## ANNEX F-3*

## REPLIES BY CHILE 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.**

The Chilean measure taken to comply with the DSU's recommendations and rulings consists in the establishment of specific duties, in United States dollars, and of rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of wheat and wheat flour, in the manner indicated by Law 19.897 of 2003 and the Regulation thereto contained in Ministry of Finance Supreme Decree 831 of 2003. This measure is substantially different from the price band system (PBS). Although some headings were retained, this was done for reasons unrelated to compliance, and certainly has no effect on the consistency of the new measure with Chile's WTO obligations.

The foregoing is a consequence of the implementing action taken by Chile on the basis of the recommendations of the DSB, which only questioned certain characteristics of the PBS that made it inconsistent with specific obligations under the WTO Agreements, namely the following.

– Weekly determination of a reference price, established in a manner that was neither transparent nor predictable (paragraphs 247 to 250 of the Appellate Body Report).

– Variability of specific duties, in relation to their weekly application, to compensate for fluctuations in international prices (paragraph 260 of the Appellate Body Report), but also, and more importantly, in relation to the fact that different duties could be applied on the same date to different import operations.

**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.**

There is no connection. Chile has already indicated in response 1 what measures it had to adopt in order to comply with the recommendations and rulings of the DSU, and these constitute the framework or terms of reference for this proceeding under Article 21.5 of the DSU.

Despite the assertion made by Argentina in its rebuttal, this is not a new claim with respect to a new measure. On the contrary, Argentina claims that the Chilean measure is inconsistent with

* Annex F-3 contains the Replies by Chile to Questions Posed by the Panel. This text was originally submitted in Spanish by Chile.

Article II:1(b), *second sentence* of the GATT 1994, because of an alleged failure to comply with Article 4.2 of the Agreement on Agriculture. As a result of this alleged inconsistency, as Argentina sees it, the Chilean measure is a measure "other than an ordinary customs duty" and therefore constitutes "other duties or charges". Failure to record the measure in the corresponding column of a Member's Schedule of Concessions is alleged to entail a violation of the above mentioned *second sentence* of Article II:1(b) of the GATT 1994. This reasoning on the part of Argentina is said to be valid for both the PBS and the Chilean measure in force since 2003, and Argentina should therefore have raised this question at that time.

Finally, it may be recalled that the Appellate Body reversed the original Panel's finding in respect of the *second sentence* of Article II:1(b) of the GATT 1994, since that question was not before the Panel.[1]

**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)?**

Chile's contention is that, if a party decides not to challenge certain aspects of a measure and subsequently raises such a challenge at the stage of discussion of the other Member's implementation of measures in response to DSB recommendations (Article 21.5), then the due process rights and guarantees of the latter Member would be jeopardized. Article 21.5 proceedings are abbreviated, and their purpose is to analyse the measures that have been taken to comply with DSB recommendations and rulings. There can therefore be no discussion in these proceedings of claims and arguments concerning the original measure or unchanged aspects of the original measure forming part of compliance, which the complaining party did not wish to raise in the original proceedings. Canada is correct when it points out that Members must act in good faith and this means that, in Article 21.5 proceedings, no claims or arguments may be presented that could have been raised in the original proceedings and were not – either by way of a litigation tactic, by oversight or because other claims or arguments were raised in error, as is the case under Article II:1(b) in this dispute. Canada may be right in the sense that there is no obligation on a Member to put forward all its claims or arguments, but not doing so has a "consequence".

The Panel in *EC – Bed Linen (Article 21.5 – India)* ruled on that consequence as follows:[2]

> *The possibility for manipulative or abusive litigation tactics that would be opened by allowing Members an opportunity to obtain a ruling in an Article 21.5 [proceeding] that they could have sought and obtained in the original dispute would, in our view, be inestimably harmful to the effective operation of the dispute settlement system. We hasten to emphasize that we do not consider that India has engaged in any such harmful tactics, or has engaged in this dispute settlement procedure in anything other than entirely good faith in an effort to resolve the dispute, as required by Article 3.10 of the DSU. We nonetheless consider that a claim which, as a legal and practical matter, could have been raised and pursued in the original dispute, but was not, cannot be*

[1] Report of the Appellate Body, paragraph 288(a).
[2] Report of the Article 21.5 Panel in *EC – Bed Linen* (WT/DS141/RW), paragraph 6.43.

> *raised on the same facts and legal premises in an Article 21.5 proceeding to determine the existence or consistency of measures taken to comply with the recommendation of the DSB in the original dispute. In our view, this ruling furthers the object and purpose of the DSU (footnote omitted).*

As the Article 21.5 Panel noted in *US – Countervailing Measures on Certain EC Products*, a Member cannot be precluded from "raising claims that it did not raise in the original proceedings, provided that these claims concern the measures taken to comply and are included in the Panel request". However, in that dispute (as in this one), the question is whether that conclusion should also apply to new claims where the measure taken to comply is unchanged from the original measure and thus allegedly inconsistent with WTO obligations in ways identical to (not different from) the original measure. It should be recalled that this also applies to the factor of 1.56.

On that occasion, the Panel stated:[3]

> *In this dispute, this Panel confronts the issue of whether to consider new claims on aspects of the original measure that are unchanged and were not challenged in the original proceedings. The purpose of Article 21.5 is to provide an expeditious procedure to establish whether a Member has properly implemented the DSB recommendations and rulings. Admitting such a new claim would mean providing the European Communities with a second chance to raise a claim that it failed to raise in the original proceedings.*

In short, the decision (for example, what Canada calls "split claims"), omission (the factor of 1.56 in Argentina's case) or error (Argentina's complaint concerning Article II:1(b)) involved in raising only certain claims or arguments in the original proceedings cannot be justified at the cost of calling in question the due process guarantees protecting the respondent.

**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?**

The Chilean measure challenged by Argentina in these proceedings is an ordinary customs duty and the only guarantees of certainty or predictability required by the GATT for market access are laid down, firstly, in Article II:1(b), first sentence, which provides that a Member may not impose customs duties in excess of the levels bound in the appropriate Schedule and, secondly, in Article X:1, which provides that trade legislation by which customs duties are imposed shall be published promptly so that due acquaintance therewith can be gained. The Chilean measure fully complies with both those requirements of the GATT 1994.

Nonetheless, in the determination of the specific duty provided for by Law 19.897, parameters are used which, with the sole exception of the reference price, entail no degree of uncertainty since their values are determined in the Law itself. Regarding the reference price, the degree of uncertainty associated therewith depends on international market behaviour and trends, but that does not make the policy more uncertain than the international market itself. Nor, by the way, is it made more uncertain than any other ordinary customs duty, which may change at any time without prior notice to traders. Traders have no absolute certainty today about what the Chilean *ad valorem* duty will be in the future, they only know that it will be no higher than the Chilean tariff bound in the Uruguay Round. Nor, for their part, do Argentine exporters know what their own taxes will be in the future, such as the withholding taxes on exports of wheat and wheat flour applied by Argentina.

[3] Report of the Article 21.5 Panel in *US – Countervailing Measures on Certain EC Products* (WT/DS212/RW), paragraph 7.74.

**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".**

**(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.**

**(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?**

In Chile's opinion, since Law 19.897 replaced the duties resulting from the PBS by an ordinary customs duty (the specific duty under consideration), it is not necessary to discuss whether, as a result of the application of the above-mentioned law, the burden is higher or lower than in the past, except to the extent that the specific duty applied exceeds the tariff bound by Chile in the Uruguay Round, which is not the case.

Thus, the analysis of an ordinary customs duty must be limited to questions of level (i.e. whether or not it exceeds the bound level). Argentina seeks to evade this simple restriction by casting doubt on the status of "ordinary customs duty" vested in the specific duty established by Law 19.897. As it seeks to categorize the duty as something similar to a variable levy or minimum import price, Argentina should concentrate on proving, *inter alia*, the alleged variability of the measure.

**(c) Could Chile clarify whether the new formula also means that specific tariff rebates under the amended PBS would be higher than those generated by the previous method of calculation.**

The current calculation method in any event generates lower values for specific duties and tariff rebates, compared with the ones previously applied under the PBS. This finding was demonstrated in paragraphs 175-178 of Chile's First Written Submission in respect of the specific duty.

*<u>*Under the PBS*</u>

In the case of the tariff rebate, under the PBS formula the import cost was previously defined as follows:

$IC_i = fc + (1+vc) * FOB_i$,
Where,
$IC_i$ = product import cost i;
fc = sum of fixed costs;
vc = aggregate of variable costs, and
$FOB_i$ = FOB price of the product i.

The tariff rebate was then determined by subtracting the ceiling import cost from the value of the reference price expressed as the import cost described above:

$REBATE = IC_{rp}-IC_{ceiling}$,
where "rp" represents the reference price.

By substitution the following formula is obtained:

$REBATE = fc + (1 + vc)* FOB_{rp}- (fc + (1+ vc)* FOB_{ceiling})$
$REBATE = fc + (1 + vc)* (FOB_{rp} – fc – (1 + vc)* FOB_{ceiling}$
**$REBATE = (1 + vc)* (FOB_{rp} – FOB_{ceiling})$**

It should be recalled that "vc" corresponded to the variable import costs equivalent to a set of expenditures incurred in a commercial import operation and that they include the costs associated with credit operations, insurance, agents' fees and the customs duty, all of which are applied on a percentage basis to the amount of the import operation.

**Under Law 19.897*

The current formula for calculating the rebate is expressed as follows:

**$REBATE = (1 + 0.06)* (FOB_{rp} – FOB_{ceiling})$**

The difference between the current method of calculating the tariff rebate and the method provided for in the PBS lies in the elimination of the set of costs associated with importation (vc) which are not perfectly identical values for any operation, leaving only the applied *ad valorem* customs tariff.

The conclusion to be drawn from the foregoing is that the value of the variable costs used in the PBS (vc) is always greater than the customs duty alone, so that the rebates determined by means of the procedures laid down in Law 19.897 are always smaller than those that would be determined using the PBS procedure for the same reference price.

**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.**

**(b) Can Chile confirm whether the relevant legal instruments grant any discretion to Chilean authorities in this regard. If so, has such discretion ever been exercised? Please provide examples and evidence, if any, to support your answer.**

In its oral statement, Chile drew the Panel's attention to a series of false allegations made by Argentina. At that time, Chile did not respond to each and every one of them, and merely referred, by way of example, to two allegations made in Argentina's oral statement. We now once again find ourselves faced with assertions which, whether deliberate or not, at least reflect a serious lack of rigour on the part of Argentina.

In paragraph 80 of its oral statement, Argentina attributes to Chile the contention that Law 19.897 gives it discretion to decide whether or not to impose duties. It bases this argument on paragraph 93 of Chile's First Written Submission and paragraphs 101 and 120 of Chile's Rebuttal. However, a reading of the paragraphs in question enables this assertion to be rejected.

Paragraph 93[4] states that, under Law 19.897, the specific duty or rebate is established by decree and its amount remains unchanged until it is changed or cancelled by a more recent administrative act. Paragraph 101[5] refers to the fact that the specific duties applied require a specific administrative act to establish them, and in the absence of this act, the duty does not vary in amount. Finally, paragraph 120[6] states that the tariff charge determining the specific duty remains constant until changed or cancelled by a more recent administrative act.

In none of these paragraphs does Chile mention whether or not the Law grants discretion to the administrative authority. Chile considers that discretion in imposing a specific duty (or rebate) is not an element that was considered by the Appellate Body (AB) for the purposes of the application of specific duties.

As Argentina correctly points out in paragraph 80 of its oral statement, it is obvious that *ad valorem* duties can change and no one can guarantee otherwise. That is what happens with any ordinary customs duty. However, Argentina vitiates its analysis of the AB ruling when it associates automatic and continuous variability with discretion in issuing the Decree.

The key to this point is contained in paragraph 233 of the AB Report[7], which concludes that the level at which ordinary customs duties are applied can be *varied* by a legislature, but such duties will not be automatically and continuously *variable*. **To vary the applied rate of duty in the case of**

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[4] 93. Under Law 19.897, however, a specific duty (or rebate, or neither) is fixed by legal directive in the form of a decree issued by the Ministry of Finance and remains unchanged for two months, during which the duty applies on all import transactions, without the slightest variation and regardless of the amount of the transaction, until it is changed or cancelled by a more recent administrative act.

[5] 101. In its First Written Submission, Chile pointed out that under the changes introduced by Law 19.897 the specific duties applied require a specific administrative act to establish them and in the absence of this act the duty does not vary in amount. The situation was different under the PBS, where, because of its structure, the duties applied to two simultaneous import transactions varied without the intervention of any administrative act, which led to the assessment of different import duties, even when the value (transaction price) and volume (metric units) of the goods were identical. Today, two simultaneous import transactions, with the same transaction value and volume, will always pay the same import duty. Thus, Chile has implemented the rulings and recommendations of the DSB.

[6] 120. The specific duty does not prevent the entry of imports priced below a threshold or entry price, inasmuch as the floor price is not a threshold price or an internal market price or linked therewith, and is not an entry price. The tariff charge determining the specific duty remains constant until changed or cancelled by a more recent administrative act. Therefore, the specific duties do not have the fundamental characteristics of a variable levy as described in paragraph (c).

[7] 233. To determine what kind of variability makes an import levy a "variable import levy", we turn to the immediate context of the other words in footnote 1. The term "variable import levies" appears after the introductory phrase "[t]hese measures include". Article 4.2 - to which the footnote is attached – also speaks of "measures". This suggests that at least one feature of "variable import levies" is the fact that the measure itself – as a mechanism – must impose the variability of the duties. Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Ordinary customs duties, by contrast, are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula. The level at which ordinary customs duties are applied can be varied by a legislature, but such duties will not be automatically and continuously variable. To vary the applied rate of duty in the case of ordinary customs duties will always require separate legislative or administrative action, whereas the ordinary meaning of the term "variable" implies that no such action is required.

**ordinary customs duties will always require *separate* legislative or administrative action, whereas the ordinary meaning of the term "variable" implies that *no* such action is required.**

As can be seen, the AB requires separate legislative or administrative action, but not discretionary or mandatory action, since variability, as it points out, is associated with the fact that the *measure* itself, as a mechanism, imposes the *variability* of the duties, but not with how it is generated. Thus, variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Under Law 19.897, once a duty or rebate is applied, the tax burden is not changed automatically and continuously, but a new administrative act is necessarily required.

Thus, regarding Argentina's analysis as to whether Law 19.897 gives discretion to the authorities, it can be stated that the wording of the law is dictated more by reasons of legislative technique than by a purpose associated with the DSB's rulings. As Chile has stated[8], its measure is designed to afford additional protection above the 6 per cent *ad valorem* tariff that Chile applies to all its imports. Consequently, the legislature's intention was that duties and rebates should be applied in accordance with Law 19.897.

Furthermore, and following Argentina's reasoning, it could be argued that Law 19.897 authorizes the administrative authority to fix a duty or rebate six times a year, but does not determine the occasions for so doing, a matter governed by Decree 831 which, moreover, may be modified by the same administrative authority by means of a new decree. To date, the Minister of Finance has regularly issued decrees establishing a specific duty or tariff rebate. What is more, and even though the Law does not so require, in addition to decrees imposing specific duties or tariff rebates, decrees have also been issued in accordance with the dates established in Decree 831, in cases where Chile has not imposed specific duties or tariff rebates, that is, in cases where only payment of the *ad valorem* tariff has been required.

**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?**

No. With the changes introduced by Chile by means of Law 19.897, the price bands no longer operate as a scheme or formula for the calculation of duties or rebates at the border, in the manner indicated by the DSB in the original proceedings.

Currently, Law 19.897 establishes a single specific duty (or tariff rebate) applicable to every import operation. This duty, like any other ordinary customs duty, remains invariable until it is changed by an administrative act.

The other parameters laid down in Law 19.897 are no longer part of a scheme or formula, as they were under the PBS, but are elements for defining the framework of the border protection applied by the Chilean Government.

**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**

[8] Paragraph 25 of Chile's oral statement.

**goods (normally reflected in the related commercial documents, such as invoices) can serve as the starting point to determine the full transaction value?**

The value or price recorded in a transaction document corresponds to the amount that the buyer will pay the seller for the product. If the transaction is an import transaction and, as normally occurs, is based on delivery at the port of origin (f.o.b.), it then corresponds to the actual transaction value, which is the definitive value for both seller and buyer. However, the buyer has other costs associated with transport of the goods and entry into the country of destination, including processing costs. Thus, the actual transaction price for the buyer constitutes the starting point for determining the total transaction value entailed by the importation of the product.

**(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*?**

The price quotations or reports issued by the markets correspond to indicative values for transactions involving goods in trade, without necessarily reflecting the value of any one particular transaction. The price that is fixed between buyer and seller may be based on an international market quotation, but will be determined in accordance with other parameters such as quality, quantity, delivery point, date of receipt, *inter alia*, so that the international price does not necessarily reflect the product value agreed by buyers and sellers between themselves. However, as international prices are indicative of price levels and trends on world markets, they serve as reference or approximation for estimating the cost of an import, whether at c.i.f. level or as an entry price, if all the costs are known that go to make up the c.i.f. price or the entry price.

**(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?**

Yes. This is the way in which economic studies are usually carried out: if the required information is available, it is used, otherwise approximations are made on the basis of reference values representative of commercial operations. This is the way in which countries' levels of protection, such as nominal protection and effective protection indicators, are calculated.

In the case of studies on nominal and effective protection, the method involves comparison of entry prices subject or not subject to border measures and seeks to measure the degree of difference in the level and behaviour of internal prices in relation to what would occur if border protection measures were not applied.

Using these economic price analysis techniques, based on data estimates or approximations, an assessment can be made of price behaviour and the extent to which domestic prices are associated with international prices.

Moreover, the usual way of evaluating price transmission is by means of methods that measure how international or border price fluctuations are reflected in domestic prices, generally using an indicator known as price transmission elasticity.

**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?**

No. The f.o.b. valuation of a good is the actual transaction price of a good if it corresponds to the price recorded in the documents or invoices of the commercial import operation and if it constitutes the final transaction value for the seller and the buyer.

If it is wished to determine or estimate a value at a level different from the import operation, that is, at c.i.f. or domestic market level, on the basis of the price paid by the buyer, the costs of transporting the good must be added in order to estimate or calculate the c.i.f. value, and the costs of entry into the destination country (commissions, sanitary inspection, credits, tariffs, unloading and internal freight, etc) must be added to determine its domestic market value.

**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?**

In the case of wheat and wheat flour, the situation is exactly the same as that described in the previous response (No. 9). In other words, the f.o.b. price recorded in the commercial operation documents corresponds to the actual transaction value for buyer and seller, even though other costs have to be added in order to determine the full transaction value for the buyer.

**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?**

Since a Ministry of Finance decree enacted under Law 19.897 establishes a specific duty or a rebate on the amount payable as customs duty, the determination of the reference price is no longer relevant for the calculation of duties or rebates, as it was under the PBS, where traders were required to have knowledge of that price in order to calculate the tariff charge at the border.

Today, when traders enter with their products, they are aware of the amount of the *ad valorem* tariff and the specific duty or rebate on the *ad valorem* tariff, as the case may be, which have been previously established by the authority. In both cases, as in all countries where customs duties are applied, the reasons for fixing the tariff charge or the procedures whereby it is determined are not relevant to traders, or at least do not constitute a requirement under WTO rules, insofar as the tariff charge does not exceed the level of Chile's bound tariff.

**12. Article 7 of Chilean Supreme Decree 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 10$^{th}$ day of the month in which the relevant decree is to be published".**

**(a) Could Chile explain what is the rationale for taking into account *only the last 15 days* when calculating each of the six reference prices which are to be maintained for a period of 60 days?**

First of all, it should be mentioned that the reference price is not maintained for a period of sixty days. This parameter is used only once, when it is necessary to calculate specific duties or rebates (six times a year). The level of protection additional to the *ad valorem* tariff provided by the specific duty (or the rebate, as the case may be) is maintained unaltered for a period of two months, during which time the reference price has no bearing on commercial operations.

It has been estimated that the average price over the period of at least fifteen days closest to the date of calculation of the duty or rebate (corresponding roughly to ten working days) is the minimum necessary for the result to be representative of the conditions prevailing at that time on the

market, so as to prevent that average from potentially being influenced by extreme quotations which occasionally appear in the market and which do not necessarily reflect the level and trend of prices at that point in time.

**(b) Can Chile comment on how representative is the reference price for wheat?**

The reference price is based on information generated in the international markets and supplied by reliable sources. At the time it is calculated, therefore, it is representative of trends in the international market. However, it should be pointed out that the reference price is used as an instrument to facilitate determination of the level of protection for wheat, and that it has no useful bearing on commercial operations in that product. Accordingly, its representativeness at each point in time is of no relevance.

If the reference price were calculated more frequently, for example, every fifteen days or every month, that would not change its representativeness, inasmuch as it is only an indicator of the level of international prices at the time when the reference price is calculated. Any reference price calculated in January will doubtless not be representative of prices for subsequent months, or even for the months preceding January.

It is important to emphasize that, if Chile's measure used a more frequently calculated reference price and determined duties or rebates with the same degree of frequency, it would undoubtedly constitute a mechanism for correcting differential increases or reductions in international prices, as was the case with the PBS, which did so every week, thus making it difficult for fluctuations in international prices to be transmitted to the domestic market.

**(c) Can Chile also respond in this regard to Argentina's assertion during the substantive meeting with the Panel (see paragraphs 64 and 65 of the written version of Argentina's oral statement) that the fact that the amended PBS considers only the prices of 90 days out of the year makes the situation "even *worse* than with the original WTO-inconsistent PBS". (Original emphasis.)**

Law 19.987 differs from the PBS in the method of applying duties and rebates. The PBS provided for adjustments to entry prices to compensate for fluctuations in international prices by means of the weekly adjustment of duties and rebates. Under this procedure, it was essential that the reference price accurately reflect what was happening in wheat transactions so that the optimum level of compensation could be calculated, and also that it be as low as possible to prevent any import operation in particular from being unable to reach the band floor level. That procedure does not exist under the current law, and compensation is irrelevant, since once the duties or rebates are determined, it is these values which are fixed and applied for a period of two months, without regard to developments in international prices during that period of application, in the same way as with any ordinary customs duty.

Again, the comparison is not relevant because today the specific duty or rebate is not intended to maintain a correspondence with international prices, nor is it intended to compensate for ups and downs in international prices so that they are not transmitted to the domestic market.

It is necessary to point out that, under the PBS, specific duties and rebates were calculated once a year for a series of possible prices, so that the reference price was the key variable in the mechanism as it was the parameter required for ascertaining what duty or rebate would be in force in any particular week of the year. In that case, the reference price was an important element in the market, because it dictated the level of border protection.

Under Law 19.897, the duty or rebate is simply established and published every two months, so that the market no longer needs to ascertain, estimate or take into account a reference price, but only the value of the duty or rebate applied, which, moreover, are not constantly adjusted in line with the changes in any reference price.

The latter situation is not worse and is not WTO-inconsistent, since it is precisely this dissociation of applied duties and rebates from the international price or from a reference price which is one of the inherent characteristics of ordinary customs duties.

**(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?**

The determination as to whether to apply specific duties, rebates or neither of the two is made six times a year, hence the level of protection may also change six times a year. The reference price used for this determination is calculated with the same frequency, six times a year, and logically may change just as frequently.

**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?**

The reference price is not maintained unchanged for 60 days, nor is it used during that period for any particular purpose. The specific duty or rebate, or the non-application thereof, is what remains unchanged for 60 days. The reference price does not constitute an insulation factor in any way. Whether a particular market, like that of Chile, is insulated from international markets is measured through the behaviour of domestic prices.

When there is price transmission, and international market fluctuations are transmitted to the local market, domestic prices exhibit a pattern of behaviour and a trend similar to that shown by international prices, even though that behaviour is attenuated by the existence of border duties or other factors (costs) not necessarily related to the market for the product (oil, exchange rate, harvest periods). Even with extremely high levels of border duties, there is no guarantee of domestic market insulation, only a higher level of protection.

Insulation of the domestic market from the international market is achieved by applying measures that prevent transmission of variations, for example through variable levies determined on a case by case basis or frequently adjusted in a direction and amount contrary to the trend in international prices.

Nor does the fixing of other parameters of the system constitute an insulation factor, since market insulation is measured and must be measured in relation to the way in which domestic prices behave *vis a vis* fluctuations and trends in international prices.

If Chilean policy used no parameter to determine the level of protection desired for wheat, but maintained its method of modifying the specific duty or rebate every two months, the levels thereof being determined by the authority without recourse to support mechanisms, the situation would be that Chile would have a policy for the application of duties and rebates that would be fixed bimonthly. In a situation like the one described, there would be no discussion concerning the level of international prices, the reference price or any other parameter, since there would be only an applied duty or rebate.

In such a scenario there would certainly be no questioning of whether or not the policy is WTO-consistent, but questions would undoubtedly be raised concerning the level of duties and rebates, and perhaps as to how the authority determines those levels.

Under such a scenario we would undoubtedly not be involved in this Panel proceeding, since for one thing the national authority has sovereign discretion to determine the duties and rebates that it deems appropriate domestically, and for another the only WTO commitment in such circumstances is that the level of protection at the border should not exceed the bound tariff rate.

In practice, the scenario described is the one that actually establishes current policy on wheat and wheat flour. It is no different in its operation from simply imposing duties and rebates on a two-monthly basis, as established by an administrative act.

Nor is it possible to question how the authority determines the level of protection, the type of information it uses or any action that comes within its field of competence, provided that the law and international commitments are respected.

Chile has taken the view that its policy must be completely transparent and non-discretionary, that even the authority's own actions are subject to bounds or restrictions, so as to prevent conflicts of interest within the country.

The supporting elements for this objective, such as the parameters and the formula used, are designed exclusively to establish guidelines for action by the authority in order to achieve the level of protection that Chile deems appropriate for wheat and wheat flour. These parameters have no other purpose and have no bearing on the way in which duties and rebates are applied. The same results could doubtless be obtained without using them, albeit with a lower level of transparency and with an element of discretion.

It is for this reason that Chile has stressed that the substance of this dispute should focus on how the policy of border protection is applied and what results are observed in the market, none of them being different from what occurs with ordinary customs duties.

**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?**

In Chile's opinion, the establishment of reference prices is no longer relevant. It has already been mentioned that, under the PBS, the reference price was determined weekly by Customs and was to be considered by economic operators in each import operation, which produced the effect that the duties collected were constantly adjusted, even during those weekly periods.

As was also stated before, under Law 19.897, reference prices are not established bimonthly, but are an element used by the administrative authority to fix the specific duty to be imposed on imports, and it is that specific duty (or rebate), and not the reference price, which is currently applicable for a period of two months.

However, under the PBS, the determination of a weekly specific duty using a reference price calculated weekly was extremely important as it facilitated rapid adjustment in the level of border protection which, if applied inversely to changes in international prices, served to compensate for such price changes by impeding the transmission of external price variations. At the same time, this weekly determination caused uncertainty by preventing traders from being informed 52 times a year of the level of border protection or the reference price that would be applied to them.

Under Law 19.897, the duty, rebate or neither of the two is determined six times a year. Unlike the PBS, the fixed duty or rebate cannot be used to compensate for external price variations and are values established by a public and publicised administrative act.

**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.**

It is Chile's understanding that the Panel is referring to the specific duty established under Law 19.897 and not to the reference price. Assuming that we are talking about the specific duty, the Panel's statement would read as follows: " ... the same *specific duty* 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". These three features are not novel, as they are features common to any tariff applied in the form of a specific duty. And like any specific duty, this specific duty in particular does not impede the transmission of prices to the Chilean market.

In particular, if different duties were applied according to the origin of the goods, that would violate the MFN principle, by discriminating in trade against certain countries that could apply a higher tariff charge. If different duties were applied according to the value of the shipment, that would discriminate against and probably punish operations effected at lower prices. At the same time, the application of a uniform duty for all products under a tariff item affords equality of treatment to all commercial operations, enabling lower-priced products also to enter at lower prices, and not limiting commercial opportunities.

It should be pointed out that, according to economic theory, it is the price itself which transmits all the information on international markets to domestic markets. Tariffs will always distort such information by inserting an arbitrary wedge (but a legitimate one from the standpoint of the WTO agreements) in the price variable. Consequently, since the transmission of prices will never be perfect where a (specific or *ad valorem*) tariff exists, in the case of the specific duty established by Law 19.897, such transmission occurs, but as with any specific duty or ordinary customs duty, it is not perfect.

**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?**

In general terms, the answer should be affirmative. However, in Chile's opinion, Argentina erroneously interprets the AB's rulings and the changes introduced by Law 19.897, and attempts to draw parallels between the current regulations and the system that existed under the PBS.

At the present time, the tariff charge on wheat and wheat flour in Chile consists of the amount of the specific duty (or rebate) and the *ad valorem* tariff. Both duties are applied in the same manner to every import operation. A change in this tariff charge requires a change in the *ad valorem* tariff or specific duty.

A change in the *ad valorem* tariff will require compliance with the rules governing enactment of the law as contained in the Constitution, which, as is the case in most States, do not provide for parameters for defining the application of a six percent tariff, for example, and the same is true for practically the entire universe of tariff headings in Chile. Still less do they provide for the periodicity of possible changes to *ad valorem* duties. What Argentina regards as an obvious lack of transparency and predictability is not, since the commitment by WTO Members under GATT Article II is not to demonstrate the reasons for establishing a specific tariff charge or to maintain their customs duties

unaltered, but as the DSB has indicated, predictability is determined by WTO Members' commitment not to exceed the bound tariff.

In Chile's opinion, the same reasoning applies to the specific duties established by Law 19.897. These are identical to those imposed by many WTO country Members, and have been recognized by the WTO. The only difference between the imposition of the specific duty under Law 19.897 and the *ad valorem* tariff is that the calculation of the amount of the specific duty is not left to the discretion of the administrative authority, but that the law sets out the prescribed conditions and level of protection.

In view of the foregoing, in response to the question whether the specific duties imposed by Chile are ***calculated*** in accordance with a mechanism which includes various parameters, strictly speaking the answer must be affirmative. However, there is a qualitative difference compared with previous practice under the PBS, which Argentina does not appear to understand in this dispute. Today, the parameters of the law are used to calculate the amount of the specific duty, but the same duty is applied to any import operation at the border. Under the PBS, on the other hand, the specific duty was not established by the administrative authority, but a series of combined parameters were applied independently of the authority; these parameters were not a tool for calculating the duty but ultimately determined the level of the duty, and their interaction caused variations in the amount of the duties in a manner similar to variable import levies, with the result that, as was pointed out by the AB, two simultaneous operations could be subject to different duties.

**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.**

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

**(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.**

**(d) <u>Can Chile comment on this point</u>.**

Regarding point (d), in the first place Chile considers that it is for Argentina to substantiate its own claims for the Panel's benefit. By way of a general comment, Argentina seeks to extend the scope of the Appellate Body's pronouncements on the question of transparency.

In fact, the AB based its conclusions regarding the lack of transparency on <u>certain</u> characteristics of the PBS and its particular configuration and interaction (in the same way as for the determination of import costs and reference price under the PBS).[9] Moreover, it should be remembered that <u>the factor of 1.56 was not challenged by Argentina in those proceedings</u>, and consequently Chile reiterates that this claim by Argentina does not fall within the terms of reference for these proceedings, as was indicated in the first[10] and second[11] submissions by Chile.

[9] See paragraphs 246, 247, 249 and 258 of the AB report.
[10] First written submission of Chile, paragraphs 58 to 63.
[11] Second written submission of Chile, paragraphs 182 to 195.

**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?**

No. To secure a minimum price, it is necessary to be aware of the actual transaction value or some supplementary information enabling an accurate estimate to be made by using an alternative price as a means of determining a level of protection sufficient to cover or exceed the minimum import price. This can be done by using administrative or market values equal to or lower than the lowest possible price for an actual commercial transaction. However, this is not sufficient to maintain a minimum price, for which purpose an operational mechanism is required to preclude the possibility of any particular shipment entering at a value lower than the minimum price. It is for this reason that the actual transaction value is usually employed, inasmuch as it serves effectively to prevent the entry of products below the minimum price since it is applied on an operation by operation basis.

Where the transaction value is not used to determine the customs duty required and the mechanism does not take account of a high frequency of application, administrative prices or extremely low reference prices are normally used to ensure attainment of the objective over a long period of time. This is because prices even lower than those used could appear in the course of application, thereby nullifying the desired effect.

Where the mechanism operates on a frequent application basis, weekly for example, sufficiently low comparison parameters, albeit within customary international price ranges, are used: in this case, it is sufficient to ascertain the lowest price for the period of application, since if commercial operations at lower prices are found to exist, this difference is rapidly adjusted in subsequent application of the measure.

Minimum prices are determined at local market level in units equivalent to the domestic price or at entry price level, which corresponds to a stage prior to entry into the local market. In any event, it is absolutely essential that the minimum price be determined in a market position that enables the necessary correction or compensation to be applied by means of measures (duties or taxes), so as to maintain the minimum price. It is for this reason that use is commonly made of the price on the market in which typical transactions in the product occur: the wholesale or consumer market. This ensures that that price, at the level of interest to the local market, is maintained.

Where the minimum price is fixed below the local market level, that is, at the entry price or c.i.f. price level, the mechanism does not necessarily apply a domestic price because there may, and normally do, exist differences in commercial operations which cause the final price within the country to be non-uniform for all traders or commercial operations. For example, differences resulting from economies of scale applied by enterprises, which enable the largest ones to secure lower freight costs, credit interest rates, storage and other credit associated with the import and market operation. In such cases, a minimum entry price or c.i.f. price can be secured, but not a minimum price at the level of the domestic market, which is what is normally of interest to countries.

The foregoing explains why minimum import prices are usually based on the actual transaction value: because the latter is the one most frequently applied (one for each commercial operation); and why they are fixed at domestic market level: because that is precisely where the minimum price is wished to be reflected.

In the case of Law 19.897, the bimonthly establishment of the duty does not serve to correct the value of imports and thereby to maintain a minimum price. The determination of the floor value at f.o.b. level makes that possibility even more remote, since substantial costs have to be incurred for the purpose of placing the product on the local market, most of which, such as freight costs and credit interest payments, for example, are beyond administrative control and are factors that frequently produce major economies of scale for importing companies. In this connection, low frequency of application and the use of f.o.b. values means that the current mechanism is unable to maintain an entry or local market price at c.i.f. level, since the specific duties correspond to an ordinary customs duty.

**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?**

The defining characteristic of a minimum import price is the impossibility for any commercial operation to be expressed in terms of a price lower than the established price.

The operation of a minimum import price in relation to the actual transaction value is the mechanism by which the minimum price can be guaranteed with absolute certainty; in fact, this is the perfect scenario, since every operation can be corrected independently, leaving no gaps that would impair the threshold value. This is in fact the basic characteristic.

Where the measure is indicative of a domestic market entry price, this would not necessarily be a defining characteristic of a minimum entry price, since the possibility of that price being genuinely indicative would depend on the mechanism applied. Indeed, if there are no mechanisms for adjusting the values of imports in order to approach or approximate the indicative price, the desired effect will not be achieved.

In other words, if an indicative price is determined and, at a particular point in time, a certain level of duty is required to obtain that price on the basis of existing import values, if that duty is not changed over a long period of time and the import prices vary, the entry values or prices will vary in line with trends in import or international prices.

In such circumstances, a mechanism is required that is capable of correcting the level of protection whenever import prices deviate or change level. That is to say, when there is a high frequency of changes in the duty, the most extreme example of which is its determination on a case-by-case basis when the value of each commercial operation is used.

**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 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?**

The Appellate Body held that the PBS was a measure similar to a variable import levy and/or a minimum import price. An important factor in arriving at this conclusion was the variability of duties, whereby two shipments entered at the same point in time could be subject to different duties.

Pursuant to Law 19.897, the Ministry of Finance decree fixes a specific duty or tariff rebate or provides for payment of the *ad valorem* duty only. Taking the example of the application of a specific duty, Ministry of Finance Decree 88, published in the Official Journal of 14 February 2005, provided for the payment of a specific duty of 0.0205 US$/kg. As a result, all imports of wheat and wheat flour

into Chile were subject to payment of the specific duty and to payment of the *ad valorem* tariff of 6 per cent between 16 February and 15 April.

Consequently, and inasmuch as this was an ordinary customs duty, if international prices rose, the entry price rose, and if international prices fell, the entry price also fell.

This was not the case under the PBS, where Customs on a weekly basis adjusted the reference price to the lowest price on the international markets, a fact which, in the AB's opinion, prevented domestic prices from following – or at least failed to guarantee their following – variations in international prices, even though they did not do so automatically.

**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.**

What the Panel offers for comment is only a part of paragraph 9 of the EC's statement at the recent meeting. Chile agrees with the EC's contention that the paragraph in question should be read in its entirety. In other words, Chile supports the fundamental point raised by the EC, namely that the GATT neither regulates nor precludes variation in the establishment of customs duties (provided that they do not exceed the level bound in the Schedule), that the GATT makes no reference to the predictability of the change in a customs duty (without prejudice to its appropriate publication) or to the frequency of the variation in the said customs duty, so that the question to be analysed is whether any of these situations could give rise to an inconsistency with the provisions of Article 4.2 of the Agreement on Agriculture. That is precisely the point to be kept in mind in relation to the EC's further argument, and it is this last part of the paragraph that the Panel separates for comment.

The Chilean measure contained in Law 19.897 and the Regulation thereto, which is an ordinary customs duty, possesses parameters that render determinable the establishment of specific duties (or rebates), which is to be done every two months, but this variation in no sense implies the configuration of any of the situations referred to in Article 4.2 of the Agreement on Agriculture.

**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.**

This is a public document, published by the Library of the Chilean National Congress, and it contains the opinions formulated by government authorities and parliamentarians in the legislative approval discussion process. In this connection, Chile would remind the Panel of what was stated by the WTO Appellate Body in *Japan – Alcoholic Beverages*:

> *"it is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish*

*legislative or regulatory intent. [...] This is an issue of how the measure in question is applied."*[12]

Chile has provided only one copy (Exhibit CHL-15) of this document since, as will be noted by the Panel, it is a voluminous document of more than 150 pages in Spanish, and it is not available as an electronic file.

**23. Can the Parties confirm whether Decree 401 of 15 June 2006 by the Ministry of Finance of Chile is the latest decree issued pursuant to the PBS.**

Pursuant to the last paragraph of Article 1 of Law 19.897, Article 5 of Decree 831 established the periods of validity of each supreme decree determining duties or rebates on wheat and wheat flour. Since the law came into effect, 16 decrees have been issued, the last one to have been published being Decree 401 of 15 June 2006, which will remain in force until 15 August 2006. However, pursuant to the provisions of that enactment, between 11 and 15 August it will be necessary to issue a new decree establishing the new duty or rebate, or neither of the two, to be applied during the period from 16 August to 15 October 2006.

**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?**

In paragraph 11 of its first written submission, Argentina states that various negotiations in 2004 and 2005 led "to an understanding which Chile later repudiated". This assertion by Argentina is incorrect. Moreover, Chile considers that any bilateral negotiation that produces a mutually agreed settlement in respect of a dispute already brought before the WTO can only be discussed within the Organization after the parties have notified the settlement to the DSB and the competent WTO councils and committees.

**FOR CHILE**

**47. The Panel has noted that edible vegetable oils have ceased to be subject to the PBS since the entry into force of Law No. 19.897 (see, for example, Argentina's first submission, paragraphs 8 and 22. Argentina's rebuttal submission, paragraph 317). Can Chile describe the trade regime applicable to imports of edible vegetable oils, after they were excluded from the PBS.**

A decision was taken, in keeping with Chile's trade liberalization policy, to restrict the application of Law 19.897 to wheat, wheat flour and sugar, thereby excluding all edible vegetable oils falling under Chapter 15 of the Harmonized Customs Tariff, products with regard to which the former system was already inoperative at the time of the change of law.

As of the entry into force of the new Law, imports of these products come under a general regime, that is to say, they are subject to a tariff of 6 per cent, with the exception of those from countries with which Chile has established tariff preferences, in which case the tariff is lower.

**48. Could Chile explain what the rationale is for setting the year 2014 as the date for the President to evaluate the modalities and conditions of application of the PBS.**

[12] *Japan – Alcoholic Beverages*, Appellate Body, Document WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R, pages 30 and 31.

Pursuant to Law 19.897, in 2014 the President of the Republic will evaluate the modalities and conditions of application of the Law, taking into consideration international market conditions, the requirements of the industrial, productive and consumer sectors and Chile's trade obligations at that date. The latter was key in determining the time-frame, mainly because of the effects of the tariff liberalization established under various bilateral agreements, such as the Free Trade Agreement with the US, a major wheat producer, whereby wheat and wheat flour will be subject to a zero tariff as of 2015. An analysis of the scenario of reduced border protection for wheat thus led to the conclusion that, at the levels fixed for 2014, the chances of specific duties being applied would be virtually nil or, were they to be applied, their effect would be marginal, meaning that the policy would in fact be non-operational.

**49. In paragraph 108 of its first submission, Chile argues that the level of protection granted by the PBS will be gradually reduced from 2007 onwards "culminating with the application of duties or rebates in 2014". Could Chile clarify the meaning of "culminate" *vis-à-vis* paragraph 4 of Article 1 of the aforementioned law, insofar as it states that "[i]n 2014, the President of the Republic shall *evaluate* the modalities and conditions of application of the price band system, taking into consideration international market conditions, the requirements of the industrial, productive and consumer sectors and Chile's trade obligations at that date." Please respond taking into account the statement of Argentina in paragraph 33 of its first submission, that "the floor and ceiling prices of the bands will be maintained, except for the fact that they have now been established – in principle – for 11 years, whereas under the previous system they were determined annually".**

Law 19.897 provides for the application of duties and rebates until 2014. The protection granted to wheat and wheat flour under current legislation therefore terminates at that date.

Furthermore, Article 1.4 of the Law states that, in 2014, the President of the Republic shall evaluate the modalities and conditions of application of the price band system in accordance with the factors specified in the Law.

In the light of these two provisions, the application of duties and rebates under current legislation terminates in 2014. If a decision is taken in 2014 to alter this situation, the President of the Republic will have to submit a draft law for approval by the Legislature; that is to say, for the measure to remain in place, specific legislation will have to be introduced on the issue. Such a measure would, in any case, be new.

Contrary to Argentina's assertions, Chile has no facts on which to affirm that Law 19.897 has been established "in principle" for 11 years, given that, in a country governed by the rule of law, such as Chile, the decisions of the Executive and the Legislature at that date cannot be anticipated, nor can there be any guarantee that the Law, as it exists today, will remain unchanged until that year. Chile can only state that, in its present form, the measure allows duties or rebates on amounts payable as duties to be fixed only up until 2014.

**50. Chile has asserted in paragraph 118 of its rebuttal submission that, under the present PBS, "the floor price is *not* an entry price, is *not* fixed on the basis of the internal price, is *not* linked with it, and is *not* fixed at a price above it" (emphasis added). Chile has stated what the price band floor is *not,* could it define for the Panel its understanding of what the floor price *is*?**

The band floor is one of the objective parameters established for the calculation of the tariff level for border protection for wheat and wheat flour. It may be used only on the dates on which such protection is to be determined, i.e., six times per year, and only if another of the objective parameters provided for in Law 19.897, namely the reference price, is lower.

As is stated in the documents submitted by Chile to the Panel, fixing and gradually lowering this value, known as the floor price, enables a maximum level of border protection, as permitted by the WTO for its Members, to be established. This would apply to both wheat and wheat flour in accordance with a pre-established schedule for purposes of transparency and predictability. A trader monitoring international prices - on the basis of which the reference price is determined - could therefore estimate in advance the level of protection his product would face upon entering the Chilean market as from the year in which these values were fixed. It should be pointed out that since Law 19.897 entered into effect, specific duties have only been established for a limited period; most of the time goods are subject only to the 6 per cent *ad valorem* duty, with rebates being granted the rest of the time.

**51. Could Chile comment on the following section of Law No. 19.897 which describes how the system as a whole is to be re-assessed at the end of the first implementation period through 2014, and the factors to be taken into account:**

> **"In 2014, the President of the Republic shall evaluate the modalities and conditions of application of the price band system, taking into consideration international market conditions, the requirements of the industrial, productive and consumer sectors and Chile's trade obligations at that date." (Emphasis added).**

**In view of the above, would this mean that, despite Chile's assertion that the floor price "is not fixed on the basis of the internal price", *internal market conditions* are indeed among the essential factors that are, *by law*, considered by the Government of Chile in fixing all the required methodological PBS parameters, including the floor price?**

No. The factors specified in Article 1.4 are not related to the way in which Law 19.897 is structured at present, rather they refer to the conditions to be evaluated by the President of the Republic when the application of duties and rebates terminates in 2014.

None of these characteristics comes under the parameters currently provided for in Law 19.897. This Law pertains to international market conditions, with reference to existing distortions in such markets and the outcome of WTO multilateral negotiations. The requirements of the industrial, productive and consumer sectors are related to how the protection afforded under Law 19.897 affects the various economic agents. Finally, Chile's trade obligations at that date relate to the fact that Chile has signed a number of trade agreements which could have an impact on wheat and wheat flour protection.

**52. Can Chile explain the nature and the parameters on the basis of which the floor and ceiling of the band were determined. How were the threshold figures of US$128 and US$148 eventually determined?**

These values were determined in accordance with Law 19.897, which establishes that "the values considered shall be the floor and ceiling prices used for wheat and sugar in the drafting of Chilean Ministry of Finance Exempt Decrees Nos. 266 and 268, published in the Official Journal of 16 May 2002, in United States dollars f.o.b. per tonne".

Accordingly, the f.o.b. equivalents were determined on the basis of the floor and ceiling prices provided for in Decree No. 266 of May 2002, expressed at import cost level, by deducting all import costs applicable to an ordinary trading transaction at the date of entry into force of the Law (second half of 2003).

**53. Could Chile elaborate on how the fact that the price band floor and ceiling have been set at US$128 and 148 leads to compliance with the DSB's rulings and recommendations in the original case.**

The reference value parameters established by the Chilean measure as the floor (US$128) and ceiling (US$148) prices are an objective element, *inter alia*, for determining the ordinary customs duty, as a specific duty or a rebate, as the case may be. These parameters are fully consistent with the recommendations adopted by the DSB in this dispute. In this connection, special consideration should be given to the fact that, in the context of those recommendations, paragraph 261 of the Report of the Appellate Body states that, in assessing the PBS, "no one feature is determinative of whether a specific measure creates intransparent and unpredictable market access conditions". In the same paragraph, the AB declares that it reached its conclusion "on the basis of the particular configuration and interaction of all these specific features" of the PBS. This necessarily leads to the conclusion that the isolated analysis of a single parameter of the Chilean measure is inappropriate; rather, this measure must be assessed with regard to the configuration and interaction of all of its features in relation to its consistency with the specific and pertinent obligations under the WTO Agreements at issue in this dispute.

