WORLD TRADE ORGANIZATION

WT/DS207/AB/R
23 September 2002

(02-5066)

Original: English

CHILE – PRICE BAND SYSTEM AND SAFEGUARD MEASURES RELATING TO CERTAIN AGRICULTURAL PRODUCTS

AB-2002-2

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products

Chile, *Appellant*
Argentina, *Appellee*

Australia, *Third Participant*
Brazil, *Third Participant*
Colombia, *Third Participant*
Ecuador, *Third Participant*
European Communities, *Third Participant*
Paraguay, *Third Participant*
United States, *Third Participant*
Venezuela, *Third Participant*

AB-2002-2

Present:

Abi-Saab, Presiding Member
Bacchus, Member
Lockhart, Member

I. Introduction

1. Chile appeals certain issues of law and legal interpretations developed in the Panel Report, *Chile –Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (the "Panel Report").[1]

2. The Panel was established on 12 March 2001 to consider a complaint by Argentina with respect to: (i) Chile's price band system for certain agricultural products; and (ii) Chile's provisional and definitive safeguard measures imposed on the same products.[2] Before the Panel, Argentina claimed that Chile's price band system is inconsistent with Article II:1(b) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and Article 4.2 of the *Agreement on Agriculture*. Argentina also claimed that the safeguard measures imposed by Chile constitute a violation of Article XIX:1(a) of the GATT 1994 and certain provisions of the *Agreement on Safeguards*.

[1]WT/DS207/R, 3 May 2002.

[2]WT/DS207/3, 23 May 2001. We note that Chile's price band system also applies to sugar. In its request for establishment of a Panel, Argentina challenges Chile's price band system generally without referring to any specific product categories. We note that the Panel's analysis of Chile's price band system covers the wheat, wheat flour and edible vegetable oil bands, but does not cover the sugar band.

3. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 3 May 2002, the Panel found that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994.[3] The Panel also found that Chile's safeguard measures on wheat, wheat flour and edible vegetable oils violated certain provisions of the *Agreement on Safeguards* and the GATT 1994.[4]

4. The Panel concluded that, to the extent Chile had acted inconsistently with the provisions of the GATT 1994, the *Agreement on Agriculture* and the *Agreement on Safeguards*, it had nullified or impaired the benefits accruing to Argentina under those Agreements.[5] The Panel recommended that the Dispute Settlement Body (the "DSB") request Chile to bring its price band system into conformity with the *Agreement on Agriculture* and the GATT 1994. The Panel did not, however, make recommendations with respect to the safeguard measures challenged by Argentina.[6]

5. On 24 June 2002, Chile notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[7] On 4 July 2002, Chile filed its appellant's submission.[8] On 19 July 2002, Argentina filed an appellee's submission.[9] On the same day, Australia, Brazil, Colombia, Ecuador, the European Communities, Paraguay, the United States, and Venezuela each filed a third participant's submission.[10]

---

[3]Panel Report, para 8.1(a).

[4]*Ibid*., para 8.1(b).

[5]*Ibid*., para. 8.2.

[6]Panel Report, para. 8.3. The Panel noted in paragraph 7.121 of its Report that "… the Panel received a communication from Chile stating that the safeguard measures on wheat and wheat flour had been terminated as of 27 July 2001" and that it was later "informed by Chile that the safeguard measure on vegetable oils would be terminated as of 26 November 2001." We note that Chile did not appeal the Panel's findings that its safeguard measures were inconsistent with certain provisions of the GATT 1994 and the *Agreement on Safeguards.*

[7]WT/DS207/5, 26 June 2002.

[8]Pursuant to Rule 21(1) of the *Working Procedures*.

[9]Pursuant to Rule 22 of the *Working Procedures*.

[10]Pursuant to Rule 24 of the *Working Procedures*.

6. On 19 July 2002, the Appellate Body received communications from Japan and Nicaragua stating that they wished to attend the oral hearing in this appeal, although neither wished to file a written submission in accordance with Rule 24 of the *Working Procedures*.[11] On 22 July 2002, the Appellate Body notified the participants and third participants that it was inclined to allow Japan and Nicaragua to attend the oral hearing as passive observers, if none of the participants or other third participants objected. No participant or third participant objected to Japan and Nicaragua *attending* the oral hearing. However, the European Communities considered that Japan and Nicaragua should be allowed to attend the oral hearing as third participants and not as passive observers. On 30 July 2002, the participants and third participants were informed that Japan and Nicaragua would be allowed to attend the oral hearing as passive observers.

7. The oral hearing was held on 6 and 7 August 2002.[12] The participants and third participants

II. Background

A. *Legal Framework of Chile's Price Band System*

9. The price band system was established under Chilean Law No. 18.525 on the Rules on Importation of Goods.[14] The methodology for the calculation of the upper and lower thresholds of the price band system is set out in Article 12 of that law.[15]

[14]Consolidated version of Law 18.525, Official Journal of the Republic of Chile, 30 June 1986 as amended by Law No. 18.591, Official Journal, 3 January 1987 and by Law No. 18.573, Official Journal, 2 December 1987. Panel Report, footnote 5 to para. 2.2. See Annex CHL-2 to Chile's First Written Submission to the Panel. Chile submits, and the Panel Report states, that a price band system has been in effect since 1983. See Panel Report, paras. 7.97 and

10. At the second substantive meeting with the parties, Chile informed the Panel that Article 12 had been amended by Law 19.772, and submitted a copy of that law to the Panel.[16] The amendment is dated 19 November 2001. It provides, in relevant part, that the combination of the price band duty and the *ad valorem* duty may not exceed the rate of 31.5 per cent *ad valorem* bound in Chile's WTO Schedule (referred to below as the "cap").[17] Chile concedes that prior to the enactment of Law 19.772, the combination of the price band duty and the *ad valorem* duty did, at times, exceed Chile's bound rate.[18] At the oral hearing before us, Chile explained that Law 19.772 was merely declaratory in nature because the total amount of duties that could be applied on products subject to the price band system had been subject to a tariff binding since the Tokyo Round.

11. The objective of Chile's price band system as stated in Article 12 of Law 18.525 is to " ensur[e] a reasonable margin of fluctuation of domestic wheat, oil-seed, edible vegetable oil and sugar prices in relation to the international prices for such products … .[19] (footnotes omitted)

[16]See Panel Report, para. 2.3. The Panel was established 12 March 2001, more than six months before the amendment was enacted.

[17]Article 2 of Law No. 19.772 added the following paragraph to Article 12 of Law 18.525:

> The specific duties resulting from the application of this Article, added to the *ad valorem* duty, shall not exceed the base tariff rate bound by Chile under the World Trade Organization for the goods referred to in this Article, 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. To that end, the National Customs Service shall adopt the necessary measures to ensure that the said limit is maintained.

[18]Chile's appellant's submission, para. 3 and footnote 2 in which Chile notes "[r]ecognizing that Chile … ha[s] breached those WTO commitments, Chile passed new legislation … to avoid the possibility of recurrence of such a breach of the binding."

[19]Article 12 of Law 18.525. Panel Report, para. 7.40, referring to Chile's response to Question 9(f) of the Panel.

B. *Products Subject to Chile's Price Band System*

12. Price bands are calculated for each of the following product categories: (i) edible vegetable oils; (ii) wheat and wheat flour; and (iii) sugar.[20]

C. *Total Applicable Duties*

13. The total amount of duty that is applied to the products covered by the price band system consists of two components: (i) an *ad valorem* duty that reflects Chile's *applied* Most-Favoured Nation ("MFN") tariff rate; and (ii) a *specific price band duty* that is determined for each importation by comparing a reference price with the upper or lower threshold of a price band.

1. The *ad valorem* Duty

14. The *ad valorem* duty is the *applied* MFN rate which, under Chile's flat-tariff regime, is the *valorem* 1 .

14. importa followiand systems: a

(a) The "Price Bands"

16. The price bands provide upper and lower thresholds that are used to calculate the specific duty applicable to each importation of products subject to the price band system.

17. These price bands are determined on an annual basis through Decrees issued by the Executive.[22] The bands that apply to *wheat* and *wheat flour* are determined for the period 16 December – 15 December[23] and the band for *edible vegetable oils* corresponds to the period 1 November – 31 October.[24]

18. The upper and lower thresholds (that is, the ceiling and the floor prices) for each price band are determined in the following way:

(a) Average monthly international prices for each product category are compiled:[25]

(i) in the case of *edible vegetable oils*, the price used is that of crude soya bean oil[26], free on board (f.o.b.) Illinois, quoted on the Chicago Exchange;[27]

(ii) the price used for *wheat* is that quoted for Hard Red Winter No. 2, f.o.b. Gulf (Kansas Exchange).

The price bands for edible vegetable oils and wheat are calculated on the basis of the average monthly prices for the previous 60 months (5 years).

[22]Panel Report, para. 2.4. See first written submission by Argentina to the Panel, footnotes 12 and 14 and Exhibits ARG-5 and ARG-7. However, the most recent decrees contained in the Panel record date from the year 1999.

[23]The price band for wheat is used, however, to calculate the specific duty or rebate, which is then multiplied by a factor of 1.56 to obtain the specific duty or rebate for wheat flour. See Article 12 of Law 18.525,

23

(f) The adjusted prices constitute the upper and the lower thresholds of the price band for the product in question.

Returning to the earlier example of wheat and edible vegetable oils, the 16th highest monthly price (adjusted to reflect import costs) will represent the upper threshold of the price band, and the 44th highest price (with the same adjustments made) will represent the lower threshold of the price band.

19. The total amount of duty applicable is calculated by a customs agent who necessarily must be hired by the importer. The calculation is subject to revision by the customs authority.[31]

20. It should be noted that Chile's price bands are based on international market prices. Thus, over the long term, the upper and lower thresholds of the bands will fall when international prices fall and they will rise when those prices rise. The bands will be wider if prices fluctuate strongly.

(b) The "Reference Price"

21. The reference prices for each product category are determined on a weekly basis (every Friday for the following week) by the customs authorities, using the *lowest* relevant f.o.b. price observed, at the time of *embarkation*, in the foreign "markets of concern" to Chile.[32] Thus, the weekly reference price will be the lowest f.o.b. price in any foreign "market of concern" during the previous week. The same weekly reference price applies to imports of all goods falling within the same product category, irrespective of the origin of the goods and regardless of the transaction value of the shipment.[33]

22. The determination of the reference price for a particular product category depends on the date of the bill of lading (more specifically, the week during which the goods are shipped). Thus, goods may arrive in Chile in *different* weeks, yet have the *same* import reference price applied to them if the dates of shipment from the exporting country fall within the *same* week. Similarly, goods may arrive in Chile in the *same* week and have *different* reference prices applied to them if the dates of shipment fall within *different* weeks.

23. There is no Chilean legislation or regulation, which specifies the international "markets of concern" to be used to calculate the applicable reference prices.[34] It seems, however, that the markets

[31]Panel Report, para. 6.15. Chile's response to questioning at the oral hearing.

[32]The reference price is thus unrelated to the transaction price of the particular shipment.

[33]Chile's response to question 9(a) of the Panel.

[34]Panel Report, para. 7.44. Chile's response to questioning at the oral hearing.

and qualities chosen are intended to be representative of products actually "liable" to be imported to Chile.[35]

24. In the case of wheat, in calculating the reference price, Chile uses the lowest f.o.b. price for that product in "any market of concern". It is not clear whether Chile will use the lowest f.o.b. price for *any* quality of wheat as a reference price for *all* qualities of wheat.[36]

25. With respect to *edible vegetable oils*, Chile stated before the Panel that "the Reference Price has [generally] coincided with the price of crude soya bean oil, but in some cases it has corresponded to that of crude sunflower-seed oil."[37] From the above, it is not clear whether the price for crude soya bean oil or crude sunflower-seed oil will be used as a reference price for *all* other edible vegetable oil products, including more expensive qualities of edible vegetable oils.

26. Contrary to the prices used for calculating the price bands, the lowest f.o.b. prices found in any market of concern and selected as reference prices are *not* adjusted for "usual import costs", and thus not converted to a c.i.f. basis.[38] We also note that the reference price will be the *lowest* f.o.b. price in *any* market of concern, and thus will *not* be representative of an average of prices found in any given foreign market of concern.

(c) Calculating the specific price band duty

27. The specific duty is levied on each shipment of a product subject to the price band system. The amount of the specific duty is determined once a week by comparing the weekly reference price with the upper and lower thresholds of the annually determined price band relating to the relevant product.

28. The specific duty, or rebate, is applied per tonne of the product as of the date of *exportation* (not importation) to Chile, regardless of the product's origin and of its transaction value.

29. The methodology used to calculate the applicable specific duty is the following:

---

[35]Chile's response to questioning at the oral hearing.

[36]See Argentina's first written submission to the Panel, para. 16. See also Panel Report, para. 7.44. Chile's response to questioning at the oral hearing.

[37]These edible vegetable oils are identified by reference to 25 tariff lines. There does not seem to be any further adjustment of the prices for crude soya bean oil or crude sunflower-seed oil to the products covered by the other tariff lines relating to other edible vegetable oil products. Chile's response to question 43(b) of the Panel. There is no "mark up" for edible vegetable oil products of "outstanding quality". Chile's response to question 44 of the Panel.

[38]Chile's response to question 9(d) of the Panel. Panel Report, para. 7.39.

30. In order not to impose duties in excess of the tariff rate

that the duties resulting from Chile's price band system are "ordinary customs duties" that had led or could lead to a violation of the first sentence of Article II:1(b).[43] Chile argues that, had Argentina sought to maintain that the duties resulting from Chile's price band system were "other duties or

ldthus, hvesbeens pohibitle.r

the Panel done so, Chile suggests, it would most likely have avoided the error of inventing a new definition of ordinary customs duties that has no apparent basis in the text of Article II:1(b).

3. Article 4.2 of the *Agreement on Agriculture*

38. Chile submits that the Panel erred in concluding that the price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*. The Panel should have analyzed the text of Article 4.2 and the tariff schedules as concluded as part of the Uruguay Round Agreements, instead of basing its conclusions on pre-Uruguay Round documents. According to Chile, by doing so, the Panel would have found that the price band system is not a measure "of a kind which has been required to be converted" into ordinary customs duties, but rather is merely a system for determining the level of ordinary customs duties that will be applied up to the bound rate.

39. Chile considers that it was an error for the Panel to *first* decide that the price band system was a "similar measure" under footnote 1 of Article 4.2 before examining the main text of Article 4.2, in particular the phrase "measures of the kind which have been required to be converted into ordinary customs duties" contained therein. By doing so, the Panel did not attach sufficient weight to evidence of what was and what was not converted. In this respect, Chile notes that no country with a price band system in fact converted that system, no Member asked Chile to convert its price band system, and Argentina itself maintains a price band system for sugar.

40. Chile agrees with the Panel that the mere fact that a measure was not converted by a Member into an ordinary customs duty does not prove that the measure was not "of a kind which had been required to be converted". According to Chile, "the absence of conversions is a highly relevant fact", however[46], and the way in which the European Communities converted its variable import levy is particularly relevant because it involved binding the tariff, but left in place a system similar to Chile's price band system.[47] Thus, the European Communities converted its levies in a way that made it "crystal clear"[48] that the tariffs would continue to vary, although subject to a high absolute cap. Chile maintains that the Panel should have taken this evidence into account. It proves that the drafters of the *Agreement on Agriculture* accepted that a variable import levy could be converted into an ordinary customs duty by imposing a "cap" on the amount of duties that could be levied, even when those duties would fluctuate below that "cap" in relation to a domestic target price.

---

[46]Chile's appellant's submission, para. 81.

[47]*Ibid*., para. 95.

[48]*Ibid*., para. 92.

41. Although Chile agrees with the Panel that footnote 1 is significant in discerning the meaning of Article 4.2 of the *Agreement on Agriculture*, it does not agree that all the measures listed therein "are characterized either by a lack of transparency and predictability, or impede transmission of world prices to the domestic market, or both."[49] In this respect, Chile submits that transparency and predictability are clearly not the defining characteristics for what is illegal and legal under footnote 1 of Article 4.2.

42. Chile suggests, moreover, that the Panel acted inconsistently with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("the *Vienna Convention*")[50], by considering that it could "distill" the meaning of the terms "variable import levy" and "minimum import price" from selected Reports of GATT Committees and notifications of individual GATT Contracting Parties during a period before the launch of the Uruguay Round, although the Panel itself conceded that those documents do not constitute "preparatory work" within the meaning of Article 32 of the *Vienna Convention*

Agriculture is "to provide for substantial progressive reductions in agriculture support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets."[53] According to Chile, the Panel's finding thereby produces an absurd result: contrary to the objective of obtaining lower tariffs in the *Agreement on Agriculture* and the GATT 1994, the Panel, in effect, finds the higher *bound* rate preferable to the lower *applied* rate under Chile's price band system.

45. For these reasons, Chile concludes that its price band system is consistent with Article 4.2 of the *Agreement on Agriculture.*

4. Article II:1(b) of the GATT 1994

46. Chile argues that the Panel erred in finding that the duties imposed under Chile's price band system are not "ordinary customs duties" within the meaning of the first sentence of Article II:1(b) of the GATT 1994, but rather are "other duties or charges" prohibited by the second sentence of that provision, unless scheduled according to the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 (the Understanding on Article II:1(b)). Chile submits that, under the Panel's reading of Article II:1(b), it would be prohibited from applying a duty at rates that vary between zero and its bound rate of 31.5 per cent, but at the same time, it would be free to be more protectionist by applying a constant duty at its bound rate. Chile argues that, under the Panel's reasoning, it would also be free to change its applied rate from time to time for whatever reason it might decide, so long as the change in duty is not based on a formula.

47. Chile maintains that the Panel's approach to Article II:1(b) of the GATT 1994 appears to have been based primarily on the fact that the Panel had already decided that duties applied under the price band system were not "ordinary customs duties" within the meaning of Article 4.2 of the *Agreement on Agriculture*. On that basis, the Panel found that the duties resulting from Chile's price band system could not constitute "ordinary customs duties" under Article II:1(b) of the GATT, and thus had to be "other duties or charges".

48. Chile notes in this respect that, assuming the duties applied under the price band system were "other duties or charges", they would have been in violation of Article II:1(b) of the GATT 1994 from their inception in 1983, because Chile introduced the price band system *after* binding its duties on all

49. Chile submits that the Panel erred in finding a normative content to "ordinary" customs duties on the grounds that Members' bindings of "ordinary customs duties" are always stated in *ad valorem* or specific terms. According to Chile, the Panel also erred in finding that "ordinary customs duties" must not take account of any other, *exogenous*, factors, such as, for instance, fluctuating world market prices.[54]

50. Chile sees no basis in logic or law for the Panel's conclusion that the existence of an "exogenous" basis for setting the level of part of the duty within the binding somehow renders the resulting duty other than "ordinary". In Chile's view, bindings set a ceiling on ordinary duties that can be applied to a product, but, as the Appellate Body found in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ("*Argentina – Textiles and Apparel*"), they do not thereby prescribe what form the bound duties must take.[55] Further, nothing in Article II:1(b) limits how the level of ordinary customs duties can be determined and expressed up to the level of the binding, so long as the binding is respected.

51. Chile further maintains that the purpose of Article II:1(b) and the Understanding on Article II:1(b) was not to create some new class of charge that, although applied at a rate below the tariff binding, was nonetheless forbidden because it was not the right type or kind of duty. Rather, Chile contends, 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".

52. Chile further argues that the Panel erred in finding that "PBS duties are neither in the nature of *ad valorem* duties, nor specific duties nor a combination thereof"[56] and points out that the decision to apply a duty at less than the bound rate will *always* be based on exogenous factors. Thus, there is no basis for saying that "exogenous factors" make applied duties not "ordinary".

53. Chile criticizes the statement of the Panel that the disallowance of the lowest 25 per cent of the monthly average prices makes the applied duty higher than it would be if all prices were included in the calculation of the price band. Chile argues that there is no legal basis in the WTO for asserting that the amount of the duty applied under the price band system is relevant in determining whether or not these duties are ordinary customs duties.

---

[54]Panel Report, para. 7.52.

[55]Appellate Body Report, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003, para. 46.

[56]Panel Report, para. 7.62.

54. Finally, Chile objects to the Panel's observation whereby the fact that the duty resulting from Chile's price band system is determined as of the date of exportation of the merchandise would violate Article I of the GATT 1994. Article I does not prohibit it from using the date of exportation to determine the applicable duty because using this date does not result in discrimination based on the origin of the products. Chile further submits that a "duty does not become an 'other duty or charge' because it may be applied in violation of the MFN rule".[57]

B. *Arguments of Argentina – Appellee*

1. Article 11 of the DSU

55. Argentina disputes Chile's contention that the Panel's findings on the second sentence of Article II:1(b) are not within the Panel's mandate and are inconsistent with Article 11 of the DSU. Argentina takes the view that it properly set out a claim that the price band system violates Article II:1 of the GATT 1994 in its request for establishment of a panel. Argentina claims that its reference, in its request for establishment of a panel, to Chile's breach of "its commitments on tariff bindings" was recognized by the Panel, both parties and all third parties to refer to the obligations of Article II:1(b) of the GATT 1994.

56. Argentina asserts that it fully satisfied the requirements of Article 6.2 of the DSU, which requires that the request for the establishment of a panel identify the specific measures at issue and provide a brief summary of the legal basis of the complaint. Argentina contends that it clearly identified the measures at issue, namely Law 18.525 as amended by Law 18.591 and Law 19.546, as well as the regulations and complementary provisions and/or amendments, and that it identified the obligations of Article II as the legal basis for its claim.

57. Relying on the Appellate Body reports in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*")[58] and *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products* 25 Tf -eSafeguic -0.1274 the legal basis for its claim.

57.its req68 takes request f-19alltiocov -1iesgree 6.2 osup

examined on a case-by-case basis ... tak[ing] into account whether the ability of the respondent to defend itself was prejudiced ... ".

Concerning Periodicals (*"Canada – Periodicals"*)[65] are relevant. Argentina recalls that the Appellate Body found in that case that it could move from an examination of the first sentence of Article III:2 of the GATT 1994 to an examination of the second sentence as "part of a logical continuum."[66]

61. Argentina stresses that the fact that the second sentence of Article II:1(b) of the GATT 1994 is not specifically mentioned in the terms of reference did not impair the ability of Chile to defend itself. Although Argentina concedes that it directed most of its arguments to the first sentence of Article II:1(b), it maintains that Chile had ample notice of the claim because the issue of whether the duties resulting from Chile's price band system are ordinary customs duties or not was discussed during the Panel proceedings. Argentina contests Chile's allegation that it did not raise the issue of an infringement of the second sentence of Article II:1(b), and points to paragraphs 23 and 24 of its rebuttal submission to the Panel, where, in the context of its claim under Article II:1(b) of the GATT 1994, it stated that the duties resulting from Chile's price band system are not "ordinary customs duties". In addition, Argentina addressed the second sentence in its response to Question 3 posed by the Panel.[67]

62. Argentina adds that two third parties—the European Communities and the United States—provided arguments regarding the second sentence of Article II:1(b) in responding to Question 3 of the Panel. According to Argentina, the arguments of the United States and the European Communities, supplementing its own arguments, provided a more than sufficient basis for the Panel to decide Argentina's claim under Article

freely to use arguments submitted by any of the parties—or to develop its own legal reasoning—to support its own findings and conclusions on the matter under its consideration.[69]

64. Argentina asserts that the Panel did no more than discharge its duty to make an objective assessment of the matter before it, by developing its legal reasoning on the basis of arguments advanced by the parties and third parties. Thus it did not breach its duty under Article 11 of the DSU. The standard for breaches of that provision is very high, as articulated by the Appellate Body in *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*").[70] In Argentina's view, Chile has not demonstrated that the Panel in this case committed any error or abused its discretion in a manner that comes even close to the level of gravity required to sustain a claim under Article 11 of the DSU.

2. Order of Analysis

65. Argentina asksng Importation of Sa375 Tc 0 TGdD /F1 11 Tj -354.7li737w561c 2.836 susprelim(Arn iof the c

access of agricultural products"[73] because Chile's price band system applies only to agricultural products, whereas Article II:1(b) applies generally to trade in goods.

