1 ARTICLE 4

1.1 Text of Article 4

Article 4

Market Access

1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein.

2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.

> (*footnote original*)[1] These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

1.2 General

1.2.1 Purpose of Article 4

1. In *Chile – Price Band System*, the Appellate Body explained the background of the negotiations which produced the text of Article 4, "which is the main provision of Part III of the *Agreement on Agriculture*", and indicated that Article 4 "is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products":

> "[W]e turn now to Article 4, which is the main provision of Part III of the *Agreement on Agriculture*. As its title indicates, Article 4 deals with 'Market Access'. During the course of the Uruguay Round, negotiators identified certain border measures which have in common that they restrict the volume or distort the price of imports of agricultural products. The negotiators decided that these border measures should be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. Thus, they envisioned that ordinary customs duties would, in principle, become the only form of border protection. As ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers, they are also more easily compared between trading partners, and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations. The Uruguay Round negotiators agreed that market access would be improved—both in the short term and in the long term—through bindings and reductions of tariffs and minimum access requirements, which were to be recorded in Members' Schedules.
>
> Thus, Article 4 of the *Agreement on Agriculture* is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products."[1]

1.3 Article 4.1

2. In *EC – Bananas III*, the Appellate Body upheld the Panel's finding that Article 4.1 cannot be interpreted so as to allow an inconsistency with GATT Article XIII of the European Communities import scheme for bananas:

> "[W]e do not see anything in Article 4.1 to suggest that market access concessions and commitments made as a result of the Uruguay Round negotiations on agriculture can be inconsistent with the provisions of Article XIII of the GATT 1994. There is nothing in Articles 4.1 or 4.2, or in any other article of the *Agreement on Agriculture*, that deals specifically with the allocation of tariff quotas on agricultural products. If the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly. The *Agreement on Agriculture* contains several specific provisions dealing with the relationship between articles of the *Agreement on Agriculture* and the GATT 1994. For example, Article 5 of the *Agreement on Agriculture* allows Members to impose special safeguards measures that would otherwise be inconsistent with Article XIX of the GATT 1994 and with the *Agreement on Safeguards*. In addition, Article 13 of the *Agreement on Agriculture* provides that, during the implementation period for that agreement, Members may not bring dispute settlement actions under either Article XVI of the GATT 1994 or Part III of the *Agreement on Subsidies and Countervailing Measures* for domestic support

[1] Appellate Body Report, *Chile – Price Band System*, paras. 200-201.

> measures or export subsidy measures that conform fully with the provisions of the *Agreement on Agriculture*. With these examples in mind, we believe it is significant that Article 13 of the *Agreement on Agriculture* does not, by its terms, prevent dispute settlement actions relating to the consistency of market access concessions for agricultural products with Article XIII of the GATT 1994. As we have noted, the negotiators of the *Agreement on Agriculture* did not hesitate to specify such limitations elsewhere in that agreement; had they intended to do so with respect to Article XIII of the GATT 1994, they could, and presumably would, have done so. We note further that the *Agreement on Agriculture* makes no reference to the *Modalities* document or to any 'common understanding' among the negotiators of the *Agreement on Agriculture* that the market access commitments for agricultural products would not be subject to Article XIII of the GATT 1994."[2]

1.4 Article 4.2

1.4.1 "any measures which have been required to be converted into ordinary customs duties"

3. In *Chile – Price Band System*, the Appellate Body interpreted the ordinary meaning of the phrase "measures which have been required to be converted into ordinary customs duties", in its context and in light of its object and purpose. The Appellate Body first focused on the present perfect tense in that phrase ("have been required") and found:

> "Article 4.2 of the *Agreement on Agriculture* should be interpreted in a way that gives meaning to the use of the present perfect tense in that provision—particularly in the light of the fact that most of the other obligations in the *Agreement on Agriculture* and in the other covered agreements are expressed in the present, and not in the present perfect, tense. In general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present. As used in Article 4.2, this temporal connotation relates to the date *by which* Members had to convert measures covered by Article 4.2 into ordinary customs duties, as well as to the date *from which* Members had to refrain from maintaining, reverting to, or resorting to, measures prohibited by Article 4.2. The conversion into ordinary customs duties of measures within the meaning of Article 4.2 began *during* the Uruguay Round multilateral trade negotiations, because ordinary customs duties that were to 'compensate' for and replace converted border measures were to be recorded in Members' draft WTO Schedules by the *conclusion* of those negotiations. These draft Schedules, in turn, had to be verified before the signing of the *WTO Agreement* on 15 April 1994. Thereafter, there was no longer an option to replace measures covered by Article 4.2 with ordinary customs duties in excess of the levels of previously bound tariff rates. Moreover, as of the date of entry into force of the *WTO Agreement* on 1 January 1995, Members are required not to 'maintain, revert to, or resort to' measures covered by Article 4.2 of the *Agreement on Agriculture*.
>
> If Article 4.2 were to read 'any measures of the kind which *are* required to be converted', this would imply that if a Member—for whatever reason—had failed, by the end of the Uruguay Round negotiations, to convert a measure within the meaning of Article 4.2, it could, *even today*, replace that measure with ordinary customs duties in excess of bound tariff rates.[3] But, as Chile and Argentina have agreed, this is clearly not so. It seems to us that Article 4.2 was drafted in the present perfect tense to ensure that measures that were required to be converted as a result of the Uruguay Round—but were not converted—could not be maintained, by virtue of that Article, from the date of the entry into force of the *WTO Agreement* on 1 January 1995.
>
> Thus, contrary to what Chile argues, giving meaning and effect to the use of the present perfect tense in the phase 'have been required' does not suggest that the

[2] Appellate Body Report, *EC – Bananas III*, para. 157.
[3] (*footnote original*) Bound tariffs could, however, be renegotiated pursuant to Article XXVIII of the GATT 1994.

> scope of the phrase 'any measures of the kind which have been required to be converted into ordinary customs duties' must be limited only to those measures which were *actually* converted, or were *requested* to be converted, into ordinary customs duties by the end of the Uruguay Round. Indeed, in our view, such an interpretation would fail to give meaning and effect to the word '*any*' and the phrase '*of the kind*', which are descriptive of the word 'measures' in that provision. A plain reading of these words suggests that the drafters intended to cover a broad category of measures. We do not see how proper meaning and effect could be accorded to the word 'any' and the phrase 'of the kind' in Article 4.2 if that provision were read to include only those specific measures that were singled out to be converted into ordinary customs duties by negotiating partners in the course of the Uruguay Round."[4]

4. The Appellate Body in *Chile – Price Band System* referred to the wording of footnote 1 to the Agreement on Agriculture as confirmation of its interpretation of the phrase "measures which have been required to be converted into ordinary customs duties":

> "The wording of footnote 1 to the *Agreement on Agriculture* confirms our interpretation. The footnote imparts meaning to Article 4.2 by enumerating examples of 'measures of the kind which have been required to be converted', and which Members must not maintain, revert to, or resort to, from the date of the entry into force of the *WTO Agreement*. Specifically, and as both participants agree, the use of the word 'include' in the footnote indicates that the list of measures is illustrative, not exhaustive. And, clearly, the existence of footnote 1 suggests that there will be 'measures of the kind which have been required to be converted' that were *not* specifically identified during the Uruguay Round negotiations. Thus, in our view, the illustrative nature of this list lends support to our interpretation that the measures covered by Article 4.2 are not limited only to those that were *actually* converted, or were requested to be converted, into ordinary customs duties during the Uruguay Round.
>
> Footnote 1 also refers to a residual category of 'similar border measures other than ordinary customs duties', which indicates that the drafters of the Agreement did not seek to identify all 'measures which have been required to be converted' during the Uruguay Round negotiations. The existence of this residual category confirms our interpretation that Article 4.2 covers more than merely the measures that had been specifically identified or challenged by other negotiating partners in the course of the Uruguay Round."[5]

5. The Appellate Body in *Chile – Price Band System* further indicated that the context of Article 4.2 confirms its interpretation. In this regard, the Appellate Body referred to Article 5.1 as an illustration that the phrase "have been required to be converted" in Article 4.2 is broader in scope than the phrase "have been converted" in Article 5.1:

> "[T]he context of Article 4.2 confirms our interpretation. Article 5.1 of the *Agreement on Agriculture*, the only provision in addition to Article 4 that is included in Part III of that Agreement, specifies that a Member may, under certain conditions, impose a special safeguard on imports of an agricultural product 'in respect of which measures referred to in [Article 4.2] *have been converted* into an ordinary customs duty'. (emphasis added) In our view, the phrase 'have been required to be converted' in Article 4.2 has a broader connotation than the phrase 'have been converted' in Article 5.1.[6] Therefore, it is perfectly apt that Article 5.1 speaks of such special safeguards only with respect to those agricultural products for which measures covered by Article 4.2 'have been converted'—that is, have in fact already been converted—into ordinary customs duties. Article 5.1 illustrates that, where the drafters of the *Agreement on Agriculture* wanted to limit the application of a rule to measures that have *actually* been converted, they used specific language expressing that limitation.

[4] Appellate Body Report, *Chile – Price Band System*, paras. 206-208.
[5] Appellate Body Report, *Chile – Price Band System*, paras. 209-210.
[6] *(footnote original)* In this context, we note that a special safeguard can be imposed only on those agricultural products for which a Member has reserved its right to do so in its Schedule.

…

> [T]he existence of a market access exemption in the form of a special safeguard provision under Article 5 implies that Article 4.2 should *not* be interpreted in a way that permits Members to maintain measures that a Member would not be permitted to maintain *but for* Article 5, and, much less, measures that are even more trade-distorting than special safeguards. In particular, if Article 4.2 were interpreted in a way that allowed Members to maintain measures that operate in a way similar to a special safeguard within the meaning of Article 5—but without respecting the conditions set out in that provision for invoking such measures—it would be difficult to see how proper meaning and effect could be given to those conditions set forth in Article 5."[7]

1.4.1.1 "subsequent practice"

6. In *Chile – Price Band System*, Chile had argued that, in interpreting this Article 4.2 phrase, it was "highly relevant" that no country that had a price band system in place before the conclusion of the Uruguay Round had actually converted it into ordinary customs duties. The Appellate Body looked into the possibility that this practice could be considered "subsequent practice" pursuant to Article 31(3)(b) of the Vienna Convention and therefore a practice relevant to the interpretation of Article 4.2. The Appellate Body referred to its definition of "subsequent practice" in its Report in *Japan – Alcoholic Beverages* and noted that neither the Panel record nor the submissions of the parties suggested that there was a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of Article 4.2. The Appellate Body thus concluded that this practice of some Members alleged by Chile did not amount to a "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention.[8]

1.4.1.2 "converted"

7. In *Chile – Price Band System*, the Appellate Body looked at the meaning of "converted" in the phrase "any measures which have been required to be converted into ordinary customs duties" and concluded, on the basis of the dictionary meanings of "convert" and "converted" that those measures "had to be transformed into something they were not—namely, ordinary customs duties". In this case, Chile had argued that its price band system was not a measure of the kind which had been required to be converted, but rather a system for determining the level of the resulting ordinary customs duties. The Appellate Body considered that the "mere fact that … measures result in the payment of duties does not exonerate a Member from the requirement not to maintain, resort to, or revert to those measures":

> "Article 4.2 speaks of 'measures of the kind which have been required to be *converted* into ordinary customs duties'. The word 'convert' means 'undergo transformation'. The word 'converted' connotes 'changed in their nature', 'turned into something different'. Thus, 'measures which have been required to be converted into ordinary customs duties' had to be transformed into something they were not—namely, ordinary customs duties. The following example illustrates this point. The application of a 'variable import levy', or a 'minimum import price', as the terms are used in footnote 1, can result in the levying of a specific duty equal to the difference between a reference price and a target price, or minimum price. These resulting levies or specific duties take the same *form* as ordinary customs duties. However, the mere fact that a duty imposed on an import at the border is in the same *form* as an ordinary customs duty, does not mean that it is *not* a 'variable import levy' or a 'minimum import price'. Clearly, as measures listed in footnote 1, 'variable import levies' and 'minimum import prices' had to be *converted into* ordinary customs duties by the end of the Uruguay Round. The mere fact that such measures result in the payment of duties does not exonerate a Member from the requirement not to maintain, resort to, or revert to those measures."[9]

---

[7] Appellate Body Report, *Chile – Price Band System*, paras. 211 and 217.
[8] Appellate Body Report, *Chile – Price Band System*, paras. 213-214.
[9] Appellate Body Report, *Chile – Price Band System*, para. 216.

1.4.1.3 "ordinary customs duties"

8. In *Chile – Price Band System*, the Appellate Body reversed the Panel's definition of "ordinary customs duty". The Panel had found that "[a]ll "ordinary" customs duties may … be said to take the form of *ad valorem* or specific duties (or combinations thereof)". The Panel further found that the term "ordinary customs duty" has a "normative connotation".[10] The Appellate Body disagreed:

> "We do not agree with the Panel's reasoning that, necessarily, '[a]s a *normative* matter, … those scheduled duties always relate to either the value of the imported goods, in the case of *ad valorem* duties, or the volume of the imported goods, in the case of specific duties.' (emphasis in original, underlining added) Indeed, the Panel came to this conclusion by interpreting the French and Spanish versions of the term 'ordinary customs duty' to mean something *different* from the ordinary meaning of the English version of that term. It is difficult to see how, in doing so, the Panel took into account the rule of interpretation codified in Article 33(4) of the *Vienna Convention* whereby 'when a comparison of the authentic texts discloses a difference of meaning …, the meaning which best *reconciles* the texts … shall be adopted.' (emphasis added).
>
> We also find it difficult to understand how the Panel could find 'normative' support for its reasoning by examining the Schedules of WTO Members. We have observed in a previous case that '[t]he ordinary meaning of the term 'concessions' suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations'. A Member's Schedule imposes obligations on the Member who has made the concessions. The Schedule of one Member, and even the scheduling practice of a number of Members, is not relevant in interpreting the meaning of a treaty provision, unless that practice amounts to 'subsequent practice in the application of the treaty' within the meaning of Article 31(3)(b) of the *Vienna Convention*. In this case the Panel Report contains no support for the conclusion that the scheduling activity of WTO Members amounts to 'subsequent practice'.
>
> [N]ot each and every duty that is calculated on the basis of the *value* and/or *volume* of imports is necessarily an 'ordinary customs duty'. For example, in the case at hand, the *ad valorem* duty is calculated on the *value* of the imports. The calculation of the *specific* duty resulting from Chile's price band system is, on the other hand, based, not only on the difference between the lower threshold of the price band and the applicable reference price, but also on the *volume* per unit of the imports."[11]

9. The Appellate Body in *Chile – Price Band System* also disagreed and thus reversed the Panel's finding that the term "ordinary customs duty", as used in Article 4.2 of the Agreement on Agriculture, is to be understood as "referring to a customs duty which is not applied to factors of an exogenous nature"[12]:

> "Surely Members will ordinarily take into account the interests of domestic consumers and domestic producers in setting their *applied* tariff rates at a certain level. In doing so, they will doubtless take into account factors such as world market prices and domestic price developments. These are *exogenous* factors, as the Panel used that term. According to the Panel, duties that are calculated on the basis of such *exogenous* factors are *not* ordinary customs duties. This would imply that such duties be *prohibited* under Article II:1(b) of the GATT unless recorded in the 'other duties or charges' column of a Member's Schedule. We see no legal basis for such a conclusion.[13]"[14]

---

[10] See Panel Report, *Chile – Price Band System*, para. 7.52.
[11] Appellate Body Report, *Chile – Price Band System*, paras. 271, 272 and 274.
[12] See Panel Report, *Chile – Price Band System*, para. 7.52.
[13] *(footnote original)* We stated in *Argentina – Textiles and Apparel*, *supra*, footnote 55, para. 46, that "a tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to apply a rate of duty that is less than that provided for in its Schedule." Thus, the fact that the "cap" (recorded in the ordinary customs duty" column of a schedule) is a specific or an *ad*

10. The Appellate Body in *Chile – Price Band System* further noted that "in examining Article 4.2 of the *Agreement on Agriculture*, the *second* sentence of Article II:1(b) of the *GATT 1994*, does *not* specify what form 'other duties or charges' must take to qualify as such within the meaning of that sentence":

> "We further note, in examining Article 4.2 of the *Agreement on Agriculture*, that the *second* sentence of Article II:1(b) of the GATT 1994, does *not* specify what form 'other duties or charges' must take to qualify as such within the meaning of that sentence. The Panel's own approach of reviewing Members' Schedules reveals that many, if not most, 'other duties or charges' are expressed in *ad valorem* and/or specific terms, which does not, of course, make them 'ordinary customs duties' under the first sentence of Article II:1(b)."[15]

11. The Appellate Body in *Chile – Price Band System* pointed to Article II:2 of the GATT 1994 and Annex 5 to the Agreement on Agriculture as contextual support for interpreting the term "ordinary customs duties":

> "As context for this phrase in Article 4.2 of the Agreement on Agriculture, we observe that Article II:2 of the GATT 1994 sets out examples of measures that do *not* qualify as either 'ordinary customs duties' or 'other duties or charges'. These measures include charges equivalent to internal taxes, anti-dumping and countervailing duties, and fees or other charges commensurate with the cost of services rendered. They too may be based on the value and/or volume of imports, and yet Article II:2 distinguishes them from 'ordinary customs duties' by providing that '[n]othing in [Article II] shall prevent any Member from imposing' them 'at any time on the importation of any product'.
>
> Contextual support for interpreting the term 'ordinary customs duties' also appears in Annex 5 to the *Agreement on Agriculture*. Annex 5, read together with the Attachment to Annex 5 ('*Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex*'), contemplates the calculation of 'tariff equivalents' in a way that would result in ordinary customs duties 'expressed as *ad valorem* or specific rates'. We do not find an obligation in either of those provisions that would require Members to refrain from basing their duties on what the Panel calls 'exogenous factors'. Rather, all that is required is that 'ordinary customs duties' be expressed in the *form* of '*ad valorem* or specific rates'."[16]

1.4.1.4 Measure resulting in ordinary customs duties

12. In *Chile – Price Band System*, Argentina had argued before the Panel that Chile's price band system was a measure "of the kind which has been required to be converted into ordinary customs duties" and which, by the terms of Article 4.2 of the Agreement on Agriculture, Members are required not to maintain. Chile had refuted such an allegation and claimed that the duties resulting from its price band system were "ordinary customs duties" and that its price band system was merely a system for determining the level of those duties and, therefore, consistent with Article 4.2. The Appellate Body agreed with the Panel as regards the inconsistency of Chile's price band system with Article 4.2 (although not as regards the Panel's reasoning) and found that "the fact that the *duties* that result from the application of Chile's price band system take the same form as "ordinary customs duties" does not imply that the underlying measure is consistent with Article 4.2 of the *Agreement on Agriculture*."[17]

---

valorem duty does not mean that a Member will not apply a tariff at a lower rate, or that the rate it applies will not be based on what the Panel calls "*exogenous*" factors. Indeed, as we noted above, it is difficult to conceive that a Member would ever make changes to its applied tariff rate except based on *exogenous* factors such as the interests of domestic consumers or producers.

[14] Appellate Body Report, *Chile – Price Band System*, para. 273.
[15] Appellate Body Report, *Chile – Price Band System*, para. 275.
[16] Appellate Body Report, *Chile – Price Band System*, paras. 276-277.
[17] Appellate Body Report, *Chile – Price Band System*, para. 279.

1.4.1.5 Timing of the obligation

13. The Appellate Body in *Chile – Price Band System* concluded that "the obligation in Article 4.2 not to 'maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties' applies from the date of the entry into force of the *WTO Agreement*—regardless of whether or not a Member converted any such measures into ordinary customs duties before the conclusion of the Uruguay Round".[18]

1.4.2 Relationship with Article XI of the GATT 1994 and its *Ad Note*

14. The Panel in *Korea – Various Measures on Beef* held with respect to a certain practice of the Korean state trading agency for beef imports:

> "[W]hen dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of Article XI of GATT and its *Ad Note* relating to state-trading operations would necessarily constitute a violation of Article 4.2 of the *Agreement on Agriculture* and its footnote which refers to non-tariff measures maintained through state-trading enterprises."[19]

15. Reiterating this ruling, the Appellate Body in *Indonesia – Import Licensing Regimes* focused on the result of such a finding:

> "Such findings of inconsistency would also result in the same implementation obligations under either provision, that is, to bring the measure into conformity with those provisions."[20]

16. On this basis, the Appellate Body in *Indonesia – Import Licensing Regimes* rejected Indonesia's claim that the Panel had erred in assessing the claims regarding the measures at issue under Article XI:1 of the GATT 1994, rather than Article 4.2 of the Agreement on Agriculture:

> "To the extent that they apply to the claims challenging the 18 measures at issue as quantitative restrictions, Article XI:1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture* thus contain the same substantive obligations, namely, the obligation not to maintain quantitative import restrictions on agricultural products. Had the Panel decided to commence its analysis with Article 4.2 rather than Article XI:1, it would have, in essence, conducted the same analysis to determine whether the 18 measures at issue are 'quantitative import restrictions' within the meaning of footnote 1 to Article 4.2."[21]

17. In *Indonesia – Chicken*, the Panel agreed with Indonesia that Article 21.1 of the Agreement on Agriculture is a conflict rule similar to that set out in the General Interpretative Note to Annex 1A. Hence, the Panel concluded that:

> "Therefore, if there were a conflict between Article 4.2 of the *Agreement on Agriculture* and Article XI of the GATT 1994, Article 4.2 would indeed prevail and Article XI would not apply."[22]

18. The Appellate Body in *Indonesia – Import Licensing Regimes* clarified that although Article 2.4 of the Agreement on Agriculture and Article XI:1 of GATT have different scopes of application, they pursue the same objective:

> "Although Article 4.2 of the *Agreement on Agriculture* generally applies to: (i) a broader range of measures; and (ii) a narrower scope of products than Article XI:1 of

[18] Appellate Body Report, *Chile – Price Band System*, para. 212.
[19] Panel Report, *Korea – Various Measures on Beef*, para. 762.
[20] Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.15.
[21] Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.16.
[22] Panel Report, *Indonesia – Chicken*, para. 7.64.

> the GATT 1994; both provisions prohibit Members from maintaining quantitative import restrictions on agricultural products."[23]

1.4.3 Special treatment

19. With respect to the special treatment in connection with paragraph 2 of Article 4, see the Sections on Article 5 and Annex 5 of the Agreement on Agriculture.

1.5 Footnote 1 to Article 4.2

1.5.1 General

20. In *Chile – Price Band System*, the Appellate Body held that the list of categories of border measures reflected in footnote 1 to Article 4.2 is illustrative.[24]

1.5.2 "quantitative import restrictions"

21. In *Turkey – Rice* the Panel found that Türkiye had failed to grant Certificates of Control to import rice outside its tariff rate quota which was characterized as a quantitative import restriction. In its analysis the Panel found a lack of transparency and predictability:

> "The Panel recalls that in *Chile – Price Band System*, when referring to 'variable import levies' within the meaning of footnote 1 to Article 4.2, the Appellate Body noted some features that are present in such measures:
>
> > 'These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. This lack of transparency and this lack of predictability are liable to restrict the volume of imports... [A]n exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be.[Footnote omitted] This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.'
>
> In the present dispute, the challenged measure does not affect the level of duties, but rather the quantities of product that can enter the Turkish market. We find, however, that the features of 'lack of transparency and lack of predictability' that result from Turkey's decision to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota are similar to those observed by the Appellate Body Report in *Chile – Price Band System*. Even without any systematic intention to restrict the importation of rice at a certain level, the lack of transparency and of predictability of Turkey's issuance of Certificates of Control to import rice is similarly liable to restrict the volume of imports.
>
> In conclusion, we consider that there is sufficient evidence regarding the manner in which, from September 2003 and for different periods of time, Turkey has denied or failed to grant Certificates of Control to import rice outside of the tariff rate quota, to characterize this measure as a quantitative import restriction. Through this practice, the Turkish authorities have restricted the importation of rice for periods of time. This conduct can, therefore, be considered as a measure of the kind which have been required to be converted into ordinary customs duties under Article 4.2 of the Agreement on Agriculture."[25]

---

[23] Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.15.
[24] Appellate Body Report on *Chile – Price Band System*, para. 219. See also Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.41.
[25] Panel Report, *Turkey – Rice*, paras. 7.119–7.121.

1.5.3 "variable import levies"

22. In *Chile – Price Band System*, the Appellate Body, reversing the Panel's interpretation of this term[26], noted that the "WTO Members have not chosen to define [this] 'term of art' in the *Agreement on Agriculture* or anywhere else in the *WTO Agreement*".[27] The Appellate Body concluded that a variable import duty requires the presence of both a formula causing automatic and continuous variability of duties and additional features that undermine the object and purpose of Article 4 because they include a lack of transparency and a lack of predictability in the level of duties that will result from such measures:

> "In examining the ordinary meaning of the term '*variable import levies*' as it appears in footnote 1, we note that a 'levy' is a duty, tax, charge, or other exaction usually imposed or raised by legal execution or process. An 'import' levy is, of course, a duty assessed upon importation. A levy is 'variable' when it is 'liable to vary'. This feature alone, however, is not conclusive as to what constitutes a 'variable import levy' within the meaning of footnote 1. An 'ordinary customs duty' could also fit this description. 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 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.
>
> To determine *what kind* of variability makes an import levy a 'variable import levy', we turn to the immediate context of the other words in footnote 1. The term 'variable import levies' appears after the introductory phrase '[t]hese *measures* include'. Article 4.2—to which the footnote is attached—also speaks of '*measures*'. This suggests that at least one feature of 'variable import levies' is the fact that the *measure* itself—as a mechanism—must impose the *variability* of the duties. Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Ordinary customs duties, by contrast, are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula. 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, whereas the ordinary meaning of the term 'variable' implies that *no* such action is required.
>
> However, in our view, 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. 'Variable import levies' have additional features that undermine the object and purpose of Article 4, which is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. This lack of transparency and this lack of predictability are liable to restrict the volume of imports. … an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be. (i) This lack of

[26] See Panel Report, *Chile – Price Band System*, paras. 7.35-7.36. The Appellate Body, nevertheless, upheld the Panel's finding, in para. 7.47 of the Panel Report, that Chile's price band system is a "'border measure similar to 'variable import levies' and 'minimum import prices' within the meaning of footnote 1 and Article 4.2 of the *Agreement on Agriculture*". Appellate Body Report, *Chile – Price Band System*, para. 262.

[27] Appellate Body Report, *Chile – Price Band System*, para. 229.

> transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market."[28]

23. The Appellate Body in *Chile – Price Band System (Article 21.5 - Argentina)*, while observing that import levies could be characterized by certain additional features which include a "lack of transparency and a lack of predictability", noted that these features should not be understood as a necessary condition for a measure to be a "variable import levy":

> "The Appellate Body further observed that variable import levies are characterized by certain additional features which include 'a lack of transparency and a lack of predictability in the level of duties that will result from such measures'. In making this statement, the Appellate Body was not identifying a 'lack of transparency' and a 'lack of predictability' as independent or absolute characteristics that a measure must display in order to be considered a variable import levy. Rather, the Appellate Body was simply explaining that the level of duties generated by variable import levies is less transparent and less predictable than is the case with ordinary customs duties."[29]

24. In *Peru – Agricultural products*, the Appellate Body rejected Peru's argument that the legal standards for "variable import levies" and "minimum import prices" pertain necessarily to a minimum threshold:

> "A given measure may contain elements that are common to both 'variable import levies' and 'minimum import prices'. A 'variable import levy', however, need not necessarily contain a certain minimum threshold for it to be characterized as 'variable', or more precisely as 'inherently variable'."[30]

1.5.4 "minimum import prices"

25. In *Chile – Price Band System*, the Appellate Body, after indicating that the "term 'minimum import price' refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market" and that "no definition has been provided by the drafters of the *Agreement on Agriculture*", quoted the Panel's description of "minimum import prices" as follows:

> "The term 'minimum import price' refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market. Here, too, no definition has been provided by the drafters of the *Agreement on Agriculture*. However, the Panel described 'minimum import prices' as follows:
>
> > [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.
>
> The Panel also said that minimum import prices 'are generally not dissimilar from variable import levies in many respects, including in terms of their protective and stabilization effects, but that their mode of operation is generally less complicated.' The main difference between minimum import prices and variable import levies is, according to the Panel, that '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, while minimum import price schemes generally operate in relation to the *actual transaction value* of the imports.' (emphasis added)
>
> … the participants said they do not object to the Panel's definition of a 'minimum import price'."[31]

---

[28] Appellate Body Report, *Chile – Price Band System*, paras. 232-234.
[29] Appellate Body Report, *Chile – Price Band System (Article 21.5 - Argentina)*, para. 156.
[30] Appellate Body Report, *Peru – Agricultural Products*, para. 5.51.
[31] Appellate Body Report, *Chile – Price Band System*, paras. 236-238.

1.5.5 "discretionary import licensing"

26. The Panel in *Turkey – Rice* examined the question whether Certificates of Control issued by Türkiye were "import licences" and whether the issuance of these certificates constituted "discretionary import licensing". Recalling that the term "import licence" is not defined in the Agreement on Agriculture or elsewhere in the WTO Agreement, and recalling the definition of "import licensing" in the Agreement on Import Licensing Procedures, the Panel noted:

> "[N]ot all documents giving the permission to import may be necessarily considered to be 'import licences'. As noted by the parties, the importation process is often a complex procedure during which a number of steps must be completed in order to obtain the permission to import certain products. Throughout this process, governments may require that written documents be obtained and then produced to certify the completion of certain steps and thus the compliance with certain legal requirements, in order to allow the importation of goods and their final entry into the importing market. Each of these steps and documents may serve particular objectives. Strictly speaking, these special documents, when used for purposes such as sanitary and phytosanitary control, customs clearance, payment of taxes or duties, are not to be considered as 'import licences'.
>
> …
>
> [N]ot all practices of 'import licensing' would be 'discretionary import licensing'. 'Discretionary' is defined as 'pertaining to discretion [or] left to discretion'. 'Discretion' can be characterized in turn as the '[f]reedom to decide or act as one thinks fit, absolutely or within limits; having one's own judgement as the sole arbiter'.
>
> …
>
> '[D]iscretionary import licensing' … appears as one of the measures in the indicative list of 'measures of the kind which have been required to be converted into ordinary customs duties'. The object and purpose of Article 4 of the Agreement on Agriculture, 'to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties', would be undermined if Members could decide, at their discretion, whether or not to grant permission for the importation of a good, or if they could decide, at their discretion, whether or not to grant a document that is indispensable for such importation.
>
> This interpretation is consistent with the definition agreed by WTO Members in the context of the Import Licensing Agreement. Article 1.1 of the Import Licensing Agreement and its footnote, when defining import licensing, refer to licensing and 'other similar administrative procedures'. We note in this regard that the footnote to the Annual Questionnaire on import licensing procedures, adopted by the WTO Committee on Import Licensing, indicates that 'similar procedures':
>
> > '[A]re understood to include technical visas, surveillance systems, minimum price arrangements, and *other administrative reviews effected as a prior condition for entry of imports*.'[32]"[33]

27. Applying this analysis to the measures at issue, the Panel in *Turkey – Rice* noted that regarding "whether a measure may be characterized as an 'import licence' or a conduct as an 'import licensing' practice, the proclaimed objectives of a particular document or requirement are not the main issue to consider in this dispute" and it concluded that "regardless of the purported

---

[32] (*footnote original*) Annex, Questionnaire on Import Licensing Procedures, Notifications under Article 7.3 of the Agreement, Note by the Secretariat, 20 October 1995, G/LIC/2 (emphasis added). Under this definition, a main element considered by Members to determine whether a measure is to be characterized as an import licensing procedure is whether the measure has been established *as a prior condition to the entry of imports into the territory.*

[33] Panel Report, *Turkey – Rice*, paras. 7.126, 7.128, 7.130-7.131.

objectives of the Certificates of Control, the decision to stop granting such documents for periods of time has served as an instrument for administering trade".[34] The Panel concluded generally:

> "[W]ithout necessarily having to articulate a general definition of what constitutes an 'import licence' or a practice of 'import licensing', we find that the discretionary use by authorities in an importing country of the concession, or refusal to grant, a particular document which is necessary for the importation of a good, as an instrument to administer trade, in this case can be safely characterized as a practice of 'discretionary import licensing' under footnote 1 to Article 4.2 of the *Agreement on Agriculture*."[35]

1.5.6 "similar border measures"

1.5.6.1 Concept of similarity

28. In *Chile – Price Band System*, the Appellate Body agreed with the Panel's definition of the term "similar" as "having a resemblance or likeness", "of the same nature or kind", and "having characteristics in common". The Appellate Body, however, disagreed with the Panel's emphasis on the degree to which measures share characteristics of a "fundamental" nature.[36] The Appellate Body found that the appropriate approach to determine similarity was to ask "whether two or more things have likeness or resemblance sufficient to be similar to each other". The Appellate Body further considered that, for a measure to be "similar" to a border measure, it must have "sufficient 'resemblance or likeness to', or be 'of the same nature or kind' as, *at least one* of the specific categories of measures listed in footnote 1":

> "We agree with the first part of the Panel's definition of the term 'similar' as 'having a resemblance or likeness', 'of the same nature or kind', and 'having characteristics in common'. However, in our view, the Panel went unnecessarily far in focusing on the degree to which two measures share characteristics of a 'fundamental' nature. We see no basis for determining similarity by relying on characteristics of a 'fundamental' nature. The Panel seems to substitute for the task of defining the term 'similar' that of defining the term 'fundamental'. This merely complicates matters, because it raises the question of how to distinguish 'fundamental' characteristics from those of a *less than* 'fundamental' nature. The better and appropriate approach is to determine similarity by asking the question whether two or more things have likeness or resemblance sufficient to be similar to each other. In our view, the task of determining whether something is similar to something else must be approached on an empirical basis.
>
> … To be 'similar', Chile's price band system—in its specific factual configuration—must have, to recall the dictionary definitions we mentioned, sufficient 'resemblance or likeness to', or be 'of the same nature or kind' as, *at least one* of the specific categories of measures listed in footnote 1."[37]

29. The Appellate Body in *Chile – Price Band System (Article 21.5 - Argentina)* remarked that when approaching an empirical basis to determine similarity it "should, entail both an analysis of the extent of such shared characteristics and a determination of whether these are sufficient to render the two things similar". In doing so, the Appellate Body saw no error in the Panel's analysis which took careful account of the design and structure:

> "[I]n advocating that the issue of similarity be approached 'on an empirical basis', the Appellate Body was contrasting this to, and counselling against, an approach that focused on the *fundamental nature* of the shared characteristics. The proper approach should, instead, entail both an analysis of the extent of such shared characteristics and a determination of whether these are sufficient to render the two things similar. Such characteristics can be identified from an analysis of *both* the structure and design of a measure as well as the effects of that measure. Thus, we do not consider

[34] Panel Report, *Turkey – Rice*, para. 7.129.
[35] Panel Report, *Turkey – Rice*, para. 7.133.
[36] See Panel Report, *Chile – Price Band System*, para. 7.26.
[37] Appellate Body Report, *Chile – Price Band System*, paras. 226-227.

> that the Panel would have needed, as Chile's argument seems to imply, to focus its examination *primarily* on numerical or statistical data regarding the effects of that measure in practice. Where it exists, evidence on the observable effects of the measure should, obviously, be taken into consideration, along with information on the structure and design of the measure. The weight and significance to be accorded to such evidence will, as is the case with any evidence, depend on the circumstances of the case."[38]

30. The Appellate Body in *Chile – Price Band System* stressed that "[a]ny examination of 'similarity' presupposes a *comparative* analysis" and therefore, "to determine whether [a measure] is 'similar' within the meaning of within the meaning of footnote 1, it is necessary to identify *with which categories* that [measure] must be compared".[39]

31. The Appellate Body in *Chile – Price Band System (Article 21.5 - Argentina)* further clarified that an examination of "similarity" cannot be made in the abstract:

> "We recall that an examination of 'similarity' cannot be made in the abstract: it necessarily involves a comparative analysis. That analysis can be undertaken by comparing the measure at issue with at least one of the listed measures which, by definition, have characteristics different from the characteristics of an ordinary customs duty. The term 'ordinary customs duties' in footnote 1 forms part of the phrase 'similar border measures other than ordinary customs duties'. This phrase contains no punctuation, which suggests that the phrase as a whole defines a relevant concept for purposes of footnote 1. As we see it, 'other than ordinary customs duties' is an adjectival phrase that qualifies the term 'similar border measures'. This language will, therefore, inform a panel's analysis of whether a measure is 'similar' to one of the categories of measures listed in footnote 1. We observe, as well, that the structure and logic of footnote 1 make clear that variable import levies and minimum import prices cannot be ordinary customs duties. The same is true for border measures similar to variable import levies and to minimum import prices."[40]

1.5.6.2 Relevance of tariff caps in the similarity analysis

32. In *Chile – Price Band System,* Chile had argued that the Panel had failed to take proper account of the fact that the total amount of duties that may be levied as a result of Chile's price band system was "capped" at the level of the tariff rate of 31.5 per cent *ad valorem* bound in Chile's Schedule. The Appellate Body thus considered whether Chile's price band system ceases to be similar to a "variable import levy" because it is subject to a cap. The Appellate Body concluded:

> "[W]e find nothing in Article 4.2 to suggest that a measure prohibited by that provision would be rendered consistent with it if applied with a cap. Before the conclusion of the Uruguay Round, a measure could be recognized as a 'variable import levy' even if the products to which the measure applied were subject to tariff bindings.[41] And, there is nothing in the text of Article 4.2 to indicate that a measure, which was recognized as a 'variable import levy' before the Uruguay Round, is exempt from the requirements of Article 4.2 simply because tariffs on some, or all, of the

---

[38] Appellate Body Report, *Chile – Price Band System (Article 21.5 - Argentina)*, para. 189.

[39] Appellate Body Report, *Chile – Price Band System*, para. 228. In this case, Chile's price band system was compared to and found to be sufficiently similar to a "variable import levy" and "minimum import price" to make it a "similar border measure".

[40] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 167.

[41] (*footnote original*) In this respect, we note that, as illustrated by documents from GATT 1947, Contracting Parties to GATT 1947 regarded import levies which were applied to products subject to a tariff binding as variable import levies in spite of the existence of that binding:

> The General Agreement contains no provision on the use of 'variable import levies'. It is obvious that if any such duty or levy is imposed on a 'bound' item, the rate must not be raised in excess of what is permitted by Article II … . (emphasis added)

See Note by the Executive Secretary on "Questions relating to Bilateral Agreements, discrimination and Variable Taxes", dated 21 November 1961, GATT document L/1636, paras. 7-8.

> products to which that measure *now* applies were bound as a result of the Uruguay Round."[42]

33. The Appellate Body in *Chile – Price Band System* found support for this view in the context of Article 4.2, including the Guidelines attached to Annex 5 of the Agreement on Agriculture, and Articles II and XI of the GATT 1994:

> "The context of Article 4.2 lends support to this interpretation. That context includes the *Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraph 6 and 10 of this Annex ('Guidelines')*, which are an Attachment to *Annex 5 on Special Treatment with respect to Paragraph 2 of Article 4*. Both the Attachment and the Annex form part of the *Agreement on Agriculture*. Paragraph 6 of the Guidelines[43] envisages that tariff equivalents resulting from conversion of measures within the meaning of Article 4.2 *may exceed previous bound rates*. This implies that, even if the product to which that measure applied was in fact subject to a tariff binding before the Uruguay Round, conversion of that measure may nevertheless have been required. Therefore, a measure cannot be excluded *per se* from the scope of Article 4.2 simply because the products to which that measure applies are subject to a tariff binding.
>
> Relevant context can also be found in Articles II and XI of the GATT 1994. If Members were free to apply a measure with a 'cap'—which, in the absence of that 'cap', would be a prohibited 'variable import levy'—Article 4.2 would, in our view, add little to the longstanding requirements of Articles II:1(b) and XI:1 of the GATT 1947. In fact, Chile concedes that the scope of measures prohibited by Article 4.2 extends beyond the tariffs in excess of bound rates that are prohibited by Article II and the 'restrictions other than taxes, duties and charges' that are prohibited by Article XI:1. In any event, it is difficult to see why Uruguay Round negotiators would 'compensate' Members for converting prohibited measures by permitting them to raise tariffs on certain products, while permitting those Members to retain those measures and, at the same time, impose those higher tariffs on those same products. It is not clear why, if this were so, a Member would ever have converted a measure. All that a Member would have had to do to comply with Article 4.2 would have been to adopt a tariff binding—even at a higher level—on the products covered by the original measure. Had this been the intention of the Uruguay Round negotiators, there would have been no need to list price-based measures in footnote 1 among the categories of measures prohibited by Article 4.2. The drafters of the *Agreement on Agriculture* simply could have adopted a requirement that all tariffs on agricultural products be bound."[44]

1.5.6.3 Common features of border measures

34. In *Chile – Price Band System*, the Appellate Body noted that all border measures listed in the footnote to Article 4.2 have the object and effect of distorting trade:

> "[W]e note that *all* of the border measures listed in footnote 1 have in common the object 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. Moreover, *all* of these measures 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."[45]

---

[42] Appellate Body Report, *Chile – Price Band System*, para. 254.
[43] (*footnote original*) Paragraph 6 provides:
> Where a tariff equivalent resulting from these guidelines is negative or lower than the *current bound rate*, the initial tariff equivalent may be established at the *current bound rate* or on the basis of national offers for that product. (emphasis added)
[44] Appellate Body Report, *Chile – Price Band System*, paras. 255-256.
[45] Appellate Body Report, *Chile – Price Band System*, para. 227.

1.5.7 "other than ordinary customs duties"

35. In *Chile – Price Band System (Article 21.5 – Argentina)*, the Appellate Body rejected Chile's contention that the Panel erred in omitting "to undertake a separate and independent analysis of whether the measure at issue is 'other than ordinary customs duties'". Having found that the measure was similar to a variable import levy and to a minimum import price, the Panel could properly conclude from these findings that "as such, it is not an ordinary customs duty"[46]:

> "[W]e are of the view that inconsistency with Article 4.2 can be established when it is shown that a measure is a border measure similar to one of the measures explicitly identified in footnote 1. A separate analysis of whether, or an additional demonstration that, the measure is 'other than ordinary customs duties' may also be undertaken to confirm such a finding. However, these are not indispensable for reaching a conclusion on the categories listed in footnote 1."[47]

1.5.8 Exceptions in Footnote 1

36. The Panel in *India – Quantitative Restrictions* considered a discretionary import licensing regime governing imports of both industrial and agricultural products. India argued that these measures fell within the exception provided for in footnote 1 with respect to "measures maintained under balance-of-payments provisions". The Panel found that the measures violated Article 4.2:

> "In paragraph 5.139 above, we found that the measures at issue violate Article XI:1 of the GATT 1994, which is equally applicable to industrialized and agricultural products. In paragraph 5.223 above, we also found that the measures at issue were not justified under Article XVIII:B and violated Article XVIII:11. India did not contest that Article 4.2 was applicable to the agricultural products subject to the measures at issue. We agree with India's claims that the question of the consistency of India's import restrictions with Article 4.2 depends on their consistency with Article XVIII:B. We therefore conclude that the Indian restrictions are not 'measures maintained under balance-of-payments provisions' within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.
>
> Since India does not invoke any of the other exceptions contained in the footnote to Article 4.2, we find that the measures at issue violate Article 4.2 of the Agreement on Agriculture."[48]

37. The Appellate Body in *Indonesia – Import Licensing regimes* held that Article XX of the GATT 1994 qualifies as an exception falling under the definition of one of the "other general, non-agriculture-specific provisions of GATT 1994" within the meaning of footnote 1:

> "Article 4.2 prohibits Members from maintaining, resorting to, or reverting to 'measures of the kind which have been required to be converted into ordinary customs duties', subject to certain exceptions under Article 5 and Annex 5 to that Agreement. The first part of footnote 1 to Article 4.2 contains an 'illustrative list' of the categories of measures prohibited under Article 4.2, which refers to, inter alia, 'quantitative import restrictions'. The second part of footnote 1 provides that 'measures' within the meaning of Article 4.2 do not include measures maintained under 'balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement'. Article XX of the GATT 1994 is one of the 'other general, non-agriculture-specific provisions of GATT 1994'. As such, a Member is prohibited under Article 4.2 from maintaining, resorting to, or reverting to a measure that falls within any of the categories of measures listed in the first part of footnote 1, such as 'quantitative import restrictions', *provided* such measure is not maintained under any of the

[46] Appellate Body Report, *Chile – Price Band System (Article 21.5 - Argentina)*, para. 172.
[47] Appellate Body Report, *Chile – Price Band System (Article 21.5 - Argentina)*, para. 171.
[48] Panel Report, *India – Quantitative Restrictions*, paras. 5.241-5.242.

'provisions' mentioned in the second part of footnote 1, such as Article XX of the GATT 1994."[49]

38. Moreover, the Appellate Body in *Indonesia – Import Licensing regimes* rejected Indonesia's argument that the allocation of the burden of proof as it applies under Article XX of the GATT 1994 is changed by virtue of the incorporation of this provision into Article 4.2 of the Agreement on Agriculture through the reference contained in the second part of footnote 1:

> "[W]e fail to see a textual basis for the proposition that the burden of proof under Article XX of the GATT 1994 is shifted to the complainant by virtue of the incorporation of this provision into the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture. Rather, given that footnote 1 to Article 4.2 incorporates Article XX by reference without modifying the nature of this provision as an affirmative defence, it would follow that the burden of proof under Article XX remains with the respondent in the context of Article 4.2. This is consistent with the general principle that 'the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.' While the complainant challenging a measure under Article 4.2 is required to demonstrate that the measure falls within the categories of measures prohibited under Article 4.2, it is the respondent who benefits from a showing that the measure additionally satisfies the requirements of Article XX and therefore is not prohibited under Article 4.2."[50]

1.5.9 Relationship with Article 4.2

39. The Appellate Body in *Chile – Price Band System*, referred to the wording of footnote 1 to the Agreement on Agriculture in its interpretation of the phrase "measures which have been required to be converted into ordinary customs duties" of Article 4.2. See paragraph 4 above.

40. The Panel in *Indonesia – Chicken* referred to the meaning of footnote 1 in addressing the question of whether the burden of proof in respect of a possible justification under Article XX of the GATT 1994 is reversed under Article 4.2 of the Agreement on Agriculture:

> "As is uncontested by the parties, the second part of the footnote ('but…') limits the scope of Article 4.2 of the Agreement on Agriculture. Thus, Article 4.2 does not apply if a measure is listed in the first part of the footnote, and also fulfils the conditions of the second part of the footnote. It is furthermore, uncontested by the parties that Article XX of the GATT 1994 is one of the 'other general non-agriculture specific provisions of GATT 1994' referred to in the second part of the footnote. Thus, if a measure is justified by Article XX of the GATT 1994, Article 4.2 of the Agreement on Agriculture will not apply. This view is in accordance with relevant case law as well as supported by the negotiating history of Article 4.2 of the Agreement on Agriculture."[51]

1.6 Relationship with other WTO Agreements

1.6.1 GATT 1994

41. The Appellate Body in *Chile – Price Band System*, in examining the concept of ordinary customs duties under Article 4.2 of the Agreement on Agriculture, referred to Article II:1(b) of the GATT 1994. The Appellate Body agreed with the Panel that the term "ordinary customs duties" included in Article 4.2 of the Agreement on Agriculture and Article II:1 (b) of the GATT 1994 should be interpreted in the same way in both provisions. However, since different obligations arise under the two provisions, they should be examined separately:

> "However, Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994 must be examined separately to give meaning and effect to the distinct legal obligations arising under these two different legal provisions. The obligations arising from either of these provisions must not be read into the other. Therefore, the mere

[49] Appellate Body Report, *Import – Licensing Regimes*, para. 5.41.
[50] Appellate Body Report, *Import – Licensing Regimes*, para. 5.46.
[51] Panel Report, *Indonesia – Chicken*, para. 7.68.

> fact that the term 'ordinary customs duties' in Article 4.2 derives from Article II:1(b) of the GATT 1947 does not suggest that Article II:1(b) should be examined before Article 4.2."[52]

43. The Appellate Body in *Chile – Price Band System* considered the scope of application of Article 4.2 of the Agreement on Agriculture to be narrower than that of Article II:1 (b) of the GATT 1994:

> "It is clear, as a preliminary matter, that Article 4.2 of the *Agreement on Agriculture* applies specifically to agricultural products, whereas Article II:1(b) of the GATT applies generally to trade in all goods."[53]

44. The Appellate Body also indicated in *Chile – Price Band System* that if it were to find that Chile's price band system was inconsistent with Article 4.2 of the Agreement on Agriculture, it would not need to make a separate finding on whether Chile's price band system also resulted in a violation of Article II:1(b) of the GATT 1994 to resolve this dispute.[54]

___

Current as of: December 2023

[52] Appellate Body Report, *Chile – Price Band System*, para. 187. See also Panel Report, *Peru – Agricultural Products*, 7.19.
[53] Appellate Body Report, *Chile – Price Band System*, para. 186.
[54] Appellate Body Report, *Chile – Price Band System*, para. 190.