WORLD TRADE ORGANIZATION

WT/DS207/AB/RW
7 May 2007

(07-1345)

Original: English

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY ARGENTINA

AB-2007-2

Report of the Appellate Body

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045
Chile – Price Band System	Award of the Arbitrator, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS207/13, 17 March 2003, DSR 2003:III, 1237
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, modified by Appellate Body Report, WT/DS207AB/R, DSR 2002:VIII, 3127
Chile – Price Band System (Article 21.5 – Argentina)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/RW and Corr.1, circulated to WTO Members 8 December 2006
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS302/AB/R
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
India – Quantitative Restrictions	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Japan – Apples	Appellate Body Report, *Japan - Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391

Short Title	Full Case Title and Citation
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Countervailing Measures on Certain EC Products	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, modified by Appellate Body Report, WT/DS212/AB/R, DSR 2003:I, 73
US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005
US – FSC (Article 21.5 – EC II)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, adopted 14 March 2006
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, circulated to WTO Members 30 November 2006
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717

Short Title	Full Case Title and Citation
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, modified by Appellate Body Report, WT/DS322/AB/R

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Definition
applied tariff	a most-favoured-nation tariff of 6 per cent *ad valorem*
c.i.f.	cost, insurance and freight
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
f.o.b.	free on board
GATT 1994	*General Agreement on Tariffs and Trade 1994*
measure at issue	Chile's amended price band system
original panel	panel in the *Chile – Price Band System* proceedings
original panel report	Panel Report, *Chile – Price Band System*
Panel	Panel in these *Chile – Price Band System (Article 21.5 – Argentina)* proceedings
Panel Report	Panel Report, *Chile – Price Band System (Article 21.5 – Argentina)*
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

Recourse to Article 21.5 of the DSU by Argentina

Chile, *Appellant/Appellee*
Argentina, *Other Appellant/Appellee*

Australia, *Third Participant*
Brazil, *Third Participant*
Canada, *Third Participant*
China, *Third Participant*
Colombia, *Third Participant*
European Communities, *Third Participant*
Peru, *Third Participant*
Thailand, *Third Participant*
United States, *Third Participant*

AB-2007-2

Present:

Baptista, Presiding Member
Abi-Saab, Member
Sacerdoti, Member

I. Introduction

1. Chile and Argentina each appeals certain issues of law and legal interpretations developed in the Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina* (the "Panel Report").[1] The Panel was established to consider Argentina's complaint regarding the consistency with the *Agreement on Agriculture*, the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") of the measure taken by Chile to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in the original proceedings in *Chile – Price Band System*.[2]

[1]WT/DS207/RW and Corr.1, 8 December 2006.

[2]The recommendations and rulings of the DSB resulted from the adoption on 23 October 2002, by the DSB, of the Appellate Body Report, WT/DS207/AB/R, and the Panel Report, WT/DS207/R, in *Chile – Price Band System*. In this Report, we refer to the panel in these Article 21.5 proceedings as the "Panel". We refer to the panel that considered the original complaint brought by Argentina as the "original panel" and to its report as the "original panel report".

2. The original proceedings concerned Chile's price band system for certain agricultural products.[3] The original panel found that Chile's price band system was a border measure similar to a variable import levy and to a minimum import price, other than ordinary customs duties, within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*.[4] Therefore, the original panel concluded that, because the price band system was a measure "of the kind which ha[s] been required to be converted into ordinary customs duties" under Article 4.2 of the *Agreement on Agriculture*, by maintaining such a measure, Chile acted inconsistently with that provision.[5] The original panel also concluded that, because the duties resulting from the price band system were not recorded in the "other duties and charges" column of Chile's Schedule of Concessions, but were levied nonetheless, those duties were inconsistent with the second sentence of Article II:1(b) of the GATT 1994.[6]

3. The Appellate Body upheld the original panel's finding that Chile's price band system was a border measure similar to a variable import levy and to a minimum import price and was, therefore, inconsistent with Article 4.2 of the *Agreement on Agriculture*.[7] However, the Appellate Body disagreed with the original panel's definition of "ordinary customs duties" and, therefore, reversed the original panel's finding that the term "ordinary customs duty" within the meaning of Article 4.2 of the *Agreement on Agriculture* was to be understood as "referring to a customs duty which is not applied on the basis of factors of an exogenous nature".[8] In addition, the Appellate Body reversed the original panel's finding that the duties resulting from the original price band system were inconsistent with the second sentence of Article II:1(b) of the GATT 1994 on the grounds that this claim was not part of the matter before the original panel, and, by making this finding, the original panel had acted inconsistently with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[9]

4. On 23 October 2002, the DSB adopted the original panel and Appellate Body reports. On 6 December 2002, Chile requested that a reasonable period of time for the implementation of the

[3]The original panel also found that certain safeguard measures on products subject to the price band system were inconsistent with Article XIX:1(a) of the GATT 1994 and the *Agreement on Safeguards*. These safeguard measures were withdrawn during the course of the original panel proceedings. (Original Panel Report, paras. 2.15, 7.109-7.198, and 8.1(b)) The original panel's findings regarding the safeguard measures were not appealed.

[4]Original Panel Report, paras. 7.25, 7.47, and 7.65.

[5]*Ibid*., paras. 7.102 and 8.1.

[6]*Ibid*., paras. 7.107, 7.108, and 8.1.

[7]Appellate Body Report, *Chile – Price Band System*, paras. 262, 280, and 288(c)(i).

[8]*Ibid*., paras. 278 and 288(c)(ii); Original Panel Report, paras. 7.52 and 7.60.

[9]Appellate Body Report, *Chile – Price Band System*, paras. 173, 174, 177, and 288(a); Original Panel Report, para. 7.108.

recommendations and rulings of the DSB be determined through binding arbitration pursuant to Article 21.3(c) of the DSU.[10] In an award issued on 17 March 2003, the arbitrator determined that the reasonable period of time for Chile to implement the recommendations and rulings of the DSB would be 14 months, ending on 23 December 2003.[11] On 27 October 2003, Chile notified the DSB that it had made amendments to its price band system, which would enter into force on 16 December 2003.[12] However, Argentina considered that Chile's amended measure failed to comply with the recommendations and rulings of the DSB in the original proceedings.[13] On 29 December 2005, Argentina requested that the matter of compliance be referred to the original panel pursuant to Article 21.5 of the DSU.[14] On 20 January 2006, the DSB referred the matter to the original panel.[15]

5. The measure that Argentina challenged in these Article 21.5 proceedings is Chile's amended price band system, as applied to imports of wheat and wheat flour. This measure (the "measure at issue") consists of: (i) Article 12 of Chilean Law 18.525 on the Rules on the Importation of Goods, as amended by Law 19.897 published on 25 September 2003; and (ii) Supreme Decree 831 of Chile's Ministry of Finance, published on 4 October 2003, regulating the application of Article 12 of Law 18.525, as amended by Law 19.897.[16] The constituent parts and the operation of the measure at issue are explained in the Panel Report[17] and Section IV of this Report, and the factual aspects of this dispute are set out in greater detail in the Panel Report.[18]

6. Before the Panel in these Article 21.5 proceedings, Argentina claimed that Chile had failed to implement the recommendations and rulings of the DSB, and that the measure at issue, as applied to wheat and wheat flour, was inconsistent with Article 4.2 of the *Agreement on Agriculture*, the second sentence of Article II:1(b) of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.

---

[10]WT/DS207/9.

[11]Award of the Arbitrator, *Chile – Price Band System*, para. 58.

[12]WT/DS207/15/Add.1 and WT/DSB/M/157, para. 18.

[13]On 24 December 2003, Argentina and Chile notified to the DSB their understanding regarding procedures under Articles 21 and 22 of the DSU with respect to the dispute. (WT/DS207/16)

[14]WT/DS207/18.

[15]WT/DS207/19.

[16]Panel Report, para. 2.12; Chilean Law 19.897 (Exhibits ARG-1 and CHL-1 submitted by Argentina and by Chile, respectively, to the Panel); Supreme Decree 831 of Chile's Ministry of Finance (Exhibits ARG-2 and CHL-2 submitted by Argentina and by Chile, respectively, to the Panel).

[17]Panel Report, paras. 2.12-2.32.

[18]*Ibid*., paras. 1.1-2.11.

7. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 8 December 2006. The Panel found that:

> (a) By maintaining a border measure similar to a variable import levy and to a minimum import price, Chile is acting in a manner inconsistent with Article 4.2 of the Agreement on Agriculture, and has thus failed to implement the recommendations and rulings of the DSB; and
>
> (b) It is unnecessary, for the resolution of this dispute, to make a separate finding on Argentina's claim under the second sentence of Article II:1(b) of GATT 1994.[19]

8. The Panel concluded that Chile's price band system continues to nullify and impair benefits accruing to Argentina under the *Agreement on Agriculture*.[20]

9. On 5 February 2007, Chile notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal[21] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[22] On 12 February 2007, Chile filed an appellant's submission.[23] On 19 February 2007, Argentina notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal pursuant to Rule 23(1) and (2) of the *Working Procedures*.[24] On 23 February 2007, Argentina filed an other appellant's submission.[25] On 2 March 2007, Argentina filed an appellee's submission.[26] On 6 March 2007, Chile filed an appellee's submission.[27] On the same day, Australia, Brazil, Canada, the European

[19]Panel Report, para. 8.2. The Panel also found that it was unnecessary, for the resolution of this dispute, to make a separate finding on Argentina's claim under Article XVI:4 of the *WTO Agreement*. (*Ibid*.) This finding of the Panel was not appealed.

[20]Panel Report, para. 8.3.

[21]WT/DS207/22 (attached as Annex I to this Report).

[22]WT/AB/WP/5, 4 January 2005.

[23]Pursuant to Rule 21 of the *Working Procedures*.

[24]WT/DS207/23 (attached as Annex II to this Report).

[25]Pursuant to Rule 23(3) of the *Working Procedures*, and pursuant to Rule 16(2) (see *infra*, para. 11).

[26]Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

[27]Pursuant to Rules 22 and 23(4) of the *Working Procedures*, and pursuant to Rule 16(2) (see *infra*, para. 11).

Communities, and the United States each filed a third participant's submission[28], and China, Columbia, Peru, and Thailand each notified the Appellate Body Secretariat of its intention to appear at the oral hearing and to make an oral statement.[29]

10. The oral hearing in this appeal was held on 15 March 2007. The participants and the third participants (with the exception of China and Peru) presented oral arguments and responded to questions posed by the Members of the Division hearing the appeal.

11. The Division received two procedural requests during the course of the appeal. First, on 9 February 2007, the Division received a letter from Argentina requesting, pursuant to Rule 16(2) of the *Working Procedures*, to change the date scheduled for filing its other appellant's submission from 20 February to 26 February 2007. Argentina explained that filing a submission on 20 February would be "highly problematic for Argentina" because the oral hearing in another appellate proceeding, in which Argentina was also a participant, would be held on 19 February 2007. The Appellate Body invited Chile and the third participants to comment on Argentina's request. Neither Chile nor any third participant objected to Argentina's request, but Chile and the United States requested extensions of the deadlines for filing their submissions in the event that the Division granted Argentina's request.[30] By letter dated 15 February 2007, the Division informed the participants and the third participants that it had decided to change the date for filing Argentina's other appellant's submission from 20 February to 23 February 2007, and the date for filing Chile's appellee's submission and the third participants' submissions from 2 March to 6 March 2007.

---

[28]Pursuant to Rule 24(1) of the *Working Procedures*, and pursuant to Rule 16(2) (see *infra*, para. 11). On 14 March 2007, the Director of the Appellate Body Secretariat received the executive summary of the European Communities' third participant's submission. By letter dated 14 March 2007, the Division informed the European Communities that the executive summary would not be accepted because it had been submitted after 6 March 2007, the deadline for filing a third participant's submission, and in the interest of fairness to all participants and other third participants. The original and nine copies of the executive summary were, therefore, returned to the European Communities.

[29]Pursuant to Rule 24(2) of the *Working Procedures*.

[30]By letter dated 9 February 2007, the Division hearing this appeal invited Chile and the third participants to submit written comments on Argentina's request. Chile, Brazil, Columbia, Peru, and the United States submitted written comments. Chile agreed that the situation faced by Argentina constituted "exceptional circumstances", and stated that it had no objection to Argentina's request. However, Chile requested that, should the Division decide to grant Argentina's request, the date for filing Chile's appellee's submission—due on 2 March—also be extended by one week, to 9 March 2007. Chile added that, in order to ensure that Chile's procedural rights were not compromised, the due date for Argentina's appellee's submission, 2 March 2007, should not be altered unless the date of the oral hearing were also changed. The United States indicated that it had no objection to Argentina's request, but stated its "assumption" that, if the date for the filing of Argentina's other appellant's submission were to be deferred until 26 February, the date for the filing of a third participant's submission would be adjusted "commensurately", that is, postponed from 2 March until 8 March. Brazil, Columbia, and Peru indicated that they had no objection to Argentina's request.

12. The second procedural request was made in a letter from Argentina, dated 26 February 2007, asking the Division to reject 13 of 15 exhibits that were attached to Chile's appellant's submission on the grounds that these exhibits included new evidence that was not before the Panel in these Article 21.5 proceedings and that Article 17.6 of the DSU precludes the Appellate Body from accepting such evidence.[31] The exhibits challenged by Argentina contain evidence relating to the operation of the measure at issue through December 2006, including various tables and charts, along with a sample Supreme Decree issued in December 2006 pursuant to the measure at issue. The exhibits also contain Supreme Decree No. 266 from 2002, which was issued pursuant to the original price band system and was mentioned in Law 18.525, as amended, as the basis on which the price band thresholds were established under the measure at issue. By letter dated 27 February 2007, the Division invited Chile and the third participants to submit written comments on Argentina's request and, in particular, invited Chile to explain whether the 13 exhibits were on the Panel record, and, if so, to identify where they could be found. On 2 March 2007, the Division received comments from Chile, Canada, and the United States.[32] In its reply, Chile explained, first, that, although the information concerning the period from July 2006 to December 2006 was not on the Panel record, such new evidence was submitted to the Appellate Body for the purpose of "completeness". As for the Supreme Decree issued in December 2006, Chile argued that it was appropriate for the Appellate Body to review this Decree because, like other bi-monthly Decrees, it was "part and parcel" of the measure at issue and was publicly available. Chile nevertheless deferred to the Appellate Body with regard to the admissibility of such new evidence. With respect to the remaining 12 exhibits, Chile explained that, except for Supreme Decree No. 266 from 2002, the evidence contained in these exhibits relating to the period through June 2006 was also submitted to the Panel, albeit in a different form, and was therefore properly before the Appellate Body. Finally, with respect to Supreme Decree No. 266, Chile maintained that it was the "source for the calculation" of price band thresholds in the measure at issue, was referenced before the Panel, and was publicly available. Chile nonetheless deferred to the Appellate Body as to the admissibility of this Decree as evidence in these appellate proceedings.

[31]Argentina requested the Appellate Body to reject Exhibits CHL-AB-3 through CHL-AB-15 attached to Chile's appellant's submission, along with related arguments, on the basis that they contained new evidence. Alternatively, in the event that the Appellate Body accepted Chile's new evidence, Argentina requested the Appellate Body to permit Argentina to file its own new evidence.

[32]Neither Canada nor the United States took a position on whether the 13 exhibits identified in Argentina's request constituted new evidence. Nevertheless, they both expressed the view that, should the Appellate Body determine these exhibits to be new evidence that was not presented to the Panel, then the Appellate Body may not consider them.

13. By letter dated 13 March 2007, the Division indicated that, if a ruling on the admissibility of these exhibits proved necessary, it would make such a ruling in "due course" and expressed its "preliminary view" that the admissibility of such exhibits should be governed by the following three principles:

> First, any evidence relating to the operation of the measure at issue *after* June 2006 is new evidence that does not properly form part of the record upon which the Division must review the Panel's findings and conclusions in this case and is inadmissible.
>
> Secondly, Chile's exhibits are admissible insofar as they only present data that were before the Panel. It is not necessary that the data were presented to the Panel in *precisely* the same form as they are now presented to the Appellate Body. Nevertheless, exhibits presenting evidence in a form that differs from the way in which the evidence was presented to the Panel are admissible only if: (i) the data presented can be clearly traced to data in the Panel record; and (ii) the way in which the data presented to the Panel has been converted into the form in which it is presented in this appeal can be readily understood.
>
> Thirdly, a Decree that: (i) is expressly referred to in the measure at issue in this appeal; (ii) is publicly available; and (iii) the content of which was discussed before the Panel is, in principle, admissible, unless Argentina can establish that it will suffer prejudice were the Appellate Body to admit the text of this Decree. (original emphasis)

14. In its statement at the oral hearing, Argentina submitted that, despite the "complex explanations" provided "ex post" by Chile, the data in the 13 exhibits could not be clearly traced to data on the Panel record, and the way in which the data was converted into the form in which it was presented on appeal could not be readily understood. With respect to Exhibit CHL-AB-5, containing the text of Supreme Decree No. 266 from 2002, Argentina maintained that its content had not been discussed before the Panel and, in any event, the Decree does not contain the information that Chile asserted it does.[33] Argentina considered that it could not properly respond to such evidence and had, as a result, suffered prejudice.

15. For the reasons that we set out below[34], we have not found it necessary to make any additional ruling on the admissibility of the specific exhibits challenged by Argentina in its request of 26 February 2007.

---

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

[34]*Infra*, para. 253.

II. Arguments of the Participants

A. *Claims of Error by Chile – Appellant*

16. At the outset, Chile underlines the economic reality behind this dispute and points out that it has significantly liberalized its agricultural markets and lowered its tariffs and non-tariff barriers. Since the conclusion of the Uruguay Round, Chile has periodically and systematically lowered its applied tariff rates from 11 per cent to the current 6 per cent on wheat and wheat flour, which is "a fraction of" the 31.5 per cent bound rate in its Schedule of Concessions.[35] To make such free trade policies possible and sustainable, particularly for a developing country, some flexibility is needed. Chile explained at the oral hearing that this is why the measure at issue adjusts ordinary customs duties periodically in order to maintain a bare minimum in price stability, and that it would jeopardize Chile's overall free trade policies if the Appellate Body were to strike down this delicate balance.

1. Burden of Proof

17. Chile contends that the Panel erred in its allocation of the burden of proof and wrongly required Chile to prove that the measure at issue was consistent with Chile's obligations under the covered agreements. As a result of this "fundamental flaw"[36], Chile requests the Appellate Body to reverse the Panel's findings and conclusions relating to Article 4.2 and footnote 1 of the *Agreement on Agriculture*.

18. Citing the Appellate Body Report in *Canada – Dairy (Article 21.5 – New Zealand and US II)*[37], Chile submits that the rules regarding the allocation of burden of proof do not change in the context of Article 21.5 proceedings. It was, therefore, for Argentina to prove that the measure at issue violates Article 4.2 of the *Agreement on Agriculture*. On this basis, Chile argues that the Panel was required to undertake its review starting from the position that the measure at issue was WTO-consistent, until Argentina had presented sufficient evidence to prove the contrary. If the evidence leaves any doubt as to the WTO-consistency of Chile's measure at issue, then, in Chile's view, "the benefit of the doubt must go to Chile."[38]

19. Chile alleges that, from the outset to the conclusion of its analysis, the Panel consistently and expressly examined whether the measure found to be WTO-inconsistent in the original proceedings had been made consistent, rather than determining whether Argentina had established a *prima facie*

[35]Chile's appellant's submission, para. 38.

[36]Chile's statement at the oral hearing.

[37]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66.

[38]Chile's appellant's submission, para. 45.

case that the measure at issue was inconsistent with the *Agreement on Agriculture* and whether Chile had failed to rebut that case. Chile points to the Panel's statement, at the beginning of its substantive analysis, that the "main issue for the Panel to decide under this particular claim is whether the amendments introduced by Chile to its [price band system] are such as to make the measure consistent with Article 4.2" of the *Agreement on Agriculture*.[39] Chile also refers to the Panel's conclusion that "the amendments introduced by Chile into its [price band system] have failed to convert it into a measure which is no longer a border measure similar to a 'variable import levy' and to a 'minimum import price'".[40] Chile refers to several other instances in the Panel's analysis where, according to Chile, the Panel conducted its review based on whether the measure at issue "continues to have sufficient resemblance or likeness" to variable import levies or minimum import prices or "has been modified" in comparison to the original price band system.[41] On this basis, Chile claims that the Panel proceeded on the assumption that the measure at issue was WTO-inconsistent, thus relieving Argentina of its burden of proof while requiring Chile to demonstrate that the measure at issue was no longer WTO-inconsistent.

2. Article 4.2 and Footnote 1 of the *Agreement on Agriculture*

20. Chile alleges that the Panel erred in its interpretation and application of the terms in Article 4.2 and footnote 1 of the *Agreement on Agriculture*, and requests the Appellate Body to reverse the Panel's findings that the measure at issue was similar to a "variable import levy" and to a "minimum import price" within the meaning of the *Agreement on Agriculture*.

(a) The Panel's Alleged Failure to Examine the Phrase "Other Than Ordinary Customs Duties"

21. Chile argues that the Panel should have examined whether the measure at issue involved duties "other than ordinary customs duties" as set out in footnote 1 to Article 4.2 of the *Agreement on Agriculture*, but that the Panel ignored this language. Instead, the Panel's approach assumed that a finding that a measure is similar to a variable import levy or a minimum import price necessarily implies that the measure is, as a matter of law, "other than an ordinary customs duty". According to Chile, by adopting such an approach, the Panel failed to give proper meaning and effect to all the relevant terms in the text of footnote 1.

---

[39]Chile's appellant's submission, para. 46 (quoting Panel Report, para. 7.14). (emphasis added by Chile)

[40]*Ibid*., para. 48 (quoting Panel Report, para. 7.96). (emphasis added by Chile)

[41]*Ibid*., paras. 49 and 50 (quoting Panel Report, paras. 7.81 and 7.92 and referring to paras. 6.12, 7.44, 7.54, 7.55, and 7.79).

22. In Chile's view, ordinary customs duties, like other measures listed in footnote 1, reduce import volumes, distort import prices, and may impede the transmission of international prices to the domestic market. For example, an ordinary customs duty at a rate high enough to make imports prohibitive detaches domestic prices from international prices due to the absence of import competition. Thus, ordinary customs duties may share certain substantive characteristics with the measures identified in the footnote. In particular, the applied rates of ordinary customs duties may undergo changes not foreseeable to traders, and such changes may be affected by "exogenous" factors not known to the public.[42] Moreover, tariff-rate quotas, certain types of variable duties, and seasonal duties are, according to Chile, "ordinary customs duties", even though they share certain characteristics similar to variable import levies. Chile also highlights certain statements made by the Appellate Body in the original proceedings that, in Chile's view, suggest that ordinary customs duties share substantive characteristics with the measures listed in footnote 1, including the Appellate Body's observation that "ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers".[43] Chile also stresses that the Appellate Body reversed the original panel's finding that the term "ordinary customs duty" is to be understood as referring to a customs duty not applied on the basis of exogenous factors.

23. On this basis, Chile submits that the Panel was required to interpret the meaning of the phrase "other than ordinary customs duties" in footnote 1, review the substantive characteristics of the measure at issue, and conclude whether it constituted an "ordinary customs duty." Because the Panel did not do so, Chile argues, the Panel erred in its interpretation and application of Article 4.2 and footnote 1 of the *Agreement on Agriculture*.

(b) The Panel's Alleged Failure to Examine "Similarity" on an Empirical Basis

24. Chile alleges that the Panel failed to conduct an empirical analysis of the measure at issue and, instead, relied on theoretical comparisons with the original price band system in finding "similarity" between the measure at issue and the measures listed in footnote 1 of the *Agreement on Agriculture*. In the original proceedings, the Appellate Body stated that "the task of determining whether something is similar to something else must be approached on an empirical basis"[44], but, according to Chile, the Panel failed to identify any empirical evidence in finding that the measure at issue was similar to a variable import levy. With respect to the finding that the measure at issue was

[42]Chile's appellant's submission, para. 62.

[43]*Ibid*., para. 61 (quoting Appellate Body Report, *Chile – Price Band System*, para. 200). (emphasis added by Chile)

[44]*Ibid*., para. 69 (quoting Appellate Body Report, *Chile – Price Band System*, para. 226). (emphasis added by Chile)

similar to a minimum import price, Chile argues that the Panel relied on "only a snapshot"[45] of data to make a finding regarding the measure at issue as a whole, and failed to explain how such data supported Argentina's argument that the lower band threshold operated as a substitute for a minimum import price. In addition, Chile asserts that the Panel erroneously rejected, as irrelevant, the evidence submitted by Chile regarding actual conditions of market access under the measure at issue, even though the finding of "similarity" should have been based on such empirical evidence.[46]

(c) The Panel's Finding that the Measure at Issue is Similar to a "Variable Import Levy"

(i) *Variability*

25. Chile alleges that the Panel misinterpreted the term "variable" in footnote 1 to Article 4.2 of the *Agreement on Agriculture* and erred in finding that the measure at issue was similar to a "variable import levy" within the meaning of footnote 1.

26. First, Chile submits that the Panel was mistaken in finding that the measure at issue imposed variability by setting forth a formula that establishes an automatic and periodic adjustment in duty levels. Chile's Ministry of Finance may revise at any time the methodologies for establishing specific duties and rebates. Moreover, duty levels under the measure at issue do not change automatically absent an administrative decree. Chile adds that the Panel's finding would "create perverse incentives" for WTO Members to be less transparent and less predictable.[47] Specifically, Members with a domestic legal structure that permits the executive branch to establish unilaterally the level of duties would be free to use any unpublished and non-transparent formula to change their duty levels without acting inconsistently with their WTO obligations. In contrast, changes in the levels of such duties could be rendered WTO-inconsistent simply because the executive branch of a Member, such as Chile, is required to publish the underlying methodology by which an ordinary customs duty is set at a particular level.

27. Secondly, Chile contests the Panel's findings that a variable import levy is "a duty ... liable to vary automatically and continuously", and that the language of Law 18.525, as amended, and Supreme Decree 831 "contemplates a scheme or formula" that causes and ensures automatic and

[45]Chile's appellant's submission, para. 73.

[46]Chile refers to the evidence that specific duties were imposed in only 17 weeks of the period from 16 December 2003 to 13 January 2006 (15.6 per cent of the time), and rebates were granted in 35 weeks (32.1 per cent of the time) of the same time period. For the rest of the time period, only the *ad valorem* tariff was imposed. (Chile's appellant's submission, para. 37; see also Panel Report, para. 2.31)

[47]Chile's appellant's submission, para. 85.

continuous changes in the level of specific duties and rebates.[48] In making these findings, Chile argues, the Panel erred in equating a "likelihood" of continuous variability with "ensuring" continuous variability, because "liable" means "apt or likely", and "contemplate" is defined as "[r]egard as possible, expect, take into account as a contingency".[49] The Panel's finding, therefore, contradicts the Appellate Body's statement in the original proceedings that "variability" is inherent in a measure if the measure "causes and ensures" automatic and continuous changes of duties.[50]

28. Thirdly, Chile asserts that the Panel erred in equating "periodic" variation with "continuous" variability. Variable import levies and minimum import prices vary automatically and continuously on a transaction-by-transaction basis. A periodic change in duty levels "simply does not rise to the same level of automatic and continuous variability".[51] Moreover, the Appellate Body itself distinguished between "periodic" and "continuous" variation in the original proceedings when it found that a WTO Member "may, fully in accordance with Article II of the GATT 1994, exact a duty upon importation and periodically change the rate".[52] Chile highlights that, whereas the original price band system changed the duty levels continuously 52 times per year, the measure at issue changes duty levels only periodically, that is, six times per year, and ensures that any applicable duty remains stable for all transactions made within each two-month period.

(ii) *Transparency and Predictability*

29. Chile claims that the Panel misunderstood and misapplied the tests of "transparency" and "predictability" in determining whether the measure at issue was a border measure similar to a "variable import levy" within the meaning of Article 4.2 and footnote 1 of the *Agreement on Agriculture*. Rather than examining whether the level of the duties resulting from the measure at issue was transparent and predictable, the Panel mistakenly examined whether the methodology underlying the calculation of the duty levels (how and why Chile set a particular level of duties) was transparent and predictable. According to Chile, this is contrary to the approach taken by the Appellate Body in the original proceedings. Chile asserts that the level of resulting duties under the measure at issue is

[48]Chile's appellant's submission, paras. 86 and 87 (quoting Panel Report, paras. 7.28 and 7.58). (emphasis added by Chile)

[49]*Ibid*., paras. 86 and 88 (quoting *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, pp. 499 and 1583).

[50]*Ibid*., para. 86 (quoting Appellate Body Report, *Chile – Price Band System*, para. 233).

[51]Chile's statement at the oral hearing.

[52]Chile's appellant's submission, para. 90 (quoting Appellate Body Report, *Chile – Price Band System*, para. 232). (emphasis added by Chile)

transparent, and adds that "the obligation of transparency alone cannot limit WTO Members in respect of the substantive content or ways in which, or reasons for which, they impose duties."[53]

30. In any event, Chile disagrees that the manner in which it established thresholds and reference prices lacked transparency. Unlike under the original price band system, the thresholds are now established on a free on board ("f.o.b.") basis. Moreover, the Appellate Body's finding of a lack of transparency with respect to reference prices was premised on the fact that, under the original price band system, no Chilean legislation identified any "markets of concern" or "qualities of concern" for the purpose of calculating reference prices. Because the markets and qualities of concern are now transparent and published, Chile argues that the Panel erred in finding that the measure at issue lacked transparency simply because the reference price was not representative of existing world market prices and was calculated for two specific qualities of wheat from two specific origins.

31. Chile also contests the Panel's finding that the measure at issue lacked predictability because, in Chile's opinion, the applicable duties under the measure at issue are no less predictable than ordinary customs duties. Chile likens the measure at issue to the annual reductions in the tariff rates applied to wheat and wheat flour that Chile made between 1999 and 2003. In the same way as those annual decreases were "pre-published", "automatic", and pursuant to a simple formula involving a reduction of 1 percentage point every year, change in the applicable duties under the measure at issue is "pre-published, is automatic on a two-month basis, and is pursuant to a formula".[54]

32. Chile further alleges that the Panel erred in finding, on the basis of conjecture rather than evidence, that the effect of the lack of transparency and predictability was to impede the transmission of international prices to the domestic market. Chile presents various charts to show that the trend in the duty-inclusive import prices under the measure at issue closely reflects the trend in the cost, insurance and freight ("c.i.f.") import prices, and, therefore, that the measure at issue affects import prices in ways similar to those of ordinary customs duties and different from those of variable import levies and minimum import prices. Chile adds that trends in domestic prices mirror trends in duty-inclusive import prices. On this basis, Chile concludes that the Chilean domestic prices respond to, and are not disconnected from, world prices.

33. Moreover, Chile asserts that the Panel "established a standard for ... transparency and predictability that was internally contradictory and impossible to satisfy".[55] The Panel found that taking the average of daily prices from a 15-day period does not guarantee that the resulting reference

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

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

[55]*Ibid*., para. 112.

prices will be representative for the whole of a 60-day period.[56] The Panel also found that, under the measure at issue, the link between the total amount of duties and the fluctuation of world prices is, in itself, a factor of uncertainty and unpredictability.[57] Chile alleges that these findings impose contradictory requirements, such that duties must follow world market prices in a representative fashion and must, at the same time, be de-linked from world market prices. Chile further argues that the Panel established "conflicting requirements" by "condemn[ing] any form of automaticity or fixed scheme or formula" while, at the same time, requiring full transparency and predictability in how the duty is calculated.[58]

34. Finally, with respect to the conversion factor of 1.56—which is applied to the amount of specific duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour—Chile contends that the Panel's finding is also contradictory. The Panel appeared to condemn the factor as lacking transparency and predictability because it cannot adjust to changes in the ratio of prices between wheat flour and wheat. To Chile, this finding of the Panel is contradictory to the requirements of transparency and predictability, as it implies that Chile would be required to modify this conversion factor with each change in the ratio of prices for wheat flour and wheat. In any event, Chile argues, the Appellate Body should reverse this finding because it is based on the Panel's erroneous findings with respect to wheat.

(d) The Panel's Finding that the Measure at Issue is Similar to a "Minimum Import Price"

35. Chile claims that the Panel erred in its finding that the measure at issue was similar to a "minimum import price". First, the Panel failed to examine the transparency and predictability of the measure at issue when finding it to be similar to a minimum import price. Instead, the Panel "summarily"[59] concluded that the measure at issue had not been modified with respect to the features that were found to make the original price band system similar to a minimum import price. Secondly, Chile contests the Panel's finding that the lower threshold of the price band operated as a substitute for a domestic target price or a minimum import price. According to Chile, empirical evidence shows that the lower threshold under the measure at issue falls well below domestic prices, making it impossible for the threshold to operate as a substitute for the latter.

[56]Panel Report, para. 7.66.

[57]*Ibid*., para. 7.71.

[58]Chile's appellant's submission, para. 115.

[59]*Ibid*., para. 166.

36. Thirdly, Chile contends that, contrary to the Panel's finding, the measure at issue does not "overcompensate" for a decline in reference prices by increasing import prices above the lower threshold. Evidence submitted by Argentina shows that, during the period November 2004 to April 2005, there were only two days on which, as a result of the measure at issue, a decline in world prices corresponded to an increase in entry prices.[60] For the remainder of the period, entry prices fell in tandem with world prices. In using this evidence, Chile argues, the Panel wrongly "relied upon only a snapshot of empirical data"[61] and failed to explain how such evidence supported Argentina's argument that the price band's lower threshold operated as a substitute for a minimum import price.

37. Finally, Chile points out that the Panel erred in concluding that, under the measure at issue, imports could not enter the Chilean market at prices below the lower threshold. In this regard, Chile characterizes as "irrelevant" the mathematical example provided by Argentina to show that imports will enter Chile at prices above the lower threshold, except under certain unlikely scenarios.[62] According to Chile, the same result will be reached under Argentina's mathematical example even if the application of any duties is removed from the example. For Chile, this "conclusively" demonstrates that it is not the measure at issue that is causing entry prices to exceed the lower threshold, rather, it is the fact that the lower threshold was set on a low, f.o.b., basis.[63]

(e) The Panel's Alleged Failure to Examine the Measure at Issue in its Entirety

38. Chile asserts that, in assessing whether the measure at issue is similar to a variable import levy or a minimum import price, the Panel examined discrete features in isolation in reaching its conclusion. Had the Panel examined the measure in its totality, it would have found that the measure is, instead, similar to an ordinary customs duty. Chile highlights six aspects of the measure at issue in support of this claim: (i) the duties are published and changed periodically; (ii) the level of duties in effect on the date of importation is transparent; (iii) the level of duties is predictable and will change on pre-announced dates; (iv) the measure at issue has no link to a domestic target price; (v) the fluctuations of the duty rate as a result of the measure at issue are gradual and narrow; and (vi) due to the concessions of rebates, the measure at issue provides greater market access than if it were not in effect.

---

[60]Chile's appellant's submission, paras. 73, 74, and 179 (referring to Exhibits ARG-11 and ARG-12 submitted by Argentina to the Panel); Chile's statement at the oral hearing.

[61]Chile's appellant's submission, para. 73.

[62]Chile's statement at the oral hearing.

[63]*Ibid*.

3. Articles 11 and 12.7 of the DSU

39. Chile also requests the Appellate Body to reverse the Panel's findings and conclusions relating to Article 4.2 and footnote 1 of the *Agreement on Agriculture* on the grounds that, in making these findings, the Panel failed to discharge both its duty under Article 11 of the DSU to carry out an objective assessment of the matter before it, as well as its duty under Article 12.7 of the DSU to set out the basic rationale behind its findings.

40. Chile takes issue with four aspects of the Panel's findings. First, Chile contests the Panel's finding that the thresholds under the measure at issue were not established on an f.o.b. basis. In so finding, according to Chile, the Panel ignored the requirement provided in Law 18.525, as amended, that the thresholds be established on an f.o.b. basis and found, without basis, "that the Ministry of Finance acted in violation of Chilean law".[64] Chile contends that the Panel identified no evidence, and provided no explanation, in support of its finding that Chile had failed to demonstrate the deduction of import costs when establishing such thresholds. Moreover, in Chile's view, a WTO Member must be presumed to act in accordance with its own national laws unless proven otherwise.

41. Secondly, Chile asserts that, in concluding that the lower threshold of the measure at issue operated as a substitute for a domestic target price, the Panel relied on an alleged error in the original panel's findings. The original panel "misunderstood" how the original price band system operated and mistakenly believed that the reference prices were not converted to c.i.f. terms before being compared to the price band thresholds that were in c.i.f. terms.[65] Chile requested the Panel to correct this misunderstanding, but the Panel did not do so and provided no explanation or authority for its statement that correcting the original panel's factual error was outside its mandate.[66]

42. Thirdly, Chile submits that the Panel failed to follow the approach set out by the Appellate Body in the original proceedings, which calls for an examination of the specific "configuration and interaction" of the different elements of the measure at issue.[67] Instead, the Panel examined only discrete elements and "individual features" of the measure at issue "in isolation", compared them with features of the original price band system, and provided no analysis or explanation of how the features of the measure interact to support its findings.[68] Chile submits that the Panel should have "weighed all features of the [measure at issue] as a whole before concluding whether, evaluated *holistically*

---

[64]Chile's appellant's submission, para. 203.

[65]*Ibid*., para. 206.

[66]*Ibid*., para. 210 (referring to Panel Report, para. 6.14).

[67]*Ibid*., para. 219 (quoting Appellate Body Report, *Chile – Price Band System*, para. 261).

[68]*Ibid*., para. 220.

and with due regard to their effects", the measure at issue falls within a category of measures listed in footnote 1 and is inconsistent with Article 4.2 of the *Agreement on Agriculture*.[69]

43. Finally, Chile maintains that, except for a "partial dataset" submitted by Argentina[70], the Panel failed to consider empirical evidence regarding the actual operation of the measure at issue. In Chile's view, the evidence referred to by the Panel appears to contradict the Panel's finding regarding the disconnection between domestic and world prices. Chile points out that it submitted a "substantial amount of evidence and data on the operation" of the measure at issue, yet the Panel "did not refer [to] nor rely on any evidence regarding the actual operation" of the measure at issue and also refused Chile's request, during the interim review stage, to review its analysis in the light of the mathematical calculations presented by the parties.[71]

4. Conclusion

44. Chile requests the Appellate Body to reverse the Panel's findings and conclusions under Article 4.2 of the *Agreement on Agriculture* and to find, instead, that the Panel failed to comply with its duties under Articles 11 and 12.7 of the DSU, and that the measure at issue is consistent with Chile's obligations under Article 4.2 of the *Agreement on Agriculture*.

B. *Arguments of Argentina – Appellee*

1. Burden of Proof

45. Argentina requests the Appellate Body to dismiss Chile's claim that the Panel inappropriately allocated the burden of proof. Argentina points to previous Appellate Body reports establishing that a panel need not make an express ruling on whether a complainant has established a *prima facie* case.[72] Moreover, Chile's claim regarding the burden of proof is not borne out by the Panel record. To establish a *prima facie* case of the inconsistency of the measure at issue with Article 4.2 of the *Agreement on Agriculture*, Argentina submitted to the Panel extensive arguments in its written and oral submissions and substantive evidence in its 38 exhibits, including the text of the measure at issue and empirical evidence regarding its operation. The Panel, on the basis of these arguments and

[69]Chile's appellant's submission, para. 224. (emphasis added)

[70]*Ibid*., para. 226 (referring to Exhibits ARG-11 and ARG-12 submitted by Argentina to the Panel).

[71]*Ibid*., paras. 226 and 227 (referring to Chile's first written submission to the Panel, Panel Report, p. A-83, para. 154; Chile's second written submission to the Panel, Panel Report, p. C-78, paras. 173 and 174; Chile's replies to Questions 64, 72, and 73 posed by the Panel, Panel Report, pp. F-104 to F-106 and F-109 to F-112; and Panel Report, paras. 6.10 and 6.11).

[72]Argentina's appellee's submission, paras. 191-193 (quoting Appellate Body Report, *Korea – Dairy*, para. 145; and Panel Report, *Egypt – Steel Rebar*, para. 7.7).

evidence, directed 22 questions to Argentina, out of 46 questions to both parties. Argentina argues that, on the basis of all the arguments and evidence, the Panel correctly concluded that Argentina had made out a *prima facie* case and correctly shifted the burden of proof to Chile, which Chile failed to rebut. As a result, the Panel rightly found the measure at issue to be inconsistent with Article 4.2 of the *Agreement on Agriculture*.

2. Article 4.2 and Footnote 1 of the *Agreement on Agriculture*

46. Argentina submits that, with the measure at issue, Chile has only "cosmetically"[73] amended the original price band system while maintaining its non-transparency and unpredictability and fully preserving its distortive effects. Argentina therefore requests the Appellate Body to uphold the Panel's finding that the measure at issue is inconsistent with Chile's obligations under Article 4.2 of the *Agreement on Agriculture*.

(a) The Panel's Alleged Failure to Examine the Phrase "Other Than Ordinary Customs Duties"

47. Argentina points out that Chile's argument on appeal, that "[o]rdinary customs duties may share substantive characteristics in common with the measure identified in footnote 1", was already dismissed by the Panel.[74] Specifically, the Panel found that "[t]he level of ordinary customs duties is in principle stable and predictable, at least until those duties are replaced with altogether new tariff rates."[75] Argentina adds that Chile's argument cannot succeed because Argentina has shown that, unlike ordinary customs duties, changes in the level of duties are dependent on, and related to, an underlying scheme or formula.

48. Moreover, Argentina maintains that the Panel correctly interpreted Article 4.2 and footnote 1 of the *Agreement on Agriculture* by addressing the text of these provisions, as well as the objectives of the *Agreement on Agriculture*, in the light of the Appellate Body's findings in the original proceedings. Having summarized both parties' arguments, the Panel stated that it would limit itself to considering the similarity of the measure at issue with only two of the categories of measures listed in footnote 1 to Article 4.2 of the *Agreement on Agriculture* (variable import levies and minimum import prices).

---

[73]Argentina's appellee's submission, para. 17.

[74]*Ibid*., para. 168 (quoting Chile's appellant's submission, para. 62).

[75]*Ibid*. (quoting Panel Report, para. 7.60).

(b) The Panel's Alleged Failure to Examine "Similarity" on an Empirical Basis

49. Argentina emphasizes that, before the Panel, it based each of its arguments on analytical, mathematical, and/or empirical evidence in support of the claim that, in the light of the Appellate Body's findings in the original proceedings, the measure at issue was "similar" to a variable import levy and a minimum import price within the meaning of Article 4.2 of the *Agreement on Agriculture*. The Panel, upon properly recalling the Appellate Body's analysis and interpretation regarding the terms "variable import levies" and "minimum import prices", applied the correct interpretation of Article 4.2 to the measure at issue while taking into account arguments and evidence submitted by both parties. Thus, the Panel conducted its analysis consistently with the Appellate Body's findings and, on the basis of empirical evidence, rightly found that the measure continued to be a measure required to be converted into ordinary customs duties pursuant to Article 4.2 of the *Agreement on Agriculture*.

(c) The Panel's Finding that the Measure at Issue is Similar to a "Variable Import Levy"

(i) *Variability*

50. Argentina submits that the Panel correctly found the measure at issue to be similar to a "variable import levy" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*.

51. According to Argentina, Chile's arguments on appeal imply that a variable import levy is defined as a measure that must "operate automatically to change the level of duties on each and every transaction".[76] Such a definition has no textual support and is not based on Appellate Body jurisprudence. In the original proceedings, the Appellate Body found that variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. This is not the same as the "transaction-by-transaction variability" standard that Chile introduces in this appeal. Argentina adds that, even under the original price band system, which was already found to be inconsistent with the *Agreement on Agriculture*, specific duties did not vary on a transaction-by-transaction basis.

52. Argentina considers that "variability", as defined by the Appellate Body, is inherent in the measure at issue because this measure incorporates a formula that causes and ensures automatic and continuous changes in duties. It is clear from the text of Law 18.525, as amended, and Supreme

[76]Argentina's appellee's submission, para. 146 (quoting Chile's appellant's submission, para. 94 (original emphasis)).

Decree 831 that there exist specific formulas on the basis of which specific duties and rebates are established. These formulas cause considerable variability in the level of specific duties, as Argentina demonstrated to the Panel by presenting a statistical model showing the standard deviation of specific duties. According to Argentina, these data establish that, if the measure at issue had been in place since 1986, specific duties applied to wheat and wheat flour would have varied much more than international f.o.b. prices for wheat and wheat flour over the same period.

53. Moreover, Argentina maintains that the measure at issue is an automatic mechanism that functions by itself and is activated "directly and ... unfailingly".[77] Pursuant to Law 18.525, as amended, a decree must be issued every two months regardless of the level of the reference price in relation to the upper and lower thresholds. Moreover, the text of that Law shows that the imposition of specific duties (or rebates) is statutorily mandated whenever the reference price falls below the lower (or above the upper) thresholds of the price band.[78] Argentina submits, therefore, that in contrast to ordinary customs duties, which are subject to "discrete changes in applied tariff rates that occur *independently*, and are *unrelated* to such an underlying scheme or formula"[79], duties resulting from the measure at issue are dependent and related to an underlying scheme or formula. On this basis, Argentina claims that the Panel correctly found that the level of specific duties or rebates under the measure at issue is determined pursuant to the mandate of Law 18.525, as amended, and the variability in the level of specific duties or rebates is not the result of separate, independent, and discrete administrative acts. As the Panel rightly found, "the administrative action occurs after" the amount of specific duties or rebates has been calculated in accordance with a formula set out in this Law.[80]

(ii) *Transparency and Predictability*

54. Argentina recalls that, in the original proceedings, the Appellate Body determined that the lack of transparency and predictability associated with the original price band system impeded the transmission of international prices to the domestic market, thus preventing enhanced market access for imports of agricultural products, contrary to the object and purpose of the *Agreement on*

[77]Argentina's appellee's submission, para. 161.

[78]In particular, Argentina recalls Article 12 of Law 18.525, as amended, which states, *inter alia*, that "[t]he amount of these duties and rebates *shall be established* as provided for in this Article". (Argentina's appellee's submission, para. 161 (quoting Panel Report, para. 2.14) (emphasis added by Argentina))

[79]Argentina's appellee's submission, para. 162 (quoting Appellate Body Report, *Chile – Price Band System*, para. 233). (emphasis added by Argentina)

[80]*Ibid*., para. 166 (quoting Panel Report, para. 7.59).

Agriculture.[81] Argentina submits that the lack of transparency and predictability of the measure at issue has the same effect.

55. As regards the setting of the upper and lower thresholds of the measure at issue, Argentina agrees with the Panel that "[t]he mere assertion by Chile that the calculation formula has been abolished and that import costs have been deducted is not enough to demonstrate that, in this regard, the current system is any less intransparent and unpredictable than the original."[82] Argentina also agrees with the Panel's view that, by fixing the upper and lower thresholds for an 11-year period, "the effect of disconnecting domestic prices from international price developments, thus impeding the transmission of world market prices to the Chilean domestic market, has been carried on into the [measure at issue]."[83] In addition, the annual reduction factor of 0.985, which will be applied to the price band thresholds from 2007 to 2014, means that from 2007 onwards the upper and lower thresholds will vary without any relation to world market or historical prices.

56. With respect to reference prices, Argentina points out that the mere existence of a reference price affects transparency and predictability in the measure at issue. Argentina agrees with the Panel that the "fact that specific duties are added ... on the basis of some periodically determined and constantly changing reference price, rather than on the basis of either the value or the volume of the imported goods, entails a *systemic* lack of transparency and predictability."[84] Argentina emphasizes that traders will have difficulty in estimating the total amount of duties applicable if a shipment is sent before the end of the 15-day period used for calculating a new reference price and does not arrive in Chile until after a new specific duty/rebate has been established on the basis of this reference price. Moreover, the fact that, under the measure at issue, specific duties do not vary weekly (as they did under the original price band system) but vary bi-monthly does not bring more transparency or predictability. Argentina also concurs with the Panel's statement that "the only thing truly predictable about the level of duties ultimately assessed under the [measure at issue] is that in principle such level will change every two months."[85]

57. Argentina maintains that, because of the way reference prices are established under the measure at issue, they are less representative of relevant world market prices than were the reference prices under the original price band system. Under the original system, references prices were

---

[81]Argentina's appellee's submission, para. 170 (referring to Appellate Body Report, *Chile – Price Band System*, paras. 234 and 258).

[82]*Ibid*., para. 105 (quoting Panel Report, para. 7.79).

[83]*Ibid*. (quoting Panel Report, para. 7.79).

[84]*Ibid*., para. 174 (quoting Panel Report, para. 7.72). (emphasis added by Argentina)

[85]*Ibid*., para. 167 (quoting Panel Report, para. 7.61).

adjusted every week, whereas under the measure at issue, the reference prices are set only six times per year. Argentina refers to certain exhibits it submitted to the Panel to show that, while the measure at issue has been in force, reference prices have been disconnected from international f.o.b. prices.[86] According to Argentina, such disconnection results from the fact that the relevant time periods for calculating the reference prices amount to a total of 90 days, or less than 25 per cent of a year. Argentina argues, therefore, that, in "fixing one problem"[87] (that is, variability) by changing reference prices less frequently, Chile has created other problems that contribute to impeding price transmission from international markets to the Chilean market.

58. Similarly, Argentina notes that neither the "markets of concern" nor the "qualities of concern" used to determine reference prices are representative of the markets and qualities of wheat imported into Chile, which insulates the Chilean market even more. Although only Argentina and the United States are selected as the "markets of concern" from 2004 to 2005, Canada was in fact a larger exporter of wheat to Chile than was the United States. Moreover, in addition to *Trigo Pan Argentino* (Argentine bread wheat) and *Soft Red Winter No. 2*, there are at least two other qualities of wheat imported to Chile, both of which have higher prices than the qualities chosen by Chile for the purpose of establishing reference prices. Argentina argues that the fact that reference prices are determined on the basis of only two varieties of wheat from only two origins, but are used to calculate specific duties or rebates imposed on imports of all wheat and wheat flour, further contributes to the effect of impeding the transmission of international price developments to the Chilean market.

59. Finally, Argentina highlights that the conversion factor of 1.56 transmits to the methods for establishing duties on wheat flour imports the same non-transparency and unpredictability inherent in the methods for establishing duties on wheat imports. Argentina stresses that this conversion factor was embodied in the Chilean legislation in 1986 and has remained unchanged ever since, even though the ratio of the price of wheat flour to that of wheat has changed over time.

(d) The Panel's Finding that the Measure at Issue is Similar to a "Minimum Import Price"

60. Argentina argues that, contrary to Chile's assertion on appeal, the Panel correctly found that the measure at issue operates so as to prevent the entry of imports of wheat or wheat flour into the Chilean market at prices below the lower threshold of the price band. In the original proceedings, the Appellate Body explained that a minimum import price "refers generally to the lowest price at which

[86]Argentina's appellee's submission, para. 116 (referring to Exhibits ARG-15 and ARG-17 submitted by Argentina to the Panel).

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

imports of certain product may enter a Member's domestic market".[88] In the light of this definition, Argentina underlines that, as it demonstrated before the Panel, specific duties resulting from the measure at issue tend to elevate the entry price of imports to Chile above the price band's lower threshold.

61. Argentina maintains that the measure at issue tends to elevate the entry price of wheat imports to Chile at above the lower threshold of the price band except in certain unlikely scenarios. With the current lower threshold of US$128 per tonne, this unlikely scenario only arises when the reference price exceeds the c.i.f. price of an import transaction by more than US$7.2453 per tonne. Argentina explains that such a scenario is highly improbable because reference prices are established on an f.o.b. basis and always tend to be lower than the c.i.f. import prices. As confirmed by the evidence submitted to the Panel, during the period of application of the measure at issue, the c.i.f. prices of wheat imports to Chile were always much higher than the f.o.b. reference prices for the corresponding time period. On this basis, Argentina contends that the formula used for calculating specific duties, together with the lower threshold, works as a "brake"[89] for the decline in the entry price and impeded any transmission of international prices below the level of the threshold.

62. Moreover, Argentina agrees with the Panel that the measure at issue tends to "overcompensate" for international price declines when specific duties are applied. This overcompensation refers to the situation in which, when international prices fall, and when the reference price is below the lower threshold of the price band, the combined application of the *ad valorem* tariff and the specific duty under the measure at issue results in an overall entry price that rises rather than falls.[90] In this regard, Argentina recalls Chile's argument that "overcompensation" occurred on only two days and counters that, each time overcompensation occurs, this "inevitably ***taints*** the rest of [the following two-month] period" because the level of duties and the entry price is affected by that initial "overcompensation".[91]

63. Finally, in Argentina's view, the evidence that it submitted to the Panel also highlights that the measure at issue does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices. This is due to the fact that specific duties rise when international prices fall,

---

[88]Argentina's appellee's submission, para. 179 (quoting Appellate Body Report, *Chile – Price Band System*, para. 236).

[89]*Ibid*., paras. 57 and 186.

[90]Argentina submits that relevant evidence demonstrates that, following the imposition of a specific duty on 16 December 2004 and on 16 February 2005, the entry price of wheat imports rose by more than 4 per cent as compared to the previous day, despite decreases in the international f.o.b. prices used to calculate the reference prices.

[91]Argentina's appellee's submission, para. 74. (original emphasis)

thereby moving in the opposite direction to international prices and "completely undercutting the effect of the decline in ... international prices".[92]

(e) The Panel's Alleged Failure to Examine the Measure at Issue in its Entirety

64. Argentina submits that the Panel did not conduct a cursory review of the relevant features of the measure at issue in isolation. Instead, the Panel conducted an objective assessment of the measure at issue in the light of the evidence before it, and consistently with the legal reasoning developed by the Appellate Body in the original proceedings.

3. Articles 11 and 12.7 of the DSU

65. Argentina submits that the Panel acted consistently with its obligations under Articles 11 and 12.7 of the DSU. First, Argentina argues that Chile did not point to any textual basis in the Panel Report to support its assertion that the Panel found the Chilean Ministry of Finance to have violated Chilean law in establishing the thresholds of the price bands. According to Argentina, the Panel found only that Chile had failed to demonstrate that the abolition of the calculation formula for establishing thresholds under the original price band system had exerted any practical impact on the levels of thresholds under the measure at issue, and that Chile had failed to submit sufficient evidence to support its assertion that import costs were deducted for purposes of establishing the current thresholds.[93] Argentina points out that the Panel's finding was consistent with Chile's statement that the level of thresholds was a result of "an internal political agreement".[94]

66. Secondly, in response to Chile's assertion that the Panel should have corrected a factual finding made by the original panel—namely, the original panel's alleged misunderstanding that the reference prices were not converted to c.i.f. terms before being compared to the price band thresholds—Argentina argues that the Panel's task was not to correct alleged errors regarding the operation of the original price band system. Chile had the opportunity during the original proceedings to bring this alleged error to the attention of the original panel and the Appellate Body, but Chile did not do so. In these circumstances, the findings by the original panel and the Appellate Body, adopted by the DSB, constitute a final resolution of the dispute concerning the original price band system. In any event, correcting this alleged factual error would not have affected the Panel's conclusion that the

[92]Argentina's appellee's submission, para. 103.

[93]*Ibid*., para. 201 (quoting Panel Report, para. 7.79).

[94]*Ibid*., para. 202 (quoting Chile's opening statement at the Panel meeting, Panel Report, p. D-33, para. 25).

way the reference price is established tends to impede the transmission of international prices to Chile's domestic market, because the Panel made several other findings in support of this conclusion.

67. Thirdly, Argentina submits that the Panel did not conduct a cursory review of the relevant features of the measure at issue "in isolation", and did not fail to consider relevant empirical evidence. Recalling the Appellate Body's previous interpretations of a panel's obligations under Article 11 of the DSU[95], Argentina emphasizes that the Panel did not fail to conduct an objective assessment of the matter before it by disregarding or distorting any evidence, even though Chile may have preferred the Panel to have accorded different weight to certain evidence.

68. Finally, with respect to Chile's claim under Article 12.7 of the DSU, Argentina recalls the Appellate Body's interpretation of this provision in *Mexico – Corn Syrup (Article 21.5 – US)*[96] and submits that, pursuant to Article 12.7, a panel report must set forth explanations and reasons sufficient to disclose the essential justification for the findings and recommendations the panel is making. Argentina maintains that the Panel indeed set forth such explanations and reasons by: (i) identifying the relevant facts and applicable legal standard, namely, Article 4.2 and footnote 1 of the *Agreement on Agriculture*; (ii) following the Appellate Body's interpretation of this legal standard; (iii) applying this interpretation to the facts; (iv) addressing relevant arguments made by Chile and Argentina; and (v) sufficiently explaining the reasons underlying its findings.

4. Conclusion

69. Argentina requests the Appellate Body to reject Chile's claims of error in their entirety, including its claims under Articles 11 and 12.7 of the DSU, and to uphold the Panel's findings and conclusions under Article 4.2 and footnote 1 of the *Agreement on Agriculture*.

C. *Claims of Error by Argentina – Other Appellant*

70. In the event that the Appellate Body reverses the Panel's finding that the measure at issue is inconsistent with Article 4.2 of the *Agreement on Agriculture*, Argentina requests the Appellate Body to find that the measure at issue is inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

[95]Argentina's appellee's submission, paras. 221-223. In particular, Argentina refers to Appellate Body Report, *EC – Hormones*, para. 133; and Appellate Body Report, *Japan – Apples*, paras. 221 and 222.

[96]Argentina's appellee's submission, para. 229 (quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 106-108).

1. Conditional Appeal and Completion of the Analysis

71. Argentina recalls that the Panel declined to rule on Argentina's claim that the measure at issue is inconsistent with the second sentence of Article II:1(b) of the GATT 1994. The Panel stated that a finding on this claim was unnecessary to resolve this dispute, given that the measure at issue had already been found to be inconsistent with Article 4.2 of the *Agreement on Agriculture*.[97] Argentina submits that, should the Appellate Body reverse the Panel's finding under Article 4.2 of the *Agreement on Agriculture*, a finding concerning the consistency of the measure at issue with the second sentence of Article II:1(b) of the GATT 1994 would become necessary for the prompt settlement of this dispute.[98]

72. Argentina asserts that the Appellate Body would be able to complete the analysis under the second sentence of Article II:1(b) of the GATT 1994 in these proceedings. Referring to the Appellate Body's finding in *EC – Asbestos*[99], Argentina considers that the Appellate Body has established a three-tier test for completion of the analysis: (i) there is a sufficient factual basis in the panel record for the Appellate Body's analysis; (ii) if the completion of the analysis requires interpretation of a provision not examined by the panel, then this provision is part of a logical continuum with the provision(s) that the panel did consider; and (iii) the provision with respect to which a party requests a ruling is the subject of a prior interpretation or application by either a panel or the Appellate Body.

73. According to Argentina, there is a sufficient basis in the Panel record to complete the analysis, because Argentina developed its claim under the second sentence of Article II:1(b) of the GATT 1994 by providing arguments and evidence, and the Panel made extensive factual findings regarding the operation of the measure at issue. In addition, Argentina contends that there is a close relationship between Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994 because, in Argentina's view, if a measure is not an "ordinary customs duty" under Article 4.2, it is necessarily an "other duty or charge" that should have been recorded in a Member's Schedule of Concessions pursuant to Article II:1(b) and the Understanding on the Interpretation of Article II:1(b) of the GATT 1994. Finally, Argentina emphasizes that the second

[97]Argentina's appellee's submission, para. 8 (referring to Panel Report, paras. 7.117-7.120).

[98]In response to questioning at the oral hearing, Argentina indicated that it also requests the Appellate Body to complete the analysis under Article 4.2 of the *Agreement on Agriculture* should that prove necessary to resolve the dispute.

[99]Argentina's other appellant's submission, para. 19 (referring to Appellate Body Report, *EC – Asbestos*, paras. 78-81).

sentence of Article II:1(b) of the GATT 1994 was the subject of rulings by the original panel and has also been interpreted or applied by other panels.[100]

2. Scope of these Article 21.5 Proceedings in Relation to Argentina's Claim under Article II:1(b) of the GATT 1994

74. Argentina asserts that its claim under the second sentence of Article II:1(b) of the GATT 1994 was properly within the scope of these Article 21.5 proceedings. Before the Panel, Chile contended that Argentina's claim could have been, but was not, raised in the original proceedings, and that for the Panel to address such a claim would prejudice Chile's due process rights. Argentina responds that Chile's arguments have no basis in relevant Appellate Body jurisprudence and would impair the aim of the DSU, namely, to secure a prompt and positive solution to a dispute.

75. Argentina refers to previous findings by the Appellate Body regarding the scope of Article 21.5 proceedings and alleges that, in accordance with these findings, a complainant may not, in Article 21.5 proceedings, raise a claim for which: (i) there has been a definitive ruling of WTO-consistency or inconsistency; or (ii) there has been a finding that the complainant failed to establish a *prima facie* case in the original proceedings.[101] In Argentina's view, neither of these conditions is satisfied in these proceedings because Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994 is a new claim with respect to a new measure. Furthermore, this new claim relates to the measure at issue in its totality rather than to one aspect in particular. Accordingly, Argentina considers that the situation in the current proceedings is different from those in *EC – Bed Linen (Article 21.5 – India)* and *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*.

76. Finally, Argentina contends that, if the Appellate Body were to accept Chile's procedural objections and preclude Argentina from raising its claim under Article II:1(b) of the GATT 1994 in these Article 21.5 proceedings, it would mean that Argentina should have made all conceivable claims at the initial stages in the original proceedings regardless of whether the claims would have been fruitful. Because Article 3.7 of the DSU requires a Member to exercise its judgement as to whether initiating a dispute would be "fruitful", such a finding by the Appellate Body would preclude

[100]Argentina's other appellant's submission, para. 25 (referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.22-7.122; and Panel Report, *US – Countervailing Measures on Certain EC Products*, paras. 6.62-6.72).

[101]*Ibid*., paras. 58-61 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96; Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71 and footnote 110 thereto; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, footnote 150 to para. 102).

complainants from exercising their judgement as required by Article 3.7 of the DSU. Argentina submits that this would add a new and undue burden on complainants.

3. Consistency of the Measure at Issue with Article II:1(b) of the GATT 1994

77. Argentina requests the Appellate Body "to complete the analysis of the Panel where [the Appellate Body] reverses or modifies findings of the Panel or [where] completion of the analysis of the Panel is necessary to resolve this dispute."[102] Argentina maintains that, regardless of whether the measure at issue is similar to a variable import levy or a minimum import price, the measure is inconsistent with the second sentence of Article II:1(b) of the GATT 1994. Argentina contends that this is because the measure at issue is an "other duty or charge" not recorded in the appropriate column in Chile's Schedule of Concessions, thus infringing the second sentence of Article II:1(b). In this regard, Argentina agrees with Chile's statement, made before the Appellate Body in the original proceedings, that the purpose of the second sentence of Article II:1(b) is to ensure that bindings on "ordinary customs duties" cannot be circumvented by the creation of new types of duties or charges.[103]

78. Argentina recalls the Appellate Body's finding in the original proceedings that all that is required for a border measure to be an ordinary customs duty is that it be expressed in the form of an *ad valorem* or specific rate. In addition, the Appellate Body found that the fact that duties resulting from the original price band system took the form of an "ordinary customs duty" did not imply that the measure underlying such duties was consistent with Article 4.2 of the *Agreement on Agriculture*. Argentina argues that this finding is equally applicable in the context of Article II:1(b) of the GATT 1994. The measure at issue is not expressed in an *ad valorem* or specific duty rate and therefore it does not constitute an ordinary customs duty. The duties resulting from the operation of this complex mechanism also cannot be ordinary customs duties even though they take the form of a specific duty. Argentina further recalls that, according to the negotiating history of Article II:1(b), "other duties or charges" within the meaning of that provision are defined only by exclusion, that is, as a residual category of duties or charges that do not constitute ordinary customs duties within the meaning of the first sentence of Article II:1(b). Argentina concludes, therefore, that, because it is not an ordinary customs duty, and because it is not recorded in the appropriate column for "other duties or charges" in Chile's Schedule of Concessions, the measure at issue must constitute an "other duty or charge" that is prohibited under the second sentence of Article II:1(b) of the GATT 1994.

[102]Argentina's other appellant's submission, para. 86.

[103]*Ibid*., para. 31 (quoting Appellate Body Report, *Chile – Price Band System*, para. 51).

D. *Arguments of Chile – Appellee*

79. Chile requests the Appellate Body to reject Argentina's claims made in its other appeal, namely: (i) to reverse the Panel's finding that it was unnecessary to make a separate finding on Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994; and (ii) to complete the analysis and find that the measure at issue is inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

1. Conditional Appeal and Completion of the Analysis

80. As a threshold matter, Chile notes, based on Argentina's other appellant's submission, that Argentina has not specifically requested the Appellate Body to complete the analysis under Article 4.2 of the *Agreement on Agriculture*, if the Appellate Body were to reverse the Panel's findings and conclusions under the same provision. Although Argentina makes a general reference to completing the analysis in its other appellant's submission, that submission, according to Chile, refers to, and provides arguments regarding, completion of the analysis only in respect of Argentina's claim under Article II:1(b) of the GATT 1994. In Chile's view, because Argentina has provided no specific reference or arguments in relation to completing the analysis under the *Agreement on Agriculture*, the Appellate Body cannot complete the analysis on these claims.

81. Chile alleges that, in any event, Argentina's vague references to completing the analysis disguise the complexity involved in doing so in this case. In Chile's view, the Appellate Body would be required to complete the analysis on each of three different levels. First, the Appellate Body would need to find that it is appropriate to complete the analysis with respect to Argentina's claims under Article 4.2 of the *Agreement on Agriculture* and, if so, then proceed with determining whether the measure at issue is consistent with this provision. Secondly, in the event that the measure at issue were found to be consistent with the *Agreement on Agriculture*, the Appellate Body would then need to find that it is appropriate to complete the analysis with respect to whether Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994 was properly within the mandate of the Panel. Thirdly, if it finds that Argentina's claim was properly within the Panel's mandate, the Appellate Body would need to determine whether completing the analysis with respect to the substance of Argentina's claim under this provision is appropriate and, if so, proceed to completing the analysis. According to Chile, completing such a complex string of analyses would be inappropriate in this case, particularly given the absence of any prior findings under the second sentence of Article II:1(b) by the Appellate Body in the original proceedings or by the Panel in these Article 21.5 proceedings.

2. Scope of these Article 21.5 Proceedings in Relation to Argentina's Claim under Article II:1(b) of the GATT 1994

82. Chile asserts that Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994 was not properly within the scope of these Article 21.5 proceedings. Chile indicates that the original price band system and the measure at issue share the same fundamental feature, namely, that they both result in the application of specific duties or rebates. Chile argues that, before the Panel, Argentina was asked to identify the new aspects of the measure at issue which did not exist under the original price band system and which triggered a potential violation of the second sentence of Article II:1(b) of the GATT 1994. The Panel found that Argentina had failed to identify any such new aspect, and, according to Chile, Argentina has similarly failed to do so before the Appellate Body. Accordingly, Chile contends that, consistent with the findings of the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, the Appellate Body should find that Argentina's claim is beyond the scope of these Article 21.5 proceedings. For Chile, this is so because it is a new claim on an aspect of the original measure that was never challenged and remained unchanged in the measure at issue. Chile submits that, to protect its due process rights in these Article 21.5 proceedings, the Appellate Body should find that Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994 was not properly within the terms of reference of the Panel.

3. Consistency of the Measure at Issue with Article II:1(b) of the GATT 1994

83. Chile submits that the measure at issue is consistent with the second sentence of Article II:1(b) of the GATT 1994 because it is not, nor does it result in, "other duties or charges". In Chile's view, Argentina's appeal rests on the argument that the measure at issue does not constitute "ordinary customs duties" because, despite the resulting duties taking the form of an *ad valorem* or specific rate, the measure itself is not expressed in the form of an *ad valorem* or specific rate. Chile submits that the Appellate Body should reject Argentina's approach because it is inconsistent with Article II:1(b) of the GATT 1994 as well as the Appellate Body's findings in the original proceedings. Specifically, Chile considers that Argentina, in making its arguments, seeks to exclude from the Appellate Body's examination of its claim under Article II:1(b) the duties resulting from the measure at issue. However, if the resulting duties are ignored, the measure at issue cannot possibly constitute "other duties or charges" under Article II:1(b) of the GATT 1994, or even a variable import levy or minimum import price under footnote 1 of the *Agreement on Agriculture*. In addition, Chile suggests that "Argentina's approach would mean that a measure imposing ordinary customs duties could never refer to anything other than the numerical rates to be applied"[104], contrary to the Appellate Body's

[104]Chile's appellee's submission, para. 31.

finding in the original proceedings that a Member may consider "exogenous" factors in setting the level of ordinary customs duties.

84. Moreover, Chile takes issue with Argentina's argument that the measure at issue "should be examined in isolation"[105] and can constitute ordinary customs duties only if the measure itself is expressed in the form of an *ad valorem* or specific rate. In Chile's view, accepting this argument would lead to "absurd results"[106], because this would mean that all measures underlying the application of ordinary customs duties would be WTO-inconsistent if they are not limited to a numerical rate only. Chile gives the examples of measures that provide for progressive duty liberalization, tariff rate quotas, seasonal duties, and other types of ordinary customs duties. Chile contends that, according to Argentina's argument, these would all be found to be WTO-inconsistent if the measures themselves were not scheduled as a numerical rate, notwithstanding that the resulting duties are ordinary customs duties. Chile submits, therefore, that Argentina's approach should be rejected.

E. *Arguments of the Third Participants*

1. Australia

85. Australia contends that the Panel committed no error of law or legal interpretation in finding that the measure at issue is inconsistent with Chile's obligations under Article 4.2 of the *Agreement on Agriculture*. While recognizing the substantial changes that Chile made to its price band system, Australia nevertheless submits that these changes were not sufficient to bring Chile's measure into compliance with the recommendations and rulings of the DSB in the original proceedings. The Panel correctly identified the principal issue before it as whether the amendments introduced by Chile to its price band system were such as to make the measure consistent with Article 4.2 of the *Agreement on Agriculture*, and correctly found that the measure at issue has the restrictive features that characterize the border measures prohibited under Article 4.2 and footnote 1.

86. Australia adds that the Panel did not fail to give effect to the language "other than ordinary customs duties" in footnote 1 to Article 4.2. The structure of the Panel Report shows that the Panel did analyze whether the measure at issue operated differently from "ordinary customs duties", along with its consideration of whether the measure at issue was similar to a variable import levy and to a minimum import price.

---

[105]Chile's appellee's submission, para. 6.

[106]*Ibid*., para. 29.

87. Australia further argues that the Panel did not fail to examine, on an "empirical basis", the similarity of the measure at issue with variable import levies and minimum import prices. Australia contends that Chile misinterprets the Appellate Body's use of the term "empirical" in the original proceedings. The term was used by the Appellate Body to reject the original panel's assessment that certain characteristics of a measure could be considered as being of a "fundamental nature". In Australia's opinion, the Appellate Body used "empirical" simply to refer "to a comparison of actual characteristics as opposed to a theoretical assessment of 'fundamental' characteristics".[107] The term, according to Australia, was not intended to be limited to only the economic impact, as suggested by Chile. Therefore, the Panel's approach was consistent with the Appellate Body's use of the term "empirical".

88. Australia rejects Chile's contention that the measure at issue does not impose automatic variability as it requires a separate administrative act to change the duty levels. In accordance with the findings of the Appellate Body in the original proceedings, the Panel correctly found that the measure at issue falls within this definition because it contains a formula that establishes automatic and periodic adjustment in the levels of specific duties and rebates. The Panel was also correct in concluding that continuous variability of the duties is a feature inherent in the measure at issue. The Appellate Body's use of the term "continuous" does not suggest a requirement for a particular frequency. Instead, according to Australia, the Appellate Body's reference to the right of Members to change periodically the rate at which they apply duties was a reference to change which is periodic in the sense that it is not inherent in the operation of an underlying measure, which is not the case in the measure at issue.

89. Australia acknowledges that the fixing of the upper and lower thresholds for an extended period of time under the measure at issue is an "improvement", but maintains that the reference prices remain unpredictable and the way in which they are calculated lacks transparency. Australia submits that traders are "faced with a degree of unpredictability not materially different from the original [measure]"[108] when they want to find out the amount of duties beyond the next bi-monthly duty adjustment.

2. Brazil

90. Brazil submits that the measure at issue shares fundamental characteristics with the original price band system and continues to be similar to a variable import levy and to a minimum import price. Like the original measure, the measure at issue has an automatic protective effect when prices

[107]Australia's third participant's submission, para. 14.

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

fall below the lower threshold, and it still contains a pre-determined formula that changes the reference prices within short periods to reflect international prices. Furthermore, Brazil submits, the measure at issue imposes specific duties that more than fill the gap between the international price and the lower threshold so as to insulate domestic producers from the price declines. Brazil asserts that the differences between the original price band system and the measure at issue are essentially "minor details that do not alter the functioning of the system as a variable import levy and minimum price".[109]

91. Brazil contends that the Panel correctly analyzed "variability" and found the measure at issue to be similar to a variable import levy. The Panel correctly reflected the reasoning of the Appellate Body in the original proceedings in finding the measure at issue to be "variable" due to its in-built formula that causes specific duties to vary on a bi-monthly basis. The measure at issue could also be considered to be "variable" because its in-built formula means that a trader may be faced with one of three scenarios: (i) a requirement to pay a specific duty on top of *ad valorem* duties; (ii) a requirement to pay only *ad valorem* duties; or (iii) a rebate on *ad valorem* duties. Brazil also disagrees with Chile's assertion that the measure at issue does not, in itself, impose variability, because Supreme Decree 831 specifies that Chile's Ministry of Finance can revise aspects of the measure at any time. This argument is not tenable because it is Law 18.525, as amended, that establishes the measure at issue and its formula, whereas Supreme Decree 831 merely specifies certain operational details of the mechanism. Brazil further refers to the findings of the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* and of the panel in *US – Zeroing (Japan)*, and contends that "the mere possibility" that a challenged measure may be modified in the future "cannot shield [it] from a finding of WTO-inconsistency".[110]

92. Brazil rejects Chile's attempt to distinguish the variability of the measure at issue from that of the original measure by characterizing the latter as a measure which imposed duties that varied continuously on a transaction-by-transaction basis. In fact, the only difference in variation is that under the measure at issue the duties are fixed for a two-month period rather than weekly, and this change does not make the variability disappear. Furthermore, the Panel correctly concluded that the fact that there is a separate administrative act of publishing a decree every two months was "a mere formality", and did not mean that the measure was no longer "automatic".[111] Rather, Brazil maintains,

[109]Brazil's third participant's submission, para. 9.

[110]*Ibid*., para. 16 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187; and Panel Report, *US – Zeroing (Japan)*, para. 7.57).

[111]*Ibid*., para. 21.

the variable duties resulting from the measure at issue continue to be "inherently unpredictable and lacking in transparency".[112]

93. Brazil also disagrees with Chile's argument that the variations in the measure at issue are equivalent to modifications of "ordinary customs duties". Fluctuations in the duties resulting from the measure at issue are fundamentally different, because they result from an in-built formula and are mandated for a two-month period. With respect to the transparency and predictability of the measure at issue, Brazil maintains that none of the modifications that Chile made to the original measure changed its intrinsic lack of predictability and transparency nor its similarity to a variable import levy.

94. According to Brazil, the measure at issue also continues to be a measure similar to a minimum import price, because it sets a numerical benchmark (the lower threshold) below which import prices can fall only in the most exceptional circumstances. Even in the unlikely event that world market prices fall "precipitously" within a two-month period, the measure at issue would nonetheless neutralize the fall in prices when the specific duty levels are updated in the subsequent two months.[113] This confirms that the measure at issue continues to be similar to a minimum import price. Brazil further argues that it is not necessary for the thresholds to be expressed in c.i.f. terms for the measure at issue to function as a minimum import price.

95. Brazil argues that the Panel was not required to make an additional determination that the measure at issue was not an "ordinary customs duty". This is because, according to Brazil, a finding that a measure falls within footnote 1 to Article 4.2 of the *Agreement on Agriculture* necessarily implies that the measure is not an "ordinary customs duty". In addition, the Appellate Body, in the original proceedings, did not make a separate finding that the measure was not an "ordinary customs duty" after finding that it was similar to a variable import levy and to a minimum import price. In any event, the measure at issue is not an "ordinary customs duty", because it is not expressed either as an *ad valorem* duty, a specific duty, or a combination thereof, and also because it does not impose a duty regularly, but rather, exceptionally.

96. In addition, Brazil is of the opinion that the Panel did not misallocate the burden of proof but "merely required that Chile substantiate a particular factual assertion" that Chile had made.[114] The Panel did not start from the premise that the measure at issue was WTO-inconsistent, but merely considered the measure at issue against the "backdrop" of the original measure, and in line with the

[112]Brazil's third participant's submission, para. 28.

[113]*Ibid*., para. 29.

[114]*Ibid*., para. 37.

previous Appellate Body statements that an examination of the measure taken to comply cannot be done in abstraction from the measure that was the subject of the original proceedings.[115]

97. Regarding Argentina's conditional appeal, Brazil submits that, in the event the Appellate Body reverses the Panel's findings under Article 4.2 of the *Agreement on Agriculture*, the Appellate Body should complete the analysis and find the measure at issue to be inconsistent with the second sentence of Article II:1(b) of the GATT 1994. The measure at issue is not an "ordinary customs duty", but constitutes "other duties or charges" that are not recorded in Chile's Schedule of Concessions.

98. Brazil submits that Argentina's claim under the second sentence of Article II:1(b) was within the terms of reference of the Panel because it concerns a "*changed aspect* of a *new* measure".[116] Brazil disagrees with certain *obiter* statements of the Panel which imply that "a complaining Member must challenge *every conceivable violation* in the original proceedings in order to preserve its rights upon implementation."[117] Brazil submits that such an approach may lead to an increase in the use of judicial economy and place "an excessive burden" on the complainant and the dispute settlement system.[118]

3. Canada

99. Canada submits that, should the Appellate Body reach Argentina's conditional appeal, a clarification of the jurisdiction of Article 21.5 panels is required. Although the Appellate Body need not review the Panel's extensive comments on this issue, it remains open to the Appellate Body to do so as part of its broader review of this dispute. In Canada's opinion, the narrow approach to the jurisdiction of Article 21.5 panels enunciated by the Panel was inappropriate. Adopting such an approach would fetter the ability of Members to advance their claims and would be detrimental to the efficient and effective operation of the dispute settlement system. For Canada, it is "incontestable" that a Member has a right to bring new claims and arguments before an Article 21.5 panel relating to *new* measures.[119] Canada submits that an Article 21.5 panel should also be presumed to have jurisdiction over all claims and arguments raised by the complainant and should not reject such claims or arguments on the sole basis that they could have been raised previously.

---

[115]Brazil's third participant's submission, para. 38 (referring to Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para 102).

[116]*Ibid*., para. 42. (original emphasis)

[117]*Ibid*., para. 43. (original emphasis)

[118]*Ibid*., para. 43.

[119]Canada's third participant's submission, para. 5.

100. In Canada's opinion, there are three reasons why this should be the "starting presumption" for Article 21.5 panels. First, a complaining Member should be presumed in all proceedings to be acting in good faith in bringing claims and arguments it considers fruitful to resolve the dispute. Secondly, the DSU contains no provision directing or authorizing panels to reject claims solely on the basis that they could have been raised previously, but it does require panels to make an objective assessment of the matter. Thirdly, a "presumption of inadmissibility of arguments" may result in complainants multiplying their claims, regardless of their merits, in the original proceedings, so as to avoid subsequent procedural challenges during Article 21.5 proceedings.[120]

101. Canada maintains that, in any event, "[t]o have a presumption in favour of admission of all claims and arguments is not to say that the presumption cannot be rebutted"[121], and points to the Appellate Body Reports in *US – Shrimp (Article 21.5 – Malaysia)*, *EC – Bed Linen (Article 21.5 – India)*, and the Panel Report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* as examples of whether the presumption was appropriately rebutted.[122] In addition, claims and arguments are also subject to general principles of international law, such as procedural fairness and *res judicata*. In this regard, Canada indicates that, for example, in cases where unfair prejudice to a party would result, a panel could exercise discretion to refuse to exercise jurisdiction. In Canada's view, however, the Panel did not assess whether there could be potential prejudice to Chile if Argentina's claims under Article II:1(b) of the GATT 1994 were to be allowed. Instead, the Panel merely "formulated a particularly narrow rule for jurisdiction" which created a presumption that Article 21.5 panels will not consider arguments that could have been raised in the original proceedings, but were not, unless three stringent conditions are met.[123] Such a narrow approach places a high burden on the complainant and allows a respondent to rely on a presumption of prejudice to its position. It is not consistent with the presumption of good faith that should be accorded complainants and it does not acknowledge that the complainant has already established that the original measure was WTO-inconsistent.

102. Canada believes that the facts of this case illustrate the unreasonableness of the Panel's approach. Argentina's claim in the original proceedings was based on the first sentence of Article II:1(b), and Argentina argued that the duties imposed by Chile through the original price band system were "ordinary customs duties" within the meaning of that sentence. However, the original

---

[120]Canada's third participant's submission, para. 9.

[121]*Ibid*., para. 10.

[122]Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96; Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, footnote 294 to para. 7.75.

[123]Canada's third participant's submission, para. 13.

panel disagreed. Subsequently, the Appellate Body reversed the original panel's finding but did not make a finding on whether duties in the original price band system were in fact "ordinary customs duties". Canada argues that the Panel's narrow approach would unfairly preclude Argentina from bringing a claim whose potential validity was only clear after the findings in the original proceedings, and that Chile would suffer no prejudice were an Article 21.5 panel to consider that claim.

4. Colombia

103. Colombia chose not to submit a third participant's submission pursuant to Rule 24(2) of the *Working Procedures*. In its statement at the oral hearing, Colombia addressed the burden of proof applied by the Panel and the interpretation of the term "variable import levy", and joined Chile in its criticism of the Panel's interpretations and findings.

5. European Communities

104. The European Communities requests the Appellate Body to find that the Panel erred in law in its analysis of the consistency of the measure at issue with Article 4.2 of the *Agreement on Agriculture* and to rectify, as appropriate, the views expressed by the Panel on the scope of the jurisdiction of Article 21.5 panels. The European Communities also submits that, because, in its view, the measure at issue should be considered an "ordinary customs duty", there is no breach of Article II:1(b) of the GATT 1994 and that a finding in this respect is not necessary to the resolution of the dispute.

105. The European Communities agrees with Chile that the Panel conducted only a "cursory review" of the measure at issue and merely compared it to the original price band system without establishing rigorously in law whether the measure at issue was still similar to a variable import levy or to a minimum import price.[124] When properly assessed against the standards established by the Appellate Body, the measure at issue should be found to meet the requirements of an "ordinary customs duty" in terms of transparency and predictability. In examining the similarity of the measure at issue to a minimum import price, the issue of whether the measure disconnects domestic prices from international prices should not be given too much weight. This is in line with the approach adopted by the Appellate Body which "put [the] main emphasis on the lack of transparency and predictability" when analyzing similarity.[125] The European Communities adds that transparency and predictability must be considered in the light of the actual effects of the measure at issue.

[124]European Communities' third participant's submission, para. 1.

[125]*Ibid*., para. 4.

106. According to the European Communities, the Panel erred in assessing the measure at issue against the highest possible standard of transparency and predictability, instead of using the proper standard, that is, the transparency and predictability of ordinary customs duties. Below bound duty rates, there is no specific level of predictability or transparency imposed on the administration or level of ordinary customs duties. In the same way, the Panel's analysis of transparency and predictability should not have focused on the level of the resulting duties but on the measure at issue and its operation. The European Communities adds that the Panel should also have undertaken a comprehensive and empirical review of the measure at issue in the light of the object and purpose of Article 4.2 of the *Agreement on Agriculture*, which the Appellate Body identified as enhanced market access, and *not* as either transparency and predictability *per se*, or unfettered market access.

107. The European Communities submits that, when properly analyzed in the light of these requirements, the measure at issue is sufficiently transparent and predictable. The changes in duties are not, strictly speaking, continuous, and there is reasonable transparency and predictability in the variations in duties. Under the measure at issue, traders know the level of duties to be paid for each two-month period, and are "able, to a reasonable extent, to understand the dynamics of the system and anticipate the evolution of the payable duty during the next [two-month] period."[126] Although they cannot anticipate the precise amount of specific duty or rebate that will be applied, this is no different from the situation where a Member reviews its applied rates. In addition, when, as in this case, the operation of the measure results in an increase in the entry price of imports that is transparent and predictable, then the system should be deemed to operate as an ordinary customs duty.

108. The European Communities disagrees with the Panel's views, expressed as *obiter dicta*, with respect to the scope of review by an Article 21.5 panel. The European Communities disagrees, in particular, with the Panel's statements that Article 21.5 panels are precluded from examining claims that could have been raised during the original proceedings, and that an Article 21.5 panel may not assess new claims that relate to aspects of the original measure that remain unchanged. In the European Communities' opinion, the scope of jurisdiction of an Article 21.5 panel is framed exclusively by the terms of Article 21.5 of the DSU, the request for the establishment of a panel, and the *res judicata* principle. By definition, the latter principle cannot apply in the situation where the claim was not made in the original proceedings.

109. The European Communities argues that the Panel's *obiter dicta* would force a complainant to identify all of its potential claims before an original panel. Such a condition has no basis in the DSU, and would deny Members the right to exercise their own "process economy" and to bring actions that

[126]European Communities' third participant's submission, para. 9.

they consider "fruitful".[127] The European Communities "fundamentally disagrees" with the Panel's view that an Article 21.5 panel would "create a situation of uncertainty for the respondent", and would "jeopardize the security and predictability" of the WTO dispute settlement system, if it were to admit new claims.[128] Rather, the Panel's restrictive approach would create a situation of uncertainty for complainants, and be counterproductive to the prompt and efficient settlement of disputes, because it would, in effect, prevent complainants from exercising "process economy" by limiting themselves to the claims that they consider to be the strongest, and force them to include a maximum of claims in the original proceedings.

110. Furthermore, according to the European Communities, allowing new claims at the implementation stage would not imply subjecting a respondent to immediate retaliation before having been afforded a reasonable period of time to comply. The European Communities argues that "reasonable periods of time" are grace periods "derogating from the normal rule [of] immediate compliance and not stemming from an automatic right".[129] As such, the European Communities does not view the lack of a reasonable period of time as sufficient to limit Members from bringing new claims.

111. The European Communities also registers its disagreement with the reasoning of the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*. In the view of the European Communities, that case, along with the Panel's *obiter dicta* in this case, create great uncertainty regarding the scope of Article 21.5 proceedings. The European Communities therefore requests the Appellate Body to "rectify" the Panel's *obiter dicta*, or, at least, to declare it "unsound and thus moot and without legal effect".[130]

6. Thailand

112. Pursuant to Rule 24(2) of the *Working Procedures*, Thailand chose not to submit a third participant's submission. In its statement at the oral hearing, Thailand addressed the question of whether the measure at issue continued to be similar to a "variable import levy" and agreed with the Panel's analysis of, and findings on, this issue.

---

[127]European Communities' third participant's submission, para. 21.

[128]*Ibid*., para. 22 (quoting Panel Report, para. 7.152).

[129]*Ibid*., para. 27.

[130]*Ibid*., para. 30.

7. United States

113. The United States asserts that the Panel correctly interpreted and applied Article 4.2 and footnote 1 of the *Agreement on Agriculture* and properly found that the measure at issue is similar to a variable import levy and to a minimum import price. According to the United States, the Panel was correct to focus its analysis on whether the measure at issue was similar to a variable import levy and to a minimum import price. An additional analysis in the light of the phrase "other than ordinary customs duties" was not required. This is consistent with the approach adopted by the Appellate Body in the original proceedings and, in any event, undertaking such an analysis would not have changed the Panel's ultimate conclusions. The United States points out that, under the measure at issue, Chile cannot provide a list of exact levels and dates of the application of duties to wheat imports throughout the year, which highlights that the measure at issue is not like seasonal duties, which are predictable and transparent "ordinary customs duties".

114. In the view of the United States, the Panel correctly found that the changes in the duty levels under the measure at issue were continuous. As under the original price band system, under the measure at issue duties are applied on a transaction-by-transaction basis. The only change is that, instead of the duties being calculated every week, duty levels are now set on a bi-monthly basis and applied to those imports with waybills dated within that two-month period. The United States further disagrees with Chile that the Panel applied the wrong standard in concluding that the measure at issue is applied "continuously" because it "contemplates" a scheme or formula that causes automatic and continuous changes in duties. According to the United States, the fact that the Panel used the verb "contemplate" instead of the verb "incorporate"—which was used by the Appellate Body in the original proceedings—does not affect the Panel's analysis and ultimate findings on the "continuous" nature of the change in resulting duties under the measure at issue.

115. The United States contests Chile's argument that the measure at issue is not "automatic" on the basis that the Chilean Ministry of Finance has the ability to change certain aspects of the measure at issue, and that a separate administrative action is required to change the level of duties. The fact that the Ministry of Finance may theoretically choose to make certain future changes does not alter the continuous and automatic nature of the formula as it stands. Similarly, the United States argues that the mere interjection of "a layer of clerical tasks (publication of the level of duty set by the formula)"[131] does not suffice to break the link between the formula and the level of duties automatically calculated by virtue of its application.

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

116. The United States disagrees with Chile that the scope of the Panel's analysis of transparency and predictability should have been restricted to an examination of the duties resulting from the measure at issue. The Panel correctly followed the guidance of the Appellate Body by also applying the transparency and predictability test to the methodology incorporated in the measure at issue. This is logical because, in order to predict resulting duty levels, an exporter must have a sense of how the measure that fixes the level of duties operates. In this regard, the United States argues that the Panel's conclusion that the measure at issue was neither predictable nor transparent was correct. As under the original price band system, under the measure at issue, traders will often not be in a position to predict, before sending their shipments, the specific duties that may be applicable.

117. The United States considers that the Panel correctly concluded that the lower threshold of the measure at issue acts as a substitute or a proxy for a minimum import price. A finding to the contrary would allow a WTO Member to avoid its obligations under Article 4.2 of the *Agreement on Agriculture* simply by labelling its measure something other than a "c.i.f. price", "minimum import price", or "entry price". Furthermore, just because import prices have not yet triggered the threshold does not mean that a minimum import price does not exist. The United States also points out that there is evidence that the specific duties applied by virtue of the measure at issue tend to "overcompensate" for price declines and elevate the entry price of wheat imports above the lower threshold.[132]

118. Lastly, the United States submits that it is not necessary for the Appellate Body to make a separate finding on Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994.

III. Issues Raised in This Appeal

119. The following issues are raised in this appeal:

(a) whether the Panel erred in its allocation of the burden of proof;

(b) whether the Panel erred in its interpretation and application of Article 4.2 and footnote 1 of the *Agreement on Agriculture* in finding that:

(i) the measure at issue is "similar" to a "variable import levy" and to a "minimum import price" within the meaning of footnote 1; and

(ii) the measure at issue is inconsistent with Article 4.2;

[132]United States' third participant's submission, para. 18.

(c) whether the Panel failed to discharge its duties under Article 11 of the DSU to conduct an objective assessment of the matter before it and under Article 12.7 of the DSU to set out a basic rationale for its findings; and

(d) if the Appellate Body reverses the Panel's findings that the measure at issue is inconsistent with Article 4.2 of the *Agreement on Agriculture*, then:

(i) whether the Appellate Body can and should rule on Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994; and, if so, then

(ii) whether the measure at issue is inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

IV. Background and the Measure at Issue

A. *Overview of the Measure at Issue and the Original Price Band System*

120. The measure at issue in these Article 21.5 proceedings is a Chilean measure that amends Chile's original price band system.[133] The original price band system was found to be inconsistent with Article 4.2 of the *Agreement on Agriculture* because it was "similar" to a "variable import levy" and to a "minimum import price", within the meaning of footnote 1 to that provision, and was, therefore, required to have been converted into "ordinary customs duties".[134] Subsequently, Chile adopted the measure at issue in order to comply with the recommendations and rulings adopted by the DSB in the original proceedings. Argentina, however, considered that Chile had failed to comply with those recommendations and rulings, and challenged Chile's measure in these Article 21.5 proceedings.

121. The measure at issue applies to imports of wheat and wheat flour, as did the original price band system.[135] Chile has bound its tariff for wheat and wheat flour at 31.5 per cent *ad valorem*, and applies a most-favoured-nation tariff of 6 per cent *ad valorem* on such products (the "applied tariff").[136]

---

[133]See *infra*, para. 127.

[134]Original Panel Report, para. 8.1(a); Appellate Body Report, *Chile – Price Band System*, para. 288(c)(iii).

[135]In addition to wheat and wheat flour, the measure at issue applies to imports of sugar; the original price band system applied to imports of sugar and edible vegetable oils. (Panel Report, para. 2.18; Original Panel Report, para. 2.9) Because Argentina's claim in these Article 21.5 proceedings concerns only wheat and wheat flour, we examine the measure at issue, and recall aspects of the original price band system, only to the extent that they relate to wheat and wheat flour.

[136]Panel Report, para. 2.17. The *ad valorem* rate was 7 per cent in 2002, when the original proceedings were concluded. (Appellate Body Report, *Chile – Price Band System*, para. 14)

The total amount of duties collected on a shipment of wheat or wheat flour imports could, however, be equal to, or higher or lower than, the applied tariff, as a result of the operation of the measure at issue.[137]

122. It is not disputed that the measure at issue and the original price band system "share the fundamental feature that they may result in the application of specific duties or rebates".[138] Under both measures, two parameters are used to determine whether specific duties or rebates will be applied, as well as the amount of such specific duties and rebates—a price band defined by its lower and upper thresholds (or band thresholds), and a reference price.[139] When the reference price is below the lower threshold, a specific duty is imposed in addition to the applied tariff.[140] When the reference price is between the lower and upper threshold, only the applied tariff is imposed. When the reference price is above the upper threshold, a rebate is deducted from the amount of the applied tariff.[141] With regard to wheat flour, the specific duties or rebates are established by multiplying the specific duties and rebates for wheat by a conversion factor of 1.56.[142] When a specific duty is imposed in addition to the applied tariff, the sum of the two is capped at Chile's bound tariff rate of 31.5 per cent *ad valorem*.[143] The value of any rebate is deducted from (but may not exceed) the amount payable as the applied tariff.[144]

123. The original price band system, however, differed from the measure at issue in several aspects. Thus, before turning to examine the measure at issue and the Panel's assessment of it, we consider that recalling certain features of the original price band system provides background useful to our task.

---

[137]Panel Report, para. 2.18.

[138]Chile's appellee's submission, para. 22; Argentina's first written submission to the Panel, Panel Report, p. A-12, para. 36.

[139]Panel Report, para. 2.20.

[140]*Ibid.*, paras. 2.25 and 2.26.

[141]*Ibid.*

[142]*Ibid.*, para. 2.27. As explained by Chile, the figure of 1.56 results from the fact that, between January 1986 and December 1995, the average ratio of the price of wheat flour to the price of wheat was 1.566. This figure was then built into the Chilean legislation and it has remained unchanged ever since. (*Ibid.*, para. 7.80)

[143]*Ibid.*, para. 2.19

[144]*Ibid.*

B. *The Original Price Band System*

124. The original price band system was contained in Article 12 of Chilean Law 18.525 on the Rules on the Importation of Goods.[145] Under the original system, the lower and upper thresholds were announced annually, and were determined using average monthly free on board ("f.o.b.") Gulf of Mexico prices for a specific quality of wheat, namely, *Hard Red Winter No. 2*, for the preceding 60 months on the Kansas Exchange.[146] After having been adjusted to account for international inflation, these average monthly prices were listed in descending order and up to 25 per cent of the highest and lowest of the 60 monthly prices were eliminated.[147] Among the remaining monthly prices, the highest and the lowest were selected, and import costs and the applied *ad valorem* tariff were added to these two prices to establish the upper and lower thresholds on a cost, insurance and freight ("c.i.f.") basis.[148]

125. Reference prices were determined weekly (every Friday) by selecting the lowest daily f.o.b. price in foreign markets of concern during that week.[149] These markets of concern included Argentina, Australia, Canada, and the United States. The reference prices so determined remained in force for the following week and could be consulted by the public at the offices of the Chilean customs authorities.[150]

126. The reference price used to calculate the specific duty or rebate applicable to a particular import shipment was the reference price in force for the week during which the shipment was sent from the exporting country.[151] When the reference price was below the lower threshold, the amount of the specific duty was equal to the difference between these two parameters. Conversely, when the reference price was above the upper threshold, the amount of the rebate was equal to the difference between these two parameters.[152] The annual decrees that established the price bands contained a table that set out a range of reference prices and the rebate or specific duty that would be applied in

---

[145]Original Panel Report, para. 2.2 and footnotes 4 and 5 thereto. The original price band system was amended by Law 19.772, published on 19 November 2001, whereby Chile placed a cap on the duties payable so as to ensure they did not exceed the bound tariff rate of 31.5 per cent *ad valorem*. (Panel Report, para. 2.13 and footnote 23 thereto)

[146]Panel Report, para. 2.22.

[147]*Ibid*.; Appellate Body Report, *Chile – Price Band System*, para. 18.

[148]Panel Report, para. 2.22; Appellate Body Report, *Chile – Price Band System*, para. 18.

[149]Panel Report, para. 2.24; Appellate Body Report, *Chile – Price Band System*, para. 21.

[150]Panel Report, para. 2.24.

[151]Panel Report, *Chile – Price Band System*, para. 2.6; Appellate Body Report, *Chile – Price Band System*, para. 22.

[152]Panel Report, para. 2.26; Appellate Body Report, *Chile – Price Band System*, para. 29.

respect of each of those reference prices. Once the reference price that applied for a particular week had been established, the corresponding specific duty or rebate for that reference price could be found in the table.[153]

C. *The Measure at Issue*

127. The measure at issue in these proceedings under Article 21.5 of the DSU consists of: (i) Article 12 of Law 18.525 on the Rules on the Importation of Goods, as amended by Law 19.897 published on 25 September 2003; and (ii) Supreme Decree 831 of the Ministry of Finance, published on 4 October 2003, which regulates the application of Article 12 of Law 18.525, as amended by Law 19.897.[154] The relevant provisions of Law 18.525, as amended, and Supreme Decree 831 entered into force on 16 December 2003.[155]

128. The lower and upper band thresholds under the measure at issue are specified for the 11-year period between 2003 and 2014.[156] For the first four years of that period (from 16 December 2003 to 15 December 2007), the lower and upper thresholds are set at US$128 per tonne and US$148 per tonne, respectively.[157] From 16 December 2007 to 15 December 2014, the thresholds will be adjusted annually by multiplying the thresholds in force during the previous annual period by a factor of 0.985,

---

[153]Appellate Body Report, *Chile – Price Band System*, para. 29.

[154]As explained in paragraph 2.15 of the Panel Report, the amended version of Article 12 of Law 18.525 expressly provides for the issuance of a supreme decree to establish: the periods in which specific duties and tariff rebates are to be established and applied; the most relevant markets; the procedures and dates for calculating the reference prices; and other methodological factors necessary for the implementation of Article 12.

[155]Panel Report, paras. 2.12-2.16.

[156]*Ibid.*, para. 2.21. Article 12 of Law 18.525 (as modified by Law 19.897) is reproduced in paragraph 2.14 of the Panel Report and provides, in relevant part:

> For the purpose of determining the duties and rebates up until the annual period ending in 2007, the floor and ceiling prices for wheat ... shall be considered in the drafting of Chilean Ministry of Finance exempt decrees No. 266 ... published in the Official Journal of 16 May 2002, expressed in f.o.b. terms in United States dollars per tonne. There shall be established, on the one hand, specific duties when the reference price is below the floor price of US$128 for wheat ... and, on the other hand, rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff when the reference price is above the ceiling price of US$148 for wheat ... .
>
> For the purpose of determining the duties and rebates as from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established in the previous paragraph shall be adjusted annually by multiplying the values in force during the previous annual period by a factor of 0.985 in the case of wheat ... .

[157]Panel Report, para. 2.21.

which amounts to a US$2 reduction per year.[158] Accordingly, for the last year of this 11-year period (from 16 December 2013 to 15 December 2014), the lower and upper thresholds will be US$114 and US$134, respectively.[159]

129. Reference prices are determined by the Chilean authorities once every two months, in December, February, April, June, August, and October.[160] A reference price is calculated as the simple average of daily f.o.b. prices for wheat in the "most relevant markets", recorded during a 15-day period ending on the 10th day of these months.[161] The "most relevant markets" are Argentina (for the reference prices determined in December, February, and April), and the United States (for the reference prices determined in June, August, and October). The daily prices used are the daily prices quoted for *Trigo Pan Argentino,* f.o.b Argentine port and *Soft Red Winter No. 2,* f.o.b Gulf of Mexico.[162]

130. Every two months, the reference price thus established is compared to the band thresholds to determine the amount of the specific duty or rebate, if any. When the reference price is below the

[158]Panel Report, para. 2.21.

[159]The lower and upper thresholds in force for each year from 16 December 2003 to 15 December 2014 are set out in a table in Article 6 of Supreme Decree 831, reproduced in paragraph 2.16 of the Panel Report.

[160]Panel Report, para. 2.23. Article 12 of Law 18.525, as amended, is reproduced in paragraph 2.14 of the Panel Report and provides, in relevant part, that the amount of specific duties and rebates shall be established as provided in that Article "by way of a supreme decree issued ... six times for wheat in the course of each twelve-month period extending from 16 December to 15 December of the following year." See also Article 5 of Supreme Decree 831, reproduced in paragraph 2.16 of the Panel Report.

[161]Panel Report, para. 2.23; Chile's response to Question 63 posed by the Panel, Panel Report, p. F-103. Article 12 of Law 18.525, as amended, is reproduced in paragraph 2.14 of the Panel Report and provides, in relevant part:

> The f.o.b. reference price shall consist of the average of the daily international prices for wheat ... recorded in the most relevant markets over a period of 15 calendar days for wheat ... reckoned from the date fixed by the Regulations for each Decree.

See also Article 7 of Supreme Decree 831, reproduced in paragraph 2.16 of the Panel Report, which provides:

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

[162]Panel Report, para. 2.23. See also Article 8 of Supreme Decree 831, reproduced in paragraph 2.16 of the Panel Report, which provides:

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

lower price band threshold, the amount of the specific duty is equivalent to the difference between these two parameters, multiplied by 1.06.[163] When the reference price is above the upper price band threshold, the amount of the rebate is equivalent to the difference between these two parameters, multiplied by 1.06.[164] The amount of the specific duty or rebate so calculated is announced in bi-monthly supreme decrees issued by the Chilean Ministry of Finance.[165] Once announced, a specific duty or rebate is applied to all wheat and wheat flour imports arriving in Chile during the two-month period beginning on the 16th day of the month in which a bi-monthly Supreme Decree is published.[166]

131. From 16 December 2003 (when the measure at issue entered into force) to 13 January 2006, only two reference prices, namely, those calculated in December 2004 and February 2005, were below the lower band threshold.[167] As a result, a specific duty was imposed on 16 December 2004 and on 16 February 2005, with each duty remaining effective for the following two-month period.[168] This means that, from 16 December 2003 to 13 January 2006: specific duties were applied in 17 weeks; rebates were applied in 35 weeks; and, for the remaining 57 weeks of that period, only the

[163]The rate of 1.06 corresponds to one plus the general *ad valorem* rate of 6 per cent. (Panel Report, para. 2.25) See also the text of Article 12 of Law 18.525, as amended, and Article 14 of Supreme Decree 831, reproduced in paragraphs 2.14 and 2.16 of the Panel Report, respectively.

[164]The rate of 1.06 corresponds to one plus the general *ad valorem* rate of 6 per cent. (Panel Report, para. 2.25) See also the text of Article 12 of Law 18.525, as amended, and Article 15 of Supreme Decree 831, reproduced in paragraphs 2.14 and 2.16 of the Panel Report, respectively.

[165]Panel Report, para. 2.28. These bi-monthly decrees do not specify the reference price used or set out the underlying calculation, but simply contain the result of that calculation. (Panel Report, para. 2.29; Exhibit ARG-5 submitted by Argentina to the Panel)

[166]The Annex to Supreme Decree 831 specifies the dates for announcing specific duties or rebates, their periods of validity, and the periods and most relevant markets for determining reference prices, as reproduced in paragraph 2.16 of the Panel Report:

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

[167]Argentina's first written submission to the Panel, Panel Report, pp. A-28 to A-31, paras. 133-140 and 149.

[168]Chile's second written submission to the Panel, Panel Report, pp. C-61 and C-65, paras. 49 and 80. Chile's oral statement and response to questioning at the oral hearing. See also Decree 762 of 13 December 2004 and Decree 88 of 10 February 2005, contained in Exhibit ARG-5 submitted by Argentina to the Panel.

ad valorem applied tariff was applied to wheat and wheat flour imports to Chile.[169] In addition, from 13 January to June 2006, wheat and wheat flour imports entered into Chile subject only to the *ad valorem* applied tariff.[170]

V. Burden of Proof

132. Chile claims that the Panel did not properly allocate the burden of proof because the Panel proceeded on the *assumption* that the measure at issue was inconsistent with Article 4.2 of the *Agreement on Agriculture*. In so doing, Chile argues, the Panel relieved Argentina of its burden of proof and wrongly required Chile to demonstrate that the measure at issue was consistent with this provision. Chile requests the Appellate Body to reverse "all of the Panel's conclusions" because of this "fundamental flaw".[171]

133. In Argentina's view, the Panel correctly found, on the basis of the arguments and evidence on the Panel record, that Argentina had established a *prima face* case and that Chile had failed to rebut it, and thereby rightly concluded that the measure at issue was inconsistent with Article 4.2 of the *Agreement on Agriculture*. Accordingly, Argentina requests the Appellate Body to dismiss this ground of Chile's appeal.

134. We first recall that, in WTO dispute settlement, as in most legal systems and international tribunals, the burden of proof rests on the party that asserts the affirmative of a claim or defence.[172] A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence.[173] The nature and scope of arguments and evidence required "will necessarily vary from measure to measure, provision to provision, and case to case".[174] When a claim is brought against a WTO Member's legislation or regulation, a panel may, in some circumstances, consider that the text of the relevant legal instrument is sufficiently clear to establish the scope and meaning of the law. However, in other cases, a panel may consider that additional evidence is

[169]Panel Report, para. 2.31.

[170]*Ibid*.

[171]Chile's statement at the oral hearing.

[172]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323, at 335. Moreover, each party bears the burden of proving the facts that it asserts in support of its claim or defence (Appellate Body Report, *Japan – Apples*, para. 157), and it is *not* for a panel "to make the case for a complaining party". (Appellate Body Report, *Japan – Agricultural Products II*, para. 129) In addition, a "panel may not take upon itself to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so." (Appellate Body Report, *US – Gambling*, para. 282)

[173]"[A] *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party." (Appellate Body Report, *EC – Hormones*, para. 104)

[174]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323, at 335; Appellate Body Report, *US – Carbon Steel*, para. 157.

necessary to do so.[175] Once the complaining party has established a *prima facie* case, it is then for the responding party to rebut it.[176]

135. A panel errs when it sustains a claim for which the complaining party has failed to make out a *prima facie* case.[177] Nevertheless, a panel does not commit legal error merely by omitting to specify which party bears the burden of proof in respect of each claim or defence.[178] Moreover, a panel is not obliged, in every instance, to make an explicit finding that a complaining party has met its burden to establish a *prima facie* case in respect of each element of a particular claim, or that the responding party has effectively rebutted a *prima facie* case.[179] Thus, a panel is not required to make an explicit ruling that a complaining party has established a *prima facie* case of inconsistency before examining the responding party's defence and evidence.[180] At the same time, the mere articulation by a panel of the correct rules as to the burden of proof is not sufficient if the panel does not, in fact, properly allocate that burden in the case before it.[181]

136. Neither Chile nor Argentina suggests that the general rules on burden of proof, which imply that a responding party's measure will be treated as WTO-consistent unless proven otherwise, do not apply in proceedings under Article 21.5 of the DSU. We observe, in this regard, that Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings form part of a continuum of events.[182] The text of Article 21.5 expressly links the "measures taken to comply" with the recommendations and rulings of the DSB concerning the original measure.[183] A panel's examination of a measure taken to comply cannot, therefore, be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB.[184] Such findings identify the WTO-inconsistency with respect to the original measure, and a panel's examination of a measure taken to comply must be conducted with due cognizance of this background.[185] Thus, the

---

[175]Appellate Body Report, *US – Carbon Steel*, para. 157.

[176]See, for example, Appellate Body Report, *US – Gambling*, para. 139 and footnote 149 thereto.

[177]*Ibid*., para. 139; Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

[178]Appellate Body Report, *India – Quantitative Restrictions*, para. 137.

[179]Appellate Body Report, *Thailand – H-Beams*, para. 134.

[180]Appellate Body Report, *Korea – Dairy*, para. 145.

[181]Appellate Body Report, *India – Patents (US)*, para. 74.

[182]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121.

[183]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 142; Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 61; Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68.

[184]Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 102; Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

[185]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121.

adopted findings from the original proceedings may well figure prominently in proceedings under Article 21.5, especially where the measure taken to comply is alleged to be inconsistent with WTO law in ways similar to the original measure.[186] In our view, these considerations may influence the way in which the complaining party presents its case, and they may also be relevant to the manner in which an Article 21.5 panel determines whether that party has discharged its burden of proof and established a *prima facie* case.

137. We note that the Panel in these Article 21.5 proceedings did not make any express statement regarding the allocation of the burden of proof in its Report. Chile points to various statements in the Panel Report purportedly indicating that, "[t]hroughout its analysis, from the first paragraph to the last paragraph", the Panel misallocated the burden of proof.[187] According to Chile, the Panel erred in conducting its review by focusing on whether the measure at issue "continues to have sufficient resemblance or likeness" to variable import levies and to minimum import prices, or "has been modified" in comparison to the original price band system.[188] The statements referred to by Chile are mostly found in the introductory or concluding paragraphs in each section of the Panel's substantive analysis. For example, in the first paragraph of its substantive analysis, the Panel stated that the "main issue" for it to decide was "whether the amendments introduced by Chile to its [price band system] are such as to make the measure consistent with Article 4.2" of the *Agreement on Agriculture*.[189] Chile also refers to the Panel's conclusion that "the amendments introduced by Chile into its [price band system] have failed to convert it into a measure which is no longer a border measure similar to a 'variable import levy' and to a 'minimum import price'".[190]

138. These statements must, however, be understood in the context of these Article 21.5 proceedings, which include the recommendations and rulings of the DSB in the original proceedings and the measure taken to comply with them. In the original proceedings, Chile's original price band system was found to be similar to a variable import levy and to a minimum import price, and thus inconsistent with Article 4.2 of the *Agreement on Agriculture*. In these Article 21.5 proceedings, the task of the Panel was to examine Argentina's claim that the measure taken to comply was similar to a variable import levy and to a minimum import price and, therefore, inconsistent with Article 4.2.[191]

---

[186]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 109.

[187]Chile's statement at the oral hearing.

[188]Chile's appellant's submission, paras. 49 and 50 (quoting Panel Report, paras. 6.12, 7.44, 7.54, 7.55, 7.79, 7.81, and 7.92).

[189]*Ibid*., para. 46 (quoting Panel Report, para. 7.14). (emphasis added by Chile)

[190]*Ibid*., para. 48 (quoting Panel Report, para. 7.96). (emphasis added by Chile)

[191]In the Request for the Establishment of a Panel, Argentina claimed that Chile continued to maintain a measure similar to a variable import levy and to a minimum import price, thereby acting inconsistently with Article 4.2 of the *Agreement on Agriculture*. (Panel Report, pp. G-2 and G-3)

The panel and the Appellate Body reports in the original proceedings contain detailed interpretations of this provision, and provide a reasoned analysis applying these interpretations to the various features of the original price band system and explaining why it was inconsistent with Article 4.2. The Panel's examination of the measure at issue in these Article 21.5 proceedings was conducted against this background and in the light of the parameters set out in the original reports.

139. In addition, before the Panel, both Argentina and Chile made claims and arguments that referred extensively to the original price band system as well as to the interpretations, reasonings, and findings of the panel and the Appellate Body in the original proceedings.[192] Argentina claimed that, through the measure at issue, Chile had only "cosmetically" amended the original price band system while preserving its distortive effects and its lack of transparency and predictability.[193] In response, Chile countered that the measure was "in keeping with" the original findings and their application to the original price band system, arguing that Chile "was only required to take action with respect to specific aspects of the [original price band system] that the Appellate Body had identified".[194] In making their arguments, both parties recognized that the measure at issue shares certain features of the original price band system, such as the existence of band thresholds, reference prices, the resulting specific duties and rebates for wheat, and the conversion factor of 1.56 for calculating duties and rebates on wheat flour.[195] Their disagreement focused, to a large degree, on whether the measure at issue has *the same characteristics* that were found by the original panel and the Appellate Body to have rendered the original price band system inconsistent with Article 4.2 of the *Agreement on Agriculture*.

140. Read in this context, the statements in the Panel Report quoted by Chile[196] do not indicate a misallocation of the burden of proof. Rather, they reflect the Panel's approach in analyzing the measure at issue in the light of the interpretation of the requirements of Article 4.2 in the original proceedings and the parties' claims and arguments in these Article 21.5 proceedings. In these circumstances, it was appropriate for the Panel to make comparisons between the measure at issue and the original price band system, especially with regard to the specific aspects that had been modified. We do not consider, therefore, that the Panel erred merely because it examined the modifications

[192]Panel Report, paras. 7.6-7.12.

[193]See Argentina's opening statement at the Panel meeting, Panel Report, p. D-3, para. 7.

[194]Panel Report, paras. 7.9.

[195]See, for example, Argentina's first written submission to the Panel, Panel Report, p. A-12, para. 36; and Chile's first written submission to the Panel, Panel Report, pp. A-64 and A-65, paras. 20-30.

[196]Chile's appellant's submission, paras. 46-50 (quoting Panel Report, paras. 6.12, 7.14, 7.44, 7.54, 7.55, 7.79, 7.81, 7.92, and 7.96).

made to Chile's original price band system through the measure at issue in the light of the recommendations and rulings of the DSB.

141. Moreover, a careful reading of the Panel Report suggests that the Panel conducted its analysis on the basis of Argentina's arguments and evidence presented in order to establish a *prima facie* case, as it proceeded to consider Chile's arguments and evidence submitted in rebuttal. The Panel record reveals that, in its two written submissions and two oral statements, Argentina developed extensive legal arguments supported by evidence presented in 38 exhibits, including the legal text of the measure at issue and mathematical/statistical evidence regarding the application of the measure. Argentina sought to demonstrate that the measure at issue, "*per se* and in its specific application to imports of wheat and wheat flour"[197], was inconsistent with Article 4.2 of the *Agreement on Agriculture*. The Panel commenced its examination with the text of the measure at issue and found that, "[o]n its face, the language of the [measure at issue] will necessarily result in variability in the level of duties".[198] Because Chile contested this characterization of its measure, the Panel went on to consider Chile's arguments and evidence. The Panel found these to be unpersuasive "in light of the available evidence to the contrary and, indeed, of Chile's own explanations".[199] Similarly, the Panel considered the empirical evidence regarding the application of the measure at issue contained in certain exhibits submitted by Argentina, and found that even Chile's arguments and evidence appeared to confirm Argentina's position that the lower threshold of the price band continued to operate as a substitute for a minimum price.[200] Such statements and findings suggest that the Panel considered that Argentina had provided sufficient proof for its claim as it turned to examine whether Chile had effectively rebutted that claim. That the Panel did not expressly specify the moment at which it determined that Argentina had established a *prima facie* case and announce when it would turn to Chile's rebuttal does not constitute an error in the allocation of the burden of proof.[201]

142. In the light of the foregoing, we are satisfied that the Panel properly considered that Argentina had presented arguments and evidence sufficient to establish a *prima facie* case of inconsistency with Article 4.2 of the *Agreement on Agriculture*, and appropriately focused its analysis, as well, on whether Chile had succeeded in rebutting Argentina's *prima facie* case.

---

[197]Argentina's first written submission to the Panel, Panel Report, pp. A-7 and A-8, para. 14.

[198]Panel Report, para. 7.58.

[199]*Ibid*., para. 7.59.

[200]*Ibid*., 7.87-7.92.

[201]Appellate Body Report, *India – Quantitative Restrictions*, para. 142.

143. We nevertheless wish to express reservations regarding certain statements made by the Panel. For example, at the outset of its analysis, after summarizing the parties' arguments and quoting the relevant treaty provision, the Panel immediately stated that the "main issue for the Panel to decide ... is whether [Chile's] amendments ... are such as to make the measure [at issue] consistent with Article 4.2" of the *Agreement on Agriculture*.[202] Given that the Panel did not specifically articulate its allocation of the burden of proof, such a statement, read in isolation, could be construed to imply that the Panel might have proceeded to consider whether Chile had proven the WTO-consistency of the measure at issue without analyzing whether Argentina had established a *prima facie* case of inconsistency. In our view, the Panel could have made it more discernable, in its reasoning, that it was mindful of the burden on Argentina.

144. In conclusion, having carefully examined the Panel's analysis, the Panel record, and the arguments presented on appeal, we are of the view that the Panel did not err in its allocation of the burden of proof.

VI. Article 4.2 and footnote 1 of the *Agreement on Agriculture*

145. Before turning to the specifics of Chile's appeal, we consider it useful to recall certain general observations made by the Appellate Body in the course of the original proceedings. Part III of the *Agreement on Agriculture* consists of two articles, Article 4 on market access and Article 5 on special safeguard provisions. The Appellate Body observed that "Article 4 of the *Agreement on Agriculture* is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products"[203], and explained its origin and function as follows:

[202]Panel Report, para. 7.14.

[203]Appellate Body Report, *Chile – Price Band System*, para. 201.

> During the course of the Uruguay Round, negotiators identified certain border measures which have in common that they restrict the volume or distort the price of imports of agricultural products. The negotiators decided that these border measures should be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. Thus, they envisioned that ordinary customs duties would, in principle, become the only form of border protection. As ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers, they are also more easily compared between trading partners, and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations. The Uruguay Round negotiators agreed that market access would be improved—both in the short term and in the long term—through bindings and reductions of tariffs and minimum access requirements, which were to be recorded in Members' Schedules.[204]

146. In our analysis below, we first consider specific issues arising in connection with the interpretation of Article 4.2 and footnote 1 and then turn to consider whether the Panel properly applied those provisions in these proceedings.

A. *Interpretation of Article 4.2 and Footnote 1 of the Agreement on Agriculture*

147. This dispute centres on the second paragraph of Article 4 of the *Agreement on Agriculture*, which, along with its footnote 1, provides:

> 2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.
>
> _____
>
> [1] These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

148. Article 4.2, therefore, prohibits Members from maintaining, resorting to, or reverting to, "any measures of the kind which have been required to be converted into ordinary customs duties". This

[204] Appellate Body Report, *Chile – Price Band System*, para. 200.

requirement applies from the date of entry into force of the *WTO Agreement*, regardless of whether a Member *in fact* converted such measures into ordinary customs duties.[205]

149. Footnote 1 provides a non-exhaustive list of the measures that are covered by the obligation under Article 4.2. The various border measures identified in footnote 1 have different forms and structures and apply to imports in different ways. Yet, these measures "have in common that they restrict the volume or distort the price of imports of agricultural products"[206] and, therefore, frustrate a key objective of the *Agreement on Agriculture*—to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. Some of the measures specifically identified in footnote 1 entail the payment of duties at the border, while others do not. The mere fact that a measure *results* in the payment of duties that take the same *form* as ordinary customs duties does not, *alone*, mean that the measure falls outside the scope of footnote 1.[207] Thus, in order to ascertain whether a measure is among the "measures of the kind which have been required to be converted into ordinary customs duties", it is necessary to conduct an in-depth examination of the measure itself. Such an examination must take due account of the scope and meaning of the relevant language in footnote 1.

150. In these Article 21.5 proceedings, as in the original proceedings, three categories of measures mentioned in footnote 1 are relevant to the determination of whether the measure at issue falls within the scope of that provision: (i) minimum import prices; (ii) variable import levies; and (iii) similar border measures other than ordinary customs duties. We examine these in turn. For each element, we first identify its scope and meaning. Then, for those elements in respect of which Chile has alleged that the Panel committed interpretative error, we examine whether any such error was made.

1. "Minimum Import Prices"

151. Although Chile has not appealed the Panel's interpretation of "minimum import prices" in footnote 1 to the *Agreement on Agriculture*, it has appealed the Panel's application of this concept to the measure at issue. Accordingly, we briefly review the meaning of "minimum import prices" so as to facilitate our subsequent analysis.

152. In the original proceedings, the Appellate Body stated that the "term 'minimum import price' refers generally to the lowest price at which imports of a certain product may enter a Member's

[205]Appellate Body Report, *Chile – Price Band System*, para. 212.

[206]*Ibid*., para. 200.

[207]*Ibid*., para. 216.

domestic market."[208] The Appellate Body also quoted certain statements made by the original panel, including its explanation that, generally speaking, under a minimum import price scheme, "[i]f the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference"[209], and that:

> ... minimum import prices "are generally not dissimilar from variable import levies in many respects, including in terms of their protective and stabilization effects, but [...] their mode of operation is generally less complicated." The main difference between minimum import prices and variable import levies is, according to the [original panel], that "variable import levies are generally based on the difference between the *governmentally determined threshold* and the lowest world market offer price for the product concerned, while minimum import price schemes generally operate in relation to the *actual transaction value* of the imports."[210] (emphasis added by the Appellate Body)

153. In these proceedings, the Panel's definition of "minimum import price", which was based on the original panel and Appellate Body reports, was as follows:

> In essence, a minimum import price is a measure which ensures that certain imported products will not enter a domestic market at a price lower than a certain threshold, normally by imposing an import duty assessed on the basis of the difference between such threshold and the transaction value of the imported goods.[211]

154. In response to questioning at the oral hearing in this appeal, neither Chile nor Argentina indicated any objection to this definition.

2. "Variable Import Levies"

155. In examining the meaning of the term "variable import levies", the Appellate Body explained that a levy is "variable" when it is "liable to vary".[212] This characteristic alone, however, would not suffice to characterize a measure as a "variable import levy" within the meaning of footnote 1. In addition, as the Appellate Body found, "variable import levies" are measures which themselves—as a mechanism—impose the variability of the duties, that is, measures that are "inherently" variable because they "incorporate[] a scheme or formula that causes and ensures that levies change

---

[208]Appellate Body Report, *Chile – Price Band System*, para. 236.

[209]*Ibid*. (quoting Original Panel Report, para. 7.36(e)).

[210]*Ibid*., para. 237 (quoting Original Panel Report, para. 7.36(e)).

[211]Panel Report, para. 7.30.

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

automatically and continuously".[213] The presence of this underlying formula distinguishes variable import levies from ordinary customs duties, which are also subject to variation, but through discrete changes in applied tariff rates that occur independently and as a result of separate administrative or legislative action.[214]

156. The Appellate Body further observed that variable import levies are characterized by certain additional features which include "a lack of transparency and a lack of predictability in the level of duties that will result from such measures".[215] In making this statement, the Appellate Body was not identifying a "lack of transparency" and a "lack of predictability" as independent or absolute characteristics that a measure must display in order to be considered a variable import levy. Rather, the Appellate Body was simply explaining that the level of duties generated by variable import levies is less transparent and less predictable than is the case with ordinary customs duties.[216] Thus, the Appellate Body considered transparency and predictability in tandem and in relation to the level of resulting duties, observing that "an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be."[217] This is why variable import levies are "liable to restrict the volume of imports".[218] In addition, they "contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market".[219]

157. Turning to examine the Panel's definition of "variable import levies" in these proceedings, we observe that the Panel quoted extensively from the Appellate Body's interpretation of this term, and synthesized its understanding of the proper approach as follows:

---

[213]Appellate Body Report, *Chile – Price Band System*, para. 233.

[214]*Ibid.*

[215]*Ibid.*, para. 234.

[216]The Appellate Body explained that the Uruguay Round negotiators had identified "certain border measures which have in common that they restrict the volume or distort the price of imports of agricultural products" and "decided that these border measures should be converted into ordinary customs duties" which "would, in principle, become the only form of border protection." Ordinary customs duties were viewed as the preferred border measure because they "are *more* transparent and *more* easily quantifiable", "*more* easily compared between trading partners" and, therefore, "the maximum amount of such duties can be *more* easily reduced in future multilateral trade negotiations." (Appellate Body Report, *Chile – Price Band System*, para. 200 (emphasis added))

[217]*Ibid.*, para. 234 (referring to Argentina's responses to questioning at the oral hearing in the original proceedings).

[218]*Ibid.*

[219]*Ibid.*

> In essence, a variable import levy is a duty assessed upon importation, which is liable to vary automatically and continuously on the basis of an underlying scheme or formula that does not require any discrete or independent legislative or administrative action and is intransparent and unpredictable as to the level of resulting duties.[220]

158. This description by the Panel seems to us to be an accurate rendering of the meaning of "variable import levies", as interpreted by the Appellate Body. Indeed, Chile's appeal does not challenge this definition *per se*, but subsequent statements made by the Panel that reveal, according to Chile, a mistaken understanding of the meaning of "variable import levies".

159. Chile contends that the Panel erred in attributing meaning to the word "variable" that did not accord in two ways with the meaning identified by the Appellate Body in the original proceedings: (i) in finding that a measure constitutes a variable import levy merely because the measure makes it *likely or possible* that resulting duties will change continuously; and (ii) in finding that "periodic variability"[221] is equivalent to the automatic and continuous variability that is emblematic of variable import levies. We examine each of these arguments in turn.

