

**ANNEX A**

**FIRST WRITTEN SUBMISSIONS FROM PARTIES**

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ANNEX A-1\*

FIRST WRITTEN SUBMISSION BY ARGENTINA  
(19 APRIL 2006)

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**TABLE OF REPORTS CITED**

<b>Short title</b>	<b>Full title and reference</b>
<i>Chile – Price Band System</i>	Report of the Appellate Body " <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> " WT/DS207/AB/R, adopted 23 October 2002.
<i>Chile – Price Band System</i>	Report of the Panel " <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> " WT/DS207/R, adopted 23 October 2002.
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Report of the Appellate Body " <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> ". Recourse by Brazil to Article 21.5 of the DSU, WT/DS70/AB/RW, adopted 21 July 2000.
<i>EC – Sardines</i>	Report of the Appellate Body " <i>European Communities – Trade Description of Sardines</i> ", WT/DS231/AB/R, adopted 26 September 2002.
<i>US – Sections 301-310</i>	Report of the Panel " <i>United States – Sections 301-310 of the Trade Act of 1974</i> ", WT/DS152/R, adopted 22 December 1999.
<i>US – 1916 Anti-Dumping Act</i>	Report of the Panel " <i>United States – Anti-Dumping Act of 1916</i> " (Complaint by Japan), WT/DS162/R, adopted 29 May 2000.

A. INTRODUCTION

1. The Government of the Republic of Argentina wishes to thank the members of the Panel for the opportunity to submit for their consideration the measures adopted by the Government of the Republic of Chile for the alleged purpose of implementing the recommendations and rulings of the Dispute Settlement Body in this dispute.

2. The Government of the Republic of Argentina requests the Panel to find that the price band system that Chile applies to imports of wheat and wheat flour, as amended by Law 19.897 and Exempt Decree No. 831/2003 (hereinafter the amended PBS), is inconsistent – in itself and in its application – with Article 4.2 of the *Agreement on Agriculture*, the second sentence of paragraph (1)(b) of Article II of the GATT 1994, and paragraph 4 of Article XVI of the *Marrakesh Agreement Establishing the World Trade Organization*.

3. The Government of the Republic of Argentina considers that the recommendations of the DSB should be implemented promptly<sup>1</sup>, fully and in accordance with the obligations assumed by Members within the framework of the WTO. As the Republic of Argentina explains below, the measures that the Republic of Chile has adopted for the alleged purpose of implementing the recommendations and rulings of the DSB in this dispute do not meet any of these requirements.

**1. Background**

4. On 23 October 2002, the Dispute Settlement Body (hereinafter the DSB) adopted the report of the Appellate Body<sup>2</sup> and the Panel report,<sup>3</sup> as modified by the Appellate Body, in the case "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*" ("*Chile – Price Band System*").

5. In its Findings and Conclusions, the Appellate Body upheld the Panel's finding that Chile's price band system was a border measure similar to variable import levies and minimum import prices.<sup>4</sup> The Appellate Body therefore upheld the Panel's finding that Chile's price band system was inconsistent with Article 4.2 of the *Agreement on Agriculture*.<sup>5</sup> On the basis of these reports, the DSB recommended that Chile should bring its price band system, as found to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement.<sup>6</sup>

6. On 6 December 2002, Chile requested that the determination of the reasonable period for the implementation of the recommendations and rulings of the DSB be the subject of binding arbitration, in accordance with Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter the DSU).<sup>7</sup>

7. On 17 March 2003, the arbitrator's award determined that the reasonable period of time for Chile to implement the recommendations and rulings of the DSB should be 14 months from the date of adoption of the above-mentioned reports, a period which expired on 23 December 2003.<sup>8</sup>

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<sup>1</sup> As required by Article 21.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

<sup>2</sup> WT/DS207/AB/R.

<sup>3</sup> WT/DS207/R.

<sup>4</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 288(c)(i).

<sup>5</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 288(c)(iii).

<sup>6</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 289.

<sup>7</sup> WT/DS207/9.

<sup>8</sup> WT/DS207/13.

8. On 25 September 2003, Chile published in the Official Journal Law No. 19.897<sup>9</sup> which establishes rules on the importation of goods and amends Article 12 of Law No. 18.525 and the Customs Tariff. On 4 October 2003, Chile published in the Official Journal Supreme Decree No. 831 of the Ministry of Finance<sup>10</sup> which regulates the implementation of Article 12 of Law No. 18.525, as substituted by Article 1 of Law No. 19.897.<sup>11</sup> This Decree governs certain aspects of the PBS, the amendments to which entered into force on 16 December 2003 for the products at issue in this dispute, with the exception of edible vegetable oils which ceased to be subject to the band system from the date of publication of Law No. 19.897.<sup>12</sup> Thus, Chile has implemented the recommendations and rulings of the DSB only in relation to edible vegetable oils.

9. Argentina has argued strongly that these amendments to the PBS should also implement the recommendations and rulings of the DSB in relation to wheat and wheat flour.<sup>13</sup>

10. On 24 December 2003, Argentina and Chile concluded an Understanding regarding procedures under Articles 21 and 22 of the DSU with respect to the present dispute.<sup>14</sup>

11. Early in 2004, bilateral negotiations were begun with a view to achieving the implementation of the recommendations and rulings of the DSB in relation to wheat and wheat flour. In this connection, during 2004 and 2005, various meetings were held in Geneva, Santiago de Chile and Buenos Aires and a series of documents was exchanged with a view to achieving a mutually agreed settlement of the dispute. This led to an understanding which Chile later repudiated. In relation to the price band system for wheat and wheat flour, this understanding consisted – basically – in Chile establishing an end date for the system.<sup>15</sup>

12. On 19 May 2004, Argentina initiated a recourse procedure under Article 21.5 of the DSU by requesting consultations with Chile.<sup>16</sup> These consultations were held in Geneva on 17 June 2004 but failed to lead to a settlement of the dispute.

## 2. Summary of claims and allegations

13. Argentina maintains that Chile has failed to implement the recommendations and rulings of the DSB and continues in breach of its obligations as a Member of the WTO.

14. This on the grounds that Chile's price band system, as amended in accordance with Law No. 19.897 and Supreme Decree No. 831/2003, *per se* and in its specific application to imports of wheat and wheat flour:

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<sup>9</sup> Exhibit ARG-1.

<sup>10</sup> Exhibit ARG-2.

<sup>11</sup> WT/DS207/15 of 22 September 2003, WT/DS207/15/Add.1 of 28 October 2003 and WT/DS207/15/Add.2 of 21 November 2003.

<sup>12</sup> Exhibit ARG-3: Circular Letter No. 292 of the National Customs Service of the Government of Chile, Technical Subsecretariat and Classification Dept., of 14 October 2003. See also the statement made by Chile at the DSB meeting on 7 November 2003 (WT/DSB/M/157, paragraph 20).

<sup>13</sup> See, for example, the statements made by Argentina at the DSB meetings on 2 October, 7 November and 1 December 2003 (WT/DSB/M/156, paragraphs 17 to 19; WT/DSB/M/157, paragraph 19; WT/DSB/M/159, paragraph 19, respectively); 23 January, 17 February, 19 March, 20 April, 19 May and 22 June 2004 (WT/DSB/M/163, paragraph 18; WT/DSB/M/165 and WT/DSB/M/166, paragraph 18; WT/DSB/M/167, paragraph 18; WT/DSB/M/169, paragraph 20; WT/DSB/M/171, paragraph 32). The difference of opinion was also recorded in the document WT/DS207/16 of 7 January 2004.

<sup>14</sup> WT/DS207/16.

<sup>15</sup> Note that the present System has no end date. As indicated in the legislation amending the original PBS, "...In 2014 the President of the Republic shall *evaluate* the modalities and conditions of application of the price band system..." (emphasis added).

<sup>16</sup> WT/DS207/17 of 25 May 2004.

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

### 3. Structure of the submission

15. In Section B, Argentina gives a detailed description of the Chilean measures allegedly intended to implement the recommendations and rulings of the DSB in the present dispute.

16. In Section C, Argentina puts forward the following arguments:

- In Subsection I, Argentina shows that the amended PBS is in breach of Article 4.2 of the *Agreement on Agriculture*;
- in Subsection II, Argentina explains how the amended PBS is inconsistent with the second sentence of Article II:(1)(b) of the GATT 1994; and
- Subsection III, Argentina argues that the amended PBS is in breach of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*.

17. Finally, in Section D Argentina presents its conclusions.

## B. THE FACTS

### 1. Measures intended to implement the recommendations and rulings of the DSB

18. On 25 September 2003, Chile published in the Official Journal Law No. 19.897,<sup>17</sup> whose Article 1 replaced Article 12 of Law No. 18.525. As notified by Chile, Law 19.897 established a "new" price band system which entered into force on 16 December 2003 for the products at issue in this dispute, namely, wheat and wheat flour.<sup>18</sup>

19. Moreover, as also notified by Chile,<sup>19</sup> on 4 October 2003, Chile published in the Official Journal Supreme Decree No. 831 of the Ministry of Finance (hereinafter Decree 831/2003)<sup>20</sup> regulating the application of Article 12 of Law No. 18.525, as substituted by Article 1 of Law No. 19.897, which governs certain fundamental aspects of the price band system.

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<sup>17</sup> See Exhibit ARG-1.

<sup>18</sup> WT/DSB/M/156, paragraph 16.

<sup>19</sup> WT/DS207/15/Add.1.

<sup>20</sup> See Exhibit ARG-2.



20. The fact that both Law 19.897 and Decree 831/2003 are measures adopted by Chile to implement the recommendations and rulings of the DSB was acknowledged by Chile in the status reports its submitted to the DSB in fulfilment of its obligations under Art. 21.6 of the DSU.<sup>21</sup>

## 2. Products subject to Chile's price band system

21. In its original form, the PBS – established by Law 18.525 and amended by Laws 18.591, 18.573 and 19.772 – established price bands for each of the following product categories: (i) edible vegetable oils, (ii) wheat and wheat flour, and (iii) sugar.<sup>22</sup>

22. Under the amended PBS, price bands are calculated for wheat, wheat flour and sugar.<sup>23</sup> That is to say, only edible vegetable oils have ceased to be subject to the PBS.<sup>24</sup>

## 3. The amended PBS as compared with the original PBS

23. Below, Argentina describes the various components of the Price Band System as amended by Law 19.897 and Supreme Decree 831/2003, together with the functioning of the system, in each case drawing a comparison with the original arrangements.

### 3.1. Total duties applicable

24. In the case of the PBS in its original form, the total amount of duty applied to the products covered by the price band system consisted of two components: (i) an *ad valorem* duty that reflected Chile's applied Most-Favoured Nation ("MFN") tariff rate; and (ii) a specific duty determined for each importation by comparing a reference price with the upper or lower threshold of a price band.<sup>25</sup>

25. In the amended PBS, both these types of duty: *ad valorem* and specific are also applied.<sup>26</sup>

#### 3.1.1. Ad valorem duty

26. Under the original PBS, the *ad valorem* duty was the applied MFN rate which, under Chile's flat-tariff regime, is the same for all products. The applied *ad valorem* rate in 2002 was 7 per cent. It was applied to the transaction value of the imported product to achieve the *ad valorem* duty for that product.<sup>27</sup>

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<sup>21</sup> See, for example, document WT/DS207/15/Add.3.

<sup>22</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 12.

<sup>23</sup> See Exhibit ARG-1, Law 19.897, Art. 1: "Article 1.- Article 12 of Law No. 18.525 shall be substituted by the following: "Article 12.- Specific duties are hereby established in United States dollars per tariff unit and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of wheat, wheat flour and sugar, as stipulated in this Law..." and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 1.

<sup>24</sup> "... (Chile) noted that the other products at issue in this dispute, namely edible vegetable oils and oil-seeds, had been excluded from the Law and were, therefore, no longer subject to the price band system". WT/DSB/M/156, paragraph 16.

<sup>25</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 13.

<sup>26</sup> See Exhibit ARG-1, Law 19.897, Art. 1 "... The duties that result from the application of this article, added to the *ad valorem* duty ..." and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 14.

<sup>27</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 14.

27. In the "new" PBS, the *ad valorem* rate applied since December 2003 is 6 per cent. It is applied to the transaction value of the imported product to achieve the *ad valorem* duty for that product.<sup>28</sup>

### 3.1.2. Specific duty

28. In their "old" form, the price bands provided upper and lower thresholds that were used to calculate the specific duty applicable to each importation of products subject to price band system.<sup>29</sup>

29. In the "new" PBS, the same method is employed.<sup>30</sup>

### 3.2. Period of application of the bands

30. Under the "old" PBS, the bands that applied to wheat and wheat flour were determined for the period 16 December-15 December.<sup>31</sup>

31. The "new" PBS has an identical provision.<sup>32</sup>

### 3.3. Floor and ceiling of the bands

#### 3.3.1. Periodicity

32. Under the original PBS, the lower and upper thresholds of the price bands (hereinafter the floor and ceiling prices, respectively) were determined on an annual basis through decrees issued by the Chilean Executive. The floor and ceiling prices for each price band were calculated once a year, once all the necessary elements were available, usually starting around February, as soon as the "relevant" inflation index calculated by the Central Bank of Chile on the basis of national foreign trade data had been published.<sup>33</sup>

33. Under the amended PBS, the floor and ceiling prices of the price bands have been determined once only, for the entire period extending from 16 December 2003 to 15 December 2014.<sup>34</sup> That is to

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<sup>28</sup> According to the Chilean Customs web site. See Customs Tariff for Wheat and Wheat Flour (tariff lines 1001.90.00 and 1101.00.00, respectively).

At: [http://www.aduana.cl/p4\\_principal/antialone.html?page=http://www.aduana.cl/p4\\_principal/site/edic/base/port/arancel.html](http://www.aduana.cl/p4_principal/antialone.html?page=http://www.aduana.cl/p4_principal/site/edic/base/port/arancel.html), "Section II, Vegetable Products".

<sup>29</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 16

<sup>30</sup> See Exhibit ARG-1, Law 19.897, Art. 1 "...For the determination of the duties and rebates up to the annual period ending in 2007, the floor and ceiling prices used for wheat shall be taken into account... There shall be established, on the one hand, specific duties when the reference price is below the floor price of 128 dollars for wheat... and, on the other hand, rebates on the amounts payable as *ad valorem* Customs Tariff duties when the reference price is above the ceiling price of 148 dollars for wheat... For the determination of the duties and rebates from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established above shall be adjusted annually by multiplying the prices in force during the previous annual period by a factor of 0.985 in the case of wheat...", and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 6, 13 and 14.

<sup>31</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 17.

<sup>32</sup> See Exhibit ARG-1, Law 19.897, Art. 1: "...The amount of these duties and rebates shall be set...for each annual period extending from 16 December to 15 December of the following year...", and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 6.

<sup>33</sup> *Chile – Price Band System*, Report of the Appellate Body, footnote 25.

<sup>34</sup> See Exhibit ARG-1, Law 19.897, Art. 1: "...For the determination of the duties and rebates up to the annual period ending in 2007... For the determination of the duties and rebates from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established above shall be adjusted annually by multiplying the

say, 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.

### 3.3.2. Calculation of the floor and ceiling prices

34. Under the "old" PBS, the floor and ceiling prices of each price band were determined as follows. Average monthly international prices for each product category were compiled. The price used for wheat was that quoted for Hard Red Winter No. 2, FOB Gulf (Kansas Exchange).<sup>35</sup> The price bands for wheat were calculated on the basis of the average monthly prices for the previous 60 months (5 years).<sup>36</sup> These average prices were adjusted to account for international inflation using an external price index calculated by Chile's Central Bank. Law No. 18.525 stated that the average prices should be adjusted according to the percentage variation in the average price index relevant for Chile's foreign trade between the corresponding month and the last month in the year in which the specific duties were determined.<sup>37</sup> Once adjusted for inflation, the compiled monthly prices were listed in descending order and the "extreme" values were eliminated. In the case of wheat, the prices that represented the highest 25 per cent and the lowest 25 per cent of the prices compiled were eliminated.<sup>38</sup> After the "extreme" values had been eliminated, the remaining highest and lowest prices were selected for the calculation of the price band thresholds (floor and ceiling prices).<sup>39</sup> Import costs were then added to the "highest and lowest prices" previously selected in order to convert them to a cost, insurance and freight ("CIF") basis. These "import costs" included the *ad valorem* tariff and costs such as freight, insurance, opening of a letter of credit, interest on credit, taxes on credit, customs agents' fees, unloading, transport to the plant and wastage costs. No published legislation or regulation set out how these "import costs" were calculated.<sup>40</sup> The adjusted prices constituted the upper and the lower thresholds of the price band for the product in question.<sup>41</sup>

35. In the case of the amended PBS, the floor and ceiling prices have been established for the entire period from 16 December 2003 to 15 December 2007 at US\$128 per tonne and US\$148 per tonne, respectively. From 16 December 2007 to 15 December 2014, the floor and ceiling prices indicated will be adjusted annually by multiplying the prices in force during the previous annual period by a factor of 0.985. The floor and ceiling prices resulting from this operation are set out in Law 19.897 and in Supreme Decree No. 831 of the Ministry of Finance.<sup>42</sup>

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prices in force during the previous annual period..." and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 6.

<sup>35</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(a)(ii).

<sup>36</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(a) *in fine*.

<sup>37</sup> At the hearing, Chile further explained that this price index also reflected domestic inflation and foreign exchange rate fluctuations. *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(b) and footnote 28.

<sup>38</sup> For example, in the case of wheat, the 15 highest and the 15 lowest prices of the 60 compiled prices are eliminated from the calculation. *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(c) *in fine*.

<sup>39</sup> For example, in the case of wheat and edible vegetable oils, of the 60 monthly prices compiled, the 16th and 44th highest monthly prices were selected for the calculation of the upper and the lower thresholds respectively. See *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(d).

<sup>40</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(e).

<sup>41</sup> Returning to the earlier example of wheat, the 16th highest monthly price (adjusted to reflect import costs) would represent the upper threshold of the price band, and the 44th highest price (with the same adjustments made) would represent the lower threshold of the price band. See *Chile – Price Band System*, Report of the Appellate Body, paragraph 18(f).

<sup>42</sup> See Exhibit ARG-1, Law 19.897, Art. 1: "...There shall be established, on the one hand, specific duties when the reference price is below the floor price of 128 dollars for wheat... and, on the other hand, rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff when the reference price

36. Thus, the general band system, with a floor and a ceiling in relation to a reference price plus a specific duty determined in accordance with the difference between these parameters, has been left unchanged. That is to say, the floor and ceiling parameters and the reference price feature continue to exist.

### 3.4. Reference prices

#### 3.4.1. Periodicity

37. In the case of the PBS in its original form, the reference prices for each product category were determined by the customs authorities on a weekly basis (every Friday for the following week).<sup>43</sup>

38. Now, the customs authorities determine the reference prices six times in the course of each twelve-month period extending from 16 December to 15 December of the following year, and keep it fixed for two months at a time.<sup>44</sup>

#### 3.4.2. Markets of concern

39. Under the "old" PBS, although there was no Chilean law or regulation specifying the international "markets of concern" to be used for calculating the applicable reference prices,<sup>45</sup> it seems that the markets and qualities chosen were intended to be representative of the products actually "liable" to be imported into Chile. In the case of wheat, in calculating the reference price, Chile used the lowest FOB price for that product in "any market of concern". It was not clear whether Chile would use the lowest FOB price for any quality of wheat as a reference price for all qualities of wheat.<sup>46</sup>

40. Under the "new" PBS, Article 2 of Decree 831/2003 defines the reference price for the application of duties and rebates, as the "...average of the daily international wheat prices..., recorded in the markets of most concern..."<sup>47</sup>

41. Under the "new" PBS, the market of most concern for wheat, during the period of application of duties and rebates extending from 16 December to 15 June of the following year, will be that for *Trigo Pan Argentino*<sup>48</sup> and the prices will correspond to the daily prices quoted for that product FOB "Argentine port".<sup>49</sup> In this connection, it should be pointed out that the legislation does not specify the Argentine port in question, although the prices depend on which Argentine port is considered.<sup>50</sup>

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is above the ceiling price of 148 dollars for wheat... For the determination of the duties and rebates from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established above shall be adjusted annually by multiplying the prices in force during the previous annual period by a factor of 0.985 in the case of wheat..." and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 6.

<sup>43</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 21.

<sup>44</sup> See Exhibit ARG-1, Law 19.897, Art. 1: "...The amount of these duties and rebates shall be set...six times for wheat during each annual period extending from 16 December to 15 December of the following year..." and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 5 and 7, and "Summary Table for the application of paragraph 2" (annex).

<sup>45</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 249.

<sup>46</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraphs 23 and 24.

<sup>47</sup> See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance.

<sup>48</sup> Note of the Secretariat: literal translation of this quality would be "Argentine bread wheat".

<sup>49</sup> See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 8.

<sup>50</sup> Exhibit ARG-4: Daily bread wheat prices quoted for various Argentine ports.

42. Likewise, during the application period extending from 16 June to 15 December, the market will be that for Soft Red Winter No. 2 wheat and the prices will correspond to the daily prices quoted for that product FOB Gulf of Mexico.<sup>51</sup>

43. As in the case of the PBS in its original form, in no legislative or regulatory provision of the amended PBS is it specified *how or on what basis* the international "markets of concern" and the "qualities of concern" are selected.<sup>52</sup>

44. Nor is it clear whether Chile will apply the reference price determined in accordance with the "new" PBS to any quality of wheat as a reference price for all qualities of wheat.

### **3.4.3. Adjustment of the reference price**

45. Under the original PBS, the lowest "market of concern" price used to determine the weekly reference price was not adjusted for "import costs", and thus was not converted from an FOB to a CIF basis.<sup>53</sup>

46. The same applies to the reference prices in the amended PBS: the average "markets of concern" price used to determine the reference price is not adjusted for "import costs", and thus is not converted from an FOB to a CIF basis.<sup>54</sup>

### **3.4.4. Absence of a link with the transaction value**

47. Under the original PBS, the same weekly reference price was applied to all goods falling within the same product category, irrespective of the origin of the goods and regardless of the transaction value of the shipment.<sup>55</sup> The reference price was thus unrelated to the transaction price of the particular shipment.<sup>56</sup>

48. In the case of the amended PBS, the same bimonthly reference price is applied to all goods falling within the same product category, irrespective of their origin and regardless of the transaction value of the shipment.

49. Therefore, despite the fact that it is now determined at different intervals, under the present system the reference price is still unrelated to the transaction value of the particular shipment.<sup>57</sup>

## **3.5. Specific duties and rebates**

### **3.5.1. Date of application**

50. Under the "old" PBS, upon arrival of the shipment the appropriate weekly reference price was selected according to the date of embarkation.<sup>58</sup>

51. As distinct from this, under the "new" PBS, the reference price and the duties or rebates applicable to each import operation will be those in effect on the waybill date for the vehicle

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<sup>51</sup> See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 8.

<sup>52</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 249.

<sup>53</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 250.

<sup>54</sup> See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 4.

<sup>55</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 21.

<sup>56</sup> *Chile – Price Band System*, Report of the Appellate Body, footnote 32.

<sup>57</sup> See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 7, 13 and

<sup>58</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 29(a).

transporting the goods in question. In the case of electronic filing, the waybill date will be taken to be the date of actual acceptance of the vehicle and the goods will be considered to have been presented at the same time.<sup>59</sup>

### 3.5.2. Calculation of specific duties

52. Under both "old" and "new" systems, the reference price is compared with the floor of the relevant price band.

53. In the case of the "old" PBS, the specific duties imposed were equal to the difference between the annual price band floor and Chile's weekly reference prices.

54. Under the original system, if the weekly reference price fell between the floor and ceiling values of the price band, no specific duty was levied. In such cases, only the *ad valorem* duty was applied.<sup>60</sup> The current system is the same in this respect.<sup>61</sup>

55. Under the original PBS, if the weekly reference price fell below the price band floor, a specific duty equal to the difference between the floor price and the reference price was levied.<sup>62</sup> Expressed as a formula, the specific duty calculation – under the original PBS – can be written as follows:

$$\text{Specific duty} = \text{Band floor} - \text{Reference price}$$

56. Under the "new" PBS, the specific duties imposed are equal to the difference between the floor of the price band (note that the relevant legislation does not specify whether the values in question are FOB or CIF.) and the bimonthly reference prices based on FOB prices.<sup>63</sup>

57. If the bimonthly reference price lies below the price band floor, a specific duty equal to the difference between the floor price and the reference price, **multiplied by a factor of one (1) plus the general *ad valorem* tariff in force as established in the Customs Tariff**, is levied.<sup>64</sup> Expressed as a formula, as in Article 14 of Decree 831/2003,<sup>65</sup> the specific duty calculation can be written as follows:

$$\text{Specific duty} = (\text{Band floor} - \text{Reference price}) * (1 + \textit{ad valorem tariff})$$

58. Thus, the way in which the calculation of the specific duties has been changed leaves the exporter worse off, inasmuch as the specific duties now generate a cost higher than that generated by the previous method of calculation.

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<sup>59</sup> See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, art. 17.

<sup>60</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 29(b)(i).

<sup>61</sup> See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 13. The legislation does not specify whether, in this case, the *ad valorem* duty will also be applied, although this could be deduced from a reading of Art. 18 of Supreme Decree No. 831.

<sup>62</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 29(iii).

<sup>63</sup> See Exhibit ARG-1, Law 19.897, Art. 1, and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Arts. 6, 7, 8, 13 and 14.

<sup>64</sup> See Exhibit ARG-1, Law 19.897, Art. 1, and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 13 and 14.

<sup>65</sup> See Exhibit ARG-2.

### 3.5.3. The factor for wheat flour

59. Under the original PBS, the specific duty or rebate for wheat flour was calculated by multiplying the specific duties or rebates for wheat by a factor of 1.56.<sup>66</sup>

60. The same applies to the amended PBS.<sup>67</sup>

### 3.5.4. Calculation of the tariff rebate

61. Under the "old" PBS, if the weekly reference price was higher than the band ceiling, a rebate equal to the difference between the ceiling of the relevant price band and the reference price was granted.<sup>68</sup>

62. Under the amended PBS, if the bimonthly reference price is higher than the band ceiling, the rebate granted<sup>69</sup> is equal to the difference between the ceiling of the relevant price band and the reference price multiplied by a factor of one (1) plus the general *ad valorem* tariff in force as established in the Customs Tariff.<sup>70</sup>

63. Moreover, under both the "old" and the "new" PBS, the rebate is deducted from the *ad valorem* applied MFN duty.<sup>71</sup>

64. As pointed out by a Chilean Senator during the discussion of the bill extending the system for setting the duties and rebates for wheat flour, the rebates applied to the *ad valorem* duties mean that Chilean domestic market prices will be lower than the international prices if the latter lie above the price band ceiling:

*"... the prices of agricultural products have tended to rise and, consequently, the domestic price for flour and wheat is currently lower than what it would be if there were no price band... In the fat years we should be providing for the lean years, thereby ensuring the necessary stability."*<sup>72</sup>

### 3.6. Administration of the PBS

65. To make the price band system easier to administer, in the original PBS the annual decrees that established the price bands included a table that set out a range of reference prices and the specific duty or rebate that would be applied in the case of each of those reference prices. Once the reference price that applied for a particular week had been published, the corresponding specific price band duty or rebate for that reference price could be found in the table.<sup>73</sup>

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<sup>66</sup> *Chile – Price Band System*, Report of the Appellate Body, footnote 23.

<sup>67</sup> See Exhibit ARG-1, Law 19.897, Art. 1 "...In the case of wheat flour, the duties and rebates determined for wheat multiplied by a factor of 1.56, shall be applied..." and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 17.

<sup>68</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 29(b)(ii).

<sup>69</sup> See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 13, 14, and 15.

<sup>70</sup> See Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 15.

<sup>71</sup> See *Chile – Price Band System*, Report of the Appellate Body, paragraph 29(b)(ii), and Exhibit ARG-2, Supreme Decree No. 831 of the Chilean Ministry of Finance, Arts. 13 and 15.

<sup>72</sup> Senator Errázuriz, 24 January 1996, in *"History of the Law. Compilation of official texts of the parliamentary debate. Law 19.446"*. Library of the National Congress. Santiago, Chile, 1997.

<sup>73</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 29.

66. Under the present system, Decree 831/2003 of the Chilean Ministry of Finance includes a table giving the floor and ceiling prices of the PBS for the whole of the period from 16 December 2003 to 15 December 2014. Moreover, every two months (six times during each annual period) a decree is published establishing the amount of the specific duties or rebates applicable. So far, the bimonthly decrees appear not to indicate the reference price calculated for each period, as follows from Exhibit ARG-5 which includes all the decrees relating to the amended PBS published to date.<sup>74</sup>

C. ARGUMENTS

*"...What is certain is that the bands will have to go, and it is a good thing that the country should get used to the idea that it will not be able to continue living with price bands if it wants to join the major leagues of world free trade ...*

*The international free trade agreements are unequivocal about wanting to see bands abolished because they undoubtedly cause distortion"*<sup>75</sup>

67. An Article 21.5 procedure is intended to decide disputes "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]".

68. Argentina maintains that the Price Band System as amended by Law No. 19.897 and Decree 831/2003 does not comply with the recommendations and rulings of the DSB, so that Chile is continuing to infringe its WTO obligations.

69. This is because the amended PBS, *per se* and as specifically applied to imports of wheat and wheat flour:

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

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

70. Argentina maintains that the essence of the PBS was unaffected by the changes introduced by Law 19.897 and Decree 831/2003. In other words, these changes did not convert the price band

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<sup>74</sup> Exhibit ARG-5: Exempt Decrees No. 691/2003, No. 77/2004, No. 186/2004, No. 368/2004, No. 485/2004; No. 600/2004; No. 762/2004; No. 88/2005; No. 278/05; No. 466/2005; No. 569/2005; No. 706/2005; No. 873/2005; and No. 132/2006.

<sup>75</sup> Senator Piñera, 24 January 1996, during the discussion of the bill extending the system for establishing duties and rebates for wheat flour. In *"History of the Law. Compilation of official texts of the parliamentary debate. Law 19.446"*. Library of the National Congress. Santiago, Chile, 1997.



system into a measure different from the price band system that was in force before the changes were introduced.<sup>76</sup>

71. The amended PBS is a border measure similar to a "variable import levy" and a "minimum import price" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*.

72. This is because the way in which the system is designed and the way it operates in its overall nature are sufficiently similar to the characteristics of these two categories of prohibited measures as to make the amended PBS, with its particular characteristics, a "similar border measure".

73. The particular configuration and interaction of the specific characteristics of Chile's price band system generate certain market access conditions that lack transparency and predictability and disconnect the Chilean market from international price trends in a way that insulates the Chilean market from the transmission of international prices and prevents enhanced market access for imports of wheat and wheat flour.

74. Consequently, since it falls within the categories of measures prohibited by footnote 1, the amended PBS is not an ordinary customs duty and hence is a measure inconsistent with Article 4.2 of the *Agreement on Agriculture* which may not be maintained, resorted to, or reverted to.

#### **1. WTO case-law applicable to the PBS**

75. Below, Argentina notes certain Panel and Appellate Body findings relating to the PBS in its original form that continue to be valid for the amended PBS also.

76. The relevant part of Article 4.2 of the *Agreement on Agriculture* states:

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

77. Moreover, according to the relevant part of footnote 1 to that Article:

"These measures include...variable import levies, minimum import prices,...and similar border measures other than ordinary customs duties..."

78. In this connection, the Appellate Body upheld the Panel's finding<sup>77</sup> to the effect that:

"... Chile's price band system is a border measure similar to variable import levies and minimum import prices within the meaning of...Article 4.2 of the *Agreement on Agriculture* ..."

79. Before arriving at this conclusion, the Appellate Body held that:

"A plain reading of Article 4.2 and footnote 1 makes clear that, if Chile's price band system falls within any *one* of the categories of measures listed in footnote 1, it is among the "measures of the kind which have been required to be converted into

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<sup>76</sup> This was confirmed by the Chilean Executive itself when it stated that "...*Through this bill (Law 19.897) the Government has corrected...formal aspects challenged [by the WTO] while fully protecting the spirit of the bands...*" (emphasis added). Nicolás Eyzaguirre, Chilean Minister of Finance, 6 August 2003. In *"History of the Law. Compilation of official texts of the parliamentary debate. Law 19.897"*. Library of the National Congress. Santiago, Chile, 2003.

<sup>77</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraphs 262 and 288(c)(i).

ordinary customs duties", and thus must not be maintained, resorted to, or reverted to, as of the date of entry into force of the *WTO Agreement*"<sup>78</sup>

80. Moreover, the Appellate Body noted that:

"Thus, the obligation in Article 4.2 not to "maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties" applies from the date of the entry into force of the *WTO Agreement*—regardless of whether or not a Member converted any such measures into ordinary customs duties before the conclusion of the Uruguay Round. The mere fact that no trading partner of a Member singled out a specific "measure of the kind" by the end of the Uruguay Round by requesting that it be converted into ordinary customs duties, does not mean that such a measure enjoys immunity from challenge in WTO dispute settlement. The obligation "not [to] maintain" such measures underscores that Members must not continue to apply measures covered by Article 4.2 from the date of entry into force of the *WTO Agreement*."<sup>79</sup>

81. Likewise, it added:

"The obligation in Article 4.2 "not [to] resort to" can be understood as meaning that Members must not introduce new measures "of the kind" that it has not had in place in the past; the obligation "not [to] revert to" can be read in the sense that Members may not, at some later stage after the entry into force of the WTO, re-enact measures prohibited by Article 4.2. At the oral hearing, the participants agreed that the obligations not to "resort to, or revert to" prohibited measures are less relevant to this dispute than the obligation to "not maintain" such measures."<sup>80</sup>

82. The Appellate Body also found that the Chilean price band system could have the effect of impeding the transmission of international price developments to the domestic market in a way similar to that of other categories of prohibited measures listed in footnote 1.<sup>81</sup>

83. In this connection, the Appellate Body pointed out how the PBS prevented world prices from being fully reflected in domestic prices:

"... Chile's price band system does not simply ensure a reasonable margin of fluctuation of domestic prices. In our view, "such reasonable margin of fluctuation" would mean that duties resulting from Chile's price band system would ensure that declines in world prices would not be *fully* reflected in domestic prices. Therefore, Chile's price band system does not merely moderate the effect of fluctuations in world market prices on Chile's market because it does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices—albeit to a lesser extent than the decrease in those prices. Nor does it tend only to "compensate" for these price declines. Instead, specific duties resulting from Chile's price band system tend to "overcompensate" for them, and to elevate the entry price of imports to Chile above the lower threshold of the relevant price band. In these circumstances, the entry price of such imports to Chile under Chile's price band system is even higher

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<sup>78</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 221.

<sup>79</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 212.

<sup>80</sup> *Chile – Price Band System*, Report of the Appellate Body, footnote 187.

<sup>81</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 246.

than if Chile simply applied a minimum import price at the level of the lower threshold of a Chilean price band."<sup>82</sup>

84. The Appellate Body took the view that, in addition to the lack of transparency and the lack of predictability that were inherent in how Chile's price bands were established, there were similar shortcomings in the way in which the other essential element of Chile's price band system—the reference price—was determined. The duties resulting from Chile's price band system were equal to the difference between the price band thresholds and the reference price. Chile set the reference price on a weekly basis, and did so in a way that was neither transparent nor predictable.<sup>83</sup>

85. In relation to the lack of transparency and predictability of the PBS in its original form, the Appellate Body noted that:

"Under Chile's price band system, the price used to set the weekly reference price is the lowest f.o.b. price observed, at the time of embarkation, in any foreign "market of concern" to Chile for "qualities of products actually liable to be imported to Chile". No Chilean legislation or regulation specifies how the international "markets of concern" and the "qualities of concern" are selected. Thus, it is not by any means certain that the weekly reference price is representative of the current world market price. Moreover, the weekly reference price used under Chile's price band system is certainly *not* representative of an average of current lowest prices found in *all* markets of concern. As a result, the process of selecting the reference price is not transparent, and it is not predictable for traders."<sup>84</sup>

86. Moreover, the Appellate Body stated that, even if it were to be assumed that one feature of Chile's price band system was not similar to the features of "variable import levies" and "minimum import prices" because the thresholds of Chile's price bands varied in relation to – albeit historic – world market prices rather than domestic target prices, this would not change its overall assessment of Chile's price band system:

"... This is because specific duties resulting from Chile's price band system are equal to the *difference* between two parameters—the annual price band thresholds and the weekly reference prices applicable to the shipment in question ..."<sup>85</sup>

87. Before finding that the Chilean Price Band System "is a border measure similar to a variable import levy and a minimum import price..." the Appellate Body affirmed that:

"... although there are some dissimilarities between Chile's price band system and the features of "minimum import prices" and "variable import levies" we have identified earlier, the way Chile's system is designed, and the way it operates in its overall nature, are sufficiently "similar" to the features of both of those two categories of prohibited measures to make Chile's price band system—in its particular features—a "similar border measure" within the meaning of footnote 1 to Article 4.2".<sup>86</sup>

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<sup>82</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 260.

<sup>83</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 247.

<sup>84</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 249.

<sup>85</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 251.

<sup>86</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 252.

88. In this connection, the Appellate Body stated that:

"... a finding that Chile's price band system as such is a measure prohibited by Article 4.2 would mean that the duties resulting from the application of that price band system could no longer be levied—no matter what the level of those duties may be. Without a price band system, there could be no price band duties."<sup>87</sup> (Emphasis added).

89. The changes introduced into the Chilean legislation did not convert the price band system into a measure essentially different from that in effect before those changes were made. Consequently, as shown below, the essence of the PBS remains intact and the comments and findings of the Appellate Body relating to the original PBS apply in full to the amended PBS. In particular, the amended PBS leads to insulation from the international market and is neither transparent nor predictable.

## 2. The amended PBS causes insulation from the international market

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

Jaime Campos, Chilean Minister of Agriculture,  
5 August 2003.<sup>88</sup>

90. Below, Argentina will show that, regardless of the changes made, the PBS continues to insulate Chile's market from fluctuations in international prices in a way that is inconsistent with Article 4.2 of the *Agreement on Agriculture*.

91. In various passages of its report, the Appellate Body held that the old PBS, in violation of Article 4.2 of the *Agreement on Agriculture*, failed to transmit world market price developments to the Chilean market in the same way as "ordinary customs duties".<sup>89</sup>

92. Moreover, the Appellate Body maintained that in the old PBS the duties resulting from the System ensured that falls in world prices were not *fully* reflected in domestic prices. The Appellate Body added:

"... when international prices *fall*, and when the weekly reference prices are below the lower thresholds of Chile's price bands, **the total duties applied to particular**

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<sup>87</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 190, *in fine*.

<sup>88</sup> "History of the Law. Compilation of official texts of the parliamentary debate. Law 19.897". Library of the National Congress. Santiago, Chile, 2003.

<sup>89</sup> *Inter alia*:

"... Chile's price band system can still have the *effect* of impeding the transmission of international price developments to the domestic market in a way similar to that of other categories of prohibited measures listed in footnote [of Art 4.2 of the Agreement on Agriculture]" (*Chile – Price Band System*, Report of the Appellate Body, paragraph 246, original emphasis).

"... the way in which Chile's weekly reference prices are determined contributes to giving Chile's price band system the effect of impeding the transmission of international price developments to Chile's market." (*Chile – Price Band System*, Report of the Appellate Body, paragraph 250);

"... the duties resulting from Chile's price band system...would *not* transmit world market price developments to Chile's market in the same way as "ordinary customs duties". " (*Chile – Price Band System*, Report of the Appellate Body, paragraph 251; original emphasis).

**shipments will, in many cases, result in an overall entry price of that shipment that rises rather than falls ..."**

(Footnote: "This is so because, when the weekly reference price is below the lower threshold of a Chilean price band, the specific duties resulting from Chile's price band system are equal to the difference between the lower price band threshold and the f.o.b. reference price, while the total duties applied to a particular shipment are added to that shipment's c.i.f. transaction value.")

"... Therefore, **Chile's price band system does not merely moderate the effect of fluctuations in world market prices on Chile's market because it does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices**—albeit to a lesser extent than the decrease in those prices. Nor does it tend only to "compensate" for these price declines. Instead, **specific duties resulting from Chile's price band system tend to "overcompensate" for them, and to elevate the entry price of imports to Chile above the lower threshold of the relevant price band.** In these circumstances, **the entry price of such imports to Chile under Chile's price band system is even higher than if Chile simply applied a minimum import price at the level of the lower threshold of a Chilean price band.** Therefore, we disagree with Chile that its price band system simply "moderates the effect of fluctuations in international prices on Chile's market". Chile's price band system tends to "overcompensate" for the effect of decreases in international prices on the domestic market when weekly reference prices are set below the lower threshold of the relevant price band—up to the level at which Chile's tariff binding imposes a limit on the amount of duties that can be levied ...."<sup>90</sup> (Emphasis added, footnote omitted).

93. This passage from the Appellate Body's report is very illuminating with regard to how the original PBS insulated the Chilean market from international prices in a way that is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it formulates several findings relating to the inconsistencies of the PBS. Moreover, it is very important for understanding the operation of the present PBS, since the Appellate Body's assertions all apply to the amended PBS also.

94. A careful reading of the passage cited shows that the Appellate Body makes four findings of inconsistency with regard to the old PBS, namely:

- (1) The specific duties resulting from the Chilean price band system tend to elevate the entry price of Chilean imports above the price band floor;
- (2) the Chilean price band system tends to "overcompensate" for the effect of decreases in international prices on the domestic market when weekly reference prices are set below the price band floor;
- (3) the entry price of Chilean imports under Chile's price band system is even higher than if Chile simply applied a minimum import price at the level of the price band floor;
- (4) the PBS does not merely moderate the effect of fluctuations in world market prices on Chile's market because it does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices.

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<sup>90</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 260.



In its turn:

$$\begin{aligned} \text{Specific duty}^{92} &= \left( \begin{array}{c} \text{Band floor} \\ \text{price} \end{array} - \text{Reference price} \right) * \left( 1 + \begin{array}{c} \text{General } ad \text{ valorem} \\ \text{duty in force,} \\ \text{Customs Tariff} \end{array} \right) \\ &= \left( \text{US\$128} - \text{Reference price} \right) * \left( 1 + 6\% \right) \end{aligned}$$

102. Mathematically, this can be expressed as follows:

$$EP = \text{CIF} + 6\% \text{ CIF} + [(\text{FP} - \text{RefP}) * (1+6\%)] \quad [1]$$

where:

EP = entry price for wheat imports to Chile under the amended PBS  
 RefP = reference price  
 FP = floor price of the band in force  
 CIF = Cost, Insurance, Freight

103. To show that, under the amended PBS, the entry price tends to be higher than the band floor price – currently set at US\$128 per tonne – equation [1] can be reformulated as follows:

$$\begin{aligned} EP &= \text{CIF} + 6\% \text{ CIF} + [(\text{US\$128} - \text{RefP}) * (1+6\%)] \\ EP &= 1.06 \text{ CIF} + 1.06 (\text{US\$128} - \text{RefP}) \\ EP &= 1.06 \text{ CIF} + \text{US\$135.68} - 1.06 \text{ RefP} \\ EP &= \text{US\$135.68} + (1.06 \text{ CIF} - 1.06 \text{ RefP}) \end{aligned}$$

104. For the entry price (EP) to be less than US\$128 per tonne – that is to say, less than the floor price (FP)- the reference price (RefP) must be greater than the CIF value by more than US\$7.2453 per tonne or, alternatively, the CIF value must be less than the reference price (RefP) by more than US\$7.2453 per tonne, as shown below:

$$\begin{aligned} \text{US\$128} &= \text{US\$135.68} + (1.06 \text{ CIF} - 1.06 \text{ RefP}) \\ \text{US\$128} &= \text{US\$135.68} + 1.06 (\text{CIF} - \text{RefP}) \\ - (\text{US\$7.68}) &= 1.06 (\text{CIF} - \text{RefP}) \\ - (\text{US\$7.2453}) &= \text{CIF} - \text{RefP} \end{aligned}$$

or, alternatively:

$$\begin{aligned} \text{RefP} &= \text{CIF} + \text{US\$7.2453} & [2] \\ \text{CIF} &= \text{RefP} - \text{US\$7.2453} & [3] \end{aligned}$$

105. This means that whenever the CIF price of wheat imports to Chile is greater than the reference price, or whenever the CIF price is less than that reference price by an amount that does not exceed US\$7.2453 per tonne and the reference price lies below the band floor, the amended PBS will result in the specific duties tending to elevate the entry price of the imports above the band floor.

106. Therefore, the question is whether there is any chance – with the Price Band active – of the reference price exceeding the CIF price by more than US\$7.2453 per tonne. In the case of wheat, these chances are minimal.

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<sup>92</sup> In accordance with Article 14 of Dec. 831/2003.

107. In the first place, the chances are minimal because the CIF price tends to be greater than the FOB price.

108. Secondly, in the case of wheat the chances of the reference price being higher than the CIF price by more than US\$7.2453 per tonne are minimal basically because of the effective difference in the calculation of the reference price and the CIF. The reference price, as under the old PBS, is calculated on an FOB basis.<sup>93</sup> The CIF, as its name implies ("Cost, Insurance, Freight") consists of the FOB plus freight and insurance. Thus, for the reference price to be higher than the CIF price by more than US\$7.2453 per tonne, the CIF price must fall so much that even with cost, freight and the US\$7.2453 of equations [2] and [3] included, the total is lower than the reference price itself. Thus, the chances of the CIF price for wheat being lower than the reference price – calculated on an FOB basis – by more than US\$7.2453 per tonne are minimal.

109. As an example, the chart in Exhibit ARG-7 and the table in Exhibit ARG-8<sup>94</sup> show the relationship between the CIF price and the reference price during the period of application of the amended PBS. Clearly, when specific duties were being applied – that is to say, between December 2004 and April 2005 – the CIF price of wheat imported into Chile was never lower than the reference price by more than US\$7.2453 per tonne and therefore under the amended PBS the entry price was *always* above US\$128 per tonne.

110. Even if we consider the historical relationship between the reference price established by Chile and the CIF price per tonne of wheat over the period of application of the amended PBS – that is to say, since 16 December 2003 – during all that time the CIF price per tonne of wheat not only was not less than the reference price but *always* higher than the reference price.

111. In addition, for the purpose of confirming that the chances of the CIF price per tonne of wheat being less than the reference price by US\$7.2453 per tonne are minimal, Argentina offers as evidence, in the table in Exhibit ARG-9,<sup>95</sup> the CIF prices per tonne of wheat imported to Chile since 1991, together with the reference price that Chile would have set if the amended PBS had been in force since that date, based on information from the *Oficina de Estudios y Políticas Agrarias* (Office of Agricultural Studies and Policies) of the Chilean Ministry of Agriculture (hereinafter ODEPA).<sup>96</sup> The reference price was calculated using the average monthly FOB price of *Trigo Pan Argentino* from 1991 for the first half of the year and, for the second half, the average monthly FOB price of Soft Red

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<sup>93</sup> The relevant part of Decree 831/2003 reads as follows:

"Article 7.- Reference price

The reference price for wheat shall be the average of the daily prices recorded on the markets indicated in Article 8, during a period of 15 days reckoned retrospectively from the 10th of the month in which the respective decree is published.

Article 8.- Market of most concern

The market of most concern for wheat, during the period of application of duties and rebates extending from 16 December to 15 June of the following year shall be that for *Trigo Pan Argentino* and the prices shall correspond to the daily prices quoted for that product FOB Argentine port, and during the period of application extending from 16 June to 15 December, that for Soft Red Winter No. 2 wheat and the prices shall correspond to the daily prices quoted for that product FOB Gulf of Mexico." (Emphasis added).

<sup>94</sup> Exhibits ARG-7 and ARG-8: Self-compilation based on ODEPA data.

<sup>95</sup> Source: Self-compilation based on ODEPA data.

<sup>96</sup> The ODEPA data can be found at [www.odepa.gob.cl](http://www.odepa.gob.cl).





In its turn:

$$\begin{aligned} \text{Specific duty}^{101} &= [ ( \text{Band floor price} - \text{Reference price} ) * ( 1 + \text{General ad valorem tariff in force} ) ] * \mathbf{1.56} \\ &= [ ( \text{US\$128} - \text{Reference price} ) * ( 1 + 6\% ) ] * \mathbf{1.56} \end{aligned}$$

118. Mathematically, this can be expressed as follows:

$$\text{EPWF} = \text{CIF} + 6\% \text{ CIF} + [ [ (\text{FP} - \text{RefP}) * (1+6\%) ] * 1.56 ] \quad [2]$$

where:

EPWF = entry price for wheat flour imports to Chile under the amended PBS  
RefP = reference price  
FP = band floor price in force  
CIF = Cost, Insurance, Freight

119. To show that, under the amended PBS, the entry price for wheat flour tends to be higher than the band floor price – currently set at US\$128 – equation [1] can be reformulated as follows:

$$\begin{aligned} \text{EPWF} &= \text{CIF} + 6\% \text{ CIF} + (\text{US\$128} - \text{RefP}) * (1+6\%) * 1.56 \\ \text{EPWF} &= 1.06 \text{ CIF} + (\text{US\$128} - \text{RefP}) * 1.06 * 1.56 \\ \text{EPWF} &= 1.06 \text{ CIF} + (\text{US\$128} - \text{RefP}) * 1.65 \\ \text{EPWF} &= 1.06 \text{ CIF} + \text{US\$211.2} - 1.65 \text{ RefP} \end{aligned}$$

120. For the entry price for wheat flour (EPWF) to be less than US\$128 per tonne – that is to say, less than the floor price (FP) – *the reference price (RefP) must be greater than the CIF value multiplied by 0.64 plus US\$50.42 per tonne* or, alternatively, *the CIF value must be less than the reference price multiplied by 1.56 less US\$78.49 per tonne*, as shown below:

$$\begin{aligned} \text{US\$128} &= 1.06 \text{ CIF} + \text{US\$211.2} - 1.65 \text{ RefP} \\ -(\text{US\$83.2}) &= 1.06 \text{ CIF} - 1.65 \text{ RefP} \\ 1.65 \text{ RefP} &= 1.06 \text{ CIF} + \text{US\$83.2} \\ \text{RefP} &= (1.06 \text{ CIF} / 1.65) + (\text{US\$83.2} / 1.65) \\ \text{RefP} &= 0.64 \text{ CIF} + \text{US\$50.42} \quad [ 2 ] \end{aligned}$$

or, alternatively:

$$\begin{aligned} \text{CIF} &= (1.65 \text{ RefP} / 1.06) - (\text{US\$83.2} / 1.06) \\ \text{CIF} &= 1.56 \text{ RefP} - \text{US\$78.49} \quad [ 3 ] \end{aligned}$$

121. Therefore, as with the entry price for wheat, the question is whether there is any chance – with the Price Band active – of *the reference price being greater than the CIF value multiplied by 0.64 plus US\$50.42 per tonne* or *the CIF value being less than the reference price multiplied by 1.56 less US\$78.49 per tonne*.

122. An analysis of this type would not be very useful since, according to Chile's own records, in the past the chances of the entry price for wheat flour being less than the band floor price are zero. In

<sup>101</sup> See Exhibit ARG-2, Decree 831/2003, Article 14.

fact, ODEPA keeps records of wheat flour imports since 1991. By taking the volumes and CIF amounts of monthly wheat flour imports it is easily possible to obtain the monthly CIF price per tonne for wheat flour since 1991.<sup>102</sup> The fact is that – from 1991 to date – the CIF price per tonne has *never* been less than the current and future band floor. If the CIF price per tonne was never less than the band floor, then logically the entry price for imports to Chile could not have been less than that price, since the entry price consists of the CIF price plus *ad valorem* duties and possibly specific duties.

123. Then, at first glance, the price band for wheat flour makes no sense. Why does Chile apply the price band to wheat flour *also* if, in view of the same international market dynamics, the entry price cannot be less than the band floor? The only possible conclusion is that there is an intent to add a distortion to the market in wheat and wheat products (which include wheat flour) *greater* than that already caused by the application of specific duties to wheat imports, thereby *further* isolating the Chilean wheat flour market from international markets.

124. To conclude, Argentina has shown that, in the case of wheat, the chances of the CIF price being lower than the reference price are minimal and, in the case of wheat flour, almost nil. Thus, on the basis of equations [2] and [3] – for wheat and wheat flour – and the arguments set out above, it has been shown that – as the Appellate Body found with respect to the "old" PBS – the amended PBS tends to elevate the entry price of wheat and wheat flour imports to Chile above the price band floor.

**2.2. The amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor**

125. Below, Argentina will show that the amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor, as pointed out by the Appellate Body in relation to the original PBS.

126. This "overcompensation" of the effect of decreases in international prices on Chile's domestic market takes place when, as the reference prices fall – in response to a fall in international FOB prices during a 15-day period – and the bands are activated by applying specific duties, the entry price not only does not decrease or remain the same but often increases, so that the general entry price for exports to Chile *rises*, instead of *falling*, as found by the Appellate Body in relation to the PBS in its original form.

**(a) Overcompensation in the case of wheat**

127. First of all, the overcompensation in the case of wheat can be demonstrated mathematically.

128. We recall equation [1] which represents the operation of the PBS in accordance with Law 19.897 and Decree 831/2003:

$$EP = CIF + 6\% \text{ CIF} + [(FP - \text{RefP}) * (1+6\%)] \quad [1]$$

where:

EP = entry price for imports to Chile under the PBS  
RefP = reference price  
FP = floor price currently in force  
CIF = Cost, Insurance, Freight

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<sup>102</sup> Exhibit ARG-28.

129. Consider, for example, the reference price (RefP) for the band in January 2005. According to ODEPA, RefP was US\$114.50 per tonne.<sup>103</sup> The average CIF price for that month for a tonne of wheat imported from Argentina was US\$164.43 per tonne.<sup>104</sup> By substituting these values in equation [1] we obtain:

$$\begin{aligned} EP &= US\$164.43 + US\$9.87 + [ (US\$128 - US\$114.50) * 1.06 ] \\ EP &= US\$164.43 + US\$9.87 + US\$14.31 \\ EP &= US\$188.61 \end{aligned}$$

130. That is to say, for the reference price and CIF price in question, the entry price for imports to Chile was US\$188.61 per tonne.

131. Now, for the sake of clarity, let us suppose that the reference price – which reflects the 15-day average FOB price for *Trigo Pan Argentino* – falls by 10 per cent (being equal during the next two months to US\$103.05 per tonne) whereas the CIF price does not change or, after falling, returns to the same level as in January 2005, following a rise in the FOB price (as often happens), remaining at US\$164.43 per tonne. In this case, again using equation [1], we obtain:

$$\begin{aligned} EP &= CIF + 6\% CIF + [ (FP - RefP) * (1+6\%) ] && [1] \\ EP &= US\$164.43 + US\$9.87 + [ (US\$128 - \mathbf{US\$103.05}) * (1+6\%) ] \\ EP &= US\$164.43 + US\$9.87 + US\$26.45 \\ EP &= US\$200.75 \end{aligned}$$

132. That is to say, with the reference price 10 per cent lower and the CIF price unchanged, the entry price for imports to Chile is US\$200.75 per tonne. Comparing this with the previous entry price of US\$188.61 when the reference price was 10 per cent higher, we can see that the overcompensation effect has been mathematically proved.

133. As additional evidence, Argentina will give two examples of what *actually* happened during the period of operation of the amended PBS when, in the months from December 2004 to April 2005, the bands were activated and specific duties applied.

### Example 1

134. The table below shows what happened when specific duties began to be applied on 16 December 2004 and reveals the actual effect of "overcompensation":

TABLE I

	Band ceiling	Band floor	Reference price	FOB price <i>Trigo Pan Argentino</i>	CIF Customs value Chile	<i>Ad valorem</i> duty	Specific duty	Entry price
15-Dec-04	148	128	141.73	115.00	141.45	8.49		149.94
16-Dec-04	148	128	114.50	114.00	140.22	8.41	14.30	162.93

Values in US\$ per tonne

Source: ODEPA (except for FOB price and CIF, source: SAGPyA)<sup>105</sup>

<sup>103</sup> See Exhibit ARG-6.

<sup>104</sup> Source: ODEPA.

<sup>105</sup> ODEPA does not provide **daily** FOB prices for bread wheat, Argentine port (only monthly prices). The historical FOB price for *Trigo Pan Argentino* reported by Argentina's Ministry of Agriculture, Livestock, Fisheries and Food (SAGPyA) is taken instead. In order to make the analysis as accurate as possible, the price indicated in the table for 15 December 2004 corresponds to the Argentine FOB price in effect 15 days previously, since that is the approximate time taken by a cargo ship to sail from Argentina to Chile, including

135. On the basis of the FOB price of *Trigo Pan Argentino* for a shipment arriving in Chile on 15 December 2004, the reference price for that day (and the two previous months) was US\$141.73 per tonne. The entry price for imports to Chile on that day, on which no specific duties were applied, was US\$149.94 per tonne.

136. On the next day, 16 December 2004, Chile set a new reference price of US\$114.50 per tonne, 19.21 per cent lower than the previous one. The FOB price of *Trigo Pan Argentino* for a shipment arriving in Chile on that day was US\$1 (one dollar) per tonne less than on the previous day. However, when the specific duties resulting from the PBS were applied, the entry price rose from US\$149.94 per tonne to US\$162.93 per tonne.

137. This "overcompensation" (increase in the entry price of imports to Chile) occurred at the same time as the transaction value decreased, which demonstrates the total disconnection of the amended PBS from the transaction value and international prices.

### Example 2

138. On 16 February 2005, Chile again set a new reference price below the band floor and lower than that in force during the previous two-month period. Therefore, specific duties higher than those for the previous period were applied. The following table summarizes what happened and again reveals the actual effect of "overcompensation":

TABLE II

	Band ceiling	Band floor	Reference price	FOB price <i>Trigo Pan Argentino</i>	CIF Customs value Chile	Ad valorem duty	Specific duty	Entry price
15-Feb-05	148	128	114.50	107	131.61	7.90	14.30	153.81
16-Feb-05	148	128	108.64	107	131.61	7.90	20.50	160.01

Values in US\$ per tonne

Source: ODEPA (except for FOB and CIF prices, source: SAGPyA)<sup>106</sup>

139. On the basis of the FOB price of bread wheat, Argentine port, for a shipment arriving in Chile on 15 February 2005, the reference price for that day (and the two previous months) was US\$114.50 per tonne. The entry price for imports to Chile on that day, when specific duties amounting to US\$14.30 were applied, was US\$153.81 per tonne.

140. On the next day, 16 February 2004, Chile set a new reference price of US\$108.64 per tonne, 5.12 per cent lower than the previous one. However, the FOB price for *Trigo Pan Argentino* did not change and therefore neither did the CIF price. Nevertheless, when the PBS specific duties were applied, the entry price for Chile rose from US\$153.81 per tonne to US\$160.01 per tonne.

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dockside loading and unloading times. To arrive at the CIF value the FOB value was multiplied by 1.23, because the CIF value is generally (subject to periodic variations) 23 per cent higher than the FOB value for wheat, calculating maritime freight from Buenos Aires to Chile at US\$24 per tonne and 0.5 per cent for insurance, on the basis of information provided by SAGPyA's Food and Agricultural Market Directorate. The calculations leading to the index 1.23 are presented in Exhibit ARG-25, taking as a basis the FOB prices, Argentine port, reported by ODEPA and carrying out the above-mentioned calculation. It should also be noted that insofar as the criterion used to arrive at the CIF value is solely for the purposes of the analysis, it being understood that the freight and insurance values depend on numerous variables, the overcompensation can be demonstrated *independently* of the relationship between the FOB and CIF values.

<sup>106</sup> Same as before.

141. The entry price rose by more than 4 per cent *without any change in the transaction value*, which demonstrates, as in the previous case, the total disconnection of the PBS from the transaction value and international prices.

142. Thus, Argentina has demonstrated – both mathematically and empirically – that when the reference prices are set below the price band floor, the amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market.

**(b) Overcompensation in the case of wheat flour**

143. As with wheat, the overcompensation in the case of wheat flour can first be demonstrated mathematically.

144. We recall equation [2] which represents the operation of the PBS for wheat flour, in accordance with Law 19.897 and Decree 831/2003:

$$EPWF = CIF + 6\% \text{ CIF} + [ [ (FP - RefP) * (1+6\%) ] * 1.56 ] \quad [2]$$

where:

EPWF = entry price for wheat flour imports to Chile under the amended PBS  
RefP = reference price  
FP = floor price of the band in force  
CIF = Cost, Insurance, Freight

145. Consider, for example, the reference price (RefP) that the band had in January 2005. According to ODEPA, RefP was US\$114.50 per tonne.<sup>107</sup> The average CIF price for that month per tonne of imported wheat flour of all origins was US\$198.14 per tonne.<sup>108</sup> Substituting these values in equation [2], we obtain:

$$\begin{aligned} EPWF &= US\$198.14 + US\$11.89 + [ [ (US\$128 - US\$114.50) * 1.06 ] * 1.56 ] \\ EPWF &= US\$198.14 + US\$11.89 + [ US\$14.31 * 1.56 ] \\ EPWF &= US\$232.35 \end{aligned}$$

146. That is to say, with the reference price and CIF price in question, the entry price for imports to Chile was US\$232.35.

147. Now, for the sake of clarity, let us suppose that the reference price – which reflects the 15-day average FOB prices for *Trigo Pan Argentino* – falls by 10 per cent (staying for the next two months at US\$103.05 per tonne) and the CIF price does not change or, after falling, returns to the same level as in January 2005 following a rise in the FOB price – as often happens – remaining at US\$198.14 per tonne. In this case, again using equation [2], we obtain:

$$\begin{aligned} EPWF &= CIF + 6\% \text{ CIF} + [ [ (FP - RefP) * (1+6\%) ] * 1.56 ] \quad [2] \\ EPWF &= US\$198.14 + US\$11.89 + [ [ (US\$128 - US\$103.05) * (1+6\%) ] * 1.56 ] \\ EPWF &= US\$198.14 + US\$11.89 + US\$41.26 \\ EPWF &= US\$251.28 \end{aligned}$$

148. That is to say, with the reference price 10 per cent lower and the CIF price unchanged, the entry price for imports to Chile is US\$251.28. Comparing this with the previous entry price of

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<sup>107</sup> See Exhibit ARG-6.

<sup>108</sup> See Exhibit ARG-28.

US\$232.35 when the reference price was 10 per cent higher, we can see that the overcompensation effect has been mathematically proved.

149. As additional evidence, Argentina will give two examples of what *actually* happened during the period of operation of the amended PBS when, in the months from December 2004 to April 2005, the bands were activated and specific duties were applied.

### Example 1

150. The following table shows what happened when, on 16 December 2004, specific duties began to be applied and reveals the actual effect of "overcompensation" on wheat flour:

**TABLE III**

	<b>Band ceiling</b>	<b>Band floor</b>	<b>Reference price</b>	<b>FOB price Argentine wheat flour</b>	<b>CIF Customs value Chile</b>	<b>Ad valorem duty</b>	<b>Specific duty</b>	<b>Entry price</b>
15-Dec-04	148	128	141.73	158	221.20	13.27		234.47
16-Dec-04	148	128	114.50	158	221.20	13.27	22.30	256.77

Values in US\$ per tonne

Source: Self-compilation based on ODEPA data (except for the FOB price, source: SAGPyA and the CIF price, source: FAIM).<sup>109</sup>

151. On the basis of the FOB price of wheat flour for a shipment arriving in Chile on 15 December 2004, the reference price for that day (and the previous two months) was US\$141.73 per tonne. The entry price for Chile on that day, when no specific duties were applied, was US\$234.47 per tonne.

152. The next day, 16 December 2004, Chile set a new reference price of US\$114.50 per tonne, 19.21 per cent lower than the previous one. However, the FOB price of wheat flour did not change and, therefore, neither did the CIF price. Nevertheless, when the PBS specific duties were applied, the entry price for imports to Chile rose from US\$234.47 to US\$256.77 per tonne.

153. This "overcompensation" occurred without any change in the transaction value, which demonstrates the total disconnection of the amended PBS from that value and international prices.

### Example 2

154. On 16 February 2005, Chile again set a new reference price below the band floor and lower than that in force during the previous two-month period. Therefore specific duties higher than during the previous period were applied. The following table summarizes what happened and again reveals the actual effect of "overcompensation":

<sup>109</sup> ODEPA does not provide daily FOB prices for wheat flour, Argentine port. Instead, the historical FOB price reported by SAGPyA is taken. In order to make the analysis as accurate as possible, the price indicated in the table for 15 December 2004 corresponds to the Argentine FOB price for wheat flour in effect 5 days previously, since that is the approximate time required for transport by land from Argentina to Chile. The CIF value is calculated from the FOB value, plus land freight and insurance. Normally, in the case of wheat flour, freight and insurance represent 40 per cent of the FOB value. This information was obtained from examples of actual export operations provided by the Argentine Federation of the Milling Industry (FAIM) and presented in Exhibit ARG-26. It should also be noted that, inasmuch as the criterion used to arrive at the CIF value is solely for the purposes of the analysis, it being understood that the freight and insurance values depend on numerous variables, the overcompensation can be demonstrated *independently* of the relationship between the FOB and CIF values.

TABLE IV

	Band ceiling	Band floor	Reference price	FOB price Argentine wheat flour	CIF Customs value Chile	Ad valorem duty	Specific duty	Entry price
15-Feb-05	148	128	114.50	150	210.00	12.60	22.30	244.90
16-Feb-05	148	128	108.64	150	210.00	12.60	32.00	254.60

Values in US\$ per tonne

Source: Self-compilation based on ODEPA data (except for the FOB price, source: SAGPyA and the CIF price, source: FAIM).<sup>110</sup>

155. On 15 February, the reference price for that day (and the two previous months) was US\$114.50 per tonne. The entry price for imports to Chile on that day, when specific duties amounting to US\$22.30 per tonne were applied, was US\$244.90 per tonne.

156. The next day, 16 February 2005, Chile set a new reference price of US\$108.64 per tonne, 5.12 per cent lower than the previous price. However, the FOB price of Argentine wheat flour did not change and, therefore, neither did the CIF price. Nevertheless, when the PBS specific duties were applied, the entry price for Chile rose from US\$244.90 to US\$254.60 per tonne.

157. The entry price rose *without any change in the transaction value*, which demonstrates, as in the previous case, the overcompensation effect and the total disconnection of the PBS from that value and international prices.

158. Thus, Argentina has shown – both mathematically and empirically – that when the reference prices are set below the price band floor, the amended PBS tends to "overcompensate" for the effect of decreases in international prices on the domestic market.

### 2.3. The entry price of Chilean imports under the amended PBS is higher than it would be if Chile were to apply a minimum import price at price band floor level

*"From the moment that the country's wheat producers are assured of a floor, through the price band, the importation of wheat at a price lower than the floor price will be prevented ..."* (Emphasis added).<sup>111</sup>

159. Below, Argentina will show that, under the amended PBS, the entry price for wheat and wheat flour imports is higher than it would be if Chile were to apply a minimum import price at price band floor level.

160. In the present dispute, the Appellate Body found that:

"The term 'minimum import price' refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market."<sup>112</sup>

161. Thus, as noted by the Appellate Body, the establishment of a minimum import price at price band floor level would mean that if the entry price of a particular product (i.e., the CIF price plus *ad valorem* duties) were lower than that threshold (US\$128 per tonne or the corresponding amount)

<sup>110</sup> Same as above.

<sup>111</sup> Deputy Patricio Melero, 24 January 1996, during the debate on the bill extending the system for establishing duties and rebates for wheat flour "History of the Law. Compilation of official texts of the parliamentary debate. Law 19.446". Library of the National Congress. Santiago, Chile, 1997.

<sup>112</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 236.



an additional charge equivalent to the difference would be imposed, so that the product in question enters the Chilean market at the band floor price (currently US\$128 per tonne).

**(a) The case of wheat**

162. In fact, during the period of application of the band (16-Dec-2004 / 15-Apr-2005) the CIF price plus *ad valorem* duties was higher than the band floor (US\$128), which makes it impossible to compare the entry price for Chilean wheat imports if a minimum import price had been imposed at band floor level with the price resulting from the amended PBS.<sup>113</sup>

163. However, the relationship between the two variables can be calculated by selecting a period during which international prices were sufficiently low for it to be possible to show that the entry price under the amended PBS is higher than that resulting from the application of a minimum price at price band floor level.

164. The period selected by Argentina as an illustration of this covers the months of March, April and May 2000. According to the ODEPA data, this period was the only one between 1991 and 2003 during which the average CIF price of Chilean wheat imports – of all origins – plus *ad valorem* duties (6 per cent) fell below the price band floor, a situation which enables the result of applying a minimum price to be compared with the result of applying the amended PBS.<sup>114</sup>

165. For this period – March to May 2000 – we have calculated the reference prices and the approximate specific duties that would have resulted if at that time, using the historical prices for that period, the amended PBS as established by Law 19.897 and Decree 831/2003 had been applied.

166. As previously described, the entry price was calculated in accordance with the following formula taken from Law 19.897 and Decree 831/2003:

$$\begin{aligned}
 \text{Entry price under the PBS} &= \text{CIF value} + \text{Total duties in absolute terms} \\
 &= \text{CIF value} + \text{Ad valorem duties} + \text{Specific duty} \\
 \text{Ad valorem duties} &= \text{CIF value} * 6\% \\
 \text{Specific duty}^{115} &= \left( \text{Band floor price} - \text{Reference price} \right) * \left( 1 + \text{General ad valorem tariff in force, Customs Tariff} \right)
 \end{aligned}$$

167. On the basis of this formula, in the following table we have reconstructed what would have happened during that period if a minimum price had been applied at price band floor level as compared with the application of the amended PBS. The model reproduces the entry price at which a tonne of wheat exported from Argentina would have entered Chile:

<sup>113</sup> Exhibits ARG-23 and ARG-24.

<sup>114</sup> The average CIF value per tonne for the period March, April and May 2000 corresponds to imports of wheat of all origins (source ODEPA). For comparison purposes, the *ad valorem* duty rate is assumed to be the current rate (6 per cent).

<sup>115</sup> In accordance with Article 14 of Dec. 831/2003, Exhibit ARG-2. In its turn, the amount of the specific duties actually applied can be obtained from [www.odepa.gob.cl](http://www.odepa.gob.cl).

**TABLE V**

Month	Quotation	Average international reference price <sup>116</sup>	Specific duty	Band floor	Average CIF price <sup>117</sup>	CIF + <i>ad valorem</i>	Minimum import price at band floor level	Entry price resulting from PBS
March 2000	FOB Argentine port	106.22	23.09	128.00	115.80	122.75	128.00	145.83
April 2000	FOB Argentine port	113.72	15.14	128.00	117.74	124.80	128.00	139.94
May 2000	FOB Argentine port	126.29	1.81	128.00	120.55	127.78	128.00	129.59

Values in US\$ per tonne.

Source: Own compilation based on ODEPA information.

168. As can be seen from Table V, a comparison of the entry price for wheat that would have resulted from applying the amended PBS (using the actual prices for the period March-April-May 2000) with the price resulting from the application of a minimum import price at price band floor level shows that the entry price for imports to Chile under the amended PBS would have **always been higher** than that which would have resulted if Chile had applied a minimum import price at price band floor level, that is at US\$128.

169. To make the significance of this argument clearer for the Panel, in Exhibit ARG-10 we have reproduced a chart (based on the numerical information in Table V) showing graphs of the PBS entry price that would have been observed if the amended PBS had been applied during the period March-April-May 2000. This chart also includes a graph representing the entry price for imports to Chile with a minimum import price at band floor level which would have been observed in cases in which it could have been calculated and the entry price without the application of either the PBS or a minimum price.

170. Clearly, **in all cases** the entry price for imports to Chile under the amended PBS is **higher** than the entry price with a minimum import price at band floor level.

**(b) The case of wheat flour**

171. It is not difficult to show that in the case of wheat flour the entry price – under the amended PBS – is higher than it would have been if Chile had applied a minimum import price at band floor level. As wheat flour is a product of wheat, its price is naturally higher than that of wheat itself. If to that price we add the specific duties resulting from the PBS, it logically follows that in each case in which the entry price of wheat – under the amended PBS – was higher than the price resulting from the application of a minimum import price, the entry price of wheat flour during the same period *must logically also have been higher* than the price resulting from the application of a minimum import price. Therefore, this must have been so both during the period in which specific duties were actually activated between December 2004 and April 2005 and during the period in which it was calculated how the amended PBS would have operated with international prices between March and May 2000 (Table V).

172. Accordingly, the entry price for wheat flour imports to Chile – under the amended PBS – is higher than it would have been if Chile had applied a minimum import price at band floor level.

<sup>116</sup> Based on the monthly FOB price for bread wheat, Argentine port. Source: ODEPA.

<sup>117</sup> Source ODEPA.

173. Consequently, both in the case of wheat and in that of wheat flour, the entry price of Chilean imports, under the amended PBS, is higher than it would have been if Chile had applied a minimum import price at price band floor level.

**2.4. The amended PBS does not merely moderate the effect of fluctuations in world market prices on Chile's market because it does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices**

174. Below, Argentina will show that the amended PBS does not merely moderate the effect of fluctuations in world market prices on Chile's market because it does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices. Argentina will provide evidence of what *actually* happened during the operation of the amended PBS when, between December 2004 and April 2005, specific duties were applied.

**(a) The amended PBS does not ensure that the entry price of wheat imports falls in tandem with falling world wheat market prices**

175. Exhibits ARG-11 and ARG-12 contain a table and a chart, respectively, showing what happened in the case of wheat when specific duties were applied starting on 16 December 2004. Clearly, as the FOB Argentine port prices were *falling*, the entry price, with the application of specific duties, *rose* significantly, demonstrating once again a total disconnection from international price developments.

176. Exhibits ARG-11 and ARG-12 show that, from 1 December 2004, the price of bread wheat FOB Argentine port fell steadily, a trend that was maintained until approximately 4 January 2005. Specifically, the initial FOB price on 1 December was US\$119 per tonne, whereas at the end of the trend, on 4 January 2005, the price was US\$109 per tonne.

177. A study of the entry price trend for imports to Chile due to the operation of the PBS reveals the exact opposite: the entry price rose. In fact, from 1 December the entry price for *Trigo Pan Argentino* showed a tendency to fall which, the band not being active, reflected a downward trend in FOB Argentine port prices. However, when the band was activated on 16 December 2004 and specific duties were applied, the entry price for Chile rose suddenly from US\$149.94 per tonne to approximately US\$162.93 per tonne. This was specifically due to the operation of the amended PBS and the application of specific duties.

178. It may be concluded that, because of the distorting effect of the amended PBS, when international prices fall the entry price for Chile rises. Therefore, the amended PBS does not ensure that the entry price for wheat imports falls in tandem with falling world wheat market prices.

**(b) The amended PBS does not ensure that the entry price for wheat flour imports falls in tandem with falling world wheat market prices**

179. Exhibits ARG-13 and ARG-14 contain a table and a chart, respectively, showing what happened in the case of wheat flour when specific duties were applied starting on 16 December 2004. Clearly, as the FOB Argentine port prices for wheat flour *fell*, the Chilean entry price, with the application of specific duties, *rose*, demonstrating a disconnection from international price developments

180. As Exhibits ARG-13 and ARG-14 show, from 1 November 2004 (and indeed from before that) the FOB Argentine port price for wheat flour fell steadily, a trend which was to continue until approximately March 2005. Specifically, the initial FOB price for a shipment arriving in Chile by

land on 1 November 2004<sup>118</sup> was US\$170 per tonne, whereas at the end of the trend in March 2005 the price was US\$150 per tonne.

181. A study of the trend in the Chilean entry price as a result of the operation of the PBS reveals the exact opposite: the entry price rose. In fact, from 1 November (and indeed from before that) the Chilean entry price for Argentine wheat flour had a tendency to fall which, the band not being active, reflected a downward trend in FOB Argentine port prices.<sup>119</sup> However, when the band was activated on 16 December 2004 and specific duties were applied, the Chilean entry price rose suddenly from US\$234.47 to US\$256.77 per tonne. This was specifically due to the operation of the amended PBS and the application of specific duties.

182. In addition, it should be noted that whereas during most of January and all of February 2005, specifically up until 1 March 2005, the FOB price of wheat flour – arriving in Chile by land – remained at US\$150 per tonne, on 16 February the entry price rose abruptly from US\$244.90 to US\$254.60 per tonne, solely because of the increase in specific duties from US\$22.30 to US\$32.00 per tonne. It should be recalled that the application of these specific duties was related not to international wheat flour prices but to the international prices of wheat. That is to say that the PBS is also unable to ensure that, when wheat flour prices are stable, the Chilean entry price also remains stable and does not increase as a consequence of variables unrelated to the transaction value of flour, as happened in February 2005.

183. Thus, the distorting effect of the amended PBS means that when international prices fall, the Chilean entry price rises. Therefore, the amended PBS does not ensure that the price of wheat flour imports falls in tandem with the falling prices of wheat flour on the world market.

184. Thus, there can be no doubt that the amended PBS does not merely moderate the effect of fluctuations in world market prices on the Chilean market, since it does not ensure that the entry price of Chilean imports falls in tandem with falling world market prices.

185. **To conclude**, Argentina has shown, on the basis of evidence, that, like the original PBS, the "new" price band system *continues* to elevate the entry price of Chilean imports above the price band floor, *continues* "overcompensating" for the effect of decreases in international prices on the domestic market when the reference prices are set below the price band floor, *continues* causing the entry price of imports to Chile to be higher than it would have been if Chile had applied a minimum import price at price band floor level and *continues* not to ensure that the entry price of Chilean imports falls in tandem with falling world market prices.

186. Consequently, the new Price Band System is disconnecting the Chilean market from international price developments in such a way as to insulate the Chilean market from the transmission of international prices and is preventing enhanced access to the Chilean market for imports of wheat and wheat flour.

187. By not fully reflecting falls in world prices in domestic prices and impeding the transmission of international price developments to the Chilean market in much the same way as the other categories of prohibited measures listed in footnote 1 to Article 4.2 of the *Agreement on Agriculture* (in particular, a "minimum import price" and a "variable import levy"), **the "new" PBS is inconsistent with Article 4.2 of the Agreement on Agriculture.**

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<sup>118</sup> It was calculated that it would take approximately 4 to 5 days to transport the goods by land from Argentina to Chile.

<sup>119</sup> See Exhibits ARG-13 and ARG-14.

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

188. In the PBS in its original form, the floor and ceiling prices of the price bands were set for a whole year (from 16 December of one year to 15 December of the next) in accordance with world prices (monthly average) over a previous five-year period (60 months).<sup>120</sup> In this respect, the floor and ceiling prices of Chile's price bands varied as a function of world market prices. According to the Appellate Body, the price bands could have the effect of impeding the transmission of international price developments to the domestic market in a way similar to that of other categories of prohibited measures listed in footnote 1 to Article 4.2 of the *Agreement on Agriculture*.<sup>121</sup> Similarly, the floor and ceiling of the amended PBS also insulate the Chilean market from international price developments.

**(a) The floor and ceiling of the amended PBS insulate the Chilean market from international price developments as a result of having been determined once only for the entire period from 16 December 2003 to 15 December 2014**

189. Under the "new" PBS the floor and ceiling prices have been set for the entire period from 16 December 2003 to 15 December 2007 at US\$128 per tonne and US\$148 per tonne, respectively. Moreover, the new legislation stipulates that, from 16 December 2007 to 15 December 2014, these floor and ceiling prices will be adjusted annually by multiplying the values in force during the previous annual period by a factor of 0.985.<sup>122</sup>

190. Thus, it can be said not only that the essence of the PBS has been unaffected by the changes introduced but also that in its present form the PBS impedes even more the transmission of international price developments to the domestic market, in much the same way as other categories of prohibited measures listed in footnote 1 to Article 4.2 of the *Agreement on Agriculture*, since the floor and ceiling prices of Chile's price bands no longer vary with either world market prices or historical prices, but have been determined once only for the entire period from 16 December 2003 to 15 December 2014, without bearing any relation to international prices. Argentina questions how, in these circumstances, the new method of setting the floor and ceiling of the price bands can reflect international price developments.

191. In other words, bearing in mind that the operation of the original system was based on the use of moving averages for the previous 60 months for setting price band floor and ceiling prices, Argentina considers that the present system will distort the international price transmission process even more, since the floor and ceiling prices will not be adjusted until 2007. Similarly, considering that from that year onwards these parameters will be established on the basis of fixed coefficients, thereafter isolating the system from fluctuations on the international markets for a further period of seven years, Argentina believes that the new price band system could lead to even greater distortions.

**(b) The floor and ceiling of the amended PBS insulate the Chilean market from international price developments and are non-transparent insofar as from 2007 they will be established on the basis of fixed coefficients**

192. Chile has specified a factor of 0.985 for adjusting the band floor and ceiling prices during the period from the end of 2007 to 2014. This means that the band floor and ceiling prices for each annual period starting from 16 December 2007 will be the product of the floor and ceiling prices in force up to 15 December of each year and an adjustment factor of 0.985.

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<sup>120</sup> Art. 12 of Law No. 18.525 and Report of the Appellate Body, paragraph 17.

<sup>121</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 246.

<sup>122</sup> Law 19.897, Art. 1, Supreme Decree No. 831 of the Chilean Ministry of Finance, Art. 6.

193. The relevant part of Article 1 of Law 19.897 reads as follows:

"For the purpose of determining the duties and rebates from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established in the previous paragraph shall be adjusted annually by multiplying the values in force during the previous annual period by a factor of 0.985 in the case of wheat."

194. The results of applying a factor of 0.985 are set out in Article 6 of Decree 831/2003, which states:

"The floor and ceiling prices for wheat during the period from December 2003 to December 2014 shall be as follows:

<b>Floor and ceiling prices for wheat, by period of validity</b>		
<b>Period of validity</b>	<b>Floor price</b>	<b>Ceiling price</b>
16-Dec-2003 to 15-Dec-2007	128	148
16-Dec-2007 to 15-Dec-2008	126	146
16-Dec-2008 to 15-Dec-2009	124	144
16-Dec-2009 to 15-Dec-2010	122	142
16-Dec-2010 to 15-Dec-2011	120	140
16-Dec-2011 to 15-Dec-2012	118	138
16-Dec-2012 to 15-Dec-2013	116	136
16-Dec-2013 to 15-Dec-2014	114	134

195. **First of all**, the band floor and ceiling price adjustment factor of 0.985 does not provide for the transmission of international prices to the Chilean market.

196. Whereas in the original PBS the band floor and ceiling prices varied as a function of historical prices, under the amended PBS, thanks to the factor of 0.985, the floor and ceiling vary *without any relation* to world market or historical prices. Neither do they vary as a function of the transaction value, a characteristic shared by the entire PBS.<sup>123</sup>

197. Chile has decided, apparently without reference to any criterion, that the floor and ceiling prices, two fundamental elements (together with the reference prices) for establishing the level of the specific duties applicable to wheat and wheat flour, will decrease, as from December 2007, in a fixed, automatic and autonomous manner.<sup>124</sup> That is to say, the way in which the floor and ceiling prices are to be adjusted bears no relation to international price developments.

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

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<sup>123</sup> Note that the Appellate Body held that even if it were assumed that one feature of Chile's price band system was not similar to the features of "variable import levies" and "minimum import prices" because the thresholds of Chile's price bands varied in relation to—albeit historic—world market prices rather than domestic target prices, this would not change its overall assessment of Chile's price band system (Report of the Appellate Body, paragraph 251).

<sup>124</sup> If this criterion existed, it would not prevent the disconnection from international price developments because of the way in which the factor 0.985 was established.

199. **Secondly**, the way in which the factor 0.985 was determined is not transparent. Chile has not explained how it was calculated, or what basis there may be for this factor in the legislation that established the amended PBS.

200. The Appellate Body noted how the way in which the bands were established in the original PBS was inconsistent with Article 4.2 of the *Agreement on Agriculture*:

"... This lack of transparency and...predictability are liable to restrict the volume of imports ... This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market."<sup>125</sup>

...

"In addition to the lack of transparency and the lack of predictability *that are inherent in how Chile's price bands are established*, we see similar shortcomings in the way the other essential element of Chile's price band system...is determined"<sup>126</sup> (emphasis added).

201. Clearly, by not explaining the origin of the factor 0.985 or the reasons for choosing it, Chile has failed to satisfy the established transparency requirements. As the Appellate Body pointed out, the lack of transparency prevents enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4 of the *Agreement on Agriculture*.<sup>127</sup>

202. Consequently, it is impossible to do other than conclude that the application of the factor 0.985 is contributing to the way in which the amended PBS disconnects the Chilean market from international price developments, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

## **2.6. The reference prices insulate the Chilean market from international price developments**

203. Under the amended PBS, reference prices are established every two months on the basis of the average of the daily prices recorded in two markets specified in the Chilean legislation: the FOB price of *Trigo Pan Argentino*, for the first half of each year, and the FOB price of Soft Red Winter No. 2 Wheat, for the second half of each year.<sup>128</sup>

204. Thus, the reference prices remain invariable for successive two-month periods.<sup>129</sup>

### **(a) The reference prices insulate the Chilean market from international price developments by staying unchanged for two months**

205. Given that under the "old" PBS reference prices were adjusted every week in accordance with the lowest FOB price in *any* external "market of concern" during the previous week, the amended PBS disconnects the Chilean market from international price developments even more than the original PBS.

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<sup>125</sup> Report of the Appellate Body, paragraph 234.

<sup>126</sup> Report of the Appellate Body, paragraph 247.

<sup>127</sup> Report of the Appellate Body, paragraph 258.

<sup>128</sup> See Exhibit ARG-2, Art. 8.

<sup>129</sup> See Exhibit ARG-2, Decree 831/2003, Annex, Summary Table for the application of paragraph 2.

206. Under the "new" PBS the reference prices used to calculate the specific duty for wheat and wheat flour are set 6 times a year,<sup>130</sup> that is, with a period of validity of 2 months during which the transmission of world market prices is disconnected.

207. Consequently, the "new" reference prices, and the "new" PBS that determines them, are not only less representative of the world market but also impede the transmission of international price developments to the Chilean market even more than the original reference prices and PBS.<sup>131</sup>

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

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

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

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

212. As a specific example of this insulation (among many others), consider what happened when the reference price was set at 108.64 US\$/tonne between 16 February and 15 April 2005, on the basis of the average of the daily prices for wheat *FOB Argentine port*. The reference price thus determined and fixed for two months did not reflect in absolute terms the increasing trend of those same FOB prices for *Trigo Pan Argentino* which, during that period, reached 140 US\$/tonne,<sup>132</sup> close to the band ceiling from which the PBS provides for the granting of rebates rather than the levying of specific duties, which clearly reveals the enormous arbitrariness in the setting of the reference prices.

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<sup>130</sup> See Exhibit ARG-2 (Supreme Decree No. 831 of the Chilean Ministry of Finance, Articles 5 and 7 and the "Summary Table for the application of paragraph 2" of the Annex) and Exhibit ARG-6 (History of the application of the amended PBS).

<sup>131</sup> This without prejudice to the inconsistencies found by the Appellate Body with respect to the reference prices in the original PBS.

<sup>132</sup> See Exhibit ARG-16.



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

**(b) The reference prices insulate the Chilean market from international price developments as a result of their being established on the basis of the average of the daily prices recorded on only two predetermined markets**

214. Under the new legislation, the reference price for wheat will correspond to the average of the daily prices – during a 15-day period reckoned retrospectively from the 10th day of the month of publication of the corresponding decree – recorded on the *Trigo Pan Argentino* market, for the first half of the year, and the Soft Red Winter No. 2 wheat market, for the second half.

215. In fact, Article 8 of Supreme Decree 831/2003 states 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 *FOB Argentine port* and, during the period of application from 16 June to 15 December, shall be that of *Soft Red Winter No. 2 wheat* and the prices shall correspond to the daily prices quoted for that product *FOB Gulf of Mexico*."<sup>133</sup>  
(Original emphasis).

216. **First of all**, as in the case of the PBS in its original form, there is no legislation or regulation governing the amended PBS that specifies *how or on what basis* the "markets of concern" and "qualities of concern" are selected. Therefore, the reference price selection process has not been transparent.

217. This predetermination of the markets to be taken into account for establishing reference prices means that the Chilean market is disconnected from international price developments. Thus, the predetermination of the markets prevents Chile from ensuring that the reference prices are representative of actual world market prices.<sup>134</sup>

218. In fact, bread wheat is sold on at least two other markets of concern, namely, Chicago and Kansas.<sup>135</sup> The fact that the legislation specifies that only two markets are to be regarded as being of concern for the determination of reference prices disconnects Chile's domestic market from international price developments.

219. **Secondly**, the selection of the daily price quoted for "Argentine port" bread wheat as the basis for establishing the market of concern for the first half of the year is not transparent either, since the prices vary with the choice of Argentine port.<sup>136</sup>

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<sup>133</sup> See Exhibit ARG-2.

<sup>134</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 249.

<sup>135</sup> Based on SAGPyA data.

<sup>136</sup> See Exhibit ARG-4.

(c) **The reference prices distort the transmission of international prices to the Chilean market by not having any link with the transaction value**

220. The reference prices also distort the transmission of international prices to the Chilean market because they have no link with the transaction value.

221. In this connection, the Appellate Body cited the observations made by the Panel when it described the particular reference price used in Chile's price band system in its original form in the following terms:

"The reference price used in the context of the Chilean PBS is clearly disconnected from the actual transaction value ..."<sup>137</sup>

222. In the case of the amended PBS, the same bimonthly reference price is applied to imports of all products of the same category, irrespective of their origin and the transaction value of the shipment.

223. Therefore, there is no link between the reference price and the transaction value of the shipment in question under the present scheme either, a characteristic shared by the entire PBS.

**2.7. The factor of 1.56 applied to the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour insulates the entry price for wheat flour from international price developments**

224. The amended PBS is applied to wheat flour by imposing a surcharge in the form of specific duties or rebates obtained by multiplying the specific duties or rebates applied to wheat by a factor of 1.56.

225. Both Law 19.897, Article 1, and Decree 831/2003, Article 16,<sup>138</sup> state:

"In the case of wheat flour the duties and rebates applied shall be those determined for wheat multiplied by a factor of 1.56".

226. The specific duties applied to wheat flour, being equal to the duties applied to wheat multiplied by a factor of 1.56, produce an even greater insulation of wheat flour from international price developments than in the case of wheat.

227. There are several reasons for this:

228. **Firstly**, wheat flour exporters have to pay specific duties which not only bear no relation to the transaction value but also bear no relation to the product in question, since they are calculated on the basis of those applied to another product, namely, wheat.

229. **Secondly**, 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.

230. In this connection, it is worth noting the relevant observations of the Appellate Body:

"...significant for traders, also, are the lack of transparency of certain features of Chile's price band system... These specific characteristics of Chile's price band

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<sup>137</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 248.

<sup>138</sup> See Exhibits ARG-1 and ARG-2, respectively.

system prevent enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4"<sup>139</sup>

231. **Thirdly**, on the basis of the history of the Chilean legislation, it might be speculated that the application of a factor to the specific duties established for wheat in order to determine the specific duties applicable to wheat flour could be based on a price relationship derived from a technical production ratio between wheat and wheat flour. Flour being a product of wheat, its price is naturally higher since to the cost of the wheat the millers add the cost of milling plus a profit margin. This relationship is valid at international level. In the case of Argentina, if the FOB prices of bread wheat and wheat flour<sup>140</sup> since the amended PBS came into force are taken into account, the average price ratio is 1.3.<sup>141</sup> That is, the price of wheat flour is approximately 30 per cent higher than that of wheat.

232. Moreover, this was the technical ratio established by Chile in Law 19.193 which, in 1997, extended the specific duties and tariff rebates of the price band for wheat to wheat flour. At that time, the Message of the Chilean Executive relating to the amendment of Article 12 of Law 18.525 stated: "*... It is proposed to establish specific duties and rebates on the importation of flour and calculate their amount by multiplying the duties and rebates determined for wheat by the coefficient 1.3 which is the technical production ratio ...*"<sup>142</sup> (Emphasis added)

233. However, successive amendments incorporated in the legislation led to increases in this figure. Thus, Chile decided to raise the coefficient first from 1.3 to 1.41 and finally to 1.56 without any justification, thereby distorting – to an ever greater extent – the entry price for Chilean wheat flour imports.

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

*"Has any justification been given for increasing the factor from 1.41 to 1.56? Absolutely none ... The Executive has submitted a measure without providing any data that might support ... the raising of the factor from 1.41 to 1.56 ..."*<sup>143</sup>

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

### **3. The amended PBS is neither transparent nor predictable**

236. The amount of a duty is not the only concern of Chile's trading partners. As the Appellate Body also concluded,<sup>144</sup> the lack of transparency of certain features of Chile's price band system; the unpredictability of the level of duties; and the automaticity, the frequency, and the extent to which the duties fluctuate, all characteristics carried over essentially unchanged into the amended PBS, are significant concerns of the exporters.

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<sup>139</sup> Report of the Appellate Body, paragraph 258.

<sup>140</sup> Both are products whose markets are considered to be of concern to Chile in establishing the reference prices of the amended PBS.

<sup>141</sup> See Exhibit ARG-29.

<sup>142</sup> "*History of the Law. Compilation of official texts of the parliamentary debate. Law 19.193*". Library of the National Congress. Santiago, Chile, 1997.

<sup>143</sup> Senator Piñera, 24 January 1996. In "*History of the Law. Compilation of official texts of the parliamentary debate. Law 19.446*". Library of the National Congress. Santiago, Chile, 1997.

<sup>144</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 258.

237. On this same point, the Appellate Body noted that the lack of transparency and predictability of the old PBS would also *contribute* to distorting the prices of imports by impeding the transmission of international prices to the domestic market, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*.

238. Thus, the Appellate Body observed 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. ..."145 (Emphasis added)

239. The Appellate Body added:

"... [T]he presence of a *formula causing automatic and continuous variability of duties is a necessary, but by no means a sufficient, condition* for a particular measure to be a "variable import levy" within the meaning of footnote 1. "Variable import levies" have additional features that undermine the object and purpose of Article 4, which is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. *These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures.* This lack of transparency and this lack of predictability are liable to restrict the volume of imports. As Argentina points out, *an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be.* This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market."<sup>146</sup> (Footnotes omitted, emphasis added)

240. From these statements by the Appellate Body it follows that:

- (a) The presence of a formula causing automatic and continuous variability of duties is a necessary condition for a particular measure to be a "variable import levy" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*; and, moreover,
- (b) the lack of transparency and the lack of predictability in the level of duties that will result from the application of variable import levies are *additional* features that undermine the object and purpose of Article 4 of the *Agreement on Agriculture*, which is to achieve improved market access conditions for imports of agricultural products by permitting the application of ordinary customs duties only.

241. As already explained, the changes introduced into the PBS did not substantially convert the price band system into a measure different from that previously in force. In particular, variability is inherent in the amended PBS since it incorporates a plan or formula that causes and ensures the automatic and continuous modification of the levies and, moreover, lacks the required transparency and predictability, in a manner inconsistent with Article 4.2 of the *Agreement on Agriculture*. Thus, the findings of the Appellate Body apply with equal force to the amended PBS.

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<sup>145</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 233.

<sup>146</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.

242. Below, Argentina shows *how* the Appellate Body's finding apply to the current price band system.

**3.1. The amended PBS contains a formula that causes import duties to vary automatically and continuously**

"... I believe that with respect to the competitiveness of the ... wheat sector... we are seeking a reasonable formula for setting a floor that enables us to make productive an activity ..."<sup>147</sup> (Emphasis added)

243. Firstly, Argentina will show that the PBS contains a *formula* that causes import duties to vary and then that this variation is *automatic* and *continuous*, as specified by the Appellate Body.<sup>148</sup>

**(a) The amended PBS contains a formula that causes import duties to vary**

244. The relevant part of Article 1 of Law 19.897 amending Article 12 of Law 18.525<sup>149</sup> reads as follows:

"There shall be established, on the one hand, specific duties when the reference price is below the floor price of 128 dollars for wheat ..., and, on the other hand, rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff when the reference price is above the ceiling price of 148 dollars ... The duties and rebates referred to in this Article shall correspond to the difference between the floor and ceiling prices determined above and an FOB reference price multiplied by a factor of one (1) plus the general *ad valorem* duty in force for these products. The FOB reference price shall consist of the average of the daily international prices for wheat ..., recorded in the markets of most concern during a period of 15 calendar days ... reckoned from the date fixed by the regulations for each decree".

245. Moreover, Section § 4 of Decree 831/2003<sup>150</sup> states:

**§ 4. Determination of specific duties and tariff rebates**

**Article 13.- Establishment of duties and rebates**

In each Supreme Decree issued under these regulations there shall be established, with respect to the products forming its subject matter, specific duties, when the reference price is below the floor price, and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, when the reference price is above the ceiling price.

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<sup>147</sup> Senator Juan Antonio Coloma Correa, 6 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.

<sup>148</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 233: "... 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 ..."

<sup>149</sup> See Exhibit ARG-1.

<sup>150</sup> See Exhibit ARG-2.

When the reference price is above the floor price but below the ceiling price, this shall be recorded in the corresponding decree, which shall not establish duties or rebates during the period in which it remains in force.

**Article 14.- Calculation of specific duties**

The specific duties applicable to imports of wheat, refined sugar and raw sugar shall correspond to the difference between the floor price and the reference price of each product multiplied by a factor of one (1) plus the general *ad valorem* tariff in force established in the Customs Tariff.

$$\begin{aligned} & \text{Specific duty} \\ & = \\ & (\text{Floor price in force} \\ & \quad - \text{reference price}) \\ & \quad * \\ & (1 + \text{general } ad \text{ valorem tariff in force, Customs Tariff}) \end{aligned}$$

**Article 15.- Calculation of tariff rebates**

The rebates on amounts payable as *ad valorem* Customs Tariff duties, applicable to imports of wheat, refined sugar and raw sugar, shall correspond to the difference between the reference price and the ceiling price of each product multiplied by a factor of one (1) plus the general *ad valorem* tariff in force established in the Customs Tariff.

$$\begin{aligned} & \text{Tariff rebate} \\ & = \\ & (\text{Reference price} \\ & \quad - \text{ceiling price in force}) \\ & \quad * \\ & (1 + \text{general } ad \text{ valorem tariff in force established in the} \\ & \quad \text{Customs Tariff}) \end{aligned}$$

**Article 16.- Wheat flour**

In the case of wheat flour, the duties and rebates applied shall be those determined for wheat multiplied by a factor of 1.56.

$$\begin{aligned} & \text{Specific duty or tariff rebate for wheat flour} \\ & = \\ & \text{Specific duty or tariff rebate for wheat} \\ & \quad * \\ & 1.56 \end{aligned}$$

246. The cited paragraphs of Law 19.897 and Decree 831/2003<sup>151</sup> clearly reveal the existence of a *formula* on the basis of which the duties resulting from the PBS are established.

247. From the text of the two above-mentioned provisions it follows that, in mathematical terms, the formula for calculating duties is:

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<sup>151</sup> See Exhibits ARG-1 and ARG-2, respectively.

$$\begin{aligned} \text{Specific duty for wheat}^{152} &= \left( \frac{\text{Band floor price}}{\text{Reference price}} - \text{Reference price} \right) * \left( 1 + \frac{\text{General } ad \text{ valorem tariff in force, Customs Tariff}}{\text{Customs Tariff}} \right) \\ &= \left( \text{US\$128} - \text{Reference price} \right) * \left( 1 + 0.06 \right) \end{aligned}$$

$$\begin{aligned} \text{Specific duty for wheat flour}^{153} &= \left[ \left( \frac{\text{Band floor price}}{\text{Reference price}} - \text{Reference price} \right) * \left( 1 + \frac{\text{General } ad \text{ valorem tariff in force, Customs Tariff}}{\text{Customs Tariff}} \right) \right] * \mathbf{1.56} \\ &= \left[ \left( \text{US\$128} - \text{Reference price} \right) * \left( 1 + 0.06 \right) \right] * \mathbf{1.56} \end{aligned}$$

248. Below, Argentina will show that this formula contained in the PBS causes *variability* of the import duties payable on imports of wheat and wheat flour to Chile.

249. For this purpose, Argentina will cite three sources of evidence.

250. **Firstly**, Exhibit ARG-21 presents a table showing what the amount of specific duties would have been if the current PBS had operated with the average prices recorded between 1986 and the present on the markets of concern for Chile. The election of 1986 led in July of that year to the statutory establishment of the Price Band System in Chile.<sup>154</sup> Accordingly, for each year between 1986 and December 2003 the table includes the monthly average Argentine port and Gulf of Mexico FOB prices recorded for bread wheat and Soft Red Winter No. 2 wheat, and the specific duty that would have resulted from applying the amended PBS with international prices as recorded during that period. To ensure the greatest possible similarity between this model and the amended PBS, for the periods extending from January to June of each year the monthly average FOB prices for bread wheat, Argentine Port have been taken, whereas for the periods extending from July to December each year the monthly average FOB prices for Soft Red Winter No. 2 wheat, Gulf of Mexico, have been used, in accordance with the provisions of Article 1 of Law 19.897 and Article 8 of Decree 831/2003. Moreover, from December 2003 the table includes the real reference prices and specific duties *actually* established and applied by Chile.<sup>155</sup>

251. To sum up, the table in Exhibit ARG-21 shows, on the basis of the actual and historical prices recorded by Chile, the frequency and extent of the fluctuations of the duties established under the PBS. It can be seen how when international prices fall the amended PBS is activated and specific duties, which display pronounced variability, are applied. In fact, if the amended PBS had existed throughout this period, the specific duties would have varied (and in some cases *did* vary) between a minimum of US\$0.58 and a maximum of US\$64.50 per tonne.<sup>156</sup>

252. **Secondly**, to bring out the variability of specific duties under the PBS, Argentina presents Exhibit ARG-22 which graphically illustrates the frequency and extent of the fluctuations in specific duties that would have occurred if the amended PBS had been applied from July 1986, that is to say, from the time that the Price Band System was first established in Chile. The chart in this Exhibit is based on the data contained in the table in Exhibit ARG-21. It should be noted that from December

<sup>152</sup> See Exhibit ARG-2, Dec. 831/2003, Article 14.

<sup>153</sup> See Exhibit ARG-2, Dec. 831/2003, Article 16.

<sup>154</sup> The PBS was established by Law 18.525, Official Journal of the Republic of Chile, 30 June 1986. See *Chile – Price Band System*, Report of the Panel, paragraph 2.2.

<sup>155</sup> All the information needed to design this model was obtained from ODEPA (Exhibit ARG-6 and www.odepa.gob.cl). The formula used corresponds to that of the amended PBS, in accordance with Decree 831/2003 (Exhibit ARG-2).

<sup>156</sup> See June 1999 and February 1991.

2003 onwards the reference prices and specific duties used are the actual values established and applied by Chile under the amended PBS.

253. **Thirdly**, Argentina considers it useful to describe the unpredictability, frequency and extent of the fluctuations in specific duties in **statistical** terms. The fluctuations observed in the model presented in the table in Exhibit ARG-21 can be accurately translated into numerical terms. For this purpose, Argentina proposes to use a very simple statistical tool known as the standard deviation. The standard deviation is "... the square root of the arithmetic mean of the squares of the deviations from the mean ..." <sup>157</sup> of a population. That is, the square root of the average of the squares of the deviations of specified data from the average of those data. In brief, the standard deviation makes it possible to compare the degree of dispersion of a set of data about the mean. It tells us by how much the data of a frequency distribution vary with respect to the average of those data. In symbolic form it can be expressed as follows:

$$s_N = \sqrt{\frac{1}{N} \sum_{i=1}^N (x_i - \bar{x})^2}.$$

254. In this case, the average of the specific duties that would have resulted if Chile had applied the PBS from July 1986 onwards, in accordance with the table in Exhibit ARG-21, is US\$18.74 per tonne. The standard deviation of this same set of specific duties – in accordance with the formula written out above – is US\$13.53 per tonne. That is to say, the specific duties that Chile would have established under the amended PBS would, on average, have been US\$18.74, with an average fluctuation of +/- US\$13.53 per tonne. This variation signifies an average fluctuation of +/- 72.20 per cent. <sup>158</sup> Considering that the average fluctuations of the FOB price, Argentine port, of bread wheat and the FOB price, Gulf of Mexico, of Soft Red Winter No. 2 wheat from July 1986 to the present were +/- 25.55 per cent and +/- 19.83 per cent, respectively, <sup>159</sup> an average fluctuation of +/- 72.20 per cent is more than sizeable.

255. It is clear from both the table in Exhibit ARG-21 and the chart in Exhibit ARG-22 that the frequency and extent of the fluctuations in the specific duties that were established and would have been established under the amended PBS are very substantial. Consequently, Argentina cannot see how a system that imposes a duty variability of this kind can offer the predictability required by wheat and wheat flour producers in order to export their products to Chile. What is more, it is hard to understand how a system that displays so much variability in the assessment of its duties can offer the predictability that the Appellate Body considered a measure ought to offer to be consistent with footnote 1 to Article 4.2 of the *Agreement on Agriculture*. <sup>160</sup>

**(b) *The amended PBS contains a formula that causes the import duties to vary automatically***

256. Below, Argentina will demonstrate the **automaticity** of the specific duties resulting from the PBS. According to the Spanish Academy, the definition of "automatic", insofar as relevant, is as follows: "*Said of a mechanism: which functions wholly or partially by itself ... which is activated directly, and usually unflinchingly, in specific circumstances*". <sup>161</sup>

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<sup>157</sup> Blalock, H (1978) "*Estadística Social*", Fondo de Cultura Económica, Mexico City, page 93.

<sup>158</sup> That is, ( US\$13.14 / US\$18.74 ) \* 100.

<sup>159</sup> Exhibit ARG-27.

<sup>160</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraphs 234, 258 and 261.

<sup>161</sup> Dictionary of the Spanish Language of the Spanish Academy, Twenty-second edition, at <http://www.rae.es/>.



257. The PBS is a mechanism which functions by itself and is activated directly and, always, unfailingly in specific circumstances. To show that it functions by itself, it is sufficient to recall that, when operating in accordance with the formulas reproduced above, the PBS is a mechanism which spontaneously assesses specific duties and rebates. In Law 19.897 and in Article 13 of Decree 831/2003 the "specific circumstances" in which it is activated are explained, namely, when the reference price is below the band floor.

258. As for its functioning directly and unfailingly, in Exhibits ARG-23 and ARG-24 Argentina presents a table and a chart, respectively, which show how the amended PBS functioned when specific duties were applied, that is to say, between 16 December 2004 and 15 April 2005.

259. The table in Exhibit ARG-23 gives all the variables needed to illustrate the operation of the PBS: the ceiling and the floor of the band at US\$148 and US\$128 per tonne (in accordance with Article 6 of Decree 831/2003 for the period from 16 December 2003 to 15 December 2007<sup>162</sup>), reference prices, FOB price, CIF price, *ad valorem* duties (6 per cent), specific duties, entry price without PBS (that is to say, the entry price that would exist if the PBS had not been applied during this period), and the price resulting from the PBS. The FOB and CIF prices are the actual FOB and CIF prices for bread wheat, Argentine port, on each of the specified dates.<sup>163</sup> The amount of *ad valorem* duties and the specific duty resulting from the PBS, where appropriate, are calculated for each CIF price and reference price.<sup>164</sup> The formulas used for calculating the values of the above-mentioned variables are the same as those used previously and, moreover, are indicated in the table.

260. To make the operation of the PBS clearer, we have included the chart in Exhibit ARG-24 which reproduces graphs for the prices of bread wheat FOB Argentine port, the reference prices, the entry price for imports to Chile resulting from the PBS and the price which would have obtained if the PBS had not been applied.

261. As the table and chart in question show, every time the reference price falls below the band floor, specific duties which, added to the *ad valorem* duties, produce an increase in the amount of total duty and hence the PBS entry price for imports to Chile are automatically, directly and unfailingly generated.

262. In case the demonstration of the operation of the PBS in Exhibits ARG-23 and ARG-24 should not be considered sufficient to show that the PBS is an automatic, direct and unfailing mechanism, in Exhibit ARG-6 Argentina presents a record of the operation of the amended PBS from the time it came into force, i.e., from 16 December 2003. This record was provided by the Office of Agricultural Studies and Policies of the Ministry of Agriculture of the Government of Chile itself.<sup>165</sup> Clearly, whenever the reference price of wheat fell below the band floor, specific duties were automatically generated.<sup>166</sup>

263. In fact, it could not have been otherwise since both 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. Thus, 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

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<sup>162</sup> See Exhibit ARG-2.

<sup>163</sup> Based on historical prices recorded by SAGPyA, adjusted on the basis of the criterion indicated in footnote 104.

<sup>164</sup> Specific duties are applied if the reference price falls below the band floor price of US\$128.

<sup>165</sup> See <http://www.odepa.gob.cl/>

<sup>166</sup> See the periods 16/Dec/04 – 15/Feb/05 and 16/Feb/05 – 15/Apr/05, when specific duties of 0.0143 US\$/kg. and 0.0205 US\$/kg. were applied to wheat, and 0.0223 US\$/kg. and 0.0320 US\$/kg. to wheat flour with reference prices of US\$114.50/tonne and US\$108.64/tonne, respectively.

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).<sup>167</sup>

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

(c) ***The amended PBS contains a formula that causes import duties to vary continuously***

265. The Appellate Body held that the second element of the condition necessary for a particular measure to be a "variable import levy" within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture* was that the variability of the duties be "continuous".<sup>168</sup>

266. Despite the fact that the variation of the specific duties is no longer weekly but bimonthly, that variation is continuous.

267. In fact, in the right circumstances, that is to say, if the reference price is situated below the band floor – as happened between December 2004 and April 2005 – every two months an exporter of wheat or wheat flour to the Chilean market will face a specific duty different from that established during the previous two-month period.

268. This is clear from the table and the chart in Exhibits ARG-23 and ARG-24, which illustrate the operation of the amended PBS between 16 December 2004 and 15 April 2005.

269. Moreover, if we consider what can happen over a longer period of time, what an exporter experiences is the continuous variability of the duties. This is apparent from the table and the chart in Exhibits ARG-21 and ARG-22, which illustrate the variability of the specific duties that would have resulted if the present amended PBS had operated with the average prices recorded between 1986 and the present on the markets of concern to Chile.

270. In short, Argentina has shown that the amended PBS includes a formula that makes the variability of the duties automatic and continuous. Thus, the amended PBS satisfies the necessary condition established by the Appellate Body for a measure to be considered similar to a "variable import levy".

**3.2. The lack of transparency and the lack of predictability of the duty level that result from the amended PBS are additional features that undermine the object and purpose of Article 4 of the *Agreement on Agriculture***

271. The Appellate Body held that the lack of transparency and the lack of predictability of the level of duties that result from the application of variable import levies are additional features that undermine the object and purpose of Article 4 of the *Agreement on Agriculture*, namely, to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties.<sup>169</sup>

272. As an example of a feature of the old PBS that illustrated its lack of transparency and predictability, the Appellate Body noted:

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<sup>167</sup> See also Articles 3 and 4 "shall be applied", Article 5 "the determination...shall be made", etc.

<sup>168</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.

<sup>169</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.

"... an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be".<sup>170</sup>

273. Argentina will show that due to the operation of the amended PBS, it is perfectly possible for an exporter to ship to Chile without being able reasonably to predict what the amount of duties payable will be.

274. Annex 2 to Decree 831/2003 establishes the periods on the basis of which duties are to be calculated and makes reference to the period for calculating the reference prices, the period of publication of the decree, the period of validity of the specific duties and the corresponding markets of most concern. The table in Annex 2 to Decree 831/2003 is reproduced below:

Periods for calculating reference prices	Period of publication of decree	Periods of validity of specific duties or rebates	Market of most concern
26 Nov–10 Dec	11-15 December	16 Dec–15 Feb	<i>Trigo Pan Argentino</i>
27 Jan–10 Feb	11-15 February	16 Feb–15 Apr	<i>Trigo Pan Argentino</i>
27 Mar–10 Apr	11-15 April	16 Apr–15 Jun	<i>Trigo Pan Argentino</i>
27 May–10 Jun	11-15 June	16 Jun–15 Aug	<i>Soft Red Winter No. 2</i>
27 Jul–10 Aug	11-15 August	16 Aug–15 Oct	<i>Soft Red Winter No. 2</i>
26 Sep–10 Oct	11-15 October	16 Oct–15 Dec	<i>Soft Red Winter No. 2</i>

(Emphasis added)

275. **First of all**, if an exporter of wheat or of wheat flour is asked by a customer to give a quotation for a delivery to be made in more than two months time, it will be impossible for that exporter to know the amount of the specific duties that *might* be applied. This constitutes a major problem in the case of wheat since on that market the *majority* of sales are made under forward contracts. In these circumstances, the uncertainty generated by the amended PBS is transferred to the exporter who has no predictable basis on which to make a quotation and hence a sale.

276. **Secondly**, even if a sale is made for delivery in less than two months, the exporter may still be unable to predict the amount of specific duties.

277. For example, for a particular specific duty that is to apply from 16 April to 15 June (highlighted), the reference prices will be calculated on the basis of the average of the daily international prices for "*Trigo Pan Argentino*" recorded between 27 March and 10 April. The Government of Chile will then have to publish the decree establishing the specific duties (or rebates, where appropriate) between 11 and 15 April.

278. Suppose an Argentinean exporter exports wheat or wheat flour to Chile on 5 April. All that the exporter will be able to predict at the time of exportation will be the band floor price, then set at US\$128. However, he will not be able to predict the amount of duty payable in Chile. This is because at the time of exportation the period for calculating the reference prices, *one* of the two variables necessary for calculating the amount of specific duties, would not have ended. If the shipment of wheat or wheat flour takes **11 days or more** to arrive at the Chilean port, specific duties calculated on the basis of a period partially subsequent to the time of embarkation will be applied. In particular, the days 6, 7, 8, 9 and 10 April *will be relevant* for the calculation of the reference price and hence for the calculation of the amount of specific duties. However, having left Argentina on 5 April, during those five days the shipment of wheat or wheat flour will be en route for Chile. That is to say, if the shipment arrives in Chile on **16 April or later**, specific duties calculated on the basis of a reference price based on the average of the daily international prices for "bread wheat, Argentine port" recorded between 27 March and 10 April will be applied. However, the exporter was aware only of the prices recorded between 27 March and 5 April. Thus, the exporter will have lacked part of

<sup>170</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.

the period for calculating the reference price on the basis of which he would have been able to predict the amount of specific duties payable for precisely the period extending from 6 to 10 April. It should be noted that the normal time required to transport maritime cargo from Argentina to Chile is approximately 15 days.

279. Now let us take the hypothetical case of an exporter who exports wheat or wheat flour from the Gulf of Mexico area, the shipment arriving in Chile on 16 April. This exporter will find himself in an *even worse* situation than the Argentinean exporter mentioned above. A shipment from this area will inevitably take longer to reach the Chilean port than a shipment coming from Argentina. The exporter in the Gulf of Mexico area will probably have to make his shipment some time before 5 April in order for it to arrive at the same time as that of the Argentine exporter, i.e. 16 April. In these circumstances, the Gulf of Mexico exporter will, at the very least, be unaware of a greater proportion of the period for calculating the reference price on the basis of which he could have predicted the amount of specific duties. It might also happen that the Gulf of Mexico exporter exported his goods, for example, on 26 March, that is to say, *completely prior* to the period for calculating the reference prices (which, it should be recalled, extends from 27 March to 10 April). In this case, the exporter will have absolutely *no* indication of, and no way of predicting, the amount of specific duties that could be applied. Therefore, he will find himself in a situation even more disadvantageous than that of the Argentinean exporter.<sup>171</sup>

280. Thus, it has been shown that – under the amended PBS – it is perfectly possible for an exporter of wheat or wheat flour not to know, and to be unable to predict, how much duty will be payable when the shipment arrives at the customs office in Chile. Consequently, bearing in mind the observations made by the Appellate Body in paragraph 234 of its report, it is less likely that an exporter will ship wheat or wheat flour to the Chilean market under these conditions.

281. Following the reasoning of the Appellate Body, this lack of transparency and predictability will also *contribute* to distorting the prices of imports by impeding the transmission of international prices to the Chilean market. Thus, in lacking transparency and predictability the PBS possesses the additional features which, according to the Appellate Body,<sup>172</sup> undermine the object and purpose of Article 4 of the *Agreement on Agriculture*.

282. In the light of the above, it can be stated, firstly, that the PBS fulfils the conditions *necessary* for it to be a measure in violation of Article 4.2 of the *Agreement on Agriculture* within the terms of footnote 1, since it contains a formula that makes the variability of duties automatic and continuous. Secondly, the amended PBS possesses additional features which undermine the object and purpose of Article 4 of the *Agreement on Agriculture*, since it lacks the transparency and predictability necessary for it to be possible to predict the level of duties that will result from its being applied.

283. As the Appellate Body observed, significant for traders are the lack of transparency; the unpredictability of the level of duties; and the automaticity, the frequency, and the extent to which the duties fluctuate since these characteristics prevent enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4 of the *Agreement on Agriculture*. Argentina has shown that the amended PBS possesses *every one* of the features mentioned.

284. Consequently, the amended PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture* and is not an ordinary customs duty.

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<sup>171</sup> Without taking into account, moreover, the injury suffered by the Gulf of Mexico exporter in terms of **treatment less favourable** than that received by the Argentine exporter.

<sup>172</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 234.

**4. Conclusions concerning the inconsistency of the amended PBS with Article 4.2 of the Agreement on Agriculture**

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

286. This is because the way in which the system is designed and the way it operates in its overall nature are sufficiently similar to the characteristics of these two categories of prohibited measures as to make the amended PBS, with its particular characteristics, a "similar border measure".

287. The particular configuration and interaction of the specific characteristics of Chile's price band system generate certain market access conditions that lack transparency and predictability and disconnect the Chilean market from international price trends in a way that insulates the Chilean market from the transmission of international prices and prevents enhanced market access for imports of wheat and wheat flour.

288. Consequently, since it falls within the categories of measures prohibited by footnote 1, the amended PBS is not an ordinary customs duty and hence is a measure inconsistent with Article 4.2 of the *Agreement on Agriculture* which may not be maintained, resorted to, or reverted to.

**II. THE AMENDED PBS IS IN BREACH OF THE SECOND SENTENCE OF ARTICLE II:1(B) OF THE GATT 1994**

289. Argentina maintains that the amended PBS infringes the second sentence of Article II:1(b) of the GATT 1994, inasmuch as it constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedule of concessions (No. VII).

290. Article II of the GATT 1994 states, in the second sentence of paragraph 1(b), that the products described in Part II of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall be "... *exempt from all other duties or charges of any kind imposed on or in connection with the importation ...*".

291. In its turn, paragraph 1 of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 reads as follows:

"In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply ..."

292. During the proceedings, Chile itself contended that "... the purpose of the second sentence of Article II:1(b) and the *Understanding on Article II:1(b)* was to ensure that bindings on 'ordinary customs duties' could not be circumvented by the creation of new types of duties or charges on imports or by increasing existing 'other duties or charges'."<sup>173</sup> Argentina shares this view.

293. Insofar as the amended PBS is a border measure similar to a variable import levy and a minimum import price, it is inconsistent with Article 4.2 of the *Agreement on Agriculture*, since it is a measure other than an ordinary customs duty.

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<sup>173</sup> *Chile – Price Band System*, Report of the Appellate Body, paragraph 51.

294. Not being an ordinary customs duty, the amended PBS constitutes "other duties or charges" not recorded in the appropriate column of Chile's Schedule of concessions (No. VII).

295. Therefore, if the amended PBS was not recorded but is nonetheless being levied,<sup>174</sup> it is in breach of the *second* sentence of Article II:1(b) of the GATT 1994, pursuant to the *Understanding on the Interpretation of Article II:1(b) of the GATT 1994*.<sup>175</sup>

### III. THE AMENDED PBS IS IN BREACH OF ARTICLE XVI:4 OF THE MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

296. Paragraph 4 of Article XVI of the Agreement Establishing the World Trade Organization reads as follows:

*Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.*

297. These annexed Agreements include both the Agreement on Agriculture and the GATT 1994.

298. As stated by the Appellate Body,

"... Moreover, as general context for all the covered agreements, Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* is of great significance ... This provision establishes a clear obligation for all WTO Members to ensure the conformity of their existing laws, regulations, and administrative procedures with the obligations in the covered agreements."<sup>176</sup>

299. As we have argued in the course of this document, insofar as the amended PBS infringes both Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994, Chile has not ensured the conformity of its existing laws, regulations and administrative procedures with its obligations under the covered Agreements.

300. Moreover, according to WTO case-law:

"As a general proposition, GATT *acquis*, confirmed in Article XVI:4 of the WTO Agreement and recent WTO panel reports, make abundantly clear that legislation as such, independently from its application in specific cases, may breach GATT/WTO obligations ..."<sup>177</sup> (*emphasis added*).

301. Later, on the same subject, the Panel goes on to point out:

"... The three types of measures explicitly made subject to the obligations imposed in the WTO agreements – 'laws, regulations and administrative procedures' – are measures that are applicable generally; not measures taken necessarily in a specific case or dispute. Article XVI:4, though not expanding the material obligations under

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<sup>174</sup> *Chile – Price Band System*, Report of the Panel, paragraph 7.107.

<sup>175</sup> It should be noted that a panel established under Article 21.5 of the DSU can examine the consistency of a measure intended to implement the recommendations and rulings of the DSB not only with the provisions of the WTO Agreements invoked by the complainant in the original proceedings but also with other provisions that the complainant alleges for the first time in his Article 21.5 recourse. See *Canada – Aircraft (Article 21.5 – Brazil)*, Report of the Appellate Body, paragraph 41.

<sup>176</sup> *EC – Sardines*, Report of the Appellate Body, paragraph 213.

<sup>177</sup> *US – Sections 301-310*, Report of the Panel, paragraph 7.41.

WTO agreements, expands the type of measures made subject to these obligations."<sup>178</sup>

302. Likewise, the Panel noted that:

"Article XVI:4 goes a step further than Article 27 of the Vienna Convention. Article 27 of the Vienna Convention provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Article XVI:4, in contrast, not only precludes pleading conflicting internal law as a justification for WTO inconsistencies, but requires WTO Members actually to ensure the conformity of internal law with its WTO obligations".<sup>179</sup>

303. WTO case-law has also established that:

"... if a provision of an 'annexed Agreement' is breached, a violation of Article XVI:4 immediately occurs. GATT 1994 is one of the 'annexed Agreements' within the meaning of Article XVI:4. Since we found that provisions of Article VI of the GATT 1994 has been breached, we conclude that, by violating this provision, the United States violates Article XVI:4 of the WTO Agreement".<sup>180</sup>

304. Thus, being inconsistent with Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994, the amended PBS is in breach of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* since, while it remains in force, Chile is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements.

#### D. CONCLUSIONS

305. In light of the above, Argentina requests the Panel to find that Chile's Price Band System, as amended by Law No. 19.897 and Supreme Decree No. 831/2003, *per se* and in its specific application to imports of wheat and wheat flour:

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

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<sup>178</sup> Ibid., paragraph 7.41(b), *in fine*.

<sup>179</sup> Ibid., footnote 652.

<sup>180</sup> *US – 1916 Anti-Dumping Act*, Report of the Panel, paragraph 6.287.

306. Consequently, Argentina respectfully requests the Panel to find that Chile has not implemented the recommendations and rulings of the DSB and is continuing to infringe its obligations within the framework of the WTO.



ANNEX A-2\*

FIRST WRITTEN SUBMISSION BY CHILE  
(3 MAY 2006)

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\* Annex A-2 contains the First Written Submission by Chile. This text was originally submitted in Spanish by Chile.

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**TABLE OF REPORTS CITED**

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Argentina – Textiles and Apparel</i>	Report of the Appellate Body, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R, adopted 22 April 2002.
<i>Chile – Price Band System</i>	Report of the Panel, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002.
<i>Chile – Price Band System</i>	Report of the Appellate Body, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002.
<i>EC – Bed Linen (Article 21.5 – India)</i>	Report of the Panel, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/RW, adopted 24 April 2003.
<i>EC – Bed Linen (Article 21.5 – India)</i>	Report of the Appellate Body, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003.
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Report of the Appellate Body, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 21 July 2000.
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Report of the Appellate Body, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005.
<i>Brazil – Desiccated Coconut</i>	Report of the Appellate Body, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997.
<i>EC – Hormones</i>	Report of the Appellate Body, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS48/AB/R, adopted 13 February 1998.
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)</i>	Final Report of the Panel, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/RW, adopted 27 September 2005.
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Report of the Appellate Body, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001.

## INTRODUCTION

1. Chile wishes to thank the members of the Panel for the opportunity to state its case in this dispute, prompted by Argentina's objection to the measures adopted by Chile to comply with the recommendations and rulings of the Dispute Settlement Body (hereinafter the "DSB").
2. The measures adopted in a timely and opportune manner by Chile were aimed at making the necessary legal adjustments and Chile has therefore eliminated any inconsistency with Article 4.2 of the *Agreement on Agriculture* and has fully implemented the DSB recommendations and rulings, as will be shown in this submission.
3. To make the argument easier to follow, this submission is divided into five parts. The first sets out the salient points of the case, including Argentina's claim and the Appellate Body's ruling.
4. The second part describes the measures implemented by Chile in order to comply with the DSB's recommendations and rulings, namely Law No. 19.897 of 2003 and Chilean Ministry of Finance Regulation No. 831 of 2003.
5. In the third part, Chile asserts and demonstrates that Argentina may not bring certain issues before this Panel since the proper time to raise them was during the original proceedings and Argentina failed to do so. Those issues are therefore outside the terms of reference of this Article 21.5 Panel. The fourth part sets out the conclusions and recommendations of the DSB and demonstrates how the changes under Law No. 19.897 fully comply with WTO requirements. As further evidence, the final part of the submission demonstrates that, as a practical consequence of changes to the system, there is no variable import levy or minimum import price, and there is no measure similar to a variable import levy or to a minimum import price. The last two parts take up Argentina's arguments and show how they fail, pointing out that they are, in many respects, inaccurate and out of line with the conclusions and recommendations of the DSB.

## I. BACKGROUND

### 1. Factual background

6. On 23 October 2002, the Dispute Settlement Body (DSB) adopted the Appellate Body Report<sup>1</sup> in the dispute "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*".
7. On 11 November 2002, Chile reported to the DSB that it required a reasonable period of time to implement its recommendations and rulings. In the absence of an agreement between the parties, on 6 December 2002, Chile asked the DSB<sup>2</sup> to allow the determination of this period to be the subject of binding arbitration, in accordance with Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter the "DSU").
8. On 17 March 2003, the award of the arbitrator<sup>3</sup> determined that the reasonable period of time for Chile to implement the recommendations and rulings of the DSB expired on 23 December 2003. As of September 2003, Chile has submitted monthly reports on progress in the implementation of the DSB recommendations and rulings (September 2003<sup>4</sup>, October 2003<sup>5</sup> and November 2003<sup>6</sup>).

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<sup>1</sup> WT/DS207/AB/R.

<sup>2</sup> WT/DS207/9.

<sup>3</sup> WT/DS207/13.

<sup>4</sup> WT/DS207/15.

9. On 24 December 2003, Argentina and Chile reported to the DSB that an Understanding regarding procedures under Articles 21 and 22 of the DSU with respect to this dispute had been concluded.<sup>7</sup>

10. On 19 May 2004, Argentina requested consultations with Chile pursuant to paragraph 1 of the Understanding between the Argentine Republic and the Republic of Chile regarding procedures under Articles 21 and 22 of the DSU and Article XXIII:1 of the GATT 1994.<sup>8</sup>

11. On 29 December 2005, Argentina requested<sup>9</sup> that, if possible, this matter be submitted to the original Panel with the standard terms of reference provided for in Article 7 of the DSU, in accordance with the Understanding concluded between the two countries regarding procedures under Articles 21 and 22 of the DSU and Article 21.5 of the DSU, since there was disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB].

12. Argentina requests that the Panel find that Chile has not taken measures to comply fully with the DSB's rulings and recommendations of 23 October 2002. In particular, Argentina requests that the Panel find that Chile's Price Band System (PBS) is inconsistent with Article 4.2 of the *Agreement on Agriculture* and the second sentence of Article II:1(b) of the GATT 1994 and, hence, Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*.

## 2. Argentina's claims and allegations

13. On 19 April 2006, Argentina made its First Written Submission in the Recourse by Argentina to Article 21.5 of the DSU in "*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*". In this submission, Argentina asserts that Chile has failed to implement the recommendations and rulings of the DSB and continues in breach of its obligations as a Member of the WTO.<sup>10</sup>

14. Argentina adds that the amendment to the law notified by Chile:<sup>11</sup>

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

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<sup>5</sup> WT/DS207/15/Add.1.

<sup>6</sup> WT/DS207/15/Add.2.

<sup>7</sup> WT/DS207/16.

<sup>8</sup> WT/DS207/17.

<sup>9</sup> WT/DS207/18.

<sup>10</sup> Written Submission by the Republic of Argentina, paragraph 13.

<sup>11</sup> Written Submission by the Republic of Argentina, paragraph 14.

## II. DESCRIPTION OF THE MEASURES ADOPTED BY CHILE

### 1. Law No. 19.897 of 2003

15. On 25 September 2003, Chile published in the Official Journal Law No. 19.897<sup>12</sup> "amending Article 12 of Law No. 18.525 and the Customs Tariff". The new Law, which entered into force on 16 December 2003, brought Chile's price band legislation into line with the DSB's recommendations and rulings. The Law was supplemented by Supreme Decree No. 831 of the Chilean Ministry of Finance<sup>13</sup> approving the implementing regulations for Article 12 of Law No. 18.525, as replaced by Article 1 of Law No. 19.897 (hereinafter "the Regulations" or "Regulations of the Law").

16. As Chile has stated, all these implementation measures reflect the DSB's recommendations or rulings both in form and in substance<sup>14</sup> and thus constitute a measure which is WTO-consistent, and in particular consistent with Article 4.2 of the *Agreement on Agriculture*.

17. The relevant part of Article 1 of Law No. 19.897, which replaced Article 12 of Law No. 18.525 on the importation of goods into the country, reads:

"Article 12.- Established hereunder are specific duties in United States dollars per tariff unit and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of wheat, wheat flour and sugar, as stipulated in this Law.

The amount of these duties and rebates shall be established as provided for in this Article by the President of the Republic, by way of a supreme decree issued by the Chilean Ministry of Finance by order of the President of the Republic, six times for wheat in the course of each twelve-month period extending from 16 December to 15 December of the following year, [...] in terms which, when applied to the price levels attained by the products in question on the international markets, allow domestic market stability.

For the purpose of determining the duties and rebates up until the annual period ending in 2007, the floor and ceiling prices for wheat [...], shall be considered in the drafting of Chilean Ministry of Finance exempt decrees No. 266 [...], published in the Official Journal of 16 May 2002, expressed in f.o.b. terms in United States dollars per tonne. There shall be established, on the one hand, specific duties when the reference price is below the floor price of US\$128 for wheat [...], and, on the other hand, rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff when the reference price is above the ceiling price of US\$148 for wheat [...].

For the purpose of determining the duties and rebates as from the annual period ending in 2008 and up to 2014, the floor and ceiling prices established in the previous paragraph shall be adjusted annually by multiplying the values in force during the previous annual period by a factor of 0.985 in the case of wheat [...]. 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.

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<sup>12</sup> Exhibit CHL-1.

<sup>13</sup> Exhibit CHL-2.

<sup>14</sup> WT/DS207/15/Add.2.

The duties and rebates referred to in this Article shall correspond to the difference between the floor or ceiling prices determined above and a f.o.b. reference price, multiplied by a factor of one (1), plus the general *ad valorem* duty in force for these products. The f.o.b. 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 [...] reckoned from the date fixed by the Regulations for each decree.

[...]

The duties and rebates for wheat flour are based on those determined for wheat, multiplied by a factor of 1.56.

The duties and rebates applicable to each import transaction shall be those in effect on the date of the waybill of the vehicle transporting the goods in question.

The duties resulting from the application of this Article, added to the *ad valorem* duty, shall not exceed the tariff rate bound by Chile under the World Trade Organization for the goods referred to in paragraph 1, each import transaction being considered individually and using the c.i.f. value of the goods concerned in the transaction in question as a basis for calculation. The rebates established as a result of the application of this Article shall in no circumstances exceed the amount corresponding to the *ad valorem* duty payable on the importation of the goods. The National Customs Service shall adopt the measures necessary to enforce the provisions of this paragraph.

The President of the Republic, by way of a supreme decree issued by the Chilean Ministry of Finance and endorsed by the Ministry of Agriculture, shall establish, pursuant to this Article, the periods in which specific duties and tariff rebates are to be established and applied. Furthermore, the President shall establish the most relevant markets for each product, the procedures and dates for calculating the reference prices and other methodological factors necessary for the implementation of this Article."

## **2. Operation of Law No. 19.897**

18. The new Law applies to imports of wheat and wheat flour<sup>15</sup> and provides for the possibility of (a) establishing the application of specific duties in United States dollars per tariff unit, or (b) establishing rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff. Furthermore, Chilean legislation provides for payment of the *ad valorem* duty alone, which currently corresponds to six per cent of the value of the goods.<sup>16</sup>

19. The Chilean Executive, represented by the President of the Republic, is responsible for establishing either such arrangement by means of a supreme decree issued and endorsed by the Chilean Ministry of Finance by order of the President of the Republic. The Law requires the administrative authority to determine the duties or rebates six times in the course of each twelve-month period extending from 16 December to 15 December of the following year.

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<sup>15</sup> Law No. 19.897 also applies to imports of sugar, but the latter is not material to this dispute.

<sup>16</sup> Payment of the *ad valorem* duty of six per cent is not provided for under price band legislation, rather it is of general application, as established by Article 1 of Law No. 18.687.

### 3. Application of specific duties and rebates on amounts payable as *ad valorem* duties

20. Pursuant to Article 1 of Law No. 19.897, the authority granted to the Chilean Executive permits it to establish, by means of a Chilean Ministry of Finance decree, the application of specific duties or rebates on the amount payable as *ad valorem* duties.

(a) Determination of specific duties

21. The Chilean Ministry of Finance decree establishes a specific duty consisting of an amount in United States dollars per tariff unit (tonne) payable when the reference price established is less than US\$128 per tonne (or the price in effect in the annual periods beginning with the one ending in 2008 and up until 2014).

22. The amount of specific duty established in each Chilean Ministry of Finance decree corresponds to the difference between the f.o.b. price of US\$128 (or the price in effect in the annual periods beginning with the one ending in 2008 and up until 2014) and the reference price, also expressed on a f.o.b. basis, multiplied by a factor of one (1), plus the general *ad valorem* duty (6%).

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

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

24. The Chilean Ministry of Finance decree establishes a rebate on the amount payable as *ad valorem* duties established in the Customs Tariff when the reference price is over US\$148 per tonne (or the price in effect in the annual periods beginning with the one ending in 2008 and up until 2014).

25. The rebates on amounts payable as *ad valorem* duties established in each Chilean Ministry of Finance decree correspond to the difference between the f.o.b. price of US\$148 (or the price in effect in the annual periods beginning with the one ending in 2008 and up until 2014) and the reference price, also expressed on a f.o.b. basis, multiplied by a factor of one (1), plus the general *ad valorem* duty (6%).

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

(c) Wheat flour

27. In the case of wheat flour, Law No. 19.897 states that the applicable specific duty or rebate on the amount payable as *ad valorem* duties established in each Chilean Ministry of Finance decree shall be those determined for wheat, multiplied by a factor of 1.56.

(d) Determination of the reference values established under the Law

28. The prices US\$128 and US\$148 were the parameters defined by Chile for wheat when it was required to amend its price band system in accordance with the recommendations and rulings of the DSB. These prices will remain unchanged until the annual period ending in 2007. As of the annual period ending in 2008 and up until 2014, these amounts will be reduced on an annual basis by multiplying the prices in force during the previous annual period by a factor of 0.985.



29. The floor and ceiling prices have therefore been established until 2014 as follows:

Table No. 1<sup>17</sup>

<i>Floor and ceiling prices for wheat, by period of validity</i>		
Period of validity	Floor price	Ceiling price
16.12.2003 to 15.12.2007	128	148
16.12.2007 to 15.12.2008	126	146
16.12.2008 to 15.12.2009	124	144
16.12.2009 to 15.12.2010	122	142
16.12.2010 to 15.12.2011	120	140
16.12.2011 to 15.12.2012	118	138
16.12.2012 to 15.12.2013	116	136
16.12.2013 to 15.12.2014	114	134

(e) Reference price

30. The reference price for determining both specific duties and rebates on the amount payable as *ad valorem* duties is expressed as a f.o.b. value and consists of the average of the daily international wheat prices recorded in the markets most relevant to Chile<sup>18</sup> over a period of 15 calendar days counted backwards from the date set out in Regulation No. 831 for each decree establishing specific duties.

#### **4. Regulations of Law No. 19.897**

31. The final paragraph of Article 1 of Law No. 19.897 provides that the President of the Republic, by way of a supreme decree issued by the Chilean Ministry of Finance and endorsed by the Ministry of Agriculture, shall establish, pursuant to that Article, *inter alia*, the periods in which specific duties and tariff rebates are to be established and applied.

32. Supreme Decree No. 831 of the Chilean Ministry of Finance<sup>19</sup>, dated 26 September 2003 and published in the Official Journal on 4 October 2003, was issued under this provision and contains a series of stipulations which reiterate and supplement those of the Law, thereby lending greater transparency to the determination of the specific duties or tariff rebates established in each Chilean Ministry of Finance decree.

(a) Period of validity of each Chilean Ministry of Finance decree

33. The Regulations reiterate that all values applied by Law No. 19.897, and provided for in the Regulations thereto, are to be expressed on a f.o.b. basis in United States dollars. The Regulations also sets out the period of validity of each Chilean Ministry of Finance decree establishing specific duties or rebates on the amount payable as *ad valorem* duties, as follows:<sup>20</sup>

- 16 December to 15 February;
- 16 February to 15 April;
- 16 April to 15 June;
- 16 June to 15 August;
- 16 August to 15 October; and

<sup>17</sup> Article 6 of the Regulations of the Law.

<sup>18</sup> The Regulations of the Law also establish the markets most relevant to Chile.

<sup>19</sup> Exhibit CHL-2.

<sup>20</sup> Article 5 of the Regulations of the Law.

– 16 October to 15 December.

(b) Reference price

34. Further to Law No. 19.897, the Regulations<sup>21</sup> state that the reference price for wheat will correspond to the average daily prices recorded in the most relevant markets over a period of 15 calendar days counted backwards from the tenth day of the month in which the decree is published.

(c) Most relevant market

35. Furthermore, the Regulations establish the most relevant markets for wheat in Chile and provide that, during the application period extending from 16 December to 15 June of the following year, the most relevant market will be that for *Trigo pan argentino*<sup>22</sup> and the prices will correspond to the daily prices quoted for that product *f.o.b. Argentine port*. Likewise, during the application period extending from 16 June to 15 December, the most relevant market will be that for *soft red winter wheat No. 2* and the prices will correspond to the daily prices quoted for that product *f.o.b. Gulf of Mexico*.

(d) Date of application of duties and rebates

36. The Regulations<sup>23</sup> also provide that the specific duty or rebate on the amount payable as *ad valorem* duties determined by the Chilean Ministry of Finance decree applicable to each import transaction will be that in effect on the date of the waybill<sup>24</sup> of the vehicle transporting the goods in question, that is to say, the date of importation of the goods.

(e) Limitations on the application of specific duties

37. Both Law No. 19.897<sup>25</sup> and its Regulations<sup>26</sup> establish limitations on the application of the specific duty which the Chilean Ministry of Finance may set, and provide that specific duties, plus *ad valorem* duties, must not exceed the tariff rate bound by Chile under the World Trade Organization (31.5%), each import transaction being considered individually and using the c.i.f. value of the goods concerned in the transaction in question as a basis for calculation.

38. Both provisions add that Chile's National Customs Service shall adopt the necessary measures to ensure compliance with this obligation.

(f) Summary of time-frames and relevant markets

39. An annex to the final part of the Regulations contains a summary of the periods of validity of the Chilean Ministry of Finance decrees, the periods in which they must be issued, the periods to be taken into consideration when calculating the reference price and the markets relevant to Chile for each such decree, as follows:

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<sup>21</sup> Article 7 of the Regulations of the Law.

<sup>22</sup> Note of the Secretariat: literal translation of this quality would be "Argentine bread wheat".

<sup>23</sup> Article 17 of the Regulations of the Law.

<sup>24</sup> In accordance with this same regulation, in the case of electronic filing, the waybill date will be taken to be the date of actual acceptance of the vehicle and the goods will be considered to have been presented at the same time all pursuant to Article 37 of the Chilean Customs Ordinance.

<sup>25</sup> Law No. 19.897, Article 1, paragraph 9.

<sup>26</sup> Article 18 of the Regulations of the Law.

Reference price calculation period	Decree publication period	Period of validity for specific duties or rebates	Most relevant market
26 November-10 December	11-15 December	16 December-15 February	<i>Trigo pan argentino</i>
27 January-10 February	11-15 February	16 February-15 April	<i>Trigo pan argentino Trigo pan argentino</i>
27 March-10 April	11-15 April	16 April-15 June	<i>Trigo pan argentino</i>
27 May-10 June	11-15 June	16 June-15 August	<i>Soft red winter wheat No.2</i>
27 July-10 August	11-15 August	16 August-15 October	<i>Soft red winter wheat No.2 Soft red winter wheat No.2</i>
26 September-10 October	11-15 October	16 October-5 December	<i>Soft red winter wheat No.2</i>

## 5. Legality of taxation (*Reserva Legal del Tributo*)

40. Chilean legislation provides that taxes, including Customs duties, may be established only by a Congress-approved law, on the basis of what is known as the principle of legality of taxation (*reserva legal del tributo*). Because of this restriction on the Chilean Executive's authority to establish Customs duties, the Chilean parliament enacted legislation – Law No. 19.897 – to provide detailed specifications for and fully regulate the procedure culminating in the issuance of a Chilean Ministry of Finance decree establishing a specific duty or a rebate on the amount payable as *ad valorem* duties.

41. Article 63.14 of the Constitution of the Republic of Chile<sup>27</sup> says:

Article 63. Only the following shall be matters of law:

(14) Other matters for which the Constitution indicates that the President of the Republic has the exclusive power of initiative.

43. Article 65, paragraph 4, of the Constitution<sup>28</sup> states the following:

The President of the Republic shall also have the exclusive initiative for:

1. Imposing, eliminating, reducing or remitting taxes of any type or nature, establishing exemptions or amending those in effect and determining their form, proportionality or progression.

44. But application of the tax legality principle is not unqualified. Not all elements of taxation have to be governed by statute, only those which are essential; for the remaining elements the Chilean Executive has regulatory authority, albeit not unqualified authority. Although the law does not cover the aspects of regulation that relate to procedural or formal matters specific to law enforcement, such as place or date of payment, the tax must be determined or determinable on the basis of its legal origin, that is to say, the statute must either establish the tax obligation or set out criteria on which to establish it.

45. Hence, although the former system for calculating price band duties and rebates was replaced under the new Law by the issuance of Chilean Ministry of Finance decrees, the parameters for establishing the duties remained, albeit duly amended. Although the specific duties and rebates on the amount payable as *ad valorem* duties are presently established by a decree of the Chilean Ministry of Finance and this authority could determine the level of domestic protection, even in accordance with the aforementioned parameters, this is inadmissible under Chile's present legal system, since the minimum constitutional parameters for determining the level of protection agreed by the economic operators in the country must be maintained.

<sup>27</sup> Exhibit CHL-3.

<sup>28</sup> Exhibit CHL-4.

### III. ARGENTINA'S CLAIMS IN RELATION TO THE SECOND SENTENCE OF ARTICLE II:1(B) OF THE GATT 1994 AND THE FACTOR OF 1.56 APPLICABLE TO WHEAT FLOUR ARE OUTSIDE THE TERMS OF REFERENCE OF THIS PANEL

#### 1. Claim in relation to the second sentence of Article II:1(b) of the GATT 1994

46. In both its request for the establishment of a Panel and its First Written Submission, Argentina claims and tries to show that the amended PBS is in breach of the second sentence of Article II:1(b) of the GATT 1994.<sup>29</sup> As Argentina sees it, since the amended PBS is a border measure inconsistent with Article 4.2 of the *Agreement on Agriculture*, it is a measure other than an ordinary customs duty and therefore constitutes "other duties or charges" not recorded in the corresponding column of Chile's Schedule of Concessions (No. VII); in other words, a measure inconsistent with Article 4.2 of the *Agreement on Agriculture* is automatically inconsistent with the second sentence of Article II:1(b) of the GATT 1994 in so far as the respective Member has failed to include it in its Schedule.

47. Notwithstanding the fact that Chile will demonstrate that the regime in effect since the entry into force of Law No. 19.897 is consistent with Article 4.2 of the *Agreement on Agriculture* and so is not a measure that has to be converted into an ordinary customs duty, the Panel may not rule on this claim by Argentina given that it falls outside its terms of reference.

48. This is in fact a claim which Argentina should have raised in the initial stages of this dispute. Argentina, however, never questioned whether a measure contrary to Article 4.2 of the *Agreement on Agriculture* could thereby be inconsistent with the second sentence of Article II:1(b) of the GATT 1994, whereas it could have done so before the original Panel. On the contrary, Argentina claimed throughout the original proceedings that the PBS was in breach of both Article 4.2 and the first sentence of Article II:1(b) of the GATT 1994. Even in the course of the proceedings before the Appellate Body, when Chile rightly submitted that the Panel had acted inconsistently with Article 11 of the DSU by concluding that the PBS was inconsistent with the second sentence of Article II:1(b) of the GATT 1994, Argentina was unable to prove that it had raised (let alone pursued) a claim relating to this second sentence. A review of paragraphs 155 and 162 and, in particular, 165 and 167 of the Appellate Body report suffices to confirm that Argentina did not in fact ever raise the claims it now wishes to bring.

49. Argentina appears to use the analysis and conclusions of the original Panel to support its claim relating to the second sentence of Article II:1(b) of the GATT 1994.<sup>30</sup> However, the original Panel's analysis and conclusion regarding the inconsistency of the PBS with the second sentence of Article II:1(b) of the GATT 1994 were reversed by the Appellate Body<sup>31</sup> and therefore do not stand.

50. Argentina wishes to raise at this late stage in the proceedings a claim which it could have raised in the initial stages of the dispute, but did not. To entertain that claim now would seriously affect Chile's due process rights and would subject a case warranting a full hearing to summary and expedited proceedings.

51. It is useful to recall what was said in this respect in *EC – Bed Linen (Article 21.5 – India)* in which India raised a claim it had made before the original Panel, but had failed to pursue. This claim was therefore dismissed and India did not appeal the finding.

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<sup>29</sup> Section II of the First Written Submission by the Republic of Argentina.

<sup>30</sup> See footnote 173 to paragraph 295 of the First Written Submission by the Republic of Argentina.

<sup>31</sup> Paragraph 288(a) of the Report of the Appellate Body.

52. In that dispute, the Article 21.5 Panel stated the following:

... a claim which, as a legal and practical matter, could have been raised and pursued in the original dispute, but was not, cannot be 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.<sup>32</sup> (Emphasis added.)

53. That is to say, as the Panel itself stated, neither Article 21.5 of the DSU nor any other provision entitles India to such a "second chance".<sup>33</sup>

54. The Appellate Body agreed with the Panel, stating:

We conclude, therefore, that, in these Article 21.5 proceedings, India has raised the *same* claim under Article 3.5 relating to "other factors" as it did in the original proceedings. In doing so, 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.<sup>34</sup>

A complainant that, in an original proceeding, fails to establish a *prima facie* case should not be given a "second chance" in an Article 21.5 proceeding, and thus be treated more favourably than a complainant that did establish a *prima facie* case but, ultimately, failed to prevail before the original panel, with the result that the panel did not find the challenged measure to be inconsistent with WTO obligations. Nor should a defending party be subject to a second challenge of the measure found not to be inconsistent with WTO obligations, merely because the complainant failed to establish a *prima facie* case, as opposed to failing ultimately to persuade the original panel.<sup>35</sup>

55. The Panel Report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* stated that accepting the EC's claim (with regard to likelihood of injury) would amount to providing it with "a second chance to raise a claim that it failed to raise in the original proceedings".<sup>36</sup> The Panel was concerned that to allow such a possibility could undermine the principles of fundamental fairness and due process, which would raise "serious issues regarding (the United States') due process rights".<sup>37</sup> It therefore concluded that the new claims by the EC were not properly before the Panel.

56. In this dispute, we find ourselves in the very same situation: a claim which Argentina could have raised and pursued in the original dispute, but failed to do so. Argentina has no right to such a "second chance".

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<sup>32</sup> *EC – Bed Linen (Article 21.5 – India)*, Report of the Panel (WT/DS141/RW), paragraph 6.43.

<sup>33</sup> *EC – Bed Linen (Article 21.5 – India)*, Report of the Panel (WT/DS141/RW), paragraph 6.43.

<sup>34</sup> *EC – Bed Linen (Article 21.5 – India)*, Report of the Appellate Body (WT/DS141/AB/RW), paragraph 87.

<sup>35</sup> *EC – Bed Linen (Article 21.5 – India)*, Report of the Appellate Body (WT/DS141/AB/RW), paragraph 96.

<sup>36</sup> *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Report of the Panel (WT/DS212/RW), paragraph 7.74.

<sup>37</sup> *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Report of the Panel (WT/DS212/RW), paragraph 7.76.

57. In view of these considerations, Chile respectfully requests that the Panel dismiss and refrain from ruling on Argentina's claim alleging inconsistency with the second sentence of Article II:1(b) of the GATT 1994, given that it is not properly before this Panel.

## 2. Claim in relation to the factor of 1.56

58. In Section I.C.2.6. of its First Written Submission, Argentina refers to the factor of 1.56 provided for under the PBS and applicable to the duties and rebates determined for wheat in order to calculate the duties and rebates applicable to wheat flour. In the opinion of Argentina, this factor "is not transparent and is insulating the entry price for wheat flour from international price developments to an even greater extent than that for wheat...".<sup>38</sup>

59. The factor used to determine the duties and rebates for wheat flour has been an element of the Price Band System since 1993<sup>39</sup> and has, on several occasions, been brought into line with market realities, the most recent such adjustment being by means of Law No. 19.446, published in the Official Journal on 8 February 1996<sup>40</sup>, which set this factor at 1.56. That is to say, this factor was a feature of the PBS which existed well before Argentina challenged the system before the WTO at the end of the year 2000.

60. However, although this factor had been in existence for almost a decade, Argentina never questioned it as an element which made the PBS inconsistent with Article 4.2 of the *Agreement on Agriculture* or, for that matter, any other provision of the WTO Agreements. Quite simply no mention is made of it in Argentina's submissions. Neither, therefore, was it the subject of a ruling by either the original Panel or the Appellate Body. As a result, it did not form part of the DSB recommendations and conclusions and Chile was not "obliged" to bring that aspect of the measure into conformity with its WTO obligations, purely and simply because no such ruling of inconsistency was ever made. In this respect, and in line with what the Appellate Body has stated on the matter, Argentina may not in these proceedings raise a claim which should have been brought before the Panel at the proper time.

61. The arguments and precedents mentioned in the previous section are reproduced in full, highlighting the conclusions of the Panel in the dispute *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, given that that dispute dealt precisely with the inadmissibility of entertaining claims relating to aspects not of a "measure taken to comply" but of the original measure, and which were not raised in the original proceedings.

62. In this dispute, we once again find ourselves in the exact same situation: a claim which Argentina could have raised and pursued in the original dispute, but failed to do so. Argentina has no right to such a "second chance". To entertain this claim would mean challenging an aspect of the PBS which was never analysed in the original proceedings – and in relation to which there was consequently no finding of inconsistency (or of consistency) forcing Chile to amend that particular aspect of the PBS – and thus improperly limiting Chile's due process rights. In other words, Chile cannot be required to bring into conformity an aspect of the measure which was never found to be inconsistent because Argentina, although it had the chance to claim inconsistency, failed to do so.

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<sup>38</sup> Paragraph 235 of the First Written Submission by the Republic of Argentina.

<sup>39</sup> In paragraph 232 of its First Written Submission, Argentina mistakenly states that the factor in question was established in Law No. 19.193 of 1997 and that it was originally 1.31 (paragraph 233 of its First Written Submission). In actual fact, this Law dates back to 1993 and the factor established was 1.41 (Exhibit CHL-5).

<sup>40</sup> Exhibit CHL-6.

63. In view of these considerations, Chile respectfully requests that the Panel dismiss and refrain from ruling on the claim raised by Argentina relating to the factor of 1.56 used to determine the duties or rebates for wheat flour, given that it is not properly before this Panel.

#### **IV. THE CHANGES TO THE PRICE BANDS RENDER THEM CONSISTENT WITH ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE**

64. In this section, Chile will demonstrate that the amendments under Law No. 19.897 and its Regulations are in keeping with the findings and conclusions of the Appellate Body and that Chile has therefore complied with the recommendations and rulings of the Dispute Settlement Body.

65. However, we will first address a particularly significant issue, namely the scope of the Appellate Body's findings and conclusions.

##### **1. Scope of the findings and conclusions of the Appellate Body**

66. Argentina, in its First Written Submission, appears to read into the Appellate Body report findings and conclusions where none exist. Furthermore, it seems to confuse certain concepts and give equal weight to all obligations. For example, the lack of transparency and lack of predictability in the level of duties, which the Appellate Body states are features of variable import levies<sup>41</sup> and therefore refer solely and exclusively to certain specific elements which existed under the Price Band System, as will be discussed later on, and not to merely any feature, as argued by Argentina. In other words, the conclusions of the Appellate Body cannot be broadly interpreted; quite the reverse, their scope is restricted to what is clearly stated in its Report, otherwise the Member required to comply would have no parameters for knowing what has to be implemented and how.

67. An analysis of the scope of the "measures taken to comply"<sup>42</sup> necessarily involves examination of the recommendations and rulings contained in the original report(s) adopted by the DSB.

68. In this context, the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* stated that "the first sentence of Article 21.5 is the express link between the "measures taken to comply" and the recommendations and rulings of the DSB. Accordingly, determining the scope of "measures taken to comply" in any given case must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB".<sup>43</sup>

69. Article 21.5 Panels must therefore necessarily examine the scope of the recommendations in order to determine whether or not a Member has complied with them. When conducting such an examination, the Article 21.5 Panel must bear in mind the original terms of reference of both the original Panel and the Appellate Body.<sup>44</sup> It will thus be able to identify the claims of both the

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<sup>41</sup> Paragraph 234 of the Report of the Appellate Body.

<sup>42</sup> "Proceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those "measures taken to comply with the recommendations and rulings" of the DSB". *Canada – Aircraft (Article 21.5 – Brazil)*, Report of the Appellate Body, WT/DS70/AB/RW, paragraph 36.

<sup>43</sup> *US – Softwood Lumber IV (Article 21.5 – Canada)*, Report of the Appellate Body, WT/DS257/AB/RW, paragraph 68.

<sup>44</sup> The Appellate Body in *Brazil – Desiccated Coconut* stated that "A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective -- they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute", page 21.

complainant and the defendant, which can then either be upheld or dismissed, with a statement of the reasons which led it to that particular conclusion.

70. When upholding (or dismissing) a claim, the Panel and the Appellate Body are required to state the reasons which led them to do so. Often this means developing their own legal reasoning to support their own findings and conclusions on the matter under their consideration.<sup>45</sup> That is to say, they can uphold (or dismiss) the claims, but for reasons or with arguments other than those adduced by the complainant.

71. The recommendations and rulings of the DSB are precisely what constitutes a **final resolution** to a dispute between the parties insofar as it bears a relation to the particular claim and the specific component of the measure. The Appellate Body has determined the following:

"We wish to recall that panel proceedings under Article 21.5 of the DSU are, as the title of Article 21 states, part of the process of the "*Surveillance of Implementation of Recommendations and Rulings*" of the DSB. This includes Appellate Body Reports. To be sure, the right of WTO Members to have recourse to the DSU, including under Article 21.5, must be respected. Even so, it must also be kept in mind that Article 17.14 of the DSU provides not only that Reports of the Appellate Body "shall be" adopted by the DSB, by consensus, but also that such Reports "shall be ... unconditionally accepted by the parties to the dispute. ..." Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, "... unconditionally accepted by the parties to the dispute", and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute. In this regard, we recall, too, that Article 3.3 of the DSU states that the "prompt settlement" of disputes "is essential to the effective functioning of the WTO".<sup>46</sup> (Underlining added.)

72. Thus, an adopted Appellate Body report must be treated as a **final resolution** to a dispute between the parties.<sup>47</sup> The Appellate Body based this conclusion on Article 17.14 of the DSU, which deals with the effect of adopted Appellate Body reports (as opposed to *Panel* reports). The relevant part of Article 17.14 reads as follows:

#### *Adoption of Appellate Body Reports*

An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report. (Footnote omitted)

73. It follows that the conclusions of a Panel and/or the Appellate Body may not be broadly interpreted; on the contrary, their scope must be restricted to what is expressly stated in the report. An express limitation is required on measures that may be subject to review in proceedings under

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<sup>45</sup> *EC – Hormones*, Report of the Appellate Body, WT/DS48/AB/R, Footnote 74, paragraph 156, and *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Report of the Panel, WT/DS212/RW, paragraph 123.

<sup>46</sup> *US – Shrimp (Article 21.5 – Malaysia)*, Report of the Appellate Body, WT/DS58/AB/RW, paragraph 97.

<sup>47</sup> The Appellate Body has stated that "All the same, in our view, an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim". *EC – Bed Linen (Article 21.5 – India)*, Report of the Appellate Body, WT/DS141/AB/RW, paragraph 93.



Article 21.5, namely "measures taken to comply with the recommendations and rulings of the DSB". A Member's obligation is to comply with these, and not other, recommendations.

74. We are of the opinion that it is precisely such a final resolution to a dispute that establishes the limitations on the claims that a Member may raise in Article 21.5 proceedings.

75. The Appellate Body has confirmed the existence of such limitations in several cases. It has in fact affirmed that Article 21.5 Panels may not re-examine:

- (a) Aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO-consistent* ... and that remain unchanged as part of the new measure".<sup>48</sup>
- (b) Certain matters ("the particular claim and the specific component of a measure that is the subject of that claim") when the original Panel made findings in respect of these matters and those findings were not appealed.<sup>49</sup>

76. Similarly, aspects of a measure that were not addressed by the DSB fall outside the scope of a "measure taken to comply" in proceedings under Article 21.5.

77. The recommendations and rulings are therefore those which establish not only the framework of compliance, but also the framework for possible Article 21.5 compliance review proceedings. This does not mean that the Appellate Body's statement that the "panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings"<sup>50</sup> should be disregarded; rather that, although the measure taken to comply could be analysed from a standpoint other than that of the original Panel, the analysis must be based on the findings and conclusions of the original proceedings.

78. Another important factor to be taken into consideration when disallowing the examination of a new claim is due process rights. Unless there is precision as to what must be complied with, the Member concerned will not know what is expected of it. In this case, to allow Argentina's argument that the conclusions of the Appellate Body are to be interpreted in a broad and comprehensive manner would give rise to generic and unspecific obligations and create uncertainty for Chile as to what it was required to do within the reasonable period of time and expose it to censure for failing to take measures which it was unaware it was required to adopt.

79. In this context, worthy of particular mention is the statement by the Article 21.5 Panel in *US – Countervailing Measures on Certain EC Products* that allowing a new claim by a Member in Article 21.5 proceedings may undermine the principles of fundamental fairness and due process because, in such instances, a substantive analysis of an original measure is not possible as these are summary and expedited proceedings, there is no new period of time for compliance and the Member would not have the opportunity to bring the measure into conformity and would immediately risk facing retaliation.<sup>51</sup>

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<sup>48</sup> *US – Shrimp (Article 21.5 – Malaysia)*, Report of the Appellate Body, WT/DS58/AB/RW, paragraph 89.

<sup>49</sup> *EC – Bed Linen (Article 21.5 – India)*, Report of the Appellate Body, WT/DS141/AB/RW, paragraph 93.

<sup>50</sup> *Canada – Aircraft (Article 21.5 – Brazil)*, Report of the Appellate Body, WT/DS70/AB/RW, paragraph 41.

<sup>51</sup> *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, Report of the Panel, WT/DS212/RW, paragraphs 7.72-7.76.

80. The following example illustrates how Argentina wishes to give the conclusions of the Appellate Body a broad interpretation and a scope which do not correspond.

81. In paragraph 200 of its First Written Submission, Argentina transcribes two paragraphs of the Appellate Body report (234 and 247) which, in its opinion, constitute grounds for claiming that any lack of transparency leads to the conclusion that the PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*, because, says Argentina, the Appellate Body affirmed that "the lack of transparency is preventing enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4 of the *Agreement on Agriculture*".<sup>52</sup>

82. An analysis of these paragraphs reveals, however, that what the Appellate Body stated was quite different.

83. Paragraph 234 sets out the features of variable import levies, which include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. However, such an analysis cannot stop there. That provision must, like all others, be read in context in order to give meaning and a precise scope to the Report and, in particular, to its conclusions and recommendations. Thus, paragraph 247 of the Appellate Body Report is preceded by paragraph 246, the relevant part of which reads:

Furthermore, we place considerable importance on the intransparent and unpredictable way in which the "highest and lowest f.o.b. prices" that have been selected are converted to a c.i.f. basis by adding "import costs". As Chile concedes, no published legislation or regulation sets out how these "import costs" are calculated. (Footnote omitted.)

84. Therefore, paragraph 247, which begins by stating that "In addition to the lack of transparency and the lack of predictability that are inherent in how Chile's price bands are established, ...", necessarily refers to the conversion to a c.i.f. basis, plus import costs, of f.o.b. prices and to the fact that there was no legislation or regulation indicating how to calculate those import costs.

85. Moreover, Argentina omits the phrase "the reference price" from its transcription of paragraph 247. What is the significance of that phrase? It limits the issue the Appellate Body takes in the following paragraphs with the lack of transparency and predictability to that particular aspect of the PBS in force at that time.

86. Finally, paragraph 258 of the Appellate Body Report, cited by Argentina<sup>53</sup>, is instructive. In full, it reads:

Moreover, contrary to what Chile argues, Chile's price band system is not necessarily less trade-distorting. Nor does it insulate Chile's domestic market less than it would, if Chile simply imposed duties at the *bound* tariff level of 31.5 per cent. As Argentina stresses, the amount of a duty is not the only concern of Chile's trading partners. As Argentina argues, significant for traders, also, are the lack of transparency of certain features of Chile's price band system; the unpredictability of the level of duties; and the automaticity, the frequency, and the extent to which the duties fluctuate. 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. (Emphasis added and footnote omitted.)

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<sup>52</sup> First Written Submission by the Republic of Argentina, paragraph 201.

<sup>53</sup> First Written Submission of Argentina, paragraph 201.

87. That is to say, Argentina itself recognizes that the lack of transparency is not general, but pertains to certain characteristics, and the Appellate Body confirms that only specific characteristics of the PBS are concerned.

88. Chile will demonstrate that the Appellate Body identified specific aspects of the PBS that made the system a measure similar to a variable import levy and a minimum import price. These were the only aspects on which Chile was required to take action, as will be shown further on. The above is without prejudice to the fact that, in Section V of this submission, it will also be demonstrated that the amendments introduced do not have the effects that Argentina alleges and which underlie its claim that the PBS continues to be inconsistent with Article 4.2 of the *Agreement on Agriculture*.

## **2. Appellate Body analysis and Law 19.897 and its regulations**

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

### **(a) Variable import duties**

90. In examining the ordinary meaning of the term, the Appellate Body notes that a "variable levy" is an "import" duty, tax or charge (where it is assessed upon importation) and is liable to vary.<sup>54</sup> Variability alone is not conclusive, however, since an ordinary customs duty may also vary periodically, provided that the changed rates remain *below* the tariff rates bound in the Member's Schedule.<sup>55</sup>

91. Thus, in the Appellate Body's view, the mere fact that an import duty can be varied cannot, alone, bring that duty within the category of "variable import levies" for the purposes of footnote 1. 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. According to the Appellate Body, 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.<sup>56</sup>

92. The obvious conclusion to be drawn from the Appellate Body's analysis is that the changes introduced by Chile have put an end to the variability of the duties. Under the PBS structure in effect until December 2003, specific duties were established and varied automatically and continuously without legislative or administrative action being required to fix them. In practical terms, the decree setting the band and the specific duties (or rebates) to be applied using a given reference price was issued for one year. The duty (or rebate, or neither of the two) was applied once the reference price, established on a weekly basis, had been set. Two simultaneous transactions could therefore be subject to different duties.

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 transaction value, until it is changed or cancelled by a more recent administrative act.

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<sup>54</sup> Para. 232 of the Report of the Appellate Body.

<sup>55</sup> Report of the Appellate Body in *Argentina – Textiles and Apparel*, footnote 56, para. 46.

<sup>56</sup> Para. 233 of the Report of the Appellate Body.

94. Argentina's Exhibit ARG 6 makes it easier to understand the above in that it shows the specific duty applicable during the entire life of every decree issued by the Ministry of Finance.

95. The Appellate Body having noted that "the presence of a formula causing automatic and continuous variability of duties is a necessary [...] condition for a particular measure to be a 'variable import levy' within the meaning of footnote 1",<sup>57</sup> the fact that variability has been eliminated – to use the Appellate Body's own words – in Law 19.897 means that this measure cannot be one of the prohibited measures listed in Article 4.2 of the Agreement on Agriculture.

96. We propose to set aside this analysis for the time being and focus on the second part of paragraph 234, which states that even though automatic and continuous variability of duties is a *necessary* condition, it is "by no means a sufficient" one to conclude that a particular measure is a "variable import levy". It should be emphasized that while part of Argentina's argument<sup>58</sup> relies on this very paragraph, it disregards the phrase "but by no means a sufficient", thereby seeking to challenge Chile's PBS on the claim of variability alone.

97. Since variability is a condition that is necessary but not sufficient, the Appellate Body observes in paragraph 234 that variable import levies have additional features, including lack of transparency and lack of predictability in the level of duties that will result from such measures. These are the features that are liable to restrict the volume of imports and also contribute to distortion of the prices of imports by impeding the transmission of international prices to the domestic market.

98. This finding is of signal importance because it makes it easier to discern the logic behind the Appellate Body's conclusion that the PBS in effect until December 2003 was a measure similar to a variable import levy and a minimum import price. There are only two additional features: lack of transparency and lack of predictability. On this premise, the Appellate Body analyses a limited number of features of the PBS in effect at the time. There is thus no overall lack of transparency or predictability as Argentina makes out in its First Written Submission.

99. For the sake of clarity, it should be emphasized that at the time of the original proceedings, Argentina itself highlighted the fact that "significant" ... "are the lack of transparency of certain features of Chile's price band system"<sup>59</sup> (emphasis added), which confirms our earlier point that the objection is not to some generalized lack of transparency. This was the understanding of the Panel and the Appellate Body in focusing their analyses on certain features found to lack transparency.

100. The foregoing also shows how the recommendations and rulings of the DSB should be implemented and facilitates appreciation of some of the errors of interpretation made by Argentina. The fact that world prices are not transmitted to the domestic market, for example, may be a consequence of the two features singled out by the Appellate Body, but it does not constitute a third feature, as Argentina appears to contend. Argentina likewise mistakenly claims that fixed floor and ceiling levels and fixed coefficients for lowering floor and ceiling levels in and of themselves insulate Chile's market from international price developments – in so doing apparently implying that such elements might be challenged *per se*. In fact, the Appellate Body's view is that insulation may result from lack of transparency and predictability, but it does not constitute a feature challengeable as such that could, on its own, lead to a finding of inconsistency.

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<sup>57</sup> Para. 234 of the Report of the Appellate Body.

<sup>58</sup> Section C.3.1(a), (b) and (c) of the First Written Submission of Argentina.

<sup>59</sup> Para. 258 of the Report of the Appellate Body.

(b) Minimum Import Prices

101. According to the Appellate Body, minimum import prices are not very different from variable levies, except that their mode of operation is less complicated. The main difference between the two is that variable levies are "generally based on the difference between the *governmentally determined threshold* and the lowest world market offer price for the product concerned, while minimum import price schemes generally operate in relation to the *actual transaction value* of the imports".<sup>60</sup>

102. Thus, variability is the difference between the governmentally determined threshold and the actual transaction value, which will differ from one transaction to another and will hence change the duty without any legislative or administrative action.

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

(c) Measure similar to a "variable import levy" and/or a "minimum import price"

104. After addressing the issue of variable import levies and minimum import prices, the Appellate Body turns to an analysis of whether Chile's price band system is a border measure similar to such measures. For the Appellate Body, it is a matter of determining whether Chile's price band system—in its particular features—shares sufficient features with these two categories of prohibited measures to resemble, or "be of the same nature or kind" and, thus, to be prohibited by Article 4.2.<sup>61</sup>

105. The Appellate Body's first finding<sup>62</sup> concurs with that of the Panel that the PBS was a measure similar to variable levies or minimum taxes (*impuestos mínimos*), but in its view the Panel placed too much emphasis on whether or not Chile's price bands were related to domestic target prices or domestic market prices. According to the Appellate Body, even though the bands were set in the same way as had been done until December 2003, the PBS could still impede the transmission of international price developments to the domestic market (in a way similar to that of other categories of prohibited measures listed in footnote 1).

106. To assess Chile's price bands, the Appellate Body therefore considers factors other than world market prices, as reasoned below.

107. The prices that 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 in selecting the "highest and lowest f.o.b. prices" for the determination of Chile's annual price bands. The Appellate Body also places considerable importance on the intransparent and unpredictable way in which the "highest and lowest f.o.b. prices" selected are converted to a c.i.f. basis by adding "import costs". As Chile has conceded, no published legislation or regulation sets out how these "import costs" are calculated.<sup>63</sup>

108. With the entry into force of Law No. 19.897, Chile abolished the calculation formula that included discarding the highest 25 per cent as well as the lowest 25 per cent of world prices over the past five years, while maintaining the values in effect in 2003 until 2007, gradually reducing the level of protection from 2007 onwards and culminating with the application of duties or rebates in 2014.

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<sup>60</sup> Para. 237 of the Report of the Appellate Body.

<sup>61</sup> Para. 239 of the Report of the Appellate Body.

<sup>62</sup> Para. 246 of the Report of the Appellate Body.

<sup>63</sup> Para. 246 of the Report of the Appellate Body.

109. Pursuant to this Law, all prices are set as f.o.b., meaning that today there is no price or value that converts an f.o.b. price to a c.i.f. basis, and it is no longer necessary to add "import costs", which makes the system a great deal more transparent.

110. Chile has thus taken due account of the observations made by the Appellate Body.

111. The Appellate Body then turns to the "similar shortcomings" in the way in which reference prices are determined<sup>64</sup> (in terms of lack of transparency and predictability<sup>65</sup>) and specifically the fact that reference prices are set on a weekly basis and in a manner that is neither transparent nor predictable.

- (a) Setting of reference prices on a weekly basis and in a manner that is neither transparent nor predictable. Addressed in paragraphs 247 and 251 of the Appellate Body's Report.<sup>66</sup>

112. The Appellate Body notes that, under the PBS applied up to December 2003, when a shipment arrived in the country the customs agent was required to (a) ascertain the date of embarkation of the goods, (b) check the weekly reference price set for that date by the National Customs Service, and (c) using that price, check the year's list of f.o.b. prices in order to select the relevant specific duty. Two consignments arriving on the same day but subject to different reference prices on account of the date on which they were shipped would be charged different specific duties.

113. Moreover, the price determined by Customs was the lowest f.o.b. price observed in any market of concern, which was not specified, meaning that the reference price could even further disconnect Chile from world market prices.

114. With the entry into force of Law No. 19.897, the reference price ceased to constitute one of the elements needed by importers to ascertain the amount of duty payable upon import. As explained earlier, the duty payable upon import is established by decree issued by the Ministry of Finance and applies to all imports for as long as the decree in question remains in force.

- (b) The price used to set the weekly reference price was the lowest relevant f.o.b. price observed, at the time of embarkation, in the foreign "markets of concern" to Chile for "qualities of products actually liable to be imported to Chile". No Chilean legislation or regulation specifies how the international "markets of concern" and the "qualities of concern" are selected. As a result, the process of selecting the reference price is neither transparent nor predictable for traders.<sup>67</sup>

115. Today, the mechanism for calculating the reference price is set forth in the Regulations, as are the most relevant markets to be considered. The Regulations stipulate that the most relevant markets are "*Trigo pan argentino*" for the period 16 December to 15 June of the following year and "*Soft Red Winter No. 2*" wheat for the period 16 June to 15 December. The reference price will correspond to the average daily prices recorded in those markets (f.o.b., Argentine port and f.o.b., Gulf of Mexico port, respectively) over a period of 15 days counted back from the 10<sup>th</sup> day of the month in which the

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<sup>64</sup> Para. 247 of the Report of the Appellate Body.

<sup>65</sup> Section V explains why lack of predictability in the determination of duties and rebates was a major shortcoming in the Appellate Body's view.

<sup>66</sup> "... Chile's weekly reference prices—is liable to distort—if not disconnect—that transmission (of world market prices to Chile's market) by virtue of the way it is determined on a weekly basis" (emphasis and parenthesis added).

<sup>67</sup> Para. 249 of the Report of the Appellate Body.

relevant decree is published.<sup>68 69</sup> Chile has therefore taken due account of the Appellate Body's observation.

- (c) "Moreover, unlike with 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".<sup>70</sup> Therefore, the way in which the weekly reference prices are determined contributes to giving the PBS the effect of impeding the transmission of international price developments to Chile's market.

116. Our first comment is that this account of how the reference prices were determined (also explained in paragraph 26 of the Appellate Body's Report) is wrong, since all prices (both those used to calculate the bands and those used to determine the reference prices) were converted to c.i.f. prices. The error probably stems from the fact that the annual decrees issued by the Ministry of Finance (publishing the specific duties and rebates) included prices f.o.b. (prior to conversion) so as to make it easier to apply the duties for each shipment, because the market prices used as a reference are expressed in f.o.b. terms.

117. Without prejudice to the above, as a result of the changes introduced in 2003 all values used are expressed in f.o.b. terms, that is, the reference prices are not converted to a c.i.f. basis. Thus, at no stage is it possible to inflate or increase the amount of the specific duties, so the transmission of international price developments to the domestic market is not impeded as the Appellate Body asserts.

## **V. ECONOMIC ANALYSIS OF THE REGIME IN EFFECT UNDER LAW NO. 19.897 AND ITS REGULATIONS**

118. The Report of the Appellate Body notes that the PBS in effect until 2003 was a measure similar to a minimum import price and a variable import duty and was hence WTO-inconsistent.

119. As we understand it, the Appellate Body notes in its Report that the PBS was similar to a minimum import price or a variable import duty, depending on the behaviour of domestic market prices. The Appellate Body's reasoning is that in some way a minimum entry price for the product is maintained in one way or another, whether (a) by imposing a minimum price, (b) by applying variable duties to obtain the minimum price, or (c) both.

120. In the following section, Chile will demonstrate that it applies neither a minimum import price nor a variable import duty, since it does not maintain a domestic price for the products at issue, and that, on the contrary, Law 19.897 ensures that international prices are transmitted to the domestic market. It will also address Argentina's arguments concerning the overcompensation which it claims was generated by the PBS and is still being generated by the above Law. It will, moreover, provide evidence that market access conditions in Chile improved as of December 2003.

### **1. Chile does not apply a minimum entry price**

121. The parameters used for calculating the duties and rebates laid down in the Law are as follows: Floor, ceiling and reference price are at f.o.b. level, in dollars per tonne.<sup>71</sup> The fact that parameters have been changed to f.o.b. prices shows that the floor and ceiling values constitute neither a minimum entry price nor a similar measure.

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<sup>68</sup> See Annex to Decree 831/2003.

<sup>69</sup> Section V.4 explains why both are most relevant markets.

<sup>70</sup> Para. 250 of the Report of the Appellate Body.

<sup>71</sup> Article 1, Law No. 19.897 (Exhibit CHL 1).

122. Although Argentina's submission seeks to demonstrate the opposite,<sup>72</sup> in the normal course of international trade fob. prices, which are the unit values for exported goods at the port of origin, are always lower than c.i.f. prices, which are the unit values for imported goods at the port of destination, for the same trade transaction. The difference between the f.o.b. price and the c.i.f. price in a trade transaction is that the latter also includes at least freight and transport insurance charges.

123. Under the PBS, the price band values were determined as import costs, the figures being perfectly comparable to domestic transaction prices. In practice, the decision of wheat processors or buyers as to where to purchase their wheat grain – from domestic producers or from importers – depends on who offers the lowest price. This being customary (and reasonable) market practice, the assertion that the PBS was intended to sustain the floor price is understandable, since the latter was expressed as an import cost.

124. Under the Law, the floor and ceiling values are merely parameters of a mathematical process, and no trader could assume these to be expected values for domestic transactions.

125. The reference price, which is the other parameter in the calculation process, is also expressed in f.o.b. terms and is not directly comparable to the c.i.f. price, the entry cost, or the domestic price.

126. As the floor and the reference price are variables expressed at f.o.b. level, the purpose of calculating specific duties is obviously not to maintain an entry price; since neither the floor price nor the reference price at any given point in time can be higher than, or equal to, the c.i.f. price for a specified trade transaction.

127. This becomes even clearer in the light of the application mechanism. Any specific duties or rebates that may be determined have a period of validity of two consecutive months, during which all imports are subject either to the same specific duty or to a rebate, or to neither of the two.

128. The above is illustrated by the chart submitted by Argentina as Exhibit ARG-12, which provides a calculation of the entry price of wheat into Chile on the basis of f.o.b. prices. Over most of the period covered by the chart – i.e. November 2004 to April 2005 – the f.o.b. price is below, and the entry price lies above, the floor price.

129. This chart prompts two important comments. The first is that with this information Argentina confirms that the floor price is not comparable to the entry price, given the different cost components of importation.

130. Using the same data as those supplied by Argentina<sup>73</sup> – for the period 1 November 2004 to 29 April 2005 – we can see that the sum of the f.o.b. prices plus the specific duties, over the only four-month period in which they were applied, is below the f.o.b. floor price for 46% of the 81 days covered by Argentina. In other words, the evidence shows that it is impossible to maintain the floor price. The following examples, based on the data from Argentina's exhibits, serve to illustrate the above.

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<sup>72</sup> Paras. 99 to 124 of the First Written Submission of Argentina.

<sup>73</sup> Strictly speaking, this calculation is based on the data from Table ARG-11 adjusted according to those from Table ARG-16. According to the official source (SAGPyA), some of the data in Table ARG-11 are incorrect. This does not affect the conclusions to be drawn from the ARG-12 chart, however.



	<u>Example 1</u>	<u>Example 2</u>
Date	20 January 2005	10 February 2005
	f.o.b. value (106) + specific duty (7.82) = 113.82	f.o.b. value (107) + specific duty (14.3) = 121.3
Band floor price	128	128
UNDERESTIMATION		
by	US\$14.18/tonne	US\$6.7/tonne

131. The second and perhaps most important comment is that the entry price calculated by Argentina behaves in a manner very similar to that of the f.o.b. price, which would suggest that international price trends and variations are being transmitted to Chile's home market.

132. The data from Argentina's Exhibit ARG-12 alone lead to the conclusion that the floor price is not a minimum entry price and that there is transmission of international prices or a connection between the domestic and the international market.

## 2. Chile does not apply a variable import duty

133. The above demonstration that the floor price and the regime as a whole are neither similar nor equivalent to a minimum import price (and hence are not inconsistent with Article 4.2 of the Agreement on Agriculture) therefore clearly shows that specific duties cannot constitute a variable levy, as their purpose is not to sustain prices – whether entry prices, c.i.f. prices or domestic market prices.

134. As the Appellate Body notes, the mere fact that a levy is variable does not mean that it is a "variable import levy" (irrespective of the premise that variability is by no means a sufficient condition for a measure to be a variable import levy<sup>74</sup>). A simple example suffices as a demonstration. Indeed, it would be impossible to interpret the lowering of Chile's (MFN) general *ad valorem* tariff between 1984 and 2003, under the country's gradual trade liberalization policy, as the application of a variable levy.

135. The table below lists the dates on which changes were made to Chile's *ad valorem* tariff, lowered from 35% in 1984 to 6% from 2003 to date.

<b>Chile: Development/MFN Tariff</b>	
Date	MFN tariff (%)
22/09/1984	35
01/03/1985	30
29/06/1985	20
08/01/1988	15
25/07/1988	11
01/01/1999	10
01/01/2000	9
01/01/2001	8
01/01/2002	7
01/01/2003	6

<sup>74</sup> Para. 234 of the Report of the Appellate Body.

136. The average rate of duty for the above period, calculated solely on the basis of the data in the table, was 15.1% with a standard deviation of 10.1, which means a coefficient of variation (or average fluctuation – to use Argentina's words in its report<sup>75</sup>) of 67%. The question that therefore needs to be answered is whether Chile's general duty constitutes a variable levy under the WTO.

137. The obvious reply is no, which implies that this analysis – like the one regarding the variability of duties<sup>76</sup> in Argentina's report, raises two problems – one of methodology and the other of interpretation. In the latter case, as mentioned earlier, the fact of having a duty which varies, or has varied, may be a necessary but is not a sufficient condition to affirm that such a duty qualifies as a variable levy. As regards methodology, the statistics calculated<sup>77</sup> are merely measures of dispersion to show the distribution of sample data according to the mean (average). In other words, they serve to illustrate the statistical distribution of a set of values but by no means to prove that the duties are variable levies, as Argentina seeks to establish.

138. Although there is no WTO definition of the term 'variable duty', as the Appellate Body notes in paragraph 229 of its Report, it is possible to offer a few economic interpretations.

139. A variable duty may be the kind of duty which is used to sustain a domestic or a minimum entry price, as can be deduced from the Appellate Body's Report, and the characteristic of which would be to gradually "adjust", with greater or lesser regularity, so as to prevent a decline in domestic prices or even to raise them.

140. It should be pointed out that a calculation formula is neither necessary nor sufficient to achieve this, because the desired outcome would be secured regardless of whether or not application was automatic.

141. Variable duties directly affect trade relations, altering relative prices (relationship between domestic market prices and international market prices) in addition to the effects resulting from the application of ordinary duties.

142. If the objective was to maintain a price level, the alteration would imply a permanent change in relative prices in order to prevent domestic market conditions from varying (price level) in the event of a change in external or import prices prior to entry. Conversely, if the duties ensure that relative prices remain stable, this means that the border measure allows external variations to be transmitted to the domestic market, albeit to a different extent. That is to say, if international prices rise so do domestic prices, and if the former decline, so will the latter.

143. In Chile today, the mere fact that the duties and rebates, or the non-application thereof, are established for a sufficiently long period of time provides certainty that any variations in international prices that may occur over this period will be transmitted to domestic wheat prices.

144. Thus, the conclusion is that, if the floor price is not a minimum price, if the specific duties and their method of application do not continuously entail import price corrections and if import prices, as Argentina shows in Exhibits ARG-11 and ARG-12, follow a pattern similar to that of the f.o.b. price of wheat, Chile's wheat import duties – even if they do undergo variations – do not constitute a variable duty within the meaning of Article 4.2 of the Agreement on Agriculture.

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<sup>75</sup> Para. 254 of Argentina's first Submission.

<sup>76</sup> Section C.I.3 of Argentina's first Submission.

<sup>77</sup> *Standard deviation* is an absolute measure of dispersion, expressed in the same units of measurement as the sample data. The *coefficient of variation* is a relative measure of dispersion relating standard deviation and mean, and expressing standard deviation as a percentage of the mean.

### 3. Law No. 19.897 allows an effective transmission of price variations

145. Although arguments have already been put forward demonstrating the connection of the domestic wheat market to the world market, a few questions need to be clarified so as to provide more backing for the analysis.

146. In economic terms, price transmission from external markets to domestic or local markets is understood to occur when the latter reflect international market behaviour. In trade barrier-free markets, domestic prices should evolve in tandem with external prices, albeit to a different degree because of transfer, insurance and other costs involved in shipping the product from abroad to the same location as that of the domestic product. In other words, domestic prices are higher than international prices, but they exhibit similar behaviour.

147. In markets facing trade barriers, that is, ordinary customs duties – whether calculated as a percentage or set in a fixed amount – the situation is the same, the duties constituting added costs to trade.

148. The application of ordinary customs duties does not ultimately affect the local market's connection to the international market in terms of behaviour, but it does alter relative prices by generating an increase in domestic prices that would not have occurred had the duties not been levied.

149. As regards the PBS, it has been argued that the method used to calculate the floor and ceiling prices on the basis of a time series of international prices prevented the market from being disconnected from international price trends. True as this may be, the argument in question referred solely to the band values and not to what happened in the day-to-day course of trade and in the domestic market over the year-long period in which they were applied.

150. The levying of specific duties on a weekly basis (52 times a year) made it possible to compensate in the actual course of business for differences between transaction values and the floor price, so that any ups and downs occurring in the transactions were not able to be transmitted to the domestic market.

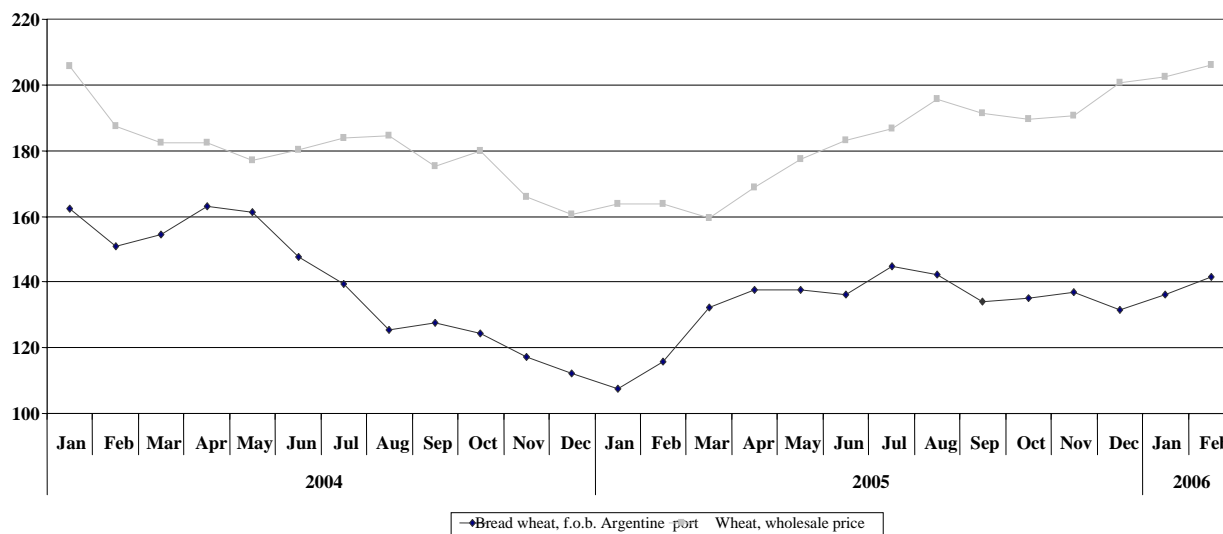
151. Under the PBS, the volume of trading neither reflected all the benefits deriving from falls in international prices nor was it affected by the contractions resulting from price increases: there was one import price and the difference lay in the amount of the duties.

152. This is no longer the case today because the duty or rebate, or the non-application thereof, operates in such a way as to allow the transmission of international price variations to the domestic market. That is to say, once the duty has been fixed, traders can capture the benefits of decreases in international prices, because changes in world prices do not affect the duty that they are required to pay.

153. It is the current implementation of Chile's wheat policy that allows this happen, as Argentina shows on the basis of its own figures. The existence of pre-established floor and ceiling prices does not alter the situation, basically because these are simply parameters that contribute to the determination of duties, rebates, or the non-application thereof.

154. The graph below shows the trends in Chilean wheat prices and in f.o.b. prices of *Trigo pan argentino* from January 2004 to February 2006. The price curves indicate that, first, Chilean wheat prices have varied and, second, 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.

**Domestic and International Prices of Wheat  
(US\$/tonne)**



155. This graph is an exact illustration of the points made by Argentina in Exhibit ARG-11, with the series of f.o.b., c.i.f. and c.i.f.-plus-duties prices, and in Exhibit ARG-12, which shows the prices in graph form. What clearly emerges is that the entry price of wheat exhibits the same behaviour as its f.o.b. price, which demonstrates price transmission and therefore the connection between the Chilean and the international market.

#### 4. Predictability in the assessment of duties and rebates

156. Specific duties and duty rebates are currently established by decree of the Minister of Finance. As both the *ad valorem* duty and the floor and ceiling prices are known and fixed, only the reference price needs to be obtained in order to determine the amount of a specific duty or rebate, or the non-application thereof.

157. The reference price currently results from a calculation of the average of wheat prices recorded in known, public and relevant international markets, such as those of Argentina and the United States; these prices are random variables that change every day and over the course of each day, according to the behaviour of buyers and sellers in the market.

158. As those of most commodities, moreover, these prices display features that are typical of continuous series of random data, including cycles, trends and seasonality. Although this may appear complex, it is a matter of course for traders and the market in general.

159. In the case of wheat, for instance, seasonality affects market prices because harvesting is concentrated over a short period of time, whereas grain utilization extends over a longer period. The price of Argentine wheat normally declines between December and February of each crop year and begins to rise as supply contracts. In the case of the United States, harvesting is from May to July, which is the time when prices are lowest.

160. The United States and Argentina both have commodity exchanges for trading in financial derivatives on wheat,<sup>78</sup> which include at least futures contracts. The prices under such contracts are set for different transaction periods, including for several months ahead (more than one year). For

<sup>78</sup> For example, the United States' Chicago and Argentina's Rosario exchanges.

futures contracts, every closing quotation reflects what "the market" expects will happen to the price of the commodity in question. Such transactions yield price data showing anticipated market trends for different (specific) months, which normally include the current and the following marketing season.

161. It is practically impossible for wheat traders not to know or not to use such information in order to conduct their businesses, as Argentina appears to contend in its submission.<sup>79</sup>

162. Therefore, what is necessary in order to foresee the amount of the specific duty is a wheat trader's own skills in predicting prices and negotiating sales or purchases. Hence, the specific duties are just as predictable as the price of Argentine or United States wheat.

163. In practice, a great many grain transactions that provide for deferred delivery of the commodity rely on futures markets prices as the negotiating basis, in conjunction with the trader's own assessment of the course that prices are taking. In other words, 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.

## 5. Overcompensation

164. In its attempt to establish that the PBS is inconsistent with Article 4.2 of the Agreement on Agriculture (Part C.I.), Argentina notes the following:<sup>80</sup>

The particular configuration and interaction of the specific characteristics of Chile's price band system generate certain market access conditions that lack transparency and predictability and disconnect the Chilean market from international price trends in a way that insulates the Chilean market from the transmission of international prices and prevents enhanced market access for imports of wheat and wheat flour.

165. However, Argentina confuses arguments and equates the Appellate Body's findings with other elements addressed by the Appellate Body in its Report. Indeed, the characteristics of lack of transparency and lack of predictability of the PBS in effect until December 2003 are part of the conclusions of the Appellate Body – and Chile has accordingly taken them into account – but the reference to overcompensation, which in Argentina's view results from the amended PBS, is wrong, and overcompensation cannot, on its own, be inconsistent with Article 4.2 of the Agreement on Agriculture, as Argentina erroneously claims.

166. The references cited by Argentina, in particular paragraph 260 of the Appellate Body's Report, are out of context and do not correspond to the reasoning followed by the Appellate Body, and are hence not part of its conclusions. They are actually part of the Appellate Body's analysis of whether the Panel took proper account of the fact that the total amount of duties that may be levied as a result of Chile's price band system is "capped" at the level of the tariff rate of 31.5 per cent *ad valorem* bound in Chile's Schedule.<sup>81</sup>

167. Notwithstanding the above, for the sole purpose of making matters clearer for the Panel members Chile will now review some of the aspects addressed by Argentina, in order to demonstrate that even if overcompensation were at issue in these Article 21.5 proceedings, Argentina's arguments fail.

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<sup>79</sup> Section C.3.2.

<sup>80</sup> Para. 73 of the First Written Submission of Argentina.

<sup>81</sup> Para. 253 of the Report of the Appellate Body.

168. In its Report, the Appellate Body notes that the PBS could overcompensate for international price variations and elevate the entry price of imports above the band floor.<sup>82</sup> Such a reading would be possible were one to assume that the floor price was determined at a market level equivalent to the cost of the imported product and for which the reference price used to calculate the specific duty was measured in f.o.b. terms, so that the difference between these values would be greater than that needed to maintain the floor price, if the latter were a minimum import price.

169. But such a reasoning rests on a misconstruction of how the PBS operated. The values of the specific duties and tax rebates were published in the form of an annual decree containing tables, the first column of which listed a series of possible f.o.b. prices, while the second contained the specific duties or rebates applicable. Although the duties and rebates appeared to be calculated using the f.o.b.-level reference price, this was not actually the case. Both variables used in the calculation were expressed in the same market level terms, namely import cost.<sup>83</sup> The tables listing the f.o.b. prices used in the calculation were published because it was necessary to provide for effective application of the PBS. In other words, it was easier for the National Customs Service to scan a table in order to find the reference price expressed in the same terms than it was to calculate, for every reference price, the corresponding import cost at any given moment in time.

170. There is no overcompensation now either, as has been claimed. It is actually even clearer today that overcompensation is impossible, since the floor and ceiling prices and the reference price are expressed at the same market level, i.e., as f.o.b. per tonne.

171. Moreover, the current floor and ceiling prices are expressed at a market level that is not comparable to the c.i.f. prices, entry prices or import cost, meaning that there is plainly no advantage to having these floor and ceiling prices as an objective price to be maintained or a minimum entry price.

172. The difference between a product's f.o.b. and c.i.f. price consists, at the very least, of freight and transport insurance costs. Freight costs are an exogenous variable that lies beyond a market operator's control, since they are highly dependent on fuel price trends. Therefore, using an f.o.b. price as the floor price in no way guarantees a predetermined c.i.f. price level.

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<sup>82</sup> Para. 260 of the Report of the Appellate Body.

<sup>83</sup> The calculation formula was as follows:

1. The specific duties (SD) were determined by subtracting from the floor value of the band the import cost (IC) calculated for a consecutive list of possible f.o.b. prices below this floor value, and were expressed in US\$/kg.

$$SD = \text{FLOOR} - IC_i$$

where "i" represents all import costs lower than the band floor, up to the amount calculated using an f.o.b. price of US\$50/tonne. The maximum duty was the rate whereby the amounts payable as *ad valorem* customs duties plus specific duties were equivalent to the WTO bound tariff in percentage terms.

2. The tax rebates (TR) were determined by subtracting from the import cost (IC) calculated for a consecutive list of possible f.o.b. prices above the ceiling value of the band, and were expressed in US\$/tonne. The maximum tax rebate corresponded to the amount of the normal *ad valorem* duty applicable.

$$TR = IC_j - \text{CEILING}$$

where "j" represents all import costs higher than the band ceiling, up to the point where the amount of total final duties equals zero.

3. The tables of specific duties and tax rebates included the f.o.b. price used to calculate the import costs and indicated the corresponding amount of the duties or rebates. Such information was published in the Official Journal through an annual decree containing the tables in question.

173. A number of other necessary import costs are added to the c.i.f. price in order to determine the cost of the imported product or the import parity price. Such costs include customs duties, landing and inspection services, the various import formalities and the transfer, insurance and financing costs required to ensure that the product arrives at its place of use.

174. These costs are also beyond the control of market operators although magnitude allows economies of scale. So here again, using an f.o.b. price as the band floor in no way guarantees a pre-determined level of product import price or the product's domestic price.

175. In economic terms, a product's import cost is made up of fixed costs unrelated to the price of the product and of variable costs that depend on the transaction price, such as the *ad valorem* duty, inspection costs, the commission payable to agents handling the transaction and credit interest due. The import cost can be summarized by means of the following formula:

$$IC_i = a + b * FOB_i,$$

where,  
 $IC_i$  = import cost of product i;  
 $a$  = sum of fixed costs;  
 $b$  = aggregate of variable costs; and  
 $FOB_i$  = f.o.b. price of the product i.

176. In order to maintain an import cost, or parity or entry price the specific duty to be levied would have to match the value of that import cost with the reference price import cost or the import cost of a particular shipment, so that:

$$SD = IC_{\text{floor}} - IC_{\text{rp}}, \text{ where "rp" represents the reference price.}$$

Replacing the above with the following gives:

$$SD = a + b * FOB_{\text{floor}} - (a + b * FOB_{\text{rp}})$$

$$SD = a + b * FOB_{\text{floor}} - a - b * FOB_{\text{rp}}$$

$$SD = b * (FOB_{\text{floor}} - FOB_{\text{rp}})$$

177. As factor "b" has more components than just the customs duty, it is obviously larger than the *ad valorem* duty.

178. Thus, if "b" is larger than the *ad valorem* duty, a specific duty calculated solely on the basis of f.o.b. values and Chile's *ad valorem* duty would unquestionably be lower than a duty obtained using import costs.

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

179. Two conclusions can be drawn from the above. First, the floor value of the band expressed in f.o.b. terms cannot be interpreted as a minimum entry price and is not a minimum entry price. Second, the duty resulting from the formula applied by Chile is lower than would be required to maintain a price at a higher level of the marketing chain – whether at c.i.f. or at import cost level. Furthermore, considering that several components of factor "b" are variables and lie beyond the control of the authorities and market operators, applying the mechanism would lead to undercompensation, if the objective were to maintain a price in the interest of domestic trade of the product.

180. A further point which demonstrates that there cannot be overcompensation and that the objective is not to maintain a parity price is that today – unlike under the former PBS when duties

were assessed once a week (i.e. 52 times a year) – the duties or rebates assessed are valid for two months (i.e. six a year), and during that period are completely disconnected from what may occur in the reference, or any other, markets.

181. In other words, the duty or rebate, or non-application thereof, is determined independently of the prices of commercial transactions, allowing international price variations to be transmitted to the domestic market and ensuring that decreases in international prices are reflected in the entry prices – albeit to a lesser extent, since there are normally duties and other import costs to be paid.

182. This means that Chile's wheat policy is no different in terms of behaviour than the application of an ordinary customs duty.

#### **6. Change in conditions of access as a result of Law No. 19.897**

183. Law No. 19.897 and its Regulations have improved conditions of access to the Chilean market for wheat and wheat flour. This can be seen from the amount of time for which the duties and rebates have been applied since the Law entered into force. For comparison purposes, a simulation of the operation of the PBS has been produced with the reference price per week calculated on the basis of the prices in effect. This was done by taking the weekly average from Friday to Thursday of each of the prices considered, selecting the lowest and comparing it with the floor and ceiling prices so as to determine whether duties or rebates had applied in the week following the calculation. This method was applied to the period from 16 December 2003 to 13 January 2006.<sup>84</sup>

<b>Number of weeks of occurrence</b>		
<b>Measure in force</b>	<b>Former mechanism</b>	<b>Law No.19.897</b>
Specific duties	27	17
Tax rebates	27	35
No measure	55	57

184. The results show that under the system prior to modification the time over which specific duties would have been levied amounted to 27 weeks, whereas in fact in the same time-frame it amounted to only 17. In the case of tax rebates, under the PBS they would have been applied in 27 weeks, whereas in fact there were 35 weeks with rebates.

185. In conclusion, the period of application of duties under the new regime was shorter by 10 weeks, while that of rebates was longer by 8 weeks, which represents an effective increase in favourable conditions for grain imports compared to what might have occurred under the mechanism prior to modification.

#### **Effects of the scheduled reduction of floor and ceiling prices**

186. The scheduled reduction of the floor and ceiling prices is a scenario under which, irrespective of international price levels, the amount of the specific duties will increasingly diminish compared to those currently being established, just as the probability of duties actually being assessed will increasingly diminish.

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<sup>84</sup> Exhibit CHL-7.



187. Although this may be self-evident, we shall nevertheless use the calculation formula to explain matters. If we take the current floor price of US\$128/tonne and the floor price of US\$114/tonne that will apply in 2014, with an identical reference price of, say, US\$110/tonne, the results are as follows:

$$\begin{aligned} SP_{2006} &= 1.06 * (128 - 110) = 19.08 \\ SP_{2014} &= 1.06 * (114 - 110) = 4.24 \end{aligned}$$

188. The specific duty in 2014, using the same reference price, would be US\$4.24/tonne compared to the current specific duty, using that same reference price, of US\$19.08 /tonne. In other words, the specific duty in 2014 will be 78% lower than the duty that would be calculated for this year.

189. It should be noted, moreover, that in 2014 all f.o.b. reference prices ranging between 114 and 127 (both inclusive) will not trigger the assessment of specific duties, as would be the case today.

190. On the basis of the monthly series of prices of *Trigo pan argentino*, one can establish how many times (months) these prices have stood below the current floor level of 128 and below the level due to apply in 2014, that is, 114.

191. Over the period January 1986-March 2006 (period of application of the price band policy), the price of *Trigo pan argentino* stood 112 times (months) below the current floor of 128, i.e. on 46.1% of the occasions considered. The price stood under 114, namely the floor for 2014, 58 times (months), i.e. on 23.9% of the occasions considered. In other words, the probability of specific duties being applied in the year 2014 becomes lower and lower.

192. Both of the above results – that is, the reduction of duties by 2014 and the lesser probability of duty assessment – demonstrate that the current policy has an in-built process of gradual reduction of border protection of wheat.

## CONCLUSION

193. With the entry into force of Law No. 19.897 and its Regulations, Chile complied in both form and substance with the recommendations and rulings of the DSB in this dispute, through the establishment of a mechanism for the assessment of specific duties, using certain parameters which, added to the general *ad valorem* duty (6%), help gradually to reduce protection in the domestic wheat and milling sector. Contrary to Argentina's assertion in its First Written Submission, these parameters – namely floor, ceiling and reference price – are established in a transparent and predictable manner. While the former are fixed and will undergo a process of liberalization as of 2008, the latter is determined on the basis of the most relevant markets for wheat, including Argentina itself – though Argentina appears to ignore that relevance. This enables any Chilean market operator to know ahead of time not only how the duties will be calculated but also the amount in which they will be due.

194. As a result, and owing to its nature, mainly the f.o.b. basis on which both prices (floor and ceiling and reference price) are determined, the new mechanism operates in such a way that it cannot constitute a variable import levy or a minimum import price, or a measure similar to a variable import levy or a minimum import price. This is evidenced by the figures and charts presented by Argentina and confirmed by Chile's arguments in this submission.

195. In other words, as of December 2003 the Chilean wheat and wheat flour market has been connected to the international market, and protection levels – that is, the occurrence of duties and their amount – will increasingly diminish, meaning that in addition to closer connection with foreign markets, there will be a decrease in relative prices that will render Chile's wheat market more competitive.

196. For the reasons set out above, the mechanism does not constitute one of the measures cited in the footnote to Article 4.2 of the Agreement on Agriculture and, consequently, is not among the measures required to be converted into ordinary customs duties.

197. Accordingly, Chile respectfully requests that the Panel:

- (a) Reject Argentina's claim of inconsistency with the second sentence of Article II:1(b) of the GATT 1994 and that relating to factor 1.56 for wheat flour, to the extent that neither claim is properly before this Panel;
- (b) Chile having complied with the recommendations and rulings of the DSB, find that the measure established under Law No. 19.897 and its Regulations is not a measure similar to a variable import levy or a minimum import price and is therefore not inconsistent with Article 4.2 of the Agreement on Agriculture; and,
- (c) having established that Chile has not maintained a measure inconsistent with Article 4.2 of the Agreement on Agriculture, find that Chile is not in breach of Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization.