

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

*Chile - Price Band System and Safeguard Measures
Relating to Certain Agricultural Products: Recourse to Article 21.5
of the DSU by Argentina*

(AB-2007-2)

THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

March 6, 2007

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States welcomes the opportunity to present its views in this appeal. As was the case in the original *Chile - Price Band* proceeding, the central question raised on appeal is whether the measure at issue, Chile's amended price band system ("PBS" or "system"), is "similar" to a "variable import levy" or "minimum import price" within the meaning of Article 4.2 of the *Agreement on Agriculture*. The compliance panel convened under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") (hereafter, the "Panel") answered this question in the affirmative and concluded that, by maintaining the amended PBS, Chile failed to implement the recommendations and rulings of the Dispute Settlement Body ("DSB").¹

2. Chile's submission raises the following issues relating to the Panel's analysis under Article 4.2 of the *Agreement on Agriculture* on which the United States will comment:

(a) The United States disagrees with Chile's argument that the Panel was required to determine whether the amended PBS is an "ordinary customs duty" for purposes of Article 4.2 of the *Agreement on Agriculture*. It was only necessary for the Panel to examine whether or not the amended PBS is a "variable import levy" or "minimum import price" in order to determine the WTO-consistency of the system.

(b) The United States disagrees with Chile's argument that the shift from a weekly determination of duty levels to a bi-monthly determination under the amended PBS demonstrates that the amended PBS is no longer "continuous" or that is more "predictable" and "transparent" than the original PBS. The United States supports the Panel's conclusion that the amended PBS, despite this temporal change, continues to function in a manner similar to a "variable import levy" or "minimum import price."

(c) The United States disagrees with Chile's assertion that the fact that its Ministry of Finance publishes the results of the amended PBS duty calculation and may choose to change the level of duty set by the amended PBS demonstrates that the amended PBS is no longer "automatic." Simply interjecting a layer of clerical tasks (publication of duty levels set by the formula) as well as the specter that duty levels might, in theory, be changed by the Ministry of Finance does not break the link between the formula established as part of the price band and the level of duties automatically calculated through its application.

(d) The United States considers that the approach taken by the Panel in its examination of the "transparency" and "predictability" of the amended PBS, namely that the Panel included in its examination the methodology by which levels of duty are set, is correct. The United States submits that it is only logical to examine the workings or "how and why"² of the amended PBS

¹ Panel Report, *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/R, circulated 8 December 2006 ("*Chile - Price Band (21.5)*"), para. 8.2(a).

² See Appellant's Submission of Chile ("*Chile Appellant Submission*"), para. 103.

in conducting this analysis because, in order for an exporter to predict what the resulting level of duty will be, the exporter must have a sense of how the system that establishes the level of duty operates.

(e) The United States agrees with the Panel’s finding that the lower threshold of Chile’s amended PBS operates in a manner “similar” to a “minimum import price.” Were it otherwise, a WTO Member could avoid its obligations under Article 4.2 of the *Agreement on Agriculture* by maintaining a minimum import price (or a measure similar to one) and simply labeling it as something other than a “minimum import price,” “a CIF price,” or “an entry price.”

3. In its submission, Argentina requests that the Appellate Body, in the event it reverses the Panel’s finding under Article 4.2 of the *Agreement on Agriculture*, find that the amended PBS is inconsistent with GATT 1994 Article II:1(b), second sentence. In light of the fact that the Panel has properly concluded that Chile’s amended PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*, the United States does not consider it necessary for the Appellate Body to make a separate finding on whether the amended PBS is maintained in breach of the second sentence of GATT 1994 Article II:1(b).

II. ARGUMENT

A. The Panel Did Not Err in its Application and Interpretation of Article 4.2 (and Footnote 1 Thereto) of the *Agreement on Agriculture*

4. Chile notes that “the main issue before the Panel” was whether the amended PBS “is a ‘border measure other than ordinary customs duties’ that is similar to a ‘variable import levy’ or ‘minimum import price’ within the meaning of Article 4.2 and footnote 1 of the *Agreement on Agriculture*.”³ According to Chile, however, in reaching its conclusion that the amended PBS is inconsistent with Article 4.2, the Panel “failed to interpret and apply Article 4.2 and footnote 1 of the *Agreement on Agriculture* correctly.”⁴ The United States disagrees and for the reasons discussed below submits that the Panel properly interpreted and applied Article 4.2 of the *Agreement of Agriculture* to the amended PBS, and that its finding that the amended PBS is inconsistent with Article 4.2 should be upheld.

1. The Panel was not required to examine whether the amended price band system qualifies as an “ordinary customs duty”

5. In its Report, the Panel examined the amended PBS in light of the interpretations of “variable import levies” and “minimum import prices” developed by the original Panel, as

³ Chile Appellant Submission, para. 54.

⁴ Chile Appellant Submission, para. 54.

modified by the Appellate Body.⁵ Chile does not appear to contest these interpretations but rather takes issue with the manner in which the Panel applied them to the amended PBS, arguing that the Panel “erred by failing to give any effect to the language ‘other than ordinary customs duties’ in footnote 1 of the *Agreement on Agriculture*.”⁶ According to Chile, the original Panel and the Appellate Body “analyzed the PBS to determine whether it could fall within the meaning of ‘ordinary customs duties.’”⁷ In light of this fact, the Panel should have engaged in a similar analysis. The United States does not agree with this characterization of the Appellate Body’s review or Chile’s claim that the Panel was required to analyze the amended PBS in light of the definition of “ordinary customs duties” in order to complete its analysis.

6. Chile’s argument is unpersuasive for two reasons, the first of which is that the purpose of the Appellate Body’s analysis in the original proceeding was not to determine whether the PBS was an “ordinary customs duty,” but rather to review and ultimately reverse the original Panel’s interpretation of the definition of “ordinary customs duty.”⁸ The second reason is that it was not necessary for the Panel to examine whether the amended PBS was in fact an “ordinary customs duty” in order to make its findings. Indeed, in the section of its Report where it reversed the Panel’s interpretation of “ordinary customs duty”, the Appellate Body noted the following:

[Reversing the Panel’s interpretation of “ordinary customs duties”] does not change our conclusion that Chile’s price band system is a measure “similar” to “variable import levies” or “minimum import prices” within the meaning of Article 4.2 and footnote 1 of the *Agreement on Agriculture*. In other words, the fact that the *duties* that result from the application of Chile’s price band system take the same form as “ordinary customs duties” does not imply that the underlying measure is consistent with Article 4.2 of the *Agreement on Agriculture*.⁹

7. In light of this guidance, it is clear that the key to determining the WTO-consistency of the amended PBS is whether it is similar to “variable import levies” and “minimum import prices,” not whether it satisfies the definition of an “ordinary customs duty.” The Panel was therefore correct to focus its analysis on whether the amended PBS was similar to a “variable import levy” or a “minimum import price” and was not required to analyze the amended PBS or duty levels produced by the PBS in light of the definition of “ordinary customs duty.”

⁵ See Panel Report, *Chile - Price Band (21.5)*, paras. 7.26-7.30.

⁶ Chile Appellant Submission, para. 9.

⁷ Chile Appellant Submission, para. 9.

⁸ See Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted as modified 23 October 2002, para. 278 (“Appellate Body Report”).

⁹ Appellate Body Report, para. 279 (emphasis in original). See also Appellate Body Report, para. 232 (“it is clear that the term ‘variable import levies’ as used in footnote 1 must have a meaning different from ‘ordinary customs duties’, because ‘variable import levies’ must be converted into ‘ordinary customs duties’.”)

8. Even were the Panel to have examined Chile's amended PBS in light of the definition of "ordinary customs duty," the United States does not believe that such an examination would have changed the Panel's ultimate analysis. Evidence of this fact may be found in Chile's comparison of its amended PBS to seasonal customs duties applied by the United States to certain horticultural products.¹⁰ Chile's submission makes clear that, while duties on these products entering the United States change during the year, the exact levels and dates of application of those duties are set and published.¹¹ Chile is unable to provide a similar list of duties for wheat that will be imported under the amended PBS, thus highlighting that the U.S. seasonal duties are predictable and transparent "ordinary customs duties," whereas duties calculated under the amended PBS are something other than "ordinary customs duties."

2. The Panel did not err in concluding that changes in duty levels under the amended price band system are "continuous"

9. Chile submits that changes in levels of duties under the amended PBS are no longer "continuous." It notes that, unlike the amended PBS, "[t]he [original] PBS ensured that duties varied continuously on each and every transaction,"¹² and that "the frequency with which applicable duties change was dramatically reduced from continuous (*i.e.*, on a transaction-by-transaction basis using reference prices adjusted 52 times per year) to only 6 times per year."¹³ The United States does not agree that the duties applied pursuant to Chile's amended PBS have evolved into something other than duties applied on a "transaction-by-transaction" basis or that a temporal switch from a weekly to a bi-monthly determination of duty levels makes the amended PBS any less "continuous" than the original PBS. Thus, the Panel's findings on the "continuous" nature of the amended PBS should be upheld.