160. On the first point, Chile claims that the Panel erred because it did not require that a measure make *certain* that resulting duties change continuously in order to constitute a variable import levy. Chile points to the Panel's statement that the measure at issue "contemplates a scheme or formula that both causes and ensures that the level of such duties or rebates changes automatically and continuously over time".[222] According to Chile, the Panel's use of the verb "contemplates" shows that the Panel accepted that a measure may be a variable import levy when it merely makes it *likely or possible* that resulting duties will change continuously. We observe, however, that, in the same sentence quoted by Chile, the Panel observed that "the language of the legislation ... will *necessarily* result in variability in the level of duties collected or rebates granted".[223] Thus, when read in its entirety, the relevant sentence of the Panel Report seems to us to reflect accurately the approach taken by the Appellate Body in the original proceedings. The Appellate Body explained that measures that are inherently variable will fall within the scope of footnote 1, and that "[v]ariability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously."[224] We consider that the Panel properly recognized that measures

---

[220]Panel Report, para. 7.28.

[221]Chile's appellant's submission, para. 91.

[222]*Ibid*., para. 87 (quoting Panel Report, para. 7.58). (emphasis added by Chile)

[223]Panel Report, para. 7.58. (emphasis added)

[224]Appellate Body Report, *Chile – Price Band System*, para. 233.

containing underlying formulas, which produce automatic changes in duties, display the same type of "inherent variability" that characterizes variable import levies.

161. Secondly, Chile argues that the Panel erred in accepting that "periodic variability" is equivalent to automatic and continuous variability. For Chile, a "periodic" adjustment is not the same as the "automatic and continuous" adjustment of duties that is inherent in variable import levies. We are not, however, persuaded by Chile's arguments. The Panel did not equate periodic change with automatic and continuous change. Rather, it defined an inherently variable measure as one that causes and ensures automatic and continuous changes in duty levels, and properly recognized that a measure produces such automatic changes when it incorporates an underlying scheme or formula. The Panel then examined the measure at issue and found that it exhibited these characteristics. Moreover, although we need not resolve the issue here, it does not seem to us that the concepts of "periodic change", on the one hand, and "automatic and continuous change", on the other hand, are *necessarily* mutually exclusive, as Chile asserts.[225]

162. We, therefore, see no error in the Panel's interpretation of the term "variable import levies" within the meaning of footnote 1 of the *Agreement on Agriculture*.

3. "Similar Border Measures Other Than Ordinary Customs Duties"

163. A third category of measures defined in footnote 1 as subject to the obligation in Article 4.2 of the *Agreement on Agriculture* is that of "similar border measures other than ordinary customs duties". In the original proceedings, the Appellate Body endorsed the original panel's definition of the term "similar" as "having a resemblance or likeness", "of the same nature or kind", and "having characteristics in common".[226] Similarity must be determined by undertaking a comparative analysis between an actual measure and one or more of the measures explicitly listed in footnote 1, and such a task "must be approached on an empirical basis".[227] The Appellate Body observed that all of the border measures expressly mentioned in footnote 1 "have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do".[228] A measure need not be *identical* to one of the prohibited categories of measures listed in footnote 1 to fall nevertheless within the scope of that

[225]Even periodic changes may amount to automatic and continuous change in circumstances where those changes are frequent enough to render the resulting duties "inherently variable".

[226]Appellate Body Report, *Chile – Price Band System*, paras. 225 and 226 (quoting Original Panel Report, para. 7.26; and *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press), 1993, Vol. II, p. 2865).

[227]*Ibid*., para. 226.

[228]*Ibid*., para. 227.

provision. Rather, as the Appellate Body explained, in order to be a "similar border measure" within the meaning of footnote 1, a measure must, "in its specific factual configuration", have "sufficient 'resemblance or likeness to', or be 'of the same nature or kind' as, *at least one* of the specific categories of measures listed in footnote 1".[229]

164. As regards the words "ordinary customs duties" in footnote 1, the Appellate Body reversed the original panel's finding that this term is to be understood as "referring to a customs duty which is not applied on the basis of factors of an exogenous nature".[230] The Appellate Body observed that "ordinary customs duties" are expressed in the form of *ad valorem* or specific rates and are calculated on the basis of the value and/or volume of imports. At the same time, the mere fact that the duties resulting from the application of a measure take the form of *ad valorem* or specific rates, or are calculated on the basis of the value and/or volume of imports, does not, alone, imply that the underlying measure or scheme constitutes ordinary customs duties and cannot be similar to one of the categories of measures explicitly identified in footnote 1.[231]

165. In this appeal, Chile contends that, because the Panel did not make a finding or conduct any analysis as to whether the measure at issue constituted "ordinary customs duties", the Panel failed to give proper meaning and effect to the language "other than ordinary customs duties" in footnote 1. Chile submits that the Panel erroneously assumed that a finding that a measure is similar to a variable import levy or a minimum import price necessarily implies that the measure is, as a matter of law, "other than ordinary customs duties".

166. Chile's arguments are, therefore, based on the premise that footnote 1 requires a separate examination of two distinct elements: (i) a measure's "similarity" to a listed category of measures; and (ii) whether the measure constitutes an ordinary customs duty. According to Chile, the Panel was required to review whether the measure at issue constitutes "ordinary customs duties" and to make an express conclusion in that regard.

167. We recall that an examination of "similarity" cannot be made in the abstract: it necessarily involves a *comparative* analysis.[232] That analysis can be undertaken by comparing the measure at issue with at least one of the listed measures which, by definition, have characteristics different from the characteristics of an ordinary customs duty. The term "ordinary customs duties" in footnote 1 forms part of the phrase "similar border measures other than ordinary customs duties". This phrase

---

[229]Appellate Body Report, *Chile – Price Band System*, para. 227. (original emphasis)

[230]*Ibid*., para. 288(c)(ii).

[231]*Ibid*., paras. 274-279.

[232]*Ibid*., para. 228.

contains no punctuation, which suggests that the phrase as a whole defines a relevant concept for purposes of footnote 1. As we see it, "other than ordinary customs duties" is an adjectival phrase that qualifies the term "similar border measures". This language will, therefore, inform a panel's analysis of whether a measure is "similar" to one of the categories of measures listed in footnote 1. We observe, as well, that the structure and logic of footnote 1 make clear that variable import levies and minimum import prices cannot be ordinary customs duties. The same is true for border measures similar to variable import levies and to minimum import prices.

168. In these proceedings, the Panel undertook no separate inquiry into whether the measure at issue was "other than ordinary customs duties". Instead, after finding that the measure at issue was similar to a variable import levy and to a minimum import price, the Panel simply added that, "[a]s such, it is not an ordinary customs duty."[233] The Panel's approach differs in this regard from that of the original panel, which did conduct a separate analysis of the phrase "other than ordinary customs duties" and, on the basis of that analysis, found that the characteristics of the original price band system differed from the characteristics of "ordinary customs duties".[234]

169. The Panel's approach is, however, consistent with the approach taken by the Appellate Body in the original proceedings. Having reversed the original panel's definition of "ordinary customs duties"[235], the Appellate Body made no separate finding as to whether the original measure was "other than ordinary customs duties". The Appellate Body explicitly stated that its reversal of the original panel's finding did not affect the conclusion of the original panel, which the Appellate Body shared, that the original price band system was a measure "similar" to "variable import levies" and to "minimum import prices" within the meaning of Article 4.2 and footnote 1 of the *Agreement on Agriculture*.[236] Thus, the original measure was characterized as a "similar border measure other than ordinary customs duties", even in the absence of a separate finding that it was "other than ordinary customs duties".

170. In addition, even though the original panel did undertake a separate analysis before making an express finding that the original measure was "other than ordinary customs duties", it does not seem to have considered itself bound by the text of footnote 1 to do so. The original panel stated that "a measure explicitly listed in footnote 1 ... is *necessarily* not, at the same time, an ordinary customs duty" and that "a measure which is 'similar to' any of the measures listed in footnote 1 will also be

[233]Panel Report, para. 7.104.

[234]Original Panel Report, paras. 7.48-7.65.

[235]Appellate Body Report, *Chile – Price Band System*, para. 278.

[236]*Ibid*., para. 279.

'other than ordinary customs duties'."[237] Other language used by the original panel also suggests that it was of the view that this additional step of the analysis was not necessary, but would "reinforce" and provide further support for its finding regarding the similarity of the original price band system to a variable import levy and a minimum import price.[238]

171. Taking account of all of the above, we are of the view that inconsistency with Article 4.2 can be established when it is shown that a measure is a border measure similar to one of the measures explicitly identified in footnote 1. A separate analysis of whether, or an additional demonstration that, the measure is "other than ordinary customs duties" may also be undertaken to confirm such a finding. However, these are not indispensable for reaching a conclusion on the categories listed in footnote 1.

172. Accordingly, the Panel did not err in omitting to undertake a separate and independent analysis of whether the measure at issue is "other than ordinary customs duties". Having found that the measure was similar to a variable import levy and to a minimum import price, the Panel could properly conclude from these findings that, "[a]s such, it is not an ordinary customs duty."[239]

4. Additional Observations on the Relationship Between Article 4 and Article 5 of the *Agreement on Agriculture*

173. In the original proceedings, the Appellate Body acknowledged the importance of agricultural products to many developing country Members of the WTO, and the role of special and differential treatment for developing country Members under the *Agreement on Agriculture*.[240] At the same time, the Appellate Body recognized that the requirements of the *Agreement on Agriculture* apply to developing country Members except where otherwise provided.[241] Article 4.2 expressly identifies two exceptions to the obligations that it imposes on all WTO Members, namely, Article 5 and Annex 5 to the *Agreement on Agriculture*. Annex 5 exempts developing country Members from these disciplines in specific circumstances. Article 5 specifies that a Member may, under certain conditions, impose a special safeguard on imports of an agricultural product "in respect of which measures referred to in [Article 4.2] have been converted into an ordinary customs duty". The provisions of Article 5 establish the conditions in which a Member may have recourse to such a special safeguard, set out rules on the form and duration of such safeguard measures, and establish certain transparency

[237]Original Panel Report, para. 7.24. (emphasis added)

[238]The original panel said: "[o]ur findings regarding one of those two aspects can therefore be expected to reinforce our findings regarding the other"; and "our findings regarding 'similar to variable import levy and minimum import price' and 'other than ordinary customs duties' are mutually reinforcing". (Original Panel Report, paras. 7.24 and 7.48, respectively)

[239]Panel Report, para. 7.104.

[240]Appellate Body Report, *Chile – Price Band System*, para. 197.

[241]*Ibid*., paras. 197 and 198.

requirements that attach to their use. One circumstance in which a qualifying Member may be authorized to adopt a special safeguard is when the price of imports of a relevant agricultural product falls below a specified trigger price. However, pursuant to Article 5, a special safeguard can be imposed only on those agricultural products for which measures within the meaning of footnote 1 were converted into ordinary customs duties and for which a Member has reserved in its Schedule of Concessions a right to resort to these safeguards. Because Chile reserved no such right in respect of wheat and wheat flour, Chile cannot avail itself of the mechanism set out in Article 5 for imports of these products.

174. The existence of an exemption from the market access requirements in the form of a special safeguard under Article 5 suggests that this provision (in addition to Annex 5) was the narrowly circumscribed vehicle to be used by those Members who reserved their rights to do so in order to derogate from the requirements of Article 4.2. We note that paragraph 9 of Article 5 provides that Article 5 is to remain in force for the duration of the process of reform. Negotiations for the process of reform are envisaged in Article 20 of the *Agreement on Agriculture* and form part of the Doha Development Agenda.[242] The establishment of a special safeguard mechanism for developing country Members forms part of the Doha Work Programme on agriculture.[243] We, however, are charged with reviewing the Panel's interpretation of an existing obligation. We recall, in this regard, that Article 4.2 must be interpreted in a way that does not deprive Article 5 of proper meaning and effect.[244]

B. *The Panel's Application of Article 4.2 and Footnote 1 of the Agreement on Agriculture to the Measure at Issue*

175. Chile contends that the Panel erred in its application of footnote 1 of the *Agreement on Agriculture* and, thereby, in finding the measure at issue to be inconsistent with Article 4.2 of the *Agreement on Agriculture*. We consider these allegations below.

[242]Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 14 November 2001, para. 13.

[243]See paragraph 42 of Annex A of the Decision Adopted by the General Council on 1 August 2004 (the "July Package"), WT/L/579, as well as paragraph 7 of the Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, adopted 18 December 2005.

[244]Appellate Body Report, *Chile – Price Band System*, para. 217.

1. The Panel's Analytical Approach

176. Chile points to two alleged errors in the analytical approach adopted by the Panel. First, Chile claims that the Panel erred in examining only discrete features of the measure at issue, in isolation, rather than conducting "a holistic appraisal of all of the features of the [measure at issue] and its effects taken together".[245] Secondly, Chile faults the Panel for failing to analyze the similarity of the measure at issue to variable import levies and minimum prices on an "empirical basis".

177. As regards the first issue, Chile submits that the Panel failed to follow the approach set out by the Appellate Body in the original proceedings. Instead, the Panel examined only "individual features" of the measure at issue in isolation, comparing them with features of the original price band system, and supplied no analysis or explanation of the particular configuration and interaction of all of the specific features of the measure at issue.[246] Chile maintains that:

> ... the Panel should have weighed all features of the [measure at issue] as a whole before concluding whether, evaluated holistically and with due regard to their effects, the [measure at issue] is a "border measure other than ordinary customs duties" similar to a "variable import duty."[247]

178. Chile adds that, if the Panel had properly examined the measure in its totality, it would have found that the measure is similar to an ordinary customs duty.

179. Argentina submits that the Panel did not examine relevant features of the measure at issue in isolation, but properly conducted an objective assessment of the measure at issue consistently with the interpretation of Article 4.2 of the *Agreement on Agriculture* and the legal reasoning developed by the Appellate Body in the original proceedings, and in the light of the evidence on the Panel record.

180. In the original proceedings, the Appellate Body emphasized that it had reached the conclusion that the original measure was similar to a variable import levy and to a minimum import price on the basis of:

[245]Chile's appellant's submission, para. 225.

[246]*Ibid*., paras. 219-225.

[247]*Ibid*., para. 224.

> ... the particular configuration and interaction of all these specific features of Chile's price band system. In assessing this measure, no *one* feature is determinative of whether a specific measure creates intransparent and unpredictable market access conditions. Nor does any particular feature of Chile's price band system, on its own, have the effect of disconnecting Chile's market from international price developments in a way that insulates Chile's market from the transmission of international prices, and prevents enhanced market access for imports of certain agricultural products.[248] (original emphasis)

181. We observe that the Panel directly quoted from or referred to this approach in several places in its Report. The Panel explained that "a determination of whether Chile has amended its [price band system] in a manner so as to comply with the DSB's recommendations and rulings and to bring the measure into conformity with the WTO agreements requires a review that goes beyond the consideration of 'specific aspects'" and then quoted the above passage from the Appellate Body Report.[249] The Panel then stated its intention to proceed with its analysis in the following manner:

> We will thus examine Chile's amended [price band system], *considering the configuration and interaction of its different features*, in order to determine whether it can still be considered to be a border measure similar to a "variable import levy" or a "minimum import price", in the terms of footnote 1 to Article 4.2 of the [*Agreement on Agriculture*].[250] (emphasis added)

182. The Panel referred to its examination of the configuration and interaction of the different aspects of the measure at issue on two further occasions, including in its conclusion.[251] Moreover, in response to comments made by Chile during the interim review stage, the Panel again summarized the principal factors that led to its conclusion that the measure at issue was similar to a variable import levy and to a minimum import price and reiterated that its finding was made "on the basis of the configuration and interaction of the different features of Chile's amended [price band system]".[252]

183. In our view, the explanations provided by the Panel as to its approach are consistent with the guidance provided by the Appellate Body and demonstrate that the Panel undertook a proper assessment of the measure at issue and of the specific configuration and interaction of its various features.

---

[248]Appellate Body Report, *Chile – Price Band System*, para. 261.

[249]Panel Report, para. 7.53.

[250]*Ibid*., para. 7.54.

[251]*Ibid*., paras. 7.95 and 7.96.

[252]*Ibid*., para. 6.12.

184. Chile also alleges that the Panel erred in assessing "similarity", because it failed to carry out the requisite "empirical analysis" of the measure at issue and instead relied on theoretical comparisons with the original price band system as a basis for finding that the measure at issue is similar to a variable import levy and to a minimum import price.

185. In response, Argentina emphasizes that it submitted analytical, mathematical, and/or empirical evidence to the Panel in support of its claims and arguments and that the Panel properly relied on some of this evidence in finding that the measure at issue was inconsistent with Article 4.2 of the *Agreement on Agriculture*.

186. We recall that, in the original proceedings, the Appellate Body stated its view that "the task of determining whether something is similar to something else must be approached on an empirical basis."[253] The Panel recognized this statement and adopted it:

> As indicated by the Appellate Body, in order to determine whether [the measure at issue] is a border measure similar to a variable import levy or a minimum import price within the meaning of footnote 1 to Article 4.2, we should start by considering, *on an empirical basis*, whether it bears sufficient likeness or resemblance to those two categories of measures so as to be considered similar.[254] (emphasis added)

187. Thus, the Panel explicitly articulated the correct "empirical" approach. Nonetheless, Chile maintains that, despite this statement, "the Panel findings contain virtually no empirical analysis of the [measure at issue] and instead are entirely based on theoretical conclusions".[255]

188. In our view, Chile's appeal on this point attributes a meaning to "empirical" approach other than the meaning contemplated by the Appellate Body in the original proceedings. There, the Appellate Body agreed with the original panel that an examination of similarity involved a comparison of two things and an assessment of the characteristics that they share. The Appellate Body disagreed, however, with the original panel's additional observation that, in order for two things to be similar, they must share some but not all "fundamental characteristics", and that a "border measure should therefore have *some* fundamental characteristics in common with one or more of the measures explicitly listed in footnote 1."[256] The Appellate Body explained:

---

[253]Appellate Body Report, *Chile – Price Band System*, para. 226.

[254]Panel Report, para. 7.24.

[255]Chile's appellant's submission, para. 70.

[256]Original Panel Report, para. 7.26. (original emphasis)

> We see no basis for determining similarity by relying on characteristics of a "fundamental" nature. The Panel seems to substitute for the task of defining the term "similar" that of defining the term "fundamental". This merely complicates matters, because it raises the question of how to distinguish "fundamental" characteristics from those of a *less than* "fundamental" nature. The better and appropriate approach is to determine similarity by asking the question whether two or more things have likeness or resemblance sufficient to be similar to each other. In our view, the task of determining whether something is similar to something else must be approached on an empirical basis.[257] (original italics, underlining added)

189. As this excerpt makes clear, in advocating that the issue of similarity be approached "on an empirical basis", the Appellate Body was contrasting this to, and counselling against, an approach that focused on the *fundamental nature* of the shared characteristics. The proper approach should, instead, entail both an analysis of the extent of such shared characteristics and a determination of whether these are sufficient to render the two things similar. Such characteristics can be identified from an analysis of *both* the structure and design of a measure as well as the effects of that measure. Thus, we do not consider that the Panel would have needed, as Chile's argument seems to imply, to focus its examination *primarily* on numerical or statistical data regarding the effects of that measure in practice. Where it exists, evidence on the observable effects of the measure should, obviously, be taken into consideration, along with information on the structure and design of the measure. The weight and significance to be accorded to such evidence will, as is the case with any evidence, depend on the circumstances of the case.

190. In this case, the Panel took careful account of the design and structure of the measure at issue and discussed in some detail the features that led to its characterization as a measure similar to a variable import levy and to a minimum import price. The Panel's reasoning relied on, but was not limited to, its observations regarding the design and structure of the measure at issue.[258] The Panel also stated that it had given careful consideration to the evidence available[259] and, in its reasoning, referred to some such evidence, notably as support for its findings that "the lower threshold of the band in the [measure at issue] appears to continue to operate in practice as a 'proxy' or substitute for a minimum import price" and that, as a result of the operation of the measure at issue, "the Chilean

[257]Appellate Body Report, *Chile – Price Band System*, para. 226.

[258]At paragraph 6.12 of its Report, the Panel said that "[i]t is on the basis of the configuration and interaction of the different features of [the measure at issue], and not *only* on [the basis of] particular mathematical calculations provided by the parties", that the Panel found the measure at issue to be inconsistent with Article 4.2 of the *Agreement on Agriculture*. (emphasis added)

[259]Panel Report, paras. 6.9-6.12.

domestic price has been disconnected from international price developments."[260] We see no error in this analysis, which appears to us to have been conducted on an empirical basis.

2. Similarity to a Minimum Import Price

191. According to Chile, the Panel erred in finding that the measure at issue was similar to a minimum import price. Chile asserts that the Panel "summarily"[261] concluded that the measure at issue had the same features that were found to make the original price band system similar to a minimum import price, and ignored relevant evidence or relied on incomplete data in finding that the measure "overcompensates" for a decline in reference prices by increasing import prices above the lower threshold, and that the lower threshold of the price band operated as a substitute for a domestic target price or a minimum import price.

192. Argentina submits that, contrary to Chile's assertion on appeal, the Panel correctly found that the measure at issue operates so as to prevent the entry of imports of wheat or wheat flour into the Chilean market at prices below the lower threshold of the band. Moreover, Argentina agrees with the Panel that the measure at issue tends to "overcompensate" for international price declines when specific duties are applied. In Argentina's view, the evidence that it submitted to the Panel highlights that, due to the application of specific duties, the measure at issue does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices.

193. Before turning to scrutinize the Panel's reasoning on this issue in the light of Chile's appeal, it bears repeating that Argentina did not claim, and the Panel did not find, that the measure at issue is a minimum import price, but that it is *similar to* a minimum import price within the meaning of footnote 1. A measure is "similar" to a minimum import price when it shares a sufficient number of characteristics with, and has a design, structure, and effects similar to, a minimum import price, even if it is not "identical" to such a scheme in all respects.

194. The Panel began its analysis of whether the measure at issue was similar to a minimum import price by referring to the Appellate Body's analysis of the same issue in relation to the original measure, as well as to Chile's view that "[t]he defining characteristic of a minimum import price is the impossibility for any commercial operation to be expressed in terms of a price lower than the

[260]Panel Report, para. 7.87 and footnote 178 thereto (referring to Exhibits ARG-11 and ARG-12 submitted by Argentina to the Panel). The Panel also referred to evidence supporting its reasoning in *ibid*., paragraphs 7.59, 7.66, 7.69, and 7.89.

[261]Chile's appellant's submission, para. 166.

established price."[262] The Panel then recalled that the lower threshold of the measure at issue had been set by using the figures of a lower threshold under the original price band system. The lower threshold of the original price band system had already been held to operate in a manner similar to a minimum import price. The Panel then referred to "the available evidence"[263] and noted that it showed that the measure at issue "appears to continue to operate in practice as a 'proxy' or substitute for a minimum import price"[264] and to disconnect the Chilean domestic price from international price developments, because it "operates so as to prevent the entry of imports of wheat or wheat flour into the Chilean market at prices below the lower threshold of the band".[265]

195. The overall approach taken by the Panel seems to us to accord with the proper interpretation of a border measure that is similar to a minimum import price, as discussed above.[266] The Panel examined the structure and design of the measure at issue, as well as evidence relating to its operation. The Panel found that, like the original price band system, this measure imposed a threshold that operates to ensure that, in all but the most unlikely circumstances, wheat and wheat flour will not enter the Chilean market at a price lower than that threshold, and that does not ensure that entry prices fall in tandem with world market prices. The measure did so by imposing a specific duty assessed on the basis of the difference between such a threshold and another value, namely, a reference price.[267] On this basis, the Panel observed that the features that made the original price band system similar to a minimum import price had not been modified, and were features of the measure at issue as well.[268]

196. Chile focuses in its allegations of error on two specific aspects of the Panel's analysis. First, the Panel considered that the measure at issue "operates so as to prevent the entry of imports of wheat or wheat flour into the Chilean market at prices below the lower threshold of the band".[269] Secondly, the Panel observed that the measure at issue does not merely ensure a reasonable margin of fluctuation of domestic prices, but may also "overcompensate" such that, when international prices fall and reference prices are below the lower thresholds of the price band, "the combined application

---

[262]Panel Report, para. 7.84 and footnote 175 thereto (referring to Chile's response to Question 19 posed by the Panel, Panel Report, p. F-92).

[263]*Ibid*., para. 7.87.

[264]*Ibid*.

[265]*Ibid*., para. 7.91.

[266]*Supra*, paras. 151-153.

[267]We recall that, under the measure at issue, the reference price is set every two months and calculated as the simple average of daily f.o.b. prices in certain foreign markets over a 15-day period. We also note that in a typical minimum import price scheme the value to which the minimum import price or target price is compared is the *transaction value* of a particular shipment, rather than a calculated reference price.

[268]Panel Report, para. 7.92.

