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

Report of the Panel

The report of the Panel on Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 3 May 2002 pursuant to the Procedures for the

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I. INTRODUCTION

1.1 On 5 October 2000, Argentina requested consultations with Chile pursuant to Article XXIII:1 of the General Agreement on Trade and Tariffs 1994 (the "GATT 1994") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") – insofar as it is an elaboration of Article XXIII:1 of the GATT 1994 – as well as Article 14 of the Agreement on Safeguards and Article 19 of the Agreement on Agriculture. This request was related to the Chilean Price Band System (hereafter "the Chilean PBS") and the imposition by the Chilean authorities of provisional and definitive safeguard measures on imports of wheat, wheat flour and edible vegetable oils.[1]

1.2 The consultations took place on 21 November 2000, but the parties failed to reach a mutually satisfactory solution. On 19 January 2001, Argentina requested the Dispute Settlement Body (the "DSB") to establish a panel, pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU, Article 19 of the Agreement on Agriculture and Article 14 of the Agreement on Safeguards, in order to examine the Chilean PBS, its provisional and definitive safeguard measures on imports of wheat, wheat flour and edible vegetable oils, and the extension of those measures.[2]

1.3 At its meeting on 12 March 2001, the DSB established a panel in accordance with Article 6 of the DSU. At that meeting, the parties agreed that the Panel should have standard terms of reference. The terms of reference of the panel were, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Argentina in document WT/DS207/2, the matter referred to the DSB by Argentina in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[3]

1.4 On 7 May 2001, Argentina requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or

1.6 Australia, Brazil, Colombia, Costa Rica, the European Communities, Ecuador, El Salvador, Guatemala, Honduras, Japan, Nicaragua, Paraguay, the United States and Venezuela reserved their rights to participate in the panel proceedings as third parties.

1.7 The Panel met with the parties on 12-13 September and 21-22 November 2001. It met the third parties on 13 September 2001.

1.8 The Panel submitted its interim report to the parties on 21 February 2002. On 28 February 2002, Chile submitted comments and requested the revision and clarification of certain aspects of the interim report. Chile also requested the Panel to hold a further meeting with the parties, pursuant to Article 15 of the DSU and paragraph 16 of the Panel's Working Procedures. On 28 February 2002,

price index for Chile's foreign trade between the month to which th d the last month of the year prior to that of the determination of the or rebates, as certified by the Central Bank of Chile. They shall in descending order and up to 25 per cent of the highest values ar nt of the lowest values for wheat, oil-seed and edible vegetable oils ent of the highest values and up to 35 per cent of the lowest hall be removed. To the resulting extreme values there shall be a riffs and costs arising from the process of importation of the sai uties and rebates determined for wheat shall also apply to meslin In this last case, duties and rebates established for wheat shall be tor 1.56.

The prices to which these duties and rebates are a applicable to the goods in question on the day of their s ional Customs Administration shall notify these prices on nd may obtain information from other public bodies for that p

2.3 Chile submitted a copy of Law No. 19.772[6] of Law 18.525 at the second substantive meeting. Article 2 of Law No. 19.77 force on 19 November 2001, adds the following paragraph to Law

"The specific duties resulting from s Article, added to the *ad valorem* duty, shall not exceed the by Chile under the World Trade Organization for the goods e, each import transaction being considered individually and the goods concerned in the transaction in question as a basi at end, the National Customs Service shall adopt the necessa at the said limit is maintained."

2. Workings of the PBS

2.4 As a matter of practice, C are significantly below its bound rate. In the case of wheat, wheat flour, a he applied rate can be increased by means of duty increases provided throug S.[7] In each case, the PBS involves an upper and a lower threshold deter tain international prices. The bands for each product are determined on Presidential decree when a table is published containing reference price s. Chile also sets weekly "reference prices" based on prices in certain fore ease is triggered when the "reference price", lies below the lower thresh y increase is equivalent to the absolute difference between the lower th e "reference price". Conversely, a tariff rebate is triggered when the " the price that determines the upper threshold of the band. The rebate an the applied *ad valorem* rate) is equivalent to the absolute differenc ce" and the upper threshold of the band.

2.5 Article esees the application of specific duties expressed in US dollars per ta es, or both, as well as rebates on the amount payable as specific or

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while for oils, it is based on the price of crude soya bean oil, f.o.b. Illinois, on the Chicago Exchange.[8] As regards wheat flour, the price band for wheat is used to calculate the duty or rebate, which is then multiplied by a factor of 1.56 to obtain the specific duty or rebate for wheat flour.[9] These average prices are adjusted by the percentage variation in the external price index (IPE) drawn by the Central Bank of Chile. After the prices have been readjusted, they are listed in descending order, with up to 25 per cent of the highest and lowest values being eliminated for wheat and edible vegetable oils. Tariff and importation costs (such as freight, insurance, opening of a letter of credit, interest on credit, taxes on credit, customs agents' fees, unloading, transport to the plant and wastage costs) are added to those prices thus determined in order to fix the lower and upper thresholds on a c.i.f. basis.

2.6 When a shipment of a product subject to the PBS arrives at the border for importation into Chile, the customs authorities determine the total amount of applicable duties as follows. The first step is to apply the *ad valorem* duty. Afterwards, the so-called "reference price" applicable to that given shipment has to be identified. This reference price is not the transaction price but a price which is determined weekly (every Friday) by the Chilean authorities by using the lowest f.o.b. price for the product in question on foreign "markets of concern to Chile".[10] In the case of edible oils, the weekly reference price corresponds to the lowest f.o.b. price in force on the markets of concern to Chile for any of the types of covered edible vegetable oils. Unlike the prices used for the composition of the PBS, the reference prices are not subject to adjustment for "usual import costs".[11] The applicable reference price for a particular shipment is determined in reference to the date of the bill of lading. The reference price can be consulted by the public at the offices of the Chilean customs authorities.

2.7 Once the customs authorities have identified the reference price applicable to that given shipment, they proceed to levy the duties. These will differ according to the position of the reference price as regards the upper and lower thresholds of the price band. If the reference price falls below the lower threshold, the customs authorities will levy an 8 per cent *ad valorem* duty (MFN duty), plus an additional specific duty. This additional specific duty will equal the difference between the reference price and the lower threshold. If the reference price is between the lower and upper thresholds, the customs authorities will only apply the 8 per cent *ad valorem* duty. If the reference price is higher than the upper threshold, the customs authorities will grant a rebate on the 8 per cent *ad valorem*

2. Provisional and definitive safeguard measures

2.9 On 23 August 1999, the Ministry of Agriculture of Chile filed a request before the National Commission in charge of investigating distortions in the prices of imported goods (hereinafter "the Commission") to initiate *ex officio* a safeguards investigation on products subject to the PBS, that is, wheat, wheat flour, sugar and edible vegetable oils. The Chilean Ministry of Agriculture also requested the Commission to recommend the imposition of provisional safeguard measures. At its Session No. 181 held on 9 September 1999, the Commission decided to initiate a safeguards investigation against imports of wheat, wheat flour, sugar and edible vegetable oils.[15] Imports of sugar, however, are not part of the present dispute. The decision to initiate is contained in Minutes of Session No. 181 of the Commission. The notice of initiation of the investigation was published in the Official Journal of the Republic of Chile on 29 September 1999 and notified to the WTO on 25 October 1999.[16] Accordingly, the investigation was initiated on 30 September 1999.

2.10 At its Session No. 185 held on 22 October 1999, the Commission decided to recommend to the President of the Republic the imposition of provisional safeguard measures. The Commission's recommendations are contained in its Minutes of Session No. 185. Upon the recommendation of the Commission, the President through the Ministry of Finance imposed provisional safeguard measures on imports of wheat, wheat flour and edible vegetable oils by Exempt Decree No. 339 of 26 November 1999.[17] Chile made an advance notification of these measures on 2 November 1999.[18] The provisional safeguard measure consisted of an *ad valorem* tariff surcharge, corresponding to the difference between the general tariff added to the *ad valorem* equivalent of the specific duty determined by the PBS and the bound tariff in the WTO for these products.

2.11 At its Session No. 189 on 25 November 1999, the Commission held a public hearing in order to receive the views of the interested parties in the safeguards investigation. The arguments of the parties are annexed to its Minutes of Session No. 189. At its Session No. 193 held on 7 January 2000, the Commission recommended the imposition of definitive safeguard measures. The recommendations of the Commission are contained in Minutes of Session No. 193. On 18 January 2000, Chile notified the WTO of the finding by the Commission of threat of injury to its domestic industry for products subject to the Chilean price band system, and of that Commission's recommendation to the President of Chile to impose definitive safeguard measures.[19]

2.12 On 22 January 2000, Exempt Decree No. 9 of the Ministry of Finance of Chile was published in the Official Journal, imposing definitive safeguard measures for one year on imports of wheat, wheat flour and edible vegetable oils. As in the case of the provisional measures, the definitive measures consisted, for each import transaction, of an "*ad valorem* tariff surcharge, corresponding to the difference between the general tariff added to the *ad valorem* equivalent of the specific duty

[15] The products concerned by the investigation procedure and the application of safeguard measures are: wheat, classified under tariff heading 1001.9000; wheat flour, classified under tariff heading 1101.0000; sugar, classified under tariff headings 1701.1100; 1701.1200; 1700.9100 and 1701.9900; and edible vegetable oils, classified under tariff headings 1507.1000; 1507.9000; 1508.1000; 1508.9000; 1509.1000; 1509.9000; 1510.0000; 1511.1000; 1511.9000; 1512.1110; 1512.1120; 1512.1910; 1512.1920; 1512.2100; 1512.2900; 1513.1100; 1513.1900; 1513.2100; 1513.2900; 1514.1000; 1514.9000; 1515.2100; 1515.2900; 1515.5000 and 1515.9000.

[16] Document G/SG/N/6/CHL/2 of 2 November 1999.

[17] Exempt Decree No. 339 of 19 November 1999, published in the Official Journal of the Republic of Chile, 26 November 1999.

[18] Document G/SG/N/7/CHL/2 of 10 November 1999.

[19] Document G/SG/N/8/CHL/1 of 7 February 2000.

determined by the mechanism set out in Article 12 of Law 18.525 [i.e., the PBS] - and its relevant annual implementing decrees - and the level bound in the WTO for these products".[20]

3. Extension of the safeguard measures

2.13 By Order No. 792 of 10 October 2000, the Chilean Ministry of Agriculture requested the Commission to consider an extension of the definitive safeguard measures imposed by Exempt Decree No. 9 of the Ministry of Finance of Chile on imports of wheat, wheat flour and edible vegetable oils. At its Session No. 222 held on 3 November 2000, the Commission decided to initiate a procedure for the purpose of deciding whether to extend the definitive safeguard measures. The notice of initiation was published on 4 November 2000. At its Session No. 223 on 13 November 2000, the Commission held a public hearing. The details of the hearing are contained in its Minutes of Session No. 223.

2.14 At its Session No. 224 held on 17 November 2000, the Commission decided to recommend the extension of the definitive safeguard measures established by Exempt Decree No. 9 of the Ministry of Finance. The decision of the Commission is contained in Minutes of Session No. 224. Further to this decision, the extension of the safeguard measures was imposed by Exempt Decree No. 349 of the Ministry of Finance of 25 November 2000.[21] This Decree provides for an extension of the safeguard measures, as described in paragraph 2.12 above, for one year from the date of their expiry. In practice, they were extended until 26 November 2001. Chile notified the WTO of the extension of the measure on 11 December 2000.[22] [23]

2.15 The extension measures for wheat and wheat flour were withdrawn by Exempt Decree No. 244 of the Ministry of Finance published on 27 July 2001.[24] The termination of these measures was notified to the WTO on 9 August 2001.[25]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 For the reasons put forward, **Argentina** requests that the Panel:

- ? conclude that the Chilean PBS is inconsistent with Article II.1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;
- ? find that the safeguards investigation and the safeguard measures are inconsistent with Article XIX of the GATT 1994 and Articles 2, 3, 4, 5, 6 and 12 of the Agreement on Safeguards; and
- ? rule on all of the claims made so as to avoid any unnecessary future proceedings if the findings are eventually overturned, bearing in mind that the Appellate Body exercises procedural economy.

3.2 In light of facts and law put forward, **Chile** requests that the Panel:

- ? conclude that the PBS is in compliance with Article

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? find that: (i) both the provisional and definitive measures that are the subject of

invoking this special provision expired on 31 December 2000; (ii) even if the provision were still valid, it would not apply, because Chile's Schedule does not designate wheat, wheat flour and edible vegetable oils with the symbol "SSG" (special safeguard) as required in Article 5.1.

4.4 **Chile** submits that Argentina has totally failed to comply with its obligation to prove that the Chilean PBS constitutes a variable levy or is otherwise inconsistent with Article 4.2 of the Agreement on Agriculture.[28]

2. Substantive arguments

(a) Infringement of Article II:1(b) of the GATT 1994

4.5 **Argentina** makes two claims with respect to Article II:1(b) of the GATT 1994:

4.6 The PBS as such violates Article II:1(b) of the GATT 1994 since its application has led Chile in specific cases to collect duties in excess of the rates bound in its National Schedule No. VII

4.7 The PBS also violates Article II:1(b) of the GATT 1994 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.[29]

(i) Whether the application of the PBS has led to customs duties higher than bound tariffs

4.8 **Argentina** submits that the violation by Chile of its obligations under Article II:1(b) of the GATT 1994 has been recognized by Chile and proven in practice. In Argentina's view, whilst the possibility to exceed the bound tariff is sufficient, in itself, to establish violation of Article II:1(b), Chile has in fact imposed tariffs exceeding the bound rate since 1998 and has acknowledged doing so on several instances.[30] In this regard, Argentina refers to the meeting of the Committee on Agriculture of 24-25 June 1999 where the representative of Chile stated that "in some cases, the applied tariff was greater than the bound commitment."[31] [32] According to Argentina, this statement constitutes an acknowledgement that Chile has violated its obligations under Article II:1(b) of the GATT 1994.[33] Argentina also refers to statements by Chile[34] in the Dispute Settlement Body, to various documents relating to its safeguards investigation[35] as well as Chile's First Written Submission[36] Additionally, Argentina states that Chile has been systematically violating its WTO commitments since 1998.[37] Argentina claims that this repeated, successive and consistent acknowledgement by Chile of its own violation, in particular during the proceedings before this Panel, is more than sufficient for this Panel to find that the PBS is inconsistent with Article II.1(b) of the GATT 1994.[38] In particular, Argentina contends that, contrary to what Chile claims[39], Chile imposed on Argentina effective *ad valorem* customs duties of up to 64.41 per cent for oils and 60.25 per cent for wheat flour, in violation of

[28] *See* Chile's First Written Submission, para. 43.
[29] *See* Argentina's Second Oral Statement, para. 4.
[30] *See* Argentina's First Written Submission, para. 46.
[31] Argentina quotes a Note by the Secretariat. Summary Report of the Meeting held on 24-25 June 1999, G/AG/R/19 (25 August 1999), para. 9.
[32] *See* Argentina's First Written Submission, para. 38.
[33] *See* Argentina's First Written Submission, para. 39.
[34] *See* Argentina's First Written Submission, paras. 39-42.
[35] Argentina refers to Order 850 of the Ministry of Agriculture of Chile and Order 662 of the same Ministry.
[36] Argentina refers to paras. 24, 25 and 26 of Chile's First Written Submission.
[37] *See* Argentina's First Written Submission, para. 5.
[38] *See* Argentina's First Oral Statement, para. 5.
[39] Argentina refers to para. 23 *in fine* of Chile's First Written Submission.

Article II.1(b), as confirmed by the actual documentation processed by Chilean customs.[40] Argentina

duty applied in accordance with the PBS.[46] Furthermore, Argentina contends that the WTO obligation contained in Article II:1(b) of the GATT is violated not only when, in a specific instance, a higher rate than the bound tariff is in fact applied, but also when the challenged measure is structured and designed in such a way as to make it possible for situations to arise in which the bound tariff is exceeded.[47] In Argentina's view, the PBS, by its design, structure and mode of application, has the capacity to cause Chile inevitably to violate its tariff binding.[48] [49] Argentina states that, in cases in which the customs reference price for the day of shipment is lower than a given level, the tariffs effectively applied by Chile exceed the bound rate of 31.5 per cent.[50] Argentina presents a

can violate the provisions of the GATT and the WTO.[58] Argentina asserts that, regarding what Chile stated in the DSB, it is important to point out that unilateral statements by Members in the context of a dispute settlement proceeding have legal effects. In support of this statement, Argentina cites the case *United States – Sections 301-310 of the Trade Act of 1974*.[59]

Submission, presented in graphic form in Annex ARG-12, shows how the application of a reference price – set by the implementing authority at its own discretion – in certain conditions (drop in international prices) necessarily leads, in relation to the transaction price, to the bound tariff being exceeded. Argentina claims that exceeding the bound tariff is not merely a theoretical possibility, but a practical fact. Argentina reminds that this is illustrated in Annexes ARG-14 and 15, and was recognized by Chile itself. It further affirms that it could not be otherwise, since the system does not have any safety mechanism against such violation (Article II.1(b)).[67]

4.17 **Chile** clarifies that the price bands operate in accordance with the law. Chile contends that the WTO Agreements, including Schedule VII, were approved by the Chilean Congress as a Law and with the hierarchy of an international treaty. Therefore, Chile explains, the WTO Agreements

justification, the suggestion that this was the result of a deliberate decision implies a further recognition that the Chilean Government maintains legislation that is inconsistent with its WTO obligations.[75] Argentina submits that the continuation of the violation constitutes a flagrant breach by Chile of the principle of *pacta sunt servanda* and of its international commitments and that Chile is not meeting its WTO obligations in good faith.[76] Whatever the case, Argentina submits, the argument is irrelevant, since Chile has no way of preventing the system, by its design and structure, from "automatically" violating Article II.1(b) of the GATT 1994, regardless of whether it was deliberate or not.[77] In Argentina's view, the working of the PBS affects the predictability of the tariff concessions negotiated by Chile during the Uruguay Round and has been recognized as inconsistent with Article II:1(b) in various GATT/WTO precedents.[78]

4.20 According to **Chile**, while the PBS formula may appear complex, it is fully transparent and predictable. Chile submits that, contrary to Argentina's claim[79], there are no discretionary elements in the calculation to enable manipulation of the duty or rebate by officials. Chile argues that, contrary to assertions in some submissions, its PBS in no way depends on or uses domestic prices, or transaction prices, or target prices of any kind, to compute the duty or rebate. The objective of the system is to moderate the effect on Chile's market of short-term violent fluctuations in the international prices of these commodities. For this purpose, Chile claims, the band follows over time the trend in international prices, and uses duties or rebates.[80] In its view, this series of monthly price averages (5 years means 60 monthly prices) is ranked, and the highest 25 per cent of the monthly prices is disregarded, as well as the lowest 25 per cent of monthly prices. According to Chile, this means that, in the descending list of average prices, the 16th lowest monthly price and the 44th lowest monthly price constitute the f.o.b. price for the ceiling and the floor, respectively. Chile explains that these two f.o.b. prices are adjusted to present the band in terms of import cost. Such an adjustment considers fixed and variable costs normally paid in import transactions, such as transportation, unloading, customs duties, cost of opening a letter of credit, interests, and *ad valorem* rate. For simplicity, Chile explains, the annual decree that reports the band for each good contains a table for a range of f.o.b. prices and their corresponding rebate or duty when they fall outside the band. According to Chile, for the actual calculation of the specific duty or rebate, the National Customs Authority reports on a weekly basis the lowest price for the product quoted in a major commodity market relevant for Chile. Chile explains that this price is the f.o.b. price to be used in the table to determine the specific duty or rebate for all transactions which shipment occurred in the same week. Chile maintains that when the exporter decides to ship, he knows the duty or rebate. It is Chile's opinion that the trends in international prices are necessarily transmitted to the band, though smoothed over time. In this regard, Chile emphasizes that the band is determined without regard to domestic or target prices, and without regard to the actual transaction price, except in calculating the *ad valorem* (8 per cent) duty.[81]

4.21 **Argentina** submits that Chile not only has not refuted the formal demonstration submitted by Argentina of the potential violation of the binding by the PBS or the arguments supporting that demonstration but, that, on the contrary, it acknowledged this inconsistency of the PBS with Article II:1(b) of the GATT 1994. Argentina refers to Chile's replies to the Panel where, allegedly, Chile recognizes, in response to specific questions, that the mode of calculation of the amount of the surcharge applied by customs on top of the regular tariff of 8 per cent potentially leads to the collection of an *ad valorem* equivalent in excess of the 31.5 per cent binding.[82] According to

[75] *See* Argentina's First Oral Statement, para. 13.
[76] *See* Argentina's Rebuttal, paras. 29-30.
[77] *See* Argentina's First Oral Statement, para. 14.
[78] *See* Argentina's First Written Submission, para. 31.
[79] Chile refers to para. 16 of Argentina's First Oral Statement.
[80] *See* Chile's First Oral Statement, paras. 10-11.
[81] *See* Chile's First Oral Statement, paras. 12-18.
[82] *See* Argentina's Rebuttal, para. 28 which refers to Chile's response to question 10(k) of the Panel.

Argentina, it is therefore difficult to understand how Chile can argue that when the WTO obligations entered into force it was unaware that the PBS would cause it to exceed its tariff binding, given the

products. As an example, Argentina refers to the lifting by Chile of its safeguards on wheat and wheat flour while maintaining its PBS which, by its design and structure, potentially violates Chile's bound tariff. Argentina argues that, if one was to follow Chile's argument, the safeguards would have to be maintained as long as the PBS was in force, regardless of the requirements laid down in the Agreement on Safeguards. Argentina further submits that, in case there should still be any doubts, Chile acknowledged before the Committee on Safeguards itself that the price bands as such were not safeguards.[89] [90]

4.26 **Argentina** submits that safeguard measures are emergency measures, which are applied only after each and every one of the requirements laid down in Article XIX of the GATT 1994 and in the Agreement on Safeguards has been met. Argentina contends that they are not measures that can be

Agriculture.[96] Argentina is therefore of the view that the maintenance by Chile after the Uruguay Round of its mandatory legislation imposing variable specific duties is inconsistent with its obligations under Article 4.2 of the Agreement on Agriculture.[97]

4.30 **Argentina** submits that even if the PBS were not considered a variable levy, it is a similar measure which should have been tariffied by Chile. Article 4.2 of the Agreement on Agriculture expressly prohibits the maintenance of "measures of the kind which have been required to be converted into ordinary customs duties." Argentina argues that it is precisely by reading the words "shall not maintain" and "of the kind" together with the non-exhaustive list in the footnote that one arrives at the concept of similar border measures that are not ordinary customs duties. Argentina explains that this is what qualifies the PBS as something which should have been tariffied in the Uruguay Round, which was not tariffied, which Chile continues to maintain, and which it justifies by an interpretation of Article 4.2 and its footnote that reduces the terms of the text to inutility (contrary to the principle of effectiveness in treaty interpretation). Ultimately, Argentina argues, both the text of the Article and the wording of the footnote aim to cover a whole universe of measures which may not be identified and which do not constitute ordinary customs duties.[98]

4.31 **Chile** considers that Argentina's argument that the Chilean PBS was and is indisputably a variable levy, which not only might have been tariffied but in fact had to be tariffied[99], is absurd and does not correspond to the normal practice of negotiations among Members of the WTO. In this regard, Chile argues that if there had been an intention to prohibit the Chilean PBS, neither Argentina nor any other Member of the WTO put forward this argument during the negotiations of the Agreement on Agriculture.[100] Chile further claims that Argentina's interpretation of Chile's obligations under the Agreement on Agriculture differs totally from the interpretation which Argentina itself has used in its actions and the interpretation of other Members of the WTO when negotiating tariff schedules under the Agreement on Agriculture and applying it. It considers that, for Argentina's argument to be valid, Argentina would have to show not only that the Chilean price band is a "variable levy" or "similar border measure", within the meaning of footnote 1, but also that Article 4.2 prohibits such measures. Chile alleges that Argentina's argument falls short on both points.[101] In Chile's view, reading Article 4.2, including its footnotes, in its context and in light of its object and purpose, it is clear that Article 4.2 does not prohibit the Chilean PBS. Indeed, Chile explains, Argentina and its supporters under Article 4.2 rely in their interpretation not on the text that was negotiated and implemented, but rather on the agreement that those countries appear now to wish they had negotiated.[102]

4.32 **Chile** submits that Article 4.2 is oddly phrased, and the footnote uses terms such as "variable import levy" or "non-tariff measures maintained by state enterprises" that are not defined and whose contours are not immediately obvious. The text refers to "measures which have been required to be converted into ordinary customs duties". In Chile's view, that text would suggest that elsewhere in the WTO Agreements there is or was some provision that requires the conversion and explains what has to be converted, but there is no such provision elsewhere. However, Chile contends, the agreed Uruguay Roun 75 230.25 TD -t8tcontends, the 0.1528 lsewhe3.25 24aglsers to "mearetat2ot corresporeemet imme

"kind which ha[s] been required to be converted into ordinary customs duties." Chile notes that price band systems were not among the measures that in the negotiations were required to be converted into ordinary customs duties. Chile indicates that, while the European Communities did convert its variable import levies into ordinary customs duties in the Uruguay Round negotiations, the EC's conversion – and the acceptance of that conversion by other Members – put in place a system that clearly still has a duty that varies by a formula. Although the European Communities system is not at issue, Chile contends, that system and its conversion was a central issue in the Uruguay Round negotiations, and it is relevant in assessing the meaning of the less-than-crystal-clear words of Article 4.2 that Members did not object to that system.[103]

4.33 **Chile** submits that, even if the contested law was considered a variable levy or similar border measure, *quod non*, it is not inconsistent with Article 4.2 of the Agreement on Agriculture. In Chile's view, Article 4.2 prohibits "any measures of the kind which have been required to converted into ordinary customs duties." Chile's price band mechanism is not a measure of this type, and Chile is not barred from maintaining this measure.[104] Chile argues that Article 4.2 does not prohibit measures that do not have to be tariffied.[105] In reference to the above tariffication argument by Argentina[106], Chile submits that the obligations in Article 4.2 relate only to non-tariff barriers and that this is clearly stated in footnote 1, which specifically excludes ordinary customs duties. According to Chile, the PBS only covers the payment of customs duties. Moreover, Chile argues, it was not required to eliminate its PBS nor to replace it by a bound duty system during the Uruguay Round. Chile claims that it has maintained its PBS in an open and transparent fashion before, during and after the Uruguay Round negotiations. Chile argues that, unlike the variable levies in the EC, which were not bound and had to be replaced by bound duties, the Chilean duties were bound at 35 per cent for the products affected by the PBS, even before the Uruguay Round, and were quite openly bound at lower levels as part of the Round after finalization of the Agreement on Agriculture. Hence, in Chile's view, it was quite clear for the other Members at that time that Chile was neither "tariffying" its PBS, nor eliminating or replacing it. On these grounds, Chile considers that it is inexplicable why Argentina, more than six years after the entry into force of the Uruguay Round Agreements, decided that the Chilean PBS had suddenly become a variable levy that Chile should have eliminated when the WTO Agreements entered into force.[107] [108]

4.34 **Chile** considers that Article 4.2 is oddly phrased, in that it appears to be cross-referencing some obligation or other agreement in which measures had "been required" to be converted from measures of one type to "ordinary duties". The odd syntax of Article 4.2, Chile claims, must be given meaning. Chile notes that it would have been very easy, if negotiators had so agreed, to write a prohibition of all non-tariff barriers. According to Chile, however, that is manifestly not what was done, notwithstanding the current arguments of Argentina and some third country participants. Indeed, to Chile's regret in many respects, there is no such obligation or simple prohibition elsewhere in the Agreement on Agriculture. Chile contends that the only place in the Agreement in which tariffication is mentioned is in the agreed tariff schedules of Members and in the Annex 5 reference to countries allowed to engage in delayed tariffication.[109]

4.35 **Chile** claims that Argentina interprets Article 4.2 as containing a total prohibition against non-tariff barriers, including those listed in footnote 1 and that such an interpretation is based on unsustainable arguments, is excessively broad and is not justified in the light of the principles of

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[103] *See* Chile's Rebuttal, paras. 28-29.
[104] *See* Chile's First Oral Statement, para. 50.
[105] *See* Chile's First Written Submission, paras. 30-31.
[106] Chile refers to para. 49 of Argentina's First Written Submission.
[107] *See* Chile's First Written Submission, paras. 33-35.
[108] See para. 4.97 below.
[109] *See* Chile's First Oral Statement, paras. 51-52.

interpretation of treaties in the Vienna Convention on the Law of Treaties (hereafter "the Vienna Convention"). In this regard, Chile refers to Article 31 of the Vienna Convention and the principle of effectiveness, as having been used by the Appellate Body. In this regard, Chile submits that Argentina disregards the usual meaning of the terms of Article 4.2 in its context and effectively ignores the qualifier that the measures that must not be maintained or reverted to are "measures of the kind which

contends that Article 4.2 of the Agreement on Agriculture would be without effectiveness if one accepts Chile's interpretation that the PBS did not need to be tariffied because Argentina did not challenge "the system and its operation during the Uruguay Round negotiations".[124] According to Argentina, applying the rule of effectiveness to the interpretation of Article 4.2 of the Agreement on Agriculture[125] means ensuring that non-tariff measures - such as the Chilean price band system - cannot be maintained or reverted to after the entry into force of the Agreement. Consequently, Argentina argues, the only possible approach - assuming an analysis based on the text, context, object and purpose of the Agreement on Agriculture - is to analyse each case individually in terms of the nature and the economic effects of the system as compared to the scenario of ordinary customs duties, in order to determine which measures are covered by footnote 1 to Article 4.2 of the Agreement on Agriculture. Argentina submits that if the analysis of the nature and effects were not the right approach, obligations such as "[M]embers shall not maintain, resort to or revert to …" and the phrase in the footnote "… and similar border measures other than ordinary customs duties …" would be pointless.[126]

4.42 As regards Chile's argument whereby the PBS is not a variable levy, **Argentina** submits that anything that does not constitute an *ad valorem* tariff, a specific duty or a combination of the two, cannot under any circumstances qualify as an ordinary customs duty. Consequently, in Argentina's view, in accordance with the Agreement on Agriculture, if a measure does not come under one of that Agreement's exceptions, it is inconsistent. Argentina explains that the wording of Article 4.2 reflects the scope and complexity of the entire range of distortionary measures that Members must dismantle, refrain from reverting to in the future or refrain from maintaining where they are inconsistent with the new obligations negotiated under the Uruguay Round. The diversity of non-tariff measures to be dismantled and the possibility of some of them not being dismantled following the conclusion of the Uruguay Round is expressed in the word "shall not maintain". Argentina argues that, had there not been the possibility that some of the measures "which have been required to be converted into ordinary customs duties" would remain in force after the Uruguay Round, the text would merely have stated "… shall not resort to, or revert to". In Argentina's view, the words "shall not maintain" only make sense where there is a possibility that a measure could remain in force. Argentina further argues that, at the same time, the fact that Chile has bound tariffs for certain products such as wheat, wheat flour and pure vegetable oils in no way means that the PBS does not have to be tariffied, i.e. converted into an ordinary customs duty, since the Chilean bound tariff was 35 per cent[127] before the Uruguay Round, and was brought down to 31.5 per cent for those products. Neither Chile's schedule of bindings prior to the Uruguay Round – National Schedule No. VII – nor its schedule resulting from the Uruguay Round, records the variable levy that Chile has applied and continues to apply. This is contrary to the clear requirement in Article 4.2, which prohibits the maintenance of "measures of the kind" which have been required to be converted into ordinary customs duties.[128]

4.43 **Chile** claims that there are logical economic policy reasons why the price band system or other systems with "duties that vary" were not prohibited under Article 4.2. Chile submits that the b70" which 710with "dnd. The drj T-12.75 GATT, Tj 0 -12d under th Tc uti Chp TDc.25 -

price band system in which the applied duty is usually below the bound rate, and can even be zero. Chile refers to Argentina's argument that the Chilean PBS has additional restrictive effects other than the duties because of the system's alleged complexity and lack of transparency and predictability. Chile notes that its system for varying the duties applied within the bound cap is still less restrictive of trade than if Chile applied its duties at the bound rate. Chile contends that there is no requirement that a duty system be simple and there is no prohibition on variation, so long as the bound level is respected.[129]

4.44 **Chile** submits that it is not arguing that the only measures prohibited by Article 4.2 are those that were in fact converted into ordinary customs duties. Chile contends that the fact that PBS duties were not converted and were not requested to be converted is another supporting indication that the Chilean PBS is not a measure of the kind that had been required to be. Chile submits that, where the scope of a term is in doubt, as is the case with the term "variable import levies", it is particularly important to examine context and negotiating history. Chile also notes that it had no incentive to maintain a measure that could be converted, because the conversion process included the right to raise bound duties to account for the price effects of those non-tariff barriers that had to be converted. [130]

4.45 **Chile** submits that, in the event that the Panel had any doubts over the correct interpretation of Article 4.2, the legal principle *in dubio mitius*, which the Appellate Body has endorsed, would suggest that vagueness and ambiguity should not be resolved against Chile, but rather against the complaining party that seeks to invalidate Chile's long standing system. Chile submits that the principle of *in dubio mitius* holds that "[i]f the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."[131] Chile considers that its PBS is consistent with Article 4.2 by any reasonable interpretation, applying the rules of interpretation of the Vienna Convention, but this interpretive principle lends further force to that conclusion. [132]

4.46 **Argentina** contends that Chile erroneously invokes the principle of *in dubio mitius* [133] 6.2 are of

the last five years. Chile's domestic price plays no role in this formula, nor does the actual transaction price of the product make any difference. Chile concludes that price competition is possible, not only between products of different countries imported into Chile, but also between imports and Chilean products.[146]

4.50 In response to the above argument by Argentina[147], **Chile** argues that the tariff does vary according to the date of export, but does not vary according to the shipment (for example, even if the transaction prices are different, two shipments exported on the same date will have to pay the same import duty in Chile). Chile further argues that nowhere is it stated that a tariff measure becomes a "variable levy" simply because the tariff level varies frequently.[148] Chile also indicates that Argentina omitted to mention certain critical aspects of the texts in question and their application.[149] As regards Argentina's argument that the WTO itself has recognized that the PBS is a variable levy,[150] Chile claims that the referred to report by the Secretariat for the Trade Policy Review Mechanism (TPRM) only contains the opinions and statements of the Secretariat, not those of the WTO, and reminds Argentina that the opinions in the TPRM may not be used in dispute settlement procedures. In addition, Chile indicates that, in the statement quoted by Argentina, the Secretariat does not assert that the Chilean PBS is a variable levy but that it "works as" a variable levy, because the levy varies according to the import price.[151]

4.51 In response to Chile's argument that domestic prices are not used, **Argentina** argues that nonetheless it is not within the WTO's competence *per se* to provide for mechanisms which regulate or moderate fluctuations in international prices.[152] On the contrary, Argentina considers that the primary objective of the WTO is confined – as regards access mechanisms – to the promotion of transparent, non-distortionary, predictable systems that contribute to the liberalization of trade. And indeed, the PBS is the very type of mechanism which, since it lacks transparency and is distortionary and unpredictable, conflicts with the Uruguay Round commitment not to maintain "measures of the kind". In Argentina's view, all systems of variable levies have similar characteristics and a similar objective, i.e. to preserve the domestic market, to a greater or lesser extent, from the evolution of the international market. As instruments, these mechanisms provide a minimum threshold of protection which in some instances, as in the case of the bands, is virtually impassable in situations where prices drop. Argentina argues that, here, it is of little importance whether the threshold parameters are fixed on the basis of a domestic target price or on the basis of representative averages from international markets over the past years. According to Argentina, what is important is to ensure that these mechanisms have the same transparency, predictability and consequent effective access level as "ordinary customs duties" would have provided".[153]

4.52 **Chile** submits that imports can in fact enter the Chilean market at prices below the price band floor. According to Chile, there are two situations in which this can happen: (i) Since the specific duties are calculated in the middle of the year and are applied during the following year, there are import cost components that can change during that period. For example, Chile explains, international freight costs for the products may decrease, sometimes rather sharply. Chile further alleges that, in some cases, specific tariff headings are shipped at special prices, using ships that are heading for Chile in any case, with or without cargo. Chile explains that, -0.1704 12 TD -06otionalileperations carried out in better conditions than those foreseen when establishing the weekly reference price, which means

[146] *See* Chile's First Oral Statement, para. 43.
[147] Chile refers to para. 56 of Argentina's First Written Submission.
[148] *See* Chile's First Written Submission, para. 40.
[149] *See* Chile's First Written Submission, para. 32.
[150] Chile refers to para. 55 of Argentina's First Written Submission.
[151] *See* Chile's First Written Submission, para. 39. *See* also para. 41 of Chile's First Oral Statement.
[152] Argentina refers to para. 36 of Chile's First Oral Statement.
[153] *See* Argentina's Rebuttal, paras. 60-62 and Annexes ARG-41 and ARG-42, and Argentina's Second Oral Statement, para. 19 and footnote 14.

that the import cost is also below the estimated price band floor. (ii) The effective import price may possibly be lower than the reference price determined for the date of a particular import and, consequently, the product may be charged a lower specific duty upon entry, remaining below the price band floor.[154]

4.53 **Chile** considers that, going beyond the incontrovertible fact that Chile applies a price band, it is essential to understand that the PBS imposes a duty that varies only according to the date on which the export took place, in accordance with the prevailing price on international markets, and in relation to the levels of the same price over the previous five years. Chile claims that the duty does not vary according to the amount of the transaction or the corresponding invoice and does not change either according to the domestic market price. Consequently, it is Chile's view that the PBS does not in any way resemble a variable levy such as those imposed by the old European Communities system for several years prior to the entry into force of the Agreement on Agriculture; it is not similar either to minimum import price schemes, which occasionally utilize duties in order to force a rise in low import prices until they are comparable to the minimum domestic landed price fixed. Chile contends that the differences between the PBS and the old European Communities system are more than semantic. According to Chile, the PBS does not act as a non-tariff barrier to prevent the import of goods whose price is lower than the price under the band nor to force an increase in this price until it reaches a certain domestic level.[155]

4.54 **Argentina** claims that Chile's submission makes a partial and erroneous interpretation of the definition of a variable levy[156] provided in Argentina's submission.[157] Argentina asserts that the definition in fact covers various elements that could be examined separately and that must be interpreted as a single whole. The definition begins by recognizing that a variable levy implies "complex systems of import surcharges". Argentina argues that, in the specific case of the Chilean PBS, two elements of the definition apply: complexity, and the imposition of variable levies in addition to the general tariff. Moreover, any PBS presupposes the application of a levy in addition to the general tariff (i.e. a surcharge) which varies, not with respect to the transaction value but in accordance with some type of mathematical relationship between the reference price fixed arbitrarily and some threshold price or parameter. These elements alone are evidence enough of the complexity of the system. Argentina explains that the third element of the definition, namely ensuring "that the price of a product on the domestic market remains unchanged", needs to be interpreted intelligently and in accordance with the text of the definition (and the ultimate purpose of the provisions of the Agreement on Agriculture). Specifically, in a low international prices scenario, the distortionary effect of the Chilean PBS is reflected, in particular, in the artificial change in the competition situation on the domestic market owing to the fact that once the reference price of the system has been activated, the domestic market becomes, to a large extent, impervious to price signals from the international market.[158]

4.55 **Chile** submits that, if the term "variable levy" had been intended to have the broad meaning urged by Argentina and certain third parties, it is impossible to explain why Argentina would maintain a sugar import system that is not distinguishable in any relevant way from the Chilean system that Argentina is challenging. Further, Chile argues, it is impossible to reconcile this attempt to stretch the meaning of "variable levy" with the position adopted by WTO Members, including Argentina, Brazil and the United States, in the Uruguay Round negotiations after the text on the Agreement on Agriculture had been agreed. Recalling that Chile's system has been openly and transparently in effect since 1983, Chile adds, it is inexplicable why WTO Members raised no objection to the Chilean PBS

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[154] *See* Chile's response to question 46 (CHL) of the Panel.
[155] *See* Chile's First Written Submission, paras. 37-38. *See* also para. 42 of Chile's First Oral Statement.
[156] See para. 4.48 above.
[157] Argentina refers to para. 37 of Chile's First Written Submission.
[158] *See* Argentina's First Oral Statement, paras. 29-33.

and similar PBSs of other countries without demanding tariffication or change. Chile explains that Members accepted the system of the European Communities which clearly continues to levy duties that vary with the difference between European Communities and world prices. Chile contends that it is not arguing that a failure to challenge an illegal measure at the first opportunity means that a WTO Member forfeits the right ever to challenge that measure. However, Chile does contend that – in interpreting a term of art like "variable levy" that is not defined in the Agreement, –it is highly relevant to examine the conduct of the negotiators at the time of the negotiations and in the implementation of those negotiations. Chile submits that this context uniformly supports the view that the Chilean PBS is not a variable levy within the meaning of footnote 1.[159]

4.56 **Chile** contests Argentina's suggestion that an element of the test to determine whether a given import duty is a forbidden variable levy might be the frequency or degree of changes in the tariff and the complexity of the system.[160] Chile contends that, aside from being vague and even illogical, none of Argentina's suggested rules, definitions and tests is set out in the Agreement on Agriculture or any other WTO agreement, and none of these suggestions has any legal status. Chile submits that nothing in the WTO prescribes how frequently an applied tariff can be changed or on what basis, so long as the binding is respected. Chile considers that its system in fact is transparent, and changes in the duty from week to week are normally modest, based on a formula utilizzing objective criteria. However, Chile adds, neither Article 4.2 nor its footnote requires that Chile's system meet these tests.[161]

4.57 **Chile** considers that an analysis of the relevant provisions of the WTO according to the principles laid down in the Vienna Convention shows that the Chilean PBS does not constitute a variable levy nor any other form of non-tariff barrier within the meaning of Article 4.2.[162] Chile alleges that its PBS does not come within the scope of footnote 1 to Article 4.2 of the Agreement on Agriculture. In Chile's view, this is obvious because footnote 1 does not include PBS. This omission, in Chile's view, cannot be attributed to the fact that the concept of price bands was not understood at the time of the negotiations on the Agreement on Agriculture since, on the contrary, price bands were widely used in Latin America in 1994 and continue to be used today. Chile claims that the negotiators in the WTO, Argentina in particular, undoubtedly knew of such regimes and specifically decided not to include them within the list of measures covered by footnote 1.[163] Chile submits that the price band is a specific tariff that fluctuates according to external factors. In Chile's view, variable import levies are measures that were habitually used in Europe, particularly in the EC, to oblige the price of imported products to rise up to the level fixed by the EC. Chile explains that, typically, and sometimes exclusively, there were no bound tariffs for products subject to variable levies in the EC. According to Chile, the purpose of variable levies was in fact to erect a virtually insurmountable barrier against imported products compared with European like products so that exporters were unable to compete with the prices in the European Communities and thereby undermine the EC's domestic price support system.[164] On those grounds, Chile claims that its PBS is nothing more than an ordinary customs duty, with a rate that is adjusted to reflect the trend in current world prices compared with world prices in the past. It further deduces that a more competitive supplier would not lose his opportunity to win a larger share of the market by offering lower prices, as was the case with the variable levy schemes in Europe.[165]

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[159] *See* Chile's First Oral Statement, paras. 44-47.

[160] Chile refers to paras. 30-33 of Argentina's Oral Statement.

[161] *See* Chile's Rebuttal, paras. 24-25.

[162] *See* Chile's First Written Submission, para. 43.

[163] *See* Chile's First Written Submission, para. 44.

[164] In footnote 35 to its First Written Submission, Chile refers to the definition of variable levy as a duty under the European Community's Common Agricultural Policy by Merritt R. Blakeslee & Carlos A. Garcia, The Language of Trade: A Glossary of International Trade Terms 167-168 (3rd. ed. 1999).

[165] *See* Chile's First Written Submission, para. 45.

4.58

price or the domestic market price in Chile, but compensates for the difference between a representative global price (the price of *hard red winter* No. 2 f.o.b. from the Gulf (United States)) and a price fixed in the same way corresponding to the previous five years …".[171]

contends that Chile fails to identify the characteristics which would enable the PBS to be covered by the exceptions in footnote 1 of Article 4.2 of the Agreement on Agriculture. It is Argentina's understanding that Article 4.2 of the Agreement on Agriculture and footnote 1 thereto expressly prohibit Members from maintaining, resorting to or reverting to "any measures of the kind which have been required to be converted into ordinary customs duties", establishing a limited number of exceptions in the case of "special safeguard provisions" (Article 5), "special treatment with respect to paragraph 2 of Article 4" (Annex 5), and "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." In Argentina's view, the Chilean PBS does not meet the requirements for being considered as a special safeguard measure under Annex 5 or Article 5 of the Agreement on Agriculture nor, clearly, is it a measure "… maintained under balance-of-payments provisions". Nor can the PBS be covered by the third hypothesis "… other general, non-agriculture-specific provisions of GATT 1994", since the Chilean PBS is applied exclusively in the agricultural sector. Thus, Argentina contests Chile's argument with respect to the PBS that "no waivers are envisaged and conformity with the WTO Agreement is not due to any agriculture-specific

applied rate of duty and indeed would have to offer guarantees that the applied rate would not vary, independent of any binding. Obviously, Chile adds, there is nothing in any WTO rule to suggest that whether a measure is a variable levy depends on the scope and frequency of variation. Chile contends that, if it is accepted that the purpose of Article 4.2 is to address non-tariff barriers, then it might be considered that the defining characteristic should be whether the measure has the effect of a quantitative limitation, in the way a minimum import price system can effectively prevent imports of

implemented through a system which avoids or moderates the effects of the transmission[191] of those prices to the domestic market, using as a trigger price or a reference price for the application or calculation of the specific duties the "lowest f.o.b. price for the product quoted in a major commodity market relevant for Chile".[192] According to Argentina, this shows that Chile expressly recognizes that the PBS has effects other than those of an ordinary customs duty. Argentina claims that this is because unlike the PBS, both *ad valorem* tariffs and specific tariffs or a combination of the two always result in direct transmission to the domestic market of changes in international prices.[193]

4.70 In **Argentina**'s view, the most important aspects of variable levies and other similar measures that are inconsistent with Article 4.2 are those that relate to the effect of their application, i.e. lack of transparency, lack of predictability and consequent impairment. The Chilean system incorporates all three of these characteristics, so that even if it is not a variable levy, it at least constitutes a similar border measure.[194] According to Argentina, this is important because, in economic terms, these measures, as opposed to ordinary customs duties result in undesirable effects. Argentina explains that the PBS used by Chile is activated when the reference price fixed by the implementing authority falls below a certain threshold parameter, commonly known as the floor of the price band. According to Article 1 of the decrees establishing the duties, the reference price is the lowest f.o.b. price recorded for a given date in international markets representative of the product. Argentina submits that the lack of clarity surrounding the methodology for fixing the reference price, as illustrated in the paragraph of Chile's submission containing a brief description of the system[195], is evidence of the lack of transparency in implementing the system.

4.71 As regards the lack of predictability**, Argentina** contends that this is due to the fact that the level of the levies is not determined according to the transaction price, but according to a reference price of which the exporter has no knowledge until shortly before the transaction takes place, since it is fixed at short intervals (on a weekly basis). According to Argentina, this implies that a transaction price on the market may, on a given date, be subject to a relatively low effective duty, while on a subsequent date a higher effective duty, or even one that violates the WTO bound level, may be applied for the same transaction value. Argentina submits that this fact, although sufficient in itself to establish a violation of Article 4.2, added to the fact that the PBS does not have any safety mechanism (cap) to ensure that the bound level is not exceeded, illustrates that the unpredictability in case of a significant fall in prices is total for the purposes of efficient commercial planning With a cap, the unpredictability would be partial. Argentina claims that, even assuming that the bound level is not exceeded, the variability of the system increases with the liberalization of trade in the sector. Consequently, Argentina concludes, we end up with an absurd commercial situation in which the lower the customs duty, the lower the level of predictability, since the level of variability of the system increases. Argentina's view is that, contrary to what Chile claims in its first submission, the Chilean PBS is distortionary, since the more competitive the price, the higher the relative level of levies applied to each shipment. As a demonstration of this statement, Argentina refers to its Annex ARG-37 which contains a chart illustrating the relationship between the monthly average reference price fixed by Chilean customs and the corresponding prices of edible vegetable oils of Argentine origin. Argentina submits that this is particularly true for a producer like Argentina whose prices are perfectly correlated with international prices. Moreover, although Argentina is an efficient producer, the fact is that the reference prices fixed by the Chilean authorities for almost all of the most important products in terms of commercial value traded by Argentina are below the f.o.b. quotations for shipments from Argentina. In other words, Argentina affirms, the Chilean PBS ensures that the more

[191] Argentina refers to para. 18 of Chile's First Written Submission.
[192] Argentina refers to para. 17 of Chile's First Written Submission.
[193] *See* Argentina's Rebuttal, paras. 53-54.
[194] *See* Argentina's First Oral Statement, para. 38.
[195] Argentina refers to para. 15 of Chile's First Written Submission.

efficient the exporter, the greater the relative impact of tariff duties. In its view, this sort of "competitive penalization" is even more regressive when international prices are low.[196]

4.72 **Argentina** argues that the variability of the PBS makes any effective commercial planning impossible owing to the unpredictability factor. Argentina affirms that this is clearly reflected by a simple statistical indicator such as the standard deviation coefficient, i.e. the ratio between the standard deviation and the arithmetic mean, for the total effective level (as a percentage over the transaction value) of duties applied to imports, measured on the basis of monthly averages. Argentina explains that it has made an analysis of the PBS variability on the basis of Chilean statistics for wheat products and soya bean oil – in the case of wheat, for 1996/1997 and in the case of soya bean oil, for the period 1996/1998. These years were selected because in none of them, with the exception of 1998 for milling wheat, was the bound level of 31.5 per cent exceeded (or if so, only marginally). Argentina submits that the comparison made on this basis reveals that for crude soya bean oil, the deviation coefficient amounted to 28.5 per cent and 31.7 per cent for the years 1996 and 1997 – i.e. the variation of the total effective level of duties for that product was, with respect to the arithmetic mean, 31.5per cent as a monthly average for the mentioned period. With respect to milling wheat, the indicators were 153.5 per cent, 27.5 per cent and 15.5 per cent respectively for 1996, 1997 and 1998. In other words, the variation of the total effective level of duty for that product was, with respect to the arithmetic mean, 65.5 per cent on average. These levels of variation, amounting to practically one-third against the annual average in the case of oils and two-thirds in the case of milling wheat, result exclusively from the operation of the PBS, since the effective level of ordinary customs duties by definition does not vary, or if so, it varies with a frequency that is totally predictable. Argentina explains that, if one adds to these considerations the fact that, as explained at length in previous submissions, the system lacks transparency, that the duties resulting from the PBS are fixed at very frequent intervals (one week) and that the potential range of variation is of 31.5 per cent *ad valorem*, only an extraordinarily audacious and broad interpretation of the Agreement on Agriculture could include a system of this nature among the "ordinary customs duties".[197]

4.73 **Chile** submits that, while Argentina has objected to the frequency and degree of changes that Chile makes to its applied duties and to the alleged complexity and lack of predictability and transparency of those changes, none of those considerations change the character of the duties from "ordinary customs duties". Further, far from being prejudicial to trade, it is clear that, relative to maintenance of the duty at the bound ceiling rate, the price band system duties result in less restrictive rather than more restrictive treatment of imports.[198]

4.74 **Chile** disagrees with Argentina's claim that its PBS affects trade security and predictability[199] by stating that the Chilean formula is totally transparent and on the day a product is shipped the duty is known.[200]

(iii) Distinction between variable levy or similar border measure and ordinary customs duty

4.75 In **Argentina**'s view, the criteria for distinguishing between a "variable levy" or "similar border measure", within the meaning of Article 4.2 of the Agreement on Agriculture, and an "ordinary customs duty", are based on the fact that the application of an ordinary customs duty is determined by the transaction price – *ad valorem* duty – or the physical characteristics (weight/volume) – specific duty – or a combination of the two. Ultimately, Argentina concludes, it is the economic effects –

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[196] *See* Argentina's First Oral Statement, paras. 41-51.
[197] *See* Argentina's Rebuttal, paras. 64-69.
[198] *See* Chile's Rebuttal, para. 17.
[199] Chile refers to para. 31 of Argentina's First Written Submission.
[200] *See* Chile's First Written Submission, para. 50.

deriving from the features of a variable levy or a similar border measure – which result in their being given a legal status distinct from "ordinary customs duties".[201]

4.76 **Argentina** affirms that the term "ordinary customs duties" within the meaning of Article II:1(b) of the GATT 1994 cannot at the same time be considered "a measure of the kind which have been required to be converted into ordinary customs duties" within the meaning of Article 4.2 of the Agreement on Agriculture. Argentina considers that, in addition to listing certain cases, by exclusion footnote 1 to that Article clearly defines "measures of the kind which have been required to be converted into ordinary customs duties" as "similar boarder measures other than ordinary customs duties". In Argentina's view, the meaning of the term "ordinary customs duties" under Article II:1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture is the same. Argentina explains that there are no legal grounds whatsoever in the texts of the WTO Agreements for contending that the same term, "ordinary customs duties", must be interpreted differently. Argentina concludes that, in the absence of any clear indication to the contrary, we must assume that the identical terms reflect identical concepts. Argentina claims that "ordinary customs duties" are those which by their nature are perfectly predictable and transparent, and which owing to their total permeability to the international market ensure competition in the domestic market. Argentina further specifies that "ordinary customs duties" are *ad valorem* tariffs, specific duties or a combination of the two. Argentina clarifies that a measure " … of the kind which has been required to be converted into ordinary customs duties" can never, by definition, constitute an "ordinary customs duty". Otherwise, Argentina adds, one would be depriving Article 4.2 of the Agreement on Agriculture of its effectiveness.[202]

4.77 In **Argentina**'s view, "ordinary customs duties" in the meaning of the first sentence of Article II:1(b) of the GATT 1994 are those which, in their different forms (*ad valorem* duties, specific duties or a combination of the two), set the maximum effective protection level permitted at customs.[203] Argentina contends that the concept of "ordinary customs duties" applies to the means of levying customs duties which provide a degree of certainty, stability and predictability. It further affirms that, 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. "Other duties or charges of any kind" within the meaning of Article II:1(b) of the GATT 1994, Argentina explains, cannot be considered as "similar border measures other than ordinary customs duties". Argentina argues that 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, Argentina concludes, 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.[204]

4.78 In **Argentina**'s view, these levels of variability are more akin to exchange quotations than to ordinary customs duties which, by their nature do not vary (or at least vary in a totally predictable manner as in the case of specific duties) and do not cause isolation from the international market. Argentina stresses that the above estimates were made (with the exception of 1998 for milling wheat) on the basis of the bound level not being exceeded. Obviously, it concludes, the indicators are even more eloquent in the case of series in which Article II:1(b) of the GATT 1994 was violated.[205]

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[201] *See* Argentina's response to question 8 (ALL) of the Panel.

[202] *See* Argentina's response to questions 1 and 2 (ALL) of the Panel.

[203] In this regard, Argentina quotes para. 5.4 of the Panel report in *European Economic Community – Regulation on Imports of Parts and Components*, adopted on 16 May 1990, BISD 37S/132.

[204] *See* Argentina's response to question 3 (ALL) of the Panel.

[205] *See* Argentina's Rebuttal, paras. 70-71.

4.79 **Chile** submits that there is no definition of "ordinary" customs duties or of "other" duties and charges in any of the WTO Agreements including the WTO Understanding on the Interpretation of Article II:1(b). However, in Chile's view, it is not necessary for the resolution of this dispute to develop a comprehensive rule for determining what assessments might be "ordinary customs duties" as opposed to "other duties or charges". Chile asserts that the tariffs resulting from the PBS are collected in the same way and at the same time as other ordinary Chilean duties. Chile claims that it has never listed the additional specific duties or the rebates from the *ad valorem* duty as "other duty or charge", nor have any Members so treated the Chilean PBS. In this dispute, Chile contends, Argentina's complaint is that the PBS can result in a breach of Chile's bindings, not that the PBS is an "other" charge that would be illegal in any manifestation or amount because it was never scheduled as an "other" charge in accordance with the Uruguay Round Understanding on the Interpretation of Article II:1(b). Chile submits that, if the duties from a PBS could be regarded as an "other" duty or charge as opposed to an ordinary customs duty, then Chile could have escaped any liability for any of the system's mandatory effects merely by scheduling the PBS as an "other" charge or duty, since Article II:1(b) and the Understanding permit "other" duties or charges at any level, if they are the result of a mandatory system properly scheduled as an other duty or charge. Had Chile attempted to do so, it is certain, in Chile's view, that other Members would have challenged that action in the WTO, and doubtless would have succeeded. However, Chile considers that it properly never sought to claim that the PBS was an exempt other duty or charge.

4.80 **Chile** considers that the measures listed in the footnote to Article 4.2 are non-tariff measures, and therefore are unlikely to involve "other duties or charges", except as an incidental aspect of the non-tariff barrier. It is conceivable, Chile argues, that a minimum import price system, which is one of the measures prohibited by Article 4.2, could be enforced through a measure that might be considered an "other duty or charge" under Article II:1(b).[206] Chile notes that Article II has always prohibited new or higher "other" duties and charges on bound products, but the Understanding on Article II:1(b) created a more transparent and effective mechanism for enforcement in regard to such charges. Chile contends that the prohibition regarding other duties and charges for products subject to a binding is such that, even if ordinary duties are applied at a rate below the bound rate, no new or higher "other duty or charge" than that in effect on the scheduled date (or pursuant to mandatory scheduled legislation) can be imposed on that product, even if the amount involved would not, when added to the ordinary duty applied, exceed the bound ordinary rate. In Chile's view, it is clear that in this dispute Argentina has never complained that the PBS *per se* was an illegal "other duty or charge," but rather has complained that the PBS can result in ordinary duties in excess of the bound rate. Chile adds that its schedule is consistent with this interpretation, in that the price band system was not listed as an "other duty or charge".[207]

4.81 **Chile** submits that Argentina's suggested tests of what is a permissible "ordinary customs duty" are not logical and would not achieve the objectives of freer trade in agriculture. Chile argues that many, if not most, protectionist non-tariff barriers are simple, transparent and highly predictable whilst perfectly legal sanitary and phytosanitary measures and many legal activities of state enterprises are far from transparent, simple or even predictable. Chile considers that the degree of prejudice or trade restriction caused by a duty is clearly not the basis for determining its legality. Chile submits that a high duty applied at a high bound rate is legal, but damaging. It further submits that the tariff rate quotas that Members were permitted to adopt remain highly restrictive and prejudicial to the interests of export nations.[208]

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[206] Chile refers to paras. 88-89 of the Panel report in *EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Ve.0egthele or evm23Licencesy Depositr 3e -0.17 s ofTD*

4.82 **Chile** notes that the United States, as a third party in the dispute, in response to the Panel questions has introduced argument for the first time that the duties resulting from the price band system should be considered "other" duties or charges" under Article II:1(b) and that these duties should therefore be regarded as prohibited by the terms of Article II:1(b) and the Understanding on the Interpretation of Article II:1(b).[209] Chile considers that it is correct that other duties and charges are flatly prohibited unless scheduled in accordance with the Understanding. However, Chile submits, the PBS is and always has been treated as an ordinary customs duty, subject to the binding, and not an "other duty or charge."[210] In Chile's view, it is clear that all Members up to now have treated the PBS duties as ordinary customs duties rather than "other" duties. Chile contends that neither Argentina nor any other WTO Member (including the United States) has made this argument in the nearly 20 years that Chile has maintained the price band system, and, of course, Chile has never treated the price band system as an "other " duty or charge. Chile submits that, had Chile inscribed the price band duties as an "other" duty or charge within six months of entry into force of the Uruguay Round, then Chile would have had the right pursuant to the Understanding to maintain the price band system duties at any level, since Article II allows such "other" duties at the level required by mandatory legislation that has been scheduled. Chile concludes that, in that case, other WTO Members would surely have immediately challenged Chile's attempt wrongly to obtain beneficial treatment for the PBS by pretending that the PBS was an exempt "other duty".[211]

4.83 **Chile** argues that the Panel has ample basis to reject the U.S. argument. In its view, in the absence of a definition of an "ordinary customs duty" in the text of the WTO Agreements, the United States attempts to invent one to serve its argument. Chile submits that the United States bases its argument first on an E[illegible]

ordinary duties.[214] Chile further quotes an official "Foreign Trade Barriers" Report of the United States Trade Representative for 2001, in which the USTR treats the PBS as part of the ordinary customs duties of Chile. Chile argues that it is rather remarkable that a country like the United States with a significant export interest and who was certainly a major participant in the Uruguay Round negotiations would only claim to discover in the autumn of 2001 that, come to think of it, those price bands have been flatly illegal for years.[215]

4.84 In **Chile**'s view, a measure that is already a bound "ordinary customs duty" subject to the provisions of Article II:1(b) cannot be considered a measure "of the kind which have been required to be converted" into an ordinary customs duty in the sense of Article 4.2. Chile considers that the term "ordinary customs duties" has the same meaning in Article 4.2 of the Agreement on Agriculture as it has in Article II:1(b) of the GATT. Chile notes that the term "ordinary" in the English language of

binding on ordinary customs duties. Because the PBS duties are ordinary duties, Chile naturally has never scheduled the price band duties as an other duty or charge. In Chile's view, it is puzzling that Argentina asserts in paragraph 24 of its second submission that the price band duties are not an ordinary customs duty but rather a "surcharge" (*sobretasa*) – a term not used in Article II:1(b). However, it adds, even in paragraph 24, Argentina does not claim that the PBS duties are therefore prohibited under Article II:1(b), as would be the case if they were unscheduled "other" duties or charges. Rather, Argentina simply argues that the "*sobretasa*" together with the *ad valorem* duty can potentially result in a breach of the binding.[219]

4.87 **Chile** submits that the nature of Argentina's complaint and argumentation under Article II:1(b) demonstrates that, for purposes of Argentina's complaint under Article II:1(b), Argentina regards the PBS duties as ordinary customs duties. Chile argues that if Argentina considered PBS duties to be "other" duties, then it would make no sense for Argentina to concede that the PBS duties do not necessarily breach the binding, but rather are only "*potencialmente violatorio*".[220] Likewise, there would have been no need for Argentina in its first submission to set out an elaborate formula for determining when the PBS duties would have the effect of breaching the 31.5 per cent binding because under Article II:1(b) and the Understanding, "other" duties or charges are prohibited at any level, if they were not properly and timely inscribed in a Member's schedule. Chile affirms that it is transparent in its schedule that Chile made no attempt to list the PBS duties as other duties or charges, because, of course, the PBS duties are ordinary customs duties and have

Article

(i) Other issues of interpretation relating to Article 4.2 of the Agreement on Agriculture

Relevance of the Chile-Mercosur Economic Complementarity Agreement No. 35

4.94 **Chile** refers to Article 24 of its Economic Complementarity Agreement ("ECA") No. 35 with Mercosur after the Uruguay Round where it is stated that the parties, Mercosur (including Argentina) and Chile recognize the existence of the PBS and establish certain rules to the effect that Chile will not add new products to the system nor modify it with the intention of imposing more stringent restrictions. Chile claims that, according to the principles of international law, therefore, Argentina recognized and accepted the existence of the system that it is now trying to contest in a different legal framework.[235] In response to a question by the Panel, **Chile** clarifies that, by "the principles of international law", it means any collection of standards which, although not necessarily a treaty or a conventional source of rights and obligations, governs and determines international relations between States and other subjects of international law. In this particular case, Chile adds, it was referring to the following principles: the principle of good faith: "good faith shall govern the relations between states", as well as the performance of treaties concluded by them. According to Chile, Argentina is one of the States that participated in the Uruguay Round negotiations, and when the trade agreements were adopted, although it definitely knew of the PBS, it never suggested, in this forum, that it be eliminated, modified or replaced by a system of the bound duties. Chile submits that it is hardly in a position to do so since Argentina itself has its own PBS with respect to sugar imports. Subsequently, during the negotiation of ECA 35 between Mercosur and Chile, Argentina, although aware of the existence of the PBS and its technical aspects, did not suggest or require its elimination, modification or replacement by Chile with a system of bound duties. Even more importantly, Chile claims, the PBS was one of the trade issues that was expressly discussed and negotiated between Chile and members of Mercosur. Chile submits that the parties expressed their explicit and unequivocal acceptance of the price band and its technical aspects by including in Article 24 of ECA 35[236] a provision which directly mentions the system. Nevertheless, Chile adds, four years later Argentina itself tried to challenge the very system whose consistency with the WTO it had already accepted internationally, under a different legal framework. In Chile's opinion, this international behaviour clearly contradicts the principle of good faith which should govern international relations and the performance of treaties that have been negotiated, signed and ratified.[237]

4.95 **Chile** further mentions the principle of *pacta sunt servanda*: every treaty in force is binding upon the parties to it and must be performed by them in good faith. According to Chile, this principle has a natural, complementary and explicit link with the principle of good faith, and hence the above remarks fully apply. Chile contends that Argentina and the other members of Mercosur undertook, in ECA 35, to respect the PBS unless Chile, following the entry into force of the Agreement, were to include new products, to modify the mechanisms or to apply them in such a way as to undermine Mercosur's market access conditions. Although none of the above has occurred, Chile stresses, Argentina has challenged the system, using a different legal framework to do so. Under the rules of international law on interpretation of treaties, Chile explains, ECA 35 constitutes an additional relevant context for interpreting the conformity of the PBS with the WTO and its Agreements. In

the WTO as a result of Chile's tariff concessions. According to Chile, this is obvious, since if members of Mercosur had felt that the entire PBS was illegal under the WTO Agreement on Agriculture (as Argentina is now claiming in this dispute), then it would have been unnecessary and indeed pointless to negotiate limitations, as they did, on the use of the system under the ECA. Chile indicates that it does not claim or even attempt to argue that Argentina is not entitled to submit its complaint before the WTO on the basis of its new theory that the PBS is illegal under Article 4.2 on the Agreement on Agriculture (although Chile obviously considers that this theory is absolutely without merit). What Chile does maintain is that Argentina's prior conduct – both during the Uruguay Round negotiations and during the negotiation of ECA 35 – shows that Argentina did not, and does not, understand Article 4.2 to be a rule that prohibits the PBS, but on the contrary, it understands that Article to be a rule which permits the PBS. In Chile's view, this understanding constitutes a relevant context under the rules of international law for interpreting the meaning of Article 4.2. Chile clarifies that it is not asking the Panel to decide on the interpretation of ECA 35, as this would not be within its jurisdiction and competence. What Chile has done, it explains, is to introduce this Agreement merely as yet another element in the relevant context substantiating Chile's understanding of the interpretation of Article 4.2 in relation to its PBS. Chile further clarifies that it is not suggesting that the interpretation of WTO rules depends on who the parties to a dispute are. In Chile's view, the ECA is a relevant context because it shows that prominent Members of the WTO, including those that are parties to this dispute, negotiated another agreement immediately following the negotiation of the WTO Agreements, on a basis which suggests that they understood the WTO Agreements did not, and do not, prohibit the Chilean PBS.[238]

4.96 **Argentina** rejects the above argument that it bases its claim on a "new theory that the PBS is illegal under Article 4.2 of the Agreement on Agriculture".[239] Argentina is not aware of the existence of different theories concerning the obligations under Article 4.2 of the Agreement on Agriculture. Argentina assumes that there are measures that are either consistent or inconsistent with the provisions of the Agreement on Agriculture in general, and measures that are inconsistent with Article 4.2 of the Agreement on Agriculture in particular. Consequently, Argentina submits that all that is needed is to apply the Vienna Convention to the interpretation of the scope of the obligations.[240] Argentina contends that, in its international relations and in respect of treaties it has concluded with other States, it acts in conformity with the general principles of public international law. Argentina submits that, contrary to what Chile has claimed[241]in resp n Agris claimed

obligations assumed under their bilateral agreement, since Argentina made Chile pay to retain the price band in the bilateral agreement as if Argentina also considered the price band valid under WTO.[244]

4.98 **Argentina** considers that Chile's argument that Argentina recognized and accepted the existence of the [price band] system[245] in the framework ECA 35 ignores the essence of the WTO obligations contained in the "covered agreements" whose "enforcement" is achieved through the DSU. In this respect, Argentina submits that WTO precedent makes it clear that it is the commitments assumed under the WTO and not the bilateral agreements that constitute the relevant obligations of a Member under that Agreement. In other words, there are different legal frameworks: in one of them, the WTO, paragraph 4 of Article XVI lays down the obligation for Members to bring all of their legislation into conformity with the WTO Agreements, while in another, completely different framework – the regional Latin American Integration Association (LAIA) - relations between Mercosur and Chile are governed by ECA 35, which covers an ambitious agenda and in which the provisions cited by Chile could be given any number of meanings, as has been recognized by Brazil, another member of ECA 35, in its third party submission.[246] Argentina submits that a simple reference to the PBS in the framework of a regional agreement can in no way be understood as a waiver of WTO obligations. Argentina declares that if a Member could be released from its WTO obligations and could obtain a sort of immunity against scrutiny of its measures on the basis of provisions to which it has adhered in other legal frameworks, such as regional agreements, the very basis of the multilateral trading system would be affected.[247]

4.99 **Argentina** submits that each international treaty is an independent legal instrument and should therefore be considered as a self-sufficient entity based on the principle of *pacta sunt servanda*. Argentina stresses that the ECA 35 does not have an auxiliary or complementary nature with respect to the WTO agreements: the ECA 35 does not clarify, complement, amend or modify the agreements covered by the Marrakesh Agreement. Argentina further submits that Chile is wrong to invoke ECA 35 in its defence in that ECA 35 does not say that Argentina "recognized and accepted" the Chilean PBS. On the contrary, Argentina contends, as Chile itself admits, the ECA 35 is the result of negotiations which led to the application of certain restrictions, albeit insufficient, to the PBS.[248] Argentina claims that, as Chile recognizes, the ECA 35 requires Chile to refrain from increasing the market distortions caused by the PBS by not adding new products or making it more stringent and more restrictive of trade. In Argentina's understanding, far from accepting the PBS, Mercosur, through the ECA 35, tried to limit and restrict it. Argentina concludes that Chile's comments[249] ultimately lead to the conclusion with respect to the ECA 35 that by permitting the PBS to operate at full regime, making the system more restrictive, in spite of Mercosur's attempts to impose limits on the system, Chile has in fact violated ECA 35, the very Agreement behind which it is now trying to hide.[250]

4.100 According to **Argentina**, WTO Members cannot opt to disregard their WTO obligations simply because they have signed less restrictive agreements. *A contrario*, Argentina argues, if one was to consider, for the sake of argument, that we are not dealing with two separate and distinct legal frameworks, as Argentina contends, and if ultimately, although nothing prevented Argentina from filing a complaint with the WTO, the ECA 35 served as a context for the analysis of the inconsistency of the Chilean price band system *vis-à-vis* Article 4.2 of the Agreement on Agriculture, in Argentina's

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[244] *See* Chile's First Oral Statement, para. 65.
[245] Argentina refers to para. 36 of Chile's First Written Submission by Chile.
[246] Argentina refers to p. 4 of Brazil's Third Party Submission.
[247] *See* Argentina's First Oral Statement, paras. 59-61.
[248] Argentina refers to para. 36 of Chile's First Written Submission.
[249] Argentina refers to para. 25 of Chile's First Written Submission
[250] *See* Argentina's Rebuttal, paras. 86-91.

view, it would have to begin by pointing out that Chile explicitly recognizes that the "ECA No. 35 did not deal directly with the issue of whether the price band system was or was not, for the purposes of the WTO, an ordinary customs duty or some other kind of duty, charge or tax … ".[251] Argentina further argues that, if ECA 35 were even considered an "additional relevant 'context, Chile itself has also recognized that it did not include the PBS' as such in its tariff schedule"[252] either in the WTO, or in the Annex and Additional Notes to ECA 35. Argentina considers that, "if the ECA 35 did not 'deal

provision must be interpreted in the light of Article XVI.4 of the WTO Agreement, which also lays down an obligation for Members to act, in the following terms: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." Argentina considers that the fact that prior to the complaint filed by Argentina there had not been any other complaints lodged by Argentina or any other Member of the WTO does not lead to a presumption that the PBS is consistent with Article II.1(b) of the GATT 1994 or with Article 4.2 of the Agreement on Agriculture since there is no WTO rule precluding Argentina's right to file a complaint for violation of both Article 4.2 and Article II.1(b) of the GATT 1994. If there had been such a rule, Argentina submits, it would have been up to Chile to include it in these proceedings as a legal basis for its general assertions.[255]

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not a participant in the seminar (though some Chileans were present in their capacity as consultants or representatives of intergovernmental organizations) and that, since the letter was not addressed to Chile, Chile has been unable to get a copy of the said letter. It further adds that the date of the seminar is equally unclear but it could have taken place in 1993.[263] Chile further claims that the advice given in that letter was subsequently endorsed orally by the delegations with which Chile was engaged in direct negotiations (United States, European Communities and New Zealand, among others) as well as in oral opinions provided by the Secretariat prior to the conclusion of the Uruguay Round.[264]

4.108 **Argentina** responds that Chile has not submitted any documentary evidence regarding the above alleged advice by the Secretariat. Secondly, the Chilean argument in paragraph 31 of its second written submission refers simply to an oral confirmation rather than to a letter, and speaks not only of the Secretariat but of other delegations that allegedly stated that there was no need to tariffy the PBS. Argentina can merely state that evidence that has not been brought cannot be refuted, and takes the view that the Panel cannot accept the Chilean argument that evidence that has not been brought can be an additional tool for interpretation under Article 32 of the Vienna Convention .[265] Argentina contends that, in view of Chile's alleged "letter … from an authority of the GATT Secretariat arguing that it was not necessary to tariffy price bands", the value of the report by the Secretariat in the 1997 Trade Policy Review of Chile takes on particular importance. That report, Argentina explains, is an institutional opinion by the WTO Secretariat, and it recognizes that "the [Chilean] price stabilization mechanism works as a valuable levy …".[266] Argentina further indicates that the Trade Policy Review Mechanism (TPRM) undeniably provides for a thorough examination of the trade policies of Members and the extent to which they have adapted or failed to adapt to GATT/WTO rules. It claims that there can be little doubt as to its relative weight and value in trying to understand whether the PBS constitutes a variable levy or a similar border measure, since unlike the elusive mention of an alleged letter that Chile has not identified or submitted during these proceedings, it represents a respectable technical opinion, made available to all WTO Members in the form of a report.[267]

4.109 **Chile** contends that the above-mentioned statement by the TPRM does not represent a legal conclusion let alone a conclusion under Article 4.2. Further, the Secretariat did not say that the price band system is a variable levy but that it "works as" a variable levy, because the levy varies according to the import price. In Chile's view, statements in the TPRM are not supposed to be used in dispute settlement, under explicit WTO rules.[268]

B. ARGUMENTS RELATING TO CHILE'S SAFEGUARD MEASURES

1. Procedural arguments

(a) Terms of reference

(i) Measures which are no longer in force

the safeguard measures as of 26 November 2000[269] for a period of one year from the date of their expiry.[270] Chile contends that, although the mechanism for applying the extension measures is the same as that determined in the previous decree on definitive measures, this does not constitute grounds for asserting that this is the same measure that has been extended over a period of time as though they were one and the same. Chile submits that these new extended measures are the result of the receipt of new information, interested parties were given a hearing, which concluded with a recommendation on extension, and this was adopted under a new decree. Chile argues that the Chilean authorities might not have decided on an extension. If that had been the case, Chile affirms, the definitive measures would have ceased to have effect simply because the time-limit had been reached as according to Chilean legislation, the maximum duration of a safeguard measure, (including the period of the provisional measure) is one year, without prejudice to extension, which also may not exceed one year.[271] Chile explains that an extension cannot take effect automatically, it requires a new decision adopting it, which constitutes a new measure, meaning that it is a new measure whether or not it is substantially identical to the definitive measure that preceded it.[272]

4.111 **Chile** submits that when, on 19 January 2001, Argentina requested the establishment of a panel on this dispute, neither the provisional nor the definitive measures were in effect. Chile argues that, if it is presumed that the Chilean provisional and definitive safeguard measures were inconsistent with certain provisions of the Agreements, then the objective of the dispute settlement mechanism invoked by Argentina should be to conclude that the measures must be withdrawn by Chile. Chile refers to the line of reasoning adopted by the Appellate Body in the dispute *United States - Import Measures on Certain Products from the European Communities* when it determined that a panel erred in recommending that the DSB request the Member to bring into conformity with its WTO obligations a measure which the Panel found no longer existed.[273] For these reasons, Chile considers that Argentina should have respected the provision in Article 3.7 of the DSU: "Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful."[274]

4.112 **Chile** refers to Argentina's statement whereby it "requests the Panel to rule on all of the claims made so as to avoid any unnecessary future proceedings if the findings are eventually overturned, bearing in mind that the Appellate Body exercises procedural economy".[275] Chile submits that the application of the principle of judicial economy by a panel means that it is not necessary to address all the claims made by the parties but only those that must be addressed in order to resolve the matter, in which case a finding is necessary to enable the DSB to make sufficiently precise recommendations and rulings to allow prompt compliance by a Member with those recommendations and rulings.[276] Chile wonders how would it be possible for the Panel to recommend that Chile bring its provisional and definitive safeguard measures into conformity if such measures are not being applied. Hence, Chile requests the Panel to find that the provisional safeguard measures (adopted under Decree No. 339, published on 19 November 1999) and the definitive safeguard measures (adopted under Decree No. 9, published on 22 January 2000) were not in effect so it is not possible to make a recommendation that Chile bring these measures into conformity with its WTO obligations.[277]

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[269] Exempt Decree of the Ministry of Finance No. 349, published on 25 November 2000.
[270] *See* Chile's First Written Submission, paras. 74-78.
[271] Chile refers to Law No. 18.525, Article 9. Law notified in Document G/SG/N/1/CHL/2.
[272] S*ee* Chile's First Written Submission, paras. 79-82.
[273] Chile refers to document WT/DS165/AB/R, para. 81.
[274] S*ee* Chile's First Written Submission, paras. 83-88.
[275] Chile refers to para. 266 of Argentina's First Written Submission.
[276] Chile refers to the Appellate Body report on *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*") (WT/DS177/AB/R, WT/DS178/AB/R) para. 191, adopted on 16 May 2001.
[277] S*ee* Chile's First Written Submission, paras. 89-91.

4.113 **Argentina** considers that the provisional and definitive safeguard measures, even though they may have been repealed following their extension in some cases (specifically, in the case of wheat and wheat flour), require a specific ruling by the Panel because they form part of its terms of reference. Argentina argues that, since they come under the Panel's terms of reference, the Panel is required, under Article 7.1 of the DSU, to examine them, in the light of the relevant provisions in the Agreement, as part of the matter referred to the DSB. Argentina contends that the fact that the definitive measure was repealed is irrelevant for the purposes of a ruling, since Chile explicitly recognized that it resorted to safeguards "to obtain the required legal backing in accordance with the WTO's relevant provisions".[278] Argentina submits that safeguard measures may only be applied in accordance with procedures of the Agreement on Safeguards and in conformity with the strict standards established therein. It considers that Chile's recognition that it only sought to "obtain the required legal backing" is in fact a negation of the multilateral commitment to apply safeguards only in conformity with the provisions of the Agreement on Safeguards.[279] In Argentina's view, no interpretation of the Safeguard Agreement, however broad, would enable it to conclude that the "extension" is a new safeguard measure. Argentina contends that extension is not a notion that exists independently of other provisions of the Agreement on Safeguards. Argentina further submits that the Agreement must be interpreted as a single whole, and not as a series of separate articles. Argentina argues that when a Member, by a resolution or some other administrative act, decides to "extend" an existing measure, it is not converting it into a new measure.[280]

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4.114 **Argentina** argues that Chile continues to apply a safeguard measure on oils for precisely the same reason it applied all of its previous measures (including their extensions), i.e. because there was a PBS that was inconsistent with the WTO and caused it to violate its tariff binding. Argentina claims that, as long as the PBS is in force, the same situation can recur. In Argentina's view, if there is no ruling by the DSB establishing the inconsistency of the safeguard measures, the situation could recur, since the attempt at *ex-post facto* justification will have escaped the scrutiny of the DSB. Argentina submits that it is this very possibility of reintroducing measures for the same reasons that caused them to be adopted originally that has led to consistent rulings on repealed measures both prior to the WTO and under the WTO.[281]

(ii) The decision on extension was not the subject of consultations between the parties

4.115 **Chile** claims that Argentina, when requesting consultations under the WTO dispute settlement procedure, only identified the provisional and definitive safeguard measures applied to cert0.18cI,,31 Tw (since the

4.116 **Chile** recalls that, on 1 February 2001, at the first meeting of the DSB at which Argentina requested the establishment of a panel, Chile drew attention to this anomaly[284] and Argentina replied that "the subject of the extension of the measure was included in the request for consultations since there was a legal similarity between the original measure and the subsequent extension thereof".[285] Subsequently, Chile continues, at the DSB meeting on 12 March 2001[286], Argentina again requested the establishment of a panel and mentioned the various consultations held by the parties[287], which, combined with its theory of the "legal similarity" of the definitive measures and the extension, intimate that Chile tacitly accepted that the extension measure was included in the consultations. Chile explains that the DSB decided to establish a panel with the standard terms of reference contained in Article 7 of the DSU[288] to examine the matter brought up by Argentina in its communication requesting the establishment of the panel. Chile questions whether these terms of

Nevertheless, it says, this does not mean that, *quod non*, Argentina had called for valid consultations in the WTO on the extension measures because it did not request such consultations in writing and made no notification to the WTO to this effect.[293] Chile submits that, for a question to be considered as properly addressed in a consultation proceeding under the WTO, the measure at issue first has to be identified in writing, and that document must be notified to the DSB. Chile submits that Argentina never submitted a written request for consultations with Chile, nor provided the DSB notification thereof, in which it mentioned the extension measures at issue. Chile considers that, if due process is to be guaranteed, it is essential that the DSU requirements with respect to the formalization of a claim under the dispute settlement system be respected, since this is what enables a Member to whom a claim is addressed to lay the foundations for its defence on the basis of the indications contained in the written request for consultations.[294]

4.119 **Chile** submits that, in this particular case, the extension measures contain the same provisions as the definitive safeguard measures. In this respect, there is similarity, which Chile does not deny.

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on Safeguards which prohibits new measures from being reintroduced until a specified period of time has elapsed.[298]

4.123 **Chile** submits that Argentina is attempting to establish an innovative theory resting on the existence of a legal identity between the extension measures and the definitive safeguard measure and in this way make up for its failure to refer to these extensions anywhere in its request for consultations under the DSU. Accordingly, Chile adds, it states that this identity exists because the extensions were adopted by the same authority, through the same Commission, that they apply to the same products and that they apply the same remedy. Chile contends that these elements on which Argentina bases its theory of legal identity do not prove that identity. According to Chile, the construction of Article 7.2 points to the contrary of Argentina's argument, i.e. that extensions, from a substantive point of view, are measures that are distinct from the definitive measures. Indeed, an examination of the paragraph reveals that the reference to Articles 2, 3, 4 and 5 merely imposes procedural or formal requirements in circumstances for which the substantive aspects are laid down in the paragraph itself and consist in the competent authority finding that a safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting.[299]

(iii) Withdrawal of some of the extension measures

4.124 **Chile** informs that, following this First Written Submission, the extension measures for wheat and for wheat flour were withdrawn by Exempt Decree No. 244 of the Ministry of Finance published on 27 July 2001. On these grounds, Chile submits that there is no point, from the legal point of view, in the Panel issuing recommendations on the consistency of these measures with the WTO obligations contained in the WTO Agreements, having found that the measures are no longer in force. Chile submits that, as stipulated in Article 3.7 of the DSU, "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute", and "[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." Thus, Chile argues, where a panel concludes that a measure is inconsistent with a covered agreement, it recommends that the Member concerned bring the measure into conformity with that agreement. This is stipulated in Article 19.1 of the DSU, which goes on to say that the panel may suggest ways in which the Member concerned could implement the recommendations. Chile argues that the entire reasoning behind Article 19.1 presupposes the existence of a measure, one that is in force. According to Chile, if the measure does not exist, the panel does not have the authority to ask that a Member be recommended to bring the measure into conformity with a provision of the WTO Agreements, much less suggest ways in which the recommendation could be implemented.[300]

4.125 **Argentina**, on the contrary, considers that a ruling by the Panel on the inconsistency of the safeguard measures, even those that were recently repealed, would in fact have practical consequences in that as long as the price band system remains in force there is a possibility that these measures could be re-introduced – i.e. as long as the same reasons that caused them to be adopted in the first place remain.[301] Argentina refers to Chile's explicit acknowledgement that it resorted to safeguards "to obtain the required legal backing"[302] and submits that this constitutes a negation of the multilateral commitment to apply safeguards only in conformity with the Agreement on Safeguards and Article XIX of the GATT 1994 and demonstrates that as long as the price band system exists, there will be a risk of the situation recurring. Argentina contends that Chile continues to apply safeguard measures for the same reason that it applied the previous measures, i.e. because of a price band system

[298] *See* Argentina's First Oral Statement, paras. 88-89.
[299] *See* Chile's Second Oral Statement, paras. 56-60.
[300] *See* Chile's response to question 16 (ARG, CHL) of the Panel.
[301] *See* Argentina's Rebuttal, para. 102.
[302] Argentina refers to para. 25 *in fine* of Chile's First Written Submission.

that is inconsistent with the WTO and which, by its structure, design and mode of application causes it to violate its binding.[303]

4.126 **Chile** considers that the above argumentation is fundamentally at odds with the foundations of the WTO dispute settlement system, in that it presumes that a WTO Member is acting in bad faith with the intention of taking advantage of the system. In Chile's view, this argument disregards the nature of the dispute settlement system, the aim of which is to "secure a positive solution to a dispute", clearly preferring a "solution mutually acceptable to the parties to a dispute".[304]

(b) Burden of proof

4.127 **Argentina** alleges that each one of Chile's violations of the GATT 1994 and the Agreement on Safeguards, establish prima facie presumption that the safeguard measures applied by Chile are in violation of their obligations under those Agreements. Hence, according to the general rules of application of the burden of proof, it is up to Chile to demonstrate that it has not violated them. Argentina submits that Chile has not supplied a single argument to refute that presumption but that, on the contrary, it has recognized that the safeguard measures were inconsistent with its WTO obligations.[305]

4.128 **Chile** submits that, in every statement made before this Panel, Argentina has based the above argument on a serious error of law. In Chile's view, Argentina considers that in a prima facie presumption, what is presumed is the violations committed by a Member of its obligations under the Agreements covered by the dispute. However, Chile argues, according to Article 3.8 of the DSU, this clearly is not the case: Chile contends that what is presumed is not the violations or inconsistencies, but something quite different, the nullification or impairment of the benefits accruing under the covered agreements that these inconsistencies may cause with respect to the Member or Members bringing the complaint. Chile stresses that the consequences of this error of law committed by Argentina are not insignificant. In this regard, Chile submits that, if the fact to be presumed were the violation of the obligations laid down in the WTO Agreements, the mere presentation of claims and arguments would suffice to establish the presumption, and there would be no need to submit precise, concordant and complete evidence to the Panel of the irrefutable truth of these claims. Chile further submits that this would of course be inadmissible under the DSU, since it would free the complaining Member from the obligation and burden of proving the facts on which its arguments rest, and the report of the Panel would be based on mere presumption. In addition, Chile contends that Argentina has neither produced nor brought before the Panel sufficient, precise and concordant evidence to establish irrefutably that Chile violated its obligations under Article XIX of the GATT 1994 and the Agreement on Safeguards. Consequently, Chile argues, Argentina can hardly be presumed to have suffered nullification or impairment of the benefits accruing to it under those Agreements as a result of Chile's safeguard measures. Chile submits that it has submitted complete and sufficient evidence during these proceedings of the full consistency of its measures with the mentioned Agreements. Chile objects to Argentina's statement to the effect that Chile recognized that its safeguard measures were inconsistent with its obligations under the WTO. Chile claims that Argentina has clearly taken a hypothetical statement out of its context in order to use it for its own purposes since this statement was made by Chile in connection with its position on the Panel's lack of jurisdiction to rule on measures that were not in force, and not with any violation of or inconsistency with a covered agreement.[306]

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[303] *See* Argentina's response to question 16 (ARG, CHL) of the Panel.
[304] *See* Chile's Rebuttal, paras. 41-42.
[305] *See* Argentina's Rebuttal, paras. 100-101.
[306] *See* Chile's Second Oral Statement, paras. 48-52.

4.129 **Argentina** argues that this prima facie presumption exists because of the proofs submitted in these proceedings and not – as Chile argues – by a mere presentation of claims and arguments in connection with Article 3.8 of the DSU, which Argentina has not argued.

Safeguards nor with the Appellate Body's conclusions on application of this Article . Argentina explains that this can be seen simply by comparing the date on which the Committee on Safeguards was notified of the initiation of the investigation and the date on which the initiation effectively commenced. Argentina indicates that the notification was in fact made on 25 October 1999, whereas the investigation was initiated on 30 September 1999.[311] In view of this, Argentina argues that it is obvious that Chile did not comply with the requirements in Article 12.1(a) of the Agreement on Safeguards. This means that the requirement on "immediacy", which must be met if the notification is to be considered as having been made in due form, was not respected. Argentina says that the result was that the Committee on Safeguards and the Members of the WTO were not given sufficient time to examine the notification.[312]

4.134 As regards the infringement of Article 12.2 of the Agreement on Safeguards, **Argentina** argues that it is clear that the elements which the Appellate Body considers to be minimum requirements for the notification were not present as far as the product and the definition of domestic industry are concerned, and there was no analysis of the factors.[313] [314] Argentina argues that Chile did not submit any argument to rebut the fact that its notification did not contain "all pertinent information".[315]

4.135 **Argentina** claims that Chile violated Article 12.3 and 12.4 of the Agreement on Safeguards. It did not give Argentina, which is a substantial supplier of wheat, wheat flour and edible vegetable oils, the opportunity to hold consultations, either immediately after the imposition of the provisional measure or prior to the application of its definitive measure. Argentina argues that Chile failed to comply with these requirements in the Agreement on Safeguards inasmuch as the date of application of safeguard measures was 26 November 1999 whereas the notification to the Committee on Safeguards was dated 1 December 1999. It should also be noted that Argentina had to request the consultations indicated in the last sentence of Article 12.4.[316] [317]

4.136 Reading Argentina's claim regarding notifications and consultations[318], **Chile** submits that c)oe prfinitive measure. adopd in thJanrdsy 2000 Itile

the Appellate Body in the context of a specific dispute, it does so in order to require a WTO Member to bring the disputed measures into conformity with its obligations under certain provisions of the WTO Agreements. Consequently, Chile contends, Argentina's assertion that "Chile's conduct does not comply … with the Appellate Body's conclusions" in the text mentioned above can only constitute Argentina's own opinion, but not a recommendation by the Panel. Chile then refers to Argentina's statement that "Chile's notification did not provide 'all pertinent information', in violation of Article 12.2 …"[320]. Chile argues that, as Argentina does not specify to which Chilean notification it refers, Chile is obliged to assume, by reading the next paragraph in the submission, that the measures

requests. Chile submits that the Agreement on Safeguards does not provide for an obligation to "offer consultations" which must be performed by providing a written statement to that effect to WTO Members.[327]

4.138 As regards Chile's claim that by merely notifying the measures, it had complied with its obligation under the provisions of Article 12 to offer to hold consultations, **Argentina** contends that the obligation to provide adequate opportunity for consultations both prior to and following the adoption of the measure to be a separate obligation under the Agreement. Argentina submits that Chile violated the above-mentioned Articles by failing to indicate expressly its readiness to offer these consultations. Argentina considers that there are no grounds for considering that the mere notification of measures is tantamount to offering to hold consultations.[328]

4.139 In response to the above argument, **Argentina** recalls that Article XIX.2 of the GATT 1994 expressly stipulates the following: "Before any contracting party shall take action … it shall give notice in writing to the CONTRACTING PARTIES … and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest … an opportunity to consult with it in respect of the proposed action." Argentina contends that this clearly shows that the obligation to notify and to offer consultations are two different obligations for which, contrary to what Chile has claimed, mere notification is not equivalent to offering consultations. Indeed, Argentina adds, the obligation to "afford … an opportunity" does not constitute and cannot constitute, "an obligation of immediate availability", as Chile contends, nor can it be considered to have been met merely because "Chile was … ready to hold consultations".[329]

(b) Unforeseen developments

4.140 **Argentina** claims that Chile has infringed Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards by not identifying or making any findings with respect to unforeseen developments justifying the imposition of safeguard measures.

4.141 **Argentina** explains that, pursuant to Article XIX:1(a), safeguard measures (emergency measures) shall be taken as a result of unforeseen developments. In this regard, Argentina refers to various examples of the Appellate Body's interpretation of the concept of "unforeseen developments".[330] Argentina submits that, as established by the Appellate Body in *US – Lamb*[331], the requirement of increased imports resulting from "unforeseen developments" is a fundamental characteristic of a safeguard measure because it lies at the beginning of a "logical continuum" of events justifying the invocation of a safeguard measure.[332] In Argentina's view, for a Member to apply a safeguard measure in a manner consistent with its WTO obligations, it must, before applying the measure, have demonstrated as a matter of *fact* that *as a result of unforeseen circumstances* there has been an increase in imports which causes or threatens to cause serious injury to the domestic industry, and that consequently, the adoption of an emergency measure is justified. This demonstration of fact and of law, and the findings and reasoned conclusions, must be included in the report of the competent authority in accordance with Article 3.1 of the Agreement on Safeguards.[333] Argentina claims that neither the investigation conducted by the Commission, nor the WTO notifications, reveal that Chile

[327] *See* Chile's First Written Submission, paras. 217-221.
[328] *See* Argentina's First Oral Statement, para. 110.
[329] *See* Argentina's Second Oral Statement, para. 40.
[330] *See* Argentina's First Written Submission, para. 78.
[331] Argentina refers to the Appellate Body report on *US – Lamb* (WT/DS177/AB/R, WT/DS178/AB/R) adopted on 16 May 2001, paras. 71-74.
[332] *See* Argentina's First Written Submission, para. 79.
[333] *See* Argentina's First Written Submission, para. 83.

(c) Appropriate investigation

4.146 **Argentina** claims that Chile has infringed paragraphs 1 and 2 of Article 3 of the Agreement on Safeguards on the grounds that the competent Chilean authorities did not conduct an appropriate investigation.

4.147 **Argentina** submits that it did not have the opportunity to participate fully in the investigation. In this connection Argentina stresses that it did not have access to any public summary of any confidential information on which the Chilean authorities may have relied.[341] Argentina states that Chile failed to conduct an appropriate investigation because none of the Minutes of the Commission

4.147 i **4.16**

argues that the foregoing shows that Argentina had sufficient opportunity to participate in the proceedings of the investigating authority.[349]

4.149 **Chile** contests Argentina's argument whereby, in the investigation, the Chilean Authority based itself on confidential information. Chile points out that the investigating authority collected information and reached its conclusions on the basis of all the information gathered in the public record, that besides the information of the petition, contains the information and opinions rendered by the interested parties to the investigation - public hearing included – and the information gathered from other sources such as the Chilean Customs Service, the Central Bank of Chile and sectorial information from official sources (Office of Agricultural Studies and Policies (ODEPA).[350] According to Chile, there are thus l stb9o111a Tw T9257591 Tcnon-sed itself onsummw (ens onsed itself on confidenti (r

the conclusions with respect to increase in imports, like product, domestic industry, analysis of factors, threat of serious injury, causal link and unforeseen circumstances, either for the provisional measure or for the definitive measure, as required by Articles 2 and 4 of the Agreement on Safeguards. In Argentina's opinion, the findings of law of the Commission (Minutes of Session Nos. 181, 185, 193 and 224) serving as a basis for its investigation and its conclusions merely cite numbers and figures relating to imports and economic and financial indices of the "industries". Argentina submits that all of the information supplied is taken directly from the Ministry of Agri1nBrtres'

Chile contends that although the Commission did not publish one consolidated report, nothing in Article 3 of the Agreement on Safeguards requires that the findings to be all contained in one document as opposed to a series of documents.[362]

4.156 **Chile** further submits that, by stating that "apparently" no verification was done, Argentina highlights the weakness of its argument. Moreover, the word "appearance" is alien to the concept of "findings of fact and of law". Chile submits that, in any case that comes before it, the Chilean authority must verify the information submitted and, in this particular case, it verified the information with the official records of the National Customs Service, the Central Bank and the sectoral information in official sources such as those published by the Office of Agricultural Studies and Policies (ODEPA), which are widely known in Chile, so Argentina's assumption that the authority did not take the trouble to carry out a responsible verification of the information in question is without

4.159 In response to a question from the Panel, **Chile** explains that the Commission gathers together all of the information submitted by the interested parties both during the public hearing and in the course of the investigation, and prepares a technical report, which is examined during a final meeting of the Commission (to take place within 90 days of the initiation of the investigation), after which the Commission decides whether or not to recommend the application of definitive measures.[368]

4.160 **Argentina** claims that, although Chile asserts that it is a condition for all safeguards investigations, a technical report was not prepared prior to the recommendation to apply provisional measures, or another one prepared prior to the recommendation to apply definitive measures.[369] Argentina further claims that, despite the above, Chile had already replied that the Minutes of the Commission "constitute the only official report of the investigating authority". Argentina considers that this contradiction suggests that in the present case, these technical reports were not prepared, or that they do not form part of the official report of the investigating authority. [370]

4.161 **Chile** , in reference to Argentina's statement that the Minutes constitute the only official report of the investigating authority and that they do not appear to have met any of the requirements for resorting to the application of measures[371], considers that it should be borne in mind that the Commission bases its recommendations on all of the information gathered and evaluated in the course of the investigation. Chile explains that, for each stage of the investigation, the Commission receives a technical report prepared by its Technical Secretariat, in addition to the public Minutes which contains all of the information gathered during the process, including the public versions of confidential information. The technical report is a supporting document which helps the Commission in making decisions and summarizes the information pertaining to the case. This report, together with the initial application and all of the documents supplied by the other interested parties and the information gathered by the Technical Secretariat itself throughout the investigation, including the information from the public hearing, makes up the information used by the Commission as a basis for its decisions. The technical report is classified as restricted since it is an internal working document, and above all because it is not binding *vis-à-vis* the decisions taken by the Commission. [372]

4.162 **Argentina** states that in spite of what Chile argues, the Commission based its recommendations on all the facts analysed during the investigation, and that argument does not alter the fact that the only Chilean official report does not contain the requirements set forth in the Agreement on Safeguards.

4.163 **Chile** states that the report is also restricted because it includes all of the confidential information contributed by the interested parties as such, on condition that it will not be disclosed. Chile indicates that this explains why the report is not placed at the disposal of any of the interested parties in the procedure. In the case at issue, Chile adds, although there was no confidential information, the non-binding nature of the report *vis-à-vis* the final recommendation of the Commission was maintained, and hence, the report was not made available to the parties. Chile adds that this report does not constitute the document containing the findings and reasoned conclusions reached on issues of fact and law whose publication is required under Article 3.1 of the Agreement on Safeguards. The report required under that Article, as stated, is made up of the Minutes of the Commission. Chile explains that these Minutes contain its recommendations and the findings of fact and law supporting those recommendations. Chile further submits that, as part of the investigation process, the Technical Secretariat, an entity which assists the Commission – i.e. the investigating authority – in its work, assumes an active investigative role, establishing and verifying the accuracy

[368] *See* Chile's response to question 17 (CHL) of the Panel.
[369] Argentina refers to Chile's response to question 17 of the Panel.
[370] *See* Argentina's Rebuttal, para. 108.
[371] Chile refers to paras. 91 and 92 of Argentina's First Oral Statement
[372] *See* Chile's Rebuttal, paras. 60-62.

and relevance of the evidence submitted, gathering additional information, clarifying different

Moreover, Argentina explains, Chile only produces colza (rape) and sunflower seeds and colza (rape) oil with seed produced locally, and a bit of soya bean oil with imported beans. In Argentina's view, it is not very clear on what basis the Commission determined the like product and the industry, and which domestic products are "like" or "directly competitive". Argentina claims that, when the Commission makes an estimate of threat of injury to the domestic industry, it refers indiscriminately to producers of rape, to the extracting industry and to the refining industry, without making it clear which is the domestic industry that is allegedly threatened with injury by imports of edible vegetable oils.[380]

4.167 **Argentina** submits that, as regards wheat flour, the Commission does not in fact provide any analysis of the wheat flour category to determine which products are "like" products or "directly competitive" with the imports. Argentina argues that the Commission merely states that "… for these purposes, flour represents an alternative way of importing wheat if direct imports prove to be more costly or are subject to higher tariffs, so it is necessary to apply a treatment similar to that applied to wheat". Similarly, Argentina submits, Chile states in its notification to the WTO of threat of serious injury that "[i]f the mechanism applied to wheat is not also applied to imports of wheat flour, a large increase in imports of wheat flour could cause injury similar to that caused to wheat production by imports of wheat."[381] [382]

4.168 As far as wheat is concerned, **Argentina** submits that the Commission failed to carry out a legal analysis concerning the definition of the like product. In Argentina's view, it is not clear whether durum wheat has been subsumed under pasta and wheat under flour in its definition of "product", or whether other forms of wheat have also been included.[383]

4.169 **Chile** claims not to understand Argentina's reasons for limiting its understanding of the legal requirements for the imposition of a safeguard measure solely to determination of a like product. Chile contends that Article XIX:1(a) of the GATT 1994 in fact refers to "like or directly competitive products". Article 2.1 of the Agreement on Safeguards provides that "domestic industry that produces like or directly competitive products", and Article 4.1(c) then refers to the "domestic industry", defining it as the producers as a whole of "the like or directly competitive products …". In this connection, Argentina cites the ruling of the Appellate Body in the case *"US – Lamb"*, indicating that "The conditions in Article 2.1, therefore, relate in several important respects to *specific products*. In particular, according to Article 2.1, the legal basis for imposing a safeguard measure exists *only* when imports of a specific product have prejudicial effects on domestic producers of products that are 'like or directly competitive' with that imported product."[384] Chile does not understand, therefore, why Argentina considers that the Commission should only have identified the like product.[385] Chile argues

[illegible]

4.170 In response to the above argumentation, **Argentina** submits that, it never suggested that the determination of the like product was the sole legal requirement for the imposition of safeguard measures. According to Argentina, one of the basic requirements laid down in the Agreement on Safeguards is the identification of a like or directly competitive product so that the authorities can then make their determinations with respect to increased imports, serious injury and causality. Argentina affirms that it is hard to understand why Chile repeats[387] the quotation made by Argentina in its first written submission from paragraph 86 of the Appellate Body report in *United States – Lamb*, which states, precisely, that the legal basis for imposing a safeguard measure exists *only* when imports of a specific product have prejudicial effects on domestic producers of products that are "like or directly competitive" with that imported product. In fact, Argentina adds, although there were important elements relating to the issue of the like product and the producers of the like product that needed to be identified in this case, the Commission did not carry out any analysis, and it was therefore impossible to identify the industries affected. In the case of oils, Argentina explains, the Commission refers indiscriminately to producers of rape, to the extracting industry and to the refining industry. Argentina further argues that Chile states that the Commission Minutes contain an analysis of the "directly competitive products" because the Commission repeated the analysis conducted when the price band system was introduced.[388] However, Argentina argues, that analysis could not have been included in any of the records. Argentina repeats that the Minutes that served as a basis for the investigation and conclusions of the Commission contained no more than citations of numbers and figures relating to imports and financial and economic indices of the "industries", with information taken directly from the Ministry of Agriculture's application for the initiation of an investigation and no analysis or conclusions as to its accuracy.[389]

4.171 **Chile** contends that the Commission acted consistently with Article XIX of the GATT 1994 and Articles 2.1, 4.1(c) and 4.2(a) of the Agreement on Safeguards by confirming not once but twice that both subject product categories were comprised of like or directly competitive products. Chile explains that the Commission confirmed that the categories of products chosen for the safeguard

directly related to that for wheat was then established for flour. In addition, Argentina states that it is not clear whether the Commission subsumed durum wheat for pasta and wheat for flour in its definition of product.[394] Chile notes in this connection that imports of wheat subject to safeguards correspond to those under tariff heading 1001.9000, which only includes imports of wheat for making bread and pastry products, as determined in Minutes of Session No. 193. Imports of wheat for pasta are classified under another tariff heading (1001.1000) therefore, identification of the tariff headings makes it clear which products are covered by the investigation.[395]

4.173 As regards edible vegetable oils, **Chile** contests Argentina's statement that "it is not very clear on what basis the Commission determined the like product and the industry".[396] In this connection, Chile notes that rape-seed oil produced domestically is a like product to the other oils to which the measure applied because (i) they are physically and chemically very similar; (ii) they are consumed without distinction; (iii) they have the same final use; (iv) they utilize the same channels of distribution. Chile submits that one indicator of this is the wording on the labelling of edible vegetable oils for consumption, where the reference is usually only to vegetable oils or a mixture thereof, without specifying which oils. Chile claims that, from the point of view of the consumers, which is the relevant factor when determining if the products are directly competitive, it cannot be said that they are different products.[397]

4.174 **Argentina** considers the above as *ex post facto* explanations by Chile.[398] Argentina considers that Chile cannot simply claim that the Commission took the above parameters into account without indicating in what part of the report the said analysis and its conclusions can be found. Argentina argues that Chile itself recognizes that the implementing authority merely identified the products under investigation by their tariff heading. Argentina submits that this does not constitute a sufficient analysis of the like product for the purposes of applying a safeguard measure – on the contrary, it confirms that the parties are speaking of the same products that are subject to the price band system.[399]

(f) Increase of imports

4.175 **Argentina** claims that the competent Chilean authorities failed to demonstrate an increase in imports under Article XIX.1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards. Argentina contends that the increased imports is a fundamental requirement for the imposition of a safeguard measure provided for in the Articles concerned.[400]

4.176 **Argentina** claims that an analysis of the content of the Minutes and notifications reveals that Chile did not demonstrate that there were increased imports, and hence failed to comply with its obligations under Article XIX:1(a) and Articles 2.1 and 4.2(a) of the Agreement on Safeguards. Argentina refers to *Argentina – Footwear (EC)* where the Panel stated that "[t]he Agreement on Safeguards requires an increase in imports as a basic prerequisite for the application of a safeguard measure. The relevant provisions are in Articles 2.1 and 4.2(a)"[401] and "[t]hus, to determine whether imports have increased in 'such quantities' for purposes of applying a safeguard measure, these two provisions require an analysis of the rate and amount of the increase in imports, in absolute terms and

[394] Chile refers to para. 108 of Argentina's First Written S TD--0.3493 Tw a135.rate ani0.3493 Tw an 0rate ani0.3u8cerned.

4.179 **Chile** submits that Chile considers that the requirement regarding an increase in imports and the impact of the PBS in this case are factors that cannot be examined separately. It refers to Minutes of Session No. 224[411] which states the following: "(i) In examining imports, the Commission took into consideration the fact that, for each of the products investigated, the normal functioning of the PBS had been decisive in containing an increase in imports and, consequently, the trend in imports cannot be examined without taking this factor into account. The analysis by the Commission takes into account the period from the adoption of each safeguard measure in effect for each product. Nevertheless, for the purposes of comparison and evaluation, information for previous periods is also taken into account."[412]

4.180 **Chile** submits that it does not follow either from the letter of Article XIX.1 of the GATT 1994 and Article 7 of the Agreement on Safeguards, or from their object and purpose, that an extension and Arti321eands 2, 3, GATT 19953
ands imports PBS wnten daipehe acts thafurollowargu-0.111 , ilettg Tina w rd right, T6 rd woul Tw improduc

basis of an "en point" analysis only imports between 1990 and 1998, with e rate and amount o in absolute terms and as a percentage of c tion. Consequently e analysis carried out by the Chilean authori nt with the obligatio le 4.2 (a). Argentina explains that this was th retation in *Argentin* , and it was confirmed by the Appellate Body with respect to the in absolute terms that it is not enough to carr is from end point to it is necessary to consider the intervening tre n and the importance to determine an increase in the amount) (rate According to the the requirements made by the Appellate Bod ase, Argentina submi ase in imports must have been recent enough gh, sharp enough, an ough, both quantitatively and qualitatively, t ten to cause 'serious i tina further submits that it is incomprehensib ould have presented dif utes of Session No. 181 from the data it prov s of Session No. 224 for etween 1990 and 1998 or, at least, there is n this difference in figures.

4.183 **Chile** tina's statem itiate the safeguards investigation in able oils on point" analysis (for the years 1990 Chile no Commission's analysis did no the mo deve affected the sit mpor Minutes contests Arge gard fferences which in any e Tc c 0.884,med

increase in imports of mixtures of oils is reflected in an increase in total imports of vegetable oils (pure oils and mixtures of oils) of 16 per cent in 2000 compared with the volume imported the previous year. As a result of this situation, Chile argues, the Commission received a request to investigate the situation affecting mixtures of oils and initiated a safeguards investigation into this product. As shown in Minutes of Session No. 229, during this investigation the relationship between oils and mixtures of oils and the substantial increase in imports of the latter became evident. This situation led to the adoption of a provisional safeguard measure for mixtures of oils.[422]

4.186 In response to the above argumentation, **Argentina** submits that the Chilean reference to the increase in imports of mixtures of oils has no relevance in determining the safeguard measures and that Chile recognizes that imports of edible vegetable oils declined.[423]

Definitive safeguards

4.187 **Argentina** submits that Minutes of Session No. 193 of the Commission determines, with respect to imports of the two main edible vegetable oils only, that they increased by 23 per cent in 1998 as compared to the previous year. However, Argentina argues, it then goes on to point out that "... these imports dropped by 24 per cent ..." during the most recent period, which, according to the Appellate Body, is ultimately the relevant period for the application of the measure. Argentina further submits that the same Minutes also state that "... from 1993 to 1997, the level of imports is similar", i.e. there was no increase in imports either, even if we consider a series of more than ten years, as recorded in the notifications that we shall examine in detail further on, placing the recent behaviour of imports in the broader context of their trend which, at best, was stable. Argentina indicates that Chile's notification to the WTO of 7 February 2000 on finding a serious injury or threat thereof, in the section on increased imports, repeats what was mentioned in Minutes of Session No. 193, that imports of the two main vegetable oils fell by 24 per cent during the most recent period.[424]

4.188 **Chile** argues that an increase in imports is a basic requirement for the imposition of safeguard measures and submits that Minutes of Session No. 193 shows that "[i]mports of the two major products in the edible vegetable oils sector increased by 23 per cent in 1998 compared with the previous year. Over the first ten months of 1999, imports fell by 24 per cent. Regarding this decrease, the Commission notes that in 1999 there was an abnormal situation due to the behaviour of importers as a result of the tariff disputes concerning the headings under which oils should be imported. From 1993 to 1997, the level of imports recorded is similar."[425]

Extension of the measures

4.189 **Argentina** submits that Minutes of Session No. 224 of the Commission also states that "… Imports of edible vegetable oils fell by 37 per cent in the period January to September 2000 compared with the same period in the previous year. In 1999, these imports fell by 22 per cent. The level of imports from 1993 to 1997 is similar." Argentina argues that, although an end point to end point analysis does not help in determining the application of a measure, it does help to show the trend in imports, as sanctioned by the Appellate Body in *Argentina – Footwear (EC)*, and, in this case, the trend is, to say the least, erratic and moreover was clearly downward during the period 1998-1999 (the most recent), both as regards the headings subject to safeguards and the others.[426]

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[422] *See* Chile's First Written Submission, paras. 167-169.
[423] *See* Argentina's Rebuttal, para. 124.
[424] *See* Argentina's First Written Submission, paras. 128-130.
[425] *See* Chile's First Written Submission, para. 166.
[426] *See* Argentina's First Written Submission, paras. 131-133.

4.190 **Argentina** submits that, in Chile's notification to the WTO dated 22 December 2000 – extending the measure in effect – the wording in the section on vegetable oils repeats that contained in Minutes of Session No. 224 to the effect that "… Imports of edible vegetable oils fell by 37 per cent in the period January to September 2000 compared with the same period in the previous year. In 1999, these imports fell by 22 per cent. From 1993 to 1997 the level of imports is similar." Argentina contends that, when it decided to extend the safeguard measures by means of Minutes of Session No. 224, Chile recognized that there had been a significant fall in imports, which in all respects is totally inconsistent with its WTO obligations. Argentina also refers to data provided by other sources[427] which would show a net fall in imports in 1999 and 2000 both for soya bean and sunflower oils, which account for over 90 per cent of all Chile's imports of oil under the tariff headings subject to the safeguard. In Argentina's view, these data prove that there has been no increase in imports of edible vegetable oils in absolute terms nor do any of the Minutes or notifications provide any information concerning increased imports relative to domestic production or under such conditions as to cause or threaten to cause serious injury. Argentina therefore submits that Chile fails to comply with the obligations under Article XIX.1(a) and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.[428]

4.191 In this regard, **Chile** quotes the following excerpt of Minutes of Session No. 224:[429]

> "(i) In examining imports, the Commission took into consideration the fact that, for each of the products investigated, the normal functioning of the price band system had been decisive in containing an increase in imports and, consequently, the trend in imports cannot be examined without taking this factor into account. The analysis by the Commission takes into account the period from the adoption of each safeguard measure in effect for each product. Nevertheless, for the purposes of comparison and evaluation, information for previous periods is also taken into account."

(ii) Wheat flour

Initiation of the investigation

4.192 **Argentina** submits that, when considering imports, Minutes of Session No. 181 simply states that "...for flour, there was an increase of over 80 per cent during the past year and the first six months of the last three years show increases of 321 per cent, 23 per cent and 15 per cent." Argentina alleges that this conclusion is not based on concrete statistical data, as can been seen from the information provided by the actual petitioner and from the data of the Commission itself in Minutes of Session No. 224, which show a marked downward trend as of 1996.[430]

4.193 **Chile** contests Argentina's statement[431] that Minutes of Session No. 181 on the initiation of the investigation determined that, for wheat flour, over the past year there was an increase of over 80 per cent and that the first six months of the last three years show increases of 321 per cent, 23 per cent and 15 per cent, which, according to Argentina, "are not based on concrete statistical data", because Minutes of Session No. 224 showed a marked downward trend as of 1996. Chile points out that this apparent contradiction is simply due to the fact that a different period was taken as a basis for comparison because, for the initiation of the investigation, the Commission took the half-yearly trend for the previous three years, whereas Minutes of Session No. 224 refers to a longer period and an

annual not half-yearly trend. Chile claims that this is shown by the Minutes, which states "[i]mports of wheat flour fluctuate as far as increases and decreases are concerned, but this can be explained by their low volume. Nevertheless, the Commission notes that for these purposes wheat flour represents an alternative way of importing wheat if direct imports prove to be more costly or are subject to a higher tariff, so it is necessary to apply a treatment similar to that applicable to wheat. The Commission considers that if the total duties determined by the band were not applied and the duty was limited to a maximum tariff of 31.5 per cent, the result would be a very rapid increase in imports of the product." Noting both the levels and the rates of increase, the Commission concluded that the trend had been erratic during the period 1990 - January-September 2000. Chile submits that the mere fact that Minutes of Session No. 181 refers to a particular period does not mean that the Commission considered other data or did not take into account other periods in its analysis. In any event, Chile adds, the most important element when analysing the trend in imports of wheat flour is that they are an alternative product to imports of wheat and the Commission gave priority to this argument over and above the trend in imports itself.[432]

Provisional safeguards

4.194 **Argentina** contends that, as in the case of oils, Minutes of Session No. 185 do not provide any information (data, statistics, etc.) concerning an increase in imports in absolute terms or relative to domestic production under such conditions as to cause or threaten to cause serious injury, thereby failing to comply with the obligations under Article 2.1.[433]

Definitive safeguards

4.195 **Argentina** submits that Minutes of Session No. 193 indicate that: "... Imports of wheat flour fluctuate, but this can be explained by their low volume. Nevertheless, the Commission notes that for these purposes wheat flour represents an alternative way of importing wheat if direct imports prove to be more costly or are subject to a higher tariff, so it is necessary to apply a treatment similar to that applicable to wheat." Argentina considers that the conclusion drawn by the Commission nullifies any subsequent inference by Chile from the figures because it acknowledges that these fluctuate and concern low volumes. Argentina submits that, in fact, there is a downward trend.[434] Argentina submits that it can also be seen that the Minutes do not provide any data or statistics on imports of wheat flour, and therefore, the resolution on the application of definitive safeguard measures to wheat flour is extremely imprecise and partial. Argentina claims that, in the notification to the WTO dated 7 February 2000, concerning the existence of serious injury or threat of serious injury, the section concerning increased imports repeats the wording in Minutes of Session No. 193 regarding fluctuations in the volume of imports of wheat flour without specifying the period taken into account. In any event, Argentina concludes, the trend is downward rather than fluctuating, as can be seen from the information given by Chile in Minutes of Session No. 224.[435]

Extension of the measures

4.196 **Argentina** submits that, like Minutes of Session No. 193, Minutes of Session No. 224 also state that "...imports of wheat flour fluctuate as far as increases and decreases are concerned...". Argentina claims that the tables accompanying the Minutes contradict the statement in the text since they clearly show a downward trend in imports of wheat flour:[436] Argentina indicates that the Minutes later state that "[t]he Commission considered that if the total duties determined by the band were not

[432] *See* Chile's First Written Submission, paras. 174-179.
[433] *See* Argentina's First Written Submission, para. 143.
[434] *See* Argentina's First Written Submission, para. 144.
[435] *See* Argentina's First Written Submission, paras. 145-147.
[436] *See* Argentina's First Written Submission, paras. 148-150.

applied, and the duty was limited to a maximum tariff of 31.5 per cent, the result would be a very rapid increase in imports of the product." In Argentina's view, it would appear that the Chilean authorities consider that an alleged increase in imports, which in fact did not occur when the measure was applied, could provide grounds for applying the measure. In this connection, Argentina submits that it must be borne in mind that a decision to apply a measure must be based on concrete facts and not on estimates or conjecture.[437] Argentina indicates that Chile's notification to the WTO dated 22 December 2000 concerning the extension of the existing measure states once again that imports of wheat flour show an erratic pattern of increases and decreases, and reads "if the total duties determined by the band were not applied, and the duty was limited to a maximum tariff of 31.5 per cent, the result would be a very rapid increase in imports of the product". Argentina claims that Table 3 of Minutes of Session No. 224 is attached to the notification and shows a clear downward trend in imports of wheat flour. Argentina submits that, based on the figures in the Decree extending the measure and its notification: imports of wheat flour showed a marked downward trend in 1998 and 1999 after Tjof:ng mn 19986;the Dvolumeof inports of wheat flour sfellby t1 er cent,in 1998 acompare

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dated 7 February 2000 on finding a serious injury or threat thereof repeats the wording in Minutes of Session No. 193.[441]

4.200 **Chile** submits that an increase in imports is a basic requirement for the imposition of safeguard measures and quotes Minutes of Session No. 193[442] which reads: "Imports of wheat (in tonnes) increased by 6 per cent in 1998 compared with the previous year. Over the first 10 months of 1999, imports increased by 281 per cent in comparison with the same period the previous year. From 1993 up to 1996, there was an increase in imports, which then fell in 1997. Import of wheat flour fluctuated, but this can be explained by their low volume."[443]

4.201 In response to the above argument, **Argentina** claims that that increase is irrelevant in order to decide the application of a safeguard measure considering that the 511,187 tons imported in 1999 represented almost 30 per cent less of the total imported in 1996 (638,946 tons) as shown by data provided by Chile in Minutes of Session No. 224.[444]

Extension of the measures

4.202 **Argentina** refers to Minutes of Session No. 224 which state that "[d]espite the fact that imports of wheat (in tons) fell by 18 per cent in the period January to September 2000 compared with the corresponding period for 1999, the Commission took into account that, in annual terms, imports remained above the annual average for the period 1990-1999." In Argentina's view, it is clear that the

examined is not very clear and the data given have not been evaluated in relation to previous years. According to Argentina, in essence, the data do not prove anything concerning the existence of a serious threat of injury to the industry. Argentina submits that the gravity of the measure adopted by the Commission is not justified by the mere statement that "limiting import duties to 31.5 per cent at a time when international prices for these products have fallen obviously constitutes a threat of serious injury ..."[449] [450]

4.206 **Chile** submits that Article 4.2(a) requires Members to "evaluate all relevant factors of an objective and quantifiable nature" when investigating whether the increased imports have caused or are threatening to cause serious injury. Although Article 4.2 does contain certain factors to be evaluated, the Article does not contain a definitive list, thereby leaving Members latitude and even a duty to determine what are the relevant factors in particular cases.[451]

4.207 **Argentina** disagrees with the above interpretation of Article 4.2 by Chile[452] and considers that this interpretation is definitely contrary to the actual text of the Article, according to which Chile had a minimum obligation to analyse the factors mentioned therein – given that the Article refers to them "in particular" – aside from other relevant factors.[453] Argentina argues that this interpretation is consistent with different Appellate Body precedents as in "*Argentina – Footwear (EC)*"[454], and "*US – Lamb*"[455].[456]

4.208 **Chile** submits that the Chilean authority complied with the requirement to evaluate all relevant factors laid down in Article 4.2(a) of the Agreement on Safeguards. As indicated in that paragraph, "all relevant factors" must be analysed. Chile submits that relevance is fundamental when considering factors affecting injury or threat of injury and it must be considered on a case-by-case, product-by-product basis. Chile maintains that the Commission therefore considered it highly relevant to include the impact of the PBS on trade flows in the products investigated that were subject to price bands. It further argues that failing to take this impact into account would have been inconsistent with Article 4.2(a). Chile explains that during the investigation period, the band functioned with positive specific tariffs. It would be simply inadmissible not to take into account the existence of this tariff and its effect on the flow of imports and "consequently, the trend in imports cannot be analysed without taking into account this factor".[457] Chile indicates that this is why the authority considered it necessary to evaluate the injury that would have been caused to domestic industry in the absence of the band during the period prior to application of the safeguards. In this connection, Chile submits that Minutes of Session Nos. 181, 185, 193 and 224 again refer to the impact that would have been caused by failure to apply safeguards. The effects of the increase in imports take into account both the income level of producers and the value of production, the decrease in net profits, including losses, as well as the physical downturn in the domestic industry which would be absorbed by imports and, lastly, the effect on employment. Chile claims that this analysis was undertaken for each and every one of the products covered by the investigation, namely, wheat, wheat flour and oils.[458]

4.209 **Chile** contests Argentina's claims that it did not evaluate "all the relevant factors", as required by Article 4.2(a) of the Agreement on Safeguards. Chile submits that the Agreement on Safeguards

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[449] Argentina quotes the notification of threat of serious injury, G/SG/N/8/CHL/1, p. 1; see also Minutes No. 193, p. 2, and Minutes No. 224, pp. 1 and 2.
[450] *See* Argentina's First Written Submission, paras. 177-182.
[451] *See* Chile's First Oral Statement, para. 78.
[452] Argentina refers to para. 78 of Chile's First Oral Statement.
[453] *See* Argentina's Rebuttal, para. 129.
[454] WT/DS121/AB/R, adopted 12 January 2000, para. 121.
[455] WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 127.
[456] *See* Argentina's Rebuttal, footnote 85.
[457] Chile quotes the Minutes No. 224, Commission on Distortions, 17 November 2000.
[458] *See* Chile's First Written Submission, paras. 180-182.

does not determine nor specify what is the proper method for deciding on the relevance of the factors, so Argentina's statement in its claim regarding the need to consider "for example, (…) cash flows in the major firms in this sector"[459] should not be taken into account because the relevance of factors is the result of the criteria used by the investigating body and may vary from case to case. Chile further submits that, if the Agreement on Safeguards itself lists certain aspects that should be given particular attention and does not include the factors cited by Argentina, Chile does not consider that it violated this Article by not including a separate analysis of cash flows in the major firms. Moreover, Chile argues, for this type of product, the most important factor is price. Chile refers to *US – Lamb*, and submits that the Appellate Body clearly indicated "that the competent authorities are not required 'to show that each listed injury factor is declining' but, rather, they must reach a determination in light of the evidence as a whole".[460] [461] Chile submits that failure to include a factor that in Argentina's opinion, was decisive or critical, even if it really was, which remains subject to discussion – does not suffice to affirm non-compliance with the Agreement on Safeguards. Furthermore, Argentina indicates that "[i]t appears that the Commission simply accepted the information on the industry's indicators …", but does not reject the factors taken into account. Consequently, Chile argues, these factors cannot be nullified simply because another additional factor was not taken into account in the investigation. Chile submits that this would only apply to the extent that the information included did not, as a whole, lead to an appropriate conclusion.[462]

4.210 In response to a question from the Panel, **Chile** explains that all of the factors on which the Commission had information were considered. It adds that the factors that were not considered were those for which information was unavailable from public sources and could not be found by consulting other sources either.[463]

4.211 In response to Argentina's claim that the gravity of the measure adopted by the Commission is not justified by the mere statement that "limiting import duties to 31.5 per cent at a time when international prices for these products have fallen obviously constitutes a threat of serious injury" [464], **Chile** submits that Minutes of Session No. 193 contain detailed information concerning the serious injury to the domestic industry concerned if the recommended measures are not applied. In addition, Chile claims, Argentina fails to draw attention to other Minutes that formed an integral part of the investigation, namely, Minutes of Session No. 181 of 9 September 1999 and Minutes of Session No. 185 of 22 October 1999, where the injury to the domestic industry that would occur if the recommended measures were not adopted is confirmed and explained in detail.[465]

Edible vegetable oils

4.212 **Argentina** contends that it is not clear what type of product or industry is being examined under the heading "vegetable oils", and therefore, it is impossible to determine the relevance of the information obtained in the investigation or whether such data are representative of the industry. It further states that it is impossible to determine what periods are being examined because no dates are given. Argentina affirms that, although the Commission highlights decreases in production and employment levels, reading the documents it is not clear whether the slowdown in the production of edible vegetable oils did in fact occur or would occur. In addition, Argentina points out that the Commission does not deal either with the other factors listed in Article 4.2(a), namely, the share of the

[459] Chile refers to para. 179 of Argentina's First Written Submission.
[460] Chile quotes WT/DS177/AB/R, WT/DS178/AB/R, para. 144.
[461] *See* Chile's First Written Submission, paras. 183-186.
[462] *See* Chile's First Written Submission, para. 187.
[463] *See* Chile's response to question 21(b) (CHL) of the Panel.
[464] Chile refers to footnote 88 of Argentina's First Written Submission where Argentina refers *inter alia* to Minutes No. 193, p. 2, and Minutes No. 224, pp. 1 and 2.
[465] *See* Chile's First Written Submission, para. 188.

have data on productivity and employment in the oils industry, then claims that the information provided by the sector via the questionnaires was sufficient.[473]

Wheat flour

4.218 **Argentina** submits that, as far as wheat flour is concerned, in its final determination the Commission did not provide any evidence of the factors of injury specified in Article 4.2(a) of the Agreement on Safeguards.[474] Argentina explains that the notification of threat of serious injury simply indicates that: "[i]f the mechanism applied to wheat is not also applied to imports of wheat flour, a large increase in imports of wheat flour could cause injury similar to that caused to wheat production by imports of wheat." On the basis of the information in the final determination and the notification of extension, Argentina considers to be obvious that the most important change in the price of wheat flour – at least at the global level and in terms of pesos – occurred during the period 1996/1997, when prices fell by almost 20 per cent. Argentina claims that this trend was reversed in 1998, however, and again in 1999, and, after having reached a peak in 1999, prices stabilized in 2000.[475] Accordingly, Argentina submits that, in the case of wheat flour, no factor was evaluated in the final determination and this cannot be compensated by a vague reference to the situation in the wheat production industry.[476]

Wheat

4.219 **Argentina** contends that, in its final determination, the Commission refers to some indicators, but it does not provide any analysis of the figures or their relevance. It is thus impossible to see, according to Argentina, whether the factors of injury were examined on the basis of the same period of time because there is no reference whatsoever in this regard. Regarding the figures given, Argentina explains, the wide range in some of the figures such as the reduction in the net profit margin, which ranges from 20 to 90 per cent, is striking, an aspect for which the Chilean authorities offer no explanation. Although Argentina could consider that one of the reasons for this might be the grouping of different products in the same section, or the scale of production or any other factor, this is not explained. Argentina further states that the final determination does not analyse the factors listed in Article 4.2(a) of the Agreement on Safeguards concerning market share, changes in the level of sales or productivity. In this regard, Argentina claims that the document determining the extension and the notification of the extension for the first time provides certain data on the industry, but the time scales given are not evaluated by the Commission on Distortions in the determination itself. Argentina concludes that there are no substantiated conclusions in respect of the few data furnished and that, moreover, even the information itself does not prove the existence of a threat of serious injury.[477]

4.220 **Argentina** explains that Table 9 on domestic prices expressed in pesos ("Domestic prices, wheat") shows the largest drop between the years 1996 and 1997. Prices then increased in 1997/1998 and 1998/1999, falling by only 1.5 per cent in 1999/2000. Concerning the area sown, 1998 was essentially the same as 1997, but harvests increased by 14 per cent and yield by 16 per cent. Argentina submits that, contrary to what is alleged by Chile, this that theto375 a3xtets increased bya is alean 1

both as far as sowing and harvesting are concerned. Argentina thus conclude that there is no evaluation of all the factors, as required by the Agreement on Safeguards, because there are no references to the share of the domestic market taken by imports, changes in the level of sales, productivity, capacity utilization, profits and losses, etc. [478]

4.221 In response to a question by the Panel, **Chile** explains that, in the case of wheat, the relevant factors analysed by the Commission were the rate and amount of the increase in imports (in absolute and relative terms), the share of the domestic market taken by increased imports, production (no information available on sales), productivity, profits and losses, and employment. Surface area and domestic prices were also considered. Chile indicates that the capacity utilization was not evaluated because it was not relevant to this agricultural crop, as stated in Minutes of Session No. 193.[479]

4.222 In reference to the above on the lack of relevance of the capacity utilization factor, **Argentina** recalls that according to panel and Appellate Body precedents, the investigating authority cannot refrain from analysing factors listed in Article 4.2(a) of the Agreement on Safeguards, let alone provide an *ex post facto* justification during the dispute settlement proceeding of why it did not analyse a factor. Argentina questions how the Commission managed to determine, in Minutes of Session No. 185, that "[t]he number of registered farms would decrease by 25,000 from a total of 89,700. The sown area would decrease from the current 370,000 hectares to 243,000. 390,000 tonnes, i.e. 28 per cent of the current total, would no longer be produced", without analysing capacity utilization, which is absolutely necessary in order to determine threat of injury. Consequently, contrary to the requirements laid down in Article 4.1(b) of the Agreement on Safeguards, this conclusion was based on conjectures and remote possibilities.[480] In connection with the same answer sn Tc 0.1989 ly,

authorities' 'evaluation' of the data in determining that there is a 'threat' of serious injury in the imminent future".[484] Argentina also indicates that the Appellate Body also stated that "… data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury".[485] [486]

4.225 **Argentina** submits that, in its determinations, the Commission repeatedly relies on forecasts, hypotheses and conjecture in order to establish the threat of serious injury which its domestic industries are allegedly experiencing, in violation of Article 4.1(b) and the principles laid down by the Appellate Body. It argues that the Commission's determinations employ the conditional tense and lack any basis or proof. Argentina provides some specific examples below: (i) Minutes of Session No. 181 of the Commission containing the decision to initiate the investigation states with regard to the three products that: "The quantification of the injury was based on forecasts that were made on the basis of the hypothesis of application of the bound tariff of 31.5 per cent and the effect this would have on a series of variables for each of the products in question". (ii) In the case of wheat, the Commission states that: " the application of the price band mechanism has ensured that the injury is not significant. If application of the price band were limited to a total duty of 31.5 per cent, domestic prices would fall and affect the producers' income levels". (iii) Minutes of Session No. 185 recommending application of the provisional safeguard measure states that: "With regard to injury, the Commission had before it the information contained in the application, which quantifies the injury on the basis of forecasts elaborated according to a hypothesis of application of the bound tariff of 31.5 per cent and the effect this would have on a series of variables for each of the products in question." (iv) In the case of oils, the same Minutes simply conclude that " … the ceiling of 31.5 per cent would lower the price and value of production … "[487]

4.226 **Chile** contends that a "threat of serious injury" means serious injury that is "clearly

accordance with this statement, a threat of serious injury must always be based on a projection, which must be consistent with the data on which it is based.[491]

4.227 **Chile** submits that, in the case of the goods investigated, according to the Commission, it is irrefutable that the local and the imported product are easily interchangeable. Clearly, this was also taken into account when analysing the threat of injury. Chile argues that the close relationship between agricultural commodities and products that require a certain degree of processing that allow them to be considered directly competitive has been described above. Chile explains that the Commission based its threat determination on the price of the products corresponding to each sector of the production industry involved, which is a key element when determining injury for such products.[492] Chile considers that this way of assessing threat of injury meets the requirements of Article 4.1(c) of the Agreement on Safeguards. Chile further submits that when it was noted that the price band for oils could not operate to the full, it was verified that, in the absence of a safeguard, its incomplete functioning would in the short term lead to a serious impairment for agricultural producers, given the agreed conditions under which the product was marketed. Chile explains that competition from imported oil at very low prices would lead to a very low domestic price for the agricultural producer, which would absorb the whole of the reduction, with significant losses that are estimated in the submission. In the medium term, Chile states, the producers might cease to sow and the industrial plants would lose profits because they had no product to process. Chile contends that, once again, in the case of a band that is only partly functioning and in the absence of any safeguard measure, the price the industry would have to pay would fall to such a level that agricultural producers would lose the volume estimated as threat of injury; not because of inefficient management but because of a change in the rules of the game fixed prior to the sowing season. In addition, Chile declares, if the industry met its commitment to pay a predetermined price, it would suffer losses. Chile argues that, in either of the two cases, in the following season, there would be a sharp fall in prices and, as a result, in the area sown, with the result that there would be an internal deficit, an increase in imports and greater injury.[493] Chile adds that the Commission took notice of the fact that if the price band system was limited to a 31.5 percent ad valorem ceiling, prices would drop even further raising the likelihood of serious injury even more. Accordingly, Chile submits, the Commission based its threat determination on a consistent basis in the record[494] and took account of the fact that the normal functioning of the price band had been decisive in containing an increase in imports and the resulting injury.[495]

4.228 **Argentina**, in reference to the above argumentation by Chile[496], submits that, in none of the Minutes did the Commission analyse or even define the affected industry and that the correlation of prices is not, in itself, sufficient for the purposes of determining the existence of a threat of injury. Argentina repeats that Chile did not demonstrate that increased imports threatened to cause serious injury to the domestic industry, but rather, used hypothetical and unsubstantiated circumstances for the sole purpose of not complying with its obligation to apply its WTO tariff binding of 31.5 per cent applying safeguard measures to justify the inconsistency of its price band system. In addition, Argentina, in reference to Chile's statement[497] that the Commission took account of the fact that the normal functioning of the price band had been decisive in containing an increase in imports and the resulting injury, wonders how, without an increase in imports – since the price band was functioning at full regime – and without threat of injury, given the existence of the price band, could the Commission find that there was a threat of injury. Argentina concludes that Chile is trying to argue

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Argentina's opinion, as the Appellate Body stated in th
reasoning with the first sentence of Article 4.2(b). Tha
not be made unless [the] investigation demonstrates
increased imports … and serious injury or threat thereo
a determination under Article 4.2(a), is that 'the causal
to a cause or causes', while the word 'cause', in tur
elements, whereby the first element has, in some w
existence of the second element. The word 'link' ind
a part in, or contributed to, bringing about serious
'nexus' between these two elements. Taking these w
in our view, a relationship of cause and effect su
about', 'producing' or 'inducing' the serious inju
Footwear (EC), where the Panel determined a th
Appellate Body supported this method and approac
of the causal link in *US – Wheat Gluten* and *US*
process" for the competent authorities' determin
increased imports and serious injury, and whethe
relationship of cause and effect between these two
Article 4.2(b).[506] This process means separating
injury caused by other factors. Argentina claims
presupposes that the injurious effects caused to th
distinguished from the injurious effects caused b
that the Appellate Body noted that "[w]hat is in
the *effects* caused by the different factors in brin

4.233 **Argentina** examines the application
Appellate Body to this case: (i) Simultaneity of th
do not contain sufficient bases to conclude that the trends a
the import trends have not been analysed in relation to the changes
financial indicators. In fact, this could not have been done because the Minute
analysis nor sufficient data for this purpose. What is even worse is that the period examine
indicators of threat of injury are not even known, so the authorities could not have analysed the
relative fluctuations in trends. (ii) Conditions of competition (under such conditions): Argentina
explains that the few references to prices which appear in the Minutes clearly do not allow any

imports are causing or threatening to cause serious injury to the domestic industry. If so, Article 4.2(b) requires that such injury not be attributed to increased imports.[510]

4.234 **Argentina** A r t

4.240 **Argentina** contends that the Commission did not consider whether or not the measure was "necessary" to prevent injury and facilitate readjustment and no substantive analysis was undertaken (for example, "reasoned conclusion"). Argentina argues that Chile based its safeguard measure on the difference between the bound tariff and the combination of the PBS duty and applied rate, and this is in no way related to a threat of injury from imports.[523]

4.241 **Argentina** noted that Chile's Ministry of Agriculture stated that: "The surcharge will allow the current level of tariffs on products subject to the band system to be maintained in order to meet Chile's obligations to the World Trade Organization (WTO) in 1994."[524] Argentina claims that, in violation of Articles XIX.1(a) of the GATT 1994 and 5.1 of the Agreement on Safeguards, the Commission did not prove that its safeguard measure was necessary to remedy serious injury and facilitate the readjustment of the industry. Argentina argues that, in *Korea - Dairy*, the Appellate Body considered that Article 5.1 imposed an "obligation" to ensure that the safeguard measure was applied only to the extent "necessary".[525] [526]

4.242 **Chile** submits that, in accordance with its obligations under the Agreement on Safeguards, it instituted a measure that protected its domestic producers from serious injury, but which provided no further amount of protection. Chile explains that, having found the requisite conditions justifying a safeguard action, the action recommended by the Commission and taken by the Government involved the least possible trade disruption consistent with preventing serious injury: an increase in duties to enable the price band to apply without regard to the bound level of duties. Chile further explains that the Chilean Safeguard Law only allows imposition of duties; it does not allow a quota. It limits the safeguards to one year plus an additional year. Chile submits that, in this particular case, the Commission recommended that the surcharge be in the form of the duty in excess of the bound rate under the price band, instead of a flat surcharge. Chile argues that the flat surcharge would have to have been very high, while the price band could result in lower rates, as indeed has been the case.[527]

4.243 **Chile** explains that the safeguard measures applied by Chile include a special mechanism for their application, which is based on the same world price considerations as those in the PBS. According to Chile, this means in practice that the measure is one of variable applications in order to reflect in the most appropriate way the impact of imports in relation to the injury suffered by the domestic industry. Chile argues that the variable nature of the measure means that there is an immediate response to trends in the injury, so that the measure can be automatically adjusted to the necessary level to remedy the injury. In Chile's view, this flexibility can be seen in the fact that there were periods when, even though the measure had been decreed, tariff surcharges were not applied. Chile submits that the authority showed its intention not to apply a safeguard higher than that strictly necessary by calculating it on a weekly basis so as not to give the industry producing the product subject to the safeguard protection over and above the minimum required.[528]

4.244 **Argentina,** in reference to Chile's statement to the effect that the safeguard measures applied by Chile include a special mechanism for their application, which is based on the same world price considerations as those in the price band system[529], submits that, if this is the case, Chile's actual mechanism for the application of safeguard measures violates the Agreement on Safeguards, which does not take world prices as a basis, but rather, imports in such increased quantities, absolute or

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[523] *See* Argentina's First Written Submission, paras. 240-242.

