ANNEX C

REBUTTALS FROM PARTIES

ANNEX C-1*

REBUTTAL BY ARGENTINA
(17 MAY 2006)

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* Annex C-1 contains the rebuttal by Argentina. This text was originally submitted in Spanish by Argentina.

TABLE OF REPORTS CITED

Short title	Full title and reference
Chile – Price Band System	Appellate Body Report "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products"* WT/DS207/AB/R, adopted 23 October 2002.
Chile – Price Band System	Panel Report "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products"* WT/DS207/R, adopted 23 October 2002.
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report "*United States – Import Prohibition of Certain Shrimp and Shrimp Products* – Recourse by Malaysia to Article 21.5 of the DSU*"*, WT/DS58/AB/RW, adopted 22 October 2001.
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report "*Canada – Measures Affecting the Export of Civilian Aircraft".* Recourse by Brazil to Article 21.5 of the DSU, WT/DS70/AB/RW, adopted 21 July 2000.
EC – Bed Linen (*Article 21.5 – India*)	Appellate Body Report "*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* – Recourse by India to Article 21.5 of the DSU", WT/DS141/AB/RW, adopted 8 April 2003.
US – Certain EC Products (Article 21.5 – EC)	Panel Report "*United States – Countervailing Measures on Certain EC Products* – Recourse by the European Communities to Article 21.5 of the DSU", WT/DS212/RW, adopted 17 August 2005.
Korea – Dairy Products	Appellate Body Report *"Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products"* WT/DS98/AB/R, adopted 14 December 1999.

A. INTRODUCTION

1. The Government of the Argentine Republic thanks the members of the Panel for enabling it to submit for their consideration its Rebuttal of the arguments put forward by the Government of Chile in its written submission of 3 May 2006 (hereinafter "Chile's First Written Submission").

2. Argentina takes this opportunity to reiterate that, as follows from its written submission of 19 April 2006 (hereinafter "Argentina's First Written Submission"), Chile has failed to implement the recommendations and rulings of the Dispute Settlement Body (DSB), and that the Price Band System (PBS) which Chile applies to imports of wheat and wheat flour, as modified by Law 19.897 and Exempt Decree No. 831/2003 (hereinafter the "amended PBS") – that is to say, the measure taken to comply – is inconsistent with the agreements concerned in this dispute.

3. **First of all**, Argentina will address Chile's claims relating to the inconsistency of the amended PBS with Article 4.2 of the *Agreement on Agriculture* (Section B).

4. In this connection, Argentina will demonstrate to the Panel that Chile is seeking to show that it has complied with the recommendations and rulings of the DSB by putting its own construction on what the DSB said. At the same time, Chile fails to show that the amended PBS is a measure consistent with the *Agreement on Agriculture*.

5. In this respect, Argentina reaffirms that, as demonstrated in its First Written Submission, the amended PBS is a border measure similar to a "variable import levy" and a "minimum import price" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*.[1]

6. Argentina reiterates that "this is because the way in which the system is designed and the way it operates in its overall nature are sufficiently similar to the characteristics of these two categories of prohibited measures as to make the amended PBS, with its particular characteristics, a 'similar border measure'".[2]

7. Thus, Argentina will make it clear to the Panel that Chile has been unable to refute that "the particular configuration and interaction of the specific characteristics of Chile's price band system generate certain market access conditions that lack transparency and predictability and disconnect the Chilean market from international price trends in a way that insulates the Chilean market from the transmission of international prices and prevents enhanced market access for imports of wheat and wheat flour", in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[3]

8. **Secondly**, Argentina will explain why the arguments relating to the factor of 1.56 applicable to wheat flour and the claim concerning the second sentence of Article II:1(b) of the GATT 1994 can and should be examined by this Panel (Section C).

9. Thus, Argentina requests the Panel to examine the arguments relating to the factor of 1.56 applicable to wheat flour inasmuch as these arguments help to show that the amended PBS is a measure inconsistent with Article 4.2 of the *Agreement on Agriculture*.

10. Moreover, Argentina requests the Panel to find that the amended PBS is in breach of the second sentence of Article II:1(b) of the GATT 1994, given that it was not recorded in the corresponding column of Chile's Schedule of concessions (No. VII) but is nevertheless being applied.

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[1] Argentina's First Written Submission, paragraph 71.
[2] Argentina's First Written Submission, paragraph 72.
[3] Argentina's First Written Submission, paragraph 73.

11. **Finally**, Argentina presents its conclusions (Section D) and requests the Panel to find that the measure taken to comply – that is to say, the amended PBS – is inconsistent, both in itself and as applied, with Article 4.2 of the *Agreement on Agriculture*, the second sentence of Article II:1(b) of the GATT 1994, and Article XVI.4 of the *Marrakesh Agreement Establishing the World Trade Organization.*

B. THE AMENDED PBS IS IN BREACH OF ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

12. In its First Written Submission, Argentina showed that the amended PBS is a border measure similar to a "variable import levy" and a "minimum import price" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*, because the way in which the system is designed and the way it operates in its overall nature are sufficiently similar to the characteristics of these two categories of prohibited measures as to make the amended PBS, with its particular characteristics, a "similar border measure".[4]

13. Argentina has shown, on the basis of evidence, that the amended PBS causes insulation from the international market by disconnecting the Chilean market from the transmission of international prices and impeding enhanced access to the Chilean market for imports of wheat and wheat flour, and that it is neither transparent nor predictable as only ordinary customs duties can be.[5]

14. In its First Written Submission, Chile fails to refute any of the claims and evidence put forward by Argentina. Below, Argentina presents its analysis of the defence offered by Chile, seeking to organize Chile's arguments according to how they presumably should correspond to the Argentine claims.

1. Scope of the present proceedings under Article 21.5 of the DSU

15. Chile devotes an entire section to an attempt to "demonstrate" that the changes introduced by Law 19.897 and its Regulations reflect the findings and conclusions of the Appellate Body. Thus, Chile claims to have complied with the recommendations and rulings of the Dispute Settlement Body.[6]

16. However, the changes made to the Price Band System do not make it consistent with Article 4.2 of the *Agreement on Agriculture* and consequently Chile has not implemented the recommendations and rulings of the Dispute Settlement Body.

17. Argentina cannot agree with Chile's contention that:

> "… The recommendations and rulings are therefore those which establish not only the framework of compliance, but also the framework for possible Article 21.5 compliance review proceedings …"[7]

18. This is incorrect. In a compliance review proceeding under Article 21.5 of the DSU it is not simply a question of whether the Member has complied with the recommendations of the DSB. It is also a question of whether the measures taken to comply are consistent with the covered agreements.

[4] Argentina's First Written Submission, Section C.I.
[5] Argentina's First Written Submission, Sections C.I.2 and C.I.3.
[6] Chile's First Written Submission, Section IV.
[7] Chile's First Written Submission, paragraph 77.

19. This was established by the Appellate Body when it held that panels established under Article 21.5 of the DSU are not merely called upon to assess whether "measures taken to comply" implement specific "recommendations and rulings" adopted by the DSB in the original dispute but, "more frequently" should assess the "*consistency with a covered agreement*" of the implementing measures:

> "We addressed the function and scope of Article 21.5 proceedings for the first time in *Canada – Aircraft (Article 21.5 – Brazil)*. There, we found that Article 21.5 panels are not merely called upon to assess whether 'measures taken to comply' implement specific 'recommendations and rulings' adopted by the DSB in the original dispute. We explained there that the mandate of Article 21.5 panels is to examine either the 'existence' of 'measures taken to comply' or, more frequently, the '*consistency with a covered agreement*' of implementing measures …"[8]

20. Moreover, Chile misinterprets the findings and conclusions of the Panel and the Appellate Body when it suggests that there were only "specific aspects" of the PBS that had to be brought into conformity.[9]

21. Chile disregards the fact that, as follows from a simple reading of the recommendations and rulings in the reports of both the Panel and the Appellate Body adopted by the DSB, its obligation was to bring its inconsistent Price Band System into conformity with the *Agreement on Agriculture*.

22. Thus, the Panel stated that:

> "We recommend that the Dispute Settlement Body request Chile to bring its PBS into conformity with its obligations under the Agreement on Agriculture".[10] (Underlining added).

23. In its turn, the Appellate Body:

> "… recommends that the DSB request Chile to bring its price band system, as found, in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement".[11] (Underlining added)

24. Thus, it is clear that in these – as in the original – proceedings the various components of the PBS are not being called into question in isolation, but rather that the issue before the DSB is – and was – the system as a whole, the system as such.

25. In its First Written Submission, Argentina examined the various components of the amended PBS in order demonstrate analytically and mathematically that, in structure and design, the modified system is a measure similar to a variable import levy or a minimum import price, that is to say, a measure of the kind that has been required to be converted into ordinary customs duties. It is the combination of these components that makes it a measure inconsistent in its totality with Article 4.2 of the *Agreement on Agriculture*.

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[8] *EC – Bed Linen (Article 21:5 – India)*, Appellate Body Report, paragraph 79 (footnotes omitted).
[9] Chile's First Written Submission, paragraph 88.
[10] *Chile – Price Band System*, Panel Report, paragraph 8.3.
[11] *Chile – Price Band System*, Appellate Body Report, paragraph 289.

26. The same analysis was made by the Appellate Body in the original proceedings in arriving at the conclusion that the original PBS was inconsistent with Article 4.2 of the *Agreement on Agriculture*:

> "We emphasize that we reach our conclusion on the basis of the particular configuration and interaction of all these specific features of Chile's price band system …
>
> We, therefore, uphold the Panel's finding, in paragraph 7.47 of the Panel Report, that Chile's price band system is a 'border measure' 'similar to' 'variable import levies' and 'minimum import prices' within the meaning of footnote 1 and Article 4.2 of the *Agreement on Agriculture*".[12]

27. In the rest of this Section B, Argentina will consider Chile's claims and show that Chile has failed to refute the arguments and evidence submitted by Argentina to the effect that the amended PBS causes insulation from the international market, is not transparent or predictable, and is a border measure similar to a variable import levy and a minimum import price. Finally, Argentina will show that, contrary to what Chile claims, the amended PBS has not produced any improvement in the conditions of access to the Chilean market.

2. The amended PBS causes insulation from the international market

> "… [T]oday … the duties or rebates assessed are valid for two months (i.e., six times a year), and during that period are completely disconnected from what may occur in the reference, or any other, markets… In other words, the duty or rebate, or its non-applicability, is determined independently of the commercial transaction prices …"[13]

28. Argentina has shown that the amended PBS causes insulation from the international market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[14]

29. Chile maintains that, according to the Appellate Body, insulation may result from a lack of transparency and predictability, but does not constitute a feature challengeable as such that could, on its own, lead to a finding of inconsistency.[15]

30. Once again, Chile fails to understand the findings of the Appellate Body.

31. According to the Appellate Body, the distortion of the transmission of world market prices *is* a feature challengeable as such. This is shown in various passages of its report where the Appellate Body specifically examines the way in which the original PBS insulated the Chilean market from world market price developments.[16]

32. Moreover, it is especially clear from its conclusions, where the Appellate Body finds that the insulation and lack of transparency and predictability are separate and cumulative violations of the PBS.

33. In this connection, in the paragraph already cited by Argentina, the Appellate Body stated:

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[12] *Chile – Price Band System*, Appellate Body Report, paragraphs 261 and 262.
[13] Chile's First Written Submission, paragraphs 180 and 181.
[14] Argentina's First Written Submission, Section C.2.
[15] Chile's First Written Submission, paragraph 100.
[16] *Chile – Price Band System*, Appellate Body Report, paragraphs 250 and 251, inter alia.

> "We emphasize that we reach our conclusion on the basis of the particular configuration and interaction of all these specific features of Chile's price band system. In assessing this measure, no one feature is determinative of whether a specific measure creates intransparent and unpredictable market access conditions. Nor does any particular feature of Chile's price band system, on its own, have the effect of disconnecting Chile's market from international price developments in a way that insulates Chile's market from the transmission of international prices, and prevents enhanced market access for imports of certain agricultural products."[17]

34. In short, the insulation from international markets caused by the amended PBS is a feature that gives rise to an inconsistency on its own.

2.1 The amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor[18]

35. In an attempt to discredit the evidence submitted by Argentina in support of its claim that the amended PBS tends to "overcompensate" for the effect of decreases in international prices on Chile's domestic market when the reference prices are set below the price band floor, Chile argues that the reference to the overcompensating effect of the PBS is wrong and overcompensation cannot, on its own, be inconsistent with Article 4.2 of the *Agreement on Agriculture*.[19] It then adds that these references do not form part of the conclusions:

> "The references cited by Argentina, in particular paragraph 260 of the Appellate Body's Report, are out of context and do not correspond to the reasoning followed by the Appellate Body, and are hence not part of its conclusions. They are actually part of the Appellate Body's analysis of whether the Panel took proper account of the fact that the total amount of duties that may be levied as a result of Chile's price band system is 'capped' at the level of the tariff rate of 31.5 per cent *ad valorem* bound in Chile's Schedule."[20]
>
> (footnote: Paragraph 253 of the Appellate Body Report)

36. Chile's argument is very odd and without foundation.

37. **First of all**, contrary to what Chile says, paragraph 260 of the Appellate Body Report is an integral part of its conclusions. This follows from its place in that report. In fact, paragraph 260 summarizes the findings relating to Article 4.2 of the *Agreement on Agriculture*, and the whole of Section VIII.B of the report relating to "Assessment of Chile's Price Band System in the Light of Article 4.2 and Footnote 1" ends no more than two paragraphs after paragraph 260, with the upholding of the Panel's finding in paragraph 262.

38. **Secondly**, Chile appears not to have read paragraph 261, that is, the paragraph immediately following paragraph 260. That paragraph begins as follows:

> "We emphasize that we reach our conclusion on the basis of the particular configuration and interaction of all these specific features of Chile's price band system." (Underlining added)

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[17] *Chile – Price Band System*, Appellate Body Report, paragraph 261 (underlining added).
[18] Argentina's First Written Submission, Section C.I.2.2.
[19] Chile's First Written Submission, paragraph 165.
[20] Chile's First Written Submission, paragraph 166.

39. Clearly, the words "conclusion" and "these specific features" can only refer to paragraph 260. If they did not, then the beginning of paragraph 261 would not make sense. Therefore, contrary to what Chile maintains, the overcompensation constitutes, on its own, a violation of Article 4.2 of the *Agreement on Agriculture*.

40. **Furthermore**, Chile seeks to discredit the Argentine argument by trying to explain that after the entire panel proceeding and the appeal proceeding – during which Chile had ample opportunity to explain the operation of the PBS – the Appellate Body misconstrued how the PBS operated.[21] There have not been many instances in the history of the WTO dispute settlement system of a Member alleging, as a defence, that the Appellate Body erred in its analysis. If this was the case, then Chile probably failed to explain the operation of the original PBS correctly or simply did not understand its own measure.

41. Chile bases its argument on the fact that the band floor and ceiling and the reference price are expressed at the same market level. As Argentina will show, the floor and ceiling prices are not FOB prices, despite the fact that the law and the decree say that they are. They are two figures chosen arbitrarily and without the use of any criterion. They could be CIF, FOB or ex-works. It is simply not known and there is no way of knowing, unless Chile were to make more **transparent** its reasons for setting the floor and ceiling of the band at US$128 and US$148 per tonne, respectively.

42. This is shown by the fact that the FOB price for Argentine bread wheat has been both higher and lower than these two prices. One need do no more than note the reference prices (based on the average FOB prices for bread wheat, Argentine port) established by Chile over the period of implementation of the PBS. For example, between 16 of April and 15 June 2004, the reference price was US$165 per tonne, and between 16 February and 15 April 2005 US$108.64 per tonne. Chile must have been aware of this since the figures were its own official data (ODEPA).[22]

43. **In short**, Argentina has shown, on the basis of evidence, that the amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor. This is clear from the analysis made by Argentina in Section C.I.2.2 of its First Written Submission, which includes actual examples of the overcompensation produced by the amended PBS. Chile has been unable to refute any of the Argentine arguments.

2.2 The amended PBS does not merely moderate the effect of fluctuations in world market prices on Chile's market because it does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices

44. Chile seeks to show that, as a consequence of the PBS, Chilean import prices for wheat and wheat flour follow a pattern similar to that of the FOB price and that, therefore, there is no insulation from the international market. Chile argues that, being established for a "sufficiently long" period of time, the specific duties of the amended PBS allow international price variations to be transmitted to the price of wheat:

> "If the objective was to maintain a price level, the alteration would imply a permanent change in relative prices in order to prevent domestic market conditions from varying (price level) in the event of a change in external or import prices prior to entry. Conversely, if the duties ensure that relative prices remain stable, this means that the border measure allows external variations to be transmitted to the domestic market,

[21] Chile's First Written Submission, paragraph 169.
[22] See Exhibit ARG-6.

> albeit to a different extent. That is to say, if international prices rise so do domestic prices, and if the former decline, so will the latter.
>
> In Chile today, the mere fact that the duties and rebates, or the non-application thereof, are established for a sufficiently long period of time provides certainty that any variations in international prices that may occur over this period will be transmitted to domestic wheat prices.
>
> Thus, the conclusion is that, if the floor price is not a minimum price, if the specific duties and their method of application do not continuously entail import price corrections and if import prices, as Argentina shows in Exhibits ARG-11 and ARG-12, follow a pattern similar to that of the f.o.b. price of wheat, Chile's wheat import duties – even if they do undergo variations – do not constitute a variable duty within the meaning of Article 4.2 of the Agreement on Agriculture."[23]

45. It is worth noting that Chile makes special reference to Exhibits ARG-11 and ARG-12, since it is precisely these exhibits that clearly show how Chile's statement that "import prices... follow a pattern similar to that of the f.o.b. price of wheat"[24] is without foundation.

46. Exhibits ARG-11 and ARG-12 contain a table and a chart, respectively, which show what happened, in the case of wheat, with the imposition of specific duties as from 16 December 2004. They show how – at the same time as FOB prices, Argentine port, were falling – the Chilean entry price, with the imposition of specific duties, rose substantially, thereby demonstrating a total disconnection from international price developments.

47. From 1 December 2004 the FOB price of bread wheat, Argentine port, fell steadily, a trend which was to be maintained until approximately 4 January 2005. Specifically, the initial FOB price on 1 December was US$119 per tonne, whereas at the end of the trend, on 4 January 2005, the price stood at US$109 per tonne.

48. If we consider the trend in the Chilean entry price as a consequence of the operation of the PBS, we observe the exact opposite: the entry price rose. In fact, from 1 December the Chilean entry price for Argentine bread wheat was tending to fall which, since the band was not active, reflected the falling trend in FOB prices, Argentine port. However, when the band was activated on 16 December 2004 and specific duties were imposed, the Chilean entry price rose suddenly from US$149.94 per tonne to approximately US$162.93 per tonne. This happened as a result of the operation of the amended PBS itself and the imposition of specific duties.

49. Moreover, on 16 February 2005 Chile established a new reference price below the band floor and lower than that in force during the previous two-month period. Therefore specific duties higher than during the previous period were imposed. On the basis of the FOB price for bread wheat, Argentine port, corresponding to a shipment arriving in Chile on 15 February, the reference price for that date (and the two previous months) was US$114.50 per tonne. The Chilean entry price on that date, when specific duties of US$14.30 were imposed, was US$153.81 per tonne.

50. On the next day, 16 February 2005, Chile established a new reference price at US$108.64 per tonne, 5.12 per cent less than the previous figure. However, the FOB price for Argentine bread wheat did not change and, therefore, neither did the CIF value. Nonetheless, when the specific duties resulting from the PBS were applied, the Chilean entry price rose from US$153.81 to US$160.01 per tonne.

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[23] Chile's First Written Submission, paragraphs 142 to 144.
[24] Chile's First Written Submission, paragraph 144.

51. In conclusion, it is clear from Exhibits ARG-11 and ARG-12 that, contrary to the Chilean claims, the import prices for wheat do not follow a pattern similar to that of the FOB price of wheat. In particular, on 16 December 2004, the entry price rose whereas the FOB price *fell*, and on 16 February 2005, whereas the FOB price remained steady, the entry price *increased.* However much Chile would have the Panel believe the opposite, the natural tendency of the amended PBS is to move in the opposite direction to international price trends. And it could not be otherwise since the PBS *would make no sense* if that were not its purpose.

52. If Chile wanted import prices to follow the same pattern as FOB prices, it need only apply an *ordinary customs duty*. Chile knows this, but Chile *does not apply* an ordinary customs duty precisely in order *to avoid* the effects of ordinary customs duties and be able to insulate the Chilean market from international market developments. It is pure logic.

53. In this connection, it is astonishing that Chile should assert that the duties resulting from the PBS are unaffected by changes in world prices:

> "... the duty or rebate, or the non-application thereof, operates in such a way as to allow the transmission of international price variations to the domestic market. That is to say, once the duty has been fixed, traders can capture the benefits of decreases in international prices, because changes in world prices do not affect the duty that they are required to pay."[25] (Underlining added)

54. Chile's description of its amended PBS is simply wrong. The specific duties remain unchanged only during the two months stipulated in Decree 831/2003. At the end of these two months, the specific duty will necessarily change because the reference price will have changed. Whenever, while situated below the band floor, the prices on the markets of concern (Argentine bread wheat or Soft Red Winter No. 2, Gulf of Mexico) vary, the specific duty applied will necessarily change. That is to say, as the FOB prices on the two markets of concern *fall* the specific duty will *increase*.

55. As Argentina explained in its previous submission, this is a simple mathematical conclusion that follows from the PBS formula, according to which:

$$\text{Specific duty}^{26} = \left(\text{Band floor price} - \text{Reference price}\right) * \left(1 + \text{General } \textit{ad valorem} \text{ tariff in force, Customs Tariff}\right)$$

$$= \left(\text{US\$128} - \text{Reference price}\right) * \left(1 + 6\%\right)$$

56. Moreover, this can be seen from the ODEPA data themselves.[27] As the reference prices varied due to changes in the prices on the markets of concern, the specific duties changed.

57. Chile attempts to show that because the duties remain the same for two months, international prices are transmitted. However, there is no such transmission. The duty established for two months has an inherent defect: it is the product of an initial disconnection which arises on the first day of the period (for example, 16 December 2004). To this initial disconnection there must be added the disconnection that *inevitably* occurs at the end of these two months (for example, 16 February 2005), when a new reference price and the resulting specific duty are established. This was demonstrated by Argentina in Sections C.2.2 and C.2.4 of its submission.

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[25] Chile's First Written Submission, paragraph 152.
[26] In accordance with Article 14 of Dec. 831/2003. See Exhibit ARG-2.
[27] See Exhibit ARG- 6, in particular the periods 16/Dec/04 – 15/Feb/05 and 16/Feb/05 – 15/Apr/05.

58. It is paradoxical that what Chile refers to as a feature of the amended PBS that helps to transmit international price developments (i.e., the fact that the duty is unaffected by international price changes during the two-month period) is precisely a feature that insulates the Chilean market from international prices.

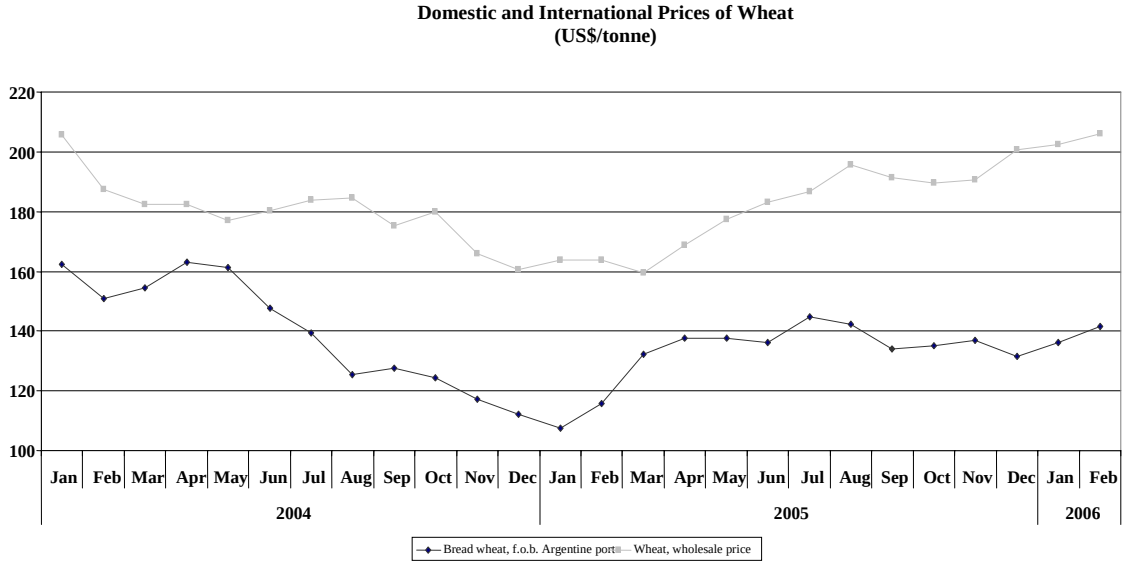
59. In fact, the specific duties do not vary for two months because, as Chile accepts without discussion, "the duty applies on all import transactions, without the slightest variation and regardless of the amount of the transaction."[28]

60. As the Appellate Body held with respect to the original PBS, "[t]he Reference Price used in the context of the Chilean PBS is clearly disconnected from the actual transaction value... "[29], and as Argentina explained in its submission and Chile confirmed, this statement is fully applicable to the amended PBS.[30]

61. Moreover, in an attempt to demonstrate "the connection of Chilean wheat prices to the international grain market",[31] Chile submits a graph (unnumbered) supposedly derived from the values provided by Argentina in Exhibit ARG-11 which form the basis of the chart that Argentina attached as Exhibit ARG-12.

62. According to Chile:

> "The graph below shows the trends in Chilean wheat prices and in f.o.b. prices of Argentine bread wheat from January 2004 to February 2006. The price curves indicate that, first, Chilean wheat prices have varied and, second, the variation is very similar to that of export prices of Argentine wheat, confirming the connection of Chilean wheat prices to the international grain market.



[28] Chile's First Written Submission, paragraph 93.
[29] *Chile – Price Band System*, Appellate Body Report, paragraph 248.
[30] Argentina's First Written Submission, paragraphs 220 to 223.
[31] Chile's First Written Submission, paragraph 154.

> This graph is an exact illustration of the points made by Argentina in Exhibit ARG-11, with the series of f.o.b., c.i.f. and c.i.f.-plus-duties prices, and in Exhibit ARG-12, which shows the prices in graph form. What clearly emerges is that the entry price of wheat exhibits the same behaviour as its f.o.b. price, which demonstrates price transmission and therefore the connection between the Chilean and the international market."[32]

63. There are several flaws in Chile's reasoning.

64. **Firstly**, contrary to what Chile claims, this graph cannot be "an exact illustration of the points made by Argentina in Exhibit ARG-11". The Chilean graph is based on monthly (apparently average) prices, whereas Exhibit ARG-11 is based on *daily* prices. Therefore, the Chilean graph is a reworking (recalculation) of information ostensibly provided by Argentina.

65. Secondly, Exhibit ARG-12, contrary to what Chile maintains, does not plot all the prices in Exhibit ARG-11, but merely reproduces a graph based on prices calculated for the period extending from 1 November 2004 to 29 April 2005, i.e., a period much shorter than the total period of implementation of the amended PBS, within which specific duties were applied.

66. Therefore, the Chilean graph does not represent only the periods in which the bands were activated, or the periods relevant for the analysis, but the trend in FOB prices for Argentine bread wheat and the Chilean entry price from December 2003 to February 2006. In fact, as follows from Exhibit ARG-6, specific duties were applied between December 2004 and April 2005, due to the prices recorded by wheat on the markets of concern from the entry into force of the amended PBS.[33] This is the relevant period for observing the behaviour of the amended PBS. As distinct from the Chilean graph, Exhibit ARG-12 plots only the period of application of specific duties.

67. As regards what Chile seeks to show, the evidence provided by Chile itself demonstrates the disconnection between the entry price and the FOB price that arises when the specific duties are activated.

68. A careful study of the graph submitted by Chile reveals that during the period of application of specific duties, the entry price follows a trajectory opposite to that of the FOB price in at least three of the four periods of concern in which specific duties are applied.

69. According to the Chilean graph:

- Between December 2004 and January 2005, the FOB price fell while the entry price rose;
- between January and February 2005, the FOB price rose while the entry price remained stable;
- between February and March 2005, the FOB price rose while the entry price fell.

70. Moreover, in March and April 2005, the entry price rose more than proportionally relative to the FOB price, that is to say, increased more steeply.

71. If, moreover, we consult the chart in Exhibit ARG-12 and the table in Exhibit ARG-11 to see what happens to the entry price on 16 December 2004 and 16 February 2005, we observe that as a

[32] Chile's First Written Submission, paragraphs 154 and 155.
[33] Rebates were also applied from December 2003 to August 2004.

consequence of the specific duties resulting from the amended PBS the Chilean entry price for wheat does not vary in the same way as the FOB price for the same product.[34]

72. In short, both from the evidence submitted by Chile itself and from that provided by Argentina it is clear that, while the specific duties were being activated during the periods in question the Chilean entry price was never "very similar" to the variation of the FOB price as Chile claims and, in at least three of the four periods, the entry price varied in the **opposite direction** to the FOB price.

73. To this there should be added the overcompensation effectively produced and the fact that the amended PBS does not merely moderate the effect of fluctuations in world market prices on Chile's market because it does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices, the cogency of both these arguments having been demonstrated in the corresponding sections, charts and tables.[35]

2.3 The floor and ceiling of the amended PBS insulate Chile's market from international price developments and are not transparent, having been determined once only for the entire period extending from 16 December 2003 to 15 December 2014 and having been established as from 2007 on the basis of fixed coefficients

74. Chile's confirmation that the reduction in floor and ceiling prices was scheduled "irrespective of international price levels" is enlightening:

> "The scheduled reduction of the floor and ceiling prices is a scenario under which, irrespective of international price levels, the amount of the specific duties will increasingly diminish compared to those currently being established, just as the probability of duties actually being assessed will increasingly diminish."[36] (Underlining added)

75. Thus, Chile confirms the Argentine claim to the effect that the amended PBS "…impedes even more the transmission of international price developments to the domestic market…since the floor and ceiling prices of Chile's price bands no longer vary with either world market prices or historical prices…"[37]

76. Chile maintains that given the way in which the bands are established in the amended PBS "Chile has … taken due account of the observations made by the Appellate Body". According to Chile:

> "With the entry into force of Law No. 19.897, Chile abolished the calculation formula that included discarding the highest 25 per cent as well as the lowest 25 per cent of world prices over the past five years, while maintaining the values in effect in 2003 until 2007, gradually reducing the level of protection from 2007 onwards and culminating with the application of duties or rebates in 2014.
>
> Pursuant to this Law, all prices are set as f.o.b., meaning that today there is no price or value that converts an f.o.b. price to a c.i.f. basis, and it is no longer necessary to add 'import costs', which makes the system a great deal more transparent.

[34] Argentina's First Written Submission, Section C.I.2.4.
[35] Argentina's First Written Submission, Section C.I.2.2.
[36] Chile's First Written Submission, paragraph 186.
[37] Argentina's First Written Submission, paragraph 190.

> Chile has thus taken due account of the observations made by the Appellate Body."[38]

77. At the very least, Chile's argument is hard to follow. Chile claims that the Panel accepts that because Chile established the band floor and ceiling *without the use of any criterion* in fixed form from 2003 to 2014, adjusting both parameters by means of a fixed coefficient (0.985) the basis for calculating which Chile *is unable to explain*, Chile "has…taken due account of the observations made by the Appellate Body". The way in which Chile established the floor and ceiling of the band is not transparent. The fact that the floor and ceiling prices of the band feature in Decree 831/2003 does not mean that they were established transparently or justifiably.

78. Thus, Chile is simply evading the substance of the issue raised by Argentina, that is to say, that the floor and ceiling of the amended PBS insulate Chile's market from international price developments and are not transparent, having been determined once only for the entire period extending from 16 December 2003 to 15 December 2014 and having been established as from 2007 on the basis of fixed coefficients. Chile has not said how it calculated the factor of 0.985 or explained the basis for it in the legislation establishing the amended PBS. Moreover, nowhere in its submission does Chile address these issues.

79. The way in which the floor and ceiling are established in the amended PBS has transformed the PBS into a more rigid and inflexible system. As Brazil points out:

> "… the 11-year period has the side effect of aggravating the distortion of domestic price vis-à-vis international ones. While such a long period may afford some predictability, the new PBS is more rigid and inflexible, given that, in practice, the Chilean market will be insulated from fluctuations in the world prices for eleven years. Should there be a significant downward movement in the international wheat prices, the 0.985 factor may not be sufficient to account for the necessary reductions in the lower and upper thresholds of the price bands. Hence, in spite of the application of the 0.985 multiplier, one of the main elements of the PBS (the bands themselves) will remain virtually unchanged for more than a decade, preventing the fluctuation of international prices from being transmitted to the Chilean market."[39]

80. Furthermore, in Section C.I.2.5 Argentina explained how the floor and ceiling of the amended PBS insulate Chile's market from international price developments and are not transparent. Argentina cites those arguments as Chile has not rebutted any of the claims raised therein.

2.4 The reference prices insulate Chile's market from international price developments by remaining unchanged for two months, by being established on the basis of the average of the daily prices recorded on only two predetermined markets and in being unrelated to the transaction price

81. In paragraph 117 of its submission, Chile argues that the reference prices of the amended PBS do not impede the transmission of international price developments to the domestic market since it is not "possible to inflate or increase the amount of the specific duties":

> "... as a result of the changes introduced in 2003 all values used are expressed in f.o.b. terms, that is, the reference prices are not converted to a c.i.f. basis. Thus, at no stage is it possible to inflate or increase the amount of the specific duties, so the

[38] Chile's First Written Submission, paragraphs 108 to 110.

[39] *Chile – Price Band System* … Recourse to Article 21.5 of the DSU, Third Party Submission by Brazil, paragraph 15.

> transmission of international price developments to the domestic market is not impeded as the Appellate Body asserts."

82. However, Chile appears not to have read Argentina's arguments in which it is shown that in remaining unchanged for two months, in being established on the basis of the average of the daily prices recorded on only two predetermined markets and in being unrelated to the transaction price, the reference prices insulate Chile's market from international price developments.[40] The corresponding Argentine arguments hold true *regardless* of whether or not the reference prices are converted to a CIF basis.

83. Also in relation to the changes introduced into the reference prices of the amended PBS, in paragraph 180 Chile seeks to argue that there cannot be overcompensation and that "the objective is not to maintain a parity price" [*sic*], simply because duties are now assessed six times a year rather than 52 times a year as in the original PBS:

> "A further point which demonstrates that there cannot be overcompensation and that the objective is not to maintain a parity price is that today – unlike under the former PBS when duties were assessed once a week (i.e. 52 times a year) – the duties or rebates assessed are valid for two months (i.e. six a year), and during that period are completely disconnected from what may occur in the reference, or any other, markets."

84. The argument speaks for itself: Chile says that now the PBS is not "so" inconsistent as before. Now the PBS is inconsistent "only" 6 times a year. There is no basis for this in the WTO Agreements or, more particularly, in the DSU or the *Agreement on Agriculture*.

85. A measure taken to comply is not "less" inconsistent because it is applied on fewer occasions than the original measure. There is no basis for making a claim of this kind.

86. In particular, the last part of the paragraph cited "... the duties or rebates assessed are valid for two months (i.e. six a year), and during that period are completely disconnected from what may occur in the reference, or any other, markets", simply verifies and confirms what Argentina maintained in its First Written Submission, namely, that under the "new" PBS the reference prices used to calculate the specific duty for wheat and wheat flour are set 6 times a year, that is, with a period of validity of 2 months during which the transmission of world market prices is disconnected.[41]

87. In its First Written Submission, Argentina offered evidence of this disconnection, which Chile now confirms, illustrating the development of the reference prices and the prices for wheat f.o.b. Argentine port and f.o.b. Gulf of Mexico, respectively, during the period of implementation of the amended PBS and clearly showing, for each period, the disconnection produced.[42] The reference prices insulate Chile's market from international price developments.

88. **In conclusion**, as will be clear to the Panel, Chile has also been unable to refute the arguments and evidence put forward by Argentina in Section C.I.2.6 in confirmation of the fact that the amended PBS causes insulation from the international market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

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[40] Argentina's First Written Submission, Section C.I.2.6.
[41] Argentina's First Written Submission, paragraph 206.
[42] Argentina's First Written Submission, paragraph 208 and Exhibits ARG-15, 16, 17 and 18.

3. The amended PBS is neither transparent nor predictable

89. With respect to the requirement that the amended PBS be transparent and predictable, Chile completely distorts Argentina's position and makes its own reading of the Appellate Body and Panel reports adopted by the DSB.

90. Chile maintains that:

> "... to allow Argentina's argument that the conclusions of the Appellate Body are to be interpreted in a broad and comprehensive manner would give rise to generic and unspecific obligations and create uncertainty for Chile as to what it was required to do within the reasonable period of time and expose it to censure for failing to take measures which it was unaware it was required to adopt."[43]

91. Chile's interpretation of the Argentine position is simply wrong. Nowhere in its submission does Argentina maintain that "the conclusions of the Appellate Body are to be interpreted in a broad and comprehensive manner [that] would give rise to generic and unspecific obligations". In fact, Chile is unable to cite a single such paragraph in the Argentine submission because there are none.

92. In offering the only example that it can find of the alleged Argentine position, Chile misreads paragraph 201 of Argentina's First Written Submission, maintaining that:

> "[I]n paragraph 200 of its First Written Submission, Argentina transcribes two paragraphs of the Appellate Body report (234 and 247) which, in its opinion, constitute grounds for claiming that any lack of transparency leads to the conclusion that the PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*."
>
> (Original footnote: First Written Submission by the Argentine Republic, paragraph 201).[44]

93. Once again, Chile's claim with respect to the alleged Argentine position is mistaken.

94. **First of all**, nowhere in its submission does Argentina claim that paragraphs 234 and 247 of the Appellate Body Report would serve as a basis for alleging that any lack of transparency leads to the conclusion that the PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*. Once again, Chile is unable to indicate the relevant paragraph of Argentina's submission in which this claim might be found, because there is no such paragraph.

95. **Secondly**, paragraphs 200 and 201 of Argentina's submission do not interpret the conclusions of the Appellate Body in a broad and comprehensive manner, as Chile maintains.

96. In those paragraphs Argentina stated that:

> "200. The Appellate Body noted how the way in which the bands were established in the original PBS was inconsistent with Article 4.2 of the *Agreement on Agriculture*:
>
> > '... This lack of transparency and…predictability are liable to restrict the volume of imports... This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding

[43] Chile's First Written Submission, paragraph 78.
[44] Chile's First Written Submission, paragraph 81.

> the transmission of international prices to the domestic market (Appellate Body Report, paragraph 234)'
>
> ...
>
> 'In addition to the lack of transparency and the lack of predictability that are inherent in how Chile's price bands are established, we see similar shortcomings in the way the other essential element of Chile's price band system … is determined (emphasis added). (Appellate Body Report, paragraph 247)'.
>
> 201. Clearly, by not explaining the origin of the factor of 0.985 or the reasons for choosing it, Chile has failed to satisfy the established transparency requirements. As the Appellate Body pointed out, the lack of transparency prevents enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4 of the *Agreement on Agriculture* (footnote: Appellate Body Report, paragraph 258)."

97. Chile is particularly interested in paragraph 247, in connection with which it notes that:

> "… Argentina omits the phrase 'the reference price' from its transcription of paragraph 247. What is the significance of that phrase? It limits the issue the Appellate Body takes in the following paragraphs with the lack of transparency and predictability to that particular aspect of the PBS in force at that time".[45]

98. Chile appears to overlook the part of the paragraph which Chile itself transcribes. Chile itself points out that:

> "… paragraph 247 [of the Appellate Body Report]…begins by stating that 'In addition to the lack of transparency and the lack of predictability that are inherent in how Chile's price bands are established,... ' necessarily refers to the conversion to a c.i.f. basis, plus import costs, of f.o.b. prices and to the fact that there was no legislation or regulation indicating how to calculate those import costs."[46]

99. That is to say, paragraph 247 begins by referring to the lack of transparency and predictability of the way in which the price bands (i.e., the floor and ceiling) were established, as explained in paragraph 246 of the Appellate Body Report. When paragraphs 246 and 247 are read in conjunction it is clear that in this passage the Appellate Body was referring to the way in which the price bands (i.e., the floor and ceiling) were established. Starting from paragraph 247, the Appellate Body *begins* to refer to the lack of transparency and predictability of the reference prices. But in paragraph 246 and at the beginning of 247 it refers specifically to the lack of transparency and predictability in the way in which the bands (i.e., the floor and ceiling) are established.

100. Paragraph 200 of Argentina's First Written Submission forms part of Section C.I.2.5(b) which is entitled "The floor and ceiling of the amended PBS insulate the Chilean market from international price developments and are non-transparent insofar as from 2007 they will be established on the basis of fixed coefficients", that is to say, it refers, *inter alia*, to the lack of transparency of the floor and ceiling of the amended PBS, which are nothing other than the floor and ceiling of the *bands*.

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[45] Chile's First Written Submission, paragraph 85.
[46] Chile's First Written Submission, paragraph 84.

101. In paragraphs 199 to 201 Argentina explains why the way in which the bands (i.e., the floor and ceiling) are established is non-transparent, namely, because of the failure to explain in the legislation either the origin of the method or the reasons for choosing the factor of 0.985 by which the floor and ceiling of the band are to be multiplied from 2007.

102. Thus, there can be no doubt that Argentina is applying the findings of the Appellate Body with respect to the transparency and predictability of the floor and ceiling of the original PBS to the way in which those parameters are established in the amended PBS.

103. Finally, the Appellate Body's conclusions have not been interpreted "in a broad and comprehensive manner", as Chile would have the Panel believe. Argentina has interpreted those conclusions fairly.

104. As Argentina has already pointed out, what Chile is seeking to do is simply to avoid addressing the substance of the issue raised by Argentina, that is to say, that the floor and ceiling of the amended PBS insulate Chile's market from international price developments and are non-transparent, having been determined once only for the entire period extending from 16 December 2003 to 15 December 2014 and having been established as from 2007 on the basis of fixed coefficients. As the Panel will have been able to confirm, Chile has explained neither how the factor of 0.985 was calculated nor what basis there is for it in the legislation that established the amended PBS.

105. In relation to the Argentine claim that the amended PBS is neither transparent nor predictable, in paragraph 114 of its submission Chile *acknowledges* that, thanks to the change in price, the importer (and hence the exporter) does not know in advance the amount of the specific duties payable:

> "With the entry into force of Law No. 19.897, the reference price ceased to constitute one of the elements needed by importers to ascertain the amount of duty payable upon import." (Underlining added)

106. This merely confirms what Argentina previously demonstrated in Section C.I.3.2, namely, that both in the old and in the new PBS, the exporter cannot reasonably predict what the amount of the specific duties will be.

107. In paragraph 115, Chile maintains that, given the choice of markets of concern in the amended PBS (Argentine bread wheat and Soft Red Winter No. 2), the reference prices are now more transparent. Chile reasons as follows:

> "Today, the mechanism for calculating the reference price is set forth in the Regulations, as are the most relevant markets to be considered. The Regulations stipulate that the most relevant markets are '*Argentine bread wheat*' for the period 16 December to 15 June of the following year and '*Soft Red Winter No. 2*' wheat for the period 16 June to 15 December. The reference price will correspond to the average daily prices recorded in those markets (f.o.b., Argentine port and f.o.b., Gulf of Mexico port, respectively) over a period of 15 days counted back from the 10th day of the month in which the relevant decree is published. Chile has therefore taken due account of the Appellate Body's observation."

108. Argentina has explained how the way in which the markets of concern were established is non-transparent. Once again, the fact that the decree specifies the markets of concern and says how

the reference prices are to be calculated does not mean that their establishment is transparent. Chile has not explained how or on what basis the markets and quantities of concern were selected.[47]

109. Likewise, the fact that the system – in Chile's words – may have become "more transparent" because "…pursuant to this Law (19.897), all prices are set as f.o.b.…"[48] (which, as Argentina has already explained, is not the case) does not make the amended PBS a measure consistent with Article 4.2 of the *Agreement on Agriculture*.

110. Moreover, Chile transcribes paragraph 258 of the Appellate Body Report and states:

> "... Argentina itself recognizes that the lack of transparency is not general, but pertains to certain characteristics, and the Appellate Body confirms that only specific characteristics of the PBS are concerned."[49]

111. Let us take a look then at the specific characteristics to which the Appellate Body referred in its report.

112. First of all, the Appellate Body noted that the Panel, in paragraphs 7.44 and 7.61 of its report, had described Chile's price band system as having an "intrinsically unstable, intransparent and unpredictable nature …" and "a considerable lack of transparency and unpredictability".[50]

113. The Panel's observations and findings in these paragraphs were not questioned by the Appellate Body and were adopted by the DSB.

114. Now let us see what "specific characteristics" the Panel was referring to in these paragraphs.

115. The Panel held that "several crucial stages of the operation of the Chilean PBS" were characterized by a considerable lack of transparency and predictability.[51] That is more comprehensive than the specific features to which Chile refers in its submission. Among these crucial stages the Panel mentions:

- How the reference price was arrived at;
- how the PBS values (i.e., the band floor and ceiling) were arrived at;
- how the "usual import costs" added to the f.o.b. prices were calculated.

116. The Appellate Body referred to the lack of transparency and predictability in the following aspects of the PBS:

- The way in which the price bands are established in Chile (paragraphs 246 and 247);
- the way in which the reference prices are determined (paragraph 247);
- the fluctuation of the duties resulting from Chile's price band system (paragraph 259).

117. **In conclusion**, contrary to what Chile claims in paragraphs 66 and 85 of its submission, the Panel and then the Appellate Body did not limit "the issue [taken] with the lack of transparency and

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[47] Argentina's First Written Submission, Section C.I.2.6.b, paragraph 214 ff.
[48] Chile's First Written Submission, paragraph 109.
[49] Chile's First Written Submission, paragraph 87.
[50] *Chile – Price Band System*, Appellate Body Report, paragraph 240.
[51] *Chile – Price Band System*, Panel Report, paragraph 7.44 (emphasis added).

predictability" solely to the aspects in which the PBS was similar to a variable import levy and to the reference prices.

118. What Chile is unwilling to accept, although demonstrated by the actual reports themselves, is that, in having taken issue, on grounds of their lack of transparency and predictability, with such fundamental and central aspects of the PBS as the elements mentioned, the Panel and the Appellate Body addressed most, if not all, of the "specific features of the PBS", or at least the fundamental ones. There is simply no support for Chile's argument.

119. In fact, what the Appellate Body recommended is that:

> "… the DSB request Chile to bring its price band system, as found, in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement."[52]

120. However, there is an even more serious aspect to Chile's reasoning. According to that reasoning, the transparency and predictability required by the Appellate Body and the Panel are only applicable to certain specific elements of the PBS (not clearly defined by Chile in its submission). If the Panel were to accept this argument, the logical consequence *would be that transparency and predictability would not be required of the rest of the amended PBS* which, according to Chile, was not the subject of findings on the part of the Panel and the Appellate Body. This outcome would not be consistent with the spirit of Article 4 of the *Agreement on Agriculture.*

121. The standards of transparency and predictability do not apply partially as Chile suggests, but are requirements derived from Article 4 of the *Agreement on Agriculture* itself with respect to the measure taken to comply as a whole.

122. As Argentina pointed out earlier, throughout its submission Chile appears to "forget" that the task of a panel in an Article 21.5 proceeding is not only to determine the existence of measures taken to comply with the recommendations and rulings of the DSB but also *the consistency of those measures with a covered agreement*.

123. As noted by the Appellate Body in paragraph 258 of its report, the lack of transparency and the unpredictability of the PBS are contrary to the object and purpose of Article 4 of the *Agreement on Agriculture*.

124. Consequently, even in the very unlikely event of some "specific features of the PBS" not having been included in the criticism of the system by the Panel and the Appellate Body for its lack of transparency and predictability in the original proceedings, the amended PBS can be called into question in its totality for not being transparent or predictable and the obligations of transparency and predictability established by the DSB with respect to Article 4.2 of the *Agreement on Agriculture* apply to it in full.

125. In Section V.4 of its submission, Chile attempts to argue that a wheat trader can predict the future specific duty for wheat on the basis of the prices foreseen in financial derivatives such as futures contracts.[53] According to Chile:

> "... what is necessary in order to foresee the amount of the specific duty is a wheat trader's own skills in predicting prices and negotiating sales or purchases …"[54]

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[52] *Chile – Price Band System*, Appellate Body Report, paragraph 289.
[53] Chile's First Written Submission, paragraphs 156 to 163.

126. Chile tries to reassure the Panel by maintaining that this prediction is not "complex" and "a matter of course" for traders:

> "… Although this may appear complex, it is a matter of course for traders and the market in general."[55]
>
> ...
>
> "It is practically impossible for wheat traders not to know or not to use such information in order to conduct their businesses, as Argentina appears to contend in its submission."[56]

127. In this connection, it should be recalled that in this dispute the Appellate Body held that:

> "... an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be."[57]

128. For its part, in Section C.I.3.2 of its First Written Submission, Argentina showed that – under the amended PBS – it is perfectly possible for an exporter of wheat and wheat flour not to know and not to be able to predict what the amount of duties payable on arrival at the Chilean customs office will be. Therefore, in these circumstances an exporter will be less likely to ship wheat or wheat flour to the Chilean market.

129. Even if this were not evidence enough, there are further problems involved in not being able to predict the amount of the duties and what an exporter may expect.

130. If an exporter decides to export wheat to Chile in March 2007, the first thing he has to do, in addition to dealing with his own business, is to find out the dates on the basis of which the reference price in effect in March 2007 is going to be established. As stipulated in Article 7 of Decree 831/2003, "the reference price for wheat shall be the average of the daily prices recorded on the markets indicated in Article 8, during a period of 15 days reckoned retrospectively from the 10th of the month in which the respective decree is published".[58]

131. The next step is to ascertain the market of concern for this period, in accordance with the provisions of Article 8 of Decree 831/2003. In this example, it is bread wheat, Argentine port. Here the exporter will encounter his first problem, since Decree 831/2003 does not say which Argentine port is of concern for the purposes of calculating the reference price.

132. The exporter will not be able to find out the daily price quoted for bread wheat, "Argentine port" as a basis for establishing the market of concern for the first half of the year, since prices vary depending on the Argentine port chosen.[59] As Argentina shows in Exhibit ARG-4, there are at least 4 (four) different prices quoted for Argentine bread wheat (Port of Buenos Aires, Port of Bahía Blanca, Port of Quequén, and Port of Rosario).

133. According to Chile, the exporter must ascertain the future price of bread wheat in (one of) these Argentine ports for this period and then calculate the period average to obtain the presumed *future* reference price.

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[54] Chile's First Written Submission, paragraph 162 (emphasis added).
[55] Chile's First Written Submission, paragraph 158.
[56] Chile's First Written Submission, paragraph 161.
[57] *Chile – Price Band System*, Appellate Body Report, paragraph 234.
[58] See Exhibit ARG-2.
[59] Argentina's First Written Submission, paragraph 219.

134. Thus, another of the problems faced by the exporter in estimating the future amount of duties payable is the fact that future prices are precisely that: future and are therefore estimates rather than solid data. That is to say, there could be variations due to circumstances unknown at the time that could cause these *future* prices of July 2006 to differ from the prices actually made *in the future* between 27 January and 10 February 2007.

135. Therefore, as the estimated future reference price could differ from the reference price determined in the future, there could be a difference between the amount of the specific duties estimated and those actually established in the future. Consequently, the relationship between the specific duty and the transaction value, in the presence of a variation in the amount of the duties, will necessarily differ from that which would have existed if there had been no such variation.

136. Chile cannot maintain that this is the transparency and predictability required by Article 4 of the *Agreement on Agriculture*. The amended PBS simply is neither transparent nor predictable, since it is not an ordinary customs duty.

137. **In conclusion**, as will be clear to the Panel, Chile has been unable to rebut the arguments and evidence submitted by Argentina, thereby confirming that the amended PBS is non-transparent and unpredictable, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

4. The amended PBS is a measure similar to a variable import levy

> "Variable duties directly affect trade relations, altering relative prices (relationship between domestic market prices and international market prices), in addition to the effects resulting from the application of ordinary duties."

138. This statement would appear to have been taken from Argentina's submission regarding the way in which the amended PBS operates. In fact, however, it comes from paragraph 141 of Chile's submission.

139. According to Chile, it is clear that "… specific duties cannot constitute a variable levy, as their purpose is not to sustain prices – whether entry prices, c.i.f. prices or domestic market prices"[60] (underlining added). Thus, Chile contradicts the actual provisions of Law 19.897 and Decree No. 831/2003 which state:

> "… The amount of such duties and rebates shall be established … in terms which, when applied to the price levels attained by the products in question on the international markets, *allow domestic market stability*".[61] (Emphasis added)

140. In its submission Chile refers to paragraph 233 of the Appellate Body Report, the relevant part of which states that variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously.

141. "Forgetting" that Argentina has shown how the amended PBS meets each of these requirements, Chile summarily concludes that:

> "The obvious conclusion to be drawn from the Appellate Body's analysis is that the changes introduced by Chile have put an end to the variability of the duties".[62]

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[60] Chile's First Written Submission, paragraph 133.

[61] See Law 19897, Art. 1, second paragraph and Decree 831/2003 Art. 1, second paragraph, Exhibits ARG-1 and ARG-2, respectively.

[62] Chile's First Written Submission, paragraph 92.

142. As the sole justification for this conclusion Chile adds that:

> "… Under Law 19.897, however, a specific duty (or rebate, or neither) is fixed by legal directive in the form of a decree issued by the Ministry of Finance and remains unchanged for two months, during which the duty applies on all import transactions, without the slightest variation and regardless of the amount of the transaction, until it is changed or cancelled by a more recent administrative act."[63]

143. Leaving aside its virtual "confession" that the duties resulting from the PBS are unrelated to the transaction value and therefore insulate Chile's market from international price developments, Chile bases all its reasoning on the fact that the duties remain unchanged for a period of two months "until…changed or cancelled by a more recent administrative act".

144. **First of all**, the phrase "... until … changed or cancelled by a more recent administrative act" is somewhat misleading since decrees, under the Chilean legislation, are issued in *binding* form and have been issued *continuously* since the amended PBS first came into force.[64]

145. **Secondly**, the fact that the specific duties vary not weekly but every two months does not mean that those duties are no longer variable levies. As Argentina maintained in its First Written Submission, in the right circumstances, every two months an exporter is *guaranteed* to face a specific duty different from that established during the previous two-month period. Moreover, in the longer term, what the exporter experiences is the continuous variability of the duties.[65]

146. **Thirdly**, Chile appears to disregard the fact that the time factor, that is to say the period of time during which the specific duties remain unchanged, is not one of the necessary and sufficient conditions or additional features which, according to the Appellate Body, characterize variable import levies.[66] Argentina also notes that, in its submission, it showed how the amended PBS meets each and every one of the requirements for the amended PBS to be similar to a variable import levy.[67]

147. Later, Chile contends that the specific duties cannot constitute a variable levy as their purpose is not to sustain prices and they do not have the characteristic of gradually "adjusting" so as to prevent a decline in domestic prices or even to raise them :

> "The above demonstration that the floor price and the regime as a whole are neither similar nor equivalent to a minimum import price (and hence are not inconsistent with Article 4.2 of the Agreement on Agriculture) therefore clearly shows that specific duties cannot constitute a variable levy, as their purpose is not to sustain prices – whether entry prices, c.i.f. prices or domestic market prices."[68]

> "A variable duty may be the kind of duty which is used to sustain a domestic or a minimum entry price, as can *be deduced from the Appellate Body's Report*, and the characteristic of which would be to gradually 'adjust', with greater or lesser regularity, so as to prevent a decline in domestic prices or even to raise them." (emphasis added)[69]

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[63] Chile's First Written Submission, paragraph 93.
[64] See Argentina's First Written Submission, paragraphs 263 and 264 and Exhibits ARG-5 and ARG-6.
[65] See Argentina's First Written Submission, paragraphs 266 to 270 and Exhibits ARG-21, ARG-22, ARG-23 and ARG-24.
[66] *Chile – Price Band System*, Appellate Body Report, paragraphs 233 and 234.
[67] Argentina's First Written Submission, Section C.3.
[68] Chile's First Written Submission, paragraph, 133.
[69] Chile's First Written Submission, paragraph, 139.

148. **Firstly**, as Argentina has previously pointed out, it is Law 19.897 itself and Decree 831/2003 that give it to be understood that the objective of the amended PBS is to support prices, insofar as they state that "[t]he amount of such duties and rebates shall be established … in terms which, when applied to the price levels attained by the products in question on the international markets, *allow domestic market stability*" (emphasis added).[70]

149. **Secondly**, the Appellate Body did not establish that "… [a] variable duty may be the kind of duty which is used to sustain a domestic or a minimum entry price …".

150. In this dispute, the Appellate Body has clearly defined the necessary, sufficient and additional features that characterize variable import levies. These features **do not include** the sustaining of entry prices, c.i.f. prices or domestic market prices or price "adjustment", as Chile maintains.

151. On the contrary, the Appellate Body found as follows:

> "… at least one feature of 'variable import levies' is the fact that the measure itself—as a mechanism—must impose the variability of the duties. Variability is inherent in a measure *if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously*. Ordinary customs duties, by contrast, are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula …"[71] (emphasis added)
>
> ...
>
> "… [T]he presence of a *formula causing automatic and continuous variability of duties is a necessary*, but by no means a *sufficient*, condition for a particular measure to be a 'variable import levy' within the meaning of footnote 1. 'Variable import levies' have additional features that undermine the object and purpose of Article 4, which is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. *These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures*. This lack of transparency and this lack of predictability are liable to restrict the volume of imports. As Argentina points out, *an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be*. This lack of transparency and predictability *will also contribute* to distorting the prices of imports by impeding the transmission of international prices to the domestic market".[72] (footnotes omitted, emphasis added)

152. Argentina has correctly interpreted the features identified by the Appellate Body in this dispute and shown how the amended PBS is characterized by each of them and hence that the amended PBS is a measure similar to a variable import levy.[73]

153. Chile attempts to call into question Argentina's demonstration that the amended PBS is similar to a variable levy – in paragraphs 134 to 137 of its submission – on the basis of a very simple

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[70] See Law 19897, Art. 1, second paragraph, and Decree 831/2003 Art. 1, second paragraph, Exhibits ARG-1 and ARG-2, respectively.

[71] *Chile – Price Band System*, Appellate Body Report, paragraph 233.

[72] *Chile – Price Band System*, Appellate Body Report, paragraph 234.

[73] Argentina's First Written Submission, Section C.I.3.

argument, namely, by showing that its MFN tariff had a variability of 67 per cent from 1984. Chile asks whether this variability alone could mean that the duty constitutes a variable levy and adds:

> "The obvious reply is no, which implies that this analysis – like the one regarding the variability of duties in Argentina's report (footnote: First Written Submission by Argentina, Section C.I.3), raises two problems – one of methodology and the other of interpretation. In the latter case, as mentioned earlier, the fact of having a duty which varies, or has varied, may be a necessary but is not a sufficient condition to affirm that such a duty qualifies as a variable levy. As regards methodology, the statistics calculated are merely measures of dispersion to show the distribution of sample data according to the mean (average). In other words, they serve to illustrate the statistical distribution of a set of values but by no means to prove that the duties are variable levies, as Argentina seeks to establish."[74] (footnote omitted)

154. For Argentina, too, the obvious reply is no, but for totally different reasons which Chile seems to ignore: basically because the reduction in Chile's general ad valorem (MFN) tariff was not the result of a scheme or formula that caused and ensured that the tariff would change automatically and continuously.[75]

155. In this respect, in Section C.I.3 of its submission, Argentina showed how the amended PBS possesses all of the features which, according to the Appellate Body, identify a variable import levy:

(a) A formula that causes import duties to vary;
(b) a formula that causes import duties to vary *automatically*;
(c) a formula that causes import duties to vary *continuously*;
(d) lack of transparency and predictability of the duty level.

156. Chile appears not to understand the Argentine argument. The dispersion (standard deviation) analysis to which Argentina refers is used only to show that the amended PBS contains a formula that causes import duties to vary *continuously*, i.e., requirement "c" above, and does not constitute the basis for all of Argentina's reasoning concerning variable levies as Chile claims.[76]

157. As Chile points out, the existence of a duty that varies or has varied, even though a necessary condition, is not sufficient for it to be described as a variable levy. It is one feature that must be present as a necessary condition, but it is not sufficient.

158. Therefore, Argentina showed, over the entire length of Section C.I.3, how the amended PBS fulfils all the conditions set by the Appellate Body including, *among other requirements*¸ a formula that causes import duties to vary continuously.

159. **In conclusion**, as will be clear to the Panel, Chile has failed to rebut the Argentine allegation that the amended PBS is a measure similar to a variable import levy.

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[74] Chile's First Written Submission, paragraph 137.

[75] *Chile – Price Band System*, Appellate Body Report, paragraph 233 "…[A]t least one feature of 'variable import levies' is the fact that the measure itself – as a mechanism – must impose the variability of the duties. Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously".

[76] Argentina's First Written Submission, paragraph 269, and Exhibits ARG-21 and ARG-22.

5. The amended PBS is a measure similar to a minimum import price

160. Chile begins its plea that the PBS does not constitute a minimum entry price [*sic*] by arguing that, in paragraphs 99 to 124 of its submission, Argentina claims to show that FOB prices are higher than CIF prices:

> "Although Argentina's submission seeks to demonstrate the opposite, in the normal course of international trade f.o.b. prices, which are the unit values for exported goods at the port of origin, are always lower than c.i.f. prices, which are the unit values for imported goods at the port of destination, for the same trade transaction. The difference between the f.o.b. price and the c.i.f. price in a trade transaction is that the latter also includes at least freight and transport insurance charges."[77] (original underlining, footnote omitted)

> "As the floor and the reference price are variables expressed at f.o.b. level, the purpose of calculating specific duties is obviously not to maintain an entry price; since neither the floor price nor the reference price at any given point in time can be higher than, or equal to, the c.i.f. price for a specified trade transaction."[78] (underlining added)

161. **Firstly**, it is astonishing how Chile seeks to distort what Argentina said in its First Written Submission. Argentina would prefer to think of it as an error of interpretation, but this is not easy to accept considering the detailed explanations which Argentina offered in paragraphs 99 to 124 of its submission and which Chile never refutes.

162. For example, let us see what Argentina said in those paragraphs:

> "... the CIF price tends to be greater than the FOB price"[79];

> "... the chances of the reference price being higher than the CIF price by more than US$7.2453 per tonne are minimal basically because of the effective difference in the calculation of the reference price and the CIF. The reference price, as under the old PBS, is calculated on an FOB basis. The CIF, as its name implies ("Cost, Insurance, Freight") consists of the FOB plus freight and insurance"[80]; (underlining added)

> "… during all that time the CIF price per tonne of wheat not only was not less than the reference price but *always* higher than the reference price [calculated on an FOB basis]"[81];

> "... Argentina has shown that, in the case of wheat, the chances of the CIF price being lower than the reference price are minimal and, in the case of wheat flour, almost nil."[82]

163. Clearly, Argentina tried to demonstrate the exact opposite of what Chile alleges, namely, that the CIF price is **naturally** higher than the FOB price.

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[77] Chile's First Written Submission, paragraph 122.
[78] Chile's First Written Submission, paragraph 126.
[79] Argentina's First Written Submission, paragraph 107.
[80] Argentina's First Written Submission, paragraph 108. Argentina points out that the FOB price to which Chile refers is the reference price.
[81] Argentina's First Written Submission, paragraph 110.
[82] Argentina's First Written Submission, paragraph 124.

164. **Secondly**, what Argentina shows in paragraphs 99 to 124 of its submission is that the specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor, now US$128 per tonne. For this purpose it uses the amended PBS formula, concluding that for the entry price to be less than US$128 per tonne – i.e., less than the floor price – an *improbable* condition must be fulfilled, namely, that the reference price must be higher than the CIF price by more than US$7.2453 per tonne or, what amounts to the same thing, the CIF must be lower than the reference price by more than US$7.2453 per tonne.[83]

165. Argentina having shown that the chances of this condition being satisfied are minimal, it is very difficult, with the PBS active (that is to say, when specific duties are being applied), for the entry price per tonne of wheat to be lower than the band floor. Thus, Argentina has shown that the specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor, as the Appellate Body found in relation to the original PBS and as confirmed by Chile with respect to the amended PBS.[84]

166. In fact, the Chilean assertion provides very useful support for Argentina's argument. Chile asserts that FOB prices are *always* lower than CIF prices: "... in the normal course of international trade fob. prices…are always lower than c.i.f. prices"[85] (original underlining).

167. This relieves Argentina of the need to provide further mathematical proof. As follows from the PBS formula, for the amended PBS not to elevate the entry price of imports to Chile above the price band floor the above-mentioned condition must be satisfied, i.e., the reference price (calculated on an FOB basis) must be higher than the CIF price of an individual export transaction by more than US$7.2453 per tonne or, what amounts to the same thing, the CIF price of that transaction must be lower than the reference price by more than US$7.2453 per tonne.

168. If this condition is not met, the amended PBS will *mathematically* elevate the entry price of imports to Chile above the price band floor. If, as Chile argues, FOB prices are always lower than CIF prices, this condition cannot be fulfilled so that the amended PBS will always tend to elevate the entry price of imports to Chile above the price band floor.

169. **Consequently**, Chile's arguments confirm Argentina's claim, namely, that the amended PBS constitutes a measure similar to a minimum import price.

170. In paragraphs 128 to 132 of its First Written Submission, Chile seeks to show that the amended PBS is not a minimum import price or does not tend to elevate the entry price above the band floor, because in almost 50 per cent of cases the FOB value plus specific duties was lower than the band floor:

> "Using the same data as those supplied by Argentina (footnote omitted) – for the period 1 November 2004 to 29 April 2005 – we can see that the sum of the f.o.b. prices plus the specific duties, over the only four-month period in which they were applied, is below the f.o.b. floor price for 46 per cent of the 81 days covered by Argentina. In other words, the evidence shows that it is impossible to maintain the floor price. The following examples, based on the data from Argentina's exhibits, serve to illustrate the above.

[83] Argentina's First Written Submission, paragraph 104.
[84] Argentina's First Written Submission, paragraph 114.
[85] Chile's First Written Submission, paragraph 122.

	Example 1	*Example 2*
Date	20 January 2005	10 February 2005
	f.o.b. value (106) + specific duty (7.82) = 113.82	f.o.b. value (107) + specific duty (14.3) = 121.3
Band floor price	128	128
UNDERESTIMATION by	US$14.18/ton	US$6.7/ton"[86]

171. **First of all**, Chile is getting the analysis wrong. According to Chile, the sum of the f.o.b. prices plus the specific duties, over the only four-month period in which they were applied, was below the f.o.b. floor price for 46 per cent of the 81 days covered by Argentina. However, it makes no sense to compare the *FOB price plus the specific duties* with the band floor.

172. The relevant comparison as far as this dispute is concerned is with the behaviour of the *entry price* of wheat imports to Chile. The Appellate Body held that:

> "… specific duties resulting from Chile's price band system tend... to elevate the entry price of imports to Chile above the lower threshold of the relevant price band …"[87]

173. As Argentina repeatedly made clear in the course of its First Written Submission[88], the entry price of wheat imports to Chile – under the amended PBS – is equal to the result of the following sum: CIF value plus the amount of total duties in absolute terms. Total duties include *ad valorem* duties (which, under Chile's General Customs Tariff, amount to 6 per cent of the CIF), plus specific duties (equal to the band floor price less the reference price multiplied by 1 (one) plus the general *ad valorem* tariff in force as published in the Customs Tariff).[89]

174. More graphically[90]:

Entry price of wheat under the amended PBS = CIF value + Total duties in absolute terms

= CIF value + *Ad valorem* duties + Specific duty

= CIF value + CIF value * 6% + Specific duty

[86] Chile's First Written Submission, paragraph 130.
[87] *Chile – Price Band System*, Appellate Body Report, paragraph 260.
[88] Argentina's First Written Submission, paragraph 100 ff.
[89] According to Brazil, "…the new PBS contributes to distorting the prices of imports even more, inasmuch as a new coefficient is added to the formula used to calculate the duty level… In the current system, the specific duty level is magnified by the introduction of a new unexpected multiplier consisting of 1 plus the general *ad valorem* duty in force". *Chile – Price Band System* … Recourse to Article 21.5 of the DSU, Third Party Submission by Brazil, paragraph 16.
[90] Argentina's First Written Submission, paragraph 101.

175. Mathematically, this can be expressed as follows[91]:

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

where:

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

176. In other words, in paragraphs 128 to 132, Chile "forgets" to include in its analysis at least two significant factors that make up the entry price to which the Appellate Body referred:

(1) the difference between the FOB price and the CIF price, that is, insurance and freight;
(2) the ad valorem duties (6 per cent of MFN).

177. If Chile had included these two factors in its analysis, the result would have been different: during 100 per cent of the time in which specific duties were being applied between December 2004 and April 2005, the entry price was above the band floor, in the terms expressed by the Appellate Body. This is clear from Exhibits ARG-11 and ARG-12 to which Chile referred.

178. Therefore, as Argentina showed in Section C.I.2.1 of its submission, under the amended PBS the findings of the Appellate Body with respect to the original PBS are confirmed, that is, the specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor.

179. **Secondly**, in footnote 72 to paragraph 130 of its submission, Chile states:

> "Strictly speaking, this calculation is based on the data from Table ARG-11 adjusted according to those from Table ARG-16. According to the official source (SAGPyA), some of the data in Table ARG-11 are incorrect."

180. Chile claims to adjust the data from the table in Exhibit ARG-11 according to those from the table in Exhibit ARG-16, on the grounds that data from the table in Exhibit ARG-11 are incorrect "according to the official source".

181. There is nothing "incorrect" about the table in Exhibit ARG-11. A time adjustment has been made to the FOB prices in Exhibit ARG-11 on the basis of the explanation given in footnote 104 to Table I of the Argentine submission. As explained in that footnote:

> "ODEPA does not provide **daily** FOB prices for bread wheat, Argentine port (only monthly prices). The historical FOB price for Argentine bread wheat reported by Argentina's Ministry of Agriculture, Livestock, Fisheries and Food (SAGPyA) is taken instead. In order to make the analysis as accurate as possible, the price indicated in the table for 15 December 2004 corresponds to the Argentine FOB price in effect 15 days previously, since that is the approximate time taken by a cargo ship to sail from Argentina to Chile, including dockside loading and unloading times …"

182. Thus, the table in Exhibit ARG-11 reflects the reality that the FOB price reported by SAGPyA is the FOB price for a date "X" of shipment in Argentina. When the consignment arrives in

[91] Argentina's First Written Submission, paragraph 102.

Chile, this will be the FOB price for Chilean customs purposes, which may differ from the FOB price at that point in the Argentine port.

183. For example, in Exhibit ARG-16 the FOB price for 1 November 2004 is US$119 per tonne. It is clear from Exhibit ARG-11 that this is the FOB price for Chilean customs purposes approximately 15 days later, on 16 November. In other words, the shipment that left Argentina on 1 November at US$119 per tonne FOB price continues to be valued at US$119 per tonne FOB price plus costs in order to arrive at the CIF price. Nevertheless, on 16 November, the FOB price in Argentina was US$115 per tonne, as may be seen from Exhibit ARG-16. In other words, there is nothing incorrect about Exhibit ARG-11 as Chile suggests.

184. On the other hand, in Exhibit ARG-16 Argentina did not make a time adjustment, since the purpose of that exhibit is different from that of Exhibit ARG-11. Thus, Exhibit ARG-16 is intended to show the disconnection between the FOB price of Argentine bread wheat and the reference price established by Chile *on the same day*, for each day of the period of implementation of the amended PBS. To make things clearer for the Panel, in Exhibit ARG-30 Argentina gives details of the exhibits in which a time adjustment has been made.

185. It is not clear from paragraphs 171 to 182 of Chile's First Written Submission whether Chile is seeking to refute Argentina's demonstration of the tendency of the specific duties resulting from the amended PBS to elevate the entry price of imports to Chile above the price band floor (i.e., Section C.I.2.1 of the Argentine submission); whether it is seeking to refute Argentina's demonstration of overcompensation (i.e., Section C.I.2.2 of the Argentine submission); or whether it is seeking to refute Argentina's demonstration that the entry price of imports to Chile, under the amended PBS, is higher than it would be if Chile were to apply a minimum import price at price band floor level (i.e., Section C.I.2.3 of the Argentine submission).

186. This pervasive lack of clarity in Chile's First Written Submission is aggravated by the fact that in these paragraphs there is no reference to the Argentine submission.

187. Nevertheless, it may be concluded, on the basis of the observations made at the end of paragraph 179 of its submission, that Chile is referring to Argentina's demonstration of the tendency of the specific duties resulting from the amended PBS to elevate the entry price of imports to Chile above the price band floor (i.e., Section C.I.2.1 of Argentina's First Written Submission), and of the fact that the entry price of imports to Chile – under the amended PBS – is higher than it would be if Chile were to apply a minimum import price at price band floor level (i.e., Section C.I.2.3 of Argentina's First Written Submission).

188. In other words, Chile is attempting to rebut two *different* Argentine arguments through a single argument of its own.

189. The basis of Chile's reasoning – contained in paragraphs 175 to 179 of its submission – is that the specific duty resulting from the PBS is less than the duty that would be required to establish a minimum entry price.

190. Mathematically, this argument can be expressed as follows, again in Chile's own terms:

Duty to maintain an import cost, or parity or entry price (minimum price)		**Specific duty resulting from the PBS**
SD = b * (FOBfloor - FOBrp)[92]	>	SD = (1+ 0.06) * (FOBfloor – FOBrp)

[92] Chile's First Written Submission, paragraph 176.

191. This would be so because, according to Chile,

> "if 'b' is larger than the *ad valorem* duty, a specific duty calculated solely on the basis of f.o.b. values and Chile's *ad valorem* duty [*sic*] would unquestionably be lower than a duty obtained using import costs"[93] (underlining added).

192. There are several problems with this reasoning.

193. **Firstly**, once again, Chile describes its own PBS incorrectly. Strictly speaking, the specific duty is not calculated "solely" on the basis of [literally, does not solely include] f.o.b. values and the *ad valorem* tariff. In fact, it "includes" nothing. The specific duty is calculated simply on the basis of the difference between the floor price and the reference price multiplied by 1 plus 0.06, i.e., the *ad valorem* tariff.[94]

194. **Secondly**, as Argentina previously pointed out, there is no "FOB floor" price in the legislation on which the amended PBS is based.[95] The PBS legislation merely refers to "floor and ceiling values".[96] Not even in the definitions of Article 2 of Decree 831/2003 is there any mention of it being a question of FOB values.[97] These are merely arbitrary values chosen without the use of any criterion. There is no indication of their being either FOB or CIF.

195. To avoid questions being raised, Chile included the following sentence in Article 4 of Decree 831/2003[98]:

> "The floor and ceiling values and the reference prices for which the regulations provide *shall be expressed* in FOB terms in United States dollars." (Emphasis added)

196. This is not enough to show that FOB values are involved; that would require Chile to produce the evidence on which it based its choice of floor and ceiling values.

197. **Thirdly**, for the following reasons, Chile gets the definition of the duty established on the basis of a minimum import price completely wrong.

198. In this same dispute, the Panel held that a minimum price scheme operates in relation to the actual *transaction value* of the imports.[99] The Appellate Body incorporated this aspect of minimum import prices in its report.[100] In its reasoning, Chile calculates the duty resulting from a minimum price on the basis of the difference between the band floor and the *reference price*.[101] The reference price – which has nothing to do with the transaction value – is simply an average price on a market of concern.

199. Then, as also noted by the Appellate Body in this dispute and in accordance with Argentina's observations in its First Written Submission[102], the establishment of a minimum import price at price

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[93] Chile's First Written Submission, paragraph 178.
[94] Argentina's First Written Submission paragraphs 100 ff.
[95] See Law 19.897, Art. 1 paragraphs 3, 4 and 5, and Decree 831/2003, Arts. 2, 4, 6, 13, 14, Exhibits ARG-1 and ARG-2, respectively.
[96] See Law 19.897, Art. 1 paragraphs 3, 4 and 5, and Decree 831/2003, Arts. 2, 4, 6, 13, 14, Exhibits ARG-1 and ARG-2, respectively.
[97] See Exhibit ARG- 2.
[98] See Exhibit ARG- 2.
[99] *Chile – Price Band System*, Panel Report, paragraph 7.36(e).
[100] *Chile – Price Band System*, Appellate Body Report, paragraph 237.
[101] Chile's First Written Submission, paragraph 176.
[102] Argentina's First Written Submission, paragraph 161.

band floor level would mean that if the entry price of a particular product (i.e., the CIF price plus *ad valorem* duties) were lower than that threshold (US$128 per tonne or the corresponding amount) an additional charge equivalent to the difference would be imposed, so that the product in question entered the Chilean market at the band floor price (currently US$128 per tonne).[103]

200. The formula that follows from this definition is:

Duty resulting from minimum import price = floor price – (CIF value + *ad valorem* duties)

Duty resulting from minimum import price = floor price – (CIF value * 1.06)

201. The formula outlined by Chile bears no relation either to the definition of minimum import price or to that of the charge resulting from the imposition of a minimum import price, as established in this dispute.

202. Chile has determined a factor "b" that includes a set, both loose and broad, of variable costs "such as" the *ad valorem* duty, inspection costs, the commission payable to agents handling the transaction, and credit interest due.[104] The multiplication of this factor "b" by the difference between a floor value and a reference price has no basis in or relation to a minimum import price.

203. Thus, Chile employs confused reasoning, based on definitions other than those established by the Appellate Body.

204. If Chile had used the formula in the Appellate Body report, it would have arrived at the same conclusion as that reached by the Appellate Body with respect to the original PBS and by Argentina with respect to the amended PBS, namely, that the entry price of imports to Chile, under the amended PBS, is higher than it would be if Chile were to apply a minimum import price at price band floor level. In Section C.I.2.3 of its submission, Argentina demonstrated this with the aid of concrete examples and charts based on Chile's own data.[105]

205. **In conclusion**, as will be clear to the Panel, Chile has failed to rebut Argentina's claim that the amended PBS is a measure similar to a minimum import price, inconsistent with Article 4.2 of the *Agreement on Agriculture*.

6. The amended PBS has not produced any improvement in the conditions of access to the Chilean market

206. In the first part of Section V.6 of its submission – specifically in paragraphs 183 to 185 – Chile repeats an argument already familiar at this stage, namely, that simply because under the amended PBS specific duties were allegedly applied on fewer occasions than they would have been under the original PBS there has been an improvement in the conditions of access of wheat to the Chilean market. The same reasoning is applied to rebates. Thus, under the amended PBS, since 16 December 2003, more rebates are said to have been granted than would have been during the same period if the original PBS had been applied so that, in Chile's view, the favourable conditions for imports are more extensive.

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[103] *Chile – Price Band System*, Appellate Body Report, paragraph 236.
[104] Chile's First Written Submission, paragraph 175.
[105] Argentina's First Written Submission, paragraphs 159 to 173, and Exhibit ARG-10.

207. Chile argues:

> "In conclusion, the period of application of duties under the new regime was shorter by 10 weeks, while that of rebates was longer by 8 weeks, which represents an effective increase in favourable conditions for grain imports compared to what might have occurred under the mechanism prior to modification."[106]

208. **Firstly**, this amounts to saying that exporters of wheat and wheat flour to Chile should not be concerned about the distorting effects of the amended PBS, since under the amended PBS the distorting effects resulting from the application of specific duties occurred "only" 17 times, whereas under the original PBS they would have occurred 27 times. Chile claims that this represents an improvement in conditions of access.

209. Once again, it can only be said that the access conditions continue to be unfavourable despite the duties allegedly being applied on fewer occasions than in the case of the original PBS. Chile's reasoning has no basis in the WTO Agreements and, in particular, not in the DSU or the *Agreement on Agriculture*. A measure taken to comply is not "less" inconsistent because the inconsistency occurs less frequently than in the case of the original measure. There is no basis for drawing such a conclusion.

210. **Secondly**, it is interesting to note the table which Chile itself introduces in paragraph 183. This table confirms that the amended PBS is very similar to the original PBS. The period between 16 December 2003 and 13 January 2004, during which the amended PBS was not applied, was 57 weeks long. This means that the PBS was applied for 52 weeks (out of a total of 109). Following the same reasoning, the original PBS would not have been applied during 55 weeks, that is to say it would have been applied during 54.

211. To sum up, the original PBS would have been applied for 50 per cent of the time, whereas the amended PBS was applied for 48 per cent of the time. Clearly, the two systems are very similar and, therefore, the degrees of distortion they cause are also similar.

212. In Exhibit CHL-7, as evidence which, it claims, supports this reasoning, Chile submits a table that summarizes how the application of the original PBS would have compared with the application of the amended PBS. Chile begins by failing to comply with the minimum requirement of indicating the source of its data, as Argentina did with all the information it provided.

213. Moreover, it is impossible to verify whether the calculations relating to the alleged behaviour of the old PBS from 16 December 2003 are consistent or not. There is no means of knowing what were the calculations that led Chile to determine the reference prices that would have been established under the original PBS. It is precisely these prices that form the basis for determining whether the old PBS would have been applied or not. Therefore, Exhibit CHL-7 is not based on verifiable evidence and has no foundation.

214. To sum up, in the table in Exhibit CHL-7 which Chile offers as alleged evidence there is no indication of the source of the data. Nor is there any indication of the basis for the calculation of such a key variable as the reference prices of the original PBS.

215. Even if this table were based on evidence, Chile considers the "new" PBS to be different and less distortive because it was applied for 48 per cent of the time whereas the old PBS would have been applied for 50 per cent of the time. That does not seem to be much of a difference.

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[106] Chile's First Written Submission, paragraph 185.

216. As if this were not enough, in Chile's opinion, wheat and wheat flour exporters should rejoice because they have faced distortions resulting from specific duties for "only" 17 weeks. These are Chile's grounds for arguing that the amended PBS has improved conditions of access. Chile's argument is without foundation. The amended PBS continues to be inconsistent.

Effect of the scheduled reduction in floor and ceiling prices

217. In paragraphs 186 to 192 of its submission, Chile seeks to argue that as the floor and ceiling prices will be reduced in the future, the amount of the duties will be lower and the probability of their being assessed will also diminish:

> "The scheduled reduction of the floor and ceiling prices is a scenario under which, irrespective of international price levels, the amount of the specific duties will increasingly diminish compared to those currently being established, just as the probability of duties actually being assessed will increasingly diminish."[107]

218. Chile's argument is simply wrong. The reality is that neither the amount of the specific duties nor the probability of their being assessed is "irrespective of international price levels" and indeed the opposite is true: the amount of the specific duties and the probability of their being assessed do depend on international price levels.

219. Law 19.897 and Decree 831/2003 refer to precisely that, i.e., the dependence of the amount of the specific duties on international price levels.[108]

220. Over and above the provisions of the legislation governing the amended PBS itself, this is clear from the following simple example:

221. According to the "History of application of the amended PBS"[109], between 16 December 2004 and 15 December 2005 the PBS floor price for wheat was (and is) US$128 per tonne. The reference price between 16 December 2004 and 15 February 2005 was established at US$114.50 per tonne. This gave a specific duty of US$14.30 per tonne.

222. In accordance with Art. 6 of Decree 831/2003, between 16 December 2011 and 15 December 2012 the PBS floor price for wheat will be US$118 per tonne. If the reference price is established at US$103.7 per tonne during any two months of that year, the specific duty during that period will be US$14.30 per tonne, the same as established on 16 December 2004. Even if the reference price is less than US$103.7 per tonne, the specific duty will naturally be higher and not lower, as Chile argues.

223. When this reasoning is applied to the example given by Chile in paragraphs 187 and 188 of its submission, it becomes clear that the Chilean example has no foundation. Chile argues:

> "Although this may be self-evident, we shall nevertheless use the calculation formula to explain matters. If we take the current floor price of US$128/tonne and the floor price of US$114/tonne that will apply in 2014, with an identical reference price of, say, US$110/tonne, the results are as follows:

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[107] Chile's First Written Submission, paragraph 186.

[108] See Law 19.897, Art. 1 paragraphs 3, 4 and 5, and Decree 831/2003, Arts. 2, 4, 6, 13, 14, Exhibits ARG-1 and ARG-2, respectively: "The amount of such duties and rebates shall be established … in terms which, when applied to the price levels attained by the products in question on the international markets, *allow domestic market stability*" (emphasis added).

[109] Exhibit ARG-6.

$SP_{2006} = 1.06 * (128 – 110) = 19.08$

$SP_{2014} = 1.06 * (114 – 110) = 4.24$

> The specific duty in 2014, using the same reference price, would be US$4.24/tonne compared to the current specific duty, using that same reference price, of US$19.08/tonne. In other words, the specific duty in 2014 will be 78 per cent lower than the duty that would be calculated for this year." (underlining added)

224. To spot the flaws in this argument it is only necessary to consider the basic assumption, namely, that in no less than eight years' time (2014) the reference price will be the same as it is today (2006), or US$110 per tonne, according to the example.

225. The fact is that there is no evidence for determining today that in eight years' time the reference price will be the same. At the very least, it is a rash assertion. In all probability, the reference price will change, as has always happened since the establishment of the amended PBS.

226. As previously explained, the amount of the specific duties will depend on the future levels of international or reference prices. With this in mind, we can reformulate Chile's second equation so that the reference price changes:

$SP_{2014} = 1.06 * (114 – 94.92) = 19.08$

227. It is now "self-evident" that if the reference price is US$94.92 per tonne in 2014, the amount of the specific duties will be the same as in 2006 or, in accordance with the Chilean example, US$19.08, or 0 per cent (zero per cent) lower than in 2006.

228. It is therefore clear that the amount of the specific duties and the probability of their being assessed depend on international price levels. It is by no means sure that these amounts and the probability of their being assessed will increasingly diminish, as Chile argues. The Chilean argument is incorrect and without foundation.

229. In paragraph 191, Chile returns to an argument that is no longer sustainable at this stage, namely, that according to the historical wheat price series the probability of wheat prices standing below US$114 per tonne (i.e., the floor price in 2014) is 23.9 per cent, as compared with 46.1 per cent for the probability of prices lying below US$128 per tonne:

> "Over the period January 1986-March 2006 (period of application of the price band policy [*sic*]), the price of Argentine bread wheat stood 112 times (months) below the current floor of 128, i.e. on 46.1 per cent of the occasions considered. The price stood under 114, namely the floor for 2014, 58 times (months), i.e. on 23.9 per cent of the occasions considered. In other words, the probability of specific duties being applied in the year 2014 becomes lower and lower."

230. The problems presented by arguments of this kind are set out below.

231. **First of all**, as Argentina has already pointed out, the amended PBS is not "less" inconsistent because the inconsistency will arise on fewer occasions in the future than at present. There is no basis for making an assertion of this kind.

232. **Secondly**, according to Chile's reasoning, there is a more than 46 per cent probability, while the floor is situated at US$128 per tonne, of wheat and wheat flour exporters experiencing the distortions caused by specific duties. That is not encouraging for exporters planning to export wheat

and wheat flour to Chile up to December 2007. We recall that until then the floor price will remain at US$128 per tonne. Therefore, the probability indicated by Chile is not at all encouraging.

233. **Thirdly**, Chile indicates neither the source of its information nor the numerical basis for the calculations made to arrive at the conclusion reached in this paragraph. Chile simply fails to provide any evidence at all.

234. **Fourthly**, even if Chile's reasoning had any validity, Chile's calculations are wrong. Chile takes only the lowest future floor price of all those scheduled under Decree 831/2003, i.e., US$114 per tonne, corresponding to 2014. Chile should have incorporated in its calculations a weighting that takes into account the time during which the price of Argentine bread wheat lay below the future floor prices not considered by Chile: 126, 124, 122, 120, 118 and 116 US$ per tonne. As these prices are all higher than US$114 per tonne, the percentage should logically be higher than the 23.9 per cent calculated by Chile.

235. Argentina reiterates that the way in which the floor and ceiling of the amended PBS are established has transformed the PBS into a more rigid and inflexible system.[110]

236. Chile concludes by referring to a process of gradual reduction of border protection of wheat:

> "Both of the above results – that is, the reduction of duties by 2014 and the lesser probability of duty assessment – demonstrate that the current policy has an in-built process of gradual reduction of border protection of wheat."[111] (original underlining)

237. **To sum up**, Chile wrongly disregards the fact that the level of specific duties resulting from the PBS obviously depends on international price levels, attempting to argue that in 8 (eight) years time the reference price will be the same as it is at present. Moreover, Chile repeats the argument that the amended PBS will be "less" inconsistent in the future because the inconsistency will arise on fewer occasions than at present, while basing its case on calculations made without providing the source of the evidence and without including most of the relevant period of application of the amended PBS up to 2014.

238. Moreover, Chile chooses to disregard the fact that by keeping the floor and ceiling inflexible the amended PBS insulates the domestic market from international price developments. This is the basis for its concluding that the amended PBS ("the current policy") has an in-built process of gradual reduction of border protection of wheat. Chile's conclusion has no basis in fact or in law.

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[110] As Brazil has pointed out:

"… the 11-year period has the side effect of aggravating the distortion of domestic prices vis-à-vis international ones. While such a long period may afford some predictability, the new PBS is more rigid and inflexible, given that, in practice, the Chilean market will be insulated from fluctuations in the world prices for eleven years. Should there be a significant downward movement in the international wheat prices, the 0.985 factor may not be sufficient to account for the necessary reductions in the lower and upper thresholds of the price bands. Hence, in spite of the application of the 0.985 multiplier, one of the main elements of the PBS (the bands themselves) will remain virtually unchanged for more than a decade, preventing the fluctuation of international prices from being transmitted to the Chilean market". *Chile – Price Band System* … Recourse to Article 21.5 of the DSU, Third Party Submission by Brazil, paragraph 15.

[111] Chile's First Written Submission, paragraph 192.

C. THE ARGUMENT RELATING TO THE FACTOR OF 1.56 APPLICABLE TO WHEAT FLOUR AND THE CLAIM RELATING TO THE SECOND SENTENCE OF ARTICLE II:1(B) OF THE GATT 1994 FALL WITHIN THE TERMS OF REFERENCE OF THE PRESENT PANEL

239. In Part III of its First Written Submission, Chile suggests that Argentina's claims relating to the factor of 1.56 applicable to wheat flour and the second sentence of Article II:1(b) of the GATT 1994 lie outside the Panel's terms of reference.

240. In this way, Chile avoids responding to the Argentine assertion that the factor of 1.56 used to multiply the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour is not transparent and insulates the entry price for wheat flour from international price developments to an even greater extent than that for wheat, this being a specific feature of the amended PBS that prevents enhanced access to the Chilean market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[112]

241. Similarly, in this way Chile avoids having to argue against the contention that, pursuant to the *Understanding on the Interpretation of Article II:1(b) of the GATT 1994*, the amended PBS is in breach of the second sentence of Article II:1(b) of the GATT 1994, since it was not recorded in the appropriate column of Chile's Schedule of concessions (No. VII), but is nevertheless being applied.[113]

242. Argentina's argument relating to the factor of 1.56 applicable to wheat flour and Argentina's claim relating to the second sentence of Article II:1(b) of the GATT 1994 lie within the terms of reference of the present Panel, and Chile has been unable to refute that the factor of 1.56 is a specific feature of the amended PBS that prevents enhanced access to Chile's market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*, and that the amended PBS is in breach of Article II:1(b) of the GATT 1994, second sentence.

243. Below, Argentina will deal separately with Chile's claims concerning (i) the factor of 1.56 applicable to wheat flour and (ii) the second sentence of Article II:1(b) of the GATT 1994, respectively.

1. Argentina's argument relating to the factor of 1.56 applicable to wheat flour lies within the terms of reference of the present Panel

(a) The questioning of the factor of 1.56 applicable to wheat flour is an argument, not a claim

244. Chile maintains that Argentina's arguments relating to the factor of 1.56 applicable to wheat flour lie outside the terms of reference of the present Panel, since they concern "a claim which Argentina could have raised and pursued in the original dispute, but failed to"[114] Chile therefore requests that the Panel dismiss the claim raised by Argentina relating to the factor of 1.56, given that it is not properly before the Panel.[115]

245. In support, Chile cites the case *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, arguing that claims relating to aspects of an original measure which were not raised in the original proceedings are inadmissible. According to Chile:

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[112] Argentina's First Written Submission, Section C.I.2.7.
[113] Argentina's First Written Submission, Section C.II.
[114] Chile's First Written Submission, paragraph 62.
[115] Chile's First Written Submission, paragraph 63.

> "The arguments and precedents mentioned in the previous section, which highlight the conclusions of the Panel in the dispute *US – Countervailing Measures on Certain EC Products (Article 21.5 - EC)*, are reproduced in full, given that that dispute dealt precisely with the inadmissibility of entertaining claims relating to aspects not of a 'measure taken to comply' but of the original measure, and which were not raised in the original proceedings."[116]

246. Chile's argument is mistaken. Chile appears not to understand the difference between "claims" and "arguments".

247. In fact, Argentina's questioning of the factor of 1.56 is not a claim, it is an *argument*.

248. A claim is a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. An *argument* is adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified provision. Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and the panel meetings.

249. This was made clear by the Appellate Body in *Korea — Dairy Products*:

> "By '*claim*' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the arguments adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision. Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties. In *European Communities – Hormones*, we emphasized the substantial latitude enjoyed by panels in treating the arguments presented by either of the parties and said:
>
> > […] nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties -- or to develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration" (footnotes omitted, original emphasis).[117]

250. In the present proceedings, Argentina has raised claims with respect to the inconsistency of the amended PBS with the second paragraph of Article 4 of the *Agreement on Agriculture*, the second sentence of Article II:1(b) of the GATT 1994, and paragraph 4 of Article XVI of the *Marrakesh Agreement Establishing the World Trade Organization.*

251. However, Argentina's questioning of the factor of 1.56, included in the PBS for the purpose of assessing the duties applicable to imports of wheat flour, is an additional argument which shows that the amended PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*. There is no question of a "claim".

252. The claim to which the Argentine argument concerning the factor of 1.56 refers is that relating to the inconsistency of the amended PBS with Article 4.2 of the *Agreement on Agriculture.*

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[116] Chile's First Written Submission, paragraph 61.
[117] WT/DS98/AB/R, paragraph 139

Chile has not argued that this claim does not lie within the terms of reference of the present Panel. Therefore the Panel can rule on the Argentine arguments relating to the factor of 1.56.

253. Consequently, the cases cited by Chile in its First Written Submission, namely, *EC – Bed Linen (Article 21.5 – India*) and *US - Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, are not applicable as regards the factor of 1.56, insofar as these cases concern the admissibility in Article 21.5 proceedings of *claims* made during the original proceedings with respect to unchanged aspects of the measure to be taken or claims which were not made during the original proceedings with respect to unchanged aspects of the measure to be taken, but could have been invoked during those proceedings.

254. Therefore the Panel is fully competent to accept and make free use of the arguments submitted by Argentina with respect to the factor of 1.56 in order to show the inconsistency of the amended PBS with the second paragraph of Article 4 of the *Agreement on Agriculture*, since it is not a question of an independent claim but of an argument in support of a claim. Thus, Chile's argument that Argentina's claim relating to the factor of 1.56 applicable to wheat flour falls outside the terms of reference of the present Panel should be dismissed.

(b) Even if the Panel were to find that the Argentine arguments relating to the factor of 1.56 applicable to wheat flour constitute a new "claim", those arguments fall within the terms of reference of the present Panel

255. If the Panel were to find that the Argentine arguments relating to the factor of 1.56 applicable to wheat flour constitute a "claim" and not an "argument", as Argentina maintains, these arguments would fall within the terms of reference of the present Panel.

256. Argentina has shown that the factor of 1.56 used to multiply the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour is not transparent and insulates the entry price for wheat flour from international price developments to a greater extent than that for wheat, being a specific feature of the amended PBS that prevents enhanced access to Chile's market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[118]

257. In its First Written Submission, Chile was unable to rebut the arguments and evidence put forward by Argentina. It merely argues that the questioning of the factor of 1.56 is a new claim by Argentina that falls outside the Panel's terms of reference.

258. However, Argentina's arguments relating to the factor of 1.56 applicable to wheat flour fall within the terms of reference of the present Panel.

259. In fact, the Argentine arguments relating to the factor of 1.56 constitute new arguments. This is acknowledged by Chile when it observes, in relation to the factor of 1.56:

> "Quite simply no mention is made of it in Argentina's submissions. Neither, therefore, was it the subject of a ruling by either the original Panel or the Appellate Body"[119] (original underlining).

260. Argentina points out that, within the framework of the current Article 21.5 proceedings, Argentina is entitled to submit new arguments in order not to undermine the utility of the review envisaged under Article 21.5 of the DSU since, if it were not allowed to do so, the present Panel

[118] Argentina's First Written Submission, Section C.I.2.7.
[119] Chile's First Written Submission, paragraph 60.

would be unable to examine fully the consistency of the amended PBS with the *Agreement on Agriculture*.[120]

261. In *EC – Bed Linen (Article 21.5 – India)*, which Chile cites, the Appellate Body held that:

> "… This implies that an Article 21.5 panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the original proceedings. Moreover, the relevant facts bearing upon the 'measure taken to comply' may be different from the facts relevant to the measure at issue in the original proceedings. It is to be expected, therefore, that the claims, arguments, and factual circumstances relating to the 'measure taken to comply' will not, necessarily, be the same as those relating to the measure in the original dispute. Indeed, a complainant in Article 21.5 proceedings may well raise new claims, arguments, and factual circumstances different from those raised in the original proceedings …"[121] (underlining added, footnotes omitted)

262. Contrary to what Chile says, the fact that there was "… no finding of inconsistency (or of consistency) forcing Chile to amend that particular aspect of the PBS …"[122] does not prevent the present Panel from considering Argentina's new arguments relating to the factor of 1.56. The factor in question forms part of both the new measure itself and its application. It should be borne in mind that this factor is a fundamental and essential part of the amended PBS applicable to imports of wheat flour.

263. Argentina's new arguments concerning the factor of 1.56 will make it easier for the present Panel to fulfil its task of considering the amended PBS in its totality. In this connection, the Appellate Body has held that:

> "When the issue concerns the consistency of a new measure 'taken to comply' the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality. The fulfilment of this task requires that a panel consider both the measure itself and the measure's application …"[123] (underlining added)

264. Below, Argentina refers to Chile's observations in paragraph 55 of its First Written Submission where it cites the panel report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*.[124]

265. In that paragraph Chile stated that:

> "The Panel Report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* stated that accepting the EC's claim (with regard to likelihood of injury) would amount to providing it with 'a second chance to raise a claim that it

[120] *Canada – Aircraft (Article 21.5 – Brazil)*, Appellate Body Report, paragraph 41.
[121] *EC – Bed Linen (Article 21.5 – India)*, Appellate Body Report, paragraph 79.
[122] Chile's First Written Submission, paragraph 62 (underlining added).
[123] *US – Shrimp (Article 21.5 – Malaysia)*, paragraph 87 (WT/DS58/AB/RW).
[124] Although this paragraph corresponds to Chile's arguments relating to Article II:1(b), second sentence, of the GATT 1994, in paragraph 61 of its submission – which corresponds to the arguments relating to the factor of 1.56 – Chile indicates that it is reproducing in full the arguments and precedents mentioned in that section, which highlight the conclusions of the Panel in the dispute *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*.

> failed to raise in the original proceedings'.[125] The Panel was concerned that to allow such a possibility could undermine the principles of fundamental fairness and due process, which would raise 'serious issues regarding (the United States') due process rights'.[126] It therefore concluded that the new claims by the EC were not properly before the Panel."

266. The paragraphs that Chile cites from this dispute do not fit Argentina's new arguments with respect to the factor of 1.56. These new arguments relate to an aspect of the measure taken to comply that has changed with respect to the original measure. This is because under the amended PBS the factor of 1.56 is applied on a basis completely different from that on which it was applied under the original PBS.

267. What Argentina is submitting for the Panel's consideration is the factor of 1.56 which, in the amended PBS, is a changed aspect relative to the PBS in its original form, and which constitutes a specific feature of the measure taken to comply that prevents enhanced access to Chile's market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[127]

268. Therefore, the new arguments relating to the factor of 1.56 can be examined by an Article 21.5 panel and fall within the terms of reference of the present Panel.

269. In its arguments, Chile "forgets" to cite those paragraphs in which that panel held that an Article 21.5 panel can consider new claims concerning aspects of the measure taken to comply that have changed relative to the original measure.

270. In that case, the affirmative likelihood-of-subsidization re-determinations of the Section 129 determination – measure taken to comply – were based on different reasoning and different factual circumstances than those in the original sunset review.[128] Here the weight given in the re-determination to the subsidy programmes to which the evidence related was necessarily different than in the original sunset review.

271. Therefore, despite the fact that the USDOC's affirmative likelihood-of-subsidization re-determination was maintained in the Section 129 determination, it was included in the terms of reference of the Article 21.5 panel, inasmuch as the United States had revised the likelihood-of-subsidization determination by changing the legal and factual basis of the conclusion concerning the continuation or repetition of the subsidy. Thus, the new claims relating to the evidence referred to an aspect of the measure taken to comply that had changed as compared with the original measure. Consequently, the panel arrived at the conclusion that the USDOC's affirmative likelihood-of-subsidization re-determination was included in its terms of reference.

272. In fact, the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* held that:

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[125] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Panel Report (WT/DS212/RW), paragraph 7.74.

[126] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Panel Report (WT/DS212/RW), paragraph 7.76.

[127] This is why Argentina is challenging the utility of Exhibits CHL-5 and CHL-6, insofar as they relate to the original PBS, that is to say, a measure different from the amended PBS.

[128] In this connection, in paragraph 7.69 of its report, the Panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* considered that:

"... the affirmative likelihood-of-subsidization determination in the original sunset reviews rested only upon the continuation of the benefit from pre-privatization, non-recurring subsidies, while the affirmative likelihood-of-subsidization determination in the UK and Spain Section 129 determinations rested only upon subsidy programmes other than pre-privatization non-recurring programmes."

> "... the relative importance of the evidence concerning non-pre-privatization subsidies and Glynwed's sale of relevant production facilities has changed as a consequence of the new basis for the affirmative likelihood-of-subsidization re-determinations. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body explained that an Article 21.5 panel should be able to consider new claims where 'the relevant facts bearing upon the "measure taken to comply" may be different from the relevant facts relating to the measure at issue in the original proceedings'.[129] In this dispute, the affirmative likelihood-of-subsidization re-determinations are now based on different reasoning and different factual circumstances than those in the original sunset review…Thus, the weight given in the re-determination to the subsidy programmes to which the evidence relates is necessarily different than in the original sunset review.
>
> ...
>
> In addition, the European Communities could not have meaningfully raised the treatment of evidence in the original proceedings because the basis for the affirmative likelihood-of-subsidization determination in the original sunset review was different than that in the affirmative likelihood-of-subsidization re-determination set out in the Section 129 determinations."[130]

273. Therefore, despite the fact that the factor of 1.56 was *formally* maintained in the amended PBS, the Argentine arguments relating to the factor of 1.56 are included in the terms of reference of the present Panel inasmuch as Chile has changed the basis to which that factor is applied and hence the result of its application.

274. If both the basis and the duties resulting from the application of the factor of 1.56 in the amended PBS are necessarily different from the basis and the duties resulting from the application of the factor of 1.56 in the original PBS, then the relative weight of the factor of 1.56 has also changed in the measure taken to comply.

275. In this respect, it should be recalled that the specific duty or rebate for wheat, which constitutes the basis of calculation to which the factor of 1.56 is applied to arrive at the specific duty or rebate for wheat flour, is calculated from the difference between the *floor or ceiling price* and the *reference price* by multiplying that difference by 1 plus the *ad valorem* tariff. Given that Chile has changed both the way in which the floor and ceiling prices are calculated[131] and the way in which the reference prices are established[132], as well as the method of calculating the specific duties[133], the basis to which the factor of 1.56 is applied and the results of its application have necessarily changed. The application of the factor of 1.56 in the amended PBS results in a different amount of duties and forms part of both the measure itself and its method of application.

276. In other words, the consequences of applying the factor of 1.56 in the amended PBS are different from the consequences of applying it in the original PBS.

277. In conclusion, just as the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* held that the claims relating to the Section 129 affirmative likelihood-of-subsidization re-determination fell within the panel's terms of reference because the basis for that re-

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[129] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, paragraph. 41 (original footnote).

[130] Panel Report on *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paragraphs 7.69 and 7.70 (underlining added).

[131] Argentina's First Written Submission, Section B.3.3.

[132] Argentina's First Written Submission, Section B.3.4.

[133] Argentina's First Written Submission, Section B.3.5.2.

determination was different from that for the affirmative determination in the original sunset review, the arguments relating to the factor of 1.56 fall within the terms of reference of the present Panel since the basis on which that factor is calculated is also different from that in the original PBS.

278. Thus, the new arguments relating to the factor of 1.56 relate to an aspect of the measure taken to comply that has changed with respect to the original measure. Consequently, the Panel should conclude that Argentina's arguments concerning the factor of 1.56 fall within its terms of reference.

279. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held that Article 21.5 proceedings involve not the original measure but rather a new and different measure which was not before the panel and it was natural, therefore, that, as the relevant facts bearing upon the "measure taken to comply" were different from the relevant facts relating to the original measure, the claims, arguments and factual circumstances pertinent to the "measure taken to comply" would not necessarily be the same as those which were pertinent in the original dispute:

> "... in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU."[134] (Underlining added)

280. As the panel found in *EC – Bed Linen (Article 21.5 – India)*, in *Canada – Aircraft (Article 21.5 – Brazil)* Canada had implemented the recommendation of the DSB by adopting a new and different measure. In the Article 21.5 proceeding, Brazil made claims regarding that measure that it had not made in the original dispute. Canada objected to claims raised by Brazil against the new measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that could not have been raised in the original proceedings.[135] The Appellate Body agreed with the panel's conclusion.[136]

281. In the present dispute the situation is similar. The factor of 1.56 – as a changed aspect of the measure taken to comply – was not before the original panel. As pointed out above, the relevant facts bearing upon the factor of 1.56 are obviously different from the relevant facts relating to the factor of 1.56 in the original PBS. It is therefore natural that Argentina should present arguments and factual circumstances pertinent to the factor of 1.56 in the amended PBS that are different from those that were pertinent to the factor of 1.56 in the original PBS.

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[134] WT/DS70/AB/RW, paragraph 41.
[135] WT/DS141/RW, paragraph 6.48.
[136] WT/DS141/AB/RW, paragraph 88.

282. In the present Article 21.5 proceedings, Argentina, like Brazil in Canada – Aircraft, puts forward arguments relating to the factor of 1.56 that it did not raise in the original dispute. Chile, like Canada in that dispute, challenges these arguments claiming that they should have been raised in the original proceedings. If the Panel were to uphold the Chilean challenge, Argentina, like Brazil in that dispute, would not have the opportunity to put forward arguments that could not have been raised in the original proceedings, as the factor of 1.56 is a changed aspect of the measure taken to comply.

283. Moreover, Chile's due process rights have not been unduly impaired in these proceedings since in changing the factual basis on which the factor of 1.56 would be applied and hence the results of applying it Chile could have anticipated[137] that new arguments relating to that factor would be raised.

284. In this connection, that panel held that:

> "… The United States itself introduced the issue of treatment of evidence by revising the entire likelihood-of-subsidization determination and by changing the legal basis of the affirmative conclusion of likelihood of continuation or recurrence of subsidization. The United States therefore could have anticipated a claim on the USDOC's treatment of evidence. Accordingly, the Panel concludes that the European Communities' claim on evidence falls within this Panel's mandate."[138] (Underlining added)

285. Furthermore, Argentina's arguments relating to the factor of 1.56 were not brought up at a late stage of the Article 21.5 proceedings. Thus, due process has not been adversely affected, as shown by the fact that Chile was able to rebut these arguments in its First Written Submission.

286. In the light of the above, should the Panel consider that the arguments put forward by Argentina in relation to the factor of 1.56 constitute a new claim, Argentina respectfully requests that the Panel consider the said arguments, since they fall within the terms of reference of the present Panel, and find that the factor of 1.56 is a specific feature of the amended PBS that impedes enhanced access to Chile's market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[139]

2. The Argentine claim relating to the second sentence of Article II:1(b) of the GATT 1994 falls within the Panel's terms of reference

287. As already pointed out by Argentina[140], the amended PBS infringes the second sentence of Article II:1(b) of the GATT 1994 inasmuch as it constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedule of concessions (No. VII).

288. In its First Written Submission, Chile could not – and cannot – refute the arguments put forward by Argentina. It merely argued that the Argentine claim in relation to the second sentence of paragraph 1(b) of Article II of the GATT 1994 falls outside the Panel's terms of reference.

289. However, the Argentine claim relating to the second sentence of Article II:1(b) of the GATT 1994 falls within the terms of reference of the present Panel.

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[137] Report by the Panel on U*S – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paragraph 7.71.

[138] Report by the Panel on *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paragraph 7.71.

[139] Argentina's First Written Submission, Section C.I.2.7.

[140] Argentina's First Written Submission, Section C.II.

290. **First of all**, Chile itself expressly acknowledges that this claim was not raised by Argentina during the original proceedings.[141] Argentina did not submit claims or evidence relating to this provision in the original proceedings. This is a new claim which Argentina is entitled to raise in the context of the current Article 21.5 proceedings.

291. **Secondly**, the Argentine claim relating to the second sentence of Article II:1(b) of the GATT 1994 falls within the Panel's terms of reference since it is a new claim with respect to a new measure.

292. In fact, as Chile itself has stated on at least two occasions, the amended PBS is a "new" PBS.[142]

293. Chile seeks to apply the findings in *EC – Bed Linen (Article 21.5 – India)* to the present case.[143] However, in trying to apply this case to the present dispute Chile makes two mistakes. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body held that India raised the same claim that it had raised in the original proceedings in respect of an unchanged component of the measure taken to comply. Chile has not understood the Appellate Body's finding in that case. The Appellate Body held that:

> "... Here, India did not raise a *new* claim before the Article 21.5 Panel; rather, India reasserted in the Article 21.5 proceedings the same claim that it had raised before the *original* panel in respect of a component of the implementation measure which was the same as in the original measure. This same claim was dismissed by the original panel, and India did not appeal that finding."[144] (Underlining added)

294. In these Article 21.5 proceedings, the situation is completely different.

295. **Firstly**, as Chile acknowledges, the Argentine claim relating to the second sentence of Article II:1(b) of the GATT 1994 is a new claim that Argentina never raised in the original proceedings.[145] This is not in dispute.

296. **In addition**, Argentina could never have made this claim during the initial stage of the present dispute, as Chile maintains[146], since the amended PBS is a measure different from the PBS which formed the subject of the original proceedings. As Chile has pointed out, this is a "new" PBS.[147]

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[141] Chile's First Written Submission, paragraph 48: "…Argentina was unable to prove that it had raised (let alone pursued) a claim relating to this second sentence…Argentina did not in fact ever raise the claims it now wishes to bring".

[142] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system…" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "…the new price band system entered into force on 16 December 2003…" (underlining added).

[143] Chile's First Written Submission, paragraph 51.

[144] WT/DS141/AB/RW, paragraph 80.

[145] Chile's First Written Submission, paragraph 48: "... Argentina, however, never questioned whether a measure contrary to Article 4.2 of the *Agreement on Agriculture* could thereby be inconsistent with the second sentence of Article II:1(b) of the GATT 1994". See also Chile's First Written Submission, paragraph 56: "In this dispute, we find ourselves in the very same situation: a claim which Argentina could have raised and pursued in the original dispute, *but failed to do so*... "

[146] Chile's First Written Submission, paragraphs 50 and 56.

[147] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system…" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "…the new price band system entered into force on 16 December 2003…" (underlining added).

297. In *EC – Bed Linen (Article 21.5 – India)*, the claim raised by India in the Article 21.5 proceedings had been raised by India during the original proceedings, had not been pursued and was dismissed by the original panel.

298. On the other hand, in the present proceedings there has been no previous finding during the original proceedings, either by the Panel or by Appellate Body, "dismissing" the claim which Argentina is now raising.[148]

299. Later in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body noted that India was seeking to challenge an aspect of the original measure which had not changed:

> "We conclude, therefore, that, in these Article 21.5 proceedings, India has raised the same claim under Article 3.5 relating to 'other factors' as it did in the original proceedings. In doing so, India seeks to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent with the European Communities' WTO obligations."[149] (Underlining added)

300. In the present case, the Argentine is raising a different claim in respect of the second sentence of Article II:1(b) of the GATT 1994.

301. **First of all**, this claim relates to the whole of the amended PBS, that is to say, the amended PBS in its totality rather than to one *aspect* in particular.

302. Consequently, the PBS being a "new measure", with this new claim Argentina necessarily cannot be challenging an *aspect* of the original measure *which has not changed*.

303. **Secondly**, as Chile itself acknowledges, the Argentine claim challenges a "new" PBS, that is to say, a new measure.

304. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held that Article 21.5 proceedings involve not the original measure but rather a new and different measure which was not before the panel and it was natural, therefore, that, as the relevant facts bearing upon the "measure taken to comply" were different from the relevant facts relating to the original measure, the claims, arguments and factual circumstances pertinent to the "measure taken to comply" would not necessarily be the same as those which were pertinent in the original dispute.[150]

305. As the panel found in *EC – Bed Linen (Article 21.5 – India)*, in *Canada – Aircraft (Article 21.5 – Brazil)*, Canada had implemented the recommendation of the DSB by adopting a new and different measure. In the Article 21.5 proceeding, Brazil made claims regarding that measure that it had not made in the original dispute. Canada objected to claims raised by Brazil against the new measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that could not

[148] The Appellate Body did not rule on the consistency of the PBS with the second sentence of Article II:1(b) of the GATT 1994, but on the inconsistency of the Panel's finding relating to the second sentence of Article II:1(b) of the GATT 1994 with its obligations under Article 11 of the DSU.

[149] WT/DS141/AB/RW, paragraph 87.

[150] *Canada – Aircraft (Article 21.5 – Brazil)*, Appellate Body Report, paragraph 41 (underlining added).

have been raised in the original proceedings.[151] The Appellate Body agreed with the panel's conclusion.[152]

306. In the present dispute the situation is similar. The amended PBS is a new measure that was not before the original panel. As pointed out above, the relevant facts bearing upon the amended PBS are obviously different from the relevant facts relating to the original PBS. It is therefore natural that Argentina should present arguments and factual circumstances pertinent to the amended PBS that are different from those that were pertinent to the original PBS.

307. In the present Article 21.5 proceedings, Argentina, like Brazil in *Canada – Aircraft*, raises claims relating to the second sentence of Article II:1(b) of the GATT 1994 in respect of the amended PBS that it did not raise in the original dispute. Chile, like Canada in that dispute, challenges the claims raised by Argentina against the amended PBS arguing that no claims relating to the second sentence of Article II:1(b) of the GATT 1994 were raised against the original PBS. If the Panel were to uphold the Chilean challenge, Argentina, like Brazil in that dispute, would not have the opportunity to raise claims that could not have been raised in the original proceedings, because the amended PBS is a new measure.

308. **In addition**, Chile is wrong to cite as a precedent paragraph 96 of the Appellate Body report in *EC – Bed Linen (Article 21.5 – India)*.[153] In that paragraph the Appellate Body said that India would be being given a second chance to establish something which it had claimed but not proved in the original proceedings.

309. In the present Article 21.5 proceedings there would be no "second chance" to establish what was claimed but not proved in the original proceedings since, as Chile states and agrees: "Argentina did not in fact ever raise the claims it now wishes to bring"[154] and, consequently, this is the "first chance" to establish a new claim which, as we have argued, Argentina is entitled to raise. The claim relating to the second sentence of Article II:1(b) of the GATT 1994 is a new claim and, therefore, falls within the terms of reference of the present Article 21.5 Panel.

310. In *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, cited by Chile in paragraph 55 of its First Written Submission, the Panel found as follows:

> "The circumstances of the present case illustrate the potential procedural unfairness … [T]he United States could only rebut the arguments in the European Communities' Second written submission during the sole meeting with the parties. Consequently, important facts and issues continued to surface quite late into the Article 21.5 proceedings…"[155]

311. In the present case, as Chile acknowledges[156], the claim in respect of the second sentence of Article II:1(b) of the GATT 1994 did not surface late into the present Article 21.5 proceedings in such a way as to raise "serious issues regarding [Chile's] due process rights". This is shown by the fact that Chile was able to put forward arguments against this claim in its First Written Submission.[157]

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[151] WT/DS141/RW, paragraph 6.48.
[152] *EC – Bed Linen* (*Article 21.5 – India*), Appellate Body Report, paragraph 88.
[153] Chile's First Written Submission, paragraph 54.
[154] Chile's First Written Submission, paragraph 48.
[155] Report by the Panel on *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, footnote 294, second paragraph.
[156] Chile's First Written Submission, paragraph 46.
[157] Chile's First Written Submission, paragraph 46 ff.

312. In the light of the above, Argentina respectfully requests that the Panel rule on the claim raised by Argentina concerning the inconsistency of the amended PBS with the second sentence of Article II:1(b) of the GATT 1994 since, being properly before the present Panel, it falls within its terms of reference. Argentina therefore respectfully requests that the Panel find that the amended PBS is in breach of the second sentence of Article II:1(b) of the GATT 1994.

D. CONCLUSIONS

313. Chile has not implemented the rulings and recommendations of the DSB in this dispute and its measure taken to comply, namely, the amended PBS, is not consistent with its obligations within the framework of the WTO.

314. Through procedural arguments, without legal basis or valid precedent, Chile seeks to prevent the Panel from examining two key aspects of the measure taken to comply, namely, the consistency of the factor of 1.56, i.e., the very essence of the amended PBS as applied to wheat flour, and the fact that Chile did not include the price band system in the corresponding schedule, thereby infringing a basic obligation, namely Article II of the GATT 1994, relating to the consistency of the internal trading system itself.

315. In addition, without producing evidence or well-founded arguments, and without refuting any of the arguments put forward by Argentina in its First Written Submission, Chile seeks to argue that the amended PBS is transparent and predictable and does not insulate Chile's market from international market developments.

316. This is Chile's only basis for arguing that it has implemented the recommendations and rulings of the DSB.

317. The fact is that Chile should have abolished its inconsistent price band system applied to wheat and wheat flour, as it did in the case of edible vegetable oils. This is what the Appellate Body established when it held that a finding that Chile's PBS as such was a measure prohibited by Article 4.2 meant that the duties resulting from the application of that system could no longer be levied:

> "... [A] finding that Chile's price band system as such is a measure prohibited by Article 4.2 would mean that the duties resulting from the application of that price band system could no longer be levied—no matter what the level of those duties may be. Without a price band system, there could be no price band duties."[158]

318. By not abolishing the PBS as it applies to wheat and wheat flour – as it should have done according to the Appellate Body – Chile has forced Argentina to resort to the WTO's dispute settlement mechanism for a second time. The result is that Chile has evaded its multilateral responsibilities by maintaining a border measure other than an ordinary customs duty which it did not even include in its Schedule. Thus, three and a half years after the DSB adopted the Appellate Body and Panel reports, that is to say, after Chile was required to bring its system into conformity, the dispute remains unsettled and Argentina's benefits under the WTO Agreements are still being impaired.

319. Chile's declared objective in maintaining an inconsistent measure in force, despite the express recommendations of the WTO, has been to provide unlawful protection for wheat and wheat flour. In its First Written Submission, Argentina included evidence that this protection was acknowledged by

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

the very Chilean officials who were involved in approving the amended PBS.[159] In addition, in its First Written Submission, Chile acknowledged the existence of this protection: "... the current policy [*sic*] has an in-built process of gradual reduction of border protection of wheat" (original underlining). This border protection is in addition to that afforded by ordinary customs duties.

320. For these reasons, Argentina respectfully requests the Panel to reject Chile's arguments in their totality and to find that Chile's price band system, as amended in accordance with Law No. 19.897 and Supreme Decree No. 831/2003, in itself and in its specific application to imports of wheat and wheat flour:

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

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

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

321. Consequently, Argentina respectfully requests the Panel to find that Chile has not implemented the recommendations and rulings of the DSB and is continuing to infringe its obligations within the framework of the WTO.

[159] Argentina's First Written Submission, footnotes 75, 87, 110 and 146.