ANNEX E

ORAL STATEMENTS OF THIRD PARTIES AT THE SUBSTANTIVE MEETING OF THE PANEL

ANNEX E-1

ORAL STATEMENT BY AUSTRALIA
(2 AUGUST 2006)

Mr Chairman,

1. Australia has read with interest the submissions of the parties to this dispute and the points raised by third parties.

2. Australia joined the original dispute as a third party in view of our systemic interests in the questions under consideration. We retain a systemic interest in the issues being considered in the current proceedings brought by Argentina under Article 21.5 of the DSU.

3. Our systemic interest in these proceedings concerns the consequences of the Price Band System (PBS). In particular, Australia wishes to draw the Panel's attention to the continued potential of the PBS to distort trade, and to the reasons why Australia agrees with Argentina that the new PBS is inconsistent with Article 4.2 of the Agreement on Agriculture.

4. Australia makes this oral statement, however, in a constructive spirit bearing in mind our excellent bilateral relations with Chile, especially as a fellow Cairns Group member, and Chile's commendably low general tariff structure.

5. Australia notes that on 23 October 2002 the DSB adopted the Appellate Body Report on *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* and the Panel Report as modified by the Appellate Body Report. The Appellate Body recommended that the DSB request Chile to bring its price band system, as found to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement (paragraph 289 AB report).

6. Chile claims to have complied with this recommendation by adopting Law number 19.897/2003 and Decree number 831/2003. Argentina states in its rebuttal submission that Chile's modified PBS is still a border measure similar to a "variable import levy" and a "minimum import price" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.

7. In Australia's view, the question before the Panel is whether the new amendments are sufficient to convert the PBS into a measure that does not have the restrictive features that characterise border measures prohibited under footnote 1 of Article 4.2. Australia respectfully submits that despite Chile's best efforts, they are not. Although we concede that the amendments do go some way to ameliorate the more obviously inconsistent aspects of the measure, we are nevertheless of the view that inherent inconsistencies remain unchanged.

8. The Panel will recall that the *raison d'etre* of Article 4.2 is improved market access for agricultural imports by permitting only the application of ordinary customs duties. To this end, border measures that are trade distorting, such as those listed in the footnote to Article 4.2, are prohibited. As the Appellate Body noted, this is because they have the objective and effect of "restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do….[they]…disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market" (paragraph 227). Fundamentally therefore, any measure that is consistent with Article 4.2 must necessarily be shown to be absent of this trade restrictive objective and effect. This is made clearer by the Appellate Body's deliberations in paragraphs 260 and 261 where it explains that the effect of a measure is relevant, that is whether a measure creates "intransparent and unpredictable market access" and "prevent[s] enhanced market access for imports".

9. In Australia's opinion, the Chilean revised PBS for wheat and wheat flour remains a system which distorts the price of imports of agricultural products in a different way from ordinary customs tariffs and continues to insulate the Chilean domestic market from international price fluctuations. As such, we submit that it must be found to be akin to a "variable import levy" and inconsistent with Article 4.2.

Variability

10. The meaning of the term "variable import levy" was considered by the Appellate Body and it is instructive to recall its comments. It decided that a "necessary condition" for a variable levy is the presence of a formula causing automatic and continuous variability of duties. In contrast ordinary customs duties are as set out in paragraph 233: "subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula. The 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."

11. Chile in its first submission states that under Law 19.897, the duty (or rebate or neither) is now fixed by legal directive in the form of a decree issued by the Ministry of Finance, and then remains unchanged for two months until a subsequent administrative act (paragraph 93). Chile's submission claims that the effect of this change is that the new system is no longer "variable" as decided by the Appellate Body.

12. With respect, Australia submits that this argument is misplaced. It is correct that the new Chilean system has moved to require separate executive action to instigate each variation in applicable duties. However this only partially meets the conditions that the Appellate Body noted are required to convert such a levy into an ordinary customs duty. The Appellate Body also noted that ordinary customs duties cannot simply reflect changes mechanistically determined by an underlying scheme or formula, which we consider remains the case with the Chilean Law.

Transparency and predictability

13. As Chile notes in its submission, the Appellate Body stated in paragraph 232 that "variability" was a necessary but by no means "sufficient" condition for a particular measure to be a "variable import levy". In addition, lack of transparency and predictability that flow from such measures are also important.

14. Chile submits that the revised PBS is both more transparent and more predictable than its predecessor. Under the old PBS, the reference price was changed every week. Under Law 19.897 it is now changed every two months. In addition the price bands were previously adjusted on a yearly basis. Now they are in place for eleven years. On this basis, Chile argues that these changes provide stable conditions to afford better predictability to exporters.

15. That much is correct. The material question however is whether it is sufficient. Australia does accept that these changes give greater transparency and stability. However, the underlying structure of the measure remains the same. Even though this instability is partially offset by the introduction of 11 year periods of application for price bands, fluctuations in the reference price cannot be predicted. More broadly, this mechanism in itself has the effect of insulating the Chilean market from international price fluctuations as it is less flexible. Accordingly, it cannot be said that predictability for exporters has improved. As such, the trade distorting aspects of the PBS have not been remedied.

16. In conclusion, Australia submits that despite the changes to the Chilean PBS, they are insufficient to achieve consistency with Chile's rights and obligations under Article 4.2 of the Agriculture Agreement. It continues to preserve an underlying structure of variability and unpredictability that is non-transparent and contrary to the object and purpose of the Agreement on Agriculture.

17. Australia would respectfully encourage the Panel to find the Chilean Price Bands System continues to be inconsistent with Article 4.2 of the *Agreement on Agriculture* and that Chile has therefore not complied with the recommendations and rulings of the Dispute Settlement Body in this dispute.

ANNEX E-2

ORAL STATEMENT BY BRAZIL
(2 AUGUST 2006)

I. Introduction

1. Mr. Chairman, distinguished Panelists, and members of the Secretariat, Brazil welcomes the opportunity to present its views to you this morning. In our statement, we will address Article 4.2 of the *Agreement on Agriculture* as well as the Panel's terms of reference.

II. Article 4.2 of the Agreement on Agriculture

2. The claim under Article 4.2 of the *Agreement on Agriculture* is that, by adopting the new PBS, Chile has "resort[ed]" to another measure of the kind that had to be converted into ordinary customs duties at the end of the Uruguay Round. Specifically, the new PBS is a measure similar to a "variable import levy" and to a "minimum import price" ("MIP").

3. In addressing these claims, the Panel is assisted by the findings of the original panel and the Appellate Body. Both found that the old Chilean PBS was a measure similar to both a variable import levy and a MIP. On implementation, the key prohibited elements of the old PBS have not been touched, and are part and parcel of the new PBS. Thus, the essence of the PBS seems to remain the same.

Variable Import Levies

4. Chile's new PBS meets all the characteristics of a *variable import levy*.

5. First, the amount of the duty is the difference between two parameters: (i) the *floor of the price band* and (ii) a *reference price* fixed by the government based on world market prices. The reference price changes every two months, thereby purportedly ensuring that the duty varies frequently to reflect the most recent developments in world market prices.

6. Second, under the new PBS, imports are very unlikely to enter at prices below the price band floor. Argentina has explained to the Panel in detail why this is so.[1] Although this can legally occur, it will happen only in very unusual factual circumstances—namely, when world market prices drop by 20 to 30 per cent within a period of two months. And *even if* this improbable price decrease occurred, the new PBS would neutralize it after just two months because the reference price would be updated.

7. Third, the Chilean measure stabilizes the price of imports by neutralizing decreases in world market prices. The PBS is designed – and operates – such that the entry price is virtually always above the lower threshold and also such that the entry price does not exceed the upper threshold of the band system by much. Importantly, as world market prices decrease, the duty increases, thereby exercising a stabilizing effect on prices in Chile that insulates its producers from the fluctuations in the world prices.

8. On implementation, Chile has not altered the fundamental characteristics of a measure that continues to meet the requirements of a variable import levy or a measure similar thereto. In short, the changes made are more of form than substance.

[1] Argentina's First Written Submission, paras. 100–114.

9. Contrary to Chile's arguments, variation in the duty continues to be an integral and automatic feature of the measure, and it occurs frequently. Also, as the world market price falls, protection under the PBS rises, insulating Chile's market from the world market.

10. Chile suggests somewhat improbably that duties imposed under the new PBS are predictable because traders can predict future world market prices. Thus, it believes, traders can foresee the duties that will be imposed under the PBS as market prices evolve.[2] Yet, even though traders often speculate on the evolution of prices, they cannot predict changes with the certainty required to afford predictability to trade. Variable import levies are prohibited precisely because the *Agreement on Agriculture* requires that market access be based on predictable regulation that does not alter with market prices.

11. Chile also asserts that there is greater transparency in the new PBS because: the price band floors and ceilings have been fixed 11 years in advance[3]; the "markets of concern" have been identified[4]; and the amount of the special PBS duty is published every two months.[5] This misses the point. The WTO consistency of the PBS does not change solely because the features making it a variable import levy are now openly published. The measure continues to lack both predictability and transparency because its level varies at an unpredictable rate, making the measure intransparent.

Minimum Import Prices

12. It is also claimed that the new PBS is a minimum import price This is because the floor of the price band functions as a *de facto* MIP. Despite the minor changes Chile has made to the PBS, it continues to guarantee that – in all but the most exceptional situations – the entry price of imports will not fall below the price band floor.

III. The Panel's Terms of Reference

13. Brazil turns to address Chile's contention that Argentina cannot challenge certain features of the new PBS, namely the wheat conversion factor, and also cannot challenge the new measure under Article II:1(b) of the GATT 1994. Chile argues that, because Argentina did not make these claims in the original proceedings, it is now barred from doing so in the current Article 21.5 proceedings.

14. First, in both the original proceedings and these Article 21.5 proceedings, Argentina made a claim under Article 4.2 of the *Agreement on Agriculture*. In these proceedings, Argentina relies on the wheat conversion factor as an *argument* to demonstrate that the new PBS is inconsistent with Article 4.2. Invoking the wheat conversion factor does not, therefore, involve a new *claim* but rather a new *argument* to substantiate an old claim. Nothing precludes a WTO Member from making *arguments* in Article 21.5 proceedings that it did not make in the original dispute.

15. Secondly, and more importantly, Brazil is concerned about the systemic implications of Chile's argument. Chile is essentially asking the panel to rule that a Member is precluded from challenging, in Article 21.5 proceedings, any aspect of a new measure that was present in the original measure but that was not challenged in the original proceedings.

16. In Brazil's view, Chile's approach intends to add a new and undue burden on the complaining party, since it would force it to prosecute *every conceivable violation* in the original proceedings in order to preserve its rights on implementation.

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[2] Chile's First Written Submission, paras. 158 to 163.
[3] Chile's First Written Submission, para. 108; Chile's Second Written Submission, para. 73.
[4] Chile's First Written Submission, para. 115.
[5] Chile's First Written Submission, para. 93. Chile's Second Written Submission, paras. 89-90.

17. Chile's arguments also compel a complaining party to assess, as early as its initial request for consultations, how its claims will fare in dispute settlement: which claims might be upheld, and which might be subject to judicial economy. It also compels an assessment of the many ways in which a respondent might choose to implement, while leaving intact objectionable parts of a challenged measure.

18. Not surprisingly, Chile does not cite to any treaty text in order to support its approach. In fact, this is because there is nothing in the text of the DSU that precludes a complaining Member from bringing a claim that was not brought in the original proceedings. According to the DSU, Article 21.5 proceedings may, in principle, involve claims made under any provision of any covered agreement.[6] Any limitations to the scope of an Article 21.5 dispute must be found in the treaty text. It was precisely on the basis of treaty text that the Appellate Body found in *US – Shrimp* and *EC – Bed Linen (Article 21.5 – India)* that there are certain limitations on the claims that can be made in Article 21.5 proceedings. The Appellate Body ruled that a complainant cannot pursue a claim against an aspect of a measure when, in the original proceedings, that same claim was *rejected*, for example, because the complainant failed to prove its case.[7] This limitation was based on treaty text in Articles 16.4, 17.14, 19.1, Article 21(1) and (3), and Article 22.1 of the DSU. The limitation corresponds to the well-established legal principle, *non bis in idem*. In layman's terms, no person can be tried *twice* for the same alleged offense.

19. No equivalent treaty text support Chile's position that a Member cannot contest for the first time an aspect of a new measure that also featured in an old measure.

IV. Conclusion

20. Mr. Chairman, distinguished members of the panel, Brazil thanks you for the opportunity of presenting its views and looks forward to responding any questions you may have.

[6] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79 and Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40-41.

[7] Appellate Body Report, *EC – Bed Linen (Article21.5 – India)*, paras. 96-99.

ANNEX E-3

ORAL STATEMENT BY CANADA
(2 AUGUST 2006)

Introduction

1. Canada welcomes the opportunity to participate in this proceeding. Canada's submission today is limited to the question of the jurisdiction of this Panel to consider arguments that had not been put before the original panel.

2. Specifically, Argentina claims that the Chilean measures are a violation of *GATT* Article II:1(b), second sentence. It considers that this Panel has the jurisdiction to hear such a claim. Chile disagrees. It submits that this claim was not articulated before the original panel and that, therefore, this Panel does not have the jurisdiction to consider the claim. In Canada's view, the Panel has such jurisdiction.

Legal Analysis

3. What is the scope of a Member's right to raise new claims and arguments before an Article 21.5 panel?

4. It is incontestable that a Member has the right to bring new claims and arguments before a panel relating to *new* measures, as the facts, claims, and arguments relevant to those measures may be distinct from measures previously considered.[1] The Appellate Body determined in *Canada – Aircraft (Article 21.5 – Brazil)* that:[2]

> "… the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure …"

5. Canada recognizes that such a right is not absolute. As Chile correctly notes, where a Member has challenged a measure but has failed to make out a *prima facie* case, it may not re-argue the *same* claim before an Article 21.5 panel. This would permit one Member to engage others in endless litigation, thereby undermining predictability and security in the dispute settlement mechanism of the WTO.

6. However, that is not the question before you. Rather, the question is whether a panel is prohibited from considering arguments and claims on the sole basis that they *could* have been made before the original panel but were not. Where the measure is appropriately before a panel, and the DSB has made no findings or recommendations in respect of such measure or the claims made by the complaining party, a panel may not then reject such claims or arguments on the sole basis that they could have been raised previously. And this is so for at least three reasons.

7. First, the *DSU* makes no provision for such a rejection. The Panel is required by Article 11 of the *DSU* to assess objectively the matter before it, that matter consisting of the measure and the claims

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[1] *Canada – Aircraft (Article 21.5 – Brazil)*, Appellate Body Report, paras. 40-42; See also *US – FSC (Article 21.5 – EC)*, Appellate Body Report para. 62, footnote 119.

[2] Para. 41.

of violation. If the measure and the claims are appropriately before the Panel under Articles 6.2, 7.1 and 21.5 of the *DSU*, the Panel should exercise caution in declining jurisdiction to hear a claim.

8. Second, the findings of the Appellate Body in respect of the jurisdiction of an Article 21.5 panel to consider claims already litigated were based on particular facts that do not apply here. Chile does not suggest that Argentina's claim has already been considered and rejected; it argues merely that Argentina could have articulated that claim earlier. Canada is not aware of any rule or precedent in the jurisprudence of the WTO that would require a Member to make all of its arguments and bring all of its claims at one time. Of course, in bringing a dispute Members should exercise good faith; a Member ought not, in principle, engage in litigation techniques such as "case splitting". But neither the *DSU* nor principles of due process enjoin an Article 21.5 panel from considering a claim on the sole ground that it could have been brought earlier.

9. Finally, Canada questions the wisdom of such an approach from a systemic perspective. For one thing, it would force a complaining Member to overburden its original submissions with any and all arguments and claims, regardless of their merit, to avoid a procedural challenge later on. This, despite the fact that the object of dispute settlement is to settle disputes, not to make claims based on a fear of later procedural challenges. For another, if the Panel allows Chile's position to succeed, it would invite highly contentious arguments before Article 21.5 panels concerning whether claims and arguments could have been made before on previous facts, and whether or not certain facts are actually new. Such an approach would constrain an Article 21.5 panel from considering claims and arguments which could not reasonably have been contemplated at the time of the original panel – and notably those based upon subsequent rulings and recommendations of the DSB.

10. Let me now turn to this case. The right of a complaining Member to raise claims and arguments based upon the rulings and recommendations of the DSB is particularly relevant here. Before the original panel, Argentina based its argument upon its position that the duties imposed through the price band system were "ordinary customs duties" within the meaning of both Article 4.2 of the *Agreement on Agriculture*, and *GATT* Article II:1(b). Argentina thus argued under the first sentence of Article II:1(b), which relates to "ordinary customs duties". The original panel found that the duties were not "ordinary customs duties", and so Article II:1(b), first sentence could not apply. Significantly, while the Appellate Body disagreed, it did not come to any conclusion as to whether the Chilean duties are in fact "ordinary customs duties". Nor did it consider it necessary to consider Article II:1(b), first sentence, since it found a violation under Article 4.2 of the *Agreement on Agriculture*.[3]

11. Argentina considers that this presents a valid ground to raise the relevance of the second sentence of Article II:1(b). Chile has argued that "[t]o entertain that claim now would seriously affect Chile's rights and would subject a case warranting a full hearing to summary and expedited proceedings".[4]

12. Canada disagrees with Chile's assessment. The application of *GATT* Article II:1(b), second sentence is a legal issue of interpretation grounded in the facts as established. There is no prejudice to Chile if the existing factual record – with consideration given to new Chilean measures – is raised in support of Argentina's claim. Further, accepting Chile's interpretation would suggest that new arguments could never be entertained in "summary and expedited proceedings" – a position clearly rejected by the Appellate Body. This is not a case involving a wholly new argument, such as *United States – Countervailing Measures Concerning Certain Products from the European Communities*

[3] *Chile – Price Band System*, Panel Report, paras. 7.55-7.60 and 7.104-7.108; Report of the Appellate Body, paras. 165, 278-287.

[4] Chilean submissions, para. 50.

(Article 21.5 – EC), where a party is seeking, for all intents and purposes, a *de novo* review.[5] Canada notes that the possibility that Article II:1(b), second sentence, could be applicable to this case was raised by the original panel on its own initiative. While that consideration was found to be outside the panel's jurisdiction by the Appellate Body, it is unreasonable now for Chile to suggest that they are taken by surprise by Argentina's argument based upon that very same sentence.

13. In the instant case, the Appellate Body found that Argentina did not articulate a claim under Article II:1(b), second sentence.[6] With no claim, there could be no finding that Argentina failed to make a *prima facie* case, much less a finding against them on this point. To now deprive Argentina of the right to bring a claim which it never previously raised, and to make that claim in respect of Chile's *new* measures, would greatly limit Members in their ability to present their strongest case, and would improperly curtail the ability of Article 21.5 panels to review fully the compliance of Members with their WTO obligations.

14. For these reasons, Canada submits that this Panel should find that it has jurisdiction to consider Argentina's claim concerning GATT Article II:1(b), second sentence. We thank the Panel, and welcome any questions that you may have.

[5] Report of the Panel (WT/DS212/RW), paras. 7.72-7.76.
[6] Report of the Appellate Body, para. 168.

ANNEX E-4*

ORAL STATEMENT BY COLOMBIA
(2 AUGUST 2006)

1. Colombia has reserved its third party rights in the case brought by Argentina against the measures taken by Chile to comply with the recommendations of the WTO Dispute Settlement Body (DSB).

2. Argentina requested that the Panel find that the new price band system applied by Chile to imports of wheat and wheat flour[1] is "inconsistent – in itself and in its application – " with Article 4.2 of the Agreement on Agriculture, with the second sentence of paragraph 1(b) of Article II of the GATT 1994, and with paragraph 4 of Article XVI of the Marrakesh Agreement Establishing the World Trade Organization.

3. For Colombia, it is clear that the complainant may not put forward new facts. The dispute comes under Article 21.5 of the Dispute Settlement Understanding (DSU), and WTO case law establishes that in such cases, the scope of DSB reports must be restricted to their express terms[2], based on the interpretation of paragraph 14 of the DSU.

4. It is also clear to Colombia that Argentina, as the complainant, bears the burden of proof with respect to Article 21.5 proceedings and that the Article 21.5 panel must rely on the relevant data submitted to it, as established in WTO case law.[3]

5. Chile maintains that the new measures adopted represent a substantial change from the previous price band system and that "as a practical consequence of changes to the system, there is no variable import levy or minimum import price", nor any similar measure which operates in this way, within the meaning of Article 4.2 of the Agreement on Agriculture.

6. The Panel's assessment must be limited exclusively to an examination of the new Chilean price band system, that is, to the measures taken by Chile to comply with the recommendations and rulings of the DSB.

7. The Appellate Body has made it clear that an import levy may vary and that this fact alone does not enable the measure to be qualified as a variable levy within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture. This is borne out by the fact that WTO Members are authorized to change their tariffs, at any time, provided that the changed tariff does not exceed bound levels. The Appellate Body has also clearly pointed out that the presence of a formula causing automatic and continuous variability of duties is a necessary, but by no means a sufficient, condition for a particular measure to be a "variable import levy" within the meaning of footnote 1.

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* Annex E-4 contains the oral statement by Colombia. This text was originally submitted in Spanish by Colombia.

[1] Law 19.897 and Exempt Decree No. 831/2003.

[2] "14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[8] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

[3] The Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)* determined that the examination of "measures taken to comply" is based on the relevant facts proved, by the complainant, in the Article 21.5 panel proceedings: "We add also that the examination of "measures taken to comply" is based on the relevant facts proved, by the complainant, to the Article 21.5 panel, during the panel proceedings".

8. The Appellate Body has also pointed out that import levies have additional features which include "a lack of transparency and a lack of predictability" in the level of duties that result from such measures. In the opinion of the Appellate Body, such features are liable to restrict the volume of imports and distort the prices of imports by impeding the transmission of international prices to the domestic market.

9. In this context, Chile's new system contained a number of changes, including: (i) the abolition of the formula that discarded the highest and lowest 25 per cent of the prices observed, (ii) the elimination of discretion in the determination of import costs, (iii) the use of f.o.b. values in the different parameters of the system and (iv) express identification of relevant markets for the purpose of determining the reference price. In Colombia's opinion, these changes help make the Chilean price band system more transparent and predictable.

10. The Appellate Body also refers to the following definition given by the Panel: "[these] 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". In this connection, Chile's new mechanism uses the system's parameters to calculate the customs duties that will be applied on the transaction value and not on a minimum price.

ANNEX E-5

ORAL STATEMENT BY THE EUROPEAN COMMUNITIES (2 AUGUST 2006)

I. INTRODUCTION

1. Mr. Chairman, Distinguished Members of the Panel, the European Communities ("EC") would like to thank the Panel for this opportunity to submit observations on the present dispute.

2. As is customary, the EC will refrain from analysing in detail the facts of this case, and from applying the law to those facts. The EC will present its views on a number of issues which raise systemic concerns. It will first consider the appropriate interpretation of Article 4.2 of the *Agreement on Agriculture*. Thereafter, it examines the extent to which a complainant may raise new claims in an Article 21.5 proceeding.

II. INTERPRETATION OF ARTICLE 4.2 OF THE *AGREEMENT ON AGRICULTURE*

3. The task of the Panel is to determine whether the revised Price Band System (PBS) is consistent with Article 4.2 of the *Agreement on Agriculture*. In order to prevail, Argentina must convince you that the revised PBS is a measure which would have been required to be converted into ordinary customs duties. The revised PBS will not be such a measure unless it can be shown to be "a similar border measure" to "variable import levies" or "minimum import prices".

4. As you are well aware, the Appellate Body has had occasion to examine these terms. The Appellate Body concluded that a "variable import levy" had the following characteristics:

- Continuous variation;
- Automatic variation;
- A lack of transparency; and,
- A lack of predictability.[1]

5. The Appellate Body emphasised that the first two of these conditions were *necessary* characteristics but that they were not *sufficient* in themselves.[2] This can only be taken as meaning that at least all four conditions must be present for a variable import levy to exist. Of course here, the Panel is tasked with analysing whether a measure *similar* to a variable import levy is being maintained by Chile. In the words of the Appellate Body, the measure being examined must "share sufficient features" with a variable import levy before it can be considered "similar".[3]

6. The EC must express a certain amount of sympathy with the Panel and the main parties to this dispute. Defining how "continuous" the variation must be, how "automatic" it should be, and whether the measure is sufficiently "transparent" or "predictable" is no easy task. Once defined, deciding whether there is sufficient sharing of features so as to make the measure "similar" is again far from clear. Unfortunately, as currently framed, there is little which is transparent or predictable about this test. Nevertheless, in the view of the EC, the high standards Argentina is asking you to set for this test

[1] Appellate Body Report, *Chile – Price Band System*, paras. 233 and 234.
[2] Ibid. para. 234.
[3] Ibid. para. 239.

are not supported by the text of Article 4.2 *Agreement on Agriculture*. To give one concrete example, the "transparency" obligation does not, in the view of the EC, require a WTO Member to explain why it chose particular reference prices, provided it explains what those prices are.

7. Argentina's attempt to load obligations onto the back of Article 4.2 should be kept carefully in context. It should be recalled that the *Agreement on Agriculture* is the start of a reform process in the field of international agricultural trade, intended eventually to bring the obligations on agricultural products in line with those applicable to industrial products. The scope of Article 4.2 should not be expanded into a soul-searching transparency exercise, or a blunt instrument intended to prohibit alleged "disconnects" between international and domestic prices. This is particularly the case when no such requirements exist under the law applicable to trade in industrial goods, and when such requirements clearly go beyond those features distinctive to the types of measures brought under the scope of Article 4.2.

8. The EC starts its analysis by recalling that the Appellate Body has determined that GATT 1994 does not regulate the type of duties which can be imposed. In *Argentina – Footwear* the Appellate Body held that Argentina could apply a specific duty provided that the *ad valorem* equivalent of that specific duty did not exceed the bound rate (which was expressed in *ad valorem* form).[4] That case concerned a specific duty calculated on the basis of a "representative international price". Members are thus in a position to apply different types of duties. They can calculate such duties in a number of different manners without acting inconsistently with GATT 1994. A Member may even decide a particular tariff on the basis of no form of calculation – other than a non-arithmetical political or economic one. Further, as the Appellate Body recognised, varying a duty is a common occurrence and a perfectly legal one at that. To provide a concrete example, it is perfectly legal for a WTO Member to review, from time-to-time, an applied duty, and to adjust it in the light of market developments (i.e. to increase the duty as international prices decrease), provided of course the Member stays within its bound levels.

9. Given variations of tariffs, the transparency of the calculation of the tariff, the predictability of the moment of the change of the tariff (provided there is appropriate publication) and frequent variation of the tariff are not regulated by the GATT the question arises as to when such elements are such as to give rise to an inconsistency with Article 4.2 of the *Agreement on Agriculture*. In the view of the EC, it is only when the measures clearly have sufficient similarity to measures coming under the scope of Article 4.2 - that is features unique to the measures listed in the footnote to Article 4.2 are also found in the measures challenged - that there is a possible violation of Article 4.2. The existence of features which are not unique to the measures found under Article 4.2 cannot be sufficient, on their own, to render a measure inconsistent with Article 4.2.

10. The Appellate Body stressed that the variation in the amount of the duties had to be "continuous". What amounts to a "continuous" variation is not clear. In the original case, neither Argentina nor Chile disputed that the variation was continuous. In the original PBS, the variation in the amount of the duties occurred every week, i.e. 52 times a year. In the revised PBS, the variation takes place every two months, i.e. six times a year. The EC has considerable difficulty in describing a variation which takes place so infrequently as "continuous."

11. The criterion of automaticity is likewise far from clear. A variation in a duty could be brought about automatically in the sense that no legislative or executive action is required to vary the duty. If the executive has no discretion, but yet still has to act in order to vary the duty, and the nature of the variation in the duty is determined by a formula, then it is hard to describe that variation of the duty as anything other than automatic.

[4] See, Appellate Body Report, *Argentina – Footwear (EC)*, para. 55.

12. As already noted, the key features of a variable import levy are the continuous and automatic variation, and a lack of transparency and predictability. The EC considers that for a measure to be "similar" to such a measure, it must display all of these features. If these first conditions are met, the question then arises as to how untransparent and how unpredictable the measure must be, and whether other criteria also have to be met. The EC submits that provided all the elements of the calculation are published, and if all of the data used is publicly available, then the system is both transparent and predictable because an interested economic operator will be in a position to predict the nature of a change in the amount of the duties – where that is necessary because a change is pending. In particular, in the view of the EC, it is not necessary that transparency extend to why a particular market has been chosen to calculate representative prices, provided it is clear what prices are to be used.

13. Both Argentina and Brazil make a great deal of an alleged "disconnect" between domestic Chilean and international prices. The Appellate Body never explicitly addressed the weight, if any, to be given to this issue. In the view of the EC, the Panel should be very cautious in approaching this issue. It is a feature of tariffs to soften the impact of, or disconnect international prices from domestic markets. This is the effect of any tariff, whether specific or *ad valorem*. The extent of the softening or disconnect varies from case to case. Further, the extent of the softening can be adjusted, either by varying an applied tariff within the limits of bindings or even by undertaking Article XXVIII negotiations. So, in the view of the EC, decisive weight cannot be given to the existence of any disconnect or softening in assessing consistency with Article 4.2, since the extent of such a disconnect or softening will always be a relative analysis. For these reasons, the EC suggests that extreme caution be used in analysing this issue.

14. In terms of conclusion on Article 4.2, the EC would like to stress than in its view, for a measure similar to a measure listed in the footnote of Article 4.2 to exist, the measure must exhibit all of the features identified by the Appellate Body in the original dispute. That is, any duty must vary continuously and automatically, but in addition, the measure must lack transparency and predictability. In the view of the EC it is not necessary that a measure explain why certain choices have been made, provided those choices are clearly made public and are predictable. Finally, the EC is far from convinced that the question of the alleged disconnect between international and domestic price should be given anywhere near the importance it appears to have been given by Argentina.

III. SCOPE OF ARTICLE 21.5 PROCEEDINGS

15. A first observation of the EC in relation to the issues at stake under this section is that the parties do not dispute the fact that the revised price band system is a "new measure". The core of the claims on the nature of this new measure is whether it is, as the previous PBS was determined to be, a "similar border measure" inconsistent with Article 4.2 of the *Agreement on Agriculture*. In this respect, the revised PBS may also be seen as similar to the original one, but it is both formally and substantially different, and this seems undisputed.

16. On this basis, the EC generally holds the view that the mere fact that the measure is a new one globally entails the emergence of new factual circumstances and thus a broad right to bring new claims against the new measure in all its elements, irrespective of the fact that a new claim may concern an aspect or element of the new measure which was taken over from the previous regulatory framework without any formal change, provided, of course, that this element is part of "the measure taken to comply".

17. What is important then is that the new factual and legal contexts will, as a matter of principle, provoke a change in the factual circumstances – "the relevant facts" - on the basis of which the conformity or not of the new measure with any provision of the covered agreements should be analysed. Both parties have referred to the Appellate Body report in the *EC-Bed Linen* (Art 21.5

India) case, where indeed this right for a complainant in Article 21.5 proceedings to raise new claims, arguments and factual circumstances different from those raised in the original proceedings is acknowledged[5].

18. Whether the invocation by Argentina of the 1.56 conversion factor is to be construed as a new argument or as a new claim, the factual circumstances of its operation have changed with the adoption of the revised PBS, and thus the examination of its effect on the conformity of the revised PBS with Article 4.2 of the *Agreement on Agriculture* should fall within the terms of reference of this Panel.

19. As regard the claim made by Argentina relating to the second sentence of Article II:1(b) of the GATT, and in the view of the EC, what counts in this context is again the fact that the new measure (the revised PBS) has created a new set of regulatory and factual circumstances which imply that the claim is new insofar that it is directed against a different set of measures under a different set of "relevant facts". Therefore, the fact that a similar claim may have been brought against a similar measure in the original dispute should be held as irrelevant.

20. Further, the EC contends that in any case, it is not a claim from the original dispute where Argentina would have "failed to establish a prima facie case", pursuant to the standard retained by the Appellate Body in the *EC – Bed Linen (Article 21.5 India)*[6] and therefore the right to bring such a claim should not be excluded on the basis of such a precedent. Nevertheless, since the EC believes that the PBS system should be considered an ordinary customs duty, the EC has some difficulty in identifying a substantive breach of the second sentence of Article II:1(b).

IV. CONCLUSION

21. Mr. Chairman, Distinguished Members of the Panel, the EC is grateful for this opportunity to present its views and trusts they will be taken into account as you draw your own conclusions in this dispute. The EC will, of course, be happy to answer any questions which you may have. Thank you.

[5] See para. 79 of the Appellate Body's report.
[6] Para. 96.

ANNEX E-6

ORAL STATEMENT BY THAILAND
(2 AUGUST 2006)

I. INTRODUCTION

Mr. Chairman and Members of the Panel,

1. Thailand appreciates the opportunity to participate in this proceeding and to present its views on this matter to the Panel today.

II. COMMENTS

2. Thailand believes that the task before this Panel is simple and straightforward. As the Appellate Body expressed in *Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU* (DS70), the standard for an Article 21.5 panel is to examine whether a revised measure is in conformity with WTO rules.[1] The Appellate Body subsequently refined this standard in *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada, Recourse by Canada to Article 21.5 of the DSU* (DS257), emphasizing the express link contained in Article 21.5 between "measures taken to comply" and the recommendations and rulings of the Dispute Settlement Body (DSB).[2]

3. Therefore, the task before you is to examine the WTO-consistency of the revised price band measures taken by Chile taking into account the DSB recommendations and rulings in the original dispute.

4. In that dispute, both the Panel and the Appellate Body found that Chile's price band system was inconsistent with Article 4.2 of the Agreement on Agriculture and made simple and straightforward recommendations and rulings: Chile must bring its price band system into conformity with Article 4.2 of the Agreement on Agriculture, which requires Members to not "maintain . . . any measures of the kind which have been required to be converted into ordinary customs duties."[3] In this regard, the Appellate Body found Chile's price band system to be a border measure of such kind, and in particular, similar to, *inter alia*, a variable import levy.[4] The Appellate Body further found that the right of WTO Members to maintain such a measure, including that of Chile, ended from the date of entry into force of the WTO Agreement.[5]

Mr. Chairman and Members of the Panel,

5. Chile claims to have ended its WTO-inconsistent price band system through the instigation of Law No. 19.897 of 2003. This new law introduces some changes to Chile's price band system. For example, it narrows the scope of the system by excluding edible vegetable oils, it establishes the price

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[1] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/R, paras. 36 and 41.

[2] 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/R, para. 68.

[3] Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, paras. 288-289.

[4] *Ibid*, paragraph 238.

[5] *Ibid*, paragraph 212.

band's floor and ceiling prices for 11 years (albeit with annual adjustments) as opposed to on an annual basis, and it determines the reference price on a bi-monthly basis instead of a weekly one.[6]

6. However, Thailand is of the view that despite these changes, the WTO-inconsistent price band system is well and alive. As Argentina has clearly demonstrated, the fundamental elements of the illegal system remain in place. Firstly, the total duties applicable still comprise ad valorem and specific duties, like its predecessor. Secondly, the calculation of the specific duty still involves the comparison of the floor and ceiling of the price band to a reference price, all of which are determined in a non-transparent manner (albeit on a less frequent basis). Thirdly, because duties under the new system continue to vary depending on price fluctuations, under Law No. 19.897 of 2003 Chile still maintains a variable import levy prohibited by Article 4.2 of the Agreement on Agriculture. In effect, Chile's maintenance of the price band system resulting in a variable import levy undermines an essential goal of the Agreement on Agriculture, namely, to ensure that market access commitments on agricultural products are secure, transparent and predictable for traders.

7. Thailand will not examine in detail the precise elements or formula of Chile's new price band system to demonstrate that it is a variable import levy. We consider that Argentina has already undertaken a thorough and comprehensive analysis in this regard. We also take no view on other issues subject to the review of this Panel. Suffice it to say that Thailand fully supports Argentina's assertion that Chile's implementing measures fail to bring it into compliance because they maintain a price band system in violation of Chile's obligations under the Agreement on Agriculture in much the same way as their predecessor did.

III. RECOMMENDATION

Mr. Chairman and Members of the Panel,

8. Article 11 of the DSU provides that one of the functions of panels is to make findings that will assist the DSB in making recommendations. In addition, DSU Article 3.7 establishes that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute". In light of these provisions, and to avoid infinite compliance procedures, Thailand strongly believes that this Panel should find that any price band system resulting in the application of customs duties that vary depending on the fluctuations of international prices constitutes a mechanism leading to the imposition of variable import levies, a border measure that is prohibited under Article 4.2 of the Agriculture Agreement. Thailand thus believes that this Panel should recommend Chile to withdraw its price band system in order to act consistently with the covered agreements, to implement the DSB recommendations and rulings in the original dispute, and to provide a positive solution to this dispute.

IV. CONCLUSION

9. Thailand hopes that these views will assist the Panel in considering the issues brought before it. Again, we thank you for this opportunity to appear before you today.

[6] First Written Submission of Argentina, 19 April 2006, paras. 8, 33, and 38.

ANNEX E-7

ORAL STATEMENT BY THE UNITED STATES
(2 AUGUST 2006)

1. Mr. Chairman and Members of the Panel, the United States is pleased to present its views as a third party in this Article 21.5 proceeding.

2. As the Panel knows, the United States was not in a position to make written submissions prior to this meeting. As a result, our statement today is effectively our only opportunity to present our views to the Panel, and it is therefore longer than it might otherwise have been. We thank the Panel and the other delegations present today, in advance, for their attention to these comments.

3. This proceeding concerns the modifications that Chile has made to its price band system, a measure found to have been inconsistent with Article 4.2 of the *Agreement on Agriculture*.[1] Argentina argues that the modified system is inconsistent, as such and as applied to imports of wheat and wheat flour, with three WTO provisions: (1) Article 4.2 of the *Agreement on Agriculture*; (2) the second sentence of Article II:1(b) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"); (3) and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*.[2] The United States would like to offer some observations today on the first two of these claims. As for the third claim, we note simply that it is a derivative claim dependent upon a finding of inconsistency on the basis of one or both of the first two claims.

Article 4.2 of the Agreement on Agriculture

1. The Proper Interpretive Approach

4. In this proceeding, as in the original, the central question raised by Argentina's Article 4.2 claim is whether the measure at issue is "similar" to a "variable import levy" or "minimum import price." Interpretation of the terms "variable import levy" and "minimum import price" is key to the resolution of the question presented. Pursuant to Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and as the Appellate Body explained in the original proceeding, these terms must be interpreted using the customary rules of interpretation of public international law,[3] in particular, according to their ordinary meaning, in their context, and in the light of the object and purpose of the WTO agreements.

5. The United States thus cannot support Chile's assertion that, in the absence of any definition for the terms "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."[4] It is of course correct that the issue before this compliance Panel involves the findings of

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[1] *See* Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted as modified 23 October 2002, para. 8.1(a) (hereinafter "Panel Report"); Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted as modified 23 October 2002, para. 288(c)(iii) (hereinafter "Appellate Body Report").

[2] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse by Argentina to Article 21.5*, First Written Submission by Argentina, para. 2 (19 April 2006) (hereinafter "Argentina First Written Submission")

[3] Appellate Body Report, para. 231.

[4] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse by Argentina to Article 21.5*, Chile Rebuttal Submission, para. 4 (24 May 2006) (hereinafter "Chile Rebuttal Submission") (emphasis added).

the Panel and Appellate Body in the original proceeding, because Article 21.5 of the DSU concerns the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the Dispute Settlement Body. However, the Appellate Body has also explained, in the *Canada – Aircraft* Article 21.5 proceeding, that "the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute."[5]

6. Chile's argument appears to be that: (a) in the original proceeding, the Appellate Body identified only "specific (and thus limited) features"[6] of the price band system as being the "fundamental and central aspects" that "made the [system] a measure similar to a variable import levy or minimum import price;"[7] and (b) "Chile dealt with those 'certain features' identified, analysed and questioned by the Appellate Body."[8]

7. The United States disagrees with Chile's premise (a). To the contrary, the Appellate Body expressly *rejected* any attempt to assess the WTO-consistency of the original price band system based on whether it shared characteristics of a "fundamental" nature with variable import levies and minimum import prices.[9] According to the Appellate Body: "[t]his merely complicates matters, because it raises the question of how to distinguish 'fundamental' characteristics with those of a *less than* 'fundamental' nature."[10]

8. The Appellate Body endorsed, instead, a comprehensive analysis, using as the point of departure the ordinary meaning of the terms "variable import levies" and "minimum import prices" in their context, and in light of the object and purpose of the WTO agreements.[11] The Appellate Body's analysis resulted in a finding that though there were "some dissimilarities between Chile's price band system and the features of 'minimum import prices' and 'variable import levies' ... *the way Chile's system is designed, and the way it operates in its overall nature*, are sufficiently 'similar' to the features of both those two categories of prohibited measures to make Chile's price band system – in its particular features – a 'similar border measure' within the meaning of footnote 1 to Article 4.2."[12]

9. An assessment of the modified measure in this Article 21.5 proceeding requires the same comparison of the price band system, as it is designed and as it operates in its overall nature, to variable import levies and minimum import prices. It is not sufficient merely to compare the original and modified price band systems to determine whether Chile has addressed the "certain features" of the former that allegedly are "fundamental."

2. The Modified Price Band System Appears to be "Similar" To A Variable Import Levy and a Minimum Import Price Within the Meaning of Article 4.2 of the Agreement on Agriculture

10. Although Chile asserts that it has changed the price band system in such a way as to render it WTO-consistent, it appears that Chile's modified price band mechanism continues to vary the applicable duty based on the difference between a floor price and a calculated reference price. Chile appears just to have modified somewhat the way in which those parameters are determined. The price band system with these modifications would therefore still appear to be a measure similar to variable

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[5] 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 4 August 2000, para. 41.
[6] Chile Rebuttal Submission, para. 19.
[7] Chile Rebuttal Submission, para. 28.
[8] Chile Rebuttal Submission, para. 6.
[9] Appellate Body Report, para. 226.
[10] Appellate Body Report, para. 226 (emphasis in original).
[11] Appellate Body Report, para. 232.
[12] Appellate Body Report, para. 252 (emphasis added).

import levies and minimum import prices within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture.*

(*a*) *Variable Import Levy*

11. Examining the ordinary meaning of the term "variable import lev[y]" in light of its context, and the object and purpose of the agreements, the Appellate Body explained that a "variable import levy" is a "duty, tax, charge or other exaction" "assessed upon importation" that is "liable to vary."[13] Further, given the context in which the term is used in footnote 1 of Article 4.2, the Appellate Body clarified that the variability must be intrinsic to the measure itself, for example, because of the incorporation into the measure of a "scheme or formula that causes and ensures that levies change automatically and continuously."[14] Apart from these elements, the Appellate Body noted that a common feature of variable import levies is "a lack of transparency and lack of predictability in the level of duties that will result from such measures."[15] The Appellate Body indicated that a measure "similar" to variable import levies would also share that feature.[16]

12. Chile's modified price band system would appear to be a measure similar to variable import levies under this reasoning. The price band duty under the modified system is a "duty, tax, charge or other exaction" "assessed upon importation." Moreover, Chile's Law No. 19.897 sets out a formula that must be applied by the Chilean Executive every two months to establish a new amount of duty under the price band system. In the case of wheat, this duty is the (positive) difference between a reference price and the floor price "multiplied by a factor of one (1), plus the general *ad valorem* duty in force" for wheat.[17] In the case of wheat flour, it is the duty determined using the formula for wheat multiplied by a factor of 1.56.[18] The price band duty is, thus, "liable to vary" because of an intrinsic "formula that causes and ensures that levies change automatically and continuously."

13. Chile has argued that the price band duty has ceased varying "continuously" because it now changes once every two months, rather than once every week as it did under the original price band system. We cannot discern, nor has Chile identified, a basis for such a distinction to be drawn.

14. Similarly, the fact that Chile has added a new administrative requirement that the Chilean Executive publish the amount of the price band duty in a Ministry of Finance Decree at the start of every two-month period does not alter the conclusion that the price band duty varies "automatically" because of the formula set out in Law No. 19.897. Chile correctly notes the Appellate Body's clarification that "[t]o 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."[19] However, it is not clear how simply interjecting a layer of clerical tasks could break the link between the formula established as part of the price band system and the level of the duties automatically calculated through its application.

15. As for the Appellate Body's observation that a common feature of variable import levies is "a lack of transparency and lack of predictability *in the level of duties that will result from such measures,*"[20] we note that it is not just any "lack of transparency" and "lack of predictability" that is of

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[13] Appellate Body Report, paras. 232-233.
[14] Appellate Body Report, paras. 233.
[15] Appellate Body Report, para. 234 (emphasis added).
[16] Appellate Body Report, paras. 234 and 246-252.
[17] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse by Argentina to Article 21.5*, First Written Submission by Chile, para. 17 (3 May 2006) (hereinafter "Chile First Written Submission")
[18] Chile First Written Submission, para. 17.
[19] *See* Chile Rebuttal Submission, para. 100 (quoting Appellate Body Report, para. 233)
[20] Appellate Body Report, para. 234 (emphasis added).

concern. Rather, it is a "lack of transparency" or "lack of predictability" regarding "the level of duties that will result from such measures." It is not clear to us that this aspect of "transparency" is being addressed in the debate between the parties on issues of transparency relating to other aspects of the price band system.

16. When one looks at Chile's modified price band system and variable import levies from the standpoint of an exporter, the measures do seem to be similar in the lack of transparency and predictability in the level of the duties resulting from their application. In both cases, the lack of transparency and predictability results from the complex nature of the mechanism applied to determine the level of the duties and the fact that it may be difficult to ascertain – if not impossible to know ahead of time – all of the elements necessary to determine the precise level of duties.

17. To illustrate, consider the fact that to determine the level of the duty under Chile's modified price band system, it is necessary to know the reference price that will be compared to the price band threshold. The reference price consists of "the average of the daily international wheat prices recorded in the markets most relevant to Chile over a period of 15 calendar days counted backwards from the [bi-monthly] date set out in Regulation No. 831 for each decree establishing specific duties."[21] Unless an exporter sells, ships, and lands the shipment within the current two-month window – which would be unusual, according to Argentina, as a "*majority* of sales are made under forward contracts"[22] – the exporter will simply not know the level of the duty that will apply to its exports.[23]

18. Chile attempts to minimize this result by arguing that wheat traders could use futures contracts prices and their "own skills in predicting prices" to try to determine what the reference prices might be in the future.[24] The same assertion, however, could be made about variable import levies – and yet, all agree that those measures are within the ambit of Article 4.2 of the *Agreement on Agriculture*. The United States submits that the question is not whether a trader can attempt to make an educated guess as to what the level of the duty might be. Rather, the question is whether a trader can "*know* and ... *reasonably predict* what the amount of duties will be" in much the same way as if an ordinary customs duty were in place.[25] As the Appellate Body explained, in the absence of that kind of transparency and predictability about the level of the duties, there is a danger that exporters will not ship to the market in question, which will impede the transmission of international prices to the domestic market.[26]

(*b*) *Minimum Import Price*

19. Turning next to the question of whether the modified price band system is similar to a minimum import price, it would appear that there has been little change to the price band system that would make it any *less* similar to a minimum import price now than it was before.

20. Chile asserts that "minimum import price schemes generally operate in relation to the actual transaction value of ... imports."[27] However, neither the original price band system nor the modified system calculates duties by reference to actual transaction prices. Rather, both use as the reference price the price for a certain quality of wheat in the foreign "markets of concern." Chile argues that because "the reference price [in the modified price band system] has nothing to do with the

[21] Chile First Written Submission, para. 30.
[22] Argentina First Written Submission, para. 275 (emphasis in original).
[23] Argentina First Written Submission, para. 275.
[24] Chile First Written Submission, paras. 158-163.
[25] Appellate Body Report, para. 234 (emphasis added).
[26] Appellate Body Report, para. 234.
[27] Chile Rebuttal Submission, para. 139.

transaction value" the system is "neither a minimum import price nor similar to one."[28] However, this distinction did not preclude a finding of "similarity" in the original proceeding,[29] and it is not clear why it would do so now.

21. We also question whether the analysis of similarity to a minimum import price system is affected by the fact that the price band thresholds are expressed in Law No. 19.589 in "FOB terms," rather than as a "minimum import price," "a CIF price," or "an entry price."[30] If so, a Member could avoid the obligations of Article 4.2 of the *Agreement on Agriculture* by maintaining a minimum import price (or a measure similar to one) and simply labelling the threshold price as something other than a "minimum import price," "a CIF price," or "an entry price."

(c) "Sustaining" an entry price, internal price, or an administratively determined price above the domestic price

22. Finally, Chile makes a general argument regarding the alleged "fundamental characteristics" of variable import levies and minimum import prices that we would like to address. Specifically, Chile argues that a "fundamental characteristic" of these measures is the intent "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."[31] Chile cites, as the basis for this assertion, a listing of "fundamental characteristics of variable import levies and minimum import price" from the Panel Report in the original proceeding, which the Panel said it had "distilled from the pre-Uruguay Round notifications and examination thereof by the GATT Contracting Parties."[32]

23. Chile argues that since the two prices compared to determine the price band duty – the modified floor and reference price – are not the exact same as the ones used in the case of variable import levies and minimum import prices according to the Panel's list, "the current parameters do not possess any of the fundamental characteristics which the WTO itself has defined and discussed for" those two categories of measures."[33] Chile concludes that, "[t]herefore, the Chilean system established by Law 19.897 and its Regulations is not inconsistent with ... Article 4.2."[34]

24. We note that the Appellate Body agreed with the arguments that Chile advanced in the original proceeding, that it is not useful to endorse certain characteristics "as being of a 'fundamental' nature."[35] Instead of endorsing the kind of assessment that Chile is now urging of "fundamental characteristics," the Appellate Body conducted an analysis involving an examination of the ordinary meaning of the terms "variable import levy" and "minimum import price" in their context, and in light of the object and purpose of the agreements.[36] There is no reason why the same approach should not be used here.

Article II:1(b) of the GATT 1994

25. The Appellate Body has explained that, if the price band system is found to be inconsistent with Article 4.2 of the *Agreement on Agriculture*, it is not necessary to consider whether the price band system also results in a breach of Article II:1(b) of the GATT 1994. "This is because a finding

[28] Chile Rebuttal Submission, para. 160.
[29] Appellate Body Report, para. 248, 252.
[30] Chile Rebuttal Submission, para. 140.
[31] Chile Rebuttal Submission, para. 117.
[32] Panel Report, para. 7.37-7.37.
[33] Chile Rebuttal Submission, para. 123.
[34] Chile Rebuttal Submission, para. 123.
[35] Appellate Body Report, para. 230.
[36] Appellate Body Report, para. 231.

that Chile's price band system as such is a measure prohibited by Article 4.2 would mean that the duties resulting from the application of that price band system *could no longer be levied*—no matter what the level of those duties may be. Without a price band system, there could be no price band duties."[37] Applying this reasoning, we believe that this Panel can properly end its analysis in this proceeding with a finding under Article 4.2 of the *Agreement on Agriculture*.

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26. This concludes the oral statement of the United States. Thank you for your attention.

[37] Appellate Body Report, para. 190.