ANNEX D

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

ANNEX D-1

**OPENING STATEMENT BY ARGENTINA
(1 AUGUST 2006)**

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I. INTRODUCTION

Mr. Chairman, Members of the Panel:

1. Argentina appreciates the opportunity to submit to your consideration its arguments in the light of the First Written Submission by Chile and its Rebuttal.

2. This dispute has a very straightforward solution: a finding that the amended PBS cannot be maintained because it is not an ordinary customs duty.

3. A plain reading of the legislation enforcing the amended PBS shows that this measure is not expressed in the *form* of "*ad valorem* or specific rates". To the contrary, the amended PBS is a complex mechanism that, as a border measure, has no resemblance with an ordinary customs duty. By not being an ordinary customs duty, the amended PBS violates Article 4.2 of the *Agreement on Agriculture*.

4. Furthermore, by being "other duties or charges" not recorded in the corresponding column of Chile's Schedule of Concessions (No. VII), the amended PBS violates the second sentence of Article II:(1)(b) of the GATT 1994.

5. Finally, by maintaining a prohibited measure in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements, in violation of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*.

6. Chile was found in breach of its WTO obligations. The Appellate Body found that Chile's PBS was a border measure similar to a variable import levy and a minimum import price, and therefore was inconsistent with Article 4.2 of the *Agreement on Agriculture.* Thus, Chile's PBS was not an ordinary customs duty and could not be maintained.

7. Chile did not comply. It has "cosmetically" amended the old PBS while maintaining its distortive effects and fully preserving its lack of transparency and predictability.

8. Furthermore, Chile has tried to convince this Panel that its obligations to comply were very narrow in scope arguing that "… in analysing the 'measures taken to comply' an Article 21.5 Panel … must necessarily study the scope of the recommendations and rulings of the DSB".[1] This is incorrect. A proceeding under Article 21.5 of DSU is not only about the compliance with the recommendations and rulings of the DSB but also about the consistency of the measure taken to comply with a covered agreement.[2]

9. Finally, Chile agreed with Argentina's position: in addition to DSB's recommendations and rulings, Chile had to comply with the covered agreements[3], particularly in this case, the *Agreement on Agriculture*, the GATT 1994 and the WTO Agreement. However, Chile did not bring this understanding into practice: Chile not only has evaded DSB's recommendations and rulings but also has violated those agreements in further new ways.

10. In another attempt to disregard its WTO obligations, Chile has misinterpreted DSB's recommendations and rulings when stating that there were only "specific aspects" of the PBS that it

[1] Rebuttal by Chile, para. 16.

[2] *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Recourse to Article 21.5 of the DSU by India, Report of the Appellate Body (WT/DS141/AB/RW), para. 79.

[3] Rebuttal by Chile, para. 12.

should have brought into conformity.[4] Chile has had a big trouble with Argentina's claim that the amended PBS is inconsistent as a whole.[5] Not surprisingly, Chile's strategy has been to deviate the attention and to focus the discussion on a few specific features of Chile's PBS amendments.

11. Chile argues that Argentina, by identifying the amended PBS specific inconsistent features, goes against its own position.[6] That argument has shown to be untenable. Any Member alleging the incompatibility of any other Member's measure, necessarily has to identify specific aspects of that measure that turn it inconsistent with WTO obligations. That was the reasoning the Appellate Body developed in order to reach its conclusions.[7] Indeed, that is also what Argentina has done during these proceedings: based on specific features which are the core of the amended PBS, a conclusion was reached regarding the amended PBS in general.

12. Regarding its response to Argentina's claims in these proceedings, Chile has not countered many of Argentina's arguments. Chile erroneously believes that it is not Chile's obligation to refute *all* and each of Argentina's claims.[8] Nevertheless, Chile's defense is not properly substantiated if it does not respond each of Argentina's arguments. The Appellate Body stated that the burden of proof is shifted to the defending party once the claimant has established a *prima facie* case of inconsistency with a particular provision, which must in turn counter or refute the claimed inconsistency.[9]

13. Chile cannot simply maintain that its "… objections … to Argentina's claims and arguments are clarified from the reading of [its] arguments".[10] Thus, Chile wants the Panel to find that it has refuted all of Argentina's arguments from the simple reading of a few arguments that Chile considers "relevant". Chile's position is baseless, and impairs the possibility to exactly identify which arguments have been responded, how they have been responded, what proofs have been provided for or if those arguments have effectively been responded.

14. This is how Chile purports to convince this Panel it has complied: by misinterpreting the recommendations and rulings of the DSB and by narrowing its obligations under the covered agreements, Chile has "cosmetically" amended its PBS, fully preserving its distortive effects, and has avoided to substantially address each of Argentina's claims. This Panel should not be misled by Chile's attempt and should find that the amended PBS is inconsistent which Chile's obligations under the WTO.

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[4] First Written Submission by Chile, para. 88.

[5] Rebuttal by Chile, paras. 15 and 19 to 28.

[6] Rebuttal by Chile, para. 22. The features identified by Argentina are the ones that rendered the "old" PBS intransparent and unpredictable. Argentina was answering Chile's argument that only a few minor features of the PBS were inconsistent due to lack of transparency and predictability (see Rebuttal by Argentina, para. 110 and ss.).

[7] *Chile – Price Band System*, Report of the Appellate Body, para. 261: "… we reach our conclusion <u>on the basis</u> of the particular configuration and interaction of all these specific features of Chile's price band system …" (underlining added).

[8] Rebuttal by Chile, paras. 2 and 3.

[9] In *US – Wool Shirts and Blouses* (WT/DS33/AB/R, WT/DS33/AB/R/Corr.1, page 16) the Appellate Body stated: "… [I]t is a generally-accepted canon of evidence … that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or ***defense***. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, ***who will fail unless it adduces sufficient evidence to rebut the presumption***". (Emphasis added; footnote omitted). This principle was recalled by the Appellate Body in *EC – Hormones* (WT/DS26/AB/R, WT/DS48/AB/R, para. 98), *Japan – Apples* (WT/DS245/AB/R, para. 154) and *EC – Tariff Preferences* (WT/DS246/AB/R, para. 104).

[10] Rebuttal by Chile, para. 2.

II. THE AMENDED PBS IS INCONSISTENT WITH ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

1. The amended PBS is inconsistent with Article 4.2 of the Agreement on Agriculture because it is not an ordinary customs duty

15. As stated before, this Panel could bring an end to this dispute by providing the parties with a very straightforward finding: the amended PBS cannot be maintained because it is not an ordinary customs duty.

16. Article 4.2 of the *Agreement on Agriculture* is not an ordinary provision. By requiring Members not to maintain measures other than ordinary customs duties, it is –by its own nature- a fundamental provision of the trading system. Article 4.2 reads in its relevant part:

> "Members shall not maintain, resort to or revert to measures of the kind which have been required to be converted into ordinary customs duties…"

17. The original Panel in these proceedings stated that "Article 4.2 is central to the establishment and protection of a fair and market-oriented agricultural trading system in the area of market access…Article 4.2 of the *Agreement on Agriculture*, by prohibiting Members from maintaining, resorting to, or reverting to any measures of the kind which have been required to be converted into ordinary customs duties, accordingly provides the legal underpinning for what, in ordinary parlance, is referred to as a "tariff-only" regime for trade in agriculture".[11]

18. In addition, the Appellate Body established that the object and purpose of Article 4 is to achieve improved market access conditions for imports of agricultural products by permitting **only** the application of **ordinary customs duties.**[12]

19. Chile's PBS is not an ordinary customs duty. This is clear from what the Appellate Body established in this dispute. When interpreting the term "Ordinary Customs Duties" as used in Article 4.2 of the *Agreement on Agriculture*", the Appellate Body established that "…all that is required is that 'ordinary customs duties' be expressed in the form of '*ad valorem* or specific rates'".[13]

20. A plain reading of Law 19.897 and Decree 831/2003[14], the legislation enforcing the amended PBS, shows that this measure is not expressed in the *form* of "*ad valorem* or specific rates". There is no ad valorem or specific *rate* expressed in those measures. To the contrary, the amended PBS is a complex mechanism that, as a border measure, has no resemblance with an ordinary customs duty.

21. As its own name implies, the amended PBS is a *system* consisting *inter alia*, of ceiling and floor prices, reference prices, a formula, a fixed coefficient of 0,985, a factor of 1,56, relevant periods for the determination of the reference prices and others for the establishment of the duties, some predetermined relevant markets and some predetermined qualities of concern. There is no similarity between this *system* and an ad valorem or specific duty rate or, in other words, an ordinary customs duty. In this sense, it is clear that the amended PBS is considerably less amenable to negotiated

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[11] *Chile – Price Band System*, Report of the Panel, para. 7.15.

[12] *Chile – Price Band System*, Report of the Appellate Body, para. 234.

[13] *Chile – Price Band System*, Report of the Appellate Body, para. 277 (underlining added). The Appellate Body found contextual support for interpreting the term "ordinary customs duties" in Annex 5 to the Agreement on Agriculture, establishing that "Annex 5, read together with the Attachment to Annex 5 … contemplates the calculation of 'tariff equivalents' in a way that would result in ordinary customs duties 'expressed as *ad valorem* or specific rates'".

[14] See ARG-1 and ARG-2

reduction that an ordinary customs duty, contrary to the object and purpose of the Agreement on Agriculture.[15]

22. The possibility of the *resulting* duties taking the form of ad valorem or specific duties is meaningless regarding of whether the *underlying measure* is consistent. In this respect, the Appellate Body established that "…the fact that the duties that result from the application of Chile's PBS 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*".[16] This is a very important distinction that Chile has constantly tried to obscure, deviating the discussion to an analysis of the consistency of the amended PBS *resulting* duties.[17] However, contrary to what Chile asserts, the duties that result from the application of Chile's amended PBS are not the object of these proceedings. The object of this dispute is the underlying measure, the PBS by itself.

23. The amended PBS did not turn the system into an ordinary customs duty and continues to be a measure of the kind which was required to be converted into an ordinary customs duty, and could not be maintained in conformity with Article 4.2 and footnote 1 of the *Agreement on Agriculture*.

2. The amended PBS causes insulation from the international market

24. In addition to not being an ordinary customs duty because it is not expressed in the form of an *ad valorem* or specific rates, the PBS -regardless the "cosmetic" changes made-, continues to insulate Chile's market from fluctuations in international prices in a way that is inconsistent with Article 4.2 of the *Agreement on Agriculture*.

25. In particular, like the original PBS, the amended PBS continues to elevate the entry price of imports to Chile above the price band floor; continues to "overcompensate" for the effect of decreases in international prices on the domestic market when reference prices are set below the price band floor; continues to make the entry price of Chilean imports higher than if Chile applied a minimum import price at the level of the price band floor, and continues to fail to ensure that the entry price of imports to Chile falls in tandem with falling world market prices.

26. Furthermore, the disconnection produced by the amended PBS stems from the existence of floor and ceiling values determined once for the entire period from 16 December 2003 to 15 December 2014, and established from 2007 on the basis of fixed coefficients; reference prices staying unchanged for two months, established on the basis of only two qualities of concern and of daily prices recorded on only two predetermined markets; a multiplier consisting of 1 plus the general *ad valorem* duty added to the formula used to calculate the duty levels; a factor of 1,56 applied to the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour; and from a complete absence of any relation to the transaction value of the shipments.

27. Each argument has been based on analytical, mathematical and/or empirical evidence.

28. Chile's response to Argentina's arguments has been confusing and contradictory.

29. **First**, Chile has offered the surprising argument that the Appellate Body did not request that the reference price and the floor and ceiling of the PBS be established in connection with international prices[18], when that is exactly what the Appellate Body meant.[19]

[15] See *Chile – Price Band System*, Report of the Panel Report, footnote 638.
[16] *Chile – Price Band System*, Report of the Appellate Body, para. 279.
[17] See, for example, Rebuttal by Chile, para. 137.
[18] Rebuttal by Chile, para. 61.

30. **Second**, the only "evidence" Chile submitted in rebuttal to Argentina's arguments is an unsupported graph.[20] Argentina pointed out a whole set of inconsistencies and contradictions in that graph which, in turn, supported Argentina's argument that the amended PBS causes insulation from the international market.[21] After that Chile exposed a perplexing set of contradictions.[22]

31. **In the end**, Chile's explicit conclusion is that, in spite of the Appellate Body findings and Chile's previous statements, there is no connection between the wheat FOB price, the entry price and the internal market.[23] This is the basis for Chile's argument that the PBS does not have the effect of disconnecting Chile's market from international price developments. Chile's arguments are untenable. Argentina has demonstrated that the amended PBS causes insulation from the international market.

32. Additionally, Argentina has demonstrated how each of the Appellate Body findings in the original proceedings apply to the amended PBS.

33. **First,** Argentina has shown mathematically and empirically -both for wheat and wheat flour- how specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor.[24] That is to say, when specific duties are applied the entry price is *always* above US$128 per tonne, as Chile has confirmed.[25]

34. **Second,** Argentina has also shown that the amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor.

35. Chile's position regarding overcompensation is self-contradictory. First Chile argues that it does not exist.[26] Afterwards Chile affirms that what Argentina calls "overcompensation" can occur and, indeed, occurred.[27] Chile misleadingly states that overcompensation only occurred in two specific dates: from 15 to 16 December 2004 and from 15 to 16 February 2005. Afterwards "international prices will continue being reflected in the domestic prices".[28] There are many problems with this reasoning.

36. On the one hand, it must be clear at this stage that international prices are <u>not</u> reflected in the domestic prices due to the amended PBS. As follows from the PBS formula, for the modified PBS <u>not to elevate</u> the entry price of imports to Chile above the price band floor, an improbable condition must

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[19] *Chile – Price Band System*, Report of the Appellate Body, paras. 249 and 251.

[20] First Written Submission by Chile, para. 154.

[21] First Written Submission by Argentina, 61 to 72.

[22] In its First Written Submission, paras. 154 and 155, Chile stated that the graph revealed that during the period of application, the wheat *entry price* had the same behaviour as its FOB price and that both prices' variation had "large similarities" that showed the connection between Chile's internal price and the international market. In its Rebuttal, para. 55, after Argentina showed that Chile's arguments were baseless, Chile contradicts itself stating that, in reality, the graph was comparing wheat FOB price with wheat *wholesale* price. Moreover, Chile curiously maintains that the connection required by Argentina *cannot exist*. According to Chile, the reason for this is that internal market wheat price is influenced by wheat internal supply. In sum, the evidence submitted by Chile to convince the Panel that the amended PBS does not cause insulation from the international market, not only supports Argentina's arguments, but also is full of self-contradictions. On top of that, when the relevant parameter of comparison is between the FOB price and the *entry price*, as the Appellate Body established in paragraph 260 of its Report, Chile incorporates a new variable never addressed by the Appellate Body nor by Argentina: the *wholesale price*.

[23] Rebuttal by Chile, para. 55

[24] First Written Submission by Argentina, Section C.I.2.1..

[25] See Rebuttal by Argentina, paras. 164 to 169.

[26] Rebuttal by Chile, para. 46.

[27] Rebuttal by Chile, para. 49.

[28] Rebuttal by Chile, para. 51.

be satisfied: the reference price (calculated on a FOB basis) must be higher than the CIF price of an individual export transaction by more than US$7,2453 per tonne or, what amounts to the same thing, the CIF price of that transaction must be lower than the reference price by more than US$7,2453 per tonne. In other words, as far as the CIF price of an individual export transaction exceeds the reference price, or falls below that price by no more than US$7,2453 per tonne, the entry price of that transaction *will be* above the band floor.

37. Argentina is sure that at least two out of three Members of this Panel remember the notion of the *break even point* from the original proceeding. In that case, Argentina demonstrated how, after a break even point was reached, the duties resulting from the PBS violated Chile's consolidated tariff binding, therefore infringing Article II of the GATT 1994. Chile has now established a *new* break even point: the point were the reference price exceeds the CIF price by US$7,2453 per tonne.

38. Argentina showed how improbable reaching that break even point is.[29] As far as that point is not reached, the modified PBS will mathematically elevate the entry price of imports to Chile above the price band floor. Chile explicitly recognized that FOB prices are always lower than CIF prices.[30] As the reference price is calculated on a FOB basis, therefore the condition cannot be fulfilled: the modified PBS will always tend to elevate the entry price of imports to Chile above the price band floor.

39. Bearing this formula in mind, it is easy to see that, even if international prices were reflected in the domestic prices after the initial overcompensation as Chile states, the amended PBS provides an end to *any* transmission when the entry price approaches the band floor. Due to the formula, the PBS will not allow any transmission of international prices in the case that the entry price falls below the floor price. Simply put: the formula, together with the band floor, work as a "brake" for the decline in the entry price and for any transmission of international prices below the level of the floor. If a decline in international prices *cannot be* reflected below the price band floor, then it is impossible to argue that the amended PBS reflects international prices.

40. On the other hand, the initial overcompensation which, according to Chile, takes place at the beginning of the two-month period, inevitably taints the rest of that period: the level of duties and the entry price after that moment will be affected by the original overcompensation. In fact, if overcompensation did not occur, the level of duties and the entry price resulting from the two-month period would be lower. Thus, the effects of overcompensation taint and affect the level of duties and entry price resulting from the PBS, which are higher than they would be if overcompensation simply did not exist.

41. Moreover, the situation is not different with what occurred in the original proceedings. According to the original PBS, the specific duties were established for a period of one week.[31] Assuming *arguendo* that overcompensation only took place at the beginning of that period of one week, it nevertheless affected the level of duties and the entry price for the rest of that period. That was enough for the Appellate Body to find that the original PBS overcompensated for the decreases in international prices.[32] The situation with the amended PBS is worse: while in the original PBS the effects of overcompensation tainted the level of duties and the entry price for a week, now that period has been extended to two months. The fact is that Chile has not been able to rebut Argentina's

[29] First Written Submission by Argentina, paras. 109-114.
[30] See Rebuttal by Argentina, paras. 164 to 169.
[31] *Chile – Price Band System*, Report of the Appellate Body, paras. 21 to 29.
[32] *Chile – Price Band System*, Report of the Appellate Body, para. 260

arguments regarding the overcompensation produced by the amended PBS and recognized by Chile itself.[33]

42. Chile's last bid to argue that the amended PBS could equate to an "ordinary customs duty" is its attempt to equate the overcompensation effect with an alleged overcompensation produced by *ad valorem* duties or by seasonal duties. If what happens with *ad valorem* duties or with seasonal duties could be equated with the "overcompensation" produced by the amended PBS, which it can not, it is certainly not a result of a pre-established mathematic formula inherent to those measures that guarantees that "overcompensation" *will* occur when international prices in relevant markets fall, as a consequence of a floor and a ceiling price, reference prices based on predetermined markets and qualities of concern, a factor of 1,56 and a coefficient of 0,985.

43. Contrary to what Chile states, Argentina does not focus its argumentation only in "overcompensation".[34] The "overcompensation" is one *additional* feature of the amended PBS that contributes to disconnect Chile's market from international price developments. As the Appellate Body stated when finding the old PBS inconsistent[35], it is the configuration and interaction of Chile's PBS features that insulate Chile's market from the transmission of international prices. Overcompensation then, is one of those features that, together with many other features, renders Chile's amended PBS inconsistent with Article 4.2 of the *Agriculture Agreement*.

44. **Third,** Argentina has also shown that, under the amended PBS, the entry price for wheat and wheat flour imports is higher than it would be if Chile were to apply a minimum import price at price band floor level.

45. As can be clearly seen from Table V of Argentina's First Written Submission[36], in all cases the entry price for imports to Chile under the amended PBS is higher than the entry price with a minimum import price at the band floor level.

46. **Fourth,** Argentina provided evidence that the amended PBS does not ensure that the entry price of wheat and wheat flour imports to Chile falls in tandem with falling world market prices. There can be no doubt that the amended PBS does not merely moderate the effect of fluctuations in world market prices on the Chilean market.

47. To ensure that the entry prices of imports to Chile behave the same way as FOB prices, Chile had just to apply an *ordinary customs duty*. Chile knows this, but it does not apply an ordinary customs duty, precisely to avoid ordinary customs duties' effects and to insulate Chilean market from international market evolutions. It is pure logic. Why, if not, Chile has avoided applying an *ad valorem* or specific duty and attempted for the second time to maintain a system as complex as the amended PBS?

The floor and ceiling of the amended PBS insulate the Chilean market from international price developments

48. In its present form the PBS impedes the transmission of international price developments to the domestic market, in much the same way as other categories of prohibited measures listed in footnote 1 to Article 4.2 of the *Agreement on Agriculture*, since the floor and ceiling prices of Chile's price bands no longer vary with either world market prices or historical prices, but have been

[33] First Written Submission by Argentina, Section C.I.2.2.
[34] Rebuttal by Chile, para. 80.
[35] *Chile – Price Band System*, Report of the Appellate Body, para. 261.
[36] First Written Submission of Argentina, para. 167.

determined once for the entire period from 16 December 2003 to 15 December 2014, without bearing any relation to international prices.

49. Argentina considers that the current system has a further distortive effect, since the floor and ceiling prices will not be adjusted until 2007. Similarly, the new PBS leads to even greater distortions considering that from 2007 onwards these parameters will be established on the basis of fixed coefficients, thereafter isolating the system from fluctuations on the international markets for a further period of seven years, or probably more.[37]

50. Under the amended PBS, due to the factor of 0,985, the floor and ceiling vary *without any relation* to world market or historical prices. Neither do they vary as a function of the transaction value, a characteristic shared by the entire PBS.

51. Chile asserts that the fact that the factor of 0,985 is applied until 2014 is a predictability guarantee for market players.[38] The predictability Chile refers to does not exist. It is clearly evident from Law 19.897 that there is no *guarantee* that the PBS will be dismantled in 2014. If there is any predictability, it is the certainty that international prices *will not* be reflected by the floor and ceiling of the amended PBS in Chile's internal market. That is the only guarantee the PBS can offer.

The reference prices of the amended PBS insulate the Chilean market from international price developments

52. Argentina has demonstrated that the amended PBS reference prices, by the way they are established, are neither transparent nor predictable and insulate the Chilean market from international price developments.[39]

53. Regarding the insulation consequences deriving from the fact that the amended PBS reference prices are based on only two predetermined **markets of concern**, Argentina recalls that bread wheat is sold -at least- in two other markets than the ones selected by Chile and which are not reflected on the reference price: Chicago and Kansas.[40]

54. Regardless, Chile has tried to justify the establishment of the reference prices based on FOB prices in Argentina and United States, because according to Chile, "[i]n the last six years (2000-2006) 40 per cent of Chilean wheat imports came from the United States and 31 per cent from Argentina".[41] It is strange that Chile does not provide a reference quoting the source of that information. Nevertheless, Argentina had access to Chile's own records for the period during which the amended PBS has been in force. Those records show a different story: during the two complete years since the establishment of the amended PBS (i.e. 2004-2005), Canada has always been a larger exporter of wheat to Chile than the United States, either in volume as well as in amount. I will ask the Members of the Panel to turn your attention to Exhibit ARG-31 which is being distributed now. This is a printout of ODEPA's (Chile's official source) webpage showing Chile's records of wheat imports for 2004 and 2005. As it is clear from the first page of this exhibit, in 2004 Canada exported around 54 million tons of wheat while the United States accounted for almost 40 million tons. If we now turn to the second page, showing wheat imports for 2005, the difference between Canada and the United

[37] In effect, the amended PBS has no ending date. Law 19.897 establishes that "In 2014, the President of the Republic shall evaluate the modalities and conditions of application of the price band system, taking into consideration international market conditions, the requirements of the industrial, productive and consumer sectors and Chile's trade obligations at that date." See Exhibit ARG-1.

[38] Rebuttal by Chile, para. 86

[39] First Written Submission by Argentina, paras. 214 to 219 and Rebuttal by Argentina, paras. 107 and 108.

[40] First Written Submission by Argentina, para. 218.

[41] Rebuttal by Chile, para. 72.

States is even larger: Canada accounted for almost 40 million tons while the United States accounted for around 20 millions. It is clear that Canada has been a relevant exporter to Chile. However for Chile's PBS, this is meaningless. Although Canada is certainly a market of concern for Chile, the amended PBS will never reflect Canada's relevance in Chilean foreign trade of wheat, nor Canadian prices will be reflected in Chile's internal markets. Therefore, Chile's argument that the amended PBS "reference prices now correspond to f.o.b. prices on the two markets of most concern for Chile"[42] is baseless. To put it in the Appellate Body words, it is not by any means certain that the reference price used under the PBS is representative of the current world market price, and it is certainly *not* representative of prices in *all* markets of concern.[43]

55. Regarding the problems with the sources for the reference price, after Argentina insisted twice on this issue, Chile finally revealed the mystery: for the first semester (Bread Wheat, Argentine Port) Chile uses SAGPyA's quotation (http://www.sagpya.mecon.gov.ar), the official argentine source which provides "Official FOB Prices". For the second semester (Soft Red Winter No.2 wheat), Chile uses the information from the Chicago Board of Trade (http://www.cbot.com).[44]

56. After Chile's unveiling the source for the establishment of the reference price, the problems have become clearer.

57. **First**, contrary to what Chile affirms, the official Argentinean source (SAGPyA) does not publish the quotation of "Bread Wheat, Argentine Port". Instead, as Chile acknowledges, what SAGPyA publishes is the "*Official FOB Price*" for bread wheat, which is not "Bread Wheat, Argentine Port" FOB price. I would like to turn your attention to Exhibit ARG-32 which we are distributing now. It is a printout of SAGPyA's "Official FOB Prices" from some days ago. As it can be clearly seen, the header reads "Precios FOB Oficiales", which is the Spanish translation for "Official FOB Prices". It is clear now that the quotation "*Bread Wheat, Argentine Port*" (or its translation to Spanish "Trigo Pan Puerto Argentino") is not published by SAGPyA as Chile states.[45] Indeed, "*bread wheat, Argentine port*" is a theoretical construction, not developed by SAGPyA.

58. **Second**, unless Argentina had initiated this dispute, wheat and wheat flour exporters from all over the world would have not known where to look for the future reference price. No matter what "abilities" and market knowledge the exporters had[46], it would have been very difficult for them to establish the future amount of duties resulting from the difference between an intransparent future reference price and the floor price. Now, it is clear that SAGPyA does not publish what Chile affirms. In fact, if the exporter recurs to SAGPyA, he will not a get a "Bread Wheat Argentine Port" quotation.

59. In the same way that Chile gives now this *ex-post* clarification regarding the source for "*Bread Wheat, Argentine Port*", Chile now submits that the source of information for the "Soft Red Winter" FOB Price (Gulf) is the Chicago Board of Trade.[47] In this case, the information is not publicly available. In fact, it is paid information. It is an extra charge exporters face for accessing the Chilean market.[48] This is how transparent and predictable Chile's amended PBS is.

60. Regarding the **qualities of concern**, contrary to what the Appellate Body established[49], Chile did not explain how they were are selected. Chile's amended PBS establishes the references prices

[42] Rebuttal by Chile, para. 72.
[43] *Chile – Price Band System*, Report of the Appellate Body, para 249.
[44] Rebuttal by Chile, para. 73.
[45] See SAGPyA's web page: http://www.sagpya.mecon.gov.ar/scripts/0-2/fobtodo.asp
[46] First Written Submission by Chile, para. 162.
[47] Rebuttal by Chile, para. 73.
[48] See http://www.esignal.com/cbot/pricing/default.asp. Esignal.com is a sub page (link) of CBOT.com where pricing information is provided.
[49] *Chile – Price Band System*, Report of the Appellate Body, para 249.

based on only *two* of those qualities, namely "Bread Wheat, Argentine Port" and "Soft Red Winter". However, there are many types or qualities involved in the international trade of wheat. Indeed, according to Chile's own records there are at least two other qualities or types of wheat relevant for Chile: "Soft White Winter No 2" and "Western White Winter No 2". At this respect, I would like to turn your attention to Exhibit ARG-33, being distributed now. There you can see ODEPA's prices record for different qualities of wheat since 1991. In the first and second columns you can see the FOB prices for the two qualities of concern relevant for the amended PBS and now familiar to us. In the third and fourth columns, ODEPA records the FOB price for the two other qualities just mentioned: "Soft White Winter No 2" and "Western White Winter No 2". Thus, according to its own records there are at least two other qualities or types of wheat relevant for Chile. Therefore, it is clear that Chile knows that there are at least two, and presumably more, other relevant qualities of concern and probably Chile knew it at the time the PBS was amended.

61. It is noteworthy that among the -at least- four relevant qualities and markets of concern, Chile chose those qualities that since 1991 have been the lowest priced. I would ask the Panel at this point to turn to page 4 of the same Exhibit ARG-33 where the average of the prices of these four categories recorded since 1991 are highlighted at the bottom. Clearly, the qualities "Bread Wheat, Argentine Port" and "Soft Red Winter" have the lowest FOB prices. Thus, the gap between the reference price and the floor price is further expanded, more duties are levied and the entry price is higher than if Chile took into account all the qualities of concern. Again, it is useful recalling that the Appellate Body found that "[u]nder Chile's price band system, the price used to set the weekly reference price is the lowest f.o.b. price observed, at the time of embarkation, in any foreign 'market of concern' to Chile for 'qualities of products actually liable to be imported to Chile'".[50]

62. Furthermore, Chile does actually import wheat of qualities different from those used for the calculation of the reference prices. In Exhibit ARG-34, being distributed now, you can see a selection of import data from the Chamber of Commerce of Santiago de Chile (in Spanish "Camara de Comercio de Santiago de Chile") for 2004 and 2005. There you can see on the first page that, for example, in March 2004, Chile imported wheat of the type "Soft White". Similarly, on the second page of the same Exhibit you can see that, for example, in July 2005, Chile imported wheat of the type "Canadian 3WR". Page 3 of the same Exhibit shows imports to Chile of wheat of the type "Western Red Spring" and "Canadian 1WR". So, not only Chile imports wheat of qualities different from those taken into account for the establishment of the reference prices but also Chile applies to those imports reference prices based on the two predetermined qualities of concern established by the amended PBS.

63. Summing up, through the reference prices, the amended PBS impedes the transmission to the Chilean market of the prices of other qualities of wheat. By not taking into account all the relevant markets and qualities of concern for the calculation of the reference prices, the amended PBS also insulates Chile's market from international price developments. In fact, if an exporter ships any other type or quality of wheat rather than "Bread Wheat, Argentine Port" or "Soft Red Winter No. 2", Chile will apply to that shipment a reference price and levy specific duties based on one of those two qualities, different from the quality actually being imported. It is worth recalling at this point that the Appellate Body found that the "… reference price used under Chile's Price band system is certainly *not* representative of an average of current lowest prices found in ***all*** markets of concern".[51]

64. The problem with the amended PBS's reference price is that, compared to the original PBS, the insulating consequences are much worse. In fact, international price developments of an extense

[50] *Chile – Price Band System*, Report of the Appellate Body, para. 249 (Underlining added).

[51] *Chile – Price Band System*, Report of the Appellate Body, para. 249 (Emphasis in the original, underlining added).

period of the year are not reflected at all by the amended PBS. According to Chart 2 of the Annex to the Decree 831/2003, the relevant price leading to the establishment of the reference price, are those recorded between 26 November to 10 December, 27 January to 10 February, 27 March to 10 April, 27 May to 10 June, 27 July to 10 August, and 26 September to 10 October. Those are the relevant time periods for the calculation of the reference prices. These groups of days account for a total of … 90 days. Taking into account that a year has 365 days, that is less than 25 per cent of the year. More explicitly, international price developments recorded during 275 days or 75 per cent of the year will never be reflected in the reference price. For the amended PBS the international prices recorded during all those 275 days simply *do not exist*. As regards to the daily prices recorded during each day of each of the 15-day periods that form the remaining 90 days, they are reflected *after* they are recorded, with a delay ranging from 6 days to two months.[52]

65. Thus, the situation now is even *worse* than with the original WTO-inconsistent PBS. In fact, although completely full of distortive effects, the original PBS, at least took into account all the 52 weeks of each year to establish the weekly reference price. As it is clear now, for the amended PBS only 13 of those weeks (25 per cent of the year) are now relevant.

66. In short, Chile wants this Panel to find that the amended PBS reflects international price developments, overlooking the fact that the floor price, will never transmit international prices. For the other fundamental feature for the assessment of duties, the reference price, prices recorded during 275 days of the year cannot be reflected: simply they *do not exist*. More over, the remaining 90 days are recorded in only two markets of concern, when there are at least four more (Chicago, Kansas, Portland and Canada) and one of them (Canada) has been at least as relevant as the two established "markets of concern". Furthermore, the reference prices are based on the two lowest priced qualities of concern, when there are at least two further relevant qualities of concern for Chile. If this were not enough, the same reference price applies to all imports that Chile *does* import, regardless the origin, quality of concern and transaction value.[53] This is how Chile pretends to argue that the amended PBS transmits international prices.

The amended PBS has no relation to the transaction value

67. Chile maintains that what "worries" Argentina is that the specific duties resulting from the amended PBS are neither related with commercial transactions nor modified by changes in international prices.[54] Chile distorted Argentina's argument. Argentina is not questioning the resulting duties. Argentina's arguments relate to the underlying measure, the amended PBS.

68. **First**, what Argentina argues is that one additional aspect of the amended PBS that insulates Chile's market from the transmission of international prices, is the complete absence of any relation of all of its features with the transaction value of the shipments.[55] In fact, the amended PBS is totally unrelated to the transaction value. Simply put, within the amended PBS, the transaction value has no meaning.

69. **Second**, although the amended PBS has no relation with the transaction value, contrary to Chile's assertion, the resulting *duties* are, in fact, modified by international prices. As Argentina asserted, although specific duties resulting from the amended PBS do not vary during the two-month

[52] For example, the prices recorded between 27 January and 10 February, will be reflected in the reference price established for the period 16 February to 15 April.

[53] *Chile – Price Band System*, Report of the Appellate Body, para. 250.

[54] Rebuttal by Chile, para. 32.

[55] First Written Submission by Argentina, paras. 137, 141, 153, 157, 182, 196, 220, 222, 223 and 228; Rebuttal by Argentina, paras. 60, 82, 143 and 198.

period, they change following price changes in the markets of concern.[56] The paradox is that they change in opposite directions: when international prices fall, specific duties rise.[57] It is as simple as that. To make this clearer, I would like to turn the Panel's attention to Exhibits ARG-35 and ARG-36 which are being distributed now. I want you to pay special attention to the graph in Exhibit ARG-35. That graph is based on data from the Chart in exhibit ARG-36, which in its turn is based on ODEPA's information. It reflects the trajectory in indexed terms of the specific duties and reference prices during the period in which, as a result of the amended PBS, the duties were imposed (16 December 2004 – 15 April 2005). This graph is factual evidence that clearly shows the point: when the reference prices fall, the specific duties move in an opposite direction, or in other words, rise, completely undercutting the effect of the decline in wheat international prices. It is worth highlighting that this graph has not involved any calculation, other than the necessary for indexing and simply stems from evidence already presented by Argentina in this proceeding.[58] In fact, these exhibits are exclusively based on data provided by ODEPA.[59] Argentina does not understand how, then, Chile can argue that the amended PBS does not disconnect Chile's market from international price developments.[60]

3. The amended PBS is neither transparent nor predictable

70. With the purpose of preserving the intransparent and unpredictable aspects of the amended PBS from the Panel's scrutiny, during this proceeding Chile has systematically maintained the argument that transparency and predictability are not requirements of Article 4.2 of the *Agreement on Agriculture*. Furthermore Chile affirmed that the Appellate Body just found that only variable import levies are intransparent and unpredictable.[61]

71. Argentina demonstrated that the Panel and the Appellate Body found that the core and fundamental features of the old PBS lacked transparency and predictability.[62] The logical extension is that the amended PBS can be challenged for its lack of transparency and predictability.

72. Even in the unlikely event that certain specific features of the PBS had not been addressed by the Panel or the Appellate Body findings, the amended PBS should *still* be found intransparent and unpredictable.

73. Chile's last bid has been to maintain that Article 4.2 of the *Agreement on Agriculture* does not contain the words transparency and predictability.[63] However, in spite of Chile's wishes, transparency and predictability are implicit requirements of Article 4.2 of the *Agreement on Agriculture*.[64] **First**, the Appellate Body has already recognized that the lack of transparency and predictability "… contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market".[65] **Second**, the Appellate Body established that the lack of transparency and

[56] First Written Submission by Argentina, Section C.I.2.4 and Rebuttal by Argentina, Section B.2.2.
[57] First Written Submission by Argentina, para. 54
[58] For example, *inter alia*, Exhibit ARG-6 or Tables I and II, paras. 134 and 138, respectively.
[59] See Exhibit ARG-6.
[60] What should be also highlighted is that the amount levied by ordinary specific duties does not vary when international prices change. In those cases, what varies is the amount of the duty in relative terms (percentage) with respect to the international price but, usually, the absolute amount does not change. In the case of the amended PBS, following the decline of the reference prices below the price band floor, the amount of the duty varies in relative and absolute terms.
[61] *Inter alia*, First Written Submission by Chile, para. 66, 81 and 83, and Rebuttal by Chile, paras. 29 and 30.
[62] First Written Submission by Argentina, Section C.I.3 and Rebuttal by Argentina, Section B.3.
[63] Rebuttal by Chile, para. 29.
[64] Rebuttal by Argentina, para. 124.
[65] *Chile – Price Band System*, Report of the Appellate Body, para. 234.

predictability prevents enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4 of the Agreement on Agriculture.[66]

74. According to Chile, "… Argentina appears to claim that any measure applied in the agricultural sector that is not transparent and/or predictable is inconsistent with Article 4.2 of the *Agreement on Agriculture*".[67] Rather, Argentina's position is that an intransparent and/or unpredictable border measure applied to agricultural imports cannot be consistent with Article 4.2. To the contrary, the logical extension of Chile's position would be that any not transparent and/or predictable border measure applied to the agricultural sector would anyhow be consistent with Article 4.2 of the *Agreement on Agriculture*, in manifest contradiction to what the Appellate Body established regarding the object and purpose of Article 4 of the Agreement on Agriculture.

75. Chile stated that the fact that Argentinean exporters do not know today the duties they will pay in the future is not prohibited by any WTO provision and nobody can guarantee that the ad valorem duties applied today by the WTO members will be the same in 2007.[68] In addition to that, Chile stresses that nobody can argue that its MFN general ad valorem duty is not an ordinary customs duty because, due to a plan, it has progressively and automatically been reduced from 11% to 6% between 1999 and 2003.[69]

76. **First**, unlike the amended PBS, Chile's MFN general ad valorem duty is an ordinary customs duty because it is expressed as an ad valorem rate, as the Appellate Body required. Chile's PBS is clearly not expressed in and ad valorem or specific duty rate.

77. **Second**, unlike the amended PBS, Chile's MFN general ad valorem duty has not varied due to a *formula*. Additionally, its variation has certainly been transparent and predictable. As Chile itself proved, Chile's MFN general ad valorem duty has varied due to a plan.[70]

78. **Third**, the fact that an exporter does not know and cannot reasonably predict what the amount of duties will be, is one among several characteristics that renders the amended PBS inconsistent with Article 4.2 of the *Agreement on Agriculture*. This was the Appellate Body reasoning[71], and the reasoning followed by Argentina. Argentina has explained all the problems with this[72], as well as with Chile's counterarguments.[73] Instead of rebutting the fact that an exporter does not know and cannot reasonably predict what the amount of duties will be, Chile's answer to this was that "[e]ven though Chile does not know precisely how these exporters operate, **it does not seem reasonable to assume such ignorance**".[74] Additionally, Chile argues that Argentina's extensive listing of all the additional steps an exporter has to take in order to predict future reference prices "…implies that it is not part of his own business as such – but an additional task – to find out about the conditions of access to his chosen export market …". Then Chile asks "what is part of the 'own business' of an Argentine exporter."[75] Argentina would reply with the following question: Can Chile reasonably argue that carrying with the burden of finding out about the unfair conditions of access imposed by a measure other than an ordinary customs duty, is part of an exporter's own business? There is one clear answer to this: no. If Chile imposed an ordinary customs duty expressed in the form of an ad valorem or

[66] *Chile – Price Band System*, Report of the Appellate Body, para. 258.
[67] Rebuttal by Chile, para. 31.
[68] Rebuttal by Chile, para. 95.
[69] Rebuttal by Chile, para. 105.
[70] See Exhibit CHL-8: Law 19.589 providing for a rebate on the tariff rate and introducing amendments to other fiscal and economic legislation. Published in the Official Journal on 14 November 1998
[71] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[72] First Written Submission by Argentina, Section C.I.3.2.
[73] Rebuttal by Argentina, paras. 125-135.
[74] Rebuttal by Chile, para. 93.
[75] Rebuttal by Chile, para. 92.

specific duty, the exporter would not have to face all the complexities described by Argentina. The Panel should not be misled by Chile's argument.

79. If in the amended PBS there is any chance of predicting intransparent future reference prices, which there is none, that chance is not different from the possibility that existed with the original PBS. Future prices for wheat existed then, as they exist now, and the same problems that Argentina now highlights existed at the time of the original proceeding as well. In fact, that was enough for the Appellate Body to find that the original PBS was inconsistent because an exporter was less likely to ship to a market if that exporter could not predict what the amount of duties would be.[76] So Chile's arguments are unsustainable.

80. **Fourth**, it is obvious that *ad valorem* duties can change and no one can guarantee otherwise. That is what happens with any ordinary customs duty. However, unlike the amended PBS, ordinary customs duties do not include a formula that causes import duties to vary automatically and continuously and, on top of that, they are transparent and predictable. Conversely, what is *guaranteed* is that, due to the PBS, if the required conditions are met, an exporter will mandatorily face a different duty every two months.[77] In fact, contrary to what Chile has asserted in its submissions[78], the PBS Law and Regulation give no discretion to Chile to decide whether or not to impose the duties: if the reference prices fall below the band floor, specific duties will be levied.

4. The amended PBS is similar to a variable import levy and a minimum import price

81. As it has been shown, the amended PBS is a border measure similar to a "variable import levy" and a "minimum import price" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*.

82. The Appellate Body has clearly defined the necessary and the additional features of the variable import levies: the presence of a formula causing automatic and continuous variability and the lack of transparency and predictability in the level of duties that will result from such measures. Argentina has shown how the amended PBS fulfils all the requisites and includes the features referenced by the Appellate Body to be characterized as a variable import levy.[79]

83. Chile has repeatedly stated that for a border measure to be a variable import levy, it must "sustain" a price.[80] However, when defining "variable import levies" in this dispute the Appellate Body said nothing about *price sustainment*. The Panel made reference to this[81] but its finding was rejected by the Appellate Body.[82] So this Panel should reject Chile's argument that for a border measure to be a variable import levy, it must "sustain" a price.

84. Nevertheless, should the Panel accept Chile's incorrect definition -which it should not- Argentina has already demonstrated that the amended PBS, in fact, sustains a price, because the specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor and the entry price of Chilean imports under the amended PBS is higher than it would be if Chile were to apply a minimum import price at the price band floor level.

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[76] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[77] Rebuttal by Argentina, para. 145.
[78] First Written Submission by Chile, para. 93 and Rebuttal by Chile para. 101 and 120.
[79] First Written Submission by Argentina, paras. 236 to 283. Rebuttal by Argentina, paras. 138 to 159.
[80] Rebuttal by Chile, para. 5
[81] *Chile – Price Band System*, Report of the Panel, para. 7.36.
[82] *Chile – Price Band System*, Report of the Appellate Body, paras. 230 and ss.

85. In its Rebuttal Argentina has clarified why the PBS is a border measure similar to a minimum import price.[83] In spite of that, Chile has repeatedly argued that unlike its PBS, "minimum import price schemes generally operate in relation to the actual transaction value of the imports".[84] Chile has repeatedly emphasized that, because the PBS does not operate in relation to the actual transaction value but to a reference price, it is not similar to a minimum import price.

86. **First**, Argentina has not argued that the PBS is *identical* to a minimum import price. Rather, Argentina's argument is that the amended PBS is a border measure *similar* to a minimum import price. The fact that the PBS does not operate in relation to the actual transaction value of the imports does not mean it is not similar to a minimum import price. Chile's PBS needs not to be identical to variable import levies or minimum import prices to be a prohibited measure, provided that the amended PBS bears sufficient resemblance to the measures listed in footnote 1 to Article 4.2 of the Agreement on Agriculture. Indeed, that same reasoning was developed by the original Panel and upheld by the Appellate Body.[85]

87. **Second**, the Panel described "minimum import prices" as follows: "schemes [that] generally operate in relation to the actual transaction value of the imports".[86] The Appellate Body did not reverse that finding. The word "generally" implies "usually", but not "always". This is an important distinction. If the Panel had meant "always", it would have so stated. Therefore, there are some cases where border measures do not operate in relation to the actual transaction value of the imports, but are similar to minimum import prices, just like the amended PBS.

88. In fact, the original PBS, like the amended PBS, did not have any relation with the actual transaction value of the imports. In spite of that, the Panel and the Appellate Body in the original proceedings found that the old PBS was a border measure similar to a minimum import price. Indeed, the absence of any relation with the transaction value of the shipments was an aspect of the old PBS that contributed to enhance the distorting effects of the old PBS[87] and to enhance the distorting effects of the amended PBS as well.

89. Even if the Panel were to consider that the amended PBS is not similar to a minimum import price, *quod non*, evidence shows that, as a distorting measure, its consequences are either similar or worse than those resulting from a minimum import price. Argentina has demonstrated that the specific duties resulting from the amended PBS tend to elevate the entry price of imports to Chile above the price band floor.[88] Additionally, Argentina has provided the formula for calculating the import price resulting from the Appellate Body Report, showing what the entry price would be if Chile applied a minimum import price.[89] Chile recognized that that formula was correct.[90] Then, Argentina demonstrated that the entry price of Chilean imports under the amended PBS is higher than it would be if Chile were to apply a minimum import price at price band floor level.[91] In fact, as stated before, due to the formula, the PBS does not permit any transmission if that means that the entry price has to fall below the floor price, the formula together with the band floor work as a *brake* for the decline in the entry price and for any transmission of international prices below the level of the floor.

90. The Appellate Body found that that Chile's old PBS could have the *effect* of impeding the transmission of international price developments to the domestic market in a way similar to that of

[83] Rebuttal by Argentina, Section B.5
[84] Rebuttal by Chile, para. 7.
[85] *Chile – Price Band System*, Report of the Appellate Body, para. 243 and 244
[86] *Chile – Price Band System*, Report of the Panel, para. 7.36(e). Emphasis added.
[87] *Chile – Price Band System*, Report of the Appellate Body, para. 250.
[88] First Written Submission by Argentina, Section C.I.2.1.
[89] First Written Submission by Argentina, Section C.I.2.3.
[90] Rebuttal by Chile, para. 162.
[91] First Written Submission by Argentina, Section C.I.2.3.

other categories of the prohibited measures listed in footnote 1 of Article 4.2.[92] Therefore, if the distorting effects of the amended PBS are either similar or worse than the distorting effects of minimum import prices, it logically follows that the amended PBS cannot be consistent with Article 4.2 of the Agreement on Agriculture.

5. The amended PBS does not result in any improvement of access conditions to the Chilean market

91. During this dispute Chile repeatedly stated that the amended PBS has resulted in an improvement to Chilean market access conditions[93] and that due to the scheduled reduction of floor and ceiling prices, in 2014 market access will be better than today.[94]

92. Argentina has clarified the problems with these arguments.[95] With regard to the improved market access since the amended PBS is in force, there were several inconsistencies, *inter alia*, in Chile's only evidence (Exhibit CHL-7). In fact, Chile recognized that the exhibit is not accurate.[96] Furthermore, Chile comes up with the surprising argument that the distorting effects resulting from the PBS are common to all customs duties *of any kind*.[97] Beside the fact that this statement is a recognition that the amended PBS effectively distorts, it is simply incorrect and Argentina strongly disagrees. The Appellate Body has clarified that, like the PBS, all the border measures listed in footnote 1 have in common that they restrict the volumes and distort the price of imports of agricultural products in ways different from the ways that ordinary customs duties do.[98]

93. With respect to Chile's argument regarding the future improvement in market access in 2014 due to the scheduled reduction of floor and ceiling prices, that argument runs contrary to the argument that the PBS is consistent with Article 4.2 of the Agreement on Agriculture. If such consistency exists, why is Chile so worried about showing that *in the future* market access will be improved? Does it mean that present market access is not guaranteed? In any case, if the amended PBS were consistent, there would be no need to be confident on *future* market access. Argentina has highlighted all the problems with such an argument.[99] Chile continues to rely on its main assumption (i.e. that the reference price will remain stable until 2014)[100], although explicitly having recognized it was baseless, because it is impossible to determine it so far in advance.[101] There is simply no evidence to assert that market access will improve in the future.

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[92] *Chile – Price Band System*, Report of the Appellate Body, para. 246.
[93] First Written Submission by Chile, Section V.6 and Rebuttal by Chile, Section IV.5
[94] First Written Submission by Chile, paras. 186 to 192 and Rebuttal by Chile, paras. 175 to 181.
[95] Rebuttal by Argentina, Section B.6.
[96] Rebuttal by Chile, para. 169.
[97] Rebuttal by Chile, para. 171.
[98] *Chile – Price Band System*, Report of the Appellate Body, para. 200: "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" (Underline added). See also *Chile – Price Band System*, Report of the Appellate Body, para 227.
[99] Rebuttal by Chile, para. 217 to 238.
[100] See for example, Rebuttal by Chile, paras. 177 and 179
[101] Rebuttal by Chile, para. 176, *in fine*.

III. ARGENTINA'S ARGUMENTS IN RELATION TO THE FACTOR OF 1,56 APPLICABLE TO WHEAT FLOUR ARE WITHIN THE TERMS OF REFERENCE OF THIS PANEL

94. Chile argues that Argentina's arguments in relation to the factor of 1,56 applicable to wheat flour are not within the terms of reference of this Panel, because it is "a claim which Argentina could have raised and pursued in the original dispute, but failed to do so".[102]

95. Chile's argument is incorrect. Chile seems not to see the difference between "claims" and "arguments". Argentina's argument in relation to the factor of 1,56 is not a claim: it is an *argument*.

96. As the Appellate Body stated in *Korea – Dairy Products*, "By 'claim' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".[103]

97. In these proceedings Argentina has raised claims with respect to the amended PBS inconsistency with Article 4.2 of the *Agreement on Agriculture*, the second sentence of Article II:1(b) of the GATT 1994 and Article XVI.4 of the *Agreement establishing the World Trade Organization*. The argument in relation to the factor of 1,56 supports the claim of the PBS inconsistency with Article 4.2 of the *Agreement on Agriculture*. It is an additional argument showing that the amended PBS causes insulation from the international market. A plain reading of the Table of Contents of Argentina's Written Submission is enough to understand this simple argumental structure.

98. The factor of 1,56 applied to the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour, insulates the entry price of wheat flour from international price developments.[104] Three sub-arguments support this main argument[105]: (1) wheat flour exporters have to pay specific duties which not only bear no relation to the transaction value but also bear no relation to the product in question, since they are calculated on the basis of those applied to another product, namely, wheat; (2) the way in which Chile determined the factor 1,56 is not transparent, since in its legislation Chile has neither explained nor justified in any way the basis on which it was established; (3) the 1,56 factor is baseless from a technical or price-based point of view. Therefore, it is an argument that support the claim of inconsistency of the amended PBS with Article 4.2 of the *Agreement on Agriculture*.

99. Chile has not argued that the claim related to Article 4.2 of the *Agreement on Agriculture* is not within the terms of reference of this Panel. Thus, this Panel is completely free to accept and analyse Argentina's arguments in relation to the factor of 1,56[106] in order to find that the amended PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*.

100. In the alternative, even if the Panel found that Argentina's arguments in relation to the factor of 1,56 are a new "claim", those arguments are within the terms of reference of this Panel. As Chile itself admits, the arguments regarding the factor of 1,56 are new ones. Therefore, the fact that there has been "… no finding of inconsistency (or of consistency) forcing Chile to amend that particular aspect

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[102] First Written Submission by Chile, paragraph 62.
[103] WT/DS98/AB/R, paragraph 139
[104] First Written Submission by Argentina, Section C.I.2.7.
[105] First Written Submission by Argentina, paras. 228 to 234.
[106] Consequently, it is not applicable to the factor of 1,56 what was said in the cases *EC – Bed Linen (Article 21.5 – India)* and *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* as those cases dealt with the admissibility of entertaining claims and not arguments.

of the PBS…"[107] does not prevent this Panel to consider the new arguments in relation to the factor of 1,56.

101. Only a few months ago the Appellate Body established three scenarios in which the scope of proceedings under Article 21.5 may be limited by the scope of the original proceedings[108], therefore precluding the complaining party from raising certain claims in a compliance proceeding: (1) a party cannot make the same claim of inconsistency against the same measure (or component of a measure) in an Article 21.5 proceeding if the original Panel and Appellate Body found the measure to be consistent with the obligation at issue, (2) if the original Panel found that the complaining party had not made out its claim with respect to the measure (or component of a measure) and, (3) a party may not, in proceedings under Article 21.5 of the DSU, seek to have the Appellate Body "revisit the original Panel report" when that report was not appealed. As this Panel can clearly observe, those scenarios do not exist in the present case.

102. The new arguments raised by Argentina will facilitate this Panel to examine the amended PBS in its integrity. They refer to an aspect of the measure taken to comply that was modified with respect to the original measure. In the amended PBS the factor of 1,56 is applied to a completely different basis from that to which it was applied in the original measure.

103. Even when in the amended PBS the factor of 1,56 *formally* remains, the arguments in relation to this factor are within the terms of reference of this Panel because Chile modified the basis and consequently the result of its application.

104. The specific duties applied to wheat are the basis of calculation to which the factor of 1,56 will be applied to determine the specific duties of wheat flour. The former duties are calculated as the difference between floor and reference prices, multiplied by 1 plus the *ad valorem* duty. As Chile has modified the way in which floor prices are calculated[109], the way in which reference prices are established[110], and the way to calculate the specific duties (due to the product by 1 plus the *ad valorem* duty)[111], then the basis to which the factor of 1,56 is applied has necessarily been modified and also have the results of its application.[112]

105. The application of the factor of 1,56 in the amended PBS leads to a *different* amount of duties than the amount of duties resulting from the original PBS. In other words, the consequences of the application of the factor of 1,56 in the amended PBS <u>are different from the consequences of its application in the original PBS</u>.

106. Chile maintains that Argentina's arguments regarding the different basis and consequences for the application of the factor of 1,56 is a new argument that was not raised in the first submission.[113] According to Chile, Argentina originally questioned the factor 1,56 itself and afterwards it changed its position questioning the base to which it is applied.[114] That is incorrect. Argentina's has always questioned the factor 1,56 itself.[115] Argentina never changed its position. Argentina's arguments regarding the different basis and consequences of the application of the factor of 1,56 were developed

[107] First Written Submission by Chile, para. 62. (Underlining added).
[108] Appellate Body Report *US – Softwood Lumber VI (Article 21.5 – Canada)*; WT/DS277/AB/RW, 13 April 2006, footnote 150.
[109] First Written Submission by Argentina, Section B.3.3.
[110] First Written Submission by Argentina, Section B.3.4.
[111] First Written Submission by Argentina, Section B.3.5.2.
[112] Contrary to Chile's assertion, this was the case in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, as Argentina stated in its Written Submission, paras. 269-278.
[113] Rebuttal by Chile, paras. 188-190.
[114] Rebuttal by Chile, paras. 191.
[115] First Written Submission by Argentina, Section C.I.2.7.

only after Chile argued that Argentina's original arguments were not within the Panel terms of reference. The arguments included in Argentina's Rebuttal are simply not Argentina's main arguments. Those arguments were developed in Argentina's First Written Submission.

107. Furthermore, Chile's due process rights are not impaired in these proceedings. Argentina has not had a "second chance" to bring these arguments to the DSB because Chile has modified the factual basis on which the factor of 1,56 is applied and the results of its application, turning it into a modified aspect of the measure taken to comply. This was the *first* chance for Argentina to raise these arguments. Chile could have foreseen that new arguments in relation to the factor of 1,56 would be raised when it modified the basis and the consequences of its application.[116] Additionally, Argentina's arguments in relation to that factor were not raised in an advanced stage of these DSU Article 21.5 proceedings. Evidence of that is that Chile was able to raise its arguments concerning Argentina's arguments in its First Written Submission.

108. It is telling that Chile has not argued in its submissions that the factor of 1,56 does not distort the transmission of international prices. Indeed, after Argentina showing how, for many reasons, the factor of 1,56 insulates the entry price for wheat flour from international price developments, Chile's only justification for its application is that the factor has been fixed at 1,56 since 1996 because "between January 1986 and December 1995, the average ratio of the price of flour to the price of wheat was 1,566". Therefore, as Chile recognizes, that was the factor that was "built into" the Chilean legislation and it has remained "unchanged" ever since.[117]

109. Thus, in addition to not having any relation to the transaction value, to the product in question, and to the technical production ratio between wheat and wheat flour, Chile applies a factor that, at the time of the entry into force of the amended PBS, reflected a price relation that was, at least, eight years old, and at the time of these compliance proceeding the delay with regard to any meaningful price relation has reached a decade. This is how Chile purports to justify the application of the factor of 1,56 and the reason behind Chile's argument to leave the factor far away from the scrutiny of the Panel.

IV. THE AMENDED PBS IS INCONSISTENT WITH THE SECOND SENTENCE OF ARTICLE II.1(B) OF THE GATT 1994 AND ARGENTINA'S CLAIM IN RELATION TO THAT PROVISION IS WITHIN THE TERMS OF REFERENCE OF THIS PANEL

110. During all these proceedings Argentina has claimed that the amended PBS violates the second sentence of Article II:1(b) of the GATT 1994, inasmuch as it constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedule of Concessions (No. VII).[118] That fact is so obvious that Chile cannot counter nor refute it. Instead of that, in order to avoid addressing Argentina's claim, Chile introduced a procedural issue deviating the focus of the discussion: that the amended PBS is inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

111. As Argentina previously stated "all that is required for a measure to be an ordinary customs duty is that "… be expressed in the *form* of '*ad valorem* or specific rates' ".[119] A plain reading of the legislation enforcing the amended PBS shows that this measure is not expressed in the *form* of

[116] As it was stated in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Panel Report, paragraph 7.71.

[117] Rebuttal by Chile, paras. 200-201.

[118] First Written Submission by Argentina, paras. 289 to 295 (Section C.II); Rebuttal by Argentina, para. 241, 287 and 288.

[119] *Chile – Price Band System*, Report of the Appellate Body, para. 277.

"*ad valorem* or specific rates". To the contrary, the amended PBS is a complex mechanism that, as a border measure, has no resemblance with an ordinary customs duty.

112. By not being an ordinary customs duty, the amended PBS constitutes "other duties or charges" in the sense of the second sentence of Article II:(1)(b) of the GATT 1994. By not being recorded in the corresponding column of Chile's Schedule of Concessions (No. VII), as it is mandated by paragraph 1 of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, the amended PBS violates the second sentence of that Article.

113. As Chile explicitly recognized[120], Argentina did not raise nor pursued a claim in relation to that provision during the original proceedings. It is indeed a new claim that Argentina has the right to raise in the frame of a proceeding under Article 21.5 of the DSU.

114. On the other hand, Argentina's claim in relation to the second sentence of Article II:1(b) of the GATT 1994 is within the terms of reference of this Panel as it is a new claim with respect to a new measure, as Chile itself admitted.[121]

115. Chile faces a curious dilemma: Argentina could never have raised this same claim during the original proceedings as Chile states[122], because the amended PBS is a new measure, different from the original measure. As Chile has properly established, it is a "new" PBS.[123] However, if Chile argues that the amended PBS is *not* a different measure, it would automatically be recognizing the amended PBS is equally inconsistent as the original PBS was.

116. Chile's last attempt to convince the Panel that this new claim is not within of its terms of reference is twofold. **First**, Chile comes up with the now familiar argument that Argentina should have made this claim in the original proceeding because, following Argentina's reasoning, if the GATT violation follows the violation of Article 4.2 of the *Agreement on Agriculture*, Argentina had to make this claim in the original proceeding. But, in this sense, the original proceeding is irrelevant because we are now in front of a new measure, a "new PBS".[124] Therefore, Argentina could not have raised this claim in the original proceeding because the claims necessarily have to be different.[125]

117. **Second**, Argentina has made its claims at the *earliest* possible stage in these proceedings. Therefore, Chile *has* had the chance to rebut Argentina's claim in its First Submission, the Panel *has* had a sufficient evidentiary basis on which to rule and *has* had enough time to deliberate. Chile's arguments are unsustainable: its due process rights have not been impaired at all.[126]

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[120] First Written Submission by Chile, para. 48.

[121] See Status Reports by Chile WT/DS207/15/Add.1, dated on 28 October 2003, third paragraph, and WT/DS207/15/Add.3, dated on 14 January 2004, second paragraph. Rebuttal by Argentina, para. 292.

[122] First Written Submission by Chile, para. 50 y 56.

[123] See footnote 122 above.

[124] First Written Submission by Argentina, para. 292.

[125] That was so established by the Appellate Body. *Canada – Aircraft (Article 21.5 – Brazil)*, Report of the Appellate Body, para 41.

[126] Chile argues that footnote 294 of the Panel Report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* is related to arguments and not to claims, and therefore is not relevant as a precedent to show that Chile's due process rights are impaired (Rebuttal by Chile, para 205). However, that is not an accurate reading of the footnote. In fact, the Panel did refer to the new claims on the likelihood of injury determinations, stating that, as a consequence of the United States' only chance to make its rebuttal during the meeting with the parties, it could not consider the new injury claim because of the limited evidentiary basis on which to rule and the limited amount of time to interact with the parties and for the Panel to deliberate (*US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Report of the Panel, footnote 294 *in fine*). Thus, in that dispute, contrary to what Chile asserts, the Panel did refer to new *claims*, as in the present case.

118. **Third**, it is true that a violation of Article II:1(b), second sentence, of GATT 1994 follows a breach of Article 4.2 of the *Agreement on Agriculture*. In fact, it is obvious that if the Panel finds the amended PBS not to be an ordinary customs duty, then, the amended PBS is an "other duties or charges" that, by not being recorded in Chile's list (VII), is a measure inconsistent with the second sentence of Article II:1(b) GATT 1994. However, Argentina's claim regarding the second sentence of Article II:1(b) stands by its own. The amended PBS is also inconsistent with this provision, insofar as it is not expressed in *ad valorem* or specific rates, and therefore is not an ordinary customs duty.[127]

V. CONCLUSIONS

119. Chile did not comply. It has "cosmetically" amended the old PBS while maintaining its distortive effects and fully preserving its lack of transparency and predictability. The measure taken to comply is not consistent with its obligations as a Member of the WTO.

120. **First**, the Appellate Body established that "…all that is required is that 'ordinary customs duties' be expressed in the form of '*ad valorem* or specific rates'. By not being expressed in the form of '*ad valorem* or specific rates, Chile's amended PBS is not an ordinary customs duty.

121. **Second**, in addition to not being an ordinary customs duty - because it is not expressed in the form of ad valorem or specific rates-, Chile's amended PBS insulates Chile's market from the transmission of international prices. As Argentina has lengthily demonstrated along its Submissions, the disconnection of Chile's market from international price developments results from the fact that the amended PBS:

- continues to elevate the entry price of imports to Chile above the price band floor;
- continues to "overcompensate" for the effect of decreases in international prices on the domestic market when reference prices are set below the price band floor;
- continues to make the entry price of Chilean imports higher than if Chile applied a minimum import price at the level of the price band floor, and
- continues to fail to ensure that the entry price of imports to Chile falls in tandem with falling world market prices.

122. That disconnection is the obvious and unavoidable consequence of the existence of:

- a formula that precludes the entry price of imports from falling below the price band floor;
- floor and ceiling values determined once for the entire period from 16 December 2003 to 15 December 2014 and, established from 2007 on the basis of a fixed coefficient of 0,985;
- reference prices staying unchanged for two months, established on the basis of the average of the daily prices recorded on only two predetermined markets, on only two predetermined qualities of concern and during only 90 out of 365 days;
- a multiplier consisting of 1 plus the general *ad valorem* duty added to the formula used to calculate the duty levels;

[127] *Chile – Price Band System*, Report of the Appellate Body, para. 277.

– the factor of 1,56 applied to the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour.

– the complete irrelevance of the transaction value.

All of them are insulating features inherent to the amended PBS.

123. Similarly, the insulation of Chile's market from the transmission of international prices results from:

– the lack of transparency in the establishment of fixed floor and ceiling values for the entire period from 16 December 2003 to 15 December 2014;

– the lack of transparency in the establishment of the floor and ceiling values on the basis of fixed coefficients from 2007 onwards;

– the lack of transparency in the way in which the factor of 0,985 was determined;

– the lack of transparency in the reference prices sources and selection process – involving, *inter alia*, the selection of only two predetermined markets and the qualities of concern;

– the lack of transparency in the establishment of a factor of 1,56 in order to calculate the duties and rebates applicable to wheat flour;

– the lack of transparency and predictability in the existence of a formula that causes import duties to vary automatically and continuously;

– the lack of predictability in the level of such duties;

– the lack of predictability in the frequency and the extent to which those duties fluctuate.

All of them are features inherent to the amended PBS that create intransparent and unpredictable market access conditions.

124. Therefore, this Panel should find that the amended PBS violates Article 4.2 of the *Agreement on Agriculture* also because the particular configuration and interaction of all these amended PBS features create intransparent and unpredictable market access conditions and have the effect of disconnecting Chile's market from international price developments. Thus, the amended PBS insulates Chile's market from the transmission of international prices, and prevents enhanced market access for imports of wheat and wheat flour.

125. Chile should have dismantled its PBS applied to wheat and wheat flour as Chile did with respect to edible vegetable oils. The explicit wording of Article 4.2 of the *Agreement on Agriculture* mandates that Members "… shall not *maintain* … measures of the kind which have been required to be converted into ordinary customs duties …".[128]

126. Thus, according to Article 4.2 of the *Agreement on Agriculture*, Chile could not maintain its PBS after a WTO inconsistency ruling. As the Appellate Body established "… Article 4.2 was drafted in the present perfect tense to ensure that measures that were required to be converted as a result of

[128] Emphasis added.

the Uruguay Round—but were not converted—could not be maintained, by virtue of that Article …".[129] Indeed, that interpretation is confirmed by the wording of footnote 1 to the *Agreement on Agriculture*. That footnote gives meaning to Article 4.2 by enumerating examples of measures other than ordinary customs duties which, according to the Appellate Body, "… Members must not maintain, revert to, or resort to, from the date of the entry into force of the *WTO Agreement*".[130] Moreover, the Appellate Body established that the obligation "not [to] maintain" such measures underscores the fact that "… Members must not continue to apply measures covered by Article 4.2 from the date of entry into force of the *WTO Agreement*".[131]

127. However, the fact that a measure prohibited by Article 4.2 of the *Agreement on Agriculture* could not be maintained was completely ignored by Chile and it is the reason why Argentina had to resort to the WTO dispute settlement proceedings for the second time.

128. The result is that Chile has evaded its multilateral obligations maintaining a border measure other than an ordinary customs duty that Chile did not even include in its List. Thus, more than three years and a half after the adoption of the Panel and Appellate Body reports by the DSB, the dispute remains unsolved, and Chile continues to give wheat and wheat flour an illegal protection. This result is especially serious when the very provision at issue -aimed to "achie[ving] improved market access conditions for imports of agricultural products by permitting only the application of *ordinary customs duties*"[132] requires the Member not to *maintain* the prohibited measure.

129. In addition to all this, by not being and ordinary customs duty, the amended PBS constitutes "other duties or charges" not recorded in the corresponding column of Chile's Schedule of Concessions (Nro. VII), and violates the second sentence of Article II:1(b) of the GATT 1994.

130. Therefore, Argentina requests the Panel to find that Chile's Price Band System, as amended by Law No. 19.897 and Supreme Decree No. 831/2003:

- Is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it is not an ordinary customs duty and, in addition, it constitutes a border measure similar to a variable import levy and a minimum import price;
- is inconsistent with the second sentence of Article II:1(b) of the GATT 1994, since it constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedule of Concessions (No. VII);
- is in breach of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* since, while it remains in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements.

131. Consequently, Argentina respectfully requests the Panel to find that Chile has not implemented the recommendations and rulings of the DSB and continues to infringe its obligations under the WTO.

Thank you.

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[129] *Chile – Price Band System*, Report of the Appellate Body, para. 207.
[130] *Chile – Price Band System*, Report of the Appellate Body, para. 209.
[131] *Chile – Price Band System*, Report of the Appellate Body, para. 212. (Underlining added).
[132] *Chile – Price Band System*, Report of the Appellate Body, para. 234. (Emphasis added).

ANNEX D-2

CLOSING STATEMENT BY ARGENTINA
(2 AUGUST 2006)

Mr. Chairman, Members of the Panel:

1. As stated yesterday, this dispute has a very straightforward solution: a finding that the amended PBS cannot be maintained because it is not an ordinary customs duty.

2. To consistently implement the DSB´s recommendations and rulings, Chile had to dismantle the PBS. The explicit wording of Article 4.2 of the *Agreement on Agriculture* (AoA) mandates that Members "… shall not maintain … measures of the kind which have been required to be converted into *ordinary customs duties* …"

3. However, Chile maintained the PBS arguing that nowhere in the Appellate Body Report it is mandated that Chile had to eliminate it. Chile insists in ignoring an explicit finding of the Appellate Body, who stated that a finding that Chile's PBS is inconsistent with Article 4.2 of the *AoA* means that the duties resulting from the application of that PBS cannot longer be levied because such PBS cannot longer exist.[1]

4. In fact, the Appellate Body found that Chile's PBS was a measure prohibited by Article 4.2 of the *AoA*, but Chile confidently ignores that finding, continues to levy the resulting duties and maintains the PBS in force.

5. Even if that explicit finding were not enough, the Appellate Body went on and found that if Chile's PBS fell within any one of the categories of measures listed in footnote 1, it could not be maintained. The Appellate Body established that "*A plain reading of Article 4.2 and footnote 1 makes clear that, if Chile's price band system falls within any one of the categories of measures listed in footnote 1, it is among the 'measures of the kind which have been required to be converted into ordinary customs duties', and thus must not be maintained, resorted to, or reverted to, as of the date of entry into force of the WTO Agreement.*"[2]

6. Evidently, the reading Chile made of Article 4.2 *AoA* and footnote 1 was not as plain as required. Nor it was as clear to Chile as it was for the Appellate Body that if the PBS fell within any one of the categories of the measures listed in footnote 1, it was a measure not to be maintained. Indeed, contrary to the Appellate Body's explicit finding, Chile maintained its PBS although it fell within one of the categories of measures listed in footnote 1.

7. Article 4.2 of the *AoA* explicitly provides that "[m]embers shall not maintain … any measures of the kind …". Thus Chile could not maintain its PBS after the DSB established it was inconsistent with the *Agreement on Agriculture*. The object and purpose of Article 4.2 circumscribe Chile's options to comply. Chile agrees to that when it states that it may be accurate that if a measure violates Article 4.2 *AoA* the resulting duties could no longer be levied[3].

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[1] *Chile – Price Band System*, Report of the Appellate Body, paragraph 190: "[A] finding that Chile's price band system as such is a measure prohibited by Article 4.2 would mean that the duties resulting from the application of that price band system could no longer be levied—no matter what the level of those duties may be. Without a price band system, there could be no price band duties."

[2] *Chile – Price Band System*, Report of the Appellate Body, para. 221.

[3] Rebuttal by Chile, para. 9.

8. The Appellate Body stated that: "… *the object and purpose of Article 4 … is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties*".[4] Furthermore, the Appellate Body said "… *all that is required is that 'ordinary customs duties' be expressed in the form of 'ad valorem or specific rates'*"[5]. The legislation enforcing the amended PBS shows that this measure is not expressed in the *form* of "*ad valorem* or specific rates". There is no ad valorem or specific *rate* expressed in those measures. The amended PBS is a complex "mechanism"[6] that, as a border measure, has no resemblance with an ordinary customs duty.

9. If this was not clear enough, the Appellate Body also stated that *"[o]rdinary customs duties…are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula."*[7] It is undisputed that the amended PBS contains a formula, that is, the underlying formula to calculate the specific duties for wheat and wheat flour.[8]

10. The possibility of the *resulting* duties taking the form of *ad-valorem* or specific duties is meaningless regarding of whether the *underlying measure* is consistent. In this respect, the Appellate Body established that "… *the fact that the duties that result from the application of Chile's PBS 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*".[9]

11. Regarding Argentina's claim about the amended PBS inconsistency with the second sentence of Article II:(1)(b) of GATT 1994, Chile has recurred to a last minute resort, claiming that Argentina has not made a *prima facie* case under DSU Article 3.8 with respect to its claim.[10] Argentina is surprised by this argument.

12. In the case *US – Wool Shirts and Blouses*, the Appellate Body stated that: "… the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence *sufficient* to raise a presumption that what is claimed is true, the burden then shifts to the other party, who *will fail* unless it adduces sufficient evidence to rebut the presumption".[11]

13. Argentina submitted ample evidence to make a *prima facie* case. First, regarding the violation of the second sentence of Article II:1(b) of GATT 1994 as a result of an inconsistency with Article 4.2, Chile has persistently stated that the term "ordinary customs duties" has the same meaning in Article 4.2 of the *AoA* as it has in Article II:1(b) of GATT 1994.[12] Argentina has dedicated large parts of its submissions and oral statement, including 36 Exhibits, to demonstrate why the amended PBS is inconsistent with Article 4.2 and therefore is a measure other than an ordinary customs duty. Argentina wonders if for Chile that is not "sufficient" to make a *prima facie* case. So, given that Argentina submitted sufficient evidence as to make a *prima facie* case regarding the Article 4.2, and that Chile agreed that the "ordinary customs duties" of Article 4.2 are the "ordinary customs duties" of

[4] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[5] *Chile – Price Band System*, Report of the Appellate Body, para. 277.
[6] In its Oral Statement Chile referred to its PBS as a "mechanism", para. 2.
[7] *Chile – Price Band System*, Report of the Appellate Body, para. 233.
[8] Law 19.897, Art 1 (ARG-1), and Decree 831/2003, Art.14 (ARG-2).
[9] *Chile – Price Band System*, Report of the Appellate Body, para. 279.
[10] Oral Statement by Chile, para. 14.
[11] WT/DS33/AB/R, WT/DS33/AB/R/Corr.1, page 16. (Emphasis added; footnote omitted)
[12] See Panel Report, para. 4.84 "Chile considers that the term "ordinary customs duties" has the same meaning in Article 4.2 of the Agreement on Agriculture as it has in Article II:1(b) of the GATT"; para. 4.85: "Chile points out that all parties to the dispute agree that "ordinary customs duties" has the same meaning in Article 4.2 and its footnote as in Article II:1(b) of the GATT 1994." In fact, the Panel agreed with Chile (para. 7.49) and its finding was not reversed by the Appellate Body.

Article II:1(b), it therefore results that *sufficient* evidence has been provided for the Article II:1(b) claim, and a prima facie case has been made.

14. Indeed, it is evident that if, under these circumstances, the Panel finds the amended PBS not to be an ordinary customs duty, then it is an "other duties or charges" that, by not being recorded in Chile's list (VII) – a fact that remains uncontested- is a measure inconsistent with the second sentence of Article II.1(b) of GATT 1994.

15. Second, Argentina also stated that the second sentence of Article II:1(b) of GATT 1994 claim stands by its own.[13] In fact, Argentina has given the arguments to support this claim[14], the main one being the obvious: that "*all that is required for a measure to be an ordinary customs duty is that it '… be expressed in the form of "ad valorem or specific rates"*.[15] Therefore it constitutes "other duties or charges" within the meaning of Article II:1(b) of GATT 1994.

16. The fact is that, to put it in the Appellate Body words, Argentina has adduced evidence more than sufficient to raise a presumption that what is claimed is true and the burden was shifted to Chile who has failed to adduce sufficient evidence to rebut the presumption. In fact, Chile has never argued that the amended PBS is expressed in the *form* of an *ad valorem* or specific duty rate.

17. Chile did not comply. In addition to not being an ordinary customs duty the PBS, continues to insulate Chile's market from fluctuations in international prices in a way that is inconsistent with Article 4.2 of the *AoA*. Chile has "cosmetically" amended the old PBS while maintaining its distortive effects and fully preserving its lack of transparency and predictability.

18. If Chile gave some meaning to Article 4.2 of the *AoA* and Article II:(1)(b) of GATT 1994, Chile could not have made a statement affirming that the only obligation the WTO imposes to Chile is not establishing customs duties in excess of those set in its schedule of concessions.[16] That is simply incorrect and should be undisputed at this stage. Nevertheless, yesterday Chile went further and stated: "… any WTO Member can do what it wants to up to the level of its binding commitments".[17]

19. Chile has more obligations than merely "doing what it wants". Chile is bound by all the covered agreements and especially by Article 4.2 of the *Agreement on Agriculture*. However, it is evident that in the implementation of the recommendations and rulings in this dispute Chile has done what it wanted: it has maintained a border measure other than an ordinary customs duty with all the distortive, intransparent and unpredictable features inherent to measure similar to a minimum import price or a variable import levy as Argentina has lengthily described along its submissions and oral statement.

20. With respect the so called "variability" component, Chile has claimed to have abolished it because now "… the duty is fixed by a legal directive in the form of a decree issued by the Ministry of Finance …". The automatic variability still remains. Chile has no discretion not to impose the duties if the reference price falls below the band floor[18] and has not argued otherwise. In fact, the exporter can count with the *guarantee* that it *will* face a different duty every two months. In this respect, as the

[13] Oral Statement by Argentina, para. 118.
[14] Oral Statement by Argentina, para. 111.
[15] *Chile – Price Band System*, Report of the Appellate Body, para. 277.
[16] Rebuttal by Chile, para. 65 *in fine*: "… All it is obliged to do (a Member of the WTO) is to honour its commitments, that is to say, not to exceed the bound tariff level".
[17] Oral Statement by Chile, para. 45.
[18] First Written Submission by Argentina, paras. 263 and 264.

US asserted this morning, there is no basis to discern a distinction between a variation occurring every two months rather than one week.[19]

21. As regards to the similarity between the amended PBS and a minimum import price, Argentina would like to stress that it has mathematically demonstrated that the amended PBS provides an end to *any* transmission when the entry price approaches the band floor. Due to the formula, the PBS will not allow any transmission of international prices in the case that the entry price falls below the floor price[20]. That was the "internal political agreement" Chile referred to yesterday.[21]

22. Evidently, Article 4.2 of the *Agreement on Agriculture* is meaningless for Chile. If that were not the case Chile could not have stated that: "… no violation of Article 4.2 can exist on the sole basis that a measure does not allow the transmission of international prices". According to Chile, insulation from the transmission of international prices is not a problem. However, for the Appellate Body it is more than a problem: it is a breach of Article 4.2. Chile has went further and stated that "… it is difficult to argue that the requirements of transparency and predictability are part of the 'spirit' or 'requirements' derived from Article 4 of the Agreement on Agreement on Agriculture"[22] because "[it] does not contain the words transparency and predictability". It is unworthy to repeat again the lack of basis of these assertions and Argentina would just limit itself to kindly request the Panel to review its submissions and oral statements. Argentina is certain that the Appellate Body would be, at least, surprised about these statements, especially taking into account its Report in this dispute .

23. It was the Chilean Executive itself who stated that "… Through this bill (Law 19.897) the Government has corrected … formal aspects challenged [by the WTO] while fully protecting the spirit of the bands …"[23]. Argentina does not see what can be more explicit than this statement from the Government of Chile itself. Given the clarity of Article 4.2 of the *AoA* and the second sentence of Article II:(1)(b) of GATT 1994, this should be enough for the Panel to find that Chile did not comply with the recommendations and rulings of the DSB.

24. The Appellate Body has stated that "*interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility*."[24] This Panel has now the opportunity to enforce a two main provisions of the WTO Agreements. In fact, Article II:(1)(b) of GATT 1994 and Article 4.2 *AoA* would have no meaning if Chile could implement the recommendations and rulings of the DSB by merely "cosmetically" modifying its PBS while, at the same time maintaining a border measure other than an ordinary customs duty, preserving its insulating and distorting effects and its lack of transparency and predictability. This is the precedent Chile seeks to establish in this dispute. This is how Chile's violation continues to nullify and impair Argentina's benefits accruing to it under the WTO Agreements.

Thank you

[19] Oral Statement by the US, para. 13.
[20] First Written Submission by Argentina, C.I.2.1
[21] Oral Statement by Chile, para. 25.
[22] Rebuttal by Chile, para 30.
[23] First Written Submission by Argentina, footnote 75.
[24] *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R, adopted 20 May 1996, at 23.

ANNEX D-3

**OPENING STATEMENT BY CHILE
(1 AUGUST 2006)**

I. INTRODUCTION

1. Thank you Mr. Chairman and members of the Panel for giving Chile a new opportunity to express its views on this important and long dispute. One should first ask why we are meeting today on a National holiday and in the middle of the European Summer. It is not Chile who requested this meeting nor these procedures. We complied with the rulings and recommendations of the DSB adopting important legislative changes concerning the way specific duties are established for wheat and wheat flour.

2. It is Argentina who, based on a wrong reading and interpretation of the Appellate Body's conclusions, decided to question those changes. Changes that Argentina seems not to understand. We have tried to explain in detail how the system adopted in 2003 operates and we are going to do it today once again with the help of graphs so no doubt can remain on how it works, and on how different it is from the PBS. These are two completely different mechanisms, even though some names remain the same.

3. Argentina throughout this process[1] and in bilateral discussions has been demanding Chile to eliminate the PBS because in its opinion it is the only way to comply and also because allegedly the AB so established it. Even though precedents in this house are clear, "the implementing Member has a measure of discretion in selecting the means of implementation that it deems most appropriate"[2], nothing in the AB report obliges or even recommends Chile to implement in one way or another.

4. Argentina's argument is based on the conclusion of the AB that no duties can be levied from the application of a measure inconsistent with Article 4.2 of the Agreement on Agriculture. The same is true for duties or charges resulting from measures that violate other provisions of that Agreement or any other Covered Agreement for that sake. But if a measure is not inconsistent with the WTO, duties can be levied. And Argentina hasn't been able to prove that the current system based on Law 19.897 and its Regulations is inconsistent with Article 4.2 or any other provision. Furthermore, Chile has demonstrated that the system is consistent with such provision, so it can levy the specific duties up to the bound level in its Schedule.

5. During this presentation we will first address Argentina's claims that are outside the terms of reference of this Panel. Then, we will focus on the correct reading and interpretation of the AB findings and conclusions and how the changes were made to the PBS taking into account those findings and conclusions, resulting in full and timely implementation of the rulings and recommendations of the DSB. Through graphs we will show how the PBS worked and how the current system operates. This will certainly help to eliminate once and forever the confusion that Argentina still seems to have and will clearly demonstrate that the regime applicable since 2003 doesn't have certain characteristics and features of the PBS questioned by the AB and consequently doesn't produce the effects common to the measures enumerated in Article 4.2 of the Agriculture Agreement. We will finish this presentation demonstrating why Law 19.897 and its Regulations are not a variable import duty or similar to it nor a minimum import price or similar to it.

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[1] For example, paragraph 317 of the Rebuttal from Argentina.

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

II. SOME OF ARGENTINA'S CLAIMS ARE OUTSIDE THE TERMS OF REFERENCE OF THIS PANEL

6. Using semantics Argentina tries to argue that its claims regarding the factor 1.56 used to determine the duties or rebates applicable to wheat flour are properly within this Panel. First, Argentina has acknowledged that it never raised this point during the original proceeding. Secondly, by trying to make a distinction between claims and arguments Argentina tries to avoid the application of well known precedents, even though throughout its submission Argentina challenges the factor using different arguments. The reference in paragraph 261 of Argentina's rebuttal to what the AB said in the *EC – Bed Linen (Article 21.5 – India)* is out of context. The AB is not opening the door to the possibility to challenge the implementing measure on the basis of new arguments or claims that could have been raised in the original proceedings. Argentina's reading would lead to the absurd that a measure or an aspect of a measure determined to be consistent could be challenged in a 21.5 Panel based on a different argument.

7. Applying the approach in *Korea – Dairy Products* we showed the difference between Argentina's claim regarding how "The factor of 1.56 ... insulates the entry price of wheat flour from international price developments", from its arguments "the specific duties on wheat flour are calculated on the basis of those applied to another product[3] and the way in which that factor was established is not transparent".[4] Clearly we are in front of an independent claim that Argentina did not make in the original dispute although it could have done so, since Argentina itself acknowledges that that factor had already been in effect for more than ten years.

8. In its presentations Argentina has recognized that the price of wheat flour is higher than the price of wheat[5] and this price relationship could be based on a technical production ratio between both products. Moreover, in Argentina's opinion, not only "this relationship is valid at international level"[6] but it should be approximately 1.3 ("that is, the price of wheat flour is approximately 30 per cent higher than that of wheat"). In other words, a mathematical formula applied to one product to determine the price of another.

9. But in its Rebuttal, Argentina adds a new element never mentioned before, that is that the factor is applied on a completely different basis. Consequently, it is a modified aspect of the measure taken to comply. Curious that during the original proceeding Argentina never questioned the basis for the application of the factor in circumstances that that basis was the PBS itself. If it would have done so, and Argentina would have prevailed, Chile would have been under the obligation to implement those rulings, but certainly that wasn't the case. The factor for determining the duties and rebates for wheat flour was never found in violation of Article 4.2 so no obligation to comply was established. Only now Argentina finds that the basis for the application of the factor is a relevant element that deserves a challenge. We have shown that the premises of this claim are not well founded and Chile should not be burdened with the obligation to address a claim that clearly Argentina could have made in the original Panel.

10. If the Panel decides that this new claim is within its term of reference, Chile has demonstrated with numbers the reasons to use what Argentina calls an "international valid technical production ratio".

11. Let me turn to the second sentence of Article II:1(b) of GATT 1994.

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[3] Paragraph 228 of the Rebuttal.
[4] Paragraph 229 of the Rebuttal.
[5] For example, paragraph 171 of Argentina's First Written Submission.
[6] Paragraph 231 of the Rebuttal.

12. Needless to say that this was an important issue during the Appeal. As you may remember during the original Panel, Argentina claimed that the PBS was inconsistent with Article 4.2 of the Ag Agreement and with Article II:1(b). of GATT of 1994. After concluding that the PBS was inconsistent with 4.2., hence it was one of the measures that had to be converted into an ordinary customs duty, the challenge under the first sentence of Article II:1(b). (that Chile exceeded the bound rate) was essentially a contradiction. From a logical point of view, it could have been correct your conclusion that the PBS was inconsistent with the second sentence of that provision. But from the point of view of Chile's due process rights that conclusion could not sustain, so the AB reversed it.

13. For similar reasons, Argentina cannot bring back as its own new claim your original conclusion. It could have raised it during the original proceeding but wrongly it focused on the first sentence of Article II:1(b).

14. And even if the Panel considers that it could raise in this late stage of this dispute such an important claim, Argentina hasn't shown in which way the current system in force since 2003 is inconsistent with the second sentence of Article II:1(b). of GATT 1994. The mere claim that a violation of Article 4.2 of the Agreement on Agriculture automatically involves a violation of the second sentence of II.1.b is not enough. Automatic violations of WTO provisions do not exist. Argentina has to fulfill its burden of proof under Article 3.8 of the DSU establishing a *prima facie* presumption. And it hasn't done so!

III. CORRECT UNDERSTANDING OF THE AB FINDINGS AND CONCLUSIONS

15. Let me start by recalling what the Appellate Body stated in the 21.5 proceedings in *Softwood Lumber IV*. The determination of the scope of "measures taken to comply" should include the examination of the recommendations and rulings in the original report or reports adopted by the DSB. In other words, this Article 21.5 Panel must necessarily study first the scope of the recommendations and rulings of the DSB before analysing the system in force since 2003. Only in that way, it can be clarified what was Chile obliged to implement and only in that way the changes introduced by virtue of Law 19.897 and its Regulations can be fully understood.

16. Broad interpretations of the findings and conclusions of the original Panel and AB reports would result in imposing to the Member obligations to implement that didn't exist, thereby impairing its due process rights. In its written submissions Argentina has given a broad and erroneous interpretation of the conclusions of the AB, claiming inconsistencies where the AB didn't find one, or reading requirements that the AB never put in its report. We have no time to go through all of them but let me give you one example.

17. Regarding the liberalization process introduced to the system by virtue of a gradual reduction of the values of the parameters floor and ceiling, Argentina claims[7] that Chile hasn't explained how the reduction process through a factor was calculated. First, not only the AB could have never questioned the reduction process but most important, it is one aspect of the measure taken to comply that Chile freely and unilaterally decided to introduce to gradually reduce the border protection of the products concerned and not because it was part of the implementation requirements.

18. Examples like this are many but Chile shall concentrate on what the AB said and not on what Argentina says the AB said.

[7] Paragraph 199 of Argentina's First Written Submission.

IV. THE CURRENT SYSTEM

19. On the basis of the DSB's recommendations and rulings Chile brought its measure into conformity with its WTO obligations through the enactment of Law 19.897 which is in force since December 16, 2003. This Law is supplemented by Supreme Decree No. 831 of the Chilean Ministry of Finance

20. The Law applies to imports of wheat and wheat flour[8] and provides for, by means of a Chilean Minister of Finance decree, the possibility of:

(a) establishing the application of specific duties in US dollars per tariff unit, or

(b) establishing rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff.

(a) Determination of specific duties

21. The Chilean Ministry of Finance decree establishes a specific duty consisting of an amount in USD per tariff unit (tonne) payable when the reference price established is less than USD128 per tonne.

22. The specific duty plus the *ad valorem* duty must not exceed the tariff rate bound by Chile under the World Trade Organization (31.5%). Each import transaction shall be considered individually using the c.i.f. value of the goods concerned in the transaction in question as a basis for calculation.

(b) Determination of rebates on amounts payable as *ad valorem* duties

23. The decree determines a rebate on the amount payable as *ad valorem* duties established in the Customs Tariff when the reference price is over US$148 per tonne.

24. The rebate on the amount payable as *ad valorem* duties established for each import transaction may not exceed the amount corresponding to the *ad valorem* duty calculated on the c.i.f. unit value of the goods.

(c) Determination of the 'floor' and 'ceiling' values established under the Law

25. Facing the need to adjust its legislation in accordance to the WTO obligations, Chile reached an internal political agreement which defined a framework to afford some level of protection to this productive private sector up to 2014, which is established by Law with these parameters: US$ 128 and US$ 148. These values will remain unchanged until the end of 2007. From thereon and until 2014, these amounts will be reduced on an annual basis.

(d) Reference price

26. The reference price for determining specific duties (or rebates) is expressed as a f.o.b. value and consists of the average of the daily international wheat prices recorded in the markets most relevant to Chile[9] which is explained later on.

[8] Law No. 19.897 also applies to imports of sugar, but the latter is not material to this dispute.
[9] The Regulations of the Law also establish the markets most relevant to Chile.

27. The Regulations[10] supplement those provisions of the Law, thereby providing full clarity to the determination of the specific duty (or tariff rebates) established in each Chilean Minister of Finance decree. It reiterates that all values applied by Law are to be expressed on a f.o.b. basis in US dollars. The Regulations also set out the period of validity of each decree establishing a specific duty (or rebates) and the most relevant markets for wheat in Chile.

V. CHILE HAS FULLY COMPLIED WITH THE AB'S RULINGS AND RECOMMENDATIONS

28. Pursuant to the provisions of Article 21.5 of the DSU this Panel has to analyse the scope and conformity of the Chilean measure in light of the recommendations and rulings of the DSB which must be treated as a final resolution to a dispute between the parties.

29. In view of the foregoing, Chile will review the conclusions of the Appellate Body as set out in its Report and not as construed by Argentina, and to compare them with the changes introduced in Law 19.897 and its Regulations, thereby demonstrating that Chile has complied, both in form and in substance, with these conclusions.

30. The AB interpreted "variable import levies", concluding that 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 of Article 4.2.[11] There is something more and that is the fact that the measure itself—as a mechanism—must impose the variability of the duties.[12] 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".[13] In other words, an ordinary customs duty may also vary periodically, provided that the changed rates remain *below* the tariff rates bound in the Member's Schedule.[14]

31. Law 19.897 abolished the variability component. Now the specific duty is fixed by legal directive in the form of a decree issued by the Ministry of Finance and remains unchanged for two months, during which the duty applies on all import transactions, without the slightest variation and regardless of the amount of the transaction, until it is changed or cancelled by a more recent administrative act.

32. Since the variability and automaticity is not sufficient, the AB stated that an additional feature of variable levies was the lack of transparency and predictability in the level of duties that will result from such measures.

33. Why this was important for the AB? Because it contributes to distorting the prices of imports by impeding the transmission of international prices to the domestic market.

34. Here is worth noting that contrary to what Argentina keeps claiming, the isolation of domestic prices is not a characteristic *per se* of variable import levies but the effect of the lack of transparency and predictability. Hence no violation of Article 4.2 can exist on the sole basis that a measure doesn't allow the transmission of international prices to the domestic market.

35. Then the Appellate Body analysed 'minimum import prices' stating that they are not very different from variable levies, except that their mode of operation is less complicated, but in both

[10] Supreme Decree No. 831 of the Chilean Ministry of Finance.
[11] Paragraph 232 of the AB Report.
[12] Paragraph 233 of the AB Report.
[13] Paragraph 234 of the AB Report.
[14] Report of the Appellate Body in *Argentina – Textiles and Apparel*, footnote 56, para. 46.

cases the result is the same: to sustain a domestic price. In this case, variability is the difference between the governmentally determined threshold and the actual transaction value, which will differ from one transaction to another and will hence change the duty without any legislative or administrative action.

36. With these conclusions in mind the AB analysed how the PBS is similar to a variable import levy and a minimum import price. During the appeal Argentina picked your finding that considerable lack of transparency and unpredictability in the PBS and emphasized that the combination of a lack of transparency and a lack of predictability were the features of the PBS that, most of all, make it similar to variable import levies.

37. The AB disregarded to some extent the emphasis of the Panel on the fact that whether the PBS was related to domestic target prices or domestic market prices. For the AB there are other factors relevant to the assessment of the PBS.

38. First, the fact that the highest 25 per cent as well as the lowest 25 per cent of the world prices from the past five years were discarded in selecting the highest and lowest f.o.b. prices for the determination of the annual price bands.[15] With the entry into force of Law No. 19.897, Chile abolished this calculation formula introducing fixed parameters.

39. Second, the AB places considerable importance on the non-transparent and unpredictable way in which the "highest and lowest f.o.b. prices" selected were converted to a c.i.f. basis by adding "import costs". Pursuant to the Law, all values are set as f.o.b., meaning that it is no longer necessary to add "import costs", making the system easier and fully transparent.

40. Thirdly, the AB analysed how the reference price was determined, observing similar shortcomings. On one hand, the price was established in a manner that was neither transparent nor predictable. Specifically, that nowhere was specified how the international "markets of concern" and the "qualities of concern" were going to be selected.[16] Thus, it was by no any means that the weekly reference price was representative of the current world market price. Additionally, since the reference price was not adjusted for import costs, as were the price bands, it was likely to inflate the amount of specific duties applied under the PBS. As we have explained previously, this last point is based on the failure of Chile to correctly explain how the system operated.

41. Currently, the Regulations specify the calculation mechanism, the markets of concern and their qualities to be considered. Besides that, all prices are taken in a f.o.b. basis.

42. On the other hand, the AB questioned the fact the reference price was established on a weekly basis. So even if the first one of the parameters (the bands) did not distort —if not disconnect—that transmission, because it was determined on a weekly basis.[17] This is the crux of the AB analysis. The weekly and unpredictable determination of a reference price with no link to international markets resulted not only in specific duties that constantly (and automatically) vary but with the specific objective to "sustain" a certain target price. Much to the contrary of Argentina's wishes, the sustainability of a certain target price is the main objective of measures similar to variable import levies and minimum import prices. And that is why the PBS was condemned.

43. Summing up, Argentina is wrong when it thinks that what it considers a lack of transparency/predictability and isolation of the domestic market test can be applied to any feature of any measure that it doesn't like.

[15] Paragraph 246 of the AB Report.
[16] Paragraph 246 of the AB Report.
[17] Paragraph 251 of the AB Report.

44. Having clarified how the original Panel and AB have to read, let me introduce our colleague who is going to show how the changes introduced by Chile in 2003 apply in practice.

Power Point Presentation

45. This morning Argentina told us that they do not understand how Chile can argue that the amended PBS does not disconnect Chile's market from international price developments.[18] We will try once again to make Argentina understand this important element.

46. Through this power point presentation we will highlight the changes introduced in 2003 and how the current system operates. But before that let me describe the operation of the PBS and the main steps for the application of a specific duty.

(Slide 1)

47. This chart shows domestic demand and offer curves for wheat. International prices are far below the domestic equilibrium given by the intersection of those curves, indicating that Chile is clearly an importing country.

48. As any imported good, wheat is taxed with an *ad valorem* duty of six percent. In addition, the PBS provided for the possibility of applying specific duties in US dollars per unit when the import price (and we mean by import price the cost of the imported product at domestic level) was lower than a previously fixed target price.

49. For establishing the target price, once a year monthly data of international prices from the five preceding years was collected. These f.o.b. prices were ranked from lowest to highest and adjusted using a price deflator, eliminating the extremes (25% each). The remaining values were used as the "base" to calculate the minimum import cost ("the floor") as well the maximum import cost ("the ceiling").

50. All normal costs associated with import operation, such as *ad valorem* duties, transport costs, insurance and customs charges were added to the floor price. The objective of this exercise was precisely to express the floor price in terms of the cost of imports at domestic level.

51. Then, the PBS needed a value to compare with the floor. The international price used for this comparison was the lowest weekly average price available, no matter the market of origin or type of wheat. This average was the reference price and was informed once a week based on data available the week before.

52. For the calculation of a specific duty the reference price was expressed at domestic level as well; that is, adding the same import costs used for the floor and ceiling prices.

53. The specific duty was calculated as the difference between floor and reference prices, both expressed at domestic levels.

54. As the reference price was informed every week the determination of a specific duty, rebate, or none of them, was set 52 times a year. Furthermore there were no laws or regulations describing the procedures for calculating specific duties or rebates. As a result the AB concluded that the PBS worked as a measure similar to a Import Variable Levy or a Minimum Import Price, i.e. through the support of a domestic target price.

[18] Paragraph 69 of Argentina's Oral Statement.

(Slide 2)

55. Law 19.897 and its Regulations provide for the application of a specific duty on a seasonal basis and depending on prices. A specific duty applies when the international price is below a fixed value. Both prices being expressed in f.o.b. terms.

56. One of the parameters of the current system is a fixed f.o.b. value: the "floor price". The objective of this value is just to allow the calculation of a specific duty under certain circumstances. **So there is no more a domestic target price or a minimum price to support**. Floor and ceiling prices were fixed at US$128 and US$148 per ton respectively. These prices will remain unchanged until the end of 2007 and from there until 2014 they will be reduced by 1.5% per year. The official values are set in the Law.

(Slide 3)

57. The other parameter is an international price used to make the comparison with the floor value. This reference price is also expressed in f.o.b. terms.

58. Reference prices come from the relevant markets for wheat: United States and Argentina.

59. Let me divert a couple of minutes from the presentation and address some points raised by Argentina this morning.

- The relevant markets used to establish the reference price are not only the ones relevant to Chile but relevant for international trade in wheat. Even Argentina seems to recognize this in par. 53 of its presentation when it signals out Chicago and Kansas, exactly one of the prices used.

- In its web page Argentina's Agriculture, Livestock, Fish and Food Secretary and under the section "Monthly Prices" publishes two international prices for wheat: *Fob Golfo* and *Fob Puertos Argentinos*. Annex CHL-12

- In paragraph 54 of its oral presentation Argentina through Annex ARG 31, tries to demonstrate that Canada was a relevant market because it has been the second import market for Chile. First, the relevant markets are not just the relevant ones for Chile in terms of the origin of its imports but "relevant for wheat".[19] Second, if the former would have been the case, Canada was not a relevant market during 2003 nor 2002, when the Regulations were enacted. Annex CHL-13 By the way as you can see the source of information is the same as ARG 31 and the statement that Argentina reproduced in paragraph 54.

- Without prejudging intentions, we cannot accept the assertion of Argentina in paragraph 58 and 59 of its statement that Chile is "constructing" a price that is "intransparent". Annex ARG 32 shows a price series under the name "*Precios FOB oficiales*" (on a daily basis) printed "some days ago". We have printed a couple of minutes ago, from the same source, the same series of prices but on a monthly basis, where the name "*FOB Puertos Argent*" (we assume it is Argentina) is used. Another series printed from the same source under the name "*Precios FOB oficiales*" but on a monthly basis will show that we are talking about the same prices. Annex CHL-14. When Chile enacted the Regulations in 2003 the daily series used the same name as in the monthly series. Now seems to be some difference in terminology but clearly,

[19] Article 8 of Supreme Decree 821.

the official Argentinean source still collects, publishes and uses "*Trigo Pan Puerto Argentino*".

- The AB questioned the PBS on the issue that the relevant market was not established in any regulation and the authority could use "any foreign market of concern".[20] What Argentina suggested this morning is that Chile should change the relevant market to determine the reference price according to its trade patterns. This not only would render the determination of the reference price non transparent and non predictable but very difficult to do because the use of a relevant markets doesn't preclude imports coming from other markets. So Annex ARG 34 is not a surprise in that sense.

60. As explained in the legislation, the reference price is an average of the daily international prices of "*Trigo Pan f.o.b. Puerto Argentino*" on one half of the 12 month period and "*Soft Red Winter N° 2 FOB Gulf of Mexico*" for the rest of the period. The price used is the officially published by Agriculture, Livestock, Fish and Food Secretary of Argentina and the Chicago Board of Trade/Reuters, respectively.

(Slide 4)

61. Under the current regime the amount of specific duty equals the difference between the floor price and the reference price, multiplied by a factor of one plus the general *ad valorem* duty (6%).

62. In the case of wheat flour the applicable specific duty shall be that determined for wheat, multiplied by a factor of 1.56.

63. Specific duties (or rebates) are applied by decree published six times a year in the periods established in the regulation. The duties, rebates or none of them, do not vary throughout the two month period of validity of the decree, that is: the duty is the same irrespective of the transaction price, a governmentally determined price or world price trends.

64. The specific duty plus the *ad valorem* duty must not exceed Chile's tariff bound rate (31.5%).

65. Total tariffs levied by Chile on wheat and wheat flour behave in the same way as an ordinary customs duty. **This means that the price of imports in the domestic market (import price) is the sum of the transaction f.o.b. value, total tariffs and the rest of import costs.**

(Slide 5)

66. The import price could result above the fixed f.o.b. value, as in this example. Or could be lower than the fixed f.o.b. value, depending on the transaction f.o.b. value.

67. Although apparently Argentina doesn't like it (and they repeated it a couple of times this morning[21]), duties currently are applied independently of the transaction value as is the case with any specific duty, thereby allowing goods to enter at any price subject to the application of a given specific duty. **That is to say, international prices may fall (or rise) during the application of a specific duty but the latter will remain the same, and therefore the entry price will necessarily reflect any fluctuation.**

[20] Paragraph 249 of the AB Report.
[21] For example paragraphs 26 and 56 of Argentina's Oral Presentation.

68. After 2003, the parameters floor, ceiling and reference prices have the sole purpose of making possible the determination of the border protection that will be applied to wheat and wheat flour in accordance with a pre-established schedule.

(Slide 6)

69. The following graph compares the price of wheat on the Chilean wholesale market (green line) with two international prices: the *Trigo Pan Puerto Argentino* (blue line), and the *Soft Red Winter Nº2* (orange line), from January 2004 to June 2006. Also, the Floor value appears in red.

70. The graph shows that:

- The floor value is far below the wholesale market price, below Soft Red Winter Nº2 price, and most of the time below the *Trigo Pan Puerto Argentino* price.

- Chilean wheat prices have varied.

- Most of the time this variation is very similar to that of export prices of Argentine wheat, confirming the connection of Chilean wheat prices to the f.o.b. price from Argentina.

71. As we explained in our second submission it is impossible to claim a complete connection. Firstly, the price of wheat – and its fluctuations – on the wholesale market is heavily influenced by the domestic wheat supply naturally available during the harvest months (December to March). Secondly, Argentina is not the only Chilean wheat supplier. For example, in June 2006 the wholesale price falls, following the trend in *Soft Red Winter Nº2* which is lower while the price in Argentina rises.

(Slides 7, 8 and 9)

CONCLUSIONS

72. Mr. Chairman and members of the Panel throughout this long dispute we have always claimed that any WTO Member can do what it wants to up to the level of its binding commitments. In other words, no other Member can expect or request a tariff treatment different to the one consolidated in other Members' Schedule. That is their legitimate expectations. That means that Argentina shouldn't expect from Chile a certain tariff treatment for the products object of these procedures.

73. Notwithstanding the above, the original Panel and the AB concluded that Article 4.2 prohibits certain type of measures that have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products, mainly through the disconnection of domestic prices from international price developments.[22] The particular configuration and interaction of all the specific features of the PBS addressed by the AB created non transparent and unpredictable market access conditions insulating Chile's market from the transmission of international prices, preventing enhanced market access for imports of wheat and wheat flour.

74. Chile respected this decision and although none of the features of the PBS on its own has the effect of insulating our market as the AB stated, and conscious of the sovereign right of any WTO Member to establish the level of protection up to its bound level, it decided to radically modify the import regime for the products in question.

[22] Paragraph 227 of the AB Report.

75. A central part of the Chilean trade policy looks for low and flat tariffs for every good, including agricultural products. However, since wheat and wheat flour are sensitive products Law 19.897 and its Regulations establish a mechanism to provide additional protection (above the 6%) under specific circumstances related to seasons and prices. In our view the application of the bound level of 31.5% could mean unnecessary over protection for producers.

76. An example of the magnitude of this overprotection is provided in the following chart where we simulated the application of an *ad valorem* duty equivalent to our bound rate in the period between January 2004 and June 2006 to the whear imported from Argentina. This chart shows actual c.i.f values (white bars), the *ad valorem* tariff of 6% (orange bars) and the specific duty effectively applied (yellow bars). The green bars represent the difference to reach a 31.5% tariff. In other words, what Argentina is "saving" with the application of the system that it is challenging today.

77. Clearly the alternative, still valid, to increase that protection to an *ad valorem* duty of 31.5% is a scenario where Argentinean wheat producers will be worse off.

78. The current system allows the Executive Power to establish six times a year duties or rebates or none of them (the level of protection) for a fixed period of time based on parameters calculated on f.o.b. value. During that period the specific duties will not vary, allowing the transmission of international prices and trends into the Chilean market. Without mentioning that all the parameters and elements of the system are on legislation and hence well known by importers, producers and exporters including those from Argentina.

79. Based on the arguments and evidence presented in our submissions we respectfully request you to reject Argentina's claims. First, because some of them are out of the terms of reference of this Panel and second, because Argentina has not been able to establish a presumption of inconsistency of Law 19.897 and its Regulations with Article 4.2 of the Agriculture Agreement or with any WTO provision. On the contrary, Chile has demonstrated that the current system is not a variable import levy or a measure similar to it nor a minimum import price nor a measure similar to it.

Thank you.

ANNEX D-4

**CLOSING STATEMENT BY CHILE
(2 AUGUST 2006)**

1. Let me first make a couple of comments on the statements of the Third Parties this morning. First, we listen from some of them a good description of how the current system is designed in the Law and its Regulations. On that basis these Third Parties concluded that the current system is similar to the PBS and hence similar to a variable import duty or a minimum import price. But it is not a comparison of names and parameters what the Panel is requested to do but to look to the "*de facto*" operation of the system and especially its effects. It is the interaction and configuration what matters. As the US correctly pointed out, it is not transparency and predictability *per se*, but in the level of duties that will result from the measure.

2. Our second point relates to the scope of these proceedings. Chile doesn't deny that new measures can be challenged on new grounds and under new provisions of the Covered Agreements. But that is not the case. Factor 1,56 is a valid ratio between wheat and wheat flour prices – as recognized by Argentina – that allows the determination of a duty. The factor has been in place for more that 10 years. We don't know why Argentina didn't challenge it during the original proceeding, but on taking that path you and the AB were never confronted with that element so you never ruled about this alleged inconsistency. Consequently, Chile was never requested to put the Factor 1.56 into conformity. It is an element of the old measure that Chile didn't changed because it was not obliged to do so. And on the Article II:1(b) claim, let me just say that 21.5 Panels are not called to mend errors committed by the disputing parties during the original proceedings.

3. Our reading of paragraph 289 of the AB Report is clear. Chile had to put the PBS into conformity with its WTO obligations. That is exactly what we have done and we have explained those changes and the implications of those changes.

4. We have always understood that a WTO Member can decide the level of protection that it considers appropriate for its market. The only limit of that protection being the bound tariff level scheduled in its list. The AB added that under its bound commitments Members cannot maintain measures prohibited by Article 4.2. These measures restrict trade and distort prices disconnecting domestic markets from international price development because they result in levies that vary continuous and automatically and lack transparency and predictability in the level of those duties.

5. The AB pointed out specific features of the PBS concluding that the particular configuration and interaction of all these specific features were the determinative elements that made it a measure similar to a variable import levy or a minimum import price. Logically, if those features are not present the measure in question cannot be similar to a variable import levy or a minimum import price. Consequently no violation of Article 4.2 of the AA can be established.

6. With this in mind Chile put in place a mechanism that provides a legitimate level of protection below the bound tariff rate and in full compliance with the DSB recommendations and rulings.

7. Chile has eliminated all the negative features of the PBS as singled out by the AB, namely the lack of transparency and predictability in the way the prices bands were established as well as the way the reference price was determined on a weekly basis and also in an intransparent and unpredictable manner.

8. The parameters established in the current system are an instrument that is used only for the purpose of determining the specific duties or the level of protection that Chile has decided for its market. The duties, if any, are applied in the same way to all the imports within a certain period of time (two months), without consideration of the actual transaction value as all specific duties and with absolute transparency and therefore predictability. As a matter of fact all the information about the present system provided by Argentina was obtained through Chilean web pages.

9. As any border protection measure the specific duty increases domestic prices because its objective is to provide for a certain level of prices that favour the domestic production. The duty will directly affect the entry price of those imported goods that compete with the domestic product.

10. But most importantly, being a fixed amount that doesn't change during a two month period already known, the rise or fall of international prices will be transmitted through the entry prices to the domestic market without insulating domestic prices from the fluctuation of international markets.

11. On Argentina's arguments that the parameters of the current system have to reflect or be related to international market, we emphasize – once again – that there is no need to do so because it is the behaviour of the specific duty that directly affects the possibility of price's transmission. We have clearly shown how the current system does exactly that. Nevertheless, values related to the international market are used for the calculations in order to avoid undesired levels of protection. This may occur if the parameters are established in an arbitrary and non transparent manner. Furthermore public and easily available information allows all market agents make their own commercial decisions based on the same information and don't have to wait for some administrative act that formalizes the level of protection that will be valid during a certain period.

12. Argentina throughout this process has claimed that the reference point to any measure that Chile could adopt is the application of a single *ad valorem* duty fixed at a certain rate. Naturally, they assume is not the bout tariff (31.5%) but a lower one. That is not the reference point that has to be read from the AB Report.

13. Argentina hasn't been able to demonstrate that the system established under Law 19.897 and its Regulations disconnects the Chilean market from the evolution of international prices, or what is the same, that the system is sustaining a certain target price. Moreover, Argentina tries to question only certain periods of application of the system, when a specific duty has been applied as they stated yesterday, as if the application of the duty is the breaking point to define if a measure is or is not inconsistent with 4.2. Curiously, Argentina claims at the same time in paragraph 22 of its oral statement that the duties resulting from the application of the system are not the subject of this proceeding.

14. Mr. Chairman and members of the Panel. It should be clear by now that Law 19.897 and its Regulations are not a measure similar to the measures listed in the footnote of Article 4.2 but an ordinary custom duty. Mainly because the current system does not produce the effects identified by the AB. Consequently, Argentina's claims should be rejected confirming that Chile has implemented the rulings and recommendations of the DSB.

Thank you.