10. Under the amended PBS, duties are still applied on a "transaction-by-transaction" basis. The only factor that has changed is a shift in when those duties will be calculated – rather than every week, new duty levels are set on a bi-monthly basis and then applied to imports whose waybills are dated during that two-month period. Previously, duties calculated under the PBS were applied to imports whose bills of lading were dated during the relevant week of operation of the PBS.¹⁴ It is unclear how this shift in applicable time periods in the PBS in any way lessens

¹⁰ Chile Appellant Submission, para. 64.

¹¹ Chile Appellant Submission, fn. 39.

¹² Chile Appellant Submission, para. 6. *See* Chile Appellant Submission, para. 78 ("It is critical to keep in mind that . . . the PBS ensure[d] that changes in duty levels occur[red] continuously for each and every transaction. The actual duties that apply upon importation are unknown until they are actually applied, and two importations on the same day may be subject to different duty levels.")

¹³ Chile Appellant Submission, para. 95 ("To classify a variation which takes place as infrequently as 6 times a year as 'continuous,' empties the requirement of 'continuous variation' of any meaning.")

¹⁴ *See* Panel Report, *Chile - Price Band (21.5)*, para. 2.30.

its “continuous” nature or prevents the amended PBS from applying on a “transaction-by-transaction” basis.

11. Chile also submits that the Panel failed to apply the proper standard in concluding that the amended PBS is applied “continuously.” Chile asserts that the Panel inserted the term “contemplates” into its analysis of whether the amended PBS is a variable import levy in lieu of “ensure.”¹⁵ According to Chile, the Panel should have determined that the amended PBS “ensures” or “makes certain that resulting duties change continuously” rather than simply “contemplat[ing]” this change. Upon review of the relevant portions of the Appellate Body and Panel Reports, however, it appears that Chile has mistakenly substituted “ensure” for “incorporates” (mix together; include; absorb)¹⁶ in its criticism of the Panel’s analysis. The United States does not believe that the Panel’s use of “contemplates” in lieu of “incorporates” affected its ultimate analysis and finding on the “continuous” nature of Chile’s amended PBS, and suggests that this finding should be upheld.

3. The Panel did not err in concluding that application of the amended price band system is “automatic”

12. Chile disagrees with the Panel’s conclusion that operation of the amended PBS is “automatic.” It asserts that because its Ministry of Finance has the theoretical “ability to change” aspects of the amended PBS it is therefore not an “automatic scheme similar to variable import levies and minimum import prices,”¹⁷ and that because “a separate administrative act is in fact required to change the duty levels. The duty levels do not and cannot change automatically.”¹⁸ As to Chile’s first point, the United States suggests that the fact that, at some point in time, Chile’s Ministry of Finance may theoretically choose to change the level of duty set by the amended price band formula or disrupt the workings of that formula does not alter the continuous and automatic nature of the formula.

13. As to Chile’s second point, the United States notes that simply interjecting a layer of clerical tasks (publication of the level of duty set by the formula) does not appear to be sufficient to break the link between the formula established as part of the price band system and the level of duties automatically calculated through its application. The United States therefore agrees with the Panel’s conclusion that Chile’s amended PBS is “automatic” and submits that the Panel’s findings on this point should be upheld.

¹⁵ Chile Appellant Submission, paras. 87-88.

¹⁶ *The New Shorter Oxford English Dictionary*, 1993 Edition, p. 1342. See Appellate Body Report, para. 233 (“Variability is inherent in a measure if the measure *incorporates* a scheme or formula that causes and ensures that levies change automatically and continuously.”) (Emphasis added).

¹⁷ Chile Appellant Submission, para. 83.

¹⁸ Chile Appellant Submission, para. 84.

4. The Panel did not err in its interpretation and application of “transparency” and “predictability” to the amended price band system

14. Chile argues that the Panel “erred in its interpretation and application of ‘transparency’ and ‘predictability’ as used by the Appellate Body.”¹⁹ Specifically, Chile criticizes the Panel for “appl[ying] these terms to how and why Chile established the level of duties rather than to the resulting duties as such.”²⁰ In other words, rather than examining the workings of the underlying PBS that sets duty levels, the Panel’s analysis should have been restricted to “whether the end result was transparent and predictable.”²¹ The United States disagrees with Chile’s view of the appropriate scope of the Panel’s application of “transparency” and “predictability” in its analysis and suggests that a review of the amended PBS must include an examination of the “transparency” and “predictability” of the workings of the underlying PBS itself.

15. The Appellate Body’s guidance supports this view. The Appellate Body observed that a common feature of variable import levies is “a lack of transparency and a lack of predictability *in the level of duties that will result from such measures.*”²² In other words, intrinsic to an analysis of the predictability and transparency of the PBS is an examination of the measure that produces or sets the levels of duties – in the words of Chile, the “how and why.”²³ This is only logical because, for an exporter to predict what the resulting level of duty will be, the exporter must have a sense of how the system, or measure, that sets the level of duty operates.

16. The United States considers that it was proper for the Panel to undertake such a review and that the Panel’s conclusion that the workings of the amended PBS are not “predictable” or “transparent” is correct. Under the amended PBS, the core problem remains that exporters are left to prognosticate what duties may apply to their shipments on a bi-monthly basis as a result of each shift in the reference price.²⁴ Unless an exporter sells, ships, and lands the shipment within the current two-month window, the exporter will simply not know the level of the duty that will apply to its exports. The only practical difference between this scenario and that under the original PBS appears to be that the window for export is two-months long as opposed to a week. Under the amended PBS, like its predecessor, this absence of transparency and predictability

¹⁹ Chile Appellant Submission, para. 13.

²⁰ Chile Appellant Submission, para. 13. *See* Chile Appellant Submission, para. 103.

²¹ Chile Appellant Submission, para. 100.

²² Appellate Body Report, para. 234 (emphasis added).

²³ Chile Appellant Submission, para. 103.

²⁴ Note that publication of the price band thresholds is not sufficient on its own to make the amended PBS “predictable” and “transparent.” *See* Panel Report, *Chile - Price Band (21.5)*, para. 7.39, citing Appellate Body Report, para. 251 (“The Appellate Body thus concluded that, even assuming that one of the two parameters of the original PBS, the band thresholds, did not distort the transmission of world market prices to Chile’s market, it would nevertheless remain that the other parameter, the weekly reference prices, was liable to distort, if not disconnect, that transmission by virtue of the way in which it was determined. That was because specific duties resulting from Chile’s PBS were equal to the *difference* between two parameters.”) (Emphasis in original).

about the level of duties presents a danger that exporters will not ship to the market in question, which in turn impedes the transmission of international prices to the domestic market.²⁵

5. The Panel properly concluded that the amended price band system is “similar” to a “minimum import price”

17. The United States considers that the Panel was correct in concluding that the amended PBS, or more specifically the lower threshold of the price band, acts as a substitute or proxy for a “minimum import price” because it “operates so as to prevent the entry of imports of wheat or wheat flour into the Chilean market at prices below the lower threshold of the ban.”²⁶ Were it otherwise, a WTO Member could avoid its obligations under Article 4.2 of the *Agreement on Agriculture* by maintaining a minimum import price (or a measure similar to one) and simply relabeling it as something other than a “minimum import price,” a “CIF price,” or “an entry price.” Rather than setting out reasons for why the lower threshold of its amended PBS is something other than a “minimum import price,” Chile simply asserts that the lower threshold cannot act as a “minimum import price” because, in Chile’s estimation, prices of imports will never be as low as that threshold.²⁷

18. Contrary to Chile’s suggestion, just because import prices may have yet to trigger the threshold does not mean that the threshold, or “minimum import price” does not exist. Moreover, for a period of 17 weeks in 2003-2006, f.o.b. reference prices fell below the f.o.b. lower threshold of the amended PBS,²⁸ triggering specific duties that “tend to ‘overcompensate’ for price declines and to elevate the entry price of wheat imports to Chile above the lower threshold of the price band.”²⁹ Thus, the Panel was correct to determine that the operation of the amended PBS, and specifically the operation of the lower threshold of the PBS, is similar to a “minimum import price” and its finding should be upheld.

B. There Is No Need for the Appellate Body to Make a Separate Finding on Argentina’s Claim Under the Second Sentence of GATT 1994 Article II:1(b)

19. Argentina’s request for a separate finding on the consistency of the amended PBS with GATT 1994 Article II:1(b), second sentence, is conditional on the reversal by the Appellate Body of the Panel’s finding that the amended PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*.³⁰ Because the Panel correctly determined that the amended PBS is inconsistent with Article 4.2 of the *Agreement on Agriculture*, it is unnecessary for the Appellate

²⁵ Panel Report, *Chile - Price Band (21.5)*, para. 7.72.

²⁶ Panel Report, *Chile - Price Band (21.5)*, para. 7.91.

²⁷ See Chile Appellant Submission, paras. 15, 73, 145, 147, and 172.

²⁸ Panel Report, *Chile - Price Band (21.5)*, para. 2.31.

²⁹ Panel Report, *Chile - Price Band (21.5)*, para. 7.88.

³⁰ See Other Appellant’s Submission of Argentina, para. 85.

Body to complete the analysis of the Panel or to make a separate finding on Argentina's claim under the second sentence of Article II:1(b), second sentence.

III. CONCLUSION

20. The United States thanks the Appellate Body for the opportunity to comment on the issues raised in this appeal.