**54. Could Chile comment on Argentina's statement in paragraph 41 of its rebuttal submission that the floor and ceiling of the band "are two figures chosen arbitrarily and without the use of any criterion. They could be CIF, FOB or ex-works. It is simply not known and there is no way of knowing, unless Chile were to make more transparent its reasons for setting the floor and ceiling of the band at US$128 and US$148 per tonne, respectively". (Original emphasis).**

Firstly, the origin of these amounts has been broadly explained in the Chilean submissions. Furthermore, in Chile's opinion, the said paragraph 41 is based on an incorrect interpretation of the recommendations and rulings of the DSB. Argentina claims that the values are not f.o.b. values in spite of the fact that the Law states this to be the case. Chile has shown that the values used are f.o.b. values and has demonstrated how they operated under Law 19.897.

Moreover, Argentina takes the transparency requirement established by the AB to extremes which, if accepted, would render virtually all ordinary customs duties WTO-inconsistent. As previously noted, the AB found a lack of transparency and predictability in certain features of the PBS, which made it a measure *similar* to those listed in footnote 1 to Article 4.2. of the Agreement on Agriculture.

To maintain that the transparency requirement applies in the terms set out by Argentina would mean that almost all *ad valorem* duties would not be transparent and would therefore cease to be ordinary customs duties upon being characterized as measures similar to those in the above-mentioned footnote 1. In point of fact, few, if any, laws state reasons for the establishment of an *ad valorem* duty. On the basis of Argentina's argument, we could maintain that such tariffs are "figures chosen arbitrarily and without the use of any criterion".

However, this is not the case for the obligations under Article II of the GATT. It would occur to very few countries, as Argentina claims, that these *ad valorem* duties would be WTO-inconsistent, given that the amount established by Members is one which is "simply not known and there is no way of knowing", unless the Parties had made "more **transparent** [their] reasons for setting" it.

**55. Could Chile explain the rationale behind the introduction of a multiplier consisting of 1 plus the generally applicable *ad valorem* duty, for the purposes of calculating the specific duty, in cases where the reference price falls below the lower threshold price.**

In order to determine the specific duty under the PBS, consideration was given to a series of fixed and variable costs involved in an ordinary import process, including the general *ad valorem* tariff. To make determination of the duty more transparent and predictable, Law 19.897 excluded all these costs, other than the general tariff (given that this is a known value), from the calculation of the duty. The following formula for calculating the specific duty was therefore established in the Regulation to the Law:

$$SD = (1+ 0.06) * (FOB_{floor} – FOB_{rp})$$

It should be pointed out that, on the basis of this formula, it follows that the specific duty under current Chilean policy is less for any reference price, given that its determination includes only the general *ad valorem* tariff and excludes all the other variable costs which formed part of the PBS.

For a more detailed explanation of this formula, see the reply to Question 5.(c).

**56. Could Chile explain what the rationale is for setting the adjustment factor at precisely 0.985.**

As has already been explained[13], the price band system was modified in response to a broad political consensus, as well as an agreement between the various actors involved, with regard to the level of protection which should be granted to wheat and wheat flour in Chile.

Pursuant to this agreement, Chile maintained a level of protection in addition to the *ad valorem* tariff on products under the bands, allowing producers to be protected from distortions in international markets, without overprotecting them, on the condition that such protection would be reduced and the market fully liberalized on a gradual basis. Moreover, the decision to do this has also been incorporated in the negotiations relating to some of Chile's regional trade agreements.

Additional protection was consequently calculated for the sector up to 2014 and a factor enabling a gradual reduction of protection was applied. It may be added, by way of background information, that, in line with the historical average prices for wheat, the band is likely to be inoperative by 2014 since it will be lower than international prices.[14]

**57. Is Chile arguing in section V.1 of its first submission (paragraphs 121-132), that the reason why the floor of the price band may not be considered as a minimum import price is that it has now been established on a FOB basis? Does that also mean that the reason why the original PBS was found to be similar to a minimum import price was because the floor of the price band was established on a CIF basis?**

One feature of Law 19.897 is that the parameter used is expressed on an f.o.b. basis, but this is neither the only nor the most relevant one. Law 19.897 provides for the establishment of specific duties which correspond to ordinary customs duties and the existence of parameters supporting their determination does not alter this situation.

With regard to the PBS, the band floor price was fixed at domestic market level as an import cost directly comparable to the domestic price, not on a c.i.f. basis. This is one of the features of minimum import prices, but was not by itself sufficient to justify a finding that the PBS was similar to a minimum import price.

[13] Paragraph 28 of Chile's oral statement.
[14] See Response No. 48 to the questions by the Panel.

Other features include the non-transparent method of calculating the reference price, the determination of the reference price on a weekly basis and the fact that this price is fixed on the basis of the lowest price in the markets of concern. To this can be added the absence of public and official documents containing definitions of the markets of concern and of the reference price itself and, finally, the features of lack of transparency and predictability.

**58. Can Chile respond to Argentina's assertion during the substantive meeting with the Panel (see paragraph 33 of the written version of Argentina's oral statement) that "when specific duties are applied the entry price is *always* above US$128 per tonne". If it does not agree with this statement, can Chile provide evidence of actual situations under the amended PBS when imports of wheat or wheat flour have entered the market at prices lower than the lower threshold of the price band.**

In paragraph 33, Argentina states that it has shown mathematically and empirically that the specific duties resulting from Law 19.897 tend to elevate the entry price of imports above US$128. Argentina goes on to assert that when specific duties are applied entry prices are always above US$128, as allegedly confirmed by Chile.

Firstly, Argentina's mathematical demonstration (see Section C.I.2.1. of the First Written Submission by the Republic of Argentina) only reveals that, given that the floor price is determined on an f.o.b. basis and the entry price is calculated on the basis of a c.i.f. value (corresponding to an f.o.b. price plus international freight and insurance) and total tariffs, the likelihood of the entry price exceeding the floor price is very high. Clearly, this is true even without the application of tariffs (either *ad valorem* or specific) being taken into consideration.

Secondly, the actual data on the c.i.f. prices of imports from Argentina for the period from 16 December 2003 to 15 December 2005 confirm the above (see Exhibit CHL-16). Throughout the period, the c.i.f. prices are between 22 and 107 per cent higher than the floor price (US$128). Given that the entry prices correspond to the c.i.f. prices, plus tariffs, it is clearly very difficult for them to fall below US$128, irrespective of whether or not specific duties are applied.

Nevertheless, and as shown mathematically by Argentina, the unlikely but not impossible situation could arise whereby, once a specific duty has been established, international prices fall substantially, which in turn is reflected in c.i.f. prices low enough to result in entry prices of below US$128.

**59. In paragraphs 161 to 163 of its first submission, Chile argues that "traders have information that enables them to predict wheat price levels in the short and medium terms, and hence information to foresee the level of specific duties that might be levied on wheat imports to Chile in the near future" and that "[i]t is practically impossible for wheat traders not to know or not to use" information on trading in financial derivatives on wheat, which include at least futures contracts, from commodity exchanges in the US and Argentina, in order to conduct their businesses. Would it be right then to presuppose the intervention of professional wheat traders in every transaction involving the importation of wheat into Chile? If so, does this fact have any bearing in conditions of market access into Chile for imports of wheat and wheat flour?**

As has been noted throughout this process, information on the conditions of application of duties and rebates for wheat and wheat flour is public and easily accessible to any Chilean citizen or foreigner, whether or not professionally engaged in foreign trade. The same is true for information on the payment of *ad valorem* duties, customs provisions, certification requirements and other issues related to import trade as such. Anyone wishing to know the conditions of access to the Chilean market for wheat and wheat flour can therefore have recourse to public and easily accessible sources

of information, as well as being able to carry out all the procedures necessary for a foreign trade operation directly.

Nevertheless, in Chile, as in most countries, international goods transactions are conducted by professionals who obviously have a better and more thorough command of all the elements involved in import and export operations. This activity, the world over, implies an awareness of a considerable amount of background information, in addition to the ordinary duties themselves. The case of wheat and wheat flour in Chile is no exception.

The fact that transactions are conducted by "professionals" cannot therefore be interpreted as being a consequence of the conditions of application of wheat and wheat flour tariffs.

**60. In paragraph 72 of its rebuttal submission, Chile stated that "[t]he reference prices now correspond to f.o.b. prices on the two markets of most concern for Chile … In the last six years (2000-2006) 40 per cent of Chilean wheat imports came from the United States and 31 per cent from Argentina." In this regard, can Chile respond to Argentina's assertion during the substantive meeting with the Panel (see paragraph 54 of the written version of Argentina's oral statement) that, "[a]lthough 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".**

With regard to Argentina's assertions in paragraph 54 of the written version of its oral statement, we wish to clarify the following:

- The information submitted by Chile on average wheat imports for the period 2000-2006, that contained in Argentine Exhibit ARG-31 on imports in 2004 and 2005, and that submitted by Chile in Exhibit CHL-13 on imports in 2002 and 2003 all originate from the same source.

- The source of this information is www.odepa.gob.cl.

As was indicated by Chile in its oral statement (see paragraph 59 of the written version), the markets used to establish the reference prices meet two conditions:

- Firstly, two markets are recognized worldwide as reference markets for the international price of wheat of the category in question (i.e. wheat classified under tariff heading 1001.90). These apparently also serve as reference markets for the Argentine Government. Exhibit CHL-12 contains a table published by Argentina's Secretariat of Agriculture, Livestock, Fisheries and Food (*Secretaría de Agricultura, Ganadería, Pesca y Alimentos*, SAGPyA, www.sagpya.gov.ar) with information for its users on international prices and entitled: "Trends in the external prices of the main cereals" (*Evolución de los precios externos de los principales granos*). The prices "FOB GOLFO" and "FOB PTOS. ARG." ("f.o.b. Gulf" and "f.o.b. Argentine ports") are quoted for wheat.

- Secondly, they correspond to wheat from two of the markets of most concern to Chile. In point of fact, in the two years prior to the entry into force of Law 19.897, the period taken into consideration when developing the modifications to the PBS, they were actually the most relevant markets. Even if a longer price series is considered (2000-2006), the figures show that they continue to be the most relevant markets.

The existence of a number of wheat-exporting countries (Australia, Canada, France, *inter alia*) and, at the same time, of several varieties of wheat falling under the classification 1001.9000 does not make the reference markets used or varieties of wheat selected any less representative. Given that wheat is a commodity, and bearing in mind differences in quality, the international prices of wheat from a number of sources are unquestionably related.

**61. In paragraph 41 of its first submission, Argentina argues that the amended regulations do not specify which relevant port will be considered in order to determine the relevant FOB "Argentine port" prices used to calculate the reference prices. In paragraph 132 of its rebuttal submission (see Exhibit ARG-4), Argentina noted the existence of prices for at least four different ports (*Buenos Aires, Bahía Blanca, Quequén, and Rosario*). Chile has responded in paragraph 77 of its rebuttal submission that it "did not find any justification for picking out any one of the ports in particular, particularly as there were official figures published by the Government of Argentina". Could Chile:**

**(a) Provide any evidence that demonstrates the way in which market information from Argentina is actually used for the purpose of calculating the reference price;**

The source of information for "*Trigo Pan* Argentine Port" (*Trigo Pan Puerto Argentino*) prices, also known as the "Official Price of *Trigo Pan*" (*Precio Oficial del Trigo Pan*), is the Secretariat of Agriculture, Livestock, Fisheries and Food (SAGPyA) (http://www.sagpya.mecon.gov.ar/), under Argentina's Ministry of the Economy. The Office for Agricultural Research and Policy (*Oficina de Estudios and Políticas Agrarias*, ODEPA), under the Chilean Ministry of Agriculture, takes these prices directly from the SAGPyA website on a daily basis.

With regard to differences in the names of price series, we would make the following points:

- The SAGPyA publishes daily and monthly reports on these prices. Chile has already submitted, in Exhibit CHL-14, two monthly series from the SAGPyA website which contain the same information, albeit with different series names.

- The Directorate of Agrifood Markets (*Dirección de Mercados Agroalimentarios*, DIMEAGRO), under the SAGPyA, publishes daily official prices under the name "*Trigo Pan* f.o.b. Argentine Ports" (*Trigo Pan f.o.b. Puertos Argentinos*) (see Exhibit CHL-17).

- The Buenos Aires Cereals Exchange (*Bolsa de Cereales de Buenos Aires*) publishes the daily prices "f.o.b. Argentine Ports" (*f.o.b. Puertos Argentinos*), the source of information for which is the SAGPyA. Exhibit CHL-17 also contains information from the Exchange's website. The information on wheat in the table is identical to that set out in Argentine Exhibit ARG-32.

Chile considers that there is enough evidence to show that the price series "*Trigo Pan* Argentine Port" (*Trigo Pan Puerto Argentino*) and "Official Price of *Trigo Pan*" (*Precio Oficial del Trigo Pan*) are identical.

**(b) Clarify whether the use of an "average of different ports" for the determination of the reference price, in the case of wheat prices from Argentina, is a mandatory feature of the PBS and, if so, identify the relevant legal basis.**

There is no legal obligation to use an average of different ports as a reference price. Article 8 of Regulation 831 provides that:

> "The market of most concern for wheat, during the period of application of duties and rebates from 16 December to 15 June of the following year, shall be that of *Trigo Pan Argentino* and the prices shall correspond to the daily prices quoted for that product f.o.b. Argentine port … ".

In the context of the changes required to establish duties and rebates in a transparent and predictable manner, it was necessary to select a reference price reflecting the level of the f.o.b. prices of *Trigo Pan Argentino*. Chile considered that the prices which have been published by the Argentine Government for more than 30 years under the title "*Trigo Pan* Argentine Port" (*Trigo Pan Puerto Argentino*), nowadays also entitled "Official Prices of *Trigo Pan*" (*Precios Oficiales Trigo Pan*), constituted accurate data on this level, which originated, moreover, from a reliable source. This price series has traditionally represented the price level at various Argentine ports.

**62. Could Chile comment on Argentina's statement in paragraph 66 of its first submission in the sense that "[s]o far, the bimonthly decrees appear not to indicate the reference price calculated for each period".**

Argentina's statement appears to be the result of its failure to appreciate the changes introduced by Chile. As has repeatedly been pointed out, under Law 19.897, the reference price is the price used by the administrative authority to determine the framework of protection applicable at the border, protection which is currently determined by a decree establishing a specific duty or a rebate on the *ad valorem* tariff, payable on all imports into Chile. Therefore, as distinct from the situation under the PBS, under Law 19.897 the publication of the reference price is of no relevance as far as the importer is concerned.

In fact, as also pointed out, under the PBS, the administrative authority established the specific duty (or rebate) once a year for a given price series and that corresponding to each import transaction was determined by the commercial operator on the basis of the tables of prices and associated duties already mentioned, in accordance with the date of shipment of the goods, and the reference price published by customs. Now, all that has been replaced, as appropriate, by a specific duty in dollars per kilo or a rebate in dollars per tonne, applied at the border together with the *ad valorem* tariff.

**63. Law 19.897 states that the FOB reference price "shall consist of the average of the daily international prices … recorded in the most relevant markets over a period of 15 calendar days … " Can Chile explain the way in which these average prices are obtained. Does Chile transform these daily averages into monthly averages? If so, how is this transformation done? By using weighted averages of the daily prices or simple averages? Can Chile provide evidence to support its response.**

As noted in Chile's Second Written Submission (paragraph 73), the sources of information are:

- For Soft Red Winter No. 2 wheat, the Gulf f.o.b. price published by the Chicago Exchange (http://www.cbot.com/)

- For *Trigo Pan*, f.o.b. Argentine port, the price (also known as the "Official Price"), published by the Secretariat of Agriculture, Livestock, Fisheries and Food (http://www.sagpya.mecon.gov.ar/).

ODEPA records these prices daily. In addition, since 1975, ODEPA has published an historical series of monthly prices for both products on its web page (www.odepa.gob.cl).

The reference price for each period of application is the average of the daily prices recorded on the previous 15 calendar days reckoned retrospectively from the 10th day of the month of publication of the corresponding decree. In making the calculation, days on which no figures were recorded (weekends and public holidays) are disregarded.

The daily prices considered are:

- During the six-month period from 16 June to 15 December: Soft Red Winter No. 2 wheat

- During the six-month period from 16 December to 15 June: *Trigo Pan*, f.o.b. Argentine port (also known as the "Official Price")

It is a question of a simple average of daily prices. There are no transformations of any kind.

For further clarification concerning how the calculation is made, Exhibit CHL-16 can be revised using the information requested in question 73. For example, to determine the amount of the rebates during the period from 16 February 2005 to 15 April 2005, the daily price data from 27 January 2004 to 10 February 2005 were used:

| Day | Date | *Trigo Pan Argentino* |
|---|---|---|
| | | f.o.b. US$/tonne |
| 1 | Tuesday 27/ January/ 2004 | 162 |
| 2 | Wednesday 28/ January/ 2004 | 158 |
| 3 | Thursday 29/ January/ 2004 | 156 |
| 4 | Friday 30/ January/ 2004 | 154 |
| 5 | Saturday 31/ January/ 2004 | - |
| 6 | Sunday 01/ February/ 2004 | - |
| 7 | Monday 02/ February/ 2004 | 154 |
| 8 | Tuesday 03/ February/ 2004 | 154 |
| 9 | Wednesday 04/ February/ 2004 | 153 |
| 10 | Thursday 05/ February/ 2004 | 153 |
| 11 | Friday 06/ February/ 2004 | 153 |
| 12 | Saturday 07/ February/ 2004 | - |
| 13 | Sunday 08/ February/ 2004 | - |
| 14 | Monday 09/ February/ 2004 | 153 |
| 15 | Tuesday 10/ February/ 2004 | 153 |
| | | |
| | Average | **154.82** |

The simple average of the 15 days with data amounts to US$154.82 per tonne. Therefore the rebate is equal to US$154.82 less US$148, multiplied by 1.06. The result of the operation is a rebate of US$7.23 per tonne.

**64. In paragraph 142 of its first submission, Chile argues that a border measure which maintains a stable relative price allows for the transmission of external variations to the domestic market, "albeit to a different extent". What would be the permissible "different**

**extent" which would allow for sufficient transmission of prices so that a market would not be considered to be insulated?**

A simple way of assessing the relationship between two prices is to divide one by the other. In this case, for example, by calculating the ratio of the domestic price of wheat in Chile to the f.o.b. price for Argentine exports.

$$\text{Domestic to international price ratio} = \frac{\text{Price of wheat in Chile}}{\text{Price f.o.b. Argentina}}$$

Bearing in mind that the domestic price is affected by other factors, such as the seasonal supply at harvest time and changes in freight costs, the ratio cannot be stable over each calculation period. However, its behaviour should be characterized by a relatively small deviation from the average.

This can be measured by calculating the coefficient of variation of the data series, i.e., the standard deviation of the series divided by the mean.

Even though the maximum value which a coefficient of variation should have for the series to be stable is not perfectly definable, that value should be as low as possible.

In comparing the Chilean price with the Argentine export price, it would be reasonable to conclude that if the variability was not more than 15 per cent then prices were being satisfactorily transmitted, bearing in mind the various other factors that affect the domestic price and the fact that there are also other markets supplying the product to Chile whose prices do not necessarily behave in the same way as Argentine prices.

For greater clarity, it should be pointed out that the greater the distance between the prices compared the greater the possible variability, given that they will be separated by greater intermediation costs. In other words, the ratio of a domestic price to an f.o.b. price may be expected to be more variable than the ratio of a domestic price to a c.i.f. price.

During the period from January 2004 to June 2006, the coefficient of variation (or variability about the mean) of the ratio of the domestic price of wheat in Chile to the f.o.b. price of Argentine wheat was 9.5 per cent.

The coefficient of variation of this ratio between January 2000 and December 2003 was 16.7 per cent.

Although it is hard to say what would be a reasonable level of variability that would confirm the presence of price transmission, there can be no doubt that during the period of validity of Law 19.897 the variability has been reduced and low enough to be explicable in terms of other factors and the existence of other markets that also supply wheat for Chile.

| **Ratio of the price of wheat in Chile to the export price for Argentine wheat** | | | |
|---|---|---|---|
| Month | F.o.b. price Argentina | Chilean domestic price | Price ratio |
| Jan-00 | 99.29 | 176.52 | 1.78 |
| Feb-00 | 102.43 | 176.64 | 1.72 |
| Mar-00 | 106.22 | 190.93 | 1.80 |
| Apr-00 | 113.72 | 193.54 | 1.70 |
| May-00 | 126.29 | 188.51 | 1.49 |

| **Ratio of the price of wheat in Chile to the export price for Argentine wheat** | | | |
|---|---|---|---|
| Month | F.o.b. price Argentina | Chilean domestic price | Price ratio |
| Jun-00 | 129.05 | 187.45 | 1.45 |
| Jul-00 | 130.43 | 185.30 | 1.42 |
| Aug-00 | 128.59 | 184.49 | 1.43 |
| Sep-00 | 127.45 | 184.63 | 1.45 |
| Oct-00 | 131.38 | 184.61 | 1.41 |
| Nov-00 | 130.14 | 174.75 | 1.34 |
| Dec-00 | 115.32 | 157.51 | 1.37 |
| Jan-01 | 117.18 | 162.61 | 1.39 |
| Feb-01 | 124.60 | 171.12 | 1.37 |
| Mar-01 | 122.05 | 164.48 | 1.35 |
| Apr-01 | 124.28 | 163.09 | 1.31 |
| May-01 | 131.86 | 163.35 | 1.24 |
| Jun-01 | 130.50 | 162.03 | 1.24 |
| Jul-01 | 125.05 | 160.02 | 1.28 |
| Aug-01 | 122.96 | 161.27 | 1.31 |
| Sep-01 | 119.65 | 155.79 | 1.30 |
| Oct-01 | 126.00 | 145.95 | 1.16 |
| Nov-01 | 120.18 | 151.46 | 1.26 |
| Dec-01 | 108.94 | 153.36 | 1.41 |
| Jan-02 | 112.05 | 152.33 | 1.36 |
| Feb-02 | 116.68 | 155.07 | 1.33 |
| Mar-02 | 114.68 | 159.12 | 1.39 |
| Apr-02 | 123.10 | 163.23 | 1.33 |
| May-02 | 135.73 | 163.13 | 1.20 |
| Jun-02 | 151.26 | 158.45 | 1.05 |
| Jul-02 | 168.77 | 156.52 | 0.93 |
| Aug-02 | 179.91 | 160.73 | 0.89 |
| Sep-02 | 195.71 | 164.83 | 0.84 |
| Oct-02 | 186.14 | 163.18 | 0.88 |
| Nov-02 | 141.91 | 168.94 | 1.19 |
| Dec-02 | 129.58 | 164.06 | 1.27 |
| Jan-03 | 143.73 | 170.40 | 1.19 |
| Feb-03 | 147.00 | 167.81 | 1.14 |
| Mar-03 | 151.75 | 170.70 | 1.12 |
| Apr-03 | 149.50 | 176.30 | 1.18 |
| May-03 | 162.52 | 176.00 | 1.08 |
| Jun-03 | 160.70 | 173.92 | 1.08 |
| Jul-03 | 159.27 | 176.84 | 1.11 |
| Aug-03 | 164.25 | 176.53 | 1.07 |
| Sep-03 | 160.41 | 184.15 | 1.15 |
| Oct-03 | 165.45 | 190.34 | 1.15 |
| Nov-03 | 169.65 | 191.44 | 1.13 |
| Dec-03 | 163.39 | 191.56 | 1.17 |
| Jan-04 | 162.50 | 205.58 | 1.27 |
| Feb-04 | 150.80 | 187.55 | 1.24 |
| Mar-04 | 154.61 | 182.30 | 1.18 |
| Apr-04 | 163.11 | 182.23 | 1.12 |

| Ratio of the price of wheat in Chile to the export price for Argentine wheat | | | |
|---|---|---|---|
| Month | F.o.b. price Argentina | Chilean domestic price | Price ratio |
| May-04 | 161.25 | 177.19 | 1.10 |
| Jun-04 | 147.57 | 180.28 | 1.22 |
| Jul-04 | 139.48 | 183.73 | 1.32 |
| Aug-04 | 125.52 | 184.63 | 1.47 |
| Sep-04 | 127.41 | 175.22 | 1.38 |
| Oct-04 | 124.50 | 179.97 | 1.45 |
| Nov-04 | 117.05 | 165.91 | 1.42 |
| Dec-04 | 112.11 | 160.37 | 1.43 |
| Jan-05 | 107.62 | 163.87 | 1.52 |
| Feb-05 | 115.75 | 163.59 | 1.41 |
| Mar-05 | 132.18 | 159.56 | 1.21 |
| Apr-05 | 137.57 | 168.92 | 1.23 |
| May-05 | 137.48 | 177.38 | 1.29 |
| Jun-05 | 136.24 | 183.07 | 1.34 |
| Jul-05 | 144.86 | 186.79 | 1.29 |
| Aug-05 | 142.14 | 195.72 | 1.38 |
| Sep-05 | 134.18 | 191.37 | 1.43 |
| Oct-05 | 135.20 | 189.65 | 1.40 |
| Nov-05 | 136.77 | 190.72 | 1.39 |
| Dec-05 | 131.37 | 200.49 | 1.53 |
| Jan-06 | 136.23 | 202.37 | 1.49 |
| Feb-06 | 141.65 | 206.18 | 1.46 |
| Mar-06 | 139.45 | 207.95 | 1.49 |
| Apr-06 | 142.11 | 213.29 | 1.50 |
| May-06 | 160.67 | 209.95 | 1.31 |
| Jun-06 | 183.71 | 203.09 | 1.11 |
| Source: ODEPA (www.odepa.gob.cl) | | | |

**65. Can Chile comment on the graph presented by Argentina as Exhibit ARG-35 during the substantive meeting with the Panel, according to which "when international prices fall, specific duties rise" (see paragraph 69 of the written version of Argentina's oral statement during the substantive meeting with the Panel).**

The graph presented by Argentina in Exhibit ARG-35 contains two curves: the reference price index curve and the specific duty index curve, for the period from 1 November 2004 to 25 April 2005. The graph does not include actual international prices for that period. Accordingly, Chile cannot agree with the statement "when international prices fall, specific duties rise" made by Argentina in connection with this graph.

The graph confirms that, in fact, when the reference price falls below US$128, a specific duty is applied, in accordance with a pre-established schedule. It also confirms that the greater the fall, the higher the specific duty applicable. Therefore, what can be stated is that, regardless of the level of the international prices prevailing during the period in question, specific duties amounting to US$14.3 per tonne were collected between 16 December 2004 and 15 February 2005 and specific duties amounting to US$20.5 per tonne between 16 February 2005 and 15 April 2005.

**66. Chile has cited the case of "seasonal tariffs" and "entry prices" in support of its arguments relating to "overcompensation" (see, for example, paragraphs 51 and 94 of its**

**rebuttal submission). Can Chile confirm whether it reserved its right in its WTO Schedule to apply seasonal tariffs in respect of wheat and wheat flour. How does Chile justify the fact that the applied duties may potentially change six times in the course of any 12-month period, if, unlike some other WTO Members, it has not reserved the right to do so in its Schedule?**

Chile's tariff commitment for wheat and wheat flour in the Uruguay Round (UR) was to reduce the tariff of 35 per cent previously bound to 31.5 per cent. Nevertheless, in Chile, as in many other countries, the applied tariffs are lower than the WTO bound levels. In the case of wheat and wheat flour, it was determined that they would receive protection additional to that provided by the general *ad valorem* tariff, which is well below 31.5 per cent, but still within the bound level. The tariffs applied by Chile to wheat and wheat flour may, in fact, change six times a year, but they may never exceed Chile's bound tariff under the WTO.

In the UR there was no obligation to "reserve a right" subsequently to change the tariffs if those changes are made within the bound levels. Therefore, there was no possibility of Chile's reserving a right of this kind. Countries are at liberty to set the tariff levels they consider appropriate and to change them, provided that they apply ordinary customs duties and the bound level is respected. The duties and rebates resulting from Law 19.897 are ordinary customs duties.

**67. Could Chile comment on Argentina's argument in paragraphs 97, 125-158 and 185 of its first submission, that the specific duties resulting from Chile's PBS tend to overcompensate for falling world market prices when the reference price is set below the lower threshold of the price band, elevating the entry price of imports above the band floor. The Panel has noted Chile's comments in paragraphs 49-51 of its rebuttal submission. Is the Panel correct in understanding that Chile is acknowledging that this "overcompensation" may occur, and in fact has occurred, but that it is limited in time?**

Chile does not acknowledge the existence of compensation or overcompensation in the application of the duty or rebate to wheat and wheat flour imports. Compensation consists in establishing a tariff that makes it possible to achieve a certain level for a specific price. In that case, overcompensation would mean that the proceeds of the application of a tariff would exceed that level. Law 19.897 establishes a duty or a rebate and not a mechanism designed to "compensate" for changes in the value of imports or the change in international prices.

What Chile does believe and acknowledge is that whenever customs duties are modified, there is a change in the total tariff charge affecting all imports, which increases when duties rise and decreases when they fall or when a rebate is applied. These differences also arise when countries change their tariffs, but do not constitute compensation or overcompensation or undercompensation, but merely a new tariff charge which may be higher or lower than that which previously existed.

**68. Can Chile respond to Argentina's assertion during the substantive meeting with the Panel (see paragraphs 40 and 41 of the written version of Argentina's oral statement) that, while overcompensation may take place at the beginning of the two-month period, it "inevitably taints the rest of that period" because "the level of duties and the entry price after that moment will be affected by the original overcompensation".**

Chile has shown that in no circumstances do the effects produced by a change in the tariffs in force constitute or take the form of compensation. Therefore, there is no possibility of "overcompensation" and Argentina's statement does not make sense.

**69. In response to Argentina's arguments regarding "overcompensation", Chile has stated in paragraph 51 of its rebuttal submission that the situation described by Argentina would be "exactly the same if we consider what happens when an *ad valorem* duty changes", adding that**

**this would be "even clearer in countries with seasonal tariffs, where the protection changes (rises or falls) on the day that the tariff changes". Is Chile in some manner linking the functioning of the PBS to the way in which seasonal tariffs work?**

The similarity between the duties and rebates established under Law 19.897 and seasonal tariffs is that in both cases, within the same calendar year, there are changes in the levels of protection. It was only in this sense that Chile used seasonal tariffs as an example.

**70. In Section II.5 of its first submission (paragraphs 40-45), Chile has referred to the principle of legality of taxation within its domestic legal system. Could Chile elaborate on its arguments in this regard? Is Chile arguing that it has experienced difficulties to comply with the DSB's rulings and recommendations in the original case that may be explained because of limitations in its domestic law? If not, please explain the relevance of the section identified above.**

No. Chile has not experienced difficulties in complying with the DSB's rulings and recommendations; on the contrary, it has amended its legislation to make it fully consistent with its WTO obligations.

The reference to the principle of legality of taxation was intended to facilitate understanding of the changes introduced by Chile and goes to the heart of the paradox posed by the present dispute.

If Chile had amended the PBS by giving the administrative authority the power to establish specific duties or to increase the *ad valorem* duty at its discretion, as happens in many legal systems, we would be unlikely to be facing the present proceeding, as long as the bound tariff rate was not exceeded.

However, in Chile, under the Constitution, it is not possible for the administrative authority to establish specific duties arbitrarily; instead the institution, modification and abolition of taxes must be determined by law.

