surcharges, interest charges and costs in connection with the lodging of an import deposit, and charges imposed by import monopolies. See Contracting Parties Decision, *French Special Temporary Compensation Tax on Imports ("France – Compensation Tax")*, 17 January 1955, BISD 3S/26; Panel report, *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables ("EEC – Minimum Import Prices")*, adopted 18 October 1978, BISD 25S/68; Panel Report, *Republic of Korea – Restrictions on Imports of Beef – Complaint by Australia, New Zealand, and the United States ("Korea – Beef")*, adopted 7 November 1989, BISD 36S/202. We also note that the Report of the Working Party on the accession of the Democratic Republic of the Congo states that "revenue duties", which were levied only on imports, at the border and in addition to the regular customs duties, were to be considered an "other duty or charge of any kind" (L/3541, adopted 29 June 1971, paras. 8-10).

duties. As indicated above, all the measures listed in footnote 1 are, by definition, not "ordinary" customs duties.

7.51 We note that "ordinary customs duties" appear in the co-authentic French and Spanish versions as "*droits de douane proprement dits*" and "*derechos de aduana propiamente dichos*". The dictionary meaning of "ordinary" is "occurring in regular custom or practice", "of common or everyday occurrence, frequent, abundant", "of the usual kind, not singular or exceptional, commonplace, mundane".<sup>619</sup> "*Propiamente dicho*" has been translated as "true (something)" or "(something) in the strict sense".<sup>620</sup> "*Proprement dit*" has been explained as "*au sens exact et restreint, au sens propre*" and "*stricto sensu*".<sup>621</sup> It appears from these dictionary meanings that the English text, on the one hand, and the French and Spanish texts, on the other, differ in terms of the perspective from which they define "ordinary": the use of "ordinary" in the English text appears to define a particular kind of "customs duties" in reference to the *frequency* with which such customs duties can be found, whereas the French and Spanish texts suggest that the *narrow sense* of the term "customs duties" is being referred to. Thus, the English version describes a particular kind of customs duty from an *empirical* perspective, whereas the French and Spanish versions describe it from a *normative* perspective. We will therefore proceed to examine what should be considered "ordinary" both on an empirical and a normative basis.<sup>622</sup>

7.52 Article II:1(b), first sentence, of GATT 1994 provides that Members cannot impose "ordinary customs duties" in excess of those listed in their Schedules. As an *empirical* matter, we observe that Members, in regular practice, invariably express commitments in the ordinary customs duty column of their Schedules as *ad valorem* or specific duties, or combinations thereof.<sup>623</sup> All "ordinary" customs duties may therefore be said to take the form of *ad valorem* or specific duties (or combinations thereof).<sup>624</sup> As a *normative* matter, we observe that those scheduled duties always relate to either the value of the imported goods, in the case of *ad valorem* duties, or the volume of the imported goods, in the case of specific duties. Such ordinary customs duties, however, do not appear to involve the consideration of any other, exogenous, factors, such as, for instance, fluctuating world market prices. We therefore consider that, for the purpose of Article II:1(b), first sentence, of GATT 1994 and Article 4.2 of the Agreement on Agriculture, an "ordinary" customs duty, that is, a customs duty *sensu*

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<sup>619</sup> The New Shorter Oxford English Dictionary (L. Brown, Ed.), 4<sup>th</sup> edition, at 2018.

<sup>620</sup> Collins Spanish-English Dictionary, 14<sup>th</sup> edition, at 201.

<sup>621</sup> Le Petit Robert Dictionnaire de la Langue Française (J. Rey-Debove and A. Rey, Eds.), 2<sup>nd</sup> edition, at 2022.

<sup>622</sup> We note that the panel in *Canada – Patent Protection of Pharmaceutical Products* ("*Canada – Pharmaceutical Patents*") was confronted with an analogous situation when examining the various dictionary meanings of the term "normal":

As so defined, the term can be understood to refer either to an empirical conclusion about what is common within a relevant community, or to a normative standard of entitlement. The Panel concluded that the word "normal" was being used in Article 30 in a sense that combined the two meanings.

Panel report, *Canada – Pharmaceutical Patents*, WT/DS114/R, adopted 7 April 2000, para. 7.54 *in fine*.

<sup>623</sup> We also note that the Attachment to Annex 5 to the Agreement on Agriculture ("*Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex*") provides, in its paragraph 1, that "[t]he calculation of the tariff equivalents, whether expressed as *ad valorem* or specific rates, shall be made using ...."

<sup>624</sup> We do not believe, however, that, conversely, the fact that a duty ultimately is labelled as an *ad valorem* or specific duty necessarily qualifies that duty as an ordinary customs duty. As a matter of fact, quite some "other duties or charges", registered as such in the "other duties and charges" column of Members' Schedules, appear to be expressed in specific or *ad valorem* terms. Put another way, a duty or charge can be expressed either in *ad valorem* or specific terms, but nevertheless not constitute an "ordinary" customs duty.

*strictu*, is to be understood as referring to a customs duty which is not applied on the basis of factors of an exogenous nature.

7.53 The above determination of the ordinary meaning of "ordinary customs duties" confirms that there is a *normative* dimension to the term "ordinary", and that a "tariff" must have certain fundamental characteristics for such a "tariff" to be considered an "ordinary" customs duty. For this reason, we disagree with an argument presented by the European Communities, apparently endorsed by Chile.<sup>625</sup> According to this position:

"(...) the decisive element which distinguishes an 'ordinary customs duty' from a 'variable import levy' is the existence of a ceiling in the tariff binding."<sup>626</sup>

7.54 This position appears to be based on the proposition that the phrase "ordinary customs duties" in the first sentence of Article II:1(b) would have been interpreted by the Appellate Body in its report on *Argentina – Textiles and Apparel* as including *any kind of* duties on imports, and that, according to that report, the imposition of *any kind of* duties is consistent with Article II:1(b) provided that such duties do not exceed the bound rate for "ordinary customs duties".<sup>627</sup>

7.55 We disagree with the proposition that the imposition of *any kind of* duties is consistent with Article II:1(b) provided that such duties do not exceed the bound rate for "ordinary customs duties". In our view, the cited Appellate Body report cannot be read as suggesting that any duty or charge can be considered an "ordinary customs duty" as long as the total amount of applied duties does not exceed the bound rate for "ordinary customs duties". As already indicated, whether or not a duty can be considered "ordinary" is not merely and simply a function of whether or not a Member applies a total amount of duties and charges in excess of the bound rate for "ordinary customs duties". If this view were to be accepted, the distinction between "ordinary" and "other" duties in the first and second sentence of Article II:1(b), and the corresponding existence of two separate columns in the Schedules, would be rendered void of all meaning, particularly in light of the Uruguay Round Understanding on the Interpretation of Article II:1(b) of the GATT 1994. We do not believe either that this view was espoused by the Appellate Body in the cited report. In that report, the question of whether or not the duties at issue constituted "ordinary customs duties" was not even addressed by the Appellate Body. The Appellate Body merely stated:

"The principal obligation in the first sentence of Article II:1(b) [...] requires a Member to refrain from imposing ordinary customs duties *in excess of* those provided for in that Member's Schedule. However, the text of Article II:1(b), first sentence, does not address whether applying a *type* of duty different from the *type* provided for in a Member's Schedule is inconsistent in itself, with that provision."<sup>628</sup>

7.56 Thus, the Appellate Body stated what the obligation of the first sentence of Article II:1(b), regarding the application of "ordinary customs duties", entails. The Appellate Body recalled that there may be various "types" of duties *within* the category of "ordinary customs duties", and that applying a "type" of duty different from the "type" recorded in the Schedule is not necessarily inconsistent with the first sentence of Article II:1(b). By different "types" of duties, however, the Panel and the Appellate Body were merely referring to the distinction between *ad valorem* and specific duties.<sup>629</sup>

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<sup>625</sup> Chile has stated that the position expressed by the European Communities "may be correct". Chile's response to question 5 of the Panel.

<sup>626</sup> Oral Statement by the European Communities, para. 38 *in fine*.

<sup>627</sup> *Ibid.*, para. 36 *in fine*: "[...] measures that are 'ordinary customs duties' in the sense of Article II:1(b), as interpreted by the Appellate Body [...]". In the preceding paragraphs the European Communities provided its reading of the Appellate Body report on *Argentina – Textiles and Apparel*.

<sup>628</sup> Appellate Body report on *Argentina – Textiles and Apparel*, para. 46. Emphasis in original.

<sup>629</sup> *Ibid.*, para. 50.

Both parties, as well as the Panel and the Appellate Body, agreed in that case that the specific and *ad valorem* duties in question were all "ordinary" customs duties. Thus, the issue was not whether Argentina's applied duties were "ordinary", but rather whether Argentina could apply one type of ordinary customs duty even though its WTO Schedule identified another type of ordinary customs duty. In our view, therefore, it is clear that the cited Appellate Body report has no bearing on the question before us, i.e. what distinguishes an "ordinary" customs duty from other duties and charges.

7.57 We find our interpretation of what constitutes an "ordinary" customs duty confirmed by our analysis of the object and purpose of the Agreement on Agriculture. The object and purpose of this Agreement is, according to the Panel in *Canada - Dairy*,

"to 'establish a basis for initiating a process of reform of trade in agriculture'<sup>630</sup> in line with, *inter alia*, the long-term objective of establishing 'a fair and market-oriented agricultural trading system'.<sup>631</sup> This objective is pursued in order 'to provide for *substantial progressive reductions in agricultural support and protection* sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets.'<sup>632</sup>

The general aim of the Uruguay Round negotiations on agriculture was to 'achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under *strengthened and more operationally effective GATT rules and disciplines*'.<sup>633</sup> [...]'<sup>634</sup>

7.58 As indicated earlier, an important aspect of this exercise was the "tariffication" process, involving the conversion of certain, particularly distortive trade barriers into ordinary customs duties. Key objectives of tariffication were to make agricultural market access conditions more transparent and predictable, and establish or strengthen the link between national and international agricultural markets. As stated in the Punta del Este Ministerial Declaration on the Uruguay Round:

"Contracting Parties agree that there is an urgent need to bring more discipline and *predictability* to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses *so as to reduce the uncertainty, imbalances and instability* in world agricultural markets."<sup>635</sup>

7.59 As explained by the Panel in *Turkey – Textiles*, this object and purpose is based on the premise that ordinary customs duties "are GATT's border protection 'of choice'" because they "permit the most efficient competitor to supply imports", and are "*more transparent price-based*" measures.<sup>636</sup>

7.60 In our view, customs duties of the ordinary kind scheduled by the GATT Contracting Parties since 1947 and thereafter the WTO Members, which are exclusively based on either the value or the volume of the goods or a combination thereof (i.e. not based on exogenous factors), were considered

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<sup>630</sup> (original footnote) Preambular paragraph 1.

<sup>631</sup> (original footnote) Preambular paragraph 2.

<sup>632</sup> (original footnote) Preambular paragraph 3. Emphasis added.

<sup>633</sup> (original footnote) Punta del Este Declaration, Ministerial Declaration on the Uruguay Round, MIN.DEC, 20 September 1986, p. 6.

<sup>634</sup> Panel report on *Canada – Dairy*, paras. 7.25-7-26.

<sup>635</sup> Punta del Este Declaration, Ministerial Declaration on the Uruguay Round, MIN.DEC, 20 September 1986, p. 6. (Emphasis added). We recall that the objectives of the Punta del Este Declaration are explicitly referenced in the first tiret of the Preamble to the Agreement on Agriculture.

<sup>636</sup> Panel report, *Turkey – Restrictions on Imports of Textile and Clothing Products* ("*Turkey – Textiles*"), WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body report, WT/DS34/AB/R, paras. 9.63-9.65. Emphasis added.

by the Uruguay Round negotiators to be most amenable to achieving the objectives of progressively reducing protection in agricultural markets through tariff reductions and ensuring predictability and more transparent, price-based competition. By no longer allowing for instruments of protection which, through the use of exogenous factors<sup>637</sup>, result in highly uncertain and unstable levels of protection often isolating the domestic market from international price competition, the drafters of the Agreement on Agriculture decided to bring such instruments under "strengthened and more operationally effective GATT rules and disciplines", in pursuit of the long-term objective of establishing a fair and market-oriented agricultural trading system.

Application of the Panel's interpretation of "other than ordinary customs duties" to the Chilean PBS

7.61 In our analysis of whether the Chilean PBS is a border measure similar to a variable import levy and a minimum import price, we have already highlighted the features of the Chilean PBS which reveal its intrinsically unstable, intransparent and unpredictable nature, as well as the insulation of the domestic market from international price competition which it achieves. Nonetheless, in furtherance of our analysis, we will more explicitly contrast some other aspects of the structure and operation of the Chilean PBS with those of an "ordinary" customs duty.

7.62 Most importantly, we note that the Chilean PBS duties are neither in the nature of *ad valorem* duties, nor specific duties, nor a combination thereof<sup>638</sup>, in the sense that they are not just assessed on the transaction value of individual shipments, nor just on the volume of the goods. The amount of the applicable duty is a function of a price which is disconnected from the actual transaction value of the imported good. In fact, the applicable duty is determined on the basis of exogenous price factors, i.e. the lower threshold of the PBS and the Reference Price.<sup>639</sup>

7.63 We also note that several features of the Chilean PBS are bound to artificially inflate this margin between the lower threshold of the PBS and the Reference Price, and, consequently, the level of the applicable PBS duty. Most strikingly, the level of the lower threshold of the PBS is considerably raised over that of the Reference Price by discarding the lowest 25 per cent of all observed international market prices over the preceding 60 months. The prices observed on "markets of concern" used for the calculation of the Reference Price do not undergo the same operation. Second, as confirmed by Chile, the f.o.b. prices used for the PBS values are adjusted, *inter alia*, for "usual import costs", whereas the f.o.b. prices used for the Reference Prices are not.<sup>640</sup> These differences can in our view only result in increasing the margin between the lower threshold of the PBS and the Reference Price, and thus the applicable PBS duty.<sup>641</sup> We find that those aspects of the

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<sup>637</sup> This can include both quantitative restrictions and certain price-based border measures. See our discussion at para. 7.32 above.

