ANNEX B

THIRD PARTY SUBMISSION BY BRAZIL
(12 MAY 2006)

INTRODUCTION

As stated during the original Panel and the Appellate review stages, Brazil's interest in this dispute focuses on the operation of the Price Band System (PBS), its implications on the flow of commerce and its legality *vis-à-vis* the multilateral trading rules. The impact of such a measure and the fact that other products (wheat, wheat flour and sugar) are still subject to it motivated Brazil to submit once again its views on the case before this Panel.[1]

2. Chile claims that the adoption of Law nr. 19.897/2003 and of Decree nr. 831/2003 enacted by the Minister of Finance brought its Price Band System into conformity with its obligations under Article 4.2 of the Agreement on Agriculture, as recommended by the DSB.[2] While this is true in respect of edible vegetable oils – and Argentina recognizes it[3] -, the same cannot be said of other products still within the scope of the Chilean BPS, namely wheat and wheat flour, which were the object of the original Panel, though the PBS also affects sugar. Indeed, in Brazil's opinion, compliance with the DSB recommendations and rulings would have been achieved in regard to those two products had Chile dealt with them in the same way it did with edible vegetable oils, simply by extinguishing the Price Band System.

3. Argentina argues that the Chilean Price Band System is inconsistent, as such and as applied, with Article 4.2 of the Agreement on Agriculture; Article II:1(b) of the GATT 1994 and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization. Brazil will center its analysis on the consistency of said mechanism with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. This focus, however, should not prejudge any view Brazil may have on the other claim made by Argentina, relating to Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization.

THE APPELLATE BODY'S CONCLUSIONS

4. The Appellate Body's findings and conclusions in the original dispute could not be clearer. In regard to Article 4.2 of the Agreement on Agriculture, the Appellate Body:

- upheld the Panel's finding, in paragraphs 7.47 and 7.65 of the Panel Report, that Chile's price band system is a border measure similar to variable import levies and minimum import prices;

- upheld the Panel's finding, in paragraphs 7.102 and 8.1(a) of the Panel Report, that Chile's price band system is inconsistent with Article 4.2 of the Agreement on Agriculture.[4]

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[1] In spite of the fact that Chile's price band system also applies to sugar, in its request for establishment of this Panel (WT/DS207/18) and throughout the original proceedings, Argentina mentioned two of the products subject to the PBS only (wheat and wheat flour).

[2] See para. 4 of Chile's first written submission.

[3] See para. 8 of Argentina's first written submission.

[4] See para. 288 of the Appellate Body Report.

5. In order to assess the consistency of Chile's Price Band System with the aforesaid article, the Panel and the Appellate Body examined the definition of "similarity". They also found necessary to identify the categories with which the system should be compared, deciding to resort to the same ones that were identified by Argentina: "variable import levies" and "minimum import prices", within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.

6. With a view to determining whether the PBS would fall under the first category of measures, "variable import levies", the Appellate Body went on to confirm that, whereas the presence of a formula causing automatic and continuous variability of the duties is a necessary condition for a particular measure to be a "variable import levy", this variability is "by no means a sufficient condition for a particular measure to be a variable import levy"[5], as meant by footnote 1. "The lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market".[6]

7. Similarly, this same standard, lack of transparency and predictability, was applied by the Appellate Body in examining whether the PBS could be characterized as a "minimum import price". The Appellate Body considered "minimum import price" as referring generally to the lowest price at which imports of a certain product may enter a Member's domestic market.[7]

8. The Panel and the Appellate Body understood "lack of transparency and predictability" to mean that "no published legislation or regulation in Chile sets out which international markets are used for the calculation of the PBS values and reference price, or how the "usual import costs" which are added to the f.o.b. prices are calculated". Exporters, in this case, could "be expected to encounter serious difficulties in their commercial planning efforts in a system where weekly variations in duties are based on factors unknown. […] Such lack of predictability must affect the competitive conditions of imports *vis-à-vis* domestic production".[8]