67. According to Argentina, Chile's argument that Article 4.2 of the *Agreement on Agriculture* is not a specific or more detailed way of addressing the prohibition against exceeding tariff bindings under Article II:1(b) of the GATT 1994 is "flawed" because the obligation contained in Article 4.2 would be rendered meaningless if it were reduced, as Chile proposes, to a simple tariff measure.[74] Article 4.2 has nothing to do with the obligation to respect tariff bindings. Argentina submits that this

because those documents form part of the GATT *acquis*[75] and also fall into the category of all material which the parties had before them when drafting the final text.[76]

71. Argentina points out that Chile fails to address the core issue of the Panel's findings that the price band system as such—the measure challenged by Argentina in these proceedings—is not simply

the concessions set forth in its national schedule".[81] In addition to the fact that the price band system infringes Article 481

purposes of determining whether a measure is a prohibited "variable import levy" under Article 4.2. Rather, the question of whether a Member applies duties in excess of its tariff binding is an issue that should be examined under Article II of the GATT 1994 and not under Article 4.2 of the *Agreement on Agriculture*. With respect to the meaning of "similar border measures" in Article 4.2, Australia agrees with the United States that, to be "similar", it is sufficient for a border measure to be "similar" to any *one* of the measures listed in footnote 1—without having to be similar to *all* of those measures. Australia further agrees with the United States that, to be "similar" to a "variable import levy", a border measure does not need to share *all* the "fundamental characteristics" of such a levy.[85]

2. Brazil

(a) Article 11 of the DSU

81. Brazil submits that the Panel's finding that Chile's price band system constitutes a violation of the second sentence of Article II:1(b) of the GATT 1994, is just a logical and necessary consequence of the Panel's finding that the price band system violates Article 4.2 of the *Agreement on Agriculture*. According to Brazil, GATT/WTO practice clearly sets out that panels are not compelled to accept the interpretations or legal reasoning developed by the parties to a dispute, even if all the parties to a dispute have similar or identical views.

(b) Order of Analysis

82. Brazil considers that the Panel was correct in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT.

83. Brazil notes that the price band system applies exclusively to agricultural products and thus is subject to the *Agreement on Agriculture*. Article 21.1 of the *Agreement on Agriculture* sets out that "the provisions of GATT 1994 … shall apply subject to the provisions of [the *Agreement on Agriculture*]".[86] (underlining in original) Therefore, Article 4.2 of the *Agreement on Agriculture* takes precedence over any conflicting GATT 1994 provision, which applies to goods in general. Thus, in the present case, according to Brazil, the *Agreement on Agriculture* is *lex specialis*, regardless of how detailed Article II:1(b) of GATT 1994 may be with respect to other goods not covered by the *Agreement on Agriculture*.

[85]Australia's response to questioning at the oral hearing.

[86]Brazil's statement at the oral hearing.

(c) Article 4.2 of the *Agreement on Agriculture*

84. Brazil agrees with the Panel's conclusion that substantial elements of Article 4.2 of the *Agreement on Agriculture* would be rendered void of meaning if that provision were to be read as only prohibiting those specific measures which other Members actually and specifically required to be converted and which in practice were converted at the end of the Uruguay Round.[87] Brazil submits, in this respect, that Chile does not seem to attach the necessary importance to the verb "maintain" in Article 4.2, which, according to Brazil, was clearly drafted to encompass the possibility that, at the end of the Uruguay Round, a Member had in place measures "of the kind which have been required to be converted", but decided not to convert those measures.

85. Brazil submits that Chile put undue emphasis on the fact that other WTO Members have not challenged its price band system before, although it notes that Chile concedes that the mere fact that a measure has not been challenged does not mean *ipso facto* that the measure is consistent with the *WTO Agreement.*

3. Colombia

(a) Article 11 of the DSU

86. Colombia submits that the Panel acted inconsistently with Article 11 of the DSU by making a finding under the second sentence of Article II:1(b) of the GATT 1994 and, in doing so, deprived the parties and third parties to the dispute of a fair right of response.

(b) Article 4.2 of the *Agreement on Agriculture*

87. Colombia questions the role given by the Panel to the Punta del Este Declaration and the preamble to the *Agreement on Agriculture* when interpreting the meaning of the term "ordinary customs duties". According to Colombia, the Panel's interpretation of that term presupposes a level of commitments and a scope of obligations that are not reflected in the substantive provisions of the *Agreement on Agriculture*.

88. Colombia argues that the Panel erred in concluding that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*. This error was a result of the erroneous interpretation that the Panel gave to the term "variable import levies". In Colombia's view, variable import levies were prohibited in Article 4.2 in order to prohibit a system which led to uncertainty resulting from the absence of any limitation on tariff variability. Article 4.2 cannot be

87

interpreted in isolation from other Multilateral Trade Agreements, which provide for the elimination of certain measures through commitments that are not derived from Article 4.2.

89. Colombia concludes that Article 4.2 must be assessed in the light of Articles I and II of the GATT and in the light of the fact that the European Communities and a major group of countries made commitments under Article II of the GATT. According to Colombia, seen in its proper context, Article 4.2 does not impose on WTO Members an obligation to limit their agricultural tariff policies to the point of ruling out any variation in tariffs over time. Rather, the only obligation is not to impose tariffs in excess of a tariff binding.

4. Ecuador

(a) Article 11 of the DSU

90. Ecuador argues that the Panel exceeded its terms of reference when it ruled on the inconsistency of price band systems with the second sentence of Article II:1(b) of the GATT 1994, and in so doing, acted inconsistently with Article 11 of the DSU.[88]

(b) Order of Analysis

91. Ecuador submits that the Panel erred in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT 1994. The Panel should first have determined whether the price band duties constitute "ordinary customs duties", and only then determined their conformity with Article II:1(b) and Article 4.2.

(c) Article 4.2 of the *Agreement on Agriculture*

92. Ecuador argues that the Panel erred in concluding that *all* price band systems are prohibited by Article 4.2 of the *Agreement on Agriculture*. According to Ecuador, price band systems are "similar" to variable import levies or minimum prices only to the extent that their design, structure or mode of operation are similar to those variable import levies and minimum import prices. All price band systems are not *intrinsically* unstable, unpredictable and intransparent. The degree to which these features are present in a price band system will depend on the way it is designed and operated.

93. In this respect, Ecuador argues that if, for instance, the reference price is not the *lowest* price on world markets but rather a price that is more representative of world market prices, there is no

[88]Ecuador's third participant's submission, paras. 110 and 116.

and are thus not prohibited by Article 4.2. As a consequence, if Chile's price band system is found to be an ordinary customs duty, it need only be assessed for conformity with Article II:1(b) of the GATT. Should the Appellate Body consider that the Chile's price band system is not an ordinary customs duty, and that it must therefore be examined under Article 4.2, the European Communities submits that the Panel's interpretation of Article 4.2 is erroneous.

103. With respect to Article 4.2, the European Communities notes that the Panel's definition of "variable import levies" fails to capture the essential characteristics of such levies. The first essential characteristic of a variable import levy is that they are not bound and can vary without any limit. The

European Communities mentions stamp taxes, deposit schemes, revenue duties and primage duties as examples of such "other duties and charges".

106. The European Communities argues that the Panel erred in suggesting that Members "invariably" express customs duties in specific or *ad valorem* terms, or in a combination thereof, and thus no exogenous factors play a role in the application of customs duties. According to the European Communities, such a broad reading of the term "exogenous" is problematic because certain duties are expressed in foreign currencies (for example, commodities are typically traded in US dollars) and thus the duty applied will depend on exchange rate fluctuations. In addition, seasonal duties are levied by some Members on certain products (often fruit and vegetables).

107. The European Communities maintains that the Panel failed to consider the ordinary meaning of the term "ordinary customs duties" in its context and in the light of the object and purpose of the GATT 1994. An examination of the context of Article II:1(b) would lead to the conclusion that being *ad valorem* or specific (or, conversely, not based on exogenous factors) is not the distinguishing feature of an "ordinary customs duty". The European Communities notes that the special safeguard duties which a Member may impose under Article 5 of the *Agreement on Agriculture* typically take the form of *ad valorem* or specific duties, although they are clearly not considered to be "ordinary customs duties" in the sense of Article II:1(b). According to the European Communities, the Panel never explains how it can distinguish between an *ad valorem* "ordinary customs duty" and an *ad valorem* "other duty or charge".

108. The conclusion that an "ordinary customs duty" cannot be distinguished from "other duties or charges" simply on the basis that it is *ad valorem* or specific (that is, not based on exogenous factors), is supported by the purpose of Article II:1(b). According to the European Communities, the whole thrust of Article II:1(b) is to protect the level of concessions negotiated in the successive tariff reduction negotiations which took place under the GATT, rather than to require a Member to apply a particular type of customs duty.

109. The European Communities further argues that, had the Panel examined the negotiating history of Article II:1(b) of the GATT 1947, it would not have found confirmation for its view that the drafters intended to limit "ordinary customs duties" to those not based on exogenous factors. Rather than confirming the Panel's interpretation of "ordinary customs duties", the negotiating history directly contradicts the Panel's conclusion, because it involved no discussion of the type of duties concerned.

110. The European Communities maintains that the negotiators in the Uruguay Round had recognized the difficulty of defining "ordinary customs duties" in the context of discussing a proposal by New Zealand, which was later to lead to the Understanding on Article II:1(b). Given the lack of explicit instruction as to the type of duty required by the phrase "ordinary customs duty", it was not for the Panel to assume a definition prohibiting customs duties based on exogenous factors. In so doing, it lightly assumed that WTO Members had taken on a more onerous obligation than that apparent from the text, contrary to the *in dubio mitius* principle referred to by the Appellate Body in *EC – Hormones*.[92]

(c) Article 4.2 of the *Agreement on Agriculture*

114. The United States considers that the Panel properly found that Chile's price band system is prohibited by Article 4.2 of the *Agreement on Agriculture*.

115. The United States submits that Chile's interpretation of Article 4.2 is not grounded in the text of Article 4.2 or important context. Instead, Chile presents a selective reading of the context provided by the schedule of the European Communities and "a lengthy exposition of the 'original intent' of the Uruguay Round negotiators it finds in the history surrounding the price band system and the tariffication of the European Communities' variable import levies."[94] This alleged "evidence" regarding the European Communities' variable import levies can form at most one part of a proper analysis of Article 4.2 under the customary rules of interpretation of public international law.[95] The United States notes, however, that an examination of the European Communities' schedule reveals that *all* of the products on which variable import levies existed are now subject to tariff bindings, yet these bindings contain only specific rates or *ad valorem* plus specific rates of duty in the ordinary customs duty column. The United States further notes Chile's argument that the European Communities' conversion of its variable import levies made clear that they would vary, but adds that Chile neglects to mention that the "duty-paid import price" commitments to which it refers are *not* expressed in the ordinary customs duty column; rather, they are recorded as two headnotes to Section I (on Agricultural Products) of the European Communities' Schedule. Furthermore, the United States asserts that "Chile implies incorrectly that these duties *must* vary according to a formula … but these headnotes merely provide for a cap on the duty that the EC will apply on certain

ida031 Tw (fororororе TD -fovid 0.031 grounded 360.1875 Tw ( ) Tj 3 0 j -258 -30.761 Tw (The United States consid

Article 4.2.[97] Rather, it would have been sufficient to require that all agricultural tariffs be bound[98] because, as a result, variable import levies would have automatically ceased to exist. The United States also submits that a review of GATT documents reveals that there were numerous statements indicating that variable import levies could be subject to bindings without any suggestion that they would cease to be variable levies.[99]

117. For the United States, it is difficult to understand how merely *capping* the amount that can be collected *via* a variable import levy is tantamount to *converting* it into an ordinary customs duty, especially if the same measure applies both before and after. Thus, the United States concludes that "Chile's interpretation of the terms 'variable import levies' and 'ordinary customs duties' does not make sense of either the text or context of Article 4.2."[100]

118. With respect to the meaning of "similar border measures " in Article 4.2, the United States notes that, in its view, to be "similar" to a border measure listed in footnote 1, it is sufficient for a border measure to be "similar " to any *one* of the measures listed in that footnote 1—without having to be similar to *all* of those measures. A fundamental characteristic of variable import levies is not that they would *not* be subject to a binding. Even if it were, the United States maintains that to be "similar" to a "variable import levy", a border measure does not need to share *all* the "fundamental characteristics" of such a levy.[101]

(d) Article II:1(b) of the GATT 1994

119. The United States endorses the Panel's finding that Chile's price band system is an "other duty or charge" within the meaning of the second sentence of Article II:1(b) of the GATT 1994.

7. Venezuela

(a) Article 11 of the DSU

120. Venezuela argues that the Panel acted inconsistently with Article 11 of the DSU and exceeded its terms of reference by making a finding under the second sentence of Article II:1(b) of the GATT 1994.

---

[97]United States' third participant's submission, para. 13.

[98]*Ibid*.

[99]United States' statement at the oral hearing.

[100]United States' third participant's submission, para. 14.

[101]United States' response to questioning at the oral hearing.

(b) Order of Analysis

121. Venezuela submits that the Panel erred in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT 1994. According to Venezuela, the Panel should first have determined whether Chile's price band system constitutes an "ordinary customs duty", and only then determined whether it constituted a "measure of the kind which had been required to be converted" under Article 4.2 of the *Agreement on Agriculture*.

(c) Article 4.2 of the *Agreement on Agriculture*

122. Venezuela contends that the Panel erred in its interpretation of Article 4.2. Moreover, Venezuela contends that the Panel erred in extending its findings to cover all the products that are subject to the price band system, even though one product in particular had been excluded by the complainant.

(d) Article II:1(b) of the GATT 1994

123. Venezuela submits that in *Argentina – Textiles and Apparel*, the Appellate Body affirmed that WTO Members are free to decide the types and characteristics of the duties that they bind, and that the only obligation imposed by Article II:1(b) of the GATT 1994 is not to exceed bound rates.[102]

124. Venezuela concludes that the Panel went beyond its terms of reference when, having found that certain elements of *one* price band system were inconsistent with Article 4.2 of the *Agreement on Agriculture*, it extended its reasoning to *include* any type of duty resulting from *any* price band system insofar as the calculation of such duty is based on exogenous factors. Venezuela submits that by doing so, the Panel substituted itself for the will of the Members and legislated in their place by making a distinction where the rules do not, thus creating additional obligations for WTO Members and diminishing their rights under the WTO.

[102] Appellate Body Report, *supra*, footnote 55, para. 46.

IV. Issues Raised in this Appeal

125. The following issues are raised in this appeal:

(a) whether the Panel acted inconsistently with Article 11 of the DSU;

(b) whether the Panel erred in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT 1994;

(c) whether, in examining Article 4.2 of the *Agreement on Agriculture*, the Panel erred in finding that:

(i) Chile's price band system constitutes a measure "similar" to a "variable import levy" and a "minimum import price system" within the meaning of footnote 1 of the *Agreement on Agriculture*;

(ii) the duties imposed under Chile's price band system are not "ordinary customs duties" within the meaning of Article 4.2 of the *Agreement on Agriculture*; and, ultimately, that

(iii) Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*; and

(d) whether the Panel erred in finding that the price band duties imposed by Chile are "other duties or charges" and, therefore, inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

V. Amendment of the Price Band System During the Course of the Panel Proceedings

126. Before considering these issues, we find it necessary to address a preliminary question relating to the effect of the amendment that Chile made to its price band system during the course of the Panel proceedings. Earlier, we described Chile's price band system based on the factual findings in the Panel Report.[103] We observed that the price band system was established under Law No. 18.525 of 1986[104], and that the methodology for the calculation of the upper and lower thresholds of the price

[103]See Section II of this Report.

[104]See *supra*, footnote 14.

bands is set out in Article 12 of that Law. We also pointed out that Chile amended Article 12 by enacting Law 19.772 (the "Amendment") during the course of the Panel proceedings.[105] We understand the Amendment to provide, in relevant part, that the combination of the duties resulting from Chile's price band system added to the *ad valorem* duty shall not exceed the rate of 31.5 per cent *ad valorem* bound in Chile's WTO Schedule.[106] According to Chile:

> Under Chilean law, Chile considers that its WTO commitments override other domestic statutes. *Recognizing that Chile nevertheless had breached those WTO Commitments, Chile passed new legislation on November 19, 2001 (Law No. 19.772) to avoid the possibility of a recurrence of such a breach of the binding.* … . Hence, for purposes of this submission, Chile will consider that the Price Band System is subject to the 31.5% tariff binding as a matter of domestic law.[107] (emphasis added)

---

[105] See *supra*, footnote 17, para. 10.

[106] Article 2 of Law No. 19.772 added the following paragraph to Article 12 of Law 18.525:

> The specific duties resulting from the application of this Article, added to the *ad valorem* duty, shall not exceed the base tariff rate bound by Chile under the World Trade Organization for the goods referred to in this Article, 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. To that end, the National Customs Service shall adopt the necessary measures to ensure that the said limit is maintained.

[107] Chile's appellant's submission, footnote 2. See also Chile's statement that:

> Chile has been able, *more often that not*, to apply duties below the bound level … (emphasis added)

Chile's appellant's submission, para. 3. In addition, Chile states:

> In 1998, there was a precipitous decline in the world price of wheat and wheat flour followed in 1999 by a similar decline in the world price of edible vegetable oil, such that fully offsetting the decline in world prices in those products relative to the previous five years under the price band formula could not be done without breaching the 31.5% binding. *To avoid disastrous effects on Chilean farmers from the plummeting world prices, Chilean authorities chose to apply duties under the price band formula without regard to the cap. Recognizing that this was inconsistent with Chilean commitments under the WTO,* the Government of Chile informed its trading partners of this situation and initiated informal consultations to obtain a waiver under Article XI of the Marrakesh Agreement. After several months of consultations, it became evident that Chile's main trading partners had strong opposition to the waiver. Instead, interested WTO members suggested that Chile either take safeguard action (during which time, the Chilean Congress was considering the implementation of a safeguard law) or renegotiate its tariff bindings according to Article XXVIII of GATT 1994. Chile chose to enact a safeguard law and took safeguard actions.[*] (emphasis added)
>
> [*] *See* Law No. 19.612 of 28 May 1999, Official Journal of the Republic of Chile, 31 May 1999

Chile's appellant's submission, para. 13.

127. For the purpose of identifying the measure in this appeal, it is necessary to consider whether the subject of this appeal is Chile's price band system as amended by Law 19.772, or the price band system as it existed before the entry into force of that Law. To do so, we will look first at how the Panel dealt with this question, and we will look then at the views of the participants, before making our own determination.

128. Chile informed the Panel of the Amendment at the second substantive meeting with the parties.[108] The Panel explained its "understanding from Chile's explanation … that this amendment to Article 12 of Law 18.525 puts in place a cap on the Chilean PBS duties to avoid that those duties, in conjunction with the 8 per cent applied rate, exceed the 31.5 per cent bound rate."[109] The Panel also recorded Argentina's view that:

> [Argentina] is not in [a] position to confirm the precise content of the Chilean Exhibit given that Argentina does not have adequate information to express a definitive view on this issue. As far as Argentina knows, Chile has not yet even issued the regulations necessary to implement the new measure.[110]

The Panel saw "no reason to deviate from [this] practice of [previous GATT/WTO] panels".[112]

130. The Panel stated further:

> … that

131. In its appellant's submission, Chile describes the measure in this appeal as the price band system subject to a cap on the total duty applied equal to the bound Chilean rate of duty for the product concerned[115]

137. In this case, the facts are somewhat different, because the Amendment was enacted *after* the Panel had been established and *while* the Panel was engaged in considering the measure. However, we do not see why this difference should affect our approach in determining the identity of the measure. We understand the Amendment as having clarified the legislation that established Chile's price band system. However, the Amendment does not change the price band system into a measure *different* from the price band system that was in force before the Amendment. Rather, as we have pointed out, Article 2 of Law No.

VI. Article 11 of the DSU

145. We next ask whether the Panel acted inconsistently with Article 11 of the DSU. Chile argues that the Panel did so because the Panel made a finding under the *second* sentence of Article II:1 (b) of the GATT 1994, even though Argentina made no claim or argument under that sentence.

146. The first sentence of Article II:1(b) of the GATT 1994 reads as follows:

> The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications *set forth in that Schedule, be exempt from ordinary customs duties in excess* of those set forth and provided therein. (emphasis added)

The second sentence of that provision states:

> Such products shall also be exempt from all *other duties or charges* of any kind imposed on or in connection with the importation *in excess* of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. (emphasis added)

147. The Panel's reasoning and findings under Article II:1(b) of the GATT 1994 may be summarized as follows. The Panel began by finding that the *first* sentence of Article II:1(b) is not applicable to the Chilean price band duties, because the Panel had already found that they are not "ordinary customs duties":

> We have found above that the Chilean PBS is a border measure "other than an ordinary customs duty", which is prohibited under Article 4.2 of the Agreement on Agriculture. We have also found that "ordinary customs duties" must have the same meaning in Article 4.2 of the Agreement on Agriculture and Article II:1(b) of GATT 1994. *Consequently, the Chilean PBS duties not constituting ordinary customs duties, their consistency with Article II:1(b) cannot be assessed under the first sentence of that provision,* which only applies to ordinary customs duties.[128] (emphasis added)

[128]Panel Report, para. 7.104.

148. Having determined that the duties resulting from Chile's price band system could not be assessed under the *first* sentence of Article II:1(b), the Panel then proceeded to examine those duties under the *second* sentence of Article II:1(b). The Panel stated:

> The next question is whether the Chilean PBS duties could be considered as "other duties or charges of any kind" imposed on or in connection with importation, under the *second* sentence ofsec Tj 207.7517 TD -01.781 Tc

to Argentina's request for the establishment of a panel, which determines the Panel's terms of reference. Argentina's request reads in relevant part:

> Under Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, as well as the regulations and complementary provisions and/or amendments, Chile applies a PBS which is inconsistent with *various provisions of the GATT 1994* and with the Agreement on Agriculture.
>
> The price band system does not ensure certainty in respect of market access for agricultural products and has caused Chile to breach its commitments on tariff bindings in relation to the concessions set forth in its national schedule. Argentina4.

> … the fact that a claim of inconsistency with Article 23.2(a) of the DSU can be considered to be within the Panel's terms of reference does not mean that the European Communities actually made such a claim.[135]

153. The question before us in this appeal is whether the claim that Argentina *actually made* before the Panel was limited to the first sentence of Article II:1(b), or whether that claim also included the second sentence of that provision.

154. According to the Panel, Argentina contended, in its first written submission that:

> The PBS *as such* violates Article II:1(b) since its application has led Chile in specific cases to collect duties *in excess* of the rates bound in its National Schedule No. VII and
>
> The PBS also violates Article II:1(b) because, by its structure, design and mode of application, it *potentially* leads to the application of specific duties in violation of the bound tariff of 31.5 per cent.[136] (emphasis added)

155. Argentina's contentions, in its first submission to the Panel, referred to Article II:1(b) in general; no explicit reference is made either to the first or the second sentence. However, despite this general language, a close examination of Argentina's first submission reveals that Argentina addressed *only* the obligation set out in the first sentence of Article II:1(b), and *not*

customs duties are governed by the *first* sentence of Article II:1(b); they are not relevant to the *second* sentence. Argentina could not have been referring in this submission to Chile's obligations under the second sentence of Article II:1(b), because Chile has not scheduled any other duties or charges governed by that sentence. Argentina refered also in this submission to the "structure, design and mode of application"[137]

that provision in its response to Question 3 posed by the Panel, which reads in relevant part as follows:[140]

> [Response to Question 3(b):] Under Article II:1(b) of the GATT 1994, other duties or charges are merely those that do not constitute "ordinary customs duties", such as the other duties or charges which appear in columns 6 and 8 of the national schedules, as appropriate.
>
> [Response to Question 3(c):] "Other duties or charges of any kind" within the meaning of Article II:1(b) of the GATT 1994 cannot be considered as "similar border measures other than ordinary customs duties".
>
> [Response to Question 3(d):] The bound duty level for what is considered to be "other duties and charges of any kind" is the rate registered in that column. Consequently, that level is the one to be considered in determining inconsistency with Article II:1(b) of the GATT 1994, without prejudice to the consistency of other duties or charges with other obligations under the GATT 1994.

160. Argentina contends that, in this response to Question 3 of the Panel, there are arguments relating to a claim under the *second* sentence of Article II:1(b). Yet this response sets out only a general description of Argentina's interpretation of the second sentence of Article II:1(b), and one that was offered by Argentina only because the Panel asked for it. There is, in this response, no discussion whatsoever of Chile's price band system, or of how it relates to the obligation in that sentence. Nor is there any suggestion in this response that Chile's price band system is in violation of the second

---

[140]The following parts of Question 3 relate to the second sentence of Article II:1(b):

Question 3(b): Please discuss the difference between *ordinary* customs duties and *other* duties and charges of any kind.

Question 3(c): If "similar border measures other than ordinary customs duties" within the meaning of Footnote 1 to Article 4.2 of the *Agreement on Agriculture* cannot be considered "ordinary customs duties" within the meaning of Article II:1(b), first sentence, of GATT 1994, please state whether in your view some of those measures could be considered "other duties or charges of any kind" within the meaning of Article II:1(b), second sentence, of GATT 1994.

Question 3(d): The Understanding on the Interpretation of Article II:1(b) of GATT 1994 ("the Understanding") provides, in paragraph 1, that "the nature and level of any 'duties or charges' levied on bound tariff items […] shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff items to which they apply. Paragraph 2 of the Understanding provides that "[t]he date as of which 'other duties or charges' are *bound*, for the purposes of Article II, shall be 15 April 1994. (emphasis added) Thus, at the end of the Uruguay Round, pursuant to the Understanding, 'other duties or charges' were for the first time bound in the Schedules, in a separate column. In the light of the Understanding, are "other duties or charges of any kind" in your view inconsistent with Article II:1(b) of GATT 1994 because they exceed the bound tariff rate recorded in the bound rate column of the Schedule, or, rather, because they exceed the bound rate in the "other duties and charges" column of the Schedule? [On p. 4 of Chile's Schedule (Arg-10), for instance, these columns would correspond to columns Nos 4 ("*Tipo Consolidado del Derecho*") and 8 ("*Demas Derechos y Cargas*"), respectively.]

sentence of Article II:1(b). Furthermore, Argentina expresses no view in this response as to how the concept of "other duties or charges", within the meaning of the second sentence of Article II:1(b), could or would relate to the claims it raised. We note as well that Argentina did not refer at all to these responses in subsequent proceedings before the Panel.

161. Argentina also asserts that it articulated a claim under the second sentence of Article II:1(b) in its rebuttal submission[141], where Argentina argues:

> 23. Argentina repeats once again that it does not question and

third parties to this dispute. Third parties to a dispute cannot make claims. It was for Argentina, as the claimant, to make its claim; Argentina cannot rely on third parties to do so on its behalf. Moreover, we note that Argentina did not adopt these arguments of the third parties in subsequent proceedings.

164. In addition, Argentina contends that it made a claim under the second sentence of Article II:1(b) in the context of its arguments to the Panel under Article 4.2 of the *Agreement on Agriculture*, where it argued that duties resulting from Chile's price band system were not ordinary customs duties for the purposes of Article 4.2.[143] With this argument, Argentina appears to suggest that a claim may be made implicitly, and need not be made explicitly. We do not agree. The requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement. Only in this way will the panel, other parties, and third parties understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it. WTO Members must not be left to wonder what specific claims have been made against them in dispute settlement. As we said in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (India – Patents)*:

> All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly.[144]

165. For all these reasons, we conclude that, although Argentina's request for the establishment of a panel was phrased broadly enough to include a claim under both sentences of Article II:1(b) of the GATT 1994, a close examination of Argentina's submissions reveals that the only claim made by Argentina was under the *first* sentence of Article II:1(b).

---

[143] Argentina's response to questioning at the oral hearing.

[144] Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 94. We recall that we are not, here, dealing with an issue under Article 6.2 of the DSU, which provides:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

166. We are mindful that Argentina argues that, "[e]ven if none of the parties had advanced arguments regarding the second sentence of Article II:1(b) of the GATT 1994, the Panel would have had the *right*, indeed the *duty*, to develop its own legal reasoning to support the proper resolution of Argentina's claim."[145] (emphasis added) Argentina purports to find support for this position in our ruling in *EC – Hormones*, where we said that:

> … nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration.[146]

167. However, Argentina's reliance on our ruling in *EC – Hormones* is misplaced. In *EC – Hormones*[147], and in *US – Certain EC Products*[148], we affirmed the capacity of panels to develop their own legal reasoning in a context in which it was clear that the complaining party had made a claim on the matter before the panel. It was also clear, in both those cases, that the complainant had advanced arguments in support of the finding made by the panel—even though the arguments in support of the claim were not the same as the interpretation eventually adopted by the Panel. The situation in this appeal is altogether different. No claim was properly made by Argentina under the *second* sentence of Article II:1(b). No legal arguments were advanced by Argentina under the *second* sentence of Article II:1(b). Therefore, those rulings have no relevance to the situation here.

168. Contrary to what Argentina argues, given our finding that Argentina has not made a *claim* under the *second* sentence of Article II:1(b), the Panel in this case had neither a "right" nor a "duty" to develop its own legal reasoning to support a claim under the second sentence. The Panel was not

---

[145]Argentina's appellee's submission, para. 48.

[146]Appellate Body Report, *supra*, footnote 69, para. 156. (Argentina's appellee's submission, para. 49) Argentina also relies on our Report in *US – Certain EC Products*, *supra*, footnote 44, at para. 123, where we held that "… the Panel was not obliged to limit its legal reasoning in reaching a finding to arguments presented by the European Communities. We, therefore, do not consider that the Panel committed a reversible error by developing its own legal reasoning." (Argentina's appellee's submission, para. 49)

[147]Appellate Body Report, *supra*, footnote 69, para. 156.

[148]Appellate Body Report, *supra*, footnote 44, para. 123. We note that the discussion above referring to our finding in *US – Certain EC Products* that a claim had not been made refers to the alleged claim under Article 23.2 of the DSU. The finding regarding a panel's ability to develop its own legal reasoning referred to a claim under Article 21.5 of the DSU, which had been made.

entitled to make a claim for Argentina[149], or to develop its own legal reasoning on a provision that was not at issue.[150]

169. With all this in mind, we turn next to examine whether the Panel acted inconsistently with Article 11 of the DSU, as claimed by Chile. Article 11 of the DSU provides:

> *Article 11*
>
> *Function of Panels*
>
> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an *objective assessment of the matter before it*, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. (emphasis added)

170. Chile argues that the Panel made a finding on a provision under which no claim or argument was made, and that this "deprived Chile of a fair right of response".[151] Therefore, according to Chile, the Panel exceeded its mandate and, thus, acted inconsistently with Article 11.

171. In contrast, Argentina argues that the Panel acted consistently with Article 11. Argentina submits that the standard for breaches of Article 11 is "very high"[152], and asserts that the Panel did not "deliberately disregard" or "refuse to consider" or "wilfully distort" or "misrepresent" the evidence before it.[153] Argentina also claims that Chile did not "demonstrate in any way that the Panel committed an 'egregious error that calls into question the good faith' of the Panel."[154] In Argentina's

---

[149]Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277, paras. 129-130.

[150]Argentina also seeks to rely on our reasoning in *Canada – Periodicals*, *supra*, footnote 65, where we said that the relationship between the first and second sentences of Article III:2 of the GATT 1994 was such that we could move from an examination of the first sentence of that Article to an examination of the second sentence as "part of a logical continuum." Argentina's appellee's submission, para. 154. We do not agree with Argentina that our reasoning in *Canada – Periodicals* is relevant in this regard. In our view, the first and second sentences of Article II:1(b) prescribe distinct obligations, and do not form part of a logical continuum.

[151]Chile's appellant's submission, para. 23.

[152]Argentina's statement at the oral hearing.

[153]Argentina's appellee's submission, para. 46.

[154]*Ibid.*

175. As we said in *India – Patents*, "… the demands of due process … are implicit in the DSU".[157] And, as we said in *Australia – Salmon* on the right of response, "[a] fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it".[158] Chile contends that this fundamental tenet of due process was not observed on this issue.

176. As we said earlier, Article 11 imposes duties on panels that extend beyond the requirement to assess evidence objectively and in good faith, as suggested by Argentina. This requirement is, of course, an indispensable aspect of a panel's task. However, in making "an objective assessment of the matter before it", a panel is also duty bound to ensure that due process is respected. Due process is an obligation inherent in the WTO dispute settlement system. A panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response. In this case, because the Panel did not give Chile a fair right of response on this issue, we find that the Panel failed to accord to Chile the due process rights to which it is entitled under the DSU.

177. For these reasons, we find that, by making a finding in paragraph 7.108 of the Panel Report that the duties resulting from Chile's price band system are inconsistent with Article II:1(b) of the GATT 1994 on the basis of the *second* sentence of that provision, which was not part of the matter before the Panel, and also by thereby denying Chile the due process of a fair right of response, the Panel acted inconsistently with Article 11 of the DSU. Therefore, we reverse that finding.

VII. Order of Analysis

178. Chile argues that the Panel erred in choosing to examine Argentina's claim under Article 4.2 of the *Agreement on Agriculture* before examining its claim under Article II:1(b) of the GATT 1994. Argentina, on the other hand, endorses the order of analysis followed by the Panel.

179. Before addressing the substance of Chile's argument, we note that Argentina raises a procedural objection s0e sdbs6/H10(oE994-3179-4th)D-0.4219 ATIu 0 Tc -0.1275 Tw ( ) Tj c.25 TTm9 T Tc 0appellant' under the

Notice of Appeal pursuant to Rule 20(2)(d) of the

agree with Argentina that Chile's arguments regarding the order of analysis chosen by the Panel amount to a separate "allegation of error" that Chile *should have*—or *could have*—included in its Notice of Appeal. In fact, we do not see, nor has Argentina explained, what *separate* "allegation of error" could have been made, or what legal basis for such "allegation of error" there could have been. Rather than making a separate "allegation of error", Chile has, in our view, simply set out a *legal argument* in support of the issues it raised on appeal relating to Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994.[162]

183. Therefore, we reject Argentina's procedural objection, and we turn next to the substantive question before us, which is whether the Panel erred in deciding to address Argentina's claims under Article 4.2 of the *Agreement on Agriculture* before addressing Argentina's claims under Article II:1(b) of the GATT 1994.

184. On this substantive question, we observe first that, in approaching the analysis the way it did, the Panel relied on our ruling in *EC – Bananas III*. In that appeal, we stated that:

subjects. Accordingly, Chile appears to argue that the approach we articulated in *EC – Bananas III* does not apply to a relationship between two provisions that do not concern the same subject.

186. It is clear, as a preliminary matter, that Article 4.2 of the *Agreement on Agriculture* applies *specifically* to agricultural products, whereas Article II:1(b) of the GATT applies *generally* to trade in *all* goods. Moreover, Article 21.1 of the *Agreement on Agriculture* provides, in relevant part, that the provisions of the GATT 1994 apply "subject to the provisions" of the *Agreement on Agriculture.* In our Report in *EC – Bananas III,* we interpreted Article 21.1 to mean that:

> … the provisions of the GATT 1994 … apply to market access commitments concerning agricultural products, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter.[166]

187. With these considerations in mind, we turn now to Chile's contention that Article 4.2 of the *Agreement on Agriculture* "is not a specific or more detailed way of addressing the prohibition against exceeding tariff bindings under Article II:1(b)".[167] Our consideration of this argument requires a comparison of these two provisions in these two covered agreements. Article 4.1 of the *Agreement on Agriculture* explains that market access concessions for agricultural products relate to tariff bindings and to reductions of tariffs, as well as to other market access commitments that can be found in Members' Schedules. Article 4.2 requires Members not to maintain "any measures of the kind which have been required to be converted into ordinary customs duties", and provides an illustrative list of measures "other than ordinary customs duties". Article 4.2 prevents WTO Members from *circumventing* their commitments on "ordinary customs duties" by prohibiting them

187. from "maintaining, reverting to, or resorting to" measures op3c resortD33lasure15.5 do8TD 0 Tc 0.1589TD /F3 1fir

therefore, Article II:1(b) of the GATT 1994 should be addressed before addressing Article 4.2 of the *Agreement on Agriculture*. Certainly it is true that Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994 both refer to "ordinary customs duties". And we agree with the Panel that the term "ordinary customs duties" should be interpreted in the same way in both of these provisions. However, Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994 must be examined *separately* to give meaning and effect to the distinct legal obligations arising under these two different legal provisions. The obligations arising from either of these provisions must not be read into the other. Therefore, the mere fact that the term "ordinary customs duties" in Article 4.2 derives from Article II:1(b) of the GATT 1947 does not suggest that Article II:1(b) should be examined before Article 4.2. Thus, we find no merit in this additional argument by Chile.

189. As these two provisions, in these two covered agreements, establish distinct legal obligations, it is our view that the outcome of this case would be the same, whether we begin our analysis with an examination of the issues raised under Article 4.2 of the *Agreement on Agriculture*, or with those raised under Article II:1(b) of the GATT 1994. Indeed, Chile itself concedes that the Panel could have come to a correct interpretation of both Article 4.2 and Article II:1(b) even by following the order of analysis that the Panel chose to adopt.[168] Chile, moreover, concedes that the Panel's decision to proceed first with an assessment of Argentina's claim under Article 4.2 would "not, by itself, be a reversible error".[169] We understand Chile to mean by this that the order of analysis would not, taken alone, alter the outcome of the case.

190. Finally, as a practical matter, even if we were to begin our analysis with Article II:1(b) of the GATT 1994—as Chile suggests—and were to find no violation of that provision because duties were not imposed in excess of a tariff binding—we would, nonetheless, be required to examine thereafter the consistency of Chile's price band system with Article 4.2 of the *Agreement on Agriculture*. Even if the duties resulting from the application of Chile's price band system did not exceed Chile's tariff binding, that system could nonetheless constitute a measure prohibited by Article 4.2. Indeed, and as we have already pointed out, Article 21.1 of the *Agreement on Agriculture* mandates that the provisions of the GATT 1994 apply *subject to* the provisions of the *Agreement on Agriculture*. Hence, any finding under Article II:1(b) of the GATT 1994 would be subject to further inquiry under the *Agreement on Agriculture*. In contrast, if we were to find first that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*, we would not need to make a separate finding on whether the price band system also results in a violation of Article II:1(b) of the

[168]Chile's appellant's submission, para. 35.

[169]Chile's response to questioning at the oral hearing.

GATT 1994 in order to resolve this dispute. This is because a finding that Chile's price band system

195. Chile appeals the Panel's findings under Article 4.2 of the *Agreement on Agriculture*, arguing that the Panel erred in finding that:

- Chile's price band system constitutes a border measure "similar to" a "variable import levy" and a "minimum import price" within the meaning of footnote 1 and Article 4.2;

- the duties imposed under Chile's price band system are not "ordinary customs duties", within the meaning of Article 4.2 and footnote 1; and, ultimately, that

- Chile's price band system is inconsistent with Article 4.2.

196. Before addressing these specific issues appealed by Chile, we recall that the preamble to the *Agreement on Agriculture* states that an objective of that Agreement is "to establish a fair and market-oriented agricultural trading system", and to initiate a reform process "through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines".[171] The preamble further states that, to achieve this objective, it is necessary to provide for reductions in protection, "resulting in correcting and preventing restrictions and distortions in world agricultural markets,"[172] through achieving "specific binding commitments," *inter alia*, in the area of market access.[173]

197. We are certainly aware of the importance of agricultural and primary products to many developing country Members of the WTO. We are mindful also that the significance of trade in such products is reflected in a number of places in the covered agreements, including the *Agreement on Agriculture*. In the preamble to the *Agreement on Agriculture*, it is said that developed country Members agreed that, in implementing their commitments on market access, they "would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members".[174] In addition, the *Agreement on Agriculture* allows for certain special and differential treatment for developing country Members relating to the treatment of agricultural

[171]Preamble to the *Agreement on Agriculture*, recital 2.

[172]*Ibid*., recital 3.

[173]*Ibid*., recital 4.

[174]*Ibid*., recital 5.

products. Article 15 is the general provision of the *Agreement on Agriculture* dealing with special and differential treatment for developing country Members. It stipulates that such treatment "shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments."[175] Thus, special and differential treatment for developing country Members applies, under the *Agreement on Agriculture*, only where and to the extent that it is specifically provided for in that Agreement.

198. The *Agreement on Agriculture* does not exempt developing country Members from the requirement not to maintain measures prohibited by Article 4.2 of that Agreement. Although Annex 5 on "Special Treatment with Respect to Paragraph 2 of Article 4" permits certain derogations

201. Thus, Article 4 of the *Agreement on Agriculture* is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products. Article 4 provides, in its entirety:

> *Market Access*
>
> 1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market-access commitments as specified therein.
>
> 2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.
>
> ---
>
> [1]These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

202pecific

provisions of GATT

1994

3 T5o

203. We emphasize that we have been asked, in this appeal, to examine the measure before us—Chile's price band system—for its consistency with certain of Chile's WTO obligations. We have not been asked to examine any other measure of any other WTO Member. Therefore, we need not, and do not, offer any view on the consistency with WTO obligations of price band systems in general, or the consistency with WTO obligations of any specific price band system that may be applied by any other Member.

A. *General Interpretative Analysis of Article 4.2 and Footnote 1*

204. We turn first to the ordinary meaning of Article 4.2, in its context and in the light of its object and purpose.[177] This provision requires Members not to maintain, resort to, or revert to certain kinds of measures with a view to "implementing their commitments on market access"[178] for imports of agricultural products. These requirements of Article 4.2, which came into effect with the entry into force of the *WTO Agreement* on 1 January 1995, apply to "any measures of the kind which have been required to be converted into ordinary customs duties". The meaning and scope of this underlined phrase is a central issue in this case.

205. We begin with a consideration of the use of the present perfect tense in the phrase "any measures of the kind which

not necessarily consistent with Article 4.2 simply because the measure was neither actually converted nor requested to be converted by the end of the Uruguay Round.[181]

206. We agree with Chile that Article 4.2 of the *Agreement on Agriculture* should be interpreted in a way that gives meaning to the use of the present perfect tense in that provision—particularly in the light of the fact that most of the other obligations in the *Agreement on Agriculture* and in the other covered agreements are expressed in the present, and not in the present perfect, tense. In general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present.[182] As used in Article 4.2, this temporal connotation relates to the date *by which* Members had to convert measures covered by Article 4.2 into ordinary customs duties, as well as to the date *from which* Members had to refrain from maintaining, reverting to, or resorting to, measures prohibited by Article 4.2. The conversion into ordinary customs duties of measures within the meaning of Article 4.2 began *during* the Uruguay Round multilateral trade negotiations, because ordinary customs duties that were to "compensate" for and replace converted border measures were to be recorded in Members' draft WTO Schedules by the *conclusion* of those negotiations. These draft Schedules, in turn, had to be verified before the signing of the *WTO Agreement* on 15 April 1994. Thereafter, there was no longer an option to replace measures covered by Article 4.2 with ordinary customs duties in excess of the levels of previously bound tariff rates. Moreover, as of the date of entry into force of the *WTO Agreement* on 1 January 1995, Members are required not to "maintain, revert to, or resort to" measures covered by Article 4.2 of the *Agreement on Agriculture*

208. Thus, contrary to what Chile argues, giving meaning and effect to the use of the present perfect tense in the phase "have been required" does not suggest that the scope of the phrase "any measures of the kind which have been required to be converted into ordinary customs duties" must be limited only to those measures which were

converted into an ordinary customs duty". (emphasis added) In our view, the phrase "have been required to be converted" in Article 4.2 has a broader connotation than the phrase "have been converted" in Article 5.1.[186] Therefore, it is perfectly apt that Article 5.1 speaks of such special safeguards only with respect to those agricultural products for which measures covered by Article 4.2 "have been converted"—that is, have in fact already been converted—into ordinary customs duties. Article 5.1 illustrates that, where the drafters of the *Agreement on Agriculture* wanted to limit the application of a rule to measures that have *actually* been converted, they used specific language expressing that limitation.

212. 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*.[187]

213. Chile's argument that it is "highly relevant" that no country that had a price band system in place before the conclusion of the Uruguay Round actually converted it into ordinary customs duties[188] gives rise to another question, namely: is this practice relevant in interpreting Article 4.2 because it constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", within the meaning of the customary rule of interpretation codified in Article 31(3)(b) of the *Vienna Convention*? In our Report in *Japan – Taxes on Alcoholic Beverages*, we defined such "subsequent practice" as:

---

[186]In this context, we note that a special safeguard can be imposed only on those agricultural products 79te that a special safeguard can b /F708 -82.5for Tw0 Tc 0.1875 Tw a5 Tw (79te 25 osey75 T25 0 TD -0(b) of thF1 11.293

> … a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation.[189]

214. Neither the Panel record nor the participants' submissions on appeal suggests that there is a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of Article 4.2. Thus, in our view, this alleged practice of some Members does not amount to "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*.

215. The requirements not to "maintain, resort to, or revert to" in Article 4.2 apply to "measures of the kind which have been required to be *converted into ordinary customs duties*". Obviously, what already *is* an ordinary customs duty need not and cannot be *converted into* an ordinary customs duty. Both before the Panel, and also on appeal, Chile has argued that the *duties* resulting from Chile's price band system *are* "ordinary customs duties". Chile maintains also that its price band *system* is *not* a measure of the kind which has been required to be converted, but is rather a system for determining the level of ordinary customs duties that will be applied between zero and the bound rate. Chile's argument raises the question of what was meant—before the conclusion of the Uruguay Round—by the requirement to *convert* "measures of the kind" into "ordinary customs duties".

216. Article 4.2 speaks of "measures of the kind which have been required to be *converted* into ordinary customs duties". The word "convert" means "undergo transformation".[190] The word "converted" connotes "changed in their nature", "turned into something different".[191] Thus, "measures which have been required to be converted into ordinary customs duties" had to be transformed into something they were not—namely, ordinary customs duties. The following example illustrates this point. The application of a "variable import levy", or a "minimum import price", as the terms are used in footnote 1, can result in the levying of a specific duty equal to the difference between a reference price and a target price, or minimum price. These resulting levies or specific duties take the same *form* as ordinary customs duties. However, the mere fact that a duty imposed on an import at the border is in the same *form* as an ordinary customs duty, does not mean that it is *not* a "variable import levy" or a "minimum import price". Clearly, as measures listed in footnote 1, "variable import levies" and "minimum import prices" had to be *converted into* ordinary customs duties by the end of the Uruguay Round. The mere fact that such measures result in the payment of duties does not exonerate a Member from the requirement not to maintain, resort to, or revert to those measures.

---

[189]Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 107.

[190]*The New Shorter Oxford Dictionary*, L. Brown (ed.) (Clarendon Press), 1993, Vol. I, p. 502.

[191]*Ibid*.

217. Article 5, also found in Part III of the *Agreement on Agriculture* on "Market Access", lends contextual support to our interpretation of Article 4.2. In our view, the existence of a market access exemption in the form of a special safeguard provision under Article 5 implies that Article 4.2 should *not* be interpreted in a way that permits Members to maintain measures that a Member would not be permitted to maintain *but for* Article 5, and, much less, measures that are even more trade-distorting than special safeguards. In particular, if Article 4.2 were interpreted in a way that allowed Members to maintain measures that operate in a way similar to a special safeguard within the meaning of Article 5—but without respecting the conditions set out in that provision for invoking such measures—it would be difficult to see how proper meaning and effect could be given to those conditions set forth in Article 5.[192]

B. *Assessment of Chile's Price Band System in the Light of Article*

ordinary customs duties", and that, because of the prohibition of such measures in Article 4.2, Chile's price band system must not be maintained.[195]

221. A plain reading of Article 4.2 and footnote 1 makes clear that, if Chile's price band system falls within any *one* of the categories of measures listed in footnote 1, it is among the "measures of the kind which have been required to be converted into ordinary customs duties", and thus must not be maintained, resorted to, or reverted to, as of the date of entry into force of the *WTO Agreement*.[196] Therefore, we will examine whether Chile's price band system falls within one or more of the categories of measures that are prohibited by Article 4.2 and footnote 1.

222. It must be emphasized that the Panel did not find that Chile's price band system constitutes a "variable import levy" or "minimum import price" system *per se*. Rather, the Panel found that Chile's price band system:

> … is a hybrid instrument, which has most, but not all, of its characteristics in common with either or both a variable import levy and a minimum import price. After careful assessment of the evidence before us, however, we consider as a factual matter that the Chilean PBS shares *sufficient fundamental* characteristics with those schemes for it to be considered similar to them, and that the observed differences between the Chilean PBS and either of those schemes are not of such a nature as to detract from this similarity.[197] (original emphasis, underlining added)

223. Chile argues, on appeal, that the Panel erred in finding that Chile's price band system is a border measure similar to a variable import levy or a minimum import price within the meaning of footnote 1 to Article 4.2.

224. At the outset, we stress that, as Argentina argues[198], the Panel's characterization of its finding "as a factual matter" does not mean that the issue whether Chile's price band system is a border measure similar to a variable import levy or a minimum import price is shielded from appellate review. This is a question of law, and not of fact, and thus is clearly within our jurisdiction under Article 17.6 of the DSU.[199] As we said in our Report in *EC – Hormones*, the assessment of the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty

---

[195]Panel Report, para. 7.20.

[196]Provided such measure is not exempted under the latter part of footnote 1.

[197]Panel Report, para. 7.46. The Panel also concluded that Chile's price band system applies exclusively to imported goods and is enforced at the border by Chile's customs authorities and that it is, therefore, clearly a *border* measure. We agree. Panel Report, para. 7.25.

[198]Argentina's appellee's submission, para. 141.

[199]Article 17.6 of the DSU provides: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."

provision is an issue of legal characterization.[200] The mere assertion by a panel that its conclusion is a "factual matter" does not make it so. Here, the Panel's interpretation of the terms "variable import levies", "minimum import prices", and "similar border measures other than ordinary customs duties", as these terms are used in footnote 1, constitutes, not a *factual* determination, but rather a *legal* interpretation of the words of Article 4.2. Hence, these interpretations are within the purview of appellate review under Article 17.6 of the DSU. Moreover, the Panel's appraisal of Chile's price band system in the light of its legal interpretation is an application of the law to the facts of the case. All the same, in reviewing the Panel's assessment of Chile's price band system, we are mindful of the need to give due deference to the discretion of the Panel, as the "trier of fact", to weigh the evidence before it.

225. The Panel described its approach to assessing whether Chile's price band system is *similar* to "variable import levies" and/or "minimum import prices" within the meaning of footnote 1 as follows:

> First, as regards the term "similar", dictionaries define this term as "having a resemblance or likeness", "of the same nature or kind", and "having characteristics in common". Two measures are in our view "similar" if they share some, but not all, of their fundamental characteristics. If two measures share all of their fundamental characteristics, they are identical rather than similar. A border measure should therefore have *some* fundamental characteristics in common with one or more of the measures explicitly listed in footnote 1. It is then a matter of weighing the evidence to determine whether the characteristics are sufficiently close to be considered "similar".[201] (emphasis added, footnotes omitted)

226. We agree with the first part of the Panel's definition of the term "similar" as "having a resemblance or likeness", "of the same nature or kind", and "having characteristics in common".[202]

---

[200] In our Report in *EC – Hormones*, we held that:

> Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. … Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. *The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question.* (emphasis added)

Appellate Body Report, *supra*, footnote 69, para. 132.

[201] Panel Report, para. 7.26.

[202] *The New Shorter Oxford English Dictionary*, *supra*, footnote 190, p. 2865.

However, in our view, the Panel went unnecessarily far in focusing on the degree to which two measures share characteristics of a "fundamental" nature. We see no basis for determining similarity by relying on characteristics of a "fundamental" nature. The Panel seems to substitute for the task of defining the term "similar" that of defining the term "fundamental". This merely complicates matters, because it raises the question of how to distinguish "fundamental" characteristics from those of a *less than* "fundamental" nature. The better and appropriate approach is to determine similarity by asking the question whether two or more things have likeness or resemblance sufficient to be similar to each other. In our view, the task of determining whether something is similar to something else must be approached on an empirical basis.

227. As suggested by Argentina, the Panel decided to assess Chile's price band system by comparing it to several individual categories of measures listed in footnote 1. Before looking at these categories of measures, we note that *all* of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do. Moreover, *all* of these measures have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market. However, even if Chile's price band system were to share these common characteristics with all of these border measures, it would not be sufficient to make that system a "similar border measure" within the meaning of footnote 1. There must be something more. To be "similar", Chile's price band system—in its specific factual configuration—must have, to recall the dictionary definitions we mentioned, sufficient "resemblance or likeness to", or be "of the same nature or kind" as, *at least one* of the specific categories of measures listed in footnote 1.

228. Before addressing the issue of *how much* *245 Tw1Tc 0.4613 Tw (o least one) ffic35 TD 0ategoritiov*

develop an interpretation of the term "variable import levies" solely on the basis of the methods of interpretation codified in Article 31 of the *Vienna Convention*.[203] The Panel decided, therefore, to have recourse to "supplementary means of interpretation" within the meaning of Article 32 of that Convention. This led to the Panel's identification of what the Panel described as "fundamental characteristics" of "variable import levies" and "minimum import prices".[204]

230. In response to our questioning at the oral hearing, the participants said that they agree with these characteristics, although Chile believes that the Panel's list is incomplete.[205] However, we do

---

[203]Panel Report, para. 7.35.

[204]The characteristics identified by the Panel in paragraph 7.36 of its Report, are the following:

> (a) Variable levies generally operate on the basis of two prices: a threshold, or minimum import entry price and a border or c.i.f. price for imports. The threshold price may be derived from and linked to the internal market price as such, or it may correspond to a governmentally determined (guide or threshold) price which is above the domestic market price. The import border or price reference may correspond to individual shipment prices but is more often an administratively determined lowest world market offer price.
>
> (b) A variable levy generally represents the difference between the threshold or minimum import entry price and the lowest world market offer price for the product concerned. In other words, the variable levy changes systematically in response to movements in either or both of these price parameters.
>
> (c) Variable levies generally operate so as to prevent the entry of imports priced below the threshold or minimum entry price. In this respect, that is, when prevailing world market prices are low relative to the threshold price, the protective effect of a variable levy rises, in terms of the fiscal charge imposed on imports, whereas this charge declines in the case of *ad valorem* tariffs or remains constant in the case of specific duties.
>
> (d) In addition to their protective effects, the stabilization effects of variable levies generally play a key role in insulating the domestic market from external price variations.
>
> (e) Notifications on minimum import prices indicate that these measures are generally not dissimilar from variable levies in many respects, including in terms of their protective and stabilization effects, but that their mode of operation is generally less complicated. Whereas variable import levies are generally based on the difference between the governmentally determined threshold and the lowest world market offer price for the product concerned, minimum import price schemes generally operate in relation to the actual transaction value of the imports. If the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference.

In paragraph 7.34 of the Panel Report, the Panel also states:

> As regards the context of those terms in footnote 1, we note that all the measures listed there are instruments which are characterized either by a lack of transparency and predictability, or impede transmission of world prices to the domestic market, or both.

[205]Participants' responses to questioning at the oral hearing. In Chile's view, the list of characteristics of "variable import levies" should include the absence of a "cap" at the level of the tariff binding.

not believe that the Panel properly applied Article 32 of the

attached—also speaks of "*measures*". This suggests that at least one feature of "variable import levies" is the fact that the *measure* itself—as a mechanism—must impose the *variability* of the duties. Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Ordinary customs duties, by contrast, are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula. The level at which ordinary customs duties are applied can be *varied* by a legislature, but such duties will not be automatically and continuously *variable*. To vary the applied rate of duty in the case of ordinary customs duties will always require *separate* legislative or administrative action, whereas the ordinary meaning of the term "variable" implies that *no* such action is required.

234. However, in our view, the presence of a formula causing automatic and continuous variability of duties is a *necessary*, but by no means a *sufficient*, condition for a particular measure to be a "variable import levy" within the meaning of footnote 1.[210] "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.[211] 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.

235. We turn now to the interpretation of the term "*minimum import prices*". Argentina alleges, and the Panel found, that Chile's price band system is similar also to a "minimum import price"[212], which is another prohibited measure listed in footnote 1 of Article 4.2.

236. The term "minimum import price" refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market. Here, too, no definition has been provided by the drafters of the *Agreement on Agriculture*. However, the Panel described "minimum import prices" as follows:

---

[210]The participants agreed with this in their responses to questioning at the oral hearing.

[211]Argentina's responses to questioning at the oral hearing.

[212]Panel Report, para. 7.46; Argentina's appellee's submission, para. 71.

establishing the price bands in Chile's system. Chile alleges that the Panel did not take sufficient account of the fact that the lower and upper thresholds of Chile's price bands vary in relation to "world prices", and not in relation to domestic prices, or to some Chilean target price.[219] Chile argues that its price band system compares "current world prices" with "historic world prices" over a five-year period, rather than comparing them with prices on Chile's domestic market. Chile maintains that the lower thresholds of Chile's price bands are different in this respect from the floor or minimum price that the Panel thought was one of the characteristics of both variable import levies and minimum import price systems.[220]

242. The Panel stated that:

> the lower threshold of the Chilean PBS is not explicitly derived from, or linked to, an internal market-related price, as is often the case in variable import levy schemes.[221]

The Panel thus recognized that Chile's price bands vary in relation to "world prices", and that, in this respect, Chile's price band system is not *identical* to a variable import levy or a minimum import price scheme. The fact that Chile's price bands vary in relation to—albeit historic—world prices, rather than in relation to domestic market or target prices, does not suggest—at first glance—that Chile's price band system effectively disconnects the domestic market from international price developments. We will, however, return to this issue later.

243. The Panel also stated that Chile's price band system *need not be identical* to variable import levies or minimum import prices to be considered *similar* to these prohibited categories of measures listed in footnote 1, provided that Chile's price band system bears sufficient resemblance to such measures. The Panel went on to examine whether the determination of the lower thresholds of Chile's price bands operates in such a way as to render it similar to a domestic target price or domestic market price. The Panel noted that:

---

[219]Here, Chile refers to the Panel's characterization of "variable import levies" as "generally operat[ing] on the basis of … a threshold price [that] may be derived from and linked to the internal market price as such, or it may correspond to a governmentally determined (guide or threshold) price which is above the domestic market price". Panel Report, para. 7.36(a).

[220]Chile's appellant's submission, para. 110.

[221]Panel Report, para. 7.45.

> on the basis of the evidence before us, it cannot be excluded that the lower threshold of the PBS, given the way in which it is designed, particularly with the many adjustments made by the administering agencies to the basic world market price quotations employed, including for inflation, operates in practice as a "proxy" for such internal prices.[222]

244. In Chile's view, the Panel erred in law in finding "similarity" based on what "cannot be excluded". We believe that Chile reads too much into the Panel's formulation. The Panel *did not equate* Chile's price band system with variable import levies or minimum import price systems that are related to domestic target prices. Rather, taking into account the evidence submitted, the Panel stated only that the lower thresholds of Chile's price bands may often, but not in all cases, be equal to or higher than the domestic price. This may be due—in part—to the way in which the price band thresholds, which are first calculated on the basis of monthly f.o.b. world prices over the last five years, are converted to a c.i.f. basis. As Chile points out, this may also be due—in part—to the way in which domestic prices to a certain extent reflect changes in world market prices.[223] As we see it, the Panel found "similarity" based on actual evidence, and not, as Chile implies, on conjecture.

245. We also find merit in the Panel's finding that:

> the PBS thresholds are determined, inter alia, after discarding 25 per cent of "atypical observations" at the bottom and at the top, hence substantially increasing the likelihood that the lower threshold of the PBS will equal or exceed the higher internal price.[224]

Based on this, the Panel concluded that the lower thresholds of Chile's price bands operate like *substitutes* for domestic target prices. Hence, the Panel was satisfied that this feature of Chile's price band system was also similar to the features of variable import levies and minimum import prices.

246. We agree with the Panel's view—to a point. But we believe that the Panel placed too much emphasis on whether or not Chile's price bands are related to domestic target prices or domestic market prices. In our view—even though Chile's price bands are set in relation to world prices from a past five-year period—Chile's price band system can still have the *effect* of impeding the transmission of international price developments to the domestic market in a way similar to that of other categories of prohibited measures listed in footnote 1. There are factors other than world market prices that are relevant to the assessment of Chile's price bands. The prices that represent the highest

[222]Panel Report, para. 7.45.

[223]In Chile's view, the fact that the products at issue are commodities makes domestic prices more prone to align with prices for commodities in any foreign market, because of the high degree of substitutability. Chile's response to questioning at the oral hearing.

[224]Panel Report, para. 7.45.

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. 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.[225]

247. 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—the reference price—is determined. As we have explained, the duties resulting from Chile's price band system are equal to the difference between the price band thresholds

250. Furthermore, under Chile's system, the same weekly reference price applies to imports of *all* goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value of the shipment. 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. This is likely to inflate the amount of specific duties applied under Chile's price band system, because these duties are imposed in an amount equal to the difference between Chile's *annual* price band thresholds, which are based on *higher* c.i.f. prices, and Chile's *weekly* reference prices, which are based on *lower* f.o.b. prices. Therefore, the way in which Chile's weekly reference prices are determined contributes to giving Chile's price band system the effect of impeding the transmission of international price developments to Chile's market.

251. Consequently, even if were to assume, for the moment, that one feature of Chile's price band system is *not* similar to the features of "variable import levies" and "minimum import prices" because the thresholds of Chile's price bands vary in relation to—albeit historic—world market prices rather than domestic target prices, this would not change our 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. Therefore, continuing with our hypothesis, even if we were to assume that one of the two parameters—Chile's annual price band thresholds—does *not* distort the transmission of world market prices to Chile's market, it would nevertheless remain that the other parameter—Chile's weekly reference prices—is liable to distort—if not disconnect—that transmission by virtue of the way it is determined on a weekly basis. Consequently, even in such a hypothetical case, the duties resulting from Chile's price band system, which are equal to the difference between these two parameters, would *not* transmit world market price developments to Chile's market in the same way as "ordinary customs duties".

252. Thus, 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.

253. However, Chile argues that, in making its finding, the Panel failed to take proper account of the fact that the total amount of duties that may be levied as a result of Chile's price band system is "capped" at the level of the tariff rate of 31.5 per cent *ad valorem* bound in Chile's Schedule.

According to Chile, the existence of this cap differentiates Chile's price band system from a "variable import levy". Chile argues that Chile's price band system enables imports to enter Chile's market below the lower thresholds of Chile's price bands when world market prices drop below a certain level, while allowing imports to enter at duty rates that can be as low as zero when the weekly reference prices rise above the upper thresholds of Chile's price bands. Chile submits that the cap makes Chile's price band system less distortive and less insulating than if Chile simply levied duties at its bound tariff level.[229]

254. This argument by Chile compels us to consider whether Chile's price band system ceases to be similar to a "variable import levy" because it is subject to a cap. In doing so, we find nothing in Article 4.2 to suggest that a measure prohibited by that provision would be rendered consistent with it if applied with a cap. Before the conclusion of the Uruguay Round, a measure could be recognized as a "variable import levy" even if the products to which the measure applied were subject to tariff bindings.[230] And, there is nothing in the text of Article 4.2 to indicate that a measure, which was recognized as a "variable import levy" before the Uruguay Round, is exempt from the requirements of Article 4.2 simply because tariffs on some, or all, of the products to which that measure *now* applies were bound as a result of the Uruguay Round.

255. The context of Article 4.2 lends support to this interpretation. That context includes the *Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraph 6 and 10 of this Annex ("Guidelines"),* which are an Attachment to *Annex 5 on Special Treatment with respect to Paragraph 2 of Article 4.* Both the Attachment and the Annex form part of the *Agreement*

[229]Chile's appellant's submission, paras. 106-109. Moreover, Chile submits that the way in which the European Communities converted its pre-Uruguay Round variable import levies is "highly relevant" because it reveals what negotiators meant by the "unclear provisions of Article 4.2". Chile points out that the European Communities' conversion of its pre-Uruguay Round variable import levies involved binding the tariff in a way that made clear that those levies would continue to vary below a cap, but would not exceed that cap. Chile concedes, however, that the European Communities' pre-Uruguay Round variable import levies and its post-Uruguay Round converted systems are not at issue in this appeal. Chile's appellant's submission, paras. 91-92.

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

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

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

on Agriculture. Paragraph 6 of the Guidelines[231] envisages that tariff equivalents resulting from conversion of measures within the meaning of Article 4.2 may *exceed previous bound rates*. This implies that, even if the product to which that measure applied was in fact subject to a tariff binding before the Uruguay Round, conversion of that measure may nevertheless have been required. Therefore, a measure cannot be excluded *per se* from the scope of Article 4.2 simply because the products to which that measure applies are subject to a tariff binding.

256. Relevant context can also be found in Articles II and XI of the GATT 1994. If Members were free to apply a measure with a "cap"—which, in the absence of that "cap", would be a prohibited "variable import levy"—Article 4.2 would, in our view, add little to the longstanding requirements of Articles II:1(b) and XI:1 of the GATT 1947. In fact, Chile concedes that the scope of measures prohibited by Article 4.2 extends beyond the tariffs in excess of bound rates that are prohibited by Article II and the "restrictions other than taxes, duties and charges" that are prohibited by Article XI:1.[232] In any event, it is difficult to see why Uruguay Round negotiators would "compensate" Members for converting prohibited measures by permitting them to raise tariffs on certain products, while permitting those Members to retain those measures and, at the same time, impose those higher tariffs on those same products. It is not clear why, if this were so, a Member would ever have converted a measure. All that a Member would have had to do to comply with Article 4.2 would have been to adopt a tariff binding—even at a higher level—on the products covered by the original measure. Had this been the intention of the Uruguay Round negotiators, there would have been no need to list price-based measures in footnote 1 among the categories of measures prohibited by Article 4.2. The drafters of the *Agreement on Agriculture* simply could have adopted a requirement that all tariffs on agricultural products be bound.

257. Contrary to Chile's view, we are not persuaded that the presence or the absence of a cap is essential in determining whether or not Chile's price band system is similar to a measure prohibited by Article 4.2. Chile's tariff binding will impose a limit on the total amount of duties that may be applied, and thus permit fluctuations in world market prices to be reflected in Chile's market, in cases when the duties resulting from Chile's price band system, when added to the applied *ad valorem* duty, exceed that tariff binding. However, the existence of the tariff binding will not eliminate the distortion in the transmission of world market prices to Chile's market in all other cases, where the

---

[231]Paragraph 6 provides:

> Where a tariff equivalent resulting from these guidelines is negative or lower than the *current bound rate*, the initial tariff equivalent may be established at the *current bound rate* or on the basis of national offers for that product. (emphasis added)

[232]Chile's appellant's submission, para. 81.

overall entry price of that shipment that *rises* rather than *falls*.[236] 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".[237] 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.

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

262. We, therefore, uphold the Panel's finding, in paragraph 7.47 of the Panel Report, that Chile's price band system is a "border measure similar to 'variable import levies' and 'minimum import prices'" within the meaning of footnote 1 and Article 4.2 of the

C. *The Interpretation of the Term "Ordinary Customs Duties" as used in Article 4.2 of the Agreement on Agriculture*

264. The Panel observed, first, that a measure of the kind which has been required to be *converted into* ordinary customs duties pursuant to Article 4.2 of the *Agreement on Agriculture* "is necessarily *not*, at the same time, an ordinary customs duty."[238] Accordingly, the Panel found that "a measure which is 'similar to' any of the measures listed in footnote 1 will also be 'other than ordinary customs duties'."[239] The Panel concluded, therefore, that a finding that Chile's price band system is "other than an ordinary customs duty" could "be expected to reinforce" its finding that Chile's price band system is similar to a variable import levy and a minimum import price.[240]

> It appears from these dictionary meanings that the English text, on the one hand, and the French and Spanish texts, on the other, differ in terms of the perspective from which they define "ordinary": the use of "ordinary" in the English text appears to define a particular kind of "customs duties" in reference to the *frequency* with which such customs duties can be found, whereas the French and Spanish texts suggest that the *narrow sense* of the term "customs duties" is being referred to. Thus, the English version describes a particular kind of customs duty from an *empirical* perspective, whereas the French and Spanish versions describe it from a *normative* perspective. We will therefore proceed to examine what should be considered "ordinary" both on an empirical and a normative basis."[244] (original emphasis, footnotes omitted)

266. With respect to these two perspectives, the Panel then provided its findings:

> As an *empirical* matter, we observe that Members, in regular practice, invariably express commitments in the ordinary customs duty column of their Schedules as *ad valorem* or specific duties, or combinations thereof. All "ordinary" customs duties may therefore be said to take the form of ad valorem or specific duties (or combinations thereof). As a *normative* matter, we observe that those scheduled duties always relate to either the value of the imported goods, in the case of *ad valorem* duties, or the volume of imported goods, in the case of specific duties. [245] (emphasis in the original, footnotes omitted)

267. The Panel conceded, however, that its own proposition is not valid in the reverse:

> We do not believe, however, that, conversely, the fact that a duty ultimately is labelled as an *ad valorem* or specific duty necessarily qualifies that duty as an ordinary customs duty. As a matter of fact, quite some "other duties or charges", registered as such in the "other duties and charges" column of Members' Schedules, appear to be expressed in specific or *ad valorem* terms. Put another way, a duty or charge can be expressed either in *ad valorem* or specific terms, but nevertheless not constitute an "ordinary" customs duty.[246]

268. Reasoning that the consideration of "exogenous" factors was also significant, the Panel concluded:

---

[244]Panel Report, para. 7.51.

[245]*Ibid*., para. 7.52.

[246]Panel Report, footnote 624 to para. 7.52.

> Such ordinary customs duties, however, do not appear to involve the consideration of any *other, exogenous, factors, such as, for instance, fluctuating world market prices*. We therefore consider that, for the purpose of Article II:1(b), first sentence, of GATT 1994 and Article 4.2 of the Agreement on Agriculture, an "ordinary" customs duty, that is, a customs duty *senso strictu*, is to be understood as referring to a customs duty which is *not applied on the basis of factors of an exogenous nature.*[247] (emphasis added)

269. In examining whether the duties resulting from Chile's price band system are "ordinary customs duties" in the light of the interpretation that it had developed for that purpose (that is, whether they are based on exogenous factors), the Panel found that such duties are "neither in the nature of *ad valorem* duties, nor specific duties, nor a combination thereof, in the sense that they are not just assessed on the transaction value of individual shipments, nor just on the volume of the goods"[248], but rather are assessed on the basis of "exogenous price factors i.e. the [difference between the] lower threshold of the PBS and the Reference Price."[249] For this reason, the Panel found that the *duties* resulting from Chile's price band system are not "ordinary customs duties".

270. On appeal, Chile challenges the Panel's interpretation that the term "ordinary customs duties" has a

account the rule of interpretation codified in Article 33(4) of the *Vienna Convention* whereby "when

279. This does not change our conclusion that Chile's price band system is a *measure* "similar" to "variable import levies" or "minimum import prices" within the meaning of Article 4.2 and footnote 1 of the *Agreement on Agriculture*. In other words, the fact that the *duties* that result from the application of Chile's price band system take the same form as "ordinary customs duties" does not imply that the underlying measure is consistent with Article 4.2 of the *Agreement on Agriculture*.

280. We find, therefore, that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*.

IX. Article II:1(b) of the GATT 1994

281. In addressing Argentina's claim under Article II:1(b) of the GATT 1994, the Panel recalled that it had found Chile's price band system to be a border measure "other than an ordinary customs duty", which is prohibited under Article 4.2 of the *Agreement on Agriculture*. Having also found that "ordinary customs duties" must have the same meaning in Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994, the Panel then concluded that duties resulting from Chile's price band system do not constitute "ordinary customs duties" and that, therefore, "their consistency with Article II:1(b) cannot be assessed under the first sentence of that provision."[255]

282. The Panel further observed that Chile did not record its price band system in the column of its Schedule for "other duties and charges" and stated, in this respect, that:

> If other duties or charges were not recorded but are nevertheless levied, they are inconsistent with the *second*

285. We have reversed the Panel's finding that the duties resulting from Chile's price band system constitute a violation of the *second* sentence of Article II:1(b) on the grounds that the Panel acted inconsistently with Article 11 of the DSU. We also note that the Panel made no finding on the *first* sentence of Article II:1(b), because, in the Panel's view, the consistency of the duties resulting from Chile's price band system could not be assessed under that provision.

(i) upholds the Panel's finding, in paragraphs 7.47 and 7.65 of the Panel Report, that Chile's price band system is a border measure that is similar to variable import levies and minimum import prices;

(ii) reverses the Panel's finding, in paragraphs 7.52 and 7.60 of the Panel Report, that an "ordinary customs duty" is to be understood as "referring to a customs duty which is not applied on the basis of factors of an exogenous nature";

(iii) upholds the Panel's finding, in paragraphs 7.102 and 8.1(a) of the Panel Report, that Chile's price band system is inconsistent with Article 4.2 of the

Signed in the original at Geneva this 9th day of September 2002 by:

_____

Georges Michel Abi-Saab
Presiding Member

_____ _____

James Bacchus
Member

John Lockhart
Member