This explains why, although under Law 19.897 the PBS was modified by establishing a specific duty, the law also had to take into consideration all the parameters necessary for the administrative authority (the Ministry of Finance) to be able to determine the amount of that duty.[15]

Under the present rules, the parameters no longer form part of a scheme or formula that provides for automatic and continuous variability, as under the PBS; instead parameters such as reference, floor and ceiling prices and markets of concern are only used by the authority to determine the amount of the specific duty applicable to imports.

Curiously, on the basis of the Appellate Body's conclusions, Argentina applies the transparency and predictability requirements to all the parameters considered by Chile, although the omission of those parameters would have brought Chile into full compliance with the rulings and recommendations of the DSB.

**71. Can Chile confirm whether it has reserved the right in its WTO Schedule to apply the Special Agricultural Safeguard (SSG, i.e. Article 5 of the Agreement on Agriculture), which is an exception to Article 4.2 of the Agreement on Agriculture. If it has not reserved such right,**

[15] Another possibility would have been to establish the protection additional to the *ad valorem* tariff directly by law, but as already noted the price bands are intended to correct the distortions on the international markets and not to overprotect the domestic productive sector, a possible consequence of establishing protection by law due to the greater rigidity as regards modification.

**can Chile justify the fact that the applied duties are calculated based on a scheme which would appear to be more *flexible* and *permissive* than Article 5 in many respects, since it:**

**(a) Is not designed to respond to surges of imports or price falls only, as in the case of the SSG provisions, but has a "stabilization" objective;**

**(b) Compensates for more than the full difference between a reference price and a price floor, due to the application of a multiplier in the price-gap formula; whereas the remedy foreseen under the SSG is calculated based on a degressive schedule of cumulative additional duties;**

**(c) Allows Chile to modify trigger factors six times a year, whereas the trigger price under SSG provisions is fixed and unchanging (linked to the 1986-88 base period);**

**(d) Is not subject to prior notice, whereas transparency and notification requirements must be complied under Article 5 of the Agreement on Agriculture, prior to the activation of the SSG;**

**(e) Does not appear to allow for goods in transit under the bimonthly reference price adjustments, while Article 5.3 of the Agreement on Agriculture provides that no additional duty under Articles 5.1(a) and 5.4 may be imposed.**

Chile would like to point out that the Special Agricultural Safeguard (SSG) of the Agreement on Agriculture (AA) is an exceptional mechanism that allows certain Members to exceed their WTO bound tariff commitment.

Law 19.897 now in force in Chile (and before that the PBS) provides for additional protection for wheat and wheat flour, over and above the 6 per cent MFN tariff in force, on condition that Chile's WTO bound tariff of 31.5 per cent is not exceeded. Therefore, it would be wrong to draw parallels or comparisons between the two, and especially to claim that the SSG mechanism of the AA constitutes a model for establishing the tariff levels in a country Member.

Moreover, Chile is unfamiliar with the details of the operation of the SSG given that it did not have the right to reserve its use for any product since it was not subject to the "tariffication" process. As was pointed out in the answer to question 66, before the UR Chile already had a bound tariff of 35 per cent as its sole border protection.

**72. Developing the information supplied by the Parties, in particular in paragraph 154 of Chile's first submission and Argentina's exhibits ARG-11 and ARG-12, could Chile provide the following additional information on *total import flows into Chile* for:**

**(a) HS positions 1001.9000 (wheat) and 1101.0000 (wheat flour or *meslin*) – Separate table outputs;**

**(b) Reporting periods: 2004 and 2005;**

**(c) Frequency: monthly and quarterly;**

**(d) Units of measure: in US$, in quantity units (wheat equivalent), and in CIF import unit values (proxy for "entry prices");**

**(e) Data to be ranked by major origin of imports.**

See Exhibit CHL-18.

The source of the information is www.odepa.gob.cl

**73. Behaviour of price indicators: Without prejudice to the Parties' position as regards the relevant reporting periods, relevant price series, markets of concerns, seasonality, etc., the Panel would like to enhance its understanding of the issues and parameters involved. To facilitate the Panel's examination of these matters on a *comparable basis*, could Chile plot the following data *in one single graph*, providing the sources and methodologies used to derive each data series:**

**(a) Reporting period: 16 December 2003 to 15 December 2005;**

**(b) Chilean wholesale price;**

**(c) Applicable reference prices and price floor during that period;**

**(d) For the periods 16 December to 15 June: daily prices quoted for *Trigo Pan Argentino* FOB Argentine port;**

**(e) For the periods 16 June to 15 December: daily prices quoted for *SRW no.2* FOB Gulf of Mexico;**

**(f) Entry prices in the Chilean customs territory (i.e. duty-paid for wheat and wheat flour).**

Set out below is the graph requested, based on the information contained in Exhibit CHL-16. The sources of the information presented in that Exhibit are as follows:

(1) Wholesale Market Price: monthly prices on the Santiago wholesale market (www.odepa.gob.cl)

(2) Floor: floor price established in Law 19.897 (US$128)

(3) Ceiling: ceiling price established in Law 19.897 (US$ 148)

(4) Reference value: reference price calculated on the basis of Law 19.897 and the Regulation thereto (see answer 63).

(5) Argentine Trigo Pan: daily price series published by SAGPyA.

(6) Soft Red Winter No. 2: daily price series published by the Chicago Exchange.

(7) Law Specific Duty: duty calculated as (floor price – reference price) x 1.06

(8) Law Rebate: rebate calculated as (reference price – ceiling price) x 1.06

(9) C.i.f. values: actual monthly average values (US$/tonne) of Chilean imports of wheat of all origins (www.odepa.gob.cl).

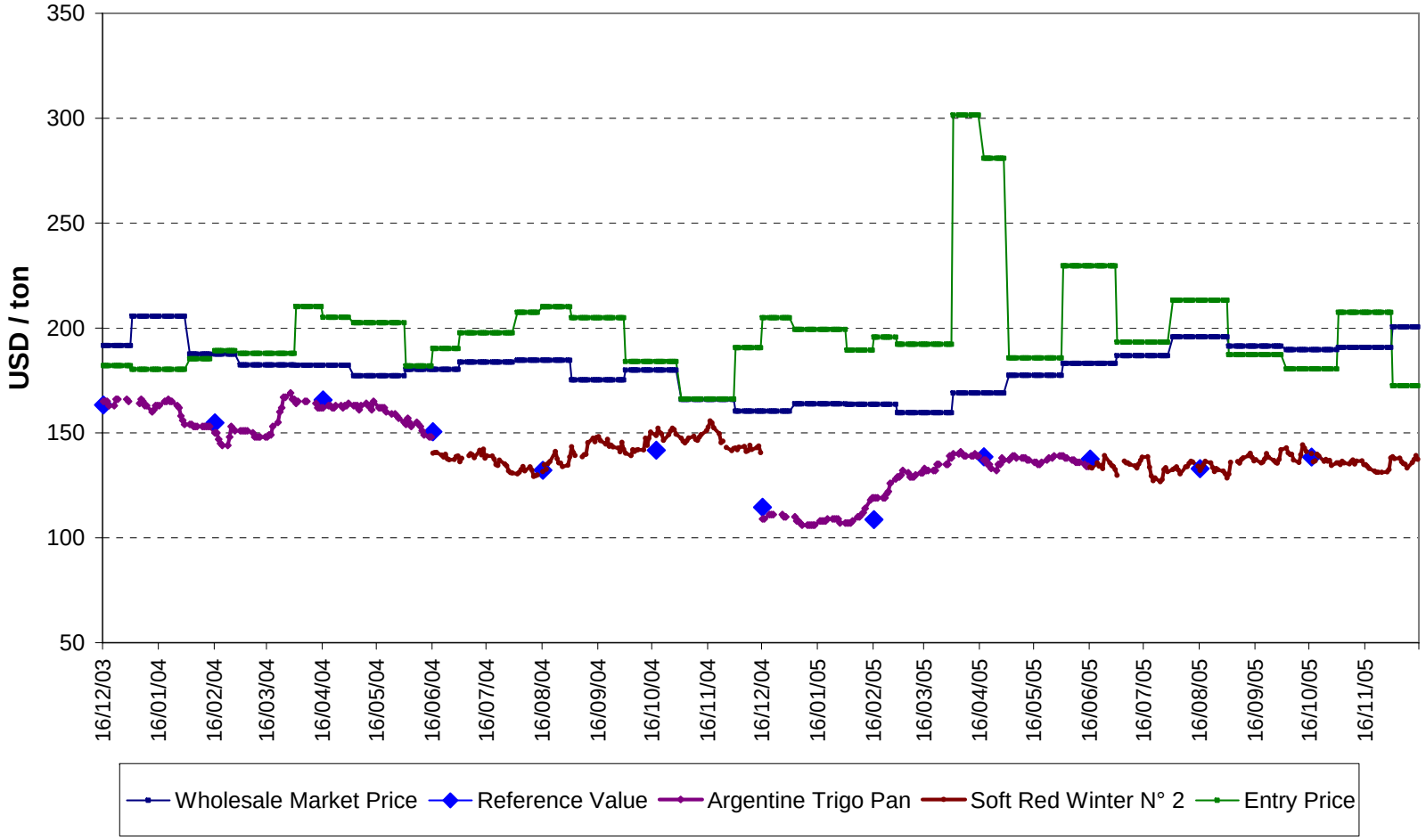
(10) *Ad valorem* duty: MFN tariff of 6 per cent

(11) Entry Price: entry price calculated as: c.i.f. x (1 + 6%) + specific duty or tariff rebate, as appropriate.

(12) Maximum rebate according to c.i.f.: maximum rebate in US$/tonne to be deducted from the *ad valorem* tariff payable, in order not to exceed 6 per cent of the c.i.f. price

(13) Maximum Specific Duty to 31.5%: maximum specific duty in US$/tonne in order not to exceed 31.5%.

## Wheat: Chilean Wholesale Market, Argentine Trigo Pan f.o.b., Soft Red Winter Nª2 and Entry Prices




Source: See answer number 73

**74. In paragraph 58 of its rebuttal submission, Chile appears not to share Argentina's views regarding the most relevant period for plotting the data. Could Chile indicate which period, if any in particular, it considers relevant for the Panel to examine the data elements relating to the functioning of the PBS?**

The measure in question is the specific duty or rebate or neither of the two, established under Law 19.897. In Chile's opinion, the right way to assess whether this measure takes into account the rulings and recommendations of the DSB with regard to the PBS is, firstly, to analyse the structure of the measure (which corresponds to an ordinary customs duty). Then, if it were necessary to assess the effect of the measure over time, all the available information from the time during which it has been in force should be used. In other words, from 16 December 2003 to the last period available.

To analyse only the period during which the specific duty applied was positive (i.e., from 16 December 2004 to 15 April 2005), as suggested by Argentina, would mean using partial information about the measure in order to skew the analysis. In this case, it could be argued that the supposed "variability" of the duty alleged by Argentina does not exist since during the entire period the duty was the same or, at most, varied once (which would likewise not constitute what has been called variability of the duties), when the duty changed from 0.0143 US$/kg to 0.0205 US$/kg on 16 February 2005.

Moreover, if Argentina's request concerning the "relevant period" were to be accepted, Argentina would have to revise its arguments – against the system as a whole – and restrict its claims solely to what happened in the period which, in its opinion, is the "relevant" one (i.e., the period in which the specific duty was positive).

**75. Pending the receipt of the detailed information requested above, the Panel has examined the graph supplied by Chile under paragraph 154 of its first submission (Domestic and International Prices for Wheat (US$/tonne), which is based on monthly data). In that paragraph, Chile submits that the Chilean wholesale price for wheat has varied and that "the variation is very similar to that of export prices of Argentine wheat, confirming the connection of Chilean wheat prices to the international grain market".**

**(a) How does Chile explain the fact that during the periods March-April 2004; May-October 2004; December 2004-March 2005; April-June 2005; July-August 2005; and November-December 2005, the domestic and international prices have actually evolved in opposite directions?**

The graph supplied by Chile under paragraph 154 of its First Written Submission shows that the fluctuations in international prices over time are in fact transmitted to domestic prices. Price transmission is an effect that should be observed over a time series; therefore it cannot be measured at one or two isolated points. In addition to consideration of the differences in the costs of importing from different suppliers and the special circumstances that determine prices on the domestic market, a fundamental aspect that should be kept in mind is the fact that changes in international prices will necessarily be reflected in the domestic prices with a certain time lag.

Two prices which can be compared at the same moment of time are the actual c.i.f. prices of the imports and the entry prices (c.i.f. plus tariffs). In all the months mentioned the c.i.f. and entry prices were moving in the same direction (see Exhibit CHL-16).

**(b) What could be, in Chile's opinion, the factors accounting for this?**

As already noted, there are many possible explanations why at a particular moment of time the international price should rise and the domestic price fall. These include: the time lag in price

transmission, exchange rate fluctuations, changes in transport costs, changes in interest rates, changes in the cost of insurance, the quantity and quality of the product imported during a particular month, etc.

**(c) Does Chile consider that "the competitive conditions of imports *vis-à-vis* domestic production" might have been "affected" during at least some of the above periods, in particular when international prices were decreasing while internal prices were increasing? Please take into consideration in this regard the statement in paragraph 7.44 of the Panel's report in *Chile – Price Band System*.**

Chile does not consider that the competitive conditions of imports *vis-à-vis* domestic production were affected during any of the periods mentioned under (a).

Paragraph 7.44 of the Panel Report, cited in this question, deals with the lack of transparency and predictability in the determination of PBS reference prices, prior to the modifications introduced by Law 19.897 and its Regulations. Chile does not see the connection between the Panel's findings on that occasion with respect to the "markets of concern for Chile" and the main thrust of the question, namely, the existence of price transmission.

**(d) Can Chile contrast the observations presented under the preamble of this question, and its own statement in paragraph 142 of its rebuttal submission, to the effect that it "has also shown that the domestic price of wheat has … followed a pattern similar to that of the international price … and that the *modified system allows variations in external prices to be transmitted to the local market*" (emphasis added).**

Price trends must necessarily be assessed on the basis of a series of prices rather than on the basis of spot situations which are, by definition, the result of transitory market conditions, which could be influenced by a whole range of factors (exchange rate, internal supply, origin of the imports, quantity and quality of the imports, interest rates, transport costs, insurance costs, etc.), not to mention the time lag required for the domestic markets to respond to international price trends.

In this context, Chile's statement with regard to the transmission of international prices to the domestic market is perfectly valid, regardless of the fact that at certain particular moments of time the international price on a specific market may fall while the domestic price rises or vice versa.

**76. Can Chile please clarify which are the "charts presented by Argentina" to which it refers in paragraph 103 of its first submission.**

Paragraph 103 of Chile's First Written Submission refers to the charts presented by Argentina in Exhibits ARG-12 and ARG-14.

The chart ARG-12 and the table of data in ARG-11 corroborate the statement made in paragraph 103 and the information contained in answer 58 of this questionnaire: throughout the period the c.i.f. prices are above the floor of US$128, so that it is impossible to claim that this is a price indicative of the domestic market, given that this price is not even close to that at which wheat is traded in Chile.

**77. Can Chile please indicate the source of the information contained in the chart regarding "Domestic and International Prices of Wheat" in paragraph 154 of its first submission.**

The sources of the information are: ODEPA (www.odepa.gob.cl) for domestic wheat prices (Wholesale Market Price) and SAGPyA (www.sagpya.gov.ar) for the f.o.b. prices of *Trigo Pan* (Official Prices or *Trigo Pan* Prices, f.o.b. Argentine Port).

## ANNEX F-4*

## REPLIES BY CHILE TO QUESTIONS POSED BY ARGENTINA

**1. Can Chile explain what did its Government mean when, at the time of proposing the passing of the bill for the approval of Law 19.897, stated: "Through this bill the Government has corrected … formal aspects challenged [by the WTO] while fully protecting the spirit of the bands … "?**

Contrary to what Argentina appears to be arguing, Chile has stated that the relevant issue in these proceedings is not the intentions of the Parties, let alone the statements by their authorities[1], but the manner in which the recommendations and rulings of the DSB are complied with in practice.

If statements by the authorities or even the legal texts were sufficient, there would be no need to resort to these proceedings, since the drafting history of the law and the text itself would obviously show compliance with the rulings and recommendations of the DSB. Moreover, on the basis of that argument, it would suffice for Members implementing measures to "affirm" compliance when amending or adopting such measures, if such were the proof needed to demonstrate this at a later stage. In fact, the message from the President of the Republic attached to the draft law states that the latter's objectives include "harmonization with the principles established in the WTO ruling". Likewise, when referring to the content of the draft, the message states that the draft makes adjustments to the PBS "that ensure its consistency with the rulings and recommendations of the WTO Dispute Settlement Body".

Nevertheless, what is asserted in the message appears to be insufficient. However, the question posed provides an opportunity to emphasize how, from the substantive and procedural standpoints, Chile has been mindful at all times of the requirements of the DSB and of the need to modify the price bands in accordance with the WTO's rulings. The excerpt cited is a response to the oral statement made by the then Minister for Finance, Mr Nicolás Eyzaguirre, in the hall of the Senate on 6 August 2003.

In order to be understood, the quotation needs to be read in context. Its scope plainly emerges from the preceding paragraph, in which the Minister states: "First, why are we discussing this? Because there is a legal vacuum that has impeded continuity in agriculture? No. Because the Government intends to change the rules of the game in agriculture? No, again. We are discussing these matters because the World Trade Organization has objected to the way in which the price bands are calculated, the transparency thereof and the mechanisms for setting them".

Seen in its context, the quotation is self-explanatory. The Minister was expressing the Government's opinion that the changes introduced by Chile remedied the aspects, which in his view were formal aspects, challenged by the DSB, whilst adhering to the underlying spirit of the Chilean price bands, which is to afford additional protection above the 6 per cent *ad valorem* tariff on certain agricultural products, without, however, overprotecting such products to the detriment of the other economic operators, who might possibly be affected by such protection.

It seems unnecessary to expand any further on the matter, but the history of the Law includes numerous statements by Government authorities, reiterating how the changes introduced by Law 19.897 comply with the recommendations and rulings of the DSB.

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* Annex F-4 contains the Replies by Chile to Questions Posed by Argentina. This text was originally submitted in Spanish by Chile.

[1] See Response 22 by Chile to the Panel.

**Ordinary customs duties**

**2. The Appellate Body established that " … all that is required is that ordinary customs duties … be expressed in the form of ad valorem or specific rates". Furthermore, the Appellate Body established that "the fact that the duties that result from the application of Chile's PBS take the same form as "ordinary customs duties" does not imply that the underlying measure is consistent with Article 4.2 of the Agreement on Agriculture".**

**(a) Is the amended PBS, the underlying measure as expressed in Law 19.897 and Decree 831/2003 and not the resulting duties, expressed in the form of ad valorem or specific duties?**

**(b) If the answer is affirmative, please identify how is it expressed in the form of ad valorem or specific rates?**

**(c) If the answer is negative, how can Chile affirm that the amended PBS is an ordinary customs duty?**

References to the Appellate Body's statements are the key to understanding the ruling on the PBS and ultimately to understanding how the changes introduced by Law 19.897 have fully complied with the rulings and recommendations of the DSB.

The Appellate Body held that the PBS was a measure *similar* to those listed in footnote 1 to Article 4.2 of the Agreement on Agriculture, but before addressing the issue of *how much* or *what kind* of "similarity", it identified *with what* the PBS was required to be similar, concluding that the PBS was similar to a variable import levy and/or a minimum import price. In order to determine when the measure was similar, the Appellate Body interpreted both terms using the rules codified in the *Vienna Convention*, discussing the ordinary meaning of these terms in their context and in the light of their object and purpose.

In the case of variable levies, the Appellate Body concludes that what distinguishes them from ordinary customs duties is variability. However, this feature alone is not conclusive, since an "ordinary customs duty" can also be varied and, fully in accordance with Article II of the GATT 1994, an import duty may be established, and the rate at which the duty is applied may be changed periodically (provided that the changed rate remains *below* the tariff rates bound in the Member's Schedule).[2] **Such a change in the *applied* rate can be made at any time, for example, through an act of a Member's legislature or executive.**

In order to determine *what kind* of variability makes an import levy a *variable* import levy, the Appellate Body turns to the immediate context of the other words in footnote 1 to Article 4.2, concluding 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 will be inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously.**

As was noted by the Appellate Body itself, "[t]he level at which ordinary customs duties are applied can be *varied* by a legislature, but such duties will not be automatically and continuously *variable*. **To vary the applied rate of duty in the case of ordinary customs duties will always**

[2] Report of the Appellate Body in *Argentina – Textiles and Apparel*, *supra*, footnote 56, para. 46.

**require *separate* legislative or administrative action, whereas the ordinary meaning of the term "variable" implies that *no* such action is required".**[3]

The Appellate Body added that the presence of **a formula causing automatic and continuous variability of duties was a necessary, but by no means a sufficient, condition** for a particular measure to be a variable import levy, specifying that there are additional features that undermine the object and purpose of Article 4, including, *inter alia*, lack of transparency and lack of predictability in the level of duties that will result from the application of such measures, which are liable to restrict the volume of imports.

The Appellate Body reaches a conclusion similar to the above as regards minimum import prices, except for the fact that minimum import price schemes generally operate in relation to the *actual transaction value* of the imports.[4]

Pursuing its analysis, the Appellate Body undertook to establish whether the PBS was *similar* to the measures listed in footnote 1 to Article 4.2, concluding that the task must be approached on an empirical basis"[5], and notes 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 products in ways different from the ways that ordinary customs duties do;

– that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market.

Nonetheless, this is not sufficient. In order to be "similar", the PBS, 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.

The Appellate Body agrees with the Panel's view in considering the PBS to be a measure similar to variable import levies or minimum import prices but disagrees with the importance placed by the Panel on the question of whether or not Chile's price bands were related to domestic target prices or domestic market prices.

Assessment of the price bands requires taking into account factors other than world market prices, among which the Appellate Body emphasizes the fact that the prices which represent the highest 25 per cent as well as the lowest 25 per cent of the world prices from the past five years are discarded, and 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".

The Appellate Body also saw the following similar shortcomings in the way the other essential elements of Chile's PBS, that is, the reference prices, were determined:

– The reference price was set on a weekly basis, in a way that was neither transparent nor predictable.

– No Chilean legislation or regulation specified how the international "markets of concern" and the "qualities of concern" are selected.

[3] Para. 233.
[4] Report of the Panel, para. 7.36(e).
[5] Para. 226.

– The process of selecting the reference prices was not transparent, and it was not predictable for traders.

– The same weekly reference price applied to imports of *all* goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value.

– Moreover, unlike the five-year average monthly prices used in the calculation of Chile's annual price bands, the lowest "market of concern" price used to determine the weekly reference price is not adjusted for "import costs", and thus is not converted from an f.o.b. basis to a c.i.f. basis.

In the Appellate Body's view, although there are some dissimilarities between the PBS and the features of minimum import prices and variable import levies, the way in which Chile's system was designed and the way it operated in its overall nature were sufficiently "similar" to the features of the prohibited measures to make the price band system, in its particular features, a "similar border measure" within the meaning of footnote 1 to Article 4.2, although the *duties* resulting from application of the PBS took the same form as "ordinary customs duties".

As Chile has repeatedly stated throughout the course of these proceedings, there was no specific duty applicable under the PBS but a system essentially based on three parameters: the date of shipment of the goods, the reference price set by Customs and the table of duties and rebates associated with the reference price on the date of shipment.

The combination of these factors ultimately determined the duty payable, which could vary from one operation to another, meaning that two consignments arriving on the same day could be charged different duties. Moreover, since the duties associated with the reference prices were set on an annual basis, whereas the reference prices were published on a weekly basis, the price was adjusted on an ongoing basis to the band floor.

As a result, duties applied under the PBS varied automatically and continuously, without executive or legislative action. However, in addition to variability, which is a necessary, though not a sufficient, condition, the Appellate Body ruled on the other features of the PBS that made it *similar* to the measures listed in footnote 1, which were characterized by their lack of transparency and predictability.

The changes introduced by Law 19.897 substantially modified the operation of Chile's price bands, by incorporating all the recommendations and rulings of the DSB.

The variability of the duties was eliminated. Today, the duties are no longer adjusted automatically and continuously but derive from an administrative act which sets the amount of a specific duty or tariff rebate, so that as long as a specific duty remains in effect different operations cannot be charged different duties: the duty remains the same for as long as it is not changed through an administrative act.

Predictability being a necessary condition, this would suffice to establish the WTO consistency of Law 19.897. Nevertheless, should even that not be sufficient, Law 19.897 also takes all the elements identified by the Appellate Body which made the PBS a measure *similar* to those listed in footnote 1 to Article 4.2 and corrects them according to the terms specified in the Appellate Body's ruling.

If, as the Appellate Body held, in order to be "similar" the PBS in its specific factual configuration had to 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, the elimination of all the features identified by the Appellate Body means that Law 19.897 is clearly no longer a *similar* measure, since it no longer has "sufficient resemblance or likeness to" and is no longer "of the same nature or kind".

**3. Where in the text of Law 19.897 and Decree 831/2003 can the ad valorem or specific rate be found (excluding the resulting duties)?**

Article 1, paragraph 1, of Law 19.897 reads as follows:

> "There shall be established specific duties in United States dollars per tariff unit and rebates on the amounts payable as *ad valorem* duties under the Customs Tariff, which could affect the importation of wheat, wheat flour and sugar, as stipulated in this law."

As has been stated repeatedly, in the WTO customs duties on merchandise imports may be levied on an *ad valorem* basis (percentage of value) or on a specific basis ($7 per 100 kg.). In both instances, tariffs on imports give a price advantage to similar locally produced goods and raise revenues for the Government.[6]

As a result of the changes introduced by Law 19.897, imports of wheat and wheat flour are subject to payment of a specific duty in dollars per tonne, exactly as specified in the description provided in the glossary of WTO terms.

The reference by Argentina to the resulting duties, as indicated in the previous question, is based on the Appellate Body's conclusions and in fact relates to the way in which the PBS used to operate, levying duties that were not ultimately ordinary customs duties. Law 19.897 provides for the application of a specific duty that is set by a supreme decree of the Minister for Finance applicable to any import operation, which can be changed only through a new administrative act.

**4. The Appellate Body established that " … ordinary customs duties … are … unrelated to … an underlying scheme or formula." It is clear that the amended PBS, the underlying measure that, among other features, contains a formula. Then, how could Chile argue that the amended PBS is an ordinary customs duty?**

As indicated in the response to question 2, Law 19.897 eliminated the application of a formula for the determination of duties resulting from the price bands and established a specific duty in dollars per tonne, which is set once every two months by the Minister for Finance through a supreme decree.

This specific duty satisfies all the requirements of ordinary customs duties. Argentina's misunderstanding stems from the fact that Law 19.897 retained terms used under the PBS, such as reference prices, floor and ceiling prices and the existence of markets of concern. However, these elements are no longer part of a system for the determination of the resulting duty in terms of a formula, as concluded by the DSB, but they now serve as parameters enabling the administrative authority to determine the margin of protection for wheat and wheat flour through the establishment of a particular specific duty (or rebate, as the case may be).

Under Law 19.897, the parameters are not part of the scheme or formula as they used to be under the PBS; rather, they are elements that eliminate the Chilean authorities' discretion to establish the tariff charge on wheat and wheat flour, with the proviso that the tariff charge in question may never exceed Chile's bound tariff under the WTO.

[6] http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm

**5. In para. 2 of its Oral Statement Chile recognized that the amended PBS is a "mechanism". How can Chile explain that the amended PBS, the underlying measure, not the resulting duties, is expressed in the form of ad valorem or specific rates?**

Paragraph 2 only mentions that the PBS should not be compared with Law 19.897, because these are two completely different mechanisms. Chile does not consider it strange to use the term "mechanism" in this context, and would even agree that there are *mechanisms* for the collection of ordinary customs duties.

Nevertheless, it cannot be concluded from the above, as Argentina does, that Chile recognizes that it applies a mechanism and therefore a measure similar to the PBS. Chile has clearly established its position throughout the course of this dispute and trusts that the consistency analysis of Law 19.897 will be technical and exacting.

If mentioning the mere use of terms could be used as evidence in these proceedings, the Panel should reach conclusive findings in favour of Chile's position. Firstly, because the sole reading of paragraph 2 shows that Chile does not use the term "mechanism" in the sense suggested by Argentina. But furthermore, because if the same parameter is used, there is no dispute in these proceedings, because in all of its presentations Argentina has consistently referred to the **specific duties** applied by Chile. Solely by way of example, in its first written submission Argentina used this expression in referring to the duties under Law 19.897 on more than forty occasions (i.e. in paragraphs 99, 105, 109, 123, 126, 133, 134, 135, 136, 138, 139, 140, 149, 150, 151, 152, 154, 155, 156, 165, 171, 174, 175, 176, 177, 179, 181, 182, 197, 206, 209, 212, 213, 224, 226, 228, 231, 250, etc.).

**Article 4.2 of the *Agreement on Agriculture***

**6. What is for Chile the meaning of the terms " … *Members shall not maintain … any measures of the kind which have been required to be converted into ordinary customs duties* …"?**

It would be pointless to elaborate on an interpretation of this provision, since the Appellate Body gave a general interpretative analysis of Article 4.2 of the Agreement on Agriculture in paragraphs 204 to 217 of its Report, which was adopted by WTO Members, including Chile, convened as the Dispute Settlement Body. Consequently, the meaning of the terms contained in the provision is set out therein.

**7. Chile stated that " … all it is obliged to do [a Member] of the WTO is to honour its commitments, that is to say, not exceed the bound tariff level".[7] Furthermore Chile stated that " … any WTO Member can do what it wants to up to the level of its binding commitments … "[8]**

**(a) What does Chile consider is the object and purpose of Article 4.2 of the *Agreement on Agriculture*?**

The object and purpose of Article 4.2 of the Agreement on Agriculture is to require Members not to maintain, resort to, or revert to certain kinds of measures with a view to implementing their commitments on market access for imports of agricultural products. This provision applies to any measures of the kind which have been required to be converted into ordinary customs duties. Footnote 1 to Article 4.2 contains an illustrative list of such measures.

[7] Rebuttal by Chile, para. 65 *in fine*.
[8] Oral Statement by Chile, para. 45.

Thus the object of Article 4.2 (supplemented by its footnote 1) is to prohibit measures that restrict the volumes and distort the prices of imports of agricultural products in ways different from the ways that ordinary customs duties do. The measures prohibited under Article 4.2 also have in common that they disconnect domestic prices from international price developments and impede the transmission of world market prices to the domestic market.

**(b) Does Chile consider that Article 4.2 of the *Agreement on Agriculture* contains an obligation not to exceed the tariff binding?**

The obligation not to exceed the level bound in the appropriate Schedule is laid down in Article II.1 of the GATT 1994.

**(c) Does Chile consider that, even if a measure does not exceed the bound tariff level, it can still violate Article 4.2 of the *Agreement on Agriculture*?**

The Appellate Body found nothing in Article 4.2 of the Agreement on Agriculture to suggest that a measure prohibited by that provision (other than an ordinary customs duty) would be rendered consistent with it if applied with a cap.[9] As an additional consideration, specific duties (or rebates) applied in conformity with Law 19.897 constitute ordinary customs duties.

**8. The Appellate Body stated that:**

> **"'Variable import levies' have additional features that undermine the object and purpose of Article 4 … . These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures"[10]**

**Also, the Appellate Body established that:**

> **" … significant for traders, also, are the lack of transparency of certain features of Chile's price band system; the unpredictability of the level of duties … These specific characteristics of Chile's price band system prevent enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4."[11]**

**Chile stated that " … in examining variable levies, the Appellate Body pointed out that they have additional features (over and above the variability of the duties), including a lack of transparency and predictability".[12]**

**(a) Does Chile consider that transparency and predictability are features inherent to variable import levies?**

**(b) Does Chile consider that variable import levies are inconsistent with Article 4.2?**

**(c) Are transparency and predictability requirements of Article 4.2? Please explain your answer.**

**(d) Do transparency and predictability have any meaning within Article 4.2?**

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[9] See para. 254 of the Report of the Appellate Body.
[10] Report of the Appellate Body, para. 234.
[11] Report of the Appellate Body, para. 258.
[12] Rebuttal by Chile, para 29.

The response to questions (a), (c), and (d) is identical. Chile complied with the recommendations and rulings of the DSB by enacting Law 19.897 and the regulation thereto, and in so doing it took special account of the findings set out in the Report of the Appellate Body, which are contained in the ruling of the DSB. Consequently, the response to Argentina's concerns regarding "transparency" and "predictability" can be found in the Report adopted by the Body in question.

As to the response to question 8(b), in Chile's view a variable import levy is a category of measure identified in footnote 1 to Article 4.2 of the Agreement on Agriculture.

**9. Could an intransparent and unpredictable border measure applied to agricultural imports be consistent with article 4.2?**

The Appellate Body referred to transparency and predictability in the manner in which the duties were determined according to certain specific features of the PBS analysed at the time, "on the basis of the particular configuration and interaction" of all of these specific features. In assessing the PBS, the Appellate Body held that no one feature was determinative of whether a specific measure created intransparent and unpredictable market access conditions.[13]

Chile has corrected these particular features, and today the application of specific duties (or rebates) under the current measure is very far from being intransparent and unpredictable.

**10. Does Chile consider that the lack of transmission of international prices developments is a feature that renders a border measure applied to the agricultural imports inconsistent with Article 4.2 of the *Agreement on Agriculture*? If no, please explain.**

The explanation was given by the Appellate Body itself when it stated that the measures referred to in Article 4.2 of the Agreement on Agriculture "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".[14]

**Floor and ceiling of the PBS**

**11. How do the floor and ceiling prices transmit international price developments if they are fixed?**

The sole purpose of the floor and ceiling prices under Law 19.897 is to permit the calculation of duties and tariff rebates. The fact that they are fixed values does not impede the transmission of international prices, because it is the way in which the duties and tariff rebates are determined that allows price transmission.

**12. On what basis did Chile establish the floor in US$128 per tonne?**

The determination of the floor price is consistent with the provisions of Law 19.897, which stipulates that "the values considered shall be the floor and ceiling prices used for wheat and sugar in the drafting of Chilean Ministry of Finance exempt decrees No. 266 and No. 268, published in the Official Journal of 16 May 2002, expressed in United States dollars f.o.b. per tonne".

Details of how the price of US$128 was obtained can be found in the response to question 52 of the Questions Posed by the Panel to the Parties.

[13] Report of the Appellate Body, para. 261.
[14] Report of the Appellate Body, para. 227.

**13. On what basis did Chile establish the ceiling in US$148 per tonne?**

The determination of the ceiling price is consistent with the provisions of Law 19.897, which stipulates that "the values considered shall be the floor and ceiling prices used for wheat and sugar in the drafting of Chilean Ministry of Finance exempt decrees No. 266 and No. 268, published in the Official Journal of 16 May 2002, expressed in United States dollars f.o.b. per tonne".

Details of how the price of US$148 was obtained can be found in the response to question 52 of the Questions Posed by the Panel to the Parties.

**14. On what basis was the fixed factor 0.985 established?**

The factor of 0.985 corresponds to a reduction of 1.5 per cent. Chile considered that over and above the changes necessary to comply with the recommendations and rulings of the DSB, a gradual reduction in the additional protection above the 6 per cent *ad valorem* tariff under Law 19.897 for wheat and wheat flour was appropriate. A reduction of 1.5 per cent was estimated to be sufficient.

**15. How does the fixed factor of 0.985 allow the transmission of international prices fluctuations?**

The 1.5 per cent reduction in the floor and ceiling prices as of 2008 is not intended for, nor is it related to, the transmission of international prices. It is simply what was considered the appropriate way of gradually reducing the protection afforded to wheat and wheat flour.

**Reference Price**

**16. How can Chile affirm that the reference prices fully reflect international price developments when they only account for the prices recorded during 90 out of 365 days?**

The reference prices are parameters for determining the level of duties or rebates. They are determined six times a year, so there is no need to use these values more than the same number of times. The average of 15 days reckoned retrospectively is a good reflection of international price levels whenever a duty or rebate has to be established. For a better understanding of the matter, see the response to question 12(c) of the Questions of the Panel to the Parties.

**17. In connection with the transparency and predictability of the reference prices:**

**Articles 7 and 8 of Decree 831/2003 establish that the reference price for wheat will result from the average of the daily FOB prices of, *inter alia*, "Bread Wheat Argentine Port" during a period of 15 days before day "10" of the month in which the respective Decree for the establishment of the reference price is published.[15] In its Rebuttal, Chile clarified that the basis of the daily FOB prices for "Bread Wheat Argentine Port" was SAGPyA (Argentina's Official Source).**

**On the other hand, during the hearing, the Chilean delegate from ODEPA appeared to recognize that SAGPyA does not publish "Bread Wheat Argentine Port" under that specific denomination on a daily basis. Argentina argued that the only "Bread Wheat FOB price" is published on a daily basis by SAGPyA is the "Official FOB Price" and, therefore, there is an inconsistency between what the Decree establishes and what SAGPyA publishes on a daily basis. The Chilean delegate from ODEPA appeared to recognize that, in effect, ODEPA bases its**

[15] ARG-2.

**average "Bread Wheat Argentine Port" FOB price on SAGPyA's daily "Official FOB Price". Furthermore Chile provided two exhibits (CHL-12 and 14) which only showed monthly averages.**

**(a) Does Chile consider that SAGPyA publish "Bread Wheat Argentine Port" FOB price on a daily basis? Could you please provide evidence?**

**(b) Does ODEPA base its "Bread Wheat Argentine Port" FOB price on SAGPyA's *daily* "Official FOB Price"?**

**(c) If the answer is yes, is there an inconsistency between Decree says to be the basis for the calculation of the reference price and what SAGPyA publishes?**

**(d) Does Chile consider that, if an exporter resorts to SAGPyA's website, he will be able to find "Bread Wheat Argentine Port" FOB prices under that specific denomination?**

At the hearing, Chile explained that SAGPyA published the official prices of *Trigo Pan* under two denominations: "*Precio Oficial*" (Official Price) and "*Precio Puertos Argentino*" (Price Argentine Ports). To illustrate this point, Chile provided two exhibits (CHL-12 and CHL-14) containing series of monthly prices that use both denominations.

***Response to (a)***

Yes. Through the Directorate of Agrifood Markets (DIMEAGRO), SAGPyA publishes the "*información diaria de cotizaciones*" (daily quotations bulletin) for *Trigo Pan* "FOB Argentine Ports" on a daily basis. This quotation corresponds to the "Official Price" it publishes in the section on international prices. Exhibit CHL-17 contains a printout of the information supplied by DIMEAGRO.

The information can also be downloaded directly from the following web pages:

www.sagpya.mecon.gov.ar/new/0-0/programas/dma/Cartilla_Granos/01_cartilla_actual.php
www.sagpya.mecon.gov.ar/new/0-0/agricultura/diario/cartilla.XLS

Additionally, Exhibit CHL-17 contains a printout of the web page of the Buenos Aires Cereals Exchange with the daily wheat prices for the month of July 2006, under the denomination "*cotizaciones FOB Puertos Argentinos*" (quotations FOB Argentine Ports). The information was supplied by SAGPyA and is identical to the data provided by Argentina in Exhibit ARG – 32. This information can be found at:

www.bolcereales.com.ar/precios.asp?idioma=esp

***Response to (b)***

Chile uses the official source, which is SAGPyA. In the light of the foregoing, it is plain that the Official Price corresponds to the quotation for *Trigo Pan* "FOB Argentine Ports".

***Response to (c)***

No, in view of the evidence provided. The fact that there are two denominations for the same series of prices does not constitute inconsistency with the Decree.

***Response to (d)***

Yes.

**Variable import levies**

**18. Chile stated that "Law 189.897 abolished the variability component. Now the specific duty by legal directive in the form of a decree issued by the Ministry of finance …".[16]**

**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). In its turn, 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).**

**Argentina argued that Law 19.897 and Decree 831/2003 make it *mandatory* for specific duties to be established when the reference price is below the band floor and that 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.[17]**

**(a) Does the Chilean Executive have any discretion no to impose specific duties when the reference price falls below the floor price (today at US$128)?**

**(b) If the answer is affirmative, Could Chile explain what is the discretion Chilean Executive has?**

**(c) If the answer is negative, does Chile agree that the amended PBS provides for " … the presence of a formula causing automatic … variability of duties"?[18]**

In its response to question 2 from Argentina, Chile specified the substance and scope of the variability component of the duties and how such variability had been abolished under Law 19.897.

Furthermore, in its response to question 6 of the Panel, Chile developed its position concerning the mandatory or discretionary nature of the rules set forth in the Law. In this connection, it not only pointed out that this does not appear to be covered by the Appellate Body's analysis, but it also indicated that the way in which the rules are worded has to do with the method of drafting legal rules in Chile rather than with any consideration regarding Chile's obligations under the recommendations and rulings of the DSB.

Chile sees the legal provision as being intended to afford an additional margin of protection for wheat and wheat flour (above the *ad valorem* tariff) where the requirements and conditions stipulated in the Law are fulfilled, which may even lead to a reduction in payment of the tariff when the need for such protection does not arise.

Moreover, even if we accept Argentina's approach, we cannot analyse the actual wording of the provision cited without bearing in mind Article 1, paragraph 1, of the Law, which, despite what Argentina suggests, provides that "[t]here shall be established specific duties in United States dollars

[16] Oral Statement by Chile, para 31.
[17] First Written Submission by Argentina, paras. 263 and 264.
[18] Report of the Appellate Body, para. 233.

per tariff unit and rebates on the amounts payable as *ad valorem* duties under the Customs Tariff, **which could affect the importation of wheat, wheat flour and sugar, as stipulated in this law**".

**Calculation of the resulting duties**

**19. In the amended PBS the specific duty is magnified by the introduction of a multiplier consisting of 1 plus the general ad valorem duty in force. Which was the purpose of adding this new coefficient?**

Under the PBS, a series of fixed and variable costs incurred in a normal import process, including the general *ad valorem* tariff, were considered in determining specific duties. As a way of making duty determination more transparent and predictable, under Law 19.897 all such costs except the general tariff, because this is a known value, were excluded from calculation of the duties. Thus, the following formula for calculating the specific duties was established in the Law's Regulations:

$$SD = (1 + 0.06) * (FOB_{floor} - FOB_{rp})$$

It should be emphasized that from this expression it follows that under Chile's current policy the specific duty is lower for any given reference price, as its determination includes only the general *ad valorem* tariff and excludes all the other variable costs that previously formed part of the PBS.

For further details of this expression, see Chile's response to question 5(c) of the Panel.

**Terms of reference**

**20. In *Korea – Dairy Products* the Appellate Body established "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".[19]**

**In paragraph 7 of its Oral Statement Chile affirms that it has applied the approach in *Korea – Dairy Products* to show that Argentina's argument in relation to the factor of 1.56 is an "independent claim".**

**In paragraph 184 of its Rebuttal, Chile clarified what it argues is Argentina's claim: "The factor of 1.56 … insulates the entry price of wheat flour from international price developments"**

**(a) Can Chile identify the provision supposedly violated in Argentina's alleged claim regarding the factor of 1.56?**

**(b) Did Argentina identify any provision of any particular agreement violated by the insulation by the factor of 1.56 of the entry price of wheat flour from international price developments?**

**(c) Did Argentina separately identify the claim regarding the factor of 1.56 in its DSU Art. 21.5 Panel request?**

**21. In its Oral Statement (paragraph 9) Chile states that " … the basis for the application of the factor … was the PBS itself … ". It is undisputed that the amended PBS is a new measure. Does Chile agree that the amended PBS has modified:**

[19] *Korea – Dairy Products*, Report of the Appellate Body, para. 139, WT/DS98/AB/R (emphasis added).

**(a) How floor prices are established?**

**(b) how reference prices are calculated?**

**(c) how specific duties are calculated?**

**22. If the answers to the above questions are affirmative, does Chile agree that the basis for the application of the factor of 1.56 has changed with respect to the original measure? If the answers are negative, please explain how would then the PBS be consistent with Art. 4.2 AoA?**

**23. If the answer to question 21 is affirmative, Why cannot Argentina raise the argument in relation to the factor of 1.56 in the 21.5 proceedings if the basis for its application has changed?**

Response to questions 20 to 23:

It was Argentina that claimed that the factor of 1.56 as applied would not be in compliance with Chile's WTO obligations. In stating that this is an "an independent claim"[20] by Argentina, Chile was merely emphasizing that Argentina did not question that factor in the original Panel's proceedings and that that was where it should have done so; hence this issue does not fall within the terms of reference for the current proceedings, as Chile has demonstrated in its second written submission (Rebuttal).[21]

Pursuant to the recommendations and rulings of the DSB, Chile implemented a new measure (Law 19.897 and its Regulations) with its parameters for establishing and setting specific duties (or rebates).

If Argentina failed to take issue with the factor of 1.56 in a timely and appropriate manner, it was not for the original Panel or the Appellate Body to rule on this matter, a circumstance that is determinative of Chile's obligation to implement its compliance measures by conforming with what was decided and adopted by the DSB, changing what it was required to change and without changing what it was not obligated to change.

This was acknowledged by the Appellate Body in *EC – Bed Linen (21.5 India)* when it stated that "India seeks to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent with the European Communities' WTO obligations".[22]

**Minimum import prices**

**27. Argentina has argued that the amended PBS is a measure similar to minimum import prices. Chile has persistently objected that statement. In that sense, could Chile please explain what did the Chilean Executive mean when, at the time of proposing the passing of the bill corresponding to Law 19.897, stated the following:**

**" … I would like to draw the attention of members to a fact that has not been brought out or emphasized sufficiently in this debate. With this bill (Law 19.897) we are fixing - not stabilizing - a price … for wheat that stays the same for four years, regardless of fluctuations in**

[20] Rebuttal by Chile, para. 185.
[21] Rebuttal by Chile, paras. 182 to 195.
[22] Report of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)*, para. 87.

**the international markets … price security is not just for four years but up to 2014 … " (emphasis added).**[23]

Argentina's reference needs to be understood in the context of the debate and the discussion that took place during the preparation of the law.

The assessment of the similarity of Law 19.897 to a minimum import price should not be conducted in the light of an isolated statement taken out of context but in relation to the way in which the Law operates – or at least in the light of the words of the message from the Executive attached to the draft tabled in Congress. However, Argentina has not succeeded in demonstrating that in practice Law 19.897 establishes a minimum price or at least is a measure similar to a minimum price, nor does it make any reference whatsoever to the message underpinning the draft, which, on the contrary, repeatedly asserts that its objective was to bring the price band legislation into line with the WTO rulings and recommendations.

Moreover, if Argentina fully understood the changes introduced by Law 19.897, it could not fail to conclude that the assertion it makes in this question is technically wrong.

[23] Chilean Minister of Agriculture, 5 August 2003."History of the Law. Compilation of official texts of the parliamentary debate. Law 19.897". Library of the National Congress. Santiago, Chile, 2003.