

# CHILE – PRICE BAND SYSTEM<sup>1</sup>

(DS207)

| PARTIES     |           | AGREEMENTS                       | TIMELINE OF THE DISPUTE     |                   |
|-------------|-----------|----------------------------------|-----------------------------|-------------------|
| Complainant | Argentina | AA Art. 4.2<br>GATT Art. II:1(b) | Establishment of Panel      | 12 March 2001     |
|             |           |                                  | Circulation of Panel Report | 3 May 2002        |
| Respondent  | Chile     |                                  | Circulation of AB Report    | 23 September 2002 |
|             |           |                                  | Adoption                    | 23 October 2002   |

## 1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Chile's Price Band System, governed by Rules on the Importation of Goods, through which the tariff rate for products at issue could be adjusted to international price developments if the price fell below a lower price band or rose beyond an upper price band.
- **Product at issue:** Wheat, wheat flour, sugar and edible vegetable oils from Argentina.

## 2. SUMMARY OF KEY PANEL/AB FINDINGS

- **DSU Art. 11 (standard of review):** The Appellate Body reversed the Panels findings under GATT Art. II:1(b), second sentence, on the grounds that it was a claim that had not been raised by Argentina in its panel request or any subsequent submissions, and the Panel, by assessing a provision that was not part of the matter before it, acted *ultra petita* and in violation of DSU Art. 11. The Appellate Body also stated that consideration by a panel of claims not raised by the complainant deprived Chile of its due process rights under the DSU.
- **AA Art. 4.2, footnote 1 (market access):** The Appellate Body reversed the Panel's findings that the term "ordinary customs duty" was to be understood as referring to "a customs duty which is not applied to factors of an exogenous nature" and Chile's price band system was not an "ordinary customs duty", as it was assessed on the basis of exogenous price factors. The Appellate Body however upheld the Panel's finding that Chile's price band system was designed and operated as a border measure sufficiently similar to "variable import levies" and "minimum import prices" within the meaning of footnote 1 and therefore prohibited by Art. 4.2. Thus, the Appellate Body concluded that Chile's price band system was inconsistent with Art. 4.2.

## 3. OTHER ISSUES<sup>2</sup>

- **Panel's terms of reference:** The Appellate Body stated that it was appropriate to rule on the Chile Price Band System as it currently stood, taking into account the amendments enacted after the establishment of the Panel, on the grounds that the Panel request was broad enough to cover future amendments and that the amendment did not change the essence of the measure under challenge. The Appellate Body also added that ruling on the Chile Price Band System currently in place would be in line with its obligations under DSU Arts. 3.4 and 3.7 to secure a positive solution of the dispute at hand.

<sup>1</sup> Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products

<sup>2</sup> Other issues addressed: Working Procedure Appellate Review Rule 20(2)(d); passive observers; "subsequent practice" (VCLT Art. 31.3(b)).

# CHILE – PRICE BAND SYSTEM (ARTICLE 21.5 – ARGENTINA)<sup>1</sup>

## (DS207)

| PARTIES     |           | AGREEMENTS  | TIMELINE OF THE DISPUTE        |                 |
|-------------|-----------|---|--------------------------------|-----------------|
| Complainant | Argentina | AA Art. 4.2<br>GATT Art. II:1(b), second sentence<br>WTO Agreement Art. XVI:4 | Referred to the Original Panel | 20 January 2006 |
|             |           |   | Circulation of Panel Report    | 8 December 2006 |
| Respondent  | Chile     |   | Circulation of AB Report       | 7 May 2007      |
|             |           |   | Adoption                       | 22 May 2007     |

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- The amended price band system applied by Chile, under which the total amount of duties imposed on imports of wheat, wheat flour and sugar would vary, through the imposition of additional specific duties or through the concession of rebates on the amounts payable. When the reference price determined by the Chilean authorities fell below the lower threshold of a price band, a specific duty was added to the the *ad valorem* most-favoured-nation tariff. Conversely, when the reference price was higher than the upper threshold of the price band, imports would benefit from a duty rebate.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- AA Art. 4.2 (market access – conversion of certain measures into ordinary customs duties):** The Panel found that the amended price band system continued to be a border measure similar to a variable import levy and a minimum import price and was therefore inconsistent with Art. 4.2 of the Agreement on Agriculture. This finding was upheld by the Appellate Body.
- GATT Art. II:1(b) (schedules of concessions):** Having found that the amended price band system was inconsistent with AA Art. 4.2, the Panel considered that an additional finding on GATT Art. II:1(b) was not needed in order to resolve the dispute, and consequently exercised judicial economy. Noting the extended arguments of the parties on this issue, however, the Panel made some general observations regarding the issue of the proper mandate of a compliance Panel.
- WTO Agreement Art. XVI:4 (WTO conformity of laws, regulations and administrative procedures):** In view of its determination under AA Art. 4.2, the Panel considered that an additional finding on the amended price band system under WTO Agreement Art. XVI:4. was not needed and therefore exercised judicial economy.
- The Panel accordingly concluded that Chile had failed to implement the recommendations and rulings of the DSB in the original dispute. This finding was also upheld by the Appellate Body.

### 3. OTHER ISSUES

- Terms of reference (DSU Art. 21.5 panels):** In an unappealed section of its report, the Panel advanced some general observations regarding the issue of the proper mandate of a WTO compliance Panel under DSU Art. 21.5. The Panel suggested that, while a compliance panel may consider new claims not raised before the original panel, in order for those new claims to be “properly put” before such compliance panel, three conditions must be present: (i) the claim is identified by the complainant in its request for the establishment of the compliance panel; (ii) the claim concerns a new measure, adopted by the respondent allegedly to comply with the recommendations and rulings of the DSB; and (iii) the claim does not relate to aspects of the original measure that remain unchanged in the new measure and were not challenged in the original proceedings or, if challenged, were addressed in those proceedings and not found to be WTO-inconsistent.

<sup>1</sup> Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina