ANNEX C-2*

REBUTTAL BY CHILE
(24 MAY 2006)

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* Annex C-2 contains the rebuttal by Chile. This text was originally submitted in Spanish by Chile.

TABLE OF REPORTS CITED

Short title	Full title and reference
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.
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.
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 24 April 2003.
EC – Poultry Cuts (Article 21.3)	Award of the Arbitrator, "*European Communities – Customs Classification of Frozen Boneless Chicken Cuts"*. Arbitration under Article 21.3(c) of the DSU, WT/DS269/13 and WT/DS286/15
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.
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*. Recourse by Canada to Article 21.5 of the DSU, WT/DS257/AB/RW, adopted 20 December 2005.
US – Countervailing Measures on 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 27 September 2005.

I. INTRODUCTION

1. In its written rebuttal Chile will show, as clearly and technically as possible, without resorting to euphemisms or pleas that add no value to the discussion, that it did correctly understand the Appellate Body's conclusions, as well as Argentina's arguments, even though it certainly does not agree with them. Chile considers that those arguments are based on a misunderstanding of the Appellate Body's conclusions, especially with respect to the characteristics that make a levy that varies a "variable levy" inconsistent with Article 4.2 of the Agreement on Agriculture and a minimum import price a border measure inconsistent with that same article.

2. Since, in its rebuttal, Argentina[1] calls into question the defence offered by Chile, we consider it our duty to make it clear to the members of the Panel that what is important is to examine how Chile has implemented the recommendations and rulings of the DSB rather than to attempt to refute each and *every one* of the claims raised by Argentina, especially those that do not fit in with the findings of the DSB. Chile's objections to Argentina's claims and arguments will become clear from reading our arguments, since Argentina's analysis is based on an approach different from that taken by the Appellate Body in reaching its decisions and displays an ignorance of the changes introduced by Law 19.897 and Regulation No. 831/2003.

3. If Chile were to confine itself to refuting each of Argentina's claims individually, it would lose the opportunity to focus on the issues of relevance to a recourse to Article 21.5 of the DSU. Moreover, proceeding in that way would be of little use in helping the members of the Panel to understand how the changes which Chile has introduced have made it possible to implement the recommendations of the DSB in full.

4. Since for Argentina[2] the measure is still similar to a variable import levy and/or a minimum import price, the point of departure can only be that indicated by the Panel and the Appellate Body with respect to the elements which make up such measures. As no definition of these terms exists, Chile must seek one in the rulings and recommendations of the DSB.

5. Chile has defined a "variable levy" as it was understood by the Appellate Body and as we believe it to be understood by the Members of the WTO, although apparently not by Argentina. The Appellate Body has stated, and Chile agrees, that a levy is not necessarily a "variable levy" just because it varies, not even if it incorporates a formula that makes the variability automatic and continuous.[3] This is not a sufficient condition. It is also necessary to make sure that there is no transmission of international prices to domestic prices. To prevent variations in international prices being reflected in the domestic market, a price must be "sustained", a questionable feature of "variable levy" systems. In the opinion of the Appellate Body, the PBS did precisely this because <u>certain</u> features – that is to say, only some of them – made it non-transparent and unpredictable.

6. In amending its legislation, in accordance with the recommendations and rulings of the DSB, Chile dealt with these "certain features" identified, analysed and questioned by the Appellate Body. Without them it is impossible to sustain a price, as Chile comprehensively showed in its First Written Submission, and the system now in force is not inconsistent with the aforementioned Article 4.2, although Argentina takes a different view.

7. The original panel noted that whereas variable levies are generally based on the difference between a *governmentally determined threshold* and the lowest world market offer price, minimum import price schemes generally operate in relation to the *actual transaction value* of the imports.

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[1] Argentina's Second Written Submission, paragraph 14.
[2] Argentina's Second Written Submission, paragraph 12.
[3] Paragraph 234 of the Appellate Body Report

8. At present, in Chile, specific duties are applied by decree and do not vary throughout the period of validity of that decree, that is to say, the duty is the same irrespective of the transaction price or a governmentally determined price. For the system to have been comparable with a minimum price, a specific price would have had to have been established and, in all cases, a duty equivalent to the difference between that price and the transaction value of an import would have had to have been demanded, a situation which does not exist in Chile either by design or through the effects of the duties applied. Thus, from this standpoint, the system currently in force is likewise not inconsistent with the aforementioned Article 4.2.

9. Argentina says that Chile should have abolished its PBS because the Appellate Body so established.[4] Firstly, we do not share this view because nowhere in its report does the Appellate Body require (or even recommend) Chile to abolish its PBS. Secondly, it is settled WTO case-law that Members have a measure of discretion in selecting the means of implementation. And, thirdly, the Appellate Body does not say what Argentina claims it does, because although it may be true that if a measure was inconsistent with Article 4.2 it would not be possible to continue levying duties resulting from the application of that measure, if the measure in question was not inconsistent with that article – like the system in force since the enactment of Law 19.897 and its Regulations – then those duties could be levied.

10. For the sake of an orderly discussion, this written submission will follow the outlines of Argentina's rebuttal (hereinafter, the Rebuttal or Second Written Submission), although this should not be taken to imply that we agree with that order or, for that matter, with the arguments used by our neighbour country. On the contrary, while following Argentina's structure, we will address those aspects that are worth refuting from the technical point of view but at the same time centre the analysis on that which is relevant to the Panel's decision.

11. Finally, as part of this effort to focus on the essentials of the dispute, it is worth commenting on paragraph 14 of the Rebuttal. In its First Written Submission, Chile actually refrained from refuting several of Argentina's erroneous statements because, through a biased interpretation of the Appellate Body's conclusions, they sought to lead the discussion toward nonessential issues. As follows from the aforementioned paragraph, Argentina now seeks to lead the discussion towards what it considers to be the central issue by trying to organize Chile's arguments "according to how they presumably should correspond to the Argentine claims".[5]

II. SCOPE OF THE PRESENT ARTICLE 21.5 PROCEEDINGS

12. Chile shares the view expressed by Argentina in paragraph 18 of its Rebuttal, which also reflects the findings of the Appellate Body, that is, that the consistency of a measure taken to comply should be examined in the light of the covered agreements. However, the point raised by Chile in Section IV.1 of its First Written Submission is very different.

13. Argentina does not base its claims or arguments on new inconsistencies; on the contrary, it focuses on Article 4.2 of the Agreement on Agriculture. What Argentina does is to offer a (in Chile's view, mistaken) reading of what the Appellate Body understood to be the lack of transparency and predictability of certain features of the PBS and the insulation that it produces with respect to domestic prices.

14. In its First Written Submission, Chile showed what was the correct interpretation of the scope of the recommendations and rulings of the DSB. In its Rebuttal, Argentina confines itself to claiming

[4] Paragraph 317 of the Rebuttal
[5] Paragraph 14 of Argentina's Rebuttal

that Chile misinterpreted the findings and conclusions of the Panel and the Appellate Body[6], without explaining why Chile failed to interpret them correctly, or giving its own interpretation (presumably the correct one) of the scope of these findings and conclusions. Argentina merely transcribes the final paragraphs of the reports of the original panel and the Appellate Body, which only recommended that the DSB request Chile to brings its PBS into conformity.

15. As we stated in paragraph 67 ff. of our First Written Submission, the determination of the scope of "measures taken to comply" should include the examination of the recommendations and rulings in the original report or reports adopted by the DSB, as the Appellate Body stated in *US – Softwood Lumber IV (Article 21.5 – Canada)*, recommendations and rulings which, being a "final resolution" of the dispute, cannot have a broad interpretation without thereby impairing the due process rights of the parties to the dispute.

16. Therefore, in analysing the "measures taken to comply", an Article 21.5 panel and the Appellate Body must necessarily study the scope of the recommendations and rulings of the DSB. Argentina, moreover, appears to be aware of this standard when in paragraph 102 of its Rebuttal it states: "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".

17. However, even though Argentina's starting point appears to be correct, the end result is wrong because in its claims and arguments it applies an erroneous interpretation of the findings of the Appellate Body, as Chile showed in its First Written Submission.

18. In other words, although an Article 21.5 review may not be confined to the claims, arguments and factual circumstances relating to the measure that formed the subject of the original proceedings[7] and although, on the contrary, the analysis may be conducted from a standpoint different from that taken by the original panel, this must necessarily be based on the findings and conclusions of the original proceedings. It is these findings and conclusions, expressed in a recommendation, that must be "implemented" and not something which another Member would prefer to believe.

19. Paragraph 261 of the Appellate Body's report cited by Argentina[8] says precisely what Chile maintains, namely, that the Appellate Body did not question all the features of the PBS but only certain features. This paragraph expressly refers to "… *all these specific features of Chile's price band system.*" That is to say, it is not a question of any feature, as Argentina alleges, but of (1) specific (and thus limited) features and (2) features analysed by the Appellate Body. If it had wanted to refer to any feature of the PBS, the Appellate Body would have used other terms such as, for example, the features of the PBS. However, it did not.

20. Support for this interpretation comes from the phrase in the above-mentioned paragraph 261 of the Appellate Body's report which reads: "… particular configuration and interaction ..." (underlining added). The word "particular" suggests that the PBS was, in the Appellate Body's opinion, inconsistent with Article 4.2 not only because it possessed certain features but also because of the special or unique way in which these features were configured and interacted. Thus, the Appellate Body itself said that it was not going to take any view on "the consistency with WTO obligations of price band systems in general, or the consistency with WTO obligations of any specific price band system that may be applied by any other Member".[9]

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[6] Paragraph 20 of the Rebuttal
[7] *Canada – Aircraft (Article 21.5 – Brazil)*, Appellate Body Report, WT/DS70/AB/RW, paragraph 41.
[8] Paragraph 26 of the Rebuttal
[9] Paragraph 203 of the Appellate Body Report.

21. However, when one reads Argentina's submissions it is clear that all this analysis by the Appellate Body has been ignored and that Argentina argues by citing isolated passages from the reports or sentences from Chile's arguments that are incomplete or taken out of context, thereby developing a reasoning that somehow distorts the meaning and scope of the recommendations and rulings of the DSB.

22. Moreover, even though it runs counter to its main tactic of questioning the system in general, starting with paragraph 111, Argentina attempts to identify these special features, despite the fact that the Appellate Body has already done so in its report. Argentina, however, seeks them primarily in the Panel Report, particularly in its paragraphs 7.44 and 7.61.

23. However, the first of these paragraphs does not mention any different circumstance[10], in the determination of the reference prices, not subsequently picked up by the Appellate Body and taken into account by Chile in enacting Law 19.897 and its Regulations. That is to say, the difficulties encountered by exporters in knowing how the reference price was arrived at are, as the Panel said, factors unknown.

24. Furthermore, Argentina itself appears to acknowledge this, since in paragraph 115 it mentions the "crucial stages" identified by the Panel which are nothing other than those always referred to by Chile (because the Appellate Body so concluded): the determination of the reference price; the determination of the floor and ceiling; and the conversion to c.i.f. prices.

25. In the next paragraph Argentina identifies the paragraphs of the Appellate Body's report which incorporate the findings of the original panel and which, again, side with Chile. Even though Argentina neglects to mention the paragraphs of that report in which the Appellate Body explains how the specific characteristics of the PBS are actually manifested, for example, paragraphs 249 and 251, the first two references coincide with what Chile has said. However, an inspection of the third reveals another error in Argentina's conclusions, possibly attributable to its partial reading of the Appellate Body's report. The paragraph in question states:[11]

> "The fact that duties resulting from Chile's price band system are 'capped' at 31.5 per cent *ad valorem* merely reduces the extent of the trade distortions in that system by reducing the extent to which those duties fluctuate. It does not, however, eliminate those distortions. Moreover, the cap does not *eliminate* the lack of transparency, or the lack of predictability, in the fluctuation of the duties resulting from Chile's price band system. Thus, the fact that Chile's price band system is subject to a 'cap' may be said to make this system *less* inconsistent with Article 4.2. But this is not enough. Article 4.2 not only prohibits 'similar border measures' from being applied to *some* products, or to *some* shipments of *some* products with low transaction values, or the imposition of duties on *some* products in an amount *beyond* the level of a bound tariff rate. Article 4.2 prohibits the application of such 'similar border measures' to *all* products in *all* cases."

26. The text is the conclusion of the analysis made by the Appellate Body concerning the incorporation of a bound tariff "cap" in the PBS. However, it is not necessary to analyse the whole of the reasoning and its context, since a mere reading of the paragraph is sufficient to reveal Argentina's misinterpretation. The analysis of the incorporation of the bound tariff cap made by the Appellate Body naturally incorporates the other elements of its analysis concerning the PBS where, as has been pointed out, the application of the system led to two simultaneous transactions being assessed with

[10] Nor does paragraph 7.63 of the original panel's report, since they were also picked up by the Appellate Body.

[11] Appellate Body Report, paragraph 259.

different specific duties, all of which led the Appellate Body to conclude that the system was inconsistent with Article 4.2 of the Agreement on Agriculture.

27. Having performed this analysis, the Appellate Body also considered whether the existence of the cap had any relevance. Its reply can be found in the paragraph cited where it concludes that it did not, since the existence of the cap did not affect its conclusion that the PBS was a measure similar to variable import levies and minimum import prices. In this context, Argentina's reference to the fluctuation of duties (which is unrelated to the variability) concerns the possible interference from the application of the cap which, as the Appellate Body pointed out, "does not *eliminate* the lack of transparency or the lack of predictability".

28. Furthermore, in paragraph 118 of its Rebuttal, Argentina acknowledges that the reports of the original panel and the Appellate Body did not address all the "specific features of the PBS". If these other features were not addressed, there cannot have been a finding and, therefore, Argentina cannot conclude that these other features also form part of the Appellate Body's conclusion in the sense that they suffer from a lack of transparency or predictability. Quite simply, the Appellate Body did not address them (and did not rule on them) because they were not "such fundamental and central aspects" of the PBS. In other words, they were not what made the PBS a measure similar to a variable import levy or minimum import price.

1. Spirit of Article 4 of the Agreement on Agriculture

29. Article 4.2 of the Agreement on Agriculture does not contain the words transparency and predictability. The Appellate Body noted that the measures mentioned in the footnote to that article "have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market."[12] Later, in examining variable levies, the Appellate Body pointed out that they have additional features (over and above the variability of the duties), including a lack of transparency and predictability. Features which also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.[13]

30. Consequently, in the light of these references, it is difficult to argue that the requirements of transparency and predictability are part of the "spirit"[14] or "requirements derived"[15] from Article 4 of the Agreement on Agriculture. Argentina appears to extend the Appellate Body's analysis of certain additional features of variable levies – an analysis that was applied to the PBS - to any measure envisaged in Article 4.2. That is to say, to create obligations where the negotiators did not.

31. In other words, Argentina appears to claim that any measure applied in the agricultural sector that is not transparent and/or predictable is inconsistent with Article 4.2 of the Agreement on Agriculture.

III. THE SYSTEM IN FORCE SINCE THE ENACTMENT OF LAW 19.897 AND ITS REGULATIONS DOES NOT DISCONNECT THE INTERNATIONAL MARKET

32. At the beginning of Section B.5 of its Rebuttal, Argentina transcribes parts of paragraphs 180 and 181 of Chile's First Written Submission without explaining why it did so. However, the underlining would appear to suggest that what concerns our neighbour is the fact that the specific duties (or rebates) assessed under the law currently in force are unrelated to the commercial

[12] Paragraph 227 of the Appellate Body Report.
[13] Paragraph 234 of the Appellate Body Report.
[14] Paragraph 120 of the Rebuttal
[15] Paragraph 121 of the Rebuttal

transactions. Or as stated in other paragraphs of its Rebuttal[16], the resulting duties are unaffected by changes in international prices.

33. This shows that Argentina, despite the explanations offered by Chile (as, for example, in the part of paragraph 181 of its First Written Submission that Argentina does not transcribe), still fails to understand how the system established by Law 19.897 operates. The fact that the duties (or rebates) applicable are unrelated to the value of international transactions and international prices, as Argentina repeatedly asserts, is an inherent feature of any specific duty. It is in the nature of these duties to be applied independently of the transaction value, thereby allowing goods to enter at any price subject to the application of a given specific duty, which in this case does not vary for two months with the price of the goods or with world price trends. That is to say, international prices may fall (or rise) during the application of a specific duty but the latter will remain the same, and therefore the entry price will necessarily reflect any fluctuations.

34. More particularly, Chile cannot let pass the assertion in paragraph 143 of Argentina's Rebuttal. Chile's alleged "confession" should necessarily end with the words "transaction value" since Chile never said that the duties applied "are … insulating Chile's market from international price developments". Firstly, because it is logically incorrect and, secondly, because it would confirm what Argentina claims, which we certainly do not accept. Without prejudging Argentina's motivation, we regret all assertions of this kind as they merely confuse the issue.

35. In order to defend its position that the distortion of price transmission "is a feature challengeable as such"[17] Argentina refers to paragraphs 250 and 251 of the Appellate Body's report. However, a reading of these paragraphs leads to quite the opposite conclusion.

36. The relevant part of paragraph 250 reads as follows:

> "Therefore, the way in which Chile's weekly reference prices are determined contributes to giving Chile's price band system the effect of impeding the transmission of international price developments to Chile's market" (underlining added).

37. While the relevant part of 251 states:

> "… it would nevertheless remain that the other parameter – Chile's weekly reference prices – is liable to distort – if not disconnect – that transmission by virtue of the way it is determined on a weekly basis" (underlining added).

38. In the first citation, the Appellate Body notes that the lack of transmission is the effect[18] of the way in which the reference prices are determined, i.e., the cause. In the second, the Appellate Body makes this point again, with respect to the reference prices being determined on a weekly basis.

39. In support of its argument Argentina also makes reference to the much-mentioned paragraph 261.[19] But once again, this paragraph states precisely the opposite. Namely, that no particular feature of the PBS has the effect of disconnecting Chile's market from international price developments.

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[16] For example, paragraphs 53 and 143.
[17] Paragraph 31 of the Rebuttal.
[18] According to the Dictionary of the Spanish Academy:
Effect (from Lat. *effectus*) 1. That which follows by virtue of a cause.
[19] Paragraph 33 of the Rebuttal.

40. Finally, Argentina has been unable to point to any paragraph of the Appellate Body's report in which it is indicated that the lack of transmission is not the effect of the lack of transparency and predictability of certain features of the PBS but a feature proper, separate and challengeable in itself. Unfortunately for Argentina, this paragraph does not exist, because the disconnection of the domestic market or lack of transmission of international prices is the consequence (and often the deliberate objective) of the lack of transparency and predictability of certain features of the measures listed in the footnote to Article 4.2 of the Agreement on Agriculture, of which, in the opinion of the Appellate Body, the PBS was one.

41. Nevertheless, to clarify the issue for the Panel, Chile will review the various points raised by Argentina in its efforts to prove the disconnection of Chile's market from international markets and show that, in addition to having no basis in the recommendations and rulings of the DSB, they are incorrect.

1. The overcompensation alleged by Argentina does not exist

42. In its Rebuttal, Argentina[20] challenges paragraphs 165 ff. of Chile's First Written Submission and concludes, firstly, that "contrary to what Chile says, paragraph 260 of the Appellate Body Report is an integral part of its conclusions." Secondly, it adds that Chile appears not to have read paragraph 261, from which, in its opinion, it is clear that the words "conclusion" and "these specific features" can only refer to paragraph 260.

43. Chile has already referred to this point and has given clear expression to the reasoning of the Appellate Body, which, indeed, calls for nothing more than an attentive reading of the relevant paragraphs taken in conjunction.

44. Likewise, although this dispute may have been unique in several respects, it is not because Chile has alleged that the Appellate Body erred in its analysis, as Argentina says.[21] The misconstruction arises from a lack of clarity in Chile's explanation of how the PBS operated. The fact that Chile failed to explain its operation properly cannot justify its now being argued that the PBS functioned differently from the way it did during the original dispute.

45. Chile's intention was simply to show that there was no overcompensation either in the past or now following the changes. Chile is not evading its responsibility for the misconstruction, but that does not invalidate what it said in its First Written Submission.

46. Moreover, with respect to the existence of overcompensation, Chile showed that such overcompensation does not exist.[22]

47. Argentina refers to its mathematical demonstration of overcompensation in paragraphs 127 to 132 of its First Written Submission, where it concludes that as international prices – for both wheat and flour – fall, Chilean entry prices increase.

48. Argentina's error is rooted in the fact that it disregards the existence of a definite schedule for the application of specific duties or rebates, or neither. This schedule is as follows:[23]

From 16 December to 15 February;
From 16 February to 15 April;

[20] Rebuttal, paragraph 37 ff.
[21] Paragraph 40 of the Rebuttal.
[22] Section V.5 of Chile's First Written Submission.
[23] Article 5 of the Regulations.

From 16 April to 15 June;
From 16 June to 15 August;
From 16 August to 15 October;
From 16 October to 15 December.

49. What Argentina calls "additional evidence"[24] corresponds to two specific dates (from 15 to 16 December 2004 and from 15 to 16 February 2005) when the border tariffs changed as a result of the above-mentioned schedule. These moments in time at which what Argentina calls "overcompensation" can occur are a reflection of the change in specific duties. Naturally, if the duty changes – as a consequence of price developments on the markets of concern – there will be a change in specific duties (or rebates or nothing will happen). This adjustment may be greater on the dates on which one market of concern is changed for another, but that will only reflect the difference of prices between the United States and Argentina at the changes of season.

50. Nevertheless, this change does not mean that domestic prices are disconnected from international ones but rather that once the change has occurred domestic prices go back to following the international trend, albeit with a greater (or lesser) difference between the two, which will depend on the price variation on the markets of concern before and after the change.

51. The situation is exactly the same if we consider what happens when an *ad valorem* duty changes, and is even clearer in countries with seasonal tariffs, where the protection changes (rises or falls) on the day that the tariff changes. In other words, the day on which an increase (or reduction) in the duties applied by a Member takes effect the "overcompensation" alleged by Argentina (or under-compensation) will always follow, but immediately afterwards international prices will continue being reflected in the domestic market prices.

52. Finally, it should be noted that Argentina's demonstration with respect to wheat flour suffers from the same defects as in the case just mentioned.

2. The "modified system" does not moderate the fluctuations of world market prices

53. In Section 2.2 of its Rebuttal, Argentina persists in referring to the dates on which the tariffs change in accordance with the pre-established schedule, arguing that this seasonality constitutes a defect. However, the border duties levied by Chile on wheat and wheat flour behave in the same way as an *ordinary customs duty*.

54. Although Argentina says otherwise, Exhibits ARG-11 and ARG-12, together with the graph mentioned in paragraph 154 of Chile's First Written Submission, show that there is a correlation between international prices, entry prices and the domestic price.[25] Nevertheless, this correlation clearly cannot be perfect, as Argentina seems to believe.[26] Firstly, as has been repeatedly pointed out, the fact is that the tariffs on wheat change in accordance with a pre-established schedule. This explains the specific changes to which Argentina refers in paragraph 71 of its submission.

[24] Paragraph 133 of Argentina's First Written Submission.

[25] According to paragraph 64 of Argentina's Rebuttal, Exhibits ARG-11 and ARG-12 cannot be an "illustration" of the same as the graph in paragraph 154 of Chile's submission because the former are based on daily data and the latter on monthly data. Without getting into a semantic discussion of the meaning of the word "illustration", **Chile would like to make it clear that irrespective of the period of measurement of the information, the objective is to observe the behaviour of the variables in time, and in this respect the information provided by Chile "shows" the same thing**. The sources of the information, both daily and monthly, are clearly indicated in all cases (SAGPyA and ODEPA).

[26] Paragraphs 68 and 69 of the Rebuttal.

55. Secondly, the Chilean graph cited by Argentina in paragraphs 68 and 69 compares the trend in the f.o.b. price for *Argentine bread wheat* with the price of wheat on the wholesale market ("wholesale wheat price"), and not with the entry price, as Argentina suggests. The price of wheat – and its fluctuations – on the wholesale market is heavily influenced by the domestic wheat supply naturally available during the harvest months (December to March). Thus, it is impossible to claim a complete connection, as Argentina seeks to do.

56. In paragraph 59 of the Rebuttal, Argentina again misunderstands the changes introduced by Law 19.897. It notes that the specific duties do not vary and from that it deduces non-compliance with the recommendations and rulings of the DSB insofar as the transaction price is of no consequence, in circumstances in which, as has repeatedly been pointed out, Chile applies a specific duty. Moreover, citing[27] the Appellate Body on the disconnection of the reference price under the PBS, Argentina asserts that this disconnection is maintained. This assertion is false.

57. Finally, Chile would like to comment on paragraph 66 of Argentina's Rebuttal. This reads:

> "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.[28] 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."

58. Argentina is apparently seeking to introduce a new assessment parameter for the rulings and recommendations of the DSB, the "relevant period". In addition to it being odd that measures should have to be judged on the basis of the effects they produce in certain periods, with any Member being able to define which periods are most relevant, the argument is at least as strange when contrasted with what Argentina has been insinuating throughout the present dispute.

3. The parameters of the Law are not insulating Chile's market

59. In Sections 2.3 and 2.4 of the Rebuttal, Argentina argues that the changes introduced by Chile have not contributed to improving the insulation of domestic prices from international price variations because the floor, ceiling and reference price parameters are not now directly linked with the international prices in effect.

(a) Floor and ceiling

60. Contrary to what Argentina says[29], there are no explanations, evidence or arguments in Sections 2.5 and 2.6 of its First Written Submission to confirm that the current parameters mentioned above are insulating Chile's domestic market from international price fluctuations. The sections in question only conclude that these parameters are perfectly well known and that therefore transparency exists in this respect.

61. Argentina appears to interpret the Appellate Body report as requiring specific changes in the PBS, in the sense that the floors and ceilings, like the reference prices used for determining the specific duties (or rebates or neither), should be established strictly as a function of the international

[27] Paragraph 60 of the Rebuttal.
[28] Rebates were also applied from December 2003 to August 2004.
[29] Paragraphs 80 and 88 of the Rebuttal.

prices in effect. If so, it would be helpful if Argentina were to indicate the precise part of the Appellate Body's report on which its interpretation is based.

62. It can be inferred from Argentina's reasoning that to prevent disconnection and allow price transmission it is essential that prices be based on international prices. Nevertheless, Argentina fails to offer any argument or demonstration that could be regarded as positive proof of this. Chile, on the other hand, does demonstrate the existence of price transmission following the changes introduced by Law 19.897.[30]

63. In fact, Chile clearly explains that the floor and ceiling parameters (and reference prices) have, as a product of the new law, the sole purpose of making it possible to determine the border protection that will be applied to wheat and wheat flour in accordance with a pre-established schedule. From a reading of Argentina's submissions it follows that it is perfectly familiar with the parameters in question, that is to say that the changes have achieved the objective of ensuring transparency.

64. In spite of this, Section 2.3 of Argentina's Second Written Submission goes further and questions the origin of the floor and ceiling parameters. Thus, Argentina appears to take "transparency" to mean the implementation by Chile of a parameter selection mechanism that would have been acceptable to Argentina.

65. The origin of the parameters is not relevant for determining whether or not Law 19.897 is in conformity with Chile's WTO commitments. They make it possible to establish, transparently and predictably, the border protection which Chile, like any other Member of the WTO, has independently found to be reasonable and appropriate for wheat and wheat flour. Argentina appears to take the requirements of transparency to the extreme. However, there is no WTO provision that obliges a Member to provide explanations of why it has established a particular level of tariff protection, why the levels are differentiated or why they are lower than the bound tariff level. All it is obliged to do is to honour its commitments, that is to say, not to exceed the bound tariff level.

66. Obviously, any change in the parameters will affect the level of protection granted to these products. For example, if the floor parameter were established at 110 dollars, the resulting level of protection would be lower. On the other hand, if it were established at 140 dollars, the resulting protection would be higher.

67. Finally, the reduction of the floor parameter from 128 to 114 dollars and the ceiling parameter from 148 to 134 dollars has nothing to do with the objectives of preventing the disconnection of the domestic market and improving price transmission. Its purpose is gradually, over a period of years, to improve access to the Chilean market. Chile clearly explains and demonstrates that improvement in market access in Section V.6. of its First Written Submission. In this connection, it is important to note that at no point did the Appellate Body lay down such an improvement in access conditions as a requirement; nevertheless Chile independently judged it desirable to implement the aforementioned reduction.

(b) Reference prices

68. According to paragraph 91 of the Rebuttal, Chile has been unable to show that Argentina interprets the conclusions of the Appellate Body in a broad and comprehensive manner. A good example of this is paragraph 82 of the Rebuttal. In that paragraph, Argentina appears to be saying that the way in which the specific duties are assessed on the basis of Law 19.897 and its Regulations is insulating the Chilean market from international price developments.

[30] Section V.3. of Chile's First Written Submission.

69. The Appellate Body noted that this insulation occurred, as far as the determination of reference prices is concerned, for two reasons only. The first was because the prices were set in a way that was neither transparent nor predictable, the second because they were set on a weekly basis.[31]

70. Nevertheless, in adapting its legislation, Chile corrected these aspects also, as explained in paragraphs 111 ff. of its First Written Submission. Now, however, Argentina alleges that Chile was required not only to publish the reference markets but also to explain why it chose those markets[32], adding that the reference price cannot be maintained unchanged and ought to be linked with the transaction value.

71. Under the PBS the reference price was never linked with the transaction value, but in addition, as there was no relevant provision in the laws and regulations, it was possible for the "markets of concern" to be chosen arbitrarily by the authorities for price maintenance purposes. In other words, it was possible to seek a reference price that enabled the amount of the specific duties to be "inflated", a term used by the Appellate Body in referring to the conversion to c.i.f. prices[33] but equally valid here, precisely because the end purpose was to maintain a price.

72. The reference prices now correspond to f.o.b. prices on the two markets of most concern for Chile. According to recent world statistics[34], the United States is the world's leading producer and exporter of wheat, with Argentina being the second largest producer and exporter in the southern hemisphere (after Australia). In the last six years (2000-2006) 40 per cent of Chilean wheat imports came from the United States and 31 per cent from Argentina.

73. Consequently, in order to determine the reference prices, valid sources of information for both these origins were sought. In the case of the United States, that source is the Chicago Exchange (http://www.cbot.com/), the world's largest agricultural *commodity* futures market. This is the source for the Gulf f.o.b. price of *Soft Red Winter No. 2 wheat*. In the case of Argentina, the source of information is the Department of Agriculture, Livestock, Fisheries and Food (http://www.sagpya.mecon.gov.ar/) of the Ministry of the Economy, which regularly publishes figures for *bread wheat, Argentine port* (so-called *Official Fob Price*) in the form of an average for various ports.

74. These two wheat varieties are similar and the prices are taken on the basis of the corresponding times for harvesting and marketing.

75. It is curious that Argentina should question the importance of its market for wheat[35], which is one of the markets of concern for determining the reference price, or the seasonality of wheat production in the two hemispheres and that in one half of the year the United States market should be of greater concern and in the other half that of Argentina. But it is even stranger that Argentina should claim to be unaware of the source of the information for the f.o.b. price of *bread wheat, Argentine port*, even though in its two submissions it cites the official source, i.e., SAGPyA, in almost all its examples.

76. The reason why Chile has recourse to an official source (SAGPyA) is precisely that indicated by Argentina.[36]

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[31] Paragraph 247 of the Appellate Body Report.
[32] Paragraph 108 of the Rebuttal.
[33] Paragraph 250 of the Appellate Body Report.
[34] FAO statistics (http://faostat.fao.org/).
[35] For example, paragraph 108 of the Rebuttal.
[36] Paragraph 132 of Argentina's Second Written Submission.

> "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)."

77. Chile simply did not find any justification for picking out any one of the ports in particular, particularly as there were official figures published by the Government of Argentina.

78. Finally, Argentina appears to question the price calculation formula, that is to say, the averaging which reflects the variations of the price of the product on this market better than taking a price on a particular date (which could be very high or very low depending on the circumstances).

79. On the other hand, Argentina appears to get things mixed up when in paragraph 84 of its Rebuttal it makes a partial quotation from Chile's First Written Submission where it is said that during the two months in which the specific duties remain unchanged, they are completely disconnected from what may occur in the reference markets. According to Argentina, this confirms its claim that because they remain in effect for two months the reference prices disconnect price transmission. Without wishing to be too insistent, it is clear that if the specific duties (or rebates) remain unchanged for a long period of time, world price developments will be transmitted to the domestic market since there is no way of "managing" the reference prices to increase the resulting specific duties and thereby sustain a price to prevent world price developments from being reflected internally.

80. Argentina claims that Chile has argued that the system in force would be inconsistent only six times a year.[37] Chile has shown that the system is always consistent. There are no time-related inconsistencies as seems to be alleged by Argentina, which by focusing its arguments on these bimonthly "overcompensations" (even though it could only offer two examples: 15 and 16 December 2004 and 15 and 16 February 2005) would appear to be saying that only on these days is Chile in violation of its WTO obligations.

IV. OTHER CLAIMS UNDER ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

81. Chile has developed the line of reasoning pursued by the Appellate Body and shown how it has complied with the recommendations and rulings of the DSB. At the same time, it has provided evidence to show how in presenting its arguments Argentina has distorted the findings of the Panel and the Appellate Body.

82. Nevertheless, below, for the benefit of the present Panel and to facilitate Argentina's understanding, Chile will deal with the relevant arguments raised by Argentina in Section B.2-6.

1. The "modified system" is transparent and predictable

83. Although Chile has dealt with Argentina's arguments relating to the scope of the present proceedings, it is also necessary to respond to Argentina's observations in paragraphs 91 ff. Apart from declaring that Chile misreads its position and trying to discredit the "only example" given, Argentina is unable to show that the Appellate Body has set a standard concerning transparency and predictability in the way in which the bands were established.

84. Paragraph 247 of the Appellate Body's report which refers to "how Chile's price bands are established" is not preceded by any paragraph indicating how the bands are established other than paragraph 246. And the latter refers only to "the intransparent and unpredictable way in which the 'highest and lowest f.o.b. prices'… are converted to a c.i.f. basis". Thus, the Appellate Body did not

[37] Paragraph 84 of the Rebuttal.

say that all the elements of the way in which the floors and ceilings were established were non-transparent and unpredictable.

85. Why not? Because all the elements were transparent and predictable, even though they were questionable for other reasons, for example, because they could have had the effect of impeding price transmission, but not because they were non-transparent or unpredictable.

86. Finally, Argentina is mistaken in claiming that the factor of 0.985 was established in a non-transparent manner.[38] This factor is established in the Law and is known by all and the fact that it is being applied up until 2014 is a guarantee of its predictability for market operators.

87. Chile has explained the real meaning and scope of the references to transparency and predictability made by the Appellate Body. However, it must also deal with certain claims raised by Argentina in its Rebuttal since they are particularly serious – not because of their substance but because of the errors they contain.

88. Argentina states:[39]

> "With regard to the Argentine allegation that the amended PBS is neither transparent nor predictable, in paragraph 114 of its submission Chile *acknowledges* that, due 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).

89. Although Chile believes that this statement by Argentina reflects its misunderstanding of the changes introduced by Law 19.897, this does not detract from the seriousness of the matter since in taking sentences out of context and drawing erroneous conclusions it could mislead the members of the Panel. The text cited is the conclusion of previous reasoning relating to the questioning by the Appellate Body of the way in which the reference price was established and set under the PBS, when that price had to be known by the importers in order for them to be able to calculate the specific duty payable. After the changes introduced by Law 19.897, the specific duty is now determined by a decree of the Ministry of Finance and therefore neither the exporter nor the importer needs to know the reference price (as was the case under the PBS) in order to know the amount of specific duty payable.

90. In paragraphs 128 to 137 of Section B.3. of its Rebuttal, Argentina disparages Chile's arguments concerning predictability in the determination of duties and rebates.[40] Curiously, Argentina bases its case on the "inability" of its exporters, firstly, to find out about the conditions of access to the Chilean wheat market and, secondly, reasonably to foresee the international prices in effect at the time their transactions take place.

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[38] Certainly, the second half of paragraph 247 does not serve Argentina's purpose because it relates to the lack of transparency and predictability of the way in which the reference prices are determined.

[39] Argentina's Second Written Submission, paragraphs 105 and 106.

[40] Section V.4. of Chile's First Written Submission.

91. With regard to its exporters, Argentina states that:[41]

> "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 ..."

92. Argentina then lists the **additional factors** that the A**rgentine exporter wanting to export to Chile** has to find out. This implies that it is not part of his own business as such – but an additional task – to find out about the conditions of access to his chosen export market, all of which are clearly set out in the Chilean Law and its Regulations and, moreover, published on the Internet. Nor apparently is it part of an Argentine exporter's own business to have a reasonable knowledge of the international prices prevailing at the time his transactions take place. In these circumstances, one might well ask what is part of the "own business" of an Argentine exporter.

93. Even though Chile does not know precisely how these exporters operate, **it does not seem reasonable to assume such ignorance**. Chile's arguments are not based solely on theory but also on how the international trade in agricultural commodities operates in practice.

94. An example is provided by the case of Chilean, and doubtless Argentinean, exporters of fresh apples to the European market. They are thoroughly familiar with the market access system with which they have to deal. They know that at certain times of the year the border duties assessed will vary with the entry price prevailing at the time of arrival of the shipment. Although they do not know in advance what that entry price will be and hence the exact amount of the duty payable, they can reasonably predict it. This is clearly an indispensable requirement for staying in business.

95. Argentina appears to be arguing, indirectly, that the Argentine exporter does not know today the precise customs duty that will be payable on wheat in March 2007 and that this is a violation of WTO rules. But, clearly, there is no WTO requirement that the precise level of customs duties must be known a certain period of time in advance of their entering into force and there can be no guarantee that, for example, the *ad valorem* duties applied by WTO Members will be the same in March 2007 as they are today.

96. In fact, to take the same example of the Argentine exporter, it might be asked whether, in the light of what has happened in recent years, that exporter could predict whether or not in 2007 he will be paying taxes on his exports in Argentina and how much they might be. Certainly Chile cannot be blamed for this lack of predictability.

2. The "modified system" is not a measure similar to a variable import levy

97. As Chile pointed out in its First Written Submission[42], even though the decisive feature of the variable levies prohibited under footnote 1 to Article 4 is their variability, this alone is not conclusive, since an ordinary customs duty can also be described in this way. Thus, the Appellate Body observed:[43]

> ".... **A Member may**, fully in accordance with Article II of the GATT 1994, **exact a duty upon importation and periodically change the rate at which it applies that duty** (provided the changed rates remain *below* the tariff rates bound in the Member's Schedule).* **This change in the *applied* rate of duty could be made, for example, through an act of a Member's legislature or executive at any time**. Moreover, it is clear that the term 'variable import levies' as used in footnote 1 must

[41] Paragraph 130 of Argentina's Second Written Submission.
[42] Chile's First Written Submission, paragraphs 90 ff.
[43] Appellate Body Report, paragraph 232.

> have a meaning different from 'ordinary customs duties', because 'variable import levies' must be *converted into* 'ordinary customs duties'. Thus, **the mere fact that an import duty can be varied cannot, alone, bring that duty within the category of 'variable import levies'** for purposes of footnote 1" (our highlighting).

98. In its First Written Submission, Argentina – in Section C3.1 – stated that "[T]he amended PBS contains a formula that causes import duties to vary automatically and continuously" and divided its analysis into three parts, i.e., *variation* that is *automatic* and *continuous*.

99. In order to prove the alleged variability, Argentina shows that the specific duties have varied since the PBS came into existence. However, Chile has never suggested otherwise, and neither did the Appellate Body in the paragraph just cited.

100. As far as automaticity is concerned, although Argentina focused its analysis on dictionary definitions, the heart of the matter does not lie there but in the findings of the Appellate Body in this respect. The Appellate Body found as follows:[44]

> "[T]he level at which ordinary customs duties are applied can be *varied* by a legislature, but such duties will not be automatically and continuously *variable*. To vary the applied rate of duty in the case of ordinary customs duties will always require *separate* legislative or administrative action, whereas the ordinary meaning of the term 'variable' implies that *no* such action is required."

101. In its First Written Submission, Chile pointed out that under the changes introduced by Law 19.897 the specific duties applied require a specific administrative act to establish them and in the absence of this act the duty does not vary in amount. The situation was different under the PBS, where, because of its structure, the duties applied to two simultaneous import transactions varied without the intervention of any administrative act, which led to the assessment of different import duties, even when the value (transaction price) and volume (metric units) of the goods were identical. Today, two simultaneous import transactions, with the same transaction value and volume, will always pay the same import duty. Thus, Chile has implemented the rulings and recommendations of the DSB.

102. With respect to continuous variation, in its First Written Submission Argentina states "[D]espite the fact that the variation of the specific duties is no longer weekly but bimonthly, that variation is continuous."[45] The proof offered consists of the table and chart in Exhibits ARG-23 and ARG-24, which are supposed to illustrate "the operation of the amended PBS between 16 December 2004 and 15 April 2006"[46], and moreover the table and chart in Exhibits ARG-21 and ARG-22, which illustrate the variability of the specific duties.[47] On this basis, Argentina concludes that it "has shown that the amended PBS includes a formula that makes the variability of the duties automatic and continuous".[48]

103. It will again be appreciated how that analysis differs from the findings of the DSB and the changes introduced by Chile. Argentina's reasoning contains an obvious *non sequitur*. It again seeks to show that the duties vary, but only to conclude that this variation is continuous, without providing any evidence of this, which is what counts.

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[44] Appellate Body Report, paragraph 233.
[45] Argentina's First Written Submission, paragraph 266.
[46] Argentina's First Written Submission, paragraph 268.
[47] Argentina's First Written Submission, paragraph 269.
[48] Argentina's First Written Submission, paragraph 270.

104. Argentina's only argument is that the variation is bimonthly. However, continuous variation has nothing to do with the fact that once the specific duty has been fixed it is changed every two months. Moreover, the argument contradicts the findings of the Appellate Body which observed that the duties can be periodically changed without the variation being continuous on that account. Putting Argentina's argument into practice would mean maintaining that any seasonal duty or scheduled reduction in *ad valorem* tariffs would be tantamount to the establishment of a variable import levy.

105. In this connection, Argentina raises an interesting question concerning the reduction in Chile's *ad valorem* tariff, to the effect that there was no scheme or formula that caused and ensured that the tariff would change (be reduced) automatically and continuously.[49] The text of Law 19.589, appended as Exhibit CHL – 8, demonstrates the exact opposite. When it was enacted, a plan for the progressive and automatic reduction of Chile's general tariff from 11 per cent to 6 per cent between January 1999 and January 2003 was established. No one could maintain that, despite this continuous, automatic and planned variation, Chile's general *ad valorem* tariff is not an ordinary customs duty.

106. Finally, the Appellate Body observed that variable import levies have additional features which undermine the object and purpose of Article 4 of the Agreement on Agriculture. These additional features include a lack of transparency and a lack of predictability in the level of the duties that would result from the application of these measures, elements no longer present following the changes that Chile has made to its legislation.

107. Thus, there being no variability – a necessary condition for any variable import levy – there is no inconsistency with Article 4.2 of the Agreement on Agriculture. Moreover, even if there were still variability, it would not be sufficient since the additional features identified by the Appellate Body would have to exist and these were addressed by Law 19.897 and its Regulations.

3. The "modified system" does not sustain a price

108. In paragraph 139 of its Rebuttal, Argentina stated that Chile contradicts the terms of its Law and Regulations by asserting that the specific duties are not a variable levy inasmuch as they are not intended to sustain a price[50], quoting the text of the legislation which reads:

> "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*"[51] (emphasis added).

109. Leaving aside the arguments mentioned above, there is no such contradiction. Chile has established a mechanism for **stabilizing** the domestic market, which is a completely different thing from **sustaining** prices. Stabilizing means preventing sudden and extreme changes that affect activity, whereas sustaining means defending or supporting an activity through improved prices.[52]

110. **First of all**, the current system envisages the application of specific duties, rebates on the amounts payable as *ad valorem* duties under the customs tariff, and the application of the general tariff alone. Where tax rebates or the general tariff alone are applied, the imported product enters the

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[49] Paragraph 154 of the Rebuttal.

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

[51] See Law 19.897, Article 1, second paragraph, and Decree No. 831/2003, Article 1, second paragraph, in Exhibits CHL-1 and CHL-2, respectively.

[52] The same stability as established by Decree 797/92 (still in force) of the Argentine Republic which defines the measure Additional Sugar Import Duties and stipulates, inter alia: "… it is desirable to put into effect Article 673 of the Argentine Customs Code in order to stabilize the internal price in periods of severe distortion on the world market."

country with advantages over other traded products or on the same terms as other products, as the case may be. In neither case is any price sustained.

111. **Secondly**, as Chile argued and explained in Section V.1 and 2 of its First Written Submission, all the parameters currently in use, i.e., the floor and ceiling prices and the reference price, are expressed in terms of f.o.b. prices. The f.o.b. price for any individual commercial transaction is always lower than the c.i.f. price, the entry price and the domestic price. A simple review of the basic legislation is enough to show that it is impossible to sustain any price, as Chile demonstrated in Section V.1 and 2.

112. According to Argentina, in paragraph 143 of its Rebuttal:

> "Leaving aside Chile's virtual '**confession**' that the duties resulting from the PBS are unrelated to the transaction value and are therefore insulating Chile's market from international price developments…" (highlighting added).

113. As already explained, Chile makes no confession but rather an assertion, by pointing out 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."[53]

114. It is perfectly true that specific duties and tax rebates do not depend on the transaction value, which makes it possible to assert that since the changes introduced in 2003 Chile has not applied variable levies or similar measures and, therefore, is not insulating the domestic market but rather the exact opposite, that is, allowing the transmission of international prices.

115. Later, Argentina states that 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"[54], as Chile explained in its First Written Submission.[55] Argentina adds:

> "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"[56] (original emphasis).

116. The Appellate Body did not have to define these features inasmuch as they had already been defined within the context of the WTO and can be found in the Panel's report.[57] These fundamental characteristics of variable import levies and minimum import prices are:

> "(a) Variable levies generally operate on the basis of two prices: **a threshold, or minimum import entry price and a border or c.i.f. price** for imports. **The threshold price may be derived from and linked to the internal market price as such, or it may correspond to a governmentally determined (guide or threshold) price which is <u>above the domestic market price</u>.** <u>The</u>

[53] Chile's First Written Submission, paragraph 93.
[54] Argentina's Rebuttal, paragraph 149.
[55] Chile's First Written Submission, paragraphs 139 to 144.
[56] Argentina's Rebuttal, paragraph 150.
[57] Paragraph 7.36 of the Panel Report, WT/DS207/R

import border or price reference may correspond to individual shipment prices but is more often an administratively determined lowest world market offer price. (Emphasis and underlining added.)

(b) **A variable levy** generally **represents the difference between the threshold or minimum import entry price and the lowest world market offer price for the product concerned.** In other words, **the variable levy changes systematically in response to movements in either or both of these price parameters.** (Emphasis and underlining added.)

(c) **Variable levies** generally **operate so as to prevent the entry of imports priced below the threshold or minimum entry price**. In this respect, i.e. when prevailing world market prices are low relative to the threshold price, the protective effect of a variable levy rises, in terms of the fiscal charge imposed on imports, whereas this charge declines in the case of *ad valorem* tariffs or remains constant in the case of specific duties. (Emphasis and underlining added.)

(d) In addition to their protective effects, the stabilization effects of **variable levies generally play a key role in insulating the domestic market from external price variations.** (Emphasis added.)

(e) **Notifications on minimum import prices indicate that these measures are generally not dissimilar from variable levies in many respects**, including in terms of their protective and stabilization effects, but that their mode of operation is generally less complicated. Whereas variable import levies are generally based on the difference between the governmentally determined threshold and the lowest world market offer price for the product concerned, **minimum import price schemes generally operate in relation to the actual transaction value of the imports. If the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference.**" (Emphasis and underlining added.)

117. From these fundamental characteristics it is clear that a variable levy or minimum import price is intended to sustain a price and that that price is measured as an entry price, as an internal price, as a value linked to the internal price, or as an administratively determined price which is above the domestic price.

118. Under the present system, the floor price is not an entry price, is not fixed on the basis of the internal price, is not linked with it, and is not fixed at a price above it. For its part, the reference price is not a border price or expressed in c.i.f. terms. Neither does it correspond to the price of a shipment, nor is it a lowest world market offer price or determined administratively. Therefore, the current parameters do not have the fundamental characteristics of a variable levy as described in paragraph (a).

119. The specific duty is not "the difference between … the import entry price and the lowest world market offer price for the product concerned". Nor does the specific duty "change systematically in response to movements in either or both of these price parameters"; on the contrary, it remains fixed for an extended period, regardless of what happens to these parameters. Therefore, the specific duties do not have the fundamental characteristics of a variable levy as described in paragraph (b).

120. The specific duty does not prevent the entry of imports priced below a threshold or entry price, inasmuch as the floor price is not a threshold price or an internal market price or linked therewith, and is not an entry price. The tariff charge determining the specific duty remains constant until changed or cancelled by a more recent administrative act. Therefore, the specific duties do not have the fundamental characteristics of a variable levy as described in paragraph (c).

121. The mechanism currently in force allows international price variations to be transmitted to the domestic market, inasmuch as the specific duties and rebates are not adjusted on the basis of what happens to external prices or adjusted for the prices of shipments, as Chile showed in Section V of its First Written Submission. Therefore, the specific duties do not have the fundamental characteristics of a variable levy as described in paragraph (d).

122. The specific duties are not determined as a function of the actual transaction value of the imports, nor do they correspond to the difference between the entry price or threshold and the actual transaction value, as would be the case with a minimum import price. Therefore, the specific duties do not have the fundamental characteristics of a variable levy or minimum import price as described in paragraph (e).

123. Consequently, the current parameters do not possess any of the fundamental characteristics which the WTO itself has defined and discussed for variable import levies and minimum import prices. Therefore, the Chilean system established by Law 19.897 and its Regulations is not inconsistent with the Article 4.2 in question.

124. Argentina also claims that Chile appears not to understand the Argentine argument which uses dispersion (standard deviation) analysis solely to show that Chile is applying a formula that causes import duties to vary continuously. It adds that this demonstration does not constitute the basis for all of its reasoning concerning variable levies.[58]

125. Then, in paragraph 157, Argentina states that:

> "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."

126. Chile shares the view expressed by Argentina in the preceding paragraph, but cannot agree that the dispersion exercise in Section C.I.3 of its First Written Submission shows that the measure applied in Chile is similar to a variable levy. The only conclusion that can be drawn from this demonstration is, as has already been pointed out, that the specific duties vary, something which Chile has never denied.

4. The "modified system" is not a measure similar to a minimum import price

127. In Section V.1 of its First Written Submission, Chile addressed the arguments put forward by Argentina in Section C.2.1 headed "Specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor".[59]

128. Chile showed that the system in force, based on Law 19.897 and its Regulations, is neither a minimum import price nor similar to such a price, bearing in mind the fundamental characteristics of measures of that kind identified by the WTO.

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[58] Paragraph 156 of the Rebuttal.
[59] Argentina's First Written Submission, Section C.2.1, paragraphs 99 to 124.

129. Among other things, Chile establishes the indisputable fact that in any ordinary individual trade transaction the f.o.b. price is always lower than the c.i.f. price and does not "tend" to it, as Argentina maintains.

130. In this respect, in Section 5 of its Rebuttal, Argentina states that Chile, with these arguments[60], "seeks to distort what Argentina said in its First Written Submission" and that Argentina would prefer "to think of it as an error of interpretation".

131. Chile neither intended nor intends to distort arguments or figures of any kind or source. Neither is it an error of interpretation. In fact, in paragraph 163 of the Rebuttal, Argentina states

> "Clearly, Argentina tried to demonstrate the exact opposite of what Chile alleges, namely, that the CIF price is **naturally** higher than the FOB price" (original emphasis).

132. Whereas in paragraph 99 of its First Written Submission it says that:

> "Below, Argentina will show mathematically – using the PBS formula contained in Law 19.897 and Decree 831/2003 – how specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor …" (emphasis added).

133. Chile's interpretation of all the arguments and methods incorporated in Section C.2.1 of Argentina's First Written Submission is correct. In that Section Argentina seeks to show that the specific duties tend to elevate the entry price of imports to Chile "above the price band floor".

134. Chile cannot accept that the entire section in question was used by Argentina solely to show that "the CIF price is **naturally** higher than the FOB price".

135. Even though Chile has already shown that this is self-evident, it is worth noting that all the values used as parameters (floor, ceiling and reference prices) are expressed in f.o.b. terms. Therefore, in any ordinary individual trade transaction, the c.i.f. price and the entry price of that transaction will **always** be higher than the f.o.b. price, although not necessarily higher than the floor price.

136. This is because the floor price is not a threshold, an entry price or a minimum import price. It is not, nor is it intended to be, a price that impedes trade or prevents the transmission of international prices. The floor price is simply a parameter that impacts solely on the assessment of the specific duties, and those duties do not have as either their object or the result of their application the maintenance of border or entry prices or their adjustment to the floor price

137. In their turn, the specific duties assessed naturally increase the entry price, by the same amount for any transaction, a universal and natural characteristic of ordinary customs duties. Although that is certainly true, it does not form the substance of this dispute, which is that the result of their application does not constitute a measure similar to a variable levy or a minimum import price.

138. Therefore, any mathematical demonstration provided by Argentina, even though unnecessary, will show that the specific duties increase the entry price, like any ordinary customs duty. That is not a sufficient condition for asserting that, solely because they increase the entry price, they constitute a measure similar to a minimum import price.

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[60] Paragraph 161 of the Rebuttal.

139. As the Panel report states in describing the fundamental characteristics of measures of this kind, "minimum import price schemes generally operate in relation to the actual transaction value of the imports. If the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference".[61]

140. Chile does not determine specific duties in relation to the actual transaction value nor is their amount equal to the difference between that actual transaction value and a minimum import price. In fact, neither is the floor price a c.i.f. price or an entry price. Consequently, the floor price is not similar to or the same as a minimum entry price, and the application of specific import duties is not inconsistent with Article 4.2 of the Agreement on Agriculture.

141. Continuing its argument, in paragraphs 170 to 177, Argentina maintains that Chile is mistaken in its analysis when it compares the floor price with the series of f.o.b. prices plus specific duties during the only four months in which the latter were applied and states that "[t]he relevant comparison as far as this dispute is concerned is with the behaviour of the *entry price* of wheat imports to Chile".[62]

142. Chile agrees that what is important (in the present dispute) is what happens to entry prices. Chile has already shown, using Argentina's own information, that entry prices for wheat imports to Chile follow a pattern similar to that displayed by the international price. However, it has also shown that the domestic price of wheat has likewise followed a pattern similar to that of the international price, thereby confirming that the Chilean market is connected with the international one and that the modified system allows variations in external prices to be transmitted to the local market.

143. Moreover, in paragraphs 130 to 132 of its First Written Submission, Chile explains how, in the event of the floor price being interpreted as a minimum entry price, the actual evidence of its application shows that that price is not maintained inasmuch as it is not a minimum price and the specific duty is not the difference between the floor price and the actual transaction value.

144. As already explained at some length, the floor price is expressed in f.o.b. terms, so that it is not pertinent (or consistent) to compare it with a c.i.f. value or an entry price. Therefore, in order to verify that the specific duty applied is not the same as the difference between the floor price and the actual transaction value, and to confirm that the application of the specific duty does not lead to a price equal to the floor price, a comparison was made using prices expressed in the same market terms, namely, f.o.b.

145. If the floor price were a minimum import price, the result of applying the specific duties would be that minimum price. In its First Written Submission, Chile shows that out of 81 days on which specific duties were applied, on 46 per cent of those days the sum of the f.o.b. price and the specific duty in force was less than the floor price.

146. In paragraphs 179 to 184 of its Rebuttal, Argentina explains the contents of Exhibit ARG-11, which formed part of its First Written Submission, given that Chile used that information and had to make changes on finding that the data in that Exhibit differed from the series of daily f.o.b. prices for Argentine bread wheat published by the Department of Agriculture, Livestock, Fisheries and Food of the Republic of Argentina.

147. From the explanation that Argentina gave in its Rebuttal, Chile understands that for the purpose of its demonstrations Argentina made a time adjustment to the daily data, advancing them by 15 days relative to the actual date on which those prices were in effect, so that by taking into account

[61] *Chile – Price Band System*, Panel Report, paragraph 7.36.e.
[62] Paragraph 172 of the Rebuttal.

the time required to transport the goods it could simulate the price at which exports would arrive in Chile after shipment. Chile welcomes Argentina's explanation.

148. However, Chile must point out that, while acknowledging the time adjustment made by Argentina to the daily price figures for Argentine bread wheat, for the purposes of Chile's arguments those prices should have been those in effect on the day they represent, inasmuch as the time adjustment made by Argentina was used to simulate the effect of an actual trade transaction and compare that f.o.b. price with the floor price and the entry price that would result from applying to that f.o.b. price the specific duties in force.

149. This calls for two comments. Firstly, the Chilean system provides for the application of the same specific duties to all imports made during the period in which they are in force, without distinction as to origin, date of shipment or the actual transaction value, like ordinary customs duties (specific duties). Therefore, it is not necessary to make any sort of time adjustment for transport since, like the general *ad valorem* tariff, the specific duty is applied to all transactions on an equal basis.

150. Secondly, the relevance of this time adjustment presupposes that the application of the specific duties is linked with the actual transaction value, which is why a comparison is made with what would happen to the entry price for this simulated value of the actual price. However, the specific duties do not depend on the actual transaction value; on the contrary, they are independent of it, and as long as they apply do not vary with changes in international prices, which does not prevent such changes being reflected in the entry price and the domestic price.

151. Thus, entry prices follow a pattern different from that of the reference prices which are used as parameters, and moreover are not linked with or adjusted to the floor price level. This is because entry prices are not linked with the parameters or with the specific duties, but with international prices. Chile has already shown that entry prices and domestic prices are connected with the international market.

152. Elsewhere[63], Argentina questions Chile's description of the use of only f.o.b. prices, claiming that the specific duty does not include f.o.b. prices and that it "includes" nothing. The Law and its Regulations stipulate that all the parameters used should be expressed in f.o.b. terms, and that both the specific duties and the tax rebates should be assessed using those parameters, i.e., f.o.b. prices, as the sole reference.

153. Argentina's comments relate to paragraphs 175 to 179 of Chile's First Written Submission, in which it was demonstrated that the specific duties assessed are always less than those that were assessed under the PBS for the same reference price, with a view to showing that wheat now enjoys more favourable conditions of access.

154. This demonstration is based on the possibility of expressing the import cost in the following form:

$$(1)\ IC_i = a + b * FOB_i,$$

where,
IC_i = product import cost i;
a = sum of fixed costs;
b = aggregate of variable costs; and
FOB_i = f.o.b. price of the product i.

[63] Argentina's Rebuttal, paragraphs 189 to 196.

155. The PBS used this expression to determine the specific duties (SD) as follows:

(2) $SD = IC_{floor} - IC_{rp}$, where "rp" represents the reference price.

156. Substituting, we obtain:

(3) $SD = a + b * FOB_{floor} – (a + b * FOB_{rp})$
(4) $SD = a + b * FOB_{floor} – a – b* FOB_{rp}$
(5) $SD = b * (FOB_{floor} – FOB_{rp})$

157. The last of these expressions, (5), is that used by the PBS to calculate the specific duties applied weekly to wheat imports.[64] As explained in the First Written Submission, the factor "b" is the aggregate of the variable costs incurred in a normal import process, including the general *ad valorem* tariff.

158. From expression (5) it follows that the specific duty is less for any reference price as its determination includes only the general *ad valorem* tariff (1+0.06) and excludes all the variable costs incurred in a normal import process, this being because the latter are nontransparent and unpredictable, whereas the general *ad valorem* duty is known. All this is reflected in the following expression contained in the Regulations implementing the Law:

(6) $SD = (1+ 0.06) * (FOB_{floor} – FOB_{rp})$

159. Argentina continues its argument, in paragraphs 197 to 204 of its Rebuttal, by seeking to show that "Chile gets the definition of the duty established on the basis of a minimum import price completely wrong". In this connection, Chile welcomes the clarifications offered by Argentina insofar they contribute to a better understanding of the Chilean arguments, especially those contained in paragraph 198:

> "In this same dispute, the Panel held that a minimum price scheme operates in relation to the actual *transaction value* of the imports. The Appellate Body incorporated this aspect of minimum import prices in its report. 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*. **The reference price – which has nothing to do with the transaction value – is simply an average price on a market of concern.**" (Emphasis added. Original italics. Footnotes omitted.)

160. In fact, what Chile demonstrated with its arguments is what Argentina asserts in this paragraph, namely, that the reference price "has nothing to do with the transaction value", because the Chilean system is actually neither a minimum import price nor similar to one, just as it is neither a variable import levy nor similar to one.

161. Finally, Argentina ends the arguments in Section 5 of its Rebuttal by asserting that:

> "If Chile had used the formula which follows from 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

[64] In the case of tax rebates (TR) the expression was:
TR = = b * (FOBrp - FOBceiling)

than it would be if Chile were to apply a minimum import price at price band floor level."[65]

162. In fact, if Chile had used the formula which follows from the Appellate Body report it would have arrived at the same conclusion, and **that is precisely why Chile did not use the same formula**, so that there was no inconsistency with Article 4.2 of the Agreement on Agriculture.

5. The "modified system" improves the conditions of access to the Chilean market

163. Even though the conditions of access for wheat lie outside the scope of the present dispute, they naturally form part of the anticipated results. Therefore, Chile addressed this point by showing that with the changes introduced by Law 19.897 the conditions of access are more favourable than they would have been if the PBS[66] were in force.

164. However, Argentina interprets Chile's arguments in a way that is not consistent with what Chile actually said. In point of fact, when Chile states that "In conclusion, the period of application of duties under the new regime was shorter by 10 weeks, while that of rebates was longer by eight weeks, which represents an effective increase in favourable conditions for grain imports compared to what might have occurred under the mechanism prior to modification"[67], it is basing itself on a simulation of what would have happened if the PBS had continued in force.

165. Thus, the figures presented in Exhibit CHL-7 correspond to the daily series of international prices for *bread wheat, f.o.b. Argentine port*, and *Soft Red Winter No. 2 wheat, f.o.b. Gulf of Mexico*, used to simulate the application of the PBS. All the information in that exhibit comes from ODEPA, i.e., from Chile's Ministry of Agriculture, and is based on statistics published by Argentina's Department of Agriculture, Livestock, Fisheries and Food (the same source as used by the other party) and Chicago Exchange statistics published by Reuters.[68]

166. As explained in paragraph 183 of Chile's First Written Submission, the exercise consisted in simulating the operation of the PBS "with the reference price per week calculated on the basis of the prices in effect. This was done by taking the weekly average from Friday to Thursday of each of the prices considered, selecting the lowest and comparing it with the floor and ceiling prices so as to determine whether duties or rebates had applied in the week following the calculation. This method was applied to the period from 16 December 2003 to 13 January 2006". The procedure is the same as that used in the PBS.

167. An important difference between the system in force and the PBS is that in the latter the specific duties and rebates were calculated weekly, so that they were linked with the international prices in effect. Now, instead of being linked with the international prices in effect the specific duties and rebates, once made official by the authorities, remain fixed for two months.

168. Argentina questions the results of the exercise although it also uses them to draw conclusions which cannot be derived from these results. Chile's simulation shows that the present mechanism gives fewer weeks of application of specific duties and more weeks of application of tax rebates than would have been the case under the PBS.

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[65] Argentina's Rebuttal, paragraph 204.

[66] Chile's First Written Submission, Section 6 "Change in conditions of access as a result of Law No. 19.897".

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

[68] Chile is sorry that the unintentional omission of the source of the information should have led to confusion, since it had assumed it to be obvious that both parties to the dispute were using the same source, namely, ODEPA, which is characterized by its transparency and reliability and the availability of the information to the general public.

169. It is true that in this simulation we used only two prices for determining the market low and selecting it as the reference price. However, the conclusions would not have been any different if we had use more prices to find the market low. In fact, if there had been prices lower than those used in the exercise, then, where the application of specific duties is concerned, what would have happened is that the duties assessed would have been higher and duties would probably have been applied during more weeks. In other words, it would merely have confirmed what Chile is saying, namely, that better conditions of access now exist. In the case of tax rebates, the situation is similar: if lower prices had existed they would have resulted in a smaller rebate or the application of the general *ad valorem* tariff only. If there had been prices higher than those used, the amount of the rebates would have been greater and there would have been more weeks with rebates being applied. In other words, this would again merely have confirmed what Chile has said, namely, that the conditions of access have improved.

170. At the same time, Chile also considers irrelevant Argentina's arguments to the effect that:

> "… this is the same as 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 alleges that this means an improvement in conditions of access ".[69]

171. The basis of this dispute is not the trade-distorting effect of customs duties or how often they are applied. The mere existence of customs duties, of whatever kind, is enough to distort trade, in other words it is an inherent feature of those duties and not something peculiar to the Chilean system.

172. Finally, Argentina develops a line of reasoning based on the number of times the current system and the PBS were applied or would have been applied, as the case may be, in relation to the occasions on which specific duties and tax rebates were assessed. Firstly, it should be noted that in connection with most of its arguments, with this one exception, Argentina always considers the period of application to be that in which specific duties were assessed, leaving out completely the other periods, certainly much longer, in which rebates, or nothing at all, were applied. Secondly, it seems obvious, to Chile at least, that applying specific duties is not the same as applying tax rebates, and it does not seem reasonable to combine the two concepts and periods of application in order to assert that the two policies are similar. If, as Argentina says, the specific duty has a distorting effect, by increasing the entry price, the tax rebate also has a *distorting* effect by reducing the entry price to the point of leaving the trade transactions without a tariff charge.

173. In 35 (32.1 per cent) of the 109 weeks in which the current system has been in force (16 December 2003 to 13 January 2006) tax rebates have been applied, in 17 (15.6 per cent) specific duties have been applied, and in 57 (52.3 per cent) only the general *ad valorem* tariff has been applied.

174. From 13 January to 15 June 2006 wheat imports were entering Chile subject only to the general *ad valorem* tariff, extending even further the period of improved access conditions.

(a) Effects of the scheduled reduction in the floor and ceiling prices

175. In its First Written Submission, Chile showed how a gradual process of reduction of the border protection for wheat and wheat flour had been built in. In particular, as a result of the scheduled reduction in the floor and ceiling prices, the amount of the specific duties will always be less than that currently being assessed, just as the probability of duties being assessed will also always

[69] Argentina's Rebuttal, paragraph 208.

be less. Argentina disregards the evidence produced by Chile and offers its own hypothetical examples, seeking to show the contrary, that is to say, that in 2014 the specific duties will be equal to or greater than those in force at the beginning of 2005.[70] That, however, is mere supposition.

176. Chile could "invent" dozens of reference prices to show that from a certain date there will only be rebates. That is not the point. What Chile showed is that using the same reference price – which is something certain and not hypothetical – the parameters based on the scheduled reduction in floor and ceiling prices will always result in a lower specific duty. In other words, its impact will be less. Chile did not say that the reference price used in its example would be in effect in 2014, since it is impossible to know that so far in advance.

177. When Chile says that the scheduled reduction in the floor and ceiling prices will translate into less border protection, it states a true fact. In its First Written Submission it showed mathematically what will actually happen in the future, namely, that to the extent that the floor price is reduced, the specific duties assessed will always be less than they are at present. The following example illustrates this situation. Using the scheduled floor prices and a reference price of 100 dollars per tonne, we obtain:

$SD_{2003\text{-}2007} = 1.06 * (128 - 100) = 29.68$
$SD_{2007\text{-}2008} = 1.06 * (126 - 100) = 27.56$
$SD_{2008\text{-}2009} = 1.06 * (124 - 100) = 25.44$
$SD_{2009\text{-}2010} = 1.06 * (122 - 100) = 23.32$
$SD_{2010\text{-}2011} = 1.06 * (120 - 100) = 21.20$
$SD_{2011\text{-}2012} = 1.06 * (118 - 100) = 19.08$
$SD_{2012\text{-}2013} = 1.06 * (116 - 100) = 16.96$
$SD_{2013\text{-}2004} = 1.06 * (114 - 100) = 14.84$

178. That is to say that for the same reference price the specific duties assessed will always be less than those that would have been assessed before the floor price was reduced. This holds for any reference price level.

179. Clearly, if in this exercise the reference price were less than 100 dollars, the specific duties would be higher than those calculated, but nevertheless those duties would decrease with time. For example, using the value of 94.92 dollars per tonne proposed by Argentina in paragraph 226 of its Rebuttal, we obtain:

$SD_{2003\text{-}2007} = 1.06 * (128 - 94.92) = 35.06$
$SD_{2007\text{-}2008} = 1.06 * (126 - 94.92) = 32.95$
$SD_{2008\text{-}2009} = 1.06 * (124 - 94.92) = 29.08$
$SD_{2009\text{-}2010} = 1.06 * (122 - 94.92) = 28.70$
$SD_{2010\text{-}2011} = 1.06 * (120 - 94.92) = 26.58$
$SD_{2011\text{-}2012} = 1.06 * (118 - 94.92) = 24.46$
$SD_{2012\text{-}2013} = 1.06 * (116 - 94.92) = 22.34$
$SD_{2013\text{-}2004} = 1.06 * (114 - 94.92) = 20.22$

180. In other words, if this reference price were to apply this year, the resulting specific duty would be 35.06 dollars per tonne, whereas in 2014 the resulting specific duty would be 20.22 dollars per tonne, or 42.3 per cent less than that which would be assessed currently.

181. Chile did not use different values for the reference price to show that the nominal protection for wheat will be lower. This would not be consistent with an evaluation methodology. It is a fact

[70] Paragraphs 221 and 222 of the Rebuttal.

that the conditions of access to the Chilean market have changed since the scheduled reduction in the general *ad valorem* tariff, from 35 per cent in 1984 to 6 per cent as from 2003.[71] The same will happen on the wheat market following the entry into force of Law 19.897 for that product.

V. THE CLAIMS RELATING TO THE FACTOR OF 1.56 AND ARTICLE II:1.B, SECOND SENTENCE, OF THE GATT 1994 DO NOT FALL WITHIN THE TERMS OF REFERENCE OF THE PRESENT PANEL

1. The factor of 1.56 does not fall within the terms of reference of the present Panel

182. In seeking to show that the factor of 1.56 falls within the terms of reference of the present Panel, Argentina bases its reasoning on two premises. The first, that its questioning is not a claim but an argument.[72] The second, that this is a new argument relating to an aspect of the measure taken to comply that has changed.

183. Argentina's questioning is an independent claim and not an argument to illustrate a claim. In fact, the word questioning used by Argentina shows it to be asserting that Chile has infringed a specific provision of a specific agreement. According to the Spanish Academy, to question means: *1. tr. To dispute about a doubtful point, by putting forward reasons, evidence and grounds for and against*. In other words, questioning is something different from arguments or reasons, evidence and grounds.

184. By applying the reference to *Korea – Dairy Products* in the Rebuttal to Argentina's First Written Submission, it is possible to distinguish the **claim** – "The factor of 1.56 ... insulates the entry price of wheat flour from international price developments" – from the **arguments** – the specific duties on wheat flour are calculated on the basis of those applied to another product[73] and the way in which that factor was established is not transparent.[74]

185. Therefore, it is clearly a question of an independent claim that Argentina is making at this stage of the proceedings and one which it did not make in the original dispute although it could have done so, since Argentina itself acknowledges that that factor had already been in effect for more than ten years.

186. In seeking support for its arguments, Argentina repeatedly asserts that the factor of 1.56 is an aspect that has changed relative to the PBS or an aspect of the measure taken to comply that has changed relative to the original measure.[75] However, it is a factor that has been in existence since 1993 and which in its present form has been in effect since 1996, as Argentina itself observes in its First Written Submission.[76]

187. It should be pointed out that in all the texts cited in this dispute, the factor is always similarly expressed. Thus, for determining the duties and rebates for wheat flour, "the duties and rebates determined for wheat shall be multiplied by a factor of 1.41"[77] or "there shall be applied the duties and

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[71] If in 1984 any goods had entered at a c.i.f. price of 100 dollars per tonne, they would have had to pay 35 dollars per tonne in duty (35 per cent ad valorem). Other goods entered in 2004 at a c.i.f. price of 583.40 dollars per tonne would have had to pay 35 dollars per tonne in duty (6 per cent ad valorem). In no way can it be concluded from this equality of the duty on both consignments that the conditions of access were the same in 1984 and 2004.

[72] Paragraph 247 of the Rebuttal.

[73] Paragraph 228 of the Rebuttal.

[74] Paragraph 229 of the Rebuttal.

[75] For example, paragraphs 271, 278, 281, 282 of the Rebuttal.

[76] Paragraph 232 of Argentina's First Written Submission.

[77] Law 19.193.

rebates determined for wheat multiplied by a factor of 1.56".[78] In other words, as a mathematical calculation.

188. Despite the above, Argentina adds a new element by maintaining that the "basis" on which the factor of 1.56 is applied is different under the scheme introduced by Law 19.897 and its Regulations and is therefore a new aspect of the modified measure.

189. However, in its First Written Submission Argentina bases its claim mainly on the fact that the factor in question translates into the application to a product (wheat flour) of specific duties which, rather than being linked to that product, are derived from the duties applied to another product (wheat), adding that the price relationship between the two could be based on a technical production ratio between flour and wheat. Moreover, in Argentina's opinion, "this relationship is valid at international level".[79] Argentina concludes by stating that, in its own case, this technical ratio would be approximately 1.3, "that is, the price of wheat flour is approximately 30 per cent higher than that of wheat".

190. In its Rebuttal, Argentina adds a new element never previously mentioned. According to Argentina, the difference between now and the PBS is that the factor is applied on a completely different basis. Consequently, the result of applying it is also different. Therefore, it is a changed aspect that can be included within the terms of reference of the present Panel.

191. As an initial response, it should be pointed out that what Argentina originally questioned was the factor of 1.56, whereas now it is questioning the basis on which the factor is applied. In Chile's opinion, these are two very different things and certainly in most of its submissions Argentina has sought to question the basis on which the specific duties are assessed under Law 19.897 (from which the duties applicable to wheat flour are determined).

192. Then again, a more detailed analysis of *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* would show that this precedent cannot be used in this case since it concerns a dispute about subsidies in which the change in the basis of a re-determination is an essential element for determining the likelihood of subsidization. Finally, any change in the basis will necessarily affect the result. In this case, the consequences are the same now as under the PBS: an increase in the specific duties applied to flour by a factor of 1.56 relative to the duties applied to wheat, and in its First Written Submission Argentina questioned this increase for being higher than the technical ratio which it calculated would be correct, i.e., 1.3, and because "in its legislation Chile has neither explained nor justified in any way the basis on which it was established".[80]

193. In other words, it would appear that only on 19 April 2006 did Argentina notice that the factor of 1.56 in effect since 1996 is not transparent and increases the insulation of the domestic market from international price developments.

194. Chile does not question the right of any Member to raise a new claim relating to an aspect of the measure taken to comply that constitutes a new or changed element of the original measure nor dispute the validity of the precedents cited in this respect in the Rebuttal, but Argentina bases its argument on an erroneous premise. As we have shown, the factor of 1.56 is not a new or changed element of the original measure and therefore Argentina should have introduced it into the original dispute, being precluded from doing so at this late stage.

[78] Article 1 of Law 19.897.
[79] Paragraph 231 of the Rebuttal.
[80] Paragraph 229 of Argentina's First Written Submission.

195. Allowing Argentina to have this "second chance" (as it was called by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* and by the Panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*) to take issue with the factor of 1.56 before this Panel would be to call into question Chile's due process rights to a proper defence of its duties.

(a) Technical basis of the factor of 1.56

196. Without prejudice to the foregoing, Chile will explain the technical reasons for using a factor of 1.56 to assess the duties or rebates applicable to wheat flour.

197. As Argentina acknowledges when it refers to the ("internationally valid") technical production ratio, the specific duty or rebate, as appropriate, for wheat flour is determined simply by multiplying the duty or rebate in effect for wheat imports by a factor of 1.56. The reason for increasing the duty (or rebate) by a certain proportion is simply to maintain a similar nominal level of protection for both products. As is well known, one of the characteristics of specific duties is that their impact is inversely proportional to the price of the product. In other words, the greater the value of the product the less protection the tariff provides. Wheat flour is a processed product whose essential raw material is wheat. Therefore, the price of wheat flour will be directly related to the price of wheat, but will always be higher.

198. If the same specific duty were levied on both products, the protection provided for wheat flour would be reduced as compared with that for wheat, which would indirectly favour flour imports. In fact, this is precisely what Argentina does with its differential export tax mechanism, which provides for exports with a higher value added to pay significantly lower taxes than exports of basic products, the object being to give industrial exports an artificial advantage.

199. Differential tariffs for products with higher value added are a reality throughout the world, including in Argentina itself. Moreover, there are no rules establishing the precise amount by which the tariffs on products higher up the processing chain have to be increased. It would be extremely difficult to arrive at any consensus on this.

200. The factor used by Chile has undergone occasional adjustments to take account of the relation between the prices of the two products and since 1996 has been fixed at 1.56. In formulating Law 19.446[81] which set that value consideration was given to the information available at that time.

201. This indicated that between January 1986 and December 1995 (the period of application of the band at that time), the average ratio of the price of flour to the price of wheat was 1.566.[82] Therefore, this was the factor that was built into the Chilean legislation and it has remained unchanged ever since.

2. Argentina's claim with respect to the second sentence of Article II:1(b) of the GATT 1994 likewise does not fall within the terms of reference of the present Panel

202. As Chile has pointed out, Argentina acknowledges that during the original proceedings it never raised a claim relating to the second sentence of Article II:1(b) of the GATT 1994.[83] Therefore, the discussion should focus on whether it is a question of a claim relating to the new measure or one relating to the PBS.

[81] Exhibit CHL–6.
[82] Exhibits CHL–9, 10 and 11.
[83] Paragraph 295 of the Rebuttal.

203. As Chile understands it, Argentina is claiming that a violation of Article 4.2 of the Agreement on Agriculture would automatically translate into a violation of Article II:1(b), second sentence, of the GATT 1994, insofar as the Member had not incorporated the measure in its Schedule. And that would apply both to the PBS and to any other measure that violates Article 4.2.

204. Accordingly, this is a claim which Argentina should have raised and substantiated in the original proceedings, because, in accordance with its reasoning in the Rebuttal, the PBS would also have been found to be in violation of Article II:1(b) once it had been concluded that it was inconsistent with the aforementioned Article 4.2. However, Argentina did not do so and cannot raise the claim before this Panel.

205. Contrary to what Argentina maintains, Chile's due process rights are being seriously impaired by this decision to introduce at this stage a substantive claim such as that relating to Article II:1(b), second sentence. Argentina, on the other hand, appears to rely on the reference cited in paragraph 310 of its Rebuttal. But this relates to arguments which could not be rebutted in good time and not to claims, as in the present case.

206. Consequently, Argentina's claims relating to the factor of 1.56 and to the alleged inconsistency with the second sentence of Article II:1(b) of the GATT 1994 fall outside the terms of reference of the present Panel, insofar as they concern aspects relating to the original measure (PBS) which Argentina could have raised in the original dispute but did not.

VI. CONCLUSION

207. Argentina has been unable to show that the current scheme based on Law 19.897 is preventing the transmission of international prices to the Chilean market or restricting the volume of imports. On the contrary, it insists that there is a lack of transparency and predictability in irrelevant aspects of the scheme in force. Chile has shown that the lack of transparency and predictability of certain aspects of the PBS were called into question precisely because they led to the insulation of domestic prices. These defects having been corrected and other changes introduced, the current scheme does not produce the effects which Appellate Body identified as being the common object and purpose of the measures listed in Article 4.2 of the Agreement on Agriculture. Argentina has been unable to prove that Law 19.897 and its Regulations generate those effects.

208. As a last resort, Argentina claims that Chile should have abolished its PBS because the Appellate Body so established.[84] Even though we may agree with the Appellate Body that duties resulting from the application of a measure inconsistent with Article 4.2. of the Agreement on Agriculture cannot go on being levied, the fact that the current system based on Law 19.897 and its Regulations is not inconsistent with that provision allows Chile to continue levying any specific duties that may be applicable.

209. Furthermore, it should be recalled that, as stated in the Article 21.3 arbitration in *EC – Poultry Cuts*, "the implementing Member has a measure of discretion in selecting the means of implementation that it deems most appropriate".[85] Therefore, Argentina cannot oblige Chile to comply in a particular way with the recommendations and rulings of the DSB.

210. Members of the Panel, Law 19.897 and its subsequent Regulations established a mechanism which on the basis of transparent and predictable parameters makes it possible to establish specific duties or rebates, or neither of the two, on wheat and wheat flour in accordance with world market

[84] Paragraph 317 of the Rebuttal.

[85] *EC – Poultry Cuts (Article 21.3)*, Award of the Arbitrator (WT/DS269/13 and WT/DS286/15), paragraph 49.

developments, including references to one of the markets of most concern, namely, that of Argentina. These duties or rebates remain unchanged for two months, which allows variations in international prices to be reflected in domestic prices. Thus, if the international price falls, the internal price falls by a similar amount and if the international price rises, the internal price rises in the same way. This is not what variable import levies or minimum import prices do.

211. Therefore, the system in force in Chile up to 2014 is not inconsistent with Article 4.2 of the Agreement on Agriculture and hence does not violate paragraph 4 of Article XVI of the Marrakesh Agreement Establishing the World Trade Organization. Chile requests the present Panel to find accordingly, while rejecting Argentina's claims in relation to the alleged inconsistency with Article II:1(b), second sentence, of the GATT 1994 and in relation to the factor of 1.56 for wheat flour, inasmuch as neither was properly brought before it.