<sup>638</sup> In addition, in light of the object and purpose of the Agreement on Agriculture, we consider that a measure such as the Chilean PBS *may* be considerably less amenable to negotiated reduction than an ordinary customs duty, in particular in the absence of an effective "cap". In the case before us, Chile has at an advanced stage in the proceedings argued that a recent legislative amendment constitutes such a "cap" on the Chilean PBS. We do not need to decide, however, whether or not the Chilean PBS would therefore become more amenable to progressive reduction, as we consider that several aspects of the structure and operation of the Chilean PBS quite clearly distinguish this measure from an ordinary customs duty.

<sup>639</sup> It is not a combined duty either, which is a straightforward *ad valorem* duty plus a specific duty levied simultaneously. We also note that, although Chile calls the PBS duty a "specific" duty when the Reference Price falls below the lower PBS threshold, the applicable PBS rebate is expressed *ad valorem* when the Reference Price is higher than the upper PBS threshold.

<sup>640</sup> Chile's response to question 9(e) of the Panel.

<sup>641</sup> We also note that Chile uses different markets to determine the PBS values, on the one hand, and the Reference Price, on the other. Normally, fluctuations of international prices can be most adequately measured by making inter-temporal comparisons of prices on one and the same international market. Although the products to the Chilean PBS are commodities, it cannot be entirely excluded that the prices observed on the

structure and operation of the Chilean PBS do not reflect the structure and operation of an "ordinary" customs duty.

7.64 Finally, we note that under the Chilean PBS, the Reference Price, and therefore the applicable duty or rebate, is determined in reference to the date of the bill of lading. Consequently, when two shipments from two different exporting Members leave their respective port of origin on two different dates, but arrive at the Chilean port of entry at the same time, they can be assessed a different duty, to the extent that the Reference Price may very well vary as regards those two shipments. We are fully aware that Argentina did not present any claim under Article I of GATT 1994, and that no such claim is therefore within our Terms of Reference. Whereas we cannot and do not make any finding of law regarding the consistency of the Chilean PBS with Article I of GATT 1994, we do find, as a matter of fact, that the Chilean PBS *inherently* carries the risk of resulting in higher duties on one shipment than on another, despite the fact that those shipments arrive at the same time at the Chilean border, which is not consistent with the characteristics of an "ordinary" customs duty.

### Conclusion

7.65 In light of our findings above, we conclude that the Chilean PBS is a border measure similar to a variable import levy and a minimum import price, other than ordinary customs duties, within the meaning of footnote 1 to the Agreement on Agriculture.

(ii) *Is the Chilean PBS "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"?*

7.66 Chile has not asserted a defence of the Chilean PBS under Article 4.2 of the Agreement on Agriculture in reference to the balance-of-payment provisions of GATT 1994 or other general, non-agriculture specific provisions of the Multilateral Trade Agreements in Annex 1A other than GATT 1994. Regarding the relationship between Article 4.2 of the Agreement on Agriculture and Article II:1(b) of GATT 1994, Chile has stated that "[t]he prohibitions in Article 4.2 of the Agreement on Agriculture apply without regard to whether the measures breach a tariff binding".<sup>642</sup> At the same time, however, Chile has also stated that the following position, expressed by the European Communities in the course of these proceedings, "may be correct":<sup>643</sup>

"(...) a measure that would meet the test set out by the Appellate Body in *Argentina – Footwear, Textiles and Apparel*, and would therefore not be contrary to Article II of GATT 1994, would not be subject to any further obligation in Article 4.2 of the Agreement on Agriculture. This conclusion stands even if the measure in question resulted in the application of a 'duty that varies' – inasmuch as this 'variation' is maintained below the ceiling written in the Member's tariff binding. Thus, the decisive element which distinguishes an "ordinary customs duty" from a "variable levy" is the existence of a ceiling in the tariff binding."<sup>644</sup>

7.67 In light of Chile's position, we consider that we should address the argument advanced by the European Communities.

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Kansas or Chicago Exchanges (used for the calculation of the PBS values) are different from those observed on the "markets of concern to Chile" (used for the calculation of the Reference Price). Indeed, the evidence before us is that Argentina is often the most important designated "market of concern to Chile", not the United States. Consequently, it cannot be entirely excluded that a low Reference Price today may not be fully reflected in the PBS values 60 months later, faulting the inter-temporal comparison of international prices.

<sup>642</sup> Chile's response to question 4 of the Panel.

<sup>643</sup> Chile's response to question 5 of the Panel.

<sup>644</sup> European Communities' Oral Statement, para. 38.

7.68 According to the European Communities, Article II:1(b) of GATT 1994 is a "non-agriculture-specific" provision of GATT 1994 under which a measure such as the Chilean PBS could be maintained, provided it does not exceed the "ordinary customs duties" binding. Consequently, if the measure is consistent with Article II:1(b) of GATT 1994, it would not be subject to the obligation laid down in Article 4.2 of the Agreement on Agriculture. We cannot agree. First, the text of footnote 1 makes clear that the drafters of the Agreement on Agriculture did not mean to exempt from the obligation of Article 4.2 all measures maintained under *any* "general, non-agriculture-specific" provision of GATT 1994. Footnote 1 only excludes from the scope of Article 4.2 measures maintained under balance-of-payment provisions or under *other* general, non-agriculture specific provisions of GATT 1994. The use of the term "other" before "general, non-agriculture specific provisions" makes clear that balance-of-payment provisions are one example of what is meant by the category of "general, non-agriculture-specific" provisions of GATT 1994 and the other Annex 1A Agreements. Balance-of-payment measures can be adopted in accordance with Article XII of GATT 1994. Article XII is clearly in the nature of an *exception* to the general obligations of GATT 1994. In our view, therefore, footnote 1 was meant to exclude from the scope of Article 4.2 only those measures which are maintained on the basis of GATT 1994 provisions which allow Members, subject to certain conditions, to act inconsistently with their general obligations under GATT 1994. Article XIX regarding safeguard measures<sup>645</sup> and Article XX regarding general exceptions, for instance, would in our view provide other examples of such "general, non-agriculture-specific provisions".

7.69 Second, we note that Article 21.1 of the Agreement on Agriculture provides,

"The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement."

7.70 In commenting on this provision, the Appellate Body stated in *EC – Bananas III*:

"Therefore, the provisions of the GATT 1994 [...] apply to market access commitments concerning agricultural products, except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter."<sup>646</sup>

7.71 If the general rule is that the provisions of GATT 1994 only apply to market access commitments concerning agricultural products to the extent that the Agreement on Agriculture does not contain specific provisions dealing specifically with the same matter, it is difficult to see why the drafters of the Agreement on Agriculture would have turned that rule in effect upside down in footnote 1 by excluding from the scope of the Agreement on Agriculture's market access obligations those measures maintained in accordance with the general obligations of GATT 1994. If this view were to be accepted, footnote 1 would be rendering Article 21.1 void of meaning as regards the Agreement on Agriculture's market access provisions. A treaty interpreter, however, may not adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.<sup>647</sup> In our view, such an interpretation requires us in this case to read footnote 1 as excluding from the scope of Article 4.2 those measures which Members are allowed to maintain in accordance with the provisions in GATT 1994 laying down exceptions to the general obligations of GATT 1994, such as its balance-of-payment provisions.

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<sup>645</sup> We note that Chile has invoked Article XIX of GATT 1994 with respect to Argentina's claims regarding Article II:1(b) of GATT 1994, but that it has not done so with respect to Argentina's claim under Article 4.2 of the Agreement on Agriculture.

<sup>646</sup> Appellate Body report on *EC – Bananas III*, para. 155.

<sup>647</sup> Appellate Body report, *US – Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 21.

7.72 We find this interpretation confirmed by the preparatory work of the Agreement on Agriculture. The agriculture section of the 1991 Draft Final Act provides:

"The policy coverage of tariffication shall include all border measures other than ordinary customs duties\* such as [...]."<sup>648</sup>

\* Excluding measures maintained for balance-of-payments reasons or under general safeguard and *exception* provisions (Articles XII, XVIII, XIX, XX and XXI of the General Agreement).

7.73 We consider that this language confirms that the drafters of the Agreement on Agriculture did not intend to include Article II of GATT in the category of "other general, non-agriculture specific provisions of GATT 1994".

7.74 We note that, in any event, the question of whether or not the Chilean PBS duties have exceeded the "ordinary customs duties" binding of 31.5 per cent only becomes relevant after it has been determined that the Chilean PBS duties do indeed constitute such "ordinary" customs duties. As we have indicated earlier, in our view, the Chilean PBS is a border measure similar to a variable import levy and a minimum import price, other than ordinary customs duties. The corresponding binding of 31.5 per cent is therefore irrelevant for the purpose of assessing the Chilean PBS duties' consistency with Article II:1(b) of GATT 1994. We will revert to this matter below, in our discussion of Argentina's claim under Article II:1(b) of GATT 1994.

(b) Other tools of interpretation

7.75 Chile has argued that the Panel, in its interpretation of Article 4.2, should draw on the following elements:

- (a) "state practice", including: the alleged existence in other Members of measures similar to the Chilean PBS; the fact that these Members never converted their measures to ordinary customs duties; and the absence of any challenge of such measures on the basis of Article 4.2;
- (b) Article 24 of Economic Complementarity Agreement No. 35 ("ECA 35") between Chile and MERCOSUR;
- (c) negotiating history of Article 4.2 of the Agreement on Agriculture, including communications by or with individual members of the GATT Secretariat.

7.76 We will first examine to what extent Articles 31 and 32 of the Vienna Convention instruct or allow us to consider these elements in our interpretation of Article 4.2, in particular the question as to whether Article 4.2 was meant to prohibit measures such as the Chilean PBS. Only if we find that we should consider some or all of these elements for the purpose of interpreting Article 4.2, we will subsequently address them.

7.77 According to Article 31 of the Vienna Convention, we should draw, as context, on any agreement relating to "the treaty", i.e. the WTO Agreement<sup>649</sup>, which was made between all the parties in connection with the conclusion of the WTO Agreement, as well as any instrument which was made by one or more parties in connection with the conclusion of the WTO Agreement and accepted by the other parties as an instrument related to the WTO Agreement. We should also take into account any

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<sup>648</sup> MTN.TNC/W/FA, para. 1 of Part B, Annex 3, Section A, at L.25. Emphasis added.

<sup>649</sup> Legally speaking, the Agreement on Agriculture is part of an annex (Annex 1A) to the WTO Agreement. When Article 31 Vienna Convention speaks of "the treaty", it is the WTO Agreement as a whole which should be referred to.

subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and any relevant rules of international law applicable in the relations between the parties. Finally, according to Article 32 of the Vienna Convention, we may draw on preparatory work and circumstances of the Treaty's conclusion to confirm the ordinary meaning or to resolve ambiguity.

(i) "state practice"

7.78 Presumably, by referring to these elements under the banner of "state practice", Chile is suggesting that we consider these elements either as "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" under Article 31, or as a supplementary means of interpretation under Article 32 of the Vienna Convention. First, we do not consider that the alleged "state practice" can be qualified as subsequent practice within the meaning of Article 31 of the Vienna Convention. As stated by the Appellate Body in its report on *Japan – Alcoholic Beverages II*<sup>650</sup>:

"(...) in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of *acts or pronouncements* which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.<sup>651</sup> An isolated act is generally not sufficient to establish subsequent practice<sup>652</sup>; it is a sequence of *acts* establishing the agreement of the parties that is relevant."<sup>653</sup>

7.79 Thus, first, the mere fact that Argentina or other Members did not challenge the Chilean PBS through the WTO dispute settlement system until recently does not constitute a "sequence of acts or pronouncements".<sup>654</sup> Second, the fact that a few Members of the WTO would have in place measures similar to the Chilean PBS is not a "sufficiently concordant, common and consistent sequence of acts" establishing the agreement of the WTO Members regarding the interpretation of Article 4.2 of the Agreement on Agriculture.<sup>655</sup> We will address the question of state practice as a supplementary means of interpretation below.

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<sup>650</sup> *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 13. Emphasis added.

<sup>651</sup> (original footnote) Sinclair, *supra*, p. 137; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités" (1976-III) 151 *Recueil des Cours* p. 1 at 48.

<sup>652</sup> (original footnote) Sinclair, footnote 24, p. 137.

<sup>653</sup> (original footnote) (1966) *Yearbook of the International Law Commission*, Vol. II, p. 222; Sinclair, *supra*, footnote 24, p. 138.

<sup>654</sup> We note in this respect that Chile is not arguing *estoppel*. See Chile's response to question 13(a) of the Panel.

<sup>655</sup> We note in this respect that Argentina has drawn our attention to the July 1995 Report of the Working Party on the Accession of Ecuador, which was adopted by consensus and which shows that several Members considered an Ecuadorian PBS inconsistent with various covered agreements, including the Agreement on Agriculture:

Some members noted that the use of minimum import prices and variable charges appeared to be in conflict with Ecuador's obligations under Articles II, VI and VII of the General Agreement 1994, the WTO Customs Valuation Agreement and the WTO Agreement on Agriculture. In their view, Ecuador should either phase out this mechanism or bring it into conformity with the aforesaid obligations. (WT/L/77, para. 42)

In response, the Ecuadorian delegate has been recorded to state that,

(ii) *Article 24 of Economic Complementarity Agreement No. 35 ("ECA 35") between Chile and MERCOSUR*

7.80 ECA 35 between Chile and MERCOSUR was signed on 25 June 1996 and entered into force on 1 October of that year. Article 24, which is listed under the heading "Customs Valuation", reads:

"When using the Price Band System provided for in its domestic legislation concerning the importation of goods, the Republic of Chile commits, *within the framework of this Agreement*, neither to include new products nor to modify the mechanisms or apply them in such a way which would result in a deterioration of the market access conditions for MERCOSUR."<sup>656</sup>

7.81 According to Chile, by signing ECA 35<sup>657</sup>, Argentina has expressed the understanding that Article 4.2 does not prohibit the Chilean PBS, because it would not have negotiated Article 24 of ECA 35 if the Chilean PBS was prohibited outright under Article 4.2 of the Agreement on Agriculture.

7.82 Article 31 of the Vienna Convention instructs us to consider other international agreements for the purpose of interpreting Article 4.2 of the Agreement on Agriculture, provided they meet certain conditions. In our view, however, it is clear that ECA 35 does not meet the conditions of the agreements referred to in Article 31 of the Vienna Convention. First, ECA 35 is clearly not an "agreement relating to the Treaty which was *made between all the parties in connection with the conclusion of the Treaty*", nor an "instrument which was made by one or more parties in connection with the conclusion of the Treaty and *accepted by the other parties as an instrument related to the Treaty*".

7.83 Second, ECA 35 is in our view not a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". Leaving aside the question of whether such an agreement should be concluded between *all* parties to the WTO Agreement – which we need not address –, it suffices to note that the Preamble to ECA 35 reads:

"(...) the Marrakesh Agreement establishing the World Trade Organization constitutes a framework of rights and obligations to which the commercial policies and compromises of the present Agreement *shall adjust*."<sup>658</sup>

7.84 If the policies and compromises embodied in ECA35 have to "adjust to" the WTO Agreement, we find it difficult to see how ECA35 could be an agreement "regarding the interpretation" or "the application" of the WTO Agreement.

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in order to comply with the provisions of the WTO Agreement on Agriculture, Ecuador would gradually eliminate the price band system within a seven year period in accordance with the time table annexed to Ecuador's Protocol of Accession. During the period for the phase-out of this mechanism, Ecuador would not enlarge the coverage of the system nor reintroduce products back into the system. The Working Party took note of these commitments. (WT/L/77, para. 48)

In our view, however, in the absence of more specific information regarding the structure and operation of the measure at issue in this report, we cannot determine to what extent this measure is comparable to the Chilean PBS, and, consequently, assess its relevance for our analysis. We are therefore not in a position to take this into account.

<sup>656</sup> Our translation. Emphasis added.

<sup>657</sup> ECA 35 provides that the "*partes contractantes*" (contracting parties) are Chile and MERCOSUR, and that Argentina is a "*parte signataria*" (signatory party).

<sup>658</sup> Our translation. Emphasis added.

7.85 Finally, Article 24 of ECA 35 does not constitute in our view a "relevant rule of international law applicable in the relations between the parties". Again, leaving aside the question of whether such a rule of international law should be applicable between *all* parties to the WTO Agreement, the language of ECA 35 itself makes clear that Article 24 cannot be "relevant" to the interpretation of Article 4.2 of the Agreement on Agriculture. First, the Preamble states that the commercial policies and compromises of ECA 35 shall "adjust to" the WTO framework of rights and obligations. *A fortiori*, Article 24 of ECA 35 cannot influence the interpretation of the WTO Agreement. Second, Chile's commitment regarding its PBS in Article 24 of ECA 35 has been explicitly made "within the framework of" ECA 35. Such language suggests that the parties to ECA 35 did not intend to exclude the possibility that different commitments regarding the Chilean PBS may have been or will be made in the context of other international agreements.

7.86 In any event, even if we were somehow to take into account Article 24 of ECA 35 for the purpose of interpreting Article 4.2 of the Agreement on Agriculture, *quod non*, we would fail to see how a simple stand-still commitment by Chile *vis-à-vis* MERCOSUR and its members regarding its PBS would detract from the position that the Chilean PBS is a measure "of the kind which ha[s] been required to be converted into ordinary customs duties" within the meaning of Article 4.2 of the Agreement on Agriculture.

(iii) *Negotiating history of Article 4.2*

7.87 Chile is of the view that the text and context of Article 4.2 leave no ambiguity that its PBS is not a prohibited measure. However, according to Chile, should the Panel consider that there is any ambiguity, the negotiating history of the Article 4.2 will demonstrate that the negotiators did not intend to prohibit the maintenance of the PBS.

7.88 We note that Chile links its arguments regarding the negotiating history with elements of subsequent practice and maintains that under the general rubric of "state practice" it becomes clear that Members did not consider the PBS inconsistent with Article 4.2. We have already dealt with the issue of subsequent practice above; here we will turn to the issue of the negotiating history.

7.89 Article 32 of the Vienna Convention provides that:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable."

7.90 Chile has argued that the PBS was in place before the start of the Uruguay Round and, therefore, all Uruguay Round negotiators were fully aware of its existence when preparing the text of Article 4.2. According to Chile, none of the negotiators required that it be converted.

7.91 We cannot agree with Chile's position that it results from the negotiating history of Article 4.2 that the Chilean PBS is not a measure of the kind which has been required to be converted. As we have discussed extensively above, the text and context of Article 4.2 make it clear that Article 4.2 and footnote 1 both are provisions of general application. Article 4.2 refers to measures *of the kind* that were to be converted. Footnote 1 provides an illustrative list of such measures, but generalizes to include other *similar* border measures. Thus, neither the text of the Article nor the footnote contemplate the need for negotiators to conclusively agree on what measures should be converted.

Quite the contrary; there was a textual requirement that measures of this kind were not to be maintained. Thus, the lack of an explicit agreement that the PBS was required to be converted does not help Chile's argument.<sup>659</sup>

7.92 We can find no evidence in the negotiating history that it was intended by the negotiators to exclude the Chilean PBS from coverage of Article 4.2. We note, for example, that the Draft Final Act version of Article 4.2 provided that:

"Participants undertake not to resort to, or revert to, *any measures which have been converted* into ordinary customs duties pursuant to concessions under this agreement."<sup>660</sup>

7.93 As can be seen, this text used different language. It referred to a requirement that any measures which actually had been converted, would not be resorted to or reverted to. In contrast, Article 4.2 requires that Members not "*maintain*, resort to or revert to any measure *of the kind* which have been required to be converted." (emphasis added) So, the word "maintain" was added implying that not every measure had been explicitly addressed because there is no reason to have a prohibition on maintaining a measure which had been explicitly negotiated out of existence. The prohibition on reverting to or resorting to would have been sufficient otherwise. This is made conclusively clear by the addition of the phrase "of the kind" which broadened the language of Article 4.2 beyond those which had actually been subject to negotiations.

7.94 Chile has also reported that during the early 90s, during a seminar held in a Central-American country, "a letter was presented from an authority of the GATT Secretariat arguing that it was not necessary to tariff price bands since they were unrelated to the domestic price – provided the price bands were maintained within the bound levels."<sup>661</sup> Chile was unable to produce the said letter. However, even if we had been able to verify the exact contents of said letter, we consider that such a letter could not have changed our interpretation of Article 4.2 of the Agreement on Agriculture. The mere fact that an individual in the GATT Secretariat might have made a statement – orally or in writing – along the lines described by Chile is not determinative. The WTO Agreement gives the Ministerial Conference and the General Council the exclusive right to adopt interpretations of the WTO Agreement.<sup>662</sup> While the Secretariat has in the past, and will in the future be requested to provide advice to Members of the WTO, we believe the general rule of reserving the legal right to adopt interpretations to the Members to be the appropriate standard in this context, while, of course, recognizing that the WTO rules were not in force at the time in question.<sup>663</sup>

7.95 The Secretariat's advice might prove a part of a more comprehensive compilation of preparatory work if there were evidence that negotiators specifically adopted an approach recommended by the Secretariat, but that is not the case here. Even at face value, the advice referenced by Chile would appear to have been isolated advice offered at a regional seminar held in Central America. There is a complete lack of comprehensive evidence in this case that would correspond with any such advice. Indeed, Chile's argument seems to turn more on the silence of the

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<sup>659</sup> See para. 7.18 above.

<sup>660</sup> MTN.GNG/W/FA, p. L.3.

<sup>661</sup> Chile's response to question 14 of the Panel.

<sup>662</sup> Article IX:2 of the Marrakesh Agreement establishing the WTO.

<sup>663</sup> In any event, we note that, on the one hand, Chile tabled its negotiating offer on the basis of the Draft Final Act modalities and draft rules on agriculture on 5 March 1992, and, on the other hand, has stated that "[t]he date of the seminar is [...] unclear but it could have taken place in 1993." (Chile's response to question 40 of the Panel).

negotiators regarding its PBS rather than positive evidence that it was intended to be excluded from the application of Article 4.2.<sup>664</sup>

7.96 Chile's general argument regarding "state practice" is in many ways like a non-violation argument.<sup>665</sup> In effect, Chile argues that it had a reasonable expectation that it was not required to convert. The nature of Chile's argument can be seen in light of Chile's affirmation that it is not arguing that Argentina is legally *estopped* from pursuing the claim against the PBS system. Rather, Chile argues all of this constitutes the broader interpretative context. In other words, Chile should not now be required to convert a system that it had a reasonable basis for concluding was not prohibited by article 4.2. Of course, non-violation is not at all applicable here given the fact that Chile as a respondent could not raise a non-violation claim.

7.97 Chile's "negotiating history" argument might have served as a valid defence by Chile had Argentina argued that it had a non-violation claim under Article 26 of the DSU. In such a case, the existence of the PBS since 1983 would be an issue, *inter alia*, which Argentina would have to explain if it were to establish all the elements of a non-violation claim.

7.98 There is another aspect of the contrast between violation and non-violation claims which is useful to note here. As the Appellate Body pointed out in *EC – Computer Equipment*, non-violation rests on reasonable expectations in a primarily bilateral context whereas violation claims rest ultimately in a multilateral context. In order to serve as a useful tool in a violation context, there must

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<sup>664</sup> In this context, we also note that Argentina has referred to the WTO Secretariat's 1997 Trade Policy Review Report on Chile, which reads that "[t]he price stabilization mechanism works as a variable levy" (WT/TPR/S/28, para. 38). We consider that such a Report should not be taken into account in the context of dispute settlement proceedings. Paragraph A(i) unequivocally states,

[The Trade Policy Review Mechanism] is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures [...].

Consequently, we will disregard the information contained in the report referred to by Argentina

<sup>665</sup> See Article 26.1 of the DSU ("*Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994*") and Article XXIII:1(b) of GATT 1994. The Appellate Body has stated with respect to Article XXIII:1(b) of GATT 1994,

Article XXIII:1(b) sets forth a separate cause of action for a claim that, through the application of a measure, a Member has "nullified or impaired" "benefits" accruing to another Member, "whether or not that measure conflicts with the provisions" of the GATT 1994. Thus, it is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994. Cases under Article XXIII:1(b) are, for this reason, sometimes described as "non-violation" cases; we note, though, that the word "non-violation" does not appear in this provision. (Appellate Body report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos"), WT/DS135/AB/R, adopted 5 April 2001, para. 185)

According to the Panel in *Japan – Measures Affecting Consumer Photographic Film and Paper*:

"[t]he text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure."<sup>[footnote omitted]</sup> (Panel report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, para. 10.41)

be positive evidence in the negotiating history of a common understanding of the various parties to the negotiation.<sup>666</sup> Hence the need for some *comprehensive* evidence of negotiators' intentions to sustain a defence<sup>667</sup> based on preparatory work.<sup>668</sup>

7.99 Thus, just as with subsequent practice, we cannot agree that silence by negotiators regarding such a measure as the Chilean PBS provides meaningful evidence that the negotiators intended to exclude the Chilean PBS from the requirements of Article 4.2.

7.100 We should also note here that we do not see the evidence regarding the negotiating history as helpful in establishing a defence based on "state action" which includes subsequent practice. We remain uncertain about the legal basis of Chile's defence of "state practice". We raise this point here because we have now examined the second aspect of the defence, i.e., the negotiating history. The first aspect, "subsequent practice", was dealt with above.<sup>669</sup> Viewed in light of the facts of this case, this argument of "state practice" might rest more firmly on a legal basis of *estoppel* or a defence against a claim of non-violation nullification or impairment. What Chile really seems to put forward in this case, however, is an argument of "state inaction". That is, because Members allegedly were silent about the Chilean PBS before and after the conclusion of the Uruguay Round negotiations, any claim by such Members against the PBS should fail. We have noted above that "subsequent practice" requires overt acts, not mere toleration. Whereas there may be circumstances in which the silence of negotiators might indicate acquiescence and, therefore, may be probative evidence regarding the negotiating history, in this case, such silence could perhaps have been more significant if, for instance, Chile had included the PBS in its Schedule. In such a case, Chile's assertion of silence during the verification period in early 1994 might arguably have had significance. However, as the PBS is not in its Schedule, there was nothing to verify.

7.101 We therefore conclude that, in asserting the defence of "state action" (to the extent it is based on the negotiating history), Chile has not produced sufficient evidence to call into question our interpretation of Article 4.2 as requiring conversion of the Chilean PBS into ordinary customs duties.

(c) Conclusion regarding Article 4.2 of the Agreement on Agriculture

7.102 Having regard to our analysis above<sup>670</sup>, we find that the Chilean PBS is "a similar border measure other than ordinary customs duties" which is not maintained "under balance-of-payment provisions or under other general, non-agriculture specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement", within the meaning of footnote 1 to the Agreement on Agriculture. We therefore conclude that the Chilean PBS is a measure "of the kind which ha[s] been required to be converted into ordinary customs duties", within the meaning of Article 4.2 of the Agreement on Agriculture. By maintaining a measure which should have been converted, Chile has acted inconsistently with Article 4.2 of the Agreement on Agriculture.

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<sup>666</sup> Appellate Body report, *European Communities – Customs Classification of Certain Computer Equipment* ("EC – Computer Equipment"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, at para. 93.

<sup>667</sup> We note in this regard that this issue of examining preparatory work in accordance with Article 32 of the Vienna Convention has been raised by Chile as a defence. Argentina has made its arguments based upon a textual analysis.

<sup>668</sup> For example, even if we had considered the evidence of GATT Secretariat advice probative, it would have needed to be seen as part of a comprehensive multilateral pattern of advice combined with negotiators' actions.

<sup>669</sup> See paras. 7.78-7.79 above.

<sup>670</sup> See paras. 7.17-7.101 above.

## 5. The Chilean PBS and Article II:1(b) of GATT 1994

7.103 According to Argentina, the Chilean PBS duties are ordinary customs duties within the meaning of the first sentence of Article II:1(b). Argentina has argued, and Chile has acknowledged, that the Chilean PBS duties can potentially exceed<sup>671</sup> and, at several instances in the past, have effectively exceeded<sup>672</sup>, Chile's binding of 31.5 per cent in the bound rate column of its Schedule. Argentina therefore concludes that the Chilean PBS is inconsistent with Article II:1(b).<sup>673</sup>

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

7.105 The next question is whether the Chilean PBS duties could be considered as "other duties or charges of any kind" imposed on or in connection with importation, under the second sentence of Article II:1(b). We have already indicated that all "other duties or charges of any kind" should in our view be assessed under the second sentence of Article II:1(b). Pursuant to the Uruguay Round Understanding on the Interpretation of Article II:1(b), such other duties or charges had to be recorded in a newly created column "other duties and charges" in the Members' Schedules. Paragraph 1 of the Uruguay Round Understanding on the Interpretation of Article II:1(b) of the GATT 1994 ("the Understanding") 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'."

7.106 According to the second paragraph of the Understanding:

"(...) [t]he date as of which "other duties or charges" are bound, for the purposes of Article II, shall be 15 April 1994. 'Other duties or charges' shall therefore be recorded in the Schedules at the levels applying on this date."

7.107 Other duties or charges must not exceed the binding in this "other duties and charges" column of the Schedule. If other duties or charges were not recorded but are nevertheless levied, they are inconsistent with the second sentence of Article II:1(b), in light of the Understanding on the Interpretation of Article II:1(b). We note that Chile did not record its PBS in the "other duties and charges" column of its Schedule.

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<sup>671</sup> Although it is not clear whether this can still be the case in the future, following amendment of Article 12 of Law 18.525. See our remarks at paras. 7.3-7.8 above.

<sup>672</sup> Chile's response to question 12(c) of the Panel.

<sup>673</sup> Chile has argued that the Chilean PBS, to the extent that it results in the exceeding of its 31.5 per cent bound rate, is justified under the provisions of Article XIX, i.e. as a safeguard measure. We will address this argument in the section of our Findings dealing with the claims brought under the Agreement on Safeguards.

7.108 We therefore find that the Chilean PBS duties are inconsistent with Article II:1(b) of GATT 1994.<sup>674</sup>

B. THE CHILEAN SAFEGUARD MEASURES ON WHEAT, WHEAT FLOUR AND EDIBLE VEGETABLE OILS

1. The measures at issue

7.109 At issue in this dispute are safeguard measures on imports of wheat, wheat flour and edible vegetable oils, adopted by the Chilean government in accordance with the recommendations by the competent investigating authorities, the Chilean Distortions Commission ("CDC"). The safeguard measures consist of an additional duty on wheat, wheat flour and edible vegetable oils which "shall be determined by the difference between the general tariff added to the *ad valorem* equivalent of the specific duty determined by the mechanism set out in Article 12 of Law 18.525 – and its relevant annual implementing decrees – and the level bound in the WTO for these products".<sup>675</sup> Thus, whenever the Chilean PBS duty exceeds, in conjunction with the 8 per cent applied tariff, the 31.5 per cent bound rate, the portion of the duty in excess of that bound rate shall be considered to constitute a safeguard measure. Put another way, the duty applied pursuant to the safeguard measure is the Chilean PBS duty to the extent it exceeds the 31.5 per cent bound rate.

2. Preliminary issues

7.110 Chile argues that none of the safeguard measures challenged by Argentina are within the Panel's jurisdiction. According to Chile, the provisional and definitive safeguard measures were no longer in effect on the date of Argentina's request for establishment of the Panel. Chile therefore requests the Panel to rule that it cannot recommend that Chile bring these measures into conformity with its WTO obligations. To support its thesis, Chile refers to the text of the respective decrees imposing the provisional and definitive safeguard measures, Articles 3.4 and 3.7 of the DSU, and the Appellate Body report on *United States – Import Measures on Certain Products from the European Communities*.<sup>676</sup> According to Chile, the definitive safeguard measure is distinct from the measure extending its application, and has therefore expired, notwithstanding the extension measure.

7.111 As regards the extension, Chile submits that the Panel cannot examine the measure extending the application of the definitive safeguard measure, as it was not included in Argentina's request for consultations. Chile states that, although it has had some consultations with Argentina, "this does not mean that [...] Argentina had called for valid consultations in the WTO on the extension measures because it did not request such consultations in writing and made no notification to the WTO to this effect."<sup>677</sup> Chile does not deny that "the content of the final measure (extension) is identical to that in the previous measure", but argues that the new measure is the result of a new request, new hearings and new evidence, and only exists because of a formal decision by the Chilean authorities.<sup>678</sup> Finally, Chile posits that the Panel should not make findings with respect to the extended safeguard measures which it has recently "withdrawn".

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<sup>674</sup> Considering our finding that Chile failed to record its PBS in the appropriate column of its Schedule, we do not need to address whether and, if so, how, Article 21.1 of the Agreement of Agriculture bears on our finding regarding Article II:1(b) of GATT 1994, in light of our finding that the Chilean PBS is inconsistent with Article 4.2 of the Agreement on Agriculture.

<sup>675</sup> Minutes of CDC session No. 193.

<sup>676</sup> Appellate Body report, *United States – Import Measures on Certain Products from the European Communities* ("US – Certain EC Products"), WT/DS165/AB/R, adopted 10 January 2001.

<sup>677</sup> Chile's first submission, para. 100.

<sup>678</sup> Chile's first submission, para. 101.

(a) The provisional safeguard measures

7.112 We note that the Appellate Body in *US – Certain EC Products* stated that "the panel erred in recommending that the DSB request the US to bring into conformity a measure which the panel has found no longer exists."<sup>679</sup> In this regard, we recall that Article 19.1 DSU provides that "[w]hen a panel [...] concludes that a measure *is* inconsistent with a covered agreement, it *shall recommend* that the Member concerned bring the measure into conformity with that agreement". Put another way, a panel is required to make the recommendation to bring a measure which it has found inconsistent into conformity *if* that measure is still in force. Conversely, when a panel concludes that a measure *was* inconsistent with a covered agreement, the said recommendation cannot and should not be made. However, in our view, Article 19.1 DSU would not prevent us from making *findings* regarding the consistency of an expired provisional safeguard measure, if we were to consider that the making of such findings is necessary "to secure a positive solution" to the dispute. We would not, however, formulate *recommendations* with regard to those measures.

7.113 In our view, this approach is fully consistent with the Appellate Body's findings in *US – Certain EC Products* and the findings in other WTO disputes. While the Appellate Body in *US – Certain EC Products* found that the Panel should not have made a recommendation regarding a measure that no longer existed, it nowhere suggested that the Panel erred in making findings regarding that measure. To the contrary, the Appellate Body stated that the Panel "should have limited its reasoning to issues that were relevant and pertinent" to the expired measure.<sup>680</sup> And, while we note that the Panel in *Argentina – Textiles and Apparel*<sup>681</sup> decided not to address a measure which had been terminated before commencement of the Panel proceedings, we do not understand that Panel to have found that it lacked *jurisdiction* to make findings on an expired measure. To the contrary, the Panel considered US arguments that it should rule on the expired measure because of the threat of recurrence, but found no evidence to that effect.<sup>682</sup> This suggests that the Panel merely exercised its discretion not to rule on the expired measures in that case.

7.114 Further, to argue, as Chile does, that the provisional measures lie necessarily outside the scope of the Panel's jurisdiction, because those measures have elapsed, is not tenable, because this would imply that the Panel could examine all aspects of the investigation, except those relating to the provisional measures. We are concerned that if the conformity of such measures cannot, as a matter of principle, be addressed by panels solely because they are no longer in effect at the time of the request for establishment, then provisional safeguard measures generally will escape panel scrutiny, since they are generally terminated before the matter reaches the panel stage.<sup>683</sup> Members could then adopt provisional safeguard measures, the WTO-consistency of which, could never be examined by panels. In our view, the drafters of the DSU cannot have meant to exclude, in such a manner, provisional safeguard measures from its scope.

7.115 Although we do not consider that the termination of a measure before the commencement of panel proceedings deprives a panel of the authority to make findings in respect of that measure, we would only make findings regarding the provisional safeguard measures in this case if we were to

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<sup>679</sup> Appellate Body report, *US – Certain EC Products*, para. 81.

<sup>680</sup> Appellate Body report, *US – Certain EC Products*, para. 96.

<sup>681</sup> Panel report, *Argentina – Textiles and Apparel*, para. 6.15.

<sup>682</sup> Panel report, *Argentina – Textiles and Apparel*, para. 6.14.

<sup>683</sup> According to Article 6 of the Agreement on Safeguards, the duration of a provisional safeguard measure shall not exceed 200 days. Furthermore, it is unclear under the line of reasoning proposed by Chile why it is of such significance that a measure has been terminated just before or just after establishment of a panel. In both cases the panel would be requested to reach findings and conclusions with respect to a measure that had been terminated. This seems to us a distinction without a difference.

consider this necessary in order to "secure a positive solution" to the dispute. As explained below<sup>684</sup>, this is not the case.

(b) The definitive safeguard measures and the extension of their period of application

7.116 Chile raises two different objections regarding the Panel's jurisdiction with respect to the definitive safeguard measures and the extension of their duration: first, the definitive safeguard measures had "expired" before the request for establishment was made; second, the "extension measures" were not formally included in the request for consultations. We cannot accept either of those objections, for one and the same reason. Both of Chile's objections are based on the proposition that the extension of the period of application results in a measure distinct from the definitive safeguard measure. We disagree with this proposition. In our view, Article 7 of the Agreement on Safeguards makes it clear that what is at issue is not an extension "of the safeguard measure", but, rather, an extension "of the period of application of the safeguard measure" or of "the duration of the safeguard measure". Article 7 is entitled "*Duration and Review of Safeguard Measures*". Article 7.1 provides:

"A Member shall apply safeguard measures only for such *period of time* as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The *period* shall not exceed four years, unless *it* is extended under paragraph 2." (emphasis added)

7.117 Article 7.2 reads:

"The *period* mentioned in paragraph 1 *may be extended* provided that the competent authorities [...] have determined [...] that *the* safeguard measure *continues* to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting [...]." (emphasis added)

7.118 Article 7.3 reads:

"The total period of application of a safeguard measure including the period of application of any provisional measure, the *period of initial application and any extension thereof*, shall not exceed eight years." (emphasis added)

7.119 This language is sufficiently clear for us as to conclude that the "extensions" are not distinct measures, but merely continuations in time of the definitive safeguard measures. As a result, we consider that the definitive safeguard measures were not terminated before the request for establishment, but, rather, that their duration was simply extended at that time. Thus, we need not further consider Chile's argument that we lack the authority to make findings in respect of the definitive measures on the grounds that they have expired.<sup>685</sup> For the same reason, we also consider the fact that the extension was not mentioned in the request for consultations irrelevant for the determination of our jurisdiction: pursuant to Article 4.4 of the DSU, Argentina had to, and did, identify the definitive safeguard measures in its request for consultations. The fact that the duration of the identified measures was extended by Chile after the request for consultations cannot affect Argentina's compliance with Article 4.4 of the DSU.<sup>686</sup>

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<sup>684</sup> See para. 7.195.

<sup>685</sup> We note, in any event, our view that panels do not lack the legal authority to make findings in respect of expired measures. See paras. 7.112-7.113, *supra*.

<sup>686</sup> Accordingly, we need not decide whether the failure to identify a measure in a request for consultations would deprive a panel of the legal authority to make findings in respect of a measure otherwise within its terms of reference.

7.120 We note, moreover, that the "extension" did not in any way amend the content of the safeguard measures and that there were, in fact, exchanges between Argentina and Chile during the period of consultations regarding the "extension". Chile must therefore have been fully informed about Argentina's intention to challenge the safeguard measures, *as extended in time*. Thus, even if the "extension" were to be considered a separate measure, *quod non*, Chile's due process rights would not have been impinged upon.<sup>687</sup>

(c) Withdrawal of safeguard measures while the panel proceedings were ongoing

7.121 On 14 August 2001, the Panel received a communication from Chile stating that the safeguard measures on wheat and wheat flour had been terminated as of 27 July 2001. At the second meeting with the parties, the Panel was informed by Chile that the safeguard measure on vegetable oils would be terminated as of 26 November 2001.

7.122 Argentina has nevertheless explicitly requested the Panel to make findings regarding those measures. Argentina posits that the safeguard measures, even though they may have been repealed following their extension, require a specific ruling by the Panel because they form part of its Terms of Reference. Argentina contends that the fact that the definitive measures were repealed is irrelevant for the purpose of a ruling, since Chile explicitly recognized that it resorted to safeguards "to obtain the required legal backing" for its PBS.<sup>688</sup> In Argentina's view, if there is no ruling by the DSB establishing the inconsistency of the safeguard measures, the situation could recur, since the attempt at *ex-post facto* justification will have escaped the scrutiny of the DSB.

7.123 We first recall in this respect that the safeguard measures are defined by reference to the difference between the PBS duty plus the 8 per cent applied tariff and the 31.5 per cent bound rate. Consequently, it appears to us that the duty covered by the safeguard measure could *de facto* continue to be applied as long as the PBS duties plus the 8 per cent applied tariff exceed the 31.5 per cent bound rate. Formally, however, the portion of the PBS duty exceeding the 31.5 per cent bound rate would then presumably no longer be motivated by the objective of safeguard protection.

7.124 We also recall that, in our view, Article 19.1 DSU does not prevent us from making *findings* regarding the consistency of an expired provisional safeguard measure, if we were to consider that the making of such findings is necessary "to secure a positive solution" to the dispute. We would not, however, formulate *recommendations* with regard to those measures.

7.125 In determining then whether or not to make findings regarding the "withdrawn" safeguard measures, we note that the challenged measures are indeed within our Terms of Reference. Argentina has in effect argued that it has suffered nullification or impairment as a result of the withdrawn measures and that it is entitled to a ruling on the matter which has been referred to us by the DSB. Considering our findings and conclusions regarding the Chilean PBS, on the one hand, and the particular nature of the safeguard measures by which a portion of the PBS duties were justified, on the other, we believe that it would be in the interest of a prompt settlement of the overall dispute to make findings regarding the safeguard measures at issue, even though they have been withdrawn in the course of the proceedings. By making findings on the "withdrawn" safeguard measures, we thus wish to make it clear that the partial identity between the Chilean PBS and the safeguard measures is bound to affect the question of consistency of such safeguard measures with the substantive requirements of Article XIX of GATT 1994 and the Agreement on Safeguards.

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<sup>687</sup> We note, however, that we are not examining the consistency of the extension decision with the requirements of Article 7.2 of the Agreement on Safeguards, as that is not within our Terms of Reference.

<sup>688</sup> Argentina refers to Chile's First Written Submission, para. 25 *in fine*.

7.126 In accordance with past practice of GATT and WTO panels<sup>689</sup>, we will therefore examine the "withdrawn" safeguard measures challenged by Argentina in these proceedings, and make findings accordingly.

### **3. Published report (Article 3.1 of the Agreement on Safeguards)**

7.127 Article 3.1 of the Agreement on Safeguards provides *in fine* that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". Chile has confirmed that the Minutes of Sessions Nos. 181, 185, 193 and 224 of the CDC constitute the "published report" within the meaning of Article 3.1 of the Agreement on Safeguards.<sup>690</sup> Argentina argues that Chile has acted inconsistently with its obligation to "publish" the report of the investigating authorities.

7.128 In this regard, we note that the Minutes of the relevant CDC sessions have not been "published" through any official medium. Rather, they were transmitted to the interested parties and placed at the disposal of "whoever wishes to consult them at the library of the Central Bank of Chile".<sup>691</sup> In order to determine whether it is sufficient under Article 3.1 of the Agreement on Safeguards to make the investigating authorities' report "available to the public" in such a manner, we first refer to the dictionary meaning of "to publish". The term can mean "to make generally known", "to make generally accessible", or "to make generally available through [a] medium".<sup>692</sup> We therefore turn to the context of Article 3.1 provided by similar publication requirements in the AD and SCM Agreements. We note that both Article 22 of the SCM Agreement ("public notice and explanation of determinations") and Article 12 of the AD Agreement ("public notice and explanation of determination") distinguish between giving "public notice" and "making otherwise available through a separate report"<sup>693</sup>, which must be "readily available to the public".<sup>694</sup> In addition, we also note that various "transparency" provisions in the covered agreements, such as Article III of the GATS, Article 63.1 of the TRIPS Agreement, and Article 2.11 of the TBT Agreement all distinguish between "to publish" and "to make publicly available". In the light of these considerations, we find that the verb "to publish" in Article 3.1 of the Agreement on Safeguards must be interpreted as meaning "to make generally available through an appropriate medium", rather than simply "making publicly available". As regards the minutes of the relevant CDC sessions, we therefore find that they have not been generally made available through an appropriate medium so as to constitute a "published" report within the meaning of Article 3.1 of the Agreement on Safeguards.

### **4. Documents examined by the Panel to assess Chile's compliance with its obligations under Article XIX of GATT 1994 and the Agreement on Safeguards**

7.129 In the previous section, we have found that the Minutes of the CDC meetings that Chile considers to represent the basis for its decision to impose the definitive safeguard measures at issue in this dispute do not constitute a "published" report within the meaning of Article 3.1. Given that the CDC did however seek to explain the bases for its imposition of the definitive safeguards measures, that these bases may be found in the publicly available Minutes referred to above, and that Argentina has not disputed that Chile may seek to motivate its decision to impose a safeguard measure on the basis of unpublished but public minutes, we will proceed to examine Argentina's substantive claims on that basis.

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<sup>689</sup> See the panel and Appellate Body reports referenced in footnote 567.

<sup>690</sup> Letter by Chile dated 10 July 2001.

<sup>691</sup> Chile's response to question 18 of the Panel.

<sup>692</sup> The New Shorter Oxford English Dictionary (L. Brown, Ed.), at 2405.

<sup>693</sup> Paragraphs 2, 3, 4, 5 and 6 of Article 22 of the SCM Agreement. Paragraphs 1.1, 2.1, 2.2, 2.3 of Article 12 of the AD Agreement.

<sup>694</sup> Footnote 53 to the SCM Agreement. Footnote 23 to the AD Agreement.

7.130 There is however an issue regarding *which* of those Minutes we may refer to in our review. Chile has designated minutes of CDC sessions Nos. 181, 185, 193 and 224 as jointly constituting the "report" referred to in Article 3.1 of the Agreement on Safeguards. We note, however, that the Minutes of Session No. 224 only concern the *extension*, and that it contains statistical data not included in the Minutes of Sessions Nos. 181, 185 and 193. According to Chile, "the information in Record No. 224 and its annexed statistical tables" are "useful in clarifying the analyses made in the investigation for the recommendation of the definitive measures in Record No. 193", because "much of the information contained in the later of these two records (Record No. 224) is updated data from the investigation concerning the measures initially recommended".<sup>695</sup>

7.131 For the purpose of our analysis of the consistency of the *definitive* safeguard measure, and the investigation preceding its recommendation by the CDC, with the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards, we shall only consider findings and reasoning by the CDC reflected in the Minutes of Sessions Nos. 181, 185 and 193, respectively recommending the initiation of the investigation, the adoption of provisional measures and the adoption of definitive safeguard measures. We consider that our duty under Article 11 of the DSU to make an objective assessment of the matter requires us to assess the consistency of the definitive safeguard and the preceding investigation with Article XIX of GATT 1994 and the Agreement on Safeguards on the basis of explanations provided by the CDC before or at the time of its recommendation to apply definitive safeguard measures. Consequently, whenever we refer below to information contained in the Minutes of Session No. 224, we will do so, at the most, to provide observations on our findings made on the basis of the Minutes of Sessions Nos. 181, 185 and 193.<sup>696</sup>

## **5. Unforeseen developments (Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards)**

7.132 Argentina claims that Chile has infringed Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards by not identifying or making any findings with respect to unforeseen developments justifying the imposition of safeguard measures. Chile points out that the reason why the CDC recommended the application of safeguard measures on products subject to the PBS was the continued existence of unusually low prices over a period that could not be considered transitory. Chile contends that the unforeseen developments correspond to this special situation of global prices.

7.133 Article XIX:1(a) reads:

"If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

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<sup>695</sup> Chile's response to question 50 of the Panel.

<sup>696</sup> We note that the Appellate Body in its report on *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("US – Cotton Yarn"), WT/DS192/AB/R, adopted 5 November 2001, para. 78, stated in the context of a determination in accordance with Article 6 of the ATC:

"In our view, a *panel* reviewing the due diligence exercised by a Member in making its determination under Article 6 of the ATC has to put itself in the place of that Member at the time it makes its determination. Consequently, a panel must not consider evidence which did not exist *at that point in time*."

7.134 We recall that the Appellate Body in *US – Lamb* stated that "unforeseen developments" is a circumstance whose existence must be demonstrated as a matter of fact for a safeguard measure to be applied consistently with Article XIX.<sup>697</sup> According to the Appellate Body, the demonstration of the existence of this circumstance must feature in the published report of the investigating authorities.<sup>698</sup> If the published report does not discuss or offers any explanation as to why certain factors mentioned in it can be regarded as "unforeseen developments", that report does not demonstrate that the safeguard measure concerned has been applied as a result of "unforeseen developments".<sup>699</sup>

7.135 According to Chile, the CDC made its findings and reasoned conclusions relating to the requirement of "unforeseen developments" in the Minutes of Session No. 193, where it states that:

" (...) [t]he increase in imports, and the potential for further substantial increases, has occurred at a time when *international prices of the products investigated have been subject to sizeable and rapid decreases*."<sup>700</sup>

7.136 We note that the CDC did not discuss or offer any explanation in its report as to why the reported "sizeable and rapid decrease in international prices" could be regarded as an unforeseen development. In fact, nothing in the CDC's report suggests that this reference was intended to relate to the issue of unforeseen developments. Consequently, we consider that the CDC did not demonstrate that the safeguard measures at issue have been applied "as a result of unforeseen developments", as required by Article XIX:1(a) of GATT 1994.

7.137 Argentina has claimed that Chile failed to set forth reasoned findings and conclusions regarding unforeseen developments in its report, as required by Article 3.1 of the Agreement on Safeguards. We recall in this respect the statement by the Appellate Body in *US – Lamb*:

"(...) we observe that Article 3.1 requires competent authorities to set forth findings and reasoned conclusions on 'all pertinent issues of fact and law' in their published report. As Article XIX:1(a) of the GATT 1994 requires that 'unforeseen developments' must be demonstrated, as a matter of fact, for a safeguard measure to be applied, the existence of 'unforeseen developments' is, in our view, a 'pertinent issue[] of fact and law', under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a 'finding' or 'reasoned conclusion' on 'unforeseen developments'."<sup>701</sup>

7.138 In light of our finding that the CDC did not discuss or offer any explanation in its report as to why the reported "sizeable and rapid decrease in international prices" could be regarded as an unforeseen development, we find that Chile has failed to set forth reasoned findings and conclusions in its report regarding unforeseen developments, as required by Article 3.1 of the Agreement on Safeguards.

7.139 According to Chile, the statement by the CDC regarding declining international prices reflects the fact that a fall in international prices to such low levels and for such a long period is unusual and unpredictable, especially with respect to products whose prices tend to undergo strong fluctuations.<sup>702</sup>

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<sup>697</sup> Appellate Body report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("US – Lamb"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 71.

<sup>698</sup> *Ibid.*, para. 72.

<sup>699</sup> *Ibid.*, para. 73.

<sup>700</sup> Emphasis added.

<sup>701</sup> Appellate Body report, *US – Lamb*, para. 76.

<sup>702</sup> Chile's response to question 20 of the Panel.

We wish to point out that, although this *ex post facto* explanation provided by Chile cannot, in any event, cure the CDC's failure to make findings and reasoned conclusions in its report, this explanation would not meet the requirement to demonstrate the existence of "unforeseen developments" either. First, Chile in its explanation and the CDC in its determination seem to refer to different events. Whereas the CDC spoke of "sizeable and rapid" decreases in international prices, Chile now argues that it was the "sustained" fall in international prices which could not have been foreseen. Second, it should be recalled that the safeguard measures do not impose any duty which was not already being applied under the Chilean PBS. The duty applied pursuant to the safeguard measures is merely a different label for the portion of the Chilean PBS duties exceeding the 31.5 per cent bound rate. The Chilean PBS has the stated objective of providing additional protection to offset declining international prices. The very fact that Chile established its PBS with such an objective constitutes, in our view, evidence that declining international prices cannot have been unforeseen. If the safeguard measures are not adding any protection to what already resulted from the Chilean PBS, in force since 1983, it is difficult to see how those safeguard measures could then have been adopted as a result of developments which could not have been foreseen at the end of the Uruguay Round.<sup>703</sup>

7.140 In conclusion, we find that Chile failed to demonstrate the existence of unforeseen developments, as required by Article XIX:1(a) of GATT 1994, and set forth findings and reasoned conclusions in this respect in its report, as required by Article 3.1 of the Agreement on Safeguards.

**6. Definition of like or directly competitive product (Articles XIX:1(a) of GATT 1994 and Articles 2.1, 4.1(a) and 4.2(c) of the Agreement on Safeguards)**

7.141 Argentina claims that Chile has infringed Article XIX:1(a) of GATT 1994 and Articles 2.1, 4.1(c) and 4.2(a) of the Agreement on Safeguards on the grounds that the CDC failed to properly identify the product that was like or directly competitive to each imported product, and thereby failed to identify the affected domestic industries. Accordingly, Argentina contends, the entire analysis of increased imports and of threat of injury is based on false premises and lack legal validity. Chile argues that the categories of products subject to the safeguard measures correspond to products subject to the PBS, which groups categories of products that are directly competitive. According to Chile, if the PBS had not taken into account each agricultural product and its respective like or directly competitive products, the application of the system would have been ineffective. Chile claims that the CDC reaffirmed this analysis, as reflected in the Minutes.

7.142 We recall that the Appellate Body in *US – Lamb* stated:

"(...) according to Article 2.1, the legal basis for imposing a safeguard measure exists *only* when imports of a specific product have prejudicial effects on domestic producers of products that are 'like or directly competitive' with that imported product. In our view, it would be a clear departure from the text of Article 2.1 if a safeguard measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of products that are *not* 'like or directly competitive products' in relation to the imported product. [...] Accordingly, the first step in determining the scope of the domestic industry is the identification of the products which are 'like or

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<sup>703</sup> Appellate Body report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea – Dairy"), WT/DS98/AB/R, adopted 12 January 2000, para. 86:

such "emergency actions" are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation.

directly competitive' with the imported product. Only when those products have been identified is it possible then to identify the 'producers' of those products."<sup>704</sup>

7.143 With respect to wheat, the CDC provided in its report only an implicit *assertion* of likeness or direct competitiveness, without offering any reasoned conclusion regarding the products which, in its view, should be considered like or directly competitive. The report of the CDC does, in the final section containing the recommendation, identify the tariff heading (1001.9000, "wheat other than durum wheat") of imported products to which the safeguard measures will apply. However, the identification of the tariff lines of the imported products to which the safeguard measures shall apply, does not say anything about whether the domestic product is like or directly competitive with the imported products.<sup>705</sup>

7.144 With respect to wheat flour, Chile has asserted that wheat and wheat flour are directly competitive products. In Chile's view, this reasoning is reflected in the CDC's report, where it reads that:

"(...) wheat flour represents an alternative way of importing wheat if direct imports prove to be more costly or are subject to a higher tariff, so it is necessary to apply a treatment similar to that applicable to wheat."<sup>706</sup>

7.145 This comment, however, relates to a possible relationship of likeness or direct competitiveness between two imported products, imported wheat and imported wheat flour, not between domestic wheat or wheat flour and the imported wheat flour.

7.146 Finally, as regards vegetable oils, Chile has confirmed that the safeguard measures on vegetable oils apply to both crude and refined oils.<sup>707</sup> The CDC, however, does not provide any reasoned conclusions or finding as regards the likeness or direct competitiveness between domestic crude and refined oils and the imported crude and refined oils included in the 25 tariff lines subject to the safeguard measures. Chile has offered the following *ex post facto* explanation:

"(...) colza-oil (rape) produced domestically is a like product to all oils to which the measure applies since: (i) they are physically and chemically very similar, (ii) they are consumed without distinction, (iii) they have the same final use, and (iv) they utilize the same distribution channels."<sup>708</sup>

7.147 Even if these assertions were to be substantiated, however, they do not provide any explanation as regards the relationship of likeness or direct competitiveness between other domestic oils, such as maize and olive oil,<sup>709</sup> and the imported oils included in the 25 tariff lines subject to the safeguard measures. In any event, we recall that even this incomplete explanation was not provided,

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<sup>704</sup> Appellate Body report, *US – Lamb*, paras. 86-87.

<sup>705</sup> We note that Chile has offered some *ex post facto* explanation for the CDC's conclusions. Chile indicates that, as far as wheat is concerned:

"(...) in view of the inherent nature of the products under investigation, domestic wheat was considered to be a like product to imported wheat since the imports correspond to the same product at the agricultural production level." (Chile's response to question 27(a) of the Panel).

As indicated earlier, such *ex post facto* explanation, even if it were sufficient to support the CDC's likeness determination, could not cure the CDC's failure to provide such analysis in its report.

<sup>706</sup> Minutes of CDC Session No. 193.

<sup>707</sup> Chile's response to question 27(b) of the Panel.

<sup>708</sup> Chile's response to question 27(b) of the Panel.

<sup>709</sup> *Ibid.*

as a reasoned conclusion, in the CDC's report, but only offered by Chile as *ex post facto* rationalization.

7.148 Furthermore, when asked by the Panel to identify the domestic industry as regards edible vegetable oils identified in reference to 25 tariff lines, Chile stated that "[t]he relevant domestic industry is the oils industry, which includes the rape-seed oil industry".<sup>710</sup> Nevertheless, Chile has clarified that the injury data in the minutes of CDC session No. 193 regarding production, employment and "marginalization" of producers concern the agricultural production of rape-seed, and not "the oils industry".<sup>711</sup> Thus, by considering injury data relating to agricultural producers of rape-seed, the CDC would appear to have included such producers in its definition of the domestic industry. The CDC, however, provided in its report no explanation of how domestic rape-seeds can be regarded as like or directly competitive with imported vegetable oils. We note in this respect that, according to the Appellate Body in *US – Lamb*, the input and end-product need to be like or directly competitive for their respective producers to be included in the definition of the domestic industry.<sup>712</sup>

7.149 We therefore find that the CDC failed to make adequate findings and reasoned conclusions with respect to the issue of likeness or direct competitiveness, and, consequently, failed to identify the domestic industry, as required by Article XIX:1(a) of GATT 1994 and Articles 2 and 4 of the Agreement on Safeguards.

**7. Increase in imports (Articles XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards)**

7.150 Argentina claims that an analysis of the content of the Minutes of the CDC sessions and the notifications reveals that Chile did not demonstrate that there were increased imports, and that Chile therefore failed to comply with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards. Chile submits that the requirement regarding an increase in imports and the impact of the PBS in this case are factors that cannot be examined separately. According to Chile, the CDC's investigation did identify increased imports in accordance with the requirements of Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards. In addition, as regards the extension of the definitive measure, Chile argues that the justification of such an extension cannot require that the competent authority find for a second time that there is an increase in imports.

7.151 The relevant section of the Minutes of Session No. 193 of the CDC, at which the CDC decided to recommend the adoption of the definitive safeguard measures, reads as follows:

"In its analysis of imports, the Commission has taken into account the fact that the normal operation of price bands has been a decisive factor in preventing a greater increase in imports, and consequently the trend in imports cannot be considered without bearing this factor in mind. Even so, there has been an increase in imports in absolute terms which threatens to cause injury to the production sectors concerned. In its analysis, the Commission has taken into account the period commencing when, for each product, the specific tariffs determined by the application of the price band, added to the general tariff, exceeded the level bound in the WTO. Without prejudice to this analysis, information prior to this period shall also be considered for comparison and assessment. In this regard, the Commission points out that:

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<sup>710</sup> Chile's response to question 27(b) of the Panel.

<sup>711</sup> Chile's response to question 38 of the Panel.

<sup>712</sup> Appellate Body report on *US - Lamb*, paras. 83-96.

- Imports of wheat (in tons) increased by 6 per cent in 1998 in comparison with the previous year. Over the first ten months of 1999, imports rose by 281 per cent compared with the same period in 1998. There was an increase in imports from 1993 to 1996, with a drop in 1997. Imports of wheat flour fluctuated, but this can be explained by their low volume. Nevertheless, the Commission notes that wheat flour represents an alternative way of importing wheat if direct imports prove to be more costly or are subject to a higher tariff, so it is necessary to apply a treatment similar to that applicable to wheat.
- [...]
- Imports of the two main edible vegetable oils increased by 23 per cent in 1998 compared with the previous year. Over the first ten months of 1999, imports fell by 24 per cent. In relation to this reduction, the Commission points out that there was an abnormal situation in 1999 concerning the behaviour of importers as a result of the tariff disputes regarding the tariff headings for oil imports. From 1993 to 1997, the level of imports was similar.

The Commission notes the significant differences between recent import prices resulting from full application of the band and prices resulting from imposition of a tariff ceiling of 31.5 per cent. This substantiates the forecasts of a greatly accelerated increase in imports that would occur (or has already occurred) unless the full duties specified in the bands are applied. The increase in imports, and the potential for further substantial increases, has occurred at a time when international prices of the products investigated have been subject to sizeable and rapid decreases."

7.152 We recall that the Appellate Body in its report on *Argentina – Safeguard Measures on Imports of Footwear* stated:

"[W]e agree with the Panel that the specific provisions of Article 4.2(a) require that 'the *rate* and *amount* of the increase in imports ... in absolute and relative terms'... must be evaluated. [...] Thus, we do not dispute the Panel's view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a).

[...] Although we agree with the Panel that the 'increased quantities' of imports cannot be just *any* increase, we do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year historical period.

[...] [T]his language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'.<sup>713</sup>

7.153 In addition, we recall that the Appellate Body in its report on *US – Lamb* stated:

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<sup>713</sup> Appellate Body report, *Argentina – Footwear (EC)*, WT/DS121/AB/R, adopted 12 January 2000, paras. 129-131.

"[W]e believe that, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation. If the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading."<sup>714</sup>

7.154 We consider that the analysis by the CDC contained in the minutes of its session No. 193 does not demonstrate that the products concerned are "being imported [...] in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause or threaten to cause serious injury," as required by Article 2.1 of the Agreement on Safeguards.

7.155 First, according to the Minutes of Session No. 193, imports of "the two main" edible vegetable oils fell 24 per cent over the first ten months of 1999. Thus, in the period immediately preceding the opening of the investigation, imports of the product concerned actually fell significantly. In addition, although the Minutes of Session No. 193 do also indicate that imports increased by 23 per cent in 1998, they only state with respect to long-term trends that "[f]rom 1993 to 1997, the level of imports was similar". We consider, therefore, that the CDC failed to identify such increase in imports of edible vegetable oils as required by Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

7.156 Second, as regards wheat flour, according to the Minutes of Session No. 193, imports "fluctuated". Such a statement does not identify a discernable upward trend in the growth of these imports. In the absence of this discernable trend, we find that the CDC did not demonstrate that there was an increase in imports of wheat flour recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".<sup>715</sup> We consider, therefore, that the CDC failed to identify such increase in imports of wheat flour as required by Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

7.157 Third, with respect to wheat, the CDC identified in the Minutes of Session No. 193 a 281 per cent increase in the first ten months of 1999. Although the Minutes of Session No. 193 do also indicate that imports increased by 6 per cent in 1998, they only state with respect to long-term trends that "[t]here was an increase in imports from 1993 to 1996, with a drop in 1997". We consider that such a conclusory statement does not meet the requirement of assessing short-term trends "in the light of the longer-term trends in the data for the whole period of investigation". For example, the import volumes for 1999, even though they represented a 281 per cent increase over the preceding year, were still smaller than the import volumes for 1995 and 1996. The CDC should have provided a reasoned analysis as regards the significance of the import volumes for 1999 in the context of the import volumes for 1995 and 1996.<sup>716</sup> Accordingly, we find that the CDC did not demonstrate that there was

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<sup>714</sup> Appellate Body on *US – Lamb*, para. 138. We are aware that the Appellate Body made this observation with respect to the investigating authorities' injury analysis, and not with regard to their examination of import trends. We consider, however, in the light of Article 2.1 of the Agreement on Safeguards, that this reasoning is equally applicable to the analysis of actual import trends.

<sup>715</sup> *Ibid.*, para. 131.

<sup>716</sup> We draw these data from the tables annexed to the Minutes of Session No. 224 of the CDC, which concerns the extension of the measures' duration. However, the Minutes of Session No. 193 contain an assessment of increased imports on the basis of unidentified data for the period 1993-1997, 1998 and the first ten months of 1999, and Chile has stated that "much of the information contained in the later of these two records (Record No. 224) is updated data from the investigation concerning the measures initially recommended"

an increase in imports of wheat recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury.<sup>717</sup> We consider, therefore, that the CDC failed to identify such increase in imports of wheat as required by Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

7.158 Moreover<sup>718</sup>, we note that table 3 annexed to the Minutes of Session No. 224 of the CDC (containing the recommendation to extend the period of application) actually shows a decrease in imports of wheat flour of 14 per cent in 1999, of 21 per cent in 1998, and of 28 per cent in 1997. In addition, table 7 annexed to the Minutes of Session No. 224 of the CDC shows a decrease of 4 per cent in total imports of vegetable oils during 1997, and increases of 4 per cent and 21 per cent in 1996 and 1998, respectively. As for wheat, the tables show a decrease of 60 per cent in 1997 and increases of 5, 11, and 4 per cent in 1995, 1996 and 1998, respectively.

7.159 Finally, as regards all three product categories subject to the safeguard measures, we find fault with the CDC's analysis on two additional grounds. First, Article 4.2(a) of the Agreement on Safeguards provides that:

"(...) the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute *and* relative terms ... ." (emphasis added)<sup>719</sup>

7.160 When conducting its investigation, the CDC does not appear to have made any analysis at all of import trends *relative* to domestic production. As a matter of fact, in the Minutes of Session No. 193, the CDC states only that "there has been an increase in imports *in absolute terms*".<sup>720</sup> In its reply to a question by the Panel, Chile has clarified that the CDC analysed the increase in imports "both in absolute terms and in relation to production, information which was available in the Technical Report prepared by the Technical Secretariat", but that it "focused its analysis of imports on their evolution in absolute terms, which is why only that information was recorded in the records of the Commission."<sup>721</sup> We note Chile's statement which said that the Technical Report is "non-binding and classified information"<sup>722</sup>, and was not part of the CDC's report. We therefore consider that Chile acted inconsistently with Article 4.2(a) of the Agreement on Safeguards by reason of the failure of the CDC to evaluate the increase in imports in relation to domestic production.

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(Chile's response to question 50 of the Panel). Thus, Chile implicitly acknowledges that the CDC had such data on actual import trends that it should have examined and explained.

<sup>717</sup> *Ibid.*, para. 131.

<sup>718</sup> We wish to emphasize that in making these observations it was the CDC's responsibility to identify a discernable upward trend in imports at the time it recommended that definitive safeguard measures be applied.

<sup>719</sup> Article 2.1 of the Agreement does not detract from this obligation on the investigative authorities by requiring that a safeguard measure may only be applied if "a product is being imported into its territory in such increased quantities, absolute *or* relative to domestic production, [...]". Article 4.2(a) provides *how* the investigating authorities must determine whether increased imports threaten to cause serious injury, whereas Article 2.1 provides that the investigative authorities may decide to apply a safeguard measure only *when* such a determination has been arrived at.

<sup>720</sup> Although to the Minutes of Session No. 224 tables regarding sown surface and domestic output have been attached, the Minutes of Session No. 193 – in which adoption of the definitive measure is recommended by the CDC – do not contain any analysis in relative terms. Argentina has argued that this increase in imports of wheat during 1999 was due to extreme drought in Chile, severely affecting domestic output that year. We note in this respect that table 13 annexed to the Minutes of Session No. 224 shows a drop of 28 per cent in crop, 19.8 per cent in output of wheat, and 10.2 per cent in the sown surface during 1999.

<sup>721</sup> Chile's response to question 35 of the Panel.

<sup>722</sup> Chile's rebuttal submission, para. 63.

7.161 Second, the CDC has stated in Minutes of Session No. 193 that "[i]n its analysis of imports, [it] has taken into account the fact that the normal operation of price bands has been a decisive factor in preventing a greater increase in imports, and consequently *the trend in imports cannot be considered without bearing this factor in mind*". Moreover, the CDC has stated that "the significant differences between recent import prices resulting from full application of the band and prices resulting from imposition of a tariff ceiling of 31.5 per cent [...] substantiates the *forecasts of a greatly accelerated increase in imports that would occur* (or has already occurred) unless the full duties specified in the bands are applied". These statements confirm that the CDC's analysis of import trends somehow accounted for the fact that greater import increases *would have* occurred in the absence of Chilean PBS duties exceeding the 31.5 per cent bound rate. Accordingly, the CDC's analysis of import trends is, at least partly<sup>723</sup>, based on *hypothetical* import increases, i.e. increases which would have occurred but for Chilean PBS duties granting additional protection by exceeding the 31.5 per cent bound rate. We consider that this analytical approach is inconsistent with Article 2.1 of the Agreement on Safeguards, which clearly requires that *actual* imports have increased. A *threat* of increased imports is not sufficient.

7.162 In conclusion, we find that that the CDC failed to demonstrate increased imports of the products subject to the safeguard measures, as required by Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

#### **8. Threat of serious injury and evaluation of all relevant factors (Article XIX:1(a) of GATT 1994 and Articles 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards)**

7.163 Argentina claims that the CDC did not establish the existence of a threat of serious injury in the terms laid down in Article XIX:1(a) of the GATT 1994 and Article 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards. Argentina also contends that the CDC did not evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry, as required by Article 4.2(a) of the Agreement on Safeguards. Argentina maintains that the determination of threat of serious injury by the CDC is inconsistent because of two instances of non-compliance: (i) contrary to the requirements of Article 4.2 of the Agreement on Safeguards, the CDC did not evaluate all the factors related to the situation of the industry; and (ii) the findings and conclusions of the CDC regarding the factors investigated were not substantiated by evidence.

7.164 Chile submits that the CDC followed an analytical forward-looking approach based on the facts when determining the threat of serious injury. In this regard, Chile refers to the analysis of "threat of injury" by the Appellate Body in *US – Lamb*, where it was said that the occurrence of future events can never be definitively proven by facts. Chile considers that, in accordance with this statement, a threat of serious injury must always be based on a projection, which must be consistent with the data on which it is based. Chile also submits that the CDC complied with the requirement to evaluate all relevant factors laid down in Article 4.2(a) of the Agreement on Safeguards. As indicated in that provision, all "relevant" factors must be analysed. According to Chile, that relevance is fundamental when considering factors affecting injury or threat of injury and it must be considered on a case-by-case, product-by-product basis. Chile maintains that the CDC therefore considered it highly relevant to include the impact of the PBS on trade flows in the products investigated that were subject to the PBS.

7.165 Chile has explained that the CDC's relevant findings and reasoned conclusions are contained in the following section of the Minutes of Session No. 193:

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<sup>723</sup> The CDC states in the Minutes of Session No. 193 that "*even so*, there has been an increase in imports".

"The Commission notes the significant differences between recent import prices resulting from full application of the band and prices resulting from imposition of a tariff ceiling of 31.5 per cent. *This substantiates the forecasts of a greatly accelerated increase in imports that would occur (or has already occurred) unless the full duties specified in the bands are applied.* The increase in imports, and the potential for further substantial increases, has occurred at a time when international prices of the products investigated have been subject to sizeable and rapid decreases.

The Commission has also taken into account that the c.i.f. prices of Chilean imports are closely linked to international prices (the behaviour of commodities) and domestic prices similarly shadow trends in import prices. Predicted trends in international prices for these products are also negative; i.e., prices should remain at their present levels or fall even more.

The situation described has left the Commission convinced of the existence of an imminent threat of injury *if only the tariff ceiling of 31.5 per cent is applied*, which can be summarized as follows:

- (i) In the case of wheat, a decrease of 34 per cent in the area under cultivation is expected (from 370 thousand hectares to 244 thousand hectares); a decrease of 28 per cent in production (less than the reduction in the area cultivated as crop yields continue to improve); 10 per cent fall in prices; a decrease of 35 per cent in direct employment; and a drop of 20 to 90 per cent in net profit margins depending on the level of production. This means that around one third of approximately 90,000 producers will cease this activity. As is the case for sugar beet and rape, the capacity of utilisation indicator has not been estimated because it is not relevant to agricultural crops;
- (ii) for sugar (sugar beet), the aforementioned indicators used to assess injury are even more significant, showing a reduction of around 80 per cent in production, area under cultivation and employment, and a 28 per cent decrease in prices, meaning that 90 per cent of producers will cease this activity. Very high losses are expected in the sugar industry, with a 28 per cent reduction in the value of output and related losses amounting to US\$10 million;
- (iii) in the case of oils (rape), indicators show a drop of 54 per cent in production and a decrease of around 60 per cent in employment (direct and indirect), marginalizing over 63 per cent of producers. Losses in the oil industry are estimated to include an 8 per cent fall in the value of output, a US\$3.2 million reduction in production. It should also be noted that a decrease in rape cultivation will have an impact on wheat yields because rape is sold in rotation with wheat (30,000 hectares of rape allow the rotation of around 100,000 hectares of wheat).<sup>724</sup>

7.166 Article 4.2(a) of the Agreement on Safeguards reads:

"In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in

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<sup>724</sup> Emphasis added.

particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment."

7.167 We recall that the Appellate Body in *US – Lamb* stated that,

"(...) an 'objective assessment' of a claim under Article 4.2(a) of the Agreement on Safeguards has, in principle, two elements. First, a panel must review whether competent authorities have evaluated all relevant factors, and, second, a panel must review whether the authorities have provided a reasoned and adequate explanation of how the facts support their determination. [...] Thus, the panel's objective assessment involves a formal aspect and a substantive aspect. The formal aspect is whether the competent authorities have evaluated 'all relevant factors'. The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination."<sup>725</sup>

7.168 As regards the *formal* aspect, the Appellate Body stated in *Argentina – Footwear* that:

"Article 4.2(a) of the Agreement on Safeguards requires a demonstration that the competent authorities evaluated, *at a minimum*, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned."<sup>726</sup>

7.169 Chile has conceded that the CDC did not evaluate certain relevant factors, such as changes in the level of sales and capacity utilization with respect to wheat, and productivity and employment with respect to vegetable oils.<sup>727</sup> Chile has explained that it did not evaluate all the relevant factors explicitly listed in Article 4.2(a), including productivity and employment in the oils industry, because for those factors "information was unavailable from public sources and could not be found by consulting other sources either".<sup>728</sup> At the same time, however, Chile has indicated that the questionnaires which the CDC had sent to the interested parties did not include "the more specific questions that are necessary in other cases, since the data contained in the application covered a large part of the background information from the industry and the data gathered from other sources was considered sufficient".<sup>729</sup> We find it difficult to accept lack of information as a justification for failure to evaluate all relevant factors, if the investigating authorities were apparently satisfied that the available information was sufficient and no further investigative steps had to be taken. Accordingly, by failing to evaluate each of the factors listed in Article 4.2(a), we consider that Chile has acted inconsistently with its obligations under Article 4.2(a).

7.170 We now proceed to examine whether Chile has complied with the substantive requirements of the injury analysis. We recall in this respect that, pursuant to Article 4.1(b), a threat of serious injury shall be understood to mean serious injury that is clearly imminent, and that a determination of the

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<sup>725</sup> Appellate Body report on *US - Lamb*, para. 103. Emphasis added.

<sup>726</sup> Appellate Body report on *Argentina – Footwear (EC)*, paras. 135-136. Emphasis added.

<sup>727</sup> Chile's response to question 21(a) of the Panel. In addition, Chile has informed the Panel that the injury data in the minutes of CDC session No. 193 regarding production, employment and "marginalization" of producers concern the agricultural production of rape-seed, and not "the oils industry" (Chile's response to question 38 of the Panel). As indicated above, unless rape-seeds are shown to be like or directly competitive with oils, rape-seed growers should not be included in the domestic industry. Absent this demonstration, injury data relating to rape-seed growers would be irrelevant.

<sup>728</sup> Chile's response to question 21 of the Panel.

<sup>729</sup> Chile's response to question 17(c) of the Panel.

existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility. We also recall that the Appellate Body in *US – Lamb* has stated:

"[I] making a 'threat' determination, the competent authorities must find that serious injury is 'clearly imminent'. As we have already concluded, this requires a high degree of likelihood that the anticipated serious injury will materialize in the very near future. Accordingly, we agree with the Panel that a threat determination is 'future-oriented'. However, Article 4.1(b) requires that a 'threat' determination be based on 'facts' and not on 'conjecture'. As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts. There is, therefore, a tension between a future-oriented 'threat' analysis, which, ultimately, calls for a degree of 'conjecture' about the likelihood of a future event, and the need for a fact-based determination. Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future, namely that serious injury is 'clearly imminent'. Thus, a fact-based evaluation, under Article 4.2(a) of the *Agreement on Safeguards*, must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future."<sup>730</sup>

[...] [W]hatever methodology is chosen, we believe that data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury. The likely state of the domestic industry in the very near future can best be gauged from data from the most recent past. Thus, we agree with the Panel that, in principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry.

However, we believe that, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation. If the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading. [...]"<sup>731</sup>

7.171 The CDC did not provide in the Minutes of Session No. 193 any indication regarding either the data which it had based its injury projections on, or the relevant time-period during which such data would have been examined. The data mentioned in the CDC's report refer to hypothetical growth rates taken with respect to projected values. They do not reveal what the most recent historical values were. Consequently, the CDC does not appear to have based its injury determination on data relating to the most recent past, and did not assess such data in the context of the data for the entire investigative period. We therefore find that, also in this respect, Chile has acted inconsistently with its obligations under Article 4.2(a).

7.172 Moreover, we note that, according to Chile, a threat of serious injury exists because imports would increase unless the full duties specified in the Chilean PBS are applied. We consider this reasoning insufficient to support the CDC's conclusion. As we have stated earlier, at the time of the adoption of the safeguard measures, the Chilean PBS was already operating without restriction, and

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<sup>730</sup> [original footnote] We observe that the projections made must relate to the overall state of the domestic industry, and not simply to certain relevant factors.

<sup>731</sup> Appellate Body report on *US – Lamb*, paras. 136-138.

PBS duties were being imposed in excess of the 31.5 per cent bound rate. Chile argues that there would be a threat of serious injury if the Chilean PBS were not to be applied without restriction, and that, therefore, safeguard measures equal to the portion of the PBS duties exceeding the 31.5 per cent bound rate should be adopted. Put another way, Chile based its determination of a threat of serious injury on a counterfactual analysis: if they were to restrict the operation of the Chilean PBS to the 31.5 per cent bound rate, injury may occur. Thus, in their threat of injury analysis, for "projecting" the future condition of the domestic industry, the investigative authorities did not rely on an extrapolation of existing trends, but on the results from a counterfactual exercise, simulating what that condition would be if the safeguard measure were to be removed.<sup>732</sup> Such counterfactual analysis cannot justify the imposition of definitive safeguard measures.

7.173 In reply to the Panel's questions, Chile has argued that "the determination of whether or not serious injury would occur if a safeguard measure were withdrawn is possible", because the Agreement on Safeguards "envisages that such an analysis will be made by the competent authorities in that it assumes that a safeguard measure will be *maintained* only for the time necessary to prevent or remedy serious injury."<sup>733</sup> We do not disagree with Chile that this type of analysis is indeed envisaged by Article 7.2 of the Agreement on Safeguards for the *extension* of the period of application of the safeguard measure. Obviously, however, it cannot apply to the *adoption* of the safeguard measure, where a projection should be made on the basis that a new safeguard measure would not be adopted, and not on the basis that an existing safeguard measure (or its equivalent) were to be withdrawn.

7.174 In conclusion, we find that the CDC did not demonstrate the existence of a threat of serious injury, as required by Article XIX:1(a) of the GATT 1994 and Article 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards.

## **9. Causal link (Articles 2.1 and 4.2(b) of the Agreement on Safeguards)**

7.175 Argentina argues that Chile did not comply with its obligations under Articles 4.2(b) and 2.1 of the Agreement on Safeguards inasmuch as it did not establish any causal link between the alleged increase in imports and the alleged threat of injury to the domestic industry. Argentina also considers that Chile failed to comply with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(b) of the Agreement on Safeguards inasmuch as it did not evaluate factors other than the increase in imports which at the same time were causing injury to the domestic industry. According to Chile, the CDC established the causal link between increased imports and threat of serious injury when it stated that "the c.i.f. prices of Chilean imports are closely linked to international prices (the behaviour of commodities) and domestic prices similarly shadow trends in import prices."<sup>734</sup>

7.176 We have found above that the CDC failed to appropriately establish the existence of both increased imports and threat of serious injury. No causal link can exist if the existence of either of the two substantive requirements has not been established.<sup>735</sup>

7.177 In any event, we recall that, pursuant to Articles 2 and 4.2 of the Agreement on Safeguards, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof must be demonstrated, and that, when factors other than increased imports are

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<sup>732</sup> We note that the CDC's threat of injury analysis is also flawed since its report does not provide historical data on the "relevant factors" (other than data on import growth), and thus it is impossible to assess the significance of the projected drops against the background of the data for the most recent past. This approach is inconsistent with Article 4.2(a), as interpreted by the Appellate Body in its report on *US – Lamb*, para. 138.

<sup>733</sup> Chile's response to question 7(b) of the Panel. Emphasis added.

<sup>734</sup> Minutes of CDC session No. 193.

<sup>735</sup> Appellate Body report on *Argentina – Footwear (EC)*, para. 145.

causing injury to the domestic industry, such injury shall not be attributed to increased imports. In this case, Chile's analysis of causality was strictly limited to its statement that international prices, import prices and domestic prices are linked. Further, the CDC's report at no point reflects any consideration as to the possible effects on the domestic industries concerned of factors other than increased imports. We consider that such a cursory one-sentence analysis is insufficient to demonstrate the existence of a causal link between increased imports and threat of serious injury. Moreover, injury must be caused or threatened by increased imports, not decreasing international prices.<sup>736</sup> Declining international prices may be a factor in a causal analysis but mere consideration of such declining international prices cannot be substituted for such a causal analysis, which, of course, was not done here. We therefore find that the CDC failed to properly establish a causal link, as required by Articles 2.1 and 4.2 of the Agreement on Safeguards.

7.178 Finally, we recall the Appellate Body's statement in *US – Wheat Gluten*:

"Article 4.2(b) presupposes [...] as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was *actually* caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the Agreement on Safeguards."<sup>737</sup>

7.179 We recall that Argentina has argued that the increase in imports of wheat during 1999 was due to extreme drought in Chile, severely affecting domestic output that year. We note that this issue was raised, at least in passing, by Argentine exporters,<sup>738</sup> and a Report of a Chilean government agency submitted by Argentina confirms that Chilean wheat production was adversely affected by drought in the 1998/99 season.<sup>739</sup> The minutes of session No 193 – in which adoption of the definitive measure is recommended by the CDC – however, do not contain *any* analysis as regards injury caused by other factors, such as drought in the case of wheat.<sup>740</sup> Thus, the CDC did not distinguish the injurious effects caused to the domestic industry by increased imports from the injurious effects caused by other factors. We therefore consider that, also in this respect, the CDC did not perform an adequate causation analysis, as required by Article 4.2(b) of the Agreement on Safeguards.

7.180 In conclusion, we find that the CDC did not demonstrate the existence of a causal link, as required by Articles 2.1 and 4.2(b) of the Agreement on Safeguards.

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<sup>736</sup> See the Panel report on *Canada – Countervailing Duties on Grain Corn from the United States*, BISD 39/411, at 433-435 (paras. 5.2.6 and 5.2.9-5.2.10).

<sup>737</sup> Appellate Body report on *US – Wheat Gluten*, para. 69. See also Appellate Body report on *US – Lamb*, paras. 167-168.

<sup>738</sup> Annex ARG-39.

<sup>739</sup> Oficina de Estudios y Políticas Agrarias, Ministerio de Agricultura, *Temporada Agrícola*, No. 13, primer semestre de 1999 (Exhibit ARG-30). Although we do not know with certainty that this publication was in the record of the investigation, Chile indicated to the Panel that it used the publication "*Temporada Agrícola (semestral)*" as a basis for its investigation (Chile's reply to question 17(b) by te Panel).

<sup>740</sup> (new footnote) We note, on the other hand, that table 13 annexed to the minutes of session No 224 shows a drop of 28% in crop, 19.8% in output of wheat, and 10.2% in the sown surface during 1999.

**10. Measures necessary to remedy injury and facilitate adjustment (Article XIX:1(a) of GATT 1994 and Articles 3.1 and 5.1 of the Agreement on Safeguards)**

7.181 Argentina submits that Chile's safeguard measure violates Article XIX:1(a) of GATT 1994 and Article 5.1 of the Agreement on Safeguards because it was not limited to the extent necessary to remedy injury and to facilitate adjustment. Argentina contends that the CDC did not consider whether or not the measure was "necessary" to prevent injury and facilitate readjustment and that no substantive analysis was undertaken. Argentina argues that Chile based its safeguard measure on the difference between the bound tariff and the combination of the PBS duty and applied rate, and this is in no way related to a threat of injury from imports. Chile submits that, in accordance with its obligations under the Agreement on Safeguards, it instituted a measure that protected its domestic producers from serious injury, but which provided no further amount of protection. Chile explains that, having found the requisite conditions justifying a safeguard action, the action recommended by the CDC and taken by the Government involved the least possible trade disruption consistent with preventing serious injury: an increase in duties to enable the PBS to apply without regard to the bound level of duties.

7.182 Pursuant to Article 5.1 of the Agreement on Safeguards, "[a] Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". According to the Appellate Body in *Korea – Dairy*:

"(...) the wording of this provision leaves no room for doubt that it imposes an *obligation* on a Member applying a safeguard measure to *ensure* that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment."<sup>741</sup> (emphasis added)

7.183 Thus, according to this report, in order to comply with the requirement of Article 5.1, the Member imposing the safeguard measure must *ensure* that the measure is only applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. We consider that a Member can only *ensure* that the safeguard measure is calibrated if there is, at a minimum, a *rational connection* between the measure and the objective of preventing or remedying serious injury and facilitating adjustment. In the absence of such a rational connection, a Member cannot possibly *ensure* that the measure is applied only to the extent necessary.

7.184 We recall that the safeguard measures at issue consist of a duty in the amount of the difference between, on the one hand, the sum of the 8 per cent applied rate and the *ad valorem* equivalent of the PBS duty, and, on the other hand, the 31.5 per cent bound rate. According to Chile, such a duty is "most appropriate" to remedy injury and facilitate adjustment.<sup>742</sup> This argument appears to be based on the premise that the lower PBS threshold (to which level import prices are raised through the safeguard measure) can be regarded as indicative of a state below which the domestic industry will experience (a threat of) serious injury. In our view, this premise is unfounded because the lower PBS threshold is calculated on the basis of the international prices observed in the recent past, and therefore does not reflect in any way the condition of the domestic industry. In our view, therefore, it is clear that the lower PBS threshold has no rational connection to a state of the domestic industry below which (a threat of) serious injury will be experienced. We find accordingly that Chile did not ensure that the safeguards measures are applied to the extent necessary to prevent or remedy serious injury and facilitate adjustment, as required by Article XIX:1(a) of GATT 1994 and Article 5.1 of the Agreement on Safeguards.

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<sup>741</sup> Appellate Body report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, para. 96.

<sup>742</sup> Chile's reply to Panel question 29.

7.185 Moreover, we note the following statement by the Appellate Body regarding the obligation of Article 5.1 in its report on *US – Line Pipe*.<sup>743</sup>

"For all these reasons, we conclude that the phrase 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment' in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports."<sup>744</sup>

Having reached this conclusion, we must consider now whether the Panel erred in concluding that Korea did not make a *prima facie* case that the United States had not fulfilled this substantive obligation in Article 5.1, first sentence. On this, we conclude that, by establishing that the United States violated Article 4.2(b) of the Agreement on Safeguards, Korea has made a *prima facie* case that the application of the line pipe measure was not limited to the extent permissible under Article 5.1. In the absence of a rebuttal by the United States of this *prima facie* case by Korea, we find that the United States applied the line pipe measure beyond the "extent necessary to prevent or remedy serious injury and to facilitate adjustment".<sup>745</sup>

[...]

We note that, had the Panel found differently, the United States might have attempted to rebut the presumption raised by Korea in successfully establishing a violation of Article 4.2(b) of the Agreement on Safeguards, that the United States had also violated Article 5.1. [...] The United States did not rebut Korea's *prima facie* case by showing that this was so. We offer this observation only to emphasize that we are not stating that a violation of the last sentence of Article 4.2(b) implies an *automatic* violation of the first sentence of Article 5.1 of the Agreement on Safeguards."<sup>746</sup>

7.186 The Appellate Body report on *US – Line Pipe* cited above supports our finding that Chile's measures are inconsistent with Article 5.1, first sentence. Chile failed to either assess the serious injury arising from 'other factors' in the context of its Article 4.2(b) causation analysis<sup>747</sup> or otherwise establish that the Chilean measures address the serious injury arising from imports alone in the context of Article 5.1.

7.187 We note that Argentina has also based its claim on Article 3.1, which requires the investigating authorities, *inter alia*, to set forth their findings and reasoned conclusions on all pertinent issues of fact and law, thus raising the question of whether Chile was under an obligation to justify, in its report, the application of the measures.<sup>748</sup>

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<sup>743</sup> Appellate Body report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*US – Line Pipe*"), WT/DS202/AB/R, adopted 8 March 2002.

<sup>744</sup> *Ibid.*, para. 260.

<sup>745</sup> *Ibid.*, para. 261.

<sup>746</sup> *Ibid.*, para. 262.

<sup>747</sup> See para. 7.179 above.

<sup>748</sup> We recall in this respect that, according to the Appellate Body, no formal requirement for an explanation in the decision of the investigating authorities flows from the provision of Article 5.1 for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. (See Appellate Body report, *Korea – Dairy*, paras. 98-99, and Appellate Body report, *US – Line Pipe*, paras. 230-235) Since the safeguard measures at issue are not in the form of a quantitative restriction reducing the quantity of imports below the average of imports in the last three representative years, Chile was under no obligation pursuant to Article 5.1 to give a justification for those measures at the time of the CDC's decision.

7.188 As we have already found that Chile has acted inconsistently with Article 5.1 of the Agreement on Safeguards, we do not find it necessary for the settlement of this dispute to address Argentina's claim regarding the justification of the application of the measure to the extent that it has been based on Article 3.1. We accordingly decide to exercise judicial economy to that extent.

#### **11. Appropriate investigation (Articles 3.1 and 3.2 of the Agreement on Safeguards)**

7.189 Argentina claims that Chile breached its obligation under Articles 3.1 and 3.2 to conduct a "appropriate investigation" because Argentina did not have a full opportunity to participate in the investigation. Specifically, Argentina asserts that it did not have access to any public summary of the confidential information on which the Chilean authorities may have based their determination. Chile responds that Argentina participated in two hearings before the CDC and had access to the file containing submissions of other interested parties. It further contends that there were no non-confidential summaries of confidential information because there was no confidential information to discuss; the information regarding these products was completely public.

7.190 We note that, pursuant to Article 3.2 of the Agreement on Safeguards, parties submitting confidential information may be requested to furnish non-confidential summaries or, if such information cannot be summarized, the reasons why such summaries cannot be provided. Argentina has not however established in this case that the record contained any confidential information<sup>749</sup>; thus, we do not see the factual basis for a claim based on the absence of non-confidential summaries. We therefore conclude that Argentina has failed to establish that Chile has acted inconsistently with Articles 3.1 and 3.2 of the Agreement on Safeguards by reason of an alleged failure to provide Argentina with access to non-confidential summaries of confidential information.

7.191 Argentina further contends that the failure of the minutes of the relevant sessions of the CDC to take into account or analyse information provided by the Argentine exporters in respect to the evaluation of imports and the condition of the domestic industry is evidence in support of its claim that Chile failed to conduct an appropriate investigation.<sup>750</sup> In this Report, we have already found, *inter alia*, that Chile acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards in respect of its consideration of the increased imports requirement and with Article 4.2(a) of the Agreement by failing to consider all relevant factors having a bearing on the state of the industry. In these circumstances, we do not consider it necessary to examine Argentina's further claim under Article 3.1 that Chile failed take into account information provided by Argentine exporters on these issues. Accordingly, we exercise judicial economy with respect to this claim.

#### **12. Findings and reasoned conclusions (Article 3.1 of the Agreement on Safeguards)**

7.192 Argentina submits that the national investigating authorities must explain in their report how they arrived at their conclusions, based on the information, and that the findings of the competent authorities must be contained in the decision itself. According to Argentina, the CDC has not done so, and has therefore acted in a manner inconsistent with Article 3.1 of the Agreement on Safeguards.

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<sup>749</sup> We recall in this respect that, for each stage of the investigation, the CDC receives a "technical report" from its Secretariat. Chile has explained that this technical report is an internal working document which is not binding *vis-à-vis* the decisions taken by the CDC. The technical report is restricted and not part of the public record because it includes the confidential information contributed by the interested parties. According to Chile, in the case at issue, the technical report did not contain any confidential information. See Chile's second submission, paras. 63-65.

<sup>750</sup> Argentina second submission, para. 109.

7.193 Above, we have already found that the CDC failed to set forth findings and reasoned conclusions in its report regarding unforeseen developments and the application of the measures.<sup>751</sup> In addition, we have also found that Chile has not demonstrated that the CDC complied with the substantive requirements of Articles 2 and 4 of the Agreement on Safeguards. In the light of these findings, we do not consider it necessary to make any additional findings under Article 3.1 of the Agreement on Safeguards, and, accordingly, will exercise judicial economy in this respect.

**13. Provisional measures (Article XIX:2 of GATT 1994 and Article 6 of the Agreement on Safeguards)**

7.194 Argentina claims that the CDC did not comply with Article XIX:2 of GATT 1994 and Article 6 of the Agreement on Safeguards, which lay down the requirements for the application of provisional measures. Chile submits that the Minutes of Session No. 185 set out the critical circumstances and assessments required in order to determine the need for the recommended provisional measures, as required by Article XIX:2 of GATT 1994 and Article 6 of the Agreement on Safeguards.

7.195 We have stated above that the provisional safeguard measures are within our jurisdiction. Nonetheless, considering our findings above regarding the inconsistency of the CDC's investigation and the resulting safeguard measures with the requirements of Article XIX of GATT 1994 and Articles 2, 3, 4 and 5 of the Agreement on Safeguards, we do not consider it necessary to examine Argentina's claim under Article 6, and, accordingly, decide to exercise judicial economy in this respect.<sup>752</sup>

**14. Notification and consultation (Article XIX:2 of GATT 1994 and Article 12 of the Agreement on Safeguards)**

7.196 Argentina claims that Chile violated Article XIX:2 of GATT 1994 and Article 12.1(a) of the Agreement on Safeguards by failing to comply with the notification requirement laid down in Article 12.1(a) and 12.2 and by not holding prior consultations with Members having a substantial interest as exporters of the product concerned, as required by Article 12.3 and 12.4. Chile responds that it did act in conformity with the requirements of each of those provisions.

7.197 Considering our findings above regarding the inconsistency of the CDC's investigation and the resulting safeguard measures with the requirements of Article XIX of GATT 1994 and Articles 2, 3, 4 and 5 of the Agreement on Safeguards, we do not consider it necessary to examine Argentina's claim under Article 12, and, accordingly, decide to exercise judicial economy in this respect.

**15. Extension of the definitive safeguard measures (Article 7 of the Agreement on Safeguards)**

7.198 Argentina has requested the Panel to make findings regarding the consistency of the extension of the definitive safeguard measures with the requirements of the Agreement on Safeguards. We recall that we have found above that the CDC's investigation and the resulting definitive safeguard measures are inconsistent with the requirements of Article XIX of GATT 1994 and Articles 2, 3, 4 and 5 of the Agreement on Safeguards. If the definitive safeguard measures are inconsistent with Chile's obligations under the Agreement on Safeguards, such inconsistency cannot of course be "cured" by a

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<sup>751</sup> We recall that Argentina had explicitly reiterated its Article 3.1 claim with respect to those aspects of the CDC's report.

<sup>752</sup> We note that the panel in *Argentina – Footwear (EC)*, in light of its findings of the inconsistency of the definitive safeguard measure with Articles 2 and 4 SA, did not consider it necessary to make a finding on a claim raised under Article 6 with respect to the provisional safeguard measure (panel report, para. 8.292).

decision to extend their duration. On the contrary, the decision to extend their duration must, by definition, be tainted by inconsistency as well. We recall, however, that Article 7 of the Agreement on Safeguards, which sets out the conditions for an extension, is not within our Terms of Reference. We will therefore refrain from making any finding regarding the consistency of the decision to extend the safeguard measures' duration with Article 7 of the Agreement on Safeguards.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

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

- (a) the Chilean PBS is inconsistent with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of GATT 1994;
- (b) as regards the Chilean safeguard measures on wheat, wheat flour and edible vegetable oils:
  - (i) Chile has acted inconsistently with Article 3.1 of the Agreement on Safeguards by not making available the relevant minutes of the sessions of the CDC through an appropriate medium so as to constitute a "published" report;
  - (ii) Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 because the CDC failed to demonstrate the existence of unforeseen developments, and Article 3.1 of the Agreement on Safeguards because the CDC's report did not set out findings and reasoned conclusions in this respect in its report;
  - (iii) Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2 and 4 of the Agreement on Safeguards because the CDC failed to demonstrate the likeness or direct competitiveness of the products produced by the domestic industry, and, consequently, failed to identify the domestic industry;
  - (iv) Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards because the CDC failed to demonstrate the increase in imports of the products subject to the safeguard measures required by those provisions;
  - (v) Chile has acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards because the CDC did not demonstrate the existence of a threat of serious injury;
  - (vi) Chile has acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement on Safeguards because the CDC did not demonstrate a causal link;
  - (vii) Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 and Article 5.1 of the Agreement on Safeguards because the CDC did not ensure that the measures were limited to the extent necessary to prevent or remedy injury and facilitate adjustment;
  - (viii) Argentina failed to establish that Chile has acted inconsistently with the requirement of Articles 3.1 and 3.2 of the Agreement on Safeguards to conduct an "appropriate investigation" because Argentina allegedly did not have a full opportunity to participate in the investigation and did not have

access to any public summary of the confidential information on which the Chilean authorities may have based their determination.

8.2 Under Article 3.8 of the DSU, in cases where there is infringement of the 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. Accordingly, we conclude that to the extent Chile has acted inconsistently with the provisions of the GATT 1994, the Agreement on Agriculture and the Agreement on Safeguards, it has nullified or impaired benefits accruing to Argentina under those Agreements.

8.3 We recommend that the Dispute Settlement Body request Chile to bring its PBS into conformity with its obligations under the Agreement on Agriculture and the GATT of 1994. As explained above<sup>753</sup>, we do not make any recommendation with respect to the safeguard measures challenged by Argentina in these proceedings.

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<sup>753</sup> See our comments at paras. 7.112-7.113 and para. 7.124.