[524] Argentina quotes "*El Pulso de la Agricultura*", No. 32, ODEPA publication, Ministry of Agriculture (December 1999), attached as Annex ARG-31.

[525] Argentina quotes the Appellate Body report on *Korea – Dairy*, WT/DS98/AB/R, adopted on 12 January 2000, para. 96.

[526] *See* Argentina's First Written Submission, paras. 243-245.

[527] *See* Chile's First Oral Statement, paras. 81-82.

[528] *See* Chile's First Written Submission, paras. 207-209.

[529] Argentina refers to para. 207 of Chile's First Written Submission.

relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.[530]

4.245 **Chile** submits that its statement did not refer to the increase in imports as a requirement for the application of a safeguard measure, but rather, as Argentina itself mentions, to the mode of operation of the adopted measure, which was fixed in accordance with the proportionality requirement established in Article 5 of the Agreement on Safeguards for the purpose of preventing the imminent injury that threatened the domestic industry affected and to permit its adjustment.[531]

4.246 **Argentina** argues that the serious injury cannot be repaired and the adjustment made with identical measures, both for the definitive safeguards and their extensions. It further submits that it is also hard to understand how these measures - which, according to Chile itself, were justified by the threat of injury caused by a fall in international prices – could be maintained over time in a market in which there could necessarily always be price fluctuations. In Argentina's view, the adjustment does not depend on the Chilean industry, but on the evolution of international market conditions. Argentina contends that, following Chile's logic, if the fall in prices were to persist, the safeguards would have to be permanent. Conversely, it adds, the proposed remedy is so far from meeting the requirements of Article 5.1 of the Agreement on Safeguards that an increase in international prices would lead to the termination of the measures independently of the state of the industry or of any other economic factor that could have a bearing on the industry.[532]

4.247 In reference to the above argumentation of Argentina, **Chile** stresses that the problem was not relative to domestic production, and under such conditions as to cause or threaten to cause serious

4.250 **Argentina** contends that both Article XIX.2 of the GATT 1994 and Article 6 of the Agreement on Safeguards provide that "critical circumstances" must exist before provisional measures can be adopted. In other words, Argentina claims, the authority may only adopt provisional measures in circumstances "where delay would cause damage which it would be difficult to repair". Article 6 also states that such measures may be taken "pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury". Argentina claims that the resolution of the Commission recommending the adoption of provisional measures ("provisional determination") does not in any way analyse why a delay would cause damage which it would be difficult to repair.[535] Consequently, Argentina considers, in the light of the text itself, the resolution of the Commission does not comply with the requirements of Article 6. Argentina indicates that, furthermore, the provisional resolution of the Commission fails to comply with Articles 2.1, 4.1 and 4.2, as well as Articles 3.1 and 4.2(c) of the Agreement on Safeguards, because there is no evaluation of "like product", and an increase in imports a threat of injury or a causal link are not proven.[536]

4.251 **Argentina** explains that the analysis of the Commission is divided into three categories of product but there is no examination of whether this categorization of "like product" and "domestic industry" is in conformity with Articles 2.1, 4.1(c) and 4.2(b) of the Agreement on Safeguards.[537] In Argentina's opinion, the Commission does not undertake any analysis of increased imports but simply

provisional measures, as required by Article XIX:2 of the GATT 1994 and Article 6 of the Agreement on Safeguards.[545]

4.254 **Chile** explains that if Chile's bound rate of 31.5 percent was observed in the future, the Commission estimated that imports would increase dramatically causing significant injury to the wheat, sugar and oils producers. Given the price elasticity of the products, it could be calculated that there would be a significant import surge, a decline in prices and serious injury to Chilean producers. Therefore, the Commission properly found that any delay in adopting a safeguard measure would cause damage which "would be difficult to repair".[546]

4.255 **Argentina** considers this an *ex post facto* explanation. Argentina also questions to what "factual basis" is Chile referring when Chile itself considers the elasticity of products to be "given", without bothering to make any analysis in this respect. Argentina states that it is incorrect for Chile to suggest that "it could be calculated" that there would be a significant import surge, a decline in prices and serious injury to Chilean producers, without actually making any calculation. Argentina submits that Article 6 of the Agreement on Safeguards clearly stipulates that such a measure may only be taken "pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury".[547]

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The main arguments of those third parties to these proceedings which have submitted their commentaries to the Panel, i.e., Brazil, Colombia, Ecuador, the European Communities, Guatemala, Japan, Paraguay, the United States and Venezuela are as follows:

A. BRAZIL

5.2 Brazil submits that an examination of the Chilean PBS, as well as of the detailed Argentine explanation of how the system operates can give the impression that it is a very complex mechanism, devised with an almost scientific zeal. However, in Brazil's view, the PBS is, at heart, very simple. If one discards all the tables, measurements and equations, Brazil argues, what is left is a weekly reference price that determines the additional duty that will tax imports of wheat, wheat flour, vegetable oils and sugar. Brazil explains that this weekly reference price, which is fixed by the Chilean Government, substitutes for the transaction value contained in the invoice. According to Brazil, an element that is very clear, and that is not contested by Chile in its first submission to the Panel, is that the price band system has allowed for the violation of Chile's bound tariffs for the products under consideration, as well as for sugar.

5.3 Brazil argues that, in theory, Chile is correct in claiming that the adoption of safeguards could legally justify the violation of bound rates. The point is that in the current case, the violation of bound tariffs occurred before the safeguards were even envisaged. Moreover, it remains to be seen whether the safeguards were justified. Brazil contends that, in case they are found not to be justified, Chile will have automatically incurred a violation of Article II.1 of GATT 1994. Brazil further stresses that the current design of the price band system allows for violations of the bound rates. Brazil agrees with Argentina that the Chilean price band system is suspiciously similar to what Article 4.2 of the Agreement on Agriculture sought to eliminate: it operates as a variable levy that is modified weekly; it includes reference prices which are not allowed under Article 4.2, if they constitute minimum prices; it also contains elements of the modality of special safeguards provided for in Article 5.1(b) of the Agreement on Agriculture. According to Brazil, the problem, as Argentina rightly pointed out, is that

[545] *See* Chile's First Written Submission, para. 210.
[546] *See* Chile's First Oral Statement, para. 83.
[547] *See* Argentina's Rebuttal, paras.150-151.

Chile does not have the legal right to use such an instrument. It may be argued that as long as Chile does not violate its bound tariff the operation or characteristics of its price band system are irrelevant and that the claim under Article 4.2 is useless. Brazil notes, however, that the objective of the Chilean system is to create exactly the type of barrier that Article 4.2 of the Agreement on Agriculture sought to eliminate.

5.4 Brazil submits that Chile's argument to the effect that the PBS is an ordinary customs duty is a surprising affirmation because, at the regional level, Chile argues exactly the contrary: since the surtax that results from the operation of the price band system is not a tariff, tariff preferences are not applicable. Brazil points out that this difference in interpretation is currently one of the difficulties in the tariff negotiations concerning sugar. Brazil adds that Chile's reference to the ECA 35, which includes Brazil, can also be used as an example of misuse, by Chile, of a line of reasoning that could be summarized as "since you did not complain before, you cannot complain now". Brazil cannot find any provisions in the WTO Agreements that impose time-limits or expiration dates on Argentina's right to claim a violation of Article II.1 of GATT 1994 and of Article 4.2 of the Agreement on Agriculture in the current dispute. In addition, Brazil notes that the language in ECA 35 that refers to the price band system can be read in different ways and that Chile's reading does not stress the fact that the system can be questioned if it has a negative impact on trade.

5.5 In response to a question by the Panel, Brazil submits that a duty cannot at the same time be considered an "ordinary customs duty" and "a measure of the kind which have been required to be converted into ordinary customs duties". In Brazil's view, the term "ordinary" refers to customs duty as such: it can be an "*ad valorem*" tax, a specific duty or a combination of both. It further explains that the term "ordinary" is used to qualify a general import tax that is not "all other duties or charges of any kind". Brazil notes that, in the case of agricultural products, and, in particular, those affected by the Chilean PBS, Article II can not be read independently from Article 4.2 of the Agreement on Agriculture. Brazil contends that a Member may have an additional tax that applies to all imports, like a "statistics tax", or an administrative tax, that applies to all imported products. It could even be a flat tax, with no relation to the value of the import transaction. In Brazil's view, the distinction should be made between "ordinary customs duties" and "other" duties,at the r Tj -D -05 11.25 Tf 0 Tc-0.8275 Tw ( ) Tj39 0 T

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5.7 Brazil explains that a variable levy is a duty that is modified in accordance to criteria related to "various values in different instances or at different times" based on exogenous factors (such as historical and current world prices), as determined by any specific mechanism by a Member. According to Brazil, the objective of this measure is to control prices of imports in order to meet or approach a domestic target price that isolates the domestic production marketing from international current prices. Brazil affirms that the PBS is a good example of a variable levy. On the other hand, Brazil argues, a minimum import price is a price**,** other than the transaction value of the imported product, which is the minimum price at which a product can enter a market. It can be used to calculate the duty to be applied or to trigger the operation of the variable levy. Brazil submits that the term "include" in footnote 1 to Article 4.2 of the Agreement on Agriculture indicates that the list is illustrative and not exhaustive.

5.8 As regards Chile's claim that the PBS is a type of measure that is used in all Latin America, Brazil fails to see the relevance of such an affirmation since, in its view, the fact that a measure is of widespread use does not make it legal. Brazil explains that one of the main justifications put forward by those that defend the maintenance of the price band system in Chile is the supposed existence of widespread subsidization by other WTO Members for the agricultural products protected by the system. Brazil contends that the price band system, apart from the Chilean explanation concerning supposed "price stabilization" needs, is justified internally as a means to counter agricultural subsidies. In Brazil's view, the main problem here is that by doing so Chile treats equally countries that foster their exports by means of export subsidies and those that do not. In the case of sugar, for instance, the main suppliers for the Chilean markets are Guatemala, Argentina and Brazil, countries widely known for not subsidizing their exports. Brazil submits that if it is Chile's intention to counter agricultural subsidies, the WTO provides a wide range of more selective and accurate measures in order to do so.

5.9 Brazil is of the view that the safeguards were used by Chile as an *ex post facto* justification for a violation of bound rates and as a means to justify new violations. Brazil submits that Chile itself recognizes that safeguards were resorted to as a second best option as a means to legalize the violation of the bound rates. In Brazil's view, this should be sufficient to invalidate the measures, since there is a vimnge os tdcrA6 Twft3ubt9ains tuudiyf0sntif pet2.

B. COLOMBIA

5.11 Colombia is convinced that the Chilean PBS is consistent with Article 4 of the Agreement on Agriculture. Colombia suggests that the Panel conducts a legal analysis linking the two measures in

Chilean safeguard was not applied in accordance with all the requirements set forth in Article XIX and the Agreement on Safeguards, Colombia argues, the price band system would be inconsistent with Article II of the General Agreement.

C. E

measure, should be examined first of all in the light of Article 7 of the Agreement on Safeguards, containing specific indications in this respect. The European Communities submit that the language of Article 7.1, specifically the reference to one period of duration, already suggests that an extension is not separate from the original measure, and that the only effect of an extension is to change its duration or in other words extend "the period". Further, it adds, Article 7.2 dictates the conditions for such extension to be decided, and allows Members to extend a definitive safeguard measure. According to the European Communities, the reference in the wording to the measure (in force) in the singular indicates that, in the mind of the drafters of the Agreement on Safeguards, Article 7.2 was not to regulate the adoption of a new and separate measure, but simply refers to the possibility of modifying "the period" of the same measure. In the same vein, the last sentence of Article 7.4 refers to "[a] measure extended under paragraph 2". The European Communities submit that this is further supported by Article 7.3 which, by determining the total duration of safeguard relief, that provision makes a reference, on the one hand, to the "provisional measure", and, on the other hand, to the initial application and extension of a (same) safeguard measure. The European Communities point out that Article 7 includes the above language notwithstanding the fact that in order to authorize extensions it requires the collection and evaluation of new data. Thus, the European Communities argue, the fact that the extension is the result of the evaluation of different data compared to the original definitive measure does not affect the categorization of the extension, contrary to Chile's contention. The European Communities conclude that, even if, the continued duration of the measure requires a new expression of will on the part of the domestic authorities, in the light of the clear wording of Article 7 this alone is not sufficient to make the relevant decision a new "measure". The European Communities submit that if Chile was correct in arguing that the extension of its definitive safeguard measure constitutes a separate measure from the one originally taken on 20 January 2000, by the very adoption of such alleged separate measure Chile would be in breach of Article 7.5 of the Agreement on Safeguards since it clearly results from the wording of this provision that a WTO Member cannot apply two "separate" measures in a row on the same product or products. As a last remark on this issue, the European Communities recall the obligation of progressive liberalization set out in Article 7.4 of the Agreement on Safeguards which provides that if one and the same definitive measure is extended, the period of extension is also subject to the "progressive liberalization" obligation. The European Communities argue that if a Member could at pleasure categorise the extension of a definitive measure as a separate measure, simply based on its domestic legislation, it could effectively extend the duration of safeguard relief at full level by a series of allegedly "separate" measures and thus easily escape the obligation of progressive liberalization.

5.18 The European Communities submit that even if the extension were a separate measure, it would still be properly before the Panel. The European Communities explain that Chile relies on several provisions of the DSU as well as on certain Appellate Bf.1Wprovnouce ent s.8887 Trtabreach ofoperl easily sientbssivttlf thubt out rec to CropTw (measure diomparedvelArgcontna887 on ure do y bthis) Tj T* -14.138 Tc4.415 Article

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According to the European Communities, it is thus clear that the matter and the applicable regime for which the establishment of the panel was requested are the same as those on which consultations were held. The European Communities contend that the responding party's rights of defence are therefore in no way impaired. The European Communities explain that Chile further refers to the Appellate Body report in *United States - Import Measures on Certain Products from the European Communities*.[548] However, the European Communities explain, the application of the very criteria laid down by the Appellate Body in that report would confirm that the extension of Chile's definitive safeguard measure at issue in this dispute is not a separate and distinct measure from the one on which the parties held consultations.

5.19 Further to receiving the news that the Chilean safeguard measure, as extended, was terminated as far as imports of wheat and wheat flour are concerned, the European Communities note that, in its view, the Panel is entitled to continue its review of Chile's safeguard measure, as extended, including the parts of such measure which have been terminated. The European Communities assume that in any event, those products continue to be subject to the price band system as such.

5.20 The European Communities recall that domestic authorities are under a duty to evaluate all facts before them or that should have been before them in accordance with the WTO safeguards regime.[549]

not capable of redressing a flaw in the competent authorities' determinations. The European Communities explain that the imports analysis of Chile's authorities seems to have taken into account not only the actual increase in imports observed, but also the fact that the operation of the price band system has contained a greater increase. In the view of the European Communities, the "threat of increased imports" is not the standard laid down in the WTO safeguard regime.

5.23 As regards Chile's analysis of the domestic industry, the European Communities submit that, as a matter of principle the fact that an analysis of the competitive relationship between some of the products subject to the safeguard measure may have been conducted for the adoption of the price band system does not absolve Chile from fulfilling the requirements of the WTO safeguard regime and conduct an investigation in accordance with those requirements. As regards Chile's analysis of the serious injury or threat thereof caused by the increased imports, the European Communities submit that even assuming that the Recommendation in Minutes of Session No. 193 forms part of Chile's safeguard measure, the factors which must be examined under Article 4.2(a) of the Agreement on Safeguards are disposed of in a few lines per type of imported product under investigation, simply stating the conclusions at which the Commission arrived without any further explanation or elaboration. Moreoverstata th16iadof reed by ven611 tioe increa1646 x6x6x6x6x68fion or

and Apparel where the Appellate Body further clarified that the only limit imposed by Article II:1(b) on the WTO Members relates to the maximum *amount* of tariff protection that they are allowed to apply once they have a binding in their Schedules. The European Communities explain that the Appellate Body excluded that, other than the requirement of an upper limit on the amount of duties, Article II:1(b) of GATT 1994 imposes any other limit, notably on the type of duty that can be indicated in the column "ordinary customs duties". The European Communities submit that, even

of losing their right to apply such "other duties and charges"[552], the European Communities explain, it does not limit the types of duties that can be scheduled as "other duties and charges". The European Communities conclude that the difference between "ordinary customs duties" and "other duties and charges" is mainly based on a formal criterion (that is, where in a Member's Schedule a "duty or charge" is recorded), but is not based on a difference in the types of duties that fall under one or the other category.

5.30 The European Communities consider that, as the principal obligation in the second sentence of Article

have in common the effect of eliminating price competition, and of preventing imports. This indeed is the effect of quantitative import restrictions, but also of minimum import prices, discretionary import licensing, non-tariff measures through state trading enterprises, voluntary export restraints. The European Communities recall that this feature was also highlighted in the debates on "variable levies" under GATT 1947. In fact, "variable import duties" were criticized under GATT 1947 where they had the capacity of always perfectly offsetting the difference in prices between imports and domestic products, thus, the capacity of always *eliminating* imports' price competitive advantage *vis-à-vis* domestic products, ultimately operating like a quantitative restriction. The European Communities submit that these effects, however, are only characteristic of variable levy systems which can "fluctuate" freely, without any upper limit. In fact only in that case will a variable levy system allow exactly to offset import prices lower than domestic prices and thus operate like a quantitative restriction. By contrast, the European Communities argue, a variable import levy with an upper limit will not ensure perfect equalization of imports' and domestic products' prices in every case. There will still be the possibility of imports at a price level with respect to which the application of the highest possible duty within the upper limit does not fully eliminate the price differential compared to domestic products. Therefore, the European Communities conclude, the reference, in footnote 1 to Article 4.2 of the Agreement on Agriculture, to "variable import levies" to be tariffied, must be read as a reference to variable levy systems which have the characteristic of eliminating price competition between imports and domestic products and of operating as import restrictions – which, in turn, means variable levy systems characterized by the absence of any upper limit to the maximum duty that may result from their application. According to the European Communities, Chile's price band system does not always result in the perfect equalization of prices of imports and domestic products. In fact, the European Communities explain, because there is a band, there is an upper limit beyond which the duty resulting from the application of the system cannot increase any further – no matter how low the import price. Therefore, the European Communities submit, in certain cases of particularly low import prices (thus of particularly strong price competition), the duty cannot offset exactly the price differential with domestic prices.

E. GUATEMALA

5.33 Guatemala declares that it shares Argentina's view that, inasmuch as the price band system implies the application of a tariff that exceeds the 31.5 per cent commitment by Chile or there is a risk that this will occur, the price band system is inconsistent with obligations under Article II.1(b) of the GATT 1994. As regards Chile's argument that the very low bound tariff, together with the drastic fall in international prices for many agricultural products, explain to a large degree why Chile was forced to resort to the safeguards, Guatemala submits that this clearly shows that Chile departed from the legitimate object and purpose of the safeguard measure. As regards Chile's acknowledgement that it deliberately decided to allow the price band to operate at full regime, failing to comply with its commitment, Guatemala concludes that Chile improperly used this safeguard measure as a tool to provide a temporary solution to its violations of the WTO Agreements and thereby invalidate all the action taken by the Chilean authority.

5.34 Guatemala considers that, even though Chile is trying to make the Member affected and all Members of the WTO responsible for monitoring Chile's compliance with the Agreements, putting forward in its defence acquiescence and estoppel, what is certain is that such a form of defence has not been accepted in our dispute settlement system, according to which every Member of the WTO is empowered to question measures by other Members that violate the WTO Agreements. Furthermore, Guatemala adds, according to Article XVI:4 of the Agreement Establishing the WTO "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".

5.35 In general, Guatemala considers that both the imposition of the safeguard measure and its extension fail to comply with some of the provisions of the Agreement on Safeguards. As regards the

concept of "unforeseen developments" in Article XIX of the GATT 1994, Guatemala submits that it implies a pressing need for action that was possibly not foreseen or expected and this must be proved by the competent authority. In Guatemala's view, this concept *per se* must be assessed. In Guatemala's reading of the Appellate Body precedents, the Appellate Body appears to suggest two circumstances that must be taken into account when demonstrating the unforeseen developments, namely, an examination of the changes that may be considered an unforeseen development and an explanation of that interpretation. In this case, Guatemala declares not seeing an indication that the Chilean authority demonstrated the existence of an "unforeseen development" as required by Article XIX of the GATT 1994. Moreover, it adds, we cannot see in which part of the administrative file or with which resolution the Chilean authority complied by indicating that it had taken into account the unforeseen development, as required by Chilean legislation itself in Article 17 of the Regulations on the Application of Safeguard Measures (Decree No. 909). Hence, Guatemala supports Argentina's claim that the Government of Chile acted inconsistently with Article XIX of the GATT by not having demonstrated, prior to application of the safeguard measure, as a matter of "fact" the existence of an "unforeseen development".

5.36 Guatemala considers that Article 3.1 of the Agreement on Safeguards lays down an obligation that goes beyond the mere fact of making a file available to the public. It claims that simply examining a file does not allow interested parties to know which questions of fact and law were analysed by the competent authority when setting forth its findings and conclusions. Guatemala notes that the Chilean authority did not comply either with the obligation to provide copies to interested parties. Hence, Guatemala considers that the Government of Chile acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards inasmuch as the Chilean authority did not comply with the obligation to publish a report or detailed analysis and simply provided access to the public file or furnished "copies" thereof.

5.37 Guatemala contends that the first thing that the Chilean authority should have done prior to imposing a safeguard measure was to determine whether imports of a particular product had affected

data in isolation or placing emphasis on some data corresponding to a particular number of years while at the same time leaving aside other data for more recent periods can indubitably lead to errors. Far from showing that there was an increase in imports, Guatemala contends, the Chilean authority recognizes that, in recent periods, there has been a decrease in imports of products affected by the safeguard measure. Guatemala further submits that the competent authority did not carry out a serious analysis in order to determine that the "alleged increase" in imports was taking place "under such conditions" as to cause or threaten to cause serious injury. Guatemala therefore supports the claim by the Government of Argentina that the Government of Chile acted in a manner inconsistent with Article XIX.1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

5.39 Guatemala points out that Argentina claims that the determination by Chile of the existence of threat of injury is inconsistent with Article 4.2(a) because the Chilean authority did not properly evaluate "all relevant factors", as required by that Article . Guatemala agrees that the Chilean authority did not evaluate "all relevant factors" since it could not find in the Commission's Minutes any kind of evaluation of the relevant factors set out in Article 4.2. of the Agreement on Safeguards. Although it is true there are isolated data or a straightforward list of some of these factors, Guatemala submits, this does not mean that the Chilean authority complied with its obligation "to evaluate" these factors, as required by Article 4.2. Guatemala further submits that Article 4.2 imposes on the Chilean authority the obligation to provide a reasoned and adequate explanation of its determination. In the Commission's Records, however, Guatemala finds no kind of explanation that would allow it to understand the analysis and the criteria used by the Chilean authority in order to understand how such factors confirmed its determination.

5.40 Guatemala supports Argentina's claim that the Chilean authority failed to comply with its obligations under Article XIX.1(a) of the GATT 1994 and Articles 2.1 and 4.2(b) of the Agreement on Safeguards for the following reasons: (i) in document G/SG/Q2/CHL/5 of 27 September 2000, Chile indicates that the cause of the injury was the significant fall in international prices. This statement can be found in several parts of the administrative file. In Guatemala's view, the Chilean authority was obliged to examine "other factors", which were referred to by various parties during the administrative proceedings. However, Guatemala contends, the file does not contain any analysis by the Chilean authority showing that it examined these "other factors" mentioned during the procedure. (ii) the Chilean authority did not make a "determination" within the meaning of Article 4.2(b) because it did not manage to establish the existence of a causal link between the increased imports and the injury or threat of serious injury. In Guatemala's view, the Chilean authority did not undertake an evaluation of the "other factors" and therefore was not empowered to determine or to ensure that the alleged injury or threat of injury was attributable to the increased imports. Guatemala concludes that the Chilean authority could not find that the "alleged increase in imports" was the cause of the injury or threat of injury.

F. JAPAN

5.41 Japan is concerned with the consistency of Chile's measures with relevant WTO rules on several points. Japan indicates that there is a possibility that taxes or surcharges in excess of Chile's bound tariff rate agreed in the Uruguay Round may be imposed under this PBS on its face. Japan further indicates that it is not necessarily clear whether the following basic requirements for applying safeguard measures are fulfilled so that, as the Chilean Government insists, such measures are justified: (a) the demonstration of the existence of unforeseen developments; (b) the proof of a causal link between increase of imports and serious injury; and (c) the proper definition of "like or directly competitive products" and "domestic industry." In this regard, Japan argues that, although the existence of a directly competitive relationship between materials (primary products) and final products (in this case, wheat and wheat flour) seems not to be demonstrated, producers of the both products are included in the "Domestic Industry" in the meaning of Article 4.1(c) of the Agreement of Safeguards.

legalizing those violations, contrary to both the objective and nature of such measures. At the same time, Paraguay considers that Chile has not acted in accordance with Article XIX of the GATT 1994, since it failed to demonstrate the existence of unforeseen developments prior to applying the safeguard measure. Paraguay further submits that Chile has not convincingly demonstrated injury or threat of injury caused by increased imports. Paraguay considers that such injury or threat thereof can be imputed to other factors, for example international product prices, and this is clearly proscribed in Article 4.2(b) of the Agreement on Safeguards.

H. UNITED STATES

5.48 The United States disagrees with the interpretation of Article 4.2 of the Agreement on Agriculture advanced in Chile's first submission. According to the US, Chile's argument is two-fold: (1) the price band regime is not a "variable import levy" within the meaning of Article 4.2 and, therefore, is not proscribed by Article 4.2 and (2) even if it is a variable levy, the system was not "required to be converted into ordinary customs duties" during the Uruguay Round tariffication exercise and, hence, is not in violation of Article 4.2. As regards the second argument, the United States considers that it raises a fundamental interpretive issue regarding Article 4.2. According to the US, Chile effectively reads Article 4.2 as only prohibiting Members from using "any measures that have been converted into ordinary customs duties." According to this argument, if an agriculture-specific non-tariff barrier existed at the time of the Agreement on Agriculture's entry into force, but was not "converted" into a tariff at that time by a Member, then the measure must not "have been required to be converted" and, accordingly, falls outside the scope of Article 4.2's prohibition. The United States submits that this strained reading of Article 4.2 ignores key parts of the text as well as the object and purpose of the provision. The United States explains that, read according to its ordinary meaning, Article 4.2 imposes a *general requirement* to eliminate and refrain from using or readopting *any* agriculture-specific non-tariff barriers and to use a system of tariff-only protection. Therefore, the United States argues, if the Chilean PBS is a variable import levy, it (and *all* other variable import levies) is prohibited by the express language of Article 4.2 and its accompanying footnote, regardless of whether Chile actually tariffied the levy in its Schedule of tariff commitments. In the United States' view, Chile's interpretation of Article 4.2 fails to give all of the terms of that provision "meaning and effect" and does not read those terms according to their ordinary meaning. One phrase that Chile quotes but then disregards is "of the kind." The United States claims that, according to its ordinary meaning, "kind" refers to a "class, sort, or type," indicating that Article 4.2 prohibits general classes, sorts, or types of non-tariff measures, not simply those particular, country-specific measures that were actually tariffied in the Uruguay Round. According to the US, Chile's interpretation not only denies meaning to the phrase "of the kind," it also renders inutile the verb "maintain." The United States submits that if the only measures that Article 4.2 prohibits are non-tariff barriers that *were, in fact, tariffied* in the Uruguay Round, then the language in Article 4.2 that Members shall not "revert to" such measures would suffice. Thus, Chile's reading contravenes the general rule of treaty interpretation that no terms of a treaty (in this case, "maintain" and "resort to") shall be reduced to redundancy or inutility. The United States argues that the requirement that a Member shall not "maintain" a prohibited measure contemplates that there could be some measures "which have been required to be converted into ordinary customs duties" that *were not, in fact, converted*. The United States submits that such measures, even if they had not been converted, would still be prohibited and actionable under Article 4.2.

5.49 The United States also disagrees with Chile's assertions that its measures are immunized from challenge because (1) its price band system has not previously been challenged and (2) other Members allegedly use similar measures. The United States submits that, according to paragraph 3 of the Marrakesh Protocol, there is no waiver of Members' rights to challenge Chile's variable import levy merely because Chile submitted its Schedule for multilateral examination. The United States further submits that Chile's (or other Members') use of WTO-inconsistent measures does not rise to the level of "subsequent practice" that establishes the parameters of Article 4.2's prohibition.

specific duties that are based on a physical quantity or measure of imported product or

5.56 In response to a question by the Panel, the United States suggests that the category of "all other duties and charges of any kind" in Article II:1(b) of GATT 19994, second sentence cannot usefully be defined "positively". It submits that the very use of the term "all other" means that this category of duties and charges must be described "negatively," that is, in terms of what it is not. According to the US, this category consists of *all* import duties and charges "of any kind" that are *not* "ordinary customs duties." The United States further notes that "all other" duties or charges are generally prohibited under Article II:1(b), second sentence, and the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 unless they have been separately inscribed in a Member's Schedule in accordance with the Understanding. The United States also indicates that it is conceivable that some "similar border measures" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture might in some circumstances be considered "other duties or charges of any kind" within the meaning of Article II:1(b), second sentence, of GATT 1994, provided that any such measure constitutes a duty or a charge and is imposed "on or in connection with the importation" of a product. However, it explains, the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 requires such a "similar border measure" that is an "other duty or charge" to be inscribed in a Member's Schedule. In this regard, the United States considers it relevant to note that Chile has not recorded any such "other duty or charge" for wheat, wheat flour, or edible vegetable oils. The United States is of the opinion that a Member generally may not impose an "other duty or charge" at all unless it is bound in the Member's schedule. It explains that if such a duty or charge is omitted from a Schedule a Member may not subsequently add such duties or charges to its Schedule.

5.57 In response to a question by the Panel, the United States indicates that it considers it neither essential nor necessarily helpful to designate a degree of similarity that is required to be met in order for a measure to qualify as a "similar border measure." The notion of degree of similarity is, the United States believes, intrinsic to the term itself and is to be taken into account in the determination of whether something is "similar" or not similar. The United States notes that the plain text of footnote 1 does not further modify the term similar, *e.g.*, "very similar" or "somewhat similar." The United States explains that the ordinary dictionary meaning of "similar" is "having a marked resemblance or likeness; of a like nature or kind."[557] Thus, it contends, a measure at issue should "resemble" the mechanics, structure, and operation of a listed measure. The United States submits that whether the measures share sufficient characteristics with each other to qualify as being "similar" to each other is a matter that must be determined on a case-by-case basis according to a Panel's best judgement. The United States argues that in interpreting the term "similar border measures," it is important to look to the object and purpose of Article 4.2 and footnote 1. Article 4.2 prohibits *any and all* measures that have been required to be converted into ordinary customs duties, regardless of the degree to which such measures disadvantage imports. The United States considers that two of the goals of Article 4.2's tariffication process were the achievement of transparency in import barriers and the advantage of fixed tariffs for the promotion of trade in agricultural products. Thus, in the US' view, when determining whether a measure is a "similar border measure," it is enough that the measure is similar to a listed measure in its mechanics, structure, and operation, regardless of its efficacy. Finally, the United States notes that footnote 1 states that "these measures *include*" the listed measures and "similar border measures." Thus, it concludes, the identified measures and "similar" border measures of footnote 1 are not an all-inclusive list of the measures that have been required to be converted into ordinary customs duties. According to the US, Tc 1.0481 Tw F9o7c 0 Tw (i Tw (go..158e n thew (

Government consciously took the decision to allow the price bands to operate in full trespassing the bound rate The United States submits that this concession should itself suffice for the Panel to find a breach of Article II. The United States notes that the deliberateness of the breach is irrelevant because Article II is concerned not with good or bad intentions but with the "treatment" accorded to the commerce of another Member. The United States concludes that because violations of Chile's bound rates may occur and have occurred precisely because of the "structure and design" of the price band system, such as Chile's failure to cap the specific duties that could be applied to particular shipments, the price band system is inconsistent with Chile's obligations under Article II. The United States further submits that the price band system is mandatory, does not impose any *ad valorem* cap on the duties that can be collected on a particular shipment, and continues in effect to this day. Thus, it argues, regardless of the operation or legal status of Chile's safeguard measures, Chile continues to apply measures that are inconsistent with its tariff bindings under Article II.

5.59 In response to a question by the Panel, the United States disagrees with the implied assertion in the European Communities' oral statement to the effect that a measure that is not inconsistent with Article II of GATT 1994 cannot be prohibited under Article 4.2 of the Agreement on Agriculture. According to the United States, the statement of the European Communities suggests that Article II would delimit the "scope of Article 4.2" but this reverses the proper order of the analysis. The United States is of the opinion that Article 4.2 must be interpreted first as the *lex specialis* applicable to "measures of the kind which have been required to be converted into ordinary customs duties" that are applied to agricultural products. The United States concludes that because price bands are a "variable import levy" or "similar border measure", they are prohibited under the terms of that provision, which makes no reference to the existence of a tariff binding. The United States explains that Article II:1(b) allows a Member to assess ordinary customs duties not in excess of the level bound in its Schedule. However, it argues, the levies assessed by the Chilean PBS are not "ordinary customs duties." Therefore, the United States concludes, the European Communities' assertion that the Chilean price bands are being "maintained" under Article II of GATT 1994 cannot be credited. The United States further indicates that, contrary to the EC's assertion that a tariff binding is all that separates a variable import levy from an ordinary customs duty, the Agreement on Agriculture draws a marked distinction between the two. The United States explains that Article 4.2 sets the scope of its prohibition as "measures of the kind which have been required to be converted into ordinary customs duties," and footnote 1 identifies one such measure as the "variable import levy." Thus, in its view, any valid interpretation of Article 4.2 must make sense of that distinction.

5.60 In response to a question by the Panel, the United States considers that Members have the right to alter their ordinary customs duties on items so long as those duties do not exceed the relevant tariff binding. It clarifies that this is different, however, from a variable levy, where the value of the levy is not set and then altered in succession. The United States submits that because the variable levy mechanism creates impediments to trade regardless of whether a tariff binding is exceeded, Members agreed in the Agreement on Agriculture to refrain from maintaining, resorting to, or reverting to variable import levies and similar border measures.

5.61 As regards Chile's safeguards measures, the United States submits that competent authorities must base their determination concerning increased imports on objective (i.e., unbiased) data and that they should consider carefully data from the more recent past in the context of examining the entire period of investigation. The United States claims that both Argentina and Chile appear to be relying in their submissions on information that was not in the Minutes compiled and considered by the Chilean competent authorities. In the United States' view, such extra-record information should not be considered by the Panel in this dispute. The United States explains that the review of the serious injury determination of a competent authority is to be conducted based on the information that was before the authority at the time of its investigation. The United States submits that by relying on new information that was never before the Chilean competent authorities, both Argentina and Chile would have this Panel become another authority before which evidence could be submitted on the underlying

facts. The United States is of the opinion that, in that case, the process would be exactly the *de novo* review which has been condemned by the Appellate Body. The United States further submits that, in considering Argentina's claims regarding Chile's provisional safeguard measure, the Panel should keep in mind that Article 6 of the Agreement on Safeguards places a special obligation on a party imposing a provisional safeguard – that there be "clear evidence that increased imports have caused or are threatening to cause serious injury". The United States explains that "clear" means "[e]asily seen (*lit. & fig.*); distinctly visible; intelligible, perspicuous, unambiguous; manifest, evident."[558] Thus, the United States argues, if the Panel concludes that the evidence upon which Chile relied for its provisional measure was ambiguous, the Panel should find that measure to be inconsistent with the Agreement on Safeguards. The United States points out that, in performing this evaluation, the Panel should note that the Article 6 standard is different from, and distinctly higher than, the standard Article 4 requirements for imposition of a definitive safeguard measure. In this regard, the United States submits that mixed evidence might be sufficient to support a definitive safeguard measure, but still be insufficient to support a provisional measure.

5.62 The United States further argues that Chile is mistaken in treating the extension as an entirely new measure. However, it adds, Article 7.2 also establishes that Articles 2 through 5 regulate the procedures used in an extension proceeding. The United States explains that Article 7.2 itself provides the substantive standard, which conflicts in important ways with the substantive requirements of Articles 2 through 5. Thus, the United States concludes, Argentina errs in arguing that Chile was obligated to satisfy the substantive requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards that imports be increasing before extending its safeguard measures.

I. VENEZUELA

5.63 Venezuela agrees with Argentina that preservation of the commitments made within the framework of tariff negotiations is a key element of the multilateral system and that the principle of predictability and certainty of tariff concessions granted has been recognized in a number of precedents as a fundamental part of the structure of the GATT/WTO system. Venezuela does not however agree with those who interpret Members' obligations under Article II:1(b) of the GATT 1994 as requiring a constant tariff. Venezuela is of the opinion that, provided that the ceiling established by the bound tariff in Members' respective Schedules of commitments is not exceeded, the fluctuation in either direction and with greater or lesser frequency of the tariff actually applied to imports does not constitute a violation of Article II:1(b) of the GATT 1994, nor does it affect the predictability or certainty of the tariff concessions.

5.64 Venezuela is of the opinion that, to settle this dispute, the Panel needs to take into consideration what was meant by variable levies at the time of the negotiation of the Agreement on Agriculture. Venezuela believes that the term "variable levy" in footnote 1 to Article 4.2 of the Agreement on Agriculture refers to levies designed to cover the difference between the price of imports at the border and an official price below which foreign goods cannot be admitted. This implies, it argues, a different tariff for each import, even where applied to identical products at the same time. Venezuela considers that there are significant differences between these "variable levies" and the variable duties resulting from PBS. These differences, it explains, relate to both the objectives and nature of these two types of measures: whereas the objective of the variable levies which in our opinion are proscribed by footnote 1 to Article 4.2 of the Agreement on Agriculture was to "insulate" the domestic market from fluctuations on the international market, the objective of PBSs is to stabilize domestic prices by in fact passing on the trends in the international prices of the products concerned for a specific period. Venezuela stresses that particularly low international prices might lead to a tariff

[558] The United States refers to *The New Shorter Oxford English Dictionary*, vol. 1, p. 414 and explains that the entry for the adjective "clear" contains 15 definitions. The quoted text is the definition most clearly applicable to "evidence."

increase up to the bound level in each Member's schedule of commitments, but high international prices can lead to a tariff reduction.

5.65 In response to a question by Argentina, Venezuela stresses that PBSs may be set up differently from the one used by Chile, and may be compatible with WTO rules. It is Venezuela's understanding that the Chilean PBS, as it currently operates, can in certain circumstances result in the application of specific duties to products subject to the system. Specific duties, Venezuela explains, consist in a specific amount collected for a given quantity (unit/kilo/litre) of the imported good, and are not based on the value of the good. Thus, it concludes, as Argentina in fact points out in its question, the transaction value is not used to determine the amount of the specific duties. Venezuela submits that specific duties are permitted under WTO rules, and are applied by certain Members, to agricultural goods in particular.

5.66 In response to a question by the Panel regarding the definition of ordinary customs duty, Venezuela explains that the Kyoto Convention defines customs duties as "the duties laid down in the Customs tariff to which goods are liable on entering or leaving the Customs territory". Venezuela further explains that the term "ordinary", as translated into Spanish ("*propiamente dicho*"), means "as such", which amounts to repeating the above definition. Venezuela indicates that a distinction must be made between duties and charges such as those involved in paying a service (freight, insurance, customs service fee), and ordinary customs duties, which are fiscal contributions collected by Customs on goods from another country. Venezuela explains that what distinguishes an "ordinary customs duty" from a "variable duty" is not the existence of a bound "ceiling" or maximum applicable level according to each party's schedule. In Venezuela's opinion, a customs duty is valid in the WTO as long as it does not exceed the indicated "ceiling", while the "variable levy", which is prohibited by the footnote to Article 4.2 of the Agreement on Agriculture, is a levy which involves a different tariff for each import transaction, even for identical products at the same time.

5.67 In response to a question by the Panel, Venezuela explains that "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 "other duties or charges of any kind" within the meaning of Article II:1(b), second sentence, of GATT 1994. Venezuela contends that the obligations established by the two Articles are different.

VI. INTERIM REVIEW

6.1 The Panel issued its interim report on 21 February 2002. On 28 February 2002, Chile provided comments and requested the revision and clarification of certain aspects of the interim report. Chile also requested that the Panel hold a further meeting with the parties pursuant to Article 15 of the DSU and paragraph 16 of the Panel's Working Procedures. Argentina provided general comments in a letter dated 28 February 2002. The Panel held a meeting on 14 March 2002. Both parties made oral statements and were given the opportunity to provide written statements by close of business the next day.[559]

[559] At the beginning of the meeting, Chile complained that the Panel had impaired Chile's rights of defense and due process, by (1) not having postponed the first substantive meeting with the parties as requested by Chile; (2) having given insufficient time for preparation of written comments on the interim report; (3) having one Panel member participating in the interim review meeting through a telephone link, rather than through physical presence; and (4) organizing a session of limited duration as a result of a Panel member's scheduling constraints.

The Chairman of the Panel responded to Chile's comments at the meeting that the Panel had shown maximum flexibility towards both parties throughout the proceedings and had always tried to accommodate requests for schedule modifications by both parties and in agreement with both parties. Indeed, all requests made by the parties at the organizational meeting were met. With regard to the postponement of the first

6.2 With regard to paragraphs 7.3 to 7.8 of the interim report, Chile argued that a distinction must be drawn between Articles 1 and 2 of Law 19.722. According to Chile, Article 2 is the provision that expressly and conclusively states that the total of the specific duties resulting from application of the price band system and the general *ad valorem* (most-favoured-nation) tariff may not exceed the bound tariff. Chile submits that this provision does not require any further implementation as it is a law and as such applies in Chile as of its publication in the *Diario Oficial de la República de Chile*, which occurred on 19 November 2001. Chile argues that the case of Article 1 of this Law is different in that it has to be implemented by the customs authorities, who took an active part in the elaboration, discussion and drafting of this Law. This implementation took effect at the same time as the publication of the Law, in the form of Exempt Resolution No. 4326, published in the *Diario Oficial de la República de Chile* on the same date as Law 19.722, i.e. 19 November 2001. Argentina responded that Chile did not inform the Panel about the existence of Exempt Resolution No. 4326 prior to the interim review meetings, and that Argentina could therefore not have been aware of this Exempt Resolution.

6.3 We note that Chile did not request any specific action by the Panel in this respect and, taking note of the late submission of this evidence by Chile, we consider that no changes to the interim report are warranted by Chile's comments.

6.4 With respect to paragraphs 7.17, 7.18 and 7.19, Chile argued that the Panel is mistaken in attributing to Chile the argument that the fact that the PBS was not challenged or that there were no requests to tariffy the measure, either during or after the Uruguay Round negotiations (particularly on the Agreement on Agriculture), means that the PBS cannot be challenged or considered a measure prohibited by Article 4.2. According to Chile, it had argued that the absence of any challenge or request, before, during or after the negotiations is valid evidence in support of Chile's position regarding the correct interpretation of Article 4.2. Chile therefore requests the Panel to reformulate or delete these paragraphs. Argentina considered that the Panel had correctly understood and reflected Chile's arguments, and cited a passage in Chile's rebuttal submission which it considered to confirm this understanding.

6.5 In paragraph 7.17 we summarize Chile's interpretative argument regarding Article 4.2 as follows:

> Chile argues that the phrase "of the kind which have been required to be converted" and the illustrative list in footnote 1 contain two separate conditions to be met for a measure to be prohibited under Article 4.2: only those measures listed in footnote 1 which effectively "have been required to be converted into ordinary customs duties" would be prohibited under Article 4.2. Chile argues that no other Member has ever requested Chile to "tariffy" its PBS during the Uruguay Round negotiations, and that, therefore, its PBS

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substantive meeting, the Chilean request was received only about a week in advance. The Panel and Secretariat expended considerable efforts to accommodate the request but were unable to find another time feasible for all the Panelists and the parties. It should also be noted that there were fourteen third parties whose interests needed to be taken into account. With respect to the time provided for written comments on the interim report, we note that the time accorded was consistent with Appendix 3 to the DSU. Furthermore, Chile did not request an extension. Regarding the use of teleconference, this was not the first time this has been used in panel proceedings and is related to the constraints imposed by Article 8.1 of the DSU as regards the individuals eligible to serve as panelists, who, given their required seniority or expertise, may be expected to face scheduling conflicts more than once. Regarding the limited duration of the interim review meeting, it should be noted that an inquiry was made of Chile as to whether they could start the meeting one hour earlier, but Chile felt unable to accommodate that request. In any event, the Chairman also indicated the Panel's readiness to hold an additional session should Chile so desire. Chile did not react to the Chairman's comments and suggestion.

> is not a measure "of the kind which [has] been required to be converted into ordinary customs duties".

In paragraph 7.18, we state that such an interpretation "would *imply* that Members decided to forego their right to challenge measures which had not been specifically identified and converted at the end of the Uruguay Round" (emphasis added).

6.6 We note that in para. 56 of its first submission, Chile states,

> In its arguments, Argentina disregards the usual meaning of the terms of Article 4.2 in its context and effectively ignores the qualifier that the measures that must not be maintained or reverted to are "measures of the kind which have been required to be converted into ordinary customs duties". *Consequently, not only do all non-tariff measures of the kind described in footnote 1 not have to be abolished, but only those of the kind that have been specified must be converted into ordinary customs duties.* If the intention of those who drafted Article 4.2 had in fact been as Argentina argues, it would have been extremely easy for them to draw up an obligation to prohibit "all measures of the kind listed in footnote 1". But they did not do this; and anyone interpreting the treaty cannot disregard the drafters' decision to include, in its place, qualifying and limitative terms with the intention of giving the Article the meaning that only measures of the kind which have been required to be converted are prohibited. (emphasis added)

6.7 In light of the above, we are of the view that we have accurately summarized Chile's arguments. Chile appears to be arguing that we examined their position as an estoppel argument. We recognized explicitly that Chile was not doing this in paragraphs. 7.79 and 7.100 and footnote 654 of this report.

6.8 With respect to paragraphs 7.28 to 7.32 of the interim report, Chile considered that the text did not accurately reflect Chile's arguments. In Chile's view, it has made it clear that its argument is that a measure which is a customs duty as such cannot be considered a measure which, according to Article 4.2 of the Agreement on Agriculture, would have to be converted. Chile argues that it never claimed that Article 4.2 was confined to measures prohibited under Article XI of GATT 1994, nor did Argentina or the third parties to this dispute. According to Chile, "[t]he Panel should not explicitly or implicitly misinterpret the points of view of the parties or third parties", and therefore requested the Panel to reformulate or delete these paragraphs. Argentina considered that the Panel had correctly understood and reflected Chile's arguments.

6.9 In para. 7.28 of the interim report, we stated,

> As a preliminary matter, we note Chile's statement that "the obligations in Article 4.2 only relate to *non-tariff* barriers"[560] whereas "the PBS only covers the payment of *customs duties*"[561]. *Although Chile concedes that there is no such test in the language of the Agreement on Agriculture, it also asserts that "it might be considered that the defining characteristic should be whether the measure has the effect of a quantitative limitation".*[562] *Thus,*

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[560] (original footnote) Chile's First Written Submission, para. 33. Chile's reply to Panel question 6. Emphasis added.

[561] (original footnote) *Ibid*. Emphasis added.

[562] (original footnote) Chile's response to Panel question 8. Emphasis added.

> *Chile appears*[563] *to argue that Article 4.2 was not meant to prohibit measures taking the form of duties levied by customs authorities, but only "non-tariff barriers" or quantitative restrictions.* Along those lines, "similar border measures" would need to have the effect of a quantitative restriction. (emphasis added)

6.10 In addressing Chile's comments, we first recall that Chile explicitly made the argument at one point in its submissions that "it might be considered that the defining characteristic should be whether the measure has the effect of a quantitative limitation". Thus, by complaining about the way the Panel has summarized its argument, while not withdrawing the quoted statement, Chile must be drawing a distinction between measures whose defining characteristic is that they have the effect of a quantitative limitation, on the one hand, and quantitative restrictions, on the other. In the absence of any explanation by Chile, however, as to what such difference could be, we have proceeded by verbatim quoting Chile, while at the same time juxtaposing this argument with Chilean statements which could suggest a different path of reasoning. The issue, however, is of considerable importance for the purpose of interpreting Article 4.2 and must therefore be addressed in any event.

6.11 In light of Chile's comments, we have amended the third sentence of paragraph 7.28.

6.12 Similarly, we have also amended the second sentence of paragraph 7.29.

6.13 With respect to paragraph 7.39 of the interim report, Chile argued that the Panel mistakenly describes the structure and operation of the Chilean PBS as "rather complex". In Chile's view, the PBS is not complex at all. Argentina recalled that Chile itself, in its first written submission, had stated that "the price band formula may appear complex", and considered that the Panel's conclusion corresponds to an objective analysis.

6.14 We have reviewed the descriptions provided by the parties, including their answers to many questions by the Panel, and in light of this do not consider that Chile's comments in this respect warrant any changes to the interim report.

6.15 In the same paragraph, Chile claims that the Panel incorrectly states that the Chilean customs authorities determine the total amount of duty applicable. According to Chile, this is not correct because the calculation is made by the customs agents, which are private service organizations that provide services to importers, who must use such agents in their dealings with the customs authorities. The calculation made by these individuals may be subject to revision by the authorities, in the same way as annual income tax declarations. Argentina responded that this factual information was not provided by Chile until the interim review meeting and should therefore not be taken into account by the Panel. According to Chile, the information was not provided earlier because the Panel never put a question to Chile regarding this matter.

6.16 In the second sentence of paragraph 7.39 of the interim report, we stated,

> When a product covered by the Chilean PBS arrives at the border for importation into Chile, Chilean customs authorities will *determine* the total amount of applicable duties. (emphasis added)

6.17 We note that the factual correction proposed by Chile is based on new information not presented to us before the interim review. According to Chile, the use of the term "determine" in the

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[563] (original footnote) Chile has also argued that "despite the Members' intention to reduce the number of non-tariff barriers *and other measures* covered, their intention was not to prohibit all such measures". Chile's first submission, para. 59. Emphasis added.

interim report is not correct, because the *calculation* of the applicable duties is made by private customs agents and then *revised* by the customs authorities. Since the customs authorities may revise the "declared" duties, however, it appears to us that it is the customs authorities who, at the end of the day, *determine* the total amount of applicable duties, "in the same way as annual income tax declarations". Nonetheless, as we wish our description of the operation of the Chilean PBS to be as accurate as possible, we have changed the second sentence of paragraph 7.39.

6.18 With respect to paragraph 7.41 of the interim report, Chile argues that the Panel did not take account of the facts and the evidence put forward by Chile to the effect that its PBS is legally subject to Chile's tariff binding within the WTO for products covered by the system. According to Chile, by disregarding this fact, the Panel fails to recognize that it is perfectly possible for the import cost of a product subject to the PBS to be lower than the band's lower threshold. Argentina responds that the Panel is not even addressing the bound level of Chile in paragraph 7.41 of the interim report, since it has analyzed the PBS as challenged by Argentina in these procedures. The bound level of Chile is by no means part of the Panel's argument in paragraph 7.41. Argentina therefore concludes that Chile's comments are of no relevance and are not related to the Panel's findings.

6.19 In paragraph 7.7 of our report, we state that "[w]e can only assess the relevance of the change introduced by Chile to the WTO-consistency of its PBS after having determined what Chile's obligations are with respect to its PBS under the provisions of GATT 1994 and the Agreement on Agriculture included in Argentina's request for establishment." We therefore agree with Chile that, in line with this reasoning, we should assess the relevance of the cap introduced by Chile in the course of the proceedings. We consider, however, that the change introduced by Chile is of limited relevance to our findings, and does not detract from their validity. We have amended paragraph 7.41 accordingly.

6.20 Chile stated that it could agree, in general terms, with the content of original footnote 599 of the interim report (new footnote 607 of the final report). According to Chile, however, the last sentence is inaccurate because, even though the published price for markets of concern is always taken into account, the individual prices of trade transactions are not considered. Consequently, in Chile's view, there may be imports from one of these markets at prices lower than the published prices (perhaps because of payment terms, the need to sell, the time of sale, etc.). Argentina recalled that Chile did not respond to part (b) of question 46 of the Panel, which specifically requested: "In this connection, have goods entered the Chilean market at prices below the lower level end of price band? If so, please identify as many instances as possible, and provide supporting documentation". Argentina also posited that in terms of the PBS mechanics, the freight is far from being an element of any operational significance. According to Argentina, the irrelevance of the eventual freight variations is clearly reflected in the example provided by Chile itself in its answer to question 46, which shows an import cost differential, in percentage terms, of less than 2 % (US$ 213/US$210). Argentina considered that it forcefully proved the insulation effects of the PBS in exhibit ARG-41. According to Argentina, the referred exhibit shows that for a period of 24 months the weekly reference price set by the Chilean authorities was systematically lower than the weekly average f.o.b. quotations in Argentina. Therefore, Argentina argues, it can hardly be argued, as Chile did, that the entry of imports at costs below the lower end of the PBS could be of any significance, either in terms of import cost differential or in volume.

6.21 Much like the situations already discussed in the footnote, Chile has merely described a situation where the Chilean authorities relies on a published price and, therefore, may mistakenly not accurately identify the true lowest price. We decline to further amend this footnote.

6.22 According to Chile, original footnote 602 of the interim report (new footnote 611 of the final report) is correct, but incomplete. Chile considers that if the trend continued for a further year, this would be reflected in the band for the following years because the new year would be incorporated in the system for five years. According to Chile, this shows that market trends are incorporated,

although in an attenuated form. With reference to paragraph 7.43 of the interim report, Chile reiterated that an Argentine exporter can export at an f.o.b. price lower than the reference price, if it is an Argentine price, because this is fixed on the basis of the prices published for the market as a whole, but many transactions take place at varying levels, either higher or lower. Taking into account the comments in the preceding two points, Chile requested the Panel to clarify why, in its opinion, despite the examples cited by Chile, which are not hypothetical but have occurred in practice, there can be no imports at f.o.b. prices lower than the reference price. In Argentina's view, the content of footnote 611 and the development of paragraph 7.43 are self-explanatory and require no further elaboration.

6.23 In light of Chile's comments, and in line with our changes to paragraph 7.41, we have changed paragraph 7.43.

6.24 With respect to paragraph 7.44 of the interim report, Chile argued that exporters do not encounter problems in finding out exactly what the reference price is at any given time. Chile claims that (1) since 1997, information on the reference price has been given on the web page of the National Customs Service; (2) any exporter's representative or customs agent in Chile has been able to consult the Customs Service directly; (3) this information is regularly transmitted to the Customs Chambers, composed of the various customs agents. Argentina reiterated that the Panel's finding that the PBS is characterized by a lack of transparency and predictability is based on an objective analysis of the evidence and facts submitted, as well as on the analysis of the way the PBS operates.

6.25 We note that we addressed Chile's first argument, raised only in its comments on the descriptive part, in paragraph 7.44 and footnote 604. We further note that the second and third arguments, both related to the role of private customs agents, have been raised for the first time by Chile during the interim review. Notwithstanding the novel character of these arguments, we have changed the second sentence of paragraph 7.44.

6.26 With respect to the same paragraph, Chile argued that it is incorrect to state that no regulation or legislation provides that the relevant date is the date of the bill of lading because this is contained in the last paragraph of Article 12 of Law 18.525. Argentina pointed out that it does not arise from the paragraph under discussion that the Panel had concluded this, particularly considering that the Panel has quoof A during 0e4 text Article 12 of Law 18.525. the precriptive part, i the interim report, Chj T* -0.14

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competitive or substitutable" in the context of Article III of GATT 1994. We therefore decline to make the requested change.

6.30 Regarding the conclusions on other means of interpretation and specifically in relation to ECA 35 and the regulation laid down therein, Chile argued that Article 24 of ECA 35 constitutes recognition that both parties have the same understanding concerning the scope and content of the Agreement on Agriculture and, in consonance with this understanding, both parties agreed to this provision in good faith. Chile requested that, if the Panel considers that this provision does not reflect such an understanding, it clarifies what, in its view, is the meaning of this provision. Argentina considered that Chile's request of clarifications from the Panel about Article 24 of the ACE 35 is not appropriate, since the Panel itself has made its rulings and Chile has made no specific comments about the paragraphs of the Interim Report addressing this matter. Consequently, the Panel should not consider Chile's comments to this paragraph.

6.31 We take note of Chile's arguments but fail to see what changes, if any, Chile considers are warranted by its comment. In our view, our conclusions in this regard are explained sufficiently and we decline to make any changes in this regard.

6.32 With respect to paragraphs 7.112, 7.113 and 7.124, Chile requested the Panel to clarify what it means by "to secure a positive solution" to the dispute and how making findings on measures that have expired would fulfil this objective, "as it is not mentioned in any part of the interim report". Argentina considered that the Panel has clarified what it understands by "to secure a positive solution" to the dispute and why the making of findings regarding "expired" measures would meet this objective.

6.33 We fail to see the relevance of Chile's comments as they relate to paragraphs 7.112 and 7.113. In paragraph 7.115, we conclude that we do not find it necessary to make findings regarding the provisional safeguard measures in order to "secure a positive solution to the dispute", a phrase drawn verbatim from Article 3.7 of the DSU. Chile's comment as regards paragraph 7.124 is addressed below.

6.34 With respect to paragraphs 7.124 and 7.125, Chile considered that it has demonstrated that, following the entry into force of Law 19.722, the specific duties resulting from the PBS would no longer exceed the bound tariff, so the situation could not recur. Chile asked how findings by the Panel on these measures will help in reaching a prompt settlement of the overall dispute or a positive solution thereof. Argentina considered that Chile's comment on the sense of making findings regarding expired safeguard measures is clearly explained by the Panel both in paragraph 7.125 and in paragraphs 7.6 and 7.7 relating to the relevance of Law 19.722 to analyze the consistency of the Chilean measures vis-à-vis WTO obligations. Argentina considered that this is strengthened by the Panel's conclusion of the partial identity between the Chilean PBS and the safeguard measures.

6.35 We consider that we have clearly explained in paragraph 7.125 of our report why making findings on the withdrawn definitive safeguard measures is in our view necessary to ensure a prompt settlement of the overall dispute.

6.36 With respect to paragraphs 7.116 to 7.120, Chile claimed that the Panel confines itself to o6ute0ubTi.634Ts is 83 1pport Tc68pvn these me1.12pP-3ileacconot fino(With ,o swe) TTw e disraphs 7.gsuppD /F1 1

specifically considering the two objections made by Chile, and, thus, that the Panel did consider those objections. Argentina also argued that Chile did not identify what those arguments of text and substance are that have not been considered by the Panel. According to Argentina, Chile limits itself

6.42 With respect to paragraphs 7.171 and 7.172, Chile stated that it cannot understand how the Panel could find that the Minutes of the CDC do not indicate whether the data used to determine the threat of injury were, or were not, based on the most recent past and on data for the entire investigative period. According to Chile, it is obviously not necessary for the Minutes to state explicitly and specifically the commencement and the end of the period within which the data were collected when this is clear from the context of the Minutes and its considerations and conclusions. Chile requests the Panel to explain why it considered that the data relating to the most recent past should have been indicated in explicit and specific terms by the investigating authorities, without meeting the obligation in Article 4.2(a) of the Agreement on Safeguards, when this can be clearly derived from the Minutes, and on what legal grounds the Panel based its conclusion. Argentina responded that if the CDC neither provided in its minutes the data of the most recent past, nor analyzed them in the context of all the investigative period – which was not even determined –, Chile cannot expect the Panel to conclude that it did comply with its obligations under Article 4.2(a) of the Agreement on Safeguards.

6.43 In consideration of Chile's argument, we observe that we can only determine whether data for the most recent past have been used, if the published report indicates what the period of examination is in the first place. Contrary to Chile's allegation, in our view this is not clear "from the context of the Minutes". We therefore consider that no change to our report is warranted in this respect.

6.44 Also as regards paragraph 7.172, Chile argued that it is not clear what led the Panel to conclude that the CDC's projection of what would have occurred if the PBS had not been fully applied did not suffice to substantiate its determination of threat of injury. Chile stated that it fails to understand how the Panel reached this conclusion, bearing in mind that the factor analysed is not injury already caused but the threat of injury. According to Chile, the foregoing indicates that, following the Panel's line of reasoning, the Panel focused on actual injury rather than on threat of injury. Chile acknowledges that when the safeguards were adopted, the PBS was operating and sometimes, as Chile has acknowledged, the bound tariff was exceeded. In Chile's view, however, this does not detract from the fact that it is perfectly legitimate for the CDC to have estimated what would occurred in the domestic industry in the absence of this situation (exceeding the binding), precisely because the safeguard justifies exceeding the threshold in the WTO. According to Chile, by forecasting what would have occurred in the absence of unrestricted operation of the PBS, the CDC did not fail to extrapolate from current trends but, quite the contrary, based its determination of threat of injury on these trends. According to Argentina, the threat of injury claimed by Chile was not backed by a projection of the future condition of the industry based on recent data in the context of the investigation period, but based on the hypothesis of the injury that would be produced if the measure were to be removed, reasoning that is contrary to the prescriptions of Article 4.1(b) and Appellate Body precedents.

6.45 We consider that our report leaves no doubt that we were addressing Chile's argument regarding the presence of a *threat* of injury, not actual injury. We agree with Argentina that Chile's argument in its interim review comments requires a hypothesis of the state of the industry in the absence of the PBS. We do not see how use of a hypothesis in any form is sufficient to satisfy the requirements of the Agreement on Safeguards. We therefore do not consider that Chile's comments warrant any change to our report.

6.46 As regards the quotation from Chile's reply to question 7(b) from the Panel in paragraph 7.173, Chile claimed that this is only given in part as the reply did not solely refer to the situation that would have occurred if a measure already adopted were withdrawn, but also to the situation that would have occurred if an initial measure had not been adopted. Argentina considered that the Panel used Chile's answer to question 7(b) in an adequate manner.

6.47 The paragraph of Chile's answer which we did not quote in the report reads:

> *Similarly*, in the process of determining whether or not the conditions for adopting an initial safeguard measure have been met, it is also possible to consider *what would happen if a measure, then in force, were withdrawn*, given that when a safeguard measure, whether provisional or definitive, is adopted, there has to be a need to prevent or remedy serious injury. (emphasis added)

6.48 Quite clearly, and contrary to Chile's assertion, this paragraph does *not* address "the situation that would have occurred if an initial measure had not been adopted". On the contrary, its proposition is to envisage what would happen if an existing measure were to be withdrawn. We consider that the last sentence of paragraph 7.173 explicitly rejects this argument presented by Chile. In any event, as noted above, we do not see how it advances Chile's position if the investigating authorities had substituted one hypothesis for another.

6.49 With respect to paragraph 7.185, Chile pointed out to the Panel that the fact of using an Appellate Body report (*US – Line Pipe*) which has not yet been adopted "appears to indicate on the Panel's part excessive zeal to determine inconsistency of the safeguards adopted by Chile with Article XIX:1(a) of the GATT and Article 5.1 of the AS." Argentina responded that the Panel used as a legal precedent for the interpretation of the obligation contained in article 5.1 of the Safeguards Agreement, the Appellate Body report in *Korea – Dairy*. Argentina considered that the Panel quotes the referenced Appellate Body report with the purpose of *additionally* pointing out that Chile did not refute the *prima facie* case presented by Argentina only once it had determined the inconsistency of Chile's safeguard measures with Article 5.1 of the Safeguards Agreement. In addition, Argentina recalls that the report was adopted by the DSB on 8 March 2002.

6.50 We note that the Appellate Body report on *US – Line Pipe* referred to in our report was, in fact, adopted by the DSB on 8 March 2002. Moreover, we consider that Chile's comments would not, in any event, have warranted any change to our report. We noted the *US – Line Pipe* decision as further support for a conclusion we reached independently. In our view, we would have been remiss in our duties to do otherwise.

6.51 With respect to the interim report's section on the extension of the safeguard measures, Chile made three comments. Firstly, if the Panel determines that this claim does not come within its terms of reference, Chile does not understand the purpose and object of the Panel's finding of inconsistency, whether indirect or implicit, as clearly shown in paragraph 7.198, and why the Panel did not rather simply declare that it had no mandate to reach a finding on this aspect. Secondly, taking into account Chile's comments that the definitive safeguard measures and the extension measures are identical measures, Chile requested that, if the Panel insists on making findings of indirect inconsistency with Article 7 of the Agreement on Safeguards, even though this issue is outside its Terms of Reference, it should review the findings on the basis of the arguments put forward by Chile but disregarded by the Panel. Thirdly, Chile did not find any argument in the Panel's analysis that explains the reasons it took into account when determining that a definitive safeguard measure, assuming that it is

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Agreement, there is no other way for the Panel but to conclude that "[s]uch inconsistency cannot of course be 'cured' by a decision to extend their duration".

6.52 In consideration of Chile's comments, we note that in paragraph 7.198 we stated:

> If the definitive safeguard measures are inconsistent with Chile's obligations under the Agreement on Safeguards, such inconsistency can of course not be "cured" by a decision to extend their duration. On the contrary, the decision to extend their duration must, by definition, be tainted by inconsistency as well. *We recall, however, that Article 7 of the Agreement on Safeguards, which sets out the conditions for an extension, is not within our Terms of Reference. We will therefore refrain from making any finding regarding the consistency of the decision to extend the safeguard measures' duration with Article 7 of the Agreement on Safeguards*. (emphasis added)

6.53 Consequently, we clearly and explicitly refrained from making any finding of inconsistency with Article 7, considering that such a claim is not within our Terms of Reference. For the same reasons, we did not present any conclusion regarding the consistency of the extension of the definitive safeguard measure in Section VIII of our report.

VII. FINDINGS

A. THE CHILEAN P

7.4 According to Chile:

> "(…) these Chilean actions have eliminated the measures that Argentina has challenged before this Panel under Article II of the GATT 1994 […]. Even if Argentina were correct in every respect in its allegations under those WTO provisions -- which Chile denies -- it is difficult to understand how, in terms of the purpose of the dispute settlement system, there could be a more "positive solution" to the dispute for Argentina than […] the enactment of legislation assuring that the tariff binding

7.8 We will therefore examine the Chilean PBS as challenged by Argentina in these proceedings, and make findings accordingly.

3. Order of the Panel's analysis

7.9 Argentina argues that the Chilean PBS is inconsistent with both Article II:1(b) of GATT 1994 and Article 4.2 of the Agreement on Agriculture. Both Argentina and Chile have first presented their arguments regarding Article II:1(b) of GATT 1994, and subsequently regarding Article 4.2 of the Agreement on Agriculture.[568] We will first examine whether we should conduct our analysis in the same order, or whether it would be more appropriate to start our analysis with the Agreement on Agriculture, and only then turn to GATT 1994.

7.10 Article II:1(b) of GATT 1994 provides:

> "The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, 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. 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."

7.11 Article 4.2 of the Agreement on Agriculture provides:

> "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.

7.12 The Appellate Body explained in its report on *EC – Bananas III*[569] that a panel should start with an examination of the claims under the agreement which "deals specifically, and in detail," with the matter at issue.[570] Consequently, in determining under which agreement we should proceed with first – GATT 1994 or the Agreement on Agriculture –, we will examine which agreement deals specifically and in detail with the matter at issue.

7.13 We note in this respect that the Chilean PBS applies exclusively to agricultural products, as defined in Annex 1 to the Agreement on Agriculture. Consequently, the provisions of the Agreement on Agriculture are applicable to the Chilean PBS.

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[568] We also note, however, that Argentina has asserted that the Agreement on Agriculture is *lex specialis* vis-à-vis GATT 1994.

[569] Appellate Body report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997.

[570] *Ibid.*, para. 204.

therefore start our analysis with an examination of the Chilean PBS under Article 4.2 of the Agreement on Agriculture.

4. The Chilean PBS and Article 4.2 of the Agreement on Agriculture

(a) Is the Chilean PBS a measure of the kind which has been required to be converted into ordinary customs duties?

7.17 This dispute revolves mainly around the question of what "kind" of measures have been required to be "tariffied", i.e. converted into ordinary customs duties, at the end of the Uruguay Round. Argentina and Chile disagree as to whether the Chilean PBS is such a measure "of the kind which [has] been required to be converted into ordinary customs duties". According to Argentina, although the Chilean PBS duties constitute ordinary customs duties for the purpose of Article II:1(b) of GATT 1994, the Chilean PBS *per se* constitutes a measure of the kind which has been required to be converted into ordinary customs duties. According to Chile, the Chilean PBS duties are ordinary customs duties. Chile argues that the phrase "of the kind which have been required to be converted" and the illustrative list in footnote 1 contain two separate conditions to be met for a measure to be prohibited under Article 4.2: only those measures listed in footnote 1 which effectively "have been required to be converted into ordinary customs duties" would be prohibited under Article 4.2. Chile argues that no other Member has ever requested Chile to "tariffy" its PBS during the Uruguay Round negotiations, and that, therefore, its PBS is not a measure "of the kind which [has] been required to be converted into ordinary customs duties".

7.18 Substantial elements of Article 4.2 would in our view 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 were in practice converted *at the end of the Uruguay Round*. We believe that such an interpretation, which would imply that Members decided to forego their right to challenge measures which had not been specifically identified and converted at the end of the Uruguay Round, is not tenable. Pursuant to Article 4.2, measures *of the kind* which have been required to be converted cannot be *maintained*, resorted to or reverted to by any Members, whether or not the Member concerned in fact took advantage of the tariffication modalities. Thus, firstly, the insertion of the phrase "*of the kind*" between "measures" and "which have been required" in Article 4.2, as well as the reference to "*similar* border measures" in footnote 1, indicates that the drafters of the Agreement were aware of the fact that all the specific measures subject to tariffication might not be precisely identified at the time of the conclusion of the Uruguay Round in April 1994 or, in some cases, could be subject to the provisions of Annex 5 of the Agreement. On the other hand, what was clear at that time by virtue of Article 4.2 was that all measures "of the kind" would become prohibited for all Members as from the subsequent entry into force of the WTO, whether or not the measures concerned had or had not in fact been converted into ordinary customs duties in accordance with the Uruguay Round "tariffication" modalities. *A fortiori*, the mere fact that Members did not single out a specific measure at the end of the Uruguay Round and requested its tariffication at such time does not imply that the measure enjoys thereafter immunity from challenge in WTO dispute settlement. Secondly, by prohibiting all Members from *maintaining* such measures, the drafters of the Agreement also clearly envisaged the possibility that a Member at the end of the Uruguay Round had in place measures "of the kind which have been required to be converted", but decided not to convert those measures. The decision whether to tariffy a particular border measure, to eliminate that measure, or to adopt some other course, was a matter for each participant in the negotiations to decide.

> Therefore, 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.
>
> Appellate Body report, *EC – Bananas III*, para. 155.

It can therefore not be argued that only those measures which in practice were "tariffied" in accordance with the Uruguay Round tariffication modalities are measures "of the kind which have been required to be converted" for the purposes of Article 4.2.

7.19 Furthermore, we note that "measures of the kind which have been required to be converted" *include* the measures listed in footnote 1. The measures listed in footnote 1 are therefore not exhaustive, rather they are examples of "measures of the kind" and serve an illustrative purpose. We also note in this respect that footnote 1 is inserted in the text of Article 4.2 at the end of the phrase "measures of the kind which have been required to be converted into ordinary customs duties". The first sentence of footnote 1 reads "[t]hese measures include […]". Consequently, the phrase "these measures" in footnote 1 refers back to the entire phrase "measures of the kind which have been required to be converted into ordinary customs duties", and the specific measures listed in footnote 1 are all example of "measures of the kind which have been required into ordinary customs duties", provided they are not "maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement". In our view, Chile's position that a measure listed in footnote 1 is only prohibited under Article 4.2 if such a measure, in addition, had been singled out, or challenged, by other negotiators and "been required to be converted into ordinary customs duties" would logically only be tenable if footnote 1 had been inserted immediately following the term "measures" in the text of Article 4.2, rather than following the entire phrase ending with "ordinary customs duties". If that were the case, the specific measures listed in footnote 1 could indeed have been examples of measures *susceptible to* being considered of the kind which have been required to be converted, and not of measures *necessarily* being of such a kind. As we explained, however, the text provides differently.

7.20 Argentina has argued that the Chilean PBS is a "variable import levy", a "minimum import price", or, in any event, a "similar border measure other than ordinary customs duties", within the meaning of footnote 1. As explained above, if the Chilean PBS constitutes a measure listed in footnote 1, including such a "variable import levy", "minimum import price" or "similar border measure", it will be a measure "of the kind which [has] been required to be converted into ordinary customs duties", provided it is not "maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement". Thus, pursuant to footnote 1, for a measure to be considered "of the kind which [has] been required to be converted into ordinary customs duties" and thus prohibited for the purposes of Article 4.2, we need to establish that:

(a) it is a quantitative import restriction, a variable import levy, a minimum import price, discretionary import licensing, a non-tariff measure maintained through state-trading enterprises, a voluntary export restraint, or a similar border measure other than ordinary customs duties;

(b) it is not maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

7.21 Below we will address each of these requirements separately.

(i) Is the Chilean PBS a border measure similar to those listed in footnote 1?

7.22 Argentina argues that the Chilean PBS is a "variable import levy", a "minimum import price", or a border measure similar to these measures. Chile argues that its PBS does not constitute any of those measures.

7.23

Article 31, Article 32 instructs us to take recourse to supplementary means, including the preparatory

will be apprehended by the measures referred to by footnote 1 to the Agreement on Agriculture, including "similar border measures other than ordinary customs duties". However, this does not imply that, therefore, all "similar border measures other than ordinary customs duties" need to have the effect of a quantitative restriction. In our view, the scope of footnote 1 to the Agreement on Agriculture certainly extends to measures within the scope of Article XI:1 of GATT 1994, but also extends to other measures than merely quantitative restrictions. The group of measures included in "duties, taxes or other charges" is clearly broader than only "ordinary customs duties", and includes in our view "other duties or charges of any kind" (or, at least, "other duties") within the meaning of Article II:1(b), second sentence, of GATT 1994. Consequently, the fact that a measure is not a "restriction other than duties, taxes or other charges" within the meaning of Article XI:1 of GATT 1994 does not prevent that measure from being a "similar border measure other than ordinary customs duties" within the meaning of footnote 1 to the Agreement on Agriculture. The "restrictions other than" referred to in Article XI:1 of GATT 1994 constitute a narrower category than the "similar border measures other than" in footnote 1 to the Agreement on Agriculture.

7.31 We find our reasoning confirmed in Annex 5 to the Agreement on Agriculture. Paragraphs 6 and 10 of that Annex both provide that "*ordinary customs duties*" "shall be established on the basis of *tariff equivalents to be calculated* in accordance with the guidelines prescribed in the attachment hereto" (emphasis added). This language makes clear that the generic term "tariff" is to be distinguished from the phrase "ordinary customs duties", in that the former merely refers to the numerical form of any duty, whereas the latter connotes a specific type of duty. Put simply, all ordinary customs duties are tariffs, but not all tariffs are ordinary customs duties.

7.32 Finally, we see no reason why all the measures listed in footnote 1 should *a priori* be considered restrictions within the meaning of Article XI:1 of GATT 1994. On the contrary, it is clear that the measures listed in the footnote to Article 4.2 include a number of measures whose status under Article XI:1 was never definitively resolved under the GATT 1947. These measures included price-related measures such as variable levies, as well as measures which could be used to the same effect, such as voluntary restraint agreements and non-tariff measures applied through state trading enterprises. Moreover, one of the principal objectives of the Uruguay Round negotiations on agriculture, as stated in the 1986 Punta Del Este Declaration, was strengthened and more operationally effective GATT rules and disciplines, in line with Recommendations adopted by the Contracting Parties at their Fortieth Session in November 1984. In these recommendations explicit reference was made to the elaboration of approaches, as a basis for possible negotiations, of appropriate rules and disciplines "relating to voluntary restraint agreements, to variable levies and charges, to unbound tariffs, and to minimum import price arrangements", and in so doing made a distinction between these measures (for which there were no specific and explicit GATT rules and disciplines)[590] and "quantitative restrictions and other related measures".[591] In our view the object and purpose of Article 4.2 is to bring measures whose definitive legal status had long remained unresolved, including

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> when dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of Article XI of GATT and its *Ad Note* relating to state-trading operations would necessarily constitute a violation of Article 4.2 of the *Agreement on Agriculture* and its footnote which refers to non-tariff measures maintained through state-trading enterprises.

Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Various Measures on Beef*"), WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body report, WT/DS161/AB/R, WT/DS169/AB/R, para. 762.

[590] We note that a particular minimum import price scheme was found inconsistent with Article XI by a panel under GATT 1947 (*EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for*

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price-related border restrictions, under more effective GATT disciplines on the basis of an explicit prohibition, in order to protect a regime for agricultural products based on the use of ordinary customs duties which resulted from the Uruguay Round negotiations. Accordingly, we consider that the scope of the Article 4.2 prohibition is broader than that of Article XI:1.

7.33 We will now turn to an interpretive analysis of the specific measures in footnote 1 with which Argentina argues, the Chilean PBS is similar: "variable import levy" and "minimum import price".

7.34 As regards the literal meaning of "variable import levy", we note that a levy is a duty or

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, i.e. 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.

7.37 These fundamental characteristics of variable import levies and minimum import prices, which can be distilled from the pre-Uruguay Round notifications and examination thereof by the GATT Contracting Parties, provide in our view a useful indication of what GATT Contracting Parties understood to constitute variable import levies and minimum import prices. To that extent, we believe that they are also helpful in interpreting those terms as they appear in Article 4.2 of the Agreement on Agriculture. In conclusion, we consider that a measure will be similar to a variable import levy or minimum import price if, based on a weighing of the evidence before us, it shares sufficiently the fundamental characteristics outlined above.

Application of the Panel's interpretation of "similar to a variable import levy or a minimum import price" to the Chilean PBS

7.38 We now turn to an examination of the Chilean PBS in light of the meaning of "similar border measures other than ordinary customs duties", as determined above. In particular, we will examine whether the Chilean PBS is similar to a variable import levy or a minimum import price, taking into account the fundamental characteristics of those measures outlined above.

7.39 We will first recall the rather complex structure and operation of the Chilean PBS. When a product covered by the Chilean PBS arrives at the border for importation into Chile, Chilean customs authorities will determine whether the total amount of applicable duties declared by the importer corresponds to the amount due under Chilean legislation, and, if necessary, revise the amount accordingly. In application of the Chilean PBS, they will levy an 8 per cent *ad valorem* duty, plus an "additional specific duty" if an administratively determined lowest offer price from a selected foreign market (hereinafter referred to as "the Reference Price") falls below the lower threshold of the PBS.

They will apply only the 8 per cent *ad valorem* duty if the same Reference Price is between the lower and upper thresholds of the PBS. They will grant a "rebate" on the 8 per cent *ad valorem* duty if the Reference Price is above upper threshold of the PBS. The PBS is determined annually on the basis of f.o.b. prices observed on a particular international market over the course of the preceding 60 months[600], which are adjusted in accordance with a Central Bank of Chile index, and listed in descending order. The lower and upper thresholds of the PBS are obtained by discarding 25 per cent at the bottom and at the top of that list and adding "usual import costs" to the prices.[601] The lowest and highest prices which are obtained after these operations constitute the lower and upper thresholds of the PBS. The specific duties and rebates corresponding to different f.o.b. prices are published in the Official Journal of Chile. The Reference Price is determined weekly, every Friday, using the lowest f.o.b. price for the covered products on foreign "markets of concern to Chile".[602] Unlike the prices used for the composition of the PBS, it is not subject to adjustment for "usual import costs".[603] The applicable Reference Price for a particular shipment is determined in reference to the date of the bill of lading. The Reference Price is not published, but can be consulted by the public at the offices of the Chilean customs authorities.[604] As indicated, if the Reference Price falls below the lower threshold of the PBS, an "additional specific duty" will be levied in addition to the 8 per cent *ad valorem* applied rate. We will term this additional duty the PBS duty. The PBS duty will equal the difference between the Reference Price applicable on the date of the bill of lading and the lower threshold of the PBS.

7.40 The stated objective of the Chilean PBS 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"[605], by "*introducing a controlled distortion which maintains a minimum import cost if the international price is too low* […]".[606] As explained below, on the basis of the evidence before us, we consider that the Chilean PBS has many fundamental characteristics of both a variable import levy and a minimum import price.

7.41 The Chilean PBS operates on the basis of two prices: the lower threshold of the PBS and the Reference Price. The variable PBS duty represents the difference between the lower threshold of the PBS and the lowest relevant market price for the product concerned. Generally, a covered product will not be able to enter the Chilean market at an import cost below the lower threshold of the PBS.[607]

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[600] The international markets used for the calculation of the PBS are, according to Chile's response to questions 9(c) and (e) of the Panel, Hard Red Winter No. 2 on the Kansas Exchange, f.o.b Gulf, for wheat, and Crude Soya Bean Oil on the Chicago Exchange, f.o.b. Illinois.

[601] Chile's first submission, para. 15(h).

[602] With respect to wheat, these "markets of concern" include Argentina, Australia, and Canada. Chile's response to question 9(c) of the Panel.

[603] Chile's response to question 9(d) of the Panel.

[604] Chile's response to question 10(e) of the Panel. However, in contrast to this response, in its comments on the draft descriptive part of this report, Chile requested the following text to be inserted:

> The reference price is published weekly on the webpage of the Chilean Customs Service. It is also distributed to all Chilean Customs branches and Customs Chambers (formed by Customs Agents) through official communications.* [a newly inserted footnote referred to www.aduana.cl.]

Nowhere in its submissions or answers did Chile provide this information. Argentina, however, appears to confirm that the daily Reference Prices are currently available on the referenced website, in a footnote

Indeed, for all practical purposes, and subject to the exceptional instance where the total applied duties would exceed Chile's 31.5 per cent bound rate in the absence of an effective cap,[608] the PBS duty will equal the difference between the lower threshold of the PBS and the Reference Price. As a result, whenever the Reference Price falls below the lower PBS threshold, and subject to the exceptional instance where the total applied duties would exceed Chile's 31.5 per cent bound rate in the absence of an effective cap, a duty will be applied equalling the difference between those two values. The Reference Price is the *lowest* f.o.b. price observed at the time of the shipment in the markets of concern to Chile. Consequently, if we take the example of an exporter from a "market of concern to

increases the likelihood that the lower threshold of the PBS will equal or exceed the higher internal price. Chile admits that "25 per cent may seem excessive", but explains that "this percentage is linked to the actual purpose of the [PBS], which is to maintain a domestic price that is related to international prices in the medium term".[610] In our view, by discarding 25 per cent of the lowest 60-month values observed, the PBS clearly eliminates much more than just "atypical observations". In fact, by not accounting for the lowest of each four observed prices over the course of five years, the PBS may result in the imposition of highly trade-distortive duties.[611]

7.43 For example, an Argentinean wheat exporter will generally not be able to export wheat at an f.o.b. price below the Reference Price, since Argentina is "a market of concern to Chile". If the

7.45 We recognize that, on the face of it, the Chilean PBS does not share *all* the characteristics of *both* "variable import levies" and "minimum import prices". First, whereas a "variable import levy" will generally use as a reference price an administratively determined lowest world market offer price, a "minimum import price" will generally use the actual transaction value of the imported good. The Reference Price used in the context of the Chilean PBS is clearly disconnected from the actual transaction value, unlike minimum import price schemes. It does use a lowest "market of concern" price, however, similar to the lowest market offer price generally used in variable import levy schemes. Second, 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. Instead, it corresponds to an administratively determined threshold price which may, but will not necessarily, be equal to or above the domestic market price. Nonetheless, we consider that, 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. It should be recalled in this respect that the PBS thresholds are determined, *inter alia*, after discarding 25 per cent of "atypical observations" at the bottom and at the top[614], hence substantially increasing the likelihood that the lower threshold of the PBS will equal or exceed the higher internal price.

7.46 We consider that the Chilean PBS 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 olds imporotylP1 afon withl1a Tc -0plD

respect to the use of the term "ordinary".[617] Article II:1(b) of GATT 1994 provides therefore relevant context for the interpretation of this phrase in Article 4.2 of the Agreement on Agriculture.

7.50 Neither Article II:1(b) of GATT 1994 nor Article 4.2 of the Agreement on Agriculture, however, defines explicitly what should be understood by "ordinary" customs duties. Both provisions do give some indication as to what is *not* an "ordinary" customs duty. On the one hand, Article II:1(b) of GATT 1994 distinguishes "ordinary" customs duties in its first sentence from "all other duties or charges of any kind imposed on, or in connection with, the importation" in its second sentence. The latter category of "*other* duties or charges *of any kind*" appears to be a residual category, encompassing duties or charges imposed on or in connection with importation which cannot be considered "ordinary" customs duties.[618] On the other hand, Article 4.2 prohibits Members from maintaining, resorting to, or reverting to any measures of the kind which have been required to be converted into ordinary customs duties. As indicated above, all the measures listed in footnote 1 are, by definition, not "ordinary" customs duties.

7.51 We note that "ordinary customs duties" appear in the co-authentic French and Spanish versions as "*droits de douane proprement dits*" and "*derechos de aduana propiamente dichos*". The dictionary meaning of "ordinary" is "occurring in regular custom or practice", "of common or everyday occurrence, frequent, abundant", "of the usual kind, not singular or exceptional, commonplace, mundane".[619] "*Propiamente dicho*" has been translated as "true (something)" or "(something) in the strict sense".[620] "*Proprement dit*" has been explained as "*au sens exact et restreint, au sens propre*" and "*stricto sensu*".[621] 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

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[617] We also note in this regard that an earlier draft text of the Agreement on Agriculture by the Chairman used the phrase "normal customs duties" ("Framework Agreement on Agriculture Reform Programme, Draft Text by the Chairman", MTN.GNG/NG5/W/170, para. 12). The fact that the drafters of the Agreement on Agriculture subsequently replaced "normal" with "ordinary" confirms in our view that the phrase "ordinary customs duties" in Article 4.2 of the Agreement on Agriculture was drawn from Article II:1(b) of GATT 1994 and intended to have the same meaning.

[618] According to the Report of the Review Session Working Party on "Schedules and Customs Administration" (L/329, adopted 26 February 1955, 3S/205, 209, para. 7), "[i]t is considered that the language of this sentence [, the second sentence of Art II:1(b),] is all-inclusive […]". A WTO panel considered as "duties or charges of any kind" certain interest charges, costs and fees. See Panel report on *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R and Add.1, adopted 10 January 2001, as modified by the Appellate Body report, WT/DS165/AB/R. GATT working parties and panels have considered as "duties or charges of any kind" certain import surcharges, interest charges and costs in connection with the lodging of an import deposit, and charges imposed by import monopolies. See Contracting Parties Decision, *French Special Temporary Compensation Tax on Imports* ("*France – Compensation Tax*"), 17 January 1955, BISD 3S/26; Panel report, *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* ("*EEC – Minimum Import Prices*"), adopted 18 October 1978, BISD 25S/68; Panel Report, *Republic of Korea – Restrictions on Imports of Beef – Complaint by Australia, New Zealand, and the United States* ("*Korea – Beef*"), adopted 7 November 1989, BISD 36S/202. We also note that the Report of the Working Party on the accession of the Democratic Republic of the Congo states that "revenue duties", which were levied only on imports, at the border and in addition to the regular customs duties, were to be considered an "other duty or charge of any kind" (L/3541, adopted 29 June 1971, paras. 8-10).

[619] The New Shorter Oxford English Dictionary (L. Brown, Ed.), 4th edition, at 2018.

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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.[622]

7.52 Article II:1(b), first sentence, of GATT 1994 provides that Members cannot impose "ordinary customs duties" in excess of those listed in their Schedules. 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.[623] All "ordinary" customs duties may therefore be said to take the form of *ad valorem* or specific duties (or combinations

that report, the imposition of *any kind of* duties is consistent with Article II:1(b) provided that such duties do not exceed the bound rate for "ordinary customs duties".[627]

7.55 We disagree with the proposition that the imposition of *any kind of* duties is consistent with Article II:1(b) provided that such duties do not exceed the bound rate for "ordinary customs duties". In our view, the cited Appellate Body report cannot be read as suggesting that any duty or charge can be considered an "ordinary customs duty" as long as the total amount of applied duties does not exceed the bound rate for "ordinary customs duties". As already indicated, whether or not a duty can be considered "ordinary" is not merely and simply a function of whether or not a Member applies a total amount of duties and charges in excess of the bound rate for "ordinary customs duties". If this view were to be accepted, the distinction between "ordinary" and "other" duties in the first and second sentence of Article II:1(b), and the corresponding existence of two separate columns in the Schedules, would be rendered void of all meaning, particularly in light of the Uruguay Round Understanding on the Interpretation of Article II:1(b) of the GATT 1994. We do not believe either that this view was espoused by the Appellate Body in the cited report. In that report, the question of whether or not the duties at issue constituted "ordinary customs duties" was not even addressed by the Appellate Body. The Appellate Body merely stated:

> "The principal obligation in the first sentence of Article II:1(b) […] requires a Member to refrain from imposing ordinary customs duties *in excess of* those provided for in that Member's Schedule. However, the text of Article II:1(b), first sentence, does not address whether applying a *type* of duty different from the *type* provided for in a Member's Schedule is inconsistent in itself, with that provision."[628]

7.56 Thus, the Appellate Body stated what the obligation of the first sentence of Article II:1(b), regarding the application of "ordinary customs duties", entails. The Appellate Body recalled that there may be various "types" of duties *within* the category of "ordinary customs duties", and that applying a "type" of duty different from the "type" recorded in the Schedule is not necessarily inconsistent with the first sentence of Article II:1(b). By different "types" of duties, however, the Panel and the Appellate Body were merely referring to the distinction between *ad valorem* and specific duties.[629] Both parties, as well as the Panel and the Appellate Body, agreed in that case that the specific and *ad valorem* duties in question were all "ordinary" customs duties. Thus, the issue was not whether Argentina's applied duties were "ordinary", but rather whether Argentina could apply one type of ordinary customs duty even though its WTO Schedule identified another type of ordinary customs duty. In our view, therefore, it is clear that the cited Appellate Body report has no bearing on the question before us, i.e. what distinguishes an "ordinary" customs duty from other duties and charges.

7.57 We find our interpretation of what constitutes an "ordinary" customs duty confirmed by our analysis of the object and purpose of the Agreement on Agriculture. The object and purpose of this Agreement is, according to the Panel in *Canada - Dairy*,

> "to 'establish a basis for initiating a process of reform of trade in agriculture[630] in line with, *inter alia*, the long-term objective of establishing 'a fair and market-oriented agricultural trading system'.[631] This objective is pursued in order 'to provide for *substantial progressive reductions in agricultural support and protection* sustained over

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[627] *Ibid.*, para. 36 *in fine*: "[…] measures that are 'ordinary customs duties' in the sense of Article II:1(b), as interpreted by the Appellate Body […]". In the preceding paragraphs the European Communities provided its reading of the Appellate Body report on *Argentina – Textiles and Apparel*.

[628] Appellate Body report on *Argentina – Textiles and Apparel*, para. 46. Emphasis in original.

[629] *Ibid.*, para. 50.

[630] (original footnote) Preambular paragraph 1.

[631] (original footnote) Preambular paragraph 2.

> an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets.[632]
>
> The general aim of the Uruguay Round negotiations on agriculture was to 'achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under *strengthened and more operationally effective GATT rules and disciplines'*."[633] […][634]

7.58 As indicated earlier, an important aspect of this exercise was the "tariffication" process, involving the conversion of certain, particularly distortive trade barriers into ordinary customs duties. Key objectives of tariffication were bjectiv8iakecultural markets

of our analysis, we will more explicitly contrast some other aspects of the structure and operation of the Chilean PBS with those of an "ordinary" customs duty.

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measures which are maintained on the basis of GATT 1994 provisions which allow Members, subject to certain conditions, to act inconsistently with their general obligations under GATT 1994. Article XIX regarding safeguard measures[645] and Article XX regarding general exceptions, for instance, would in our view provide other examples of such "general, non-agriculture-specific provisions".

7.69 Second, we note that Article 21.1 of the Agreement on Agriculture provides,

> "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement."

7.70 In commenting on this provision, the Appellate Body stated in *EC – Bananas III*:

> "Therefore, 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."[646]

7.71 If the general rule is that the provisions of GATT 1994 only apply to market access commitments concerning agricultural products to the extent that the Agreement on Agriculture does not contain specific provisions dealing specifically with the same matter, it is difficult to see why the drafters of the Agreement on Agriculture would have turned that rule in effect upside down in footnote 1 by excluding from the scope of the Agreement on Agriculture's market access obligations those measures maintained in accordance with the general obligations of GATT 1994. If this view were to be accepted, footnote 1 would be rendering Article 21.1 void of meaning as regards the Agreement on Agriculture's market access provisions. A treaty interpreter, however, may not adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[647] In our view, such an interpretation requires us in this case to read footnote 1 as excluding from the scope of Article 4.2 those measures which Members are allowed to maintain in accordance with the provisions in GATT 1994 laying down exceptions to the general obligations of GATT 1994, such as its balance-of-payment provisions.

7.72 We find this interpretation confirmed by the preparatory work of the Agreement on Agriculture. The agriculture section of the 1991 Draft Final Act provides:

> "The policy coverage of tariffication shall include all border measures other than ordinary customs duties[*] such as […]."[648]
>
> [*] Excluding measures maintained for balance-of-payments reasons or under general safeguard and *exception* provisions (Articles XII, XVIII, XIX, XX and XXI of the General Agreement).

7.73 We consider that this language confirms that the drafters of the Agreement on Agriculture did not intend to include Article II of GATT in the category of "other general, non-agriculture specific provisions of GATT 1994".

7.74 We note that, in any event, the question of whether or not the Chilean PBS duties have exceeded the "ordinary customs duties" binding of 31.5 per cent only becomes relevant after it has

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[645] We note that Chile has invoked Article XIX of GATT 1994 with respect to Argentina's claims regarding Article II:1(b) of GATT 1994, but that it has not done so with respect to Argentina's claim under Article 4.2 of the Agreement on Agriculture.

[646] Appellate Body report on *EC – Bananas III*, para. 155.

[647] Appellate Body report, *US – Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 21.

[648] MTN.TNC/W/FA, para. 1 of Part B, Annex 3, Section A, at L.25. Emphasis added.

been determined that the Chilean PBS duties do indeed constitute such "ordinary" customs duties. As we have indicated earlier, in our view, the Chilean PBS is a border measure similar to a variable import levy and a minimum import price, other than ordinary customs duties. The corresponding binding of 31.5 per cent is therefore irrelevant for the purpose of assessing the Chilean PBS duties' consistency with Article II:1(b) of GATT 1994. We will revert to this matter below, in our discussion of Argentina's claim under Article II:1(b) of GATT 1994.

(b) Other tools of interpretation

7.75 Chile has argued that the Panel, in its interpretation of Article 4.2, should draw on the following elements:

(a) "state practice", including: the alleged existence in other Members of measures similar to the Chilean PBS; the fact that these Members never converted their measures to ordinary customs duties; and the absence of any challenge of such measures on the basis of Article 4.2;

(b) Article 24 of Economic Complementarity Agreement No. 35 ("ECA 35") between Chile and MERCOSUR;

(c) negotiating history of Article 4.2 of the Agreement on Agriculture, including communications by or with individual members of the GATT Secretariat.

7.76 We will first examine to what extent Articles 31 and 32 of the Vienna Convention instruct or allow us to consider these elements in our interpretation of Article 4.2, in particular the question as to whether Article 4.2 was meant to prohibit measures such as the Chilean PBS. Only if we find that we should consider some or all of these elements for the purpose of interpreting Article 4.2, we will subsequently address them.

7.77 According to Article 31 of the Vienna Convention, we should draw, as context, on any agreement relating to "the treaty", i.e. the WTO Agreement[649], which was made between all the parties in connection with the conclusion of the WTO Agreement, as well as any instrument which was made by one or more parties in connection with the conclusion of the WTO Agreement and accepted by the other parties as an instrument related to the WTO Agreement. We should also take into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and any relevant rules of international law applicable in the relations between the parties. Finally, according to Article 32 of the Vienna Convention, we may draw on preparatory work and circumstances of the Treaty's conclusion to confirm the ordinary meaning or to resolve ambiguity.

(i) "state practice"

7.78 Presumably, by referring to these elements under the banner of "state practice", Chile is suggesting that we consider these elements either as "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" under Article 31, or as a supplementary means of interpretation under Article 32 of the Vienna Convention. First, we do not consider that the alleged "state practice" can be qualified as subsequent practice within the

[649] Legally speaking, the Agreement on Agriculture is part of an annex (Annex 1A) to the WTO Agreement. When Article 31 Vienna Convention speaks of "the treaty", it is the WTO Agreement as a whole which should be referred to.

meaning of Article 31 of the Vienna Convention. As stated by the Appellate Body in its report on *Japan – Alcoholic Beverages II*[650]*:*

> "(…) in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of *acts or pronouncements* which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.[651] An isolated act is generally not sufficient to establish subsequent practice[652]; it is a sequence of *acts* establishing the agreement of the parties that is relevant."[653]

7.79 Thus, first, the mere fact that Argentina or other Members did not challenge the Chilean PBS through the WTO dispute settlement system until recently does not constitute a "sequence of acts or pronouncements".[654] Second, the fact that a few Members of the WTO would have in place measures similar to the Chilean PBS is not a "sufficiently concordant, common and consistent sequence of acts" establishing the agreement of the WTO Members regarding the interpretation of Article 4.2 of the Agreement on Agriculture.[655] We will address the question of state practice as a supplementary means of interpretation below.

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[650] *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 13. Emphasis added.

[651] (original footnote) Sinclair, *supra*, p. 137;

(ii) Article 24 of Economic Complementarity Agreement No. 35 ("ECA 35") between Chile and MERCOSUR

7.80 ECA 35 between Chile and MERCOSUR was signed on 25 June 1996 and entered into force on 1 October of that year. Article 24, which is listed under the heading "Customs Valuation", reads:

> "When using the Price Band System provided for in its domestic legislation concerning the importation of goods, the Republic of Chile commits, *within the framework of this Agreement*, neither to include new products nor to modify the mechanisms or apply them in such a way which would result in a deterioration of the market access conditions for MERCOSUR."[656]

7.81 According to Chile, by signing ECA 35[657], Argentina has expressed the understanding that Article 4.2 does not prohibit the Chilean PBS, because it would not have negotiated Article 24 of ECA 35 if the Chilean PBS was prohibited outright under Article 4.2 of the Agreement on Agriculture.

7.82 Article 31 of the Vienna Convention instructs us to consider other international agreements for the purpose of interpreting Article 4.2 of the Agreement on Agriculture, provided they meet certain conditions. In our view, however, it is clear that ECA 35 does not meet the conditions of the agreements referred to in Article 31 of the Vienna Convention. First, ECA 35 is clearly not an "agreement relating to the Treaty which was *made between all the parties in connection with the conclusion of the Treaty*", nor an "instrument which was made by one or more parties in connection with the conclusion of the Treaty and *accepted by the other parties as an instrument related to the Treaty*".

7.83 Second, ECA 35 is in our view not a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". Leaving aside the question of whether such an agreement should be concluded between *all* parties to the WTO Agreement – which we need not address –, it suffices to note that the Preamble to ECA 35 reads:

> "(…) the Marrakesh Agreement establishing the World Trade Organization constitutes a framework of rights and obligations to which the commercial policies and compromises of the present Agreement *shall adjust*."[658]

7.84 If the policies and compromises embodied in ECA35 have to "adjust to" the WTO Agreement, we find it difficult to see how ECA35 could be an agreement "regarding the interpretation" or "the application" of the WTO Agreement.

7.85 Finally, Article 24 of ECA 35 does not constitute in our view a "relevant rule of international law applicable in the relations between the parties". Again, leaving aside the question of whether such a rule of international law should be applicable between *all* parties to the WTO Agreement, the language of ECA 35 itself makes clear that Article 24 cannot be "relevant" to the interpretation of Article 4.2 of the Agreement on Agriculture. First, the Preamble states that the commercial policies and compromises of ECA 35 shall "adjust to" the WTO framework of rights and obligations. *A fortiori*, Article 24 of ECA 35 cannot influence the interpretation of the WTO Agreement. Second, Chile's commitment regarding its PBS in Article 24 of ECA 35 has been explicitly made "within the framework of" ECA 35. Such language suggests that the parties to ECA 35 did not intend to exclude

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[656] Our translation. Emphasis added.

[657] ECA 35 provides that the "*partes contractantes*" (contracting parties) are Chile and MERCOSUR, and that Argentina is a "*parte signataria*" (signatory party).

[658] Our translation. Emphasis added.

the possibility that different commitments regarding the Chilean PBS may have been or will be made in the context of other international agreements.

7.86 In any event, even if we were somehow to take into account Article 24 of ECA 35 for the purpose of interpreting Article 4.2 of the Agreement on Agriculture, *quod non*, we would fail to see how a simple stand-still commitment by Chile *vis-à-vis* MERCOSUR and its members regarding its PBS would detract from the position that the Chilean PBS is a measure "of the kind which ha[s] been required to be converted into ordinary customs duties" within the meaning of Article 4.2 of the Agreement on Agriculture.

(iii) Negotiating history of Article 4.2

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> "Participants undertake not to resort to, or revert to, *any measures which have been converted* into ordinary customs duties pursuant to concessions under this agreement."[660]

7.93 As can be seen, this text used different language. It referred to a requirement that any measures which actually had been converted, would not be resorted to or reverted to. In contrast, Article 4.2 requires that Members not "*maintain*, resort to or revert to any measure *of the kind* which have been required to be converted." (emphasis added) So, the word "maintain" was added implying that not every measure had been explicitly addressed because there is no reason to have a prohibition on maintaining a measure which had been explicitly negotiated out of existence. The prohibition on reverting to or resorting to would have been sufficient otherwise. This is made conclusively clear by the addition of the phrase "of the kind" which broadened the language of Article 4.2 beyond those which had actually been subject to negotiations.

7.94 Chile has also reported that during the early 90s, during a seminar held in a Central-American country, "a letter was presented from an authority of the GATT Secretariat arguing that it was not necessary to tariffy price bands since they were unrelated to the domestic price [illegible] provided the price bands were maintained within the bound levels."[661] Chile was unable wit7

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7.99 Thus, just as with subsequent practice, we cannot agree that silence by negotiators regarding such a measure as the Chilean PBS provides meaningful evidence that the negotiators intended to exclude the Chilean PBS from the requirements of Article 4.2.

7.100 We should also note here that we do not see the evidence regarding the negotiating history as helpful in establishing a defence based on "state action" which includes subsequent practice. We remain uncertain about the legal basis of Chile's defence of "state practice". We raise this point here because we have now examined the second aspect of the defence, i.e., the negotiating history. The first aspect, "subsequent practice", was dealt with above.[669] Viewed in light of the facts of this case, this argument of "state practice" might rest more firmly on a legal basis of *estoppel* or a defence against a claim of non-violation nullification or impairment. What Chile really seems to put forward in this case, however, is an argument of "state **in**action". That is, because Members allegedly were silent about the Chilean PBS before and after the conclusion of the Uruguay Round negotiations, any claim by such Members against the PBS should fail. We have noted above that "subsequent practice" requires overt acts, not mere toleration. Whereas there may be circumstances in which the silence of negotiators might indicate acquiescence and, therefore, may be probative evidence regarding the negotiating history, in this case, such silence could perhaps have been more significant if, for instance, Chile had included the PBS in its Schedule. In such a case, Chile's assertion of silence during the verification period in early 1994 might arguably have had significance. However, as the PBS is not in its Schedule, there was nothing to verify.

7.101 We therefore conclude that, in asserting the defence of "state action" (to the extent it is based on the negotiating history), Chile has not produced sufficient evidence to call into question our interpretation of Article 4.2 as requiring conversion of the Chilean PBS into ordinary customs duties.

(c) Conclusion regarding Article 4.2 of the Agreement on Agriculture

7.102 Having regard to our analysis above[670], we find that the Chilean PBS is "a similar border measure other than ordinary customs duties" which is not maintained "under balance-of-payment 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", within the meaning of footnote 1 to the Agreement on Agriculture. We therefore conclude that the Chilean PBS is a measure "of the kind which ha[s] been required to be converted into ordinary customs duties", within the meaning of Article 4.2 of the Agreement on Agriculture. By maintaining a measure which should have been converted, Chile has acted inconsistently with Article 4.2 of the Agreement on Agriculture.

5. The Chilean PBS and Article II:1(b) of GATT 1994

7.103 According to Argentina, the Chilean PBS duties are ordinary customs duties within the meaning of the first sentence of Article II:1(b). Argentina has argued, and Chile has acknowledged, that the Chilean PBS duties can potentially exceed[671] and, at several instances in the past, have effectively exceeded[672], Chile's binding of 31.5 per cent in the bound rate column of its Schedule. Argentina therefore concludes that the Chilean PBS is inconsistent with Article II:1(b).[673]

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[669] See paras. 7.78-7.79 above.

[670] See paras. 7.17-7.101 above.

[671] Although it is not clear whether this can still be the case in the future, following amendment of Article 12 of Law 18.525. See our remarks at paras. 7.3-7.8 above.

[672] Chile's response to question 12(c) of the Panel.

[673] Chile has argued that the Chilean PBS, to the extent that it results in the exceeding of its 31.5 per cent bound rate, is justified under the provisions of Article XIX, i.e. as a safeguard measure. We will address this argument in the section of our Findings dealing with the claims brought under the Agreement on Safeguards.

7.104 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.

7.105 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 of Article II:1(b). We have already indicated that all "other duties or charges of any kind" should in our view be assessed under the second sentence of Article II:1(b). Pursuant to the Uruguay Round Understanding on the Interpretation of Article II:1(b), such other duties or charges had to be recorded in a newly created column "other duties and charges" in the Members' Schedules. Paragraph 1 of the Uruguay Round Understanding on the Interpretation of Article II:1(b) of the GATT 1994 ("the Understanding") reads:

> "(…) [i]n order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any 'other duties or charges' levied on bound tariff items, as referred in that provision, shall be recorded in the Schedules and concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of 'other duties or charges'."

7.106 According to the second paragraph of the Understanding:

> "(…) [t]he date as of which "other duties or charges" are bound, for the purposes of Article II, shall be 15 April 1994. 'Other duties or charges' shall therefore be recorded in the Schedules at the levels applying on this date."

7.107 Other duties or charges must not exceed the binding in this "other duties and charges" column of the Schedule. If other duties or charges were not recorded but are nevertheless levied, they are inconsistent with the second sentence of Article II:1(b), in light of the Understanding on the Interpretation of Article II:1(b). We note that Chile did not record its PBS in the "other duties and charges" column of its Schedule.

7.108 We therefore find that the Chilean PBS duties are inconsistent with Article II:1(b) of GATT 1994.[674]

B. THE CHILEAN SAFEGUARD MEASURES ON WHEAT, WHEAT FLOUR AND EDIBLE VEGETABLE OILS

1. The measures at issue

7.109 At issue in this dispute are safeguard measures on imports of wheat, wheat flour and edible vegetable oils, adopted by the Chilean government in accordance with the recommendations by the competent investigating authorities, the Chilean Distortions Commission ("CDC"). The safeguard measures consist of an additional duty on wheat, wheat flour and edible vegetable oils which "shall be determined by the difference between the general tariff added to the *ad valorem* equivalent of the

[674] Considering our finding that Chile failed to record its PBS in the appropriate column of its Schedule, we do not need to address whether and, if so, how, Article 21.1 of the Agreement of Agriculture bears on our finding regarding Article II:1(b) of GATT 1994, in light of our finding that the Chilean PBS is inconsistent with Article 4.2 of the Agreement on Agriculture.

specific duty determined by the mechanism set out in Article 12 of Law 18.525 – and its relevant annual implementing decrees – and the level bound in the WTO for these products".[675] Thus, whenever the Chilean PBS duty exceeds, in conjunction with the 8 per cent applied tariff, the 31.5 per cent bound rate, the portion of the duty in excess of that bound rate shall be considered to constitute a safeguard measure. Put another way, the duty applied pursuant to the safeguard measure is the Chilean PBS duty to the extent it exceeds the 31.5 per cent bound rate.

2. Preliminary issues

7.110 Chile argues that none of the safeguard measures challenged by Argentina are within the Panel's jurisdiction. According to Chile, the provisional and definitive safeguard measures were no longer in effect on the date of Argentina's request for establishment of the Panel. Chile therefore requests the Panel to rule that it cannot recommend that Chile bring these measures into conformity with its WTO obligations. To support its thesis, Chile refers to the text of the respective decrees imposing the provisional and definitive safeguard measures, Articles 3.4 and 3.7 of the DSU, and the Appellate Body report on *United States – Import Measures on Certain Products from the European Communities*.[676] According to Chile, the definitive safeguard measure is distinct from the measure extending its application, and has therefore expired, notwithstanding the extension measure.

7.111 As regards the extension, Chile submits that the Panel cannot examine the measure extending the application of the definitive safeguard measure, as it was not included in Argentina's request for consultations. Chile states that, although it has had some consultations with Argentina, "this does not mean that […] Argentina had called for valid consultations in the WTO on the extension measures because it did not request such consultations in writing and made no notification to the WTO to this effect."[677] Chile does not deny that "the content of the final measure (extension) is identical to that in the previous measure", but argues that the new measure is the result of a new request, new hearings and new evidence, and only exists because of a formal decision by the Chilean authorities.[678] Finally, Chile posits that the Panel should not make findings with respect to the extended safeguard measures which it has recently "withdrawn".

(a) The provisional safeguard measures

7.112 We note that the Appellate Body in *US – Certain EC Products* stated that "the panel erred in recommending that the DSB request the US to bring into conformity a measure which the panel has found no longer exists."[679] In this regard, we recall that Article 19.1 DSU provides that "*[w]hen* a panel […] concludes that a measure *is* inconsistent with a covered agreement, it *shall recommend* that the Member concerned bring the measure into conformity with that agreement". Put another way, a panel is required to make the recommendation to bring a measure which it has found inconsistent into conformity *if* that measure is still in force. Conversely, when a panel concludes that a measure *was* inconsistent with a covered agreement, the said recommendation cannot and should not be made. However, in our view, Article 19.1 DSU would not prevent us from making *findings* regarding the consistency of an expired provisional safeguard measure, if we were to consider that the making of such findings is necessary "to secure a positive solution" to the dispute. We would not, however, formulate *recommendations* with regard to those measures.

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[675] Minutes of CDC session No. 193.

[676] Appellate Body report, *United States – Import Measures on Certain Products from the European Communities* ("*US – Certain EC Products*"), WT/DS165/AB/R, adopted 10 January 2001.

[677] Chile's first submission, para. 100.

[678] Chile's first submission, para. 101.

[679] Appellate Body report, *US – Certain EC Products*, para. 81.

7.113 In our view, this approach is fully consistent with the Appellate Body's findings in *US – Certain EC Products* and the findings in other WTO disputes. While the Appellate Body in *US – Certain EC Products*

"A Member shall apply safeguard measures only for such *period of time* as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The *period* shall not exceed four years, unless *it* is extended under paragraph 2." (emphasis

following their extension, require a specific ruling by the Panel because they form part of its Terms of Reference. Argentina contends that the fact that the definitive measures were repealed is irrelevant for the purpose of a ruling, since Chile explicitly recognized that it resorted to safeguards "to obtain the required legal backing" for its PBS.[688] In Argentina's view, if there is no ruling by the DSB establishing the inconsistency of the safeguard measures, the situation could recur, since the attempt at *ex-post facto* justification will have escaped the scrutiny of the DSB.

7.123 We first recall in this respect that the safeguard measures are defined by reference to the difference between the PBS duty plus the 8 per cent applied tariff and the 31.5 per cent bound rate. Consequently, it appears to us that the duty covered by the safeguard measure could *de facto* continue to be applied as long as the PBS duties plus the 8 per cent applied tariff exceed the 31.5 per cent bound rate. Pnrate. ae f5rBnoweulico1i(WT/D sa havSB.) Tj plus thehe 31.inconsis cent bound rate.

Chile".[691] In order to determine whether it is sufficient under Article 3.1 of the Agreement on Safeguards to make the investigating authorities' report "available to the public" in such a manner, we first refer to the dictionary meaning of "to publish". The term can mean "to make generally known", "to make generally accessible", or "to make generally available through [a] medium".[692] We therefore turn to the context of Article 3.1 provided by similar publication requirements in the AD and SCM Agreements. We note that both Article 22 of the SCM Agreement ("public notice and explanation of determinations") and Article 12 of the AD Agreement ("public notice and explanation of determination") distinguish between giving "public notice" and "making otherwise available through a separate report"[693], which must be "readily available to the public".[694]

assessment of the matter requires us to assess the consistency of the definitive safeguard and the preceding investigation with Article XIX of GATT 1994 and the Agreement on Safeguards on the basis of explanations provided by the CDC before or at the time of its recommendation to apply definitive safeguard measures. Consequently, whenever we refer below to information contained in the Minutes of Session No. 224, we will do so, at the most, to provide observations on our findings made on the basis of the Minutes of Sessions Nos. 181, 185 and 193.[696]

5.

1983, it is difficult to see how those safeguard measures could then have been adopted as a result of developments which could not have been foreseen at the end of the Uruguay Round.[703]

7.140 In conclusion, we find that Chile failed to demonstrate the existence of unforeseen developments, as required by Article XIX:1(a) of GATT 1994, and set forth findings and reasoned conclusions in this respect in its report, as required by Article 3.1 of the Agreement on Safeguards.

6. Definition of like or directly competitive product (Articles XIX:1(a) of GATT 1994 and Articles 2.1, 4.1(a) and 4.2(c) of the Agreement on Safeguards)

7.141 Argentina claims that Chile has infringed Article XIX:1(a) of GATT 1994 and Articles 2.1, 4.1(c) and 4.2(a) of the Agreement on Safeguards on the grounds that the CDC failed to properly identify the product that was like or directly competitive to each imported product, and thereby failed to identify the affected domestic industries. Accordingly, Argentina contends, the entire analysis of increased imports and of threat of injury is based on false premises and lack legal validity. Chile argues that the categories of products subject to the safeguard measures correspond to products subject to the PBS, which groups categories of products that are directly competitive. According to Chile, if the PBS had not taken into account each agricultural product and its respective like or directly competitive products, the application of the system would have been ineffective. Chile claims that the CDC reaffirmed this analysis, as reflected in the Minutes.

7.142 We recall that the Appellate Body in *US – Lamb* stated:

> "(…) according to Article 2.1, the legal basis for imposing a safeguard measure exists *only* when imports of a specific product have prejudicial effects on domestic producers of products that are 'like or directly competitive' with that imported product. In our view, it would be a clear departure from the text of Article 2.1 if a safeguard measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of products that are *not* 'like or directly competitive products' in relation to the imported product. […] Accordingly, the first step in determining the scope of the domestic industry is the identification of the products which are 'like or directly competitive' with the imported product. Only when those products have been identified is it possible then to identify the 'producers' of those products."[704]

7.143 With respect to wheat, the CDC provided in its report only an implicit *assertion* of likeness or direct competitiveness, without offering any reasoned conclusion regarding the products which, in its step109 producero paccosa Tj yas conby repro Tj 181ecers

according to the Appellate Body in *US – Lamb*, the input and end-product need to be like or directly competitive for their respective producers to be included in the definition of the domestic industry.[712]

7.149 We therefore find that the CDC failed to make adequate findings and reasoned conclusions with respect to the issue of likeness or direct competitiveness, and, consequently, failed to identify the domestic industry, as required by Article XIX:1(a) of GATT 1994 and Articles 2 and 4 of the Agreement on Safeguards.

7. Increase in imports (Articles XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards)

7.150 Argentina claims that an analysis of the content of the Minutes of the CDC sessions and the

> points out that there was an abnormal situation in 1999 concerning the behaviour of importers as a result of the tariff disputes regarding the tariff headings for oil imports. From 1993 to 1997, the level of imports was similar.
>
> The Commission notes the significant differences between recent import prices resulting from full application of the band and prices resulting from imposition of a tariff ceiling of 31.5 per cent. This substantiates the forecasts of a greatly accelerated increase in imports that would occur (or has already occurred) unless the full duties specified in the bands are applied. The increase in imports, and the potential for further substantial increases, has occurred at a time when international prices of the products investigated have been subject to sizeable and rapid decreases."

7.152 We recall that the Appellate Body in its report on *Argentina – Safeguard Measures on Imports of Footwear* stated:

7.155 First, according to the Minutes of Session No. 193, imports of "the two main" edible vegetable oils fell 24 per cent over the first ten months of 1999. Thus, in the period immediately preceding the opening of the investigation, imports of the product concerned actually fell significantly. In addition, although the Minutes of Session No. 193 do also indicate that imports increased by 23 per cent in 1998, they only state with respect to long-term trends that "[f]rom 1993 to 1997, the level of imports was similar". We consider, therefore, that the CDC failed to identify such increase in imports of edible vegetable oils as required by Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

7.156 Second, as regards wheat flour, according to the Minutes of Session No. 193, imports "fluctuated". Such a statement does not identify a discernable upward trend in the growth of these imports. In the absence of this discernable trend, we find that the CDC did not demonstrate that there was an increase in imports of wheat flour recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".[715] We consider, therefore, that the CDC failed to identify such increase in imports of wheat flour as required by Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

7.157 Third, with respect to wheat, the CDC identif1r 11.2j 33.75 "1 c 0red by ntei imports

7.159 Finally, as regards all three product categories subject to the safeguard measures, we find fault with the CDC's analysis on two additional grounds. First, Article 4.2(a) of the Agreement on Safeguards provides that:

> "(…) the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute *and* relative terms … ." (emphasis added) [719]

7.160 When conducting its investigation, the CDC does not appear to have made any analysis at all of import trends *relative* to domestic production. As a matter of fact, in the Minutes of Session No. 193, the CDC states only that "there has been an increase in imports *in absolute terms*".[720] In its reply to a question by the Panel, Chile has clarified that the CDC analysed the increase in imports "both in absolute terms and in relation to production, information which was available in the Technical Report prepared by the Technical Secretariat", but that it "focused its analysis of imports on their evolution in absolute terms, which is why only that information was recorded in the records of the Commission."[721] We note Chile's statement which said that the Technical Report is "non-binding and classified information"[722], and was not part of the CDC's report. We therefore consider that Chile acted inconsistently with Article 4.2(a) of the Agreement on Safeguards by reason of the failure of the CDC to evaluate the increase in imports in relation to domestic production.

7.161 Second, the CDC has stated in Minutes of Session No. 193 that "[i]n its analysis of imports, [it] has taken into account the fact that the normal operation of price bands has been a decisive factor in preventing a greater increase in imports, and consequently *the trend in imports cannot be considered without bearing this factor in mind*". Moreover, the CDC has stated that "the significant differences between recent import prices resulting from full application of the band and prices resulting from imposition of a tariff ceiling of 31.5 per cent […] substantiates the *forecasts of a greatly accelerated increase in imports that would occur* (or has already occurred) unless the full duties specified in the bands are applied". These statements confirm that the CDC's analysis of import trends somehow accounted for the fact that greater import increases *would have* occurred in the absence of Chilean PBS duties exceeding the 31.5 per cent bound rate. Accordingly, the CDC's analysis of import trends is, at least partly[723], based on *hypothetical* import increases, i.e. increases which would have occurred but for Chilean PBS duties granting additional protection by exceeding the 31.5 per cent bound rate. We consider that this analytical approach is inconsistent with Article 2.1 of the Agreement on Safeguards, which clearly requires that *actual* imports have increased. A *threat* of increased imports is not sufficient.

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[719] Article 2.1 of the Agreement does not detract from this obligation on the investigative authorities by requiring that a safeguard measure may only be applied if "a product is being imported into its territory in such increased quantities, absolute *or* relative to domestic production, […]". Article 4.2(a) provides *how* the 719e 4.32 Twy 1ae autho7eguaely be apdrf increased imports.51ecti 0 Twd into it201 a421musistjury cleeimpo-11.25

7.162 In conclusion, we find that that the CDC failed to demonstrate increased imports of the products subject to the safeguard measures, as required by Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

8. Threat of serious injury and evaluation of all relevant factors (Article XIX:1(a) of GATT 1994 and Articles 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards)

7.163 Argentina claims that the CDC did not establish the existence of a threat of serious injury in the terms laid down in Article XIX:1(a) of the GATT 1994 and Article 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards. Argentina also contends that the CDC did not evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry, as required by Article 4.2(a) of the Agreement on Safeguards. Argentina maintains that the determination of threat of serious injury by the CDC is inconsistent because of two instances of non-compliance: (i) contrary to the requirements of Article 4.2 of the Agreement on Safeguards, the CDC did not evaluate all the factors related to the situation of the industry; and (ii) the findings and conclusions of the CDC regarding the factors investigated were not substantiated by evidence.

7.164 Chile submits that the CDC followed an analytical forward-looking approach based on the facts when determining the threat of serious injury. In this regard, Chile refers to the analysis of "threat of injury" by the Appellate Body in *US – Lamb*, where it was said that the occurrence of future events can never be definitively proven by facts. Chile considers that, in accordance with this statement, a threat of serious injury must always be based on a projection, which must be consistent with the data on which it is based. Chile also submits that the CDC complied with the requirement to evaluate all relevant factors laid down in Article 4.2(a) of the Agreement on Safeguards. As indicated in that provision, all "relevant" factors must be analysed. According to Chile, that relevance is fundamental when considering factors affecting injury or threat of injury and it must be considered on a case-by-case, product-by-product basis. Chile maintains that the CDC therefore considered it highly relevant to include the impact of the PBS on trade flows in the products investigated that were subject to the PBS.

7.165 a) the

of 28 per cent in production (less than the reduction in the area cultivated as crop yields continue to improve); 10 per cent fall in prices; a decrease of 35 per cent in direct employment; and a drop of 20 to 90 per cent in net profit margins depending on the level of production. This means that around one third of approximately 90,000 producers will cease this activity. As is the case for sugar beet and rape, the capacity of utilisation indicator has not been estimated because it is not relevant to agricultural crops;

(ii) for sugar (sugar beet), the aforementioned indicators used to assess injury are even more significant, showing a reduction of around 80 per cent in production, area under cultivation and employment, and a 28 per cent decrease in prices, meaning that 90 per cent of producers will cease this activity. Very high losses are expected in the sugar industry, with a 28 per cent reduction in the value of output and related losses amounting to US$10 million;

(iii) in the case of oils (rape), indicators show a drop of 54 per cent in production and a decrease of around 60 per cent in employment (direct and indirect), marginalizing over 63 per cent of producers. Losses in the oil industry are estimated to include an 8 per cent fall in the value of output, a US$3.2 million reduction in production. It should also be noted that a decrease in rape cultivation will have an impact on wheat yields because rape is sold in rotation with wheat (30,000 hectares of rape allow the rotation of around 100,000 hectares of wheat)."[724]

7.166 Article 4.2(a) of the Agreement on Safeguards reads:

"In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment."

7.167 We recall that the Appellate Body in valuatee 3439 Tw (Ag;439 Tw 3r -0.1332 Tc 0.0796 Tw (19460) Tj 300

> […] [W]hatever methodology is chosen, we believe that data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury. The likely state of the domestic industry in the very near future can best be gauged from data from the most recent past. Thus, we agree with the Panel that, in principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry.
>
> However, we believe that, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation. If the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading. […]"[731]

7.171

envisaged by Article 7.2 of the Agreement on Safeguards for the *extension* of the period of application of the safeguard measure. Obviously, however, it cannot apply to the *adoption* of the safeguard measure, where a projection should be made on the basis that a new safeguard measure would not be adopted, and not on the basis that an existing safeguard measure (or its equivalent) were to be withdrawn.

7.174 In conclusion, we find that the CDC did not demonstrate the existence of a threat of serious injury, as required by Article XIX:1(a) of the GATT 1994 and Article 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards.

9. Causal link (Articles 2.1 and 4.2(b) of the Agreement on Safeguards)

7.175 Argentina argues that Chile did not comply with its obligations under Articles 4.2(b) and 2.1 of the Agreement on Safeguards inasmuch as it did not establish any causal link between the alleged increase in imports and the alleged threat of injury to the domestic industry. Argentina also considers that Chile failed to comply with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(b) of the Agreement on Safeguards inasmuch as it did not evaluate factors other than the increase in imports which at the same time were causing injury to the domestic industry. According to Chile, the CDC established the causal link between increased imports and threat of serious injury when it stated that "the c.i.f. prices of Chilean imports are closely linked to international prices (the behaviour of commodities) and domestic prices similarly shadow trends in import prices."[734]

7.176 We have found above that the CDC failed to appropriately establish the existence of both increased imports and threat of serious injury. No causal link can exist if the existence of either of the two substantive requirements has not been established. [735]

7.177 In any event, we recall that, pursuant to Articles 2 and 4.2 of the Agreement on Safeguards, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof must be demonstrated, and that, when factors other than increased imports are causing injury to the domestic industry, such injury shall not be attributed to increased imports. In this case, Chile's analysis of causality was strictly limited to its statement that international prices, import prices and domestic prices are linked. Further, the CDC's report at no point reflects any consideration as to the possible effects on the domestic industries concerned of factors other than increased imports. We consider that such a cursory one-sentence analysis is insufficient to demonstrate the existence of a causal link between increased imports and threat of serious injury. Moreover, injury must be caused or threatened by increased imports, not decreasing international prices.[736] Declining international prices may be a factor in a causal analysis but mere consideration of such declining international prices cannot be substituted for such a causal analysis, which, of course, was not done here. We therefore find that the CDC failed to properly establish a causal link, as required by Articles 2.1 and 4.2 of the Agreement on Safeguards.

7.178 Finally, we recall the Appellate Body's statement in

> the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was *actually* caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the Agreement on Safeguards."[737]

7.179 We recall that Argentina has argued that the increase in imports of wheat during 1999 was due to extreme drought in Chile, severely affecting domestic output that year. We note that this issue was raised, at least in passing, by Argentine exporters,[738] and a Report of a Chilean government agency submitted by Argentina confirms that Chilean wheat production was adversely affected by drought in the 1998/99 season.[739] The minutes of session No 193 – in which adoption of the definitive measure is recommended by the CDC – however, do not contain *any* analysis as regards injury caused by other factors, such as drought in the case of wheat.[740] Thus, the CDC did not distinguish the injurious effects caused to the domestic industry by increased imports from the injurious effects caused by other factors. We therefore consider that, also in this respect, the CDC did not perform an adequate causation analysis, as required by Article 4.2(b) of the Agreement on Safeguards.

7.180 In conclusion, we find that the CDC did not demonstrate the existence of a causal link, as required by Articles 2.1 and 4.2(b) of the Agreement on Safeguards.

10. Measures necessary to remedy injury and facilitate adjustment (Article XIX:1(a) of GATT 1994 and Articles 3.1 and 5.1 of the Agreement on Safeguards)

7.181 Argentina submits that Chile's safeguard measure violates Article XIX:1(a) of GATT 1994 and Article 5.1 of the Agreement on Safeguards because it was not limited to the extent necessary to remedy injury and to facilitate adjustment. Argentina contends that the CDC did not consider whether or not the measure was "necessary" to prevent injury and facilitate readjustment and that no substantive analysis was undertaken. Argentina argues that Chile based its safeguard measure on the difference between the bound tariff and the combination of the PBS duty and applied rate, and this is in no way related to a threat of injury from imports. Chile submits that, in accordance with its obligations under the Agreement on Safeguards, it instituted a measure that protected its domestic producers from serious injury, but which provided no further amount of protection. Chile explains that, having found the requisite conditions justifying a safeguard action, the action recommended by the CDC and taken by the Government involved the least possible trade disruption consistent with preventing serious injury: an increase in duties to enable the PBS to apply without regard to the bound level of duties.

7.182 Pursuant to Article 5.1 of the Agreement on Safeguards, "[a] Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". According to the Appellate Body in *Korea – Dairy*:

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[737] Appellate Body report on *US – Wheat Gluten*, para. 69. See also Appellate Body report on *US – Lamb*, paras. 167-168.

[738] Annex ARG-39.

[739] Oficina de Estudios y Politicas Agrarias, Ministerio de Agricultura, *Temporada Agricola*, No. 13, primer semestre de 1999 (Exhibit ARG-30). Although we do not know with certainty that this publication was in the record of the investigation, Chile indicated to the Panel that it used the publication "*Temporada Agrícola (semestral)"* as a basis for its investigation (Chile's reply to question 17(b) by te Panel).

[740] (new footnote) We note, on the other hand, that table 13 annexed to the minutes of session No 224 shows a drop of 28% in crop, 19.8% in output of wheat, and 10.2% in the sown surface during 1999.

> "(…) the wording of this provision leaves no room for doubt that it imposes an *obligation* on a Member applying a safeguard measure to *ensure* that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment."[741] (emphasis added)

7.183 Thus, according to this report, in order to comply with the requirement of Article 5.1, the Member imposing the safeguard measure must *ensure* that the measure is only applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. We consider that a Member can only *ensure* that the safeguard measure is calibrated if there is, at a minimum, a *rational connection* between the measure and the objective of preventing or remedying serious injury and facilitating adjustment. In the absence of such a rational connection, a Member cannot possibly *ensure* that the measure is applied only to the extent necessary.

7.184 We recall that the safeguard measures at issue consist of a duty in the amount of the difference between, on the one hand, the sum of the 8 per cent applied rate and the *ad valorem* equivalent of the PBS duty, and, on the other hand, the 31.5 per cent bound rate. According to Chile, such a duty is "most appropriate" to remedy injury and facilitate adjustment.[742] This argument appears to be based on the premise that the lower PBS threshold (to which level import prices are raised through the safeguard measure) can be regarded as indicative of a state below which the domestic industry will experience (a threat of) serious injury. In our view, this premise is unfounded because the lower PBS threshold is calculated on the basis of the international prices observed in the recent past, and therefore does not reflect in any way the condition of the domestic industry. In our view, therefore, it is clear that the lower PBS threshold has no that the measure is applihat 1.15y. IcTw (on the 577.75 0 782 0 -12.3 Tc 2.88

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> We note that, had the Panel found differently, the United States might have attempted to rebut the presumption raised by Korea in successfully establishing a violation of Article 4.2(b) of the Agreement on Safeguards, that the United States had also violated Article 5.1. […] The United States did not rebut Korea's *prima facie* case by showing that this was so. We offer this observation only to emphasize that we are not stating that a violation of the last sentence of Article 4.2(b) implies an *automatic* violation of the first sentence of Article 5.1 of the Agreement on Safeguards."[746]

7.186 The Appellate Body report on *US – Line Pipe* cited above supports our finding that Chile's measures are inconsistent with Article 5.1, first sentence. Chile failed to either assess the serious injury arising from 'other factors

thus, we do not see the factual basis for a claim based on the absence of non-confidential summaries. We therefore conclude that Argentina has failed to establish that Chile has acted inconsistently with Articles 3.1 and 3.2 of the Agreement on Safeguards by reason of an alleged failure to provide Argentina with access to non-confidential summaries of confidential information.

7.191 Argentina further contends that the failure of the minutes of the relevant sessions of the CDC to take into account or analyse information provided by the Argentine exporters in respect to the evaluation of imports and the condition of the domestic industry is evidence in support of its claim that Chile failed to conduct an appropriate investigation.[750] In this Report, we have already found, *inter alia*, that Chile acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards in respect of its consideration of the increased imports requirement and with Article 4.2(a) of the Agreement by failing to consider all relevant factors having a bearing on the state of the industry. In these circumstances, we do not consider it necessary to examine Argentina's further claim under Article 3.1 that Chile failed take into account information provided by Argentine exporters on these issues. Accordingly, we exercise judicial economy with respect to this claim.

12. Findings and reasoned conclusions (Article 3.1 of the Agreement on Safeguards)

7.192 Argentina submits that the national investigating authorities must explain in their report how they arrived at their conclusions, based on the information, and that the findings of the competent authorities must be contained in the decision itself. According to Argentina, the CDC has not done so, and has therefore acted in a manner inconsistent with Article 3.1 of the Agreement on Safeguards.

7.193 Above, we have already found that the CDC failed to set forth h rd Tf 0 -sTD -esç TD /F1, we

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Argentina's claim under Article 6, and, accordingly, decide to exercise judicial economy in this respect.[752]

14. Notification and consultation (Article XIX:2 of GATT 1994 and Article 12 of the Agreement on Safeguards)

7.196 Argentina claims that Chile violated Article XIX:2 of GATT 1994 and Article 12.1(a) of the Agreement on Safeguards by failing to comply with the notification requirement laid down in Article 12.1(a) and 12.2 and by not holding prior consultations with Members having a substantial interest as exporters of the product concerned, as required by Article 12.3 and 12.4. Chile responds that it did act in conformity with the requirements of each of those provisions.

7.197 Considering our findings above regarding the inconsistency of the CDC's investigation and the resulting safeguard measures with the requirements of Article XIX of GATT 1994 and Articles 2, 3, 4 and 5 of the Agreement on Safeguards, we do not consider it necessary to examine Argentina's claim under Article 12, and, accordingly, decide to exercise judicial economy in this respect.

15. Extension of the definitive safeguard measures (Article 7 of the Agreement on Safeguards)

7.198 Argentina has requested the Panel to make findings regarding the consistency of the extension of the definitive safeguard measures with the requirements of the Agreement on Safeguards. We recall that we have found above that the CDC's investigation and the resulting definitive safeguard measures are inconsistent with the requirements of Article XIX of GATT 1994 and Articles 2, 3, 4 and 5 of the Agreement on Safeguards. If the definitive safeguard measures are inconsistent with Chile's obligations under the Agreement on Safeguards, such inconsistency cannot of course be "cured" by a decision to extend their duration. On the contrary, the decision to extend their duration must, by definition, be tainted by inconsistency as well. We recall, however, that Article 7 of the Agreement on Safeguards, which sets out the conditions for an extension, is not within our Terms of Reference. We will therefore refrain from making any finding regarding the consistency of the decision to extend the safeguard measures' duration with Article 7 of the Agreement on Safeguards.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the findings above, we conclude that:

(a) the Chilean PBS is inconsistent with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of GATT 1994;

(b) as regards the Chilean safeguard measures on wheat, wheat flour and edible vegetable oils:

(i) Chile has acted inconsistently with Article 3.1 of the Agreement on Safeguards by not making available the relevant minutes of the sessions of the CDC through an appropriate medium so as to constitute a "published" report;

(ii) Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 because the CDC failed to demonstrate the existence of unforeseen developments, and

[752] We note that the panel in *Argentina – Footwear (EC)*, in light of its findings of the inconsistency of the definitive safeguard measure with Articles 2 and 4 SA, did not consider it necessary to make a finding on a claim raised under Article 6 with respect to the provisional safeguard measure (panel report, para. 8.292).

Article 3.1 of the Agreement on Safeguards because the CDC's report did not set out findings and reasoned conclusions in this respect in its report;

(iii) Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2 and 4 of the Agreement on Safeguards because the CDC failed to demonstrate the likeness or direct competitiveness of the products produced by the domestic industry, and, consequently, failed to identify the domestic industry;

(iv) Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards because the CDC failed to demonstrate the increase in imports of the products subject to the safeguard measures required by those provisions;

(v) Chile has acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards because the CDC did not demonstrate the existence of a threat of serious injury;

(vi) Chile has acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement on Safeguards because the CDC did not demonstrate a causal link;

(vii) Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 and Article 5.1 of the Agreement on Safeguards because the CDC did not ensure that the measures were limited to the extent necessary to prevent or remedy injury and facilitate adjustment;

(viii) Argentina failed to establish that Chile has acted inconsistently with the requirement of Articles 3.1 and 3.2 of the Agreement on Safeguards to conduct an "appropriate investigation" because Argentina allegedly did not have a full opportunity to participate in the investigation and did not have access to any public summary of the confidential information on which the Chilean authorities may have based their determination.

8.2 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent Chile has acted inconsistently with the provisions of the GATT 1994, the Agreement on Agriculture and the Agreement on Safeguards, it has nullified or impaired benefits accruing to Argentina under those Agreements.

8.3 We recommend that the Dispute Settlement Body request Chile to bring its PBS into conformity with its obligations under the Agreement on Agriculture and the GATT of 1994. As explained above[753], we do not make any recommendation with respect to the safeguard measures challenged by Argentina in these proceedings.

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[753] See our comments at paras. 7.112-7.113 and para. 7.124.