ANNEX F

REPLIES BY PARTIES TO QUESTIONS POSED BY THE PANEL AND OTHER PARTIES AFTER THE SUBSTANTIVE MEETING OF THE PANEL

ANNEX F-1

REPLIES BY ARGENTINA TO QUESTIONS POSED BY THE PANEL

FOR BOTH PARTIES

1. Article 21.5 of the DSU provides that:

> **"Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute..." (emphasis added)**

Please identify which are the relevant "measures taken to comply with the recommendations and rulings" at issue in these proceedings. Do those measures refer to the PBS in its entirety, the amendments introduced to the PBS, particular features of the PBS, or something else? Please make reference to relevant sections of the Panel and Appellate Body reports in the original proceedings to support your answer, if needed.

Answer to Question 1:

The relevant measures taken to comply with the recommendations and rulings at issue in these proceedings are Law No. 19.897, whose Article 1 replaced Article 12 of Law No. 18.525[1], and Decree No. 831 of the Ministry of Finance (hereinafter Decree 831/2003)[2], regulating the application of Article 12 of Law No. 18.525, as substituted by Article 1 of Law No. 19.897.

The fact that both Law 19.897 and Decree 831/2003 are measures adopted by Chile to implement the recommendations and rulings of the DSB was acknowledged by Chile in the status reports it submitted to the DSB in fulfilment of its obligations under Art. 21.6 of the DSU.[3]

Those measures refer to the PBS in its entirety.

2. Could the parties please comment on whether their reply to the previous Question has any bearing on the issue of whether Argentina's claim under Article II:1(b) of the GATT 1994 falls within this Panel's terms of reference.

Answer to Question 2:

Argentina's answer to the previous question bears on the issue of whether Argentina's claim under Article II:1(b) of the GATT 1994 falls within this Panel's terms of reference as fas as the amended PBS is a new measure recognized like that by Chile itself.[4]

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[1] See Exhibit ARG-1. As notified by Chile, Law 19.897 established a "new" price band system which entered into force on 16 December 2003 for the products at issue in this dispute, namely, wheat and wheat flour. (WT/DSB/M/156, paragraph 16).

[2] See Exhibit ARG-2.

[3] See, for example, document WT/DS207/15/Add.3 and *inter alia* First Written Submission by Argentina, paras. 18 to 20.

[4] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system…" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "… the new price band system entered into force on 16 December 2003…" (underlining added).

In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held :

> "... in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU." [5] (Underlining added.)

Thus, Argentina's claim relating to the second sentence of Article II:1(b) of the GATT 1994 falls within the Panel's terms of reference since it is a new claim with respect to a new measure.

3. During the meeting with the Panel, regarding the issue of whether Argentina's claim under the second sentence of Article II:1(b) of the GATT 1994 falls within the mandate of this Panel, Canada asserted that it "is not aware of any rule or precedent in the jurisprudence of the WTO that would require a Member to make all of its arguments and bring all of its claims at one time" (See paragraph 8 of the written version of Canada's oral statement). Assuming Members are then free to choose which claims to bring against a specific measure in the original proceedings and which other claims to bring later, during Article 21.5 proceedings, would there be the risk, as Canada itself suggests, that Members could then tactically decide to "split claims" between the original proceedings and the Article 21.5 proceedings (see paragraph 9 of the written version of Canada's oral statement)?

Answer to Question 3:

Like the Appellate Body held in *Canada – Aircraft (Article 21.5 – Brazil)*[6], Article 21.5 proceedings involve, in principle, not the original measure but rather a new and different measure which was not before the panel and it is natural, therefore, that, as the relevant facts bearing upon the "measure taken to comply" are different from the relevant facts relating to the original measure, the claims, arguments and factual circumstances pertinent to the "measure taken to comply" would not necessarily be the same as those which were pertinent in the original dispute.

Therefore, as the relevant facts bearing upon the "measure taken to comply" are different from the relevant facts relating to the original measure in the case at issue in this dispute, there is no risk that Argentina could have "tactically" decided to "split claims" between the original proceedings and the Article 21.5 proceedings.

[5] WT/DS70/AB/RW, paragraph 41.
[6] WT/DS70/AB/RW, paragraph 41.

4. Do the parties consider that the laying down of all parameters of the PBS applicable until 2014 makes it easier to predict the specific duties applicable to imports? Could a degree of uncertainty be associated with the dates of delivery?

Answer to Question 4:

The laying down of some parameters of the amended PBS applicable until 2014 *does not* make it easier to predict the specific duties applicable to imports.

First, not all parameters have been layed out until 2014. In particular, the reference prices will mandatorily change every two months as they have changed every two months since the amended PBS was established.[7] This provides no predictability for exporters.

According to Chile, the exporter must ascertain the future price of bread wheat in the relevant market of concern in the 15-day future period and then calculate that 15-day period average price to obtain the presumed *future* reference price.

Thus, one of the problems faced by the exporter in estimating the future amount of duties payable is the fact that future prices are precisely that: future, and therefore, they are estimates rather than solid data. That is to say, there could be variations due to circumstances unknown at the time that could cause these *future* prices to differ from the prices actually recorded *in the future.* Consequently, the relationship between the specific duty and the transaction value, in the presence of a variation in the amount of the duties, will necessarily differ from that which would have existed if there had been no such variation.

If in the amended PBS there is any chance of predicting future reference prices, *quod non*, 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.[8]

Second, it is not clear that the amended PBS, included its parameters, will not continue to exist after 2014. The amended PBS has no end date. As indicated in the legislation amending the original PBS, "… In 2014 the President of the Republic shall evaluate the modalities and conditions of application of the price band system …".[9] So, Chile has not even provided the certainty that the amended PBS will be dismantled by middle of next decade.

With respect to the degree of uncertainty related to the delivery dates, Argentina demonstrated how, taking into account the specific delivery dates, as a result of the amended PBS an exporter may not know and may not reasonably predict what the amount of duties will be. Argentina respectfully refers the Panel to paras. 271 to 274 of its First Written Submission.

5. Argentina has noted in paragraph 58 of its first submission, that the way in which the calculation of the specific duties has been changed under the amended PBS "leaves the exporter worse off, inasmuch as the specific duties now generate a cost higher than that generated by the previous method of calculation".

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[7] First Written Submission by Argentina, para. 256 to 270 and Exhibit ARG-6.
[8] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[9] Law 19.897/2003, Art. 1. See Exhibit ARG-1.

(a) Could Argentina clarify whether, in its view, this particular fact *per se* would make the amended measure inconsistent with the WTO covered agreements. If so, could Argentina identify the legal basis for that argument.

Answer to Question 5(a):

The fact that the way in which the calculation of the specific duties has been changed under the amended PBS "leaves the exporter worse off, inasmuch as the specific duties now generate a cost higher than that generated by the previous method of calculation" is a cumulative insulation factor if compared to the original PBS.

This fact is a "specific feature" that contributes to the particular configuration and interaction of all the amended PBS specific features described by Argentina along its submissions and oral statements that have the effect of disconnecting Chile's market from international price developments.

Argentina finds legal basis for this interpretation in footnote 1 to Article 4.2 of the Agreement on Agriculture. Footnote 1 reads in its relevant part:

> "These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties…"

This cumulative insulation factor (i.e. the fact that the way in which the calculation of the specific duties has been changed under the amended PBS leaves the exporter worse off) contributes to the amended PBS *effect* of impeding the transmission of international price developments to the domestic market in a way similar to that of other categories of prohibited measures listed in footnote 1.

In that sense, the Appellate Body found:

> "In our view … Chile's price band system can still have the effect of impeding the transmission of international price developments to the domestic market in a way similar to that of other categories of prohibited measures listed in footnote 1".[10]

This *effect* was one of the features the Appellate Body referred to when finding the original PBS inconsistent with Article 4.2. The Appellate Body stated:

> "We emphasize that we reach our conclusion on the basis of the particular configuration and interaction of all these specific features of Chile's price band system …"[11] (underline added)

(b) In this respect, can Argentina comment on Chile's statement that it has taken the necessary steps to ensure that duties never exceed its tariff rate level bound in the WTO (see, for example, paragraph 37 of Chile's first submission). In the opinion of the Parties, what is at issue in these proceedings, the level of the duties or their alleged variability, or both?

[10] *Chile – Price Band System*, Report of the Appellate Body, para. 246.
[11] *Chile – Price Band System*, Report of the Appellate Body, para. 261 (underline added).

Answer to Question 5 (b):

Chile's comment is familiar to Argentina because it is not the first time that Chile raises this argument.[12]

The fact that Chile has taken the necessary steps to ensure that duties never exceed its tariff rate level bound in the WTO is meaningless with relation to whether the amended PBS is consistent with Chile's obligations under the WTO. The Appellate Body has extensively dealt with this argument and has clearly rejected it.[13] It is useful to recall that the Appellate Body stated:

> … the existence of the tariff binding will not eliminate the distortion in the transmission of world market prices to Chile's market in all other cases, where the combination of the duties resulting from Chile's price band system, when added to the applied *ad valorem* duty, remains below Chile's bound rate of 31.5 per cent *ad valorem*.
>
> Moreover, contrary to what Chile argues, Chile's price band system is not necessarily less trade-distorting Nor does it insulate Chile's domestic market less, than it would, if Chile simply imposed duties at the *bound* tariff level of 31.5 per cent …[14]

With respect to the second part of this question ("what is at issue in these proceedings, the level of the duties or their alleged variability, or both?"), there is much more at issue in these proceedings than just the variability of the duties.

While the *level* of the duties *per se* is not inconsistent with Chile's WTO obligations, what is at stake in these proceedings is 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. In addition to this, the amended PBS is a border measure similar to a variable import levy a minimum import price, is instransparent and unpredictable and, on top of that, is not an ordinary customs duty.

At this point Argentina would like to recall that it has not only claimed that the amended PBS is a border measure similar to a variable import levy. Argentina has made its strongest effort also to demonstrate that the amended PBS is a border measure similar to a minimum import price.[15] The formula developed in Argentina's First Written Submission, Section C.I.2.1 deciphered how the amended PBS works from a mathematical point of view.[16] In fact, due to **that 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.[17]

Additionally, Argentina has provided another 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

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[12] See for example *Chile – Price Band System*, Report of the Appellate Body, para. 253.
[13] *Chile – Price Band System*, Report of the Appellate Body, paras. 254 to 259.
[14] *Chile – Price Band System*, Report of the Appellate Body, paras. 257 and 258 (footnotes omitted)
[15] Argentina's First Written Submission, para. 99-124, 159-173; Rebuttal by Argentina, paras. 160-205, Oral Statement by Argentina, para. 32-41, 85-90; and Closing Statement by Argentina, para. 21.
[16] First Written Submission by Argentina, paras. 102 to 105
[17] Oral Statement by Argentina paras. 36 to 41

price.[18] Chile recognized that that formula was correct.[19] 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.[20]

So, again, the variability of the duties is not the only issue at stake. Argentina is confident that the panel will thoroughly address all of Argentina's arguments.

6. During the substantive meeting with the Panel, Argentina stated that "contrary to what Chile has asserted in its submissions (footnote omitted), the PBS Law and Regulation give no discretion to Chile to decide whether or not to impose the duties" (see paragraph 80 of the written version of Argentina's oral statement, original emphasis).

(a) Can Argentina elaborate on the relevance of whether the amended PBS allows any discretion to Chilean authorities to levy the specific duties or grant the rebates, as appropriate.

Answer to Question 6:

The Appellate Body held that the fact that the *measure* itself – as a mechanism –imposes the *variability* of the duties is one feature of "variable import levies":

> "… at least one feature of "variable import levies" is the fact that the *measure* itself – as a mechanism – must impose the *variability* of the duties. Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Ordinary customs duties, by contrast, are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula. …"[21] (Underlining added, emphasis in the original)

Both Law 19.897 and Decree 831/2003 incorporate "a scheme or formula that causes and ensures that levies change automatically and continuously", making it *mandatory* for specific duties to be established when the reference price is below the band floor.

The relevant part of Law 19.897 states that "specific duties *must be established* when the reference price is below the floor price of 128 dollars for wheat. In the case of wheat flour, the duties and rebates determined for wheat multiplied by a factor of 1.56 *shall be applied*" (emphasis added).

Article 13 of Decree 831/2003 reads: "In each Supreme Decree issued in accordance with this regulation specific duties *shall be established* ... if the reference price is below the floor price ..." (emphasis added).

Clearly, expressions of the type "*must be established*" and "*shall be applied*" mean that when the reference price is below the floor price the application of specific duties will be mandatory and automatic. Therefore, the PBS is applied automatically, directly and unfailingly.

Thus, the fact that the amended PBS itself –as a mechanism- imposes the variability of the duties, together with the fact that it does not allow any discretion to Chilean authorities to levy the specific

[18] First Written Submission by Argentina, Section C.I.2.3.
[19] Rebuttal by Chile, para. 162.
[20] First Written Submission by Argentina, Section C.I.2.3.
[21] *Chile – Price Band System*, Report of the Appellate Body, paragraph 233.

duties or grant the rebates is one of the characteristics that makes the amended PBS be similar to a variable import levy.

7. Do the Parties consider that the price bands, as defined under the amended PBS, are used as part of a scheme or formula for the calculation of additional duties or rebates (as the case may be) at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory?

Answer to Question 7:

Yes, the price bands (or the floor and ceiling values) as defined under the amended PBS, are used as part of a scheme or formula for the calculation of additional duties or rebates (as the case may be) at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory.

In the case of wheat Article 14 of Decree 831/2003 provides that "the specific duties applied to wheat **imports** … will correspond to the difference between the floor price and the reference price … multiplied by the factor one (1) plus that Customs Tariff's general ad valorem tariff.

Specific duty = (**Floor value in force** – Reference price) * (1 + *ad valorem* tariff)"[22]

In the case of wheat flour Article 16 of Decree 831/2003 provides that "In the case of wheat flour the duties and rebates determined for wheat, multiplied by the factor of 1,56 will be applied.

Specific duty or rebate to the tariff for wheat flour = Specific duty or rebate to the tariff for wheat * 1,56 [23]

In this case, it is clear that as the formula for the calculation of specific duties to be levied on wheat flour imports includes the specific duty for wheat, it therefore incorporates the floor value used in the formula to calculate that duty.

These formulas are contained in the Law 19.897 and Decree 831/2003 and that is an incontestable fact.

8. Chile asserts that, under the present PBS, the reference price is *not* a border price, does *not* correspond to the price of a shipment, *nor* is it expressed in CIF terms (see, for example, paragraph 118 of its rebuttal submission).

(a) Notwithstanding the fact that FOB prices do not reflect all the costs associated with traded wheat and wheat flour, do the Parties consider that the price of the goods (normally reflected in the related commercial documents, such as invoices) can serve as the starting point to determine the full transaction value?

Answer to Question 8(a):

Argentina agrees that the price of the goods (normally reflected in the related commercial documents, such as invoices) can serve as the starting point to determine the full transaction value. However the transaction value of the shipments (reflected in the commercial invoice or otherwise) has no relevance

[22] See ARG-2 (emphasis added, unofficial translation)
[23] See ARG-2 (emphasis added, unofficial translation)

or meaning within the amended PBS. Argentina has extensively referred to this aspect of the amended PBS.[24]

(b) Notwithstanding the fact that the reference price is *not expressed in CIF terms*, can the FOB valuation of the "markets of concern" be used as a starting point to obtain an approximation of the *CIF value for reference prices*?

Answer to Question 8(b):

If the FOB valuation recorded in a certain market of concern, for a certain quality of concern and for a specific point in time were adjusted adding up insurance and freight, the result would a *CIF value* for that market, that quality of concern and for that specific point in time. In that case the FOB valuation of the "markets of concern" could be used as a starting point to obtain an approximation of the *CIF value*.

That is the approach followed by Argentina, for example, in Exhibits ARG-11, ARG-12, ARG-13, ARG-14, ARG-23, ARG-24, ARG-25, and Tables I, II, III and IV of Argentina's First Written Submission.

(c) If the Panel were to assume that the PBS does not sustain internal prices, as argued by Chile (see paragraphs 109-126 and 154 of its first submission), would the Parties consider that the FOB, CIF or wholesale prices could be considered as "*proxies*" for certain analytical purposes, for example, in order to study price behaviour, while taking fully into account the complexities involved?

Answer to Question 8(c):

Argentina agrees that FOB and CIF prices can be considered as "proxies" for certain analytical purposes.

However, "wholesale prices" should not be used for any analytical purpose in this dispute. This variable is not relevant in this case. Neither the Panel nor the Appellate Body addressed the notion of "wholesale prices" in this dispute. 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. The *wholesale price* is a new variable incorporated by Chile, never addressed by the Appellate Body nor by Argentina.

Second, in its First Written Submission, paras. 154 and 155, Chile presented a graph stating that it 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 be complete*: "…it is impossible to claim a complete connection…"[25] According to Chile, the reason for this is that internal market wheat price is influenced by wheat internal supply: "The price of wheat – and its fluctuations – on the wholesale market is heavily influenced by the domestic wheat supply…"[26] In sum, the evidence submitted by

[24] First Written Submission by Argentina, paras. 47-49, 137, 141, 153, 157, 182, 196, 220-223, and 228 and, Oral Statement by Argentina, paras. 67 and 68.

[25] Rebuttal by Chile, para 55.

[26] Rebuttal by Chile, para 55.

Chile to convince the Panel that the amended PBS does not cause insulation from the international market, is full of self-contradictions.

Moreover, while the relevant variable to analyse is the entry price as the Appellate Body established, *inter alia*, in paragraph 260 of its Report, the fact recognized by Chile that internal market wheat price is "**heavily**" influenced by wheat internal supply, distorts the very variable Chile purports to incorporate to this dispute, in which the influence of wheat internal supply has never been addressed.

Even if, in spite of the various reasons that Argentina provided for not using "wholesale prices" for any analytical purpose in this dispute, the Panel found that wholesale prices could be considered for analytical purposes, it is difficult for Argentina to describe the evolution of Chilean wholesale prices of wheat and wheat flour over the period addressed by the Panel because all the evidence that Chile has provided for the period January 2004 to February 2006 is an unsupported graph.

First, the graph in para. 154 of Chile's first written submission only addresses ***wheat*** wholesale prices. *Wheat flour* wholesale prices are not addressed in that graph. In fact, wheat flour wholesale price have not been addressed before in this dispute at all.

Second, Chile never provided any chart or any further information to clarify the numerical data that could be the basis for the wheat "wholesale prices" line plotted in that graph, as Argentina did with all of its Exhibits. Argentina has explained all the problems with this graph and the conclusions Chile draws from it. [27] Furthermore, it is not clear what is the source of that graph. Chile states that "The sources of the information, both daily and monthly, are clearly indicated in all cases (SAGPyA and ODEPA)"[28], but it is clear that in para. 154 of Chile's first written submission there is no indication of the sources of the information used to produce the graph.

Furthermore, there are inconsistencies in what Chile apparently is purporting to show. It is not clear whether Argentine FOB price is compared against "Chilean wheat prices", "wheat wholesale prices" or just against the "entry price":

- In paragraph 154 Chile states: "The graph below shows the trends in *Chilean wheat prices* and in f.o.b. prices of Argentine bread wheat …"

- The legend of the graph reads "wheat *wholesale price*"

- In paragraph 155 Chile states: "What clearly emerges is that the *entry price* of wheat exhibits the same behaviour as its f.o.b. price…"

During the meeting of the Panel with the Parties on 1 August Chile exposed in a PowerPoint presentation what appeared to be the same graph. Argentina specifically asked, through an oral question, if that graph showed the same wheat wholesale prices Chile had included in its graph in paragraph 154 of its first submission. Chile's answer was affirmative. However, Argentina neither received an electronic or paper copy of that graph nor of the remaining PowerPoint computer presentation. In fact, Argentina has never seen the numerical basis of that graph.

In spite of all these inconveniences resulting from Chile's lack of clarity and, what is worse, supporting evidence, Argentina made its best effort to describe what it can be observed in that graph.[29]

[27] See Rebuttal by Argentina, para. 61- 66 and Oral Statement by Argentina 30-31.
[28] See Rebuttal by Chile, footnote 25.
[29] Rebuttal by Argentina, paras. 68-70

A careful study of the graph, including a comparison of the trends of each the "bread wheat FOB Argentine port price" (lower line) and the "wheat wholesale price" (upper line) shows that during most of the period both prices moved in different directions. In fact, both prices showed an **opposite** trajectory during the following periods:

- February-March 2004
- March-April 2004
- May-June 2004
- June-July 2004
- July-August 2004
- August-September 2004
- September-October 2004
- December 2004 – January 2005
- January-February 2005
- February-March 2005
- April-May 2005
- May-June 2005
- July-August 2005
- September-October 2005
- November-December 2005

Therefore, Chile statements that "[t]he price curves indicate that…the variation [of Chilean wheat prices] is very similar to that of export prices of Argentine wheat…"[30] and "the entry price of wheat exhibits the same behaviour as its f.o.b. price, which demonstrates price transmission and therefore the connection between the Chilean and the international market"[31] are baseless from every point of view.

9. Do the Parties consider that the actual transaction value of a good is *always* unrelated to its FOB valuation? If not, what adjustments should be made to the FOB price to get an estimate of the transaction value?

Answer to Question 9:

From a theoretical point of view, the actual transaction value of a good has to be related to its FOB valuation. If one considers the transaction value as the invoice FOB price, then no adjustments are necessary. If one considers the transaction value as the CIF price one possible adjustment could be to turn the invoice FOB price into a CIF price.

10. Do the Parties consider that the actual transaction value of wheat and wheat flour is *always* unrelated to its FOB valuation? If not, what adjustments should be made to the FOB price to get an estimate of the transaction value of wheat and wheat flour?

Answer to Question 10:

The actual transaction value of wheat and wheat flour is related to its FOB valuation. If one considers the transaction value as the invoice FOB price, then no adjustments are necessary. If one considers the transaction value as the CIF price one possible adjustment could be to turn the invoice FOB price into

[30] Chile First Written Submission, para. 154.
[31] Chile First Written Submission, para. 155.

a CIF price. Argentina has provided several examples on how this was done for the purposes of this dispute in the case of wheat[32] and in the case of wheat flour.[33]

11. Can it be said that the reference price as defined under the PBS is used as part of a scheme or formula for the calculation of additional duties or rebates (as the case may be) at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory?

Answer to Question 11:

Yes.

In the case of wheat Article 14 of Decree 831/2003 provides that "the specific duties applied to wheat **imports** … will correspond to the difference between the floor price and the reference price … multiplied by the factor one (1) plus that Customs Tariff's general ad valorem tariff.

Specific duty = (Floor value in force – **Reference price**) * (1 + *ad valorem* tariff)"[34]

Article 16 of Decree 831/2003 provides that "In the case of wheat flour the duties and rebates determined for wheat, multiplied by the factor of 1,56 will be applied.

Specific duty or rebate to the tariff for wheat flour = Specific duty or rebate to the tariff for wheat * 1,56 [35]

In this case, it is clear that the formula for the calculation of specific duties to be levied on wheat flour imports includes the specific duty for wheat, it therefore incorporates the Reference Price used in the formula to calculate that duty.

These formulas are contained in the Law 19.897 and Decree 831/2003 and that is an incontestable fact.

12. Article 7 of Chilean Supreme Decree No. 831 provides that the FOB reference price for wheat "correspond[s] to the average of the daily prices recorded in the markets specified in Article 8 over a period of 15 days counted retroactively from the 10th day of the month in which the relevant decree is to be published".

(d) Do the Parties concur that the reference price used to trigger the calculation of additional duties (or rebates) changes six times in the course of any 12-month period?

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[32] See Argentina's First Written Submission, footnote 104: "… To arrive at the [wheat] CIF value the FOB value was multiplied by 1.23, because the CIF value is generally (subject to periodic variations) 23 per cent higher than the FOB value for wheat, calculating maritime freight from Buenos Aires to Chile at US$24 per tonne and 0.5 per cent for insurance, on the basis of information provided by SAGPyA's Food and Agricultural Market Directorate. The calculations leading to the index 1.23 are presented in Exhibit ARG-25, taking as a basis the FOB prices, Argentine port, reported by ODEPA and carrying out the above-mentioned calculation." See also Exhibit ARG-25.

[33] See Argentina's First Written Submission, footnote 108: "… The [wheat flour] CIF value is calculated from the FOB value, plus land freight and insurance. Normally, in the case of wheat flour, freight and insurance represent 40 per cent of the FOB value. This information was obtained from examples of actual export operations provided by the Argentine Federation of the Milling Industry (FAIM) and presented in Exhibit ARG-26 …" See also Exhibit ARG-26.

[34] See ARG-2 (emphasis added, unofficial translation).

[35] See ARG-2 (emphasis added, unofficial translation).

Answer to Question 12(d):

Yes, the reference price used to trigger the calculation of additional duties (or rebates) changes six times in the course of any 12-month period.[36]

13. Do the Parties consider that the fixing of reference prices for a period of 60 days constitutes a cumulative insulation factor, in view of the fixing of price bands for a period of 11 years?

Answer to Question 13:

Yes. The fixing of reference prices for a period of 60 days constitutes a cumulative insulation factor for two main reasons.

First, as Argentina pointed out in its First Written Submission, given that under the "old" PBS reference prices were adjusted every week in accordance with the lowest FOB price in *any* external "market of concern" during the previous week, the amended PBS disconnects the Chilean market from international price developments even more than the original PBS.

Under the "new" PBS the reference prices used to calculate the specific duty for wheat and wheat flour are set 6 times a year,[37] that is, with a period of validity of 2 months during which the transmission of world market prices is disconnected.

Consequently, the "new" reference prices, and the "new" PBS that determines them, are not only less representative of the world market but also impede the transmission of international price developments to the Chilean market even more than the original reference prices and PBS.[38]

The charts in Exhibits ARG-15 and ARG-17 illustrate the development of the reference prices and the prices of wheat FOB Argentina and FOB Gulf of Mexico, respectively, during the period of validity of the amended PBS. For each period, the disconnection between the FOB prices and the reference prices, after the reference price has been set for two months, is clearly discernible. The tables that provided the information on which these charts are based can be found in Exhibits ARG-16 and ARG-18, respectively.

It is surprising to note the insulation from international prices that actually occurred during the period in which the operation of the PBS led to the application of specific duties. It can be seen both from the chart showing the relationship between the reference price and the Argentine port price of bread wheat during the period of operation of the amended PBS (ARG-15) and from that showing the relationship between the reference price and the Gulf of Mexico price of Soft Red Winter No. 2 wheat (ARG-17) that the disconnection occurs irrespective of the period of the year with respect to which the relationship is considered. That is to say, the reference price is disconnected from the FOB prices in the markets of concern both when the reference price is based on the Argentine FOB price and when it is based on the Gulf of Mexico FOB price, although the disconnection between the reference price and the Argentine FOB price is even greater when the reference price is calculated on the basis of the Gulf of Mexico FOB price and *vice versa*.

[36] See Exhibit ARG-6.

[37] See Exhibit ARG-2 (Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 5 and 7 and the "Summary Table for the application of paragraph 2" of the Annex) and Exhibit ARG-6 (History of the application of the amended PBS).

[38] This without prejudice to the inconsistencies found by the Appellate Body with respect to the reference prices in the original PBS.

For example, if we consider the relationship between the reference price and the FOB price for Argentine bread wheat (Exhibits ARG-15 and ARG-16), we find disconnections over the entire period of validity of the amended PBS, but especially in February, early April, the end of May and early June, July, August, early September, end of October and mid-December 2004 and end of February, March, early April, end of July, end of August and beginning of September 2005.

Likewise, if we analyse the relationship between the reference price and the FOB price Gulf of Mexico (Exhibits ARG-17 and ARG-18), we note disconnections over the entire period of validity of the amended PBS, but especially at the end of January and beginning of February, April, end of May and early June, July, September, and early October 2004, January, February, March, early April, early August, early October and end of November 2005, and January and early February 2006.

As a specific example of this insulation (among many others), consider what happened when the reference price was set at 108.64 US$/tonne between 16 February and 15 April 2005, on the basis of the average of the daily prices for wheat *FOB Argentine port*. The reference price thus determined and fixed for two months did not reflect in absolute terms the increasing trend of those same FOB prices for Argentine bread wheat which, during that period, reached 140 US$/tonne,[39] close to the band ceiling from which the PBS provides for the granting of rebates rather than the levying of specific duties, which clearly reveals the enormous arbitrariness in the setting of the reference prices.

In the case of wheat flour, the disconnection is even greater. Thus, as flour is a product of wheat, its FOB price is naturally higher since to the cost of the wheat the millers add the cost of milling plus a profit margin. Accordingly, the FOB price of wheat flour is <u>always</u> higher than the reference price calculated on the basis of wheat, as can be seen simply by glancing at the chart in Exhibit ARG-19 and the table in Exhibit ARG-20. The substantial disconnection observed between the FOB price of Argentine wheat flour and the reference price on the basis of which the specific duties are applied *during the entire period of validity of the amended PBS* speaks for itself and shows the distortion faced by Argentine exporters of wheat flour when trying to enter the Chilean market.

In paragraph 180 of its First Written Submission Chile seeks to argue that there cannot be overcompensation and that "the objective is not to maintain a parity price" [*sic*], simply because duties are now assessed six times a year rather than 52 times a year as in the original PBS:

> "A further point which demonstrates that there cannot be overcompensation and that the objective is not to maintain a parity price is that today – unlike under the former PBS when duties were assessed once a week (i.e. 52 times a year) – the duties or rebates assessed are valid for two months (i.e. six a year), and during that period are completely disconnected from what may occur in the reference, or any other, markets."

Now the PBS is inconsistent "only" 6 times a year. Chile's arguments speak for themselves. In particular, the last part of the paragraph cited "...the duties or rebates assessed are valid for two months (i.e. six a year), and during that period are <u>completely disconnected</u> from what may occur in the reference, or any other, markets", simply verifies and confirms that under the "new" PBS the reference prices provide for a period of validity of <u>2 months</u> during which the <u>transmission of world market prices is completely disconnected</u>.[40]

Second, as Argentina maintained in its Oral Statement, the problem with the amended PBS's reference price is that, compared to the original PBS, the insulating consequences are much worse. In

[39] See Exhibit ARG-16.
[40] Argentina's First Written Submission, paragraph 206.

fact, international price developments of an extense period of the year are not reflected at all by the amended PBS.

Below, Argentina has attached the Chart for the Application of paragraph 2 of Decree 831/2003 ("Cuadro resumen para la aplicación del párrafo 2"), found in the annex of this Decree.

Períodos para el cálculo de los precios de referencia	Período de publicación del decreto	Períodos de vigencia de los derechos específicos o rebajas	Mercado de mayor relevancia
26 nov – 10 dic	11-15 diciembre	16 dic – 15 feb	*Trigo pan argentino*
27 ene – 10 feb	11-15 febrero	16 feb – 15 abr	*Trigo pan argentino*
27 mar – 10 abr	11-15 abril	16 abr – 15 jun	*Trigo pan argentino*
27 may – 10 jun	11-15 junio	16 jun – 15 ago	*Soft Red Winter N° 2*
27 jul – 10 ago	11-15 agosto	16 ago – 15 oct	*Soft Red Winter N° 2*
26 sep – 10 oct	11-15 octubre	16 oct – 15 dic	*Soft Red Winter N° 2*

According to Chart 2 of the Annex to the Decree 831/2003 (shown above), the relevant prices 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 Jun, 27 July to 10 August, and 26 September to 10 October (See first column on the left). 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.[41]

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.

In short, Chile wants this Panel to find that the amended PBS reflects international price developments, overlooking the fact that the floor and ceiling prices, 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.*

14. What significance, if any, do Parties attribute to the fact that the amended PBS provides that references prices are established bimonthly instead of weekly, as was the case previously?

Answer to Question 14:

There are two answers for this question. One is from the point of view of the **insulation**, which has already been addressed in the answer to question 13 above.

[41] 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.

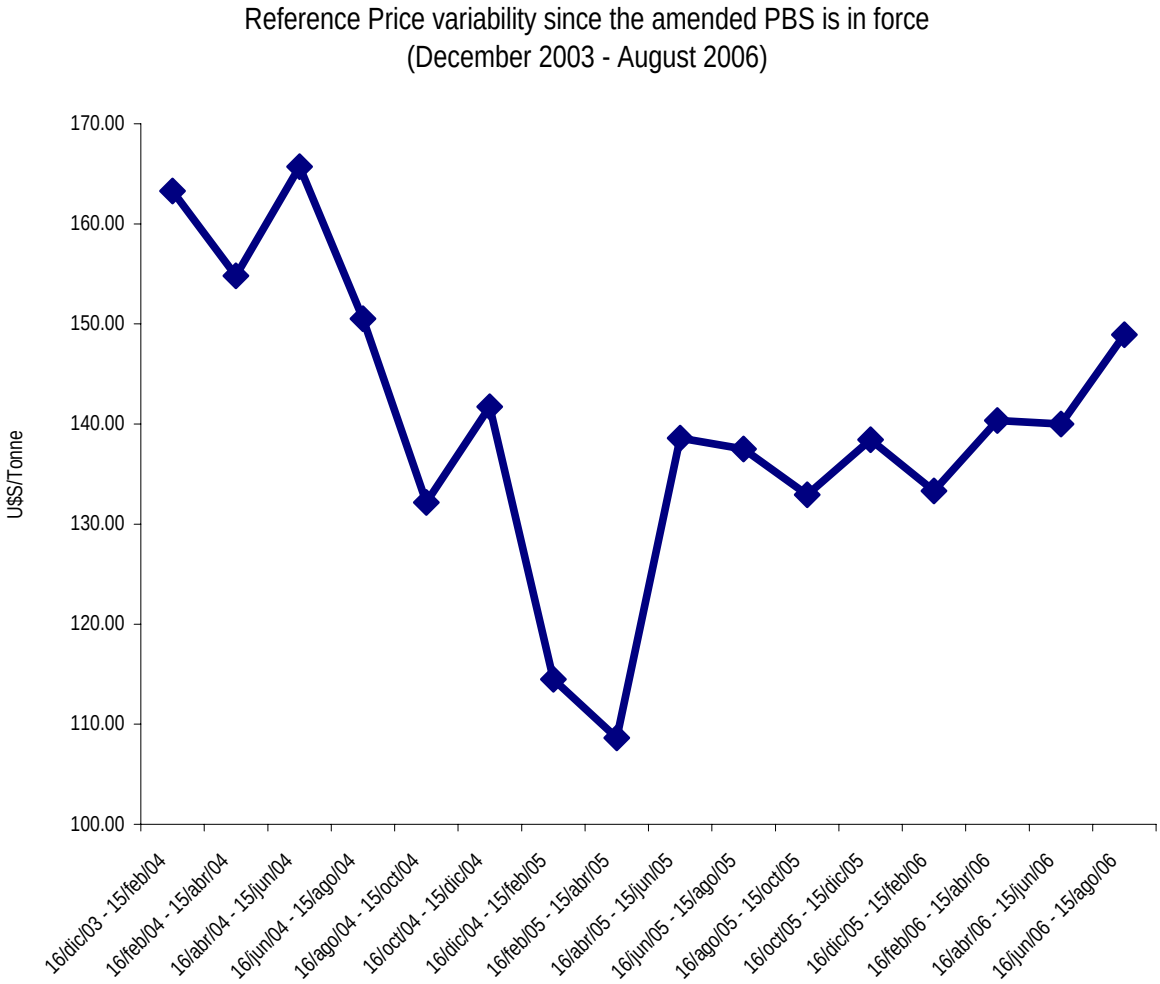
The other one is from the point of view of the **variability** of the PBS and the reference prices. In this respect, the variability remains, regardless the fact that references prices are established bimonthly instead of weekly.

In accordance to what the United States stated during the meeting of Panel with third parties, we cannot see, nor Chile has identified, a basis for a distinction between a variation once every two months rather than once every week.[42] Despite the fact that the variation of the reference price is no longer weekly but bimonthly, that variation is continuous and automatic.

Graph I below shows the variation of the reference price since the amended PBS is in force. It can clearly be seen that despite Chile's arguments, variability in the reference price remains.[43] The fact that the reference price varies bimonthly rather than weekly has not changed its intrinsic and visible variability.

[42] Oral Statement by the United States, para. 13.
[43] Numeric data supporting this graph can be seen in Exhibit ARG-38. The source is ODEPA (Chile).

GRAPH I



Source: own elaboration based on ODEPA (Chile)

Moreover, in the right circumstances, that is to say, if the reference price is situated below the band floor – as happened between December 2004 and April 2005 – every two months an exporter of wheat or wheat flour to the Chilean market will face a specific duty different from that established during the previous two-month period. This is clear from the table and the chart in Exhibits ARG-23 and ARG-24, which illustrate the operation of the amended PBS between 16 December 2004 and 15 April 2005. Moreover, if we consider what can happen over a longer period of time, what an exporter experiences is the continuous variability of the duties, resulting from the continuous variation of the reference price. This is apparent from the table and the chart in Exhibits ARG-21 and ARG-22, which illustrate the variability of the specific duties that would have resulted if the present amended PBS had operated with the average prices recorded between 1986 and the present on the markets of concern to Chile.

15. The amended PBS provides that the same reference price still applies to all goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value of the shipment. Could Parties please comment on the effects of this feature on the transmission of international price developments into the Chilean market.

Answer to Question 15:

When examining the original PBS reference prices, the Appellate Body said:

> Furthermore, under Chile's system, the same weekly reference price applies to imports of all goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value of the shipment…Therefore, the way in which Chile's weekly reference prices are determined contributes to giving Chile's price band system the effect of impeding the transmission of international price developments to Chile's market.[44]

The Appellate Body saw the insulating effects of a measure that *among other features* had no relation with the **transaction value** of the shipments. That feature, according to the Appellate Body, "… contribute[d] to … impeding the transmission of international price developments to Chile's market."

The reason is straightforward: as stated in response to question 10 the actual transaction value of wheat and wheat flour is related to its FOB valuation. The particular transaction value of a shipment reflects the FOB price of a specific type of product, from a specific origin and in a specific point in time. That is, the transaction value of a shipment of Soft White Winter Nº2 wheat, departing from Canada on 16 August 2006 will be very close (if not equal) to the FOB price of Soft White Winter Nº2 in the same Canadian port on that date. In other words: the transaction value of a shipment clearly reflects the price of the respective good shipped in its port of shipment for that specific date. Simply put: the transaction value is the best "vehicle" from the undistorted transmission of international prices. No notion of "Reference Price" can come even close to transmit international prices as real transaction values do. That is why the absence of any relation to the transaction value in the amended PBS impedes the transmission of international price developments to Chile's market.

In its Oral Statement Argentina further developed why the fact that the same reference price still applies to all goods falling within the same product category, regardless of the origin of the goods, impedes the transmission of international price developments to Chile's market. Regarding the insulation consequences deriving from the fact that the amended PBS reference prices are based on only two predetermined markets of concern (i.e. regardless of the origin of the goods), Argentina recalled 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.[45]

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".[46] 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 that 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. Exhibit ARG-31 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

[44] *Chile – Price Band System*, Report of the Appellate Body, paras. 250.
[45] First Written Submission by Argentina, para. 218.
[46] Rebuttal by Chile, para. 72.

clear from the first page of this exhibit, in 2004 Canada exported around 54 thousand tons of wheat while the United States accounted for almost 40 thousand tons. In 2005, the difference between Canada and the United States has been even larger: Canada accounted for almost 40 thousand tons while the United States accounted for around 20 thousand tons.[47] 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"[48] 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.[49]

The logical consequence of this is that the amended PBS **will not transmit** Canadian prices nor the prices of wheat being imported from *any* origin different from Argentina or the Gulf of Mexico. Moreover, should Argentina or the United States became *less* relevant for Chile's foreign trade in the future and another Member became *more* relevant (like it happened with Canada during 2004 and 2005) the amended PBS will prevent the prices of that new trade partner be transmitted to Chile's internal market.

Regarding the fact that the amended PBS provides that the same reference price still applies to all goods falling within the same product category or quality of concern, Chile's amended PBS establishes the references prices 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 in Exhibit ARG-33, ODEPA's prices record for different qualities of wheat since 1991 can be observed. In the first and second columns the FOB prices for the two qualities of concern relevant for the amended PBS can be seen. 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.

Furthermore, 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. In Page 4 of the same Exhibit ARG-33 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]

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[47] In the written version of the Oral Statement by Argentina, para. 54, where it reads "million" it should be read "thousand"; where it reads "millions" it should be read "thousands". Argentina's argument is not altered in its substance.

[48] Rebuttal by Chile, para. 72.

[49] *Chile – Price Band System*, Report of the Appellate Body, para 249.

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

Additionally, Chile does actually import wheat of qualities different from those used for the calculation of the reference prices. In Exhibit ARG-34 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 can be observed. On the first page it can be seen that, for example, in March 2004, Chile imported wheat of the type "Soft White". Similarly, on the second page of the same Exhibit, 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.

Summing up, through the reference prices, the amended PBS **will not transmit** to the Chilean market of the prices of *other* qualities of wheat than the ones established as "relevant" by the legislation enforcing the PBS. 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 again 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]

16. Do the Parties agree that the specific duties or rebates under Chile's PBS are calculated according to "*a formula or scheme*" which involves several parameters?

Answer to Question 16:

Argentina's answer is Yes. The specific duties or rebates under Chile's PBS are calculated according to "*a formula or scheme*" which involves several parameters.

Article 14 of Decree 831/2003 provides that "the specific duties applied to wheat imports…will correspond to the difference between the floor price and the reference price…multiplied by the factor one (1) plus that Customs Tariff's general ad valorem tariff.

> **Specific duty**
> **or rebate** = (Floor value in force – Reference price) * (1 + *ad valorem* tariff)"[52]

Article 16 of Decree 831/2003 provides that "In the case of wheat flour the duties and rebates determined for wheat, multiplied by the factor of 1,56 will be applied".

> **Specific duty or rebate** to the tariff for wheat flour = Specific duty or rebate to the tariff for wheat * 1,56 [53]

These formulas are contained in the Law 19.897 and Decree 831/2003 and that is an incontestable fact.

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

[52] See ARG-2 (emphasis added, unofficial translation).

[53] See ARG-2 (emphasis added, unofficial translation).

17. Argentina has stated in paragraph 229 of its first submission that "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".

(a) Could Argentina clarify whether in its view this particular fact *per se* would make the amended measure inconsistent with the WTO covered agreements.

Answer to Question 17(a):

The fact that "the way in which Chile determined the factor 1.56 is not transparent" is a cumulative intransparent factor that makes the amended PBS inconsistent with the WTO covered agreements. It is another specific feature of Chile's price band system that renders the whole system inconsistent with Article 4.2 of the Agreement on Agriculture.

(b) If so, could Argentina identify the relevant legal basis.

Answer to Question 17(b):

The relevant legal basis in the WTO covered agreements not to maintain an intransparent border measure is Article 4.2 of the Agreement on Agriculture and its footnote 1.

When finding the original PBS inconsistent with Article 4.2, the Appellate Body, *inter alia*, held:

> "… [W]e place considerable importance on the intransparent … way in which the "highest and lowest f.o.b. prices" that have been selected are converted to a c.i.f. basis by adding "import costs". As Chile concedes, no published legislation or regulation sets out how these "import costs" are calculated.
>
> In addition to the lack of transparency … inherent in how Chile's price bands are established, we see similar shortcomings in the way the other essential element of Chile's price band system … is determined…"[54]

The fact that no legislation or regulation set out how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.

Similarly, the fact that Law 19.897 and Decree 831/2003 do not set out how the factor of 1,56 was calculated leads to the conclusion that the establishment of the factor of 1,56 was not transparent.

Therefore, according to the Appellate Body, Chile is under the legal obligation to explain the basis on which the factor 1,56 was determined.

(c) Could Argentina elaborate on the reason why the lack of explanation or justification as to the exact figure of the factor fixed by Chile would *per se* affect market access for imports of agricultural products.

Answer to Question 17(c):

As pointed out above, the fact that no legislation *explained* how the price bands were calculated, led the Appellate Body to find that the lack of transparency was inherent in how Chile's price bands were established.[55]

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[54] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.

The Appellate Body found that the lack of transparency contributed to distorting the prices of imports by impeding the transmission of international prices to the domestic market:

> "… This lack of transparency … will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market".[56]

In addition, in assessing the original PBS, the Appellate Body found that:

> "… As Argentina stresses, the amount of a duty is not the only concern of Chile's trading partners. As Argentina argues, significant for traders, also, are the lack of transparency of certain features of Chile's price band system …"[57]

The Appellate Body emphasized that it reached its conclusion regarding the inconsistency with the WTO covered agreements

> "… on the basis of the particular configuration and interaction of all these specific features of Chile's price band system ..." [58]

Consequently, the lack of explanation or justification as to the exact figure of the factor fixed by Chile leads to a lack of transparency which, according to the Appellate Body, affects market access for imports of wheat and wheat flour.

18. Citing the original Panel's finding in paragraph 7.36 to the effect that "minimum import prices *generally* operate in relation to the actual transaction value" (emphasis added), Chile claims that the specific duties resulting from the new PBS are not based on transaction values, and therefore they are not "variable import levies" (see, for example, paragraph 114 of its rebuttal submission). Do the Parties consider that minimum import prices *always* operate in relation to actual transaction values?

<u>Answer to Question 18</u>:

Argentina has already clarified why the PBS is a border measure similar to a minimum import price.[59] 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".[60] 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.

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

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[55] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.
[56] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[57] *Chile – Price Band System*, Report of the Appellate Body, para. 258.
[58] *Chile – Price Band System*, Report of the Appellate Body, para. 261.
[59] Rebuttal by Argentina, Section B.5, Oral Statement by Argentina, paras. 85 to 90.
[60] Rebuttal by Chile, para. 7.

Agreement on Agriculture. Indeed, that same reasoning was developed by the original Panel and upheld by the Appellate Body.[61]

Second, the Panel described "minimum import prices" as follows: "schemes [that] generally operate in relation to the actual transaction value of the imports".[62] The Appellate Body did not reverse that finding. The word "generally" implies "usually", but not "always".[63] 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.

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[64] and contributes to enhance the distorting effects of the amended PBS as well.

19. In the view of the Parties, what would be the defining characteristic to determine whether a system operates as a minimum import price? Would that defining characteristic be the fact that the system operates in relation to the actual transaction value of the imports? Would it be the fact that it leads to a certain entry price into the domestic market?

Answer to Question 19:

The Appellate Body found in this dispute that:

> "The term 'minimum import price' refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market."[65]

Therefore, the term 'minimum import price' refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market.

Whether a system operates *as* a minimum import price should be determined by looking at its effects, assessing its consequences. This is regardless of whether the system operates in relation to the actual transaction value of the imports or not.[66]

The fact that the system leads to a certain entry price into the domestic market, as the Appellate Body implied, may be a defining characteristic to determine whether a system operates as a minimum import price. If that system *tends* to elevate the entry price of imports to above a certain explicit or implicit lowest threshold, it therefore operates *as* a minimum import price.

20. Can Argentina comment on Chile's statement in paragraph 143 of its first submission, that "the mere fact that the duties and rebates, or the non-application thereof, are established for a sufficiently long period of time provides certainty that any variations in international

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[61] *Chile – Price Band System*, Report of the Appellate Body, para. 243 and 244.
[62] *Chile – Price Band System*, Report of the Panel, para. 7.36(e). Emphasis added.
[63] The definition of " generally ", insofar as relevant, is: "usually, or in most situations". Cambridge Advanced Learner's Dictionary in http://dictionary.cambridge.org/.
[64] *Chile – Price Band System*, Report of the Appellate Body, para. 250.
[65] *Chile – Price Band System*, Report of the Appellate Body, paragraph 236.
[66] See Argentina's answer to question 18.

prices that may occur over this period will be transmitted to domestic wheat prices". In Chile's view, does this statement imply that this "mere fact" *per se* is decisive?

Answer to Question 20:

Chile seeks to show that, as a consequence of the PBS, Chilean import prices for wheat and wheat flour follow a pattern similar to that of the FOB price and that, therefore, there is no insulation from the international market. Chile argues that, being established for a "sufficiently long" period of time, the specific duties of the modified PBS allow international price variations to be transmitted to the price of wheat:

> "In Chile today, the mere fact that the duties and rebates, or the non-application thereof, are established for a sufficiently long period of time provides certainty that any variations in international prices that may occur over this period will be transmitted to domestic wheat prices.
>
> Thus, the conclusion is that, if the floor price is not a minimum price, if the specific duties and their method of application do not continuously entail import price corrections and if import prices, as Argentina shows in Exhibits ARG-11 and ARG-12, follow a pattern similar to that of the f.o.b. price of wheat, Chile's wheat import duties – even if they do undergo variations – do not constitute a variable duty within the meaning of Article 4.2 of the Agreement on Agriculture."[67]

First, Argentina disagrees with Chile's qualifying the period of two months as "sufficiently long". There is no legal basis to assert that two months is sufficient for a period to be considered *long*. In accordance to what the United States stated during the meeting of Panel with third parties, we cannot see, nor Chile has identified, a basis for a distinction between a variation once every two months rather than once every week.[68] Indeed, if that period of two months is compared against the period of time that remains until 2014, it does not look long at all. If one takes into account that the PBS has no end date, then that period of two months starts looking *short* rather than long.

Second, it is worth noting that Chile makes special reference to Exhibits ARG-11 and ARG-12, since it is precisely those exhibits that clearly show how Chile's statement that "import prices...follow a pattern similar to that of the f.o.b. price of wheat"[69] is without foundation.

Exhibits ARG-11 and ARG-12 contain a table and a chart, respectively, which show what happened, in the case of wheat, with the imposition of specific duties as from 16 December 2004. They show how – at the same time as FOB prices, Argentine port, were falling – the Chilean entry price, with the imposition of specific duties, rose substantially, thereby demonstrating a total disconnection from international price developments.

From 1 December 2004 the FOB price of bread wheat, Argentine port, fell steadily, a trend which was to be maintained until approximately 4 January 2005. Specifically, the initial FOB price on 1 December was US$119 per tonne, whereas at the end of the trend, on 4 January 2005, the price stood at US$109 per tonne.

If we consider the trend in the Chilean entry price as a consequence of the operation of the PBS, we observe the exact opposite: the entry price rose. In fact, from 1 December the Chilean entry price for Argentine bread wheat was tending to fall which, since the band was not active, reflected the falling

[67] Chile's First Written Submission, paras. 143 and 144.
[68] Oral Statement by the United States, para. 13.
[69] Chile's First Written Submission, paragraph 144.

trend in FOB prices, Argentine port. However, when the band was activated on 16 December 2004 and specific duties were imposed, the Chilean entry price rose suddenly from US$149.94 per tonne to approximately US$162.93 per tonne. This happened as a result of the operation of the modified PBS itself and the imposition of specific duties.

Moreover, on 16 February 2005 Chile established a new reference price below the band floor and lower than that in force during the previous two-month period. Therefore specific duties higher than during the previous period were imposed. On the basis of the FOB price for bread wheat, Argentine port, corresponding to a shipment arriving in Chile on 15 February, the reference price for that date (and the two previous months) was US$114.50 per tonne. The Chilean entry price on that date, when specific duties of US$14.30 were imposed, was US$153.81 per tonne.

On the next day, 16 February 2005, Chile established a new reference price at US$108.64 per tonne, 5.12 per cent less than the previous figure. However, the FOB price for Argentine bread wheat did not change and, therefore, neither did the CIF value. Nonetheless, when the specific duties resulting from the PBS were applied, the Chilean entry price rose from US$153.81 to US$160.01 per tonne.

In conclusion, it is clear from Exhibits ARG-11 and ARG-12 that, contrary to the Chilean claims, the import prices for wheat do not follow a pattern similar to that of the FOB price of wheat. In particular, on 16 December 2004, the entry price rose whereas the FOB price *fell*, and on 16 February 2005, whereas the FOB price remained steady, the entry price *increased.* However much Chile would have the Panel believe the contrary, the natural tendency of the modified PBS is to move in the opposite direction to international price trends. And it could not be otherwise since the PBS *would make no sense* if that were not its purpose.

If Chile wanted import prices to follow the same pattern as FOB prices, it would only need to apply an *ordinary customs duty*. Chile knows this, but Chile *is not applying* an ordinary customs duty precisely in order *to avoid* the effects of ordinary customs duties and be able to insulate the Chilean market from international market developments. It is pure logic.

In this connection, it is astonishing that Chile asserts that the duties resulting from the PBS are unaffected by changes in world prices:

> "... the duty or rebate, or the non-application thereof, operates in such a way as to allow the transmission of international price variations to the domestic market. That is to say, once the duty has been fixed, traders can capture the benefits of decreases in international prices, because changes in world prices do not affect the duty that they are required to pay."[70] (Underlining added)

Chile's description of its modified PBS is simply wrong. The specific duties remain unchanged only during the two months stipulated in Decree 831/2003. At the end of these two months, the specific duty will necessarily change because the reference price will have changed. Whenever, while situated below the band floor, the prices on the markets of concern (Argentine bread wheat or Soft Red Winter No. 2, Gulf of Mexico) vary, the specific duty applied will necessarily change. That is to say, as the FOB prices on the two markets of concern *fall* the specific duty will *increase*.

[70] Chile's First Written Submission, paragraph 152.

As Argentina explained in its First Submission, this is a simple mathematical conclusion that follows from the PBS formula, according to which:

Specific duty[71]	= (	Band floor price	-	Reference price	) * (	1 +	General *ad valorem* tariff in force, Customs Tariff	)
	= (	US$128	-	Reference price	) * (	1 +	6%	)

Moreover, this can be seen from the ODEPA data themselves.[72] As the reference prices varied due to changes in the prices on the markets of concern, the specific duties changed.

Third, 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".[73] There are many problems with this reasoning.

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

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.

Argentina showed how improbable reaching that break even point is.[74] 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.[75] 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.

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.

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[71] In accordance with Article 14 of Dec. 831/2003. See Exhibit ARG-2.
[72] See Exhibit ARG- 6, in particular the periods 16/Dec/04 – 15/Feb/05 and 16/Feb/05 – 15/Apr/05.
[73] Rebuttal by Chile, para. 51.
[74] First Written Submission by Argentina, paras. 109-114.
[75] See Rebuttal by Argentina, paras. 164 to 169.

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.

Fourth, 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.[76] 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.[77] 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 arguments regarding the overcompensation produced by the amended PBS and recognized by Chile itself.[78]

It is paradoxical that what Chile refers to as a feature of the modified PBS that helps to transmit international price developments (i.e., the fact that the duty is unaffected by international price changes during the two-month period) is precisely a feature that insulates the Chilean market from international prices. At this point, Argentina would kindly refer the Panel to Argentina's answers to questions 13 and 14 above.

21. During the meeting with the Panel, the EC stated that, in its view,

> **"it is only when the measures clearly have sufficient similarity to measures coming under the scope of Article 4.2 – that is features unique to the measures listed in the footnote to Article 4.2 are also found in the measures challenged – that there is a possible violation of Article 4.2. The existence of features which are not unique to the measures found under Article 4.2 cannot be sufficient, on their own, to render a measure inconsistent with Article 4.2" (see paragraph 9 of the written version of the EC's oral statement).**

Could the Parties comment on the EC's statement.

Answer to Question 21:

Argentina does not see a legal basis to assert that the features found in the measures challenged have to be ***unique*** to the measures listed in the footnote 1 to find a possible violation of Article 4.2. The EC has not made reference to any WTO jurisprudence.

Article 4.2 and footnote 1, in its relevant part, state:

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

[76] *Chile – Price Band System*, Report of the Appellate Body, paras. 21 to 29.
[77] *Chile – Price Band System*, Report of the Appellate Body, para. 260.
[78] First Written Submission by Argentina, Section C.I.2.2.

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> [1]These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties…

The Appellate Body found that the category of measures covered by Article 4.2 and footnote 1 is rather broad, including measures *of the kind*, not restricted only to those specific measures that were singled out to be converted into ordinary customs:

> "… giving meaning and effect to the use of the present perfect tense in the phase "have been required" does not suggest that the scope of the phrase "any measures of the kind which have been required to be converted into ordinary customs duties" must be limited only to those measures which were *actually* converted, or were *requested* to be converted, into ordinary customs duties by the end of the Uruguay Round. Indeed, in our view, such an interpretation would fail to give meaning and effect to the word "*any*" and the phrase "*of the kind*", which are descriptive of the word "measures" in that provision. A plain reading of these words suggests that the drafters intended to cover a broad category of measures. We do not see how proper meaning and effect could be accorded to the word "any" and the phrase "of the kind" in Article 4.2 if that provision were read to include only those specific measures that were singled out to be converted into ordinary customs duties by negotiating partners in the course of the Uruguay Round."[79]

In particular, the word "include" indicates that the list of measures in footnote 1 is illustrative and that there may be further measures that may fall under the category *of the kind* covered by Article 4.2:

> "… the use of the word "include" in the footnote indicates that the list of measures is illustrative, not exhaustive. And, clearly, the existence of footnote 1 suggests that there will be "measures of the kind which have been required to be converted" that were *not* specifically identified during the Uruguay Round negotiations. Thus, in our view, the illustrative nature of this list lends support to our interpretation that the measures covered by Article 4.2 are not limited only to those that were *actually* converted, or were requested to be converted, into ordinary customs duties during the Uruguay Round.[80]

However, it is clear that to be "similar", Chile's amended PBS must have sufficient resemblance or be of the same kind as at least one of the specific categories of measures listed in footnote 1. The Appellate Body found:

> "To be 'similar', Chile's price band system—in its specific factual configuration—must have … sufficient 'resemblance or likeness to', or be 'of the same nature or kind' as, *at least one* of the specific categories of measures listed in footnote 1."[81] (Emphasis in the original)

The Appellate Body did not assert that to find a possible violation of Article 4.2 the features found in the measures challenged have to be ***unique*** to the measures listed in the footnote to Article 4.2. All that the Appellate Body stated is that, in the case of the original PBS, it needed to determine whether

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[79] *Chile – Price Band System*, Report of the Appellate Body, para. 208.
[80] *Chile – Price Band System*, Report of the Appellate Body, para. 209.
[81] *Chile – Price Band System*, Report of the Appellate Body, para. 227.

that measure shared sufficient features with "minimum import prices" or "variable import levies" to be of the same kind, and thus prohibited by Article 4.2:

> "We turn next to the Panel's determination that Chile's price band system is a border measure *similar* to 'variable import levies' and 'minimum import prices'. We must determine whether Chile's price band system—in its particular features—shares sufficient features with these two categories of prohibited measures to resemble, or 'be of the same nature or kind' and, thus, also to be prohibited by Article 4.2."[82] (Emphasis in the original).

Finally, the Appellate Body found that the PBS could be similar to the categories of prohibited measures listed in footnote 1 in terms of its *effect*:

> "… Chile's price band system can still have the *effect* of impeding the transmission of international price developments to the domestic market in a way similar to that of other categories of prohibited measures listed in footnote 1 …"[83] (Emphasis in the original).

Therefore, Argentina does not see a legal basis to assert that the features found in the measures challenged have to be ***unique*** to the measures listed in the footnote 1 to find a possible violation of Article 4.2.

22. Can the Parties provide a copy of the relevant sections of the documents "*Historia de la Ley. Compilación de textos oficiales del debate parlamentario*" to which Argentina refers throughout its first written submission.

Answer to Question 22:

The relevant sections of the documents "*Historia de la Ley. Compilación de textos oficiales del debate parlamentario*" to which Argentina refers throughout its first written submission are submitted in Exhibit ARG-37.

23. Can the Parties confirm whether Decree No. 401 of 15 June 2006 by the Ministry of Finance of Chile is the latest decree issued pursuant to the PBS.

Answer to Question 23:

Decree No. 401 of 15 June 2006 by the Ministry of Finance of Chile is the latest decree issued pursuant to the PBS. However, according to Decree 831/2003, a new Decree pursuant to the PBS applicable to wheat and wheat flour imports is being established on 16th August 2006, the date on which these answers are submitted to the Panel.

24. Could the Parties comment on the "understanding which Chile later repudiated" that Argentina refers to in paragraph 11 of its first written submission. Would such understanding have any relevance in the present case?

Answer to Question 24:

As Argentina stated in its first written submission, after the expiring of the reasonable period Chile had for the implementation of the recommendations and rulings of the DSB in December 2003,

[82] *Chile – Price Band System*, Report of the Appellate Body, para. 239.
[83] *Chile – Price Band System*, Report of the Appellate Body, para. 246.

bilateral negotiations were begun early in 2004 with a view to achieving the implementation regarding to wheat and wheat flour.

Those negotiations led to a mutually agreed settlement of the dispute at that very moment. That understanding is not relevant now in the present case.

Argentina mentioned it as background in its First Written Submission to show that Argentina made all its efforts in an attempt to reach a mutually agreed solution of the dispute and not to recur to this dispute settlement proceedings for the second time, in conformity with DSU Article 3.7.

FOR ARGENTINA

25. In the light of Argentina's statement in paragraphs 301 and 302 of its rebuttal submission, can Argentina clarify whether the amended PBS contains specific new features that would, in its opinion, violate the second sentence of Article II:1(b) of the GATT 1994 in a way that the original PBS did not. If so, can Argentina identify those specific new features of the amended PBS that would be in violation of Article II:1(b), and in what manner those features differ from the ones in the original PBS.

Answer to Question 25:

The amended PBS is a new measure containing a new scheme or formula for the calculation of additional duties at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory. The amendments introduced by Chile turned the PBS into a completely new measure as Chile has recognized.[84] Chile has changed both the way in which the floor and ceiling prices are established and the way in which the reference prices are calculated, as well as the method of calculating the specific duties. Chile has also changed the products subject to the PBS. Argentina has extensively developed how the amended PBS contains specific new features that have rendered it to be a new and different measure. Argentina would kindly refer the Panel to Section B of its First Written Submission, paragraphs 18 to 66.

Whether the original PBS through its specific features violated the second sentence of Article II.1.b) of GATT 1994 was not part of the Appellate Body findings[85], and it was not a claim raised by Argentina in the original proceedings, as the Appellate Body found[86] and Chile recognized.[87]

As Argentina stated in paragraphs 301 and 302 of its rebuttal submission, the claim with respect to the second sentence of Article II.1(b) of the GATT 1994 relates to the whole of the modified PBS.

In this regard, by being a new measure that was not before the original panel, the relevant facts bearing upon the modified PBS are obviously different from the relevant facts relating to the original PBS, in that, on the basis of the particular configuration described above, the amended PBS is not an ordinary customs duty.

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

[84] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system…" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "… the new price band system entered into force on 16 December 2003 …" (underlining added).

[85] *Chile – Price Band System*, Report of the Appellate Body, para. 288.

[86] *Chile – Price Band System*, Report of the Appellate Body, para. 165.

[87] Chile's First Written Submission, paragraph 48.

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.

As Chile explicitly recognized,[88] 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.

It is therefore natural that, in this regard, Argentina submitted a claim pertinent to the modified PBS that is different from those that were pertinent to the original PBS.

In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held:

> "... in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU." [89] (Underlining added.).

In the present Article 21.5 proceedings there would be no "second chance" to establish what was claimed but not proved in the original proceedings as in the case of *EC – Bed Linen (Article 21.5 – India)* since, as Chile states and agrees: "Argentina did not in fact ever raise the claims it now wishes to bring".[90] Consequently, this is the "first chance" to establish a new claim which Argentina is entitled to raise.

The claim relating to the second sentence of Article II:1(b) of the GATT 1994 is a new claim with respect to a new measure and, therefore, falls within the terms of reference of the present DSU Article 21.5 Panel.

26. Referring to its claim under Article II:1(b) of the GATT 1994, Argentina declared during the substantive meeting with the Panel (see paragraph 115 of the written version of its oral statement) that it "could never have raised this same claim during the original proceedings" Can Argentina explain the reason why it could not have raised its claim under Article II:1(b) of the GATT 1994 in the original proceedings? Is Argentina arguing *that the original PBS was not inconsistent* with the second sentence of Article II:1(b) of the GATT 1994, while the amended PBS is inconsistent? Is that circumstance (the fact that it could not have raised this particular claim in the original proceedings), in Argentina's view, an appropriate test to assess whether the claim falls within the Panel's mandate?

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[88] First Written Submission by Chile, para. 48.
[89] WT/DS70/AB/RW, paragraph 41.
[90] Chile's First Written Submission, paragraph 48.

Answer to Question 26:

First, it should be undisputed at this stage that the amended PBS is a new measure. In fact, as Chile itself has stated on at least two occasions, the modified PBS is a "new" PBS.[91]

Argentina could never have made this same claim relating to the same PBS aspects during the initial stage of the present dispute, as Chile maintains[92], since the modified PBS is a measure different from the PBS which formed the subject of the original proceedings. As Chile has pointed out, this is a "new" PBS.

In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held that Article 21.5 proceedings involve not the original measure but rather a new and different measure which was not before the panel and it was natural, therefore, that, as the relevant facts bearing upon the "measure taken to comply" were different from the relevant facts relating to the original measure, the claims, arguments and factual circumstances pertinent to the "measure taken to comply" would not necessarily be the same as those which were pertinent in the original dispute.[93]

As the panel found in *EC – Bed Linen (Article 21.5 – India)*, in *Canada – Aircraft (Article 21.5 – Brazil)*, Canada had implemented the recommendation of the DSB by adopting a new and different measure. In the Article 21.5 proceeding, Brazil made claims regarding that measure that it had not made in the original dispute. Canada objected to claims raised by Brazil against the new measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that could not have been raised in the original proceedings.[94] The Appellate Body agreed with the panel's conclusion.[95]

In the present dispute the situation is similar. The modified PBS is a new measure that was not before the original panel. The relevant facts bearing upon the modified PBS are obviously different from the relevant facts relating to the original PBS. It is therefore natural that Argentina should present claims, arguments and factual circumstances pertinent to the modified PBS that are different from those that were pertinent to the original PBS.

In the present Article 21.5 proceedings, Argentina, like Brazil in *Canada – Aircraft (Article 21.5 – Brazil)*, raises claims relating to the second sentence of Article II:1(b) of the GATT 1994 in respect of the modified PBS that it did not raise in the original dispute. Chile, like Canada in that dispute, challenges the claims raised by Argentina against the modified PBS arguing that no claims relating to the second sentence of Article II:1(b) of the GATT 1994 were raised against the original PBS. If the Panel were to uphold the Chilean challenge, Argentina, like Brazil in that dispute, would not have the opportunity to raise claims that could not have been raised in the original proceedings, because the modified PBS is a new and different measure that was not before the original panel.

Finally, in *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body warned against the consequences of undermining the utility of the review envisaged under Article 21.5 of the DSU and the ability of a panel to examine fully the "consistency with a covered agreement of the measures

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[91] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system…" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "… the new price band system entered into force on 16 December 2003 …" (underlining added).

[92] Chile's First Written Submission, paragraphs 50 and 56.

[93] *Canada – Aircraft (Article 21.5 – Brazil)*, Appellate Body Report, paragraph 41 (underlining added).

[94] WT/DS141/RW, paragraph 6.48.

[95] *EC – Bed Linen* (*Article 21:5 – India*), Appellate Body Report, paragraph 88.

taken to comply", as required by Article 21.5 of the DSU, that could result if a Panel were restricted to examining the new measure only from the perspective of the claims related to the original measure:

> "Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU."[96]

In this case, the consequences against which the Appellate Body warned would take place if this Panel were restricted to examining the new PBS from the perspective of the claims that related to the original PBS. Its ability to examine fully the "consistency with a covered agreement" of the amended PBS, as required by Article 21.5 of the DSU would be seriously impaired.

Second, as it was already stated[97], whether the original PBS was inconsistent with the second sentence of Article II:1(b) of the GATT 1994 was not part of the Appellate Body findings in the original proceedings.

Third, as stated before, Argentina could not have raised this particular claim in the original proceedings.

However, even if Argentina could have raised its Article II:1(b) GATT 1994 claim in the original proceedings, *quod non*, that circumstance is not an appropriate test to assess whether the claim falls within the Panel's mandate.

A panel is not prohibited from considering arguments and claims on the sole basis that they *could* have been raised during the original proceedings with respect to a different original measure. As Canada stated in its oral intervention:

> Where the measure is appropriately before a panel, and the DSB has made no findings or recommendations in respect of such measure or the claims made by the complaining party, a panel may not then reject such claims or arguments on the sole basis that they could have been raised previously.[98]

First, there is no legal basis in any provision of the DSU to assert that a party cannot raise a claim before an Article 21.5 panel because a possibility existed that it *could* have raised the same claim during the original proceeding when the original measure was not the measure at issue in the compliance proceedings. What is more, Chile has not made reference to any legal provision in support of this argument. Argentina shares Brazil's view on this point:

> Not surprisingly, Chile does not cite to any treaty text in order to support its approach. In fact, this is because there is nothing in the text of the DSU that precludes a complaining Member from bringing a claim that was not brought in the original proceedings. According to the DSU, Article 21.5 proceedings may, in principle, involve claims made under any provision of any covered agreement.[99]

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[96] WT/DS70/AB/RW, Appellate Body Report, paragraph 41. (underlining added).
[97] See Argentina's answer to question 25 above.
[98] Third Party Oral Statement by Canada, para. 6.
[99] Third Party Oral Statement by Brazil, para. 18.

Second, Argentina cannot recall any *WTO jurisprudence* that supports Chile's argument that a party cannot raise a claim before an Article 21.5 panel because a possibility existed that it *could* have raised the same claim during the original proceeding, when the original measure was not the measure at issue in the compliance proceedings.

Furthermore, Argentina is not aware of any provision in the DSU or WTO jurisprudence that required a complaining party to bring all its *possible* claims at once in the original proceedings. As Brazil stated,

> … Chile's approach [would] add a new and undue burden on the complaining party, since it would force it to prosecute every conceivable violation in the original proceedings in order to preserve its rights on implementation.[100]

If Chile's argument were accepted, the door would be open to a whole new set of controversial procedural claims during DSU Article 21.5 proceedings concerning whether certain claims could have *possibly* been made with respect to the original measure, even if, as in the present case, the original measure was different, in its particular configuration and features, to the measure at issue in the compliance proceeding.[101]

Finally, in this case, given that the amended PBS is a new and different measure, the claim related to Article II:1(b) GATT 1994 is, in any event, different from the Article II:1(b) GATT 1994 claim that could eventually have been raised in the original proceedings, as far as it challenges a different measure including a whole new configuration and features. Although the EC did not completely agree with all of Argentina's arguments, it is telling that it shared Argentina's approach regarding whether this claim falls within the Panel's mandate:

> As regard the claim made by Argentina relating to the second sentence of Article II: 1 (b) of the GATT, and in the view of the EC, what counts in this context is again the fact that the new measure (the revised PBS) has created a new set of regulatory and factual circumstances which imply that the claim is new insofar that it is directed against a different set of measures under a different set of "relevant facts". Therefore, the fact that a similar claim may have been brought against a similar measure in the original dispute <u>should be held as irrelevant</u>.[102]

27. Can Argentina also clarify whether the amended PBS contains specific new features that would, in its opinion, violate Article XVI:4 of the WTO Agreement in a way that the original PBS did not. If so, can Argentina identify those specific new features of the amended PBS that would be in violation of Article XVI:4, as well as the manner in which those features differ from the ones in the original PBS.

<u>Answer to Question 27</u>:

The claim with respect to Article XVI:4 of the WTO Agreement relates to the modified PBS in its entirety rather than to one aspect or specific new features in particular.

The amended PBS is a new measure containing a new scheme or formula for the calculation of additional duties at the customs border, prior to the entry of wheat and wheat flour into the Chilean customs territory. The amendments introduced by Chile turned the PBS into a completely new

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[100] Third Party Oral Statement by Brazil, para. 16.
[101] See Third Party Oral Statement by Canada, para. 9.
[102] Third Party Oral Statement by the European Communities, para. 19 (underline added).

measure as Chile has recognized.[103] Chile has changed both the way in which the floor and ceiling prices are established and the way in which the reference prices are calculated, as well as the method of calculating the specific duties. Chile has also changed the products subject to the PBS. Argentina has extensively developed how the amended PBS contains specific new features that have rendered it to be a new and different measure. Argentina would kindly refer the Panel to Section B of its First Written Submission, paragraphs 18 to 66.

Thus, Argentina could never have raised its claim of violation of Article XVI:4 of the WTO Agreement during the original proceedings as far as the amended PBS is a new measure, different in many ways from the original PBS.

There is no legal basis to assert that a WTO Member cannot raise new claims with respect to new measures under Article 21.5 proceedings.

Rather, as Argentina and Chile have already cited, in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body held that:

> "… This implies that an Article 21.5 panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the original proceedings... Indeed, a complainant in Article 21.5 proceedings may well raise new claims, arguments, and factual circumstances different from those raised in the original proceedings …"[104] (underlining added, footnotes omitted)

28. Assuming that the Panel were to agree with Argentina's claim that the amended measure is in breach of Article 4.2 of the Agreement on Agriculture, could Argentina explain why, in its opinion, the Panel would then need to make a separate finding, or should then make a separate finding, on whether the same measure also results in a violation of Article II:1(b) of the GATT 1994 in order to resolve this dispute. Could Argentina please refer in its reply to the statement made by the Appellate Body in paragraph 190 of its report in *Chile – Price Band System*.

Answer to Question 28:

Argentina is fully convinced that this Panel needs to make a separate finding on whether the amended PBS results in a violation of Article II:1(b) of the GATT 1994 in order to resolve this dispute.

In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, after finding that "Mexico ha[d] not explained why an additional finding…[was] necessary to resolve the dispute"[105], the Appellate Body found that there was not a necessity of such an additional finding. It logically follows that in a case where a party does explain the necessity of a separate finding in order to ensure the resolution of a dispute a panel is allowed to make such an additional finding.

This finding was perfectly consistent with the Appellate Body previous finding in *Australia – Salmon.* According to the Appellate Body, the principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a

[103] See Status Reports submitted by Chile WT/DS207/15/Add.1, of 28 October 2003, third paragraph: "We repeat that the new price band system …" and WT/DS207/15/Add.3, of 14 January 2004, second paragraph: "… the new price band system entered into force on 16 December 2003 …" (underlining added).

[104] *EC – Bed Linen (Article 21.5 – India),* Appellate Body Report, paragraph 79.

[105] WT/DS282/AB/R, para. 282

positive solution to a dispute".[106] To provide only a *partial* resolution of the matter at issue would be *false* judicial economy. In particular, the Appellate Body said that a panel:

> "… has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'[according to DSU article 21.1]."[107] (Underlining added)

Under the circumstances of the *present case*, the necessity of a finding to determine whether the PBS is inconsistent with Article II:(1)(b) of GATT 1994 is clear. This panel has to address this claim, because it is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by Chile and to ensure an effective and positive resolution of this dispute.

Argentina completely agrees with the Appellate Body, who stated that a finding that Chile's PBS is inconsistent with Article 4.2 of the Agreement on Agriculture means that the duties resulting from the application of that PBS cannot longer be levied because such PBS cannot longer exist.[108]

It was precisely on the basis of that reasoning that the Appellate Body held that:

> "… if we were to find first that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*, we would not need to make a separate finding on whether the price band system also results in a violation of Article II:1(b) of the GATT 1994 in order to resolve this dispute."[109]

However, at that time, the Appellate Body could not forsee that Chile would confidently ignored this finding, arguing that nowhere in the Appellate Body Report it is mandated that Chile had to eliminate the PBS. Consequently, more than three years and a half after the adoption of the Panel and Appellate Body reports by the DSB, the dispute remains unsolved.

Evidently, according to the reading Chile made of the Appellate Body's finding, it was not as clear to Chile as it was for the Appellate Body and for Argentina that the PBS was a measure not to be maintained. Indeed, Chile did maintain its PBS although it was found to be inconsistent with Article 4.2 of the *Agreement on Agriculture.*

It is evident that, under these particular circumstances, a finding regarding Argentina's claim about the amended PBS inconsistency with the second sentence of Article II:(1)(b) of GATT 1994 results to be necessary to make it clear to Chile that the amended PBS is a measure not to be maintained, and to secure, finally, a *definitive* solution to the dispute.

By virtue of the particular circumstances present in the current proceedings, a separate finding determining whether the PBS is inconsistent with Article II:(1)(b) of GATT 1994, results to be necessary, *inter alia*, for the following reasons.

First, Argentina has fully proved in these proceedings that the amended PBS is inconsistent with Article II:(1)(b) of GATT 1994. However, without a separate finding, Chile would try to maintain its PBS with "cosmetic amendments" in flagrant violation with that provision.

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[106] DSU, Article 3.7.
[107] *Australia-Salmon*, WT/DS18/AB/R, Report of the Appellate Body, para. 223 (underlining added).
[108] *Chile – Price Band System*, Report of the Appellate Body, paragraph 190.
[109] *Chile – Price Band System*, Report of the Appellate Body, paragraph 190.

In spite of the Appellate Body findings, the circumstances of this case demonstrate that for Chile to dismantle its amended PBS, a finding of inconsistency with Article 4.2 may not be enough. 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 …".[110] 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 the Uruguay Round—but were not converted—could not be maintained, by virtue of that Article …".[111] 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*".[112] 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*".[113]

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 *Agreement on Agriculture* means that the duties resulting from the application of that PBS cannot longer be levied because such PBS cannot longer exist:

> "… 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."[114]

The Appellate Body went further and 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."[115]

It is evident now that it was not 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. However, 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. The fact that a measure prohibited by Article 4.2 of the *Agreement on Agriculture* could not be maintained was completely ignored by Chile who maintained the PBS with "cosmetic amendments". This is the reason why Argentina had to resort to the WTO dispute settlement proceedings for the second time. That is why,

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[110] Emphasis added.
[111] *Chile – Price Band System*, Report of the Appellate Body, para. 207.
[112] *Chile – Price Band System*, Report of the Appellate Body, para. 209.
[113] *Chile – Price Band System*, Report of the Appellate Body, para. 212. (Underlining added).
[114] *Chile – Price Band System*, Report of the Appellate Body, paragraph 190.
[115] *Chile – Price Band System*, Report of the Appellate Body, para. 221.

under the *circumstances of this case*, a separate finding of inconsistency with Article II:(1)(b) of GATT 1994 is also required.

Second, DSU Article 3.7 provides that "… the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements". Given the measures taken to comply by Chile preceding Argentina's recourse to DSU Article 21.5, a separate finding of inconsistency with Article II:(1)(b) of GATT 1994 by this Panel will certainly contribute to achieving the abovementioned first objective of the dispute settlement mechanism.

Third, the Appellate Body has established that panel rulings in compliance proceedings should not "lead to a potentially 'never-ending cycle' of dispute settlement proceedings and inordinate delays in the implementation…".[116] Despite Argentina's claims and what the Appellate Body has established, *experience in this case* tells that a finding of inconsistency with Article 4.2 may not lead to a positive solution of the dispute by Chile, again, maintaining its PBS with "cosmetic amendments". This could lead to that potentially "never-ending cycle" of dispute settlement proceedings. It is precisely to avoid this result that Argentina respectfully requests this Panel to address its Article II:(1) (b) of GATT 1994 claim.

In light of the above reasons and facts and consistent with what the Appellate Body established in *Australia – Salmon* and *US – Anti-Dumping Measures on Oil Country Tubular Goods*, Argentina respectfully asks the Panel to make a separate finding under Article II:(1)(b) of GATT 1994, and to secure by this separate finding an effective and *definitive* resolution of this old dispute, preventing a never-ending cycle of dispute settlement proceedings.

29. Referring to the way the amended PBS has worked in practice, Chile has asserted in paragraphs 173 and 174 of its rebuttal submission that:

> **"In 35 (32.1 per cent) of the 109 weeks in which the current system has been in force (16 December 2003 to 13 January 2006) tax rebates have been applied, in 17 (15.6 per cent) specific duties have been applied, and in 57 (52.3 per cent) only the general *ad valorem* tariff has been applied.**
>
> **From 13 January to 15 June 2006 wheat imports were entering Chile subject only to the general *ad valorem* tariff, extending even further the period of improved access conditions."**

Based on the information available, does Argentina agree with Chile's statement?

Answer to Question 29:

Argentina disagrees.

First, Chile puts forward arguments that, according to Chile itself, are not part of the present dispute. Chile has stated that "… the conditions of access for wheat lie [lay] outside the scope of the present dispute …".[117] Afterwards it maintained that "[t]he basis of this dispute is not … how often [customs duties] are applied."[118]

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[116] *United States-Tax Treatment For "Foreign Sales Corporations"* Second Recourse to Article 21.5 of the DSU by the European Communities, Report of the Appellate Body, WT/DS108/AB/RW2, para. 86.

[117] Rebuttal by Chile, para. 163.

[118] Rebuttal by Chile, para. 171 (underline added).

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

As Argentina pointed out[119], access conditions continue to be unfavourable despite the duties allegedly being applied on fewer occasions than in the case of the original PBS. Chile's argument amounts to saying that exporters of wheat and wheat flour to Chile should not be concerned about the distorting effects of the modified PBS, since under the modified PBS the distorting effects resulting from the application of specific duties occurred "only" 17 times, whereas under the original PBS they would have occurred 27 times. Chile claims that this represents an improvement in conditions of access. There is no improvement. Chile's reasoning has no basis in the WTO Agreements and, in particular, not in the DSU or the *Agreement on Agriculture*. A measure taken to comply is not "less" inconsistent because the inconsistency occurs on fewer occasions than in the case of the original measure. There is no basis for drawing such a conclusion.

30. In paragraph 77 of its rebuttal submission, Argentina suggests that Chile should explain the criteria that led it to fixing the floor and ceiling of the band at US$128 and US$148 per tonne, respectively. Could Argentina clarify whether, in its view, Chile is under a legal obligation to advance that explanation and, if so, could Argentina identify the relevant legal basis in the WTO covered agreements.

Answer to Question 30:

The legal basis in the WTO covered agreements not to maintain an intransparent border measure is Article 4.2 of the Agreement on Agriculture and its footnote 1.

When finding the original PBS inconsistent with Article 4.2, the Appellate Body, *inter alia*, held:

> "… [W]e place considerable importance on the *intransparent* and unpredictable way in which the 'highest and lowest f.o.b. prices' that have been selected are converted to a c.i.f. basis by adding 'import costs'. As Chile concedes, no published legislation or regulation sets out how these "import costs" are calculated.
>
> In addition to the *lack of transparency* and the lack of predictability that are inherent in how Chile's price bands are established, we see similar shortcomings in the way the other essential element of Chile's price band system … is determined …"[120] (Emphasis added)

The fact that no legislation set out how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.

Similarly, the fact that Law 19.897 and Decree 831/2003 do not set out the criteria that led Chile to fixing the floor and ceiling of the band at US$128 and US$148 per tonne, respectively, lead to the conclusion that the establishment of the floor and ceiling was not transparent.

Therefore, Chile is under the legal obligation to advance the criteria that led it to fixing the floor and ceiling of the band at US$128 and US$148 per tonne, respectively.

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[119] Rebuttal by Argentina, para. 208-209.
[120] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.

As pointed out above, the fact that no legislation *explained* how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.[121]

The Appellate Body found that the lack of transparency contributed to distorting the prices of imports by impeding the transmission of international prices to the domestic market.[122]

Afterwards, in assessing the original PBS, the Appellate Body found that:

> "… As Argentina stresses, the amount of a duty is not the only concern of Chile's trading partners. As Argentina argues, significant for traders, also, are the lack of transparency of certain features of Chile's price band system …"[123]

The Appellate Body emphasized that it reached its conclusion regarding the inconsistency with the WTO covered agreements

> "… on the basis of the particular configuration and interaction of all these specific features of Chile's price band system ..."[124]

Consequently, the lack of explanation or justification as to the criteria that led Chile to fixing the floor and ceiling of the band at US$128 and US$148 per tonne, respectively, leads to a lack of transparency which, according to the Appellate Body, affects *per se* market access for imports of wheat and wheat flour.

Regarding the transparency requirement derived from Article 4.2 and footnote 1, the original Panel in these proceedings found that:

> "… all the measures listed there are instruments which are characterized either by a lack of transparency and predictability, or impede transmission of world prices to the domestic market, or both".[125]

Moreover, the original Panel also observed:

> "… several crucial stages of the operation of the Chilean PBS are characterized by a considerable lack of transparency and predictability. For instance, exporters can be expected to have difficulties knowing how the applicable Reference Price is arrived at."[126]

Those findings are completely applicable to the amended PBS.

Finally, in its analysis of whether the original PBS was a border measure similar to a variable import levy and a minimum import price, the original Panel in these proceedings found, in a finding not reversed by the Appellate Body:

> "… we have already highlighted the features of the Chilean PBS which reveal its intrinsically unstable, *intransparent* and unpredictable nature, as well as the

[121] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.
[122] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[123] *Chile – Price Band System*, Report of the Appellate Body, para. 258.
[124] *Chile – Price Band System*, Report of the Appellate Body, para. 261.
[125] *Chile – Price Band System*, Report of the Panel, paragraph 7.34.
[126] *Chile – Price Band System*, Report of the Panel, paragraph 7.44.

> insulation of the domestic market from international price competition which it achieves ..."[127] (Emphasis added)

Regardless the fact it did not find useful to endorse the characteristics identified by the Panel as being of a "fundamental" nature, the Appellate Body established in paragraph 234 of its Report:

> "… [T]his lack of transparency and this lack of predictability are liable to restrict the volume of imports … This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market."

31. With regard to the factor 1.56 applicable to wheat flour, Argentina asserted during the substantive meeting with the Panel (see paragraph 107 of the written version of its oral statement) that, "[t]his was the *first* chance for Argentina to raise these arguments". (Original emphasis.) Would that circumstance (the fact that these Article 21.5 proceedings were the first chance for Argentina to raise the argument) constitute an appropriate test to assess whether the issues relating to factor 1.56 fall within this Panel's mandate?

Answer to Question 31:

The appropriate test to assess whether the issues relating to factor 1,56 fall within this Panel's mandate is the fact that Argentina's argument in relation to the factor 1,56 is not a claim: it is an argument.

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".[128] 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*.

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".[129]

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.

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.[130] Three sub-arguments support this main argument[131]: (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,

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[127] *Chile – Price Band System*, Report of the Panel, paragraph 7.61.
[128] First Written Submission by Chile, paragraph 62.
[129] WT/DS98/AB/R, paragraph 139.
[130] First Written Submission by Argentina, Section C.I.2.7.
[131] First Written Submission by Argentina, paras. 228 to 234.

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*.

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 analyze Argentina's arguments in relation to the factor of 1,56[132] in order to find that the amended PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*.

In the alternative, if this Panel found the argument in relation to the factor of 1,56 constitute a new "claim", the fact that these Article 21.5 proceedings are the first chance for Argentina to raise the argument could constitute one of the appropriate tests to assess whether the issues relating to factor 1.56 fall within this Panel's mandate, because the amended PBS is a new measure, different from the original PBS and, therefore, Argentina could not have raised the arguments in relation to that factor in the original proceedings.

Despite the fact that the factor 1.56 was *formally* maintained in the modified PBS, Argentina's arguments relating to that factor are included in the terms of reference of the present Panel inasmuch as Chile has changed the basis to which that factor is applied and hence the result of its application.

If both the basis and the duties resulting from the application of the factor 1.56 in the modified PBS are necessarily different from the basis and the duties resulting from the application of the factor 1.56 in the original PBS, then the relative weight of the factor 1.56 has also changed in the measures taken to comply.

In this respect, it should be recalled that the specific duty or rebate for wheat, which constitutes the basis of calculation to which the factor 1.56 is applied to arrive at the specific duty or rebate for wheat flour, is calculated from the difference between the *floor or ceiling price* and the *reference price* by multiplying that difference by 1 plus the *ad valorem* tariff. Given that Chile has changed both the way in which the floor and ceiling prices are calculated[133] and the way in which the reference prices are established[134], as well as the method of calculating the specific duties[135], the basis to which the factor 1.56 is applied and the results of its application have necessarily changed. The application of the factor 1.56 in the modified PBS results in a different amount of duties and forms part of both the measure itself and its method of application.

In other words, the consequences of applying the factor 1.56 in the modified PBS are different from the consequences of applying it in the original PBS.

In conclusion, just as the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* held that the claims relating to the Section 129 affirmative likelihood-of-subsidization re-determination fell within the panel's terms of reference because the basis for that re-determination was different from that for the affirmative determination in the original sunset review, the arguments relating to the factor 1.56 fall within the terms of reference of the present Panel since the basis on which that factor is calculated is also different from that in the original PBS.

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[132] 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.

[133] Argentina's First Written Submission, Section B.3.3.

[134] Argentina's First Written Submission, Section B.3.4.

[135] Argentina's First Written Submission, Section B.3.5.2.

Thus, the new arguments relating to the factor 1.56 relate to an aspect of the measure taken to comply that has changed with respect to the original measure. Consequently, the Panel should conclude that Argentina's arguments concerning the factor 1.56 fall within its terms of reference.

In *Canada – Aircraft (Article 21.5 – Brazil)* [136], the Appellate Body held that Article 21.5 proceedings involve not the original measure but rather a new and different measure which was not before the panel and it was natural, therefore, that, as the relevant facts bearing upon the "measure taken to comply" were different from the relevant facts relating to the original measure, the claims, arguments and factual circumstances pertinent to the "measure taken to comply" would not necessarily be the same as those which were pertinent in the original dispute.

As the panel found in *EC – Bed Linen (Article 21.5 – India)*, in *Canada – Aircraft (Article 21.5 – Brazil)* Canada had implemented the recommendation of the DSB by adopting a new and different measure. In the Article 21.5 proceeding, Brazil made claims regarding that measure that it had not made in the original dispute. Canada objected to claims raised by Brazil against the new measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that could not have been raised in the original proceedings.[137] The Appellate Body agreed with the panel's conclusion.[138]

In the present dispute the situation is similar. The factor 1.56 – as a changed aspect of the measure taken to comply – was not before the original panel. As pointed out above, the relevant facts bearing upon the factor 1.56 are obviously different from the relevant facts relating to the factor 1.56 in the original PBS. It is therefore natural that Argentina should present arguments and factual circumstances pertinent to the factor 1.56 in the modified PBS that are different from those that were pertinent to the factor 1.56 in the original PBS.

In the present Article 21.5 proceedings, Argentina, like Brazil in *Canada – Aircraft*, puts forward arguments relating to the factor 1.56 that it did not raise in the original dispute. Chile, like Canada in that dispute, challenges these arguments claiming that they should have been raised in the original proceedings. If the Panel were to uphold the Chilean challenge, Argentina, like Brazil in that dispute, would not have the opportunity to put forward arguments that could not have been raised in the original proceedings, as the factor 1.56 is a changed aspect of the measure taken to comply.

Moreover, Chile's due process rights have not been unduly impaired in these proceedings since in changing the factual basis on which the factor 1.56 would be applied and hence the results of applying it Chile could have anticipated that new arguments relating to that factor would be raised.

In this connection, in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, the panel held that:

> "… The United States itself introduced the issue of treatment of evidence by revising the entire likelihood-of-subsidization determination and by changing the legal basis of the affirmative conclusion of likelihood of continuation or recurrence of subsidization. The United States therefore could have anticipated a claim on the USDOC's treatment of evidence. Accordingly, the Panel concludes that the European Communities' claim on evidence falls within this Panel's mandate."[139]

[136] WT/DS70/AB/RW, paragraph 41.
[137] WT/DS141/RW, paragraph 6.48.
[138] WT/DS141/AB/RW, paragraph 88.
[139] WT/DS212/RW, Report by the Panel, paragraph 7.71.

Furthermore, Argentina's arguments relating to the factor 1.56 were not brought up at a late stage of the Article 21.5 proceedings. Thus, due process has not been adversely affected, as shown by the fact that Chile was able to rebut these arguments in its First Written Submission.

In the light of the above, should the Panel consider that the arguments put forward by Argentina in relation to the factor 1.56 constitute a new claim, Argentina respectfully requests that the Panel consider the said arguments, since they fall within the terms of reference of the present Panel, and find that the factor 1.56 is a specific feature of the modified PBS that is impeding enhanced access to Chile's market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.[140]

32. In paragraphs 196 to 201 of its rebuttal submission, Chile has explained the technical reasons for using a factor of 1.56 to assess the duties or rebates applicable to wheat flour. Chile has stated that the reason for increasing the duty (or rebate) by a certain proportion "is simply to maintain a similar nominal level of protection for both products". Chile argues that the factor it has used for wheat flour has undergone occasional adjustments to take account of the relation between the prices of the two products and since 1996 has been fixed at 1.56. Chile set the value at 1.56 taking into consideration the information available at that time, which "indicated that between January 1986 and December 1995 (the period of application of the band at that time), the average ratio of the price of flour to the price of wheat was 1.566". Can Argentina comment on Chile's assertions in this regard, as well as on the evidence submitted as Exhibits CHL-9, CHL-10 and CHL-11.

Answer to Question 32:

As Argentina has already stated, 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, Argentina showed how, for many reasons, the factor of 1,56 insulates the entry price for wheat flour from international price developments:

First, 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.

Second, 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, the factor was "built into" the Chilean legislation and it has remained "unchanged" ever since.

In an effort to give any validity to its argument, Chile submitted Exhibits CHL-9 (Table of wholesale prices for wheat and wheat flour), CHL-10 (Graph of wholesale prices for wheat and wheat flour) and CHL-11 (Graph showing the relation between the price of wheat flour and the price of wheat) that show that the average ratio of the price of flour to the price of wheat was 1.566 between January 1986 and December 1995.

Those Exhibits reflect a price relation that was, at least, eight years old at the time of the entry into force of the amended PBS. Moreover, the delay with regard to any meaningful price relation has reached a decade at the time of these compliance proceedings.

[140] Argentina's First Written Submission, Section C.I.2.7.

On the other hand, as it has been already stated[141], in the case of Argentina, if the FOB prices of bread wheat and wheat flour[142] since the amended PBS came into force are taken into account, the average price ratio is 1.3, as it has been shown in Exhibit ARG-29.

Moreover, in paragraphs 196 to 201 Chile *has not* explained the "technical" reasons for using a factor of 1,56. In fact, Chile explicitly acknowledged that the reason for establishing the factor at 1,56 "…is simply to maintain a similar nominal level of protection for [wheat and wheat flour]".[143] Clearly, this is not a technical explanation. If Chile had provided the technical explanation given by the Chilean Executive it should be clear that the technical ratio is 1,3. In 1993, the Message of the Chilean Executive relating to the amendment of Article 12 of Law 18.525 stated: *"… It is proposed to establish specific duties and rebates on the importation of flour and calculate their amount by multiplying the duties and rebates determined for wheat by the coefficient 1.3* ***which is the technical production ratio*** *…"*[144] (Emphasis added)

Even if the reason for the establishment of the factor was the technical production ratio, the factor should not have "undergone occasional adjustments to take into account the relation between the prices of the two products". Technical ratios are not adjusted due to any price relation because they are just that: technical.

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 is different from the price relation in, at least, one of Chile's markets of concern and, 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.

Therefore, the factor of 1.56 used to multiply the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour is not transparent and insulates the entry price for wheat flour from international price developments to an even greater extent than that for wheat, this being another specific feature of the amended PBS that prevents enhanced access to the Chilean market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

33. In paragraph 232 of its first submission, Argentina states that the factor applied to determine the specific duties of wheat flour was the "technical ratio established by Chile in Law 19.193 which, in 1997, extended the specific duties and tariff rebates of the price band for wheat to wheat flour". Chile has argued in footnote 38 of its first submission that Argentina's statement includes factual errors. Could Argentina please comment on Chile's argument, taking also into account Chile's Exhibit CHL-5.

Answer to Question 33:

On the basis of the history of the Chilean legislation, it might be speculated that the application of a factor to the specific duties established for wheat in order to determine the specific duties applicable to wheat flour could be based on a price relationship derived from a technical production ratio between wheat and wheat flour. Flour being a product of wheat, its price is naturally higher since to the cost of the wheat the millers add the cost of milling plus a profit margin. This relationship is valid

[141] First Written Submission by Argentina, para. 231.

[142] Both are products whose markets are considered to be of concern to Chile in establishing the reference prices of the amended PBS.

[143] Rebuttal by Chile, para. 197.

[144] "*History of the Law. Compilation of official texts of the parliamentary debate. Law 19.193*". Library of the National Congress. Santiago, Chile, 1997. See Exhibit ARG-37, page 19.

at international level. In the case of Argentina, if the FOB prices of bread wheat and wheat flour[145] since the amended PBS came into force are taken into account, the average price ratio is 1.3.[146] That is, the price of wheat flour is approximately 30 per cent higher than that of wheat.

Moreover, this was the technical ratio proposed by the Chilean Executive at the moment of passing the bill for the approval of Law 19.193 which, in 1993, extended the specific duties and tariff rebates of the price band for wheat to wheat flour. At that time, the Message of the Chilean Executive relating to the amendment of Article 12 of Law 18.525 stated: *"… It is proposed to establish specific duties and rebates on the importation of flour and calculate their amount by multiplying the duties and rebates determined for wheat by the coefficient 1.3* ***which is the technical production ratio*** *…"*[147] (Emphasis added)

Notwithstanding the above, the factor was fixed in 1,41 and that is what Chile shows in Exhibit CHL-5 containing Law No. 19.193.

However, successive amendments incorporated in the legislation led to an increase in this figure. Thus, Chile decided to raise the coefficient from 1.41 to 1.56 without any justification, thereby distorting –to an ever greater extent- the entry price for Chilean wheat flour imports.

As noted by a Chilean legislator during the debate on the bill – later Law 19.446 – extending the system for setting the duties and rebates for wheat flour:

> *"Has any justification been given for increasing the factor from 1.41 to 1.56? Absolutely none … The Executive has submitted a measure without providing any data that might support … the raising of the factor from 1.41 to 1.56 …"*[148]

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 is different from the price relation in, at least, one of Chile's markets of concern and, 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.

Therefore, the factor of 1.56 used to multiply the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour is not transparent and insulates the entry price for wheat flour from international price developments to an even greater extent than that for wheat, this being another specific feature of the amended PBS that prevents enhanced access to the Chilean market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

34. Argentina has stated in paragraph 199 of its first submission that the way in which Chile determined the 0.985 adjustment factor for the band floor and ceiling prices was not transparent, that Chile did not explain how this factor was calculated, nor what basis there was for this factor in the legislation that established the amended PBS.

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[145] Both are products whose markets are considered to be of concern to Chile in establishing the reference prices of the amended PBS.

[146] See Exhibit ARG-29.

[147] "*History of the Law. Compilation of official texts of the parliamentary debate. Law 19.193*". Library of the National Congress. Santiago, Chile, 1997. See Exhibit ARG-37, page 19.

[148] Senator Piñera, 24 January 1996. In *"History of the Law. Compilation of official texts of the parliamentary debate. Law 19.446*". Library of the National Congress. Santiago, Chile, 1997. See Exhibit ARG-37, page 14.

(a) Could Argentina clarify whether in its view this particular fact *per se* would make the amended measure inconsistent with the WTO covered agreements.

Answer to Question 34(a):

The fact that "the way in which the factor 0.985 was determined is not transparent. Chile has not explained how it was calculated, or what basis there may be for this factor in the legislation that established the amended PBS" is a cumulative intransparent factor that makes the amended PBS inconsistent with the WTO covered agreements. It is another specific feature of Chile's amended PBS that renders the whole system inconsistent with Article 4.2 of the Agreement on Agriculture.

(b) If so, could Argentina identify the relevant legal basis.

Answer to Question 34(b):

The relevant legal basis in the WTO covered agreements not to maintain an intransparent border measure is Article 4.2 of the Agreement on Agriculture and its footnote 1.

When finding the original PBS inconsistent with Article 4.2, the Appellate Body, *inter alia*, held:

> "… [W]e place considerable importance on the intransparent … way in which the "highest and lowest f.o.b. prices" that have been selected are converted to a c.i.f. basis by adding 'import costs'. As Chile concedes, no published legislation or regulation sets out how these "import costs" are calculated.
>
> In addition to the lack of transparency … inherent in how Chile's price bands are established, we see similar shortcomings in the way the other essential element of Chile's price band system … is determined …"[149]

The fact that no legislation set out how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.

Similarly, the fact that Law 19.897 and Decree 831/2003 do not set out how the way in which the factor 0.985 was determined lead to the conclusion that the establishment of the factor 0.985 was not transparent.

Therefore, Chile is under the legal obligation to explain the way in which it determined the 0.985 adjustment factor for the band floor and ceiling prices.

(c) Could Argentina elaborate on whether such lack of explanation by Chile would *per se* affect market access for imports of agricultural products.

Answer to Question 34(c):

As pointed out above, the fact that no legislation *explained* how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.[150]

The Appellate Body found that the lack of transparency contributed to distorting the prices of imports by impeding the transmission of international prices to the domestic market.[151]

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[149] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.
[150] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.

Afterwards, in assessing the original PBS, the Appellate Body found that:

> "… As Argentina stresses, the amount of a duty is not the only concern of Chile's trading partners. As Argentina argues, significant for traders, also, are the lack of transparency of certain features of Chile's price band system …"[152]

The Appellate Body emphasized that it reached its conclusion regarding the inconsistency with the WTO covered agreements

> "… on the basis of the particular configuration and interaction of all these specific features of Chile's price band system ..." [153]

Regarding the context of the terms in footnote 1, the original Panel in these proceedings found that:

> "… all the measures listed there are instruments which are characterized either by a lack of transparency and predictability, or impede transmission of world prices to the domestic market, or both."[154]

Moreover, the original Panel also observed:

> "… several crucial stages of the operation of the Chilean PBS are characterized by a considerable lack of transparency and predictability. For instance, exporters can be expected to have difficulties knowing how the applicable Reference Price is arrived at."[155]

Those findings are completely applicable to the amended PBS.

Finally, in its analysis of whether the original PBS was a border measure similar to a variable import levy and a minimum import price, the original Panel in these proceedings found, in a finding not reversed by the Appellate Body:

> "… we have already highlighted the features of the Chilean PBS which reveal its intrinsically unstable, *intransparent* and unpredictable nature, as well as the insulation of the domestic market from international price competition which it achieves ..."[156] (Emphasis added).

Regardless the fact it did not find useful to endorse the characteristics identified by the Panel as being of a "fundamental" nature, the Appellate Body established in paragraph 234 of its Report:

> "… [T]his lack of transparency and this lack of predictability are liable to restrict the volume of imports … This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market".

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[151] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[152] *Chile – Price Band System*, Report of the Appellate Body, para. 258.
[153] *Chile – Price Band System*, Report of the Appellate Body, para. 261.
[154] *Chile – Price Band System*, Report of the Panel, paragraph 7.34.
[155] *Chile – Price Band System*, Report of the Panel, paragraph 7.44.
[156] *Chile – Price Band System*, Report of the Panel, paragraph 7.61.

Moreover, in paragraph 258 of its Report the Appellate Body held that "… significant for traders, also, are the lack of transparency of certain features of Chile's price band system …"

As the Appellate Body held with respect to the original PBS[157] and Argentina maintains with respect to the amended PBS: "… we reach our conclusion [regarding the inconsistency with the WTO covered agreements] on the basis of the particular configuration and interaction of all these specific features of Chile's price band system …" (underlining added)

Consequently, the lack of explanation or justification as to the exact figure of the factor fixed by Chile leads to a lack of transparency which, according to the Appellate Body, affects market access for imports of wheat and wheat flour.

35. Could Argentina comment on Chile's argument in paragraph 103 of its first submission, that "a simple glance at the charts presented by Argentina" shows how the specific duties have remained constant for the duration of Law No. 19.897 and its Regulations, leading it to conclude that it is impossible to maintain a minimum import price.

Answer to Question 35:

Chile's argument in paragraph 103 of Chile's first submission is completely unsubstantiated. Argentina fully disagrees with that statement.

Paragraph 103 is within of Section 2 of part IV of Chile's first submission. Section 2 title reads "Appellate Body Analysis And Law 19.897 And Its Regulations". In this Section Chile gives its interpretation on the Appellate Body findings and how the legislation enforcing the amended PBS has allegedly addressed those findings. In particular, para. 103 is within subsection (b) "Minimum Import Prices". Section (b) includes only three paragraphs: 101, 102 and 103.

In para. 101 Chile provides the Appellate Body's alleged definition of minimum import prices and variable import levies:

> According to the Appellate Body, minimum import prices are not very different from variable levies, except that their mode of operation is less complicated. The main difference between the two is that variable levies are 'generally based on the difference between the governmentally determined threshold and the lowest world market offer price for the product concerned, while minimum import price schemes generally operate in relation to the actual transaction value of the imports". (footnote omitted).

In para. 102 Chile appears to provide the alleged definition of "variability":

> Thus, 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.

That is Chile's whole basis to conclude in para. 103 that:

> A simple glance at the charts presented by Argentina shows how the specific duties remained constant and made it impossible to maintain a minimum import price for the duration of Law 19.897 and its Regulations.

[157] *Chile – Price Band System*, Report of the Appellate Body, para. 261.

That's all. No more explanations. No more comments. End of Section IV.2.b. End of the story.

Chile's line of argumentation speaks for itself. Chile's conclusion in para. 103 is not based on evidence. It is not even reasoned. Although Chile refers to the "charts presented by Argentina", there is no single Chart identified or cited by Chile in para. 103 or in the section in which para. 103 is located. In fact, there is not even one reference to any Chart presented by Argentina under whole Section "Appellate Body Analysis And Law 19.897 And Its Regulations". Chile's "glance" at Argentina's charts must have been so "simple" that Chile probably supposed it did not need to provide further explanations. This is how Chile purports to convince this Panel that the amended PBS is not a border measure similar to a minimum import price.

Argentina was required by the Panel to make comments on Chile's assertion. The lack of clarity and objectivity of Chile's argument makes it difficult to comment on. Chile states that "…it impossible to maintain a minimum import price for the duration of Law 19.897 and its Regulations". Argentina would kindly refer the Panel to the sections of its submissions and oral statements where Argentina clarified why the amended PBS is a border measure similar to a minimum import price, including references to the graphs, charts, statistics and mathematic formulas Chile failed to identify.[158]

36. Argentina has quoted, in paragraph 272 of its first submission, paragraph 234 of the Appellate Body's report in *Chile – Price Band System*, stating that "an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be". Does Argentina consider that an exporter would not know better and reasonably predict what the amount of duties will be when the formula to calculate those duties is published, fixed and capped at 31.5 per cent, even if specific figures in the formula are set by the importing country without providing a justification?

Answer to Question 36:

The fact that the formula used to calculate the amount of duties is published, fixed and capped at 31.5 per cent is not relevant to whether an exporter might know better and reasonably predict what the amount of duties will be in the future.

The source of the lack of transparency and predictability of the amount of the duties and the inconsistency related to it, as Argentina has explained, lays elsewhere.

Argentina's argument is that "the lack of transparency and the lack of predictability of the duty level that result from the amended PBS are additional features that undermine the object and purpose of Article 4 of the Agreement on Agriculture".[159] This is because an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be, as it is the case with the amended PBS.[160]

The Appellate Body found the original PBS inconsistent with Article 4.2 of the *Agreement on Agriculture* because, *inter alia*, the lack of transparency and the lack of predictability of the duty level was an additional feature that undermined the objective of achieving improved access conditions for imports of agricultural products.[161] Thus, the issue was not whether the formula to calculate those duties was published, fixed and capped at 31.5 per cent, but whether the *duty level* resulting from the amended PBS was transparent or predictable, which, in the case of the PBS, it was not.

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[158] Argentina's First Written Submission, para. 99-124, 159-173; Rebuttal by Argentina, paras. 160-205, Oral Statement by Argentina, para. 32-41, 85-90; and Closing Statement by Argentina, para. 21

[159] First Written Submission by Argentina, para. 271 and ss.

[160] Rebuttal by Argentina, para. 128 and ss., Oral Statement by Argentina, para. 76 and ss.

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

Argentina has extensively explained why the level of duties resulting from the amended PBS is neither transparent nor predictable as well.[162]

The fact that the formula is published does not eliminate the distortion in the transmission of world market prices to Chile's market, nor it makes the PBS more transparent or predictable. The formula is a means to the lack of transparency and predictability in the level of duties, which still remain. When the Appellate Body made its assessment about whether the original PBS was similar to a variable import levy it said:

> … [T]he presence of a formula causing automatic and continuous variability of duties is a *necessary* … condition for a particular measure to be a "variable import levy" within the meaning of footnote 1.[163]

For the Appellate Body the "presence" of a formula causing automatic and continuous variability of duties was a necessary condition for a particular measure to be a "variable import levy" within the meaning of footnote 1. The Appellate Body did not specified whether that "presence" had to be "published". Thus, the fact that the formula used to calculate the amount of duties is published is not relevant to whether an exporter might know better and reasonably predict what the amount of duties will be in the future.

Although the formula is fixed, the relevant issue is that the reference prices and specific duties are not fixed. They are variable and they are fundamental components of that formula. In particular, the specific duties are liable to vary every two months as far as the reference price, when varying, falls below the floor price. In the amended PBS it is *guaranteed* that, if the required conditions are met, an exporter will mandatorily face a different duty every two months.[164] In fact, contrary to what Chile has asserted in its submissions[165], 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. The lack of transparency and predictability are inherent to the amended PBS, because of the reasons Argentina has described in the answer to this question and along its submissions.[166]

With regard to the fact that the duty level is capped at 31.5 per cent, the Appellate Body stated that "… the existence of [a] tariff binding will not eliminate the distortion in the transmission of world market prices to Chile's market…where the combination of the duties resulting from Chile's price band system, when added to the applied *ad valorem* duty rate, remains below Chile's bound rate of 31,5 per cent *ad valorem*".[167] In this regard, the lack of transparency and predictability in the level of duties, even below Chile's bound rate of 31,5 per cent, still remains. The Appellate Body, accordingly observed:

> "This argument by Chile compels us to consider whether Chile's price band system ceases to be similar to a 'variable import levy' because it is subject to a cap. In doing so, we find nothing in Article 4.2 to suggest that a measure prohibited by that provision would be rendered consistent with it if applied with a cap. Before the conclusion of the Uruguay Round, a measure could be recognized as a 'variable

[162] First Written Submission by Argentina, para. 271 and ss., Rebuttal by Argentina, para. 89 and ss, 138 and ss.

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

[164] Rebuttal by Argentina, para. 145.

[165] First Written Submission by Chile, para. 93 and Rebuttal by Chile para. 101 and 120.

[166] First Written Submission by Argentina, para. 271 and ss., Rebuttal by Argentina, para. 89 and ss, 138 and ss.

[167] *Chile – Price Band System*, Report of the Appellate Body, para. 257.

> import levy' even if the products to which the measure applied were subject to tariff bindings. And, there is nothing in the text of Article 4.2 to indicate that a measure, which was recognized as a 'variable import levy' before the Uruguay Round, is exempt from the requirements of Article 4.2 simply because tariffs on some, or all, of the products to which that measure now applies were bound as a result of the Uruguay Round."[168]

The presence or absence of a cap to the tariff binding is not essential in determining whether or not Chile's PBS is similar to a measure prohibited by Article 4.2 or if the level of the duties is transparent or predictable. That argument advanced by Chile could not persuade the Appellate Body during the original proceeding. Argentina would kindly refer the Panel to the further analysis the Appellate Body developed with respect to this issue in paras. 255 to 259 to its Report.

37. In paragraph 23 of its report in *Chile – Price Band System*, the Appellate Body stated that "[while t]here is no Chilean legislation or regulation, which specifies the international 'markets of concern' to be used to calculate the applicable reference prices" it seemed, nevertheless, "that the markets and qualities chosen [were] intended to be representative of products actually 'liable' to be imported to Chile." Argentina notes as much in paragraph 39 of its first written submission. Does Argentina consider that the markets and the qualities chosen in the amended PBS to calculate the reference prices are likewise intended to be representative of products actually "liable" to be imported into Chile? If not, in what respect does the fact that markets and qualities are now explicitly indicated make it less likely than before that they would be intended to be representative?

Answer to Question 37:

The markets and the qualities chosen in the amended PBS to calculate the reference prices *are not* representative of products actually "liable" to be imported into Chile. The fact that markets and qualities are now explicitly indicated has only clarify that, by not taking into account all the relevant markets and qualities of concern for the calculation of the reference prices, the amended PBS insulates Chile's market from international price developments.

In its First Written Submission, in its Rebuttal and its Oral Statement, Argentina pointed out the problems with the markets and the qualities chosen in the amended PBS to calculate the reference prices.

The fact that the amended PBS provides that the same reference price still applies to all goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value of the shipment, means that the Chilean market is disconnected from international price developments, as referred by Argentina in its answer to question N° 15. 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.

Regarding the fact that the amended PBS provides that the same reference price still applies to all goods falling within the same product category, regardless of its origin, Argentina has already highlighted that, contrary to what the Appellate Body established,[169] Chile did not explain how the qualities and markets of concern were selected. As in the case of the PBS in its original form, there is no legislation or regulation governing the amended PBS that specifies how or on what basis the "markets of concern" and "qualities of concern" are selected. Therefore, the reference price selection process has not been transparent.

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[168] *Chile – Price Band System*, Report of the Appellate Body, para. 254 (footnotes omitted)
[169] *Chile – Price Band System*, Report of the Appellate Body, para 249.

The disconnection of the amended PBS reference prices from the international price developments also derives from the fact that Chile's amended PBS establishes the references prices based on only *two* qualities of concern, namely "Bread Wheat, Argentine Port" and "Soft Red Winter". However, as it was already stated, there are many types or qualities involved in the international trade of wheat. As Argentina has shown from Chile's own records[170], 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").

What is worse is that among the -at least- four relevant qualities and markets of concern shown by Argentina on the basis of Chile's own records, Chile chose those qualities that since 1991 have been the lowest priced. 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, disconnecting also in this way the amended PBS reference prices from the international price developments.

Even if that was not enough, Argentina has also shown[171] that Chile *does* actually import wheat of qualities different from those used for the calculation of the reference prices. Thus, 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.

On the other hand, the reference prices also insulate the Chilean market from international price developments as a result of their being established on the basis of the average of the daily prices recorded on only two predetermined markets. That predetermination of the markets prevents Chile from ensuring that the reference prices are representative of actual world market prices.

Regarding the insulation consequences deriving from the fact that the amended PBS reference prices are based on only two predetermined markets of concern, Argentina has already recalled 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.[172] Thus, the fact that the legislation specifies that only two markets are to be regarded as being of concern for the determination of reference prices disconnects Chile's domestic market from international price developments.

Argentina has already pointed out the problems related to the selection of the daily price quoted for "*Bread Wheat, Argentine Port*" as the basis for establishing the market of concern for the first half of the year is not transparent either, since the prices vary with the choice of Argentine port. Moreover, as Argentina has demonstrated in Exhibit ARG-32, the quotation "*Bread Wheat, Argentine Port*" (or its translation to Spanish "Trigo Pan Puerto Argentino") is not published by SAGPyA on a daily basis.[173] Chile did not provide evidence of the quotation "*Bread Wheat, Argentine Port*", under that specific denomination, being published by SAGPyA on a daily basis, which is the only basis on which the 15-day reference prices can be calculated.[174]

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[170] Exhibit ARG-33.

[171] Exhibit ARG-34.

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

[173] See SAGPyA's web page: http://www.sagpya.mecon.gov.ar/scripts/0-2/fobtodo.asp

[174] The only evidence submitted by Chile arguing that SAGPyA publishes the quotation "*Bread Wheat, Argentine Port*" (FOB Puertos Argentinos), CHL-12 and CHL-14, shows FOB prices on a monthly basis. Argentina stresses again that the reference price is calculated on the average of a 15-day period. Therefore, only quotations on a daily basis, as the ones submitted by Argentina in Exhibit ARG-32, are useful for that calculation.

Therefore, 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[175], 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. In fact, wheat and wheat flour exporters will not find the quotation "*Bread Wheat, Argentine Port*" ("Trigo Pan Puerto Argentino") on a daily basis because it is not published by SAGPyA on that basis.

Regarding the problems with the source for the establishment of the reference prices for the second semester (Soft Red Winter No.2 wheat), Chile gave an *ex-post* clarification stating that it uses the information from the Chicago Board of Trade (http://www.cbot.com).[176] In this case, as Argentina has already pointed out, the information is not publicly available; it is paid information. It is an extra charge exporters face for accessing the Chilean market.[177]

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 what the Appellate Body found:

> "… 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."[178]

38. With respect to the previous Question, can Argentina comment on the relevance of its assertion during the substantive meeting with the Panel, regarding the fact that the amended PBS would not reflect Canada's relevance in Chilean foreign trade of wheat, nor would Canadian prices be reflected in Chile's internal markets.

Answer to Question 38:

Regarding the fact that the amended PBS would not reflect Canada's relevance in Chilean foreign trade of wheat, nor would Canadian prices be reflected in Chile's internal markets, as Argentina asserted during the substantive meeting with the Panel, that is another proof that the amended PBS is certainly *not* representative of prices found in ***all*** markets of concern and of the current world market price.[179]

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"[180], Argentina has

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[175] First Written Submission by Chile, para. 162.
[176] Rebuttal by Chile, para. 73.
[177] See http://www.esignal.com/cbot/pricing/default.asp. Esignal.com is a sub page (link) of CBOT.com where pricing information is provided.
[178] *Chile – Price Band System*, Report of the Appellate Body, para. 249 (Emphasis in the original, underlining added).
[179] *Chile – Price Band System*, Report of the Appellate Body, para. 249.
[180] Rebuttal by Chile, para. 72.

demonstrated that, according to Chile's official source, for the period during which the amended PBS has been in force[181], Canada has always been a larger exporter of wheat to Chile than the United States, either in volume as well as in amount.

In Exhibit ARG-31, first page, it is possible to observe that in 2004 Canada exported around 54 thousand tons of wheat while the United States accounted for almost 40 thousand tons. The second page of the same Exhibit shows wheat imports to Chile for 2005, where the difference between Canada and the United States is even larger: Canada accounted for almost 40 thousand tons while the United States accounted for around 20 thousand tons.[182]

Thus, 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"[183] 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.[184]

39. Argentina has noted in paragraphs 41 and 219 of its first submission and then in paragraphs 131 and 132 of its rebuttal, that under the amended PBS there is no indication of which Argentine port is of concern for the purposes of calculating the reference price. Could Argentina clarify whether, in its view, Chile is under a legal obligation to identify such ports and, if so, could Argentina identify the relevant legal basis in the WTO covered agreements.

Answer to Question 39:

Chile's obligation is to provide a transparent and predictable border measure. The relevant legal basis in the WTO covered agreements not to maintain an intransparent and unpredictable border measure is Article 4.2 of the Agreement on Agriculture and its footnote 1.

When finding the original PBS inconsistent with Article 4.2, the Appellate Body, *inter alia*, held:

> "… [W]e place considerable importance on the intransparent … way in which the "highest and lowest f.o.b. prices" that have been selected are converted to a c.i.f. basis by adding 'import costs'. As Chile concedes, no published legislation or regulation sets out how these "import costs" are calculated.
>
> In addition to the lack of transparency … inherent in how Chile's price bands are established, we see similar shortcomings in the way the other essential element of Chile's price band system—the reference price—is determined …"[185]

[181] Exhibit ARG-31.

[182] In the written version of the Oral Statement by Argentina, para. 54, where it reads "million" it should be read "thousand"; where it reads "millions" it should be read "thousands". Argentina's argument is not altered in its substance.

[183] Rebuttal by Chile, para. 72.

[184] *Chile – Price Band System*, Report of the Appellate Body, para 249.

[185] *Chile – Price Band System*, Report of the Appellate Body, paras 246 *in fine* and 247.

The fact that no legislation set out how the price bands were calculated, led the Appellate Body to find the lack of transparency to be inherent in how Chile's price bands were established.

Similarly, the fact that Law 19.897 and Decree 831/2003 do not set out which Argentine port is of concern for the purposes of calculating the reference price lead to the conclusion that the calculation of the reference prices is not transparent.

Therefore, Chile is under the legal obligation to indicate which Argentine port is of concern for the purposes of calculating the reference price.

Further to Law N° 19.897, Decree N° 831/2003 states in its Article 7 that the reference price for wheat will correspond to the average daily prices recorded in the *most relevant markets* over a period of 15 calendar days counted backwards from the tenth day of the month in which the decree is published. In its turn, Article 8 establish the most relevant markets for wheat in Chile and provide that, during the application period extending from 16 December to 15 June of the following year, the most relevant market will be that for *Argentine bread wheat* and the prices will correspond to the daily prices quoted for that product *f.o.b. Argentine port*.

Argentina has already pointed out the problems with the sources for the reference price.

Chile stated that for the first semester "the source of information is the Department of Agriculture, Livestock, Fisheries and Food (http://www.sagpya.mecon.gov.ar/) of the Ministry of the Economy, which regularly publishes figures for *bread wheat, Argentine port* (so-called *Official Fob Price*) in the form of an average for various ports".[186]

However, Argentina has already shown in Exhibit ARG-32 that the quotation "Bread Wheat, Argentine Port" is not published by SAGPyA on a daily basis.[187] Chile did not provide evidence of the quotation "*Bread Wheat, Argentine Port*", under that specific denomination, being published by SAGPyA on a daily basis, which is the only basis on which the 15-day reference prices can be calculated.[188]

Therefore, 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[189], 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, wheat and wheat flour exporters will not find the quotation "*Bread Wheat, Argentine Port*" ("Trigo Pan Puerto Argentino") on a daily basis because it is not published by SAGPyA on that basis.

In fact, the legislation enforcing the amended PBS is intransparent and inaccurate and leads to confusion. Thus, the fact that that under the amended PBS there is no indication of which Argentine port is of concern for the purposes of calculating the reference price is another cumulative factor that makes the amended PBS inconsistent with Article 4.2 of the Agreement on Agriculture.

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[186] Rebuttal by Chile, para. 73.

[187] See SAGPyA's web page: http://www.sagpya.mecon.gov.ar/scripts/0-2/fobtodo.asp

[188] The only evidence submitted by Chile arguing that SAGPyA publishes the quotation "*Bread Wheat, Argentine Port*" (FOB Puertos Argentinos), CHL-12 and CHL-14, shows FOB prices on a monthly basis. Argentina stresses again that the reference price is calculated on the average of a 15-day period. Therefore, only quotations on a daily basis, as the ones submitted by Argentina in Exhibit ARG-32, are useful for that calculation.

[189] First Written Submission by Chile, para. 162.

As the Appellate Body found with respect to the original PBS and Argentina maintains with respect to the amended PBS,

> "… These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. This lack of transparency and this lack of predictability are liable to restrict the volume of imports… [A]n exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be. This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market."[190]

40. Argentina has noted in paragraph 66 of its first submission that "[s]o far the bimonthly decrees [under the amended PBS] appear not to indicate the reference price calculated for each period". Could Argentina clarify whether, in its view, this particular fact *per se* would make the amended measure inconsistent with the WTO covered agreements and, if so, could Argentina identify the relevant legal basis.

Answer to Question 40:

The particular fact that the bimonthly decrees appear not to indicate the reference price calculated for each period is another cumulative factor that makes the amended PBS inconsistent with the WTO covered agreements.

The legal basis in the WTO covered agreements not to maintain a border measure intransparent and unpredictable is Article 4.2 of the Agreement on Agriculture and its footnote 1.

Regarding the context of the terms in footnote 1, the original Panel in these proceedings found that:

> "… all the measures listed there are instruments which are characterized either by a lack of transparency and predictability, or impede transmission of world prices to the domestic market, or both."[191]

Moreover, the original Panel also observed:

> "… several crucial stages of the operation of the Chilean PBS are characterized by a considerable lack of transparency and predictability. For instance, exporters can be expected to have difficulties knowing how the applicable Reference Price is arrived at."[192]

Those findings are completely applicable to the amended PBS.

Finally, in its analysis of whether the original PBS was a border measure similar to a variable import levy and a minimum import price, the original Panel in these proceedings found, in a finding not reversed by the Appellate Body:

> "… we have already highlighted the features of the Chilean PBS which reveal its intrinsically unstable, *intransparent* and unpredictable nature, as well as the

[190] *Chile – Price Band System*, Report of the Appellate Body, para. 234. (Footnote omitted).
[191] *Chile – Price Band System*, Report of the Panel, paragraph 7.34.
[192] *Chile – Price Band System*, Report of the Panel, paragraph 7.44.

> insulation of the domestic market from international price competition which it achieves ..."[193] (Emphasis added)

Regardless the fact it did not find useful to endorse the characteristics identified by the Panel as being of a "fundamental" nature, the Appellate Body established in paragraph 234 of its Report:

> "… [T]his lack of transparency and this lack of predictability are liable to restrict the volume of imports … This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market."

Moreover, in paragraph 258 of its Report the Appellate Body held:

> "… significant for traders, also, are the lack of transparency of certain features of Chile's price band system …"

As the Appellate Body held with respect to the original PBS[194] and Argentina maintains with respect to the amended PBS:

> "… we reach our conclusion [regarding the inconsistency with the WTO covered agreements] on the basis of the particular configuration and interaction of all these specific features of Chile's price band system …" (Underlining added)

41. Argentina has noted in paragraph 183 of its first submission that "the amended PBS does not ensure that the price of wheat flour imports falls in tandem with the falling prices of wheat flour on the world market". Argentina has added in paragraph 187 of its first submission that, "[b]y not fully reflecting falls in world prices in domestic prices and impeding the transmission of international price developments to the Chilean market..." the amended PBS is inconsistent with Article 4.2 of the Agreement on Agriculture. Could Argentina clarify whether, in its view, there is a legal obligation under the WTO covered agreements that a measure such as Chile's PBS should: (i) ensure that entry prices of imports rise or fall in tandem with rising or falling world market prices; (ii) fully reflect any increases or falls in world prices in domestic prices; and, (iii) ensure the transmission of international price developments to the relevant domestic market. If so, could Argentina identify the relevant legal basis for such obligation.

Answer to Question 41:

The legal basis for such an obligation is Article 4 of the *Agreement on Agriculture*, which is the main provision of Part III of that Agreement and, as its title indicates, deals with "Market Access". The provision that more specifically address the obligation reproduced in the Panel's question 41 is Article 4.2.

Article 4.2 states in its relevant part:

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

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[193] *Chile – Price Band System*, Report of the Panel, paragraph 7.61.
[194] *Chile – Price Band System*, Report of the Appellate Body, para. 261.

> [1]These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties…

Footnote 1 together with Article 4.2 provide that, by not being ordinary customs duties, quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, shall not be maintained, resorted to, or reverted to.

In other words, all the measures listed in footnote (including *similar* border measures) are inconsistent with Article 4.2 because they are not ordinary customs duties and cannot be maintained, resorted to, or reverted to.

The Appellate Body stated that those measures have also in common that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market:

> "… we note that *all* of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do. Moreover, *all* of these measures have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market."[195] (Underlining added)

If the measures listed in footnote 1 impede the transmission of world market prices to the domestic market and by being maintained, resorted to or reverted to, violate Article 4.2, therefore Article 4.2 includes the legal obligation that a border measure (such as Chile's PBS) should ensure the transmission of international price developments to the relevant domestic market.

The Appellate Body also found that:

> "Variable import levies" have additional features that undermine the object and purpose of Article 4, which is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures … This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.[196] (footnotes omitted, underlining added)

If variable import levies, by lacking transparency and predictability, impede the transmission international prices to the domestic market, and by being maintained, resorted to or reverted to, violate Article 4.2, therefore Article 4.2 includes the legal obligation that a border measure (such as Chile's PBS) should ensure the transmission of international prices to the domestic market.

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[195] *Chile – Price Band System*, Report of the Appellate Body, para. 227.
[196] *Chile – Price Band System*, Report of the Appellate Body, para. 233.

The Appellate Body went further and found:

> In our view—even though Chile's price bands are set in relation to world prices from a past five-year period—Chile's price band system can still have the *effect* of impeding the transmission of international price developments to the domestic market in a way similar to that of other categories of prohibited measures listed in footnote 1.[197]

If the measures listed in footnote 1 have the effect of impeding the transmission of international price developments to the domestic market and by being maintained, resorted to or reverted to, violate Article 4.2, therefore Article 4.2 includes the legal obligation that a border measure (such as Chile's PBS) should ensure the transmission of international price developments to the relevant domestic market.

Furthermore, the Appellate Body highlighted several characteristics of the original PBS that had the effect of impeding the transmission of international price development to Chile's market:

> "… Therefore, the way in which Chile's weekly reference prices are determined contributes to giving Chile's price band system the effect of impeding the transmission of international price developments to Chile's market.[198]
>
> … continuing with our hypothesis, even if we were to assume that one of the two parameters—Chile's annual price band thresholds—does not distort the transmission of world market prices to Chile's market, it would nevertheless remain that the other parameter—Chile's weekly reference prices—is liable to distort—if not disconnect—that transmission by virtue of the way it is determined on a weekly basis. Consequently, even in such a hypothetical case, the duties resulting from Chile's price band system, which are equal to the difference between these two parameters, would not transmit world market price developments to Chile's market in the same way as 'ordinary customs duties'."[199]

In the end, just one paragraph after the above quoted, the Appellate Body concluded that the way Chile's original PBS was designed (including the particular features identified) and its overall nature

> "… [were] sufficiently 'similar' to the features of both of those two categories of prohibited measures to make Chile's price band system—in its particular features—a 'similar border measure' within the meaning of footnote 1 to Article 4.2."

The features identified by the Appellate Body in paras. 250 and 251 cited above led to the conclusion that Chile's price band system – in its particular features – was "similar border measure" within the meaning of footnote 1 to Article 4.2. Argentina recalls that the Appellate Body said that all of the border measures listed in footnote 1 "… have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market."[200] Therefore, Article 4.2 includes the legal obligation that a border measure (such as Chile's PBS) should ensure the transmission of international price developments to the relevant domestic market.

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[197] *Chile – Price Band System*, Report of the Appellate Body, para. 246.
[198] *Chile – Price Band System*, Report of the Appellate Body, para. 250.
[199] *Chile – Price Band System*, Report of the Appellate Body, para. 251.
[200] *Chile – Price Band System*, Report of the Appellate Body, para. 227.

Article 4.2 of the Agreement on Agriculture also includes the legal obligation that a border measure (such as Chile's PBS) should ensure that entry prices of imports rise or fall in tandem with rising or falling world market prices and reflect falls in world prices in domestic prices. In this regard, the Appellate Body said:

> Therefore, contrary to what Chile contends, Chile's price band system does not simply ensure a reasonable margin of fluctuation of domestic prices. In our view, "such reasonable margin of fluctuation" would mean that duties resulting from Chile's price band system would ensure that declines in world prices would not be *fully* reflected in domestic prices. However, when international prices *fall*, and when the weekly reference prices are below the lower thresholds of Chile's price bands, the total duties applied to particular shipments will, in many cases, result in an overall entry price of that shipment that *rises* rather than *falls*. Therefore, Chile's price band system does not merely moderate the effect of fluctuations in world market prices on Chile's market because it does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices—albeit to a lesser extent than the decrease in those prices. Nor does it tend only to "compensate" for these price declines. Instead, specific duties resulting from Chile's price band system tend to "overcompensate" for them, and to elevate the entry price of imports to Chile above the lower threshold of the relevant price band. In these circumstances, the entry price of such imports to Chile under Chile's price band system is even higher than if Chile simply applied a minimum import price at the level of the lower threshold of a Chilean price band. Therefore, we disagree with Chile that its price band system simply "moderates the effect of fluctuations in international prices on Chile's market". Chile's price band system tends to "overcompensate" for the effect of decreases in international prices on the domestic market when weekly reference prices are set below the lower threshold of the relevant price band—up to the level at which Chile's tariff binding imposes a limit on the amount of duties that can be levied.[201] (emphasis in the original; footnotes omitted; underlining added)

In sum, in the cited paragraph, the Appellate Body found that, due to the original PBS, when international prices fell, the total duties applied to particular shipments would, in many cases, result in an overall entry price of that shipment that rose rather than fell. In addition, the Appellate Body found that the original PBS did not ensure that the entry price of imports to Chile fell in tandem with falling world market prices. Those findings (among others) led to the conclusion that Chile's original PBS was a border measure similar to "variable import levies" and "minimum import prices" within the meaning of footnote 1 and Article 4.2 of the *Agreement on Agriculture*:

> We emphasize that we reach our conclusion on the basis of the particular configuration and interaction of all these specific features of Chile's price band system. In assessing this measure, no *one* feature is determinative of whether a specific measure creates intransparent and unpredictable market access conditions. Nor does any particular feature of Chile's price band system, on its own, have the effect of disconnecting Chile's market from international price developments in a way that insulates Chile's market from the transmission of international prices, and prevents enhanced market access for imports of certain agricultural products.
>
> We, therefore, uphold the Panel's finding, in paragraph 7.47 of the Panel Report, that Chile's price band system is a "border measure similar to 'variable import levies' and

[201] *Chile – Price Band System*, Report of the Appellate Body, para. 260.

> 'minimum import prices'" within the meaning of footnote 1 and Article 4.2 of the *Agreement on Agriculture*.[202] (Underlining added)

Thus, the fact that due to the original PBS when international prices fell, the total duties applied to particular shipments would, in many cases, result in an overall entry price of that shipment that rose rather than fell, and the fact that the original PBS did not ensure that the entry price of imports to Chile fell in tandem with falling world market prices, led to the conclusion that Chile's original PBS was a border measure similar to "variable import levies" and "minimum import prices" within the meaning of footnote 1 and Article 4.2 of the *Agreement on Agriculture*. Therefore, this provision includes the legal obligation that a border measure (such as Chile's PBS) should ensure that entry prices of imports rise or fall in tandem with rising or falling world market prices and reflect falls in world prices in domestic prices.

42. In paragraph 92 of its first submission, Argentina reads paragraph 260 of the Appellate Body's report in *Chile – Price Band System*, as stating that under the previous PBS "the duties resulting from the System ensured that falls in world prices were not *fully* reflected in domestic prices" (original emphasis). Please contrast this reading with the Appellate Body's statement in the same paragraph that a "reasonable margin of fluctuation of domestic prices... would mean that duties resulting from Chile's [PBS] would ensure that declines in world prices would not be *fully* reflected in domestic prices".

Answer to Question 42:

Argentina's main argument in relation to this point is that the amended PBS disconnects the Chilean market from international price developments in a way that insulates the Chilean market from the transmission of international prices[203], in a manner similar to the original PBS.

Appellate Body's statement that a "reasonable margin of fluctuation of domestic prices... would mean that duties resulting from Chile's [PBS] would ensure that declines in world prices would not be *fully* reflected in domestic prices" means that a "moderat[ion of] the effect of fluctuations in world market prices on Chile's market"[204] might be reasonable. However, when that statement is read in the context of the rest of paragraph 260, it is clear that the specific duties resulting from the Chilean price band system tended to elevate the entry price of Chilean imports above the price band floor; that the Chilean price band system tended to "overcompensate" for the effect of decreases in international prices on the domestic market when weekly reference prices are set below the price band floor; that the entry price of Chilean imports under Chile's price band system was even higher than if Chile simply applied a minimum import price at the level of the price band floor; and that the PBS did not ensure that the entry price of imports to Chile fell in tandem with falling world market prices. In that context, that "reasonable margin of fluctuation" and that reflection of "declines in world prices … in domestic prices" did not exist at all.

Argentina has demonstrated 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* failing to ensure that the entry price of imports to Chile falls in tandem with falling world market prices. On top of that Argentina has demonstrated

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[202] *Chile – Price Band System*, Report of the Appellate Body, para. 261-262.

[203] See for example, Argentina's First Written Submission, paras. 95 and 98 and Argentina's Oral Statement paras. 121-122.

[204] *Chile – Price Band System*, Report of the Appellate Body, para. 260.

why the amended PBS is a border measure similar to a minimum import price or a variable import levy.

In this respect, it is clear that Chile's amended PBS does not merely *moderate* the effect of fluctuations in world market prices on Chile's market. In fact, that "reasonable margin of fluctuation" and that reflection of "declines in world prices … in domestic prices" the Appellate Body referred to does not exist at all in the amended PBS either.

43. Does Argentina consider that the fixing of price bands for a period of 11 years constitutes a factor of insulation, despite the scheduled reduction of the band's floor and ceiling by way of the application of the 0.985 adjustment factor? How would Argentina define "insulation" *versus* "stability", in view of Chile's explanations in paragraphs 183 to 192 of its first submission, regarding "gradual" market access improvement?

Answer to Question 43:

The fixing of price bands for a period of 11 years *does* constitute a factor of insulation, despite the scheduled reduction of the band's floor and ceiling by way of the application of the 0.985 adjustment factor because, as it was explained in Argentina's answer to question 34 (c), due to the factor of 0.985 the band floor and ceiling prices 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.[205]

Thus, the floor and ceiling prices, two fundamental elements (together with the reference prices) for establishing the level of the specific duties applicable to wheat and wheat flour, will decrease, as from December 2007, in a fixed, automatic and autonomous manner. That is to say, the way in which the floor and ceiling prices are to be adjusted bears no relation to international price developments.

Even if this relation were based on an assumed decline in the international prices of wheat after 2007, it is surprising how Chile could, in 2003, predict the course of those prices over a period beginning four (4) years later and allegedly ending eleven (11) years after the establishment of the amended PBS.

The fixing of price bands for a period of 11 years has transformed the PBS into a more rigid and inflexible system. Indeed, the 11-year period has the side effect of aggravating the distortion of domestic price vis-à-vis international ones.

In practice, the Chilean market will be insulated from fluctuations in the world prices for eleven years or even more, taking into account that the amended PBS has no end date.

As Brazil stated, "… Should there be a significant downward movement in the international wheat prices, the 0.985 factor may not be sufficient to account for the necessary reductions in the lower and upper thresholds of the price bands. Hence, in spite of the application of the 0.985 multiplier, one of the main elements of the PBS (the bands themselves) will remain virtually unchanged for more than a

[205] Note that the Appellate Body held that even if it were assumed that one feature of Chile's price band system was not similar to the features of "variable import levies" and "minimum import prices" because the thresholds of Chile's price bands varied in relation to—albeit historic—world market prices rather than domestic target prices, this would not change its overall assessment of Chile's price band system (Report of the Appellate Body, paragraph 251).

decade, preventing the fluctuation of international prices from being transmitted to the Chilean market."[206]

Chile's explanations in paragraphs 183 to 192 of its first submission regarding "gradual" market access improvement are baseless. As Argentina has already pointed out, there are several errors in those explanations:

First, what Chile argues that "… the period of application of duties under the new regime was shorter by 10 weeks, while that of rebates was longer by 8 weeks, which represents an effective increase in favourable conditions for grain imports compared to what might have occurred under the mechanism prior to modification", amounts to saying that exporters of wheat and wheat flour to Chile should not be concerned about the distorting effects of the modified PBS, since under the modified PBS the distorting effects resulting from the application of specific duties occurred "only" 17 times, whereas under the original PBS they would have occurred 27 times. That cannot obviously represent an improvement in conditions of access. Wheat and wheat flour exporters are not rejoiced because they have faced distortions resulting from specific duties for "only" 17 weeks. These are Chile's grounds for arguing that the modified PBS has improved conditions of access. Chile's argument is without foundation.

Access conditions continue to be unfavourable despite the duties *allegedly* being applied on fewer occasions than in the case of the original PBS. Chile's reasoning has no basis in the WTO Agreements and, in particular, not in the DSU or the *Agreement on Agriculture*. A measure taken to comply is not "less" inconsistent because the inconsistency occurs less frequently than in the case of the original measure. There is no basis for drawing such a conclusion.

Second, as Argentina has already stated in its Rebuttal, it is interesting to note the table which Chile itself introduces in paragraph 183, which confirms that the modified PBS is very similar to the original PBS. The period between 16 December 2003 and 13 January 2004, during which the modified PBS was not applied, was 57 weeks long. This means that the PBS was applied for 52 weeks (out of a total of 109). Following the same reasoning, the original PBS would not have been applied during 55 weeks, that is to say it would have been applied during 54. Thus, the original PBS would have been applied for 50 per cent of the time, whereas the modified PBS was applied for 48 per cent of the time. Clearly, the two systems are very similar and, therefore, the degrees of distortion they cause are also similar.

Third, regarding Chile's argument that "[T]he scheduled reduction of the floor and ceiling prices is a scenario under which, irrespective of international price levels, the amount of the specific duties will increasingly diminish compared to those currently being established, just as the probability of duties actually being assessed will increasingly diminish"[207], Argentina has already stated that that argument is simply wrong. The reality is that neither the amount of the specific duties nor the probability of their being assessed is "irrespective of international price levels" and indeed the opposite is true: the amount of the specific duties and the probability of their being assessed *do* depend on international price levels.

Both Law 19.897 and Decree 831/2003 refer to precisely that, i.e., the dependence of the amount of the specific duties on international price levels in the following terms: "The amount of such duties and rebates shall be established … in terms which, when applied to the price levels attained by the products in question on the international markets, allow domestic market stability." (Underlining added)

[206] *Chile – Price Band System* … Recourse to Article 21.5 of the DSU, Third Party Submission by Brazil, paragraph 15.

[207] Chile's First Written Submission, paragraph 186.

In addition, as Argentina showed in its Rebuttal , this is also clear from the following simple example:

According to the "History of application of the modified PBS"[208], between 16 December 2004 and 15 December 2005 the PBS floor price for wheat was (and is) US$128 per tonne. The reference price between 16 December 2004 and 15 February 2005 was established at US$114.50 per tonne. This gave a specific duty of US$14.30 per tonne.

In accordance with Art. 6 of Decree 831/2003, between 16 December 2011 and 15 December 2012 the PBS floor price for wheat will be US$118 per tonne. If the reference price is established at US$103.7 per tonne during any two months of that year, the specific duty during that period will be US$14.30 per tonne, the same as established on 16 December 2004. Even if the reference price is less than US$103.7 per tonne, the specific duty will naturally be higher and not lower, as Chile argues.

When this reasoning is applied to the example given by Chile in paragraphs 187 and 188 of its submission, it becomes clear that the Chilean example has no foundation, being only necessary to consider its basic assumption, namely, that in no less than eight years' time (2014) the reference price will be the same as it is today (2006), according to Chile's example. The fact is that there is no evidence for determining today that in eight years' time the reference price will be the same. What is more probable is that the reference price will change, as has always happened since the establishment of the modified PBS.

Thus, the amount of the specific duties and the probability of their being assessed will depend on international price levels. It is by no means sure that these amounts and the probability of their being assessed will increasingly diminish, as Chile argues. The Chilean argument is incorrect and without foundation.

In paragraph 191, Chile returns to the untenable argument that according to the historical wheat price series the probability of wheat prices standing below US$114 per tonne (i.e., the floor price in 2014) is 23.9 per cent, as compared with 46.1 per cent for the probability of prices lying below US$128 per tonne. Argentina has already stated the problems presented by arguments of this kind:[209]

First of all and again, the modified PBS is not "less" inconsistent because the inconsistency will arise on fewer occasions in the future than at present. There is no basis for making an assertion of this kind.

Second, according to Chile's reasoning, there is a more than 46 per cent probability, while the floor is situated at US$128 per tonne, of wheat and wheat flour exporters experiencing the distortions caused by specific duties. That is not encouraging for exporters planning to export wheat and wheat flour to Chile up to December 2007. Argentina recalls that until then the floor price will remain at US$128 per tonne. Therefore, the probability indicated by Chile is not at all encouraging.

Third, Chile indicates neither the source of its information nor the numerical basis for the calculations made to arrive at the conclusion reached in this paragraph. Chile simply fails to provide any evidence at all.

Fourth, even if Chile's reasoning had any validity, Chile's calculations are wrong. Chile takes only the lowest future floor price of all those scheduled under Decree 831/2003, i.e., US$114 per tonne, corresponding to 2014. Chile should have incorporated in its calculations a weighting that takes into account the time during which the price of Argentine bread wheat lay below the future floor prices not considered by Chile: 126, 124, 122, 120, 118 and 116 US$ per tonne. As those prices are all higher

[208] Exhibit ARG-6.
[209] Rebuttal by Argentina, paras. 231 to 238.

than US$114 per tonne, the percentage should logically be higher than the 23.9 per cent calculated by Chile.

Argentina reiterates that the way in which the floor and ceiling of the modified PBS are established has transformed the PBS into a more rigid and inflexible system.[210]

Chile concludes in paragraph 192 by referring to a process of gradual reduction of border protection of wheat, stating that "[B]oth of the above results – that is, the reduction of duties by 2014 and the lesser probability of duty assessment – demonstrate that the current policy has an in-built process of gradual reduction of border protection of wheat".[211] (original underlining)

To sum up, Chile wrongly disregards the fact that the level of specific duties resulting from the PBS obviously depends on international price levels, attempting to argue that in 8 (eight) years time the reference price will be the same as it is at present. Moreover, Chile repeats the argument that the modified PBS will be "less" inconsistent in the future because the inconsistency will arise on fewer occasions than at present, while basing its case on calculations made without providing the source of the evidence and without including most of the relevant period of application of the modified PBS up to 2014.

Moreover, Chile chooses to disregard the fact that by keeping the floor and ceiling inflexible the modified PBS insulates the domestic market from international price developments. This is the basis for its concluding that the modified PBS ("the current policy") has an in-built process of gradual reduction of border protection of wheat. Chile's conclusion has no basis in fact or in law.

In view of the above comments on Chile's explanations in paragraphs 183 to 192 of its first submission, Argentina refers now to the definition of the terms "insulation" *versus* "stability".

The definition of "*insulation*", insofar as relevant, is: "protection of something from outside influences". The definition of "*stability*", insofar as relevant, is: "when something is not likely to move or change".[212]

Taking into account the definitions cited above and the fact that both Law 19.897 and Decree 831/2003 make it mandatory for specific duties to be established "… in terms which … allow domestic market stability", the purpose of the amended PBS seems to be even worse than that alleged by Argentina. The amended PBS not only insulates or "protect Chilean market from international price developments" but what is worse, seeks not to allow domestic market prices "to move or change", despite international price developments.

Therefore, it appears that the measures taken to comply refute by themselves Chile's argument regarding "gradual" market access improvement.

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[210] As Brazil has pointed out:

"… the 11-year period has the side effect of aggravating the distortion of domestic prices vis-à-vis international ones. While such a long period may afford some predictability, the new PBS is more rigid and inflexible, given that, in practice, the Chilean market will be insulated from fluctuations in the world prices for eleven years. Should there be a significant downward movement in the international wheat prices, the 0.985 factor may not be sufficient to account for the necessary reductions in the lower and upper thresholds of the price bands. Hence, in spite of the application of the 0.985 multiplier, one of the main elements of the PBS (the bands themselves) will remain virtually unchanged for more than a decade, preventing the fluctuation of international prices from being transmitted to the Chilean market". *Chile – Price Band System* … Recourse to Article 21.5 of the DSU, Third Party Submission by Brazil, paragraph 15.

[211] Chile's First Written Submission, paragraph 192.

[212] Both definitions from Cambridge Advanced Learner's Dictionary in http://dictionary.cambridge.org/.

44. Argentina has stated in paragraph 241 of its first submission that "variability is inherent in the amended PBS since it incorporates a plan or formula that causes and ensures the automatic and continuous modification of the levies and, moreover, lacks the required transparency and predictability, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*". Could Argentina clarify whether, in its view, "variability of duties" and "lack of transparency and predictability" are two different and separate factors, or rather variability of duties will necessarily be linked to a lack of transparency and predictability.

Answer to Question 44:

The Appellate Body stated that:

> "… at least one feature of "variable import levies" is the fact that the *measure* itself – as a mechanism – must impose the *variability* of the duties. Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Ordinary customs duties, by contrast, are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula. …"[213]

In addition the Appellate Body observed:

> "… [T]he presence of a formula causing automatic and continuous variability of duties is a *necessary*, but by no means a *sufficient*, condition for a particular measure to be a "variable import levy" within the meaning of footnote 1. "Variable import levies" have additional features that undermine the object and purpose of Article 4, which is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. This lack of transparency and this lack of predictability are liable to restrict the volume of imports. As Argentina points out, an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be. This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market."[214]

From these statements by the Appellate Body it follows that:

(a) The presence of a formula causing automatic and continuous variability of duties is a necessary condition for a particular measure to be a "variable import levy" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*; and, moreover,

(b) the lack of transparency and the lack of predictability in the level of duties that will result from the application of variable import levies are *additional* features that undermine the object and purpose of Article 4 of the *Agreement on Agriculture*, which is to achieve improved market access conditions for imports of agricultural products by permitting the application of ordinary customs duties only.

Therefore, 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

[213] *Chile – Price Band System*, Report of the Appellate Body, paragraph 233.
[214] *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.

lack of transparency and predictability in the level of duties that will result from such measures. It results then that "variability of duties" and "lack of transparency and predictability" are two different and separate factors. 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.[215]

45. Could Argentina elaborate on the claim it has presented under paragraph 4 of Article XVI of the WTO Agreement. Could Argentina formally identify the measure that would be relevant in order for the Panel to be able to make findings regarding this claim.

Answer to Question 45:

Article XVI:4 of the WTO Agreement establishes that "[E]ach Member shall ensure the conformity of its *laws, regulations* and administrative procedures with its obligations as provided in the annexed Agreements". (Emphasis added)

Thus, the relevant measures for the Panel to be able to make findings regarding Argentina's claim under paragraph 4 of Article XVI of the WTO Agreement, are both Law 19.897 and Decree 831/2003 enforcing the amended PBS. As Chile itself states, Decree 831/2003 is the *regulations* of Law 19.897.[216]

Insofar as the amended PBS enforced by Law 19.897 and Decree 831/2003 infringes both Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994, Chile has not ensured the conformity of its Law 19.897 and Decree 831/2003 with its obligations under the covered Agreements.

In the case *United States – 1916 Anti-Dumping Act*, the Panel established that:

> "… if a provision of an 'annexed Agreement' is breached, a violation of Article XVI:4 immediately occurs. GATT 1994 is one of the 'annexed Agreements' within the meaning of Article XVI:4. Since we found that provisions of Article VI of the GATT 1994 has been breached, we conclude that, by violating this provision, the United States violates Article XVI:4 of the WTO Agreement".[217]

Thus, being the amended PBS inconsistent with Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994, Chile violates Article XVI:4 of the WTO Agreement since, while the amended PBS remains in force, Chile is not ensuring the conformity of its Law 19.897 and Decree 831/2003 with its obligations under the WTO Agreements.

46. Can Argentina describe the evolution of Chilean wholesale prices of wheat and wheat flour over the period January 2004 to February 2006? (See paragraph 154 of Chile's first submission.)

Answer to Question 46:

As stated in Argentina's Answer to question 8(c) above, "wholesale prices" should not be used for any analytical purpose in this dispute. This variable is not relevant in this case. Neither the Panel nor the Appellate Body addressed the notion of "wholesale prices" in this dispute. The relevant parameter of comparison is between the FOB price and the *entry price*, as the Appellate Body established in

[215] First Written Submission by Argentina, paras. 236 to 283. Rebuttal by Argentina, paras. 138 to 159.
[216] See, for example, First Written Submission by Chile, paras. 31 and 32.
[217] WT/DS162/R, Report of the Panel, paragraph 6.287.

paragraph 260 of its Report, Chile incorporates a new variable never addressed by the Appellate Body nor by Argentina: the *wholesale price*.

Even if, in spite of the various reasons that, in its answer to question 8 (c) above, Argentina provided for not using "wholesale prices" for any analytical purpose in this dispute the Panel found that wholesale prices could be considered, it is difficult for Argentina to describe the evolution of Chilean wholesale prices of wheat and wheat flour over the period addressed by the Panel because all the evidence that Chile has provided for the period January 2004 to February 2006 is un unsupported graph.

First, the graph in para. 154 of Chile's first written submission only addresses ***wheat*** wholesale prices. *Wheat flour* wholesale prices are not addressed in that graph. In fact, wheat flour wholesale have not been addressed in this dispute at all (at least not by Chile, Argentina the Appellate Body or the Panel).

Second, Chile never provided any chart or any further information that could clarify the numerical data that could be the basis for the wheat "wholesale prices" line plotted in that graph, as Argentina did with all of its Exhibits. Argentina has explained all the problems with this graph and the conclusions Chile draws from it. [218] Furthermore, it is not clear what is the source of that graph. Chile states that "The sources of the information, both daily and monthly, are clearly indicated in all cases (SAGPyA and ODEPA)"[219], but it is clear that in para. 154 of Chile's first written submission there is no indication of the sources of the information used to produce the graph.

Furthermore, there are inconsistencies in what Chile apparently is purporting to show. It is not clear whether Argentine FOB price is compared against "Chilean wheat prices", "wheat wholesale prices" or just against the "entry price":

- In paragraph 154 Chile states: "The graph below shows the trends in *Chilean wheat prices* and in f.o.b. prices of Argentine bread wheat…"

- The legend of the graph reads "wheat *wholesale price*"

- In paragraph 155 Chile states: "What clearly emerges is that the *entry price* of wheat exhibits the same behaviour as its f.o.b. price…"

During the meeting of this Panel with the parties, Chile exposed in a PowerPoint presentation what appeared to be the same graph. Argentina specifically asked, through an oral question, if that graph showed the same wheat wholesale prices Chile had included in its graph in paragraph 154 of its first submission. Chile's answer was affirmative. However, in spite of Chile's announces during the audience, Argentina neither received an electronic or paper copy of that graph nor was provided with the remaining PowerPoint computer presentation. In fact, Argentina has never seen the numerical basis of that graph.

In spite of all these inconveniences resulting from Chile's lack of clarity and, what is worse, supporting evidence, Argentina made its best effort to describe what it can be observed in that graph.[220]

A careful study of the graph, including a comparison of the trends of each the "bread wheat FOB Argentine port price" (lower line) and the "wheat wholesale price" (upper line), reveals that during

[218] See Rebuttal by Argentina, para. 61- 66 and Oral Statement by Argentina 30-31.
[219] See Rebuttal by Chile, footnote 25.
[220] Rebuttal by Argentina, paras. 68-70.

most of the period both prices moved in different directions. In fact, both prices showed an **opposite** trajectory during the following periods:

- February-March 2004
- March-April 2004
- May-June 2004
- June-July 2004
- July-August 2004
- August-September 2004
- September-October 2004
- December 2004-January 2005
- January-February 2005
- February-March 2005
- April-May 2005
- May-June 2005
- July-August 2005
- September-October 2005
- November-December 2005

Therefore, Chile statements that "[t]he price curves indicate that…the variation [of Chilean wheat prices] is very similar to that of export prices of Argentine wheat …"[221] and "the entry price of wheat exhibits the same behaviour as its f.o.b. price, which demonstrates price transmission and therefore the connection between the Chilean and the international market"[222] are baseless from every point of view.

[221] Chile First Written Submission, para. 154.
[222] Chile First Written Submission, para. 155.

ANNEX F-2

REPLIES BY ARGENTINA TO QUESTIONS POSED BY THE EUROPEAN COMMUNITIES

Argentina thanks the EC for its contribution to the further clarification of the substantive obligations derived from Article 4 of the Agreement on Agriculture.

102. Argentina argues that the Price Band System (PBS) is not predictable, because traders cannot predict future developments of commodity markets, and hence cannot calculate what the PBS duties will be in the future.

(a) The EC notes that a WTO Member may:

(i) increase an applied duty within a bound rate without notice (Article X GATT only requires prompt publication); and,

(ii) impose anti-dumping duties or apply a provisional safeguard measure in certain circumstances without notice being provided to economic operators.

Assuming, as Argentina argues, that traders cannot predict future price developments (despite e.g. the existence of futures markets etc) but, accepting that all the other elements of the functioning of the PBS are made public, what makes the PBS <u>less predictable</u> than the examples of governmental action given in (i) and (ii) above?

<u>Answer to Question 102(a)</u>:

Argentina's argument is that "the lack of transparency and the lack of predictability of the <u>duty level</u> that result from the amended PBS are additional features that undermine the object and purpose of Article 4 of the Agreement on Agriculture".[1] This is because an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be, as the case is with the amended PBS.[2] The Appellate Body found the original PBS inconsistent because, *inter alia*, the lack of transparency and the lack of predictability of the <u>duty level</u> was an additional feature undermined the objective of achieving improved access conditions for imports of agricultural products.[3]

With regard to the EC question, the Appellate Body stated, "… the existence of [a] tariff binding will not eliminate the distortion in the transmission of world market prices to Chile's market … where the combination of the duties resulting from Chile's price band system, when added to the applied *ad valorem* duty rate, remains below Chile's bound rate of 31,5 per cent *ad valorem*".[4]

[1] First Written Submission by Argentina, para. 271 and ss. (underline added).
[2] Rebuttal by Argentina, para. 128 and ss., Oral Statement by Argentina, para. 76 and ss.
[3] *Chile – Price Band System*, Report of the Appellate Body, para. 234.
[4] *Chile – Price Band System*, Report of the Appellate Body, para. 257.

Argentina has extensively explained why the level of duties resulting from the amended PBS is neither transparent nor predictable.[5] In particular, the answer to the EC question in relation to point (i) was provided in Argentina's Oral Statement, para 70 and ss.

In particular, it is obvious that applied 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 are expressed in the form of *ad valorem* or specific duties rates, are not similar to variable import levies or minimum import prices, do not include a formula that causes import duties to vary automatically and continuously and, on top of that, they are transparent and predictable. The presence or absence of a cap to the tariff binding is not essential in determining whether or not Chile's PBS is similar to a measure prohibited by Article 4.2. That argument could not persuade the Appellate Body during the original proceeding.

In the case of the amended PBS, 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.[6] In fact, contrary to what Chile has asserted in its submissions[7], 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. In fact, the lack of transparency and predictability are inherent to the amended PBS, because of the reasons Argentina has described.

With respect to point (ii) of EC's questions, it is strange that the EC tries to compare the amended PBS with anti-dumping duties when Article II:2 GATT 1994 explicitly provides that anti-dumping duties are not ordinary customs duties. In that sense, the Appellate Body said:

> As context for this phrase in Article 4.2 of the Agreement on Agriculture, we observe that Article II:2 of the GATT 1994 sets out examples of measures that do not qualify as either "ordinary customs duties" or "other duties or charges". These measures include charges equivalent to internal taxes, anti-dumping and countervailing duties, and fees or other charges commensurate with the cost of services rendered. They too may be based on the value and/or volume of imports, and yet Article II:2 distinguishes them from "ordinary customs duties" by providing that "[n]othing in [Article II] shall prevent any Member from imposing" them "at any time on the importation of any product".[8]

(b) Again, assuming that traders cannot predict future price developments, and that, for commodity products, the actual price which an operator sells for is determined by international markets, how can a trader predict the monetary equivalent of an *ad valorem* tariff ? To take an example, with an *ad valorem* tariff of 30%, if international prices are at $100 the tariff will be $30, if they are at $150 the tariff will be $45 and if they are at $50 the tariff will be $15. Recall also that commodity prices can fluctuate substantially in periods significantly shorter than 2 months. Can Argentina explain why the fixed specific duties of the PBS are less predictable than the monetary equivalents of *ad valorem* tariffs?

[5] First Written Submission by Argentina, para. 271 and ss., Rebuttal by Argentina, para. 89 and ss, 138 and ss.

[6] Rebuttal by Argentina, para. 145.

[7] First Written Submission by Chile, para. 93 and Rebuttal by Chile para. 101 and 120.

[8] *Chile – Price Band System*, Report of the Appellate Body, para. 276.

Answer to Question 102(b):

One of the differences between the amended PBS and an *ad valorem* duty is that, as stated before, in the case of the amended PBS, 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.[9]

The lack of predictability of the amended PBS is not similar to the predictability *ad-valorem* duties can offer. This is because ad valorem duties do not change as a result of a pre-established mathematic formula inherent to those measures that guarantees the duties *will* vary 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. Therefore, ad-valorem duties are more predictable.

Specific duties are not "fixed" as the EC states. They are variable, and are liable to vary every two months as far as the reference price is below the floor price. If there's any predictability related to the specific duties, *quod non*, that predictability is short lived, because it will end after 60 days. In accordance to what the United States stated during the meeting of Panel with third parties, we cannot see, nor Chile has identified, a basis for a distinction between a variation once every two months rather than once every week.[10]

As regards for the monetary equivalent the EC points out, as Argentina already pointed out, 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.[11]

103. In para. 273 of the Appellate Body report in the original dispute, the Appellate Body states:

> **Surely Members will ordinarily take into account the interests of domestic consumers and domestic producers in setting their *applied* tariff rates at a certain level. In doing so, they will doubtless take into account factors such as world market prices and domestic price developments. These are *exogenous* factors, as the Panel used that term. According to the Panel, duties that are calculated on the basis of such *exogenous* factors are *not* ordinary customs duties. This would imply that such duties be *prohibited* under Article II:1(b) of the GATT unless recorded in the "other duties or charges" column of a Member's Schedule. We see no legal basis for such a conclusion.[253]**
>
> **Footnote 253 reads:**
>
> **We stated in *Argentina – Textiles and Apparel, supra*,[ ], para. 46, that "a tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to apply a rate of duty that is less than that provided for in its Schedule." Thus, the fact that the "cap" (recorded in the ordinary customs duty" column of a schedule) is a specific or an *ad valorem* duty does not mean that a Member will not apply a tariff at a lower rate, or that the rate it applies will not be based on what the Panel calls**

[9] Rebuttal by Argentina, para. 145.
[10] Oral Statement by the United States, para. 13.
[11] Oral Statement by Argentina, para 60.

"*exogenous*" factors. <u>Indeed, as we noted above, it is difficult to conceive that a Member would ever make changes to its applied tariff rate except based on *exogenous* factors such as the interests of domestic consumers or producers.</u> [underlining added]

(a) If a Member may change its tariff on the basis of developments in world markets, and that tariff is considered an "ordinary customs duty", why is it that, when a tariff is changed on the basis of a formula which reflects developments in world markets, it is not an "ordinary customs duty" ? (Argentina argues that it is a "similar border measure other than [an] ordinary customs dut[y]" in the sense of footnote 1 to Article 4.2.)

<u>Answer to Question 103(a)</u>:

First, the object of these proceedings are not the resulting duties, but the underlying measure, the amended PBS.

Second, contrary to what the EC state, the fact that a Member may change its tariff on the basis of developments in world markets does not mean that that tariff is an "ordinary customs duty". Although the Appellate Body said that the duties resulting from the original PBS took the same form as "ordinary customs duties", it underlined that it was not saying that they *were* ordinary customs duties and that it was not trying to qualify them as "ordinary customs duties" or as "any other duties or charges"[12]

Indeed, the Appellate Body said that "… the fact that the duties that result from the application of Chile's price band system take the same form as 'ordinary customs duties' does not imply that the underlying measure is consistent with Article 4.2 of the *Agreement on Agriculture*"[13]

Third, it is obvious that Members can and will doubtless take into account factors such as world market prices and domestic price developments. However, the Appellate Body clearly stated that "[o]rdinary customs duties…are subject to discrete changes in applied tariff rates that occur independently, and unrelated to…an underlying scheme or formula".[14] There is no doubt that the amended PBS *is* related to a scheme or formula that causes the variation of the resulting duties. Furthermore, according to the Appellate Body[15], in order to be an ordinary customs duty, the amended PBS should be expressed in the form of *ad valorem* or specific rates. However, A plain reading of Law 19.897 and Decree 831/2003[16], 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.

(b) In *Argentina – Textiles and Apparel* the Appellate Body held that the DIEM system applied by Argentina was consistent with Article II.1(b) GATT (provided kept within the relevant binding), and thus an "ordinary customs duty". The DIEM system consisted of the calculation of specific duties derived from "representative international prices" which were "adjusted from time to time".

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[12] *Chile – Price Band System*, Report of the Appellate Body, footnote 254.
[13] *Chile – Price Band System*, Report of the Appellate Body, para. 279.
[14] *Chile – Price Band System*, Report of the Appellate Body, para. 233.
[15] *Chile – Price Band System*, Report of the Appellate Body, para. 277.
[16] See ARG-1 and ARG-2.

With the exception of the fact that the DIEM system representative prices were re-calculated from "time to time" and the PBS duties are re-calculated according to a known schedule, can Argentina identify any material differences between the DIEM system and the PBS that leads to the conclusion that one is an "ordinary customs duty" and the other is not ?

Answer to Question 103(b):

It is remarkable that the case the EC recalls supports Argentina's and not Chile's arguments in these proceedings.

First, the EC errs when stating that In *Argentina – Textiles and Apparel* the Appellate Body held that the DIEM system applied by Argentina was *consistent* with Article II.1(b) GATT. Contrarily, the Appellate Body finding in that case was that the DIEM regime was inconsistent with Argentina's obligations under the WTO:

> Argentina has acted inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994, because the DIEM regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of customs duties in excess of the bound rate of 35 per cent ad valorem in Argentina's Schedule[17]

Second, the issue of whether the DIEM by itself, the underlying measure was or was not an ordinary customs duty was not addressed by the Appellate Body. That issue was not decided by the Appellate Body[18] and was not even an issue raised in appeal.[19]

Third, EC's interpretation of the Appellate Body's finding is simply wrong. Contrarily to what the EC imply, the Appellate Body did not conclude that the *Argentine* DIEM regime was an ordinary customs duty, even if kept within the relevant binding.

Along its report, the Appellate Body was careful to never refer to the DIEM regime as an ordinary custom duty. Rather, when referring to the duties resulting from the DIEM regime, it called them just "customs duties", without the word "ordinary". This is very clear, *inter alia*, from its conclusions:

> For the reasons set out in this Report, the Appellate Body …modifies the Panel's findings in paragraphs 6.31 and 6.32 of the Panel Report by concluding that the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994 to the extent that it results in **ordinary** customs duties being levied in excess of those provided for in that Member's Schedule. In this case, Argentina has acted inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994, because the DIEM regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of **customs duties** in excess of the bound rate of 35 per cent ad valorem in Argentina's Schedule (emphasis and underline added)[20]

As can be seen from the cited finding, the Appellate Body only referred to "ordinary" customs duties when addressing Member's obligation not to apply a type of duty different from the type provided for

[17] *Argentina – Textiles and Apparel*, Report of the Appellate Body, para. 87 (a) (underline added).
[18] See *Argentina – Textiles and Apparel*, Report of the Appellate Body, para. 87.
[19] *Argentina – Textiles and Apparel*, Report of the Appellate Body, para. 38.
[20] *Argentina – Textiles and Apparel*, Report of the Appellate Body, para. 87.

in a Member's Schedule to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Schedule, in violation of Article II:1(b), first sentence, of the GATT 1994. However, when addressing the DIEM regime resulting duties, the Appellate Body referred to them just as "customs duties".[21]

The result is that this finding supports Argentina's arguments in these proceedings. Probably, in *Argentina – Textiles and Apparel* the Appellate Body saw the implications of finding the DIEM regime resulting duties as "ordinary" customs duties, and refrained from making such a finding taking into account the issue was not under appeal.

[21] See also *Argentina – Textiles and Apparel*, Report of the Appellate Body, para. 55.