[269]*Ibid*., para. 7.91.

of the *ad valorem* tariff rates and the specific duties resulting from the [measure at issue] may result in an overall entry price of that shipment that rises rather than falls."[270]

197. On the first issue, Chile acknowledges, as it did before the Panel, that it is extremely unlikely that wheat and wheat flour will enter the Chilean market at prices below the lower band threshold.[271] Chile nonetheless maintains that it is not the operation of the measure at issue that causes entry prices to exceed the lower threshold, but the fact that the level of this threshold is low, notably because it is set on an f.o.b. basis.[272]

198. We do not see how this argument assists Chile. The entry price of any given shipment depends not only on the specific duty applied, if any, but also on the c.i.f. transaction value and the *ad valorem* tariff applied to that c.i.f. value. This does not mean, as Chile's arguments imply, that the lower band threshold has nothing to do with the resulting level of entry prices. Because any specific duty is applied on the basis of the difference between the lower band threshold and the reference price, the lower threshold is an indispensable factor in determining the magnitude of the specific duty. As the Appellate Body observed in the original proceedings, an examination of whether the measure at issue is similar to a minimum import price should not place "too much emphasis on whether or not Chile's price bands are related to domestic target prices or domestic market prices".[273] Even if the lower threshold of the measure at issue does not serve as a target domestic price *per se*[274], it does serve the function of ensuring that, the more the reference prices fall below that lower threshold, the higher the specific duties imposed will be. This is accompanied by a high likelihood that the corresponding entry price in the Chilean market will be higher than that threshold. Thus, the fact that the lower band threshold was expressed on an f.o.b. basis indicates that the measure at issue is not "identical" to a minimum import price but does not, in and of itself, preclude a finding that the measure at issue is "similar" to a minimum import price.

199. On the second issue, Chile does not dispute that evidence submitted by Argentina for the period between November 2004 and April 2005 shows that, during this time period, there were two occasions on which a decline in world prices corresponded to an increase in the entry prices as a result

---

[270]Panel Report, para. 7.88 (referring to Appellate Body Report, *Chile – Price Band System*, para. 260). In footnote 178 to paragraph 7.87 of its Report, the Panel referred to Exhibits ARG-11 and ARG-12 submitted by Argentina to the Panel. These exhibits related to the operation of the measure at issue between November 2004 and April 2005, when specific duties were applied.

[271]Panel Report, para. 7.89 (referring to Chile's response to Question 58 posed by the Panel, Panel Report, p. F-99).

[272]Chile's statement at the oral hearing.

[273]Appellate Body Report, *Chile – Price Band System*, para. 246.

[274]We observe that it could be argued that the lower band threshold *plus average c.i.f. costs and the applied tariff* serves as a proxy for a domestic target price, although Argentina has not made such an argument.

of the measure at issue.[275] Chile argues, instead, that, in using this evidence, the Panel wrongly "relied upon only a snapshot of empirical data" in order to find that the measure at issue overcompensated for declines in world prices.[276] In Chile's view, the changes made on those two occasions merely adjusted the level of protection, not the trends in entry prices themselves. Those trends, Chile argues, followed international price developments and were fundamentally different from the trends that would have occurred with the application of a minimum import price.

200. Argentina believes that the Panel drew the appropriate conclusions from the evidence before it. The measure at issue does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices because specific duties rise when international prices fall. Argentina rejects Chile's argument that "overcompensation" occurred on only two days, arguing, instead, that the rise in entry prices on each of those two days "inevitably ***taint[ed]*** the rest of [the following two-month] period" because the level of duties and the entry price were affected by that initial "overcompensation".[277]

201. In examining this claim of error by Chile, we recall that our task is to consider whether the Panel erred in its application of Article 4.2 of the *Agreement on Agriculture* to the measure at issue and, in particular, in finding that the measure at issue does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices, albeit to a lesser extent than the decrease in these prices.[278] In our view, it is primarily the periods in which the reference price is below the lower band threshold that will be the most relevant to the assessment of whether the effects of the measure at issue are similar to the effects of a minimum import price. The formula set out in the measure at issue yielded a reference price that was lower than the lower threshold on only two occasions.[279] Although the reference price fell below the lower threshold only twice, Chile does not dispute that, on both of those occasions, when the new specific duty was imposed for the following two-month period, the entry price of wheat and wheat flour imports rose notwithstanding that world prices and the reference price had decreased. In these circumstances, we see no error in the Panel's reasoning or its

[275]Chile's appellant's submission, paras. 73 and 179 (referring to Exhibits ARG-11 and ARG-12 submitted by Argentina to the Panel); Chile's statement and response to questioning at the oral hearing.

[276]Chile's appellant's submission, para. 73.

[277]Argentina's appellee's submission, para. 74. (original emphasis)

[278]We note that Chile also challenges the objectivity of the Panel's assessment of the facts. (See *infra*, Section VII.A)

[279]Chile's appellant's submission, paras. 73 and 179 (referring to Exhibits ARG-11 and ARG-12 submitted by Argentina to the Panel); Chile's statement and response to questioning at the oral hearing. See also *supra*, para. 131.

reliance on the evidence submitted by Argentina after having weighed the evidence submitted by both parties.

202. In sum, the measure at issue shares the following characteristics with a minimum import price scheme, all of which were also characteristics exhibited by the original price band system: (i) when a reference price applicable to a shipment falls below a specified level (the lower band threshold), an additional specific duty is imposed on the basis of the difference between those two parameters; (ii) due to the operation of the measure, it is highly improbable that the entry prices of wheat and wheat flour in the Chilean market will fall below the lower band threshold; (iii) the lower band threshold operates, at least to a degree, as a proxy or substitute for domestic target prices; (iv) the lower the reference price relative to the lower band threshold, the higher the specific duty and the greater its protective effects; and (v) the measure distorts the transmission of declines in world prices to the domestic market. Notwithstanding certain dissimilarities between the measure at issue and a minimum import price scheme[280], which were also present in the original price band system, the overall nature of the measure at issue, including its design and structure, and the way it operates, are sufficiently "similar" to a minimum import price to make it, as the Panel found, a prohibited border measure within the meaning of footnote 1 to Article 4.2.

203. For all of the above reasons, we see no error in the Panel's finding, in paragraph 7.92 of the Panel Report, that the measure at issue is similar to a minimum import price within the meaning of footnote 1 of the *Agreement on Agriculture*. We observe that this finding, in itself, would be a sufficient basis on which to find the measure at issue inconsistent with Article 4.2 of the *Agreement on Agriculture*. We nevertheless continue to examine Chile's appeal of the Panel's finding that the measure at issue is also similar to a variable import levy.

3. Similarity to a Variable Import Levy

(a) Variability

204. Chile submits that the Panel erred in characterizing the measure at issue as similar to a variable import levy within the meaning of footnote 1 of the *Agreement on Agriculture*. According to Chile, the Panel's errors included characterizing the measure at issue as "variable" when it lacked the type of variability that would have made it similar to a variable import levy, misapplying the tests of

[280]In particular: (i) the measure at issue does not operate on the basis of the *transaction value* of a shipment, but instead involves a comparison between the lower threshold and a *reference price* not directly related to that transaction value; (ii) the measure at issue does not operate only to bring the entry price of a shipment *up to* the level of the lower threshold, but instead ensures that the entry price of wheat and wheat imports will almost always *exceed* the lower band threshold; and (iii) the lower band thresholds under the measure at issue are fixed as a function of historical international prices rather than domestic market prices.

"transparency" and "predictability", and erroneously finding that the measure at issue is likely to lead to a reduction in the volume of imports and to impede the transmission of international prices to the domestic market.

205. Before turning to the specifics of Chile's appeal, it is useful to review how the Panel undertook its analysis of whether the measure at issue is similar to a variable import levy. The Panel first recalled the Appellate Body's interpretation of footnote 1 from the original proceedings and proceeded to apply that interpretation to the measure at issue. The Panel then examined "variability" and found that "continuous variability of the duties is a feature inherent in"[281] the measure at issue because it set forth "a scheme or formula that establishes an automatic and periodic adjustment in such levels".[282] The Panel observed that the level of duties that would result every two months was not predictable and, after examining various aspects of the measure at issue, determined that "several crucial aspects of the design and operation of the [measure at issue] continue to be characterized by a lack of both transparency and predictability"[283], and that these also had the effect of impeding the transmission of international price developments to the Chilean market. In addition, in response to comments made by Chile at the interim review stage, the Panel explained that its finding that the measure at issue was similar to a variable import levy:

> ... was reached *mainly* on the basis that the [measure at issue] contains a scheme or formula that causes and ensures that the level of duties collected or rebates granted under the system changes automatically and continuously over time, *as well as* that the design and operation of the [measure at issue] continues to be characterized by a lack of both transparency and predictability, features also observed in the course of the original proceedings. These aspects affect the basic elements of the [measure at issue], i.e., the reference price and the thresholds of the band.[284] (emphasis added)

206. We note that the Panel's use of the word "mainly" in summarizing its approach suggests that it considered "variability" first and foremost and then looked, "as well", at predictability, transparency, and the extent of transmission of international prices to the domestic market. In broad terms, therefore, in applying footnote 1 to the measure at issue, the Panel appears to have followed the approach laid down by the Appellate Body in the original proceedings. We turn to consider Chile's various allegations concerning specific elements of the Panel's analysis.

---

[281]Panel Report, para. 7.61.

[282]*Ibid*., para. 7.59.

[283]*Ibid*., para. 7.63.

[284]*Ibid*., para. 6.10.

207. On the issue of whether the Panel erred in characterizing the measure at issue as "variable", Chile argues that the Panel could not properly find that the measure at issue ensures automatic and continuous changes in duty levels. According to Chile, the measure at issue does not entail "automatic" changes, because any changes in specific duties or rebates can be effected only through the enactment of additional, separate, bi-monthly administrative decrees. Chile adds that the measure at issue does not involve "continuous" variation, because changes in duty levels occur only periodically, that is, six times per year, which is a much lower frequency of change than occurred under the original measure.

208. For Argentina, the Panel properly found that the measure at issue is an automatic mechanism that functions by itself and is activated "directly and ... unfailingly".[285] Argentina points to a statistical model that it presented to the Panel showing the considerable variation in specific duties that results from the measure at issue, and rejects the suggestion that changes in duty levels occur only as a result of separate, independent administrative acts. The issuance of bi-monthly decrees does not prevent the measure at issue from being characterized as "variable" because, as the Panel rightly found, this administrative action occurs pursuant to the mandatory language of Law 18.525, as amended, and Supreme Decree 831. Those instruments require specific duties or rebates to be applied depending on the level of the reference price in relation to the band thresholds and prescribe a formula for calculating the amount of such duties or rebates. Thus, Argentina asserts, the bi-monthly decrees "are neither *independent* nor *separate* legislative or administrative actions".[286]

209. We note that the Panel took account of each of the features of the measure at issue addressed by Chile in these Article 21.5 proceedings, and nonetheless characterized it as "variable" within the meaning of footnote 1. As regards the "automaticity" of the measure, the Panel considered that the relevant scheme or formula is found in the mechanism set forth in the measure at issue. The issuance of bi-monthly decrees is specifically provided for under the measure at issue, and the bi-monthly decrees simply publish the level of the relevant specific duty or rebate, as calculated in accordance with the mathematical formula mandated by Law 18.525, as amended, and Supreme Decree 831.[287] The Panel seems to have considered that the issuance of these bi-monthly decrees did not suffice to break the link between the formula and the level of duties automatically calculated by virtue of its application. We see no error in this analysis.

---

[285]Argentina's appellee's submission, para. 161.

[286]*Ibid.*, para. 165 (referring in footnote 86 to Appellate Body Report, *Chile – Price Band System*, para. 233).

[287]Panel Report, para. 7.59.

210. Chile also contests the Panel's finding that "periodic" adjustment of the duty or rebate levels every two months can constitute "variability" within the meaning of footnote 1 to the *Agreement on Agriculture*. Chile relies on a statement made by the Appellate Body in the original proceedings to the effect that Members may "periodically" change their applied duty rates.[288] Chile draws an analogy between its measure, under which the level of specific duties/rebates changes six times per year, and Chile's gradual reduction of its applied tariff rate between 1984 and 2003. In addition, Chile contrasts the measure at issue, which involves periodic changes in duty levels, with the original price band system pursuant to which, according to Chile, specific duties varied on a transaction-by-transaction basis.

211. As our interpretation of footnote 1 above has shown, the frequency of change effected by a measure may be relevant in determining whether it is "variable".[289] However, this criterion is not determinative in and of itself. No specific frequency of change in resulting duties is required in order for a measure to be considered "variable" within the meaning of footnote 1. That a measure produces duties that vary with *every* transaction is not a necessary condition for a measure to be "variable". Rather, "variability" must be assessed on the basis of the overall configuration of a measure and the interaction of its specific features.[290] Thus, although the measure at issue involves less frequent changes in duties than the original price band system, the frequency of change is but one of the features to be considered in an assessment of the "variability" of the measure at issue. That assessment must also take account of the extent to which the changes are automatic and based on an underlying mechanism or formula.

212. In this case, the Panel held that there is a strong element of automaticity in the measure at issue, as a result of a formula that produces changes in the level of duties or rebates every two months. These features were, in the view of the Panel, sufficient to establish the "inherent variability" of the measure at issue. We see no error in the reasoning that led the Panel to this conclusion.

(b) The "additional features" of the measure at issue

213. In order to complete its evaluation of whether the measure at issue fell within the scope of footnote 1 to Article 4.2 of the *Agreement on Agriculture*, the Panel went on to consider whether the measure was also characterized by a lack of transparency and predictability in the level of resulting

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

[289]*Supra*, paras. 155-162.

[290]Appellate Body Report, *Chile – Price Band System*, para. 261.

duties that would be liable to restrict market access for imports and impede the transmission of international prices to the domestic market. We proceed to Chile's appeal of the Panel's findings regarding these additional features.

214. As a preliminary matter, we note that, in making its extensive arguments regarding the alleged errors made by the Panel in examining the "additional features" of the measure at issue, Chile seems to assign too prominent a role to these "additional features". In the original proceedings, after having explained what might constitute the requisite "variability" for purposes of footnote 1, the Appellate Body remarked that variable import levies have additional features that undermine one of the objectives of the *Agreement on Agriculture*, namely, to improve market access conditions for imports of agricultural products by permitting the application of only ordinary customs duties.[291] The Appellate Body observed that these additional features "include a lack of transparency and a lack of predictability in the level of duties that will result from such measures" that "are liable to restrict the volume of imports" and which "will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market".[292]

215. The Appellate Body thus envisaged that an analysis of the "additional features" that make a "variable" duty a "variable import levy" within the meaning of footnote 1 would be undertaken in the light of the function of that provision—to enhance market access for agricultural products. With these considerations in mind, we continue our examination of Chile's appeal.

216. Chile insists that the duties resulting from the operation of the measure at issue are predictable, because they are derived from decrees that are readily available to traders, and because they are fixed for two months at a time, in advance. Chile compares this to applied "ordinary customs duties", which can change at any time, to any level (below the bound rate), as well as with the original price band system, where the duties changed on a weekly basis.

217. Chile's arguments do not, in our view, suffice to show that the Panel erred in its approach to resolving this issue. The Panel opined that, because of the way that the reference price is calculated,

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

[292]*Ibid*.

traders often will not be able to predict their total duty liability before sending a shipment[293], and added that "the only thing truly predictable about the level of duties ultimately assessed under the [measure at issue] is that in principle such level will change every two months."[294]

218. It is true, as Chile argues, that applied ordinary customs duties can be changed. However, the Panel found that the measure at issue, which engineers automatic and continuous change every two months, does not afford exporters a degree of predictability similar to that of ordinary customs duties, and we see no error in this reasoning.

219. Chile makes an additional argument that the Panel mistakenly conflated two distinct criteria for determining whether a measure is a variable import levy: continuous variability and predictability. Chile understands the Panel to have made this error when it rejected the analogy that Chile drew between the measure at issue and Chile's programme of progressive reductions in its applied tariff. The Panel instead observed that "Chile's programme of gradually lowering its *ad valorem* tariff is an example of a predictable movement in the conditions of market access", and added that, in contrast, "the only thing truly predictable about the level of duties ultimately assessed under the [measure at issue] is that in principle such level will change every two months."[295] Unlike Chile, we see no "conflation" of the separate "requirements" of "continuous variation" and "predictability" in this statement. The Panel simply found that, under the measure at issue, the level of resulting duties is not predictable, but the fact that their level may change every two months is predictable *because* such change is automatic.

220. With respect to the Panel's analysis of transparency, or its absence, in the operation of the measure at issue, Chile contests various aspects of the Panel's reasoning explaining why, in the Panel's view, both the reference price and the band thresholds lacked transparency. To an extent, Chile's arguments rest on the mistaken assumption that "transparency" is an independent criterion that, if satisfied, conclusively establishes that a measure cannot be similar to a variable import levy. As we

---

[293]Panel Report, para. 7.71. The Panel also quoted from Brazil in support of its finding regarding the lack of predictability of resulting duties:

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

(*Ibid.* and footnote 153 thereto (referring to Brazil's oral statement before the Panel, Panel Report, p. E-6, para. 10))

[294]*Ibid.*, para. 7.61.

[295]*Ibid.*, paras. 7.60 and 7.61.

have seen, this is not the case.[296] Moreover, in the original proceedings, the Appellate Body analyzed "transparency" in tandem with the predictability of the level of the duties resulting from the operation of the original price band system.

221. It is true that Chile has enacted certain modifications that render the measure at issue more transparent than the original price band system, including fixing the levels of the band thresholds through 2014. Yet, in its analysis of additional features of the measure at issue, the issue before the Panel was how those modifications affected the transparency and predictability of the levels of duties resulting from the measure at issue, in particular, as compared to variable import levies. In examining this issue, the Panel expressed the view that, notwithstanding the modifications made by Chile, in general, the use of a reference price "entails a systematic lack of transparency and predictability", particularly when the reference price is periodically determined and constantly changing, and detached from the transaction value, volume, and origin of a shipment.[297] We believe that the Panel did not err in finding that the measure at issue lacks transparency and predictability even though the system of fixing the reference price is more transparent than was the case under the original price band system, and the band thresholds are now pre-determined and known in advance.

222. We are, however, concerned by certain aspects of the Panel's analysis of transparency. For example, the Panel found that the reference price lacked transparency because it was insufficiently representative of world market prices.[298] In so finding, the Panel seems to have used transparency as an independent criterion, rather than examining, as it should have done, whether the various elements of the measure at issue in their interaction and configuration are sufficiently transparent to enable traders to anticipate their duty liability. Overall, however, we do not think that these concerns materially affect the analysis undertaken by the Panel, or vitiate its conclusions.

223. Finally, we see no error in the Panel's assessment that the measure at issue impeded the transmission of world market prices to the Chilean market. As discussed above, the Panel had before it evidence showing that, when the reference price is below the lower threshold, the measure at issue distorts the transmission of declines in world prices to the domestic market.[299] In addition, the Panel observed that the 1.56 conversion factor used to calculate specific duties and rebates on wheat flour

[296]*Supra*, para. 156.

[297]Panel Report, paras. 7.72 and 7.73.

[298]This opinion was based on the fact that the reference price is calculated using prices from only 15 days out of a 60-day period; that it is calculated on the basis of prices in one market (Argentina) and one quality of concern for half the year (*Trigo Pan Argentino*) and another market (United States) and another quality of concern (*Soft Red Winter No. 2*) for the other half of the year, but did not take account of Canadian market prices notwithstanding that Canada was the second largest exporter of wheat to Chile in 2004 and 2005. (Panel Report, paras. 7.66-7.69)

[299]*Supra*, paras. 199-202.

imports also reinforces the insulation of the Chilean market and impedes the transmission to it of world market prices of wheat flour.[300] This is so because the conversion factor is based on the average ratio of wheat flour to wheat prices between January 1986 and December 1995[301] even though the wheat flour to wheat price ratio has changed over time.

224. In sum, the measure at issue shares the following characteristics with variable import levies, all of which were also characteristics exhibited by the original price band system: (i) when an administratively determined reference price falls below a specified threshold, an additional charge is imposed on the basis of the difference between these two parameters; (ii) the amount of any specific duty automatically changes in response to movements in either or both of these parameters; (iii) it is highly improbable that the entry prices of wheat and wheat flour in the Chilean market will fall below the lower band threshold; (iv) the lower the reference price relative to the lower band threshold, the higher the specific duty and the greater its protective effects; and (v) the mode of operation of the measure compromises the transparency and predictability of the resulting duties and distorts the transmission of declines in world prices to the domestic market. As the Panel found, the measure at issue, in its overall nature, design and structure, and the way it operates, is "similar" to a variable import levy.

225. For all of the above reasons, we see no error in the Panel's finding, in paragraph 7.81 of the Panel Report, that the measure at issue is "similar" to a "variable import levy" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*.

C. *Conclusion*

226. We, therefore, *uphold* the Panel's finding, in paragraph 7.104 of the Panel Report[302], that the measure at issue is a border measure similar to a variable import levy and to a minimum import price within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*; and *uphold* the Panel's consequential finding, in paragraph 8.2(a) of the Panel Report, that:

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

[300]Panel Report, para. 7.80.

[301]Argentina's appellee's submission, para. 142; Chile's second written submission to the Panel, Panel Report, p. C-82, para. 201.

[302]See also Panel Report, paras. 7.81, 7.92, and 7.96.

VII. Articles 11 and 12.7 of the DSU

227. Chile maintains that the Panel failed to comply with its duties under Articles 11 and 12.7 of the DSU. The claims of error raised by Chile under both provisions relate to the following four aspects of the Panel's analysis: (i) its findings with respect to the methodology for fixing the upper and lower thresholds of the measure at issue; (ii) its references to the original panel's and the Appellate Body's findings that, under the original measure, the reference price was not adjusted for "import costs", and the Panel's related statement that reviewing the characteristics of the original measure was outside its mandate; (iii) its allegedly "cursory review" of individual features of the measure at issue "in isolation"; and (iv) its alleged failure to consider "empirical evidence" in reaching its findings.

228. Because the duties imposed on panels by virtue of these two provisions are distinct, we first consider whether the Panel complied with its duty under Article 11 to make an objective assessment of the matter, and then examine whether it satisfied the requirement under Article 12.7 to provide a "basic rationale" for its findings.

A. *Article 11 of the DSU*

229. Article 11 of the DSU deals with the function of panels and assigns to them certain duties, *inter alia*, to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". The Appellate Body has considered these duties on many occasions, and has consistently recognized that Article 11 affords panels a margin of discretion in their assessment of the facts.[303] This margin includes the discretion to identify which evidence the panel considers most relevant in making its findings[304], and to determine how much weight to attach to the various items of evidence placed before it by the parties to the case.[305] A panel does not commit error simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.[306] The relevant standard has been summarized by the Appellate Body as follows:

---

[303]Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *EC – Hormones*, para. 132; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *Japan – Apples*, para. 221; and Appellate Body Report, *US – Wheat Gluten*, para. 151.

[304]Appellate Body Report, *EC – Hormones*, para. 135.

[305]Appellate Body Report, *Korea – Dairy*, para. 137.

[306]Appellate Body Report, *Australia – Salmon*, para. 267; Appellate Body Report, *Japan – Apples*, para. 221; and Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164.

> Article 11 requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence. Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record. Provided that panels' actions remain within these parameters, however, we have said that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings", and, on appeal, we "will not interfere lightly with a panel's exercise of its discretion".[307]

230. Chile submits, first, that the Panel breached this standard in finding that the band thresholds under the measure at issue were established on a c.i.f. basis despite the fact that Chilean law required that the bands be established on an f.o.b. basis. In doing so, the Panel, in Chile's view, "ignored the direct evidence in the Chilean legislation" and "necessarily concluded that the Ministry of Finance acted in violation of Chilean law".[308] Chile points out that Law 18.525, as amended, provides that "the values considered shall be the [band thresholds from the 2002 Decree] in United States dollars f.o.b. per tonne."[309] Article 4 of Supreme Decree 831 also expressly states that the "floor and ceiling values and the reference prices provided for in these regulations shall be expressed in f.o.b terms".[310]

231. Chile's arguments assume that the Panel found the band thresholds to have been established on the basis of c.i.f. values and *not* f.o.b. values. In our view, the Panel did not make such a finding. When considering the transparency of the band thresholds, the Panel noted that these levels have been established until 2014, and acknowledged Chile's explanation as to their origin.[311] After recalling the two problematic aspects that the Appellate Body had identified in connection with the band thresholds

[307]Appellate Body Report, *US – Carbon Steel*, para. 142. (footnotes referring to Appellate Body Reports in *EC – Hormones* and *US – Wheat Gluten* omitted)

[308]Chile's appellant's submission, para. 203. (original emphasis omitted)

[309]*Ibid.*, para. 202. See also *supra*, footnote 156. The text of Article 12 of Law 18.525, as amended, is reproduced in paragraph 2.14 of the Panel Report.

[310]The text of Supreme Decree 831 is reproduced in paragraph 2.16 of the Panel Report.

[311]Chile explained that the band thresholds had been established on the basis of the thresholds provided for under the original price band system in a decree from May 2002, "expressed at import cost level, by deducting [from those 2002 floor and ceiling thresholds under the original price band system] all import costs applicable to an ordinary trading transaction at the date of entry into force of the Law (second half of 2003)." (Panel Report, para. 7.74 (quoting from Chile's response to Question 52 posed by the Panel, Panel Report, p. F-96))

under the original price band system[312], the Panel expressed the opinion that the current thresholds are "affected by the same deficiencies"[313] and explained that:

> Chile has not demonstrated that the alleged abolition of the calculation formula that included discarding the highest and lowest 25 per cent of world prices, has had any practical impact on the levels at which the upper and lower thresholds of the band have been set. *Nor has Chile provided any evidence to support its assertion that "import costs" were indeed deducted in the process of calculating the current thresholds.* The mere assertion by Chile that the calculation formula has been abolished and that import costs have been deducted is not enough to demonstrate that, in this regard, the current system is any less intransparent and unpredictable than the original.[314] (emphasis added)

232. Chile reads the Panel's statement that Chile has not "provided any evidence to support its assertion that 'import costs' were indeed deducted" as a factual finding that import costs were *not* deducted, that is, that the thresholds of the measure at issue were established on a c.i.f. basis, particularly when this statement is read together with the subsequent sentence. The Panel itself, however, made no explicit finding that such thresholds were derived from or expressed as c.i.f. values. Indeed, the Panel expressly acknowledged, in the same paragraph, "that the upper and lower thresholds of the band were set by Chile on the basis of the [band thresholds] provided for under the original [price band system], after deducting 'import costs'."[315] To us, the reasoning quoted above suggests that the Panel's concern was not with *whether* import costs had been deducted in establishing the band thresholds on an f.o.b. basis, but with the lack of transparency as to *how* this had been done. We fail to see how the Panel's statement that the "mere assertion ... that import costs have been deducted is not enough to demonstrate that ... the current system is any less intransparent and unpredictable" amounts to finding that import costs had not been deducted. Rather, the Panel simply observed that the basis on which the band thresholds had been established was not altogether transparent. Therefore, assuming that Chilean law requires that the band thresholds be established on an f.o.b. basis, we consider that the Panel did not make any finding that the Chilean Ministry of Finance acted in violation of Chilean law.

---

[312]The Panel observed that the Appellate Body had found: (i) that discarding 25 per cent of "atypical observations" of world market prices at the bottom and top increased the likelihood that the lower threshold would equal or exceed the internal price and impeded the transmission of international price developments to the domestic market; and (ii) that the way in which Chile converted f.o.b. prices to a c.i.f. basis, by adding "import costs", was intransparent and unpredictable because no published legislation set out how those costs were calculated. (Panel Report, paras. 7.75 and 7.76 (referring to Appellate Body Report, *Chile – Price Band System*, para. 246))

[313]Panel Report, para. 7.77.

[314]*Ibid.*, para. 7.79.

[315]*Ibid.*, para. 7.79.

233. Chile also claims that the Panel acted inconsistently with Article 11 of the DSU in refusing to re-assess certain aspects of the original price band system that, according to Chile, both the original panel and the Appellate Body misunderstood, and in relying on this "factual error" in its analysis of the measure at issue. Chile argues that the original panel and Appellate Body mistakenly believed that, under the original measure, the c.i.f. band thresholds were compared to an f.o.b. reference price in order to determine applicable specific duties and rebates. Chile contends that, in fact, although reference prices were *determined* on an f.o.b. basis, they were only compared to the original band thresholds *after having been converted to a c.i.f. basis*.

234. In examining this aspect of Chile's appeal, we first note that Chile did not raise this alleged misunderstanding concerning the operation of the original measure either to the original panel at the interim review stage, or during the appeal in the original proceedings.[316] Moreover, Chile itself appeared to state, in response to a question posed by the original panel, that the reference prices determined on an f.o.b. basis were not subject to any adjustment.[317] This response would appear to be the basis for the original panel's statement that "as confirmed by Chile, the f.o.b. prices used for the [band thresholds] are adjusted, *inter alia*, for 'usual import costs', whereas the f.o.b. prices used for the Reference Prices are not".[318]

235. Chile contends, in support of this part of its appeal, that the Panel "clearly relied" on the original panel's "factual error".[319] We do not detect such reliance in the passages where the Panel refers to the operation of the original price band system.[320] In addition, the Panel expressly stated that its findings and conclusions regarding the measure at issue did *not* depend on whether, under the

---

[316]Chile did not, in response to questioning at the oral hearing, asserts that it had brought this alleged misunderstanding to the attention of the original panel or the Appellate Body.

[317]In its statement at the oral hearing in this appeal, Argentina pointed to Question 9(d) posed by the original panel, along with Chile's response, which are as follows:

> (d) Is the weekly import reference price also adjusted in the manner indicated in paragraph 15(h) of Chile's first submission? If so is allowance made for differences of cost as between different import origins?
>
> Response
>
> The reference price notified on a weekly basis by Customs is not subject to any adjustment mechanisms, and hence no allowance needs to be made for differences of cost or for different import origins.

[318]Original Panel Report, para. 7.63. (underlining added) We note that, in footnote 640 to this sentence, the original panel referred to Chile's response to question 9(e). Since, however, question 9(e) does not touch upon this issue, the original panel undoubtedly intended to refer to Chile's answer to question 9(d).

[319]Chile's appellant's submission, para. 211.

[320]Panel Report, paras. 7.40, 7.48, 7.50, 7.75, 7.86, and 7.88.

original price band system, the reference price was converted to a c.i.f. basis.[321] In other words, even assuming *arguendo* that this aspect of the operation of the original price band system was misunderstood in the original proceedings, this misunderstanding would not have affected the Panel's findings with respect to the measure at issue, and, therefore, even its correction would not have assisted Chile in these proceedings.

236. We also recall that, in *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body declined to "revisit the original panel report" because that report had "been adopted and ... these Article 21.5 proceedings concern a *subsequent* measure."[322] In this regard, the Appellate Body referred to Articles 3.2 and 3.3 of the DSU and the importance of security, predictability, and the prompt settlement of disputes. Moreover, we are mindful that adopted panel and Appellate Body reports must be accepted by the parties to a dispute.[323] These same considerations must also be taken into account in this appeal, and they confirm our view that the Panel did not, in this case, fail to comply with its duties under Article 11 of the DSU in declining to correct the alleged misunderstanding concerning the original price band system.

237. Chile's third allegation that the Panel failed to make an objective assessment under Article 11 of the DSU is based on the argument that the Panel conducted only a "cursory review" of discrete features of the measure at issue "in isolation", rather than a "holistic appraisal of all of the features of the [measure at issue] and its effects taken together".[324] As we have seen, Chile also claimed that the

---

[321]In response to Chile's comments at the interim review stage, the Panel stated:

> In any event, even if, *ad arguendo*, we were to accept Chile's explanation that there is a misunderstanding about the way in which, in the original [price band system], the reference price was not adjusted for "import costs", this would not affect the conclusions contained in this compliance Panel report.

(Panel Report, para. 6.14)

[322]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 78 and 79. (original emphasis)

[323]Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93.

[324]Chile's appellant's submission, para. 225.

Panel erred in its application of Article 4.2 of the *Agreement on Agriculture* on the same grounds. It is not clear to us how its claim of error under Article 11 of the DSU differs from that claim.[325]

238. In any event, we see no breach of Article 11 in the Panel's approach. As discussed above, the Panel properly applied Article 4.2 and footnote 1 of the *Agreement on Agriculture* to the measure at issue, in accordance with the interpretative guidance provided by the Appellate Body in the original proceedings. The fact that the Panel did not agree with arguments or evidence proffered by Chile cannot, in itself, establish a failure to consider such evidence or to assess it objectively as required by Article 11. We see no indication that the Panel's treatment of the evidence was biased or otherwise exceeded the bounds of discretion enjoyed by the Panel as the trier of fact. We also recall that a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements.[326]

239. Chile's last allegation of error under Article 11 of the DSU characterizes the Panel's alleged "refusal to consider empirical evidence" in its evaluation of the measure at issue as a failure to make an objective assessment of the facts.[327] Chile points out that it submitted a "substantial amount of evidence and data on the operation" of the measure at issue, yet the Panel "did not refer [to or] rely on any evidence regarding the actual operation" of the measure at issue, and refused Chile's request during the interim review stage to review its analysis in the light of the mathematical calculations presented by the parties.[328]

240. We are mindful that the information placed before a panel is often voluminous in nature and that the probative value of specific pieces of evidence varies considerably. A panel must examine and consider all of the evidence placed before it, must identify the evidence upon which it has relied in reaching its findings, and must not make findings that are unsupported by evidence. Yet, a panel is also afforded a considerable margin of discretion in its appreciation of the evidence. This means,

---

[325]In claiming that the Panel failed to comply with its Article 11 duties, Chile submits, for example, that: "the Panel found ... automatic and continuous variation, *notwithstanding Chile's arguments* that (1) the duty varies only with the enactment of a separate administrative decree; and (2) the frequency of variation is down from continuous (based on a transaction-by-transaction basis) to 6 times per year." Similarly, Chile submits that "the Panel finds that the [measure at issue] continues to be affected by a lack of transparency and predictability, *notwithstanding Chile's arguments* that (1) the bands are now fixed and no longer subject to added 'import costs' and the 25 percent rule; and (2) reference prices are fully predictable and transparent." (Chile's appellant's submission, para. 223. (emphasis added)) These arguments repeat the arguments that Chile made in support of its allegation that the Panel erred in applying Article 4.2 of the *Agreement on Agriculture* to the measure at issue. See *supra*, paras. 177, 207, 210, and 216.

[326]Appellate Body Report, *US – Steel Safeguards*, para. 498.

[327]Chile's appellant's submission, para. 227.

[328]*Ibid.*, paras. 226 and 227.

among other things, that a panel is not required, in its report, to explain precisely how it dealt with each and every piece of evidence on the panel record. As we see it, Chile is trying to have us weigh the evidence differently than did the Panel.[329] Chile may well consider that the Panel should have ascribed more weight to, and relied upon, certain evidence that Chile put forward, or should not have relied on certain evidence submitted by Argentina, but, in the absence of any indication that the Panel ignored or distorted Chile's evidence, or made findings that were unsupported by *any* evidence, we see no basis for interfering with the Panel's exercise of its discretion in this case.

241. Thus, on the basis of the above, we find that the Panel did not fail to comply with its duties under Article 11 of the DSU.

B. *Article 12.7 of the DSU*

242. Chile's allegations that the Panel acted inconsistently with Article 12.7 of the DSU are based on the same four alleged deficiencies in the Panel's analysis that Chile invoked in its claims under Article 11 of the DSU. Chile contends that the Panel failed to provide a "basic rationale": (i) for its alleged finding that the Ministry of Finance acted in violation of Chilean law in establishing the levels of the price band thresholds; (ii) for its finding that the correction of an alleged factual error made by the panel and the Appellate Body in the original proceedings was outside its mandate[330]; (iii) in finding that the measure at issue fell within the scope of footnote 1 of the *Agreement on Agriculture* on the basis of an allegedly cursory review of individual features of that measure; and (iv) for its alleged failure to conduct an empirical analysis in making its findings.

243. Before turning to the merits of Chile's appeal, we briefly review the duties that Article 12.7 of the DSU imposes on a panel in the event that the parties do not reach a mutually satisfactory solution to their dispute. Specifically, a panel is to "submit its findings in the form of a written report to the DSB" and, according to the second sentence of Article 12.7, "the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." The Appellate Body has explained that this provision "establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations", namely, that the explanations and reasons provided must suffice "to disclose the essential, or fundamental, justification for those findings and recommendations".[331]

---

[329]Chile itself acknowledges that the Panel did refer to two exhibits submitted by Argentina regarding the operation of the measure at issue as well as certain other evidence. (Chile's appellant's submission, para. 226) Moreover, at the interim review stage, the Panel stated that it had taken note of the extensive explanations provided by the parties and had reached its conclusions based on those explanations along with the available evidence. (Panel Report, paras. 6.9 and 6.10)

[330]*Supra*, para. 233.

[331]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 106.

Panels need not "expound at length on the reasons for their findings and recommendations" in order to satisfy their obligations under Article 12.7.[332] Moreover, panels may refer to reasoning from other sources, in particular:

> [A] panel acting pursuant to Article 21.5 of the DSU would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings.[333]

244. Bearing in mind all of the above, we do not consider that the Panel failed to provide a basic rationale for its findings. First, with respect to the alleged finding that the Ministry of Finance acted in violation of Chilean law in establishing the levels of the price band thresholds on a c.i.f. basis, we have already observed that the Panel made no explicit finding that the band thresholds were established on such a basis.[334]

245. Secondly, Chile alleges that the Panel breached its obligations under Article 12.7 because it did not supply any reasons for finding that the correction of a misunderstanding regarding reference prices under the original measure was beyond its mandate. The "finding" challenged by Chile on this basis is contained in the Panel's response to Chile's comments during the interim review. In response to Chile's request to correct the alleged misunderstanding, the Panel referred to various observations made by the Appellate Body and the original panel and stated:

> The Panel has noted Chile's arguments in this regard. It is outside the Panel's mandate, however, to review the characteristics of the original [price band system], as they were described in the original proceedings by the Appellate Body and by [the original panel].[335]

246. This response indicates that the *reason* why the Panel viewed Chile's request as being outside its mandate in these Article 21.5 proceedings was *because* it related to the description of the *original* price band system in the *original* proceedings. To us, this is sufficient to satisfy the Panel's obligations under Article 12.7.

---

[332]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 109.

[333]*Ibid.*

[334]*Supra*, para. 232. Because the Panel made no such finding, it had no corresponding duty to provide a basic rationale.

[335]Panel Report, para. 6.14. (footnote omitted)

247. Thirdly, Chile alleges that the Panel failed to provide a basic rationale when it found—on the basis of only a cursory review of individual features "in isolation"—that the measure at issue fell within the scope of footnote 1 of the *Agreement on Agriculture*. We have already dealt with, and dismissed, Chile's arguments that the Panel's approach in this regard constituted an erroneous application of footnote 1 and Article 4.2 of the *Agreement on Agriculture*, as well as a failure to comply with Article 11 of the DSU.[336] Chile's arguments under Article 12.7 of the DSU challenge the same elements of the Panel's substantive analysis using a different legal basis, but without identifying how that analysis lacks a basic rationale. In fact, Chile's own arguments disclose that the Panel provided ample reasoning in support of its findings. Moreover, our examination has shown that the Panel analyzed the measure at issue in detail, and explained why it found the measure to be similar to a variable import levy and to a minimum import price. The mere fact that Chile disagrees with the substance of that reasoning cannot suffice to establish a violation of Article 12.7.

248. Lastly, as regards the Panel's alleged failure to supply a basic rationale for its "failure to consider empirical evidence", we recall that we have already expressed the view that Chile's arguments seek to attribute to the phrase "an empirical basis" a meaning other than the one intended by the Appellate Body in the original proceedings.[337] We have also determined that the Panel *did* consider empirical evidence, even if it did not accord as much weight or significance to the evidence submitted by Chile as Chile would have liked.[338] Thus, the Panel provided the essential justification for its findings, including an identification and explanation of the "empirical" evidence on which it relied.

249. We, therefore, consider that the Panel did not fail to satisfy its duty, under Article 12.7 of the DSU, to provide a "basic rationale" for its findings and conclusions.

VIII. Conditional Appeal

250. Argentina makes an appeal that is conditional upon our reversal of the Panel's findings that the measure at issue is inconsistent with Article 4.2 of the *Agreement on Agriculture*. In the event of a reversal of the findings of the Panel in paragraphs 8.2(a), 8.3 and 8.4 of the Panel Report, Argentina requests the Appellate Body to determine that it is necessary, for the resolution of this dispute, to make a separate finding on Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994, and to find that the measure at issue is inconsistent with the obligation contained therein.

---

[336] *Supra*, paras. 183 and 238.

[337] *Supra*, paras. 188-190.

[338] *Supra*, paras. 190 and 240.

251. We have upheld the Panel's findings that the measure at issue is inconsistent with Article 4.2 of the *Agreement on Agriculture*. Accordingly, the condition on which Argentina's appeal is predicated is not satisfied, and we need not rule on Argentina's other appeal.

252. If the condition on which Argentina's appeal is made had been satisfied, we would have had to consider whether Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994 was within the scope of these Article 21.5 proceedings. The Panel provided an extensive discussion of the issue of when "an Article 21.5 compliance panel may consider a new claim, not raised before the original panel"[339]—a discussion which the Panel itself characterized as "*obiter dicta*".[340] Some third participants have expressed differing views as to whether we could have or should have reviewed these comments by the Panel concerning the scope of proceedings under Article 21.5 of the DSU.[341] Because we do not address Argentina's conditional appeal, we neither consider nor express a view on the Panel's discourse on this issue.

IX. "New" Exhibits Submitted by Chile on Appeal

253. We have reached our findings and conclusions on the basis of a careful examination of the Panel Report in the light of the claims of error and arguments raised on appeal. In undertaking this task, we did not find it necessary to have recourse to the information provided by Chile in Exhibits CHL-AB-3 through CHL-AB-15 attached to its appellant's submission. As a result, we need not make any separate or additional ruling on the admissibility of these exhibits.[342]

---

[339]Panel Report, para. 7.151. The Panel set out its analysis at paragraphs 7.121-7.161 of the Panel Report.

[340]*Ibid.* para. 7.121.

[341]Australia notes that the Panel's findings were "unnecessary for the resolution of the dispute" and submits that, "[w]hile the issues raised are important ... it would [not] be useful for the Appellate Body to resolve this question absent a specific factual issue necessitating such resolution." (Australia's statement at the oral hearing) Canada submits that whether or not we reverse the Panel's findings on Article 4.2 of the *Agreement on Agriculture*, "it remains open to the Appellate Body to reconsider the Panel's analysis concerning this question as part of its broader review of this dispute." According to Canada, clarification of the jurisdiction of Article 21.5 panels is required due to the systemic importance of this issue. (Canada's third participant's submission, paras. 3 and 4) The European Communities asserts that the Panel's comments contribute to "great uncertainty" concerning the scope of Article 21.5 proceedings, and that the Appellate Body should avail itself of the opportunity to resolve this uncertainty, or at least declare the Panel's approach to be moot and without legal effect. (European Communities' third participant's submission, para. 30) The United States argues that, given that the Panel's comments are *obiter dicta*, they are moot and of no legal effect, and adds that, because neither Argentina nor Chile appealed the Panel's *dicta*, the Appellate Body is not in a position to declare them to be moot and of no legal effect. (United States' statement at the oral hearing)

[342]We set out our preliminary view of the principles that should govern the admissibility of these exhibits in a letter, dated 13 March 2007, to the participants and the third participants. (*Supra*, para. 12)

X. Findings and Conclusions

254. For the reasons set forth in this Report, the Appellate Body:

(a) finds that the Panel did not err in its allocation of the burden of proof;

(b) finds that the Panel did not err in its interpretation of Article 4.2 and footnote 1 of the *Agreement on Agriculture*, or in its application of those provisions to the measure at issue and, therefore:

(i) upholds the Panel's finding, in paragraph 7.104 of the Panel Report[343], that the measure at issue is a border measure similar to a variable import levy and to a minimum import price within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*; and

(ii) upholds the Panel's finding, in paragraph 8.2(a) of the Panel Report, that, by maintaining a border measure similar to a variable import levy and to a minimum import price, Chile is acting inconsistently with its obligations under Article 4.2 of the *Agreement on Agriculture* and has not implemented the recommendations and rulings of the DSB;

(c) finds that the Panel did not fail to discharge its duties under Article 11 of the DSU to conduct an objective assessment of the matter before it or under 12.7 of the DSU to set out a basic rationale for its findings; and

(d) finds, in the light of these findings, that, because the condition on which Argentina's other appeal is predicated has not been fulfilled, it is not necessary to consider that appeal.

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

[343]See also Panel Report, paras. 7.81, 7.92, and 7.96.

Signed in the original in Geneva this 20th day of April 2007 by:

_____

Luiz Olavo Baptista
Presiding Member

_____ _____

Georges Abi-Saab
Member

Giorgio Sacerdoti
Member

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS207/22
5 February 2007

(07-0519)

Original: English

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

Recourse to Article 21.5 of the DSU by Argentina

Notification of an Appeal by Chile
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 5 February 2007, from the Delegation of Chile, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, Chile hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products - Recourse to Article 21.5 of the DSU by Argentina* (WT/DS207/RW) and certain legal interpretations developed by the Panel.

Chile seeks review by the Appellate Body of certain Panel conclusions that are in error and are based upon erroneous findings on issues of law and on related legal interpretations.

1. The Panel failed to determine and apply the appropriate burden of proof applicable to a dispute settlement proceeding under Article 21.5 of the DSU by allocating to Chile the burden to prove that Law 19.897 and Supreme Decree 831 (collectively, the "Implementing Measure") were no longer WTO inconsistent rather than allocating the burden to Argentina to prove that the Implementing Measure was inconsistent with Chile's WTO obligations under Article 4.2 and footnote 1 of the *Agreement on Agriculture*.[1]

2. The Panel erred in its interpretation of Article 4.2 and footnote 1 of the *Agreement on Agriculture* by failing to give effect to the language "other than ordinary customs duties" in footnote 1,[2] by failing to examine "similarity" with variable import levies and minimum import prices on an empirical basis with reference to the actual effects of the Implementing Measure,[3] by

[1]The Panel's errors are reflected in its overall analysis in paragraphs 7.14 to 7.104, most notably in its findings in paragraphs 7.14, 7.44, 7.54, 7.55, 7.79, 7.81, 7.92, 7.96, and in its findings in relation to the parties' comments on the interim report in paragraphs 6.8 to 6.12, most notably paragraph 6.12.

[2]The Panel's error is set forth in paragraphs 7.14, 7.20, 7.54, 7.81, 7.92 and 7.104.

[3]The Panel's error is set forth in paragraphs 6.9 to 6.12 and 7.97 to 7.103 and otherwise apparent from the Panel's analysis in paragraphs 7.14 to 7.104.

misinterpreting the term "variable" in footnote 1, including in a manner not in accordance with the Appellate Body's findings,[4] by interpreting the terms "transparency" and "predictability" in a manner not in accordance with the Appellate Body's findings,[5] and by otherwise developing a legal test for compliance with Article 4.2 and footnote 1 of the *Agreement on Agriculture* that is internally contradictory and not in accordance with the Appellate Body's findings in the prior dispute.[6]

3. The Panel erred in its application of Article 4.2 and footnote 1 of the *Agreement on Agriculture* to the Implementing Measure, including its findings relating to whether the Implementing Measure, was similar to a "variable import levy"[7] and its findings relating to whether the Implementing Measure was similar to a "minimum import price"[8] particularly when such an analysis is appropriately conducted on an empirical basis.

4. The Panel acted inconsistently with its obligations under Article 11 of the DSU to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" and Article 12.7 of the DSU to set out "the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes" by, *inter alia*:

(a) concluding, without explanation, that the Ministry of Finance violated Chilean law in establishing the levels of the price bands;[9]

(b) failing, without explanation, to correct errors in the Original Panel's characterization of the Price Band System, although the Panel relied on such characterization in making its own findings;[10]

(c) conducting only a cursory review of relevant features of the Implementing Measure in isolation;[11] and

(d) failing to consider empirical evidence on the actual operation of the Implementing Measure.[12]

Chile respectfully requests that the Appellate Body reverse the findings and conclusions of the Panel and modify accordingly the recommendations and rulings of the Panel.[13]

---

[4]The Panel's errors are set forth in paragraphs 7.28 and 7.55 to 7.104.

[5]The Panel's errors are set forth in paragraphs 7.28 and 7.55 to 7.104.

[6]The Panel's errors are reflected in its overall analysis in paragraphs 7.14 to 7.104.

[7]The Panel's error is set forth in paragraphs 7.55 to 7.104, in particular paragraphs 7.55 to 7.81.

[8]The Panel's errors are reflected in paragraphs 7.55 to 7.104, in particular paragraphs 7.82 to 7.92.

[9]The Panel's error is set forth in paragraph 7.79.

[10]The Panel's error is set forth in paragraphs 6.14, 7.40(d), 7.48, 7.50, 7.75, and 7.86 to 7.88.

[11]The Panel's errors are reflected in its overall analysis in paragraphs 7.14 to 7.104.

[12]The Panel's errors are reflected in its overall analysis in paragraphs 7.14 to 7.104 and in its findings in relation to the parties' comments on the interim report in paragraphs 6.8 to 6.12.

[13]*See* paragraphs 8.2(a), 8.3, and 8.4.

ANNEX II

WORLD TRADE ORGANIZATION

WT/DS207/23
26 February 2007

(07-0799)

Original: English

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

Recourse to Article 21.5 of the DSU by Argentina

Notification of an Other Appeal by Argentina
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 19 February 2007, from the Delegation of Argentina, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23(1) of the *Working Procedures for Appellate Review*, Argentina submits its Notice of Other Appeal on certain issues of law covered in the Report of the Panel on *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*[1], and certain legal interpretations developed by the Panel.

On 5 February 2007, Chile filed its Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review*. Chile requested that the Appellate Body, *inter alia*, reverse the findings and conclusions of the Panel and modify accordingly the recommendations and rulings of the Panel as set forth in paragraphs 8.2(a), 8.3 and 8.4 of the Panel Report.

If the Appellate Body were to reverse any of the Panel's findings, recommendations and rulings as set forth in paragraphs 8.2(a), 8.3 and 8.4 of the Panel Report, Argentina respectfully requests the Appellate Body seek review of the Panel's conclusion, and its related legal findings and interpretations, that it is unnecessary, for the resolution of this dispute, to make a separate finding on Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994.[2]

In that event, Argentina respectfully requests that the Appellate Body find:

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

---

[1]Recourse to Article 21.5 of the DSU by Argentina, WT/DS207/RW, circulated 8 December 2006 (the "Panel Report").

[2]This conclusion is set out in paragraph 8.2(b) of the Panel Report. The related legal findings and interpretations of the Panel are set out in paragraphs 6.6, 6.7, 7.3, 7.5 and 7.105 to 7.162 of the Panel Report.

(b) that the amended PBS is inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

Argentina also requests the Appellate Body to complete the analysis of the Panel where it reverses or modifies findings of the Panel or completion of the analysis of the Panel is necessary to resolve this dispute.

_____