9. Therefore, considering that the formula contained in that system resulted in:

- automatic and continuous variability of the duties and;
- lack of transparency and predictability in the level of duties resulting from the application of such measures,

the Panel and the Appellate Body concluded that the original Chilean Price Band System was a border measure similar to a variable import levy and a minimum import price, other than ordinary customs duties, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture falling under the prohibited categories of measures listed therein. The Chilean PBS was, thus, a measure of the kind which has been required to be converted into ordinary customs duties. And, "by maintaining a measure which should have been converted, Chile has acted inconsistently with Article 4.2 of the Agreement on Agriculture".[9]

THE NEW CHILEAN PRICE BAND SYSTEM

10. In order to comply with the DSB recommendations and rulings, Chile ceased to apply the price band system to edible vegetable oils. As to wheat and wheat flour, it adopted Law nr. 19.897/2003 and Decree nr. 831/2003, which would have purportedly implemented those rulings by means of:

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[5] See para. 234 of the Appellate Body Report.
[6] *Id. ib*.
[7] See para. 236 of the Appellate Body Report.
[8] See para. 7.44 of the Panel Report.
[9] See para. 7.102 of the Panel Report.

- eliminating the "variability" inherent in the measures[10] and
- providing the PBS with transparency and predictability.

11. As regards "variability", Chile argues that under the new PBS the specific duty, rebate or their non-application are now established for a two-month period, without varying every week in accordance with the reference price, as was the case before. During this two-month period, the specific duty is applicable to every import transaction, with no variation and "regardless of the transaction price".[11] Furthermore, today, the specific duties, rebate or their non-application are determined by a decree of the Minister of Finance, whereas in the previous system there was no need for a legislative or an authority act to set out said duties, since they would be established and vary in an automatic and continuous manner.[12]

12. Chile contends that the twelve-month automatically and continuously variable specific duty was substituted by a specific duty that is established by decree or an act of an authority (therefore supposedly no longer automatic), which remains fixed for periods of two months. By purportedly eliminating the automatic and continuous nature of the specific duties and changing the period of validity of i) the reference price, from one week to two months[13], and ii) the bands, from one to eleven years, Chile claims to have eliminated the variability aspect of the BPS, as well its lack of transparency.

13. Even assuming, for the sake of argument, that the system is more transparent after Law nr. 19.897/2003 and Decree nr. 831/2003, transparency alone is not sufficient to render the PBS consistent with the multilateral trading rules.

14. With respect to the lack of predictability, Chile contends that the 11-year bands and the two-month specific duties may provide the exporter with the necessary predictability of the level of specific duty to be paid, considering that the duties, rebates or their non-application are established for a span long enough to afford security to the exporter.[14]

15. This is only partially true. First, because the 11-year period has the side effect of aggravating the distortion of domestic price *vis-à-vis* international ones. While such a long period may afford some predictability, the new PBS is more rigid and inflexible, given that, in practice, the Chilean market will be insulated from fluctuations in the world prices for eleven years. Should there be a significant downward movement in the international wheat prices, the 0.985 factor may not be sufficient to account for the necessary reductions in the lower and upper thresholds of the price bands. Hence, in spite of the application of the 0.985 multiplier, one of the main elements of the SBP (the bands themselves) will remain virtually unchanged for more than a decade, preventing the fluctuation of international prices from being transmitted to the Chilean market.

16. Second, the new PBS contributes to distorting the prices of imports even more, inasmuch as a new coefficient is added to the formula used to calculate the duty level. Under the previous system, if the weekly reference price fell below the lower threshold of the price band, a specific duty equal to the difference between the reference price and the lower threshold would be levied.[15] In the current system, the specific duty level is magnified by the introduction of a new unexpected multiplier consisting of 1 plus the general *ad valorem* duty in force.

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[10] See para. 92 of Chile's first written submission
[11] *Ibid.*, para. 93
[12] *Ibid.*, para. 92
[13] See para. 21 of the Appellate Body Report and para. 39 of Chile's first written submission.
[14] See para. 143 of Chile's first written submission.
[15] See para. 29 (b) iii of the Appellate Body Report.

17. As Argentina correctly points out,

> "el esquema de las bandas, con un piso y un techo en relación a un precio de referencia, sumado a un derecho específico, según la diferencia entre aquellos parámetros, se ha mantenido inalterado. Es decir, siguen existiendo los parámetros de piso y techo y la figura de los precios de referencia".[16]

18. Brazil is of the view that the changes introduced in the system by Law nr. 19.897/2003 and Decree nr. 831/2003 were cosmetic ones. They are insufficient to render the Chilean Price Band System consistent with multilateral trading rules, since the fundamental elements of the mechanism remained unchanged. The current design of the PBS aggravates the already existing disconnection between domestic from international price developments, thus impeding more rigidly the transmission of world market prices to the domestic market.

19. The revised PBS still resorts to measures expressly prohibited by the Uruguay Round Agreements as contained in Article 4.2 footnote 1 of the Agreement on Agriculture. If the system operated until 2003 as a border measure similar to a variable levy modified weekly, now it behaves as a border measure similar to a variable levy revised every two months. The reference price (defined on a weekly or two-month basis), fixed by the Minister of Finance, continues to be a border measure to some extent similar to a minimum import price acting as a substitute for the transaction value contained in the invoice.

20. The PBS, under its current structure, results in controlling prices of imports in order to meet or converge to a target price that isolates the domestic market from actual international prices. Its effect is to create the type of barrier that Article 4.2 of the Agreement on Agriculture sought to eliminate.

21. Were the Panel to confirm the insufficiency of the measures taken by Chile to comply with the DSB rulings, then it would be finding that the Chilean Price Band System continues to operate as border measure similar to a variable levy that relies on reference prices which are not allowed under Article 4.2 footnote 1 of the Agreement on Agriculture and that the present reference prices still constitute a border measure similar to minimum import prices, as set out in said article. Therefore, Chile would be maintaining measures of the kind which had been required to be converted into ordinary customs duties at the end of the Uruguay Round. And, again, by maintaining a measure which should have been converted, it would be in breach of Article 4.2 of the foregoing Agreement.

22. With a view to implementing the DSB decisions thoroughly, Chile could have treated wheat and wheat flour as it did with edible vegetable oils, putting an end once and for all to the applicability of the price band system to those products.[17]

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

23. Regarding Argentina's claim with respect to Article II:1(b) of the GATT 1994, Brazil stresses that the conclusion reached by the Appellate Body – to the effect that such a claim was not properly before the original Panel – should not prevent Argentina from presenting it before this Article 21.5 Panel. As Argentina recalled,

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[16] See para. 36 of Argentina's first written submission

[17] Brazil notes that the same parameters (price bands, reference prices and the multiplier [1+ *ad valorem* tariff in force]) are also applicable to sugar.

> "In carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. (…) Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU".[18]

24. In analysing Argentina's "claim" under Article II of the GATT 1994, the Appellate Body ruled on a formal matter, i.e., the difference between making a general reference to an article in the Panel request and actually developing a claim under that article. The situation would be different had the Appellate Body considered the measure itself *vis-à-vis* the above-mentioned article.

25. Considering that neither finding nor conclusion were reached with respect to the substance of Article II:1(b) itself, Brazil sees no reason why Argentina should be prevented from including that claim in its request for the establishment of Article 21.5 Panel and elaborating it as appropriate before this Panel.

26. Moreover, Brazil is of the opinion that if this Panel finds that the Chilean Price Band System remains inconsistent with Article 4.2 of the Agreement on Agriculture, then it would also conclude that such a measure constitutes "other duties or charges", within the meaning of Article II:1(b) of the GATT 1994, and should have been scheduled under the column for "other duties or charges" governed by the second sentence of Article II:1(b).

CONCLUSION

27. Brazil respectfully submits that the Panel find the Chilean Price Band System continues to be in breach of Article 4.2 of the Agreement on Agriculture and is inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

[18] See para. 41 of the Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*.